Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering comparative analysis from top ranked lawyers

Corporate M&A

Second Edition

Austria
CHSH Cerha Hempel Spiegelfeld Hlawati

chambers.com

2019

Law and Practice

Contributed by CHSH Cerha Hempel Spiegelfeld Hlawati

Contents

CHSH Cerha Hempel Spiegelfeld Hlawati has 25 partners and 76 senior attorneys and associates in Austria; the firm also has offices in Belarus, Bulgaria, the Czech Republic, Hungary, Romania, and the Slovak Republic. The Corporate team is active for clients in the private M&A markets of Austria and CEE, representing strategic and private equity investors as well as their targets and/or management. It also advises on national and international cross-border mergers and reorganisations, specialising in developing and providing practical solutions to what can be extremely complex issues that often involve cross-border components. Due to the diversity of its clients, the team is particularly experienced in advising on public M&A, including takeover law and related disclosure requirements under stock exchange law.

Authors

Dr. Clemens Hasenauer is a managing partner of the firm and head of the Corporate Transactions department. He specialises in M&A, takeover law, capital markets law, banking and finance, reorganisations and restructurings. His broad experience includes numerous complex public and private M&A transactions, and he is particularly renowned for structuring large international joint ventures and public takeovers. Clemens is a member of the Council of the Vienna Bar Association and a delegate to the Austrian Bar Association. He is also a member of the British Law Society, the American Bar Association, the New York State Bar Association, the International Bar Association and the UIA (the International Association of Lawyers). He is widely published in this area and is a frequent speaker at seminars, particularly on M&A and Austrian takeover law. He is also a permanent lecturer at the Vienna University of Economics and Business, the Danube University Krems and the Austrian Lawyers Academy.

Dr. Albert Birkner specialises in M&A, public takeovers, corporate reorganisations and joint ventures, with a special focus on Austria and CEE/SEE. He has particular expertise in the fields of structuring and implementing corporate transactions, takeover mechanics, and the modelling of co-ownership structures. Albert is a member of the Vienna Bar Association and the Czech Bar Association, the International Bar Association, Wiener Advokatengesellschaft UNION and the UIA (International Association of Lawyers). He is the author of numerous publications, and regularly contributes to industry publications in Austrian and international law journals in his areas of expertise. Albert is currently a managing partner at CHSH, and head of the Takeovers and Antitrust department.

1. Trends

1.1 M&A Market

After 2017, which proved to be a record-breaking year, the number and volume of deals with Austrian involvement is now declining. In 2018, there were 324 M&A transactions involving Austrian companies, compared to 345 in 2017. This corresponds to a 6.1% decrease in M&A transactions.

The transaction volume also fell from EUR14.7 billion in 2017 to EUR7.9 billion in 2018. In 2017, four M&A transactions involving Austrian companies exceeded the volume of EUR1 billion, whereas only two transactions exceeded this threshold in 2018.

In 2018, 38% or 123 of the 324 M&A transactions, compared to 132 transactions (38.3%) in 2017, were inbound M&A transactions, ie, where foreign investors sought to acquire Austrian targets or their shares. The number of outbound M&A transactions (where Austrian investors sought to acquire foreign targets or their shares) increased to 132 (40.7%) in 2018, up from 116 (33.6%) in 2017.

The volume of inbound transactions in 2018 amounted to EUR3.8 billion, compared to EUR6.8 billion in 2017. The top five inbound transactions in 2018 represented a volume of EUR3 billion, whereas in 2017 one transaction on its own (the takeover offer made by Vonovia regarding BUWOG) accounted for EUR5.6 billion. Austrian companies spent EUR3.2 billion on outbound transactions, with the top five outbound transactions accounting for a volume of EUR2.6 billion. By comparison, Austrian companies spent EUR4.5 billion on outbound transactions in 2017.

Domestic M&A transactions, where both the target and the buyer are Austrian, accounted for 21.3% or 69 out of 324 M&A transactions in 2018, compared to a total of 97 domestic transactions in 2017.

1.2 Key Trends

Strategic investors are still involved in the vast majority of transactions in the Austrian M&A market. 297 out of 324 transactions in 2018 involved strategic investors, compared to a total of 325 in 2017. However, there was a significant increase in transactions, increasing from 20 in 2017 to 27 in

2018 (+35%) that involved financial investors, such as private equity or venture capital firms.

Further, Austrian companies are still attractive targets for German investors. This is demonstrated by the fact that transactions involving German investors increased in 2018 to 35.7% of all M&A transactions involving foreign investments in Austrian companies.

Furthermore, 39.8% of all M&A transactions involved European investors. The vast majority of transactions in the Austrian M&A market, approximately 72.4%, involved investors whose corporate seat is located in Europe, whereas in 2017 only 60.6% of such transactions involved European investors.

Germany remains the most attractive target for Austrian investors. 44.7% of all transactions occurred in Germany, with a further 40.2% in the European market. Without doubt, Europe is still the top investment target for Austrian investors.

1.3 Key Industries

Although the total number of deals dropped from 42 in 2017 to 31 in 2018, the real estate and construction sector proved to be, and hence remains, the most attractive industry for inbound M&A transactions in Austria. Foreign investments in real estate and construction companies in 2018 are closely followed by investments in companies in the industrial sector (29 transactions) and companies in the telecoms, media or technology (TMT) sectors (29 transactions). In 2017, there were 34 inbound transactions involving TMT companies and only 18 transactions involving industrial companies.

