

A New Takeover Code in Austria

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1. Introduction

The Austrian Takeover Act (*Übernahmegesetz, ÜbG*) entered into force on 1 January 1999. In 2006, the Takeover Act was amended by the Takeover Amendment Act (*Übernahmerechts-Änderungsgesetz, ÜBRÄG*) which was passed shortly after the implementation period of the Takeover Directive 2004/25/EC had expired. The Takeover Amendment Act was given retroactive effect as per 20 May 2006. A revision of the Austrian Takeover Act was not only necessary because of the Takeover Directive but also due to constitutional restraints. In particular, the Austrian Constitutional Court challenged the authorization of the Austrian Takeover Commission (Takeover Commission) to issue decrees as well as the definition of a floating 'controlling interest' (§ 22 ÜbG).²

2. Types of Bids, Defined Terms and General Principles

The Austrian Takeover Act distinguishes between three types of bids, namely takeover bids, mandatory bids and tender offers.³

Takeover Bids and Mandatory Bids

Takeover bids are bids that aim to obtain a 'controlling interest' in the target company. According to the flexible definition of the old Austrian Takeover Act a 'controlling interest' was acquired by the majority of the voting rights or the rights to appoint the majority of the board members or by any other means of control. The 'controlling interest' therefore was independent from participation thresholds in the registered share capital or the voting rights of a company, although the old Austrian Takeover Act and the old First Takeover Decree contained a rebuttable assumption of a 'controlling interest' with a participation of 30 per cent in the voting rights of a company.⁴ The amended Austrian Takeover Act now sets forth strict thresholds defining the 'controlling interest' – in general – as the holding of a minimum of 30 per cent of the shares with permanent voting rights in the target company and the 'qualified minority participation' as the holding of 26 per

cent of a company's voting rights. In view of the new fixed thresholds a mandatory bid must – in general – be launched if the bidder has obtained 30 per cent of the shares with permanent voting rights of the target company, for example, by means of purchases of the target company's shares over the stock exchange or in over-the-counter transactions from individual shareholders.

Tender Offers

Tender offers are bids that do not aim at gaining a 'controlling interest' over the target company. In other words, tender offers aim at the acquisition of less than 30 per cent of the permanent voting rights in the target company or, in cases where the bidder already controls the target company, simply at increasing the bidder's shareholding in the target company.

Persons Acting in Concert

Addressees of the provisions of the Takeover Act are not only the bidder and the target company, but also persons 'acting in concert' with the bidder or target company. According to § 1 para. 6 ÜbG parties 'acting in concert' are natural or legal persons cooperating with the bidder on the basis of an agreement aimed at acquiring or exercising control over the target company, especially by concerting votes, or who cooperate with the target company to frustrate the successful outcome of a takeover bid. In particular, if a party holds a direct or indirect 'controlling interest' in one or more other parties, it is assumed that all of these parties are acting in a concerted manner.

Principles

General principles set forth by the Takeover Act are (i) equal treatment of all shareholders of the target company, (ii) all addressees of the offer must have sufficient time and information to make an informed decision, (iii) the managing board and supervisory board of the target company must act in the best interest of all shareholders, employees, creditors and in the public interest, (iv) false statements should be avoided.⁵

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2 For further details on the amended Takeover Act see in particular, *Diregger/Kalss/Winner*, Austrian Takeover Law (Linde 2006); *Huber/Alscher*, The Takeover Amendment Act – an overview, *ecolx* 2006, 574 *et seq.*; *Kaindl/Rieder*, New legal framework for mandatory bids and squeeze-out of minority shareholders, *GesRZ* 2006, p. 247 *et seq.*

3 *Diregger/Kalss/Winner*, paras 13-14; *Huber/Löber*, Takeover Act (ÖrAc 1999), § 1 paras 2-13.

4 *Huber/Löber*, § 22 paras 3-14; for further details see *Zöllner*, Change of Control and obtaining a Controlling Interest under the Takeover Act (Verlag Österreich 2002), pp. 144-247.

