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THE  
EXECUTIVE  
REMUNERATION  
REVIEW

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FOURTH EDITION

EDITORS

ARTHUR KOHN AND JANET COOPER

LAW BUSINESS RESEARCH

# THE EXECUTIVE REMUNERATION REVIEW

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The Executive Remuneration Review  
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This article was first published in The Executive Remuneration Review - Edition 4  
(published in October 2015 – editors Arthur H Kohn and Janet Cooper)

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Fourth Edition

EDITORS

ARTHUR KOHN AND JANET COOPER

LAW BUSINESS RESEARCH LTD

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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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ISBN 978-1-909830-74-5

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

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# ACKNOWLEDGEMENTS

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The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET SELMER DA

BAKER & MCKENZIE

BONN STEICHEN & PARTNERS

CLEARY GOTTlieb STEEN & HAMILTON LLP

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, SC

DAVIES WARD PHILLIPS & VINEBERG LLP

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# CONTENTS

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<b>Editor's Preface</b>	.....vii
	<i>Arthur Kohn</i>
<b>Chapter 1</b>	AUSTRALIA.....1
	<i>Sean Selleck, Ellen Thomas, Michael O'Neill and Erica Kidston</i>
<b>Chapter 2</b>	AUSTRIA.....21
	<i>Georg Schima</i>
<b>Chapter 3</b>	BELGIUM .....38
	<i>Loïc Peltzer and Nikolaas Van Robbroeck</i>
<b>Chapter 4</b>	BRAZIL.....53
	<i>Anna Thereza Monteiro de Barros, Cristiane Ianagui Matsumoto Gago, William Roberto Crestani, Thiago Teno and Fernando T L Pacheco Di Francesco</i>
<b>Chapter 5</b>	CANADA.....65
	<i>Cameron Rusaw, Jessica Bullock, Chris Anderson, Shana French and Gerald Griffiths</i>
<b>Chapter 6</b>	CHINA.....82
	<i>Julia Gorham and Alan Wang</i>
<b>Chapter 7</b>	DENMARK.....96
	<i>Jeppe Høyer Jørgensen, Artur Bugsgang, Nicholas Lerche-Gredal and Lykke Asmussen</i>
<b>Chapter 8</b>	EU OVERVIEW .....107
	<i>Janet Cooper, Lorna Parkin and Matthew Hunter</i>
<b>Chapter 9</b>	FINLAND.....121
	<i>Johanna Haltia-Tapio, Lauri Lehmusojä and Hanna Westenius</i>



<b>Chapter 10</b>	GERMANY.....	136
	<i>Michael Brems, Felix Müller, Jens Hafemann, Boris Witt and Martin Begiebing</i>	
<b>Chapter 11</b>	HONG KONG.....	158
	<i>Rowan McKenzie, Steven Sieker, Karen Man and Rashi Narayan</i>	
<b>Chapter 12</b>	ISRAEL.....	172
	<i>Shachar Porat, Orly Gerbi, Keren Assaf, Michal Lavi and Efrat Tzur</i>	
<b>Chapter 13</b>	ITALY.....	185
	<i>Gianluca Russo</i>	
<b>Chapter 14</b>	LUXEMBOURG .....	204
	<i>Anne Morel, Christine Beernaerts and Pierre-Alexandre Degehet</i>	
<b>Chapter 15</b>	MEXICO .....	218
	<i>Alejandro Santoyo and Francisco J Peniche Beguerisse</i>	
<b>Chapter 16</b>	NORWAY .....	228
	<i>André Istad Johansen and Are Fagerhaug</i>	
<b>Chapter 17</b>	PORTUGAL.....	240
	<i>Tiago Piló, Inês Gomes Ferreira, José Pedro Fazenda Martins and Rita Magalhães</i>	
<b>Chapter 18</b>	RUSSIA.....	250
	<i>Mikhail A Suvorov, Svetlana Meyer and Elena Filina</i>	
<b>Chapter 19</b>	SWITZERLAND.....	271
	<i>Matthias Oertle, Harald Bärtschi and Franziska Stadtherr-Glättli</i>	
<b>Chapter 20</b>	UNITED KINGDOM .....	284
	<i>Mahesh Varia</i>	

<b>Chapter 21</b>	UNITED STATES .....301 <i>Arthur Kohn, Kathleen Emberger, Jonathan Reinstein and Zachary Kolkin</i>
<b>Appendix 1</b>	ABOUT THE AUTHORS .....317
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS .....337

# EDITOR'S PREFACE

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Executive remuneration encompasses a diverse range of practices and is consequently influenced by many different areas of the law, including tax, employment, securities and other aspects of corporate law. We have structured this book with the intention of providing readers with an overview of these areas of law as they relate to the field of executive remuneration. The intended readership of this book includes both inhouse and outside counsel who are involved in either the structuring of employment and compensation arrangements, or more general corporate governance matters. We hope that this book will be particularly useful in circumstances where a corporation is considering establishing a presence in a new jurisdiction and is seeking to understand the various rules and regulations that may govern executive employment (or the corporate governance rules relating thereto) with regard to newly hired (or transferring) executives in that jurisdiction.

The most fundamental considerations relating to executive remuneration are often tax-related. Executives will often request that compensation arrangements be structured in a manner that is most tax-efficient for them, and employers will frequently attempt to accommodate these requests. To do so, of course, it is critical that employers understand the tax rules that apply in a particular situation. To that end, this book attempts to highlight differences in taxation (both in terms of the taxes owed by employees, as well as the taxes owed – or tax deductions taken – by employers), which can be the result of:

- a* the nationality or residency status of the executives;
- b* the jurisdiction in which the executives render their services;
- c* the form in which executives are paid (e.g., cash, equity (whether vested or unvested) or equity-based awards);
- d* the time at which the executives are paid, particularly if they are not paid until after they have ‘earned’ the remuneration; and
- e* the mechanisms by which executives are paid (e.g., outright payment, through funding of trusts or other similar vehicles or through personal services corporations).

