# Public mergers and acquisitions in Austria: overview

by *Christian Herbst*, Schönherr

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A Q&A guide to public mergers and acquisitions law in Austria.

The country-specific Q&A looks at current market activity; the regulation of recommended and hostile bids; pre-bid formalities, including due diligence, stakebuilding and agreements; procedures for announcing and making an offer (including documentation and mandatory offers); consideration; post-bid considerations (including squeeze-out and de-listing procedures); defending hostile bids; tax issues; other regulatory requirements and restrictions; as well as any proposals for reform.

## M&A activity

1. What is the current status of the M&A market in your jurisdiction?

In line with the European slowdown on public M&A, the Austrian public M&A market did not see any public offer announced or published during the first three quarters of 2020. The complete absence of Austrian public M&A in 2020 to date can be partly explained by the COVID 19 pandemic which evolved at the end of Q1 2020. It is likely that this will mean that 2020 public M&A activity regarding Austrian targets will be as low or even lower than 2019, which only saw one public offer. The Austrian stock market took a deep dive in Q1 2020 and (unlike other markets) stock prices mostly stayed low throughout 2020. If stock prices continue to stay low or recover slowly only, targets may look more attractive for potential buyers pricewise, given market caps and the relevant six-month weighted average on target stock prices relevant for minimum prices in full public offers have come down substantially from their highs at the beginning of 2020. This could help Austrian public M&A activity going forward and during Q1 2021, at least as to some of the more attractive targets. Additionally, there could be some takeover activity triggered by consolidation or in distressed targets.

During Q1 2020, the Austrian Takeover Commission announced that it launched investigation proceedings into the listed Austrian regional bank Oberbank AG, reviewing whether the obligations to launch a mandatory offer into Oberbank AG had been violated. The review proceedings by the Takeover Commission will likely extend into 2021.

### Public offers in 2019

Following a strong public M&A year 2018, in 2019, the Austrian market saw only one public offer, the voluntary partial offer by BAWAG Group AG.

On 25 October 2019, BAWAG Group AG published a partial offer to repurchase up to 10.86% of the shares of the company with a transaction volume of up around EUR400 million. The offer was based on and in execution of a shareholder resolution of BAWAG of May 2019 resolving on a capital reduction achieved by a cancellation of shares that are yet to be acquired. As BAWAG is a bank, the resolution and offer required a resolution under Articles 77 and 78 of Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms, which was granted. The aim of the share re-purchase and subsequent cancellation is to return excess capital to the shareholders and to allow the core shareholders Cerberus and Golden Tree, which took the company public in Q 4 2017, a further partial exit. Until the end of the offer period on 22 November 2019, 31,700,497 shares were tendered, which resulted in a distribution quota of around 34.25 per cent. Subsequently, 10,857,763 shares were cancelled.

## Public offers in 2018

During 2018, the Austrian market saw six public offers, one voluntary offer aimed at control, one mandatory offer, three partial offers and one de-listing offer. The offers were as follows:

- **BUWOG.** On 5 February 2018, Vonovia SE Germany launched a voluntary offer aimed at control of VSE-listed real estate company BUWOG. The initial offer term ended on 12 March 2018 and the statutory additional three months offer term expired on 18 June 2018. With a total offer value of about EUR3.64 billion for ordinary shares and convertible bonds, this was one of the largest public M&A transactions ever in the Austrian market (including debt the target was valued at EUR5.2 billion). The offer was preceded by a December 2017 Combination Agreement between Vonovia and BUWOG, under which the board of BUWOG agreed to recommend the Vonovia offer. In addition to the statutory 50% acceptance threshold, the 2018 offer had several offer conditions, including no significant decline in the FTSE EPRA/NAREIT Germany index and no material adverse change in the target earnings. During the initial offer period, an aggregate tender ratio of 73.8% of all BUWOG shares and 99.6% of all convertibles was reached. During the additional offer period, Vonovia could increase the tender ratio to a total of 90.7% of target shares, thereby crossing the squeeze-out threshold of 90%. An intended squeeze-out and de-listing of BUWOG from the VSE was announced on 22 June 2018. De-listing was effected on 16 November 2018.
- **CA Immo**. On 18 April 2018 SOF -11 Starlight, a company which is part of the US Starwood Capital Group launched a limited offer for up to 26% of VSE-listed real estate company CA Immo with a total offer value of EUR706 million. The target took a neutral position on the offer. However, the offer was rejected as unattractive by core shareholder Immofinanz AG, that held 26% plus four registered shares in the target; the registered (golden) shares grant delegation rights to the supervisory board of the target. In parallel to Starwood's offer, Immofinanz AG announced an auction of their core-shareholding in CA Immo. At the end of the offer period on 30 May 2018, shares corresponding to an acceptance quota of only 0.16% were tendered. Following the unsuccessful PTO, Starwood Capital succeeded in buying the core shareholding of 26% including four registered (golden) shares in CA Immo from Immofinanz in an off-market transaction for EUR759 million on 2 July 2018.
- **Immofinanz.** In the context of the parallel limited offer for CA Immo, SOF-11 Starlight/Starwood Capital launched a limited offer for up to 5% of VSE-listed real estate group Immofinanz AG on 18 April 2018. Immofinanz rejected the offer as unattractive and took defensive measures including under a share buy-back program. During the offer period, which ended 30 May 2018, shares corresponding to an acceptance quota of only 0.2% were tendered.
- **Pankl Racing Systems.** On 2 February 2018, KTM Industries launched a de-listing offer for mid-market VSE listed holding company Pankl Racing Group, which produces and distributes motor systems and components for the racing and aerospace industries. At the launch of the offer, KTM Industries already

 

held 96.98% of the target. The offer was directed at 3.02% in the target. At the end of the offer period on 23 March 2018, KTM Industries held 98.22% in the target and thus had been able to collect 1.25% in the target. Under the Austrian rules on de-listing, Pankl Racing Group stopped trading on 30 May 2018.

- **Wolford AG.** On 1 March 2018, Fosun Industrial Holding Limited agreed to acquire 50.87% from core shareholders followed by a capital increase. The share purchase agreement with core shareholders was subject to certain conditions precedent including merger control clearance and MAC clauses. At the same time, Fosun launched a voluntary offer aimed at control for the remaining 49.13% of the target. At the end of the offer period, 14.6% of the shares had been tendered. The subsequent cash capital increase was successfully completed. The additional offer period ended 14 August 2018.
- **Ottakringer Getränke.** Core Shareholder Ottakringer Getränke AG, launched a partial offer VSE listed mid-market beverage company Ottakringer on 29 May 2018. The offer was directed at less than 10% of the total share capital. At the end of the acceptance period which ended 10 July 2018, an acceptance quota of 6.12% of share capital and 7.21% of voting capital was reached.
- **Wiener Privatbank AG.** On 28 July 2018, the target Wiener Privatbank AG announced ad hoc that under a restructuring of the target, the syndicate core shareholders Günther Kerbler and Johann Kowar would transfer their shareholding to Arca Capital Group. Following the intended closing of the transaction in Q2 2018, a mandatory offer would be launched. Closing has been delayed post H1 2018, pending clearance by the authorities, a mandatory public offer has not been launched.

