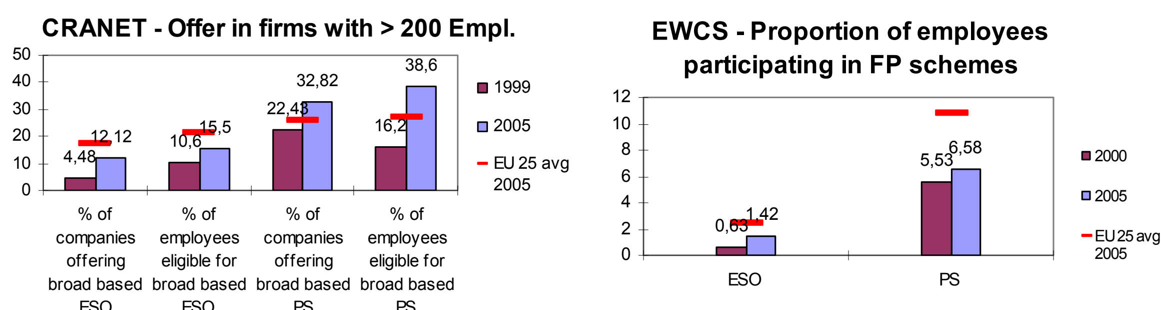
XX. Austria

Recent measures promoting employee financial participation focus on share ownership. Currently eight percent of enterprises, mostly listed joint-stock companies, have introduced employee share ownership plans; through these, 160,000 individuals, or six percent of the Austrian work force, own an average of five percent or less of shares in their employer firms (Kronberger et al., 2007, pp. 11, 67). Leveraged employee ownership plans (similar to ESOPs), using different forms of foundations as a vehicle, were introduced in connection with privatisation.

The total number of financial participation plans, although still relatively small, has increased significantly since 2001 in response to the introduction of tax incentives. Only eight percent of plans currently active were established prior to 1990; 48 per cent date between 1990 and 2000, and 45 per cent after 2000 (Vevera, 2005, pp. 54).

Stock option plans, generally not broad-based, have been implemented in one percent of enterprises. Profit-sharing plans are found in 25 per cent of enterprises, mostly small and medium-sized trade companies (Kronberger et al., 2007, p. 17).



1. General Attitude

By the end of the 1990s, the government had become more supportive of employee financial participation. Behind this change in attitude were such factors as increasing competition with Eastern European economies, promotion of employee participation by the EU, and impending privatisation of several large state-owned companies (for examplevoestalpine AG, Vienna Airport, Saline AG, AMAG, AUA, OMV). Both the trade unions and employers' associations strongly support employee financial participation and co-operate with each other in this area.

After tax incentives were introduced in 2001, the Federal Workers' Chamber (BAK) and the Austrian Economic Chamber (WKÖ), in co-operation with the University for Applied Science Wiener Neustadt, conducted a study (2005) of the effects of financial participation on enterprise results and employee attitudes in individual companies. This study

found that 80 per cent of employer companies and workers' councils in firms which have employee financial participation plans are satisfied with the results, while 71 per cent of enterprises without such plans would introduce them if the legal framework were improved (Kronberger et al., 2007, pp. 10, 16). In their proposals for reforming the legal framework, representatives of both employers and employees focus in part on the same issues: introduction of tax incentives for employee participants of profit-sharing schemes, higher tax incentives for participants in employee share ownership schemes, and more incentives to encourage small and middle-sized companies to introduce employee ownership schemes, especially leveraged ones similar to the ESOP.

The only controversial issue is whether employee financial participation should include a role in decision-making. Trade unions are critical of models which subject employees to risk, as with non-voting employee shares, without granting corresponding rights; they also object to schemes that benefit only management, for example, stock options. Since labour law already requires employee participation in decision-making, this issue only affects small enterprises without workers' councils.

2. Legal and Fiscal Framework

The incidence of various models of employee financial participation depends on the business form. Share ownership plans are introduced in: quoted joint-stock companies (AG), 45 per cent; co-operatives (Genossenschaft), foundations (Stiftung), registered associations (eingetragener Verein), 50 per cent; limited liability companies (GmbH), 6 per cent; they do not exist in partnerships (OHG, KG, OEG, KEG, GbR) (Kronberger et al., 2007, p. 17). An absolute obstacle to employee share ownership in partnerships is the institute of co-ownership under the Austrian company law; this institute is typical of Germanic legal systems. Other obstacles to the spread of employee share ownership plans in limited liability companies include the strong position shareholders enjoy vis-à-vis management, the transfer of share ownership only by notarial deed, and the absolute prohibition against a company acquiring its own shares.

