PRIVATE M&A

Austria

LEXOLOGY
Getting The Deal Through

Consulting editor
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Private M&A

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Quick reference guide enabling side-by-side comparison of local insights, including structure and process, legal regulation, consents and filings; advisers, negotiation and documentation; due diligence and disclosure; pricing, consideration and financing; conditions, pre-closing covenants and termination rights; representations, warranties, indemnities and post-closing covenants; tax considerations; employees, pensions and benefits; and recent trends.

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

Private M&A transactions in Austria are commonly structured as a share deal. Owing to the increased complexity, including the need to precisely define the assets and liabilities to be transferred, and owing to the challenges involved, including the right of third parties to object to the transfer of contracts and statutory successor liabilities, asset deals are less frequent. Asset deals are usually only seen in the context of smaller transactions and where a transfer of parts of a business (unit) involves a limited number of assets.

Sale and transfer of shares are rarely effected by merger or spin-off transactions; however, demergers of businesses or business units may be used to prepare a later sale of shares. Joint ventures are usually achieved by combining assets in an existing or newly established company, including by tax neutral demergers or contributions of those assets from existing businesses or companies.

The number of documents and steps involved depends on the type of sales process.

- In a private M&A transaction with only one seller and one (potential) buyer involved, the parties will usually only enter into a no-disclosure agreement (NDA) and possibly a letter of intent before negotiating and agreeing the final transaction documentation.
- In an auction process, the seller will usually provide an information memorandum and sell-side due diligence reports after agreeing the NDA. The bidders will then be invited to one or more rounds of bids before the definitive transaction documents are concluded with the final bidder.

While auction processes often take several months, direct seller–buyer transactions in smaller deals may be signed quickly, potentially in four to six weeks, if agreement by the seller and buyer on commercial terms has been reached at the outset, the target business is not complex, and the sell-side makes available to the buyer a well-organised and fully loaded virtual data room with the buyer not identifying major roadblocks during due diligence.

Law stated - 30 June 2022

Legal regulation

Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

There is no general overriding statute regulating acquisitions and disposals in Austria. The most relevant statutes are the General Civil Code , the Commercial Code , the Act on Limited Liability Companies and the Stock Corporation Act .

Less frequently, the Demerger Act , the Tax Reorganisation Act and the EU Merger Regulation for cross-border mergers may come into play, depending on the specifics of the business combination. For government clearances, the Cartel Act , the EU Merger Regulation, the Investment Control Act (ICA) and, for regulated industries, special laws must be observed.

Acquisitions are generally not required to be governed by Austrian law; however, even if governed by foreign law, certain

mandatory provisions of Austrian law may still apply to the acquisition (eg, the notarial deed requirement for a transfer of shares in limited liability companies). Further, Austrian law will mandatorily govern statutory successor liabilities in asset deals or corporate restructurings, such as mergers or demergers.

Cross-border share deals on Austrian targets involving at least one non-Austrian party usually follow the Europeanised form of a US-style share purchase agreement, even if the share purchase agreement is subject to Austrian law.

Law stated - 30 June 2022

Legal title

What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

The scope of the legal title associated with shares or assets and the required form to effect a valid transfer of title is prescribed by law. It is not possible to modify the legal title or to split the ownership rights to a share (eg, sell voting rights and entitlement to dividends separately). Legal title automatically transfers to the buyer as of closing if the applicable (form) requirements are met.

Title to shares or assets usually includes legal and beneficial title; however, Austrian law acknowledges that legal and beneficial title may be separated. This is the case if a person holds legal title to shares or assets, but only acts as trustee for another person.

Law stated - 30 June 2022

Multiple sellers

Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

In the case of multiple sellers, in the absence of specific contractual arrangements between the sellers (eg, drag-along rights agreed in the articles of association or under a shareholders' agreement), each seller must individually agree to sell his or her shares and assets. Statutory law does not provide for a right of the majority shareholder to drag the minority shareholders.

However, Austrian law does allow for a squeeze-out of minority shareholders by a majority shareholder holding at least 90 per cent of the registered share capital in a limited liability company or a stock corporation.

Law stated - 30 June 2022

Exclusion of assets or liabilities

Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

In a transfer of business, the automatic transfer of employees pertaining to the business to the buyer under the EU Acquired Rights Directive, which has been implemented in Austria by the Employment Contracts Adjustment Act , cannot be excluded; otherwise, the parties may contractually define the scope of assets, liabilities and contracts to be transferred in an asset deal.

