

## Austria

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### **Significance of co-participation on the supervisory board for employees' representation**

Since 1974, representatives of workers have had the right to participate in the executive supervisory bodies of corporations in Austria. Their function is honorary and they take part in the work of the executive body with basically the same rights and obligations as the shareholders' representatives, and must bear in mind the interests of shareholders and the general public, as well as those of employees. In general, the participation of employees on the supervisory board, especially relating to commercial matters, plays a major role in workers representation in Austrian companies.

Pursuant to the Austrian Works Constitution Act (*Arbeitsverfassungsgesetz, ArbVG*), members of works councils have extensive rights at the operational and enterprise level. These include the right to receive information and be consulted as well as intervention rights regarding commercial and other matters. They also have many options for negotiating agreements with employers at the enterprise level. However, it is only the co-participation of workers on the supervisory boards of corporations that gives them the opportunity to take part in decision-making together with shareholders' representatives in issues relating to the business with a strategic significance for the company's future, and thus to contribute to the shaping of such decisions.

In this respect, workers' representation on the supervisory board is an important supplement to the other co-participation rights at the company level for members of the works councils in Austria. This is true even if the actual empowerment of employees to influence decisions of the supervisory board is limited by the statutory provision that restricts the number of works' council representatives that may be so delegated to one-third (one-third parity rule). In practice this means that the company's work council may delegate one member to the supervisory board for every *two* members delegated by the shareholders' representatives.

### **Corporate governance in Austria**

The organizational structure of stock corporations in Austria breaks down into several tiers: The different functions for the operation of the company are organized as follows:

<b>Executive Body</b>	<b>Competence</b>
<i>Management board</i> (stock corporation, AG) or managing directors (public limited company, GmbH)	Management and representation
<i>Supervisory board</i>	Control and supervision
<i>Annual shareholders' meeting</i> or shareholders' meeting	Manifestation of shareholders' will
<i>Auditor</i>	Auditing of accounts

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The nomination of the members differs by executive body as well as by shareholder and employee representative:

- The annual general shareholders' meeting elects the shareholders' representatives to the supervisory board as well as the auditors.
- The employees' representatives are delegated pursuant to § 110 Works Constitution Act by the respective employees' representative body entitled to delegate members to the supervisory board.
- The supervisory board appoints the members of the managing board of the stock corporation. The managing directors of the limited liability companies are appointed by the shareholders' meeting.

Pursuant to the Austrian Stock Corporation Act, all members of the supervisory board as well as of the managing board shall undertake to exercise their functions in the interest of the company, bearing the interests of shareholders and employees as well as of the general public in mind. This fundamental principle applies to both shareholders' and employees' representatives on the supervisory board.

The supervisory board is the controlling body of a corporation. Its principal task is to supervise the management of the company. Basically, the supervisory board's duty to supervise extends to checking the legality, expediency, commercial efficiency and the social effects of measures taken by the management.

The status of the supervisory board varies in the different types of corporations. The most extensive supervisory rights are granted to the supervisory boards of stock corporations, more restricted rights to the supervisory board of limited liability companies and very limited rights to that of co-operative societies depending on the society's by-laws.

### **Responsibilities of the supervisory board**

On the one hand, the supervisory board is responsible for checking retroactively if the management board has managed the business properly, and on the other hand, it is responsible for providing guidance to the management board in the case of extraordinary measures by consulting the management in advance.

Austrian law gives the supervisory board several statutory instruments for exercising its duty of supervision:

- The management must report to the supervisory board on a regular basis, at least quarterly, concerning the development of business and the overall economic situation of the company.
- The supervisory board may request at any time a report from the managing board concerning company matters, including the company's relationships with other group companies.
- The supervisory board may inspect and review all books and documents of the company, including its assets.
- The supervisory board's approval is required for specific issues of management policy that may have a major impact the future development of the company.
- The supervisory board may seek the assistance of outside experts.

- The supervisory board must call a shareholders' meeting if required in the interest of the company and the managing board fails to call such a meeting.

Apart from the competence to appoint and dismiss the members of the managing board as well as to inspect and approve the annual financial statements, the supervisory board must – within the scope of its preventive supervisory powers – be consulted and its consent obtained for major management decisions.

