

The International Bar Association Company Director Checklist – Austria

Contact:

Dr Bernhard Rieder

DORDA Rechtsanwälte GmbH, Vienna

bernhard.rieder@dorda.at

| Item | Number | Check |
|------------------------------------|--------|--------------------------|
| Appointment | | |
| Method of appointment | 1 | <input type="checkbox"/> |
| Appointment and service agreements | 2 | <input type="checkbox"/> |
| Remuneration | 3 | <input type="checkbox"/> |
| Resignation | 4 | <input type="checkbox"/> |

Ongoing duties

| | | |
|-------------------------------------|----|--------------------------|
| Duty of care | 1 | <input type="checkbox"/> |
| Other main duties | 2 | <input type="checkbox"/> |
| To whom are the duties owed? | 3 | <input type="checkbox"/> |
| Delegation | 4 | <input type="checkbox"/> |
| The Business Judgement Rule | 5 | <input type="checkbox"/> |
| Conflicts of interest | 6 | <input type="checkbox"/> |
| Corporate bodies of the company | 7 | <input type="checkbox"/> |
| Misconduct | 8 | <input type="checkbox"/> |
| Personal disclosure obligations | 9 | <input type="checkbox"/> |
| The company's statutory obligations | 10 | <input type="checkbox"/> |
| Potential liability | 11 | <input type="checkbox"/> |

| Item | Number | Check |
|------------------------------|--------|--------------------------|
| Special circumstances | | |
| Insolvency | 1 | <input type="checkbox"/> |
| Public offers | 2 | <input type="checkbox"/> |
| Takeovers | 3 | <input type="checkbox"/> |

Self defence

| | | |
|-------------------------------------|---|--------------------------|
| Good corporate governance processes | 1 | <input type="checkbox"/> |
| Indemnities | 2 | <input type="checkbox"/> |
| Insurance | 3 | <input type="checkbox"/> |

INTRODUCTION

This checklist has been designed as a practical guide to the main obligations and procedures of a listed public company under the Austrian Stock Corporation Act (*Aktiengesetz* or AktG) and other relevant Austrian legislation. The checklist does not reflect any special regulations applicable to company directors of regulated entities (such as banks or insurers).

Austrian stock corporations have a two-tier system with:

- a management board, managing the business of the company; and
- a supervisory board, supervising the work of the members of the management board.

This checklist is mainly tailored towards members of the management board, rather than supervisory board members.

This checklist is a general guide that is not intended to be a substitute for professional advice. It will, however, highlight to a member of the management board those situations where professional advice may be required. This checklist was updated as of 5 January 2023.

DUTIES AND OBLIGATIONS OF THE DIRECTORS

| | Action/issue | Comments/notes |
|---|---|--|
| Appointment | | |
| 1. How is a member of the management board appointed, by whom and for how long? | <ul style="list-style-type: none"> • Members of the management board are appointed by resolution of the supervisory board (s 75, para 1, sentence 1). The appointment must be accepted by the respective person elected. • The maximum term of an appointment is five years. • After the end of an appointment, a member of the management board can be reappointed. Also, an extension of the appointment is possible. In each case, however, this is only for a period of up to five years. • An appointment to the management board can only be revoked for good cause. In particular, a gross breach of duties, incompetence as a director and the withdrawal of trust by the general meeting (s 75, para 4, sentence 2) would justify the revocation of the appointment. • Any changes to the management board (or to the power of representation of the members thereof) must be registered with the commercial register (s 73, para 1). | <ul style="list-style-type: none"> • Only the supervisory board has the competence to appoint members of the management board, but not a committee of the supervisory board. • Austrian law provides for employee participation in the supervisory board. The supervisory board members delegated by the works council are also allowed to participate in the voting regarding the appointment or removal of members of the management board. However, a so-called double majority is required: ie, that a majority of the total supervisory board and a majority of the supervisory board members elected in the general meeting must be obtained. • Changes of members of the management board could have significant influence on the market price of the company's shares and thus might trigger ad hoc disclosure obligations according to the Market Abuse Regulation, (EU) No 596/2014 (<i>Marktmissbrauchsverordnung</i> or MAR). |
| 2. What is the interrelation between the appointment and the service agreement? | <ul style="list-style-type: none"> • In addition to the appointment as a member of the management board under corporate law, a service agreement is concluded, as the position as member of the management board under corporate law is separated from the employment law aspects. The supervisory board represents the company in that regard. | <ul style="list-style-type: none"> • Members of the management board are not considered employees of the company, but rather as quasi-freelancers (<i>freier Dienstnehmer</i>). Therefore, employee protection provisions will only apply in particular cases. The duties as a director are generally laid down by law and cannot be |