Several provisions of Austrian law provide for a statutory successor liability of the buyer in respect of third parties for liabilities pertaining to the business, even if the parties have agreed among themselves that the liabilities shall remain with the seller. Such statutory successor liabilities may only be partially excluded with effect to third parties.

Third parties to contracts must be individually notified of the transfer of their contract and have a right to object to the transfer of their contract.

Law stated - 30 June 2022

Consents

Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

The ICA transposes the requirements under the EU FDI Screening Regulation and replaced the liberal regime under the Foreign Trade Act . M&A transactions lacking the required ICA approval will, among other things, be null and void.

Under the broadened scope of the new legislation, all non-EU, non-European Economic Area and non-Swiss investors must check whether they meet the threshold (25 or 50 per cent control and, in certain cases of highly sensitive sectors (eg, defence and critical energy or digital, such as 5G infrastructure) already at 10 per cent) and broadened sector requirements for an approval requirement under the ICA.

Sensitive sectors for public order or security where the 25 or 50 per cent thresholds apply, among other things, include critical infrastructure, such as energy, information technology, transport; health food; critical technologies (eg, artificial intelligence, cybersecurity and nano and biotech) and dual good items; and critical resources, including energy, medicines, vaccines and medical devices, as well as access to sensitive information and the freedom and pluralism of media.

In many cross-border deals relating to Austrian targets, this requires a pre-transaction determination, regardless of whether approval under the ICA is required. If approval under the ICA is required, an additional condition precedent in the transaction documentation and a filing for approval and clearance by the Ministry of Digitalisation and Economic Affairs will be required to allow the closing of a transaction. The timeline for approval is a minimum of one month plus 15 to 40 days from filing.

Additional government approvals include merger control clearance and approval requirements in certain regulated industries, such as banking, insurance, aviation and telecoms.

Law stated - 30 June 2022

Are any other third-party consents commonly required?

Statutory law does not require co-shareholders to consent to the sale and transfer of shares; however, the articles of association of limited liability companies often include such consent rights or rights of first refusal.

Agreements concluded by the target company may include change of control clauses. Change of control clauses are

typical for financing agreements allowing the lender to accelerate the loans granted in the case of a change of control. Furthermore, in the case of a transfer of business, third parties to contracts may object to the transfer of their contract.

Law stated - 30 June 2022

Regulatory filings

Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

Any shareholder of a limited liability company, as well as the sole shareholder of a joint-stock corporation, must be registered with the companies register. Furthermore, a transfer of a business must be registered with the companies register. All registrations are of declaratory effect only and not required for the transfer of ownership title. The related filing fees are minor (a few hundred euros maximum).

The parties to a transfer of business may, to a certain extent, exclude the transfer of liabilities to the buyer, also with effect in respect of third parties, if the exclusion is registered in the companies register within a maximum of one month of closing.

Law stated - 30 June 2022

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Typically, the parties will involve tax advisers and auditors. Depending on the target company's business, complexity and transaction size, further specialist consultants may be involved for the due diligence (eg, environmental experts). In large-scale transactions and auction processes, the parties often also mandate financial advisers.

Advisers usually conclude engagement letters based on their standard terms and conditions. Fees for tax advisers and auditors are usually time based, whereas financial advisers are usually paid on a success basis linked to the transaction value.

Law stated - 30 June 2022

Duty of good faith

Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

When parties enter into contract negotiations, they assume pre-contractual duties by operation of law (the concept of culpa in contrahendo). The pre-contractual duties primarily involve a duty of care. While a party may decide at any time to terminate contract negotiations, it may (in exceptional circumstances) become liable towards the other party if it has led the other party's side to believe that it will conclude the transaction and then suddenly aborts the negotiations.

In practice, letters of intent and other pre-signing documents limit the liability for violation of pre-contractual duties.

In negotiating entering into and approving an M&A transaction, managing directors and boards must observe fiduciary duties and the business judgement rule.

Law stated - 30 June 2022

Documentation

What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

In most private M&A transactions, the key document is the share purchase agreement or the asset purchase agreement, which could have numerous annexes. In more complex transactions, side agreements – including service level agreements – may be concluded.

In a pre-signing phase, the parties usually sign non-disclosure agreements and potentially agree on further documents, such as term sheets or letters of intent.

