Austria

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

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

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

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

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

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

Legal regulation

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

There is no general overriding statute regulating acquisitions and disposals in Austria. The most relevant statutes are the General Civil Code, the Commercial Code, the Act on Limited Liability Companies and the Stock Corporation Act. Less frequently, the Demerger Act, the Tax Reorganisation Act and the EU Merger Act for cross-border mergers may come into play depending on the specifics of the business combination. For governmental clearances the Cartel Act, the EU Merger Regulation, the Investment Control Act and for regulated industries special laws need to be observed.

Acquisitions are generally not required to be governed by Austrian law. However, even if governed by foreign law, certain mandatory provisions of Austrian law may still apply to the acquisition (for example, the notarial deed requirement for a transfer of shares in limited liability companies). Also, Austrian law will mandatorily govern statutory successor liabilities in asset deals or corporate restructurings, such as mergers or demergers.

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

Legal title

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

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

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

Multiple sellers

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

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

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

Exclusion of assets or liabilities

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

In a transfer of business, the automatic transfer of employees pertaining to such business to the buyer under the EU Acquired Rights Directive, which has been implemented in Austria by the Austrian Employment Contracts Adjustment Act, cannot be excluded. Otherwise, the parties may contractually define the scope of assets, liabilities and contracts to be transferred in an asset deal. However, several provisions of Austrian law provide for a statutory successor liability of the buyer vis-à-vis third parties for liabilities pertaining to the business, even if the parties have agreed among themselves that such liabilities shall remain with the seller. Such statutory successor liabilities may only be partially excluded with effect to third parties.

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

Consents

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

The new 2020 Investment Control Act (ICA) transposes the requirements under the EU FDI Screening Regulation and replaces the existing liberal regime under the Austrian Foreign Trade Act. M&A transactions lacking the required ICA approval will, inter alia, be null and void. Under the broadened scope of the new legislation, all non-EU, non-European Economic Area and non-Swiss investors will need to check whether they meet the threshold (25, 50 per cent, control and in certain cases of highly sensitive sectors, such as defence and critical energy or digital (like 5G) infrastructure already at 10 per cent) and broadened sector requirements for an approval requirement under the ICA. Sensitive sectors for public order or security where the 25/50 per cent thresholds apply, inter alia, include critical infrastructure such as energy, information technology, transport; health food; critical technologies (such as artificial intelligence, cybersecurity, nano and biotech) and dual good items, critical resources including energy but also medicines, vaccines, medical devices as well as access to sensitive information and the freedom and pluralism of media.

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

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

7 Are any other third-party consents commonly required?

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

Agreements concluded by the target company may include change of control clauses. Change of control clauses are typical for financing agreements allowing the lender to accelerate the loans granted in the case of a change of control. Furthermore, in the case of a transfer of business, third parties to contracts may object to the transfer of their contract.

Regulatory filings

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

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

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

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

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

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

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

Duty of good faith

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

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

However, in practice, letters of intent and other pre-signing documents limit the lability for violation of pre-contractual duties.

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

Documentation

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

In most private M&A transactions, the key document is the share purchase agreement, respectively the asset purchase agreement, which could have numerous annexes. In more complex transactions side agreements including service level agreements may be concluded. In a pre-signing phase, the parties usually sign non-disclosure agreements and potentially agree on further documents, such as term sheets or letters of intent.

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

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

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

The sale of individual assets or of a business unit is generally not subject to any form requirements. However, under statutory law, the sale of all or substantially all of its assets (being interpreted as more than 75 per cent) by a joint-stock corporation requires approval by a shareholders' resolution with a 75 per cent majority and a sale and transfer agreement in the form of an Austrian notarial deed. According to Supreme Court precedent this approval requirement applies by analogy to the sale of all or substantially all of its assets by a limited liability company. In such a case, according to legal scholars, the notarial deed form requirement may also apply by analogy.