As for outbound transactions, Austrian investors are continuously active in the industrial sector, with 37 transactions in 2018 compared to 33 transactions in 2017. Other attractive sectors that saw considerable outbound M&A activity in 2018 include the TMT sectors with 30 transactions, and the real estate and construction sector with 25 transactions. This means that in 2018 outbound transactions increased by 13.8% compared to 2017.

Although most transactions in the past two years have related to the real estate and construction sector, 2018 saw a greater number of transactions in the industrial sector, numbering 81 in total, the volume of which amounted to EUR1.9 billion. The real estate sector still leads in the rankings in terms of deal volume (EUR2.4 billion), with the total number of deals amounting to 72.

2. Overview of Regulatory Field

2.1 Acquiring a Company

In Austria, a private M&A acquisition is usually structured either as a purchase of shares in the target company (share deal) or of business assets (asset deal). In case of a share deal, the buyer directly acquires the shares in the target and (only) indirectly the target's business; the assets and liabilities pertaining to the business remain with the target. In an asset deal, the buyer acquires a business from a seller, which means that the assets and liabilities need to move from the seller to the buyer (subject to limitations, in particular with respect to liabilities, the parties may further define the details of the scope of the purchased assets). Whether the one or other method is applied, often depends on tax considerations, but also on the scope, shape and complexity of the business that shall be acquired, liability issues and results of due diligence, etc.

If the intention is to acquire shares in a stock corporation (*Aktiengesellschaft*) based in Austria, the shares of which are admitted to trading on the Vienna Stock Exchange (*Wiener Börse*) on a regulated market, with the aim to obtain or expand the control in such listed company, a strictly regulated procedure must be followed. This is governed by the Austrian Takeover Act (*Übernahmegesetz*). Since there are not many listed Austrian stock corporations, takeovers are not seen as often as in other jurisdictions.

In addition, alternative ways of acquisition are noteworthy, eg, statutory mergers, either by absorption (one company is merged into another) or by combination (two companies are merged into a newly established company). However, these techniques are typically employed within a group of companies rather than among unaffiliated entities, but may be employed as a preparatory step preceding a share deal with an unaffiliated entity to establish the envisaged target structure.

2.2 Primary Regulators

Merger Control

As regards merger control, the relevant authorities are the Federal Competition Authority (*Bundeswettbewerbsbehörde*), which is the recipient of Austrian merger control filings, the Federal Cartel Prosecutor (*Bundeskartellanwalt*) and the Cartel Court (*Kartellgericht*). Depending on the turnover thresholds, competence may pass to the European Commission, in which case the EU Merger Regulation exclusively applies without room for the Austrian merger control regime.

Dependent on Industry/Target Type

Depending on the industry of the target entity, regulators like the Financial Market Authority (*Finanzmarktaufsicht*) or E-Control, an authority monitoring the Austrian energy market, may supervise M&A activities and require additional notification obligations, approvals or 'fit and proper' tests. Typically, these restrictions are used to assess the identity, quality and fitness of the new acquirer and are limited to regulated industries (eg, banking, insurance, investment, pensions, telecoms, aviation, gambling, and in some respects gas and electricity). Furthermore, M&A activities within certain sensitive – mainly public order and safety-related – industries may require approval by the Austrian Ministry for Economic Affairs (for the latter, see **2.3 Restrictions on Foreign Investments** and **2.6 National Security Review**, below). Public takeovers of shares in Austrian listed entities falling within the Austrian Takeover Act are regulated and supervised by the Austrian Takeover Commission (*Übernahmekommission*).

Dependent on Asset Class

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

2.3 Restrictions on Foreign Investments

By and large, direct inward investments are usually freely available. Apart from restrictions that may be equally relevant for Austrian investors (eg, notification duties in cases of acquisition of certain share percentages in Austrian listed companies and approval/non-prohibition of the acquisition of certain qualified shareholdings in the financial sector), restrictions that may in particular also have relevance to foreign investors mainly relate to:

- *Real estate:* the acquisition of real estate assets by foreign (non-EEA) investors may be subject to notification or approval by regional land transfer authorities. Since each Austrian federal state regulates this matter individually, different provisions apply depending on the location of the real estate in question, the type of real estate and whether the acquisition may be triggered by an asset deal or also by a share deal, or even by an indirect change of control in a company that owns property.
- *Sensitive industries:* under the Foreign Trade Act 2011 (*Außenwirtschaftsgesetz* 2011) acquisitions of 25% or more of the voting rights in a domestic company by foreign (non-EU/EEA/Swiss) investors require advance approval by the Austrian Ministry for Economic Affairs, provided that the target belongs to a protected key industry. Such sensitive industries include sectors relating to the internal and external security of Austria, the public order and safety as well as procurement services and crisis prevention (among others defence, security, energy, water supply, telecommunications, healthcare and infrastructure) (see **2.6 National Security Review**, below).
- *Money laundering and dealings with blacklisted states and individuals:* further restrictions may stem from anti-money laundering legislation and KYC requirements, as well as in relation to intended transactions with blacklisted/sanctioned foreign states and/or individuals.

