11. The Interest of the Company in Austria: Small but subtle differences from German law

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A. Introduction

Austrian stock corporation law is so similar to German law that in most respects, it is practically identical. The differences that do exist are, for the most part, not very big. Section 76 (1) of the German Stock Corporation Act of 1965 (deutsches Aktiengesetz – dAktG)[1] stipulates that the management board must "manage the company under its own responsibility", and according to Section 93 (1), the management board must "act for the benefit of the company".

In contrast, Section 70 (1) of the Austrian Stock Corporations Act of 1965 (österreichisches Aktiengesetz – öAktG)[2] reads: "[t]he Management Board shall manage the company under its own responsibility in such a way as is in the best interests of the company, taking into account the interests of the shareholders and employees as well as the public interest". While the German Stock Corporation Act only mentions the good of the company without further explanation, the Austrian Stock Corporation Act mentions other aspects that must be taken into account within the interest of the company.

Interestingly, both regulations go back to the same root: the German Stock Corporation Act of 1937. In general, the development of Austrian stock corporation law since mid-19th century cannot be separated from the German development.

B. The development of Austrian stock corporation law

Until the mid-19th century, while individual stock corporations existed in Austria, there was hardly any stock corporation law in the modern sense. At

1 German Federal Law Gazette (deutsches Bundesgesetzblatt – dBGBl.) 1965 I S. 1089.
2 Austrian Federal Law Gazette (österreichisches Bundesgesetzblatt – öBGBl.) 98/1965.

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that time, privileges were the basis for the formation of stock corporations.[3] A new privilege had to be issued for each new corporation, and outside of these privileges, there were only rudimentary general regulations on stock corporations.[4]

In 1787, Austrian law stipulated that stock corporations had to file their articles of association with the competent mercantile court, and in 1821, the law further decreed that the government had to approve stock corporations.[5] In 1840 and 1843, somewhat more comprehensive decrees (Hofkanzleidekrete – HfKD) were issued on the relationship between "private associations" and the state administration.[6] An association patent (Vereinspatent) replaced these decrees in 1852.[7] These regulations did not deal exclusively with stock corporations, but with associations in general. However, stock corporations were handled as associations at the time.[8]

While the focus of the 1840, 1843, and 1852 regulations was on the formation of associations, the internal organization of associations was only dealt with very briefly.[9] These regulations reflected the fact that Austria was governed by an absolute monarch until 1848, and then again from 1852 to 1860. During these time periods, the establishment of associations, and thus of stock corporations, were controlled by the state, meaning the formation of these corporations had to be approved by the government. The state was free to decide whether to approve the formation (concession system);[10] even if the founders fulfilled certain requirements, the state was

3 Thus, the official names of all the examples mentioned contained a reference to the privilege: "privilegirte Oesterreichische National-Bank"; "k.k. privilegierte Erste Eisenbahngesellschaft"; "k.k. ausschließlich privilegierte Kaiser Ferdinands Nordbahn".

4 Kalss/Eckart, p. 50 et sequu; Leixnering/Meyer/Doralt, 103 et sequ., Schennach, p. 91 et sequu.

5 Paurnfeindt, p. 206 et sequ.

6 Collection of Statutes for the Judiciary (Justizgesetzsammlung – JGS) 462/1840 and 763/1843; Kalss/Burger/Eckert, p. 64 et sequu.

7 Austrian Imperial Law Gazette (österreichisches Reichsgesetzblatt – öRGBl.) 253/1852; this patent was remarkably long-lived and was only repealed in 1999 (BGBl. I 191/1999), although its scope of application was already significantly restricted in the 1860s: in relation to stock corporations by the General German Commercial Code (Allgemeines Deutsches Handelsgesetzbuch – ADHGB, see below) and in relation to non-profit associations by the Association Act 1867 (öRGBl. 134/1867); Kalss/Burger/Eckert, p. 68 et sequu.