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

Yes, digital signatures are enforceable. However, a notarial deed generally requires that the signatories are physically present in front of the notary. Certain exceptions to the physical presence requirement for notarial deeds using digital signatures currently exist until 31 December 2020 owing to the current covid-19 situation.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

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

Buyers usually conduct a due diligence as to legal, tax and financial matters. Depending on the type of the target company's business and the risks involved further due diligence on other matters including regulatory, environmental, IT or IP may be conducted.

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

Liability for statements

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

Yes, under statutory Austrian law, sellers can – in principle – be held liable for pre-contractual or misleading statements. However, share purchase agreements and asset purchase agreements customarily exclude the parties' liabilities for pre-contractual statements. A seller's liability is usually limited to the representations and warranties, indemnities and covenants given in the final transaction agreements. Limitations or exclusion of wilful misconduct cannot validly be excluded contractually.

Publicly available information

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

For a buyer, it is customary to search the electronically accessible (1) companies register (which includes basic corporate information as well corporate documents, such as articles of association and financial statements etc), (2) the trade register showing the trade licences held by a company and (3) the insolvency database.

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

Impact of deemed or actual knowledge

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

Under the statutory representation and warranty concept, a seller is not liable for facts, matters and circumstances that can be seen from public books and records (eg, the land register) or that are known or should have been known (gross negligence required) to the buyer, unless the seller has given a specific representation and warranty with regard to such facts, matters and circumstances. In the case of specific representations and warranties as usually given in a share purchase agreement or asset purchase agreement, such concept would, in most cases, result in the seller's liability even if the buyer knew that the warranted facts, matters or circumstances are incorrect.

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

PRICING, CONSIDERATION AND FINANCING

Determing pricing

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

Pricing is usually based on an enterprise value of the target determined by applying established accounting and valuation methods. The purchase price is usually established on a cash and debt free basis and at the end an outcome of a negotiation between the parties. Both closing accounts and locked-box structures are used in Austria. While US or other international buyers usually prefer closing accounts, in a seller's market, with respect to attractive targets and in competitive auction processes, locked-box structures prevail, unless closing accounts are more preferable for a seller under the specific circumstances.

Form of consideration

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

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

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

Earn-outs, deposits and escrows

19 | Are earn-outs, deposits and escrows used?

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

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

Financing

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

Depending on the transaction size and whether the acquirer is strategic or private equity, transactions are financed by own funds or bank financing or a mix of both. Sometimes financing is provided by alternative financing providers like debt funds. Assurance is provided by equity and debt commitment letters, by corporate guarantees and sometimes bank guarantees. The binding nature of these instruments and the degree to which the back-up is readily enforceable or liquid will depend on the nature and balance sheet of the buyer and the respective negotiation power of buyer and seller.

Limitations on financing structure

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

No restrictions exist for sellers to grant financial assistance out of sellers' own funds (for example granting vendor loans).

However, applicable capital maintenance rules and prohibitions on financial assistance limit the ability of target companies to assist buyers in connection with the acquisition. Generally, no financial assistance such as loans, upstream or cross-stream guarantees or security for acquisition financing may be provided by target companies. Transactions in violation of capital maintenance rules are null and void and may lead to a personal liability of managing directors or board members. Debt pushdown and similar structures require careful planning to comply with corporate and tax requirements.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

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

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

Additional closing conditions depend substantially on the transaction itself or the negotiation power of the parties and may include third-party approvals, waivers of change of control provisions, seller's warranties being true and correct at closing or completion of defined carve out measures. Exceptionally closing conditions relating to 'no material adverse change', shareholder approval or financing might be accepted by sellers. Post covid-19, such 'no material adverse change' closing conditions seem to be requested more often by buyers.

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

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

Pre-closing covenants

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

The nature, scope and rigidity of any pre-closing covenants will depend on the specific transaction, type of business, conditions precedent and the long-stop date. The seller will usually covenant the conduct of business of the target in its ordinary course between signing and closing subject to defined measures being subject to buyer's approvals to the extent not violating gun-jumping rules. Covenants can also include seller to procure the resignation of management of supervisory board members at closing or buyer to procure the later exoneration from liability of board members of the target for pre-closing periods. In locked-box transactions, this will include no-leakage covenants.