In addition to matters relating to the taxation of executive remuneration, employment law frequently plays a critical role in governing executives' employment relationships with their employers. There are a number of key employment law-related aspects that employers should consider in this context, including:

- a* the legal enforceability of restrictive covenants;
- b* the legal parameters relating to wrongful termination, constructive dismissal or other similar concepts affecting an employee's entitlement to severance on termination of employment;
- c* any special employment laws that apply in connection with a change in control or other type of corporate transaction (e.g., an executive's entitlement to severance or the mechanism by which an executive's employment may transfer to a corporate acquirer); and
- d* other labour-related laws (such as laws related to unions or works councils) that may affect the employment relationship in a particular jurisdiction.

The contours of these types of employment laws tend to be highly jurisdiction-specific and therefore it is particularly important that corporations have a good understanding of these issues before entering into any employment relationships with executives in any particular country.

Beyond tax and employment-related laws, there are a number of other legal considerations that corporations should take into account when structuring employment and executive remuneration arrangements. Frequently, these additional considerations will relate to the tax or employment law issues already mentioned, but it is important they are still borne in mind. For example, when equity compensation is used, many jurisdictions require that the equity awards be registered (or qualify for certain registration exemptions) under applicable securities laws. These rules tend to apply regardless of whether a company is publicly or privately held. In addition to registration requirements, it is critical for both employers and employees to understand any legal requirements that apply in respect of executives' holding, selling or buying equity in their employers.

Given the heightened focus in many jurisdictions on executive remuneration practices in recent decades – both in terms of public policy and public perception – the application of corporate governance principles to executive compensation decisions is crucial to many companies. Decisions about conforming to best practices in the field of executive remuneration may have substantial economic consequences to companies and their shareholders and executives. Corporate governance rules principally fall into two categories. The first concerns the approvals required for compensatory arrangements; a particular remuneration arrangement may require the approval of the company's board of directors (or a committee thereof) or even, in certain circumstances, the company's shareholders. The second concerns the public disclosure requirements applicable to executive remuneration arrangements; companies should be aware of any disclosure requirements that may become applicable as a result of establishing a new business within a particular jurisdiction, and in fact may wish to structure new remuneration arrangements with these disclosure regimes in mind.

Finally, we would be remiss in discussing the topic of executive remuneration without highlighting the financial services industry. The global financial crisis has, of course, led to a worldwide effort in recent years to more stringently regulate the manner in

which those working within the financial services industry are paid. We hope that readers find the following discussion of the various tax, statutory, regulatory and supervisory rules and authorities instructive.

**Arthur Kohn**

Cleary Gottlieb Steen & Hamilton LLP

New York

October 2015

## Chapter 2

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# AUSTRIA

*Georg Schima*<sup>1</sup>

### I INTRODUCTION

In Austria, executive remuneration has been under public scrutiny for many years. This is strongly related to the fact that in this country, private wealth is nothing people are used to being publicly proud of.

However, it is a more recent development that the remuneration issue has also appeared on the legislator's agenda.

Regulatory measures are focusing, due to EC-driven initiatives, on the banking sector on the one hand and directors' fees on the other. The 'ordinary' employee, even if highly paid, has not yet become the subject of tighter legislative schedules.

All tax benefits related to stock options had been eliminated already in 2009. Only non-transferable options granted before that date still enjoy some benefits. Limiting the tax deductibility of higher executive salaries was discussed in Austria during the global financial crisis, but was not put into legislation.

### II TAXATION

#### i Income tax for employees

Nationality does not have an impact on income taxation.

Under Austrian tax law, individuals are generally subject to unlimited taxation in Austria if they have their residence or habitual place of abode in Austria. The Income Tax Act defines the place of residence as a residency that gives the impression that somebody is going to keep this residency and will use it. The habitual place of abode is a place that gives the impression that somebody stays at this place not only temporarily. Where a

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<sup>1</sup> Georg Schima is a partner of Kunz Schima Wallentin Rechtsanwälte OG.

person resides in Austria for more than six months, he or she will be subject to unlimited succession. The unlimited tax liability comprises the global income of an individual.

Limited tax liability is applicable to someone who obtains an income in Austria or from Austria, but has no place of residence and no place of abode in Austria.<sup>2</sup> Income from employment in Austria and income from Austrian public funds that has been granted on the basis of current or former employment in Austria are taxable.

Double tax agreements may stipulate otherwise and limit the right of one of the two countries to taxes. Where there is no double tax agreement, the Minister of Finance may determine upon request that the income of a person who is subject to taxation in more than one state will partly or entirely not be taxed in Austria or that foreign taxes will be set off against Austrian taxes.<sup>3</sup>

EU or EEA citizens who do not reside in Austria but obtain the majority of their income in Austria (90 per cent of the income achieved in Austria, or whose annual income achieved abroad does not exceed €11,000), may opt for unlimited tax liability. Despite the unlimited tax liability, only the Austrian income will be taxed.<sup>4</sup>

In Austria income tax is of a progressive average rate. Depending on the amount of the annual income, the following formulae apply.

