Private mergers and acquisitions in Austria: overview

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Country Q&A | Law stated as at 01-Apr-2020 | Austria

Q&A guide to private acquisitions law in Austria.

The Q&A gives a high level overview of key issues including corporate entities and acquisition methods, preliminary agreements, main documents, warranties and indemnities, acquisition financing, signing and closing, tax, employees, pensions, competition and environmental issues.

To compare answers across multiple jurisdictions, visit the Private mergers and acquisitions *Country Q&A tool*.

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Corporate entities and acquisition methods

1. What are the main corporate entities commonly involved in private acquisitions?

In practice, the most common entity used in private acquisitions is the limited liability company (*Gesellschaft mit beschränkter Haftung*) (GmbH). Target companies involved in private acquisitions are usually a:

- Joint stock corporation (*Aktiengesellschaft*) (AG).
- GmbH.
- Partnership (*Kommanditgesellschaft*) (KG).
- A KG with a GmbH as an unlimited partner (GmbH & Co. KG).

However, the GmbH is the most common entity used in private acquisitions.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

There are no general restrictions under corporate law on the transfer of shares in private mergers and acquisitions except required formalities (for example, the requirement of a notarial deed in a transfer of shares in a GmbH) (*see Question 24*).

Restrictions on share transfers may exist in the statutory documents of a target company or in agreements to which the shareholders of the target company are party, such as shareholders' agreements. These agreements may provide for certain share transfer restrictions, for example:

- A requirement for consent of the target company or its shareholders.
- Drag-along and tag-along rights.
- Put and call options.

The transfer of an interest in a partnership is subject to the consent of the remaining partners, unless this consent requirement is excluded or modified in the partnership agreement.

Foreign ownership restrictions

Ownership restrictions apply equally to foreign and Austrian investors in certain regulated sectors, such as telecommunications, aviation, banking and insurance.

The following ownership restrictions apply specifically to foreign investors in the course of private acquisitions in Austria:

- **Real estate.** The transfer of ownership in real estate by non-EEA investors or the transfer of control over entities owning real estate may need to be notified to or receive approval from the regional land transfer authority (*Grundverkehrsbehörde*). Each Austrian federal state (*Bundesland*) regulates these transfers individually. This means that different provisions apply depending on the:
  - location of the real estate;
  - type of real estate; and
  - structure of the envisaged transaction (for example, share deal or asset deal).
- Each transfer must therefore be analysed individually.
- **Specific sectors.** Pursuant to the Austrian Foreign Trade Act (*Außenwirtschaftsgesetz*) (AFTA), foreign direct investments (FDI) are restricted to a certain extent. The acquisition of 25% or more of the voting rights in an Austrian entity by a foreign investor (that is, non-EU, EEA or Swiss investor) requires an approval from the Ministry of Digital and Economic Affairs (*Ministerium für Digitalisierung und Wirtschaftsstandort*) (BMDW), if the Austrian entity is operating in particular in any of the following sectors:
  - internal and external security; or
  - public order and safety, in particular in the following sectors:
  - telecommunication services;
  - water supply;
  - energy supply;

- traffic; and
- infrastructure facilities in the education and healthcare sectors.

A foreign investor is advised to verify the compliance of the envisaged transaction with AFTA at an early stage in the transaction.

The approval of the BMDW must be obtained prior to the signing of an envisaged transaction. The BMDW will make a decision within one month following receipt of a notification, or, for transactions requiring an in-depth assessment, two months (*section 25, AFTA*). A transaction is deemed to be cleared if the BMDW issues no decision within these periods.

The Ministry for Economic Affairs published a consultation draft for amendments to the AFTA provisions (Draft) following the adoption of the new EU framework on 5 March 2019 which aims to protect certain assets against investments that are detrimental to the interests of the EU or its members. The Draft aims to create more transparency and certainty with respect to FDI approvals in Austria, and a sharper approval regime for certain transactions. The Draft has not entered into force yet.

Pursuant to the Draft, an entity is subject to the FDI regime if the acquisition is likely to affect "security and public order". Such risks shall be specified by the non-exclusive list of relevant areas. This list refers to potential effects of an investment on:

- Critical infrastructure (physical or virtual) and technologies, including for example, energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, data processing or storage, biotechnologies, and so on.
- The supply of critical resources, including energy or raw materials and food security.
- Access to sensitive information, including personal data, or the ability to control such information.
- The freedom and pluralism of the media.

Under the current regime, the acquisition of 25% or more of the voting rights in an Austrian entity is subject to a BMDW review (see above). Generally, this threshold will continue to apply. However, with respect to companies in certain business sectors, that among other things operate critical infrastructure in the field of information technology, develop software for critical infrastructure, provide cloud computing services, belong to the media industry or produce certain defence-related products, the minimum threshold will be reduced to 10%.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

In Austria a private acquisition is commonly either structured as a purchase of shares in the target company (share deal) or as a purchase of the relevant business or assets (asset deal). Share deals are more common than asset deals in Austria. In a share deal, the buyer acquires the target company from the shareholder of the target company and simultaneously acquires control over the assets of the target company.

The structure of a private acquisition (that is, a share or asset deal) depends on a number of considerations, in particular, tax considerations, the scope and complexity of the relevant business, the results of the due diligence, and liability risks connected with the acquisition.

Share purchases: advantages/asset purchases: disadvantages

The main advantage of a share deal is that the identification of the object of the acquisition is simple and all the assets of the target company are simultaneously acquired (unless the parties decide to exclude certain assets).

An asset deal, on the other hand, will require the identification and specification of a large number of assets. The main disadvantage of an asset deal is its complexity, due to the requirement to specify each single asset, contractual relationship, claim, and so on. In principle, each single asset must be transferred in compliance with applicable transfer and form requirements for that asset, such as:

- **Real estate.** A transfer document, containing a specific declaration of consent (*Aufsandungserklärung*), must be signed in front of a notary public. The transfer must then be recorded in the real estate register (*Grundbuch*).
- **Tangible assets.** Generally, tangible assets are transferred by physical delivery (*section 426, ABGB*). If physical delivery is not possible or only possible with unreasonable effort (for example, extremely heavy and large machinery, or aggregated assets like office and workshop facilities) a symbolic delivery will suffice (for example, handing over the keys to a warehouse or documents that transfer exclusive control and disposal over an asset). Tangible assets may also be transferred by way of a separate transfer of ownership declaration or agreement pursuant to which the parties agree that the seller holds the asset on behalf of the buyer (*Besitzkonstitut*).
- **Receivables and rights.** Generally, rights and receivables can be assigned, subject to notification requirements (*see Question 7*).
- **Liabilities and contractual obligations.** Assuming that Article 38 of the Austrian Commercial Code (*Unternehmensgesetzbuch*) (ACC) applies, commercial contracts can be transferred without the explicit consent of the other contractual parties, subject to a three-month period after they have been duly notified, during which the counterparties have the right to object (*see Question 7*).