8 Schennach, p. 93.

9 Kalss/Burger/Eckert, p. 79.

10 Leixnering/Meyer/Doralt, p. 104 et sequ.

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not required to approve the formation of a joint-stock company (as would have been the case with a normative system).

These rudimentary provisions (1840, 1843, and 1852) on stock corporations were purely Austrian acts – enacted by the Austrian emperor for Austria only. That was different with the first comprehensive regulation of Austrian stock corporation law, which took place in the context of the German Confederation ("Deutscher Bund") Until 1866, the Austrian Empire was a member of the Confederation (although not all of Austria's territories belonged to it). The German Confederation only had limited legislative powers, but despite this, efforts were made in its last decade to standardise several areas of law in the Confederation states. To this end, the federation's council ("Bundesversammlung") set up commissions to draw up drafts of laws that were then to be enacted as state laws by the individual German states.[11]

Adoption of the draft laws in the individual states only succeeded in one case, the General German Commercial Code (Allgemeines Deutsches Handelsgesetzbuch – ADHGB), before the German Confederation ended: From 1857 to 1861 a commission in Nuremberg drew up the ADHGB.[12] In the years following, the ADHGB was enacted as state law by almost all states of the German Confederation,[13] including Austria.[14] Sections 207–249 of the ADHGB regulated stock corporation law in detail.[15] The ADHGB not only served as the first comprehensive regulation of stock corporations for Austria, but also as a common stock corporation law for the entire German Confederation. The ADHGB remained after the end of the German Confederation and even expanded to Hungary[16] and Bosnia-Herzegovina, who adopted essentially identical laws.[17]

In contrast to the previous Austrian regulations, the ADHGB primarily contained regulations on the internal organization of stock corporations; it only dealt with state approval in two articles. Section 208 (1) ADHGB stated: "[s]tock corporations may only be established with state approval". While this provision alone would call for a licensing system, Section 249 No. 1 ADHGB expressly permitted the individual states to decide whether

11 Löhnig/Wagner/Vogenauer/Schmetterer, 2024 p. 88 et sequu.
12 Löhnig/Wagner/Wagner, 2024 p. 27.
13 Löhnig/Wagner/Wagner, 2024 p. 27 (60).
14 öRGBl. 1/1863.
15 Kalss/Burger/Eckert, p. 99 et sequu.
16 Löhnig/Wagner/Gönczi, 2018 p. 113.
17 Löhnig/Wagner/Löhnig, 2018, p. 139.

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to require state authorisation.[18] The decision for a licensing or a normative system was thus left to the individual states.

However, this question shaped the development of stock corporation law over the next few decades in different ways in Germany on the one hand and Austria on the other hand. In 1867, the North German Confederation ("Norddeutscher Bund") was formed and in 1870/71 it was succeeded by the German Reich – both without Austria, which was no longer a part of Germany after the end of the German Confederation in 1866. In the North German Confederation, the concession system was uniformly abolished in 1870 and replaced by a normative system.[19] In 1884, the stock corporation law of the German Reich was comprehensively amended once again.[20] This second amendment to the stock corporation law brought about significantly more changes to the internal structure of stock corporations than the first.[21]

The ADHGB created a common commercial law, but not a common civil law, as it had to be compatible with various civil law systems – the General Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB) in Austria, the General State Law (Allgemeines Landrecht – ALR) in parts of Prussia, the Code civil (Cc) in areas on the left bank of the Rhine, the Baden State Law (Badisches Landrecht – BadLR) in Baden, the Codes Maximilianeus Bavaricus Civilis (CMBC) in parts of Bavaria, and the common law in the parts of Germany that had no civil law codification.[22] Accordingly, the ADHGB contained a comparatively large number of civil law provisions that were necessary to lay a foundation for a common commercial law.