For example, according to the relevant law the following list of business transactions are subject to the approval of the management board or managing director only after obtaining the consent of the supervisory board:

- The acquisition, sale and closing down of enterprises and plants, the acquisition and sale of investments, the establishment and closing of branches.
- The acquisition, sale and encumbrance of land.
- Investments as well as the issue of debts securities, the taking out and granting of loans and credit that exceed a certain sum (as defined by the articles of association, statute or the supervisory board).
- The start and discontinuation of lines of business and types of production.
- The definition of general principles to govern business policies as well as rules for granting the management staff shares in the profit or sales of the company as well as company pensions, and for conferring the commercial power of attorney to officers of the company.

In addition to these transactions defined by law or the articles of association, the supervisory board itself may require certain types of transactions to be subject to its approval and thus increase even further the significance of the role of the supervisory board in the control of the company.

### **Companies with a mandatory supervisory board**

Austrian law defines employees' co-participation in the supervisory board for the following types of companies:

- *Stock corporations (Aktiengesellschaften, AG)*; mandatory supervisory board pursuant to § 87 Stock Corporation Act
- *Limited liability company (Gesellschaften mit beschränkter Haftung, GmbH)*; mandatory supervisory board pursuant to § 29 Law on Limited Liability Companies under certain conditions; optional supervisory board, for example if defined in the articles of association;
- *Mutual insurance associations (Versicherungsvereine auf Gegenseitigkeit)*, mandatory supervisory board pursuant to §§ 43 and 47 Insurance Supervision Act;
- *Savings banks* as defined by Savings Bank Act (*Sparkassen im Sinne des Sparkassengesetzes*); mandatory supervisory board pursuant to Federal Law Gazette 64/1979;
- *Co-operative societies (Genossenschaften)*; mandatory supervisory board in co-operative societies which permanently employ at least 40 persons pursuant to § 24 Law on Co-operative Societies
- *Private foundations (Privatstiftungen)*, mandatory employees' co-participation pursuant to § 22 Art. 4 Private Foundation Act if it employs more than 300 employees or is under

the majority management of an Austrian corporation; otherwise optional supervisory board with employees' co-participation

- *Associations (Vereinen)* pursuant to § 5 Association Law, option of installing a supervisory board under its by-laws
- Furthermore, there are special laws that provide for employees' representation on the supervisory board of *certain companies* whose function serves the *public interest* (among these are Austrian Broadcasting Company (*Österreichischer Rundfunk*), Austrian Postal Services (*Österreichische Post*), Austrian Railways (*Bundesbahn*), Österreichische Industrieholding AG, Austro-Control).

Several categories of companies in Austria are organizations in which employees' representatives are largely excluded from co-participation on the supervisory board. These are referred to in German as "Tendenzbetriebe". These are companies whose business directly serves political, associative, religious, scientific, educational or charitable aims, as well as administrative agencies and public law entities as well as the Austrian central bank.

For companies and enterprises whose business directly serves news reporting and the expression of opinions, the relevant provisions of the Works Constitution Act concerning the co-participation of employees' representatives on the supervisory board apply only with restrictions. The provisions on employees' co-participation on the supervisory board do also not apply to theatre enterprises.

According to the current records of the Austrian Chamber of Labour there are approximately 1,500 companies with a supervisory body in Austria (about two-thirds are stock corporations and one-third limited liability companies). All in all, more than 400,000 employees work at these corporations. This concerns approximately 15% of the entire workforce in Austria, with far more in the industrial and service sector than for example, in the financial sector.

### **The one-third parity rule in employees' representation**

Since 1974, employees' representation has been defined by law under the Works Constitution Act which defines the applicability of the so-called one-third parity rule. Pursuant to this Act, the number of employees' representatives depends on the number of representatives appointed by the shareholders to the supervisory board. Thus, the Works Constitution Act goes beyond the former law of 1947 that had defined a static representation of two employees' representatives in every case.

The company's work council may delegate one member to the supervisory board for every two members elected by the capital representatives. The works council is entitled to appoint at least two mandates to the supervisory board. If the number of shareholders' representatives is odd, an additional employee representative will be delegated.

