Austria: Employee Incentives

This country-specific Q&A provides an overview of employee incentives laws and regulations applicable in Austria.

For a full list of jurisdictional Q&As visit here
1. What kinds of incentive plan are most commonly offered and to whom?

Incentives can be usually found in success-oriented forms: A variable compensation besides the normal remuneration in cash can either be based on the performance of the beneficiary (commission) or on the success of the entire company or individual areas of the company (bonus, premium). The latter can be dependent on economic figures like production volume and productivity as well as cost savings (all performance based) or profit participation, revenue participation and participation on the profit contribution (earnings based). Furthermore models exist, where the beneficiary is granted a share or a share option in the company. This kind of incentives is more common in big companies.

For employees and workers the most common offered incentives are commissions based on their performance and bonuses/premiums based on the success of the company or a part of it. Incentive plans with shares or share options are least common, but increasing.

For management and executive employees all three incentives are common and often even combined: The management body’s bonus system can distribute a certain percentage of the company’s profits and furthermore be dependent on the individual performance. Regarding publicly listed stock companies share options are mostly directed to management members and executive employees.

Another distinction can be made regarding the time frame: Commissions, bonuses and premiums are considered as short- (with reference to the past financial year) and mid-term-incentives (with reference to the past two or three years). Short- and mid-term-incentives usually are directed to employees and are considered by most companies as inappropriate to retain employees.

Shares or share options are considered as long-term-incentives (approximately four to five years). Long-term-incentives focus on promoting sustainable corporate development, which is not mandatory for short- and mid-term-incentives. Shares and share options can be regarded as an additional bonus over a longer period of time in the event of a positive performance of the company. The beneficiaries have in this regard a motivation to increase the value of the company over a longer time-period.

Furthermore one could also consider anniversary bonuses, special payments and additional pension insurances as short-, mid- and/or long-term-incentives.

Share option plans usually grant an option on the physical transfer of shares for a strike price or even for free. Those shares can be made available through capital increase, the repurchase of treasury shares or the purchase from other shareholders. Share option plans with a physical transfer of shares are rarely used.

Besides there are so-called virtual option plans,
where the beneficiary receives a compensation which depends on the performance of the company, usually the share price. Compared to share option plans, the shares are not transferred to the beneficiary in case of virtual options. The beneficiary just participates in the share price increase. These options can be linked to performance goals like indices, absolute or relative price increase targets, return, sales or EBIT targets as well. Such virtual option plans can be stock appreciation rights, phantom stocks or performance shares.

2. **What kinds of share option plan can be offered?**

Share option plans usually grant an option on the physical transfer of shares for a strike price or even for free. Those shares can be made available through capital increase, the repurchase of treasury shares or the purchase from other shareholders. Share option plans with a physical transfer of shares are rarely used.

Besides there are so-called virtual option plans, where the beneficiary receives a compensation which depends on the performance of the company, usually the share price. Share purchase plans are often subject to certain conditions. Besides, they can also be dependent on special performance goals, e.g. performance comparison with an index, absolute or relative price increase targets (e.g. 10% increase), return, sales or EBIT targets or a combination thereof. Such shares are called restricted share or restricted stock awards. If no special conditions have to be met such shares are called bonus share or bonus stock awards. Both kind of share purchase plans envisage either a discounted or free sell of shares.

3. **What kinds of share acquisition/share purchase plan can be offered?**

Share purchase plans are often subject to certain conditions. Besides, they can also be dependent on special performance goals, e.g. performance comparison with an index, absolute or relative price increase targets (e.g. 10% increase), return, sales or EBIT targets or a combination thereof. Such shares are called restricted share or restricted stock awards. If no special conditions have to be met such shares are called bonus share or bonus stock awards. Both kind of share purchase plans envisage either a discounted or free sell of shares.

4. **What other forms of long-term incentives (including cash plans) can be offered?**

See question 1.

5. **Are there any limits on who can participate in an incentive plan and the extent to which they can participate?**
Generally limits can apply but the equal treatment principle must be observed: Employees can’t be excluded from awards on non-objective grounds. Based on this an incentive plan as well as the extent can inter alia be dependent on the period of employment, the level of the staff (e.g. employee or management director) and meeting certain criteria (e.g. performance based: revenue x or share price y).

Furthermore, section 159 para 5 of the Stock Corporation Act stipulates that only 20% of the shares of the company can be obtainable for employees, the management and the supervisory board in form of options.

### 6. Can awards be made subject to performance criteria, vesting schedules and forfeiture?

This depends on the relevant award but in general most are subject to performance or earnings criteria, vesting schedules and forfeiture. Share options for example need to be exercised within a certain time period and between the granting of the option and the exercise period lies the so-called blocking period. Not-exercising the option results in forfeiture. Agreements which generally stipulate a forfeiture in case of a termination of contract are immoral and therefore void (unless the termination occurred due to a behaviour grossly negligent). The beneficiary in this case has the right for a proportionate award.