This changed for the German Reich with the BGB in 1896/1900. It introduced a standardised civil law that made many of the general civil law provisions in the ADHGB superfluous.[23] Commercial law in the German Reich was recodified in the German Commercial Code (Handelsgesetzbuch – HGB) in 1897, after the BGB was enacted but before it came into force. The HGB built heavily on the ADHGB but dispensed with its general civil law provisions. The HGB did adopt the changes to commercial law that

18 Section 249 No. 1 ADHGB: "The state laws reserve the right to determine that state authorisation is not required for the establishment of stock corporations in general or of individual types thereof."; Söhnchen, p. 173 et sequ.

19 Söhnchen, p. 178 et sequu.

20 Söhnchen, p. 196 et sequu.

21 Bahrenfuss, p. 37 et sequ.

22 In 1863/65, the Saxon Civil Code was added.

23 For example, the provisions on the contracts in general, Sections 317–323 ADHGB.

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had been made in the meantime, in addition to making some of its own changes.[24] For stock corporations, the HGB adopted the basic structure of the ADHGB and kept the modifications of 1870 and 1884 but also made some completely new regulations.[25]

The year 1900 simultaneously established and ended legal unity. The BGB gave the German Reich a standardised civil law, however, since the HGB was only introduced in the German Reich, not to Austria and Hungary, the unity of commercial law between Germany on the one hand and Austria and Hungary on the other hand was ended. The end of this unity was not a major turning point, as developments had already differed in Germany and Austria before 1900 due to the German amendments to stock corporation law.

In the last third of the 19th century and the beginning of the 20th century, there were also discussions in Austria about reform of stock corporation law. However, Austria did not amend the ADHGB. Instead, Austria introduced the "Aktienregulativ" in 1899.[26] Formally, the Aktienregulativ was an administrative regulation that implemented the Association Patent 1852 (Ausführungsverordnung). However, in terms of content, it not only concretised the rules of 1852 on the approval of stock corporations but also amended them. As a result, the Aktienregulativ replaced the licensing system with a normative system that standardised the content required in the articles of association of a stock corporation in order for it to be approved.

The debate on the reform of stock corporation law continued in Austria and Germany in the interwar period. Austria considered, but ultimately did not adopt, the German HGB.[27] In Germany, the results were more concrete: in 1930, the Ministry of Justice prepared a draft of a stock corporation law, which ultimately formed the basis for the Stock Corporation Act of 1937.[28] Even though the Stock Corporation Act of 1937 was enacted under National Socialist rule, its contents were specifically National Socialist only

24 For example, in the introduction of a purely subjective system for the delimitation of commercial law, in
contrast to the mixed system of the ADHGB; Löhnig/Wagner/Wagner, 2024, p. 27 (45 et sequu).
25 Bahrenfuss, p. 36 et sequu.
26 öRGBl. 175/1899; Kalss/Burger/Eckert, p. 188 et sequu and 145 et sequu; Leixnering/Meyer/Doralt, p. 107.
27 Wedrac, BRGÖ, p. 350.
28 dRGBl. I 1937 S. 107.

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in a few respects,[29] although the language of the act reflects National Socialist ideas in some places.[30]

The German Stock Corporation Act of 1937 initially was not relevant for Austria, but this changed in March 1938 when Austria was annexed to the German Reich. However, the annexation of Austria only resulted in some selective application of German law; German law was not introduced as general law in Austria.[31]

Some of the German laws introduced in Austria after the annexation were particularly characterised by Nazi ideology included the Nuremberg Race Laws.[32] Others, which had been introduced in Germany pre-1933, of course had no Nazi content; these laws included the German Income Tax Act and the Commercial Code, both of which were introduced in Austria following annexation.[33] Still other German laws introduced in Austria after the annexation were enacted during the Nazi era but were only influenced by Nazi ideology in part. Such laws included the Wills Act[34] and the German Stock Corporation Act of 1937.[35]

In contrast to the HGB and the German Stock Corporation Act of 1937, the German BGB was not introduced in Austria during the Nazi era – partly because there were plans for a separate National Socialist codification of private law, the Volksgesetzbuch, which were never finalised. Thus, in 1939, the situation for unification of private law was similar to the pre-1900 situation, albeit under completely different political circumstances. In (former) Austria and the rest of Germany, there was a uniform commercial law (the HGB) but no common civil law (ABGB in Austria and BGB in Germany).

