GETTING THE DEAL THROUGH

Private Equity

Fund formation and transactions in 42 jurisdictions worldwide

2009

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Austria

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1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction?

Generally, the entire range of private equity transactions commonly found in other jurisdictions is also available within Austria's legal framework. According to the latest appraisal conducted by the European Private Equity and Venture Capital Association (EVCA), Austria's tax and legal environment can be ranged in the middle in comparison to other countries.

Companies specialising in the financing of small and medium-sized enterprises (SMEs) (*Mittelstands-finanzierungsgesellschaften*, MFAG), which are often used by Austrian private equity firms, are to a certain extent subject to a favourable tax regime, whereby amendments by the Act, which entered into force in 2008 (Mittelstandsfinanzierungsgesellschaften-Gesetz, MiFiG Act), in relation to MFAGs, have led to certain restrictions in this regard (see question 14). The development of the Vienna Stock Exchange (VSE) has continued to attract interest from international venture capital investors who have since proved to be active on the Austrian market. Austria is therefore seeing various kinds of venture capital investments, ranging from seed-financing to mature private equity investments.

Recent years have also seen international venture capital investors acquiring considerable stakes in Austrian companies, such as KKR in Zumtobel AG, a lighting company; VSS and 3i in Herold Business Data, the Austrian publisher of the Yellow Pages; and Cerberus in BAWAG PSK, one of the largest banks in Austria; as well as the acquisition of ONE, the third-largest Austrian mobile phone provider, by a consortium consisting of France Télécom and PE Fonds Mid Europa Partners.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or become public companies?

In 2002 Austria introduced the Corporate Governance Code (the Code) which has been amended several times. Furthermore, a revised Code entered into force at the beginning of 2009, implementing the obligation for the legal representatives of companies whose shares are admitted for trading on a regulated market or that exclusively issue securities other than shares on such a market and whose shares are traded over a multilateral trading system with the knowledge of the company, to prepare an annual corporate governance report. The Code primarily applies to Austrian-listed companies. It is based on the provisions of Austrian corporation law, securities law and capital markets law as well as the principles set out in the OECD's Principles of Corporate Governance. It is also recommended, although not mandatory, that companies not listed on Austrian or foreign stock exchanges follow the Code. Companies can voluntarily undertake to adhere to the principles set out in the Code.

All listed companies are called upon to make a public declaration of their commitment to the Code and to adhere to the Code's rules. For Austrian entities the declaration of the commitment to the Code constitutes a legal requirement for the Prime Market of the VSE. They are monitored by an external institution on a regular and voluntary basis and its findings are reported to the public. The Code is neither a statute nor a decree. Adherence to the Code is voluntary. There are no legal consequences for non-adherence to the Code.

The new Code 2009 also leads to improved transparency in relation to the remuneration of management and more diversity with respect to the members of the supervisory board. To avoid conflicts of interest, members of the management board may only accept functions in the supervisory board of other companies after having obtained consent from the supervisory board. Pursuant to the Stock Corporation Act, capital market-oriented companies and companies that are defined as very large companies (pursuant to section 271a paragraph 1 of the Commercial Code) are required to appoint an audit committee to supervise the auditing process, the effectiveness of the internal control system and to examine the annual financial statements, the statement of affairs of the company and the corporate governance report.

In general, requirements under corporate governance rules and under, inter alia, mandatory capital markets legislation, provide for a more stringent regime, including disclosure requirements as well as accounting rules and regulations, for public rather than for private companies.

3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What is the role of a special committee in such a transaction where management members of the board are participating in the transaction?

Publicly listed companies may only be taken over pursuant to a bid following the detailed rules on content and pricing contained in the Takeover Act, which specifically sets out the principles of equal treatment of all shareholders, equal information rights of all shareholders, transparency of takeover situations to all stakeholders, the prohibition of insider dealings and the principle of diligence of the management board and the supervisory board of the target.

With regard to any takeover bid, the management board and the supervisory board are generally prohibited from any action that could impede the free and informed decision of each shareholder on the takeover bid. Hence, the management board and the supervisory board of the target company are prohibited from any action that could result in a failure of a takeover attempt except such action approved by way of a shareholders' resolution.