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

Termination rights

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

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

been fulfilled by the long-stop date. Most transaction agreements exclude unilateral rescission of the agreement. Like other contracts, transaction agreements can always be adapted or terminated by mutual consent.

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

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

If agreed in the acquisition agreement, break-up fees usually reflect a strong sell side position in an auction context or otherwise and usually protect sell side and target against regulatory clearance risks, mostly on merger control, as to an expedient closing. The amount of break-up fees varies depending on whether they should merely compensate for frustrated expenses in an aborted transaction or carry an element of liquidated damages. Excessive break-up fees may be adjusted by the court and might also carry the risk of manager liability for violation of fiduciary duties.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

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

The scope and number of representations, warranties and indemnities given to a buyer varies whether the market is a sellers or buyers' market, whether the target (business) is highly attractive and sold in an auction or in the context of a distressed sale. The warranty catalogues usually start with the so-called fundamental warranties as to title, corporate aspects and authority and power to enter into the agreement. The fundamental warranties are usually followed by warranties on the financial statements and warranties on the business, including on material contracts, IP, labour and to compliance. Except for fundamental warranties, and depending on the negotiation power of the respective party, knowledge qualifiers and materiality qualifiers may apply to individual reps and warranties. As to taxes and sometimes the environment or, for example, in the context of tech deals, also to IP, indemnities will usually be agreed. Indemnities that, apart from the standard tax indemnity, are often agreed for risks identified in the due diligence are not subject to the usual limitations of business warranties. Reps and warranties are not fault based but as with business warranties are usually subject to agreed limitations. Violation of representation and warranties and of indemnities is usually contractually agreed to be indemnified on a euro-for-euro basis.

Limitations on liability

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

Customary limitations to reps and warranties include de minimis thresholds, tipping or deductible baskets and liability caps. Rule of thumb metrics for share deals, which will vary as to the negotiation power of the respective parties, the particular transaction and deal size, are 0.1 (+) per cent of the purchase price for de minimis, 1 (+) per cent for the basket and liability caps from 10 per cent to up to 50 per cent of the purchase price for reps and warranties, usually with separate caps depending on particular types of warranties. A limit of 100 per cent of the purchase price will usually apply to breaches of fundamental warranties, in particular to the violation of the title warranty and of indemnities. Business reps and warranties are usually excluded as to matters fairly disclosed in a virtual data room by the seller during due diligence; disclosure letters are rarely used. Fundamental warranties and indemnities are not subject to the usual limitations of business warranties, thus not qualified by disclosure and not subject to knowledge qualifiers, de minimis and thresholds except for the overall cap of 100 per cent of the purchase price.

Further limitations to claims usually include a contractual definition of loss to be compensated by the seller with discussion points being the compensation for indirect damages and lost profit. Buyer contribution to the damage and violation of mitigation duties will usually also be agreed to reduce or exclude claims. Furthermore, claims for violation of representations and warranties will typically be agreed contractually to be limited in time with time limits varying as to the type of rep and warranty or claim. Business rep violation will have to brought typically within 18 months (+/-) from closing, whereas terms to claim for violation of fundamental representations, tax (often tied to the long statutory limitation periods) and other indemnities are usually multi-year periods and thus considerably longer.

Transaction insurance

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

While not yet as popular in Germany or other European countries, warranty and indemnity (W+I) insurance is on the increase also on larger transactions specifically if the sellers are private individuals or private equity. In real estate-related transactions, W+I insurance has become standard. Buyers typically take up the insurance. In auction processes, again especially in the private equity and in the real estate transaction context, sellers may already pre-discuss and arrange for insurance with a broker and W&I insurers. Process implications specifically as to timing and limited coverage as to certain risks may speak against W+I insurance in specific transaction settings.

Post-closing covenants

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

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

TAX

Transfer taxes

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

There are no transfer taxes as such levied on the sale of shares in corporations, limited liability companies or partnerships or the sale of assets.

