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# Corporate M&A 2023

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**Austria: Law & Practice**

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# AUSTRIA


## Law and Practice


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**CERHA HEMPEL** has 28 partners and 73 senior attorneys and associates in Austria; the firm also has offices in Bulgaria, the Czech Republic, Hungary, Romania and the Slovak Republic. The Corporate team is active for clients in the private M&A markets of Austria and CEE, representing strategic and private equity investors as well as their targets and/or management. It also advises on national and international cross-border mergers and reorganisations, specialising in developing and providing practical solutions to what can be extremely complex issues that often involve cross-border components. Due to the diversity of its clients, the team is particularly experienced in advising on public M&A, including takeover law and related disclosure requirements under stock exchange law.

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## 1. Trends

### 1.1 M&A Market

Overall, the Austrian M&A market has remained relatively stable compared to the globally declining trend. The number of deals with Austrian involvement increased inconspicuously, whereas the total volume of deals decreased significantly: in 2022, there were 297 M&A transactions involving Austrian companies, compared to 293 in 2021, an increase of 1.4%. The transaction volume, however, decreased considerably for a second year in a row by 74.7% from EUR9.1 billion (2021) to EUR2.3 billion (2022). The ongoing COVID-19 pandemic has not affected the pace of deal activity in the past 12 months.

The number of outbound M&A transactions (where Austrian investors sought to acquire foreign targets or their shares) increased to 133 (44.8%) in 2022 from 104 (35.5%) in 2021. The number of inbound M&A transactions (where foreign investors sought to acquire Austrian targets or their shares) on the other hand decreased from 133 (45.4%) in 2021 to 115 (38.7%) in 2022.

### 1.2 Key Trends

Strategic investors still remain the driving force of the Austrian M&A market and account for the vast majority of transactions. In 2022, 286 out of 297 transactions involved strategic investors, compared to a total of 276 in 2021. The involvement of financial investors (private equity or venture capital firms) decreased subtly from 17 transactions (2021) to 11 transactions (2022).

In 2022, there was a significant increase in company insolvencies compared to 2021. In addition to rising interest rates and soaring inflation due to the surge in energy costs, this might lead to a spike in the number of distressed M&A transactions in the future. Furthermore, environmental, social and governance topics have come to the fore, in particular for institutional investors.

### 1.3 Key Industries

In 2022, the industry sector accounted for 89 transactions, thus being the most attractive industry for M&A transactions in Austria in terms of number of transactions. The industry sector was followed by the real estate and construction sector with 68 transactions and the energy sector with 12 transactions.

In terms of disclosed transaction volume, the real estate and construction sector led the way at EUR1.5 billion and the industry sector trailing behind with a transaction volume of EUR500 million.

The hospitality and tourism sector as well as the retail sector have been particularly affected by the COVID-19 pandemic.

## 2. Overview of Regulatory Field

### 2.1 Acquiring a Company

In Austria, a private M&A acquisition is usually structured either as a purchase of shares in the target company (share deal) or of business assets (asset deal). In case of a share deal, the buyer directly acquires the shares in the target and (only) indirectly the target's business. In an asset deal, the buyer acquires a business from a seller, which means that the assets and liabilities need to move from the seller to the buyer (subject to limitations, in particular, with respect to liabilities, the parties may further define the details of the scope of the purchased assets).

## 2.2 Primary Regulators

### Merger Control

As regards merger control, the relevant authorities are the Federal Competition Authority, which is the recipient of Austrian merger control filings, the Federal Cartel Prosecutor and the Cartel Court. Depending on the turnover thresholds, competence may pass to the European Commission, in which case the EU Merger Regulation exclusively applies, thereby excluding the application of the rules applicable under the Austrian merger control regime.

### Dependent on Industry/Target Type

Depending on the industry of the target entity, regulators like the Financial Market Authority or E-Control, an authority monitoring the Austrian energy market, may supervise M&A activities and require additional notification obligations, approvals or "fit and proper" tests. Furthermore, M&A activities within sensitive industries – as listed in an annex to the relevant law – may require approval by the Austrian Ministry for Digital and Economic Affairs (see **2.3 Restrictions on Foreign Investments**). Public takeovers of shares in Austrian listed entities falling within the scope of the Austrian Takeover Act are regulated and supervised by the Austrian Takeover Commission.

### Dependent on Asset Class

With regard to real estate, acquisitions may be subject to notification or approval by regional land transfer authorities (see **2.3 Restrictions on Foreign Investments**).

## 2.3 Restrictions on Foreign Investments

Apart from restrictions that may be equally relevant for Austrian investors (eg, notification duties in cases of acquisition of certain share percentages in Austrian listed companies and approval/non-prohibition of the acquisition of certain qualified shareholdings in the financial sector), restrictions that may also have relevance to foreign investors mainly relate to real estate and sensitive industries. Further restrictions may stem from anti-money laundering legislation and KYC requirements, as well as in relation to intended transactions with blacklisted/sanctioned foreign states and/or individuals. Last but not least, the EU has recently enacted the Foreign Subsidies Regulation (Regulation (EU) 2022/2560) which will, inter alia, require prior clearance of M&A transactions by the European Commission (see **3.1 Significant Court Decisions or Legal Developments**).

## 2.4 Antitrust Regulations

The relevant pieces of merger legislation are the Austrian Cartel Act 2005 and the EU Merger Control Regulation (139/2004). Depending on turnover thresholds, transactions of a certain size become subject to merger control clearance by either the Federal Competition Authority (FCA) or the European Commission. The Commission has exclusive jurisdiction if the transaction results in concentrations with an EU dimension. Where a transaction does not fall within the exclusive jurisdiction of the Commission, it may require (pre-merger) notification to and clearance by the FCA.