With regard to share option plans inter alia the following should typically be observed: Duration of company affiliation or upright employment relationship, a specific performance target, beneficiaries (only employees, executive employees etc), maximum amount of shares and duration of the option, control rights, termination conditions and deadlines, amount of the profit or loss share, issue price (in return for payment, discounted, free), transferability, vesting period, exercise window etc.

### 7. Can awards be made subject to post-vesting and/or post-employment holding periods. If so, how prevalent are these provisions both generally and by reference to specific sectors?

Awards, especially with regard to share options, can be made subject to post-vesting and post-employment holding but the limit of immoral provisions must be observed in any case. However, such provisions are very common. Additionally companies stipulate a right of first refusal, a right of repurchase and/or generally limit the transfer of the share. Post-vesting and/or post-employment holding periods generally can be found with regard to share options.

### 8. How prevalent malus and clawback provisions are and both generally and by reference to specific sectors?

Both malus and clawback provisions can be found in incentives schemes but are limited: In general there is a strict pro-rating principle which applies to remuneration already earned for periods worked. Therefore, a clause which in general stipulates that the beneficiary loses his
award are not allowed and usually void. This does not apply if the employer is entitled to dismiss the employee as the employee in this case has behaved in a way which does not qualify him for an award. Malus and clawback provisions can be found in any sector. Malus and Clawbacks are market practice for listed stock corporations and for some financial institutions even mandatory.

9. **What are the tax and social security consequences for participants in an incentive plan?**

1. **on grant;**
   
   With regard to share options no tax consequences arise on grant: The Administrative High Court sees the granting of an option as a chance but not a tax-relevant fact. If the beneficiary receives a share however, then this benefit has to be taxed according to section 3 para 1 number 15 lit b of the Income Tax Act: Up to EUR 3.000,00 per year of gratuitous shares are tax-exempted if the share is not sold within the 5 years following the granting. If the beneficiary leaves the company the 5 years rule does not apply meaning that an employee can terminate his employment contract for example in the 3rd year after granting and sell the shares with no subsequent taxation. The same applies regarding social security according to section 49 para 3 number 18 lit c of the Act on General Social Security.

2. **on vesting;**

   In case a vesting period is stipulated the above stated applies: The receive of the share is the taxable fact.

3. **on exercise;**

   Based on the above said, in case of a share option the exercise triggers a tax-relevant fact. Benefits (profits) of such an exercised option are taxable. According to section 3 para 1 number 15 lit c of the Income Tax Act a tax-exemption may be utilised: Up to EUR 4.500,00 per year are tax-exempted if the share is held in an employee share participation foundation until the employment contract is terminated. If the share is issued to the beneficiary before termination of the employment contract then the tax-exemption stated above according to section 3 para 1 number 15 lit b of the Income Tax Act applies. The same applies regarding social security according to section 49 para 3 number 18 lit d of the Act on General Social Security.

4. **on the acquisition, holding and/or disposal of any underlying shares of securities; and**

   The above said applies to the acquisition: Either receiving (for payment or without payment) or the exercising of an option are the tax-relevant facts. Holding has tax related consequences in case of dividends which are subject to capital gains tax according to section 27 para 1 of the Income Tax Act, no tax-exemptions apply. The disposal is also subject to taxation pursuant to section 27 para 3 of the Income Tax Act.

5. **in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.**
Loans, or profits regarding the interest saving compared to a loan agreement with a third party, granted by the employer are tax-exempted up to EUR 7,300.00 according to section 3 para 1 number 20 of the Income Tax Act. The same applies regarding social security according to section 49 para 3 number 19 of the Act on General Social Security.

10. What are the tax and social security consequences for companies operating an incentive plan?

1. on grant;
   If the beneficiary receives a share which is tax exempted according to section 3 para 1 number 15 lit b of the Income Tax, the employer is not obliged to pay the employer contribution for the family equalization fund according to section 41 para 4 lit c of the Act on Equalization of Family Charges. The employer is furthermore exempted from paying the supplement to the employer contribution as well as the municipal tax. Furthermore, in case of employee share participation foundations any shares are granted to the private foundation are deductible operating expenses for the company according to section 4d para 1 of the Income Tax Act in conjunction with section 13 para 1 lit b of the Corporate Tax Act.

2. on vesting;
   The vesting has no tax or social security consequences.

3. on exercise;
   If the beneficiary exercises an option for a share which is tax exempted according to section 3 para 1 number 15 lit c of the Income Tax, the employer is not obliged to pay the employer contribution for the family equalization fund according to section 41 para 4 lit c of the Act on Equalization of Family Charges. The employer is furthermore exempted from paying the supplement to the employer contribution as well as the municipal tax. Tax consequences as stated above apply. Furthermore, losses of the Company which incur due to acquisition of treasury shares and the subsequent transfer, after the beneficiary exercised the option, may be deducted for tax purposes.