Share purchases: disadvantages/asset purchases: advantages

The main advantage of an asset deal is that the buyer can choose whether to acquire all or only certain assets. This can be advantageous in distressed cases (that is, where the relevant company faces financial adversity) and where a company would like to avoid certain liability risks (which would ordinarily be encompassed in a share deal). Generally, third party rights at the company level (such as pre-emption rights) are not triggered in the course of an asset deal.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

The sale of companies by auction is common in the Austrian market because the process is structured more stringent (compared with negotiated sales), seller-friendly and allows the seller to maximize the target's value. Typically, the auction process is handled by investment banks and other M&A advisers. No specific regulations apply to an auction process, that is, the seller determines the rules and procedure of the auction.

An auction procedure is typically structured - in line with the best practice standards - as follows:

- The investment bank and M&A advisers (including lawyers and tax advisors) structure the auction procedure.
- The seller conducts a financial assessment of the target company to determine the purchase price of the target company.

- The seller prepares an information memorandum or conducts a vendors' due diligence report and, often, also prepares a legal fact book (such documents will be provided to the bidders).
- The investment bank or the M&A adviser identify and approach potential bidders and provides limited information to these bidders.
- The seller provides non-disclosure agreements (NDAs) to potential bidders to be executed to provide them (further) information about the target company, such as the information memorandum and a process letter explaining the auction process.
- The bidders interested in the transaction provide the seller with indicative bids.
- On the basis of the indicative bids, the seller selects and invites certain bidders to the second phase of the auction and enables those bidders to conduct due diligence on the target company supplemented by management meetings and questions and answers sessions.
- The due diligence process can be structured in one or more phases.
- The bidders submit their binding bids to the seller including a mark-up to a share purchase agreement draft prepared by the seller.
- The seller starts negotiations with the bidders on the basis of the binding bids (typically, two to three bidders are involved in the final phase of the auction).

Preliminary agreements

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Typically, the parties enter into NDAs, and letters of intent (LOIs) or memorandums of understanding prior to signing the main transaction documents. In certain cases, the parties also enter into exclusivity agreements, which are often integrated into the LOI.

Letters of intent

An LOI usually contains the main terms of the envisaged transaction and serves, in particular, as the basis for the preparation and negotiation of the final transaction documents. Only certain provisions of an LOI are commonly legally binding.

A letter of intent is not necessary in each transaction but the conclusion of an LOI can be very useful in more complex deals. Generally, an LOI covers the following non-binding provisions:

- Details of the target company, group structure and description of the envisaged transaction.
- Purpose and nature of the LOI.
- Purchase price, the determination or valuation of the purchase price and adjustment of the purchase price.
- Escrow structure.

- Financing of the transaction.
- Timeline of the envisaged transaction.
- Corporate governance topics, in the case of joint ventures.
- Conditions precedent to signing of the transaction agreements.
- Conditions precedent to closing of the envisaged transaction.
- Summary of key representations and warranties and indemnities, subject to the findings of the due diligence.
- Closing accounts.

A LOI normally covers the following binding provisions:

- Exclusivity.
- Costs and expenses allocation prior to signing of the main documents.
- The due diligence process.
- Break fee provisions.
- Governing law and arbitration.
- Confidentiality and press statements.

Exclusivity agreements

Exclusivity agreements typically tend to be used in negotiated deals as opposed to auction sales (*see Question 4*). In private mergers and acquisitions, exclusivity agreements are often initially integrated into the LOI or, at a later stage of the envisaged transaction, in separate agreements.

An exclusivity agreement may:

- Stipulate that the seller may not actively seek out other buyers.
- Prohibit the seller from looking for competing offers.
- Oblige the seller to neither negotiate with a third party nor provide any information to a third party for a certain period.

The consequences of a breach may include:

- Specific performance obligations of the breaching party.
- Contractual penalties (such as break fees).
- A damage claim for non-performance.

Non-disclosure agreements

An NDA will typically be signed at the beginning of a transaction. The main purpose of an NDA in the course of a private sale is to protect confidential information of the target company and other information the sellers provide to the potential buyer. It is common for an NDA to be mutual, that is, the seller must also maintain confidentiality concerning information which the buyer provides to the seller.

Usually, confidential information is defined broadly to cover all information provided to the potential buyer or exchanged between the parties (in the case of mutual NDAs). The definition of confidential information will contain certain exceptions (for example, information which is available to the public may be disclosed). The receiving party can be required to be responsible for any breach of the NDA. It is market standard that affiliates, representatives, agents, advisers and employees of the parties are also bound to the provisions of the NDA.

In particular, an NDA may set out provisions with respect to the following:

- Management, employees and advisers.
- Disclosure exceptions.
- Terms of the NDA.
- Non-solicitation of customers and employees.
- Confidentiality with respect to negotiations of the envisaged transaction.

The breach of any obligations in the NDA can be subject to contractual penalties and the entitlement of the non-breaching party to claim further damages exceeding such contractual penalties. In the absence of agreed contractual penalties, the non-breaching party must make a claim for damages and prove, among other things:

- That the damage is caused by a breach of the obligations of the breaching party.
- The causal connection between the damage and the breach.

Asset sales

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

The ACC and the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) (ABGB) provide for different regimes of liability in connection with asset deals.

Ongoing liability of the seller for transferred or assumed liabilities

Generally, Austrian selling entities are liable (jointly with the buyer) for claims that:

- Relate to the transferred business.
- Originate from the business before closing of the transaction.
- Become due and payable within five years of the transfer.

This applies even where the claims are transferred to the buyer. The statute of limitation for those claims is limited to a maximum of three years, so the liability of the seller ends at the latest eight years after the transfer (this is the maximum period but it can be shorter depending on when the statute of limitation period began).

Liability to third parties cannot be excluded by way of an agreement between Austrian selling entities and a buyer. It can, however, be contractually excluded between the selling entity and the third party that is entitled to the claim. Therefore, at least theoretically or with regard to certain material liabilities, a contractual agreement excluding liability with a relevant third party could be an option.

Liability of the buyer for liabilities that are not transferred

The buyer of a business or part of a business is generally also liable for debts related to assets which are not transferred in the course of an asset deal (*Article 38, paragraph 4, ACC*). However, such liability can be excluded by agreement between the parties. This agreement must be duly announced, which means either:

- Registration of the exclusion of liability with the commercial register;
- Publication in newspapers; or
- Notification of the third parties concerned.