The Austrian merger control regime applies to several corporate transactions, such as the direct or indirect acquisition of shares, if a shareholding of 25% or 50% is attained or exceeded, any other combination (even below this threshold) enabling the buyer to exert a controlling influence on the target or joint ventures. These concentrations have to be notified to the FCA if certain turnover thresholds are met (and provided that no exemption applies). Furthermore, an additional threshold has applied under Austrian merger control law since 1 November 2017. The threshold is linked not only to the turnover of the undertakings involved, but also to the transaction value.

Within one month of receiving the complete notification, the FCA conducts an initial assessment (Phase I) and, most commonly, the transaction is cleared at the end of that period. In more critical cases, the FCA initiates the main examination proceedings (Phase II). Here, the Cartel Court has five months to finalise the investigations, consider whether the transaction creates or strengthens a dominant market position and finally either clears the transaction (which may be subject to conditions and/or obligations) or prohibits it (which is quite rare in practice).

## 2.5 Labour Law Regulations

In particular, an acquirer has to consider the following rules.

### Protection Against Dismissal

The Austrian employment law framework grants special status to certain groups of employees such as pregnant women or disabled persons, apprentices and members of the works council. These groups typically enjoy increased protection concerning the termination of their contracts. In addition, older employees enjoy some protection against dismissal, particularly when the dismissal results in social hardship or otherwise substantially violates their justified interests.

### Co-determination

The Austrian Stock Corporation Act provides for a two-tier board structure composed of the management board and the supervisory board. In some instances, this structure also applies to limited liability companies. The management board is responsible for the day-to-day business, while the supervisory board mainly monitors these activities and in particular resolves statutory as well as assigned matters.

If a works council is established, the Austrian Labour Constitution Act entitles employees to delegate one third of the supervisory board's members and the shareholders elect the remaining two thirds (principle of one-third parity). Thus, employee representatives may gain insights, are entitled to the same level of information as shareholder delegates and, most notably, actively take part in important business decisions.

### Acquired Rights

Since the implementation of the European Acquired Rights/Transfer of Undertakings Directive, the Employment Contract Law Adaptation Act states that the acquisition of a business unit (eg, by way of an asset deal) involves a mandatory automatic transfer of all employment contracts that are part of the affected business unit. Therefore, it is not possible to "pick and choose" employees and consequently the acquirer assumes the employment contracts, as they exist at the time of the transfer (including all benefits, unsettled claims, holiday entitlement yet to be taken and severance pay entitlements).

## 2.6 National Security Review

In 2020, in compliance with Regulation (EU) 2019/452, a new framework for screening foreign investments was introduced in Austria (under the Foreign Investment Control Act), replacing the respective provisions of the Foreign Trade Act 2011, with a view to significantly extending the scope of sensitive industries, lowering applicable thresholds on the one hand and amending and adapting the clearance process (including with respect to the requirements set out in the aforementioned EU Regulation) on the other hand.

Direct and indirect foreign investments (ie, investments by foreign investors that are not residents or citizens of the EU, the EEA or Switzerland) in Austrian companies operating in certain sensitive areas (including, inter alia, the defence industry, the operation of critical energy or digital infrastructure, water, operation of systems securing the data sovereignty of Austria and, temporarily, research and development in the medical and pharmaceutical sectors) require clearance by the Ministry if a shareholding representing at least 10%, 25% or 50% of the voting shares is to be acquired. In addition, the annex to the Foreign Investment Control Act sets out an extensive list of further industries for which the acquisition of 25% or 50% of the voting shares triggers the clearance requirement. It also covers other means of acquiring a controlling influence (sole or joint control) over a respective Austrian company, or its business or a major part thereof (in the case of an asset deal).

The request for approval has to be filed without undue delay after the signing of the respective acquisition documents or a publication of the intention to file a bid. There are safeguards in place to enable the Ministry to start proceedings even without a formal notification by the acquirer (inter alia, including a prompt notification duty of the target once the target learns of the respective intention of an acquirer).

Where there is deemed to be a “serious threat” to the interests of public security and order, the approval may be subject to conditions (which are not specified in further detail). Prior to the approval, an acquisition subject to the Foreign Investment Control Act must not be implemented (backed by substantial fines, including criminal sanctions).

# 3. Recent Legal Developments

## 3.1 Significant Court Decisions or Legal Developments

### Court Decisions

*Upstream mergers*

In late 2020, the Supreme Court ruled on the admissibility of an upstream merger of two companies, each having negative equity, with the parent company. In its ruling, the Supreme Court clarified that the intended merger is permissible as the negative equity is by far covered by the unappropriated capital reserve and the net profit of the parent company.

*Acquisition rights and insolvency*

In late 2020, the Supreme Court ruled on the admissibility of acquisition rights and their pricing in the event of an insolvency of a shareholder. The Supreme Court clarified that acquisition rights in the event of an insolvency of a shareholder stipulated in the articles of association of a company are permissible, even if the acquisition price is below the market value of the share.

*Invalidity of shareholders’ resolutions and shareholders’ agreements*

In early 2021, the Supreme Court ruled on the invalidity of shareholders’ resolutions, the transfer of shareholders’ agreements by way of universal succession and the loyalty obligations of shareholders. A resolution passed in a shareholders’ meeting of a stock company is invalid if the resolution is materially connected to an earlier resolution and the content of this earlier resolution is a precondition for the existence of the later resolution. Furthermore, the Supreme Court ruled that in some cases, even without universal succession, consent to the transfer of shareholders’ agreements is not required in order to protect the rights and obligations under the shareholders’ agreement. Additionally, the

Supreme Court clarified that the articles of association are not the sole origin of loyalty obligations. Loyalty obligations may also arise from omnilateral shareholders' agreements.

*Invalidity of Public Access to Information about Ultimate Beneficial Owners (UBO)*
In November 2022, the European Court of Justice (ECJ) ruled that Article 1(15)(c) of the fifth Anti-Money Laundering Directive (Directive (EU) 2018/843) is invalid as it infringes the fundamental rights to protection of private and family life and of personal data enshrined in Articles 7 and 8 of the European Charter of Fundamental Rights. This ruling by the ECJ will ultimately require the Austrian legislature to enact changes to Section 10 of the Austrian Beneficial Owner Register Act.