## Takeover Commission (ATC) rulings

Between 2017 and 2019, the Takeover Commission (ATC) (*Übernahmekommission*) issued the following rulings:

- **Andritz (Ruling by the ATC of 8 October 2018).** The ATC held that the suspension of voting rights between 26% and 30% for the core shareholder Custos and attributed shareholdings is lifted without a specific term. However, the voting right suspension will kick in again if and when Custos and attributed shareholders vote more than 26% at a shareholders meeting if they have a relative majority in the particular shareholders meeting (on the basis of attendance). Furthermore, the lifting of suspension does not apply to shareholder resolutions relating (among others) to:
  - capital increases with exclusion of voting rights;
  - corporate restructurings including mergers and demergers; and
  - voting on supervisory board members unless the candidates are independent or the majority of members of the supervisory board (including works council representatives) remains independent.
- **Immofinanz/S-IMMO (ruling by the ATC of 5 September 2018).** In the context of the pending acquisition by Immofinanz of a core shareholding in S-Immo and the parallel pending sale by Immofinanz of a core shareholding in CA Immo IF requested an opinion from the ATC that:
  - IF and SIMMO are not deemed concert parties in relation to CA IMMO;
  - in the case that they were deemed to act as concert parties the ATC would state that an exemption from the MTO obligation applied.

 

In its decision the ATC concluded that if IF and SIMMO are qualified as concert parties, both entities would hold more 30% of the shares in CA IMMO. However, given the timing of both parallel transactions, namely the acquisition of 29% in SIMMO and sell down of 26% plus name shares in CA IMMO, IF and SIMMO would hold a controlling interest only temporarily (roughly one month). Therefore, an exemption from the MTO obligation would apply in the case that they were qualified as concert parties.

At the end, the ATC left it open whether IF and SIMMO were deemed concert parties but stressed that if the sell down in CA IMMO fails, the ATC will need the reevaluate the IF-SIMMO situation.

- **Wiener Privatbank (Ruling by the ATC of 1 January 2018).**The ATC held that the reference date from which the six-month period to calculate weighted average stock price (VWAP), forming one of the prongs of the minimum price calculation for mandatory offers and voluntary offers aimed at control, was to be calculated from the date at which the target made an ad hoc filing on a planned target restructuring which would result in a control change, at the earliest 12 months later. The ATC reasoning was based on a non-literal interpretation of section 26/1 of the Takeover Act. Also, the ATC held that a target would likely not have made an ad hoc filing without co-ordinating with the future controlling shareholder.

  In the same ruling, the ATC held that section 21/2 of the Takeover Act on the 12-month blocking period triggered by launching a mandatory offer had to be interpreted narrowly, in case the bidder, was not in a position to complete a transaction, which triggered a mandatory offer, if an offer post-closing of the transaction served the purpose of section 3 of the Takeover Act better than an earlier offer. In this case the target was a bank that required an approval from the Financial Market Authority, however it was doubtful whether the approval would be granted by the authority.

- **HTI (Ruling by the ATC of 31 October 2017).** The ATC had to rule on a planned corporate group restructuring under which control changed below the shareholders level of the listed target. The ATC reviewed the case with reference to the lead case of a so-called "economic takeover" of 2004 (HVB/Bank Austria ruling). Criteria for such an economic takeover triggering an obligation to launch a mandatory offer included:

  - transfer of all or significant parts of the assets of the listed target;
  - transfer of the assets against receiving a participation (and not only cash);
  - investor is controlled under the takeover law;
  - intention to avoid an obligation to launch a mandatory offer;
  - arrangements between the target controlling shareholder on additional features with monetary value. The ATC held that the planed corporate restructuring was to be qualified as a transitory acquisition with cash character and not as an "economic takeover".

2. What are the main means of obtaining control of a public company?

 

A public offer, whether voluntary or mandatory or a voluntary bid aimed at control, is the most direct and common way to obtain control of a public company (*see Question 16*).

In 2000, before the 2006 revision of the TA, the ATC issued a landmark ruling on schemes of arrangements in the HypoVereinsbank and Bank Austria merger (*ATC 12.09.2000 GZ 2000/1/4-171*). The ATC applied a controlling shareholder test, holding that the TA only applies if the shareholders of the listed target face a new controlling shareholder on completion of the transaction. While this decision narrows the application of the TA to schemes of arrangements, the ATC also held that it will consider applying the TA if the equal treatment of the target's shareholders is an issue.

In certain cases, public offers under the TA can be avoided despite the change of control in the Austrian target, particularly if they are structured as cross-border reverse takeovers (for example, the Partygaming/bwin takeover in 2011 (*see Question 1*)), which resulted in the de-listing of formerly VSE-traded bwin as a result of being merged into LSE traded Partygaming in a cross-border merger. Other more recent examples or cross-border reverse mergers resulting in a de-listing of the target from the VSE include Inter-cell/Vivalis (2013) and the planed RHI/Magnesita (2017, ongoing).

## Hostile bids

3. Are hostile bids allowed? If so, are they common?

Hostile bids are permitted. However, they are not as common as in some other jurisdictions due to the:

- Two-tier board structure of Austrian stock corporations (Aktiengesellschaft) (AG); that is, an AG must have a management board (Vorstand) and a supervisory board.
- Limited number of publicly held shares (free float).
- Ability of companies to resist hostile bids (*see Question 23*).

## Regulation and regulatory bodies

4. How are public takeovers and mergers regulated, and by whom?

### The Takeover Act (TA)

 

Public bids are regulated by the TA, as amended by the 2006 Takeover Amendment Act (ATA) and latest as to de-listings in 2017. The TA applies to AGs with their registered office in Austria and their shares admitted to trading on the VSE in a regulated market.

The ATC has jurisdiction to determine whether there is an obligation to launch a bid, whether exemptions from an obligation to launch a mandatory bid apply and defensive measures (among others) if:

- The AG has its registered office in Austria.
- The AG's shares are not admitted to trading on the VSE, but are admitted in a regulated market in another EU member state.
- A public bid is launched.

The TA provisions on the content of the tender offer and the procedural rules apply if a public company has no registered office in Austria and its shares are admitted to trading on the VSE, but not in a regulated market of the country in which the AG has its registered office (if shares are admitted to trading on a different exchange within the EU, in case the first admission of trading was the VSE).

