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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
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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 (EU-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 of major importance. 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 business acquired having originated prior to the acquisition. The purchaser’s liability is limited to the current net asset value of the assets acquired and applies in case the purchaser knew or should have known of the pre-existing liabilities at the time of the purchase. 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 purchaser who acquires and continues a commercial business is liable for all debts the former owner incurred in the course of conducting the business, including 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 the liability of the buyer, such (general) limitation of liability, however, being only valid if it is made public without delay after the closing of the transaction. The publication can occur through the commercial register or through the Vienna Gazette

(*Wiener Zeitung*). In addition, the liability can also be excluded towards individual creditors if they are notified individually without delay after the closing of the transaction.

Article 38 of the Commercial Code also addresses an important aspect in asset deals, i.e. the transfer of agreements connected to the business which is to be acquired. The relevant provision states that in case of doubt all legal relationships of the seller, which are connected to the business, are transferred to the buyer, together with all rights and obligations attached thereto, provided that the business is continued by the buyer. Excluded are legal relationships being personal in nature. In addition, special provisions may apply to certain legal relationships (for example the Austrian Trademark Act provides rules for the automatic transfer of trademarks; the Austrian Lease Act provides rules for the automatic transfer of lease agreements). The parties are free to exclude the transfer of all or some legal relationships. Furthermore, the contractual counterparties of the seller's business have the right to object to the transfer of the contract within three months after having been notified of the transfer.

In addition, there are special liability provisions under the Federal Fiscal Code, the General Social Insurance Act (Allgemeines Sozialversicherungsgesetz) and the Employment Contract Adaptation Act (AVRAG), which also contains rules on the automatic transfer of employment agreements.

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 the turnover of at least two undertakings exceeded EUR 1 million each; 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 requirement in item (ii) that at least two of the companies involved must each also have generated domestic sales of more than EUR 1 million was introduced in 2021. This aims at excluding mergers where the target has no relevant domestic turnover and the merger would only need to be filed in Austria because the purchaser had a turnover of more than EUR 30 million in Austria.

The main exception, under which no merger notification needs to be filed, despite the thresholds set forth above having been met, is the following: The transaction does not need to be notified if in the year prior to the transaction (i) only one independent undertaking had a domestic turnover of over EUR 5 million, and (ii) the other participating undertakings' combined had a worldwide aggregate turnover not exceeding EUR 30 million. However, even if the thresholds set forth above are not met, transactions closing after 31 December 2021 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).

In 2021 the Austrian Cartel Act, which not only deals with merger control issues but also cartel issues, also has gone "green". The new version of Section 2 para 1 Cartel Act expands the few legal exceptions to the ban on cartels: Cartels now are also exempted from the prohibition if their profits make a significant contribution to an ecologically sustainable or climate-neutral economy. The provision thus creates legal certainty and a free space for entrepreneurial cooperation in favor of sustainable agreements that would otherwise be prohibited under national law. However, it would also be desirable to create a clear "safe harbor" for Austria by using the authorization for block exemption regulations.

There is also a new substantive review criterion that allows the prohibition of mergers. As an alternative to the prohibition of a merger which creates or strengthens a dominant position, mergers now can already be prohibited if a significant impediment to effective competition is to be expected as a result. However, there are additional justification criteria. In certain cases the Cartel Court is given the option not to prohibit a merger where an improvement of competition is to be expected which outweighs the disadvantages, or where the economic advantages of the merger substantially outweigh the disadvantages.

As regards the main criterion for the prohibition of a merger, i.e. the creation or strengthening of a dominant position, in 2021 there were two significant amendments as well. First, companies now are also deemed to hold a dominant market position if they have significant access to the market or to data of particular competitive relevance, for example, due to their intermediary services for other companies. Second, the concept of market dominance has been further tightened by the concept of relative market power. According to the new Section 4a of the Cartel Act, a company is also considered to have a dominant market position if it has a superior market position in relation to its customers or suppliers. Thus, the legislator has addressed typical market power structures of the digital platform economy.

Other relevant authorities are the Commercial Register Courts (Firmenbuchgerichte), which register and publish transactions and reorganizations 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. In the recent „Adler"-ruling (ECJ C-546/18 – Adler Real Estate et al) the European Court of Justice held that certain proceedings before the Austrian Takeover Commission are in conflict with EU law since the Austrian Takeover Commission acts on the basis of inquisitorial proceedings and its decisions are not subject to a proper review by a higher court which is also entitled to review the facts established by the Austrian Takeover Commission. Thus, an amendment to the Austrian Takeover Act is to be expected in the near future in the course of which the competences and the structure of the Austrian Takeover Commission will be re-evaluated.

