

The International Comparative Legal Guide to:
Mergers and Acquisitions 2009

A practical insight to cross-border Mergers and Acquisitions



Published by Global Legal Group with contributions from:

Albuquerque & Asociados
Allen & Gledhill LLP
Bech-Bruun
Buddle Findlay
Camilleri Preziosi
Clifford Chance
Davis Polk & Wardwell
De Brauw Blackstone Westbroek
Dittmar & Indrenius
Edward Nathan Sonnenbergs
ELIG Attorneys at Law
Elvinger, Hoss & Prussen
Eubelius

Eversheds Saladžius
Freshfields Bruckhaus Deringer LLP
Garrigues
Georgiades & Pelides LLC
Lee & Ko
Lenz & Staehelin
Lepik & Luhaäär LAWIN
Liniya Prava
Mannheimer Swartling Advokatbyrå AB
Meitar Liquornik Geva & Leshem Brandwein
Morley Allen & Overy Iroda
Nishimura & Asahi
Norton Rose (Middle East) LLP

Pachiu & Associates
Premnath Rai Associates
Raidla Lejins & Norcous
Schoenherr
Severgnini, Robiola, Grinberg & Larrechea
Skadden Arps Slate Meagher & Flom LLP
Slaughter and May
Steenstrup Stordrange
Stikeman Elliott LLP
Studio Santa Maria
TozziniFreire Advogados
Udo Udoma & Belo-Osagie
Weinhold Legal
Žurić i Partneri

Austria

Christian Herbst



Sascha Hödl



Schoenherr Rechtsanwälte GmbH

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 applies provided 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 and the shares are not admitted to trading at the seat of incorporation but on the VSE (if shares are trading on different exchanges within the EU, the first admission of trading took 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 Joint Stock Corporation Act 1965 (*Aktiengesetz*; SCA), *inter alia*, with respect to equal treatment of shareholders and director’s statutory duties. The SCA is applicable to AGs incorporated in Austria no matter whether the AG is a public or a private company (thus, admission to trading is irrelevant).

The Stock Exchange Act 1989 (*Börsengesetz*; SEA), *inter alia*, with respect to stake buildings, 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 Law on Exclusion of Shareholders (*Gesellschaftsrausschlussgesetz*) which regulates the squeeze-out of up to 10% of the remaining shareholders in an AG or a company with limited liability in Austria (GmbH).

The Cartel Act 2005 (*Kartellgesetz*; CA) which applies to mergers not subject to 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.

Regulatory control provisions in certain sectors such as in the banking, insurance, utilities, gambling and telecom industries

whereby the scope of applicability is differently regulated in the various industries. The admission of trading (either in or outside of Austria) is irrelevant.

1.2 Are there different rules for different types of public 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 do not apply anymore if companies that were once publicly traded have been delisted no matter whether these companies have a wide shareholder base or not; the SCA, the CA and 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?

Regulated industries

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 case of unapproved shareholder changes (e.g. in the banking, insurance, telecoms, 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 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 to media mergers.

Real estate

The acquisition by non-EU citizens of real estate including certain long-term leases, or of usually controlling shareholdings in companies owning Austrian real estate, is subject to notification or

approval. The real estate commission of the provinces in charge 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 telecom industries may affect the process of an acquisition. Changes of target ownership will usually require advance notification to the relevant government agencies in the case where certain thresholds of stake ownership will be 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, telecoms, airline and gambling sectors). As an 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 the approval of the FMA.

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. Anyone who commits market manipulation will be fined up to EUR 75,000 by the FMA, provided that the matter does not constitute a criminal offence falling under the competency of the courts.

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 (i) the voting rights of shares held in the target by a non-compliant bidder; and (ii) in cases of serious violation, additional shareholder rights, including financial rights such as the right to receive dividends from the target. Within six months of 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 when the contract is rescinded or the date when 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 voluntary offers, mandatory offers and anticipated mandatory offers.

- (i) Mandatory offers are triggered if a Controlling Shareholding is acquired; a mandatory offer is subject to minimum consideration thresholds, may not be 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, consideration may be in cash or securities and the offer may be subject to justified conditions including maximum or minimum percentages or quantities of shares which the bidder undertakes to acquire.
- (iii) Voluntary offers aimed at control are subject to the rules on mandatory bids, in particular on cash offer and minimum price, with, however, one exception: an anticipated mandatory offer can be conditional, in particular upon reaching or exceeding a certain threshold of shareholding (acceptance threshold).

Controlling shareholding

A controlling holding of voting stock exceeding 30% will trigger the obligation to launch a mandatory public offer. A holding of up to 26% of the voting stock does not trigger a mandatory bid (safe harbour provision). A controlling holding 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*. 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. 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 by 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 the tender offer (e.g., the 90% acceptance threshold is met).