**Legal Developments**
*Austrian Investment Control Act*
The new Austrian Foreign Investment Control Act entered into force on 25 July 2020 and transposed the requirements introduced by the EU Foreign Direct Investments Screening Regulation (Regulation (EU) 2019/452) (see **2.6 National Security Review**).

*Austrian Act on Restructuring*
As part of the implementation of the Directive on restructuring and insolvency (Directive (EU) 2019/1023), the Austrian Act on Restructuring entered into force in July 2021. Main part of the Austrian Act on Restructuring is the establishment of a pre-insolvency procedure for the preventive restructuring of companies in financial difficulties. The restructuring procedure shall enable the restructuring of these companies by concluding a restructuring plan even if individual creditors do not agree.

*Austrian Warranty Directive Implementation Act*
In the course of the implementation of the Directive on certain aspects concerning contracts for the sale of goods (Directive (EU) 2019/771) and the Directive on certain aspects concerning contracts for the supply of digital content and digital services (Directive (EU) 2019/770), the Austrian Consumer Warranty Act entered into force in January 2022. The Austrian Consumer Warranty Act applies on transactions between entrepreneurs and consumers and covers the purchase of goods, even if the goods are not yet produced, as well as the provision of digital services. Furthermore, the implementation included amendments to the warranty provisions in the Austrian Civil Code and the Austrian Consumer Protection Act.

*Cartel and Competition Law Amendment Act 2021*
In the course of the implementation of the Directive to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market (Directive (EU) 2019/1), the amendment of the Austrian Cartel Act and the Austrian Competition Act entered into force in September 2021. The amendments include far-reaching changes particularly in merger control regulations (second domestic turnover threshold), in the area of digital markets as well as by taking into account the requirements of the European Green Deal launched by the European Commission.

*Reform of the Austrian Takeover Act*
A ruling by the ECJ in the fall of 2021 led to a reform of the Austrian Takeover Act in July 2022. The ECJ ruled that the Takeover Commission does not qualify as an independent and impartial court. Decisions made by the Takeo-

ver Commission must be reviewable by a court regarding questions of law as well as questions of fact in order to fulfil the requirements of Article 47 of the European Charter of Fundamental Rights. As a result of the reform of the Austrian Takeover Act, a two-stage appeal procedure was enacted. Decisions by the Takeover Commission can now be appealed before the Higher Regional Court of Vienna, whereas decisions by the Higher Regional Court of Vienna can subsequently be appealed before the Supreme Court. Furthermore, the provisions regarding "creeping in" were clarified and the mandatory offer threshold for additional acquisitions of voting shares was increased to 3% (see **6.2 Mandatory Offer Threshold**).

*Sanctions against the Russian Federation*

In connection with the invasion of Ukraine by the Russian Federation, the Council of the European Union imposed unprecedented sanctions against the Russian Federation (Council Regulation (EU) No 833/2014). Since the end of February 2022, the Council of the European Union has decided to expand the list of goods and services which can no longer be provided to the government of the Russian Federation as well as legal persons, entities or bodies established in the Russian Federation, including legal advice. As regulators are regularly expanding the reach of sanctions, the situation requires constant scrutiny.

*EU Foreign Subsidies Regulation*

On 23 December 2022, the European Union adopted Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market. This new regulation consists of two notification requirements.

- An obligation for companies to notify the European Commission of concentrations involving a financial contribution by a non-EU government where:
  - (a) the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least EUR500 million; and
  - (b) the foreign financial contribution involved is at least EUR50 million.
- An obligation for companies to notify the European Commission of a participation in public procurement procedures, where:
  - (a) the estimated contract value is at least EUR250 million; and
  - (b) the foreign financial contribution involved is at least EUR4 million per non-EU country.

For all other market situations, the European Commission can commence an investigation on its own initiative (ex-officio) if it suspects that distortive foreign subsidies may be involved. These ex-officio powers can be exercised from 12 July 2023, whereas the obligations to notify will apply from 12 October 2023.

## 3.2 Significant Changes to Takeover Law

A new section has been added to the Austrian Takeover Act, which entered into force in 2018, regulating offers for delisting securities from the Official Market of the Vienna Stock Exchange.

Delisting offers are subject to the provisions governing mandatory offers in accordance with the derogations set out in the new Section 27e of the Takeover Act. Offer documentation must expressly indicate that the offer is a delisting offer. The delisting offer can be combined with a voluntary takeover offer to acquire a controlling interest or with a mandatory takeover offer.

The consideration offered under the delisting offer will be subject to two additional price floors. The consideration has to reach at least:

- the weighted average market price during the last five trading days prior to the day on which the intention to submit the delisting offer is announced; and
- in case the weighted average market price is obviously lower than the actual company value, the price has to be reasonably set.

For the changes resulting from the ECJ ruling, see **3.1 Significant Court Decisions or Legal Developments**.

## 4. Stakebuilding

### 4.1 Principal Stakebuilding Strategies

A bidder can acquire an initial stake in the target company prior to launching an offer. Although pre-launch stake building is generally permitted under Austrian takeover law, a shareholder is obliged to fulfil certain notification requirements if the thresholds described below are met or exceeded. As a consequence, stake-building involves the risk of generating publicity.

The Transparency Directive Amending Directive (Directive 2013/50/EU) introduced stricter disclosure requirements, including a reporting obligation regarding cash-settled equity swaps. This makes it harder to carry out a creeping increase of control.

### 4.2 Material Shareholding Disclosure Threshold

Under the Austrian Stock Exchange Act 2018, Section 130, any person directly or indirectly acquiring or selling shares in a company listed on a regulated market is required to inform the Austrian Financial Market Authority and the exchange operating company if their shares carrying voting rights reach, exceed or fall below the thresholds of 4%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 75% and 90%.

