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# Business Acquisitions in Austria



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## Introduction

Austria is an attractive business location and used by many international investors as a hub for Central and Eastern Europe. The legal and economic environment is generally considered stable and favorable to foreign investment.

There are only a few legislative restrictions on business acquisitions in Austria generally and on acquisitions by foreign investors in particular. Certain acquisitions have to be approved by the ministry of economics pursuant to the Austrian Law on Foreign Trades and Payments (*Außenwirtschaftsgesetz*). Certain requirements regarding merger control and securities laws have to be observed at the national as well as European level. However, the Austrian Takeover Act (as amended in May 2010) stipulates certain regulations that go beyond the EU Directive -2004/25/EC on takeover bids and are specific to Austrian law. Further, the regime of group taxation, introduced in 2005, provides rather unique tax incentives.

## 1. Corporate Structures

As in many other European jurisdictions, the most common form of corporation in Austria is the private limited company (*Gesellschaft mit beschränkter Haftung* or *GmbH*), followed by the joint-stock company (*Aktiengesellschaft* or *AG*). The shareholders of these two legal entities are generally subject to liability for the corporation's debts only to the extent of their capital contributions.

The following are non-corporate legal forms of business undertakings where the shareholders (except for the limited partner of a limited partnership) are personally liable for the debts of the business on an unlimited basis:

- sole proprietorship (*Einzelunternehmer*);
- civil law partnership (*Gesellschaft bürgerlichen Rechts* or *GesbR*);
- general partnership (*Offene Gesellschaft* or *OG*);
- limited partnership (*Kommanditgesellschaft* or *KG*).

## GmbH

The *GmbH* is a legal entity (*juristische Person*) whose shareholders are generally not personally liable for the liabilities of the company. Their liability is limited to the obligation to fund the share capital, as stipulated in the articles of incorporation or a subscription certificate (*Übernahmserklärung*). The stated share capital (*Stammkapital*) is divided into quotas of subscribed capital (*Stammeinlagen*) towards which the shareholders make their contributions. In contrast to an *AG*, no share certificates may be issued, and the listing of quotas in a *GmbH* on an Austrian stock exchange is not possible. Each shareholder may only hold one quota.

The minimum stated share capital of a *GmbH* is EUR 35,000, of which at least half must be raised in cash upon incorporation, except where an existing business is contributed by the founders or contributions in kind are made on the basis of an independent valuation.

The articles of incorporation may provide for further transfer restrictions like approval by the company's shareholders.

Any natural person or legal entity can be a shareholder of a *GmbH*; neither Austrian citizenship nor Austrian residency is required. A *GmbH* must have one or more managing director(s) (*Geschäftsführer*) who represent the company both in and out of court and manage the business of the company. A managing director can only be an individual who is capable of entering into legal transactions; neither Austrian citizenship nor Austrian residency is required. They are appointed by the shareholders' meeting and may basically be recalled at any time without cause. The shareholders may have a direct influence over the management, since they can issue binding instructions to the managing director(s). A supervisory board (*Aufsichtsrat*) which is independent of the board of directors, (based on a two-tier management system) is compulsory only for a larger *GmbH* meeting certain statutory criteria.

## AG

The liability of the shareholders of an AG is generally limited to the obligation to fund the share capital. The stated share capital (*Grundkapital*) is divided into shares with a par value of at least EUR 1 (*Nennbetragsaktien*) or into non-par value shares representing an equal part of the company's share capital (*Stückaktien*). Furthermore, the shares may be issued in the form of registered shares (*Namensaktien*) or bearer shares (*Inhaberaktien*), whereby bearer shares may be issued by companies listed on the stock exchange only due to changes of commercial laws in 2011, where the issuance of bearer shares of all other companies have been restricted to strengthen anti-money-laundering regulations. Existing bearer shares must be transformed into registered shares (*Namensaktien*) until 31 December 2013.

The minimum stated share capital is EUR 70,000, of which at least one quarter must be raised in cash before the registration of the company. Shares are freely transferable (without a notarial deed).

An AG must also have one or more managing director(s) (*Vorstand*) who represent the company both in and out of court and manage the business of the company. Furthermore, an AG managing director can only be an individual who is capable of entering into legal transactions; neither Austrian citizenship nor Austrian residency is required. In contrast to the *GmbH*, however, a managing director of an AG is appointed for a maximum term of five years by the supervisory board and may be recalled only upon good cause.