This situation did not change when Austria declared its independence from Germany at the end of World War II. The Second Republic of Austria kept the laws enacted in, or introduced to, Austria following annexation,[36] as long as they were not "incompatible with the existence of a free and

29 Bahrenfuss, p. 45 et sequ.

30 The interests to be taken into account by the Executive Board in accordance with Section 70 AktG were clearly described in National Socialist terms.

31 Davy/Hofmeister, p. 124.

32 On the Nuremberg Race Laws: Essner.

33 dRGBl. I 1938 S. 1428, 1999.

34 dRGBl. I 1938 S. 978; Law Gazette for (former) Austria (Gesetzblatt für das Land Österreich – GBlÖ) 346/1938; Hanel, BRGÖ 230.

35 dRGBl. I 1938 S. 385, 988.

36 Section 2 Legal Transition Act, Austrian Law Gazette (Staatsgesetzblatt – StGBl.) 6/1945.

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independent Austrian state or with the principles of a genuine democracy, [...] contradict the Austrian people's sense of justice or contain typical ideas of National Socialism".[37] As the HGB and the German Stock Corporation Act of 1937 met these criteria, they were left in force. (West) Germany also kept the HGB and the German Stock Corporation Act of 1937.[38]

This changed in 1965, when new stock corporation acts were passed in both Germany and Austria that were heavily based on the German Stock Corporation Act of 1937. The new stock corporation acts differed to some extent, ending the uniformity of Austrian and German stock corporation law. However, given their common roots, the laws were not entirely dissimilar. The same degree of similarity can be found in commercial law. The HGB initially developed slowly in both countries due to differing amendments, until it was comprehensively amended in Austria in 2005 and renamed "Unternehmensgesetzbuch" (UGB). The UGB came into force on 1 January 2007.[39]

C. The public interest in the formation of stock corporations

Public interest was at the centre of the Austrian regulations on the formation of stock corporations from the 1840s. The decree of 1840 already stated in the preamble: "[t]his concerns only the legislative provisions with regard to the relationship of private associations to the state and the state administration".[40] The title of the decree of 1843 was even clearer; its subject was the relationship between "private associations that exert a closer influence on public interests and the state administration".[41]

The subject of these regulations was not the internal organisation of associations (including stock corporations) *per se*, but rather their relationship with the state. A distinction was made between associations that had to be licenced and those that did not. Stock corporations always had to be licensed. This remained the case in the association patent of 1852, which

37 Section 1 (1) Legal Transition Act.
38 Bahrenfuss, p. 46 et sequu.
39 öBGBl. I 120/2005.
40 Preamble para. 3 HfKD 1840.
41 Preamble HfKD 1843.

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provided a few more details on the internal organization of stock corporations.[42]

Under the Association Patent of 1852, when deciding whether to grant the licence, the state administration first had to consider the object of the business and of the persons involved.[43] In addition, a license would only be granted "if the company's plan and its supporting documents meet the legal requirements [...] and the public considerations involved".[44]

However, the state's influence did not end with the licensing procedure. Even after approval, the state administration retained the right "to inspect the business management of each association, to monitor compliance with the provisions laid down in the approval of the association or by general regulations and, if it is recognised as necessary, to appoint a princely commissioner to the association, to be appointed by the authority appointed for this purpose. The latter must ensure that the association does not exceed the limits of the authorisation granted to it and the provisions of the approved company regulations".[45]

The state could also dissolve stock corporations: "[d]issolution takes place against the will of the company if [...] such circumstances arise under which, according to the law or for public considerations, the withdrawal of an authorisation to exercise an occupation or enterprise also takes place in the case of individual private individuals".[46]

The state was thus able to influence the company's consideration of public interests in all "life phases" of a stock corporation – at the formation, which was only permitted if the project did not violate public interests, during ongoing operations through a monitoring state commissioner, and finally, by dissolving the company for public considerations.