These material shareholding disclosure thresholds only apply to shareholders who hold an interest in a company whose registered office is in Austria. The personal scope of application includes individuals, legal entities, registered partnerships without legal personality and investment funds. The aim of the provision is to ensure the functioning of the capital market and to provide a reliable basis for shareholders concerning decisions about the acquisition and sale of shares.

### 4.3 Hurdles to Stakebuilding

The material shareholding disclosure thresholds mentioned above are compulsory. However, the Austrian Stock Exchange Act 2018, Section 130, paragraph 1, makes it possible to include a threshold of 3% in a company's articles of incorporation (in addition to the other thresholds in Section 130, paragraph 1).

### 4.4 Dealings in Derivatives

Dealings in derivatives are permitted.

### 4.5 Filing/Reporting Obligations

Any financial instrument is subject to disclosure and/or filing and reporting obligations as specified in the section regarding material shareholding disclosure thresholds. There are no specific statutory competition rules covering derivatives, nor are there any for other financial instruments.

National merger control will, in principle, only be triggered in case an option right is exercised in order to acquire shares unless such option right itself comes with considerable and material influence as regards the target entity and its management.

### 4.6 Transparency

Section 7 of the Austrian Takeover Act states that the offer document must contain, inter alia, the terms of the offer and information regarding the bidder. In addition, details of the bidder's intention with regard to the future business operations of the target company and, to the extent it is affected by the offer of the bidder company must be disclosed. Furthermore, information regarding the continued employment of employees and management must also be provided.

In the event of a voluntary takeover offer to acquire control, the bidder's intention will be obvious, as the aim of the offer is to acquire a controlling interest in the target by exceeding the minimum acceptance threshold of 50% of the permanent voting shares. If, however, the material shareholding disclosure thresholds of Section 130 of the Austrian Stock Exchange Act 2018 are exceeded, the disclosed information does not have to include the bidder's intention or the rationale behind the acquisition.

## 5. Negotiation Phase

### 5.1 Requirement to Disclose a Deal

In the case of extended circumstances, not only the realisation of the transaction but also each intermediate step is subject to the principles of ad hoc disclosure in accordance with Article 17 of the Market Abuse Regulation (Regulation (EU) 596/2014). The existence of inside information can be assumed if either of the following criteria is fulfilled.

- The occurrence of the final result is:
  (a) sufficiently likely;
  (b) price specific; and
  (c) price relevant.
- The intermediate step:
  (a) has already occurred or its occurrence is sufficiently likely;
  (b) is price-specific; and
  (c) is price-relevant.

Intermediate steps that derive their price relevance from the final result are to be regarded as price-relevant if the occurrence of the final result can actually be expected.

Generally, the information is not precise enough to constitute inside information at the time at which the target is first approached or the negotiations commence. A non-binding letter constitutes an ad hoc notification obligation if it is price specific and price relevant. The question of how likely it is that the final result will occur plays a crucial role in this respect. In general, the signing of definitive agreements triggers an obligation to issue an ad hoc notification.

### 5.2 Market Practice on Timing

The issuer is required to publish inside information without undue delay. Therefore, the market practice on the timing of disclosure regularly does not and should not differ from legal requirements in order to avoid any consequences of the violation of the disclosure obligations.

### 5.3 Scope of Due Diligence

In the course of takeovers, due diligence is rather the exception than the rule. In such cases, the scope of due diligence can be limited to only the publicly available information of the target. Pursuant to the Austrian Stock Corporation Act, members of the management board of a stock corporation are exercising the diligence of a responsible and conscientious corporate executive when taking business decisions if they do not allow themselves to be guided by extraneous interests and if it may be reasonably assumed on the basis of adequate information that they are acting in the best interest of the company (Business Judgement Rule).

Defining the scope of the due diligence to be carried out is in particular a commercial decision based primarily on the Business Judgement Rule, knowledge of the relevant market and the target. When determining the scope of the due diligence, it always comes down to the relevance of the transaction, with the transaction volume playing a significant role. Due diligence can be conducted in a two-step process:

- due diligence is carried out with certain restrictions; and
- comprehensive and unrestricted due diligence may be performed.

The COVID-19 pandemic has only had a minor impact on the scope of due diligence reviews conducted. However, since 2020, special attention has been paid to MAC clauses and frustration of purpose events. Likewise, as a result of the pandemic, potential claims by tenants for lease reductions must be taken into account when carrying out due diligence.

### 5.4 Standstills or Exclusivity

Generally, exclusivity is not very often required in the course of public transactions while standstill obligations are the rule. Standstills provide an incentive to successfully conclude the envisaged transaction on the first attempt. Therefore, standstills prohibiting interested parties from acquiring or selling securities in the target company or the bidder from making another offer for a certain period of time even after a takeover has failed are regularly requested and, in most cases, they are also a legal consequence of the prohibition of insider dealing.

Exclusivity arrangements vary depending on the structure of the takeover and the underlying transaction. In general, exclusivity arrangements tend to be made in connection with negotiated deals as opposed to auction sales. Exclusivity arrangements restricting the future scope of discretion of the management are not allowed in general.

### 5.5 Definitive Agreements

The bidder can unilaterally specify in its offer document the terms and conditions of the agreement. It is not possible for individual recipients of the offer to negotiate or change the terms and conditions. The bidder makes a tender offer to all shareholders concerning the conclusion of an agreement regarding the target company.

The Austrian Takeover Act assumes that a contract will only be concluded in respect of the offer aimed at the shareholders of the target company by means of the publication of the offer document if a declaration of acceptance is received. Essentially, a takeover offer fulfils the key requirements of a contract offer due to the fact that its terms are adequately defined and it expresses the willingness of the applicant to enter into an agreement. Therefore, the terms and conditions of the tender offer are documented according to the described procedure.

## 6. Structuring

### 6.1 Length of Process for Acquisition/Sale

In general, the timetable for M&A transactions may be subject to various drivers. The duration primarily depends on, inter alia, the target's size, complexity of the transaction structure, organisation and co-operativeness of the parties, the industry the target company operates in and regulatory aspects.