2.4 Antitrust Regulations

The relevant pieces of merger legislation are the Austrian Cartel Act 2005 (*Kartellgesetz* 2005) and the EU Merger Control Regulation (Regulation (EC) No 139/2004). Depending on turnover thresholds, transactions of a certain size become subject to the requirement of merger control clearance by either the Federal Competition Authority or the European Commission. The European Commission has exclusive jurisdiction if the transaction results in concentrations with an EU dimension. Where a transaction does not fall within the exclusive jurisdiction of the European Commission, it may require (pre-merger) notification to and clearance by the Federal Competition Authority.

The Austrian merger control regime catches several corporate transactions, such as the direct or indirect acquisition of shares, if a shareholding of 25% or 50% is attained or exceeded, any other combination (even below this threshold) enabling the buyer to exercise a controlling influence on the target or joint ventures. These concentrations have to be notified to the Federal Competition Authority if the following turnover thresholds are fulfilled cumulatively in the last business year immediately preceding the transaction in question:

- the aggregate worldwide turnover of the undertakings concerned (eg, in case of 'mere' acquisitions: buyer and target groups) exceeds EUR300 million;
- the aggregate turnover on the Austrian market of the undertakings concerned exceeded EUR30 million; and
- the worldwide turnover of each of at least two undertakings concerned exceed EUR5 million.

However, concentrations exceeding these turnover thresholds are exempt from mandatory notification if only one undertaking achieved a turnover in Austria of more than EUR5 million and the other undertaking(s) achieved an aggregate turnover of not more than EUR30 million worldwide.

Furthermore, an additional threshold has applied under Austrian merger control law since 1 November 2017. This additional threshold is linked not only to the turnover of the undertakings involved, but also to the transaction value. Specifically, concentrations meeting the following thresholds must in future be notified to the Federal Competition Authority:

- a combined worldwide turnover of more than EUR300 million;
- a combined turnover in Austria of more than EUR15 million;

- where the value of the consideration exceeds EUR200 million; and
- if the target company has significant business operations in Austria.

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

2.5 Labour Law Regulations

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

- *Protection against dismissal:* the Austrian employment law framework grants special status to certain groups of employees such as pregnant women or disabled persons, apprentices and members of the works council. These groups typically enjoy increased protection concerning the termination of their contracts. In addition, older employees enjoy some protection against dismissal, particularly when the dismissal results in social hardship or otherwise substantially violates their justified interests (eg, difficulties in finding a new job due to older age or age discrimination). Besides that, some employees could be entitled to the old severance payment scheme (granting such employees a multiple of their monthly salary which depends on, and increases with, their term of service). Under all these considerations, intended (post-closing) restructuring measures may become more difficult and/or costly to implement.
- *Co-determination:* similar to German law (but different in many details), the Austrian Stock Corporation Act (*Aktiengesetz*) provides for a two-tier board structure composed of the management board and the supervisory board. In some instances this structure also applies to limited liability companies. The management board is responsible for the day-to-day business, while the supervisory board mainly monitors these activities and in particular resolves statutory as well as assigned matters. If a works council is established, the Austrian Labour Constitution Act (*Arbeitsverfassungsgesetz*) entitles employees to delegate representatives to the supervisory board pursuant to the principles of one-third parity (*Drittelparität*). The employees delegate one third of the supervisory board's members and the shareholders elect the remaining two thirds. Thus, employee representatives may gain insights, are entitled to the same level of information as shareholder delegates and, most notably, actively take part in important business decisions.
- *Acquired rights:* since the implementation of the European Acquired Rights/Transfer of Undertakings Directive, the Employment Contract Law Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz*) states that the acquisition of a business unit (eg, by way of an asset deal) involves a mandatory automatic transfer of all employment contracts that are part of the affected business unit. Therefore, a 'pick-and-choose' of employees is not possible and consequently the acquirer assumes the employment contracts, as they exist at the time of the transfer. This includes for example all benefits, unsettled claims, unconsumed vacation and severance pay entitlements. Only under certain limited circumstances employees may object to the transfer, eg, if any provision on protection against termination as set forth in a collective bargaining agreement applicable before the transfer or any pension commitment of the selling side are not taken over. Furthermore, employees are granted an extraordinary right to terminate their contract if working conditions worsen significantly. By contrast, terminations by the employer due to the acquisition of the business unit or transfer of the labour relations are null and void.

2.6 National Security Review

In accordance with the Foreign Trade Act 2011, Section 25a, Austrian companies operating in areas of internal and external security (the defence industry, security services, etc) or general public services, including social security (particularly healthcare, energy or water supply, telecommunication services, traffic or education) are protected against acquisitions by foreigners by the statutory requirement of an approval of the Austrian Ministry for Economic Affairs.

Generally, the requirement of ministerial approval applies to acquisitions of domestic listed and non-listed companies by foreign investors that are not residents or citizens of the EU, the EEA or Switzerland. In particular, the Foreign Trade Act 2011 involves three scenarios:

- acquiring the target business;
- purchasing a participation in the target conferring 25% or more of the voting rights in the target; or
- obtaining a controlling influence (sole or joint control) over the target.

For the purpose of calculating the threshold triggering the approval requirement, shares of buyers acting in concert as well as persons having agreed to jointly exercise their voting rights have to be aggregated.