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42 Kalss/Burger/Eckert, p. 79 et sequ.

43 Para 11 (a) and (b) HfKD 1840; section 11 (a) and (b) HfKD 1843; sections 9 (a) and 14 (b) Association Patent 1852.

44 Section14 (c) Association Patent 1852; para. 11 (c) HfKD 1840: "[i]t must be examined whether the planned statutes contain any provisions that are contrary to the existing laws or violate public considerations, in which respect they must be duly amended"; very similar section 11 (d) HfKD 1843, according to which an association could only be authorised if it was ensured that "the plan of the company and the draft of the statutes comply with the existing laws and the public considerations that arise".

45 Section 22 Association Patent 1852; the possible, but not mandatory, appointment of a commissioner was also provided for in para. 11 (d) HfKD 1840 and Section 15 HfDK 1843.

46 Section 19 HfKD 1843; in the parallel provision in para 13 HfKD 1840 the public considerations were not expressly mentioned; this probably did not mean a difference in content.

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The ADHGB did not contain any provisions on stock corporations that referred to the public interest. However, the introduction of the ADHGB did not mean that public interest was no longer relevant for Austrian stock corporations. The ADHGB primarily regulated the internal organisation of stock corporations. Although it required that stock corporations be authorised by the state, the ADHGB did not contain any specific provisions on the requirements or procedures for authorisation. In addition, the ADHGB still allowed dissolving stock corporations by "withdrawing state authorisation", despite not outlining the requirements or procedures for withdrawal.[47] The provisions of the Association Patent of 1852 therefore remained relevant in Austria both for the authorisation of stock corporations and for their dissolution.[48]

The appointment of state commissioners to monitor the ongoing business management of stock corporations was neither explicitly included nor excluded by the ADHGB. The Austrian Introductory Act of the ADHGB did not repeal the section of the Association Patent of 1852 that provided for ongoing supervision; thus, Austria kept the possibility of ongoing supervision even after the introduction of the ADHGB. Accordingly, the ADHGB did not change that stock corporations had to take the public interest into account and that the public interest could thus be monitored by the state at every stage – at the time of formation, during ongoing operations, and on dissolution.

The Aktienregulativ of 1899 transformed the licence system into a normative system, but the ability of the state to monitor each stage did not change. Regarding authorisation for formation, Section 12 (2) of the Aktienregulativ stated: "[a]uthorisation will always be granted if the company's plan complies with the requirements of the existing laws and ordinances, in particular the current regulations, and none of the reasons listed in §14 of the Imperial Patent of 26 November 1852 stand in the way".

Although the Aktienregulativ stipulated that the licence be granted if the requirements listed in the law were met, it also expressly stated that the grounds for refusal from the Association Patent of 1852 were still applicable: general compliance with the law, the applicant's personal and financial circumstances, and "public considerations".

47 Section 242 (2) ADHGB.

48 Argumentum e contrario section 32 of the Austrian Introductory Act to the ADHGB (öRGBl. 1/1863).

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Until the German Stock Corporation Act of 1937 was introduced in Austria in 1938/39, Austrian stock corporation law remained two-tiered: the ADHGB regulated the organisation of stock corporations – without reference to the public interest – and the Association Patent of 1852 regulated the approval, monitoring, and withdrawal of approval – with multiple references to the public interest.

D. The public interest and the Management Board

The Austrian regulations from the 1840s and 1850s were very similar to the Stock Corporation Law of the Prussian ALR of 1794, which contained regulations on state control and the public interest;[49] in fact, the Prussian law might have been the model for the Austrian legislation. However, after the general introduction of the normative system in 1870 there was no longer any reference to the public interest in German stock corporation law.[50] Public interest was then reintroduced, in a completely different way, in the German Stock Corporation Act of 1937.