<i>Annual income</i>	<i>Income tax</i>	<i>Tax rate</i>	<i>Marginal tax rate</i>
Up to €11,000	€0	0%	0%
More than €11,000 to €25,000	$(\text{Income} - €11,000) \times 5,110 / 14,000$	Variable	36.5%
€25,000	€5,110	20.44%	43.2143%
More than €25,000 to €60,000	$(\text{Income} - €25,000) \times 15,125 / 35,000 + 5,110$	Variable	43.2143%
€60,000	€20,235	33.725%	43.2143%
More than €60,000	$(\text{Income} - €60,000) \times 0.5 + 20,235$	Variable	50%

In Austria, tax on taxable income is calculated according to the income tax scale above. There are three tax brackets to which one simple computation formula applies.

As the Austrian income tax is a progressive average rate and dependent on the amount of the annual taxable income, there are only fixed tax rates for particular amounts, such as €11,000, €25,000 and €60,000, which are the thresholds to the following tax bracket. All other taxable income must be calculated by using the mentioned formula.

In Austria, the annual compensation is typically paid in 14 instead of 12 instalments. This is because the 13th and 14th monthly salaries are taxable at a very

2 Section 98Z4 of the Income Tax Act.

3 In accordance with Section 48 of the Federal Tax Code.

4 The Austrian legislation responded this way to the *Schumacker* judgment by the European Court of Justice, which ruled that the income of non-residents is comparable to the income of residents and hence non-residents may not be discriminated against if they obtain the majority of their income in the state in which they work.

moderate income tax rate of 6 per cent. However, from 2013 to 2016, a ‘solidarity contribution’ is payable in addition to the fixed income tax rate of 6 per cent for annual remunerations exceeding €185,000.

Statutory severance payments are in principle also taxable at a fixed tax rate of 6 per cent. However, this tax privilege is limited to statutory severance payments, which are only applicable to employment contracts that have been concluded before 31 December 2002. Employment contracts concluded after that date are subject to the Employees and Self-Employed Provident Fund Act. Any lump-sum payments made from this particular fund<sup>5</sup> are also subject to a fixed tax rate of 6 per cent. The fixed tax rate of 6 per cent is also applicable to certain anniversary bonus payments up to a particular maximum amount stipulated in the Income Tax Act.

Where certain requirements are met, the following compensatory payments are also subject to special income tax rates: premiums granted on the basis of collective bargaining agreements for improvement suggestions; and remuneration for employee inventions.

The tax treatment of stock options depends on whether transferable or non-transferable options are granted.

#### *Transferable options*

Transferable options granted as a bonus or at below market value are subject to tax and social security payments at the time of grant, because the employees receive a taxable benefit in kind from their employment.

The value of the benefit in kind is deemed to be the sum that the employee would have had to pay to acquire the option on the free market. The tax authorities calculate the value of a transferable share option as a lump sum, unless the option is listed on the stock exchange (in this case the exchange price is used to determine the value).

This lump-sum valuation leads to higher taxation than is chargeable on a non-transferable option and imposes a tax liability before the employee has realised any benefit from the option. Therefore, it is not advisable to grant transferable options.

#### *Non-transferable options*

Under the Austrian Tax Reform Law 2009 there are no tax advantages for non-transferable options granted after 31 March 2009. The following applies to non-transferable options granted before 1 April 2009:

- a* tax is not due at the time of grant, because it effectively has no market value and is not considered to be an assessable business asset. Instead, it is subject to tax at the time of exercise; and
- b* social security contributions are not payable if the options do not exceed the tax exemption quota.<sup>6</sup>

---

5 This fund is financed by employers’ contributions amounting to 1.53 per cent of each employee’s salary.

6 Section 49, paragraph 3, no. 18d of the General Social Security Code.



Favourable tax treatment applies to non-transferable stock options that meet all of the following criteria:

- a* granted before 1 April 2009;
- b* granted in writing to all employees or groups of employees;<sup>7</sup>
- c* exercised within a certain time limit, which must not exceed 10 years; and
- d* at the time of grant, the value of the shares does not exceed €36,400 per calendar year, per employee.

The employer has to withhold the employee's wage taxes (form of collection of the income tax), which are incurred at each payment of wages. The calculation of the income tax is based on the total income<sup>8</sup> during the calendar year. Income (salaries, wages and pensions) is usually taxed with reference to the calendar year in which the employee received it. Where income with reference to the preceding year is paid, up to 15 February of the next year, it is supposed to be accepted as income received in the preceding year.<sup>9</sup>

Apart from employers' contributions to pension funds, which are not taxable upon payment (the pension payments received from the pension fund by the former employee are taxed as regular income), there are no relevant tax privileges applying to the funding of incentive or other similar compensatory arrangements that are intended to be paid in future. The general principle is that money paid by the employer is taxable if the employee is able to dispose thereof.

## ii Social taxes for employees

Any employees' earnings exceeding the marginal level are subject to social security contributions. This level is defined each year, and in 2015 amounts to €405,98 per month. Social security contributions are due at the following rates expressed as a fraction of employees' salaries (these figures are valid for white-collar employees; figures for blue-collar employees differ slightly):

	<i>Employer</i>	<i>Employee</i>
Retirement insurance	12.55%	10.25%
Health insurance	3.83%	3.82%
Accident insurance	1.40%	–
Unemployment insurance	3%	3%
Fee for housing subsidy	0.50%	0.50%

7 If one does not regard 'executives' as a 'group of employees', favourable tax treatment does not even apply to non-transferable options granted before 1 April 2009.

8 Including, for example, income from the letting or leasing of real estate, income from self-employment or any business enterprise.

9 In this case, the employer is allowed to recalculate the income tax by reassigning the received salary to the remuneration periods of the preceding year. If a reassignment is not executed, the salary is to be assigned to December of the preceding year (Section 77 Abs 5 of the Income Tax Act).