5 For further details see *Diregger/Kalss/Winner*, paras 61-109; *Huber/Löber*, § 3 paras 3-32.

3. Disclosure Obligation

Once the bidder's governing bodies (in general managing board and supervisory board) have decided to submit a bid, the bidder shall publicly announce his intention to make the bid. In certain cases, this disclosure obligation may be triggered even sooner. Under Austrian law, the bidder may initiate negotiations with the target company and/or individual shareholders of the target, but he may be forced to publicly announce his intentions in the event that the trading volume and/or price of the target's stock are affected by rumours and speculations.

4. Minimum Content of the Bid

In general, the offer documents shall at least contain the following information: (i) the terms of the bid, (ii) particulars of the bidder, (iii) the shares which are the object of the bid, (iv) the consideration offered for each share and the method of valuation used for determining said consideration, (v) the bidder's shares in the target company and those already held by the parties acting in concert or the shares they are entitled to or obligated to acquire in the future, (vi) all conditions and rights of withdrawal which the bid is subject to, (vii) the bidder's intention regarding the future business of the target company, including his plans with regard to employment and the locations of the target's place of business, (viii) the period for acceptance of the bid and for delivery of the consideration, (ix) the conditions under which the bidder is to finance its bid, (x) information on any parties acting in concert with the bidder, (xi) information on the compensation offered for rights which might be removed as a result of the breakthrough rule pursuant to § 27 a ÜbG as well as details on the form of payment of the compensation and the method according to which it is determined, (xii) information on the national law which will govern contracts concluded between the bidder and the holders of the target's shares as a result of the bid and the competent court, (xiii) in case of a partial bid within the meaning of § 20 ÜbG the maximum and minimum percentages or quantities of shares which the bidder undertakes to acquire and a description of the rules of allocation, (xiv) where consideration is offered in the form of equities, the particulars thereof (§ 7 ÜbG).⁶

5. Price of the Bid

With regard to voluntary bids the Takeover Act does – in principle – not provide for a certain minimum offer price. The price for a mandatory takeover bid (and for an offer with the intention

to acquire a 'controlling interest' (*Übernahmeangebote zur Kontrollerlangung*) must be the higher of (i) the highest consideration offered by the bidder or its related parties in a twelve months period preceding the submission of the bid to the Takeover Commission and (ii) the six months volume weighted stock exchange price during a six months period preceding the publication of the intention to make an offer. Any higher consideration paid for the shares in the target company, paid or promised by the bidder within the acceptance period of a takeover bid or within a period of nine months thereafter, obligate the bidder to effect payment of such positive difference amount also to each shareholder, who has (already) accepted the takeover offer (§ 26 ÜbG).

6. Conditions and Rights of Withdrawal

Pursuant to § 8 ÜbG a bid may be made subject to conditions or rights of withdrawal if these are objectively justified, in particular, if they result from legal obligations of the bidder, or if the application of the condition or the exercise of the right of withdrawal does not depend entirely on the offeror's discretion. The conditions of a minimum acceptance requirement, merger clearance and other official permits and material adverse change ('MAC-clause') have been the most frequently used conditions to date. MAC-clauses may generally refer to a variety of events and circumstances the occurrence of which are likely to endanger the economic goal or success of the bid. These include, for example, events that have adversely affected or reasonably could be expected to adversely affect the target's EBITA by more than a specific amount.⁷ In certain cases such conditions may be waived by the bidder.⁸ Bids by which the offerors intend to acquire a 'controlling interest' (*Übernahmeangebote zur Kontrollerlangung*) are subject to the condition imposed by law that the bidder must receive acceptance declarations within the scope of the bid that account for more than 50 per cent of the shares with permanent voting rights that are the object of the bid (§ 25 a para. 2 ÜbG).

7. Examination of the Bid by an Independent Expert

The bidder needs to appoint a suitably qualified, independent expert to provide advice throughout the proceedings and to examine the offer documents. The expert shall verify that the offer documents are complete and in compliance with the law, in particular, regarding the consideration offered. The expert is required to draw up a written report which summarizes the results of his examination (§ 9 ÜbG).

⁶ See *Diregger/Kalss/Winner*, paras 141-145; *Huber/Löber*, § 7 paras 6-52.

