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The Legal 500 Country Comparative Guides

Austria

MERGERS & ACQUISITIONS

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

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AUSTRIA
MERGERS & ACQUISITIONS

1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

Austrian law does not have one specific law regulating all issues on the acquisitions of companies, but rather various different statutes apply, depending on the specific type and form of an acquisition.

In particular, the following laws are relevant:

- Cartel Act (*Kartellgesetz*)
- Commercial Code (*Unternehmensgesetzbuch*)
- Commercial Register Act (*Firmenbuchgesetz*)
- Corporate Transformation Act (*Umwandlungsgesetz*)
- Demerger Act (*Spaltungsgesetz*)
- EC Merger Control Regulation (*EG-Fusionskontrollverordnung*)
- Employment Contract Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz*)
- EU Cross-Border Merger Act (*EU Verschmelzungsgesetz*)
- Federal Fiscal Code (*Bundesabgabenordung*)
- Foreign Trade Act (*Außenwirtschaftsgesetz*)
- General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*)
- Joint Stock Corporations Act (*Aktiengesetz*)
- Income Tax Act (*Einkommenssteuergesetz*)
- Investment Control Act (ICA) (*Investitionskontrollgesetz – InvKG)*
- Limited Liability Companies Act (*Gesetz über Gesellschaften mit beschränkter Haftung*)
- Minority Shareholder Squeeze-Out Act (*Gesellschafterausschlussgesetz*)
- Real Estate Transfer Tax Act (*Grunderwerbssteuergesetz*)
- Reorganisation Tax Act (*Umgründungssteuergesetz*)
- Stamp Duty Act (*Gebührengesetz*)
- Stock Exchange Act (*Börsegesetz*)
- Takeover Act (*Übernahmegesetz*)
- Ultimate Beneficial Owners (UBOs) Register Act (*Wirtschaftliche Eigentümer Registergesetz*)
- Rules regarding specific regulated industries (e.g., Banking Act (*Bankwesengesetz*), Insurance Supervisory Act (*Versicherungsaufsichtsgesetz*))

For asset deals, in particular the provisions of Article 1409 of the General Civil Code and Article 38 of the Commercial Code are pertinent. Article 1409 of the General Civil Code provides that a purchaser generally is jointly and severally liable with the seller towards the seller's creditors for any liabilities of the acquired business having their origin prior to the acquisition. The purchaser's liability is limited to the current net asset value of the acquired assets and applies in case the purchaser knew or should have known at the time of the purchase of the pre-existing liabilities. Article 1409 of the General Civil Code is mandatory law and cannot be waived or amended by contract. Liability can be reduced if the purchase price payable by the buyer is used to pay off the debts of the business sold.

In addition to Article 1409 of the General Civil Code also Article 38 of the Commercial Code contains special liability provisions for asset deals. Even if the buyer is not liable under the General Civil Code because, for example, the purchase price was used to pay off the debts of the business sold, the buyer still might be liable under the Commercial Code. Article 38 of the Commercial Code provides that a legal entity which acquires and continues a commercial business is liable for all debts the former owner incurred in the course of business conduct, meaning even those which are not contractually agreed to be taken over by the buyer. Unlike liability under Article 1409 of the General Civil Code, liability under the Commercial Code is not limited to the value of the acquired assets. Nevertheless, under Article 38 of the Commercial Code the seller and the buyer can agree to limit liability of the seller, such limitation of liability, however, being only valid if a timely notification to the commercial register is submitted or otherwise made public.

In addition, there are successor liability provisions under the Federal Fiscal Code, the General Social Insurance Act

(*Allgemeines Sozialversicherungsgesetz*) and the Employment Contract Adaptation Act.

Regarding the transfer of shares in Austrian limited liability companies (*Gesellschaft mit beschränkter Haftung*), the Limited Liability Companies Act requires that the transfer be executed in the form of a notarial deed. Therefore, the involvement of an Austrian notary public or a notary public subject to a comparable regime (e.g., a German notary) is necessary.