A voluntary tender offer to the remaining free float shareholders will follow subject to the condition that 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 Law on Exclusion of Shareholders.

Mergers

Acquisitions of public companies by mergers are rare. 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.

2.2 What advisers do the parties need?

The bidder is generally supported by a legal advisor (who prepares the legal documentation required in a bid), a tax advisor (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 advisor (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

The bidder must immediately inform the public (including the FMA as well as 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 on the market; or (iii) circumstances arise which trigger the obligation to make a mandatory bid (i.e., the Controlling Shareholding threshold has been exceeded). The management board of the target must in turn notify its works council.

Preparing and auditing the bid

After 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 offer document

The bidder must file the prepared offer document to the TC within 10 trading days of announcing its intention to make a bid (an extension 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 to the TC is 20 trading days). On receipt of the offer document, the TC may within a term of 15 trading days prohibit the bid, request additional information or allow such time period to pass.

Publishing the offer document

The bidder must publish the offer document not earlier than 12 and not later than 15 trading days after notifying the TC (a copy of the offer document must be sent to target in advance).

Offer period

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

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 its shareholders on whether to accept the offer. Further, the target boards must file a response statement to the bid to the TC, must inform the works council and must then publish its response statement together with the report of the independent expert of the target.

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 mandatory or voluntary aimed at control, the offer period must be extended by three months from the date of the announcement of the outcome of the bid; shareholders who have not tendered their shares within the ordinary offer period may 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 period 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, this period can be longer (e.g. in the 2004 Siemens/VA Tech offer, this period was 140 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 to 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 consideration or cash requirements on voluntary bids. The Equal Treatment Rule, however, applies. In a mandatory offer and an anticipated mandatory offer, the consideration must be at least both the (i) average quoted share price in the six months before the offer is announced; and (ii) the highest price paid for target shares by the bidder in the 12 months before the offer is filed with the TC. Securities as consideration in a mandatory offer or an anticipated mandatory offer 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 an anticipated mandatory offer, the bidder must offer all the consideration in cash but may offer securities (exchange offer) as alternative (all paper offer) or in addition to the cash offer (combined cash and paper offer). The cash offer must always meet the minimum offer price requirements set out in the TA (see questions 2.5 above). The alternative all paper offer or the alternative combined cash and paper offer may, however, be higher. 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 any limits on agreeing terms with employees?

No, approvals of the works council of the target are required. However, the target's works council needs to be notified of a bid and may issue a statement. Additionally, there are no restrictions on agreeing a deal-related package of benefits for the target's employees.

2.9 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) consideration and the valuation 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.

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 bidder with the TC and then published (e.g., improvement of bid statement, statement on the satisfaction of conditions of the offer, statement on the outcome of tender proceedings).

2.10 Are there any special accounting procedures?

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. Further, 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, 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.

2.11 What are the key costs?

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

2.12 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.

2.13 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 shareholder, 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 into the offer document a certain minimum acceptance threshold as condition precedent (e.g. 75% or 90%). Since the squeeze-out threshold is 90%, it is not uncommon to introduce a 90% minimum acceptance threshold as a condition precedent to the offer.

2.14 When does cash consideration need to be available?

In voluntary bids, the date of settlement of the consideration may be chosen freely by the bidder, whereas 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. The consideration is transferred to the respective bank account of the shareholder as mentioned in the shareholders' acceptance notice.

3 Friendly or Hostile

3.1 Is there a choice?

Hostile bids are permitted. However, hostile bids and, thus, takeover battles (the recent 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 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 must not take measures that could deprive their shareholders of the opportunity to make a free and informed decision on the bid or any action likely to frustrate the bid, unless the target boards have received after the announcement of the bid an approval of the shareholders' meeting for any specific defence measures, unless pre-approved and already (partially) implemented. In the case of a breach of these duties, target directors could face administrative fines of up to EUR 50,000 and could be confronted with additional damage claims under the SCA and the TA (director's liability).

Further, target boards must (i) respond to the bid by way of the target board response statement; and (ii) must in all of their actions and omissions 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.

3.3 Does the choice affect process?

On a hostile bid, the bidder and the target typically issue a series of documents, including newspaper ads, to persuade shareholders and counter each others' arguments. Further, 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.

On 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 a computerised public company register (*Firmenbuch*), and basic corporate documentation and annual accounts and auditor reports are accessible at the district courts of first instance with substantive jurisdiction for commercial matters. Further information is available on the website of the target. 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. It is difficult to access shareholder information on a joint stock corporation (AG), as company law allows nominee shareholdings and does not require them to be disclosed, other than in limited circumstances such as during litigation.

4.2 Is negotiation confidential?

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 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 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. Further, 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 What will become public?