	<i>Employer</i>	<i>Employee</i>
Insolvency contributions	0.55%	–
Workers' chamber contribution	–	0.50%
Staff provision fund contribution*	1.53%	–

\* Applicable to employment contracts concluded after 31 December 2002.

The basis for the calculation of social security contributions is capped at a certain maximum amount, which is adapted each year (in 2015: €4,650 per month for regular payments and €9,300 per annum for special payments). Exceeding amounts are not subject to social security contributions.<sup>10</sup>

In principle, the regulations applicable to social taxes define compensatory payments very broadly, subsuming all monetary payments and non-monetary benefits that the employee is entitled to and that he or she receives from his or her employer or a third party as remuneration subject to social taxes (social security contributions). Some benefits, however, are explicitly exempted. The following is a brief overview of the most relevant exceptions that executive employees may benefit from.

### *Settlement payments*

Depending on the particular reason for settlement, payments may be exempted. Payments made to settle claims before the employment was terminated are subject to social taxes as if they had been made at the time they were originally due. In the event that the original claim comprised both payments that are exempted from social taxes as well as payments that are not exempted from social taxes, and the settlement is made in the form of a lump sum not containing any details as to which benefit had been settled in which percentage, it is possible to divide the settlement payment in the same ratio as the original claim. For example, if 20 per cent of the original claim was exempted from social taxes, 20 per cent of the lump sum for the settlement can also be exempted.

### *General reimbursements, reimbursement of travel expenses*

General reimbursements of expenditures an employee has in the course of his or her work, as well as reimbursement of travel expenses, are in principle exempted from social taxes unless they exceed certain maximum amounts.

### *Severance payments and termination pay*

Severance payments are made upon termination of an employment contract. Contrary to income tax regulations, exemptions of social taxes are not only applicable to statutory severance payments and such determined in collective bargaining agreements, but also to severance payments on the basis of an employment contract as well as voluntary severance payments. Requirements for social tax benefits have, however, been considerably tightened in 2014.

<sup>10</sup> Employees who earn (substantially) more may voluntarily pay higher retirement insurance contributions in order to receive a higher pension. These extra (annual) contributions are limited to 200 per cent of the current monthly cap (hence, €9,300 for 2015).

In the case of a voluntary severance payment, the social security carrier may, however, prove that the actual economic objective of the parties was different (e.g., a compensation for holidays accrued and was not consumed).

The term ‘termination pay’ in Austria comprises (typically one-time) payments made to induce an employee to agree to a termination of employment (typically by mutual consent). Such payments are also exempted from social taxes.<sup>11</sup>

### *Granting options at a reduced rate*

Advantages achieved from exercising non-transferable option rights to the company of the employer are exempted from social security contributions under the condition that they are also exempted from income tax. As of 31 March 2009, newly granted option rights are no longer tax privileged; hence they are also not exempted from social taxes.

### **iii Tax deductibility for employers**

Remuneration paid to employees is generally deductible by the employer. Proposals made by some politicians in the course of the 2008/2009 financial crisis aimed at limiting the deductibility of very high salary or bonus payments, or both, were not transformed into legislative measures.

Employers, who are obliged to observe generally accepted accounting principles, may deduct any remuneration payable at the time the claim arises.

For the assessment of income, non-cash benefits (benefits in kind) will be taken into account on the basis of the average value of such commodity, where the commodity will be used. Official values for the assessment of the most common benefits in kind (e.g., company cars, apartments) are published by the competent authorities. These values are (sometimes far) below market value and hence constitute substantial tax privileges.

### **iv Other special rules**

There are no specific taxation rules in Austria applying to payments made to employees in connection with a change of control.

### *Private use of a company car*

When the car is provided both for business and private purposes, monthly social security contributions and taxes will be calculated on the basis of 1.5 per cent gross costs of the car; maximum costs are €720 per month (since March 2014; prior to that date, €600). If it is verifiable that the private use of the car does not exceed 500 kilometres per month, social security contributions and taxes decrease from 1.5 per cent to 0.75 per cent, or €360 (since March 2014; prior to that date, €300) at a maximum. Since the cost of a privately bought average car by far exceeds the above-mentioned figures, company cars are probably the most popular fringe benefit for executives in Austria.

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11 Section 49, paragraph 3, no. 7 of the General Social Security Code.

### *Insurances*

Contributions by the employer to secure the employee's future comprise any contributions, such as for sickness, invalidity, pension or death of the employee, borne directly by the employer to insurance companies for the employee. The contributions are only tax privileged if they are granted to either all employees or to a particular group of employees and if they do not exceed €300 per year per insured employee.

## **III TAX PLANNING AND OTHER CONSIDERATIONS**

Special taxation rules apply to expatriates who are temporarily posted in Austria by a group of companies. Where the temporary Austrian employer reimburses certain costs, such as expenses for the relocation costs of running two households and returning home to the family as well as extraordinary expenses due to the vocational training of a child abroad (e.g., where children of incoming expatriates temporarily live in Austria and cannot attend a public school because they do not speak German), these expenses will be deducted by the payroll from the current income tax in order to recognise that the incoming expatriates have to file for a tax assessment after returning to their home country.

When relocating to Austria from abroad, the remuneration previously earned in another jurisdiction does not affect the Austrian income tax payable or social taxes. In Austria, specific settlement tax privileges only apply to artists and sportspeople.

## **IV EMPLOYMENT LAW**

### **i Particular regulations applicable to executives**

The employment of executives is not only governed by their individual employment contract, but also by statutory provisions and in most cases by applicable collective bargaining agreements. This applies also to employed managing directors of limited companies (GmbH) who provide services to the company and who do not have a major interest in the company.<sup>12</sup> In general, the same provisions are applicable as to other white-collar employees. The most relevant exceptions for executive positions with regard to statutory provisions can be found in two fields of labour law protection:

- a* working hours (regulated by the Act on Working Hours); and
- b* protection against termination (regulated by the Labour Constitution Act; while an employer does not need to provide any reason to terminate an employment in Austria (unlike in many other EU countries), an employee may – under certain circumstances regulated in the Labour Constitution Act – challenge this termination in court).