Article 38 does not limit the general "transfer of business" liability (a joint and several liability) under Article 1409 of the ABGB. If a person acquires a business, they become directly liable for debts connected with the business of which the acquirer knew or should have known at the time of the transfer, up to an amount that corresponds to the value of the transferred assets at the date of transfer, without prejudice to the liability of the seller to its creditors (*Article 1409, ABGB*). The acquirer may be released from further liability if they pay an amount of these debts equal to the value of the acquired assets directly to the creditors of the selling entity. This liability to third parties is mandatory and cannot be excluded or limited by contractual agreement between the parties. However, the parties can regulate how they will indemnify each other in relation to claims of third parties that are based on that regime.

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

Transfer of contractual relationships or liabilities will depend on the underlying agreement. Generally, the transfer of contracts by one party requires the consent of the other party or parties to such contract (*Vertragsübernahme*).

Austrian law allows for a special type of legal succession for contractual relationships in the case of an asset deal under Article 38 of the ACC. For this to apply, the activities or assets and liabilities that are to be transferred must qualify as a "business" within the meaning of Article 38. Where Article 38 is applicable, commercial contracts can be transferred without the explicit consent of the other contractual parties, subject to a three-month period during which counterparties have the right to object after they have received due notice of the transfer. Following the expiry of the three-month term and, provided no objection has been made, the transfer of the contract to the buyer of the business is effective. If the transferred assets do not qualify as a business under Article 38, each contract must be individually transferred, requiring the consent of each relevant counterparty.

Generally, rights and receivables can be assigned. The debtor must be notified of that assignment for it to take legal effect vis-à-vis the debtor. Otherwise, the assignment is only effective vis-à-vis the assignor and the assignee. This would mean that if the debtor pays the assignor (and not the assignee) this would release the debtor from its liability. The assignee would then have to claim the applicable amount from the assignor. Receivables cannot be assigned if the possibility to assign has been excluded by way of contract (*Zessionsverbot*).

Share sales

8. What common conditions precedent are typically included in a share sale agreement?

Typically, the following conditions precedent are included in a share sale agreement:

- Corporate approvals.
- Industry-specific consents.
- Competition and regulatory approvals, such as obtaining merger control clearance.
- Obtaining change of control consents and change of control waivers.
- A confirmatory due diligence concerning the target company being completed.
- Completion of certain reorganisations.
- Non-occurrence of material adverse change (MAC) prior to the completion of the transaction.
- Execution of ancillary agreements (for example, an escrow agreement and transition services agreement).
- Completion of carve-outs.

Seller's title and liability

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

Pursuant to Austrian law, the seller must transfer the shares to the buyer free from any defects. Generally, the share purchase agreement will clarify this general rule by providing a more detailed liability agreement between the buyer and the seller. Typically, the share purchase agreement contains specific wording in this regard, such as:

- The seller is the sole legal and beneficial owner of the shares.
- The shares constitute the whole of the allotted and issued share capital of the target company.
- The share capital of the target company is fully paid up and has not been repaid.
- There is no option, right to acquire, pledge or other form of security or encumbrance on, over or affecting the shares

and there is no agreement or commitment entered into by the seller to grant or create any of this.

- The shares are free of any obligations to make additional contributions or payments and similar obligations and restrictions.
- The seller is entitled to transfer legal title and beneficial interest in the shares to the buyer free from all encumbrances, without the consent of any other person.

10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

Seller

Sellers can be liable for pre-contractual misrepresentation, misleading statements or negligent or fraudulent representations pursuant to the legal concept *culpa in contrahendo*. This means that the seller is liable when they knew or should have known of such pre-contractual misrepresentation, misleading statements or negligent or fraudulent representations.

Typically, the sale purchase agreement contains a clause excluding pre-contractual misrepresentation, misleading statements or similar matters, to the effect that the statements contained in the share purchase agreement are the only statements relevant for the liability of the seller. Fraudulent misrepresentation cannot be excluded. This liability has particular relevance in connection with relationships with third parties that may not be subject to the terms of the agreement, such as bidders in the course of an auction sale.

Advisers

In practice, claims against advisers are not often successful as they do not have any contractual obligations to the buyer, except where the seller's advisers knew that the buyer would rely on their legal advice. However, pursuant to the general concept of damages law (*Schadenersatzrecht*), claims against the seller's advisors can theoretically be successful.

Main documents

11. What are the main documents in an acquisition and who generally prepares the first draft?

In a share deal, the main document is the share purchase agreement (including its ancillary agreements such as disclosure letters, an escrow agreement, transitional services agreement, custody agreements, and so on). Typically, the buyer prepares the first draft, except in an auction process, where the seller provides the transaction documents to the bidders (*see* Question 4). Usually, the seller prepares the disclosure letter.

In an asset deal, the main document is the asset purchase agreement. Usually, the buyer prepares the first draft of the asset purchase agreement.

Acquisition agreements

12. What are the main substantive clauses in an acquisition agreement?

The main substantive clauses include in a share sale and purchase agreement:

- Definitions and interpretations.
- Sale and purchase of the sale share.
- Purchase price.
- Determination or adjustment of the purchase price.
- Closing accounts.
- Pre-closing actions.
- Conditions precedent.
- Conduct of business between signing and closing.
- Closing.
- Seller’s representations and warranties.
- Limitation of liability.
- Tax indemnity.
- Specific other indemnities.
- Buyer’s representations and warranties.
- Announcements and confidentiality.
- Notices.
- Terms of payments.
- Non-compete and non-solicit.
- Applicable law and jurisdiction.
- Final provisions.

The asset purchase agreement will have the above clauses, except for those that specifically relate to matters such as the sale and purchase of sale shares. The main substantive additional clauses to a share purchase agreement which are used in an asset purchase agreement include:

- Object of purchase:

  - tangible assets (for example, real estate, cars, machines, furniture);
  - intangible assets (for example, intellectual property rights, concessions); or
  - financial assets (for example, loans, investments, shares, securities).

- Specification of contractual relationships.
- Specification of liabilities.
- Specification of the transfer of employees.
- Specification of excluded assets and businesses.
- Provisions with respect to the exclusion of the liability of the buyer towards third parties.

In the case of an asset deal, the object of the purchase must be described and specified with respect to each single asset either in the main body of the asset purchase agreement or in its schedules.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

The parties to a transaction may agree on foreign governing law. Certain provisions of national law would apply irrespective of the application of foreign governing law, such as company law (for example, share transfer), employment law and insolvency law.

Warranties and indemnities

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Seller warranties and indemnities are an essential part of the transaction documents, irrespective of the structure of the envisaged transaction. Typically, the following warranties are contained in the acquisition agreements:

- Authorisation.
- Seller is the sole legal and beneficial owner of the sale shares.
- Status of assets, such as unencumbered title and condition.
- Status of property, such as unencumbered title.
- Environmental matters.

- Intellectual property rights.
- Information technology.
- Employment.
- Accounts, books and records.
- Finance and guarantees.
- Litigation, disputes and investigations.
- Insurance.
- Competition law.
- Taxation.

