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## Information for Austria concerning legal perspectives on an Annual Board "Statement of significant Audiences and Materiality"

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The following is an academic contribution of the authors in response to a questionnaire developed by Robert G. Eccles, Professor of Management Practices at the Harvard Business School, to assist Professor Eccles in analyzing the viability of an Annual Board Statement of Significant Audiences and Materiality. The information provided is general in nature and based solely on the Austrian laws. It is neither a legal advice nor a full and comprehensive legal report on the subjects covered. While EY is however not a law firm, but a financial and sustainability auditor, author Elke Schnötzing is an attorney employed by EY Austria.

## Setting the legal landscape

1. Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact on stakeholders, and in particular whether its primary duty is or is not do shareholders over all other stakeholders.

Regarding the difference between a company's obligation towards its stakeholders and shareholders, there are no absolute rules as to what position each of the parties holds. Some groups of stakeholders e.g. employees have legally stronger respected positions; however it is still up to the respective representatives to make use of the legal framework. Most legal requirements deal with shareholder duties and responsibilities.

## Regulatory framework

2. To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?

Austria belongs to the civil law jurisdiction; the applicable law is primarily based on statutes. General rules regarding property law and the law of obligations (including contract law and tort law) are set out in the General Civil Code (Allgemeines Bürgerliches Gesetzbuch).

3. Are corporate/securities laws regulated federally/nationally, provincially or both?

Corporate and Securities laws are regulated federally in several individual laws, among others the Austrian Corporate Code (UGB), the Austrian Stock Exchange Act (BörseG) and the Austrian Banking Act (BWG).

4. Who are the government corporate/securities regulators and what are their respective powers (in summary only)?

The tasks of the supervisory system are governed by a range of individual laws, such as the Finanzmarktaufsichtsbehördengesetz (FMABG; Financial Market Authority Act), Nationalbankgesetz (NBG; Nationalbank Act), Versicherungsaufsichtsgesetz (VAG; Insurance Supervision Act), Börsegesetz (BörseG; Stock Exchanges Act) and the Kapitalmarktgesetz (KMG; Capital Market Act). In order to carry out these activities, two distinct approaches are required to the supervisory system – referred to as solvency supervision and market and conduct supervision.

- The goal of solvency supervision is to ensure that the banks, insurance undertakings and financial service providers are able to pay out at all times and to meet their contractual obligations. Since it is a feature of a market economy that institutions that are no longer competitive will leave the marketplace, the supervisory system is not able to guarantee that individual institutions may well become insolvent and have to go into liquidation. In such cases, the aim of the supervisory system must be to ensure that in leaving the marketplace, these institutions do not damage the stability of and confidence in the financial market.

- The market and conduct supervision should ensure that business conducted on the markets is fair and transparent, and should monitor compliance with minimum standards in corporate management as well as in the advice and information provided to customers.

Particular importance is also accorded to the statutory tasks of the supervisory system, such as dealing with unauthorised banking, insurance and financial services transactions, and taking preventive measures aimed at fighting money laundering and terrorist financing<sup>1</sup>.

5. Does the jurisdiction have a stock exchange?

Yes, the Vienna stock exchange (Wiener Börse).

## Incorporation and listing

6. Do the concepts of “limited liability” and “separate legal personality” exist?

Yes, the concepts exist for the corporations (e.g. GmbH, AG).

7. Did incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company’s social or environmental impacts, or to respect its stakeholders?

No, however there are legal obligations e.g. concerning environmental impacts which are to be observed and non-financial considerations (e.g. environmental and employees) have to be included for large corporations in their annual financial statement - Lagebericht)

Also, considering international frameworks and business practices it is recommended to voluntarily adhere to one of the frameworks for ethical business conduct.

8. Do any stock exchanges have a responsible investment index and is participation voluntary? (See e.g. FTSE4Good, Dow Jones Sustainability Index, the Johannesburg Stock Exchange’s Socially Responsible Investment Index).