The request for approval has to be filed prior to signing of the respective acquisition documents. Within one month (in case of a more detailed assessment, within another two months) the Ministry for Economic Affairs decides on the request for approval, which is deemed cleared if no decree is issued within the aforementioned period. Where there is deemed to be a 'serious threat' to the interests of public security and order, the approval may be subject to conditions (which are not specified in further detail). Prior to the approval, an acquisition subject to the Foreign Trade Act 2011 must not be implemented.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

Court Decisions

In 2018, the Austrian Constitutional Court (*Verfassungsgerichtshof*) subjected the Minority Shareholders Squeeze-Out Act (*Gesellschafter-Ausschlussgesetz*) to close scrutiny. A former minority shareholder of an Austrian limited liability company (GmbH) argued that his rights with respect to property had been infringed by various sections of the Squeeze-Out Act. After an oral hearing, the Austrian Constitutional Court rejected the complaint and ruled that the relevant sections of the Squeeze-Out Act do not violate rights with respect to property because the provisions reasonably weigh the competing interests of the majority shareholder and those of the minority shareholder.

The Supreme Court (*Oberster Gerichtshof*) held in connection with the sale of the whole business of an Austrian limited liability company, by way of analogous application of the Austrian Stock Corporation Act, Section 237, that the approval of the general meeting is obligatory in such cases or else the sale and purchase agreement is void. In its decision, the Court missed the opportunity to clarify its view on the Holzmüller decisions of the German Federal Court of Justice and left open whether an approval of the general meeting by a majority of three quarters of the votes cast is sufficient or whether unanimity is required.

Legal developments

Cartel and Competition Law Amendment Act 2017

The Amendment Act introduced numerous changes, especially relating to the private enforcement of actions for damages for infringements of competition law based on the EU Directive on Antitrust Damages Actions (Directive 2014/104/EU), but it also introduced a host of innovations in other areas as well.

On the basis of the Directive on Antitrust Damages Actions, the Austrian legislator introduced the possibility for civil courts to order the disclosure of evidence and/or impose sanctions for any failure to disclose evidence. This provision may prove to be of considerable significance in future, especially when quantifying the amount of damages to which the injured party may be entitled. A disclosure order requires precise justification, both setting out the facts and evidence in the possession of the person subject to the order and adequately supporting the plausibility of the action for damages. It is, strictly speaking, even possible to request the disclosure of evidence in files held by courts or public authorities. However, this does not apply to leniency applications or settlement submissions, as the attractiveness of leniency programmes and settlement decisions should not be jeopardised by disclosure requirements that are too extensive in scope. In addition, claims for damages for competition violations become time-barred after five instead of three years, and an additional threshold has applied under Austrian merger control law since 1 November 2017. For further information regarding the additional threshold, see **2.4 Antitrust Regulations**, above.

Austrian Stock Exchange Act 2018

The new version of the Austrian Stock Exchange Act 2018 (*Börsegesetz* 2018), based on the Markets in Financial Instruments Directive II (Directive 2014/65/EU) can surely be seen as a significant legal development for listed companies. Due to the absence of a provision that allowed for a voluntary withdrawal from the Official Market of the Vienna Stock Exchange, a withdrawal was only possible by way of universal succession. The new Austrian Stock Exchange Act, which entered into force on 3 January 2018, now includes such a provision. However, it remains to be seen whether this will lead to several companies leaving the Vienna Stock Exchange, thus making the Austrian stock market less attractive to investors.

Introduction of new market segments to the Vienna Stock Exchange

As part of a new initiative for small- and medium-sized stock companies, the new Austrian Stock Exchange Act facilitates access to the capital market. The Vienna Stock Exchange introduced two new market segments to the Third Market, the so-called 'Direct Market' and 'Direct Market Plus' segments, thus replacing the 'Mid Market' market segment. A listing on either of the two new market segments does not require a capital market prospectus. Also, no minimum market capitalisation requirements and no requirements for placement volume have to be met.

The starting date for trading on the Direct Market and the Direct Market Plus was set to be 21 January 2019. It remains to be seen how the new market segments will evolve.

Equality Act for Women and Men in Supervisory Boards

On 1 January 2018, the Equality Act for Women and Men in Supervisory Boards (*Gleichstellungsgesetz von Frauen und Männern im Aufsichtsrat*) entered into force. The Act applies to listed companies (Austrian stock corporations and Societas Europaea) as well as to companies (Austrian limited liability companies and co-operatives) which permanently employ more than 1,000 people if the supervisory board of those companies consists of six shareholders' representatives and at least 20% of the workforce are male/female. The Act introduced a minimum quota of 30% of women/men as members of a supervisory board. Nonetheless, the Act contains a few loopholes that allow the provisions of the Act to be circumvented.

By and large, the Act can be seen as a step towards increasing the visibility of women in the supervisory boards of Austrian companies.

Austrian Beneficial Owner Register Act
As part of the transposition of the fourth Anti-Money Laundering Directive (Directive (EU) 2015/849), the Austrian Beneficial Owner Register Act (*Wirtschaftliche Eigentümer Registergesetz*) entered into force on 15 January 2018. All legal entities pursuant to Section 1 para 2 of the Act were required to register their beneficial owners by 16 August 2018. If, however, the respective legal entity becomes aware of any change of or relating to its beneficial owners, a change notification must be filed within four weeks. This notification requirement can be disregarded in the context of the closing of an M&A transaction where a change of beneficial owner(s) occurs.

Fifth Anti-Money Laundering Directive
The fifth Anti-Money Laundering Directive (Directive (EU) 2018/843) was published on 19 June 2018 in the Official Journal of the European Union. The provisions of the Directive include inter alia the extension of the scope to auditors, external accountants, tax advisers, as well as estate agents, art dealers and intermediaries (whereas transactions with a value of less than EUR10,000 remain excluded from the scope of the Directive), the public accessibility of specific information contained in the Beneficial Owner Register, and the establishment of a centralised bank accounts register.