Usually, acquisition agreements contain a tax indemnity and other specific indemnities based on the findings of a due diligence conducted prior to signing of the acquisition agreement.

In recent years, insurance covering damages resulting from breaches of warranties and indemnities has become part of transactions, including transactions in the Austrian M&A market. Such warranty and indemnity insurance may be useful and cover the gap between the seller's interest in limiting its exposure and achieving a clean exit and the protection and recourse requirements of the buyer.

15. What are the main limitations on warranties?

Limitations on warranties

In practice, limitations on warranties are subject to negotiations between the parties. Certain fundamental warranties are often not limited or the parties agree to specific limitations. For example, with respect to title and ownership, the parties often agree to a cap corresponding to 100% of the purchase price.

The main limitations on warranties include:

- The definition of losses and damages resulting from a breach of the warranties (indirect losses are often excluded).
- The exclusion of double-dipping.
- Time limitations for bringing claims resulting from a breach of the warranties.
- Financial limits (caps, thresholds, baskets, exclusion of *de minimis* claims).
- The exclusion of certain claims, in particular ones caused by change of law, change of tax or accounting principles and acts of the buyer.
- Mitigation of losses.

Qualifying warranties by disclosure

The parties sometimes negotiate to exclude from warranty coverage circumstances deemed to be known by the buyer, such as:

- Items disclosed in:
  - the share purchase agreement;
  - the disclosure letter;
  - the data room or otherwise in the course of due diligence;
  - management meetings; or
  - any fact books, vendor due diligence or in the information memorandum.
- Information contained in available registers, such as the commercial register or the land register.

16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

Usually, the seller is entitled to remedy a breach within a certain time frame (for example, two weeks from the buyer's request). If the seller does not remedy the breach within the agreed time frame, the buyer is, in particular, entitled to claim for damages.

There are statutory legal consequences to a breach of warranty but parties to a transaction usually try to exclude them to the extent possible. Pursuant to the ABGB, the buyer can demand:

- Improvement (repair or providing the missing part of the relevant asset).
- The replacement of the asset.
- A reasonable reduction of the price.
- Cancellation of the relevant agreement (redhibition) (*Wandlung*).

The buyer can initially demand only improvement or replacement of the relevant asset, unless such improvement or replacement is not possible or would constitute unreasonable efforts for the seller compared with another remedy. Whether this is the case depends on the:

- Value of the asset free of any defects.
- Materiality of the defect.
- Burdens for the buyer in connection with the other remedy.

The improvement or replacement must be effected within a reasonable period of time and with as little inconvenience as possible to the buyer, taking into account the type of asset and the purpose for which it is used.

If improvement or replacement is impossible or would constitute unreasonable effort for the seller, the buyer is entitled to a price reduction or, as long as it is not an immaterial defect, the right of redhibition (*Wandlung*). This also applies if:

- The seller refuses the improvement or replacement or does not undertake it within a reasonable period of time.
- These remedies would constitute unreasonable burdens for the seller or they are unacceptable to him due to material reasons based on the person of the seller.

Additionally, the buyer can claim damages if the seller has culpably caused the defect (*section 933a, ABGB*).

Time limits for claims under warranties

Typically, the parties to a private M&A transaction agree on time limits for claims under warranties of between:

- Three and six years for fundamental warranties.
- One and two years for business warranties.

In the absence of an agreement regarding time limits, claims for breach of warranty must be claimed within two years from the date of closing of the transaction, if they relate to the assets or business operations of the target company. In the case of legal defects, the period of two years commences on the date on which the buyer becomes aware of the defect.

Consideration and acquisition financing

17. What forms of consideration are commonly offered in a share sale?

Forms of consideration

In the Austrian market, the most common form of consideration are cash, share considerations or a combination of the two. In a share sale, the purchase price is often subject to adjustment based on certain financial parameters.

Factors in choice of consideration

The factors in the choice of consideration are typically driven by the parties' tax planning and whether the parties desire that the seller has a continuing interest in the target company following completion of the envisaged transaction. From the seller's perspective, cash consideration is attractive as the seller receives immediately available funds. However, from a strategic perspective, equity compensation may be attractive depending on the overall structure of the transaction.

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares,

how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

Firstly, a buyer listed in Austria will need to consider the impact of the issuance of new shares on the existing shareholders, and whether the existing shareholders or only third parties will participate. Secondly, the amount of cash to be raised is of relevance, that is, the amount of the newly issued shares will have an impact on the structure of such fundraising. Lastly, the existing provisions contained in the articles of the issuer may have an impact on the structure of the issuance of shares, in particular, pre-emptive rights of the existing shareholder may be the driver of the issuance of shares. Accelerated book-buildings require the exclusion of the pre-emptive rights of the existing shareholders of the issuer and must be considered in the course of structuring of the issuance.

Generally, the main ways for an Austrian listed company to raise equity finance are public offerings or private placements. A shareholder of the company may request a capital increase in a shareholders meeting. The management board of the company usually initiates such a request with the pre-agreement of board members on the structure of the issuance of shares in advance with the major shareholders of the company.

Consents and approvals

The issuance of shares by way of a capital increase is generally subject to a resolution of the shareholders meeting of the relevant company requiring both a vote by a:

- Majority of at least three-quarters of the share capital represented.
- Simple majority of votes cast (although the articles of the company may replace the capital majority with a lower or larger capital majority, the lowest limit being the simple capital majority).

In the course of a capital increase, the existing shareholders generally have subscription rights unless they have been excluded by the resolution of the shareholders meeting (*Bezugsrechtsausschluss*). However, subscription rights may be excluded only in a resolution on the capital increase. In that case, apart from the requirements provided by law or the articles for the capital increase, the exclusion of subscription rights requires both a vote by a:

- Majority of at least three-quarters of the share capital represented.
- Simple majority of votes cast (although the articles of the company may replace the capital majority by a higher capital majority).

The capital increase must be recorded in the commercial register. The application to register the capital increase must in particular include the following documents, several of which must be notarised:

- The relevant board resolution and authorisation.
- The subscription certificate.
- A list of the subscriber(s).
- A cost calculation for the transaction.

- A current version of the company's articles of association.

The new shares may need to be admitted to trading on the Vienna Stock Exchange. An application must be made to list the new shares on the Vienna Stock Exchange when the existing shares are already admitted to trading.

In the course of the transaction, the company will be required to publish ad-hoc announcements of potentially price-sensitive events in accordance with the Market Abuse Regulation (MAR). In addition, the capital increase must be notified to the notification office (*Meldestelle*) at *Oesterreichische Kontrollbank Aktiengesellschaft* (OeKB) no later than one business day prior to the launch, in accordance with the Austrian Capital Markets Act.