## Other regulations

Other legislation relevant to public bids includes:

- The Stock Corporation Act (SCA) with respect to equal treatment of shareholders and directors' statutory duties, among other things. The SCA applies to AGs incorporated in Austria no matter whether the AG is a public or a private company (admission to trading is therefore irrelevant).
- The Stock Exchange Act 1989 (*Börsegesetz*) (SEA) and the Market Abuse Regulation and its implementing ordinances with respect to stake building, ad hoc duty of disclosure and insider trading, among other things. The SEA only applies to public companies admitted to trading on the VSE. It is irrelevant whether the company is incorporated in or outside of Austria.
- The Law on Exclusion of Shareholders 2006 (*Gesellschafterausschlussgesetz*) (Shareholder Exclusion Act), which regulates the squeeze-out of up to 10% of the remaining shareholders in an AG or a company with limited liability in Austria (a GmbH).
- The Cartel Act 2005 (*Kartellgesetz*) (CA), which applies to mergers not subject to EU merger control. The applicability of the CA focuses only on the turnover generated in Austria. It is irrelevant whether the company is incorporated or admitted to trading in or outside Austria.
- Investment Control Act 2020 (*Investitionskontrollgesetz*) under which the advance approval of the Austrian Minister of Digital and Economic Affairs is required for direct and indirect acquisitions by foreign investors (that is, investors domiciled outside of the European Economic Area (EEA) and Switzerland) of an interest of 10% (applicable to highly protected sectors), 25% or 50% or more, or a controlling interest in an Austrian enterprise engaged in specific protected industry sectors defined in the Act.
- Regulatory control provisions in certain sectors such as in the banking, insurance, utilities, gambling, telecommunications and aviation industries. The scope of applicability is regulated differently in the various industries. The admission to trading (either in or outside Austria) is irrelevant.

 

# Pre-bid

## Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

### Recommended bid

For a recommended bid, the bidder carries out due diligence using publicly available information and then asks the target for further information before proceeding with the bid. Due diligence can be extensive in takeovers of private companies, but is usually more limited when the target is listed. This is because the target's management board must carefully balance the need to disclose information to the bidder against more extensive legal and contractual secrecy obligations, and its fiduciary duties to its shareholders. The target's boards must remain neutral and objective in relation to competing bidders (*see Question 23*), requiring them to provide the same information to all bidders or potential bidders acting in good faith.

### Hostile bid

For a hostile bid, the bidder is limited to obtaining publicly available information, as the target does not have to disclose unpublished information to the bidder.

### Public domain

Certain information is recorded in a computerised public company register (*Firmenbuch*), and basic corporate documentation, the annual accounts and auditor reports are accessible at the district courts of first instance (*Landesgerichte*) with substantive jurisdiction on commercial matters.

Information on company assets, including real estate, patents and trade marks, can also be obtained from the relevant public registers.

It is difficult to access shareholder information on a stock corporation, as company law allows nominee shareholdings and does not require them to be disclosed, other than in limited circumstances such as during litigation.

Since August 2011, stock corporations can generally only acquire registered shares (*Namensaktien*). However, listed companies are exempted from this requirement.

### Secrecy

 

6. Are there any rules on maintaining secrecy until the bid is made?

Secrecy must be maintained until a bid is announced (*section 5, The Takeover Act*). This prevents information leaks and distortion of the market, which can cause a mandatory bid and the abuse of insider information. The bidder must notify all persons involved in the bid of their secrecy obligations and the prohibition of the abuse of insider information.

If the bidder has negotiated with the target before making a bid, the target's management board (and, if involved, the target's supervisory board) must also maintain secrecy before the bid is announced.

If secrecy is not maintained before the bid is announced, the bid is prohibited and the bidder must notify the ATC of sales and purchases of shares and share options in the target by the bidder (alone or in concert).

## Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

Before a public offer, there are no restrictions on a bidder seeking irrevocable undertakings from the target's shareholders to accept its offer for their shares. However, shareholders may be reluctant to give an irrevocable offer if a higher competing bid is made.

A shareholder can revoke his acceptance if a higher competing bid is made (*section 17, TA*).

## Stakebuilding

 

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

To increase its chances of success, a bidder can take an initial stake in the target. However, the following factors must be considered.

## Before announcement of the bid

To increase its chances of success, a bidder can take an initial stake in the target. If the bidder exceeds certain thresholds in stakebuilding, it must disclose its shareholding (*see below*).

## Insider dealing

A key question is whether building a stake will breach insider dealing rules. A bidder must comply with:

- The general rules on insider dealing (SEA) and Market Abuse Regulation. If and when due diligence enquiries with the target are started, the bidder is considered an insider, and if it acquires target shares in the market it commits an offence under the insider dealing rules.
- Compliance rules in the Banking Act (*BGBl 1993/532, as amended*).
- The notification and disclosure requirements of the stock exchange, the target and the Financial Market Authority (FMA).

## Shareholder approval

Generally, shareholder approval is not required to transfer shares in listed companies, unless the articles of association (articles) state otherwise.

## Disclosure requirements

If the bidder acquires directly or indirectly, listed target shares so that its voting rights reach, exceed or fall below 4%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 75% or 90%, the shareholding must be notified to the FMA, the Stock Exchange and the target (section 130, SEA). The target's articles may provide for a percentage as low as 3% or higher percentages triggering disclosure. The implementation of Directive 2004/109/EC on transparency requirements for securities admitted to trading on a regulated market and amending Directive 2001/34/EC (Transparency Directive), among other things, into the SEA in mid-2007, led to shortened publication and disclosure terms and extended the disclosure requirements to various derivative transactions. Most recently, and with effect as of 3 January 2018, the Directive 2003/6/EC on insider dealing and market manipulation led to further changes in the Austrian disclosure regime and to further amendments to the SEA, now SEA 2018. Rules on director's dealing have also been amended by the Directive.

 

The disclosure obligations applicable to shareholders generally also apply to (direct or indirect) holders of certain financial instruments that entitle the holder to acquire existing shares to which voting rights are attached, with financial instruments and aggregation rules now being broadly defined (*section 131 and the following, SEA*).

In addition to penalties, the SEA rules provide for a temporary suspension of the voting rights of the shares affected by non-disclosure until one month after the date of disclosure.

The Austrian rules on non-compliance with disclosure obligations are different from Germany as they do not provide for a suspension of dividend rights.

The sanctions that the Financial Market Authority can impose for violations of disclosure obligations relating to holdings have been toughened. For example, breaches of the disclosure rules can result in the following fines:

- Fines of up to EUR2 million or double the benefit of the breach (for natural persons).
- Fines of up to EUR10million, or 5% of the annual net revenue (for legal persons).

(*Section 141 and the following, SEA*.)

There is a separate disclosure requirement under the ATA, if a bidder exceeds 26% of the target it must notify the ATC.

### Acting in concert

The bidder's obligations extend to all parties acting in concert with him; in relation to acquiring voting shares or the exercise of voting rights (*see Question 16*).

### Other

Finally, stakebuilders must observe the trigger thresholds for mandatory offers, including:

- The 30% threshold (*see Question 16*).
- The "creeping-in" rules between 30% and 50%, which relate to the acquisition of 2% or more in a target during 12-month intervals.

## Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

 

It is not common for the bidder and target to enter into a merger agreement (even in recommended bids). This is because restructuring an AG to implement certain takeovers requires shareholder support (by shareholder resolution). The target's board must refrain from all actions, which could impair the free and informed decision of the shareholders and which could prevent the success of an offer (*section 12/1, TA*), although a search by the board for a white knight is allowed. An agreement by the boards not to solicit or recommend other offers would violate the board's neutrality obligation under the TA.

### Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

Break fees are not common because:

- The payment of a break fee must be disclosed.
- The target could be deemed to be giving unlawful financial assistance for the purchase of shares in itself.

If a break fee is paid, the target pays an agreed amount to the bidder if specified events delay or prevent a successful public bid.

### Committed funding

11. Is committed funding required before announcing an offer?

The bidder must appoint an independent expert to certify that the bidder can finance the intended public offer. The expert's certification and report must be submitted to the ATC before it decides whether the offer can proceed (*see Question 12, Preparing and auditing the bid*).

## Announcing and making the offer

### Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

## Announcement of the intention to make a bid

The bidder must immediately inform the public and the target of its intention to make a bid if:

- Its management and supervisory boards have passed a resolution to make a bid.
- Circumstances arise that trigger the obligation to make a mandatory bid (*see Question 16*).
- At an earlier stage, if there is:
  - a significant shift in the target's share price or there is speculation in the market of a potential offer by the bidder; and
  - reasonable grounds for concluding that either of these factors results from a bid being prepared, the bidder's intention to make a bid or the bidder purchasing shares.

(*Section 5(3),TA*.)

The target faces similar obligations if it is given confidential information in a recommended bid (*section 6(2), TA*).

The announcement must be made either:

- By publication in a daily newspaper or information leaflet.
- Through an accessible electronic medium used throughout Austria (*section 11(1), TA* and *section 78, SEA*). The announcements must also be published on the bidder's and target's websites (*section 11(1a), TA*).

The bidder and the target must each notify its respective works council (which are made up of employee representatives) (*section 11(3), TA*).

At the bidder's request, the ATC can suspend the requirement to make an announcement for a short period if this will help prevent damage to the bidder (or parties acting in concert with it) (*section 5(4), TA*).

No details of the intended offer (particularly the offer price) must be published with the announcement.

## Restrictions on further dealings

When an intention to make a bid has been announced, the bidder (and parties acting in concert with it):

- Cannot sell target shares.

 

- Must improve the conditions of the entire public offer if they acquire target shares on more favourable terms outside the public offer during the offer period (*section 16, TA*). Under the post-offer improvement mechanism, the bidder must make a payment to the shareholders who accepted the public offer (*section 16(7), TA*). This payment must correspond to the difference between the share price received in the offer and per share consideration paid nine months after the completion of the public offer.
- Must notify the ATC of any purchase and sale of target shares and share options. This duty also applies to the target's board (including group companies as well as advisers and shareholders).

## Preparing and auditing the bid

After the offer has been announced, the bidder (and the target in a recommended offer) starts to work on the offer document, which must contain the bidder's formal contractual offer to the target's shareholders.

The bidder must also appoint a qualified independent expert (an auditor or bank) to:

- Report on the offer document, confirming its completeness and compliance with the law.
- Certify that the bidder has sufficient means to finance the offer.

(*Section 9, TA*.)

The expert's report is filed with the ATC and the certification must be included in the offer document.

## Notification of the bid

The bidder must submit notification of its bid, together with the offer document, to the ATC within ten trading days of announcing its intention to make a bid. The ATC can extend this period to up to 40 trading days at the bidder's request.

If notification is not submitted within the deadline, the bidder is prohibited from making another bid for the target for one year, starting 40 trading days from the announcement.

For mandatory bids, the notification period is 20 trading days, which cannot be extended.

A foreign bidder must have its notification submitted by a bank, accountant or lawyer domiciled in Austria.

## Publishing the offer document

On receipt of the offer document, the ATC has up to 15 trading days to either:

- Prohibit the publication of the offer if the legal requirements are not met and require new bid documents.
- Request additional information or amendments to the documents.
- Approve the offer document by allowing this period to pass. In this case, the bidder is allowed to publish the offer document.

 

The bidder must publish the offer document not earlier than 12 to 15 trading days after notifying the ATC, unless the ATC has prohibited the publication of the bid. A copy of the offer document must be sent to the target before it is published.

The ATC can postpone the publication of the offer document or, following agreement with the bidder, shorten the period in which it must be published.

## Offer period

Publishing the offer document triggers the offer period. The initial offer period must be set for at least four weeks and not more than ten weeks (*section 19, TA*), but can be extended by the ATC in certain circumstances (*see below, Competing bids*). The period for accepting the bid cannot expire less than three weeks after the target's response is published. After the initial offer period, mandatory offers and voluntary offers aimed at control shares can still be tendered into the offer during the statutory three months additional offer period.

## Target's obligations

The target's management board must:

- With supervisory board approval, appoint an independent expert, who can be an auditor or a bank, to report on the terms of the bid, particularly the consideration offered (*section 13, TA*).
- Make a statement to its shareholders together with the supervisory board on whether to accept or reject the offer. If it is unable to do this, it must list the advantages and disadvantages of the bid and send this to its shareholders (*section 14, TA*).

Following this, the target's management board must:

- Notify the ATC of its response, the response of the supervisory board and, if any, of the work's council, and the expert's report within ten trading days from publication of the offer document, at the latest, five trading days from the expiration of the offer term.
- Publish at least five trading days before the deadline of the public offer, its response, the response of the supervisory board and of the work's council, and the expert's report.
- Send details of the bid, its response and the expert's report to its works council.

## Competing bids

If a competing bid is made during the offer period, the target's shareholders can rescind their acceptance of the first bid, regardless of whether they accept the second bid (*section 17, TA*). A competing bid automatically extends the offer period until the end of the competing bid period. The ATC can also extend the offer period if it considers it reasonable and necessary.

## Revised bids

During the offer period the bidder can improve its offer (in relation to consideration and other conditions) provided that it is in the interests of the target's shareholders.

## Changes to the timetable

The bidder must publish the outcome of the bid immediately after the offer period expires. The offer period can be extended at the bidder's request, unless the bidder declared that the offer period would under no circumstances be extended. In the case of mandatory and voluntary offers, the offer period is automatically extended by three months from the date of the announcement of the outcome of the bid. This mandatory statutory extension also applies if the bidder acquires more than 90% of the voting stock of the target in the course of a voluntary offer.

If the bid is subject to merger control, the need to apply to the competition authorities for clearance will delay the closing of the bid (*see Question 25*). To obtain merger control and other government approvals, the ATC allows the bidder, within limits, to control the timing and type of a public bid (*GenRuling, ATC GZ 2001/V/1*). For example, the bidder can pre-empt a subsequent mandatory offer by making a voluntary offer (*section 22(11), TA*) (*see Question 16, Voluntary offer aimed at control*).