The Vienna Stock Exchange calculates sustainability indices, which can be used as basis for structured products and standardised derivatives (futures and options). Investors can invest in Austria and CEE blue chip companies that operate according to sustainability principles. The following two sustainability indices are calculated:

VÖNIX: The VBV Austrian Sustainability (VÖNIX) is made up of the exchange listed companies that are leaders with respect to social and ecological performance. It is computed daily in euro and in real time by the Vienna Stock Exchange.

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<sup>1</sup> See <https://www.fma.gv.at/en/about-the-fma/responsibilities/tasks-of-the-fma.html>

CEERIUS: CEERIUS (CEE Responsible Investment Universe) is a capitalization weighted price index that comprises companies traded on the stock exchange in the region of Central, Eastern and Southeast Europe and are leaders in social and ecological performance. It is computed daily in euro and in real time by the Vienna Stock Exchange.

## Directors' Duties

9. To whom are directors' duties generally owed?

The directors' power in Austria derives from statute and not from the shareholders. Therefore, in general the directors owe their duties only to the company (not to the shareholders) and, as a further consequence, the shareholders do not have a general instruction right towards the managers. However, certain of the director's duties (in particular in connection with the company's accounting in the case of insolvency) are interpreted to (also) protect third party creditors of the company and, thus, their breach may result in the director's direct liability towards such third parties<sup>2</sup>.

10. What are the duties owed by directors – please state briefly. Please indicate if there are express or implied duties to avoid damage to the company's reputation?

Directors are fiduciaries and thus subject to a comprehensive duty of loyalty as well as a comprehensive duty of care regarding the execution of their functions. The main duties and liabilities of directors are primarily described in the AktG (Bundesgesetz über Aktiengesellschaften - Aktiengesetz – Stock Corporation Act). In Austria it is distinguished between the individual directors' duties and the duties of the management board as a whole (as an organ)<sup>3</sup>.

### The board's duties<sup>4</sup>:

The board of directors is primarily obliged to manage the company (§ 70(1)) and to represent the company in relation to third parties (§ 71(1)). Furthermore, four duties are regulated in the AktG: the duty to report to the supervisory board (§ 81), the duty to maintain an accounting and monitoring system that is appropriate in respect of the company's size and business (§ 82), the duty to notify losses of the company to the shareholder (§ 83) and several duties regarding loans of the company to managers, certain employees and other persons (§ 80). In addition, the management board is generally obliged to act lawfully.

### The individual director's duties<sup>5</sup>:

In the AktG three different duties can be found for individual directors:

- The duty of non-competition (§ 79): Board members are not allowed to operate another business, they may not be a member of another company's supervisory board and they may not be a personally liable partner of another company. Furthermore, members of the

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<sup>2</sup> Cf. Gerner-Beuerle C., P. Paech and E. Philipp Schuster, "Study on Directors' Duties and Liability", London School of Economics, Department of Law prepared for the European Commission DG Markt, London, April 2013

<sup>3</sup> ibid

<sup>4</sup> ibid

<sup>5</sup> ibid

management board may not deal within the company's field of business ("real competition prohibition).

- The duty of confidentiality (§ 84(1)): Managers are bound to secrecy in respect of confidential information. This duty includes all kinds of business secrets, as it is a general duty.
- The duty of care (§ 84): All management directors have to apply the care of a diligent and conscientious business leader when managing the company (§ 84(1)).

The same duties also apply for the supervisory board, i.e. they have to act for the wellbeing of the company, while taking into account the interests of shareholders, employees, creditors and the public.

11. More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including impacts on the individuals and communities affected by the company's operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impact by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s. 172 UK Companies Act 2006, and in particular, ss. (1(4))

Considering the EU and UN CSR frameworks and derived prerequisites on corporations to consider various stakeholder interests it is recommended to conduct business in a responsible manner in- and outside the relevant jurisdiction also with regards to subsidiaries and suppliers.

