

# PUBLIC M&A

## Austria



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Quick reference guide enabling side-by-side comparison of local insights into public M&A issues worldwide, including types of business combination; principal laws and regulations; cross-border and sector-specific considerations; governing laws; filing and disclosure requirements; duties of directors and controlling shareholders; shareholder approval and appraisal rights; hostile transactions; break-up fees and frustration of additional bidders; government influence; conditional offers; financing; minority squeeze-outs; waiting and notification periods; tax; labour and employee benefits; restructuring, bankruptcy or receivership; anti-bribery, anti-corruption and sanctions issues; and recent trends.

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Generated 06 June 2022

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## STRUCTURES AND APPLICABLE LAW

### Types of transaction

How may publicly listed businesses combine?

By far the most important transaction structure in Austria in practice remains the acquisition of a (controlling) stake, combined with, or followed by, a public tender offer. More recent takeover practice has seen the use of business combination agreements (eg, Vonovia/BUWOG and, with the bidder AMS as the Austrian involved party, AMS/Osram ). Under the Takeover Act, the target's board must refrain from any action that could impair the shareholders' uninfluenced and informed decision on, and that may prevent the success of an offer. A search for a white knight is allowed.

Another potentially possible transaction structure resulting in a shareholder change would be a (cross-border) merger. Given the relatively broad scope of the Takeover Act as to obtaining control over a publicly listed company, a statutory merger may also result in such control change (and thus trigger a mandatory takeover bid). There have been cases in the past, however, in which a combination of listed companies was achieved without triggering a public offer in Austria (reverse mergers, eg, Bwin/PartyGaming in 2011, Intercell/Vivalis in 2013 and, most recently, RHI/Magnesita ).

*Law stated - 30 March 2022*

### Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The most important Austrian laws specifically governing transactions involving listed companies are:

- the Takeover Act;
- the Stock Exchange Act;
- the Market Abuse Regulation;
- the Stock Corporation Act;
- the Capital Markets Act; and
- the Squeeze Out Act, which regulates the squeeze-out of up to 10 per cent of shareholders in a stock corporation or a company with limited liability.

*Law stated - 30 March 2022*

### Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Under the Austrian Investment Control Act, the acquisition by non-EU/non-European Economic Area (EEA)/CH investors of an interest in, or otherwise of control over, an Austrian enterprise operating in certain industry sectors (eg, defence equipment, security services, energy, water, public transport, telecoms) requires advance approval by the Austrian Federal Minister of Digital and Economic Affairs.

The thresholds are: 10, 25 and 50 per cent (or more) for certain particularly critical sectors (defence equipment and technology, operation of critical energy infrastructure, operation of digital infrastructure – in particular, 5G – water, operation of critical data systems and R&D in relation to medicines, vaccines, medical devices and protective gear) and

25 and 50 per cent or more for other industry sectors listed on an annex to the Investment Control Act.

In practice, the ministry takes an extremely expansive view of the regulations, arguing that a transaction must be filed for approval in each case of a target company operating in a relevant sector even if the specific target company in question does not operate any critical assets or infrastructure as such. A prime example is a target company active in the IT sector, which – as a sector – is considered ‘critical’ by the authority irrespective of whether the specific target company is providing critical services or not.

*Law stated - 30 March 2022*

## Sector-specific rules

### Are companies in specific industries subject to additional regulations and statutes?

In practice, the most important sector-specific regulations concern the financial services industry (ie, apply to credit institutions, securities firms and insurance companies) as well as the telecoms sector and airlines. For instance, the direct or indirect acquisition (or sale) of a qualified stake (10 per cent or otherwise controlling influence) or the acquisition or sale of a stake resulting in a participation of 20, 30 or 50 per cent (or, in each case, more) of the share capital or voting rights of an Austrian credit institution requires prior notification to and clearance by the Financial Market Authority.

Similarly, material changes to the ownership structure of a telecom company require the prior consent of the telecommunications regulatory authority and the acquisition of control in an Austrian airline by a non-EU/non-EEA national may result in the loss of the airline’s operating licence.