⁷ See *Diregger/Kalss/Winner*, paras 152-161; *Herbst*, Conditions and right of withdrawal under the Austrian Takeover Act, JBI 2003, p. 693 *et seq.*

⁸ For further details see *Hasenauer/Birkner*, Waiver of conditions under the Austrian Takeover Act, *ecolex* 2005, p. 215 *et seq.*

8. Notification and Publication of Bid

The bidder needs to notify the Takeover Commission of the bid together with the offer document and the expert's report. Once the bidder has publicly disclosed his intention to make the bid, the bidder must notify the bid to the Takeover Commission within ten trading days. The Takeover Commission may, upon application by the bidder, extend this period to a maximum of 40 trading days (§ 10 ÜbG). The bidder shall publish the offer document and the expert's opinion no earlier than the twelfth and no later than the fifteenth trading day after receipt by the Takeover Commission, unless the Takeover Commission has prohibited the publication of the bid. In the event of well-founded cases, the Takeover Commission may order the postponement of the publication, in particular, with a view to carrying out a more detailed examination of the offer document. In turn, the Takeover Commission may also shorten the period until publication by an agreement with the bidder (§ 11 ÜbG). Publication of the offer shall be through a newspaper with nationwide distribution or in the form of a brochure made available free of charge to the investing public by the target company at its registered office.

9. Opinion of Target's Management, Supervisory Board and Works Council – Independent Expert

The management board and supervisory board of the target company shall draw up a response stating reasons on the bid immediately after the publication of the bid. The response shall contain, in particular, an assessment of whether the consideration offered and the other terms of the bid take adequate account of the interests of all shareholders and what the probable effects of the bid would be on the target company based on the strategic planning of the bidder, on creditors and the public interest. Should the management board or the supervisory board be unable to give a final recommendation they must in any case, outline the arguments for accepting or rejecting the bid, highlighting the most important features (§ 14 ÜbG). Also the target company has to appoint a suitably qualified independent expert to provide advice throughout the proceedings. The expert shall prepare an evaluation of the bid, of the response of the management board of the target company and supervisory board of the target company (§ 13 together with § 14 para. 2 ÜbG). The management board shall publish its response together with any response of the supervisory board and works council as well as the written statement of the target's independent expert within ten trading days of the publication of the offer documents, but at the latest five trading days prior to the expiry of the acceptance period.

10. Frustrating Action by Target – Changes to the Bid

§ 12 ÜbG provides that the management board and supervisory board of the target company may not take measures likely to deprive their shareholders of the opportunity to make a free and informed decision on the bid. As of the moment when the target company becomes aware of the bidder's intention to make a bid and until the publication of the results, and if the takeover goes ahead, until the bid has been completed, the management board and the supervisory board of the target company shall require the approval of the general shareholders' meeting for the concrete measures that might prevent the bid with the exception of the search for other competing bids. This applies especially to the issuance of equities by which the offeror can be prevented from acquiring a 'controlling interest' in the target company (§ 12 para. 2 ÜbG). Decisions taken by the management board and if applicable by the supervisory board of the target company prior to the point in time at which the administrative bodies of the target company became aware of the bid, which have not even been implemented in part up to that time shall require the approval of the general shareholders' meeting if the measures are not part of the routine business procedure and their implementation could serve to frustrate the bid. Measures to which the administrative bodies of the target company had already been committed at the point in time at which they became aware of the bid, shall not require any approval (§ 12 para. 3 ÜbG).⁹ During the bid period, the bidder may improve the consideration offered or otherwise change the bid to the benefit of the shareholders. An improvement is not permitted if the bidder has declared that it would by no means make an improvement; this shall not apply if a competing bid exists or if the Takeover Commission has authorized an improvement on the bid (§ 15 para. 1 ÜbG).