Furthermore, the management board of a target company may be subject to a conflict of interest if all or certain members of the management board have a specific interest in a positive result of the takeover bid. In particular, in management buyout situations the management is not entitled to issue any recommendation with regard to the takeover bid. Pursuant to the principles of neutrality and transparency, the management members have to publicise their conflicts of interests and refrain from any further action facilitating a positive result of the takeover. In such a situation, members of the management board and members of the supervisory board may be barred from exercising their voting rights in the corporate bodies forming a decision on the takeover bid.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

According to the Takeover Act, an ongoing private transaction of a publicly listed company may only be effected pursuant to a public takeover bid. Any bidder obtaining a controlling interest in a listed company has to make a mandatory bid. Such bid has to be published at the latest 20 trading days after the controlling interest has been obtained. A takeover bid may be kept open for 10 weeks at maximum. The minimum price to be offered in a mandatory offer or a voluntary offer aimed at the acquisition of a controlling interest must be higher than the highest price paid by the bidder during the 12 months preceding publication of the bid and the average share price during the six months immediately preceding the publication of the bid. In line with Directive 2004/25/EC on takeover bids (the Takeover Directive), the possibility of a 15 per cent reduction of the minimum price was eliminated by the Takeover Amendment Act 2006.

Austrian Stock Exchange law generally does not provide for the possibility of voluntary delisting. Therefore, a delisting of a company from the VSE has to be achieved through a corporate reorganisation by way of a squeeze-out of the remaining minority shareholders. In the course of the implementation of the Takeover Directive by the Takeover Amendment Act 2006, a new legal basis for the squeeze-out of minority shareholders was enacted.

A squeeze-out is generally only possible once the bidder has obtained at least 90 per cent of the total outstanding share capital of the target company. It could be performed until the Takeover Amendment Act 2006 came into effect, in principle, only by way of a disproportionate demerger of the minority shareholders or a merging transformation. In the course of the disproportionate demerger, minority shareholders will be spun off to a newly formed company (cash box) containing liquid assets corresponding to the value of the minority shareholders' interests. Such cash box may be liquidated at a later stage. The merging transformation is essentially similar to an upstream merger, where the minority shareholders receive cash compensation instead of shares in the absorbing parent company. In both cases, there are certain safeguard procedures under corporate law to ensure minority shareholders are adequately compensated.

For both squeeze-out mechanisms described above, Austrian Corporate Law provides for enhanced disclosure requirements, in particular to protect the interests of the minority shareholders, the creditors and the works council. The Squeeze-out Act provides a unification of the several ways to exclude a minority shareholder. According to the Squeeze-out Act, a majority shareholder holding not less than 90 per cent of the entire (voting and non-voting) share capital of the company may squeeze out the remaining shareholders at an equitable price. The squeeze-out right is general and is not limited to a preceding takeover bid. The minority shareholders are not entitled to block the squeeze-out but have the right to a separate judicial review of the fairness of the compensation paid for their minority stake.

Since the implementation of the Transparency Directive in Austria, which led to an amendment of the Stock Exchange Act and the Banking Act and entered into force in April 2007 it is required that persons directly or indirectly acquiring or disposing of shares admitted to listing on a regulated market have to notify the stock exchange, the Austrian Financial Market Authority and the issuer of the proportion of voting rights held as a result of the acquisition or disposal if that proportion reaches, exceeds or falls below certain thresholds.

5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

Timing of the transaction in all cases depends on the prospective transaction structure. As to which, there are certain deadlines provided for by law which have to be taken into account by the venture capital investor. Past practice has shown that a takeover procedure takes roughly three to four months from the first contact with the Austrian Takeover Commission until publication of the final result of the takeover bid. According to the Squeeze-out Act, a condition precedent for the right of squeeze-out by a majority shareholder in connection with a takeover bid is, inter alia, that the offeror squeeze-out be completed within three months of the deadline for acceptance of the bid. Registration of the resolution by the majority shareholder is constitutive and, therefore, all shares of the minority shareholder shall pass to the majority shareholder upon registration of the resolution in the commercial register.