A key regulatory authority with regard to M&A transactions is the Federal Competition Authority (*Bundeswettbewerbsbehörde*), which is competent for the clearance of mergers if the transaction volume does not exceed the thresholds of the EC Merger Control Regulation, but exceeds the thresholds under Austrian competition law. A transaction has to be notified to the Federal Competition Authority under Austrian competition law if the following conditions are met and no exception applies: (i) the combined worldwide aggregate turnover of all participating undertakings in the year prior to the transaction was more than EUR 300 million; (ii) the combined domestic aggregate turnover of all participating undertakings in the year prior to the transaction was more than EUR 30 million; and (iii) the worldwide turnover of at least two participating undertakings each was more than EUR 5 million in the year prior to the transaction. The main exception is the following: The transaction does not need to be notified if (i) only one independent undertaking has a domestic turnover of over EUR 5 million, and (ii) the other participating undertakings' combined worldwide aggregate turnover in the year prior to the transaction does not exceed EUR 30 million. Transactions closing after November 2017 which meet the following, newly introduced conditions, also need to be notified to the Federal Competition Authority: (i) the combined worldwide aggregate turnover of all participating undertakings in the year prior to the transaction was more than EUR 300 million; (ii) the combined domestic aggregate turnover of all participating undertakings in the year prior to the transaction was more than EUR 15 million; (iii) the value of the consideration for the transaction is more than EUR 200 million; and (iv) the target company has significant operations in Austria. Special rules on turnover calculation exist for the banking, insurance and media sectors. A further relevant authority regarding cartels and merger control is the Cartel Court (*Kartellgericht*).

Other relevant authorities are the Commercial Register Courts (*Firmenbuchgerichte*), which register and publish transactions and reorganisations in the Austrian commercial register, and the Financial Market Authority (*Finanzmarktaufsicht*), which reviews banking acquisitions.

Public M&A transactions regarding listed joint stock corporations (*Aktiengesellschaft*) are also subject to the supervision of the Austrian Takeover Commission (*Übernahmekommission*), which monitors compliance with the Austrian takeover regulations and decides on all matters related to the Takeover Act.

On 25 July 2020 a new Investment Control Act (**ICA**) (*Investitionskontrollgesetz – InvKG*) came into force, which aims to prevent the "sell-out" of the Austrian economy in strategic areas. The ICA implements the FDI Screening Regulation (Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments, ie, non-EU/EEA/Swiss, individuals or corporations into the Union) and significantly expands the control over foreign investment both in terms of scope and procedure. This includes a more comprehensive, EU-wide coordinated control of third country investments in system-relevant Austrian companies.

A "foreign direct investment" is subject to the approval of the Federal Minister for Digital and Business Affairs (*Bundesministerin für Digitalisierung und Wirtschaftsstandort*) if the following criteria are met: (i) the target company is active in one of the sensitive or system-relevant areas listed in the Annex to the ICA; and (ii) certain voting right thresholds are reached or exceeded or otherwise a controlling influence is acquired or a controlling influence on parts of the company is acquired through the acquisition of significant assets.

A basic distinction is made between "particularly sensitive sectors" and other areas where a threat to security or public order may arise. For "particularly sensitive sectors" the voting right thresholds are 10 %, 25 % und 50 %, whereas for the other areas only the higher thresholds of 25 % and 50 % apply. Examples of "sensitive or system-relevant areas" are defence equipment and technologies, the operation of critical energy infrastructure and critical digital infrastructure, water, research and development in the fields of pharmaceuticals, vaccines, medical devices and personal protective equipment.

The application for approval must be submitted immediately after the conclusion of the agreement (signing / commitment to the transaction) or, in the case of a public offer, immediately after the announcement of the intention to acquire. The obligation to submit an application generally applies to the acquirer(s). Information on the acquirer (including the beneficial owner), the target company and the transaction structure, as well as information on the business activities of the acquirer and the target company (including a description of the market and competitors) must be set out. Furthermore, the application for approval must contain information on the financing of the transaction and the origin of the financial sources, as well as – if foreseeable – information on whether effects on "programs of European interest" are to be expected (see in detail Section 6 para 4 cif 1 to cif 10 of the ICA).