The period to obtain regulatory approvals can be extended on application by the bidder to the ATC beyond the maximum offer period, making a total period for government approvals to be obtained of about 90 trading days. In exceptional cases, this period can be longer. For example, in the 2004 Siemens offer for VA Tech, this period was 140 trading days. In the 2005 Unicredit/Bank Austria exchange offer the term to fulfil conditions (concerning multi-jurisdictional public offers) was eight and a half months.

## Recommended and hostile bids

Generally, the same procedures apply to voluntary, mandatory and voluntary offers aimed at control (*see Question 16*), regardless of whether they are hostile or recommended. The main difference is that in a recommended bid the target's shareholders and board are involved at an early stage and often make a joint announcement with the bidder. There is no additional prescribed structure for hostile bids, although the ATC usually imposes tight controls and intervenes more.

## Offer conditions

13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

Only voluntary offers and voluntary offers aimed at control (*see Question 16*) can be subject to conditions and rights of withdrawal, provided that they are objectively justified (*sections 7(7) and 8, TA*). Fulfilment of the condition and withdrawal cannot be at the bidder's discretion. Conditions and rights of withdrawal are part of the offer document (*section 7(7), TA*), which must be approved by the ATC (*see Question 12*). The ATC interprets conditions and withdrawal rights narrowly.

Permitted conditions include:

 

- Obtaining government or other regulatory authority approvals, including merger control (*see Question 25*).
- Acceptances reaching minimum or maximum shareholding levels.
- Events affecting the target company not occurring, including:
  - insolvency;
  - changes caused by defence measures, including changes to the capital or capital structure of the target (*see Question 23*); and
  - material adverse change events (*see below*).
- Approval of the transaction by the bidder's shareholders' meeting.
- Competing bids not occurring.

The ATC allows the bidder to include a condition defining a material adverse change in the target's economic condition if the following are met:

- The material adverse change must be clearly defined in the offer document, occur during the (extended) offer period and refer to objective, measurable criteria (for example, financial data such as accounts).
- The clause must not involve the bidder's discretion.
- The bidder and the target must agree procedures for the following before the bid is made:
  - the supply and determination of financial data;
  - a review of the financial data; and
  - notification of the review results to the ATC.
- An independent third party (for example, the company's auditor) must determine whether the criteria for the material adverse change event have been met.

Whether such conditions have been met must be decided within the offer period.

Following the 2003 GE/Jenbacher offer (which, among other things, introduced material adverse change conditions), the following offers contained a lengthy list of conditions:

- Siemens/VA Tech.
- Dicom/Topcal.
- Lufthansa/Austrian Airlines.
- Vonovia/Conwert (2016).
- Vonovia/Buwog (2018).

 

- The ATC allows the unilateral waiver of certain conditions by the bidder during the offer period if a possible later waiver (if the condition was already described in the offer document) deems the waiver an improvement of the offer under the TA.

The ATC has viewed the later waiver of minimum acceptance conditions (other than mandatory statutory minimum acceptance conditions), for example a 75% or 90% acceptance condition, as admissible provided that waiver was foreseen in the offer document.

In Siemens/VA Tech, the ATC even allowed the bidder to introduce a new 90% acceptance condition during the offer period against a substantial increase in the offer price (18%), and the waiver by the bidder of a condition of the original offer (which required the maximum voting right restriction under the articles to be lifted during the offer period).

However, in its related ruling, the ATC stressed the exceptional nature of allowing this change of offer. It also invoked special circumstances in allowing such a (generally prohibited) trade-off, of an improvement against a deterioration of the terms of the offer (that is, waiving one condition against introducing a new one).

Mandatory offers must not include conditions, unless they are required by law. Permitted conditions include:

- Regulatory approvals, particularly merger control (CA and *Article 7, Regulation (EC) 139/2004 on the control of concentrations between undertakings*).
- Other government approvals, for example under the Investment Control Act 2020 or banking and insurance regulations.
- Approval of the bid by the bidder's shareholders, if required by the bidder's articles or the law where it is incorporated (this is likely to be allowed by the ATC as a condition).

Anticipated mandatory offers aimed at control may be conditional on acceptances reaching or exceeding certain key shareholdings, for example 75% and 90%.

## Bid documents

14.What documents do the target's shareholders receive on a recommended and hostile bid?

On a hostile bid, the bidder and the target typically issue a series of documents, including newspaper adverts, to persuade shareholders and counter each other's arguments. On a recommended bid, the main document that the target's shareholders receive is the offer document.

### The offer document

 

This is the formal legal document making the offer, and contains detailed information to allow the target's shareholders to decide whether they should sell their shares. It must include an expert's report (*see Question 12, Preparing and auditing the bid*) and contain, among other things, information about:

- The terms and conditions of the bid.
- The bidder.
- The securities for which the bidder is making an offer.
- The consideration and the valuation method used.
- The conduct of the bid, particularly relating to the agents authorised to receive acceptances and pay the consideration.
- Maximum and minimum percentages of shares that the bidder undertakes to acquire (if applicable).
- The bidder's existing shareholdings in the target or rights relating to target shares.
- Conditions for withdrawing the bid.
- The bidder's intentions and strategic planning in relation to the target's business and employees.
- The period for accepting the bid and paying the consideration.
- The financing of the bid.
- Entities acting in concert with bidder or target.
- Compensation if rights are taken as a result of breakthrough.
- Law and venue applicable to sale of shares tendered under offer.

(*Section 7, TA*.)

As the offer document must contain information on the bidder's intentions, it normally contains a responsibility statement from the bidder's directors.

## Target's documents

The target's management and its supervisory board must issue their responses to the bid and an independent expert's report (*see Question 11*). The boards can recommend the bid or, if they remain indifferent, the boards must list the pros and cons. If they are opposing the bid, their response will be the equivalent of a defence document in other jurisdictions.

## Employee consultation

 

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

There is no obligation to consult or involve the works council in the takeover process except for the obligation on:

- The bidder's and the target's boards to inform their respective works councils of announcements and publications relating to a bid or public offer, including the publication of the offer document.
- The management board to publish a response, if any, by the target's works council.

## Mandatory offers

16. Is there a requirement to make a mandatory offer?

## Mandatory offer

A mandatory offer to the target's remaining shareholders is triggered if a person or legal entity acquires, by any means, a controlling shareholding of more than 30% in the target (*section 22(1), TA*). A controlling shareholding enables the bidder (alone or acting in concert (*see below*)) to exercise a dominant influence on the target.

Control can be acquired directly, indirectly or contractually, for example by a shareholder agreement. The TA distinguishes between direct and indirect control in the target. For direct participations in the target, a controlling holding of voting stock exceeding 30% will trigger the obligation to launch a mandatory offer. A holding of up to 30% of the voting stock does not trigger a mandatory bid (safe harbour provision). A shareholding between 26% up to and including 30% must be notified to the ATC within 20 trading days; the voting rights on stock exceeding 26% will be suspended but there is no obligation to launch a mandatory offer.

