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The International Comparative Legal Guide to:

Mergers & Acquisitions 2017

11th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group with contributions from:

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URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
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Printed by
Ashford Colour Press Ltd
February 2017

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ISBN 978-1-911367-38-3
ISSN 1752-3362

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 41 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins & Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The Takeover Act

Public bids are regulated under the 1999 Takeover Act (TA), as thoroughly amended by the 2006 TA Amendment Act. The TA is applicable, provided that the target is a joint stock corporation (AG) based in Austria, and its shares are admitted to trading on the Vienna Stock Exchange (*Wiener Boerse*; VSE) at a regulated market. If the AG is incorporated in Austria but the shares of the AG are not admitted to trading on the VSE but at a regulated market in another Member State of the EU, and a public bid is, or has to be, launched, the Austrian Takeover Commission (TC) is the authority in charge of the public bid and the TA provisions regarding, *inter alia*, notification of employees, the "control" threshold triggering a mandatory bid, exemptions from the duty to launch a mandatory bid and defensive measures apply. If a public company is not incorporated in Austria but in another EU Member State and its shares are not admitted to trading at a stock exchange at the seat of incorporation but on the VSE (if shares are trading on different exchanges within the EU, the first admission of trading takes place on the VSE), the TA provisions regarding the tender offer content and tender offer proceedings apply.

Other regulations

Other legislation relevant to public bids includes:

- The 1965 Joint Stock Corporation Act (*Aktiengesetz*; SCA), *inter alia*, with respect to equal treatment of shareholders and directors' statutory duties. The SCA is applicable to AGs incorporated in Austria, despite whether the AG is a public or a private company (thus, admission to trading is irrelevant).
- The 1989 Stock Exchange Act (*Börsegesetz*; SEA) relates to, *inter alia*, stakebuildings, *ad hoc* disclosure duty and insider trading. The SEA is only applicable to public companies admitted to trading on the VSE. It is irrelevant whether the company is incorporated in or outside of Austria.
- The 2007 EU Merger Act (*EU Verschmelzungsgesetz*) and the SEA allow takeovers by cross-border mergers.
- The Squeeze-Out Act (*Gesellschafterausschlussgesetz*) regulates the squeeze-out of up to 10% of the remaining shareholders in a AG or an Austrian limited liability company (*GmbH*).
- The 2005 Cartel Act (*Kartellgesetz*; CA) applies to mergers not subject to European Commission (EC) merger control. The applicability of the CA only focuses on the turnovers generated in Austria. It is irrelevant whether the company is incorporated or admitted to trading in or outside of Austria.

There are regulatory control provisions in certain sectors such as the banking, insurance, utilities, gambling and telecommunications industries, whereby the scope of applicability is differently regulated. The admission of trading (either in or outside of Austria) is irrelevant.

1.2 Are there different rules for different types of company?

As to the applicability of the TA, the SEA, the SCA, the CA and the regulatory control provisions, see question 1.1 above. The TA and the SEA cease to apply after a delisting of a company, despite whether these companies continue to have a dispersed shareholder base or not; the SCA, the CA and the regulatory control provisions, if any, are, however, still applicable within the scope outlined under question 1.1 above.

1.3 Are there special rules for foreign buyers?

FTA approval

Under the Foreign Trade Act, as amended in December 2011 and February 2013, the acquisition by Foreign Investors (i.e. investors with their seat outside of the EU, Iceland, Liechtenstein, Norway or Switzerland) of an interest of 25% or more, or of a controlling interest in an Austrian enterprise engaged in specific protected industry sectors, including defence equipment, energy and telecommunications (for details on protected sectors, see question 1.4 below), requires advance approval from the Austrian Ministry of Economic Affairs.

Regulated industries

Except for the FTA approval, there are no direct Austrian inward investment restrictions. Furthermore, governmental agencies cannot influence or restrict the completion of an acquisition by foreign buyers unless: (i) "fit and proper" tests or approvals are required; or (ii) licences are subject to revocation in the case of unapproved shareholder changes (e.g. in the banking, insurance, telecommunications, airline and gambling sectors).

Merger control

Where an acquisition has a community dimension, the EC Merger Regulation applies and fully replaces the Austrian merger control regime. Under the CA, mergers must be notified if the undertakings participating in the acquisition had a turnover in the business year

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prior to the merger of: (i) more than EUR 300 million worldwide; (ii) more than EUR 30 million in Austria; and (iii) at least two of the undertakings each had a turnover of more than EUR 5 million worldwide. The CA provides for an explicit exemption for mergers where only one undertaking concerned has a national domestic turnover of more than EUR 5 million and all other undertakings concerned have a total worldwide turnover not exceeding EUR 30 million. Additionally, the CA provides for an effects doctrine limiting the notification requirements for merger transactions to those transactions which have an effect on the Austrian market. Turnover is group turnover; 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.

Real estate

The acquisition of real estate, including certain long-term leases, or of controlling shareholdings in companies owning Austrian real estate by non-EU citizens, is subject to notification or approval requirements. The competent real estate authority (i.e. the authority where the real estate is located) will usually grant approval, especially if the property serves business and not private purposes.

1.4 Are there any special sector-related rules?

Regulatory control provisions in certain sectors such as the banking, insurance, utilities, gambling and telecommunications industries may affect the process of an acquisition. Changes of target ownership will usually require advanced notification to the relevant government agencies in cases where certain thresholds of stake ownership are reached or exceeded; this government agency can prohibit the acquisition based on the various "fit and proper" tests or approvals required, or by revoking licences in the case of an unapproved shareholder change (e.g. in the banking, insurance, telecommunications, airline and gambling sectors). For example, the acquisition or sale of a shareholding in an Austrian bank, upon which the thresholds of 10%, 20%, 33% or 50% are reached or exceeded, requires notification or approval of the Financial Market Authority (FMA). In addition, every transaction involving a merger or a demerger of Austrian banks needs FMA approval.