11. Parallel Transactions

From the date of disclosure of the bidder's intention to make the bid, the bidder and any parties acting in concert shall in particular refrain from making any declarations designed to achieve the acquisition of shares of the target company under more favourable conditions than those set out in the bid, unless the bidder improves the bid or the Takeover Commission grants an exemption for significant reasons (§ 16 para. 1 ÜbG). Further, from the date of disclosure of the bidder's intention to make the bid, the bidder and any parties acting in concert shall be prohibited from selling any equities of the target company (§ 16 para. 2 ÜbG). Certain exemptions from the ban on carrying out transactions in equities of the target company apply to banking institutions (§ 16 para. 4 ÜbG).

⁹ For further details see *Hlawait/Birkner/Graf*, defensive actions against hostile takeover bids, *ecolx* 2000, p. 84 *et seq.*; *Diregger/Kalss/Winner*, paras 91-98; *Huber/Löber*, § 12 paras 1-32.

12. Exclusion Period

Should a (voluntary) bid fail, the bidder and parties acting in concert shall be excluded from making any further bids for a period of one year after the publication of the results of the bid. They shall also be banned from acquiring shares during the same period that could trigger an obligation to make a bid (§ 21 para. 1 ÜbG). The foregoing shall also apply if the bidder does not make a bid although (i) the bidder has disclosed plans or intentions to make a bid or to act in such a way as to trigger an obligation to make a bid, (ii) the bidder has disclosed the decision of its management board and supervisory board to make the bid, (iii) the bidder has publicly stated that making a bid cannot be excluded. In such cases, the exclusion period shall begin 40 trading days after the disclosure or public declaration. Likewise, the bidder shall be excluded from making a bid for a period of one year if it has publicly stated that it will not make a bid nor is it contemplating acting in such manner so as to trigger an obligation to make a bid (§ 21 para. 3 ÜbG). The Takeover Commission may, upon application by the bidder and after consultation with the target company, shorten the exclusion period if this is not detrimental to the interests of the company and the shareholders of the target company.

13. Particularities Relating to Mandatory Bids and Takeover Bids

Controlling Interest

Pursuant to § 22 ÜbG anyone directly or indirectly obtaining a 'controlling interest' (i.e. in general a direct or indirect interest in the target company of more than 30 per cent of the shares with permanent voting rights) is required to immediately notify the Takeover Commission and within twenty trading days of acquiring a 'controlling interest' announce to the target company a bid for all of its shares. An 'indirect controlling interest' – in general – exists if a legal entity (irrespective of whether it is listed or not) holds a direct 'controlling interest' in a company listed on the Vienna Stock Exchange and shares in this entity, or any other right, provide the opportunity to exercise a controlling influence over such entity. Due to the low presence of shareholders at the shareholders' meetings in Austria it should in a number of cases be possible to exercise control over a company without being under an obligation to make a mandatory bid.¹⁰

Passive Acquisition of Control

Any person having acquired a direct or indirect 'controlling interest' who has not caused this to occur by taking any action at

a time close to the bid, in particular, by acquiring shares (passive acquisition of control), is not under the obligation to make a bid if at the time of acquiring the shares, the acquisition of a 'controlling interest' was not foreseeable. In this case the shareholder is barred from exercising more than 26 per cent of the voting rights (§ 22b ÜbG). According to the Takeover Commission the requirement that the passive acquisition was not 'foreseeable' has to be defined very narrowly.¹¹

Exceptions

In spite of reaching the 30 per cent voting rights threshold, the obligation to make a mandatory bid shall not apply if the shareholding does not confer a dominant influence in the target company or if there is no change in ownership with dominant influence (§ 24 ÜbG). A shareholding in the target company, in which the voting rights are restricted in the articles of association to a maximum of 30 per cent, does not qualify as a 'controlling interest' according to the ÜbG.