6 Purchase agreements

What purchase agreement issues are specific to private equity transactions?

According to Austrian stock corporation law, the target company is prohibited from financing, or providing assistance in the financing, of the acquisition of its own shares. Such financing or assistance in financing violates section 66a of the Stock Corporation Act, resulting in the management becoming liable for damages. Further, any such financing generally results in a violation of capital maintenance rules because of the unlawful repayment of equity under section 52 of the Stock Corporation Act (section 82 of the Act on Limited Liability Companies), resulting in the transaction being null and void.

In the course of loan-financed structures, banks and other lenders intend to have debts secured with assets of the target's group. Contrary to the pledging of shares, lenders may enforce their receivables by getting hold of the group assets. However, such pledging of assets of the target company generally violates capital maintenance rules, resulting in the transaction being null and void. Therefore, any pledge, guarantee, surety, mortgage or any other security right granted by the target to the financing bank without the target receiving adequate consideration and without the management of the target having undertaken a due risk assessment of such security, stands in conflict with the mandatory provisions of Austrian law.

The guarantees and representations and warranties to be declared by the seller depend on the respective deal structure. Precedents show that unencumbered ownership of the shares to be sold has to be guaranteed. In addition, ordinary guarantees and representations and warranties relating to the ownership of the target in subsidiaries, annual statements, payment of taxes and other duties, non-existence of change of control provisions, compliance with environmental law as well as any further representations and warranties are pursuant to the results of a due diligence review.

The instrument of indemnification is normally adapted to the legal instruments provided by Austrian law. Acquisition agreements usually contain provisions on indemnifications being dependent on the seller's fault or the purchaser being under an obligation to prove the reduction in value of the respective business of the target company. Austrian law does not prohibit a system of indemnification being independent from any recourse to fault or proof, resulting in the seller being fully liable for the business transferred to the private equity investor, in a manner similar to a guarantee.

7 Participation of target company's management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues?

Austrian law recognises both the participation of management of target companies in employment agreements and equity-based incentives. In employment agreements, management is often party to flexible compensation schemes, in most cases depending on earnings before interest and taxes, turnover or after-tax profit figures. As far as stock corporations are concerned, the Stock Corporation Act provides that a flexible compensation of management essentially has to result in participation in the annual profits of the respective company.

In any case, the supervisory board has to ensure that the aggregate compensation of management (ordinary compensation, incentive-based compensation and other payments) are in proportion to the functional tasks of the management in the respective company. Management may further be granted stock options, for which certain criteria as to transparency and fairness are contained in the Code. Moreover, Austrian stock corporation law has alleviated the rules on the share buy-back programmes for the back-up of management stock options.

Other instruments include the issuance of special participation rights and similar profit-participating instruments, which may grant essentially the same rights as shareholders have but exclude management from any voting rights.

Austrian corporate law (section 66a of the Stock Corporation Act) does not allow for the target company to finance or participate in any financing of the investment to be made by the respective member of the management board to be eligible for or to fulfil its obligations under an incentive-based programme.

8 Tax issues

What are the basic tax issues involved in private equity transactions? Can share acquisitions be classified as asset acquisitions for tax purposes?

Basic tax issues involving private equity transactions in Austria relate to the structuring of the investment itself, the distribution of dividends, the servicing of acquisition indebtedness and the tax-efficient exit of the shareholders.

When entering into an investment, it should be noted that Austria, in general, levies capital duty amounting to 1 per cent for any capital contribution made to an Austrian company, irrespective of whether such contribution is effected via an actual capital increase or otherwise.

Furthermore, interest expenses payable on debt incurred for the acquisition of shares are tax deductible. However, target companies still have to distribute dividends to service the debt obligation of the acquiring parent company and dividends can generally only be distributed once during any accounting period (one intermediate dividend may, however, be payable in the case of joint stock corporations if certain requirements are met). Further interest payments will only be deductible if such payments comply with the arm's-length standard. The same is true for any compensation paid to management regarding stock options and deferred compensation plans.