A viable alternative to making an application for approval after signing can be the possibility of obtaining a clearance certificate (*Unbedenklichkeitsbescheinigung*). Within two months of receipt of the complete application for a clearance certificate, either a clearance certificate is issued or a notification is given that the application will be treated as an application for approval. If no decision is issued or notification is given within this two-month period, the clearance certificate is deemed to have been granted. This clearance certificate alternative opens up the possibility to achieve clarity at an early stage of the transaction.

In addition, the Austrian legislator implemented a new section 90a into the Notarial Regulation (NO), which entered into force on 1 January 2021. There now is the possibility to draw up all notarial acts and other public or publicly certified deeds by use of electronic means of communication without the need for physical presence before the notary. Especially for parties located abroad this brings a substantial benefit with regard to avoiding travel expenditures and time delays.

This modernization allows for a clear simplification and acceleration for the performance of the official notarial acts required under Austrian corporate law and is especially relevant for the execution of notarial deeds. The execution of notarial deeds is required for the transfer of shares in limited liability companies (GmbH). Since the vast majority of share transfers for Austrian targets are with respect to limited liability companies, the share transfer agreement for most transactions in Austria must be in the form of a notarial deed. The modernization enacted thus will substantially ease compliance with the notarial deed requirement.

Regulatory changes under discussion

The government's 2020 – 2024 programme provides for a further acceleration and simplification of the process for business start-ups, for example by promoting the development of digitisation in corporate law.

In this context the Austrian government intends to introduce a new form of corporation, the Austrian limited. This new form is intended to offer an internationally competitive option to innovative start-ups and founders in an early stage of their business.

Furthermore, unbureaucratic corporate formation, including savings models for building up share capital, e-government and English as the official language, as well as flexible share allocations to investors and employees are intended to be implemented. The exact cornerstones are currently in discussion.

2. What is the current state of the market?

After a small increase in the number of deals with Austrian involvement in 2019, in 2020 M&A transactions continued to take place in Austria fairly steadily, albeit at a somewhat slower pace, especially after the outbreak of the COVID-19 pandemic. Whereas in 2019, there were 328 M&A transactions involving Austrian companies, the number of transactions with Austrian participation fell to 275 in 2020 according to the M&A Index 2020 published by EY Austria (Ernst & Young Global Limited). This minus of 53 deals corresponds to a decrease of 16.2 % in M&A transactions.

Transaction volume, however, increased slightly by 4.1 % from € 12.1 billion to € 12.6 billion. This increase was mostly driven by four mega-deals, which made up 86 % of the total transaction volume in the first half of the year. The biggest transaction was the increase of OMV's stake in Borealis by around €4.1 billion.

Another large transaction that show-cased how intra-Austrian deals dominated the Austrian M&A market in 2020 was the purchase of an Immofinanz share package by CARPINUS Holding. Besides several medium-sized deals in the real estate sector, foreign direct investments in Austria were highlighted by the purchase of the ERBER Group by the Dutch company DSM for around € 1 billion. Investments by Austrian investors abroad declined by 44 % from € 3.6 billion to € 2 billion in 2020 and over the course of 2020 the number of out-bound deals fell from 130 to 106 (thus by around 18.5 %).

The drop in transaction numbers thus was less in 2020 than many had anticipated. This is a positive sign for the Austrian transaction market. Though statistical information is not available yet on developments in the first quarter of 2021, there appears to have been a clear up-tick in transactions since the beginning of the year. We expect this trend to continue and for there to be a strong rebound in M&A activity in Austria in 2021. Many potential buyers have weathered the COVID-19 storm well and have substantial cash resources to make acquisitions. Combined with this, there will be many companies that will be lacking liquidity once the COVID-19 relief programmes begin to run out this year and that will be attractive acquisition targets.

3. Which market sectors have been particularly active recently?

The most deals took place in 2020 in the industrial sector (85), followed by companies from the technology sector (61) deals and the real estate sector (53). In terms of published transaction volumes, the oil and gas sector was the clear first place winner with € 4.1 billion attributable to the increase in OMV's stake in Borealis. The financial sector, the technology sector and the industrial sectors had a combined volume of more than € 1.5 billion each.