Asset purchase agreements are usually more complex than share purchase agreements as asset purchase agreements must precisely define the assets and liabilities to be taken over and must address additional issues, such as third parties objecting to the transfer of the contract or payments being made to the wrong party (wrong pocket clauses).

Law stated - 30 June 2022

Are there formalities for executing documents? Are digital signatures enforceable?

While the sale and transfer of shares in an Austrian limited liability company requires the form of an Austrian notarial deed or equivalent foreign notarial deed, the acquisition of shares in a joint stock corporation is not subject to any specific form requirements.

The sale of individual assets or of a business unit is generally not subject to any form requirements; however, under statutory law, the sale of all or substantially all of its assets (being interpreted as more than 75 per cent) by a joint-stock corporation requires approval by a shareholders' resolution with a 75 per cent majority and a sale and transfer agreement in the form of an Austrian notarial deed.

According to Supreme Court precedent, this approval requirement applies by analogy to the sale of all or substantially all of its assets by a limited liability company. In such a case, according to legal scholars, the notarial deed form requirement may also apply by analogy.

Form requirements may exist with regard to the transfer or registration of transfer of specific assets, such as intellectual property or real estate. The registration of the buyer as the new owner of the real estate with the land register (which is required for the transfer of ownership title) requires a written agreement with the signature of the seller being notarised.

Digital signatures are enforceable; however, a notarial deed generally requires that the signatories be physically present in front of the notary. Certain exceptions to the physical presence requirement for notarial deeds using digital signatures have been introduced owing to the covid-19 pandemic. The option to execute notarial deeds virtually has been incorporated into permanent law and will not expire, unlike most of the other covid-19-related measures.

Law stated - 30 June 2022

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

Buyers usually conduct due diligence on legal, tax and financial matters. Depending on the type of the target company's business and the risks involved, further due diligence on other matters, including regulatory, environmental, information technology or intellectual property, may be conducted.

Sellers usually do not provide due diligence reports to prospective buyers. Sellers providing vendor due diligence reports, or more often legal or financial fact books, to prospective buyers is customary only in larger transactions and in the private equity context or in auction processes. In those cases, the vendor due diligence reports or fact books are mostly provided on a non-reliance basis only. In some cases, however, the final bidder is granted reliance.

Law stated - 30 June 2022

Liability for statements

Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

Yes. Under statutory Austrian law, sellers can, in principle, be held liable for pre-contractual or misleading statements; however, share purchase agreements and asset purchase agreements customarily exclude the parties' liabilities for pre-contractual statements.

A seller's liability is usually limited to the representations and warranties, indemnities and covenants given in the final transaction agreements. Limitations or exclusion of wilful misconduct cannot validly be excluded contractually.

Law stated - 30 June 2022

Publicly available information

What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

For a buyer, it is customary to search the electronically accessible:

- companies register, which includes basic corporate information and corporate documents, such as articles of association and financial statements;
- the trade register, which shows the trade licences held by companies; and
- the insolvency database.

Depending on the scope of the target company's business, further publicly available registers may be searched, such as the land register, the cadastre of potentially contaminated sites and the databases of the Austrian Patent Office, the European Patent Office, the EU Intellectual Property Office and WHOIS.

Law stated - 30 June 2022

Impact of deemed or actual knowledge

What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

Under the statutory representation and warranty concept, a seller is not liable for facts, matters and circumstances that can be seen from public books and records (eg, the land register) or that are known or should have been known (gross negligence required) to the buyer, unless the seller has given a specific representation and warranty with regard to those facts, matters and circumstances.

In the case of specific representations and warranties as usually given in a share purchase agreement or asset purchase agreement, the concept would, in most cases, result in the seller's liability, even if the buyer knew that the warranted facts, matters or circumstances are incorrect.

However, in Austrian M&A transactions, it is customary to exclude the seller's liabilities for facts, matters and circumstances disclosed to the buyer in the due diligence. Discussions usually revolve around the standard of disclosure required to exclude the seller's liability. Tax, however, is usually subject to a separate indemnity, under which the seller is liable irrespective of the buyer's knowledge.

Law stated - 30 June 2022

PRICING, CONSIDERATION AND FINANCING

Determining pricing

How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Pricing is usually based on an enterprise value of the target determined by applying established accounting and valuation methods. The purchase price is usually established on a cash- and debt-free basis and, at the end, an outcome of negotiations between the parties. Both closing accounts and locked-box structures are used in Austria.

