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Doing deals in Austria

Albert Birkner and Hasan Inetas of CHSH explain the governing legislation

General overview

What legislation governs M&A activity in Austria?
In Austria, the Austrian Takeover Act (*Übernahmegesetz, ATA*) governs public takeovers. It came into force on January 1 1999 and was last amended by the Takeover Amendment Act 2006 (*Übernahmerechts-Änderungsgesetz*,) implementing Directive 2004/25/EC of the European Parliament and the Council on takeover bids. Moreover, the new Squeeze-out Act (*Gesellschafter-Ausschlussgesetz*), which applies to stock corporations and limited liability companies, was enacted during the implementation of the Takeover Directive by the Austrian Takeover Amendment Act 2006.

Further important sources of law that apply to M&A transactions, are the Austrian Stock Corporation Act, the Austrian Companies Limited Liability Act, the Austrian Stock Exchange Act and the Austrian Banking Act. Finally, merger control clearance under the Austrian Cartel Act must also be taken into account.

What impact have recent legislative changes had on the nature and amount of M&A activity?
The new Squeeze-out Act enables a squeeze-out of minority shareholders. It is the sole practical alternative to withdrawal from the stock exchange, since Austrian stock exchange law does not provide for de-listing upon application of the issuer to the listed enterprise. The minority shareholder shall receive an appropriate cash settlement for the squeeze-out. The new Squeeze-out Act regulates that the respective cash settlement is payable two months after announcement of the registration in the commercial register, and shall bear interest from the time of the resolution by the meeting of the shareholders until maturity at an annual rate of 2% above the relevant base interest rate, however, the Austrian legislator did not specify the conditions that make a cash settlement "appropriate". Therefore, in practice, valuation of the appropriateness of the cash settlement is one of the main issues in Austria. This has become evident, for example, in the course of squeeze-out of the minority shareholders of Bank Austria Creditanstalt.

What legal innovation, if any, has there been in recent takeovers and mergers?
One of the most recent innovations relates to the implementation of the EC directive on cross-border mergers of limited liability companies (Directive 2005/56/EC) by the EU Merger Act (*EU-Verschmelzungsgesetz*), which entered into force on December 15 2007, and which will facilitate cross-border mergers. The new EU Merger Act *inter alia* sets out the requirements for registrations and cancellations within the Austrian Commercial Register for cross-border mergers for Austrian limited liability companies. It remains to be seen whether the intention of the Austrian legislator to help facilitate cross-border mergers can be achieved by the new EU Merger Act. In any case, another innovation provided for by the EU Merger Act, namely the validity of cross-border mergers as well as non-cross-border mergers of stock corporations (as the transferring corporations) to limited liability companies (as the surviving corporations) may be a favourable alternative.

With regard to private equity transactions, the new Act (*Mittelstandsfinanzierungs-gesellschaften – Gesetz, the MiFiG Act*) for companies specialising in the financing of small and medium-sized enterprises (*Mittelstandsfinanzierungsgesellschaften, MFAG*), which entered into force on January 1 2008, needs to be considered. The new MiFiG Act leading to amended taxation rules for MFAGs, provides for certain restrictions concerning the amount of investment. Thus, the acquisition or the increase in participation shall not exceed an amount of €1.5 million ($2.3 million) in a 12-month period. This provision, which is not particularly favourable from an investor's perspective, only allows the acquisition of minor participations in the target company.

What have been the most significant M&A transactions in Austria over the past year?
In 2007 the Austrian M&A market hit record levels. Cross-border transactions were also at record levels. The general increase in fund-raising across Europe was also reflected in Austria. With a transaction volume of more than $1.5 billion, the purchase of the Belarusian mobile network provider MDC (operating under the Velcom brand) by Telekom Austria was one of the largest transactions. The acquisition of ONE, the third largest Austrian mobile phone provider by a consortium consisting of France Telekom and PE Fonds Mid Europa Partners was another significant transaction.

How, and to what extent, is foreign involvement in M&A transactions in Austria regulated or restricted?
In the course of public takeovers the international scope of applicability of the ATA also needs to be considered, since, subject to certain qualifications, some provisions of the ATA also apply to public bids relating to shares by stock corporations that do not have their registered office in Austria but in other member states of the European Community or the EEA.

The acquisition of land in Austria is governed by the special statutes of the nine Austrian federal provinces. In accordance with European guidelines, all of the nine federal provinces' real estate transaction laws ensure equal treatment of EU and Austrian citizens. The acquisition of land by legal entities controlled by non-EU persons or entities, is subject to administrative approval.