Public takeovers, which are governed by a strict regulatory framework including prescribed steps in a prescribed timeframe, usually take a minimum of three and up to six months from the announcement of the offer to closing (hence, not including any time requirements for preparatory work). Private small- to medium-sized transactions structured as share or asset deals may typically be manageable from a minimum of three to six months onwards. In particular in the area of distressed M&A and small, simple transaction structures where no material due diligence of the target is performed, quite swift transactions, even below three months, are common.

All of the foregoing assumes that no need for merger control clearance or other regulatory approval issues arise. For larger international M&A transactions, time periods may extend up to approximately 12 or even 18 months from the first preparatory steps through to closing.

Governmental measures taken to address the COVID-19 pandemic have only had minor impact (ie, not created major delays or impediments) on the deal-closing process. Impacts concerned mainly certain logistical aspects, eg, restrictions affecting physical travelling and the obtaining of notarised/apostilled PoAs or notarisation of agreements.

## 6.2 Mandatory Offer Threshold

Essentially, the Takeover Act regulates public offers that are aimed at gaining or expanding control by acquiring shares issued by a stock corporation that has its corporate seat in Austria and is listed on a regulated market on the Vienna Stock Exchange. Furthermore, the Takeover Act also applies (partially) where only the requirement of a corporate seat or the listing is fulfilled in Austria and the other requirement is fulfilled in another jurisdiction.

The Takeover Act distinguishes between three types of offers, namely mandatory offers, voluntary offers and voluntary offers aimed at obtaining control. Furthermore, a new section has been introduced to the Takeover Act as of 3 January 2018 that governs offers for delisting securities from the Official Market of the Vienna Stock Exchange. Such offers are subject to the provisions governing mandatory offers whereby certain modifications apply (see **3.2 Significant Changes to Takeover Law**).

### Mandatory Offers

Generally, the obligation to launch a mandatory offer is triggered if a bidder (be it an individual or parties acting in concert) seeks to acquire a controlling shareholding, which is defined by statute as a direct or indirect controlling interest of more than 30% of the voting stock. A shareholding that gives the holder between 26% and 30% of the voting rights must, however, be notified to the Takeover Commission. An exception to this rule applies in certain cases in which an obligation to launch an offer would exist in principle due to the acquisition of a controlling interest. In the following cases, the Takeover Commission only needs to be notified:

- a passive acquisition of a controlling interest (ie, where a controlling interest is obtained without any action having been taken by the acquirer, provided that the acquirer could not reasonably have expected to obtain control at the time at which ownership of the respective shares was acquired);

- an acquisition of a controlling interest which does not enable the acquitting party to exert a decisive influence over the target; or
- other defined exceptional situations (such as certain "creeping in" situations).

### "Creeping in"

The Takeover Act also covers the so-called "creeping in" by shareholders. If a shareholder who holds a controlling interest which, however, does not provide them with the majority of the voting rights acquires within one calendar year, on a netted basis, at least an additional 3% of the voting rights, the shareholder must notify the Takeover Commission and launch a mandatory offer (in certain defined situations, only a notification to the Takeover Commission has to be made).

## 6.3 Consideration

Based on experience, cash is the most common form of consideration, whereas offering shares is rather rare, as are combinations of the two. However, at times, sellers explore alternative ways such as the assumption of debt by a buyer, sometimes in combination with a cash payment. In deal environments or industries with a high valuation uncertainty, closing accounts are commonly used and earn-out models are frequently being discussed to bridge value gaps.

As regards takeover transactions, mandatory offers always require cash consideration, but may have a paper alternative in addition. The same applies to voluntary takeover offers aimed at obtaining control. Only purely voluntary offers (not aimed at obtaining control) may be in cash or securities.

## 6.4 Common Conditions for a Takeover Offer

In general, mandatory offers may not be conditional on acceptance or any internal approvals by the bidder. It may solely be subject to obtaining regulatory clearance (eg, merger control).

With regard to purely voluntary offers (ie, not aimed at obtaining control) and voluntary takeover offers aimed at obtaining control, the completion may be subject to objectively justified conditions including minimum or maximum acceptance thresholds, clearance by merger control and other regulatory authorities or the absence of a material adverse change. However, the fulfilment of a condition or a right to withdraw may not depend on the buyer's discretion.

The Takeover Commission may declare an offer unlawful if conditions are unjustified, discretionary or not objectively determinable. As a result, the latter may prohibit its launch. Therefore, it is advisable to consult the competent authority prior to submitting an offer that includes conditions which are unusual, not precise enough or where their justification is not clearly evident.

## 6.5 Minimum Acceptance Conditions

A distinction must again be drawn between mandatory offers, voluntary offers aimed at obtaining control and purely voluntary offers.

- Mandatory offers may not be conditional on acceptance or any internal approvals by the bidder. It may be subject solely to obtaining regulatory clearance (eg, merger control).
- Voluntary offers aimed at obtaining control are subject to a statutory acceptance threshold of more than 50% of the voting rights (which may be combined with a higher minimum acceptance threshold in the offer).

- Purely voluntary offers may be made subject to any threshold of minimum acceptance.
- Subject to the above, thresholds are usually set at more than 50%, at 75% and sometimes also at 90% of the voting rights for the following reasons:
  (a) 50% plus one vote enables a shareholder to take majority decisions in the general meeting, in particular electing members of the supervisory board, which in turn decides on the managing board's composition, distribution of dividends and similar;
  (b) 75% of the votes (a qualified majority) enables a shareholder to amend almost all provisions of the articles of association and to implement most types of corporate restructurings (mergers, transformations, spin-offs, etc); and
  (c) 90% of the shareholding enables a shareholder to initiate a squeeze-out of minority shareholders (see **6.10 Squeeze-Out Mechanisms**) with the aim of acquiring up to 100% ownership.