Requirements for a prospectus

Generally, a prospectus is required in the course of issuance of new shares in a listed company and the prospectus must be approved by the Austrian Financial Authority (*Finanzmarktaufsicht*) (FMA). Following the publication of a prospectus, new shares of a listed stock company can be publicly offered.

The issuer must include certain information in the prospectus, such as:

- Information regarding the issuer and its business model (business description).
- Information concerning the true and fair view of the assets, liabilities, financial position and profit and loss.
- Information regarding the management board, supervisory board and administrative bodies.
- Information with respect to the new shares to be offered.
- Terms and conditions of the offer.
- Risk factors.
- Financial information in the form of the annual financial statements, including balance sheets, profit and loss accounts and capital outflow account *(Kapitalabflussrechnung)*.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

Financial assistance. Any legal transaction regarding the granting of an advance payment, a loan or a security deposit by the company to a third party for the purpose of the acquisition of the shares in the company or a parent company will not be permitted (*section 66a, Austrian Stock Corporation Act*) (AktG). This provision does not apply to legal transactions performed by a credit institution in its ordinary course of business.

Capital maintenance rule. The permissibility of transactions is subject to strict Austrian capital maintenance rules (*Verbot der Einlagenrückgewähr*). The rules are based on the principle that the entire set of assets of the company should be protected on behalf of the company's creditors. They achieve this by providing a set of capital maintenance rules, restricting the possibility of any direct or indirect distribution to shareholders and their affiliates.

Exemptions

There are no exceptions for financial assistance under Austrian law.

The most important exception with respect to the Austrian capital maintenance rules is the right of the shareholders to receive dividend payments, restricted to the amount of net profits as shown in the approved annual financial statement (to the extent not excluded from distribution by law or the articles of association).

A business transaction that provides for any value transfer to a shareholder or a shareholder's affiliates must be concluded on arm's length terms supported by adequate consideration. In the absence of arm's length terms, this transaction constitutes an unlawful repayment of capital (*verbotene Einlagenrückgewähr*) and violates Austrian capital maintenance rules. Unlawful repayment of capital may be justified by specific corporate reasons (*betrieblich gerechtfertigt*), which must be in the best interest of the company.

Signing and closing

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

A share purchase agreement and a shareholders agreement are typically produced and executed at signing. In addition, the following are usually executed either at signing (conditional on closing) or at closing (in agreed form):

- A disclosure letter.
- An escrow agreement.
- A transitional services agreement.
- A rebranding agreement.
- Capacity opinions.
- Other transaction documents (such as parent guarantees).

The main document in a share sale is the share purchase agreement and an asset purchase agreement in an asset sale.

Closing

The following documents are commonly produced and executed at closing:

- A share transfer deed, if the share purchase agreement does not include the assignment of the shares.
- Transaction documents with respect to the settlement of shareholder loans.
- Transaction documents showing third party consents.
- Resignation of the members of the supervisory board and management board.

- A transitional services agreement if the parties agree that the seller is to provide certain services following closing.
- Closing memorandum confirming that closing has occurred and the applicable requirements are fulfilled.
- Other ancillary agreements depending on the structure and specific context (for example, issuance of capacity opinions, execution of licensing agreements).
- Applications to the commercial register (*Firmenbuch*) with respect to the registration of the share transfer.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

The formalities for the execution of documents by companies incorporated in Austria depends on the type of document, that is, there are different legal formalities required, such as:

- Written form (*Schriftform*).
- The requirement of signature certification (*öffentliche Beglaubigung*) by an Austrian notary.
- Notarisation by an Austrian notary in the form of a notarial deed (*Notariatsakt*).

Any agreement with respect to the transfer of shares in a GmbH must be drawn up in the form of an Austrian notarial deed.

22. What are the formalities for the execution of documents by foreign companies?

The execution of documents by foreign companies is subject to the same formalities as the execution of documents by Austrian companies (*see Question 21*). If a signature certification is required in the course of the transaction (for example, with respect to a power of attorney or any other document requested by a public register such as the commercial register (*Firmenbuch*)), the relevant signature generally must be certified and apostilled depending on the country of origin of the relevant foreign company. Additionally, a certified translation of the relevant document (for example, power of attorney) into German may be required.

23. Are digital signatures binding and enforceable as evidence of execution?

Generally, a qualified digital signature issued on the basis of an authenticated certificate by a certification service provider (*Zertifizierungsdiensteanbieter*) is deemed equivalent to handwritten signatures. If a written form is required, such qualified digital signatures are valid, if they comply with the requirements for qualified electronic signatures pursuant to the Austrian Digital Signatures Act (*Signaturgesetz* (SigG)).

24. What formalities are required to transfer title to shares in a private limited company?

A notarial deed is required for the transfer of shares in a GmbH. Additional conditions may be required pursuant to the articles of the company, such as prior consent requirements or pre-emptive rights of other shareholders. An agreement as to the obligation of a shareholder to transfer a share in the future also must be in the form of a notarial deed.

Tax

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale

Real estate transfer tax (*Grunderwerbsteuer*). Real estate transfer tax pursuant to the Real Estate Transfer Tax Act (*Grunderwerbsteuergesetz*) is triggered, if either:

- At least 95% of the shares in a corporation holding Austrian real estate are transferred or unified in the hands of one shareholder or of shareholding companies belonging to a group of companies pursuant to the Corporate Income Tax Act (*Körperschaftsteuergesetz*).
- At least 95% of the interests in a partnership holding Austrian real estate are transferred or unified in the hands of one partner, or are transferred to new partners within a time period of five years.

Shares in a corporation and interests in a partnership held by a nominee are attributed to the principal.

The tax rate is 0.5%. The tax basis is the so-called property value (*Grundstückswert*), which is calculated either by:

- Adding the value of the building(s) to the value of the land (according to a decree of the Austrian Minister of Finance).
- Using the real estate price index published by Statistics Austria.

If the fair market value is lower than the property value, the taxpayer may demonstrate this by submitting an opinion of a court-certified expert.

Asset sale

Real estate transfer tax. The sale of Austrian real estate triggers real estate transfer tax at a rate of 3.5%. The tax basis is the higher of the consideration paid and the property value. In addition, a 1.1% registration fee generally based on the purchase price of the property transferred is triggered on registration of the transfer in the relevant land register.

Stamp duty. The sale of receivables and other rights triggers stamp duty at a rate of 0.8%, if a written deed is set up on that transfer and an Austrian connection exists. The tax basis is the consideration. Under certain circumstances the transfer of a contractual position also triggers stamp duty.