Under the 2011 amendment to the Foreign Trade Act, acquisitions of 25% or more or of controlling interests in Austrian enterprises by Foreign Investors (see also questions 1.3 above and 1.5 below) require advance approval by the Austrian Ministry of Economic Affairs if the Austrian target belongs to a specific protected industry, as defined in the FTA. Specific sectors protected include those related to the internal and external security of Austria, in particular of the defence equipment industry and security services, as well as the sectors relating to public order and safety and to procurement and crisis services. These include energy and water supply, telecommunications, traffic and infrastructure as to education and training.

With regards to the scope, procedures and sanctions of the FTA, see question 1.5 hereinafter.

1.5 What are the principal sources of liability?

Market manipulation

Market manipulation can take place through: (i) misusing a dominant position; (ii) purchasing or selling financial investments at close of trading with the consequence that investors will be misled; or (iii) misusing occasional or regular access to the media by issuing a statement in relation to a financial investment, where the issuer has acquired a position in the financial investment and will benefit from the statement without revealing the conflict of interest to the public. Fines for the violation of rules on market manipulation have recently been increased and will now amount to up to EUR 5 million for natural persons and EUR 10 million or up to 5% of annual net turnover for legal persons.

Insider dealing

An insider is either a member of a corporate body of the issuer or any person who has access to insider information due to his occupation, duties or his shareholding in the issuer. Whether the bidder qualifies as an insider or not, in either case, if he uses insider information to gain an advantage, he can be punished with a prison sentence of up to five years or a fine. A bidder can also be imprisoned or fined if he uses insider information, or is aware that such information qualifies as insider information without the intent to gain advantage of such use.

Takeover Law

The civil law penalties for non-compliance with the TA include suspending the voting rights of shares held in the target by a non-compliant bidder. Following publication of a TC suspension order, sellers to a non-compliant bidder can rescind their contracts and require the return of their shares, in consideration for either: (i) the sale price they received; or (ii) the cash value of the shares at either the date on which the contract is rescinded or the date on which the shares are returned. Additionally, administrative and criminal law penalties for non-compliance with the TA exist.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Types of public offers

The TA distinguishes between mandatory offers, voluntary offers, and voluntary offers aimed at control:

(i) Mandatory offers are triggered if a Controlling Shareholding (see below) is acquired; a mandatory offer is subject to minimum pricing rules, must not be made conditional (except for legal conditions like regulatory approvals) and requires a cash offer, but can have a paper alternative in addition.

(ii) Voluntary offers (which are offers that do not lead to a Controlling Shareholding or are launched by an already controlling shareholder) have no restriction in pricing, the consideration may be in cash or securities, and the offer may be subject to justified conditions including minimum or maximum acceptance thresholds of shares which the bidder is willing to acquire.

(iii) Voluntary offers aimed at control are triggered if a non-controlling shareholder (i.e. with a shareholding of less than 30%) makes an offer aimed at control; such offers are subject to the rules on mandatory bids, particularly on cash offers and minimum price. However, voluntary offers aimed at control are subject to a mandatory statutory 50% acceptance threshold; in addition, voluntary offers aimed at control can be made conditional, particularly upon reaching or exceeding a higher acceptance threshold.

Controlling Shareholding

A shareholding of voting stock exceeding 30% triggers the obligation to launch a mandatory offer (the Controlling Shareholding). A holding of up to 30% of the voting stock does

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not trigger a mandatory bid (safe harbour provision). However, a shareholding of between 26% and 30% must be notified to the TC; the voting rights on the stock exceeding 26% (up to a maximum of 30%) are suspended *ex lege*.

The suspension of voting rights does not apply, *inter alia*, if there is another shareholder with a shareholding exceeding 26%.

A shareholder who has become subject to the suspension of voting rights has the following options: he can accept the suspension; sell a part of the stock; or launch a public offer by acquiring additional shares and thus exceeding the 30% threshold. The shareholder can also apply to the TC for the suspension of voting rights exceeding 26% (up to a maximum of 30%) to be lifted against submission to and subsequent compliance with the shareholder, with restrictions and conditions protecting the minority shareholders, as imposed by the TC.

Recommended offer scheme

Share purchase agreements will be concluded with large target shareholders, if any, subject to the condition precedent of a successful closure of a (subsequent) voluntary offer aimed at control (e.g. the 90% acceptance threshold is met).

A voluntary tender offer aimed at offering control to the remaining free float shareholders is subsequently launched subject to the condition that, for example, the 90% acceptance threshold is met. Upon successful closure of the tender offer, the remaining shareholders (up to 10%) can be squeezed out under the Squeeze-Out Act.

Mergers

Acquisitions of public companies by mergers have been the exception rather than the rule. In 2000, the TC issued a landmark ruling on schemes of arrangement in the HypoVereinsbank and Bank Austria merger (*TC 12.09.2000 GZ 2000/1/4-171*). Highly criticised, the TC applied a new controlling shareholder test, stating that the TA did not apply if the shareholders of the listed target, on completion of the transaction, are not confronted with a new controlling shareholder in the merged legal entity. The 2005 EU Cross-Border Mergers Directive and its implementation in Austria by the 2007 EU Merger Act allows (reverse) takeovers by cross-border mergers. As for listed companies, the 2010 reverse takeover of VSE-listed bwin (Austria) by LSE listed Partygaming (UK), which resulted in a delisting of bwin, is the most prominent example. The 2012/13 cross-border SE merger of VSE-listed Intercell AG as transferring company and French Vivalis SA is a case in point regarding a merger of equals/reverse takeover of two EU-listed (biotech) companies.