Due diligence

What are the principal disclosure requirements in a typical M&A transaction?
Under Austrian Takeover Law the offer documents shall as a minimum contain *inter alia* the content of the bid regarding the consideration offered for each share and all conditions and rights of withdrawal that the bid is subject to. Considering that the buyers of the target company particularly aim to discover the material issues relating to the target's business, its assets and liabilities by means of due diligence, certain disclosures by sellers are essential for buyers to decide whether they will buy the target, and if so, to help evaluate the purchase price. However, Austrian company and civil law does not oblige the seller to make disclosures in the course of due diligence investigations.

It is common practice that the buyer will investigate the validity of title regarding the shares in case of a share deal, and further, will

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Author biographies

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Albert Birkner is managing partner of CHSH. He is chairman of the firm's M&A practice group. His main area of practice is M&A, in particular takeovers and corporate restructurings. Birkner has represented various national and international clients in takeover proceedings and matters generally relating to M&A and takeovers before the Austrian Takeover Panel. He also advises on company law issues, in particular transaction-related restructuring.

Birkner graduated from the University of Vienna (Mag Iur 1992, Dr Iur 1995) and the University of Cambridge (LLM 1995). He worked as an academic assistant at the University of Vienna Institute for Tax Law (1991/1992). Birkner is author and co-editor of a standard publication on commercial precedents under Austrian law and author of the *Corporate Governance Handbook*. He is a university lecturer.

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request the disclosure of any agreements between the target company and its shareholders. Such disclosures might enable the buyer to discover violations of capital maintenance rules prohibiting unlawful repayments of equity under the Austrian Stock Corporation Act. Pursuant to section 52 of the Stock Corporation Act contributions may not be repaid to the shareholders 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.

To what extent do the current disclosure requirements achieve market transparency?

An interested buyer cannot oblige the seller to disclose information in the course of a due diligence investigation, but certain disclosures are required irrespective of due diligence. Under the implementation of the Transparency Directive in Austria, which entered into force in April 2007, the Austrian Stock Exchange Act and the Austrian Banking Act were amended. The most relevant innovations in this regard are the obligations of periodic financial reporting of listed issuers and the obligation of persons directly or indirectly acquiring or disposing shares admitted to listing on a regulated market. Such persons must notify the stock exchange, the Austrian Financial Market Authority and the issuer of the proportion of voting rights they hold as a result of the acquisition or disposal, if that proportion reaches, exceeds or falls below certain thresholds.

How has the growth in private equity buying in the past few years affected due diligence?

The private equity market in Austria is still growing and spans from seed-financing to mature private equity investments. Legal due diligence practice needs to be adjusted to the requirements of private equity transactions, taking into account that private equity and venture capital investments require detailed legal due diligence. Accordingly, it is not unusual that in the course of an auction the investor asks the law firm to prepare a preliminary report, while aware that a full due diligence report will be required if the seller has received confidentiality and non-disclosure agreements from the private equity investor and the investor is mentioned on the shortlist.

A particular concern regarding a due diligence process in which a private equity house is involved as a prospective buyer, is that the private equity investor intends, sooner or later, to initiate an exit procedure. Such exit procedures and mechanisms vary. While negotiating these exit clauses it needs to be considered that the clauses are in line with Austrian company law and Austrian civil law, in particular with section 879 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) expounding the principle that a contract violating legal provisions or good morals (*gute Sitten*) is null and void.

Has the issue of material adverse change clauses become more important with the recent failure of some large M&A deals around the world?

In general, offers subject to conditions or rights of withdrawal are only valid under Austrian Takeover law if they are objectively justified, especially if they result from legal obligations of the bidder, or if the application of the condition or the exercise of the right to withdrawal does not depend entirely on the offeror's discretion. Therefore, material adverse change clauses can be used in such transactions.

Dealmaking and the terms in the course of a transaction did not materially change in the recent past. But provisions of sale and purchase agreements determining the scope of warranties have become more important. In particular, the buyer has an increasing interest in shifting the risks for the events that have occurred since the balance sheet date to the seller. Therefore, from an investor's perspective the determination of adequate material adverse change or material adverse effect clauses contained in the respective agreements are essential in ensuring that the target company conducts its business in the ordinary course consistent with past practice between the signing and closing date.

Takeovers

Are there any specific regulations and/or regulatory bodies governing takeovers in Austria? How do they compare with other international regulators?