## 6.6 Requirement to Obtain Financing

As regards private transactions, it is legally possible to make completion of a signed SPA/APA conditional upon the bidder obtaining financing (eg, by implementing a condition precedent stipulating (re)financing measures). However, such a contract structure is seldom accepted by the seller's side and is therefore rarely seen in practice (except in small private real estate transactions, for example).

In public takeovers, financing must be secured upfront, ie, a qualified independent expert has to certify in advance that the bidder is able to finance the offer.

## 6.7 Types of Deal Security Measures

The principle of freedom of contract granted by Austrian law enables transaction parties to seek any type of deal security measure as long as they do not violate moral principles (*Sittenwidrigkeit*). Quite frequently, purchasers aim to negotiate a MAC (material adverse change) clause to protect themselves against unforeseen occurrences that may adversely affect the target and that may also cover risks associated with the COVID-19 pandemic. Such clauses may become increasingly important if the length of the interim period between signing and closing is dependent on governmental decisions for which a longer decision-making process may need to be factored in. In particular, the actual practice applied by authorities on foreign investment regulatory screening has impacted the length on interim periods of recent M&A transactions.

However, in situations where the Takeover Act applies, further limitations need to be observed.

### Exclusivity Agreements

These appear to be quite commonly sought after by a bidder from a core shareholder and should be legally feasible, particularly in a phase preceding a public tender, but arguably also during a tender process. Exclusivity arrangements with the target, on the other hand, appear more problematic, in particular if the aim to restrict the free business judgement of management acting in the best interest of all shareholders. Therefore, no-talk arrangements (lock-ups) typically risk being too restrictive and are thus void, while there are good arguments that no shop provisions and market test provisions (if they just limit management to actively look for other bidders) are more likely to be upheld.

### Break-Up Fees

Also sometimes called inducement fees, termination fees or drop-dead fees, these will conflict with the Takeover Act if the amounts involved are substantial so that they de facto exclude or materially impede competing offers (in particular, if they are not limited to just compensating the bidder for their out-of-pocket costs but also have some penalty element).

### Standstill Obligations

These are essentially already foreseen by the Takeover Act, containing statutory rules prohibiting the launch of a new or modified offer once the tender offer is published (with only very few exceptions) as well as a statutory waiting period in case the offer turns out unsuccessful (see **6.11 Irrevocable Commitments**).

## 6.8 Additional Governance Rights

If the shares in a company are not held by a single shareholder, but by two or more shareholders, it is very common to stipulate a governance structure among unaffiliated shareholders that goes beyond the protection and instruments afforded under statutory corporate law.

Typically, governance documents include a shareholders' agreement, the articles of association themselves as well as by-laws for the management board (and the supervisory board and/or advisory board, if any).

In general, governance documents frequently contain rights to appoint and dismiss members of the supervisory and/or management board (and/or advisory board, if any), a catalogue of reserved matters with veto rights or qualified majorities, restrictions on dealings with shares (typically rights of first refusal, tag-/drag-along rights and/or a lock-up), profit distribution, anti-dilution, escalation/deadlock clauses, exit/termination rights (including also put and/or call option rights) as well as reporting and access to information rights, or any combination of the above. In addition, financing commitments to provide the company with further equity and/or shareholder loans are sometimes agreed.

## 6.9 Voting by Proxy

In Austria, shareholders may vote by proxy. However, certain formal requirements are applicable. As a rule, proxies should be issued in writing. A Power of Attorney in simple written form typically suffices as regards stock corporations.

Proxies relating to limited liability companies will in certain cases require notarised signatures and, if applicable, an apostille (or even superlegalisation). Depending on the subject of the vote/resolution, a general voting proxy may not always be sufficient.

## 6.10 Squeeze-Out Mechanisms

The Austrian Minority Shareholders Squeeze-Out Act allows a majority shareholder holding directly or indirectly at least 90% of the shares to squeeze out remaining minority shareholders. The consent of minority shareholders is not required and therefore the respective shareholders may not block the procedure. However, they are entitled to adequate cash compensation that is, on request, subject to a judicial review mechanism as to the adequate amount. Moreover, the articles of association may state an exclusion of the squeeze-out right (opting out) or introduce a higher threshold.

A special regime applies to squeeze-outs effected within three months of the completion of a successful mandatory or voluntary takeover offer aimed at obtaining control (see Section 7 of the Squeeze-Out Act).

### 6.11 Irrevocable Commitments

The shareholder structure of Austrian listed companies is typically composed of one or a few core shareholders holding large blocks of shares, whereas the percentage of free float shares is sometimes rather small. Therefore, it is not uncommon to approach a core shareholder first – if it makes sense strategically – and to privately negotiate and seek an irrevocable commitment by the shareholder to sell these shares before launching a public offer. There are good arguments supporting the validity of such commitments even within the context of a public tender process and it might also be argued (although some grey area exists) that such an irrevocable commitment, if already made prior to the launch of a public tender offer, should also remain binding in the case of a competing offer.

Contractual provisions providing a way out for the principal shareholder before a tender process are rather unusual, although such a clause would appear to be legally permissible. Within a tender process, the Takeover Act gives shareholders who have already accepted a public tender offer the mandatory right to withdraw their acceptance in the event that a competing tender offer is launched (but a contractual right of exit will make sense for those commitments, which – as outlined above – would otherwise arguably remain binding in a subsequent tender process).

## 7. Disclosure

### 7.1 Making a Bid Public

The bidder must disclose without undue delay its plan or intention to make an offer and it must inform the administrative bodies of the target company via press agencies and international news services once its administrative bodies have decided to make an offer, or if circumstances oblige the bidder to make an offer (eg, acquisition of control), or in the event of rumours and speculations or market distortion.

After the bidder makes their intention public, they must file an offer (including all relevant documentation) with the Takeover Commission within ten trading days or within 20 trading days of acquiring a controlling interest.

Between the 12th and 15th trading day after the Takeover Commission is notified, the details of the offer must be published either in a nationwide Austrian newspaper or as a complimentary brochure that is provided to the public by the target company at its registered office and by the bodies entrusted with the task of paying the consideration.