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<sup>12</sup> Managing directors of stock corporations, however, are generally not viewed as employees and are hence neither covered by employment-law related legislation nor by collective bargaining agreements.

Due to the different objectives of the protection regulations, ‘executive positions’ are defined differently in both acts.

### *Act on Working Hours*

Provisions on working hours do not apply to employees who have been ‘entrusted with important managerial responsibilities’, since their tasks do not allow for maximum working hour thresholds, and they are in a position to organise their working hours. Therefore, such employees are exempted from regulations on working hours. The definition of ‘executives’ in terms of the Act on Working Hours is relatively wide. As a result, a comparatively high number of employees will be considered as ‘executives’ with regard to the Act.

Even though statutory regulations on working hours do not apply to executives, the applicable collective bargaining agreement may contain additional regulations. Collective bargaining agreements are applicable to a vast number of Austrian companies; a major part of them also includes executive employees. However, employed managing directors are often exempted in collective bargaining agreements applicable in the industrial sector. A careful review of the scope of personal applicability of the relevant collective bargaining agreement is highly advisable.

### *Labour Constitution Act*

The Labour Constitution Act (which contains the protection against unfair dismissals) uses a different and narrower definition of ‘executives’. Two groups of employees generally referred to as ‘executives’ are exempted in Austria from the protection against termination: ‘executive positions, who have significant influence on the management of the company’; and ‘members of an executive body’ of the company.

The difference is that for an employed member of an executive body who is registered with the companies register as managing director, regulations on labour law protection automatically do not apply – without any further consideration of the actual tasks to be performed or the actual scope of influence.

In more specifically defining the ‘executive position’, the Austrian Supreme Court strongly focuses on HR-related influence. An executive who is entitled to conclude or terminate employment contracts on behalf of the employer based on his or her individual decision acts as a ‘natural counterpart’ of the works council. Consequently, such executives are not only not protected against unfair dismissals, but are also not covered by shop agreements and are generally not represented by the works council.

### *Non-competition clauses*

According to Austrian law, a non-competition clause is admissible for a maximum period of 12 months after the employment is terminated. In the event that an employee is sent on gardening leave until the termination of the employment, the 12-month period is to be calculated from the last day of employment, not from the last day of work. Such a

clause is always appraised under the aspect that it may not impede the employee's career progress in an unreasonable way.<sup>13</sup>

Basically there is no statutory territorial limit for a non-competition clause, but the territory for which the clause is valid must not be too broad and must not impede the employee's career progress.

As a matter of principle, a non-competition clause can only be agreed on with an employee who earns a monthly gross salary exceeding €2,635 gross (valid for 2015; this amount is subject to annual review).

Furthermore, the non-competition clause is only enforceable if the employment relationship is terminated by the employee (without cause); if it is terminated by the employer with cause; or in the case of a mutual termination (if agreed) or of expiry of a contract for a definite period of time.<sup>14</sup>

The employer is not obliged to continue to pay the monthly remuneration during the non-competition period. However, where the employer terminates the employment without cause (this basically impedes the application of the clause), it can only insist on the non-competition clause if it continues to pay the employee's monthly remuneration for the non-competition period.

The scope of an admissible non-competition clause is limited to the employer's field of business; it is recommended, however, to further limit the scope by describing the activities or naming the concrete rival business to make sure that the clause is not declared void in a possible lawsuit.

Some employers hedge the non-competition clause with a penalty. Contrary to standard civil law rules, the employer does not need to prove that an actual damage had been caused by non-compliance with the non-competition clause. Such a penalty usually ranges from six to 12 months' salary gross. If such a penalty is agreed on, the employer is only entitled to the penalty, but cannot enforce the non-competition clause.<sup>15</sup> Furthermore, the judge is always authorised to mitigate such a penalty (depending on the concrete circumstances). The employer therefore has to decide beforehand whether it wants to enforce the compliance or the penalty. In any case, it is not permissible to stipulate damages exceeding the agreed penalty.

In addition to non-competition clauses, which are only applicable after the termination of the employment, it is certainly also possible to prohibit competition from one's own employee during the employment. It is common procedure to allow any secondary employment of an employee only upon explicit consent in writing by the employer.

Furthermore, the White-Collar Employees Act determines certain prohibitions of competing secondary employment. According to Section 7 of the Act, a white-collar employee must not conduct any sort of commercial undertaking. Likewise, employees are prohibited from doing business for their own or another's benefit in the employer's line of business. In cases of non-compliance by the employee, the employer may

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13 Section 36 of the White-Collar Employees Act.

14 Section 37 of the White-Collar Employees Act.

15 Section 37, paragraph 3 of the White-Collar Employees Act.

claim damages or demand that the employee surrenders payments received instead of compensation for damages.

In Austria, non-solicitation covenants (regarding customers or employees) are considered a special form of non-competition clause. Hence, the same legal restrictions apply. If a (former) employee systematically tries to entice employees from the former employer, such behaviour may be deemed a violation of the Unfair Competition Act.

There might be a trade-off between employment law and civil law if an employee (protected by sections 36 and 37 of the White-Collar Employees Act) is a selling shareholder. It is customary in mergers and acquisitions contracts to impose non-competition clauses on sellers, which (especially in terms of duration) may go far beyond what is admissible under mandatory employment law. However, a real conflict of law will hardly occur since the (non-statutory but court-driven) civil law principles on non-competition clauses for sellers will only apply if the seller owns a substantial part in the business (not necessarily a majority). In such case, the seller is usually not regarded as an employee and hence is not protected by the White-Collar Employees Act.