Furthermore, each EU member state is required to issue and maintain an up-to-date list of politically exposed persons (PEPs). The Commission has the task of consolidating these lists from Member States into a single list, which must be made accessible to the public. As a result, significant amendments to the relevant Austrian laws are to be expected.

3.2 Significant Changes to Takeover Law
In addition to the new version of the Austrian Stock Exchange Act, a new section has been added to the Austrian Takeover Act, which entered into force on 3 January 2018. This newly introduced section regulates offers for delisting securities from the Official Market of the Vienna Stock Exchange.

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

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

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

4. Stakebuilding

4.1 Principal Stakebuilding Strategies
To increase the chances of success, a bidder can acquire an initial stake in the target company prior to launching an offer. Although pre-launch stakebuilding is generally permitted under Austrian takeover law, a shareholder is under an obligation to fulfil certain notification requirements if the thresholds described below are met or exceeded. As a consequence, stakebuilding involves the risk of generating publicity.

In 2013, the Transparency Directive Amending Directive (Directive 2013/50/EU) introduced stricter disclosure requirements, including for instance a reporting obligation regarding cash-settled equity swaps, which makes it harder to carry out a creeping increase of control over a listed company.

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

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

4.3 Hurdles to Stakebuilding
The material shareholding disclosure thresholds mentioned above are compulsory. However, the Stock Exchange Act 2018, Section 130 para 1, makes it possible to include a threshold of 3% in a company's articles of incorporation (in addition to the thresholds given in the paragraph, as described in **4.2 Material Shareholding Disclosure Thresholds**, above), which also requires the company to publish the provision of the articles of incorporation on its website and to inform the Austrian Financial Market Authority.

4.4 Dealings in Derivatives
Dealings in derivatives are permitted.

4.5 Filing/Reporting Obligations
Any financial instrument is subject to disclosure and/or filing and reporting obligations as specified in the section regarding material shareholding disclosure thresholds. There are no specific statutory competition rules covering derivatives. Neither are there any for other financial instruments.

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

4.6 Transparency
The Austrian Takeover Act, Section 7, states that the offer document must contain certain minimum content: for instance, the terms of the offer and information regarding the bidder. In addition, details of the bidder's intention with regard to the future business operations of the target company and, to the extent it is affected by the offer, of the bidder company must be disclosed. Furthermore, information regarding the continued employment of employees and management, including details of any material changes to terms and conditions of employment, must also be provided.

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

5. Negotiation Phase

5.1 Requirement to Disclose a Deal
In the case of extended circumstances, the realisation of the transaction and of each intermediate step is, in each case, in and of itself subject to the principles of ad hoc disclosure in accordance with Article 17 of the Market Abuse Regulation (Regulation (EU) 596/2014). The existence of inside information can be assumed if either:

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

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

Generally, the information is not precise enough to constitute inside information at the time at which the target is first approached or the negotiations commence. If a non-binding letter is signed, the question of whether there exists an obligation to issue an ad hoc notification comes down to the price specificity and price relevance of such a step. If these questions can be answered in the affirmative, the intermediate step itself is subject to an ad hoc reporting obligation. The question of how likely it is that the final result will occur plays a crucial role in this respect because on the one hand not every intermediate step is specific enough to enable a conclusion to be drawn on the effect it will have on the share price and, on the other hand, a reasonable investor does not buy or sell because, for instance, a non-binding letter is signed, but because these steps contain information relating to the final result. Generally, the signing of definitive agreements triggers an obligation to issue an ad hoc notification.

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

5.3 Scope of Due Diligence
In the course of takeovers, due diligence is rather the exception than the rule. In such cases, the scope of due diligence can be limited to only the publicly available information of the target. Pursuant to the Austrian Stock Corporation Act, Section 84 para 1a, a member of the management board of a stock corporation is said to be exercising the diligence of a responsible and conscientious corporate executive when taking business decisions if he or she does not allow him or herself to be guided by extraneous interests and if it may be reasonably assumed on the basis of adequate information that he or she is acting in the best interests of the company (Business Judgement Rule).

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

5.4 Standstills or Exclusivity

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

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

5.5 Definitive Agreements

The bidder can unilaterally specify in its offer document the terms and conditions of the agreement, which it may only change under certain circumstances. It is not possible for individual recipients of the offer to negotiate or change the terms and conditions of the tender offer. The bidder makes a tender offer to all shareholders concerning the conclusion of an agreement regarding the target company. The terms of a tender offer are adequately defined so that by means of a corresponding declaration given by the shareholder, a purchase or exchange agreement comes into effect. The Austrian Takeover Act assumes that a contract will only be concluded in respect of the offer aimed at the shareholders of the target company by means of the publication of the offer document if a declaration of acceptance is received. Essentially, a takeover offer fulfils the key requirements of a contract offer due to the fact that its terms are adequately defined and it expresses the willingness of the applicant to enter into an agreement. Therefore, the terms and conditions of the tender offer are documented according to the described procedure.