Of course the COVID-19 pandemic has hit some economic sectors in Austria hard, in particular the tourism sector as one of the main pillars of the Austrian economy. Although the Austrian government reacted quickly in providing substantial state aid packages, Austrian GDP is estimated to shrink by about 7.1 % in 2020 (as compared to growing by around 1.4 % in 2019); only a gradual recovery of expected in 2021/22.

Strategic investors are still involved in the vast majority of transactions in the Austrian M&A market. Out of the 275 transactions in 2020, 260involved strategic investors. Compared to 2019 this means a decrease of 48 transactions and a slight increase of 0.65 % in terms of total transactions. Transactions that involved financial investors, such as private equity or venture capital firms, still play a minor role in Austria's M&A market with only 15 deals (5.45 % of total transactions) compared to 20 deals in 2019. The proportion of strategic transactions and those by financial investors thus remained more or less constant compared to the previous year.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

M&A transactions already have begun to bounce back and we expect this trend to continue as the general outlook for overcoming the COVID-19 crisis continues to brighten. For Austrian companies, growth in turnover generally is expected for 2021 and the industrial, tech and real estate sectors likely will remain key drivers. In addition, an uptick in distressed M&A can be expected as COVID-19 relief programs start to phase out. All of this will be supported by enhanced digitalization, which has progressed substantially and opened up new opportunities in implementing M&A transactions.

Though there may be many market swings, we expect to see a bit more of a buyer-friendly market in Austria in 2021 as the COVID-19 crisis will put great pressure on some companies and start-ups. In addition, once the economy recovers more fully, these companies will be seeking new investors. Private equity funds are also expected to become more active, having accumulated liquidity and thus on the lookout for investment opportunities. Companies in the pharmaceutical and healthcare sectors, technology companies, companies concerned with sustainability and the environment and online retailers also should present attractive targets. In these areas, investor demand is likely to be even stronger than before the COVID-19 crisis.

5. What are the key means of effecting the acquisition of a publicly traded company?

The key means of acquisition of publicly traded companies in Austria is a takeover pursuant to the Austrian Takeover Act ("ÜbG"). The takeover procedure is a common mean of acquisition, as this Act provides for a fair public tender process for such acquisition. The Takeover Act is applicable when the target company and its shares are listed in Austria.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

Basic information on the target such as the company name, the type of corporation, the line of business, its managing directors and authorized signatories, its share capital, former reorganisations as well as its articles of association and its annual financial statements are publicly available.

Depending on the concrete assets of the target company (e.g., real estate, patent, trademark), further information may be obtained from particular public registers such as the Austrian Land Register (Grundbuch) or the Patent Register (Patentregister).

Furthermore, all insolvency proceedings are registered with the publicly accessible Austrian insolvency data base.

In private M&A transactions, which is the dominant form in Austria, companies are not required to disclose diligence related information.

The managing directors of an Austrian company are required to keep company-related information confidential in the company's interest. By way of exception, the disclosure of information to a potential acquirer is permissible if and to the extent that this does not impair the interests of the company. In case of competing takeover bids, the management of the target company must treat each competing bidder equally if information is disclosed (in order to maximise the offer price in the shareholders' interest).

7. To what level of detail is due diligence customarily undertaken?

In Austria due diligence procedures in most cases are conducted in a detailed manner. However, some companies prefer a two-step approach, meaning that in a first step a high-level due diligence analysis is conducted in order to identify red flags or deal breakers, and depending on the results of such first step analysis then conduct a more comprehensive and detailed due diligence analysis regarding the target.

The specific scope and level of detail of a due diligence procedure further depends on the size of the transaction and the business sector and also differs between private acquisitions and public takeovers. Due diligence analysis for private acquisitions are usually comprehensive (especially since financing banks usually request a detailed due diligence), while due diligence analysis prior to a public takeover are usually comparably limited.

One due diligence topic that is particularly important in Austrian transactions is the strict prohibition of the return of equity to shareholders (*Verbot der Einlagenrückgewähr*). Under this prohibition, affiliate transactions, including those between shareholders and the target, are subject to being null and void if the transactions are not on an arm's length basis. This strict prohibition can also impact the protections a purchaser or seller needs to seek contractually.

