



Country report: (2) National debate

Austria

**Challenges and Inputs from the SE to the National System of Company Law
and Corporate Governance in Relation to Workers' Participation**

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This report briefly highlights the discussion and some of the important changes regarding corporate governance in Austria. Since the right to and extent of workers' participation in the supervisory board or one-tier board have so far not been questioned, workers' participation is only a side issue within the corporate governance discussion.

A) No one-tier system for stock corporations

As already reported within the framework of transposing the SE regulation into national law there has been a lengthy discussion of whether the one-tier system should also be made available to national corporations, along with the right to vote on the company's form of corporate governance. Since the Federal government decided that it was better to wait until empirical data were available on the functioning of the one-tier system in Austria there has been no further discussion on SE inputs to the national system of company law and corporate governance. In our view, the main reason for the lack of discussion is that the SE – as in most member states – has only minor importance in Austria. Only two companies have decided to adopt an SE structure so far and neither of them selected the one tier-system. As a result, advocates of a more flexible national system and the conservative government have no arguments which would justify changing the national system.

B) 'Small' stock corporations not to be implemented in national company law

Another discussion regarding the relationship between the shareholders' meeting and the administrative body is also linked to the SE framework. In the Austrian model of stock corporations the power of the shareholders' general meeting is quite limited. Only the supervisory board can appoint and dismiss the management board. As regulated in the Companies Act, the management board is independent of the shareholders' general meeting and operates in the interest of the company, taking into account the interests of shareholders and employees as well as those of the general public. Decisions concerning the management of the company are made by shareholder resolution if required by either the management or the supervisory board.

In the context of a more flexible SE system some legal experts and industry lobbyists have demanded a new company form in Austria, the so-called 'kleine Aktiengesellschaft'. According to the advocates of this new legal form of company organisation a 'small' stock corporation would not be listed on a stock exchange. In a 'small' corporation the shareholders' general meeting would have more rights to take part in the management of the company, for example, to appoint and dismiss the management board or to give instructions to the management.

Furthermore, the obligation for workers' representation on the supervisory board should be the same as those of a GmbH (limited company). Limited companies in Austria are obliged to have a supervisory board only when the company has more than 300 employees, whilst corporations of all sizes (listed or unlisted) must have a supervisory board with workers' representation. Opponents of the 'small' corporation (for example, Chamber of Labour, legal experts) argued successfully that some of Austria's largest corporations (for example, Siemens Austria, Austria Tobacco) are not listed on the stock exchange and that holding companies often operate as a corporation with few employees. Therefore there would be no workers' representation in the decision-making body of a company group. Furthermore, a 'small' corporation would be nothing more than a limited company in the guise of a corporation. Since the implementation of the SE in national law the Federal government has not addressed the subject and we expect no further discussion in the near future.

C) The amendment of the Companies Act tightens corporate governance

In response to the spectacular collapse of a number of huge international corporations (Parmalat, Enron, and so on) the Austrian legislator has amended the Companies Act (Aktiengesetz und GmbH-Gesetz) in order to strengthen confidence in the Austrian economy and the Austrian capital market. The bill that came into force on 1 January 2006 tightens up the responsibilities of the supervisory board and of the annual auditor of Austrian stock corporations. The most important changes are given below:

Supervisory board

- An individual person may not serve on more than 10 boards. Holding the position of chairman of the board will count double. Furthermore, since the responsibilities of supervisory board membership in a listed corporation are greater, there too seats count double, while the position of chairman counts threefold. Accordingly, a person can chair only three supervisory boards of listed corporations. Some exceptions apply to the management of affiliated companies, however.
- All significant contracts between an individual member of the supervisory board and the corporation (for example, consultancy contracts) require the prior approval of the whole supervisory board.
- A member of the managing board wishing to serve on the supervisory boards of other corporations requires the approval of his own supervisory board. This will avoid potential conflicts or work overload.
- Supervisory boards of all listed corporations are obliged to have an audit committee (at present an audit committee is compulsory only when the supervisory board has more than five members, not counting workers' representatives). The audit committee prepares the

resolution on the annual financial statement and the proposal for the distribution of profits, as well as assisting the supervisory board with its proposals to the shareholders' general meeting on the appointment of the annual auditor.