6. Structuring

6.1 Length of Process for Acquisition/Sale

In general, the timetable for M&A transactions may be subject to various drivers, which differ from case to case. The duration primarily depends on, inter alia, the target's size, complexity of the transaction structure, organisation and cooperativeness of the parties, the industry the target company operates in and regulatory aspects. Additionally, the chosen method for acquiring the target (share deal versus asset deal versus regulated takeover regime) may have an impact and affect the duration of the process, in particular the implementation/closing of the transaction.

Public takeovers, which are governed by a strict regulatory framework including prescribed steps in a prescribed timeframe, usually take a minimum of three and up to six months from the announcement of the offer to closing (hence, not including any time requirements for preparatory work). Private small- to medium-sized transactions structured as share or asset deals may typically be manageable from a minimum of three to six months onwards. In particular in the area of distressed M&A and small, simple transaction structures where no material due diligence of the target is performed, quite swift transactions, even below three months, are common. All of the foregoing assumes that no need for merger control clearance or other regulatory approval issues arise (if there are such issues, the timeframe may need to be extended substantially). For larger international M&A transactions, including a competitive tender process and usual regulatory approval requirements, time periods may extend up to approximately 12 or even 18 months from the first preparatory steps through to closing.

6.2 Mandatory Offer Threshold

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

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

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

- a passive acquisition of a controlling interest (ie, where a controlling interest is obtained without any action having been taken by the acquirer (eg, without a purchase of shares), provided that the acquirer could not reasonably have expected to obtain control at the time at which ownership of the respective shares was acquired);
- an acquisition of a controlling interest which does not enable the acquitting party to exert a decisive influence over the target; or
- other defined exceptional situations.

The Takeover Act also catches the so-called 'creeping in' by shareholders: If a shareholder obtains a controlling interest which does not, however, provide them with the majority of the voting rights, and within 12 months obtains at least additional 2% of the voting rights, a mandatory offer must be launched.

Besides that, under the Austrian implementation of the European Transparency Directive notification requirements need to be observed if certain thresholds (starting with 4% of the voting rights) in Austrian listed entities will be reached or (upwards or downwards) crossed by a transaction (note that certain transactions in financial derivatives may also be relevant).

6.3 Consideration

Based on experience, cash consideration is most common whereas offering shares (or the combinations of both) is rather rare. However, sellers not infrequently explore alternative ways such as the assumption of debt by a buyer, sometimes in combination with a cash payment.

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

6.4 Common Conditions for a Takeover Offer

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

With regard to purely voluntary offers (ie, not aimed at obtaining control) and voluntary takeover offers aimed at obtaining control, the completion may be subject to objectively justified conditions including minimum or maximum acceptance thresholds, clearance by merger control and other regulatory authorities or absence of a material adverse change. However, the fulfilment of a condition or a right to withdraw may not depend on the buyer's discretion. The Takeover Commission may declare an offer unlawful if conditions are unjustified, discretionary or not objectively determinable. As a result, the latter may prohibit its launch. Therefore, it is advisable to consult the competent authority prior to submitting an offer that includes conditions which are unusual, not precise enough or where their justification is not clearly evident.

6.5 Minimum Acceptance Conditions

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

- mandatory offers may not be conditional on acceptance or any internal approvals by the bidder. It may be subject solely to obtaining regulatory clearance (eg, merger control);
- voluntary offers aimed at obtaining control are subject to a statutory acceptance threshold of more than 50% of the voting rights (which may be combined with a higher minimum acceptance threshold in the offer);
- purely voluntary offers may be made subject to any threshold of minimum acceptance; and
- subject to the above, thresholds are usually set at more than 50%, at 75% and sometimes also at 90% of the voting rights for the following reasons:
  - (a) 50% plus one vote enables a shareholder to take majority decisions in the general meeting, in particular electing members of the supervisory board, which in turn decides on the managing board's composition, distribution of dividends and similar;
  - (b) 75% of the votes (a qualified majority) enable a shareholder to amend almost all provisions of the articles of association and to implement most types of corporate restructurings (mergers, transformation, spin-offs, etc); and
  - (c) 90% of the shareholding enables a shareholder to initiate a squeeze-out of minority shareholders (see **6.10 Squeeze-out Mechanisms**, below) with the aim of acquiring up to 100% ownership.

6.6 Requirement to Obtain Financing

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

In the case of public takeovers, financing must be ensured up-front, ie, a qualified independent expert has to certify in advance that the bidder is able to finance the offer.

6.7 Types of Deal Security Measures

The principle of freedom of contract granted by Austrian law enables transaction parties to seek any type of deal security measure as long as they do not violate moral principles (*Sittenwidrigkeit*). Needless to say, the question whether any (and what kind of) deal security may be part of a transaction, depends also on the bargaining positions of the parties involved. However, in situations where the Takeover Act applies, further limitations need to be observed, eg:

- exclusivity agreements appear quite commonly sought after by a bidder from a core shareholder and should be legally feasible, particularly in a phase preceding a public tender, but arguably also during a tender process. Exclusivity arrangements with the target, on the other hand, appear more problematic, in particular if they are aimed to restrict the free business judgement of management acting in the best interest of all shareholders. Therefore, no-talk arrangements (lock-ups) typically risk being too restrictive and thus void, while there are good arguments that no shop provisions and market test provisions (if they just limit management to actively look for other bidders) are more likely to be upheld;
- break-up fees (sometimes also called inducement fees, termination fees or drop-dead fees) will conflict with the Takeover Act if the amounts involved are substantial so that they de facto exclude or materially impede competing offers (in particular, if they are not limited to just compensating the bidder for his or her out-of-pocket costs but also have some penalty element);
- standstill obligations are essentially already foreseen by the Takeover Act, containing statutory rules prohibiting the launch of a new or modified offer once the tender offer is published (with only very few exceptions) as well as a statutory waiting period in case the offer turns out unsuccessful; and
- as regards irrevocable tender commitments, see **6.11 Irrevocable Commitments**, below.