Neither the shareholders nor the supervisory board may give instructions to the managing director(s) in the course of day-to-day business. A supervisory board (*Aufsichtsrat*) is compulsory. The members of the supervisory board are appointed partly by the shareholders' meeting and partially by one-third by the workers' council.

## General Partnership (*Offene Gesellschaft, OG*)

A general partnership consists of two or more partners with unlimited personal liability for the general partnership's debts. There is no prescribed minimum capital.

## Limited Partnership (*Kommanditgesellschaft, KG*)

A limited partnership consists of at least one general partner (*Komplementär*) with unlimited liability and at least one limited partner (*Kommanditist*) whose liability is restricted to the amount of his contribution registered with the commercial register (*Firmenbuch*). The general partners represent the company and manage its business. There is no prescribed minimum capital.

In order to limit liability, while at the same time enjoy the tax benefits of a partnership structure, a limited partnership where the only general partner is a *GmbH* may be established. This kind of limited partnership is referred to as a *GmbH & Co KG*. Due to the corporation-like structure of such partnerships, certain rules governing corporations may apply by way of analogy (e.g. capital maintenance rules).

## 2. Pre-Contractual Relationship

### Letters of Intent and Heads of Agreement

When two or more parties enter into negotiations with the intent to acquire a business, a pre-contractual relationship is created which imposes on the parties *inter alia* the obligation to act in good faith. Such relationships may be created by way of oral communication, in writing or even by conclusive actions. In the context of proposed business acquisitions, Austrian legal practice has adopted the Anglo-American style "Letter of Intent" for regulating the preliminary stages of a transaction, often outlining the envisaged transaction process and the proposed transaction's material terms and conditions. The legal value of a letter of intent depends upon its specific language. To avoid ambiguity, it is recommended that one expressly determines whether the letter of intent (and which provisions thereof) is (are) to be binding upon the parties.

Usually the letter of intent will be non-binding, with the exception of certain terms, e.g. confidentiality, exclusivity, break-up fees and access to information. Nevertheless, based on the general good faith principle, a party discontinuing negotiations without any cause, where the parties have relied *bona fide* on the continuation of the negotiations, may be liable for damages on the basis of *culpa in contrahendo*. A provision in a procedure letter or similar document that reserves a party's right to discontinue the transaction at any time without cause will typically cover against this liability risk.

A binding letter of intent would be deemed a "*Punktation*" or a pre-agreement (*Vorvertrag*) depending on its specific wording. A "*Punktation*" is an agreement which contains only the essential terms of an

agreement which are regarded as binding, so that the parties may demand direct specific performance of the agreement. A pre-agreement constitutes a binding agreement for the parties to conclude a certain agreement in the future, thus giving the parties only the right to demand the execution of the specified agreement, but not to request direct specific performance of this agreement. A pre-agreement is still concluded under the condition of no change of circumstances. Nevertheless, a failure to execute the agreement on the agreed date is considered a breach and may make the responsible party liable for damages.

### **Liability for Pre-contractual Representations**

The seller may be liable for any declarations about the target company or the transaction process made during the preparation or negotiation of an acquisition agreement, if the purchaser thereby acquires a false or misleading impression of the target company and on that basis enters into the agreement. In the case that the purchaser would not have acquired the target company, had he not been misled, the purchaser may rescind the agreement. Furthermore, the seller may be liable for the damages resulting from negligent or willful misrepresentation.

Due to difficulties in practice to prove which declarations have been made and which information has been provided by the seller in the course of the negotiations, the seller will typically attempt to limit his liability to the representations expressly stated in the acquisition agreement, thus removing any liability for correctness or completeness of any pre-contractual communication.

An exclusion of liability for willful misconduct would, however, not be enforceable. The exclusion of liability for negligent conduct is basically permitted between entrepreneurs unless it relates to untypical and unforeseeable damages or to personal injury.

Based on the *bona fide* principle, the seller as a prudent businessman is obliged to inform the purchaser about all aspects regarding the transaction which the purchaser may in good faith expect to be revealed. The seller may be liable on the basis of *culpa in contrahendo* for damages resulting from the negligent failure to reveal such information. In a customary due diligence process where the seller responds to relevant inquiries of the purchaser regarding the target company, a potential liability of the seller should not materialize.

### **3. Extent of Seller's Warranties and Indemnities**

The general provisions of the Austrian Civil Code (*ABGB*) on physical and legal defects applicable to the sale of assets apply to purchase agreements regarding shares or businesses unless contracted out by the parties.