2.2 What advisers do the parties need?

The bidder is generally supported by a legal adviser (who prepares the legal documentation required in a bid), a tax adviser (who assesses the tax structure and the selection of the bid vehicle), an investment bank (which supports the bidder during the whole bid process) and a qualified independent expert (who reports on the offer document and certifies that the bidder can finance the offer). The target is generally supported by a legal adviser (who prepares the legal documentation) and an independent expert (reports on the terms of the bid). Recently, target boards have also been hiring an investment bank for the issuance of a comfort opinion regarding the price offered by the bidder.

2.3 How long does it take?

Announcement of the intention to make a bid or mandatory offer trigger

From the announcement of a bid or the date on which a fact situation is created triggering the obligation to launch a mandatory offer (see question 4.3 below), certain steps need to be taken and strict filing timelines must be observed.

Preparing and auditing the bid

Following the announcement, the bidder has to prepare the offer document and must appoint a qualified independent expert (an auditor or an investment bank) to: (i) report on the offer document, confirming that it is complete and complies with the TA; and (ii) certify that the bidder can finance the offer.

Filing of the offer document

The bidder must file the offer document with the TC within 10 trading days of announcing its intention to make a bid (an extension of up to 40 trading days is possible; for mandatory offers, the period from the acquisition of a Controlling Shareholding to the filing of the offer document with the TC is 20 trading days). The TC may, within a period of 15 trading days, review the bid, request additional information, prohibit the bid or allow the offer document to be published.

Publishing the offer document

The bidder must publish the offer document no earlier than 12 and no later than 15 trading days after filing the offer document with the TC (a copy of the offer document must be sent to the target in advance).

Offer period

The publishing of the offer document triggers the offer period. Such a period must be set at a minimum of two weeks and a maximum of 10 weeks (an extension by the TC is possible).

The target's obligations

The target boards must appoint an independent expert to report on the terms of the bid and to make a recommendation to the target's shareholders on whether to accept the offer. Furthermore, the target boards have to file a response statement to the bid to the TC, inform the works council and publish their response statements together with the report of the target's independent expert.

Publication of the outcome

The bidder must publish the outcome of the bid immediately after the offer period expires.

Changes to the timetable

If the bid is a mandatory bid or a voluntary bid aimed at control, the offer period is automatically extended for another three months from the date of the announcement of the outcome of the bid; shareholders who have not tendered their shares within the initial offer period thus have another three-month period to decide whether to accept the offer or not.

If the bid is subject to merger control (or subject to other regulatory approvals), the need to apply to the competition (regulatory) authority for clearance may delay the closure of the tender offer.

The maximum period for obtaining regulatory approval must already be mentioned in the offer document and is often subject to negotiations with the TC. Generally, the TC accepts that such a period can be extended beyond the maximum offer period to a total period of about 90 trading days from the date of publication of the offer, in order for government approvals to be obtained. In exceptional cases, especially if tendered shares have been made

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tradeable on the VSE, this period can be longer (e.g. in the 2004 *Siemens/VA Tech* offer, this period was 140 trading days, and in the *Lufthansa/Austrian Airlines* offer, this period was 114 trading days).

2.4 What are the main hurdles?

The main hurdles tend to be:

1. announcement of the bidder's intention to make a bid;
2. notification of the bid to the TC;
3. publication of the offer document;
4. response to the offer by target boards; and
5. publication of the outcome of the bid.

As regards a more detailed description of the milestones, see question 2.3 above.

2.5 How much flexibility is there over deal terms and price?

All shareholders of the target shall be treated equally (Equal Treatment Rule). In a voluntary bid, the bidder can offer cash or securities, usually in companies owned or controlled by the bidder. There are no minimum pricing rules or cash requirements in voluntary bids. The Equal Treatment Rule, however, applies. In a mandatory offer and a voluntary bid aimed at control, the consideration must be the higher of either the: (i) average share price during the six-month period prior to the announcement of the offer; or (ii) the highest price paid or offered for target shares by the bidder in the 12 months before the offer is filed with the TC. However, in exceptional cases, the average share price may not be applicable in the case of illiquid markets (*TC 06.11.2012 GZ 2012/1/4-24*). Securities as consideration in a mandatory offer or a voluntary offer aimed at control can only be offered as an alternative to a 100% cash offer. As to the other deal terms, see question 2.9 below.

2.6 What differences are there between offering cash and other consideration?

In a voluntary offer, the bidder can offer cash or securities, usually in companies owned or controlled by the bidder (or a mixture of cash and securities). In a mandatory offer and voluntary offer aimed at control, the bidder must offer an all-cash consideration but may offer securities in addition to the cash offer. The cash offer must always meet the minimum offer price requirements set out in the TA (see question 2.5 above). The alternative paper offer may, however, be higher than the all-cash offer. If the bidder offers securities as (alternative) consideration: (i) it is up to the shareholder whether to accept securities instead of cash; (ii) securities must have at least the same value as the cash offered (the bidder, however, is free to provide a paper [securities] offer which is more attractive than the cash offer); and (iii) the bidder must give the target's shareholders enough information to enable them to form an opinion of the securities offered.