As identifying risks within the target company is the main focus of due diligence, buyers should consider the specific consequences of COVID-19 for the target company in the due diligence process to determine whether the target company is adequately protected against the negative impact caused by the virus. Disrupted supply chains, loss of production and decline in revenue, but also existing insurance policies, if any, measures ordered by public authorities, crisis management processes and remote working issues should be carefully reviewed.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

In limited liability companies, which is the dominant corporate form in Austria, shareholders typically have a very strong position and the shareholders' meeting is the ultimate decision-making body of the company. While the managing directors are responsible for the management and the representation of the company, the shareholders have the right to issue instructions to the managing directors and typically have the right to approve or veto important matters regarding transactions as set forth in the articles of association. Asset deals typically will require the approval of the shareholders. Share deals in private M&A transactions do not require the approval of the target company, though for companies with multiple shareholders the articles of association may provide that the company itself has to approve the transaction.

If certain thresholds are exceeded (e.g., more than 300 employees) a supervisory board needs to be established in limited liability companies.

In joint stock corporations, the decision-making process is different. Under the Stock Corporations Act, shareholders are not entitled to issue instructions to the board of directors, which generally acts independently. The board of directors is appointed and supervised by a supervisory board, which in turn is appointed by the general assembly of the shareholders. In private M&A transactions where the target is a stock corporation, the articles of association can foresee that an approval of the target for the transfer of the shares is required.

Mergers and other reorganisations, spin-offs or transformations require the approval of the shareholders.

9. What are the duties of the directors and controlling shareholders of a target company?

The managing directors of limited liability companies have to manage the company with the due care of a diligent manager, have to represent the company and are under the duty to act in the best interests of the company. The shareholders are entitled to issue instructions to the managing directors (see above question 8).

In stock corporations the board of directors has to manage the company, is responsible for officially representing the companies and managing the company's business with the due care of a diligent manager, while the board of directors is not obliged to follow instructions issued by the shareholders (see above question 8). The board of directors needs to treat all shareholders equally and has to carry out the company's business to the benefit of the company while taking the interests of the shareholders and of the company's employees as well as the public interest into consideration.

To protect creditors, shareholders and also other affiliated companies are not allowed to conclude contracts with the company that are not at arm's length. Contracts that are not in compliance with the strict Austrian capital maintenance rules are null and void.

If a controlling shareholding in a stock corporation that is listed at the Vienna Stock Exchange is to be acquired, the obligation to provide a mandatory offer that is subject to minimum pricing rules and cannot be made conditional (except for legal conditions such as regulatory approvals) is triggered. A shareholding of voting stock that exceeds 30% is considered as a controlling shareholding pursuant to the Takeover Act (unless the articles of association provide for a lower threshold).

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

If an intended M&A transaction entails significant changes to the organisational structure (including redundancies affecting a certain percentage of employees), the works council (provided that such works council exists) has information and consultation rights and also may issue its opinion on corporate restructuring measures and may enforce a redundancy program, but cannot hinder the transaction as such.

Article 3 of the Employment Contract Adaptation Act provides for a mandatory transfer of all existing employment contracts (including benefits) pertaining to the entire business or the operational business unit sold (e.g., asset deal) or transferred (e.g., by a merger) to another company. In a share deal the benefit plans of the legal entity whose shareholder changes will continue to apply.

Furthermore, under the Takeover Act, the bidder and the management of the target company are obliged to notify their respective works council without undue delay about the public offer. The works council does not have a blocking right.

11. To what degree is conditionality an accepted market feature on acquisitions?

In private M&A transactions, conditions precedent are very common, in particular if the Federal Competition Authority needs to approve the transaction. Common conditions precedent are the clearance by the Federal Competition Authority or other authorities (e.g., the Financial Market Authority), material adverse change clauses, bring-down certificates regarding representations and warranties and the execution of ancillary agreements.

For public M&A transactions, pursuant to the Takeover Act an offer may only be conditional if it is objectively justified. Mandatory offers pursuant to the Takeover Act cannot be made conditional (except for legal conditions such as regulatory approvals).