If a target company owns real estate located in Austria, Austrian Foreign Land Transfer Approval regulations may also result in notification or approval requirements.

*Law stated - 30 March 2022*

## Transaction agreements

### Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Yes. Depending on the shareholder structure of the target, an acquirer may aim to purchase a controlling stake off-market (thereby triggering the obligation to launch a mandatory offer) or launch a voluntary offer aimed at control. Voluntary offers aimed at control are subject to a statutory minimum acceptance condition of 50 per cent + 1 share (of the shares subject to the offer). In practice, a bidder may thus try to obtain irrevocable undertakings from key shareholders to accept the offer.

More recent takeover practice in Austria has also seen the use of business combination agreements.

Agreements are typically governed by Austrian law.

*Law stated - 30 March 2022*

## FILINGS AND DISCLOSURE

### Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

In the case of a voluntary offer, the bidder must file the offer document with the Austrian Takeover Commission within 10 trading days of the announcement of the offer. This period may be extended to maximum 40 trading days upon application by the bidder. In the case of a mandatory offer, the offer document must be filed within 20 trading days from obtaining control. This period cannot be extended.

A public tender offer triggers filing fees payable to the Austrian Takeover Commission. These depend on the amount of the consideration payable by the bidder under the offer and range from minimum 0.2 per cent of the consideration payable up to the first €100 million (but at least €60,000) up to a maximum of €550,000.

Other filing obligations and fees may arise if Austrian merger control clearance is required (filing fee €3,500, payable in advance before submission of the notification to the Austrian Competition Authority). Austrian merger control clearance needs to be obtained if:

- the combined worldwide turnover of the undertakings concerned exceeds €300 million;
- the combined Austrian turnover of the undertakings concerned exceeds €30 million;
- the Austrian turnover of each of at least two undertakings concerned exceeds €1 million; and
- the worldwide turnover of each of at least two of the undertakings concerned exceeds €5 million.

A de minimis exception applies if: (1) only one of the undertakings concerned' Austrian turnover exceeded €5 million and (2) the other undertakings concerned' combined worldwide turnover did not exceed €30 million.

In addition, and even if the above criteria are not met, a transaction requires pre-merger approval provided the following four cumulative conditions are fulfilled (transaction value threshold):

- the combined worldwide turnover of the undertakings concerned exceeds €300 million;
- the combined Austrian turnover of the undertakings concerned exceeds €15 million;
- the value of consideration for the transaction is greater than €200 million; and
- the target has significant activities in Austria (local nexus).

Note 1: The relevant turnover includes turnover of companies in which a shareholding of 25 per cent or more is held, irrespective of whether such shareholding confers (co-)control.

Note 2: Thresholds have been amended with effect as of 1 January 2022. A new local revenue limb is added to the revenue-based threshold: Each of at least two undertakings concerned must have revenues of more than €1 million in Austria, in addition to their combined revenues in Austria exceeding €30 million. The existing de minimis exemption and the existing transaction value threshold remain unchanged. The new revenue-based threshold applies to notifications submitted after 31 December 2021. The FCA considers the new threshold to apply to transactions that 'close' after 31 December 2021.

A mandatory notification to the European Commission will be required in respect of transactions meeting the turnover thresholds set out in the EU Merger Regulation (but no separate filing will then be required in Austria).

No stamp duties are payable on a sale and transfer of shares as such but certain steps that may occur in connection with the acquisition of a public company may require involvement of a notary public or filings with the companies register, for which fees are due. The acquisition of 95 per cent (or more) of the shares in a company that owns real estate located in Austria by one single purchaser triggers real estate transfer tax. This can be compliantly avoided by using a suitable two-purchaser structure.