There are exceptions to this suspension of voting rights, including when:

- Another shareholder (group) holds at least the same percentage of voting stock (as in the case of the 2016 partial offer by Airports Group Europe/Vienna Airport, which allowed the bidder to increase its stake in Vienna International Airport from 29.9% (pre-offer) to above 37% (on completion of the offer) without a mandatory bid given two other shareholders currently hold together more than 40% in the company) (*see Question 1*).
- The articles provide for an upper limit of voting rights of 26%.
- There is no change in the controlling shareholder (for example, in the case of intra-group transfers or the dissolution of a syndicate without change of control).

 

A shareholder who has become subject to the suspension of voting rights has the following options:

- Accept the suspension.
- Sell a part of the stock.
- Launch a public offer. Once an offer has been launched, the bidder is free to exercise all voting rights.

The shareholder can also apply to the ATC to lift the suspension of voting rights exceeding 26% (up to a maximum of 30%) provided the shareholder is willing to accept and subsequently complies with restrictions and conditions protecting the minority shareholders that will be imposed by the ATC.

The TA provides for various exceptions to the mandatory offer regime, including if the 30% threshold was exceeded only accidentally and temporarily either:

- Where the shares of a distressed target are acquired for restructuring purposes only.
- In the case of a subsequent squeeze-out (provided the minimum price rules of the TA are observed).

An exception to the mandatory offer requirement applies in the case of a passive control change. This is a control change that could not reasonably be expected to occur and that happens without a contributory action by the majority shareholder. Although no obligation to launch a mandatory offer will be triggered, the voting rights exceeding 26% will be suspended (*see above*).

A mandatory offer is also triggered if a shareholder acquires indirect control over the target. An indirect controlling interest exists if a controlling interest (that is, more than 30%) is held by a listed company in which there is also a controlling interest. If an AG is not listed, a substantive control test applies, determining the ability to exercise influence on the target, including on the appointment and removal of directors.

## Voluntary offer aimed at control

These are voluntary public offers that, if successful, may lead to acquiring control of a company listed on the stock exchange (*section 25a, TA*). They have the following requirements:

- The bidder must not have a controlling interest when making the offer.
- The bidder must receive declarations of acceptance for the offer that account for more than 50% of the shares that are the subject of the offer.

## Acting in concert

Acting in concert with the bidder or target is defined as co-operating with the bidder on the basis of an agreement in an attempt to obtain or exercise control in the target company, in particular, by co-ordinating voting rights, or acting in concert with the target to prevent a successful takeover bid (*section 1/6, TA*). If a legal entity directly or indirectly holds a controlling stockholding in one or more other legal entities, it is assumed that all these legal entities are acting in concert. This assumption also applies if several legal entities have entered into an arrangement on the exercise of their voting rights to appoint the members of the supervisory board.

 

### Other securities

If a mandatory bid relates to securities other than ordinary shares (preference shares or participation rights) and the bidder (alone or in concert) has acquired ordinary shares in the 12 months before the bid is made, the price offered for those securities must be proportionate to the consideration offered for the ordinary shares. Proportionality depends on the specific rights involved in particular.

## Consideration

17. What form of consideration is commonly offered on a public takeover?

In a voluntary bid, the bidder can offer cash or securities, usually in companies owned or controlled by the bidder (or a mixture of cash and securities, but this is rare).

In a mandatory bid or a voluntary offer aimed at control (*see Question 16*), the bidder must offer consideration (completely in cash), payable no later than ten trading days after the offer is completed. The bidder can only offer securities (exchange offer) in addition to a cash offer. If the bidder offers securities as consideration:

- It is up to the shareholder whether to accept securities instead of cash.
- The securities must have at least the same value as the cash offered.
- The bidder must give the target's shareholders enough information (similar to that in an offer document) to enable them to form an opinion of the securities and the bidder.

The final choice of consideration may depend on whether the bid is voluntary or mandatory (including anticipatory mandatory), as exchange offers can only be made on mandatory bids in addition to a cash offer.

Cash offers tend to be accepted more than exchange offers, but require a well-financed bidder.

In the 2005 Unicredito voluntary offer for Bank Austria shares, aimed at control, the Austrian market saw the first large-scale offer providing for a cash offer and alternatively for an exchange offer (HVB shares). The ATC:

- Reviewed the price elements of both the cash and exchange offers to ensure that the paper offer complied with the minimum price requirements of the TA.
- Allowed various conditions to the offer required by regulatory approvals and parallel public offers in various European countries including Germany, Italy and Poland.

The 2016 Vonovia voluntary offer for Conwert (aimed at Control) is the most recent rare example of an Austrian alternative exchange offer. Similar to the 2005 Unicredit offer, the acceptance rate of the exchange offer as compared to the acceptance rate of the cash offer was very low.

 

In 2016, in a rare move, the ATC prohibited the publication of an exchange offer by Pierer Industries for Pankl Racing because the bidder insisted on including a certain price formula in the calculation to ensure the offer price warranty applied to share acquisitions during the nine-month period after the additional offer period. The ATC held that the price formula had to be based on the price per share quoted at the stock exchange at the time of publication of the offer document (*section 16 and 17 Austrian Takeover Act*).

18. Are there any regulations that provide for a minimum level of consideration?

In a mandatory offer and a voluntary offer aimed at control (*see Question 16*), the consideration must be at least both:

- The average quoted share price weighted according to the trade volumes of the respective security in the last six months before the day when the intention to make a bid was disclosed.
- The highest price agreed or paid for target shares by the bidder, or parties acting in concert with the bidder, in the 12 months before the notification of the mandatory offer.

There are no minimum consideration or cash requirements on straight voluntary bids.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are no specific restrictions on the form of consideration that a foreign bidder can offer to shareholders.

## Post-bid

### Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

 

The majority shareholder that owns directly or indirectly 90% of the stated capital of the target can adopt a shareholders' resolution on the squeeze-out of minority shareholders with a simple majority of votes (Shareholder Exclusion Act). Minority shareholders cannot block the squeeze-out but can under certain circumstances request a review of the compensation.

If the squeeze-out takes place following a public offer, not later than three months after the end of the offer period, there is a rebuttable presumption that the compensation for the squeeze-out is adequate if it equals the offer price.

## Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

If a bid fails, the bidder is (and parties acting in concert are) prohibited from making a further bid for the target (or acquiring shares triggering a mandatory bid) for one year from publication of the bid's failure (*section 21, TA*).

If the bidder has announced its intention to make a bid or has stated publicly that it does not rule out a bid, and then fails to notify the ATC (*see Question 12, Notification of the bid*) (*section 21(2-3), TA*), the exclusion period begins 40 days after the intention to make a bid was announced. If the bidder announces its intention not to proceed with a bid, or that it has triggered an obligation to make a bid when it did not intend to do so, the exclusion period starts from the date of this announcement.

The ATC can reduce the length of the exclusion period, if this is not detrimental to the interests of the target and its shareholders.