As a matter of Austrian law, the implied representations made by a seller of shares in a corporation only relate to the rights represented by the shares and not to the value of the shares or the corporation's business. The Austrian Supreme Court (*OGH*) has, however, held that physical or legal defects of a business undertaking itself amount to a defect of the sale shares, if all shares in the corporation are being sold. It is likely that this rule would be extended to certain majority shareholdings. The scope of such implied warranties for the underlying business is not entirely clear. The seller is deemed liable for defects which influence the merchantability or the value of the enterprise as a whole and for the absence of characteristics of the business or of material assets which are generally assumed in a business of the type being sold.

It is therefore highly advisable to agree on a specific set of representations and warranties both in an asset deal and in a share deal governed by Austrian law.

In the case that there is no special stipulation as to the remedies in an Austrian business or share purchase agreement, the purchaser has a claim for the cure (*Naturalrestitution*) of the defect (if practicable), a reduction of the purchase price (*Minderung*) or, in the event of a material defect or a breach of specific contractual representations and warranties, rescission (*Wandlung*) of the agreement. It is, however, customary to stipulate specific remedies in the acquisition agreements, particularly to avoid the rather broad rescission right under statutory law. The rescission remedy is usually excluded or restricted to extreme cases and the purchaser's rights in all other cases of a breach are limited to a reduction of the purchase price and compensation. The two-year statute of limitations for warranty claims based on defects of movable assets and three years for defects of immovable assets is often shortened or extended. *De minimis* thresholds for admissibility of warranty claims and/or liability caps are regularly stipulated in Austrian law agreements and generally do not present enforceability issues.

For a purchaser, it is generally recommendable and not uncommon to ask the seller to support his representations and warranties through a guarantee from a parent company, a bank guarantee or by retention of part of the purchase price.

As regards pre-completion risks, the risk of loss lies in the seller until the title has effectively been transferred to the purchaser, i.e. until the closing of the acquisition agreement. The parties are, however, free to agree on a different date of transfer of risk.

For the purchaser, it is therefore advisable to seek protection through a material adverse change clause relating to the period between the signing and closing of the acquisition agreement. Furthermore, provisions limiting the seller's freedom to dispose of material assets and requiring the maintenance of appropriate insurance until closing are customary.



## 4. Liability of the Purchaser for Pre-acquisition Trading and Contracts

### Share Deal

In the case of an acquisition of shares in a corporation (i.e. a private-limited company or joint-stock company), the purchaser as a new shareholder is not liable for the company's debts as a general rule. The liability of a purchaser of shares in a corporation is limited to the liability for the contribution towards the subscribed capital which has not yet been paid out by the seller and its predecessors (former shareholders). A change in the shareholder structure has no influence on the company's rights and obligations, since it is a separate legal entity.

In the case of an acquisition of an interest in a non-corporate company (i.e. a civil law partnership, general partnership or a limited partnership), the purchaser is liable for certain pre-acquisition obligations of the company as specified in the Austrian Civil Code and the Austrian Commercial Code.

### Asset Deal

In the case of an asset deal, only the contractually stipulated obligations are transferred to the purchaser. According to statutory provisions, the purchaser is further liable in the following cases:

- Pursuant to Section 1409 of the Civil Code, the purchaser of a business is jointly and severally liable with the seller towards the business' creditors for any pre-acquisition debts connected with the business which he knew of or should have known of at the time of the acquisition. The liability of the purchaser is, however, limited to the value of the acquired assets. This liability of the purchaser may not be excluded or limited by an agreement with the seller. The purchaser's liability is reduced by any amounts paid directly to the business' creditors.
- Section 38 of the Commercial Code (*UGB*) provides for a transfer of contracts subject to the right of objection of the respective third parties irrespective of whether the company name is maintained.
- Pursuant to Section 67 of the General Social Security Act (*ASVG*), the purchaser of a business is jointly and severally liable with the seller for any unpaid employer's social security contributions which have become due during the last twelve months prior to the acquisition. The purchaser may ask the social security agency for a binding statement indicating any outstanding amounts and thereby limit his liability to this amount.
- Pursuant to Section 14 of the Federal Fiscal Code (*Bundesabgabenordnung*), the purchaser of a business is liable for taxes and charges which have arisen in connection with the acquired business since the beginning of the calendar year preceding the acquisition date and which the purchaser knew of or should have known of at the time of the purchase. This liability of the purchaser is limited to the value of the acquired assets.