There are legal obligations to consider some groups of stakeholders (e.g. employees), however considerations exceeding the legal premises are allowed. As there are only few obligations concerning stakeholders inside the jurisdiction there are even fewer when it comes to international aspects, therefore responsibilities may be assumed by the corporations, e.g. through an internationally valid code of conduct or the adherence to one of the above mentioned frameworks.

12. If directors are required or permitted to consider impacts on non-shareholders and to what extent do they have discretion in determining how to balance different factors including such impacts? What additional liabilities, if any, do the board or individual directors assume in exercising such discretion?

Voluntary measures and considerations are up to their own responsibility and evaluation. Additional liabilities may only result from violation of legal standards.

13. What are the legal consequences for failing to fulfil any duties described above; and who may take action to initiate them? What defenses are available? Can these issues give rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to its action?

With regards to voluntary measures the public opinion would be the main route to address such issues. In case of violations of legal obligations civil or criminal charges may be brought by the state or an individual. The issues could – in severe cases with a strong representation –

lead to a change in the legal landscape or increased public pressure to increase considerations.

14. Are there any other director's duties which are relevant to the interests of stakeholders?

We are not aware of any other relevant director's duties which are relevant to the interests of stakeholders.

15. For all of the above, if these exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures? What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?

Generally a two tier board structure exists and the duties and obligations of each tier are prescribed by law, however some and/or additional obligations may be assigned on a contractual basis.

## Reporting

16. Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary.

Currently, the only legal requirement to disclose non-financial information is the national implementation of the new accounts directive of 2005, which was nationally implemented into § 243 UGB. It is defined very vaguely and refers directly to the director's report. Companies have to report significant environmental and social issues to the extent necessary for an understanding of the company's development, performance or position, where appropriate.

Furthermore, the European Union has recently adopted a directive regarding the disclosure of non-financial and diversity information by certain large undertakings and groups (EU directive 2014/95/EU). The Directive is currently being transposed into Austrian law.

The goal of the directive is to enhance the consistency and comparability of non-financial information disclosed throughout the European Union. Therefore, certain large undertakings have to prepare a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Such statement should include a description of the policies, outcomes and risks related to those matters. It should be included in the management report. It is not necessary to prepare a non-financial statement, when a separate report corresponding to the same financial year and covering the same content is provided. (Directive 2014/95/EU (6)).

17. Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).

See answer above. Furthermore, the ASRA, the Austrian Sustainability Assurance Award, is a voluntary award scheme established 1999 by the Austrian national chamber for accountants and auditors, following the FEE sustainability working group activities. It has about 40 reports applying for the award each year. The categories are

- Stand-alone sustainability report by large companies
- Integrated report
- SMEs
- Nonprofit organisations
- First runners

For the year 2013, 95 % of all reports applied GRI, 50 % the GRI G4 version. 47% of all reports submitted were externally assured, out of these 45 % by ISO accredited certification bodies and 55 % by financial auditing firms. The large share of certification bodies is explained by 56 % of all companies having implemented ISO 14001 and/or EMAS.

The EY annual study on national sustainability reporting revealed that in 2013 25 % (i.e. 28 reports) of the Austrian top companies published a sustainability report, of which about 70 % applied the GRI Guidelines. 21 % of the reports were externally assured, all of them by financial auditing firms.

18. Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

According to the EU directive 2014/95/EU, undertakings should provide adequate information about material matters with a risk of having severe impacts. Those adverse impacts may stem from the undertaking's own activities or may be linked to operations, and, where relevant and proportionate, its products, services and business relationships including its supply and subcontracting chains (EU directive 2014/95/EU (8)).

19. Who must verify these reports; who can access reports; and what are the legal or regulatory consequences of failing to report or misrepresentation? Is there a regulator tasked with investigating complaints of misreporting?