If the intention of the bidder to take over a target is leaked, the bidder must immediately inform the public and the target of its intention to launch a bid. As to the duty of the bidder to inform the public and the target of its intention to make a bid, see question 2.3 above.

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 that the intended offer price will be locked in with 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, he is obliged to publish the updated improved or otherwise modified bid in accordance with the announcement and publication rules under the TA. Generally, the bidder may not lapse its proposal if the information about the target previously held by it proves to be incorrect.

However, the bidder may introduce a condition precedent into the offer document that certain information (i.e. saying that the target is not insolvent) is correct or that there is no material adverse change in the state of target (on the admissibility of material adverse change 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 5.2 below.

5.2 What are the disclosure triggers?

If a buyer acquires or sells, directly or indirectly, listed target shares so that its voting rights reach, exceed or fall below 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 other percentages triggering disclosure. Furthermore, since 2007, certain 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. As to Controlling Shareholdings, see question 2.1 above. A bidder must not sell its shares in the target after the announcement of the bid.

5.3 What are the limitations?

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, yet 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 they hinder competing offers. Even without agreement on a break up 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, may sell its own available shares or may 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 such 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.

7 Bidder Protection

7.1 What deal conditions are permitted?

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 defence measures initiated by the target boards). The 2003 *GE/Jenbacher* takeover is the lead case on offer conditions, including on material adverse change conditions. In the 2004 *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 waiver as an improvement of the offer under the TA.

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.

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, 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 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 tell its shareholders if it gets an offer?

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 (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 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 (as 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. Further, press releases and ads 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 new cases, trends and developments in M&A Law in Austria.

2008 M&A and takeover activity: In line with international developments, the first half of 2008 showed a significant reduction in announced and completed cross-border transactions. However, the market saw a 50% increase in large volume transactions on a purely domestic level and significant outbound transactions which largely compensated the reduction in cross-border transactions. **Significant transactions during the first half of 2008 include:** A consortium of Citi Property Investment (Citibank) and listed Israeli Gazit Globe Ltd completed the EUR 800 million acquisition of the real estate fund Meinel European Land Ltd., a Jersey based real estate fund whose certificates are listed at the Vienna Stock Exchange in a complex transaction. I&I Real Estate announced the acquisition of CPB's real estate business for EUR 440 million. Vienna Insurance Group acquired the Austrian and CEE life insurance business from Erste Bank for EUR 1.5 billion. In mid 2008 the Vienna Stock Exchange announced the acquisition of an 81% stake in the Ljubljana Stock Exchange LJSE and in the third quarter of 2008 of a majority stake in the Prague Stock Exchange for EUR 300 million.

Erste Bank acquired a strategic 9.8% participation in the second largest Russian Bank Center Invest, while BAWAG/Cerberus announced the sale of BAWAG's Slovak participation in Istrabanka to KBC for EUR 350 million. Verbund teaming up with the Sabanci Holding acquired, in a privatisation auction, the Turkish electricity provider BEDAS for EUR 780 million. The listed Austrian technology company Andritz announced the acquisition of the hydro power business from GE in Canada, and the listed Austrian biotech company Intercell announced the EUR 130 million acquisition of the US vaccine manufacturer Iomai Corporation.

Transactions announced in 2007/2008 and aborted subsequently in 2008 include a failed EUR 150 million investment by Saudi Al Jaber into Austrian Airlines and, inter alia for antitrust concerns, the withdrawal by the Austrian oil group OMV from the contemplated EUR 24 billion merger of OMV with Hungarian MOL. Through stakebuilding, however, OMV continues to hold a participation in MOL of slightly over 20%.

During the first three quarters of 2008 takeover activity fell to a new low: In March 2008 BFI launched a mandatory offer on Brain Force Holding AG, a medium sized IT company, listed at the VSE and the regulated prime standard market in Frankfurt. During the first half of 2009 a takeover offer on Austrian airlines is expected as part of the ongoing privatisation process of the national airline. By decision of 28 January 2008, the Takeover Commission ruled that the core shareholder MS Private Foundation, who controls 29% voting stock, has not acted in concert with but only parallel to another 5% shareholder. The decision ended an investigation by the Takeover Commission on whether MS Foundation, controlling approximately 29% of voting stock, had to launch a mandatory offer as a result of voting in parallel with the 5% shareholder in the May 2007 shareholders meeting replacing the supervisory and management board.

Legislative changes include: As of 17 December 2007 the Tenth EU Directive on Cross Border Mergers (2005/56/EC) was implemented into Austrian law by the EU Merger Act. This will allow the merger between Austrian and EU entities cross-border more efficiently.