## 5. Implementation Requirements

### 5.1 Required Governmental Approvals

The purchase of Austrian real estate and the acquisition of a controlling shareholding of a company owning Austrian real estate by foreign individuals, foreign companies or Austrian companies controlled by foreign individuals may require an approval by or a notification of the local authorities in accordance with relevant legislation which differs significantly from state to state.

The acquisition of a material shareholding in a banking or insurance business requires advance notification to and an approval by the relevant regulatory authority.

The acquisition of a controlling shareholding (resulting in a shareholding of the acquirer of more than 25% of the voting rights) in an Austrian company and the acquisition of businesses:

- which are engaged in business sectors affecting the security and public organization of Austria (such as security services, universities, energy providers, weaponry industries or telecommunication providers), and
- having an annual turnover of more than EUR 700.000,

by foreign individuals, foreign companies and also Austrian companies controlled by foreign individuals are subject to the approval of the Ministry of Commerce. The approval has to be obtained prior to the acquisition (prior to signing of the purchase contracts or prior to a public bid). A decision by the Ministry of Commerce has to be made within 1- 3 months after submission of the application for approval, whereby approval may be given subject to the fulfillment of certain conditions.

All other acquisition of shares in an Austrian company and the acquisition of a business by foreign individuals or entities does not require any further specific governmental approvals, except for approvals or consents under EU and domestic merger control legislation.

### 5.2 Anti-trust and Competition Law

Austrian merger control regulations apply to concentrations (this term includes merger and acquisitions of interests of 25% or more in an Austrian undertaking) which exceed all of the following turnover thresholds during the financial year preceding the concentration:

- EUR 300 million for the aggregate world-wide turnover of the undertakings concerned;
- EUR 30 million for the aggregate Austrian turnover of the undertakings concerned; and
- EUR 5 million for the world-wide turnover of at least two of the undertakings concerned.

The implementation of the concentration is not permissible prior to a clearance by the cartel authorities.

Agreements providing for implementation in the absence of or prior to clearance are void and attract a fine of up to 10% of the world-wide turnover of the relevant undertaking in the preceding business year.

A concentration implemented outside of Austria may still be subject to clearance by the Austrian cartel authorities if the concentration has an effect on the Austrian market, due to the undertaking concerned selling goods or providing services in Austria or otherwise.

Austrian merger control regulations do not apply to concentrations falling within the European Commission's jurisdiction under Council Regulation (EC) No 139/2004 (EU Merger Regulation).

The Austrian rules on restrictive agreements and market abuse are based on Articles 101 and 102 of the Treaty on the Functioning of the European Union (AEUV). The Austrian regulations generally accord with the EU competition law regime prohibiting agreements which restrict, distort or prevent competition in Austria.

### 5.3 Required Offer Procedures

The Austrian Takeover Act (*Übernahmegesetz*) regulates both voluntary and mandatory public takeover bids for shares in a joint-stock company or Societas Europea with its registered seat in Austria, provided that such shares are listed on the Vienna Stock Exchange for official trading (*amtlicher Handel*) or regulated unofficial market (*geregelter Freiverkehr*). The Austrian Takeover Code has been substantially revised as of 9 June 2006, in part to implement the EU Takeover Directive but also to address concerns about the clarity of the existing law.

The Takeover Act provides that the acquirer of a controlling shareholding in a target company has to make a public takeover bid to the remaining shareholders for all outstanding shares (mandatory takeover bid). Under the revised Act, control is constituted by a shareholding of more than 30% of the voting rights. Certain restrictions and obligations, other than the obligation to make a public takeover bid, are triggered by the acquisition of a shareholding exceeding 26%. Mandatory takeover bids (and voluntary tender offers by which the offeror is seeking control of a target company) have to be priced at the higher of (i) the average share price for the six month period preceding the offer, and (ii) the highest price paid by the bidder for target shares during the twelve month period preceding the offer.

Non-compliance by a (potential) bidder with certain material obligations under the Takeover Act leads to a suspension of voting rights and attracts monetary fines.

A new law (*Gesellschafterausschlussgesetz*) which entered into force concurrently with the revised Takeover Act facilitates squeeze-outs of minorities of up to 10%, particularly following public tender offers.