The ATA regulates public takeovers. It also contains provisions on the Austrian Takeover Commission, which may be regarded as an independent body responsible for supervising public bids. Pursuant to section 28 ATA, the Takeover Commission consists of 12 members appointed for a period of five years. The Takeover Commission is competent to provide opinions on points of law of basic interest or importance and may at any time initiate

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proceedings *ex officio*. The Takeover Commission may in general dispense with the oral procedure if there are reasonable grounds for assuming that on the basis of the procedure no other result could be obtained, especially if the facts and the legal issues are clear, and the need for a decision to be reached quickly manifestly precludes the oral procedure.

The Austrian Constitutional Court challenged an authorisation of the Austrian Takeover Commission in the course of the Takeover Amendment Act 2006. The Austrian Takeover Commission was previously authorised to issue decrees, but the Takeover Amendment Act 2006 extinguished its authority to do so.

What are the various methods by which a takeover can be achieved?

The ATA distinguishes between three types of offers – mandatory offers, takeover offers and voluntary offers. Mandatory offers are offers to all shareholders of a target company to be launched after the offeror has reached or exceeded the threshold of the "controlling interest" within the meaning of the ATA. The definition of the term was another concern that the Takeover Amendment Act 2006 dealt with. The flexible definition of the term under the old Austrian Takeover Act has been changed, to a strict definition of "controlling interest" as the holding of a minimum of 30% of the shares with permanent voting rights in the target company and "qualified minority participation" as the holding of 26% of a company's voting rights.

The second type of offers provided for under the ATA are takeover offers. They enable the acquisition of a controlling interest within the meaning of the ATA. Voluntary offers, as the third type of offer provided under the ATA, are bids the acceptance of which does not confer a "controlling interest" to the offeror. That might be a result of the fact that the offeror already holds a controlling interest in the target company, or that after full acceptance of the offer it will remain below the threshold of a controlling interest.

How differently are hostile and voluntary takeover bids treated?

The Takeover Amendment Act 2006 does not contain any new specific provisions on hostile takeovers. The ATA expounds the principle of equality as the core principle of the entire Austrian Takeover Law, requiring the equal treatment of all shareholders of the target company. A specific determination of the rules of conduct of the boards of the target company is provided by the obligation of objectiveness (*Objektivitätsgebot*) and the prohibition of attempting to prevent takeovers (*Verhinderungsverbot*). In hostile takeovers the management board is obliged to remain neutral. Section 12 ATA states that the target company's management and supervisory boards may not take measures likely to deprive their shareholders of the opportunity to make a free and informed decision on the bid. The Austrian legislator consolidates this principle: it requires that between the time when the target company becomes aware of the offeror's intention to make a bid and the results are published, and – if the takeover goes ahead – until the bid has been completed, the management board and the supervisory board of the target company require the approval of the general shareholders' meeting before undertaking measures that could prevent the bid, with the exception of looking for other competing bids.

"Since its introduction the leniency programme has seen its first major case in 2007, relating to an elevator and escalator cartel"

What penalties are imposed for parties that violate takeover regulations (or equivalent)?

The ATA provides for a suspension of voting rights as a sanction in violations of the ATA; the legal situation has been amended extensively by the Takeover Amendment Act 2006 in this regard. Pursuant to section 34 paragraph 1 ATA, voting rights will be suspended if an offeror fails to publish a mandatory bid or violates the price building rules in a bid. In such gross violations of the ATA, the suspension of voting rights shall apply *ex lege*. However, the Takeover Commission is obliged to abolish the suspension of the voting rights as soon as a bid is made that meets the statutory requirements, a payment has been made to compensate the violation of price-building rules, or such payment is guaranteed to be paid immediately.

In addition to the civil law penalty ordaining a suspension of voting rights, section 35 ATA contains penalty provisions declaring certain acts to be administrative offences. The Takeover Commission is the relevant authority in the first instance and the provisions of the Austrian Administrative Panel Act (*Verwaltungsstrafgesetz*) apply. Appeals against its decisions are decided by the Independent Administrative Tribunal (*Unabhängige Verwaltungssenat*) in Vienna. The Takeover Commission generally may waive the conducting of an oral procedure, but within the administrative panel procedure it is obliged to conduct an oral procedure. Offences shall be punished by a fine of at least €5,000 ($7681), up to a maximum of €50,000.

What are the thresholds for disclosing bids and offers?