Under certain conditions the possibility of goodwill depreciation in the case of share deals is provided. In general, goodwill may only be capitalised for tax purposes in the course of an asset deal. However, if the target company becomes part of an Austrian tax group, it is in principle, possible to capitalise and depreciate goodwill in the case of a share deal. This provision has been enacted to provide investors with a level playing field when making the decision whether to make an investment by way of an asset deal or by way of a share deal. This goal has not been quite reached because the Austrian legislator inserted certain restrictions to limit any goodwill depreciation in the case of a share deal. Such restrictions include, inter alia, that a goodwill depreciation may only be made if the target company is an Austrian operative corporation and qualifies as a group member after completion of the acquisition. The acquirer needs to own more than 50 per cent of the value and the voting rights of the target company for such purpose. Further, there are quite complex rules on calculating the amount of any goodwill to be capitalised for tax purposes. In general, the difference between the acquisition costs and the net equity of the target company as determined for accounting purposes (thereby adding any inherent gain on non-depreciable fixed assets) is eligible for goodwill depreciation. The maximum amount of goodwill to be capitalised for such purpose corresponds to 50 per cent of the acquisition costs.

9 Existing indebtedness

What issues are raised by existing indebtedness at a potential target of a private equity transaction? How are these issues resolved?

In the case of the target's indebtedness, there are certain restrictions for the leveraging up of companies. Such restrictions are of particular importance since most of the private equity transactions in Austria are heavily debt-financed.

Generally, under the Enterprises Reorganisation Act (Unternehmensreorganisationsgesetz, URG) an Austrian company has to initiate a complex reorganisation procedure if the target company has less than 8 per cent equity or a deemed debt redemption period of more than 15 years. Further, in such cases certain liability issues may arise for the management. Moreover, if an Austrian company has negative equity, an expert opinion needs to be provided. Otherwise, the company needs to claim bankruptcy protection within 60 days.

Such issues can generally be resolved by way of new equity injections. Although not advisable, in certain limited circumstances it may also be possible to successfully complete a private equity transaction where the target fulfils the criteria for a reorganisation under the URG for a certain limited time period, provided that an expert opinion is issued stating that in such a case no reorganisation within the meaning of the URG has to be performed.

10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? Do margin loan restrictions affect the debt financing structure of these transactions?

Financing may either be provided by way of equity, debt or mezzanine capital. Equity financing can be achieved by an increase of share capital providing for an equity injection in cash or in kind, the transformation of profit reserves or a merger. Depending on the agreed structure, the venture capital investor either acquires shares from existing shareholders with the obligation to contribute all or part of the purchase price into the target or the investor directly subscribes a capital increase of the target.

Debt financing can comprise traditional bank loans on a revolving basis, corporate bonds, commercial papers or secured and unsecured notes.

Another frequently used tool for providing financing in the course of private equity transactions relates to mezzanine capital. This innovative form of financing may either be provided by straight subordinated debt or other debt obligations containing an equity kicker. Typical equity-related debt obligations include convertible bonds, profit-participating loans and other profit-participating instruments. Further, silent partnership structures are used to provide mezzanine financing.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in a going-private transaction? What other documents set out the expected financing?

As already outlined above, inter alia, the provisions of the Takeover Act and the Code of Corporate Governance are usually relevant with respect to going-private transactions. Furthermore, the prohibition of repayment of capital may be considerable. Section 52 of the Stock Corporation Act states that for stock corporations, contributions may not be repaid to the shareholders and, for the lifetime of the company, shareholders shall only be entitled to any balance sheet profit, resulting from the annual balance sheet, to the extent that such profit is not excluded from distribution by law or the company statutes.

Long preliminary negotiations are not unusual in such transactions. As a rule, such negotiations result in the execution of preliminary agreements, for example a letter of intent providing for break-up fees, which are arising more frequently in such deals and are an arrangement whereby the acquirer agrees to pay a fee to the seller if the deal does not go through.