## 5.4 Continuation of Government Licenses

Governmental licenses are generally issued to specific persons, and a transfer or assignment to a third party requires the consent of the competent authority or the re-issuance of the license.

In some cases, licenses are not issued in respect of physical objects. Such licenses authorize and oblige the owner from time to time of such an object, and therefore transfer automatically to the acquirer in the event of an asset deal. Such *in rem* licenses include permits for the operation of plants, building permits or water rights.

In the event of a share deal, licenses of the target company generally remain unaffected, and no approval by an authority is required unless the license contains a change of control provision.

## 5.5 Requirements for Transferring Shares

Shares in a private-limited company are freely transferable, unless a restriction is stipulated in the articles of association. The transfer may be subject to approval by the company, the shareholders' meeting or even by all shareholders. The sale and transfer of a quota in a private limited company as well as arrangements for a future transfer of a quota (including call- and put-options) require a notarial deed form. This formal requirement relates to the transfer itself. It is therefore possible to acquire a quota in an Austrian *GmbH* on the basis of a share purchase agreement which is not notarized and contains provisions regarding the determination of the purchase price, representations and warranties and a short-form notarial deed providing for the transfer of the quota. Certain Austrian notaries (qualified as court-sworn translators) may draw up Austrian notarial deeds in the English language without the requirement of a German translation. Deeds created by German notaries are recognized as equivalent to Austrian deeds. The situation regarding other foreign notaries is less clear.

Any change of shareholders has to be registered with the Commercial Register. Such registration is, however, only of a declaratory nature and a failure to notify does not affect the validity of the share transfer. On the other hand, one may not fully rely on the entries in the register when conducting a due diligence of the ownership of an Austrian private-limited company.

Bearer shares in an Austrian joint-stock company may be transferred without observing any particular form, by physical delivery or instruction to a depositary. However, bearer shares are only permissible regarding companies listed on the stock exchange. All other existing bearer shares have to be transformed into registered shares until 31 December 2013. Registered shares and interim certificates (*Zwischenscheine*) in a joint-stock company may be transferred by endorsement or assignment followed by the surrender of the share certificates to the acquirer. The transfer of registered shares and interim certificates has to be declared to the company that records the new shareholder in the shares register. Such registration is only of a declaratory nature. The sale and transfer of registered shares and interim certificates (unlike the transfer of bearer shares) may require the approval of the target company or its shareholders' meeting. If such approval is withheld without cause, the court may approve such a transfer instead.

The transfer of a shareholding in a general or limited partnership is only permissible if the articles of association so provide or if all partners (including the limited partners) approve such a transfer. There are no formal requirements for the transfer. The change of shareholders has to be declared to the Commercial Register.

## 5.6 Requirements for Transferring Land and Property Leases

In an asset deal including real property, a purchase agreement containing specific transfer and registration language, has to be created. This must be notarized. The transfer must be registered with the Land Register (*Grundbuch*) in order to be effective towards third parties. The purchaser of real property may generally rely on the accuracy of the entries in the land register if the purchaser is acting in good faith. The purchaser may therefore even acquire the ownership from a seller lacking title to the real property.

The purchase of real estate by foreigners may require an approval by or a notification of local authorities under state legislation (see 9. above). Under certain state laws, the acquisition of farm land and forests as well as land designated for development is also subject to approval by or notification of the local authorities.

Any mortgages and other encumbrances such as easements (*Servituten*) must be registered with the Land Register. When properly registered, they generally follow ownership of the real property.

Any purchaser of real estate should verify that the dedication (*Widmung*) of the property according to the zoning plan fits the intended purposes. The acquirer of a property may, under certain circumstance, be held liable for the costs of remediation of contaminations of the acquired property.

Under the Austrian Lease Act (*Mietrechtsgesetz*) a lessee of a business premises has the right to transfer the lease agreement to the purchaser of the business if the same business undertaking is continued in the leased premises. In such a case, the lessor has to be informed immediately of the disposal of the business undertaking. The lessor may demand an increase of the rent to the fair market rent within six months, as further specified in the Lease Act. If the lessee of the business premises is a company, the lessor is entitled to increase the rent to the fair market rent upon change of control in the company. These provisions have to be taken into consideration, since in many cases the rent tends to be below the fair market value, in particular due to the conclusion of long-term lease agreements with more favorable conditions in the past.

If a target company has rented out property, the lease agreement is transferred to the purchaser of the business.