## De-listing

22. What action is required to de-list a company?

As of 3 January 2018, de-listings can be achieved in two ways:

- On completion of a squeeze-out of minority shareholders under the Shareholder Exclusion Act, which requires that 90% of the stated capital is held by one shareholder (that is,10% or less is free float).
- Moreover, a listing can be revoked if free-float or minimum trading requirements are no longer met. Under the Stock Exchange Act 2018, at the time of a listing, sufficient free-float must be secured, which means

 

that either 25% of the total nominal value of shares admitted to trading and or in the case of non-par value shares, 25% of the number of shares admitted to trading must be held by the public (free-float). If those thresholds are subsequently no longer met, the listing can be revoked if the above initial 25% threshold requirements for free float shares do not fall to less than 2% .The first de-listing from the Vienna Stock Exchange (VSE) under the new rules was effected in the de-listing offer by Pankl Racing Systems (Q1 2018) (*see Question 1*).

- Under the now current de-listing rules a withdrawal of the listing at the VSE can be requested if:
  - the financial instruments have been listed for a minimum of three years; and
  - adequate investor protection is secured.

For a de-listing to comply with adequate investor protection, the following must be met:

- First, a resolution of the shareholders meeting of the listed company must be passed with a 75% majority, or a notarised joint request by stockholders controlling at least 75% of the voting capital of the listed company must be made.
- Then, a full public offer aimed at a de-listing and supervised by the Austrian Take-over Commission must be launched. The full public offer can be launched independently from, or in the context of, a corporate re-organisation (such as a change of the statutes including change of legal form, merger, transformation or split of the target company.

No public offer is required for a de-listing from the VSE if the target company relists or stays listed (in case of a dual listing) at an EEA exchange providing similar protection measures as the VSE. An example is the RHI/Magnesita merger. It was resolved in August 2017 that RHI will be de-listed from the VSE and relisted in London.

Offers aimed at a de-listing must comply with the following minimum pricing rules. The price offered in a public takeover launched to de-list must not be lower than:

- The weighted average price of the last six-month period.
- The highest price agreed or paid for target shares by bidder or parties acting in concert with the bidder, in the 12 months before notification of the offer.
- The average price of the last five trading days before the announcement of an intention to launch a de-listing offer. If that price is apparently below the actual (market) value of the target company, an adequate offer price (based on a company valuation) must be fixed by the Austrian Takeover Commission.

## Target's response

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

When a public bid has been announced, the target's management and supervisory boards must:

- Respond to the bid (*section 14, TA*) (*see Question 12, Target's obligations*).
- Maintain confidentiality (*section 6(2), TA*).
- Protect the interests of shareholders, employees, creditors and the public.
- Maintain neutrality (*section 12, TA*). If they breach this, the target directors could face administrative fines (*section 35, TA*) of up to EUR50,000 and damages (*sections 70 and 84, SCA and section 12, TA*).

In addition, they must not take measures to deprive the target's shareholders of the opportunity to make a free and informed decision on the bid (*section 12, TA*), or any action likely to frustrate the bid, unless they are either:

- Based on previous obligations of the boards and already partly implemented.
- Approved by shareholder resolutions adopted after the bidder's intention to make a bid was announced.

## Defences to a hostile bid

As there have been very few hostile public offers, defence strategies have rarely been tested and the TA does not specifically define what defences are allowed.

In line with international practice, the defences available can be grouped into measures affecting the target's:

- **Organisational structure.** The two-tier board structure and the limitations of section 75 and section 87 of the SCA affect takeovers. Staggered terms of office for directors can delay the bidder establishing effective control, but do not hinder takeovers.
- **Capital structure.** Possible defences (and the limitations to them) that affect the capital structure of the target include:
  - self-tenders, where the target's boards offer to buy shares back from its shareholders, although these are subject to strict requirements (including that the shares repurchased cannot exceed 10% of the issued share capital), which can limit this defence;
  - employee stock ownership plans, although listed companies have only recently started to introduce these widely, and they are limited to up to 10% of the issued share capital;
  - maximum voting rights, although these are rare in listed companies;
  - registered shares combined with board approval being required for share transfers in the bye-laws, although it is rare to have registered shares in listed companies;
  - different types of shares, for example non-voting preference shares (up to one-third of the issued share capital), as a pre-bid measure;

 

 - the management board using pre-authorised capital (with the approval of the supervisory board) to increase capital; however, this will only be allowed in exceptional circumstances given the boards' obligation to remain neutral (*section 12, TA*).
 - Certain US-type poison pills, for example the flip-over, do not work in Austria because all shareholders must be treated equally (*section 47a, SCA*).

- **Assets.** The sale of strategic assets or the acquisition of a direct competitor of the bidder (creating merger control problems for the bidder) may be effective. It will normally only require supervisory board (and not shareholder) approval but in a takeover situation shareholder approval will most likely be required (*section 12, TA*). The most effective defence of the target is, however, usually soliciting a better offer from a friendly third party.

The articles of listed corporations may provide that some of its restrictive provisions will be suspended in the event of public offers. This relates, among other things, to voting power restrictions and the non-transferability of the shares.

## Tax

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

Acquiring shares in a stock corporation is not subject to transfer tax.

Real estate transfer tax at 3.5% applies to a single shareholder who acquires 100% of a company owning real estate. A nominal share in the company can be held by a trustee to prevent a single shareholder acquiring 100% of the shares, to avoid this tax.

## Other regulatory restrictions

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

### Merger control

 

If an acquisition has a community dimension, the Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation) applies and fully replaces the Austrian merger control regime. Under the Cartel Act, mergers must be notified if in the business year before the merger of:

- The undertakings participating in the acquisition had a turnover of more than EUR300 million worldwide.
- The undertakings participating in the acquisition had a turnover of more than EUR30 million in Austria.
- At least two of the undertakings each had a turnover of more than EUR5 million worldwide.

A new additional notification threshold applies to transactions which are implemented from 1 November 2017. The threshold is a combination of turnover, transaction value and the target being active in Austria.

A concentration must be notified if all the following are met:

- Cumulatively the combined worldwide turnover of the undertakings concerned exceeds EUR300 million.
- The combined Austrian turnover exceeds EUR15 million.
- The value of the concentration (purchase price plus liabilities taken over) exceeds EUR200 million.
- The target undertaking has significant activity in Austria (that is, Austrian nexus, such as a site in Austria or, in the digital context, monthly active users).

There is an explicit exemption under the Cartel Act for mergers where only one of the concerned undertakings has a national domestic turnover of more than EUR5 million and all other concerned undertakings have a total worldwide turnover of up to EUR30 million. Under the Cartel Act, there is also an effects doctrine that limits the notification requirements for merger transactions to only transactions which have an effect on the Austrian market. Turnover means group turnover and direct or indirect participations of at least 25% must be taken into account. Special rules apply to the calculation of turnover of banks, insurance companies and media mergers.

