The Legal 500 Country Comparative Guides

Austria: Mergers & Acquisitions

This country-specific Q&A provides an overview to mergers & acquisitions laws and regulations that may occur in Austria.

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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)
- 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.

There have been some recent changes regarding corporate law will effect M&A transactions.

Under corporate law, after closing an M&A transaction, the management of the target company is obliged to file a notification with the Ultimate Beneficial Owners (UBOs) Register to update the registration with respect to the beneficial owners who ultimately own or control a legal entity. This is generally the case if a direct or indirect owner holds shares or voting rights of more than 25 % in a company. If no beneficial owner can be identified, the members of the top management level of the legal entity (e.g. managing director, board of directors) are considered to be beneficial owners.

A change that will affect M&A transactions is the Amendment of the Austrian Law on the Ultimate Beneficial Owners (UBOs) Register (UBO Register, Wirtschaftliche Eigentümer Registergesetz) as part of the EU Financial Adaptation Act 2019 (EU-Finanz-Anpassungsgesetz), which was published on 22 July 2019 and came into force on 10 January 2020. The changes now increase access to the data base on UBOs.

The new regulations implement the 5th Money Laundering Directive. Besides other changes the most important change is that the UBO Register will become accessible to the general public. As of 10 January 2020 any person may request an extract from the register on any legal entity without having to demonstrate any specific reason or legitimate interest as was requested in the past when only authorities, certain groups of persons such as lawyers, notaries or credit institutes had access. The public extract contains information on the legal entity’s name, address, register and register number, legal form and information regarding the period of time for which the legal entity has been in existence, the direct or indirect beneficial owner’s forename and surname, date of birth, nationality and country of residence and the nature and scope of the beneficial ownership.

Furthermore, the notification obligations for legal entities have been made more stringent. An annual notification regarding the completeness and correctness of the data entered in the UBO Register is required regardless whether changes have occurred. Apart from the annual statement, changes also must be reported on an on-going basis within 4 weeks of the change having occurred. The Austrian Ministry of Finance, as the competent register authority, is obliged to ensure the accuracy and completeness of the registrations, which can be enforced by penalties that have been increased.

Another change to the UBO Register concerns the voluntary provision of a so-called “KYC compliance package” by a professional party representative. The UBO Register will include the possibility for the storage and exchange of KYC-relevant documents on beneficial owners, which will be accessible only to certain persons such as financial institutions, tax advisors, attorneys and notaries to make KYC due diligence more efficient. The access to such data can be limited to individual persons and entities.

Regulatory changes under discussion

In many countries laws are being discussed to prevent foreign buyers from taking over companies in sensitive industries. Austria is one of the EU Member States that already has such a control mechanism in place that, ie in Section 25a of the Foreign Trade Act 2011 (“AußWG 2011”), which allows the government to prevent and control purchases of shares in companies in sensitive industries by foreign investors. In short, foreign direct investments in companies in the field of public security and public order as defined by Art 52 and Art 65 (1) TFEU are subject to approval. This applies primarily to the defence goods industry, security services and the field of services of general interest (in particular in the fields of energy and water supply, telecommunications, transport and certain infrastructure facilities for education and training in the field of health care).

Since May 2019 a ministerial draft exists to amend the Foreign Trade Act and has been under consideration by the government. The draft foresees a change to Section 25a. The minimum threshold of shareholdings acquired by foreign investors in Austrian companies is to be reduced from currently 25 % to 10 %, above which an approval is required. Certain companies in the media industry which contribute to the formation of public opinion by means of broadcasting, telemedia or print products and are characterized by their particular topicality and broad impact are also to be included in the group of the companies for which foreign investors need approval. Furthermore, the obligation to obtain approval would not only apply to the foreign acquirer of the Austrian company – as is now the case – but the Austrian company to be acquired is now also obliged to obtain the approval and to submit the application for approval. As in Austria a new government was only appointed in January 2020 the timeline as to when and to what extent the amendment will come into force is unclear.

2. **What is the current state of the market?**

The number of M&A transactions completed in the Austrian market has again decreased, but only slightly compared to the previous two years. In the first three quarters of 2019, according to the Deloitte M&A Deal Tracker Austria 2019, 242 transactions took place, which represents a decline of 5 %.

M&A transactions on the domestic market saw a noticeable decline from 28 % of all deals in 2018 to 22 % in 2019. This trend shows that the market is becoming increasingly cross-border. International transactions – outbound as well as inbound – are increasing. The relative share of outbound deals now stands at 41 %. Inbound transaction currently account for 37 % of all Austrian related transactions.

Germany remains Austria's most important M&A jurisdiction. The German market is of particular interest to both buyers and sellers from Austria. 60 deals were concluded with companies from Germany in the first three quarters of 2019 alone. German companies are thus involved in every third transaction on the Austrian M&A market, although a decline is also noticeable here.

The most significant sectors currently are consumer goods, telecommunication, media and technology, real estate and the service sector.

3. **Which market sectors have been particularly active recently?**

Companies from the consumer goods industry are among the most popular targets. One third of each of the outbound and domestic deals and one quarter of the inbound deals concern target companies from this sector. The hotel industry is represented disproportionately in transactions with buyers from abroad in particular. In addition to hotels, Austrian technology companies are also very popular with foreign buyers. In contrast, the frequency of transactions in the industrial sector has declined compared to previous years.

Most investments in the Austrian M&A market are completed by strategic buyers. For inbound transactions private equity is growing more important.

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

The Austrian M&A market will continue to be influenced by macroeconomic developments (such as Brexit, general economic developments). Due to the persisting low interest rates and existing high liquidity in the market, investors will keep searching for projects with higher achievable margins. We expect the Austrian M&A market to remain robust and for the trend towards larger transactions to continue. Though Austria is a relatively small market, Austrian companies have a strong reputation worldwide for having excellent expertise especially in the high-end technology area. As the M&A market is currently driven by technological transformations, we believe that Austria's expertise in this field will drive growths for Austrian M&A transactions.

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.

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.

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.