*Law stated - 30 March 2022*

## Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

In Austria, there is no general database containing all documents relating to transactions to which a listed company is party. However, individual information and documentation (at least in excerpts) may need to be disclosed (eg, under ad hoc disclosure rules or if the approval of the general shareholders' meeting is required for a transaction (in which case the relevant information needs to be disclosed together with the invitation to such meeting, eg in the case of a statutory merger)). During takeover proceedings, all documentation relating to the takeover offer and relevant for target shareholders (including the offer document and any amendment thereof, as well as statements by the target's management and supervisory board) must be disclosed on the websites of the bidder, the target company and the Austrian Takeover Commission .

Ultimate beneficial owners of more than 25 per cent or otherwise controlling beneficial owners must be registered with the Austrian Register of Beneficial Owners, parts of which are publicly accessible.

*Law stated - 30 March 2022*

## Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

The Austrian Stock Exchange Act requires notification of the Financial Market Authority, the stock exchange and the target company as soon as a bidder's stake directly or indirectly reaches, exceeds or falls below the following voting rights thresholds: 4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75 and 90 per cent. The articles of association of the target may lower the initial threshold to 3 per cent. The notification must be made without undue delay and in any event within two trading days.

The disclosure obligations also apply to (direct or indirect) holders of financial instruments that give the holder the right or discretion to acquire existing shares to which voting rights are attached or that have a comparable (economic) effect irrespective whether a transfer of financial instruments takes place (ie, cash settlements). Financial instruments and aggregation rules are defined broadly.

A violation of these disclosure obligations results in a mandatory suspension of voting rights for a period of six months from the date when the disclosure is made, except if the notification is made at the latest within two trading days from receipt of a request by the target company and (1) the shareholder's aggregate stake does not exceed 15 per cent of the total share capital and (2) the size of the stake not disclosed is below 3 per cent of the total share capital. In addition, penalties of up to €10 million or 5 per cent of annual revenues (€ 2 million or twice the benefit resulting from the violation in the case of individuals, whichever is the higher) may be imposed.

Separate notification (disclosure) obligations apply under the Austrian Takeover Act: a bidder must notify the Austrian Takeover Commission without undue delay, inter alia, upon:

- obtaining (directly or indirectly) a stake of more than 26 per cent (but not more than 30 per cent) of the permanent voting shares;
- obtaining (directly or indirectly) a controlling stake; and
- increasing its stake as long as the creeping-in rules apply (ie, as long as a bidder holds a controlling stake but remains below the majority of voting rights and acquires 2 per cent or more of additional voting shares within 12



months).

Further disclosure obligations apply during ongoing takeover proceedings, including with respect to parallel transactions, if any.

*Law stated - 30 March 2022*

## **DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS**

### **Duties of directors and controlling shareholders**

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

The management board (and the supervisory board) of an Austrian stock corporation must act in the best interest of the company, duly taking into account the interests of shareholders, employees and the public at large. Board members owe the company a duty of care of a diligent and prudent businessperson. Shareholders in general (not only controlling shareholders) have certain fiduciary duties vis-à-vis other shareholders and the company, for instance not to deliberately act to the detriment of the company's interests. Such fiduciary duties are intensified for controlling shareholders. The Stock Corporation Act sets forth that shareholders in the same circumstances must be treated equally.

In a public takeover scenario, the primary obligation of the board is not to frustrate the bid. The target's board must refrain from any action that could impair the shareholders' uninfluenced and informed decision on, and that may prevent the success of an offer. All measures that may frustrate or prevent the offer require prior approval by the shareholders' meeting once the target becomes aware of the bidder's intent to launch an offer and until publication of the result of the offer, respectively if the offer is successful, settlement of the offer. A search for a white knight is, however, allowed without seeking shareholder approval.

Other key duties concern maintaining strict confidentiality until public announcement of an offer (subject to preventing irregular stock price movements that may result into an obligation to make a leak announcement) and the preparation and publication of a reasoned opinion on the offer without undue delay after its publication.

*Law stated - 30 March 2022*

### **Approval and appraisal rights**

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

This depends on the transaction structure. Statutory mergers, for instance, require the approval by the shareholders' meeting with a majority of 75 per cent of the share capital present or represented at the vote. The same would apply in the case of a business combination by way of an in-kind capital increase (ie, the issuance of shares in exchange for the contribution of shares of another undertaking or of a business or business unit).