| | | |
|---|--|---|
| | <ul style="list-style-type: none"> • The service agreement will provide for, among others, the compensation, the right to paid vacation, fringe benefits (eg, a company car) and right to continued payment in case of illness etc. • It is quite common to link the term of the service agreement to the appointment as member of the management board. • As the appointment and the service agreement are in general two separate aspects, a revocation as member of the management board does not automatically end the service agreement. In most cases (but not necessarily), a revocation for good cause under the AktG does also stipulate good cause for the termination of the service agreement. | <p>amended by the service agreement.</p> <ul style="list-style-type: none"> • The termination of the service agreement for good cause will be made by the company (as contracting partner) which will, again, be represented by the supervisory board. |
| <p>3. What are the most important provisions regarding the remuneration under Austrian law?</p> | <ul style="list-style-type: none"> • Pursuant to s 78, para 1, the supervisory board is obliged to ensure that the total remuneration of each member of the management board (including salary, profit participation, cash expenditure reimbursement, variable compensation and bonuses) is appropriate: <ul style="list-style-type: none"> ○ with regard to the respective tasks and performances; ○ with regard to the overall economic situation of the company; ○ with regard to the sustainable development of the company. • Since 2021, the supervisory board must establish an abstract remuneration policy (s 78a), which must promote the business strategy and the long-term development of | <ul style="list-style-type: none"> • Even if the determined remuneration violates these rules, it does not affect the management board member's right to claim the conditions stipulated in the service agreement. |

| | | |
|-------------------------------------|---|---|
| | <p>the company. It must include (among other things) the fixed and variable remuneration components and explain in which ways the remuneration of the work force has been considered.</p> <ul style="list-style-type: none"> • The general meeting must resolve on the approval of the remuneration system at least every four years in case the remuneration policy is materially changed (s 78b, para 1). However, such a resolution does not create any rights or obligations and does not affect the obligation of the supervisory board. • The management board and the supervisory board are required to prepare a remuneration report containing information on the remuneration of the individual board members, which must be made publicly available (s 78c). | |
| 4. How to resign? | <ul style="list-style-type: none"> • The resignation of a member of the management board requires a declaration addressed to the company which is represented by the supervisory board. It is sufficient if one member of the supervisory board receives the resignation. • A resignation for good cause is possible at all times. Even if a person resigns without good cause, the mandate as member of the management board is terminated. The person may, however, become liable for any claims. | <ul style="list-style-type: none"> • The member of the management board and the supervisory board may also mutually agree on certain termination mechanisms, ie, on particular timing. |
| Ongoing duties | | |
| 1. What is the duty of care (s 84)? | <ul style="list-style-type: none"> • The duty of care requires that a member of the management board exercises its duties with the care of a diligent and conscientious manager (s 84, para 1, sentence 1). | <ul style="list-style-type: none"> • The management board can be considered as trustee of the funds provided for by the company and eventually by the shareholders. The members are therefore handling third-party funds and have to ask |

| | | |
|--|--|--|
| | <ul style="list-style-type: none"> • This means that a member of the management board is obliged to use best efforts to promote the purpose of the company. • In addition, the members of the management board are obliged to comply, and to ensure that the company complies, with statutory law, the articles of association and the by-laws of the company. | <p>themselves how a diligent director, taking into account external interests, would have acted.</p> |
| <p>2. What are your other main duties as member of the management board?</p> | <ul style="list-style-type: none"> • Your primary duty is to lead the company at your own responsibility (s 70, para 1). In addition, the following duties are included: <ul style="list-style-type: none"> ○ representation of the company; ○ acting in accordance with the company's articles of association; ○ summoning of the general meeting; ○ preparation and implementation of shareholders' resolutions; ○ preparation of financial statements; ○ filing for insolvency procedures; ○ establishment of a risk management system; ○ report to the supervisory board and to the general meeting; and ○ protection of the company's assets (ie, maintenance of the company's capital). | <ul style="list-style-type: none"> • Although members of the management board are solely responsible for the management of the company, certain measures require approval of the supervisory board. Such measures are determined by statutes (s 95, para 5), case law or the company's articles of association. |