12. What steps can an acquirer of a target company take to secure deal exclusivity?

In private M&A transactions the acquirer often obtains exclusivity in the letter of intent, which prevents the seller for a certain period of time from engaging in negotiations with other potentially interested persons. To further strengthen deal exclusivity a contractual penalty can be foreseen in case the seller breaches the exclusivity obligation. However, under Austrian mandatory law judges are entitled to reduce a contractual penalty if the contractual penalty is considered excessive.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

Termination or break-up fees that become due if the transaction with the acquirer is not completed can be contractually stipulated, but this does not occur frequently in Austria.

If the seller unjustifiably breaks off the negotiations the potential acquirer under certain conditions could be entitled to compensation claims based on *culpa in contrahendo* (violation of pre contractual obligations), but is rare in practice.

14. Which forms of consideration are most commonly used?

The most common form of consideration in share and asset deals is cash payment. Acquirers also often seek to have a part of the purchase price escrowed as security for potential warranty claims of the buyer. The escrow amount then is typically paid out to the seller after the expiration of the general warranty period in case no warranty claims have been filed.

Over the past few years the use of earn-out clauses (that are a preferred instrument of buyers) has increased, meaning that a part of the purchase price is only paid out post-closing if the target achieves certain milestones over a defined time period. Given the competing interests of sellers and buyers earn-out clauses bear a high risk of conflict.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

If shares in a stock corporation that is listed on the Vienna Stock Exchange are being sold, any share transfer has to be reported within two trading days to the Vienna Stock Exchange, the Financial Market Authority and to the company whose shares are being transferred, if by such share transfer the shareholding of one shareholder reaches, exceeds or falls below 4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75 or 90%.

Sec. 22 para 2 Takeover Act stipulates that in case of an acquisition of a direct stake in a publicly traded (target) corporation that exceeds 30 % of permanent voting rights, the Takeover Commission has to be informed immediately and an offer to acquire the remaining shares must be made within 20 trading days. The increase of such controlling stake by way of "creeping in" does not allow for circumvention of these public disclosure rules. Even when such controlling stake in excess of 30 % is being held through one intermediary holding company, the disclosure rules apply.

16. At what stage of negotiation is public disclosure required or customary?

Pursuant to Section 5 para (2) and para (3) of the Takeover Act, in public transactions the bidder must immediately inform the public and the target if its management board and supervisory board have taken the decision to launch an offer or a situation has arisen which results in being obliged to launch a mandatory offer (see question 24. below). Furthermore, a potential bidder has to announce the intention to make an offer if the target's share price fluctuates considerably or if there are rumours about an offer or speculation that an offer is to be launched and there are reasons to believe that this is due to the preparation of an offer, the fact that an offer is being considered or the purchase of shares by the bidder. The announcement does not need to contain details about the intended offer.

The bidder must notify the Takeover Commission of its offer and provide the Takeover Commission with the offer document within ten trading days (if no extension is granted – up to forty trading days) after the bidder has announced its intention to launch an offer. The notification period for mandatory bids is twenty trading days and cannot be extended.

The bidder must publish the offer document (see question 20 below) together with the confirmation of an independent expert at the earliest on the twelfth trading day and no later than the fifteenth trading day after such documents are received by the Takeover Commission, if the publishing is not prohibited by the Takeover Commission. Such publishing triggers the offer period. The offer needs to be published in a national newspaper that is available throughout Austria or in the form of a brochure that is provided free of charge to the public by the target company at its registered office and by the bodies instructed to pay the consideration. If the offer documents are not published in full in the Official Gazette of the Vienna Newspaper, at least information where the offer documents can be obtained needs to be published in such Official Gazette. If the bidder and/or the target company have a website, the offer document also has to be published on such websites.

The offer period has to be at least two weeks and can be for a maximum of ten weeks (the Takeover Commission can extend such offer period under certain circumstances). The result of the bid must be published immediately after the expiration of the offer period. In case of a mandatory bid or a voluntary bid aimed at control of the target, the offer period is extended for three months from the date of announcing the result of the bid.