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 defense 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 no. 1 to no. 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, even after the outbreak of the COVID-19 pandemic M&A transactions steadily continued to take place in Austria. Initially, deals took place at a somewhat slower pace, however, the market managed to catch up fairly well. Whereas in 2020, there were 275 M&A transactions involving Austrian companies, the number of transactions with Austrian participation rose to 293 in 2021 according to the M&A Index 2021 published by EY Austria (Ernst & Young Global Limited). This plus of 18 deals corresponds to an increase of 6.5 % in M&A transactions. However, compared to a pre-COVID-19 environment, the number of transactions is still at a slightly lower level.

Transaction volume, however, considerably decreased by 27.8 % from € 12.6 billion to € 9.1 billion. The decrease in transaction volume is because the environment for M&A transactions became increasingly complex and uncertain for some sectors. Especially the rather strong tourism and hospitality sector almost came to a halt.

The Austrian M&A market in 2021 was driven by three non-intra-Austrian deals, which together accounted for over 55 % of Austria's total transaction volume. Signa Holding GmbH's purchase of 50 % of Selfridges department stores (excl. Canadian locations) for around the equivalent of € 2.35 billion accounted for the biggest volume in 2021. Various investment companies bought 9.2 % of the shares in Erste Group Bank AG for € 1.5 billion which accounted for the largest deal regarding the financial sector. Starwood Capital Group buying 33.6 % of the shares in CA Immobilien Anlagen AG for € 1.157 billion accounted for the largest deal in the real estate and housing sector. All of these transactions show the strength and important role of strategic players in the Austrian M&A market and the Signa Holding transaction shows the capability of Austrian strategic players to be active outside of Austria.

The increase in transaction numbers compared to the previous year's drop is a positive sign for the Austrian transaction market. The decrease of the total transaction volume in 2021 compared to 2020 mainly is due to OMV's megadeal in 2020 by which the stake in Borealis was increased by € 4.1 billion. Though statistical information is not available yet on developments in the first quarter of 2022, there appears to have been a clear up-tick in transactions since the beginning of the year. Due to the current political situation, a short-term forecast hardly can be made, but many potential buyers have weathered the COVID-19 storm well and have substantial cash resources to make acquisitions. As the COVID-19 relief programme phased out and plans for the repayment of excess aid received are discussed, many companies will be lacking liquidity and will be attractive acquisition targets for strategic investors. We therefore expect an increase in new distressed M&A deals in 2022.

In light of the recent turmoil on the financial markets generally resulting from Russia's invasion of Ukraine, it remains to be seen what impacts this will have on M&A activities.

3. Which market sectors have been particularly active recently?

In terms of the number of transactions reported, the real estate sector took the lead in 2021 with 77 deals, followed by companies from the industrial sector with 64 deals and the technology sector with 59 deals. In terms of published transaction volumes, the sector for commercial and consumer goods was the clear first place winner with € 2.4 billion, which is due in part to the partial purchase of Selfridge's department stores by the Austrian-based company Signa Holding. Next in line were the financial sector, the real estate sector and the industrial sector.

Of course, the COVID-19 pandemic has hit some economic sectors in Austria hard, in particular the tourism and hospitality sector as one of the main pillars of the Austrian economy. The Austrian government reacted quickly in providing substantial state aid packages, but demand has fallen sharply due to COVID-19-restrictions. After the historic decline of 2020 and a slight recovery in 2021 by 4.1 % the Austrian GDP is estimated to increase by about 4.3 % in 2022 (as compared to shrinking by around 6.6 % in 2020); for the following years further recovery is expected.

Strategic investors are still involved in the vast majority of transactions in the Austrian M&A market. Out of the 293 transactions in 2021, 276 involved strategic investors. Compared to 2020 this means an increase of 16 transactions and a slight increase of 6.2 % 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 17 deals (5.8 % of total transactions) compared to 18 deals in 2020. The proportion of strategic transactions and those by financial investors thus remained more or less constant compared to the previous year. Nevertheless, some start-ups in Austria recently have achieved substantial financing from private equity investors so that this area of potential M&A activity offers potential (e.g., Bitpanda, GoStudent).

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

Despite the initial impact of the COVID-19 pandemic, M&A transactions continue to take place at a fairly robust pace in Austria. Many companies are restructuring themselves due to the pandemic, and, thus, are looking for strategic acquisition targets or an opportunity for divesting parts of their business to realign their portfolios. COVID-19 related restrictions are expected to be eased over the warmer season but reinstated over the colder season, thus creating uncertainty for leisure related businesses. In the previous year the market already dealt with the effects of high inflation and rising energy costs. It therefore remains to be seen whether the ECB will continue its originally announced low interest rate policy. Especially with Russia's invasion of Ukraine and the sanctions against Russia as a major energy supplier, factors such as rising energy costs and inflation will have a greater economic impact.