## Effects on timetable

A first stage decision (that is, a decision not requiring a second stage detailed investigation) must be made by the Cartel Court within four weeks of receipt of notification. The Cartel Court can clear the merger or prohibit it. The whole process usually takes five to six weeks.

The time limit for a final decision is five months from notification. If a decision is not given by then, the merger is deemed cleared. The closing of the transaction must be suspended until the Cartel Court has made its decision.

## Banking and insurance

The acquisition or sale of a 10% or more shareholding of an Austrian bank requires the approval of the FMA (*section 21, Banking Act*). The approval requirement also applies where a shareholder acquires or sells shares so that certain shareholding thresholds are reached or exceeded (10%, 20%, 33% or 50%). In addition, every transaction involving a merger or a demerger of banks also needs the approval of the FMA.

Similar notification and approval requirements apply to the acquisition and sale of shareholdings in insurance companies.

## Investment Control Act

See *Question 26, Investment Control Act*.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

## Regulated industries

Austrian law requires Austrian airlines to be controlled by EEA or EU entities. If other entities gain control, the airline's operating licence can be revoked.

## Real estate

Acquisition of real estate by non-EEA nationals or control of companies owning Austrian real estate is subject to notification or approval. The Real Estate Commission in the province where the real estate is located will usually grant approval, especially if the property is used for commercial rather than residential purposes.

## Investment Control Act

Under the new Investment Control Act 2020 (InvKG) the direct or indirect acquisition by foreign investors (that is, investors domiciled outside of the EEA and Switzerland) of an interest of 10% (applicable to certain highly protected sectors) and 25% , 50% or more, or a controlling interest in an Austrian enterprise engaged in specific protected industry sectors specified in the Act (including, but not limited to defence equipment, energy and digital infrastructure, energy and telecoms, semiconductors, cybersecurity as well as supply with vaccines, medical products, and so on) requires advance approval by the Austrian Minister of Digital and Economic Affairs. Lack of the approval renders the investment transaction null and void.

If an approval requirement under the Investment Control Act applies, a condition precedent in the public offer documentation and a filing for approval and clearance by the Ministry for Digital and Economic Affairs will be required to allow closing of the takeover.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no restrictions on repatriation of profits or exchange control rules for foreign companies.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

The TA also provides for a post-offer improvement. The bidder must make a payment to the shareholders who accepted the offer corresponding to the balance between the share price received in the offer and any higher per share consideration paid nine months after the expiry of the offer period. Additionally, the disclosure rules of the SEA apply when certain thresholds of shareholdings are reached or exceeded (*see Questions 8 and 12*). The target can initiate a share buyback. For security brokers, no special restrictions or disclosure requirements must be observed.

## Reform

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

There are no proposals to further reform takeover regulation. The Takeover Act was partly reformed under the 2017 Amendment Act to the Austrian Takeover which took effect on 3 January 2018, and among other things, extended the minimum acceptance period in public offers to four weeks and introduced new rules for public offers to achieve a voluntary de-listing (*for details see Question 22, De-listing*).

Under the new 2020 Investment Control Act, a new broadened governmental approval requirement will apply to listed Austrian targets engaged in certain industry sectors or having certain (digital) infrastructure. A condition precedent on clearance of the transaction by the Austrian Ministry for Digital and Economic Affairs must therefore be included in the offer documentation.

The Beneficial Ownership Register implemented the Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Fourth EU Anti-Money Laundering Directive). The Register required Austrian companies to take reasonable measures to determine the identity of and subsequently notify the Register of defined beneficial owners by 15 August 2018. Under a 2019 amendment, the information on the ultimate beneficial owner must be updated on an annual basis from 2020 onwards. The beneficial owners are natural persons holding directly or indirectly 25% capital and/or voting rights in Austrian companies. The purpose is for all EU countries to store beneficial ownership information to combat money laundering and terrorism but also to allow governmental authorities and defined others customer due diligence.

2019 legislative changes relevant for listed companies included new rules on related party transactions and say on pay. Unless listed companies have a business year not corresponding to the calendar year, the rules will show effect in the 2020 AGM season. The amendments to the Stock Corporation Act and Stock Exchange Act implementing the Shareholder Rights Directive II (2017/828) entered into force in Q3 2019. Directive 2017/628/EU to encourage long-term shareholder engagement was implemented with the aim to minimize the administrative burden on listed companies by avoiding any "gold plating". When implementing the rules on the identification of shareholders, the Austrian legislator utilised the scope provided by the Directive, requiring listed companies to obtain information from intermediaries (banks) only on such stockholders which own more than 0.5 per cent. As to "say on pay" the implementation again opts for a board friendly implementation by giving the shareholders a non-contestable advisory vote on the remuneration policy and the remuneration report. On material related party-transactions the amendment law makes extensive use of the exceptions provided by the Directive, subjecting disclosure only of certain material related party transactions and leaving approval of relevant transactions with the supervisory board rather than the shareholders meeting. Materiality thresholds as to approval and publication requirement differ (5% for approval and 10% for publication), in each case of the balance sheet total. Listed companies must therefore approve and disclose material transactions with related parties that cross a materiality threshold of 5 per cent (approval) and 10% (publication) respectively, in each case of the balance sheet total of the company under the annual accounts of the previous year, as to publication no later than on conclusion of the transaction. If several transactions are concluded with the same related party within a financial year, the values of such transactions must be aggregated to determine materiality. Members of the supervisory board qualifying as a related party to the transaction are excluded from the vote.

The new disclosure rules on board recommendation and relevant third-party transactions and the requirement for boards to regularly put board remuneration (policy) on the agenda of shareholders meeting will allow activists to increase pressure on the management without having to request specific agenda items on these topics in shareholders meetings.

**Contributor profile**

## Christian Herbst

**Schönherr**
**T** +43 1 534 37 50129
**M** +43 664 800 60 3129
**F** +43 1 534 37 66129
**E** *ch.herbst@schoenherr.eu*
**W** *www.schoenherr.eu*
**Professional qualifications.** Admitted to bar, Austria, 1988

**Areas of practice.** M&A; public M&A; corporate; corporate finance.

**Recent transactions.**

- Represented SOF-11 Starlight/Starwood Capital, Luxembourg/USA, on the 2018 partial offers for VSE listed Immofinanz and VSE listed CA Immo Anlagen AG and subsequent acquisition of 26% core shareholding by SOF-11 Starlight/Starwood Capital in CA Immo (2018).

 

- Represented VSE listed BUWOG on the 2017 Combination Agreement with German Vonovia and BUWOG on the subsequent EUR3.4 billion public offer by Vonovia launched and completed in H1 2018 (2017/18).
- Represented Cubic (London) Limited on its successful 2016 public offer for VSE listed asset manager C-Quadrat and 2017 sale of a majority participation to HNA, with subsequent de-listing (2018).
- Represented Carso Telecom/America Movil (NL/Mexico) on its EUR1.4 billion successful public takeover offer of VSE listed Telekom Austria and subsequent EUR1 billion capital increase (2014).

**END OF DOCUMENT**

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