While US or other international buyers usually prefer closing accounts, in a seller's market, in respect of attractive targets and in competitive auction processes, locked-box structures prevail, unless closing accounts are preferable for a seller under the specific circumstances.

Law stated - 30 June 2022

Form of consideration

What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Most private M&A transactions will see cash as consideration. Shares or a mix of cash and shares are used as consideration only in exceptional cases. Depending on the specific transaction and market circumstances, vendor loans may be granted to support buyer's financing.

In private M&A transactions, and different from public M&A transactions, there is no overriding principle to pay all sellers the same consideration.

Law stated - 30 June 2022

Earn-outs, deposits and escrows

Are earn-outs, deposits and escrows used?

Yes. Earn-outs and escrows are commonly used in Austrian M&A transactions. In the case of an earn-out, mostly used to bridge a valuation gap, sellers will usually push on a protection mechanism, prohibiting the buyer from post-closing conducting certain transactions or measures that may have a negative impact on the seller's ability to meet the earn-out.

Purchase price holdbacks, deposits and escrows, usually set up with notaries being the escrow agents, are regularly used to secure potential post-closing claims of buyers. The scope and staggered release terms of deposits and escrows are a standard subject of the negotiations in private M&A transactions.

Law stated - 30 June 2022

Financing

How are acquisitions financed? How is assurance provided that financing will be available?

Depending on the transaction size and whether the acquirer is strategic or private equity, transactions are financed by own funds or bank financing or a mix of both. Sometimes financing is provided by alternative financing providers, such as debt funds. Assurance is provided by equity and debt commitment letters by corporate guarantees and, sometimes, bank guarantees.

The binding nature of these instruments and the degree to which the back-up is readily enforceable or liquid will depend on the nature and balance sheet of the buyer and the respective negotiation power of buyer and seller.

Law stated - 30 June 2022

Limitations on financing structure

Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

No restrictions exist for sellers to grant financial assistance out of sellers' own funds (eg, granting vendor loans); however, applicable capital maintenance rules and prohibitions on financial assistance limit the ability of target companies to assist buyers in connection with the acquisition.

Generally, no financial assistance (eg, loans), upstream or cross-stream guarantees or security for acquisition financing may be provided by target companies.

Transactions in violation of capital maintenance rules are null and void and may lead to personal liability of managing directors or board members. Debt push-down and similar structures require careful planning to comply with corporate and tax requirements. A merger of the acquiring company (special purpose vehicle) carrying acquisition debt with the target company is no longer possible.

Law stated - 30 June 2022

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Typical closing conditions include foremost mandatory conditions precedent (ie, government approvals, such as clearance under merger control or foreign investment regulation, and additional mandatory approval requirements apply in regulated industries, such as banking, insurance, telecoms and airlines).

Additional closing conditions depend substantially on the transaction itself or the negotiation power of the parties and may include third-party approvals, waivers of change of control provisions, seller's warranties being true and correct at closing or completion of defined carve-out measures. Exceptionally, closing conditions relating to 'no material adverse change', shareholder approval or financing might be accepted by sellers.

Following the outbreak of the covid-19 pandemic and the war in Ukraine, 'no material adverse change' closing conditions seem to be requested more often by buyers.

Law stated - 30 June 2022

What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Buyers typically undertake to obtain – sometimes under 'hell or high water' clauses requiring them to accept onerous requirements imposed by the respective government agency, merger control and foreign investment or other government clearances – or at least to take reasonable best efforts to obtain, the respective approvals. Sellers typically undertake to support buyers in those efforts (eg, by supplying themselves or directing the target to supply required data for merger control filings).

Law stated - 30 June 2022

Pre-closing covenants

Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

The nature, scope and rigidity of any pre-closing covenants depends on the specific transaction, the type of business, the conditions precedent and the long-stop date. The seller will usually covenant the conduct of business of the target in its ordinary course between signing and closing, subject to defined measures being subject to buyer's approvals to the extent not violating gun-jumping rules.

Covenants can also include the seller procuring the resignation of management of supervisory board members at closing or the buyer procuring the later exoneration from liability of board members of the target for pre-closing periods. In locked-box transactions, this will include no-leakage covenants.

Breach of pre-closing covenants will, in practice, not lead to specific performance claims but to a claim for damages and indemnification, usually not subject to de minimis or other limitations, and to the no-leakage covenants to a euro-for-euro payment claim for any leakage.