VAT. The supply of goods is subject to Austrian value added tax at a rate of generally 20% if it is effected by an entrepreneur within the sphere of his enterprise in Austria against consideration. The sale of a business as a going concern (*Geschäftsveräußerung im Ganzen*) by way of an asset deal is seen as a supply of the individual assets and may trigger VAT, if those requirements are fulfilled. Therefore, whether the sale of a specific asset is taxable in Austria and whether a tax exemption applies, must be determined for each type of asset. Exemptions from VAT apply, among other things, to the sale of:

- Real estate (with an option for taxation).
- Shares in corporations and partnership interests.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

In the past, it was common that a nominee held a minimum share or partnership interest in a company holding Austrian real estate for another shareholder or partner, to prevent the triggering of real estate transfer tax. However, the statute allowing that approach has been changed. Therefore, to not trigger real estate transfer tax, it is necessary that:

- A company holding Austrian real estate is acquired by at least two buyers.
- Each such buyer acquires more than 5% of the shares or interests (without acting as a nominee for the other buyer).

Further, the indirect transfer of shares in corporations or interests in partnerships holding Austrian real estate (that is, the transfer of shares or interests in a company that holds shares or interests in another company which holds Austrian real estate) does not trigger real estate transfer tax.

Asset sale

Stamp duty. For stamp duty to be triggered, a written deed (for example, written agreements, emails and faxes) on a stamp-dutiable legal transaction must be set up and an Austrian nexus has to exist. An Austrian nexus generally exists if a written deed is signed in Austria, but can also apply if a written deed is signed outside of Austria in certain situations. The triggering of stamp duty can usually be prevented through careful structuring of the envisaged transaction.

Reorganisation Tax Act. The Reorganisation Tax Act provides for special tax provisions in connection with, among other things, mergers, contributions or de-mergers, if specific prerequisites are fulfilled. Generally, if a transaction falls within the scope of the Reorganisation Tax Act, a number of taxpayer friendly benefits apply, including:

- Roll-over relief for (corporate) income tax purposes.

- Exemptions from VAT and stamp duty.
- A beneficial tax rate for direct transfers of Austrian real estate.

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale

Generally, Austrian tax-resident corporate shareholders are subject to corporate income tax at a rate of 25% on capital gains from the sale of shares (in Austrian and non-Austrian corporations). The tax basis is the difference between the sales price and the book value of the participation. If the prerequisites of the international qualified participation exemption are fulfilled, capital gains from the sale of shares in foreign subsidiaries might be tax exempt (*see Question 28*). A taxable capital gain from the sale of a participation in a corporation can be minimised by effecting a dividend distribution before such sale (if a tax exemption applies regarding dividends received).

Austrian tax resident individual shareholders are generally taxable on capital gains on the sale of shares (in Austrian and non-Austrian corporations) at a flat income tax rate of 27.5%. The tax basis is the difference between the sales price and the acquisition costs (in case of private assets) or the book value (in case of business assets).

Non-Austrian tax resident shareholders are generally subject to either:

- Austrian corporate income tax at a rate of 25%.
- Austrian income tax at a flat rate of 27.5% on capital gains from the sale of shares in a corporation having its legal seat or its place of management in Austria, if the shareholder has held at any time within the last five calendar years a participation of at least 1% in such Austrian corporation.

However, under most of the double tax treaties concluded by Austria, only the state of residence of the shareholder will have the right to tax such capital gains (except if a special provision for shares in companies holding Austrian real estate applies).

Asset sale

Generally, Austrian tax resident corporations are subject to corporate income tax at a rate of 25% on capital gains from the sale of assets. The tax basis is the difference between the sales price and the book value of the asset.

Generally, Austrian tax resident individuals holding assets as business assets are taxable on capital gains from the sale of assets at their progressive income tax rate of up to 55%. However, a flat income tax rate of 27.5% applies in the case of capital gains from the sale of financial assets such as shares, bonds or derivatives. Further, a flat tax rate of 30% applies on capital gains from the sale of real estate qualifying as a fixed asset. The tax basis is the difference between the sales price and the book value of the asset.

Austrian tax resident individuals holding assets as private assets are generally either:

- Taxable on capital gains from the sale of assets at their progressive income tax rate of up to 55% (if the period between acquisition and sale amounts to up to one year).

- Not taxable at all (if the period between acquisition and sale amounts to more than one year).

However, a flat income tax rate of 27.5% applies on capital gains from the sale of financial assets such as shares, bonds and derivatives (irrespective of the holding period). Further, a flat tax rate of 30% applies on capital gains from the sale of real estate (irrespective of the holding period). The tax basis is the difference between the sales price and the acquisition costs of the respective asset.

Non-Austrian tax residents are only subject to Austrian corporate income tax on the sale of:

- Assets attributable to an Austrian permanent establishment.
- Shares in an Austrian corporation (*see above, Share sale*).
- Austrian real estate held as a private asset.

The sale of interests in a partnership is treated as the pro rata sale of the partnership's assets.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

Under the international qualified participation exemption, Austrian tax resident corporate shareholders are exempt from corporate income tax on capital gains if they have satisfied all of the following requirements:

- They can show that:
  - they have held a participation, whether direct or via a tax-transparent partnership, of at least 10% of the stated share capital in a foreign subsidiary;
  - that participation is held for a minimum duration of one year.
- The foreign subsidiary is either:
  - an EU company listed in annex 1 to Directive 2003/123/EC amending Directive 90/435/EEC on the taxation of parent companies and subsidiaries (Parent-Subsidiary Directive) if, according to the tax laws of an EU member state, it is considered to be resident in that member state for tax purposes and, under the terms of a double taxation treaty concluded with a third country, it is not considered to be resident for tax purposes outside the EU. It must also be subject to comprehensive income taxation, without the possibility of an option or of being exempt; or
  - legally comparable to an Austrian corporation.
- The option for regular taxation regarding the participation in that subsidiary has not been exercised.

However, this tax exemption does not apply in cases of abuse of law or if a subsidiary is low taxed and predominantly earns passive income.

Roll-over relief might be available where a share sale is structured in a way that it falls within the scope of the Reorganisation Tax Act (*see* Question 26).

Asset sale

As outlined above, roll-over relief might be available where an asset sale is structured in a way that it falls within the scope of the Reorganisation Tax Act (*see* Question 26).

29. Are other taxes potentially payable on a share sale and an asset sale?

Apart from stamp duty on assignments and transfers of a contractual position, the Stamp Duty Act contains several other transactions that are subject to stamp duty which could be relevant in connection with an asset deal or a share deal if a written deed is set up and an Austrian nexus exists, including:

- Lease agreements (generally, stamp duty at a rate of 1% applies, with the tax basis depending on the term of the lease).
- Sureties and accessions to liability as a joint debtor (generally, stamp duty at a rate of 1% applies on the value of the secured obligation).
- Mortgages (stamp duty at a rate of 1% applies on the value of the secured obligation).
- Out-of-court settlement agreements (generally stamp duty at a rate of 1% or 2% applies on the settlement amount).

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Corporations are taxed on a stand-alone basis even if they are part of a group.

