Track Changes

April 2019

Directive (EU) 2017/828

Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement (the "Directive") to be implemented in Austria until 10 June 2019 aims to create a more attractive environment for shareholders and to improve corporate governance for companies the shares of which are admitted to trading within a Member State.

After numerous and intense complaints by the Chamber of Commerce in Vienna (Wirtschaftskammer Wien) and the Federation of Austrian Industries (Industriellenvereinigung), the Austrian legislator currently considers the Directive's implementation in a more lenient manner. The legislator's final decision on the Directive's implementation is still pending.

Primary objectives of the Directive are:

(1) Listed companies shall have the right to identify their shareholders in order to enhance direct communication;
(2) Intermediaries (e.g., investment firms, credit institutions or central securities depositories) providing services such as safekeeping and administration of shares, maintenance of securities accounts on behalf of shareholders, shall, upon request be obligated to provide listed companies with information regarding the identity of the company's shareholders;
(3) In order to provide for transparency of the remuneration policy of the management, a remuneration report, giving a clear and comprehensive overview thereof, shall be submitted to the shareholders' meeting. The shareholders shall have the right to vote on the remuneration policy at least every four years;
(4) Material transactions with related parties shall be publicly announced at the latest at the time of the conclusion of such transaction. Member States may provide for shareholders to have the right to vote on such material transactions with related parties.

At the outset we would like to clarify that the implementation of the Directive will only affect companies with shares admitted to trading within a Member State.

The Directive shall be implemented by means of amendment of the Austrian Stock Exchange Act ("Börsegesetz"), the Austrian Stock Corporation Act ("Aktiengesetz"), the Austrian Act on the European Company ("SE Gesetz") and the Austrian Take-over Act ("Übernahmegesetz") foreseeing the following main new provisions:

(1) Identification of Shareholders, Transmission of Information and Facilitation of Exercise of Shareholder Rights

Listed companies shall have the right to identify their shareholders. Upon request of the listed company (or any other third party as determined by the listed company) also intermediaries shall communicate information regarding the shareholders' identity without delay.

According to the Directive Member States may provide for listed companies to be only allowed to request the identification of shareholders holding more than 0.5% of the shares or voting rights. Although the Austrian government bill on the Directive's implementation does currently not provide for this threshold, such shall allegedly be included in the government bill's amended version.

The personal data of the shareholders shall enable the listed company to communicate with their shareholders directly with the view of facilitating the exercise of shareholder rights and the shareholder engagement with listed companies.

Intermediaries are now obligated to either enable the shareholders to exercise their rights personally and/or to exercise the shareholders' rights, if expressly authorized to do so, on behalf of the shareholders and subject to the shareholders' instructions. The intermediaries are obliged to disclose the fees for the provision of such services.

Listed companies and intermediaries may not store the personal data of shareholder for longer than 12 months after having become aware the individual concerned is no longer a shareholder.

(2) Transparency of Institutional Investors, Asset Managers and Proxy Advisors

Institutional investors and asset managers shall either meet the following requirements or publicly disclose a "clear and reasoned explanation" why they have chosen not to comply with one or more of the following requirements:

a) Development and disclosure of an engagement policy that describes how shareholder engagement is integrated in their investment strategy. Such policy shall describe how they monitor companies which they are invested in on relevant matters, including (amongst others) strategy, financial and non-financial performance, risk, capital structure, and corporate governance.

b) Annual public disclosure how their engagement policy has been implemented, including a general description of voting behavior, an explanation on the most significant votes and the use of services of proxy advisors.

Proxy advisors shall publicly disclose reference to a code of conduct which they apply. They shall also report on the application of this code of conduct. If proxy advisors do not apply a code of conduct, they shall provide a clear and reasoned explanation. Where proxy advisors apply a code of conduct but depart from any of its recommendations, they shall declare from which parts they depart, provide explanations for doing so and indicate any alternative measures adopted.
Proxy advisors also need to identify and disclose any actual or potential conflicts of interests or business relationships that may influence their voting recommendations and the actions they have undertaken to eliminate or mitigate such conflicts of interests.

There are no significant proxy advisors domiciled in Austria, in practice. Such foreign (EU-domiciled) proxy advisors often merely grant proxy to a local proxy holder. Therefore, the implementation of the Directive with regard to proxy advisors will have little to no practical relevance in Austria. Foreign proxy advisors will implement the Directive in accordance with their home jurisdiction. Whenever, such proxy advisor will act in Austria, it is likely that their engagement policy and code of conduct applicable in their home jurisdiction will be referenced for Austrian purposes.

(3) Remuneration Policy and Remuneration Report

The supervisory board of listed companies needs to establish a remuneration policy for members of the management board. The shareholders shall have the right to vote on the remuneration at least every four years or in case of a material change. The vote shall, however, only serve as a recommendation and may not be contested. If the proposed remuneration policy is not approved, the listed company needs to submit a revised policy for approval at the following shareholders meeting. Upon the vote by the shareholders the remuneration policy together with the date and the results of the vote is to be published on the listed company's website.

Further, the supervisory board and the management board of a listed company need to draw up a clear and understandable remuneration report. Such needs to provide a comprehensive overview of the remuneration and any benefits awarded or due to the company's current or former directors in accordance with the remuneration policy. Again, the remuneration report is to be submitted to the shareholders for a (recommendatory) vote. In the following remuneration report the company has to explain how the shareholders' vote has been taken into account.

The above rules also apply to the remuneration of supervisory board members.

(4) Approval of Related Party Transactions

Material transactions of listed companies with related parties need to be approved by the supervisory board and to be publicly announced at the latest by the time of the conclusion of the transaction. The public announcement shall contain the name of the related party, the date of transaction and a reference that further information (in particular on the transaction's value) may be found on the company's website.

Transactions are qualified as material if their value exceeds 10% of the listed company's balance sheet total. In case of several transactions each below this threshold but with the same related party within the same year, the combined value of all transactions needs to be applied.

The above rules, however, do not apply to transactions entered into in the ordinary course of business and concluded under customary market conditions.

The Austrian legislator also made use of the option to provide for certain exceptions from the above requirements (amongst others for transactions between the company and wholly owned subsidiaries or transactions by credit institutions on the basis of measures aiming at safeguarding their stability which have been approved by the competent regulatory authority).

The Austrian legislator has yet to decide how Directive 2017/828 will be finally implemented. In any event listed companies will face a number of additional administrative tasks and related cost. The above shall serve as a short overview of the most important issues to be considered after 10 June 2019 and the business years starting thereafter. According to the current draft laws, the non-compliance with some of the new provisions (e.g., duty to transmit information or duty to disclose) shall be qualified as an administrative offence with possible fines of up to EUR 50,000.

About WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and Southeastern Europe (CEE/SEE). We have built our reputation on a combination of unrivalled local knowledge and strong international capability. We opened our first office in Vienna over 60 years ago. Our team now brings together over 340 lawyers from a diverse range of backgrounds, working in offices in 13 countries throughout the CEE/SEE region.

For more information about our services, please contact:

Christian Mikosch
Partner
christian.mikosch@wolftheiss.com
T: +43 1 51510 5310

Doris Buxbaum
Counsel
doris.buxbaum@wolftheiss.com
T: +43 1 51510 5046