The Austrian merger regime foresees special proceedings to challenge the share exchange ratio in a merger or the adequacy of cash compensation payments payable in the course of a merger, if any. As a consequence, shareholders are prevented from seeking invalidation of a shareholders' resolution approving a merger on these grounds but must raise such claims in these dedicated appraisal proceedings. In practice, these proceedings are overly complex, driven

by expert opinions on valuation and take extremely long.

*Law stated - 30 March 2022*

## COMPLETING THE TRANSACTION

### Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

Hostile takeover bids are extremely rare in Austria. However, this is due to the typical shareholder structure of Austrian listed companies (often there is an anchor shareholder whose stake will be crucial to be able to exercise control, respectively obtain a majority of voting rights). Austrian stock corporations have a two-tier board structure (management and supervisory board) and while a controlling shareholder will ultimately be able to obtain control over the supervisory board, a recall of supervisory board members prior to the expiry of their term requires a 75 per cent majority of votes cast in the shareholders' meeting (unless the articles foresee a lower majority, which is often the case for listed companies). Management board members are appointed and recalled by the supervisory board (but are not subject to instructions of the supervisory board) and may be recalled prematurely only for cause.

If a hostile bid situation would arise, due to the 'duty of neutrality' of the target's boards, the target's options are limited. Permitted actions include the search for a white knight and measures implemented with the approval of the shareholders' meeting (which, in practice, means a very high burden in a takeover situation), except for measures that the target is already obliged to implement when the bidder's announcement is made.

The target's management and supervisory boards must also issue reasoned opinions on the bid without undue delay after publication of the offer document. These opinions must be published within 10 trading days after publication of the offer document. In their opinions, the management and supervisory boards must, in particular, explain whether the consideration offered is adequate and what the expected consequences of the bid will likely be for the target company, in particular its employees and creditors but also the public at large, duly taking into consideration the bidder's strategic plans. Although these opinions must be objective, they give the target's boards certain room to voice their view on and seek to influence the outcome of a bid. Recent takeover practice has seen – ultimately unsuccessful – attempts by the boards of IMMOFINANZ AG to influence the outcome of takeover offers by, both CEE Immobilien GmbH and CPI Property Group SA by (at least initially) publishing opinions that argued that the offer price(s) were too low.

*Law stated - 30 March 2022*

### Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

(Reverse) break-up fees have so far not found their way into Austrian public takeovers. While increasingly seen in private M&A transactions, to comply with Austrian corporate law, any break-up fees payable by a target company would be permissible only insofar as they are in the best interest of the company and do not constitute a prohibited repayment of capital. Furthermore, a stock corporation is not allowed to provide financial assistance or collateral in connection with the acquisition of its own shares by a third party. Break-up fees payable by a bidder to a controlling shareholder in connection with an off-market transaction (eg, for failure to obtain merger control clearance or other approvals such as FDI clearance within a certain period of time) are quite conceivable.

*Law stated - 30 March 2022*

## Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Under the Austrian Investment Control Act, the acquisition by non-EU/non-European Economic Area (EEA)/CH investors of an interest in, or otherwise of control over, an Austrian enterprise operating in certain industry sectors (eg, defence equipment, security services, energy, water, public transport, telecoms) requires advance approval by the Austrian Federal Minister of Digital and Economic Affairs.

The thresholds are: 10, 25 and 50 per cent (or more) for certain particularly critical sectors (defence equipment and technology, operation of critical energy infrastructure, operation of digital infrastructure – in particular, 5G – water, operation of critical data systems and R&D in relation to medicines, vaccines, medical devices and protective gear) and 25 and 50 per cent or more for other industry sectors listed on an annex to the Investment Control Act.