## ii Termination of employment

The termination of employment of executive positions is primarily governed by the White-Collar Employees Act, the applicable collective bargaining agreement and the individual employment contract. Statutory severance payments are only applicable to employment contracts concluded before 1 January 2003 in cases of termination by the employer without good cause. Any employment relationships that started at a later date are subject to the Employees and Self-Employed Provident Fund Act, where contributions (1.53 per cent) must be paid from the current remuneration to a fund. In the event of a termination of employment, the said fund pays out a severance amount under certain conditions.

There are no specific rules on the termination of employment contracts related to a change of control. Since a 'change of control' usually refers to a share deal (rather than to an asset deal), the Austrian legislation that has been established in implementing the Transfer of Undertakings Directive is not applicable. In the case of an asset deal, which is considered to fall within the scope of the above-mentioned legislation, however, terminations based on and triggered by the transfer are void.

The following forms of termination of employment can be differentiated.

### *Termination by notice*

Both parties to the employment contract are free to terminate an employment by giving notice. Statutory termination periods the employer needs to respect range from six weeks (during the first two years of service) to five months (after 25 years of service), but can be prolonged by a collective bargaining agreement or altered by individual agreement, the latter, however, not to the employee's detriment. Although there is no particular form required for the agreement's validity, it is advisable to conclude it in writing. In the event that notice periods or termination dates are breached, the validity of the termination is usually not affected. In its financial consequences, however, the termination is treated as if it had been declared in accordance with the law. No reason needs to be provided

by either party to the contract when terminating the employment.<sup>16</sup> While the most senior executives are exempted from general termination protection rules, executives may also challenge the termination by notice of their employment in court, if they have reason to believe that the termination was unlawful or unethical (e.g., if notice had been given for discriminating reasons violating the Equal Treatment Act or if employment was terminated owing to the pregnancy of a female executive).

*Premature termination for substantive reasons*

Premature termination is the act by which an immediate end is put to the employment contract for important reasons (just cause). A premature termination must be declared without undue delay, if one of the parties has good reason; otherwise, this right can no longer be exercised. The possibility of a premature termination is based on the idea that in the case of severe breaches of the contract by one party, the other party cannot reasonably be expected to continue the employment relationship even for the period of notice. Under particular conditions, determined by the White-Collar Employees Act, both the employer (in which case the premature termination is called summary dismissal) as well as the employee (resignation with immediate effect) may be entitled to prematurely terminate the agreement.

The most important reasons for a summary dismissal are:

- a* the employee is disloyal;
- b* the employee is unable to perform the promised or appropriate services;
- c* any breach of prohibition on competition;
- d* if the employee refuses to work for a period without any legitimate excuse;
- e* the employee disobeys orders; and
- f* the employee sets actions against the employer or the other employees that are punishable by penalty law or that are considerable attacks on reputation and integrity.

*Termination by mutual consent*

The parties to an employment contract may also terminate the employment upon mutual consent. The agreement is almost entirely up to the parties and consequently, it is possible to agree on a termination with immediate effect even though there are no important reasons that may justify a premature termination. In practice, however, a termination by mutual consent is often initiated by either party and it is unlikely that the other party will agree unless a solid compromise, which is beneficial for both parties, can be found. Voluntary severance payments are common in connection with terminations by mutual consent that have been initiated by the employer.

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<sup>16</sup> The fact that in principle an employer is not required to give a reason for terminating an employment contract (by observing a notice period) distinguishes Austria from the (vast) majority of EU countries.



## V SECURITIES LAW

Generally, a public offer requires a prospectus. Even if the group of people addressed is limited (as is the case with share plans), these offers are generally considered to be public under the Capital Market Act 1992. However, there is an exemption from the requirement to publish a prospectus for employee share plans. This exemption applies when an employer, or an undertaking affiliated with that employer, offers, allots or will allot securities, which are already admitted to trading in a regulated market to existing or former directors or employees. The employer or undertaking must make available a document containing information on the number and nature of the securities; and the reason for and details of the offer.

There are two more general exemptions from the requirement to publish a prospectus, which may be useful for employee share plans that do not qualify under the above exemption: the offer is addressed to fewer than 100 people; or the offer amounts to less than €100,000 (calculated over a 12-month period).

Usually, at least one exemption applies and a prospectus is not obligatory.

Since share option plans are important decision criteria for members of the capital market, market-listed companies must publish the report on the granting of share options two weeks before the resolution of the supervisory board. The report must contain information such as the number of share options and their distribution to employees, executives and directors, the main conditions for the share option contracts and so on. The reports can be published in electronic form.

If a prospectus is required (because none of the above-mentioned exemptions apply), the prospectus must be approved by the Financial Market Authority (FMA), which decides within 10 banking days (or 20 banking days, if the stocks are offered for the first time publicly or have not previously been authorised for trade in the regulated market) whether it approves or not. If the information or documentation is incomplete, the FMA can ask for additional information.

There are no legal requirements in Austria that executives hold stock of their employer, and even contractual requirements for executives are rarely found. However, there are rules on directors' dealings. Persons with managerial responsibilities in issuers of financial instruments and those who have a close relationship to them (see below) must report to the FMA without delay:<sup>17</sup>

- a* all trading on their account in the company's shares or equivalent securities that are listed on a regular market;
- b* any trading in related derivatives; and
- c* any trading in relation to affiliated companies, as defined by Section 228, paragraph 3 of the Austrian Commercial Code.