4. on the acquisition, holding and/or disposal of any underlying shares of securities;
   The above said applies, especially (i). Worth noting is also that benefits from share purchase and share option plans are not included in the assessment basis for claims for continued remuneration and termination benefits according to section 2a of the Labour Contract Law Amendment Act.

5. in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.
   Interest received from the loan falls under section 27 para 2 of the Income Tax Act in conjunction with section 7 para 2 of the Corporate Tax Act and is taxable.

11. What are the reporting/notification/filing requirements applicable to an incentive plan?

There are no special reporting/notification/filing requirements applicable to incentive plans. However, if the incentive plan is constituted as work agreement according to section 97 para
1 number 16 of the Labor Constitutional Act, the work agreement has to be made available in the company according to section 31 para 1 of the Labour Constitutional Act.

12. **Do participants in incentive plans have a right to compensation for loss of their awards when their employment terminates? Does the reason for the termination matter?**

This depends on the award, the agreement and the reason for termination: For example, premiums which were granted as a bonus in the event of exceeding a given company’s success but without further restrictions can entitle the beneficiary for a claim after termination. Share options can be subject to vesting schedules meaning that after termination no claims are possible due to not meeting the requirements. Finally, in case of dismissals (if the employee breaches the employment agreement) usually neither premiums nor share options may be claimed, unless otherwise agreed. See also question 8.

13. **Do any data protection requirements apply to the operation of an incentive plan?**

If personal data is processed then the regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) applies and the data subject has to give its consent to the processing of his or her personal data before the company can process it according to Article 6 number 1 lit a of the General Data Protection Regulation.

14. **Are there any corporate governance guidelines that apply to the operation of incentive plans?**

Point 26a. of the Austrian Corporate Governance Code stipulates that the remuneration of the management, which includes profit participations and therefore also share options, has to be proportionate to the duties and achievements of each member of the management board, the position of the company and the usual remuneration, as well as serve as an incentive for long-term behaviour for sustainable corporate development.

15. **Are there any prospectus or securities law requirements that apply to the operation of incentive plans?**

According to Article 1 para 4 lit i of the Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market no obligation to publish a prospectus applies for securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer or allotment. The same applies according to Article 1 para 5 lit h for securities which are of the same class as the securities already admitted to trading on the same regulated market.
16. **Do any specialist regulatory regimes apply to incentive plans?**

No specialist regulatory regimes apply. Provisions with regard to incentive plans can be found in many different acts.

17. **Are there any exchange control restrictions that affect the operation of incentive plans?**

According to section 57 of the Stock Exchange Act shares of a company with its registered office in a non-EEA country that are not listed on an exchange in the company’s home country nor in the country where they are mainly being traded, shall only be admitted if the company can give a plausible explanation confirming that it is not for reasons of investor protection that its shares have remained unlisted in these countries.

18. **What is the formal process for granting awards under an incentive plan?**

No specific formal process applies and any process depends on the agreement and the intentions of the employer. Restrictions, however, should be made by the employer for any premiums paid: If premiums have been paid regularly **without any kind of restriction** this approach can result in a so-called *Betriebsübung* which is, simply put, comparable to customary international law meaning that the beneficiary has an enforceable claim against his employer.

19. **Can an overseas corporation operate an incentive plan?**

No general restrictions for companies domiciled outside of Austria apply in this matter.

20. **Can an overseas employee participate in an incentive plan?**

Yes, the applicable provisions do not differ between Austrian or third country employees.

21. **How are share options or awards held by an internationally mobile employee taxed?**

If the employee does not have his residence or habitual place of stay in Austria, his tax liability is only limited with the consequence that only his Austrian sourced income is taxable. The taxation then follows question 9. Any possible double taxation shall be prevented by applicable Double Taxation Agreements, if none is applicable, by Regulation of the Federal Minister of Finance on the Avoidance of Double Taxation (Federal Law Gazette II Nr. 474/2002) and, again if not applicable, through notice of the Federal Minister of Finance after an application has been filed.

22. **How are cash-based incentives held by an internationally mobile employee taxed?**

See Question 21. The Double Taxation Agreements of Austria generally stipulates a taxation
in Austria according to Article 15 para 1 and the other residence state exempts these incentives from his taxable base according to Article 23 para 1 lit a. However, depending on the circumstances many exceptions can apply.

23. **What trends in incentive plan design have you observed over the last 12 months?**

   No significant trends have been observed in the last 12 months.

24. **What are the current developments and proposals for reform that will affect the operation of incentive plans over the next 12 months?**

   According to section 4d para 4 of the Income Tax Act every employee share participation foundation has to provide information to the Federal Minister of Finance relating in particular to the number of shares held and managed, beneficiary employees and their dependents, as well as shares distributed free of charge or at a reduced price.

   The Federal Minister of Finance adopted with regulation dated October 2019 on the electronic transmission of Information by employee participation foundations the specific type of transmission and the specifications (form, structure and content) of the information to be transmitted.

   Other than that no current developments or proposals are in work or announced.