In practice, the most important sector-specific regulations concern the financial services industry (ie, apply to credit institutions, securities firms and insurance companies) as well as the telecoms sector and airlines. For instance, the direct or indirect acquisition (or sale) of a qualified stake (10 per cent or otherwise controlling influence) or the acquisition or sale of a stake resulting in a participation of 20, 30 or 50 per cent (or, in each case, more) of the share capital or voting rights of an Austrian credit institution requires prior notification to and clearance by the Financial Market Authority.

Similarly, material changes to the ownership structure of a telecom company require the prior consent of the telecommunications regulatory authority and the acquisition of control in an Austrian airline by a non-EU/non-European Economic Area national may result in the loss of the airline's operating licence.

If a target company owns real estate located in Austria, Austrian Foreign Land Transfer Approval regulations may also result in notification or approval requirements.

*Law stated - 30 March 2022*

## Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

In a mandatory takeover offer (ie, an offer triggered as a consequence of the bidder having obtained a controlling stake in the target), only legally required conditions are allowed – in essence regulatory approvals such as merger control.

In a voluntary offer aimed at control a bidder may include other conditions and even a rescission right provided the conditions are objectively justified and their fulfilment (or non-fulfilment) is not within the sole discretion of the bidder. In addition, voluntary offers aimed at control are subject to a statutory 50 per cent+ minimum acceptance threshold. Other typical conditions seen in Austrian takeover practice include material adverse change conditions, no insolvency, no changes to the capital structure of the target or its articles, etc. In a so-called anticipatory mandatory takeover offer, the bidder will be able to reserve a rescission right until the offer becomes unconditionally binding.

Financing of the bid must be secured upon a bidder's announcement to launch an offer, which may only be made if the bidder has previously ensured that it has at its disposal the necessary financial means to pay the entire cash

consideration and to deliver any other form of consideration it intends to offer. Together with the offer document, the bidder must provide a financing confirmation by an independent expert (an auditor or certain banks).

*Law stated - 30 March 2022*

## **Financing**

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Together with and as part of the offer document, the bidder must provide a financing confirmation by an independent expert (auditor or certain banks). The bidder must ensure that upon making a public announcement that it intends to launch an offer it has secured sufficient financing to be able to fulfil its obligation as regards consideration payable under the offer. Generally, it is uncommon that a seller would provide financial assistance to a buyer in the context of a public takeover bid, although, for example, a vendor loan would not be prohibited per se. In connection with applicable public takeover minimum price rules, above-market interest payable by a bidder under a vendor loan would, however, have to be taken into account as potentially increasing the consideration payable to all shareholders under the takeover offer.

*Law stated - 30 March 2022*

## **Minority squeeze-out**

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

A squeeze-out of minority shareholders is possible at any time under the Squeeze-Out Act upon approval by the shareholders' meeting against adequate compensation if a core shareholder holds at least 90 per cent of the entire outstanding share capital.

If, however, the shareholders' resolution is passed within three months of the end of the acceptance period of a public takeover offer directed at all shareholders of the target company and the bidder has acquired more than 90 per cent of the shares subject to the offer either in the offer as such or in the course of parallel transactions, a (rebuttable) presumption applies that the highest consideration payable under the takeover offer also constitutes 'adequate compensation' within the meaning of the Squeeze Out Act.

If the bidder holds 90 per cent or more of the entire outstanding share capital, it may also squeeze out non-voting preference shares.

In both squeeze-out scenarios, the majority shareholder and the target's management board must prepare a report on the contemplated squeeze out, which must be reviewed by an external auditor who also needs to confirm the adequacy of the compensation.

*Law stated - 30 March 2022*

## **Waiting or notification periods**

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

A bidder must immediately make a public disclosure and notify the management and supervisory board of the target if its board has taken a decision to launch a takeover offer or circumstances have arisen that require the bidder to launch a takeover offer. A similar disclosure must also be made immediately if there are market rumours or speculation or stock price movements due to the preparation or consideration of an offer.

Within 10 trading days from announcement, the bidder must file the offer document (including financing confirmation by the external expert) with the Austrian Takeover Commission. This period may be extended to maximum 40 trading days upon application of the bidder. In the case of a mandatory offer, the Austrian Takeover Commission must be notified immediately upon the bidder having obtained control and the offer document must be filed within 20 trading days.