Trading with a total value of less than €5,000 within one year does not need to be reported or disclosed. When calculating the total value of trading, the transactions of all persons in management positions and those closely related to these persons are aggregated. The disclosure can also be made through the FMA.

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17 Section 48d, paragraph 4 of the Stock Exchange Act.

Persons with managerial responsibilities at a company are defined as those who either:<sup>18</sup>

- a* belong to an administrative, management or supervisory body of the company; or
- b* are senior executives who are not members of the above bodies, but:
  - regularly have access to insider information relating, directly or indirectly, to the company; or
  - have the power to take managerial decisions affecting the company's future developments and business prospects.

There is also a specific definition for those who have a close relationship with persons who have managerial responsibilities at a company that issues financial instruments.<sup>19</sup> Transactions entered into by those in leadership positions act as indicators or signals for the capital market, and the same is true for those who are in close relationship to them.

## VI DISCLOSURE

In the notes to the financial statements a corporation<sup>20</sup> has to record:<sup>21</sup>

- a* severance and pension payments to members of the management board, executives and ordinary employees (for each group separately);
- b* the number and distribution of stock options granted (totally and within the current business year) to ordinary employees, executives and board members; the report has to include the number of exercisable shares, the exercise price or the formula necessary to calculate the exercise price, the duration of the programme and exercise windows, transferability of options, holding periods, if any, and the way the options are funded;
- c* the number, distribution and exercise price of the options exercised in the current business year, separately with respect to ordinary employees, executives and board members; and
- d* listed corporations have to report in the notes to the financial statements the respective estimated values of options granted at the end of the financial year as well as the value of all options that were exercised within the business year.

There is no legal requirement in Austria concerning the disclosure of ordinary salary for employees and executives. This applies even to executives whose salary exceeds the compensation of management board members.

The total remuneration of the management board for a business year must be reported in the notes to the financial statements. Starting with the business year 2012 owing to a recent amendment to the Austrian Commercial Code, the corporate

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18 Section 48, paragraph 1, no. 8 of the Stock Exchange Act.

19 Section 48a, paragraph 1, no. 9 of the Stock Exchange Act.

20 These rules do not only apply to stock corporations.

21 Considering the scope of this chapter, regulations that apply specifically to members of the management and the supervisory board are not dealt with.

governance report (Section 243b of the Commercial Code) shall contain the total remuneration of each individual member of the management board and disclose the principles governing remuneration policy.<sup>22</sup>

There is no requirement under Austrian law to make the respective arrangements with executives, employees and board members publicly available.

## **VII CORPORATE GOVERNANCE**

In Austria, corporate governance requirements regarding executive remuneration almost entirely refer to members of the management board (note that there is a two-tier system) and are furthermore restricted to stock corporations.<sup>23</sup>

The establishment of principles concerning the granting of profit or turnover-related compensation or pensions to executives<sup>24</sup> requires supervisory board approval.<sup>25</sup> The same applies to the granting of stock options to ordinary employees, executives and board members.<sup>26</sup>

The Austrian Corporate Governance Code (established in 2002 and amended from time to time) contains several recommendations that go beyond the legal requirements and are addressed solely to listed stock corporations. There are two categories of recommendations: the 'C-Rules' (comply or explain) and the 'R-Rules'. Deviations from a C-Rule have to be publicly explained (if the company in principle accepts the Code), whereas deviations from R-Rules require no public statement.

R-Rule 28a of the Corporate Governance Code states that the principles of C-Rules 27 and 28 (applying to members of the management board) shall apply accordingly also in the case of new remuneration systems for senior management staff. Hence, this provision constitutes a recommendation addressed to the members of the management board (who need supervisory board approval to a certain extent; see above).

The principles of C-Rules 27 and 28 are as follows.

The remuneration contains fixed and variable components. The variable remuneration components shall be linked, above all, to sustainable, long-term and multi-year performance criteria, shall also include non-financial criteria, and shall not entice persons to take unreasonable risks. For the variable remuneration components,

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22 Section 243b, paragraph 2, no. 3 of the Commercial Code.

23 In a GmbH it is the shareholders (and not the supervisory board, which is only mandatory in bigger GmbHs) who conclude contracts with the members of the management board. Shareholders of a GmbH administer their own property and are consequently not bound by remuneration-related restrictions. As opposed to this, the supervisory board in a stock corporation, when drafting remuneration arrangements with members of the management board, has to observe the rules set out in Section 78 of the Stock Corporation Act.

24 'Executives' in this context are defined as directors or works managers who are entitled to hire and fire staff, or who have been given procurator or general power of attorney (Section 80, paragraph 1 of the Stock Corporation Act).

25 Section 95, paragraph 5, no. 9 of the Stock Corporation Act.

26 Section 95, paragraph 5, no. 10 of the Stock Corporation Act.

measurable performance criteria shall be fixed in advance as well as maximum limits for amounts as a percentage of the fixed remuneration components. Precautions shall be taken to ensure that the company can reclaim variable remuneration components, if it becomes clear that these were paid out only on the basis of obviously false data.<sup>27</sup>

If a stock option programme or a programme for the preferential transfer of stocks is proposed for management board members, then such programmes shall be linked to measurable, long-term and sustainable criteria. It shall not be possible to change the criteria afterwards. For the duration of such programmes, but at the latest until the end of the management board member's function on the management board, the management board member shall hold an appropriate value of shares in their own company. In the case of a stock option programme, a waiting period of at least three years must be fixed. A waiting or holding period of a total of at least three years shall be defined in stock transfer programmes. The general meeting shall pass any resolutions and changes to stock option schemes and stock transfer programmes for management board members.