### 7.2 Type of Disclosure Required

Making a public offer triggers an obligation to produce a prospectus, unless a prospectus exemption pursuant to the Prospectus Regulation (EU) 2017/112 or the Capital Market Act applies. The obligation to produce a prospectus shall give investors the opportunity to gain greater knowledge of the risks involved. Before publishing the prospectus, the Austrian Financial Market Authority has to approve the prospectus.

The prospectus must comply with the provisions of the Capital Market Act and must be published at least one banking day in advance. It is deemed available to the public if it is published in the Austrian Official Gazette or in a nationwide newspaper, on the issuer's website, on the website of the regulated market to which admission to trading is being sought, on the website of the Financial Market Authority or in a printed form to be made available free of charge to the public at the competent bodies of the market on which the securities are being admitted to trading.

The newly introduced Commission Delegated Regulation (EU) 2021/528 sets out the minimum information of the documents to be published for a prospectus exemption in connection with a takeover by means of an exchange offer, a merger or a division.

### 7.3 Producing Financial Statements

Financial statements are to be included in the prospectus. Consolidated financial statements are prepared according to international financial reporting standards (IFRS), whereas others (on a stand-alone level) apply Austrian generally accepted accounting principles (GAAP). It is crucial that although the requirements regarding mandatory minimum contents are met, additional information may be needed to give the investor the chance to make a well-founded decision.

### 7.4 Transaction Documents

Parties to takeover proceedings are under an obligation to co-operate with the Takeover Commission by way of providing comprehensive information as far as necessary for the Takeover Commission to fulfil its duties. All relevant documents (eg, share purchase agreements and shareholders' agreements) must be fully disclosed to the Takeover Commission. However, the bidder or the party obliged may only disclose extracts of certain documents if the bidder or the party obliged has an interest in ensuring that information is kept secret. There is no disclosure requirement vis-à-vis the recipients of the takeover offer.

## 8. Duties of Directors

### 8.1 Principal Directors' Duties

Austrian stock corporations are governed by a two-tier board system. The members of both boards – the management board and supervisory board – are required to comply with the duty of care of a prudent business person and act foremost in the best interest of the company. Additionally (but only of secondary importance) shareholders', employees' and public interests may be taken into consideration. Besides that, Section 47a of the Austrian Stock Corporation Act lays down a general principle of equal treatment for all shareholders. For the managing directors of limited liability companies, similar duties of care and loyalty towards the company apply.

The Austrian Takeover Act additionally requires managing directors as well as members of the supervisory board to act in the interest of all shareholders as well as in the interest of the employees, creditors and the general public, and to remain objective during the takeover procedure. As soon as the intention to launch a bid has been announced (respectively, the members of the boards have knowledge of the intention to launch a bid), the boards must not prevent the public bid, must stay objective and, in addition, have to respond to the bid by way of a statement. Nevertheless, searching for a "white knight" to make a competing offer is permitted.

### 8.2 Special or Ad Hoc Committees

In Austria, it is not common for managing boards to establish special or ad-hoc committees in business combinations or in the case of a conflict of interest. Usually, conflicted members would either abstain from the vote, not participate in the meeting, or even not be granted access to information on those items in relation to which the conflict exists.

Depending on the corporate governance, conflicts of interest of directors may also be addressed to an existing supervisory board that has, among other things, some intermediary role between the managing board and the shareholders, and represents the company in dealings with directors. Note that on the level of supervisory boards, specific committees, eg, audit committees, may have to be established, depending, however, on the size of the company.

## 8.3 Business Judgement Rule

In Austria, courts defer to the judgement of managing directors according to the business judgement rule, which applies to any business decisions of board members regardless of the business situation. The business judgement rule (expressly incorporated into Austrian statutory law since 2016), as it is understood in Austria, establishes a "safe harbour" with regard to decisions of board members, provided that:

- a business decision is made;
- the board members act free from conflicts of interest;
- the decision is based on all information reasonably available; and
- board members had justifiably believed that the decision was in the best interest of the company.

A board member acting within the scope of the business judgement rule will generally not be liable to the company, its shareholders or other stakeholders.

However, the business judgement rule will not help if the law explicitly sets up a more specific rule in certain situations. Violations of law, even if they were believed to be in the best interest of the company, cannot be justified under the business judgement rule. Under the Takeover Act, there exist more specific rules that take precedence, eg, directors need to act in the interest of all shareholders as well as in the interest of the employees, creditors and the general public and generally need to stay objective.

## 8.4 Independent Outside Advice

Directors of Austrian target companies sometimes turn to lawyers and other consultants seeking outside advice on business combination matters. Advice given to directors is often limited in scope and typically concerns aspects of employment law (eg, regarding employment contract issues) but also the conduct of a due diligence process (eg, regarding confidentiality/disclosure matters) or, more generally, the scope and limitations of the business judgment rule and related aspects of careful management of a prudent business person.

In regulated industries managing directors may request advice regarding statutory duties, for example ad-hoc reporting obligations.

Public takeovers require independent experts (normally auditors) to be appointed to assess offers made and provide opinions. Additionally, an expert appointed by the target company has to assess the obligatory statements of the target company's managing board and supervisory board in which they recommend whether or not to accept the offer.

## 8.5 Conflicts of Interest

Directors' conflicts of interest may be addressed to a supervisory board that has, among other things, the role of intermediary between the managing board and the shareholders. In addition, shareholders may initiate special audits to review (potentially conflicted) business activities. However, in Austria it is rare for conflicts between shareholders and the managing board to end up in court.

By and large, conflicts among shareholders – which may arise from time to time – also do not often end up in court. Conflicts, if any, between majority and minority shareholders sometimes result in the legal challenge of majority resolutions filed by minority shareholders.