Unless the Austrian Takeover Commission prohibits publication of the offer, the bidder must publish the offer document not earlier than the 12th and not later than the 15th trading day following receipt of the bidder's filing by the Austrian Takeover Commission. Prior to publication, the bidder must provide the document to the target's management board and the chairman of the target's supervisory board.

The acceptance period must be at least four weeks and not more than 10 weeks from publication of the offer document. Without delay following the end of the acceptance period, the bidder must publish the result of the offer. The acceptance period is automatically extended by three months from the date of the announcement of the result of the offer if a mandatory offer was made, the bidder acquired more than 90 per cent of the voting stock of the target in the course of a voluntary offer or the offer was subject to a minimum acceptance threshold and this condition was met.

In the case of a statutory merger, the (draft) merger agreement and ancillary documents, including required merger reports and expert opinions must be available for review by shareholders for at least one month prior to the shareholders' meeting that shall resolve on the merger. The balance sheet of the transferring companies on which the merger shall be based must not be older than nine months when the merger is filed with the Austrian companies register. If the most recent annual financial statements date back more than six months when the merger agreement is drawn up, an interim balance sheet needs to be prepared.

In the case of (other) transaction structures that require approval by the general shareholders' meeting (eg, capital increase against in-kind contribution or a sale of material assets), it needs to be taken into consideration that the minimum invitation period is 28 days for an ordinary shareholders meeting and 21 days for an extraordinary meeting.

*Law stated - 30 March 2022*

## OTHER CONSIDERATIONS

### Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

For individuals, a sale of shares in connection with the acceptance of a public takeover offer generally gives rise to a capital gains tax liability under the Austrian Income Tax Act. The tax base, in principle, amounts to the sale proceeds less the acquisition costs. The tax rate is 27.5 per cent. If the sale is done via an Austrian custodian agent or paying agent, the income tax is collected by way of withholding tax (WHT).

Income from dividends are taxed at a rate of 27.5 per cent (WHT deduction) by the corporation distributing the dividend for income tax purposes. Different rules apply to shareholders that are not resident for tax purposes in Austria.

Corporations are subject to corporate income tax of 25 per cent on capital gains realised on the sale of shares, a business or assets. Austrian corporations may enjoy tax-exempt capital gains on shares based on a special participation privilege if:

- shares in a foreign corporation are sold;
- the shareholding is at least 10 per cent;
- the shares are held for more than 12 months;
- the foreign corporation did not generate passive income in low-tax jurisdictions; and
- the Austrian corporation did not opt for the shareholding being tax effective.

In cross-border situations, corporations may be exempt from Austrian corporate income tax on capital gains based on a double taxation treaty.

Business or asset deals are generally subject to value added tax (VAT), while a sale of shares is exempt from VAT. The applicable VAT rate depends on the assets being transferred. Most assets (including goodwill) are subject to the standard 20 per cent rate, while certain assets are subject to a reduced 13 or 10 per cent rate. VAT (if any) is generally borne by the purchaser.

There is no dedicated share or business transfer tax. However, Austrian real estate transfer tax (RETT) may be triggered in the case of an acquisition of Austrian real estate directly; at least 95 per cent of the shares of a company owning real estate by one purchaser or purchasers within a tax group; or transfers of at least 95 per cent of the shares in a partnership owning Austrian real estate over a five-year period. RETT on direct acquisitions of real estate is generally 3.5 per cent of the purchase price (in addition, 1.1 per cent per cent land register fees accrue). RETT on indirect acquisitions (via a real estate owning company or partnership) is 0.5 per cent of a special tax value, which is generally lower than the market value of the real estate.

In the case of a transfer of a business or assets, certain transactions (eg, assignments of rights and receivables or sureties) may be subject to Austrian stamp duties if a written deed (as defined in the Austrian Stamp Duty Act) is drawn up and there is a certain Austrian nexus of the transaction.