Apart from the requirement of a shareholder's resolution in connection with a (conditional) capital increase aimed at granting stock options to employees, executives and board members,<sup>28</sup> no mandatory shareholder approval is required with respect to executive remuneration arrangements.

Because of the two-tier system that governs Austrian stock corporations, the conclusion of executive remuneration arrangements is the sole task of the management board (which only needs limited supervisory board approval where principles of executive remuneration are concerned). The supervisory board, and hence its remuneration committee (which is mandatory only in banks, but recommended by the Corporate Governance Code), are not directly involved in executive remuneration and especially not in the conclusion of single contracts. However, the supervisory board has the power to demand supervisory board approval if, for example, the management board intends to conclude contracts with senior management staff exceeding a defined annual salary or bonus.

There are no 'say-on-pay' requirements in Austria (but there has been political discussion following the successful 'Minder-Initiative' in Switzerland). Corporations may establish say-on-pay votes in their statutes, which has happened very rarely to date. In Austria, there are no union or works council approval requirements regarding executive remuneration.<sup>29</sup>

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27 C-Rule 27 of the Code of Corporate Governance.

28 Section 159, paragraph 2, no. 3 and paragraph 3, no. 5 of the Stock Corporation Act.

29 The Austrian Supreme Court interpreted the previous wording of section 96, paragraph 1, no. 4 of the Labour Constitution Act in a way that required works council approval to certain profit or turnover-based remuneration programmes (even for executives). Section 96, paragraph 1, no. 4 of the Labour Constitution Act was amended in 2010 and since then does not require works council approval for profit-related (executive) remuneration arrangements.

## VIII SPECIALISED REGULATORY REGIMES

Tight remuneration-related rules apply to the financial sector. In 2011, the Austrian legislator implemented the respective amendments to the Capital Requirement Directive (CRD) and established sections 39b and 39c of the Austrian Banking Act.

Section 39b and its Annex applies to directors (which means members of the management board of a bank), risk-takers, employees with control functions and employees working within the same remuneration category as directors and risk-takers and whose services have a significant influence on the bank's risk profile.

The criteria according to the Annex to section 39b of the Austrian Banking Act slightly deviate from the respective provisions in the CRD. The rules are mainly related to bonus payments – in other words, to success-based compensation. The main principle is that at least 50 per cent of any bonus must be paid in contingent capital (shares, convertible hybrid capital or similar instruments). A substantial fraction (at least 40 per cent; in the case of extraordinarily high bonus payments, at least 60 per cent) of the variable compensation has to be withheld for at least five years.<sup>30</sup> The withheld part of the bonus has to be paid during the (at least five-year withholding period) *pro rata temporis* and only if specific performance criteria (which have to be contractually established) are met.

The specific bonus-related provisions regarding executive remuneration in the banking sector are a real challenge to the management board (which is in charge of drafting bonus arrangements with executives covered by the statutory provisions in the Austrian Banking Act) as well as to the supervisory board (which has the responsibility for establishing and overseeing the bonus arrangements made with members of the management board).

There is no *de minimis* provision; hence, even bonus payments of, for example, €5,000 fall within the scope of the mandatory rules in the Banking Act.

## IX DEVELOPMENTS AND CONCLUSIONS

Executive remuneration has for a long time been a subject of broad public interest in Austria. The public discussion, of course, was heavily influenced by the financial crisis in 2008/2009 and the perception that the crisis was (not entirely, but to a considerable extent) triggered by excessive bonus payments in the financial sector, which were based on excessive yield targets (of 25 per cent). As mentioned above, the banking sector recently had to cope with relatively tight legislation concerning bonus payments. These restrictions, which are under the supervision of the FMA (which tends to adopt very narrow interpretations of the relevant terms), have created a problematic side effect that could only surprise decision-makers lacking common sense: fixed salaries in the banking sector have been significantly increasing so as to mitigate the consequences of the bonus-related legislation. This trend may even rely on provisions in the CRD, which

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30 The EU Directive requires a minimum holding period of only three years.

states that the fixed salary should be dimensioned in a way that the executive earns a reasonable income even in complete absence of any bonus.

Apart from the banking sector, recent developments concerning Austrian legislation and recommendations in the Corporate Governance Code only refer to members of the management (and to a certain extent to members of the supervisory board). Likewise, the public discussion strongly focuses on management board members and especially on 'golden handshakes' sometimes even awarded to managers with a very modest track record.

In contrast, executive remuneration of members of staff who are considered to be employees is not really under public scrutiny, which may also be explained by the fact that the politically well-embedded and influential Austrian trade unions protect employees' interests and do not appreciate discussions on 'excessive' pay arrangements.

## Appendix 1

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# ABOUT THE AUTHORS

### **GEORG SCHIMA**

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After completing his PhD at the University of Vienna in 1983, Dr Georg Schima passed the bar examination in Vienna in 1990, turned honorary professor for corporate, labour and employment law at Vienna University of Economics and Business Administration in 2007 and passed the examination to become executive master of European and international business law (MBL-HSG) at the University of St Gallen, Switzerland. In 2012, he did his executive master of laws (LLM) in company, foundation and trust law at the University of Liechtenstein.

Having worked as associate in two Viennese law firms, Dr Schima became founding partner of Kunz Schima Wallentin Rechtsanwälte in Vienna in 1994.

Besides being proficient in German, English and French, Dr Schima is highly experienced in corporate law, labour and employment law, corporate governance and foundation law.

Dr Schima is a member of the Austrian Corporate Governance Task Force and author of more than 100 publications with respect to labour and employment law, directors' and officers' liability, corporate law, corporate governance, foundation law and further legal fields. An overview of and links to his publications can be found at [www.ksw.at](http://www.ksw.at).

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