Law stated - 30 June 2022

Termination rights

Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Unless non-satisfaction of a closing condition was caused by the terminating party, transaction agreements can be terminated if, unless waivable and waived, the conditions precedent have not been fulfilled by the long-stop date.

Most transaction agreements exclude unilateral rescission of the agreement. Like other contracts, transaction agreements can always be adapted or terminated by mutual consent.

Law stated - 30 June 2022

Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees are seen primarily in the pre-signing context under exclusivity agreements or in the context of letters of intent; they are rarely seen in the acquisition agreement. Pre-signing break-up fees could be in favour of the buyer and seller, depending on the circumstances.

If agreed in the acquisition agreement, break-up fees usually reflect a strong sell-side position in an auction context or otherwise and usually protect the sell-side and target from regulatory clearance risks, mostly on merger control, in respect of an expedient closing.

The amount of the break-up fees varies depending on whether they should merely compensate for frustrated expenses in an aborted transaction or carry an element of liquidated damages. Excessive break-up fees may be adjusted by the court and may also carry the risk of manager liability for violation of fiduciary duties.

Law stated - 30 June 2022

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

The scope and number of representations, warranties and indemnities given to a buyer varies, depending on whether the market is a sellers' or buyers' market and whether the target (business) is highly attractive and sold in an auction or in the context of a distressed sale.

The warranty catalogues usually start with the fundamental warranties in respect of title, corporate aspects and authority and power to enter into the agreement. The fundamental warranties are usually followed by warranties on the financial statements and warranties on the business, including on material contracts, intellectual property, labour and compliance.

Except for fundamental warranties, and depending on the negotiation power of the respective party, knowledge qualifiers and materiality qualifiers may apply to individual reps and warranties.

With regard to taxes and, sometimes, the environment or – for example, in the context of tech deals – intellectual property, indemnities will usually be agreed. Indemnities that, apart from the standard tax indemnity, are often agreed for risks identified in the due diligence are not subject to the usual limitations of business warranties.

Representations and warranties are not fault-based but, as with business warranties, are usually subject to agreed limitations. Violation of representations and warranties and of indemnities is usually contractually agreed to be indemnified on a euro-for-euro basis.

Law stated - 30 June 2022

Limitations on liability

What are the customary limitations on a seller's liability under a sale and purchase agreement?

Customary limitations to representations and warranties include de minimis thresholds, tipping or deductible baskets and liability caps. Rule of thumb metrics for share deals, which will vary in respect of the negotiation power of the respective parties, the particular transaction and deal size, are:

- at least 0.1 per cent of the purchase price for de minimis;
- at least 1 per cent for the basket and liability caps; and
- from 10 per cent to up to 50 per cent of the purchase price for representations and warranties, usually with separate caps depending on particular types of warranties.

A limit of 100 per cent of the purchase price will usually apply to breaches of fundamental warranties, in particular to the violation of the title warranty and of indemnities.

Business representations and warranties are usually excluded in respect of matters fairly disclosed in a virtual data room by the seller during due diligence; disclosure letters are rarely used. Fundamental warranties and indemnities are not subject to the usual limitations of business warranties and, thus, are not qualified by disclosure and not subject to knowledge qualifiers, de minimis and thresholds, except for the overall cap of 100 per cent of the purchase price.

Further limitations to claims usually include a contractual definition of loss to be compensated by the seller, with discussion points being the compensation for indirect damages and lost profit. Buyer contribution to the damage and violation of mitigation duties will usually also be agreed to reduce or exclude claims.

Claims for violation of representations and warranties will typically be agreed contractually to be limited in time, with time limits varying in respect of the type of representation and warranty or claim. Violation of business representation will have to brought typically within approximately 18 months from closing, whereas terms to claim for violation of fundamental representations, tax (often tied to the long statutory limitation periods) and other indemnities are usually multi-year periods and, thus, considerably longer.

Law stated - 30 June 2022

Transaction insurance

Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

While not yet as popular as in Germany or other European countries, warranty and indemnity (W&I) insurance is on the increase, primarily in larger transactions, specifically if the sellers are private individuals or private equity.

In real estate-related transactions, W&I insurance has become standard. Buyers typically take up the insurance.

In auction processes, especially in the private equity and the real estate transaction context, sellers may pre-discuss

and arrange for insurance with a broker and W&I insurers. Process implications specifically in respect of timing and limited coverage regarding certain risks may speak against W&I insurance in specific transaction settings.