Section 70 (1) of the German Stock Corporation Act of 1937 stated: "[t]he Executive Board shall be responsible for managing the company in a manner that is in the best interests of the company and its following and in the common interest of the people and the Reich".

The German Stock Corporation Act of 1937's major change from the ADHGB and the HGB was the new role of the management board. There was a connection between this new role and the public interest. In the ADHGB and the HGB, the general meeting did not only elect the management board but could also instruct the board in a binding way and dismiss it at any time.[51] Under the German Stock Corporation Act of 1937, the management board was still appointed by the general meeting (now called "Hauptversammlung" instead of "Generalversammlung"), but was now tasked with managing the company on its own.

Previously, resolutions by the general meeting could serve as guidelines for the actions of the management board. This was no longer the case with the board's new autonomy. Instead, three interests the management board should pursue with their actions were included in the law itself: the

49 Mittwoch, Friedmann, p. 1439 (1443 et sequu); Söhnchen, p. 134 et sequ.
50 Kalss/Burger/Eckert, p. 243.
51 A board of directors that was independent of the general meeting was not allowed; Staub, Section 227 mn. 3 a); Art. 231 mn 1.

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good of the company, the good of its following ("Gefolgschaft"), and the common good of people and the Reich ("gemeiner Nutzen von Volk und Reich"). The second and third points were written in specifically National Socialist language: "following" was used instead of employees, and the "common good of people and Reich" was used instead of the public interest. Structurally, these three aspects were equally important.

The German Stock Corporation Act of 1937 dealt with public interest in a completely different context than the ALR and the Austrian regulations from the mid-19th century had done. In these earlier laws, it was the responsibility of the state to ensure that the public interest was observed – when corporations were founded, but also through control of existing corporations. In contrast, Section 70 (1) of the German Stock Corporation Act of 1937 handed the task of considering public interest to the management board.

The introduction of the German Stock Corporation Act of 1937 to Austrian law in 1938 finally brought the normative system to Austria, meaning that the provisions of the Association Patent of 1852 were no longer applicable to stock corporations.[52] The old concept of the state-controlled public interest was seamlessly replaced by the new management board responsibility for public interest. From 1870 to 1937 public interest was not mentioned at all in German stock corporation law. In contrast, the public interest has always been mentioned in Austrian stock corporation law: before 1938 as state-controlled public interest and since then as public interest, to be taken into account by the management board.[53]

Germany and Austria both reorganised their stock corporation law in 1965, with only Austria retaining the explicit reference to the public interest. Section 70 (1) of the Austrian Stock Corporation Act, which has remained unchanged since 1965, reads: "[t]he Management Board shall manage the company under its own responsibility in such a way as is required for the good of the company, taking into account the interests of the shareholders and employees as well as the public interest".[54]

The explanations to the government bill on the Austrian Stock Corporation Act were very brief, explaining that : "[i]n eliminating National Social-

52 Section 22 Zweite Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Österreich (dRGBl. I 1938 S. 988).

53 Kalss/Burger/Eckert, p. 243 et sequ.

54 This wording had been used in a draft version for a new German Stock Corporation Act; Leixnering/Meyer/Doralt, p. 111.

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ist ideas and language, the interests of the shareholders would now also have to be given due consideration".[55] Indeed, Section 70 of the Austrian Stock Corporation Act of 1965 brought a change in terminology and an expansion compared to the previous provision in the German Stock Corporation Act of 1937 by mentioning the shareholders' interests.