Pursuant to section 10 paragraph 1 ATA the bidder must notify the Takeover Commission of a bid, together with the offer document and the expert's report. It is up to the bidder to initiate the commencement of the takeover procedure; however, once the bidder has publicly disclosed its intention to make a bid, either because of market distortions or section 5 paragraph 3 ATA, the bidder must notify the bid to the Takeover Commission within 10 trading days, after the managing board or supervisory board decide to make a bid. Upon application by the bidder, the Takeover Commission may extend the period to a maximum of 40 trading days.

The period of 10 trading days or the extended period of 40 trading days apply to bids in which the offerors intend to acquire a controlling interest. However, the respective periods do not apply to mandatory takeover bids in which those directly or indirectly acquiring a controlling interest must notify the Takeover Commission within 20 trading days of the acquisition.

How do you think M&A will develop next year? Do you think there will be more industry takeovers or purchases from emerging economies such as China and the Middle East?

Taking into account the fact that the Austrian M&A market has experienced positive developments, it remains to be seen whether such developments will continue, in particular whether the credit crises might lead to fewer transactions in the near future. In any event, an increasing demand for acquisitions by Chinese undertakings in Austria can be identified. On the other hand, certain countries such as Belarus are attractive for Austrian investors with respect to industrial facilities or to real estate.

Competition/antitrust

What have been the major recent developments in competition policy and legislation as they relate to M&A in Austria?

The Cartel Act was amended on January 1 2006. The main changes are the implementation of the leniency programme and the adaptation of the law to the provisions of Art 81 and 82 EC Treaty. Since its introduction the leniency programme has seen its first major case in 2007, relating to an elevator and escalator cartel.

The Austrian Ministry of Justice has

"In recent years the Austrian Cartel Court as increasingly imposed fines for abuse of a dominent position"

proposed a draft statute on class actions. It is designed for a minimum number of three plaintiffs with a large number of claims (at least 50) raising the same questions of fact or the same questions of fact and law against the same defendant(s). The draft statute is still under discussion.

How are the competition/antitrust regulations enforced in Austria?

The Austrian cartel law is mainly enforced by the Austrian Cartel Court (*Kartellgericht*), the Austrian Federal Competition Authority (*Bundeswettbewerbsbehörde*) and the Federal Cartel Prosecutor (*Bundeskartellanwalt*).

The main decision-making body is the Cartel Court. Its rulings may be appealed at the Appellate Cartel Court (*Kartellobergericht*) as final instance. Violations of the Cartel Act might lead to the following legal consequences: (i) provisions in agreements and decisions infringing the cartel prohibition are void; (ii) the Cartel Court (upon application of the Federal Competition Authority or the Federal Cartel Prosecutor) may impose fines on undertakings or associations of undertakings up to a maximum of 10% of the group turnover achieved in the last business year and (iii) persons or undertakings that suffered damage due to cartel law violations may also claim damages in civil courts.

How do legislation and regulation approach the issue of "abuse of dominant position"?

In general, the regulations on the abuse of a dominant market position under the Cartel Act correspond to those of Art 82 EC Treaty. However, the Austrian legislator differs on a particular point from the European regulation. It provides for a rebuttable presumption that an undertaking is market dominant if on the Austrian or a different relevant market it (i) has a market share of at least 30%, or (ii) is exposed to competition from at most two other companies and has a market share of more than 5%, or (iii) is one of the four largest undertakings, which together have a market share of at least 80%, provided it has itself a market share of more than 5% of the market.

In recent years the Austrian Cartel Court has increasingly imposed fines for abuse of a dominant position, In one magor case, for instance, the Austrian Cartel Court imposed a fine of €7 million ($10.74 million) for abuse of a dominant market position and infringement of the prohibition of cartels.

To what extent are parties to an M&A transaction subject to prior notification requirements?

A concentration within the meaning of the Austrian merger control regime has to be notified to the Federal Competition Authority before closing if in the last business year before the transaction:

- the aggregate worldwide turnover of the undertakings concerned (buyer and target group) exceeded €300 million; and
- the aggregate turnover on the Austrian market of the undertakings concerned exceeded €30 million; and
- the worldwide turnover of each of at least two undertakings concerned exceeded €5 million.

However, concentrations exceeding these turnover thresholds are exempt by law from the notification obligation if (i) only one undertaking achieved turnover in Austria of more than €5 million; and (ii) the other undertaking(s) achieved an aggregate turnover of not more than €30 million worldwide. Although the Cartel Act does not set out a specific deadline for filing a notification, the timeline in the course of an M&A deal needs to be considered, since a concentration must not be implemented before clearance.