Qualified Blocking Minority

Shareholders in control of between 26 per cent and 30 per cent of the voting rights are not obligated to make a mandatory offer but are obligated to notify the Takeover Commission of such acquisition of a 'blocking minority' (§ 26 a ÜbG). Also in this case, it shall not be possible to exercise more than 26 per cent of the shares with permanent voting rights. The Takeover Commission may rescind the suspension of the voting rights entirely or partly upon application of the affected shareholder. In such case, the Takeover Commission is entitled to define conditions and requirements as long as it provides equal protection for other shareholders. The potential target companies can lower the threshold of a 'controlling interest' in the articles of association (§ 27 ÜbG).¹²

Breakthrough

In line with § 27 a ÜbG limitations to the transferability of shares set out in the articles of association are not effective during the acceptance period so that the bidder may validly acquire and the selling shareholders may validly sell their shares during the course of the bid. The same applies in case of voting rights restrictions or transfer restrictions contained in shareholders' agreements if such restrictions or agreements have been implemented after 30 March 2004 (i.e. day of publication of the Takeover Directive in the Official Journal). A direct or indirect shareholder who is not sure whether he is required to make an offer or not has the right to obtain an assessment from the Takeover Commission.

¹⁰ *Diregger/Kalss/Winner*, paras 179-181.

¹¹ See recent statement of the Takeover Commission (GZ 2007/3/1), whereas in case of a passive acquisition of a controlling interest due to a share buy back by the target company itself no exemption under § 22 ÜbG applies, as such possibility of a buy back programme is not 'unforeseeable' but has to be taken into account by any shareholder at any time.

¹² See *Diregger/Kalss/Winner*, paras 211-213.

Takeover Bids

The provisions of the Takeover Act on mandatory bids apply *mutatis mutandis* to takeover bids that, once completed, could result in the bidder obtaining a 'controlling interest' in the target. So public takeover bids qualify as anticipatory bids if the bidder, when making the offer, does not hold a 'controlling interest' in the target company but, due to an over-the-counter share purchase or any other form of transaction, could obtain a 'controlling interest'. The instrument of the anticipatory offer opens the possibility for the bidder to structure the takeover according to its aims, for example, restructurings, delisting or general business development of the target.¹³

14. Acceptance Period, Publication of Results, Sell Out

In line with § 19 para. 1 ÜbG the period for accepting the bid shall in principle be not less than two weeks and no longer than ten weeks after the publication of the bid. Under certain circumstances the acceptance period may be shortened (§ 19 para. 1a ÜbG) or prolonged (§ 19 para. 1b ÜbG). If a competing bid has been made, the acceptance period of such bid must be at least two weeks and shall not end before the expiry of the acceptance period of the first bid (§ 19 para. 1c ÜbG). The bidder shall publish the results of the bid immediately after the end of the acceptance period, whereas also certain legal consequences have to be indicated (§ 19 para. 2 ÜbG). In case of a mandatory offer, the shareholders not having accepted the initial tender offer via the sell out provision have the possibility to accept the offer within a further period of three months after the publication of the result of the offer. The same applies to voluntary tender offers, in which the offer was subject to the condition precedent that the bidder must reach a certain acceptance threshold in the target and this condition is satisfied (§ 19 para. 3 ÜbG). The payment period for the bidder is, in case of a mandatory offer, ten market days after the publication of the result of the offer and, with respect to those shareholders who accept the offer within the additional acceptance period mentioned above, ten market days after the end of this additional acceptance period. In the case of a voluntary tender offer, the bidder is free to determine the payment period in the offer.

15. International Scope of Applicability

Within its domestic scope of application the provisions of the Austrian Takeover Act apply to all public bids (voluntary and mandatory) to acquire equities issued by a public limited company having its registered office in Austria and admitted to a regulated market on an Austrian stock exchange. As for stock