2.7 Do the same terms have to be offered to all shareholders?

Based on the applicable Equal Treatment Rule, all shareholders of the target must be treated equally. If the bidder declares that it is aiming for an acquisition of the shares of a target's shareholder on better terms than stated in the offer document, this shall already be regarded as an improvement of the public bid in favour of all recipients.

2.8 Are there obligations to purchase other classes of target securities?

Under a mandatory offer, the bidder is obliged to purchase all (equity) securities of the target company, including (i) listed shares and other listed securities conveying a profit participation or participation in the liquidation proceeds, and (ii) transferable securities entitling the holder to acquire the aforementioned instruments, if such transferable securities have been issued by the target company or an affiliated company. Thus, the bidder is obliged to purchase not only (listed) ordinary shares, but also (listed) non-voting preference shares, call options, convertible and warrant bonds, (listed) participation certificates, (listed) profit certificates and (listed) participating bonds. Partially listed instruments must be purchased as to all securities issued, irrespective of whether the individual security is listed or not.

2.9 Are there any limits on agreeing terms with employees?

There are no restrictions on agreeing a deal-related package of benefits for the target's employees. With regard to notification of a bid to, and a possible statement by, the works council, see question 2.10 hereinafter.

2.10 What role do employees, pension trustees and other stakeholders play?

In a public takeover, the statutory role of the employee is limited to the works council of the target being notified of the public offer. The works council may issue a statement commenting on the public offer; however, there is no legal requirement to issue such a statement. In the past, works councils have not issued formal statements on bids. The TA requires the supervisory board of the target to issue a statement on the public offer. Austrian corporate law provides for employee representation totalling one-third in supervisory boards. Given their minority position on supervisory boards, employee representatives cannot control the contents of the supervisory board's statement on a public offer, in particular whether the statement is positive on the bid, rejects it or is neutral. However, the employee representatives can exercise informal influence and, in exceptional cases, may have actual influence on the board's statement.

Pension trustees have not played a role in Austrian takeovers to this date. Hedge funds have played a limited role. To the extent that hedge funds did intervene, such intervention has been in acquiring either a significant stake below 10% or slightly above 10%. With 90% being the squeeze-out level, this was to gain leverage in the attempt of the majority shareholder(s) to take the company private or in trying to drive up compensation as a squeezed-out shareholder.

2.11 What documentation is needed?

The offer document

This is the formal legal document making the offer which contains detailed information to allow the target's shareholders to decide whether they should sell their shares. It must include a brief expert statement on the completeness of the offer, the compliance of the offer with the TA and the capability of the bidder to finance the offer, and must further contain information about: (i) the terms and conditions of the bid; (ii) the bidder; (iii) the securities for which the bidder is making an offer; (iv) the consideration and the valuation

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method used; (v) the conduct of the bid, particularly relating to the agents authorised to receive acceptances and pay the consideration; (vi) the maximum and minimum percentages of shares which the bidder undertakes to acquire; (vii) the bidder's existing shareholdings in the target; (viii) the conditions for withdrawing the bid; (ix) the bidder's intentions in relation to the target's business and employees; (x) the period for accepting the bid and paying the consideration; and (xi) the financing of the bid.

The target's documents

The boards of the target must issue their statutory response statements to the bid and submit an independent expert's report. Both documents, the target board's response statement and the target's independent expert report, will be published.

Others

Additionally, certain follow-up statements need to be filed by the bidder with the TC and then published (e.g. improvement of the bid statement, a statement on the satisfaction of conditions of the offer, a statement on the outcome of tender proceedings, etc.).

2.12 Are there any special disclosure requirements?

The bidder must disclose in the offer document: (i) the valuation methods used for the determination of the consideration; and (ii) information regarding its liquidity. Furthermore, the bidder is obliged to appoint an independent expert who has to issue a separate report to the TC on the completeness of the offer and the correctness of the valuation methods (outlining the valuation parameters in greater detail), and who has to confirm in the report to the TC that the bidder can finance the offer. The report issued by the independent expert will only be filed with the TC but will not be published.

The target must appoint an independent expert to report on the consideration and the terms of the bid and must include this report in the target board's response statement. The report of the independent expert of the target will be published together with the target board's response statement.

2.13 What are the key costs?

The key costs incurred in a bid are: (i) fees of advisers (i.e. investment banks, legal advisers, independent experts, etc.); (ii) fees to be paid to the TC (depending on the transaction volume of the takeover); and (iii) any internal costs.

2.14 What consents are needed?

The following consents are required: (i) the bidder's management board and supervisory board (or bidder's board of directors) must pass a resolution to launch a bid; (ii) the appointment of independent experts by the bidder's management board and by the target's management board; and (iii) *de facto* consent by the TC on the contents of the offer document before it is published (see question 2.3). In addition to merger control clearance, and depending on the industry, other regulatory consents may be required.

2.15 What levels of approval or acceptance are needed?

In a voluntary offer aimed at control, the offer is successful only if the bidder receives acceptance declarations that account for more than 50% of the voting shares of the target (statutory acceptance threshold). Voting shares acquired in connection with the offer, e.g. under conditional off-market purchase agreements with core shareholders, i.e. shares acquired parallel to the offer, count towards the threshold. In a straight mandatory and a straight voluntary offer, there are no statutory acceptance thresholds for the offer to be successful. However, straight voluntary offers may have maximum or minimum acceptance conditions. In voluntary offers aimed at control, the bidder may introduce a higher minimum acceptance threshold as condition precedent (e.g. 75% or 90%). Since the squeeze-out threshold is 90%, it is quite common to introduce a 90% minimum acceptance threshold as a condition precedent to the offer.