| | | |
|---|--|---|
| <p>3. To whom are the duties owed?</p> | <ul style="list-style-type: none"> The duties are owed to the company itself. | <ul style="list-style-type: none"> In general, shareholders, employees, creditors of the company or the public are not able to make any claims against members of the management board. However, pursuant to s 70, the interests of the shareholders, employees, creditors and the public have to be taken into account when considering the best interest of the company. Shareholders or creditors can only make their own claims against the members of the management board in case of a violation of their duties in particular circumstances. |
| <p>4. How much can be delegated and relied upon others?</p> | <ul style="list-style-type: none"> The members of the management board can delegate certain duties to other members of the management board or to employees. However, some duties remain the sole responsibility of the members of the management board (eg, filing for insolvency, applications for registration with the commercial register, etc). Even in case of a delegation, the members of the management board remain partly responsible and in addition, each member of the management board delegating must diligently chose, instruct and supervise the person who shall act instead. | <ul style="list-style-type: none"> One should always document the delegation of duties in written form to proof the delegation and therefore the reduction of duties. |
| <p>5. What is the Business Judgement Rule (s 84, para 1)?</p> | <ul style="list-style-type: none"> As a director, each member of the management board shall exercise the due care and diligence of a prudent and conscientious manager. In any case a member of the management board is acting in accordance with the Business Judgement Rule, if making (1) an entrepreneurial decision, (2) which is not guided by | <ul style="list-style-type: none"> It is advised to diligently document the steps and factors of the decision-making process in order to evidence the requirements of the Business Judgement Rule. This is particularly important concerning adequate information. External advice (eg, expert opinion) can be |

| | | |
|--|---|---|
| | <p>extraneous or private interests and (3) based on adequate information, and (4) where it can be assumed that one is acting in the best interest of the company (good faith).</p> <ul style="list-style-type: none"> • Only entrepreneurial decisions are subject to the Business Judgement Rule, ie, decisions subject to uncertainty and where the outcome is unclear. There is no liability towards the company for decisions that are required by law or are in accordance with a resolution of the general meeting. | <p>obtained. However, external advice (even from an expert) must be reviewed for plausibility. Members of the management board who violate their duties shall be jointly and severally liable to the company for any resulting damage (s 84, para 2).</p> |
| <p>6. What is the position on conflicts of interest?</p> | <ul style="list-style-type: none"> • Section 70, para 1 provides that each member of the management board is obliged to act in the best interest of the company, taking the interests of the shareholders, the employees and the public into account. Every member of the management board owes a duty of loyalty (<i>Treuepflicht</i>) to the company. Therefore, every member of the management board must omit from competitive acts such as conducting business in the company's field of operations or executing an office for a competitor (s 79, para 1). • According to s 84, para 1, a member of the management board is also not allowed to disclose confidential information or trade and business secrets of the company. • In a case of double representation (<i>Doppelvertretung</i>) – ie, a member of the management board represents both the company and a third party – approval by the supervisory board or the general meeting (or other members of the management board) is required. | <ul style="list-style-type: none"> • The supervisory board can approve of certain competitive acts according to sec 79, para 1. This approval must be given in advance. |

| | | |
|--|--|---|
| | <ul style="list-style-type: none"> • In a simple case of self-dealing (<i>Insichgeschäft</i>), ie, an agreement between the company and a member or a member of the management board (simultaneously representing the company), the supervisory board represents the company. | |
| <p>7. What needs to be observed with regard to the other corporate bodies of the company (ie, general meeting, supervisory board)?</p> | <ul style="list-style-type: none"> • The Austrian stock company consists of three corporate bodies: the management board (<i>Vorstand</i>), the supervisory board (<i>Aufsichtsrat</i>) and the general meeting (<i>Hauptversammlung</i>). • The management board represents the company and conducts its day-to-day business. It also typically convenes the general meeting. • The main responsibility of the supervisory board is to advise and supervise the members of the management board. It also appoints the members of the management board. • With few exemptions, the supervisory board can neither represent the company nor manage it. This also means it cannot give instructions to the members of the management board. However, certain measures, listed in s 95, para 5, require the approval of the supervisory board. The supervisory board can convene the general meeting if the wellbeing of the company calls for it. • As stated under point 6 (above), the supervisory board represents the company in case of certain transactions with the members of the management board. | <ul style="list-style-type: none"> • Matters that need to be approved by the general meeting are in principle codified in the AktG and in nature touch on the rights of the shareholders. The question of whether or not the general meeting is also competent for matters not listed explicitly in the law has not yet been finally decided by the courts. It is advisable to seek legal support, in case significant changes to the company are planned. |