Additionally, the new version of Section 70 in the Austrian Stock Corporation Act of 1965 introduced a different structure for the individual elements. Under the German Stock Corporation Act of 1937, the interests of the company, its followers, people, and the Reich were of equal but unrelated importance. In contrast, the Austrian Stock Corporation Act of 1965 made the good of the company the decisive guideline for the actions of the management board. The other three aspects, while they do not have the same significance as the good of the company, do not stand in opposition to the good of the company, and thus must be taken into account, albeit within the consideration of the good of the company; to put it bluntly, they can never "beat out" the interest of the company.[56]

The new Austrian Stock Corporation Act of 1965 defined the relationship between the four guidelines (interests of the company, the shareholders, the employees, and the public) but did not directly define the guidelines themselves. Nevertheless, these guidelines are mandatory; corporations' articles of association may specify how they understand the guidelines but may not cancel or restrict them.[57]

The Austrian legal doctrine defines the interests of the company as securing the continued existence of the company and achieving the best possible operating result; accordingly, the long-term development of the company must be taken into account within the scope of the purpose of the company as defined in the articles of association.[58] Having to account for the long-term development of the company means that pursuing exclusively short-term profit maximisation is excluded if it is likely to have a negative impact on long-term profitability of the company.[59] In addition,

55 Government bill, 301 of the supplements to the stenographic records of the National Council. 10th legislative period, p. 69.

56 Artmann/Karollus/Reich-Rohrwig, AktG Section 70 AktG mn. 91.

57 Artmann/Karollus/Reich-Rohrwig, AktG Section 70 AktG mn. 85.

58 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 83, 91; Eckert/Schopper/Eckert/Schopper, Section 70 mn. 9; this definition does not differ from the German definition; Eckert/Schopper refer to Goette/Habersack/Kalss, Section 76 AktG mn. 162.

59 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 92, 96.

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the management board can forego profitability in the short- or mid- term in favour of achieving profitability in the long term – for example, the management board can choose to engage in a price war, for image or marketing reasons or as part of an investment programme.[60] In any case, it is only possible to determine general limits for the actions of the management board in abstract legal terms, not which measures are required in specific individual cases. This leaves the management board with broad discretion in entrepreneurial decisions.[61]

The very structure of Section 70 the Austrian Stock Corporation Act of 1965 shows that the shareholders' interest is not identical to the company's interest but rather is an aspect that must be considered in the context of the company's interest. Therefore, Austrian stock corporation law does not allow a pure shareholder value approach.[62]

Employees' interests and the company's interests generally coincide in that both are interested in the long-term existence of the company.[63] However, the interests of employees diverge from the company's interest when it comes to the distribution of the profit generated, such as the decision between whether to make investments that build up reserves or to pay higher wages and social security contributions.[64]

The public interest means the general interest as opposed to the individual interest of the corporation i.e. the common good.[65] Occasionally, it is argued in Austrian literature that the management board of a stock corporation considers the public interest sufficiently by complying with existing laws or even just setting up a system to ensure compliance with the law.[66] However, these arguments are not very convincing.[67] If the public interest was not mentioned in Section 70 of the Austrian Stock Corporation Act of 1965, the management board would still have to comply with the law, thus leaving the public interest alone without significance. It must therefore mean more.

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60 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 92.
61 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 92 et sequ.
62 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 97.
63 Eckert/Schopper/Eckert/Schopper, Section 70 mn. 11.
64 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 100.
65 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 102.
66 Doralt/Nowotny/Kalss/Nowotny, Section 70 AktG mn. 14.
67 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 103 also comes to this conclusion, albeit with slightly different reasons.

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So far, there is no comprehensive academic discussion as to what public interest means for stock corporations in Austria. However, Reich-Rohrwig provides a plausible structure. In terms of content, he distinguishes between measures of corporate social responsibility, donations to charitable organisations, and the promotion of sport, culture, and science.[68] According to the importance of measures within the company, Reich-Rohrwig names three groups of cases: first, the core business activity including the organisation of the company and the management of production processes; second, public relations work; and third, charity in the narrow sense.[69]

According to this categorisation, the weaker the link to the actual business activity, the more strictly the measures must be assessed. Measures associated with corporate social responsibility are therefore even permissible, if they do not lead to higher productivity, higher profitability, or a better image, as long as they are closely linked to the actual business activity. (E.g. the decisions to focus on local production or environmental protection that go beyond the legal requirements or the mandatory monitoring of suppliers.) However, these measures must not jeopardise the company's long-term development.[70]