Regarding RETT and stamp duty, both parties may generally be held liable towards the tax authorities. However, it is customary that the purchaser bears such transfer taxes.

*Law stated - 30 March 2022*

## **Labour and employee benefits**

**What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?**

Employees are entitled to delegate members to the supervisory board of Austrian stock corporations. They have the right to nominate one employee representative for every two members appointed by the shareholders, and in the case of an uneven number of shareholder representatives, a further employee representative. A (co-determined) Supervisory Board, therefore, consists of at least five members, three of whom are appointed by the shareholders and two by the employees.

In addition, employees have the right to establish works councils: made up of employee representatives elected by employees, works councils oversee compliance with employee protection regulations, including health and safety regulations. They also have certain co-determination and information rights in relation to work force, working conditions and in the context of (planned) termination of employees. In their capacity as employee representative body, works councils negotiate shop agreements, if any.

In a public takeover, the target's management board must provide the works council with its and the supervisory board's opinion on the offer and the works council may decide to prepare and publish its own opinion on the offer.

*Law stated - 30 March 2022*

## **Restructuring, bankruptcy or receivership**

**What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?**

There are no laws or regulations that prohibit the acquisition of a target company in financial difficulties.

In a public takeover context, the Austrian Takeover Act provides for a restructuring privilege if the target is in financial difficulty. If the privilege applies, no mandatory offer must be made upon the acquisition of a controlling stake. To benefit from the privilege, (1) the target must be in need of restructuring and (2) the bidder must have the demonstrable intention to restructure the target. The need for restructuring may be assumed if insolvency or settlement proceedings have been initiated or the bankruptcy of the target is very likely or cannot be prevented without remediation measures. According to the Austrian Takeover Commission, the target is in need of restructuring if, inter alia, the company's equity ratio is below 8 per cent and the term for debt repayment exceeds 15 years or in the case of a severe and lasting drop of the share price and uncertainty regarding the continued existence of the target. The intention to restructure needs to be evidenced to the ATC by the submission of a reasoned restructuring concept.

As regards a seller in distress, if insolvency proceedings over the assets of a seller are opened following completion of a transaction, there is a risk that the insolvency administrator may invoke clawback rights and seek to challenge the transaction if it was to the disadvantage of creditors. This risk may even arise if the purchase price was at arm's length. If a challenge is successful, the purchaser would have to return the shares or assets to the insolvency estate. However, in return, the purchaser would only have a claim against the insolvency estate for repayment of the purchase price. If the funds have not been held separately from other monies or the insolvency estate no longer contains the (full) purchase price, the purchaser would only be entitled to the (likely quite low) insolvency quota.

Finally, if at the time of opening of insolvency proceedings, the transaction agreement has not been completely fulfilled by at least one party, the insolvency administrator has the right to rescind the transaction.

*Law stated - 30 March 2022*

## **Anti-corruption and sanctions**

**What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?**

There are no specific Austrian compliance laws and regulations dedicated to public M&A or business combinations. Having said that, corruption is a criminal offence in Austria, as is bribery of employees in the private sector. This offence is committed if someone offers or grants benefits to an employee in return for the execution or omission of an act in breach of that person's duties.

Another potentially relevant offence is breach of trust, which is committed by whoever knowingly abuses the authority conferred to him or her by statute, official order or contract to dispose of property not belonging to him and in this way intentionally causes damage to the principal. To act intentionally, it is sufficient if the person committing the breach considers it possible that a breach may occur and still proceeds to act.

Austrian criminal law provides that a legal entity can be held criminally liable for criminal offences committed by its decision makers (ie, its managers for the benefit of the company under the Law on the Responsibility of Legal Entities (VbVG)). The criminal liability relates directly to the company itself and not to its owners. Therefore, a shareholder change does not eliminate or alter the criminal liability of the company for historical criminal conduct. Depending on the committed offence, penalties under the VbVG may reach €1 million or more. In addition, a criminal court may declare all assets forfeited that were gained through the criminal conduct for which the entity is held criminally liable.



and civil law claims may ensue if criminal conduct resulted in damages.