| | | |
|---|---|---|
| | <ul style="list-style-type: none"> • The shareholders' will is formed at the general meeting. Its power is limited to decisions of fundamental importance for the company: the amendment of the articles of association, mergers and spin-offs, increase or decrease of capital etc. • The shareholders' right to ask questions at the general meeting only exists with regard to matters of the company if the answer is relevant to the agenda. In addition, shareholders have only limited rights to information. Section 118, para 3, contains a list of reasons pursuant to which the members of the management board are entitled to refuse to answer questions. • The members of the management board do not take instructions from the general meeting. However, some measures, such as those mentioned above, require the approval of the general meeting. The management board is obliged to implement the resolutions of the general meeting as far as they are within the competence of the general meeting. | |
| <p>8. Understand that turning a blind eye may not be enough</p> | <ul style="list-style-type: none"> • If a member of the management board has indications of misconduct by another member, an employee of the company or a member of the supervisory board, they are obliged to follow up on these indications. Ultimately, the member of the management board is responsible, within reason, for ensuring compliance with the law and avoiding harm to the company. | <ul style="list-style-type: none"> • The scope of actions required are highly circumstantial. In case of doubt, legal advice should be obtained. |
| <p>9. Understanding personal disclosure obligations as a director of a listed company</p> | <ul style="list-style-type: none"> • Each member of the management board must | <ul style="list-style-type: none"> • The 'directors' dealings' notifications must be |

| | | |
|--|--|---|
| | <p>notify the company and the Austrian financial markets authority (<i>Finanzmarktaufsicht</i>) within three days, if a transaction concerning shares or derivative instruments issued by the company is carried out (Article 19, para 1, MAR).</p> <ul style="list-style-type: none"> • Pursuant to L-rule (legal requirement) of the Austrian Corporate Governance Code (ACGC) the members of the management board must disclose any conflicts of interest to the other members of the management board and the members of the supervisory board. | <p>published by the company within three days (Article 19, para 3 MAR).</p> <ul style="list-style-type: none"> • The fine in case of a violation of ‘directors’ dealings’ notification duties amounts to up to €500,000 (Article 30, para 2, subpara 1 lit. I (iii), MAR). |
| <p>10. Understanding what the company must do to comply with its statutory obligations</p> | <ul style="list-style-type: none"> • Each member of the management board must ensure that the company complies with all the numerous statutory obligations. Some important ones are: <ul style="list-style-type: none"> ○ preparation of the annual financial statements (including the balance sheet, profit and loss statement and notes) and its submission to the Commercial Register; ○ providing for a reasonable risk management system and internal control mechanisms (including a compliance system). | <ul style="list-style-type: none"> • According to s 84, para 2, a member of the management board can be liable vis-à-vis the company if not acting in compliance with the law, since it is their duty to ensure compliance. • The management board should delegate the management of the compliance system to a carefully selected and qualified compliance officer, who should take care of the setting of standards in compliance and who monitors compliance with all legislation. |
| <p>11. Understand potential liability under other acts and the systems adopted by the company to minimise breaches</p> | <ul style="list-style-type: none"> • Several other legal frameworks the company must comply with are in place, eg, regarding tax, antitrust, the environment and employee health and safety. • The establishment of a suitable compliance system falls under the responsibility of the management board. | <ul style="list-style-type: none"> • The law provides for specific, harsh liabilities for members of the management board in regard to violations of the company’s tax and social security duties – namely personal liability. |