6.8 Additional Governance Rights

If the shares in a company are not held by a single shareholder, but by two or more shareholders (whether this is a joint venture, private equity or other shareholder structure), it is very common to stipulate a governance structure among unaffiliated shareholders that goes beyond the protection and instruments afforded under statutory corporate law. Minority shareholders in particular will typically seek to improve their position towards majority shareholders by ensuring certain additional governance, financial and other rights of participation.

Typically governance documents include a shareholders' agreement, the articles of association themselves (stipulating rights in the articles of association may have some benefits from an enforcement perspective but at the same time means that they will be disclosed and available to the general public through the companies register) as well as by-laws for the management board (and the supervisory board and/or advisory board, if any).

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

6.9 Voting by Proxy

In Austria, shareholders may vote by proxy. However, certain formal requirements are applicable. As a rule, proxies should be issued in writing. A Power of Attorney in simple written form typically suffices as regards stock corporations. Proxies relating to limited liability companies will in certain cases (ie, when certain entries in the commercial register need to be applied for following a resolution) require notarised signatures and, if applicable, an apostille (or even superlegalisation, depending on the country of the shareholder). Depending on the subject of the voting/resolution, a general voting proxy may not always be sufficient; in a number of cases the proxy will be required to outline in very specific detail the subject matter of a resolution or commitment if it is to be covered by a proxy.

6.10 Squeeze-out Mechanisms

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

With regard to squeeze-outs effected within three months from the completion of a successful mandatory or voluntary takeover offer aimed at obtaining control, a special regime applies according to the Squeeze-Out Act, Section 7. It differs from the general regime particularly in the following ways:

- a modified calculation of the 90% threshold applies;
- generally, cash compensation below the highest consideration paid in the public offer is not deemed adequate. If the 90% were acquired under or in connection with the public offer, it is assumed that the compensation for the squeeze-out is adequate if it corresponds to the highest consideration paid in the public offer; and
- the squeeze-out right under this special regime is mandatory and may not be excluded by amending the articles of association.

6.11 Irrevocable Commitments

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

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

7. Disclosure

7.1 Making a Bid Public

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

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

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

7.2 Type of Disclosure Required

Making a public offer triggers an obligation to produce a prospectus, as laid down in the Capital Market Act (*Kapitalmarktgesetz*), Section 2. The purpose of such a prospectus is to give investors the opportunity to gain greater knowledge of the risks involved in investing in securities and mutual funds. Before publishing the prospectus, the Austrian Financial Market Authority has to check it for completeness, coherence and comprehensibility. Only then may it approve the prospectus.

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

7.3 Producing Financial Statements

A prospectus must contain all necessary information to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, the prospects of the issuer and of any guarantor, and of the rights attached to such securities. To meet the principle of transparency, this information must be presented in a form which is easy to analyse and which is easily comprehensible.

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

7.4 Transaction Documents

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

8. Duties of Directors

8.1 Principal Directors' Duties

Austrian stock corporations are governed by a two-tier board system. The members of both boards – the management board and supervisory board – are required to comply with the duty of care of a prudent businessman (*Sorgfalt eines ordentlichen Geschäftsleiters*) and act foremost in the best interest of the company. Additionally (but only ranking second) shareholders', employees' and public interests may be taken into consideration. Besides that, the Austrian Stock Corporation Act, Section 47a, lays down a general principle of equal treatment of all shareholders. Subject to the principles of the so-called business judgement rule, failure to comply with these duties may result in personal liability. For the managing directors of limited liability companies, similar duties of care and loyalty towards the company apply.

In connection with M&A activities, the directors' duties of care and loyalty do not differ from those in other business situations. Directors' influence on a target, particularly in a share deal, is limited, since typically negotiations are conducted and decisions are made at shareholder level. In some cases target companies' managing directors are not even involved at an early stage. However, in order to provide information, their involvement is usually required in the due diligence process and in connection with closing.

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

8.2 Special or Ad Hoc Committees

In Austria, it is not common for managing boards to establish special or ad-hoc committees in business combinations or in the case of a conflict of interest. Usually, conflicted members would:

- abstain from the vote;
- not even participate in the meeting; or
- neither participate in the meeting nor be provided with information on those items in relation to which the conflict exists.

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

8.3 Business Judgement Rule

In Austria, courts defer to the judgement of managing directors according to the business judgement rule, which applies to any business decisions of board members regardless of the business situation. In 2016, the business judgement rule was expressly incorporated into Austrian statutory law, although Austrian courts had applied similar principles before. The business judgement rule, as it is understood in Austria, establishes a 'safe harbour' with regard to decisions of board members, provided that:

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

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

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

8.4 Independent Outside Advice

Directors of Austrian target companies sometimes turn to lawyers and other consultants seeking outside advice on business combination matters, particularly if they perceive a risk that they could lose their job following transaction closing or that their job terms may become subject to change. Therefore advice given to directors is often limited in scope and typically concerns aspects of employment law (eg, regarding employment contract issues) but also the conduct of a due diligence process (eg, regarding confidentiality/disclosure matters) or, more generally, the scope and limitations of the business judgment rule and related aspects of careful management of a prudent businessperson.