Employee share ownership is based on a direct participation model in 21 per cent of enterprises (Kronberger et al., 2007, p. 57). Leveraged models are less common due to high costs and complex administration; they are found in large publicly-quoted joint-stock companies, especially those created by privatisation. Profit-sharing plans are found in every third limited liability company and every second private joint-stock company (Kronberger et al., 2007, p. 53).

The law on Capital Market Offensive of 5 January 2001 introduced tax incentives for employee share ownership schemes by amending the Income Tax Law (hereinafter referred to as 'ITL') and the Capital Tax Law (hereinafter referred to as 'CTL').

a) Share Ownership

Employee share ownership plans are mainly based on direct share transfer. However, leveraged share ownership plans and stock option plans have become more widespread since 2001.

Direct Share Ownership Plans – A joint-stock company is generally prohibited from acquiring its own stock, but this does not apply to employee shares (§ 65 para. 1 no. 4 of the Law on Joint-Stock Companies, hereinafter 'JSCL'). A resolution of the general meeting is required to introduce such employee shares which remains in effect for 18 months. Transfer of shares to employees in connection with a capital increase, excluding preemptive rights of existing shareholders, is possible if the resolution of the general meeting on the capital increase makes this exclusion (§§ 65 para. 2a, 153 para. 5 JSCL). No period for the transfer of shares to employees is specified in the JSCL, but this transfer must take place immediately after issue to comply with company law. Current and retired employees of the employer company and of affiliated companies may participate in an employee share ownership plan (§ 15 JSCL). The definition of affiliated companies was extended in 2005: companies affiliated within the economic sector under the company law and also companies which are members of an association in liability (according to § 30 para. 2a of the Federal Law on Competition) are also deemed to be affiliated.

A blocking period for the transfer of employee shares is not prescribed, but shares are usually held for at least five years for tax purposes. Pursuant to § 3 para. 1 no. 15(b) ITL and § 49 para. 3 no. 18(c) of the Law on Social Security Contributions, a tax and social security allowance of up to Euro 1,460 applies to the benefit from the transfer of discounted shares if the shares are held for at least five years, the plan is broad-based, and shares are held by the employees but deposited with a domestic credit institution or a fiduciary which administrates the shares and exercises voting rights according to the employee's instructions. This tax allowance applies only to current employees of a domestic or foreign employing company or an affiliated company. The employer company is also exempted from the obligation to pay social security contributions in this case. The employers' associations, trade unions and the legal literature all object that the tax allowance is too low and advocate an increase of up to Euro 5,000. Taxation of dividends on employee shares depends on the economic ownership. If the employee has the economic ownership of shares, the capital yields tax or, upon application of the employee, half of the personal income tax, is imposed (dividends on shares of foreign companies are always taxed at half of the personal income tax) (§ 37 para. 4 ITL). If the employee is not the owner (for example, if the employing company may buy the shares back at will or if the shares must be returned at termination of the employment contract), full personal income tax and social security contributions are imposed.

Leveraged Share Ownership Plans – By the Law on Capital Market Offensive of 5 January 2001, the ITL was amended also in relation to the taxation of private foundations. In view of prospective privatisation of large state companies, a model for 'strategic ownership' of employees had to be developed. An already existing business form, the private foundation, was chosen to serve as the vehicle of the leveraged employee share ownership plans. Whereas many large privatised enterprises use a private foundation under the Law on Private Foundations as an intermediary company (for example voestalpine AG, Saline AG, AMAG), some utilise a new form 'employee participation foundation' (Belegschafts-

beteiligungsstiftung) defined in § 4 para. 11 no. 1(c) ITL (for example Vienna Airport).[158] The foundation holds and purchases the shares, exercises voting rights, and transfers returns to the employees.[159] In contrast to direct employee share ownership plans, the beneficiaries of leveraged plans enjoying tax concessions can also be retired employees and family members (spouses, children) of employees. A foundation can only be used for shares of domestic companies; the definition of affiliated companies in connection with the foundation was not extended in 2005.