2.16 When does cash consideration need to be committed and available?

In mandatory offers and in voluntary offers that have a cash component, the independent expert appointed by the bidder and approved by the TC must confirm to the TC that the bidder has the financial means to fully fund the offer. This certificate, which is part of the independent expert's report, needs to be in place before the TC will allow the offer document to be published. In practice, the expert's requirements as to such certification will depend on the size of the offer and the bidder's financial strength. In the case of a financially strong bidder, the bidder's balance sheet and bidder's binding statement to the expert might be sufficient to allow the expert to issue the certificate. With other bidders, a legally binding bank funding commitment or a proof of cash reserves may be necessary.

In mandatory bids and voluntary bids aimed at control, the date of settlement of the consideration may not be later than 10 trading days after the unconditional legal effectiveness of the bid. This is the latest date on which the cash consideration must actually be available. The consideration will be transferred to the respective bank account of the shareholder as mentioned in the shareholders' acceptance notice.

In voluntary bids, the date of settlement of the consideration may be chosen freely by the bidder. Thus, if the offer was a cash offer or a mixed paper and cash offer, the cash consideration must be available at the latest on the date of settlement.

3 Friendly or Hostile

3.1 Is there a choice?

Hostile bids are permitted. However, hostile bids and, thus, takeover battles (the 2004 *Siemens/VA Tech* offer was initially perceived as "hostile") have been rare due to: (i) the two-tier board structure of Austrian stock corporations; (ii) the limited number of publicly held shares (free floats); and (iii) the ability of companies to resist hostile bids.

3.2 Are there rules about an approach to the target?

There are no special rules about an approach to the target other than the following:

- Any approach to the target may either lead to: (i) voluntary disclosure by the target of a bidder's approach to the target management, with the effect of possibly endangering or aborting a later bid; or (ii) a statutory obligation under the TA or the SEA by the target to disclose a possible bid to the public before the official announcement by the bidder of its intended bid (for details on secrecy *versus* disclosure, see question 4.2 below).
- Any approach to the target will also increase the risk of an undesired leak. In the case of a listed bidder, any approach to

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the target must also take into account disclosure obligations, if any, in the listing jurisdiction of the bidder.

3.3 How relevant is the target board?

As soon as the intention to launch a bid has been announced by the bidder or, prior to such announcement, when the target boards (management board and supervisory board) have been approached by a bidder or have knowledge of the intention of a bidder to launch a bid, the target boards must stay objective (*Objektivitätsgebot*) and may not prevent the public bid (*Verhinderungsverbot*). In particular, the target boards may not take any measures which could prevent the shareholders from making a free and informed decision on the bid or take any action likely to frustrate the bid, unless the shareholders' meeting has approved any specific defence measures after the announcement of the bidder's intention. In the case of a breach of these duties, the target's managing directors could face administrative fines of up to EUR 50,000 and could face additional damage claims under the SCA and the TA (director's liability).

Moreover, target boards must: (i) respond to the bid by way of the target board response statement; and (ii) protect the interests of shareholders, employees, creditors and the public.

As to the defence measures that can be taken by the target boards, see question 8.2 below. The search for a white knight is explicitly permitted under the TA; no approval of the shareholders' meeting is required for this defence measure.

3.4 Does the choice affect process?

In a hostile bid, the bidder and the target typically issue a series of documents, including newspaper advertisements, to persuade shareholders and counter each others' arguments. Furthermore, the target boards will likely take certain defence measures (within the permitted scope of the TA, e.g. they will search for a white knight) and will use the target response statement as an instrument to oppose the public bid.

In a friendly bid, the main document that the target's shareholders receive is the offer document. No defensive measures are taken by the target boards. The target response statement will be a brief statement containing the legal minimum requirements for target response statements. There is no statutory distinction with respect to the offer timetable.

4 Information

4.1 What information is available to a buyer?

Certain information is recorded in the electronic public company register (*Firmenbuch*), including basic corporate documentation and annual accounts and auditor reports. Further information may be available on the target's website. Information on company assets including real estate, patents and trademarks can also be obtained from the relevant public registers. Further, information as to a pending insolvency proceeding can be obtained from the insolvency register. Currently, it is difficult to access shareholder information on a joint stock corporation (AG), as company law allows bearer shares and also nominee shareholdings, and does not require them to be disclosed, other than in limited circumstances, such as during litigation.

4.2 Is negotiation confidential and is access restricted?

In general, the boards of the target are also bound to comply with the strict rules of *ad hoc* disclosure under the SEA. Under these rules, the boards of the target are required to disclose any information on new facts or occurrences that could materially influence the quoted price, including any information on planned restructuring. In general, price fluctuations of 5% or more are considered to be material. However, an exemption to the *ad hoc* disclosure duty exists when the boards of the target are approached by a potential bidder, provided that such a bidder complies with the confidentiality rules set out under the TA.

Confidential negotiations with the target and/or the target shareholders are therefore possible prior to the announcement of the intention to launch a bid. However, secrecy must be maintained until a bid is announced, to avoid the creation of a false market, unfair disclosure of its bid (or plans which may cause a mandatory bid) and the abuse of insider information. The bidder must notify all persons involved in the bid of their secrecy obligations under the TA and the prohibition of the abuse of insider information under the SEA. Furthermore, according to the TA, a confidentiality agreement must be entered into by all persons involved in the bid.