Law stated - 30 June 2022

Post-closing covenants

Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Post-closing covenants usually include document retention requirements and seller access to books and records, as well as involvement in the defence of tax and third-party claims. Typical post-closing covenants also include non-solicitation and non-compete undertakings of the seller. As ancillary restraints admissible under antitrust and labour laws, those covenants must be specifically defined and limited in time and scope.

Law stated - 30 June 2022

TAX

Transfer taxes

Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

There are no transfer taxes levied on the sale of shares in corporations, limited liability companies or partnerships or the sale of assets; however, under Austrian law, several types of transactions may be subject to stamp duty if evidenced by written documentation in Austria. Such transactions include assignments of contracts, rights and receivables, sureties and agreements on easements and real estate pledges.

The stamp duty for those transactions ranges, depending on the type of legal transaction, from 0.8 (assignments) to 2 per cent (easements) of the calculation basis, which is usually the consideration for or value of the transaction. No stamp duty is triggered if contracts, rights or receivables transfer in a transfer of business automatically by operation of the law. Debtors of stamp duties are typically all parties to the agreement; therefore, if the transactions are concluded as ancillary transactions to the share or asset deal, stamp duty may be triggered.

The sale of shares in a corporation or limited liability company is VAT exempt, whereas the sale of assets, including the sale of a business as a going concern in respect of the underlying business assets, is subject to 20 per cent VAT at the standard rate, with certain assets being subject to a reduced rate of 13 or 10 per cent.

Real estate transfer tax (RETT) is levied on the acquisition of domestic real estate and, in some cases, also if shares in corporations and interests in partnerships that directly own real estate are transferred. RETT is triggered if 95 per cent of the shares of:

- a company that holds real estate are consolidated in the hands of one shareholder or a group of shareholders within the meaning of the Austrian group taxation regime; or
- a partnership that has held real estate over a five-year period.

RETT on direct acquisitions of real estate is 3.5 per cent (standard rate) of the purchase price or value. Upon registration of a new owner of the real estate, an additional 1.1 per cent registration duty will be triggered.

RETT on indirect acquisitions of real estate, via acquisition of companies and partnerships, or via acquisitions by

corporate reorganisation under the Tax Reorganisation Act, is 0.5 per cent.

Law stated - 30 June 2022

Corporate and other taxes

Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

In the case of a disposal of shares, a capital gain is subject to corporate income tax at a rate of 25 per cent or at the special income tax rate of 27.5 per cent if the seller is an individual. Any capital gain resulting from the disposal of assets or a business is subject to corporate income tax at the standard rate of 25 per cent if the seller is a corporation and up to 55 per cent if the seller is an individual.

Share-for-share exchanges are generally also taxable but may qualify for rollover relief under the Tax Reorganisation Act.

Austrian corporations may qualify for tax exemption on capital gains in the sale of shares if they meet the requirements for a special participation privilege or in cross-border transactions under applicable double tax treaties.

Law stated - 30 June 2022

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

In a share deal, the employment agreements with the target group and group companies are not affected and remain in full force and effect. Agreements with management must be reviewed in respect of termination rights by the manager under contractual change of control clauses.

In asset deals constituting the transfer of a business or business unit, the employees working in the business (unit) and their employment agreements automatically transfer to the buyer by operation of law. In a transfer of business, the buyer assumes all the liabilities of the seller as employer. The buyer may only object to takeover pension obligations individually granted to employees. Any transfer-related termination (prior to or following the transfer of business) is null and void.

A termination may be valid if it is justified by termination grounds (eg, personal reasons). Any termination notice given within one year of the effectiveness of the transfer of business is likely to be seen as transfer-related and, therefore, inadmissible.

Employees may only object to the transfer of their employment to the buyer if there are special termination rules set forth in an applicable collective bargaining agreement or if company pension commitments will not be taken over by the buyer.

Law stated - 30 June 2022

Notification and consultation of employees

Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

In share deals, no statutory notification of employees is required. In practice, the seller and buyer usually inform the employees at closing on the change of control before the transaction becomes public.

In transfers of business and business units, the works council or, if there is no works council, the employees affected must be notified of the transfer. Given that the law does not specify any timeline for this notification and that failure to notify does not carry any sanctions, sellers and acquirers usually notify following signing or on the day of closing to ensure confidentiality of the transaction before signing or closing.