corporations with registered office in Austria and an exchange listing abroad the regulatory authority of the country where the stock exchange is situated is in principle in charge of supervision over any public bids, only certain parts of the Austrian Takeover Act apply. Provided that (a) the shares are not admitted to trading on a regulated market in Austria, but only to a regulated market of another Member State of the European Community or of a Member State of the EEA and (b) that the bid would qualify as a mandatory bid or a voluntary bid to acquire a controlling interest (§ 27b ÜbG), such bids shall, in principle, be subject to the following provisions: (i) notification of employees of the target (§ 11 ÜbG), (ii) prohibition to block and to remain objective (§ 12 ÜbG), (iii) mandatory bid (§§ 22 through 23 ÜbG), exceptions from mandatory bid (§ 24 ÜbG), notification obligation in case of a 'controlling interest' (§ 25 ÜbG), (iv) block minority thresholds (§ 26a ÜbG), (v) declaration on proceedings (§ 26b ÜbG), (vi) changes to the articles of association (§ 27 ÜbG) and (vii) breaches of restrictions (§ 27a ÜbG). Certain provisions of the Austrian Takeover Act even apply to public bids relating to shares by a stock corporation with the registered office in another Member State of the European Community or in a Member State of the EEA if (a) the shares are admitted to trading on a regulated market in Austria, but not on a regulated market in the country of domicile of the stock corporation, (b) the shares have not already been admitted to trading on a regulated market in a third Member State of the European Community or in a Member State of the EEA before being admitted to trading in Austria, (c) the stock corporation has sent notification pursuant to § 82 para. 11 Stock Exchange Act that Austria is to be responsible for the supervision of public offerings if the equities are simultaneously admitted for the first time to trading on a regulated market in Austria and in a third Member State of the European Community or a Member State of the EEA, and (d) the bid would qualify as a mandatory bid or a voluntary bid to acquire a controlling interest if the stock corporation were to be domiciled in Austria (§ 27c ÜbG). In such case the bid shall be subject to the material provisions relating to the contents of the bid and the bidding procedure (§§ 4 through 11, §§ 13 through 21 and §§ 25a through 26 ÜbG).

16. Squeeze-out

As Article 15 of Directive 2004/25/EC constitutes that the Member States shall ensure that a bidder is able to require all the holders of the remaining securities to sell him/her those securities at a fair price, a new legal basis for the squeeze-out of minority shareholders has been enacted in Austria contained in

¹³ See *Diregger/Kaisl/Winner*, paras 325-327.

the Austrian Squeeze-out Act (*Geschafter-Ausschlussgesetz, GesAusG*). The previous Austrian law has already provided alternatives for squeeze-out pursuant to the Austrian Transformation Act (*Umwandlungsgesetz*) by transformation of a corporation by transferring its entire business by way of universal legal succession to its majority shareholder (*verschmelzende Umwandlung*) and by demerger according to the Austrian Demerger Act (*Spaltungsgesetz*). The introduction of the new GesAusG as part of the Austrian takeover law reform shall provide a unification of the several ways to exclude a minority shareholder. The squeeze-out of minority shareholders is an encroachment on their rights of property and therefore requires an objective justification. From the point of view of the Austrian legislator such an exclusion primarily is in the interests of the majority shareholder, however, there is also a public interest in competitive structures of the enterprises and control mechanics which may be implemented more easily without minority shareholders. Furthermore, the squeeze-out regime provides the sole practical alternative for an intended withdrawal from the stock exchange since the Austrian stock exchange law does not provide, for instance, a delisting upon an application of the issuer to the listed enterprise.

17. General Principles

The GesAusG shall be applicable for stock corporations as well as for limited liability companies. The legislator has extended the scope of the squeeze-out regime to limited liability companies considering that the current law provides sufficient legal protection for shareholders of a limited liability company against an expulsion as the preclusion of the application of the Squeeze-out Act by the articles of association. Furthermore, the shareholders are entitled to agree on the exclusion of such competence for a squeeze-out. The GesAusG requires a resolution of the majority shareholder holding not less than 90 per cent of the share capital of the enterprise for such squeeze-out. Whereas the enterprise is entitled to raise the respective threshold by means of a provision in the articles of association, a reduction of this threshold is not admissible (§ 4 GesAusG). Affiliated companies holding not less than 90 per cent of the share capital of the company shall also be entitled to resolve the squeeze-out. The latter postulates that the affiliation of such companies must exist continuously from one year before the passing of the resolution (§ 1 para. 4 GesAusG). Pursuant to § 2 para. 1 GesAusG the minority shareholder shall receive an appropriate cash settlement for the squeeze-out. The respective cash settlement is payable two months after the announcement of the registration in the commercial register and shall bear interest from the time of the resolution by the meeting of the shareholders until the maturity at an annual rate of two per cent above the relevant base interest rate.