## 9. Defensive Measures

### 9.1 Hostile Tender Offers

Under the Austrian Takeover Act both, friendly and hostile takeovers are allowed. Nonetheless, friendly takeovers prevail in practice. Either way, one of the general principles of the Act requires the management board and the supervisory board of the target company to remain neutral in the interests of the shareholders and not in any way prevent the shareholders from taking a decision on the proposed takeover or seek to influence the decision of the shareholders.

### 9.2 Directors' Use of Defensive Measures

In the event of a takeover offer, the administrative bodies of the target company (management board and supervisory board) must not take any measures which would likely deprive shareholders of the opportunity to make a free and informed decision about the offer. No measures must be taken that frustrate the outcome of the offer from the moment the bidder's intention to launch an offer becomes known until publication of the results of the offer, and in the event that the offer is a success, until implementation of the offer.

However, measures that could frustrate the outcome of the (hostile) takeover are permissible if the target company's shareholders' meeting explicitly approves the measure in question. The Takeover Act mentions the issue of securities that could prevent the bidder from acquiring control of the target company. The administrative bodies of the target company are also free to seek out competing bidders ("white knights") without obtaining the consent of the shareholders' meeting.

### 9.3 Common Defensive Measures

If an intention to make an offer has not yet been announced, the management board may take defensive measures in the form of preventive measures against hostile takeovers, such as the introduction of an upper limit on voting rights or long-term contracts with members of the management board, provided that standards under applicable Austrian stock corporation law are met. Defensive measures taken after the bidder's intention to make an offer has been announced require the approval of the shareholders' meeting and may inter alia consist of the inclusion of change of control clauses in certain contracts, the issue of securities, the purchase or disposal of own shares, the disposal of important assets of the company, or significant changes concerning the company's finance structure. The prevalence of defensive measures has not changed substantially as a result of the COVID-19 pandemic.

### 9.4 Directors' Duties

The Takeover Act does not provide specific duties for administrative bodies when enacting defensive measures, but based on the rules of general Austrian stock corporation law, preventive measures taken by the management board must be in the interest of the target company. However, should preventive measures be based on a resolution adopted by the shareholders' meeting, such rules of general Austrian stock corporation law do not apply.

### 9.5 Directors' Ability to "Just Say No"

A baseless rejection of a takeover offer is not permitted, since in most cases this is not in the best interests of the company. After the offer document has been published, the management board (and the supervisory board) of the target company must prepare a statement regarding the takeover offer, encompassing an economic assessment of the offer price and a recommendation to the shareholders of the target company. The management board is at liberty to explain in its statement why a takeover offer should not be accepted and it ought to underscore its position by putting forward a counterplan for the future direction of the company and its corporate policy.

## 10. Litigation

### 10.1 Frequency of Litigation

In general, litigation is not common in connection with M&A transactions in Austria. In practice, costs and the duration of proceedings are the two main deciding factors that influence whether parties initiate litigation proceedings or seek other ways to resolve a dispute, such as arbitration. The parties in small M&A deals tend to favour litigation. The main argument in favour of litigation is that the costs incurred in connection with arbitration proceedings are usually higher, making litigation the more attractive means of settling disputes.

In the case of medium or large M&A deals with a multi-jurisdictional background, the parties mostly agree on arbitration to settle any disputes that arise. Arbitration allows the parties involved to receive a swift decision on a dispute away from the public spotlight, compared to litigation proceedings that sometimes drag on for years and are open to public scrutiny. Therefore, the parties to such transactions are often willing to accept the higher costs that come with arbitration proceedings.

Enforcement issues need to be taken into consideration in the case of cross-border M&A transactions as arbitral awards might be enforceable in countries where judgments of state courts are not.

### 10.2 Stage of Deal

Disputes in connection with M&A deals occur at every stage of the transaction (pre-closing versus post-closing).

The majority of disputes occur after closing. Such disputes are often characterised by the buyer asserting claims either regarding representations and warranties provided by the seller, error on behalf of the buyer, or in connection with the calculation of purchase price adjustment amounts.

### 10.3 "Broken-Deal" Disputes

The general view is that there have been no significant findings in connection with "broken-deal disputes" that need to be taken into account in the future.

## 11. Activism

### 11.1 Shareholder Activism

Shareholder activism has emerged and become increasingly visible in Austria in recent years. However, shareholder activist organisations (eg, typically the Austrian Chamber of Labour, trade unions and consumer protection organisations) mainly focus on advising and representing consumers who have suffered damage to their investment made in units for collective investment or similar instruments, mainly by a wrongful prospectus or advertising, including in legal proceedings, rather than tackle M&A cases.

In addition, shareholders may exercise minority rights prior to and in the general meeting, eg, by taking advantage of their right to ask questions. Increasingly, minority shareholders have tried to stretch these rights (some public general meetings have lasted for some hours), but since the law provides for a rather limited system of minority rights, these strategies have not often proved successful.

### 11.2 Aims of Activists

In Austria, activists seeking to encourage companies to enter certain M&A transactions, spin-offs or major divestitures are hardly seen. There may have been very rare M&A cases where the picture may have looked rather the opposite – that hostile acquisitions or takeovers with the likely intention to liquidate, restructure or dispose of large parts of the target business and/or workforce may in rare cases have triggered certain activism or involvement (typically on a discussion and negotiation level rather than by strikes) by politicians or trade unions. Undoubtedly, cases exist where activists, typically minority shareholders, have sought to reinforce their ideas by putting pressure on management. The level of shareholder activism has not changed in a noteworthy manner due to the COVID-19 pandemic.

### 11.3 Interference With Completion

Shareholder activists rarely interfere with the completion of announced transactions in Austria. Regarding the workforce and employee representatives, such as works councils and trade unions, interfering measures, if any, are quite rare since Austrian corporate culture is in many ways characterised by discussion and compromise rather than by strikes or other disruptive action.

In this context, it should be noted that the Austrian Labour Constitution Act grants the works council certain rights to be informed about, to comment on and to be consulted in a timely fashion of planned transfers or reorganisations of undertakings or business units, particularly as to the consequences for the employee workforce.

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