If the bidder has negotiated with the target before announcing the intention to launch a bid, the boards of the target must also maintain secrecy before the bid is announced, according to the TA (exemption to *ad hoc* disclosure duty). The bidder must again notify all persons involved at target level of their secrecy obligations under the TA and the prohibition of the abuse of insider information under the SEA. A confidentiality agreement must be entered into by all persons involved at target level.

Any leaks of the intention to launch a bid evidenced by share price movements or rumours and speculations on the market will force the bidder to publish its intention to launch a bid. If the target has been approached for negotiations, the target boards are also independently obliged to publish the intention of the bidder to launch a bid in case share price movements take place or rumours and speculations enter the market following a leak. A leakage strategy must therefore be prepared before negotiations with the target and/or target shareholders are commenced.

4.3 When is an announcement required and what will become public?

The bidder must immediately inform the public (including the FMA and the VSE) and the target of its intention to launch a bid if: (i) its management and supervisory boards have passed a resolution to launch a bid; (ii) there is a leak of the intention to launch a bid evidenced by way of share price movements or by rumours and speculations in the market; or (iii) circumstances arise which trigger the obligation to make a mandatory bid (i.e. the Controlling Shareholding threshold has been exceeded).

Only the mere intention to launch a bid must be announced. No further details must be announced at this stage (including details of prior negotiations or the transfer of information between the bidder and the target), although the bidder generally announces the intended offer price in order to lock in the current share price.

4.4 What if the information is wrong or changes?

If the bidder improves the consideration or makes other modifications to the bid, it is obliged to publish the updated,

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improved or otherwise modified bid in accordance with the announcement and publication rules under the TA.

The bidder may introduce a condition precedent into the offer document that certain information (i.e. target's solvency) is correct or that there is no material adverse change in the state of the target (on the admissibility of material adverse chance clauses, see question 7.1 below).

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Prior to announcement of the bid

To increase its chances of success, a bidder can take an initial stake in the target. However, a controlling shareholder who does not yet have voting rights exceeding 50% must make a mandatory bid if it acquires 2% or more of voting shares within 12 months (known as "creeping in"). As to the disclosure requirements when certain thresholds are met, see question 5.2 below.

After announcement of the bid

The bidder may also acquire a stake in the target after the announcement of the bid. However, the bidder may not acquire shares in the target on better terms than the terms of the bid (i.e. consideration), unless the bidder improves the bid or the TC permits an exception on important grounds. Any acquisitions of shares after the announcement of the bid must be disclosed to the TC.

After closure of the bid

The TA further provides for a post-offer improvement. The bidder will have to 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. As to the disclosure requirements when certain thresholds are met, see question 5.3 below.

5.2 Can derivatives be bought outside the offer process?

As to derivatives being bought outside the offer process, the rules applicable to the purchase of shares prior to and after announcement and closure of the bid apply. Therefore, such purchases need to be notified to the Takeover Commission; they impact the statutory minimum price calculation and may thus, *inter alia*, also trigger an improvement of the bid or a price warranty payment after closure of a bid, depending on circumstances, albeit difficult calculations as to the price impact, if any, will apply. Since the 2012 and 2015 amendments of the disclosure rules, a broadened definition of financial instruments will now require stakebuilders to disclose relevant stakebuilding even if the instrument does not grant an enforceable right to acquire voting shares but does make the acquisition of voting stock (economically) possible.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

If a buyer acquires or sells, 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 VSE and the target. The target's articles may provide for a 3% triggering disclosure. Furthermore, under 2007/2010 legislation as amended in 2012 and 2015, most derivative instruments have been caught by the disclosure rules, following the implementation of the EU Transparency Directive into Austrian law. Anyone who obtains a Controlling Shareholding in the target is obliged to notify the TC of such acquisition and must launch a mandatory bid within 20 trading days following such acquisition. Regarding Controlling Shareholdings, see question 2.1 above. A bidder must not sell its shares in the target after the announcement of the bid.

5.4 What are the limitations and consequences?

There are no limits and disclosure duties on the ability to make market purchases or otherwise accumulate shareholdings outside the general bid process, other than those limitations and disclosure duties described in questions 5.1 and 5.2 above.

6 Deal Protection

6.1 Are break fees available?

Break fees are not prohibited. However, they are not common, because the payment of a break fee must be disclosed in the offer document and, if excessive, may violate the TA, provided that they hinder competing offers. Even without agreement on a break fee, under a general rule available under Austrian law, breaking off negotiations without cause may entitle negotiating partners to reimbursement of frustrated costs.

6.2 Can the target agree not to shop the company or its assets?

A standstill agreement between bidder and target, under which the boards of the target are prevented from actively shopping the company or its assets around, is possible. However, if the target is approached by a potential bidder, it must nevertheless objectively evaluate the competing bid and has to support such competing bid if it is in the best interest of shareholders, employees, creditors and the public.

6.3 Can the target agree to issue shares or sell assets?

The target may issue shares, sell its own available shares or dispose of crown-jewels assets to the preferred bidder in order to support the preferred bidder, provided that these actions have been approved by a shareholders' resolution. If this specific shareholders' resolution has not been obtained, such actions may most likely be considered as a breach of the duties of the target boards under the TA to stay objective and to not frustrate or prevent the public bid.

6.4 What commitments are available to tie up a deal?

The target boards may recommend the preferred bidder's offer in the statutory target response statement and may publish adverts in favour of the preferred bidder.