The value of its own shares or money for purchasing shares transferred to the foundation as well as the costs of establishing and operating the foundation can be deducted from the tax base of the corporate income tax by the employer company. The foundation distributes the amount of contribution by the employer company over nine financial years, and 1,460 Euro per employee per annum is tax free (§ 13 para. 1 last sentence CTL). Dividends on shares held by the foundation are also tax exempt (§ 10 para. 1 CTL). However, the capital gains tax is imposed on contributions used for administration. The employee pays a capital gains tax on returns transferred by the foundation of up to 1,460 Euro and full personal income tax, but no social security contributions on the amount in excess thereof.

Stock Option Plans – Stock option plans are generally limited to management. Executive officers and members of the management bodies of joint-stock companies are allowed to acquire shares through stock options if the shares constitute not more than 20 per cent of equity capital (§ 159 para. 5 Law on Joint-Stock Companies). However, a small number of broad-based stock option plans are also found. Taxation of stock options for employees depends on economic ownership. At the time economic ownership is transferred, the shares become taxable. The criteria for economic ownership are the relationship and tradability of options. According to § 3 para. 1 no. 15 (c) ITL, 10 per cent in one year and 50 per cent of the difference between the value of the underlying share at exercise of the option and the value of the underlying share at grant of the option are tax exempt if certain pre-conditions are met: the options must be non-tradable, the plan must be broad-based, and the value of the underlying shares at grant must not exceed 36,400 Euro. If options are deposited with a domestic credit institution or with a fiduciary, taxation of the remaining amount can be deferred until the acquired share is sold or the employment contract terminated, up to the seventh year following the option grant. The employer company can deduct the cost of shares.

[158] In literature it is objected that the economic activities of foundations are restricted by law so that it cannot create reserves and make investments. In addition, this form cannot be utilised by small companies due to administrative complexity and prohibitive costs, therefore they use business forms as associations (Vereine), trusts (Treuhandschaften) and partnerships under civil law (GbR) instead.

[159] In some companies, the shares are possessed by employees, whereas the foundation only accumulates and exercises the voting rights. In such cases, the taxation is different.

b) Profit-Sharing

Although there are no tax incentives, profit-sharing schemes are relatively widespread, especially in small corporations. Most are cash-based and take into consideration such factors as turnover, EBIT, cash flow, etc., alone or in combination, and not necessarily balance sheet profit (Kronberger et al., 2007, pp. 51). A profit-sharing plan may be introduced through a collective agreement, an in-house agreement, or an employment contract. However, an in-house agreement can regulate the pre-conditions, factors, calculation methods and form of payment (§ 97 para. 1 line 16 of the Law on Employment Contracts, hereinafter referred to as 'LEC') only if the factor to which the plan refers also considers the expenditure of the enterprise.[160] A plan not regulated by an in-house agreement is usually based on individual employment contracts whose content is not restricted in this respect. A participating employee is entitled to examine the basis of his share calculation in the books (§ 14 of the Law on Employees). If the plan originates in a collective agreement, the workers' council is also entitled to examine the calculation basis, but not documents on individual wage payments (§ 89 of the LEC).

c) Participation in Decision-Making

Under labour law, co-determination and participation rights of employees through their representatives are traditionally well developed. Employees send members to the supervisory board (§ 110 para. 1, 5 LEC) and are represented by the workers' council. There is generally no direct connection between participation in decision-making and financial participation of employees; in particular, financial participation plans cannot extend existing rights in connection with participation in decision-making. However, the employees in their capacity as shareholders can take substantial influence on important decisions of the general meeting (for example exercise the squeeze-out right) and be represented in the supervisory council if their cumulative share is at least 10 per cent. Certain aspects of financial participation plans can be regulated by a collective agreement and/or an in-house agreement; in this case, employees' representatives participate in negotiations and decisions. The following rights of the workers' council can be connected to financial participation: right to information (§§ 91, 92 LEC), right to consultation in the case of operational changes (§ 109 LEC), and right to demand elimination of faults (in this context all circumstances of financial participation detrimental to employees; see § 90 para. 1 LEC). Only 17 per cent of enterprises operating financial participation plans indicated problems in connection with decision-making (Kronberger et al., 2007, p. 61). In general, problems arise only in small enterprises which do not have a workers' council.

160 This means that plans relating to turnover as a factor cannot be regulated by an in-house agreement.