Accordingly, the number of representatives to be delegated is calculated as follows:

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|-----------------------------------|------------------------------------|
| • 3 shareholders' representatives | 2 employees' representatives       |
| • 4 shareholders' representatives | 2 employees' representatives       |
| • 5 shareholders' representatives | 3 employees' representatives       |
| • 6 shareholders' representatives | 3 employees' representatives       |
| • 7 shareholders' representatives | 4 employees' representatives, etc. |

This representation according to the one-third parity rule does not only apply to the plenary meeting of the supervisory board, but also to its committees. Employees' representatives are solely excluded from having either a seat or a vote in those committees that deal with the staff relations between the company and its management board.

A corporation's supervisory board must consist of three shareholders' representatives at least. Depending on the share capital, the maximum number of members on the supervisory board according to law may range from 7 to 20 shareholder representatives.

### **Delegation by the executive bodies of employees' representatives**

Employees who are delegated to the supervisory board must be among the elected members of the works council and have active voting rights, i.e., they must be employed in an enterprise or company of the corporation. This excludes trade union representatives from being delegated to the supervisory board although they can be elected to the works council. Members of works councils (thus employees' representatives on the supervisory boards) cannot be made subject to restrictions or discrimination in pursuing their activities; furthermore, they also enjoy special protection against being given notice or dismissed. They must also be granted paid time off to perform their duties.

The employees' representatives are delegated by the central works council (obligatory joint council formed by the works councils of several enterprises of one company or group company) or, if there is only one enterprise, by the works council or joint works committee (obligatory joint committee formed by the works councils for blue-collar workers and white-collar workers in one enterprise). If no central works council has been established although several enterprises exist, co-participation on the supervisory board is not possible.

The responsible executive bodies of employees' representatives are bound by the proposals of the political groups represented when delegating employees' representatives to the supervisory board. The seats on the supervisory board are allocated according to the shares of votes won by the parties at the last elections of the (central) works council.

When preparing the nominations, an adequate representation of blue-collar workers and white-collar workers as well as of the individual enterprises of the company must be taken into account.

With regard to the rights of co-participation regarding commercial issues in the case of pension funds, there are plans to partly modify the provisions of the applicable Works Constitution Act to include not only to the employees of the pension funds themselves, but also to persons eligible for benefits from companies which have joined the pension funds.

The activity of employees' representatives in the supervisory board begins with the resolution of the competent executive body of employee representation to delegate a representative to the supervisory board and is ended only by themselves or the works council or central works council that delegated the representative. According to this regulation, there is no certain term of office. An employee' representative remains in office as long as he or she is willing as is not recalled by the competent body. Termination of office would thus occur when, for example, the (central) works council is obligated to recall its representatives because the number of shareholders' representatives in the supervisory board has changed, the employees' representative's mandate expires, he or she resigns or no longer fulfils the requirements for delegation.

### **Delegation of employees' representatives in group (parent) companies**

If the right of employees' representation on the supervisory board is given in the case of the parent company of a group, the composition of the employees' representation on the supervisory board shall consist of the employees' representatives from both the parent company and the group companies. If employee representation has been established for the group, this group works council shall delegate the employees' representatives to the supervisory board.

The number of employees represented in the individual companies of the group shall define the number of mandates. However, regardless of the calculation according to the above mentioned ratio, one employees' representative must come from the parent company. This "secure" mandate does not apply if the parent company concentrates only on managing the investments of the group companies.

Austrian banks and insurance companies are generally excluded from this provision as parent companies of groups. In this case, the subsidiaries are exclusively entitled to delegate employees' representatives to the supervisory board of the parent company.

Since the amendment of the Works Constitution Act in 1993, works councils of subsidiaries may also delegate employees' representatives to the supervisory board of so-called "holding companies without employees" if their activities do not concentrate solely on managing the investments of the group companies.

### **Rights and duties of employees' representatives on the supervisory board**

The employees' representatives perform their duties on an honorary basis. They are entitled to reimbursement of reasonable out-of-pocket expenses. However, in contrast to shareholders' representatives, employees' representatives are not entitled to separate remuneration.

Employees' and shareholders' representatives basically have equal rights and duties. Like the shareholders' representatives, employees' representatives are not bound by instructions when performing their duties. Furthermore, shareholders' and employees' representatives are both personally liable for their actions in exercising their mandate in the supervisory board.

There are no restrictions to the rights of co-determination or decision-making of the employees' representatives' as regards the supervisory board's tasks of supervising and controlling. The employees' representatives have unlimited voting rights regarding economically significant decisions, e.g., transactions which require the approval of the supervisory board or the approval of the annual financial statements. Disputes concerning these rights have to be referred to the Labour and Social Court for decision. Employee's representatives are entitled to representation before court by the Chamber of Labour, and if a member of a trade union, also by the responsible trade union organisation.