A precedent condition for the resolution is a report by the

majority shareholder and the managing board in which at least the preconditions and the appropriateness of the cash settlement are explained and substantiated. The accurateness of the report shall be reviewed by an expert auditor upon a joint application of the majority shareholder and the enterprise. In comparison to the previous law the expert shall be appointed by the court in order to grant a certain preventive control of the appointment. If the company has established a supervisory board, the supervisory board is obliged to review both reports and to make a written report regarding the intended squeeze-out (§ 3 GesAusG). Upon request each shareholder shall be entitled to information concerning matters relating to the squeeze-out of the minority shareholder. However, the Squeeze-out Act refers to Section 112 para. 3 Austrian Stock Corporation Act (AktG). Thus, the information right of the minority shareholder is limited since the information may be refused. In consideration of this fact the minority shareholder consequently may not enforce the information right by law.

In comparison to the previous law only the managing board shall be responsible for the registration in the commercial register. In particular, the managing board shall submit a declaration stating that no action of opposition or for the establishment of nullity or declaration of nullity of the resolution has been asserted within one month following the passing of the resolution, or that such action has been withdrawn or that all shareholders have waived their rights to file such an action by means of a declaration certified by a notary public. Since the registration of the resolution is constitutive, all shares of the minority shareholder shall pass to the majority shareholder upon registration of the resolution in the commercial register. An additional assignment is not required. If securities have been issued in respect of such shares, they shall certify only the claim to the cash settlement from that moment. The GesAusG does not provide other provisions regarding the legal protection of the excluded shareholder compared to the previous law but refers to the procedure regarding the review of the exchange ratio by the committee pursuant to Sections 225g *et seq.* AktG. On this note an appeal against the resolution of the squeeze-out is not admissible. Actions of opposition shall solely be permitted in case of gross infringements such as deficiencies with respect to the convocation or the delivery. The application for the review of the cash settlement must be within one month from the announcement of the registration.

18. Squeeze-out after Takeover Proceedings

§ 7 GesAusG constitutes the right of squeeze-out by a majority shareholder in connection with a takeover bid based on Article 15 EU Takeover Directive 2004/25/EC provided that the bidder undertakes this squeeze-out within three months of the end of the period allowed for acceptance of the bid. If the share capital

of the majority shareholder is based on a takeover bid in terms of the Austrian Takeover Act representing not less than 90 per cent of the capital carrying voting rights and 90 per cent of the voting rights of the stock corporation, such shareholder is entitled to a squeeze-out. Since these provisions are mandatory law, alternative provisions provided by the articles of association may not avoid the squeeze-out of the minority shareholder after a public offer. Regarding the cash settlement § 7 para. 3 GesAusG constitutes the presumption that the cash settlement in the amount of the highest consideration is appropriate. However, the respective presumption is rebuttable.¹⁴

19. Conclusion and Final Remarks

Austria has fully implemented the Takeover Directive 2004/25/EC. In particular, Article 9 (Obligations of the board of the offeree company) and Article 11 (Breakthrough) have been implemented in a way that any frustrating action by the target requires the consent of the shareholders' meeting and the breakthrough regime can be made applicable in the target's articles of association. Before the Takeover Amendment Act implementing the Takeover Directive, Austrian takeover law did not contain a formal 30 per cent control threshold but defined the controlling interest substantially as the power to exercise a controlling influence with the term control defined. Contrary to expectations, practice has shown that even with the new 30 per cent control threshold takeover related questions and uncertainties still exist. In particular, provisions regarding the indirect acquisition of control, for which the substantial definition of a controlling interest still applies, and the politically motivated introduction of a further threshold for qualified blocking minorities at 26 per cent of the voting rights cause problems and require complex legal structuring. Creeping-in provisions have not been eliminated from the law. In practice creeping-in is impractical, in particular if a shareholder has already issued a takeover offer with little acceptance. It remains to be seen whether such inconsistencies will be subject to the next amendment of Austrian takeover law.

14 For further details see *Diregger/Kahls/Winner*, paras 353-356; *Gall/Potyka/Winner*, Squeeze-Out (Verlag Facultas 2006), p.133 *et seq.*