In the EU directive 2014/95/EU it is outlined, that statutory auditors and audit firms should only check that the non-financial statement or the separate report has been provided. In addition, it should be possible for Member States to require that the information included in the non-financial statement or in the separate report be verified by an independent assurance provided. As the directive is being transposed into Austrian law, it is currently being discussed, if the disclosed information will be externally assured.

20. What is the external assurance regime for reporting on a company's impact on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance. Please summarize.

See answer above. Currently, there are no mandatory requirements for the provision of assurance of non-financial information. However, certification providers for ISO EMS standards have to be accredited according to ISO 17021 for e.g. ISO 140001 certification. One Austrian auditing firm is also accredited according to ISO 17021.

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## Stakeholder engagement

21. Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including stakeholder impacts?

Not that we are aware of.

22. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is the legal duty that pension funds owe with regard to investment decisions in this regard? How does the legal duty of the fund align with term and contractual performance criteria of fund managers – does this facilitate or deter consideration of such impacts?

Formally, pension funds and provision funds are not required to consider CSR issues in their investment decision. However, ÖGUT, a NPO, established an award system for pension and provision funds. Since 2004, ÖGUT has been assessing ethical, ecological and social criteria in the three areas 'basic methodology', 'portfolio' and 'environment' of the funds. The investment principles and criteria (positive and negative criteria as well as criteria for exclusion), research and monitoring regarding the compliance with the criteria, as well as the effective investment in the reporting period are assessed. Furthermore, the communication and transparency concerning sustainability, the approach of commitment and sustainability in the context of provision funds are analyzed (e.g. aspects of business-ecology, employee-policy, and corporate citizenship). The assessment is conducted annually on a voluntary basis together with the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management. The award system has been effectively resulted in most provision funds (8 of 10) voluntarily applying these criteria. Only one pension fund participates in the award system<sup>6</sup>.

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<sup>6</sup> <http://www.oegut.at/en/themen/nachhaltiger-finanzmarkt/nachhaltigkeitspruefung-mvk.php>, last accessed on 2 September 2015



23. Can non-shareholders address companies' annual general meetings? What is the minimum shareholding required for a shareholder to raise a question at a company's AGM?

Non-shareholders are usually not allowed to attend the AGM let alone address any issues. In order to place an item on the agenda the shareholder - or some of them together - have to own at least 5 % of the nominal capital (Grundkapital).

## Other issues of corporate governance

24. Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or through adherence to particular sustainability principles (for example the UN Global Compact, the OECD Guidelines for Multinational Enterprises ("OECD Guidelines") etc.), related to corporate governance that might encourage companies to consider in a structured way their impacts upon the interests of their wider stakeholders including through a stakeholder engagement process?

In the EU directive 2014/95/EU it is outlined that in providing the relevant information, undertakings may rely on national frameworks, Union-based frameworks such as the Eco-Management and Audit Scheme (EMAS) or international frameworks such as the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights implementing the UN 'Project, Respect and Remedy' Framework, the Organisations for Economic Co-Operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organisation for Standardisation's ISO 26000, the International Labour Organisation's Tripartite Declaration of principles concerning multinational enterprises and social policy, the Global Reporting Initiative, or other recognised international frameworks. Per definition the UNGC, the OECD Guidelines and other international frameworks are usually (except in cases of national law being derived from EU legislation) on a voluntary basis and can be chosen by the corporation. However there are no national legal obligations in place to ensure adherence to such principles.

25. Are there any laws requiring representation of particular stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?

Stock corporations have to include employee representatives in their board of directors, if the industrial council is established in the respective corporation. (§ 110 ArbVG)

26. Are there any laws requiring gender, racial/ethnic, religious or other stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?

The board is selected by the AGM, however selection should take into account factors like know-how and other diversity factors like gender, age and international background. (§ 87 (2a) AktG). For public corporations special statutory obligations concerning diversity are applicable.

27. In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholder groups?  
Are there any serious proposals to impose such responsibility?

No.

28. Are you aware of any incoming law proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.

Nothing apart from the national implementation of the EU directive on non financial disclosure.