By the Amendment Act on Corporate Law (URÄG 2008), which took effect in mid 2008, EC Directives 2006/43/EG and 2006/46 EG on annual and consolidated accounts were implemented into Austrian law. This includes new provisions on the appointment, independence, lack of bias and dismissal of annual auditors as well as the obligation of the representatives of the company to issue an annual corporate governance report.

In line with the European action plan, Austria implemented stabilisation measures for the financial markets under the 2008 Inter-Bank Market Enhancement Act, the 2008 Financial Market Stabilization Act and amendments to the Banking and Stock Exchange Acts. These changes entered into force in October 2008. Under the legislative measures, the Austrian Finance Minister can use up to EUR 100 billion to protect the Austrian banking and insurance sector from the effects of the international financial crisis. As accompanying measure, new rules on Short Selling including by an amendment of the Stock Exchange Act were implemented in 10/2008.

Outlook: It is unclear how strong the slowdown of M&A and takeover activity will be as to the Austrian and CEE markets as a consequence of the market meltdown. The financial crisis has already affected the ongoing privatisation of Austrian Airlines and led to rescue measures as to Austrian banks including the nationalisation of Kommunalkredit Bank in 10/2008. In November 2008, the EU confirmed the terms and conditions under which EU compliant funding of financial institutions under the Austrian legislation for stabilisation measures of the financial markets could be granted. All large Austrian banks confirmed that they would tap the funding provided by the Republic of Austria. Given recession fears and profit warnings, it remains to be seen whether the mid size cross border transactions relating to the Austrian and CEE/CIS markets will be hit as severely as the larger size transactional activity.

**Christian Herbst**

Schoenherr
Tuchlauben 17
1010 Vienna
Austria

Tel: +43 1 534 37 - 129
Fax: +43 1 534 37 - 6129
Email: c.herbst@schoenherr.at
URL: www.schoenherr.eu

Christian Herbst has been a partner of Schoenherr Vienna since 1990. Christian's main areas of practice are M&A, venture capital, takeover and corporate finance transactions. Christian advises and represents mostly foreign clients in cross-border financial and corporate transactions, including on acquisitions and divestitures by way of open bids or otherwise, public tender offers, restructurings and JVs, as well as related corporate litigation and arbitration. In over 20 years of transactional practice, Christian has been involved, in many cases as lead counsel, in highly publicised privatisations (including Austria Tabak/Gallaher), M&A deals and takeovers (including GE/Jenbacher and OEVAG/Investkredit) in Austria and the CEE.

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

Christian Herbst is a lecturer on international M&A transactions at the Vienna University of Economics and Business Administration and at the MBL programme of Salzburg University, and has published extensively on issues relating to M&A, corporate and takeover law.

**Sascha Hödl**

Schoenherr
Tuchlauben 17
1010 Vienna
Austria

Tel: +43 1 534 37 - 266
Fax: +43 1 534 37 - 6266
Email: s.hoedl@schoenherr.at
URL: www.schoenherr.eu

Sascha Hödl is a partner of Schoenherr Vienna with an emphasis on mergers and acquisitions, public takeovers, corporate finance, equity capital markets and private equity / leverage buyout transactions. He has been and is involved in high profile public takeover transactions in Austria, including over the last three years the takeover of Jenbacher by General Electric, the acquisition of VA Tech by Siemens and the public tender offer of Österreichische Volksbanken for Investkredit. Additionally, Sascha is continuously representing domestic and international blue chips like Deutsche Bahn, KBC and Telekom Austria in privatizations and public auctions in Central and Eastern Europe. In 2007 Sascha has also represented several international private equity houses such as PAI Partners (acquisition of Lafarge Roofing Division) and RANK Group (acquisition of SIG Combibloc Group) in their leverage buyout investments in Austria and the CEE/SEE region.

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 from Harvard Law School (LL.M. 2000) and worked for a now UK-based international law firm before joining Schoenherr in 2000.

Sascha Hödl is a lecturer at the Vienna University of Economics and Business Administration for international M&A transactions.

schoenherr

Schoenherr is a leading corporate law firm in Central and Eastern Europe. More than 310 professionals service national and international clients from our offices in Belgrade, Bratislava, Brussels, Bucharest, Budapest, Kyiv, Ljubljana, Prague, Sofia, Vienna, Warsaw and Zagreb. The firm has a long standing tradition of advising clients in all fields of commercial law providing seamless service that transcends national and company borders. The combination of high quality, competence and efficient problem solving in complex commercial mandates and transactions is at the core of Schoenherr's philosophy. In all jurisdictions, Schoenherr's operations correspond with the local legal standards and conduct rules.

Schoenherr's firm-wide corporate and mergers & acquisitions practice group advises strategic and private equity investors on inbound and outbound investments in Austria and Central Eastern Europe. In recent years the firm has played a leading role on many private and public takeovers, joint-ventures, privatisations and private equity and venture capital investments in the region.