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7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Voluntary offers and voluntary offers aimed at control

Under the TA, conditions or rights of withdrawal from a bid must be objectively justified and must not depend entirely on the bidder's discretion. Admissible withdrawal conditions include non-acceptance of a public bid by a sufficient percentage of shareholders (introduction of a minimum acceptance level) and substantial changes in the target's assets or financial position during the bid term (possibly because of certain defence measures initiated by the target boards). The 2003 *GE/Jenbacher* takeover is the lead case on offer conditions, including material adverse change conditions. To date, the practice of the Takeover Commission on offer conditions has been settled under cases which included *VA Tech*, *Austrian Airlines* and *Christ Water Technology*.

Mandatory offers

Mandatory bids may not be conditional (except for legally required conditions such as merger control, other regulatory approvals and the approval of the bid by the bidder's shareholders, if required by the bidder's articles or the law where it is incorporated) and may not provide for a right of withdrawal.

Offer invocation

The Takeover Commission has allowed invocation of offer conditions, provided that certain requirements have been met. In the *Dicom/Topcall* and *Siemens/VA Tech* takeovers, the TC allowed for the possibility of unilateral waiver of certain conditions by the bidder during the offer term, deeming such a waiver as an improvement of the offer under the TA. In the *Austrian Airlines* takeover, the Takeover Commission again qualified the potential waiver of an antitrust clearance condition as an improvement of the offer, provided that shareholders were granted a right to withdraw their declarations of acceptance. The subsequent extension of the term to fulfil the antitrust clearance conditions to obtain EC clearance was considered admissible as an improvement of the offer to prevent failure of the offer.

Finally, also under the heading 'improvement of the offer in the interest of the free float', the Takeover Commission will allow it if a minimum acceptance condition is subsequently waived or lowered.

The Takeover Commission will require that the offer document clearly states whether and until when at the latest a particular offer condition can be waived or, in the case of an acceptance threshold, the threshold can be lowered.

7.2 What control does the bidder have over the target during the process?

The bidder does not have control over the boards of the target during the process and is thus vulnerable to a change of circumstances in the target during the bid process, e.g. due to defensive measures initiated by the target boards. As to the duties of the target boards not to frustrate a bid and to stay objective, see question 3.2 above. The bidder, as shareholder, may claim damages in the case of a breach by the target boards of these duties.

7.3 When does control pass to the bidder?

The bidder can take day-to-day control of the target after the successful closure of the bid by replacing the supervisory board with a qualified majority of 75% of the votes cast (the qualified majority is generally reduced in the target articles to a simple majority of votes cast). Corporate restructurings such as mergers and demergers (other than sales of assets or subsidiaries and in kind contributions) are possible with a qualified majority of 75% of the shares present at the shareholders' meeting. Members of the management board may, however, only be replaced by the supervisory board of the target prior to expiry of their respective office terms on good cause.

7.4 How can the bidder get 100% control?

Under the 2006 Law on Exclusion of Shareholders, applying to both listed and unlisted companies, the majority shareholder which owns directly or indirectly 90% of the stated capital of the target may adopt a shareholders' resolution on the squeeze-out of the remaining shareholders (holding up to 10% of the stated capital of the target) with a simple majority of votes. Minority shareholders may not 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 no 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 amounts to up to the highest cash consideration paid in the offer period. As a consequence of the 90% squeeze-out threshold, the anticipated mandatory offer often contains a minimum acceptance threshold of 90% to ensure an immediate follow up squeeze-out and ultimately the acquisition of 100% of the shares in the target following closure of the tender offer.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

Unless the bidder has informed the public and the target of its intention to launch a bid, the target is under no obligation to notify the market or its shareholders that it has been approached. As to the confidentiality and disclosure requirements under the SEA and the TA, see question 4.2 above.

8.2 What can the target do to resist change of control?

Unsolicited approaches (such as the 2004 *Siemens/VA Tech* offer) are not very common and the engagement of the target boards into frustrating actions (defence measures) has rarely been tested. Further, as a general principle under the TA, the target boards must stay objective and may not prevent or frustrate a public bid (see question 3.2 above).

In line with international practice, the defences available can be categorised into measures affecting: (a) the target's organisational structure (staggered terms of office for members of the target boards can delay the bidder from establishing effective control; registered shares which grant power to nominate members to the supervisory board of target); (b) the target's assets (sale of strategic crown-jewels assets, acquisition of a direct competitor of the bidder); and (c) the target's capital structure. As to defensive measures regarding the target's capital structure, the following types of measures exist: (i) self tenders, i.e. the acquisition of own shares, are possible yet subject to strict requirements (maximum 10%); (ii) employee stock ownership plans (ESOPS) may qualify as a defence response; most Austrian listed companies have ESOPS in place; (iii) voting power restrictions (maximum voting rights) are admissible but rare; and

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(iv) certain US-type poison pills (like "flip-overs") do not work because of the prohibition of unequal treatment of shareholders.

All defensive measures by the boards of the target will require a specific (new) shareholder resolution approving the defence measure. This also includes the use by the management board with approval by the supervisory board of pre-authorised capital for the capital increase. Generally, capital increases are admissible, yet may not prove effective because of strict Austrian rules on exclusion of subscription rights.

Under the TA, the target articles may provide that certain restrictive provisions in the articles will be suspended in the case of public offers (e.g. voting power restrictions, nomination rights of holders of registered shares).

Short-term defence measures available to the target boards in direct response to the offer will, in practice, largely be limited to negatively commenting in the statutory target boards' response statement to the offer and to soliciting a better tender offer from a friendly third party (white knight). The search for such a white knight is also explicitly permitted under the TA without prior shareholders' approval.