Non-compliance with export control regulations may also result in criminal liability of a company under the VbVG.

*Law stated - 30 March 2022*

## UPDATE AND TRENDS

### Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

2021 was a particularly active year as regards public M&A in Austria. At the beginning of 2021, Starwood launched and successfully completed a mandatory offer to the shareholders of CA Immobilien Anlagen AG, resulting in a 58.8 per cent stake by Starwood upon expiry of the sell-out period. Subsequently, in early December 2021, first CPI Property Group SA announced an anticipatory mandatory takeover offer to the shareholders of IMMOFINANZ AG and, subsequently, CEE Immobilien GmbH, a subsidiary of S IMMO AG, announced a voluntary partial offer to IMMOFINANZ' shareholders. This resulted in the first-ever competing offer situation in Austrian takeover practice. Ultimately, in late January 2022, CPI Property Group reached an agreement with CEE Immobilien GmbH under which the latter undertook to sell its entire stake in IMMOFINANZ to CPI, paving the way for CPI Property Group SA to reach a clear >55 per cent majority in – and thus sole control over – IMMOFINANZ AG.


























In September 2021, the European Court of Justice published its preliminary ruling in case No. 546/18, which originated in administrative penal proceedings before the Austrian Takeover Commission. In summary, the ECJ held that certain (penalty and procedural) provisions of the Austrian Takeover Act violate fundamental rights granted under the laws of the European Union. The Austrian Takeover Act will need to be amended in due course to reflect the ECJ's findings.

Beyond this, there are no imminent changes in the law affecting public takeovers or business combinations involving listed companies. The most recent regulatory changes with respect to listed companies concern new rules on related-party transactions and say on pay, and result from the Austrian legislation implementing the EU Shareholder Rights Directive II (2017/828). Environmental, social and governance topics, including without limitation ESG strategy and disclosure remain a key area, increasingly in the focus of institutional investors and shareholder activists.

*Law stated - 30 March 2022*



## Jurisdictions

|   |                             |  |
|---|-----------------------------|--|
|    | <b>Australia</b>            | Squire Patton Boggs                    |
|    | <b>Austria</b>              | Wolf Theiss                            |
|    | <b>Bermuda</b>              | BeesMont Law Limited                   |
|    | <b>Brazil</b>               | Loeser e Hadad Advogados               |
|    | <b>Bulgaria</b>             | Kambourov & Partners, Attorneys at Law |
|    | <b>Canada</b>               | Bennett Jones LLP                      |
|    | <b>China</b>                | HJM Asia Law & Co LLC                  |
|    | <b>Ghana</b>                | Kimathi & Partners Corporate Attorneys |
|    | <b>Greece</b>               | Karatzas & Partners Law Firm           |
|    | <b>India</b>                | Khaitan & Co                           |
|   | <b>Israel</b>               | Barnea Jaffa Lande                     |
|  | <b>Italy</b>                | Nunziante Magrone                      |
|  | <b>Japan</b>                | Hibiya-Nakata                          |
|  | <b>Luxembourg</b>           | Bonn & Schmitt                         |
|  | <b>Nigeria</b>              | G Elias                                |
|  | <b>North Macedonia</b>      | Debarliev Dameski & Kelesoska          |
|  | <b>Norway</b>               | Aabø-Evensen & Co                      |
|  | <b>Sweden</b>               | Advokatfirman Hammarösköld             |
|  | <b>Switzerland</b>          | Homburger                              |
|  | <b>Taiwan</b>               | Lee and Li Attorneys at Law            |
|  | <b>United Arab Emirates</b> | IN'P Ibrahim & Partners                |
|  | <b>United Kingdom</b>       | Herbert Smith Freehills LLP            |
|  | <b>USA</b>                  | Simpson Thacher & Bartlett LLP         |
|  | <b>Uzbekistan</b>           | Azizov & Partners                      |
|  | <b>Vietnam</b>              | Bizconsult Law Firm                    |