However, Austria has a group taxation regime for affiliated companies. Affiliated companies are connected by way of a direct or indirect participation of more than 50% of the nominal capital and voting power. Such participation must exist throughout the entire fiscal year of the member of the tax group and for at least three years in total. To form a tax group, affiliated companies must jointly file a group taxation application with the competent tax authority and conclude a tax allocation agreement.

Not only Austrian resident corporations may be members of a tax group, but also non-resident corporations, if the following prerequisites are fulfilled:

- They are legally comparable to an Austrian corporation.
- They are resident in another EU member state or a state with which Austria has agreed a comprehensive administrative assistance.

- The participations in such non-resident corporations are exclusively held by resident corporations in the tax group or the top-tier company in the tax group (that is, only first-tier non-resident corporations may be included in the tax group).

Not all companies in a group of companies must be included in a tax group.

The formation of a tax group results in 100% of the taxable income of each resident member of the group being attributed to the top-tier company in the tax group. For non-resident members, only the negative income (that is, losses) of such companies is attributed to the top-tier company on a *pro rata* basis. Therefore, foreign losses can be used, however, this is only temporary as it is subject to a claw-back provision. In the case of losses of non-resident companies, there is a limitation where losses amounting to 75% of the sum of the income of the top-tier company in a tax group and the Austrian resident members of the tax group may be offset immediately.

Employees

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset sale

An asset sale may entail the transfer of employees under the Austrian Acquired Rights Directive (ARD) and Transfers of Undertakings Protection of Employment (TUPE) regulations. In that case, there are mainly information duties in relation to the employees or, if a works council is established, in relation to the works council. There are no requirements to obtain any consent of the employees or the works council.

If no works council is established, either the former or new employer must inform the employees in writing about the following:

- The (planned) date of the transfer.
- The general reasons for the transfer.
- The legal, economic and social consequences of the transaction for the employees.
- Any measures contemplated regarding employees.

The employer may provide this information by individual letters to employees or as a general notice at a location in the company to which employees have access (for example, a bulletin board). Providing this information in electronic form (for example, email or announcement on the intranet) is also sufficient.

The information must be provided prior to completion of the transaction. The general opinion is that it should be timely enough that the employee can seek legal counsel, consider alternatives, and so on.

If a works council has been established, the above information must be provided to such works council, and there is no requirement to additionally inform the employees. There are no formal requirements regarding such information. In particular, oral information is sufficient. The information should be made available within “reasonable time” prior to the completion of the transaction. The general market practice is to provide the information five to eight weeks in advance.

The new employer must issue new service notes to the transferred employees within one month following the completion of the transaction. The service notes must state relevant details of the new employer, the applicable collective bargaining agreements, applicable shop agreements, and so on. The service note is not required if the relevant changes based on the asset deal are already included in the written information provided to employees mentioned above.

The law does not stipulate any direct legal consequences if employers fail to fulfil the information and consultation duties. The main consequences may be the extension of the deadline for employees to exercise any rights they have in the transfer. The employees or the employees' representatives cannot delay or stop the transaction in any event.

Share sale

In the case of a share sale, there are no information or consultation requirements to the employees or employee representatives (the works council). However, it is considered best market practice to at least inform employees and the works council of the share deals, in particular if the deal entails a complete change of ownership of the shares in the company.

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Asset sale

No specific protection rights against dismissal exist if the asset sale does not entail a transfer of employment under Austrian TUPE or ARD rules.

Share sale

No specific protection rights against dismissal exist in the case of a share deal. A share deal cannot trigger a transfer of employment under Austrian TUPE or ARD rules. The reason is that a mere change of shareholders in the employing company does not change the contractual relationship with employees, that is, the employing entity does not change.

Transfer on a business sale

Pursuant to TUPE and ARD, employees transfer automatically by operation of law.

Austrian law provides for an explicit right of the employee to object to a transfer where the transferee:

- Refuses to take over a special protection provision against termination granted in a collective bargaining agreement that ceases to apply following the transfer (rarely applicable).
- Does not take over the transferor's company pension schemes (*see* *Question 33*).

Such right must be exercised within one month of the transferee's refusal to take over the special protection or the company pension schemes, respectively.

An employee has the right to terminate his or her employment relationship if the transfer involves a substantial detrimental change in working conditions based on any collective bargaining and works council agreements. If the employee exercises this right, the employer will be regarded as having been responsible for the termination of employment.

Any dismissals solely grounded in the business transfer are regarded as violation of Austrian TUPE or ARD provisions and would not be valid.

If the dismissal occurs closely before or following completion, courts generally assume that the dismissal was grounded on the transfer of business. In practice this means that the employer must prove that other reasons for the dismissal (for example, operative restructuring measures totally unrelated to the transaction) existed.

Pensions

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private pension schemes

Company pension schemes are becoming more common in Austria, particularly in large international companies. The most common schemes are contribution based company pension funds. However, the majority of employers do not operate a company pension scheme. The reason is the extensive and expensive mandatory public pension system which is funded by considerable employer and employee contributions.

Pensions on a business transfer

Generally, a company pension scheme based on an individual contract (i.e. not based on a collective agreement) continues following completion of the transaction. In all other cases (i.e. where the company pension scheme is based on collective agreements, the company pension scheme generally also continues, but may be discontinued due to the transfer. To the extent the transaction entails universal succession, there is no possibility to discontinue pensions schemes irrespective of an individual or collective agreement in place.

A company pension scheme based on an individual contract, may be discontinued by a declaration of the new employer in due time (that is, on or around the day of the transfer) to the affected employees.

If the company pension scheme is based on a works council agreement, the seller is entitled to:

- Terminate the works council agreement in certain cases (generally, if the operation of the seller or parts thereof are transferred into an existing operation of the buyer).
- Simultaneously discontinue the company pension scheme based on a works council agreement of the former employer applicable to the transferring employees.

If the company pension scheme of the seller is discontinued, the employees may object to the transfer (*see Question 32*). If the employee does not object, the employee is generally entitled to a lump-sum payout of their accrued pension entitlements against the seller.

Competition/anti-trust issues

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Triggering events/thresholds

Austrian merger control provisions apply to concentrations as defined in section 7 of the Austrian Cartel Act (ACA):

- The acquisition of all, or a substantial part of, the assets of another undertaking, in particular by means of transformation or merger.
- The acquisition of rights in the business of another undertaking by means of a management or lease agreement.
- The acquisition of shares, if a participation of 25% or 50% (of capital or voting rights) is reached or exceeded.
- The establishment of interlocking directorates at the management or supervisory board level, if at least half of the management or supervisory board members of two or more undertakings are identical.
- Any other event having a direct or indirect controlling impact over another undertaking.
- The establishment of a full-function joint venture.