However, certain provisions of the Stock Corporation Act do not apply to employees' representatives. There are certain restrictions regarding the decisions to be taken by the supervisory board concerning the staff, e.g. the appointment and removal of members of the management board, the chairman of the supervisory board and his or her vice-chairman.

The employees' representatives in the supervisory board have special rights regarding the reports of the managing board on company matters including the company's relationships with a group company and can request such reports at any time from the management board. This collective right to be informed granted to the supervisory board may be exercised by two employees' representatives at any time.

## **Challenges faced by worker' representatives on supervisory boards**

### *a) Conflicting interests between the company and employees'*

Pursuant to the Stock Corporation Act all members of the supervisory board as well as of the managing board are obliged to perform their duties in the interest of the company taking into consideration the interests of shareholders and employees as well as of the general public. This guiding principle applies to both shareholders' and employees' representatives. However, this does not exclude the members of the supervisory board from defending the interests of the group that mandated them, i.e. the shareholders' representatives defend the interests of the shareholders and the employees' representatives defend the interests of the employees.

Although they are delegated to the supervisory board, the members of the works council still have to fulfil their duties as employees' representatives, i.e. to defend the interests of the employees. The employees' representatives on the supervisory board are therefore to a certain degree constantly in a conflict between their duties towards the company as members of the supervisory board and their commitment to the interests of employees as employees' representatives.

This conflict between the interests of the company and the interests of the employees becomes clear when it comes to the duty to observe secrecy as laid down in the Stock Corporation Act and in the context of the duty of diligence and liability. These obligations apply to the same extent to all members of the supervisory board including the employees' representatives.

### *b) Observing secrecy and duty of diligence and liability*

**Duty to observe secrecy:** Without doubt, efficient co-operation between the management board and the supervisory board requires the duty to observe secrecy which basically covers all confidential information that the members gain access to in the exercise of their duty. The same as all other members of the supervisory board, employees' representatives are also liable for damages caused by breaches of their obligation to observe secrecy.

Nonetheless, from the employees' representatives point of view, a limited amount of information may be passed on – especially to the colleagues on the works council, representatives of trade unions or experts – under certain circumstances, as long as this is covered by the right to information and disclosure as laid down in the Works Constitution Act and is deemed necessary to represent employees' interests.

**Duty of diligence and liability:** Both shareholders' and employees' representatives on the supervisory board are liable vis-à-vis the company for their actions. Neither the fact that they were delegated to the supervisory board by the employees nor the one-third parity rule of their representation on the supervisory board may be interpreted as a reason to grant an exception for employees' representatives.

In order to avoid burdening the members of the works council delegated to the supervisory board with incalculable risks, the Austrian Federation of Trade Unions (*Österreichische Gewerkschaftsbund, ÖGB*) has therefore purchased a group insurance policy for all employees' representatives who are members of the trade union and have reported that they have been delegated to the supervisory board to the trade union. This insurance covers up to a certain amount financial damages that may result from a breach of the duty of diligence or the obligations of the employees' representatives on the supervisory board.

*c) Deficits of the supervisory board authority mainly in the case of restructuring*

Restructuring is increasingly becoming part of everyday life at companies. Often, this implies a loss of employees' rights, in particular, concerning the rights of workplace representatives to intervene. In this regard, the transformations of the legal form of a company may lead to the loss of mandates for employees' representatives on the supervisory board. In extreme cases, it might even completely eliminate the mandatory supervisory board of the company. Against this background, it is urgent to extend the competence of the employee representatives, and above all that of supervisory boards, to monitor and supervise in cases of restructuring.

**Literature, Websites, Surveys**

*a) Literature*

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*c) Websites*

- <http://www.akwien.at/ifam.html>  
Austrian Chamber of Labour (a comprehensive collection of facts and figures concerning Co-participation Rights of Employees' Representatives on the Supervisory Boards of Corporations, incl. description of legal system and download of legal texts)
- <http://www.ris.bka.gv.at>  
RIS - Rechtsinformationssystem des Bundeskanzleramtes (legal texts, incl. information in English: The Legal Informationssystem of the Republic of Austria)