12 Fraudulent conveyance issues

Do private equity transactions involving leverage raise 'fraudulent conveyance' issues? How are these issues typically handled in a going-private transaction?

Secured creditors have priority in the settlement of their claims with respect to the assets in which they hold a security right. Fraudulent conveyance issues mostly arise in cases of bankruptcy. In such a case, the assets will be sold and any proceeds remaining after settlement of the secured creditors' claims will become part of the general bankrupt's estate to be distributed among the creditors. As a general rule, no security interests perfected within 60 days preceding the date of the opening of the bankruptcy proceedings will be recognised. The purpose of such provision is clearly to avoid preferential treatment of certain creditors at a time when a bankruptcy is imminent.

The law also provides for the possibility of having certain transactions undertaken by the debtor during specified periods of time preceding the bankruptcy declared null and void. This occurs when it can be established that such transactions were undertaken with the intention of depriving other creditors of assets to which they would otherwise have been entitled for the settlement of their claims or to grant an unfair advantage to certain creditors. As stated above, transactions undertaken and securities perfected within 60 days prior to the opening of bankruptcy proceedings are, as a general rule, always voidable. Actions beyond this time may be voidable depending on the various circumstances, eg, financial status at the time when the action was consummated (reasonableness of the consideration). In addition, certain transactions undertaken with the intention of depriving other creditors of assets may also constitute a criminal offence.

13 Shareholders' agreements

What are the key provisions in shareholders' agreements covering minority investments or investments made by two or more private equity firms?

Shareholders' agreements regularly contain provisions on the following:

- corporate governance (nomination rights);
- information rights;
- provisions on call-on-capital (equity injections);
- coordination of voting rights;
- catalogue of actions requiring shareholders' consent;
- non-competition provisions;
- confidentiality provisions;
- transfer restriction provisions (right of first refusal, pre-emptive rights, tag-along, drag-along, competitive sales process);
- exit provisions (trade sale, initial public offering); and
- termination provisions.

In particular, corporate governance provisions have to be drafted carefully since Austrian stock corporation law provides for an independent board system. Therefore, syndicate resolutions cannot be implemented in the boards without specific legal mechanisms.

14 Limitations on transaction size

Do private equity firms have limitations on the size of transactions they may engage in?

Most Austrian private equity firms are structured as MFAGs. MFAGs are corporations and not treated as transparent for tax purposes under Austrian law. Under the MiFiG Act, MFAGs may be established as stock corporations or alternatively, for reasons of cost savings, as limited liability companies. MFAGs are subject to strict investment limitations to be eligible for certain tax benefits, which include an exemption from capital duty and other charges as well as certain exemptions from capital gains and from withholding tax on dividend distributions up to €25,000.

The limitations stated in the law include, inter alia, that only certain types of instruments may be acquired by an MFAG and that investments in one single company are limited and any participation held by the MFAG may not exceed 49 per cent and may not result in a controlling interest. Moreover, the MiFiG Act provides for another limitation whereby the acquisition or the increase of participation shall not exceed €1.5 million in a 12-month period. This restriction only allows the acquisition of minor participations.

Further, both pension funds and insurance companies may generally invest in private equity. However, Austrian law provides for certain investment restrictions in this regard.

15 Exit strategies and investment horizons

How do the exit strategies and investment horizons of private equity firms affect the structuring and negotiation of leveraged buyout transactions?

In principle, the structuring and negotiation of LBO transactions are heavily affected by structuring a tax-efficient exit for the private equity firms. Moreover, from an investment horizon perspective the business model needs to take into account the available financing sources, in particular any bank debt provided and the cash flow

Update and trends

A ministerial bill on a capital market strengthening and innovation act was issued in 2008, which will introduce an act on investment companies (*Investmentgesellschaftengesetz*, IGG) and will amend corporation tax law. This new act is intended to improve the legal and tax framework for private equity and venture capital in Austria and strengthen the equity situation of Austrian entities. It is also aimed at broadening the field of potential IPO candidates and thereby strengthening the Austrian capital market. These objectives will be achieved by implementing corporate law provisions on investment companies and accompanying tax measures.