17. Is there any maximum time period for negotiations or due diligence?

No, there is no maximum time period for negotiations or due diligence by law. However, depending on the size of the target company, the structure of the transaction or the seller's strategic motives, the seller might set such time limit individually. Typically, in a structured bidding process, the due diligence phase leading to a binding offer of interested bidders will be set at 4 to 8 weeks. Bidders reaching the next stage of the sales process will typically have further opportunities to continue their due diligence during the negotiation phase until shortly before signing.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

As to the acquisition of shares in listed stock corporations, mandatory offers – and voluntary offers aimed at acquiring control – are subject to mandatory regulations regarding price building under the Takeover Act in order to ensure equal treatment of shareholders in case of a change of control. As a basic rule, the offer price for shares cannot fall below the highest consideration that was paid or agreed by the respective bidder within the previous twelve months before the offer was notified and also must at least meet the weighted average stock exchange quotation over the six months preceding the day on which the bidder announced the intention to launch an offer.

Many private M&A transactions contain the determination of a final purchase price based on closing accounts. In such cases sellers often seek to set a minimum price that must be paid for the shares.

19. Is it possible for target companies to provide financial assistance?

No, target companies are in principle prohibited from financing or providing assistance in the financing of the acquisition of their own shares. Austrian law has strict rules on capital maintenance and therefore generally prohibits the return of equity to shareholders outside arm's length transactions (*Verbot der Einlagenrückgewähr*), except for the distribution of the balance sheet profit, in the course of a formal reduction of the registered share capital or for the surplus paid to shareholders following liquidation.

Furthermore, the Stock Corporations Act explicitly states in Section 66a that a target company is prohibited from financing or providing assistance in the financing of the acquisition of its own shares or the shares of a parent company.

20. Which governing law is customarily used on acquisitions?

Generally, the parties to a private M&A share purchase agreement agree on Austrian substantive law and dispute resolution in Austria. For the mode of transfer, which is necessary for the transfer of shares in a limited liability company, Austrian law is mandatorily applied. This means that the share purchase agreement for such transfers needs to be in the form of a notarial deed, which now can be done by use of electronic means of communication without the need for physical presence before the notary (see question 1).

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

The bidder must provide the recipients of a public offer with an offer document. The offer document is a formal legal document containing detailed information for the shareholders to decide if they want to sell their shares. The offer document must be prepared in accordance with the principles of the Takeover Act and the recipients must have sufficient time and information in order to be able to reach a properly informed decision about the offer. The offer document must be prepared carefully, accurately and without omissions. The bidder also must appoint an independent expert to assess if the offer document is complete, in line with the legal requirements stipulated in the Takeover Act (especially with regard to the consideration that is offered) and if the bidder is capable of financing the offer. In addition, also the target company needs to appoint an independent expert who has to assess the offer and the target's management and its supervisory board must issue responses to the bid.

Public offer documents can be downloaded from the website of the Takeover Commission.

Some follow-up documents also have to be filed with the Takeover Commission and published after such filing (e.g., note on the result of the tender proceedings).

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

The transfer of shares in limited liability companies needs to be executed in the form of a notarial deed and therefore an Austrian notary public (or a notary public subject to a comparable regime, such as a German notary public) has to be involved. Furthermore, shareholders of limited liability companies are registered with the Austrian commercial register. Changes have to be reported to the competent Commercial Register Court without undue delay, whereby the registration with the commercial register generally is only declarative and thus does not prove ownership. The notary fees typically depend on the purchase price.

The shareholders of joint stock corporations are not registered with the Austrian commercial register, but the owners of registered shares have to be registered with the share register of the company.

For each registration or change made in the commercial register, application fees have to be paid to the

Commercial Register Court, whereby such fees typically are fixed at comparably low amounts.

In addition, regarding asset deals, the new owner of real estate has to be registered with the land register, whereby a fee for the land register registration (*Eintragungsgebühr*) as well as a real estate transfer tax (*Grunderwerbsteuer*) under the Real Estate Transfer Tax Act have to be paid.

As to share deals regarding a target that owns real estate, the real estate transfer tax (and no fee for the land register registration) has to be paid. However, the tax under the Real Estate Transfer Tax Act is only payable if the purchaser (alone or together with its affiliated companies pursuant to Section 9 of the Austrian Corporate Tax Act or through a fiduciary relationship) acquires more than 95% of the shares in the target company.

For asset deals, in principle value added tax has to be paid. Share deals are exempted from value added tax.