Public relations measures are also permitted if there is an appropriate cost-benefit ratio. A key aspect here is the level of publicity achieved. The same measure can therefore be permissible if presented to a wide audience, but impermissible if it does not result in greater awareness of the company.[71]

Purely charitable donations not linked to any form of consideration for the company are also permitted, however, the standard for these is much stricter. A guideline for the amount a purely charitable donation is one to two per cent of the balance sheet profit. This means that donations are problematic if the company is unprofitable in the long term.[72]

At the end of his comparatively detailed comments on the public interest, Reich-Rohrwig refers to a major commentary on the German Stock Corporation Act of 1965.[73] This is quite remarkable, as the German Stock Corporation Act of 1965, unlike the Austrian Stock Corporation Act of 1965,

68 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 104.
69 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 105 et sequu.
70 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 105.
71 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 106.
72 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 107 et sequ.
73 Artmann/Karollus/Reich-Rohrwig, Section 70 AktG mn. 110 with reference to Hirte/Mülbert/Roth/Kort, Section 76 AktG mn. 106 et sequu.

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no longer expressly recognises the public interest. Reference to the German Stock Corporation Act of 1965 helping clarify public interest under the Austrian Stock Corporation Act of 1965 shows that the practical effects of the different regulations are comparatively minor.

However, this does not mean that the different wordings of the Austrian and German Stock Corporation Acts have no effect at all. In my opinion, there is at least one fundamental difference: under German law, it is at least possible to advocate a pure shareholder value approach, even if such an approach would not be for good reasons.[74] In contrast, the explicit stipulation of other interests in section 70 German Stock Corporation Act of 1965 prohibits this in Austria.[75] Therefore, in Germany it is permissible for the management board of a stock corporation to include the public interest in its decisions, while in Austria, it is mandatory to do so, as the objectives of Section 70 of the Austrian Stock Corporation Act of 1965 are binding.[76]

Nevertheless, the practical effects of the difference are small due to both the wording and the systematic categorisation of these provisions. The guidelines of Section 70 of the Austrian Stock Corporation Act of 1965 are very broad terms and cannot be the basis for a claim. Accordingly, there are – as far as can be seen – no Supreme Court decisions based on Section 70 of the Austrian Stock Corporation Act of 1965.

The basis for the liability of the management board is Section 84 (1) of the Austrian Stock Corporation Act of 1965, which states that the management board must exercise the “diligence of a prudent and conscientious manager”. This diligence largely coincides with acting in the interests of the company.

Public interest plays practically no role in liability under Section 84 of the Austrian Stock Corporation Act of 1965 due to the construction of this liability; the management board is liable to the company, but not to third parties or even the state. It is likely that a corporation will accuse its management board of not having acted in the interests of the company, but it is much less likely that the company itself will hold the management board liable for not acting in the public interest.

74 Mittwoch, p. 330 et sequu.
75 Kalss, GesRZ 49; Kalss, DRdA 134 et sequ.
76 Leixnering/Doralt about the specific situation of energy supply companies in the public sector.

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Thus, the importance of Section 70 of the Austrian Stock Corporation Act of 1965 in the sustainability contexts is ambivalent at best. On the one hand, it is clear that sustainability is part of the public interest. Section 70 of the Austrian Stock Corporation Act of 1965 is particularly relevant in this case for sustainable action, which is not mandatory as such.[77] On the other hand, Section 70 of the Austrian Stock Corporation Act of 1965 is not a suitable way of enforcing sustainable behaviour;[78] actual enforcement of sustainable behaviour would require other instruments.

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77 If a certain form of sustainable action would be mandatory anyway, there would be no need to take the “diversions” via Section 70 öAkt. Kalss, GesRZ 49.

78 Kalss, GesRZ 51 seems to be more optimistic.

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