The investment company will provide a new structure for venture capital. An investment company can be established as a domestic limited partnership or as a stock corporation. Hence, both individuals and legal entities can act as investors. However, in the case of a limited partnership, solely domestic or comparable foreign corporations with a seat in the EU/EEA and qualified investors within the meaning of the Austrian Capital Markets Act can hold participations in an investment company. The share capital of an investment company must be €2 million or more, at least half of which needs to be paid up. The contribution of an investor into an investment limited partnership shall be at least €50,000, of which €25,000 needs to be contributed in cash upon subscription. Contributions in kind are not possible.

An investment company may instruct a corporation, as a management company, with the management of its corporate assets. If the management company is set up in the form of a limited liability company the appointment of a supervisory board is required, regardless of whether the requirements of the Limited Liability Act are fulfilled. Investment companies and management companies must have at least two executives who have the skills to manage the investment company (eg, at least one executive must have their vital interests in Austria and at least one executive must have a command of German).

The bill also provides for restrictions relating to the holdings of investment companies, which have to be for at least one year in order to avoid speculative deals. The duration of the holdings is also limited in the other direction by providing a maximum period of 10 years to help provide investors with exit strategies. Certain control mechanisms will also be provided for, one of which shall be the requirement of a depository bank to be in charge of the custody of the investment company's assets and to keep its accounts. The depositary bank must ensure that the earnings of the investment company are used in accordance with its articles of association. If the depositary bank does not fulfil its obligations, as assumed under the IGG, it will be liable towards the investment company and its investors. In addition to these control mechanisms, transparency shall be assured, in particular, by the obligation of the investment company to prepare an information document. Such information document shall contain any information that allows the investors to assess the status of the investment as to its assets, liabilities or the rights and obligations arising out of or in connection with their holdings. This reporting duty is applicable upon each end of quarter and upon each issuing or sale of the holdings. However, quarterly reporting shall not apply if circumstances occur that would make the information document incomplete, incorrect or misleading. Consequently, the Austrian control bank must maintain and disclose a list of these investment companies.

The new regulation of the private equity market is important to move it closer to international standards. Considering certain restrictions imposed by this bill, it remains to be seen which provisions of the draft bill will be enacted and to what extent the Austrian private equity market will be affected.

available to service such debt. The deductibility of interest for tax purposes is of course an important factor in any merger model underlying the private equity investment (tax shield).

Depending on the tax position of the selling entity, the structuring needs to achieve only one level of tax being assessed in the case of an exit. Any tax resulting from a gain being recognised has to be optimised to the extent possible. To structure the exit as efficiently as possible it is advisable to carry out a corporate reorganisation.

16 Principal accounting considerations

What are some of the principal accounting considerations for private equity transactions?

From 2005, Austrian publicly traded companies need to apply the International Financial Reporting Standards as the accounting principles applicable by law for the consolidated financial statements. Otherwise, Austrian companies need to apply Austria's generally accepted accounting principles (GAAP), which are based on the principle of conservatism. Certain exceptions exist with regard to consolidated financial statements in these cases internationally recognised accounting standards are applied. In principle, under Austrian GAAP participations acquired are valued at cost. No goodwill depreciation arises in the case of a share deal at the level of the acquiring entity. This may not be true for the consolidated financial statements.

Other accounting considerations include the proper accounting for mezzanine capital. In this regard, the expert committee of the Chamber of Accountants and Auditors has issued a detailed opinion on the requirements to be fulfilled to treat mezzanine capital as equity for accounting purposes.

The correct treatment of interest expenses in accordance with the arm's length standard – thereby considering any potential timing differences (eg, deferred taxes) – needs to be considered.

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years?

In many cases, going-private transactions in the past have been the result of privatisation transactions. The Republic of Austria as former owner of such companies sold stakes into the capital markets as a first privatisation step. Pursuant to the Austrian Takeover Act, the sale of the remaining stakes forced the acquirer in many cases to launch a public takeover bid to all shareholders. Most of these mandatory takeover bids resulted in the acquirer obtaining more than 90 per cent of the share capital of the respective targets, enabling the acquirer to undertake a squeeze-out of the minority shareholders as described above. Pursuant to such squeeze-out, the VSE ex officio delisted the respective target company.