The Stamp Duty Act provides that certain contracts as well as contracts which contain certain provisions (e.g., suretyships, pledge agreements, assignment agreements, rental agreements) trigger stamp duty amounting to a percentage of the concrete consideration.

Regarding public bids, fees to be paid to the Takeover Commission depend on the transaction volume of the takeover.

23. Are hostile acquisitions a common feature?

Since the number of stock corporations listed on the stock exchange is limited in Austria and only a limited number of shares is held publicly, hostile acquisitions occur very seldom in Austria.

24. What protections do directors of a target company have against a hostile approach?

In public M&A transactions, the board of directors and the members of the supervisory board have to maintain neutrality when a public bid has been announced and they are in principle not allowed to take measures to deprive the shareholders of the opportunity to make a free and informed decision on the bid.

However, there are several options of defence against a hostile approach, whereby in particular the target's organisational structure or capital structure can be organised in line with a defensive strategy. The target also could look for a 'white knight' investor to fend off unwanted advances.

Staggered terms of office for the two-tier boards (board of directors and supervisory board) cannot hinder a hostile takeover as such, but nevertheless could delay the establishment of complete control of the acquirer of the target. Regarding the capital structure, the acquisition of own shares is – under detailed restrictions and subject to limited amounts – admissible pursuant to the Joint Stock Corporations Act and also employee stock-ownership plans are possible. A share buyback programme would be possible but since shares that are repurchased cannot exceed 10% such defence measure is only limited.

A further possible defensive measure is lowering the threshold that triggers a mandatory bid obligation from the statutory 30% to a lower percentage, while increasing the majority to remove supervisory board members to a higher majority (e.g., 75%), making it more difficult to change the supervisory board members.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

If a controlling shareholding of more than 30% in a listed joint stock corporation is directly or indirectly acquired, a mandatory offer needs to be submitted to the remaining shareholders. Mandatory offers are subject to minimum pricing rules, cannot be made conditional (except for legal conditions such as regulatory approvals) and cannot foresee a withdrawal right.

Holding up to 30% of the shares does not trigger a mandatory offer but a shareholding between 26% and 30% needs to be reported to the Takeover Commission and in principle voting rights exceeding 26% are suspended.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

Under Austrian corporate law both the Limited Liability Companies Act as well as the Stock Corporations Act provide for minority rights, the extent of which depends on ownership thresholds.

Regarding limited liability companies, shareholders holding for example a minority of at least 10% of the shares are entitled to call a meeting of the general assembly or to put a certain matter on the agenda of the general assembly. Also, shareholders – alone or jointly – representing at least one-third of the share capital are entitled to designate a minority representative in the supervisory board. In addition, the Limited Liability Companies Act determines certain matters that require at least a 75% majority decision, which is why shareholders holding shares of more than 25% have a so-called blocking minority (e.g., regarding the amendment of the articles of association).

As to joint stock corporations, a minority shareholder or a group of shareholders holding for example at least 5% of the share capital may request the calling of a shareholders' meeting or request that a certain matter be put on the agenda of a shareholders' meeting. As a further example, a minority of at least 10% of the share capital may request the dismissal of a member of the supervisory board by court decision for cause. As with limited liability companies, 25% plus one vote of the share capital constitutes a blocking minority for certain matters requiring a 75% majority decision.

27. Is a mechanism available to compulsorily acquire minority stakes?

Under the Minority Shareholder Squeeze-Out Act the majority shareholder that directly or indirectly owns 90% of the shares in a limited liability company or a stock corporation can squeeze out the minority shareholders with a simple majority vote and the payment of fair compensation. The minority shareholders have no means to block the squeeze-out but can request a compensation review. If the articles of association of a company contain a provision regarding the amount of the compensation to be paid in case of a squeeze out, the contractual provision is not applicable in case the agreed amount is below fair value.

Regarding publicly listed companies, if the squeeze-out follows a public takeover offer not later than three months after the end of the offer period, there is a rebuttable presumption that the compensation is adequate if it is equal to the highest compensation that was paid during the offer period.

The articles of association can stipulate that a squeeze out pursuant to the Minority Shareholder Squeeze-Out Act is not permissible and that minority shareholders cannot be squeezed out.

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