Merger control rules do not, among other things, apply if a credit institution temporarily acquires shares for reselling or restructuring purposes. Such acquired shares must be sold within one year, as soon as security is no longer required or following the completion of the restructuring. Also, in these cases the credit institution must not exercise the voting rights associated with the acquired shares, unless exercising these voting rights is required to secure the full value of the investment or to prepare the sale of the shares.

Notification of the merger is required if, in the past business year, the:

- Combined worldwide turnover of the undertakings concerned exceeded EUR300 million.
- Combined Austrian turnover of the undertakings concerned exceeded EUR30 million.
- Individual worldwide turnover of each of at least two undertakings concerned exceeded EUR5 million.

Under the “de minimis exception”, concentrations which meet these thresholds are not subject to a notification requirement where both the:

- Austrian turnover of only one of the undertakings concerned exceeded EUR5 million.
- Worldwide combined turnover of the other undertakings concerned did not exceed EUR30 million.

Mergers where the above-mentioned thresholds are not exceeded must still be notified to the Austrian Federal Competition Authority, if all of the following conditions are satisfied:

- The combined worldwide turnover of the undertakings concerned exceeded EUR300 million.
- The combined Austrian turnover of the undertakings concerned exceeded EUR15 million.

- The value of the transaction exceeds EUR200 million.
- The undertaking to be acquired is active to a large extent on the Austrian market (*section 9, paragraph 4, ACC*).

Pursuant to the "one-stop shop" principle, concentrations with a community dimension and notified to the European Commission are not additionally subject to Austrian merger control (save for a "media concentration", where parallel notifications may be required).

Notification and regulatory authorities

Merger control notifications have to be submitted to the Federal Competition Authority (FCA). The FCA and the Federal Cartel Prosecutor (FCP) are empowered to review notified concentrations in the initial review period (Phase I). The Vienna Court of Appeals (court of first instance) and the Austrian Supreme Court (as appellate court) review concentrations in Phase II cases (Phase II is an in-depth analysis of the merger's effects on competition). The FCA and the FCP are exclusively entitled to initiate Phase II review proceedings.

The Competition Commission can recommend that the FCA requests a Phase II proceeding of a concentration although such recommendation is not binding. However, the FCA is required to publish a declaration on its website if it does not intend to follow the recommendation.

Substantive test

If a concentration does not create or strengthen a dominant position, the concentration should be cleared.

Austrian law contains a number of legal presumptions of (single or collective) dominance. For example, single firm dominance will be presumed (a rebuttable presumption) if the combined entity's relevant market share is higher than 30%.

Environment

35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

The main legal sources setting out obligations regarding the remediation of contaminations are the Water Rights Act (*Wasserrechtsgesetz* (WRG)), the Trade Regulation (*Gewerbeordnung*, (GewO)) and the Waste Management Act (*Abfallwirtschaftsgesetz* (AWG)). As a general rule, the perpetrator of a contamination is held primarily liable. If it is impossible to force the perpetrator to remediate a contamination (for example, if the perpetrator is not identifiable or able to fulfil the official order of remediation), the owner of the property at the time the contamination was being caused may be held liable, if the owner either:

- Consented to or at least tolerated the actions or omissions which led to the contamination.
- Failed to take reasonable measures to prevent it (subsidiary liability).

The subsidiary liability of the property owner passes to the legal successor of the former owner if the contamination was known to the legal successor or should have been known to a legal successor exercising reasonable care.

The Historic Waste Remediation Act (*Altlastensanierungsgesetz* (ALSAG)), as well as the Federal Environmental Liability

Act (*Bundes-Umwelthaftungsgesetz* (B-UHG)) contain further public law provisions regarding contaminations of soil and ground water and its remediation which must be analysed on a case-by-case basis.

Further, damages caused by contaminations may also lead to a liability under civil law as well as a criminal liability in the case of environmental damages due to the violation of any applicable permits, regulations or laws (*section 180, ACC*).

Contributor profiles

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Recent transactions

- Blackstone on the acquisition of CRH European distribution unit.
- The shareholders of Tag Systems S.A. on the sale of Tag Systems S.A. to AUSTRIACARD and entering into a joint venture with AUSTRIACARD.
- RHI AG in connection with its merger with Brazilian Magnesita Refratários S.A. with a view to creating a leading provider of refractory products.
- Kyocera Corporation in connection with the acquisition of Van Aerden Group.
- Panoro Group in connection with the acquisition of OMV's 100% owned subsidiary OMV Tunisia Upstream GmbH.
- Finedining S.à r.l., an indirect subsidiary of funds advised by KKR on the sale of the WMG Group to the French household equipment manufacturer Grooupe SEB.
- Telekom Austria with respect to the acquisition of Yesss! Telekommunikation GmbH in a back-to-back transaction to the acquisition of Orange Austria by Hutchison Whampoa Limited.
- Takeda Pharmaceuticals with its acquisition of several Austrian companies.
- A private equity fund in relation to the acquisition of the Austrian business of the Hypo-Alpe-Adria International Group, Hypo-Alpe-Adria-Bank AG.
- Reeder C. J. Ahrenkiel in connection with the acquisition of the remaining 50% stake in the joint venture IWH ImmobilienWerte Hamburg from Hochtief Projektentwicklung GmbH, a subsidiary of Hochtief Aktiengesellschaft which is listed in Germany.
- Agri Holding AG in connection with the acquisition of the Slovenian company Istrabenz Hoteli Portoroz d.o.o from Istrabenz Turizem d.d.
- TRUMPF Venture GmbH a wholly owned subsidiary of TRUMPF GmbH + Co KG (both based in Germany), in

connection with its venture capital participation (the Series A round of financing for) in XARION Laser Acoustics GmbH (Austria).

- Speedivest II EuVECA GmbH & Co KG Austria's largest venture capital fund, in connection with a participation in the iMobility joint venture with ÖBB Holding, Austria's state owned railway company and the subsequent acquisition by ÖBB-Holding AG of all shares in the joint venture iMobility.

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Recent transactions

- Blackstone on the purchase of CRH European distribution unit.
- Duravant in connection with its acquisition of Motion06.
- MRB Fercon regarding the acquisition of an iron foundry from GF Casting Solutions by way of a management buyout.
- Takeda Pharmaceuticals with its acquisition of several Austrian companies.
- Catella Residential Investment Management GmbH regarding its acquisition of a student apartment house by way of a forward purchase from GBI AG.
- Qatar Investment Authority (QIA) on a joint venture between QIA and BRF to acquire a 79.5% stake in Banvit Bandirma Vitaminli Yem Sanayii A.Ş.
- Vis Mundi and Levant Capital in relation to the acquisition of a 49% stake in Power Horse Energy Drinks GmbH.
- Eurazeo Patrimoine on the acquisition of a hotel portfolio from Accor Hotels and other investors

Languages. German, English

Professional associations/memberships. Vienna Bar Association; International Bar Association, Association of Young Lawyers (AIJA).

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