The most prominent going-private transactions concerned Austria Tabak AG in a takeover by the Gallaher Group; Voith AG in a takeover of Voith Austria Holding AG; Jenbacher AG in a takeover by General Electric; Topcall International AG in a takeover by the Dicom Group; BBAG and Brau Union AG in a takeover by Heineken;

VA Tech in a takeover by Siemens; Investkredit Bank AG in a takeover by Österreichische Volksbanken AG; and Bank Austria Creditanstalt AG in a takeover by UniCredito Italiano SpA (the latter as a result of the takeover of German HypoVereinsbank by UniCredito).

18 Industry-specific regulatory schemes

Do industry-specific regulatory schemes limit the potential targets of private equity firms?

As outlined above, various provisions of Austrian law limit the potential targets of private equity firms. Insurance companies, pension funds, MFAGs and others are subject to strict limitations in their investment portfolios. Moreover, Austrian law further restricts certain industries. For instance, according to a constitutional law, the Republic of Austria or the respective federal provinces have to own at least 51 per cent of the share capital of the respective energy providers regulated by federal or state law. Any transfer of shares in such energy providers exceeding 49 per cent of the share capital of the respective company would be null and void.

19 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

Typical issues to be considered with regard to structuring and financing a cross-border transaction include the strict Austrian capital maintenance and financial assistance provisions. Under Austrian corporate law, a target company may only engage in arm's length transactions with its shareholders or persons related to a shareholder. Accordingly, if an acquisition company incurs acquisition indebtedness, a target company may only secure such financing if it receives an adequate premium complying with the arm's length standard and if the assumption of such risk is something a diligent manager would do without violating his or her duty. Since most of the equity transactions in Austria are heavily debt-financed, it appears doubtful whether a diligent manager would accept the risk of providing security in such a case even if he or she were to receive an adequate premium, which would, in any event, be a costly structure.

Accordingly, a security provided by the target company for acquisition indebtedness in general violates Austrian capital maintenance rules. Further, based on the Stock Corporation Act, even in cases where capital maintenance requirements would not be violated, the participation of the target company in any financing by way of providing security interests would violate the Austrian financial assistance rules. Contrary to the capital maintenance requirements, such violation would not render the transaction null and void but it would result, at a minimum, in the potential liability of the management.

20 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

There are no special considerations as to club or group deals as a matter of Austrian mandatory law. However, two or more investors participating in the same transaction will generally tend to regulate their relationship in a shareholders' agreement (see question 13).

21 Recent credit market disruptions

How have disruptions in the credit markets affected dealmaking? What specific changes to transaction terms have you seen and do you expect in the future?

Recent legal amendments have tended to improve the legal framework for private equity and venture capital in Austria. The ministerial bill on a new act for investment companies (see Update and Trends) can be deemed as another important step in this regard. The consequences of the financial crisis are also identifiable on the private equity market in Austria; however, the disruptions in the credit markets should not lead to material changes regarding transaction terms. Rather, the scope of the warranties and the terms relating to the exit procedure will become even more important for prospective private equity investments. In general, it is a matter of judgment for the investor to determine an appropriate level of warranties. From the investor's perspective the events that have occurred since the balance sheet date are particularly important, and therefore the investor will, inter alia, aim to include transaction terms providing that there have been no material adverse changes in the financial position or prospects of the business and that the target company has conducted its business in the ordinary course consistent with past practice and that there has been no disposal of assets other than in the ordinary course of business since the balance sheet date of the last audited accounts. By means of such material adverse change or material adverse effect clauses the investor as purchaser intends to shift risks to the seller with respect to decreases in the target's assets before closing the transaction.

Taking into account that sooner or later the investor will aim to realise all or part of their investment in the company, provisions included in the transaction agreements providing for the exit of the investor are usual and important. However, legal restrictions particularly provided by the Stock Corporation Act and the Companies with Limited Liability Act need to be considered in the course of determining the exit procedure.

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