Law stated - 30 June 2022

Transfer of pensions and benefits

Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

In share deals, pension entitlements and other benefits of employees remain unaffected at the target company level by a change of shareholders.

In the case of a transfer of business or business unit, company pensions and other benefits of employees transfer to the buyer; however, the buyer may object to taking over pension entitlements granted to employees individually on a contractual basis (no right to object exists with regard to pension entitlements granted in shop agreements).

In the case of an objection by the buyer to take over company pension obligations, the employees can and will regularly object to their transfer to the buyer, and the employment relationship will remain with the seller.

Law stated - 30 June 2022

UPDATE AND TRENDS

Key developments

What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

In line with European trends, the most important development affecting private M&A was the tightening of foreign direct investment (FDI) screening for non-European Economic Area and non-Swiss investors. The new regime under the Investment Control Act 2020 (ICA) is being applied by the authorities vigorously.

Given the broad FDI screening regime, investors from the United States, Australia, the United Kingdom (post-Brexit), the Commonwealth of Independent States, the Middle East and Asia will, in many cases (depending on the activities of the target companies), need to provide for conditions precedent in M&A documentation and undergo FDI approval proceedings with the Ministry of Digitalisation and Economic Affairs.

The first report of the Federal Ministry for Digital and Economic Affairs (BMDEA), published in the first quarter of 2022, regarding procedures carried out in the period up to 2021, confirms the Austrian authorities' practice of extensively applying investment control procedures

The Cartel and Competition Law Amendment Act 2021 (KaWeRÄG) amended the Austrian merger control regime as of 1 January 2022. The amendment was driven by the need to implement the EU ECN+ Directive; however, the Austrian legislator took the opportunity to refine the Austrian merger control regime by introducing a second domestic turnover threshold and implementing the significant impediment to effective competition test, as well as strengthening the FDI screening mechanism.

KaWeRÄG introduced a second domestic turnover threshold for the primary thresholds. Now, the turnover of at least two companies in Austria must exceed €1 million to trigger a notification obligation. This filter should bring down the number of mergers notified to the Federal Competition Authority (FCA) which has steadily increased in recent years, reaching a peak of almost 500 notifications in 2019, with a significant number of notifications involving target companies that only have a marginal domestic turnover of a few thousand euros (or no Austrian turnover at all). The FCA expects that the second turnover threshold will lead to a decrease in annual filings of more than 40 per cent.

The filing fee for merger control filings has been nearly doubled to €6,000.

The amendment also provides for an obligation of the FCA to forward merger notifications to the BMDEA. This will strengthen the FDI screening regime under the ICA. Companies are advised to check whether a transaction is not only notifiable to the FCA but also subject to a notification requirement under the ICA.

In addition, covid-19-related measures introduced in 2020 and modified during 2021 and 2022 affect valuations and remain relevant for due diligence and deal documentation.

Law stated - 30 June 2022

Jurisdictions

Australia	MinterEllison
Austria	Schoenherr
Belgium	Stibbe
Brazil	Campos Mello Advogados
Canada	Bennett Jones LLP
China	Haiwen & Partners
Denmark	Gorrissen Federspiel
Dominican Republic	Guzmán Ariza
Egypt	Soliman, Hashish & Partners
Finland	Waselius & Wist
France	Davis Polk & Wardwell LLP
Georgia	MG Law Office
Germany	Gleiss Lutz
Greece	Karatzas & Partners Law Firm
Hong Kong	Davis Polk & Wardwell LLP
Indonesia	Makes & Partners
Israel	Naschitz Brandes Amir
Italy	Legance - Avvocati Associati
Japan	TMI Associates
Latvia	VILGERTS
Luxembourg	Stibbe
Malaysia	Foong and Partners
Myanmar	Myanmar Legal MHM Limited
Netherlands	Stibbe
New Zealand	Hesketh Henry

Philippines	Zambrano Gruba Caganda & Advincula
Portugal	Cuatrecasas
Romania	MPR Partners
Serbia	Stankovic & Partners NSTLaw
Singapore	WongPartnership LLP
South Korea	Bae, Kim & Lee LLC
Spain	Uría Menéndez
Sweden	Vinge
Switzerland	Homburger
Turkey	Turunç
United Kingdom	Davis Polk & Wardwell LLP
USA	Davis Polk & Wardwell LLP
Zambia	Dentons Eric Silwamba Jalasi & Linyama