8.3 Is it a fair fight?

There are no specific rules in the TA which are designed to create a level playing field between a preferred bidder and a hostile bidder. However, if a competing bid is made (preferred or hostile), the shareholders of the target are entitled to rescind previous acceptances of bids in view of another bid. An indirect level playing field, however, is created by the option for each bidder to improve or modify its bid during the offer period. Further, the TC may permit an extension of the maximum 10-week offer period if a competing bid has been launched within the original offer period. Finally, the boards of target must stay objective and must refrain from any actions that may prevent or frustrate the bids (with regard to permitted defensive measures or permitted support actions for the preferred bidder, see question 8.2 above).

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The major "success drivers" on the success of an acquisition (bid) are: (i) the consideration offered to the shareholders of the target by the bidder; and (ii) the statutory response statement of the target boards to the bid. Moreover, press releases and advertisements may influence the outcome of the offer process.

9.2 What happens if it fails?

If an initial bid fails, the bidder (and parties acting in concert) cannot make a further bid for the target (or acquire shares triggering a mandatory bid) for one year from publication of the bid's failure (one-year blocking period). If the bidder has announced its intention to make a bid or stated publicly that it does not rule out a bid, and then fails to notify its bid to the TC, the one-year blocking period will begin 40 trading 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 one-year blocking period starts from the date of this announcement. The TC can reduce the length of the one-year blocking period, provided that it is not detrimental to the interests of the target and its shareholders.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

2016 public M&A was approximately at the same level as in 2015. Seven public offers were launched – two partial, three voluntary and two mandatory offers (*Vonovia/Conwert*, *Airports Group Europe/Vienna Airports*, *Cubic (London)/C-Quadrat*, *Cross Industries/WP-AG*, *Pierer Industries/Pankl Racing Systems*, *FIBA/BWT* and *Ventana Holding/Frauenthal*). The trend to delist from the VSE continued with the announcement on 4 October 2016 by VSE listed refractoring company RHI to acquire an up to 50p stake in Brazil listed Magnesita. In a complex transaction, RHI will change its corporate seat to the Netherlands and move its listing to the London Stock Exchange. In December 2016, Sastre Holding announced an offer for listed Schlumberger with the aim to delist Schlumberger upon completion of the offer.

In 2016, the ATC issued a number of rulings covering issues like parties acting in concert, asymmetrical participations in shareholder syndicates and mandatory offers in distressed situations. In *Vienna Airports*, the ATC held that the creeping rules applying in the shareholding corridor between 30% and 50% were not triggered by the acquisition by the company of treasury shares, which, under Austrian law, are non-voting. In December 2016, the ATC issued a controversial ruling regarding Conwert on acting in concert. The ruling could severely impact the future practice on actions compliantly taken by shareholders in preparing transactions aiming at or avoiding a takeover. The ATC ruling is on appeal with the Supreme Court.

As of 26 November 2015, Austria implemented the EU Transparency Directive by Amendment Acts, *inter alia*, to the Stock Exchange Act and the Capital Markets Act. Among other things, the changes close prior gaps on the reporting of derivatives by enlarging the instruments covered and by adapted aggregation rules. The sanctions that Austria's Financial Market Authority can impose for violations in disclosures of holdings in listed companies have been toughened. Breaches of the disclosure rules may result in fines of up to EUR 2 million for natural persons and up to EUR 10 million for legal persons, or double benefit of breach and, in the case of legal persons, alternatively of 5% of annual net revenue. In addition, all sanctions imposed will be made public.

As of June 2016, the disclosure rules applying to directors dealing were changed as required by the EU Market Abuse Regulation. The changes include the following: the shortening of the notification to three business days; the participation in bonds and pledging of shares has been newly included in the scope of relevant transactions; there is a new requirement for directors to provide a list of closely associated persons to the issuer; and the fines have been toughened and are now up to EUR 0.5 million for individuals and up to EUR 1 million for the issuer.

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Christian holds law degrees from the University of Salzburg (*Dr. iur.*, 1982) and Harvard University (LL.M., 1984), and has practised with an NYC firm.

Christian Herbst is a lecturer on international M&A transactions at the Vienna University of Economics and Business Administration and has published extensively on issues relating to M&A, corporate and takeover law. Christian also currently serves as Co-Chair of the Corporate & M&A Law Committee of the International Bar Association (2015–2016).

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Sascha Hödl is a partner of Schoenherr Vienna with an emphasis on mergers and acquisitions, public takeovers, corporate restructurings and restructurings in the banking sector. He has been involved in high-profile public takeover transactions in Austria and is continuously representing domestic and international blue chips in highly publicised M&A deals in Austria and the CEE region. Since the outbreak of the financial crises, Sascha has been representing Austrian banks in bail-outs and high-profile M&A transactions (including Volksbanken AG in the sale of Volksbank International to Sberbank, and Hypo Alpe Adria AG (HAA) in the sale of its SEE banking network to Advent International and EBRD). He was also involved in Austria's major banking restructuring cases (creation of the Volksbanken-Verbund in 2012, establishment of the bad bank for Volksbanken AG, Immigon, in 2014 and the first resolution mechanism under the newly introduced EU Bank Recovery and Resolution Directive (BRRD) imposed over former Hypo Alpe Adria AG, HETA ASSET RESOLUTION AG, in 2015). Most recently, he assisted the Republic of Austria in the EUR 10 billion buy-back offer to holders of state-guaranteed bonds of HETA.

Sascha graduated from the University of Graz, Austria, in 1993, received his doctoral degree in 1996 and was admitted to the Austrian bar in 2001. He is also a graduate of Harvard Law School (LL.M., 2000) and has practised with a now UK-based international law firm before joining Schoenherr in 2000.

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