As COVID-19 relief programs start to phase out, we expect an uptick in distressed M&A. Overall, the market will continue to become a different one than it was before the crisis. Whereas in 2019 it was still possible to speak of more of a seller's market, in which sellers were able to select the suitable buyer from several interested parties, achieve high purchase prices and enforce seller-favorable provisions in purchase agreements, there may well be a continued shift towards a more buyer friendly market. As the economy recovers, companies that have come through the COVID-19 crisis in good shape, in many cases large companies such as industrials, will try to expand their market shares and acquire assets and know-how at low prices through clever acquisitions of competitors and start-ups that have come under pressure. Private equity funds are also expected to become more active, having accumulated liquidity and thus are on the lookout for investment opportunities. There is a particularly good outlook for companies in the pharmaceutical and healthcare sectors, technology companies, companies concerned with sustainability and the environment and online retailers. In these areas, investor demand is likely to be even stronger than before the 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 the filing of a public takeover bid pursuant to the Austrian Takeover Act. The filing of a public bid is the usual method of acquisition, as the Austrian Takeover 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 individual 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 this does not impair the interests of the company. In case of competing takeover bids which are subject to the Austrian Takeover Act, 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 a more comprehensive and detailed due diligence analysis regarding the target is conducted in a second step.

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, very briefly speaking and simplifying an otherwise complex issue, transactions between direct/indirect shareholders and the target (and sometimes also between sister companies) are null and void if based on the transaction the shareholder receives a benefit from the target which is not provided on an arm's length basis, and, thus, would not have been conducted by management acting diligently, unless there is a justification in the interest of the target. Classic examples of a forbidden return of equity are the target selling goods to the shareholder at an undervalue or the target securing debts of the shareholder. 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 typically do not require the approval of the target company. Nevertheless, the articles of association of the target company may provide that the company itself has to approve the transaction.

If certain thresholds are exceeded (e.g., a company having 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 reorganizations, 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.

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, a voluntary offer may be conditional, provided that the condition can be reasonably justified and the occurrence or non-occurrence of the conditions is not fully dependent on the discretion of the bidder. The condition that during the offer period no material adverse change occurs is allowed. Mandatory offers pursuant to the Takeover Act, however, 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. There are also discussions in Austrian legal literature as to whether the promising of break-up fees is in compliance with the duties of a diligent manager, in particular if the break-up fees are triggered on the basis of facts or circumstances beyond the control of the party promising the break-up fee or if the break-up was caused by the other party. As regards the amount of the break-up fee, it can be problematic under Austrian law if it is purely punitive and goes beyond a compensation for sunken costs. The validity of such break-up fees depends on the particular circumstances of the case.

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 this is rare in practice, in particular since it is usual to agree in Letters of Intent or similar documents that such claims are excluded and negotiations can be terminated at any point in time.

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 put into escrow 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%. The statutes of a listed company can provide for an additional threshold of 3 %. There are special rules for the treatment of derivatives, options and other instruments, the main aim of which is to prevent a circumvention of the notification requirements. If the notification obligations are not complied with, voting rights in excess of the relevant threshold cannot be exercised and are dormant.

Section 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. There are exceptions to the requirement of the filing of a mandatory offer, the most important of them being the existence of a larger shareholder. The increase of such controlling stake by way of “creeping in” (i.e. acquisition of shares which provide for additional voting rights of at least 2 % within a period of 12 months; provided that the shareholder does not already hold more than 50 % of the voting rights of the target) also triggers a mandatory bid, and, therefore, public disclosure rules. Even when such controlling stake in excess of 30 % is being held through one intermediary holding company, the disclosure rules apply. The direct or indirect acquisition of over 26 % but less than 30 % of the voting rights in a target company also triggers the obligation to notify the Takeover Commission. The voting rights in excess of 26 % are dormant, unless the Austrian Takeover Commission lifts the restriction. The restriction falls away as soon as a bid for the shares in the target company has been made and completed. Further, the voting rights are not dormant if certain exceptions apply, the most important being the existence of a bigger shareholder.

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, if a listed company is involved, 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 rumors 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 four 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.

In case of M&A transactions involving listed companies it also needs to be considered when to make an ad hoc notification pursuant to Article 17 of the Market Abuse Regulation (EU 596/2014), which deals with insider information. In general, the Market Abuse Regulation assumes that every intermediate step of a stretched out process consisting of various steps as well as the whole process itself can constitute insider information if that confidential information is of a precise nature and if that information can have an impact on the price of the shares listed.