However, under Austrian law several types of transactions may be subject to stamp duty if evidenced by written documentation in Austria. Such transactions include assignments of contracts, rights and receivables, sureties and agreements on easements and real estate pledges. The stamp duty for such transactions ranges, depending on the type of legal transaction, from 0.8 (assignments) to 2 per cent (easements) of the calculation basis, which is usually the consideration for or value of the transaction. No stamp duty is triggered, if contracts, rights or receivables transfer in a transfer of business automatically by operation of the law. Debtors of stamp duties are typically all parties to the agreement. Therefore, if the transactions are concluded as ancillary transactions to the share or asset deal, stamp duty may be triggered.

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

Real estate transfer tax (RETT) is levied on the acquisition of domestic real estate and in some cases also if shares in corporations and interests in partnerships that directly own real estate is transferred. Under current tax laws, RETT is triggered if 95 per cent of the shares (1) of a company that holds real estate are consolidated in the hands of one shareholder or a group of shareholders within the meaning of the Austrian group taxation regime or (2) or of a partnership which has held real estate over a five-year period. RETT on direct acquisitions of real estate is 3.5 per cent (standard rate) of the purchase price or value; upon registration of a new owner of the real estate an additional 1.1 per cent registration duty will be triggered. RETT on indirect acquisitions of real estate, via acquisition of companies and partnerships, or via acquisitions by corporate reorganisation under the Reorganisation Tax Act is 0.5 per cent.

Corporate and other taxes

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

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

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

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

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

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

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

In asset deals constituting the transfer of a business or business unit, the employees working in the business (unit) and their employment agreements automatically transfer to the buyer by operation of law. In a transfer of business, the buyer assumes all the liabilities of the seller as employer. The buyer may only object to takeover pension obligations individually granted to employees. Any transfer-related termination (prior to or following the transfer of business) is null and void. A termination may be valid if it is justified by termination grounds (eg, personal reasons). Any termination notice given within one year of the effectiveness of the transfer of business is likely to be seen as transfer-related and, therefore, inadmissible.

Employees may only object the transfer of their employment to the buyer in the case (1) special termination rules set forth in an applicable collective bargaining agreement or (2) company pension commitments will not be taken over by the buyer.

Notification and consultation of employees

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

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

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

Transfer of pensions and benefits

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

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

In the case of a transfer of business or business unit, company pensions and other benefits of employees transfer to the buyer. However, the buyer may object to taking over pension entitlements granted to employees individually on a contractual basis (no right to object exists with regard to pension entitlements granted in shop agreements). In the case of an objection by the buyer to take over company pension obligations, the employee can and will regularly object to his or her transfer to the buyer and the employment relationship will remain with the seller.

UPDATE AND TRENDS

Key developments

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

In addition to covid-19 measures affecting Austrian target companies, the most important 2020 law change affecting private M&A was the tightening of the foreign direct investment screening for non-EEA/Non-Swiss investors by the introduction of a new Austrian Investment Control Act. Given the new broad foreign direct investment (FDI) screening regime, investors from the US, Australia, UK (post Brexit), CIS, CEE (unless European Economic Area) Middle East and Asia will potentially need to provide for conditions precedent in M&A documentation and undergo FDI approval proceedings with the Austrian Ministry of Digitalisation and Economic Affairs.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Like other European country governments, the Austrian government introduced various covid-19 measure relief programmes benefitting businesses and companies, which included state backed loan and short-time work programmes with government paying 80 to 90 per cent of net salaries, deferred payment of social security contributions, tax relief on no prepayments, no interest and no late pay charges. Legal moratoria were instituted as to suspension of insolvency filing periods (in the case of over-indebtedness; not in case of illiquidity) and as to termination of leases due to non and late lease payments. The deadlines for management to draw up annual accounts for the last business year have been extended from five months to nine months and to file those with the commercial registry were extended from eight to 12 months.

As to supervisory board and shareholders meetings of companies, virtual meetings may now take place.

The processing of merger control filings was temporarily delayed during H1 2020 but normal processing has subsequently been resumed.

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