Special circumstances

1. What is the position if the company may be insolvent?

- Pursuant to s 83, the management board must convene the general meeting and inform the shareholders without undue delay if the losses of the company amount to half of the (nominal) share capital. Violations of this obligation can lead to personal liability for all damages incurring out of it. Pursuant to s 66 et seq, Austrian Insolvency Code (*Insolvenzordnung*), the management board must file for insolvency if the company is unable to pay its due debts (*zahlungsunfähig*) or is over-indebted (*überschuldet*). Each member of the management board must file for insolvency without culpable delay, but no later than 60 days after the occurrence of the insolvency.
- In case of a breach of this obligation, a member of the management board is personally liable for any damages incurred. One may also be liable under criminal law (S 159, para 2, Austrian Criminal Code) Pursuant to s 84, para 3, sentence 6, members of the management board are liable for all damages that arise because of payments made after the occurrence of insolvency. Exceptions are made for all payments that are, even after this date, consistent with the due care of a diligent and conscientious business manager.
- 'Payments' is to be understood broadly. Ultimately, all actions similar to payments that reduce the insolvency estate are adequate to cause liability.
- By definition, a company is insolvent if it can no longer meet its obligations as they fall due. The company is over-indebted if its debts exceed its assets, but only in the case of a negative forecast of continuation (*negative Fortbestehensprognose*).
- If the company is insolvent or even close to insolvency, it is highly advised to seek legal consultation to protect against possible personal liability that can emerge.
- Payments that are consistent with the due care of a diligent and conscientious business manager, according to s 84, para 3, sentence 6, are: payments that are required in the interest of the future preservation of the insolvency estate; payments that are necessary to prevent the immediate collapse of the business operations; and payments in full consideration and payments of social security contributions to be withheld by the company. Liability under criminal law may occur for non-payment of the latter. Personal liability for any decline of the value of the insolvency estate is possible if the obligations stated above are not complied with.

| | | |
|--|---|---|
| <p>2. What special responsibilities and liabilities are associated with a public offer?</p> | <ul style="list-style-type: none"> • If shares of a (listed) company (regulated market) shall be offered to the public or if shares of such company shall be admitted for trading, a prospectus must be published in accordance with the provisions of the Prospectus Regulation (EU) 2017/1129 (<i>Prospektverordnung</i>) and the Austrian Capital Markets Act (<i>Kapitalmarktgesetz 2019</i>), unless an exemption under the relevant provisions is applicable. | <ul style="list-style-type: none"> • Liability may occur if a false statement is made in a prospectus: eg, if there is a wrong assessment of assets, liabilities, profits and losses. One should seek legal and accounting advice as soon as possible. • There may be more requirements to fulfil depending on the stock exchange and market segment chosen for the issuance. |
| <p>3. What special responsibilities and liabilities are associated with a takeover of the company?</p> | <ul style="list-style-type: none"> • In case of a public offer for the purchase of shares of a listed company (regulated market) an offer document must be approved by the Austrian Takeover Commission and must be published. Among other things, the document must contain information about the offer, the bidder, the compensation to be paid to the accepting shareholders, etc. • The management board and the supervisory board of the target company must publish a substantiated statement regarding the takeover offer. • The members of the management board must not take any action that could contradict the success of the offer. | <ul style="list-style-type: none"> • Legal advice should be sought as soon as possible, if a company is the (potential) target of an intended takeover. |
| Self defence | | |
| <p>1. Good corporate governance processes</p> | <ul style="list-style-type: none"> • The management board and the supervisory board are required to comply in principle with the regulations of the ACGC. They must report on an annual basis whether or not the company complies with the provisions of the ACGC. | |
| <p>2. Indemnities</p> | <ul style="list-style-type: none"> • If actions are in accordance with a valid resolution of the shareholders, a member of | <ul style="list-style-type: none"> • The legal liability is mandatory and cannot be reduced by the articles of association or in a |

| | | |
|---------------------|---|--|
| | <p>the management board is not liable to the company. If it is unclear whether a resolution is valid, the management board is obliged to file an action for annulment to obtain clarity. In the case of gross negligence, liability shall not be excluded to the extent that claims of creditors of the company are not met by the company.</p> | <p>service agreement.</p> |
| <p>3. Insurance</p> | <ul style="list-style-type: none"> The company can take out directors and officers (D&O) insurance for the members of the management board. This is considered critical to protect directors from potential liability. It is rare, in practice, that a board member takes the insurance out on their own. The premium the company pays for the insurance is considered part of the remuneration. | <ul style="list-style-type: none"> In general, only certain defined claims against directors are covered by D&O insurances. They are often limited by a certain amount and work under a 'claims-made' principle. This means the insurance only pays for damages that have occurred, and are claimed, within the period of the insurance contract. Since s 84, para 6, mandates a limit of five years to claims made against members of the management board, it is advised to modify the claims-made principle and negotiate an additional coverage period (<i>Nachdeckung</i>) of five to six years. |