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

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

8.5 Conflicts of Interest

Directors' conflicts of interest may be addressed to a supervisory board that has, among other things, the role of intermediary between the managing board and the shareholders. It generally supervises the managing board and represents the company in dealings with directors. In addition, shareholders may initiate special audits to review (potentially conflicted) business activities. However, conflicts between shareholders and the managing board that find their way to court are rather seldom in Austria.

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

9. Defensive Measures

9.1 Hostile Tender Offers

Under the Austrian Takeover Act, no distinction is made between friendly and hostile takeovers. Thus, both forms are allowed and the same rules apply to each. Nonetheless, friendly takeovers prevail in practice. Either way, one of the general principles of the Act requires the management board and the supervisory board of the target company to remain neutral in the interests of the shareholders and not in any way to prevent the shareholders from taking a decision on the proposed takeover or seek to influence the decision of the shareholders.

9.2 Directors' Use of Defensive Measures

In the event of a takeover offer, the administrative bodies of the target company, ie, the management board and the supervisory board under Austrian corporate law, must not take any measures which would likely deprive shareholders of the opportunity to make a free and informed decision about the offer. No measures must be taken that frustrate the outcome of the offer from the moment the bidder's intention to launch an offer becomes known (ie, the moment the target company becomes aware) until publication of the results of the offer, and in the event that the offer is a success, until implementation of the offer. However, measures that could frustrate the outcome of the (hostile) takeover are permissible if the target company's shareholders' meeting explicitly approves such concrete measure. The Takeover Act mentions the issue of securities that could prevent the bidder from acquiring control of the target company. Pursuant to the Act, the administrative bodies of the target company are also free to seek out competing bidders ('white knights') without obtaining the consent of the shareholders' meeting.

9.3 Common Defensive Measures

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

9.4 Directors' Duties

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

9.5 Directors' Ability to 'Just Say No'

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

10. Litigation

10.1 Frequency of Litigation
In general, litigation is not common in connection with M&A transactions in Austria. Whether the parties involved choose to initiate litigation proceedings or opt instead for other means of dispute resolution, such as arbitration, depends mainly on the structure and size of the respective M&A deal. In practice, the main deciding factors are costs and the duration of proceedings. The parties in small M&A deals tend to favour litigation. The main argument in favour of litigation is that the costs incurred in connection with arbitration proceedings are usually higher, making litigation the more attractive means of settling disputes.

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

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

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

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

CHSH Cerha Hempel Spiegelfeld Hlawati

Cerha Hempel Spiegelfeld Hlawati
Rechtsanwälte GmbH
Parkring 2
A-1010 Vienna

Tel: +43 1 514 35 0
Fax: +43 1 514 35 35
Email: office@chsh.com
Web: www.chsh.com

CHSH
Cerha Hempel Spiegelfeld Hlawati
Rechtsanwälte GmbH

11. Activism

11.1 Shareholder Activism
Shareholder activism has emerged and become increasingly visible in Austria in recent years. However, shareholder activist organisations (eg, typically the Austrian Chamber of Labour, trade unions and consumer protection organisations such as *Verein für Konsumenteninformation*) mainly focus on advising and representing consumers who have suffered damage to their investment made in units for collective investment or similar instruments, mainly by a wrongful prospectus or advertising, including in legal proceedings, rather than tackle M&A cases. Therefore, activism caused by the aforementioned groups in M&A transactions is seen quite rarely.

It is noteworthy that minority shareholders in particular may avail themselves of legal remedies surrounding M&A activities – not so much preventing or challenging a takeover, merger or similar reorganisation or squeeze-out as such, but as regards the judicial review of the adequacy of (cash) compensation offered or granted for any forced exit as shareholder of a company. These proceedings mostly go without media publicity.

In addition, shareholders may exercise minority rights prior to and in the general meeting, eg, by taking advantage of their right to ask questions. In rare cases minority shareholders have tried to stretch these rights, such as to pose numerous questions, request a special audit or challenge resolutions in court, bordering on abuse, but since the law provides for a rather limited system of minority rights, these strategies have not often proven successful. However, lawsuits do occur from time to time. Most recently, a lawsuit to challenge a resolution to appoint members of the supervisory board of a large listed Austrian company was filed for lack of gender diversity.

11.2 Aims of Activists
In Austria, activists seeking to encourage companies to enter certain M&A transactions, spin-offs or major divestitures are hardly seen. There may have been very rare M&A cases where the picture may have looked rather the opposite – that hostile acquisitions or takeovers with the likely intention to liquidate, restructure or dispose of large parts of the target business and/or workforce may in rare cases have triggered certain activism or involvement (typically on a discussion and negotiation level rather than by strikes) by politicians or trade unions. But undoubtedly, cases exist where activists, typically minority shareholders, have sought to reinforce their ideas by putting pressure on management. There was a case, for example, where a shareholder publicly criticised the management strategy in Austrian newspapers.

11.3 Interference with Completion

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

In this context it should be noted that the Austrian Labour Constitution Act grants the works council certain rights to be informed about, to comment on and to be consulted in a timely fashion of planned transfers or reorganisations of undertakings or business units, particularly as to the consequences for the employee workforce. However, the law does not provide for sanctions if the management board fails to comply with the relevant provisions.