- Former members of the management board may not be nominated as chairman of the audit committee within three years of leaving the board (cooling down period). This provision will prevent former members of the management board from being in a position to examine their prior business activities.

Annual auditor

- The causes for exclusion of an annual auditor have been extended. For instance, the ownership (direct or indirect) of even a small number of shares in the audited company disqualifies a potential auditor. They also have to be excluded if they have been involved in the management of the corporation or if they gave financial advice to the corporation that has any bearing on the annual statement of accounts.
- The rotation of the auditor after six years is highly controversial. The bill represents a small compromise and therefore is not particularly bold. Only large corporations (pursuant to Austrian accounting law) and listed corporations will have to rotate their auditors after six years. Furthermore, the bill modified rotation to 'internal' rotation. This means that only the personnel involved in the auditing has to change, not the audit firm itself.

D) Revision of the Austrian Corporate Governance Code – No substantial progress

The Austrian Corporate Governance Code was implemented in 2002. Its goal is to reinforce the confidence of investors by improving reporting transparency and the quality of cooperation between supervisory board, management board and shareholders, and by taking long-term value creation into account. The Code applies primarily to Austrian listed companies and is based on self-regulation.

In addition to the most important statutory requirements under Austrian law, the CG Code also contains rules which are common international practice. Non-compliance with these rules must be explained and reasons given.

The CG Code also contains rules that go beyond these requirements and are applied on a voluntary basis.

The Code comprises the following categories of rules:

1. Legal requirement (L): This rule refers to mandatory legal requirements.
2. Comply or explain (C): This rule is to be followed; any deviation must be explained and the reasons stated in order to be in compliance with the Code.
3. Recommendation (R): Non-compliance with this rule requires neither disclosure nor explanation.

Every year the Chamber of Labour audits listed corporations' compliance with the Corporate Governance Code and reports the outcomes. Even three years after its introduction only 38 corporations or 48% of the 78 listed companies in Austria have complied with the Code. This is disappointing and demonstrates that for many listed corporations the Code still has no relevance. The publication of management board remuneration is still taboo. A survey in August 2005 pointed out that only 14% of listed companies are willing to report the individual salaries of their management. This does not comply with international standards of good corporate governance.

The EU recommendations on corporate governance and the amending law to the Companies Act (Gesellschaftsrechtsänderungsgesetz 2005) meant that the Austrian Corporate Governance Code had to be amended in 2005. The aim of this revision was to strengthen the independence of supervisory board members in accordance with the EU recommendation and to improve transparency, so achieving a competitive advantage for the Austrian capital market. Due to the interventions of the Federation of Austrian Industry and other lobby groups the amended Austrian Corporate Governance Code does not constitute a step towards international standards of good corporate governance.

Members independent of the core shareholder (shareholder with at least a 10% shareholding) now have only an adequate number of seats on the supervisory board and its committees. However, the European Union recommended that the majority of supervisory board and committee members shall be independent of the core shareholder to ensure independent consultancy and control. The criteria for independent board members are not as strict as the EU recommended.

The new provisions on publication of management board remuneration are particularly unsatisfactory. There is no obligation (not even a 'C' rule) for listed corporations to report the individual compensation of management board members. Only the total remuneration of the management board and the fixed and performance-linked components of remuneration are to be disclosed in the annual report ('C' rule).

Women are still the exception on the supervisory boards or management boards of listed corporations in Austria in 2005. According to a Chamber of Labour survey, only 25 out of 540 analysed supervisory board seats (nominated by the shareholders) were taken by women. The ratio between male and female members of management boards is also inappropriate. The survey pointed out that only 7 out of 230 management board members were women. The Chamber of

Labour demanded the implementation of a new ‘comply or explain’ rule (‘C’ rule) in the Austrian Corporate Governance Code. In line with diversity management corporations must aim to achieve a well-balanced proportion between male and female members in supervisory boards and management boards. Unfortunately, the Chamber of Labour was unable to get this proposal through and so the new CG Code fails to tackle this important issue. The Austrian Corporate Governance Code has not taken the opportunity to bring Austrian Corporate Governance structures in line with international standards.

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