Briefly speaking, in case of M&A transactions a relevant insider information can already exist if an intermediate step, like the signing of a Memorandum of Understanding or a Letter of Intent, has occurred or is likely to occur (>50%), provided that the information on it is precise, and further provided that this particular step can have an impact on the share price. Therefore, based on the information about the intermediate step, there must be an incentive for reasonable investors – who are not acting purely speculatively – to buy or sell shares in the listed entity. According to case law of the Austrian Administrative Supreme Court, this is also the case if the occurrence of the final event, i.e. the finalization of the transaction, cannot yet be reasonably expected, but a high price impact can be assumed if the information were to be published (Probability/Magnitude Test). However, the application of the Probability/Magnitude Test is highly disputed in Austrian legal literature and also has been rejected by the European Court of Justice.

In practice, the parties involved often defer the required ad hoc notification according to Article 17 no. 4 of the Market Abuse Regulation, on the basis of which the notification may be delayed if the interests of the listed company or the respective market participant would be impeded by the notification, for example, if the transaction would otherwise fail, if the insider information can be kept confidential and the public would not be misled by the delayed disclosure. However, the risk of these conditions having been met rests with the parties being obliged to make the ad hoc notification.

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 (compare Section 7).

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.

Briefly speaking and simplified, the offer document needs to include the following information: (i) the content of the offer; (ii) legal information concerning the bidder and shareholdings in the bidder; (iii) the shares which are subject to the offer; (iv) the consideration offered for the shares as well as the valuation method; (v) if applicable, (in total or percent) the minimum and maximum amount of securities that the bidder undertakes to acquire; (vi) the number of shares in the target company already held by the bidder or parties acting in concert with the bidder; (vii) the conditions and reservations of withdrawal to which the offer is subject; (viii) information concerning the bidder's intentions with respect to the future business activities of the target company and, to the extent affected by the bid, of the bidder, as well as information with respect to the continued employment of the target company's employees and its management, including any intended significant changes in the terms and conditions of employment, including in particular the bidder's strategic planning for the target company and the likely impact on jobs and locations; (ix) the time limit for the acceptance of the offer and for the payment of the consideration; (x) in case of consideration in the form of securities, information on these securities which needs to comply with the requirements for a prospectus; (xi) the terms and conditions of the bidder's financing of the offer; (xii) information on the legal entities acting jointly with the bidder; (xiii) information on the compensation offered if rights in relation to the shares of the target company are removed as a result of the bid; and (xiv) information on the law governing the contracts which will be concluded between the bidder and the shareholders as a result of the acceptance of the bid and information on the place of jurisdiction.

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 (www.takeover.at).

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 defense against a hostile approach, whereby in particular the target's organizational structure or capital structure can be organized in advance 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, provided that the hostile bidder has not achieved a majority large enough to remove and appoint the members of the supervisory board at will anyway. 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 defense measure is only limited. However, most defensive measures are subject to the approval of the general assembly of the target company, which makes defensive measures quite impractical.

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 % of the permanent voting rights in a listed joint stock corporation is directly or indirectly acquired, a mandatory offer needs to be submitted to the remaining shareholders, unless the articles of the target provide for a lower threshold. There are exceptions to this rule, the most important one of them being the existence of a larger shareholder. 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. Also a creeping-in can trigger a mandatory takeover bid (compare already Question 15).

If through a voluntary bid a bidder acquires a controlling stake of more than 30 % of the voting rights of the target company, a subsequent mandatory bid is triggered thereby if the voluntary bid did not fully comply with the requirements for mandatory bids, in particular as regards the pricing rules for mandatory bids.

Up to 2018 there existed the possibility of de-listing listed companies by, for example, just merging them with a non-listed company (so called “cold de-listing”). The consequences of such cold de-listing were highly disputed, in particular with respect to the level of protection to be provided to the shareholders.

In 2018 the Austrian lawmaker reacted to this situation. Section 225 paragraph 2a of the Austrian Stock Corporation Act now stipulates that a takeover bid complying with the requirements for mandatory takeover bids needs to be filed for the shares of an Austrian listed stock corporation if a merger of that company would result in the shares in that company no longer being listed in an EEA member state. In the course of the takeover bid the shareholders have to be explicitly informed of the upcoming delisting of the shares. Further, pursuant to Section 240 Stock Corporation Act such takeover bid also needs to be filed if a listed entity is to be converted into a type of company not being capable of being listed at the stock exchange, e.g. if a stock corporation is converted in a company with limited liability.

The filing of the takeover bid is a requirement for having the merger or the conversion of the company registered in the commercial register.

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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