## 5.7 Requirements for Transferring Intellectual Property

Patents, trademarks, models and designs may be transferred by assignment. The copyright as such is not assignable, but specific rights of the copyright holder may be licensed. Trademarks, designs and patents and transfers thereof must be registered with public registers, even if an entire enterprise is acquired. The seller of a business undertaking may decide not to transfer the intellectual property but to merely grant a license to the acquirer.

Under the Austrian Trademark Protection Act (*Markenschutzgesetz*), the right to a trademark and related licenses held by a company will transfer to the new owner whenever the entire business undertaking is transferred, unless other arrangements are made. If only a part of a business undertaking is sold, the trademark rights will not transfer to the acquirer unless otherwise agreed. No consent of a third party is required. The Austrian Trademark Protection Act also provides for the partial transfer of trademark rights.

The Austrian Copyright Act (*Urheberrechtsgesetz*) states that if a business holding an exploitation right (i.e. the right to use a work exclusively) is being transferred in whole or in part to a third party, the author's consent is not required to assign the right to the acquirer, provided there have been no stipulations to the contrary.

The transfer of shares has no impact on intellectual property rights, unless a license contains a change-of-control clause.

## 5.8 Requirements for Transferring Business Contracts, Licenses and Leases

In share deals, the target company remains the bearer of any of its rights and obligations. Long-term contracts may contain change-of-control clauses which are generally enforceable under Austrian law. Even in the absence of an explicit change-of-control clause, a change in the shareholder structure of one contractual party may be deemed as a fundamental change to the basis of the agreement (*Geschäftsgrundlage*), thereby entitling the other party to terminate or adjust the agreement if it appears from the agreement itself or from the circumstances of its conclusion that the party invoking this remedy has relied on the maintenance of the shareholder structure.

The transfer of business by way of an asset deal is, from a legal point of view, not a single act but a bundle of individual transfers. Generally speaking, the transfer of contractual relationships as part of a business transfer can be achieved in one of three ways: (i) statutory transfer of contract (e.g., transfer of employment relationships, transfer of certain leases and certain insurance contracts, trademark rights), (ii) transfer without a requirement of consent of the party (e.g., patent license agreements, trademark license agreements), and (iii) transfer with the consent of a third party (most commercial agreements). Certain contractual rights are not assignable (e.g., rent receivables under protected residential leases).

Whenever a transfer of a contract appears undesirable or impracticable, the parties will agree that the seller of the business continues to remain a party to such a contract in its own name, and that the economic benefit of the contract shall accrue to the purchaser of the business, with the seller acting as a trustee.

### 5.9 Requirements for Transferring Other Assets

The distinction under Austrian law between taking title and taking possession is important for the transfer of movable physical assets. A sale and purchase agreement represents legal title but its conclusion does not in itself transfer ownership of the relevant asset. The buyer acquires ownership only by physically taking over the assets or by instructing the seller (or a third party) to hold the assets for the benefit of the buyer.

The transfer of receivables is effected by the execution of a deed of assignment and by giving notice of the assignment to the debtor or as an entry in the books of the assignor. In the absence of notice to the debtor, the debtor may discharge his liability by payment to the assignor.

## 6. Encumbrances and Third-Party Interests

A mortgage on Austrian real estate are only valid when registered with the Land Register. The rank of one of several mortgages over the same property generally depends on the chronological order (priority) of their entry into the Land Register.

Customary security interests over movables include pledges, transfer by way of security (*Sicherungsübereignung*) or retention of title (*Eigentumsvorbehalt*). The retention of title to secure the claims for the purchase price, unlike the pledge or the transfer of title, is generally not subject to strict publicity requirements.

For the acquirer of shares or of a business, such security interests are not generally apparent. In an asset deal with title defects, the acquirer's good faith in the transferor's ownership is protected to a certain extent. Good faith of the transferee of the receivables or other claims or rights is generally not protected. The bona fide acquisition from an unauthorized seller is possible in respect of bearer shares of a joint-stock company, but not in respect of a quota in a private limited liability company.

## 7. Employment Aspects

### Employee Superannuation/Pension Plans

Upon retirement, employees are entitled to severance payments, and those who have contributed to social security for at least 15 years are generally entitled to a social security pension funded by the employee's and employer's past contributions.

Companies as employers are free to establish pension plans granting their employees additional income after retirement. However, the pension plan must be in accordance with the Company Pensions Act (*Betriebspensionsgesetz*).

In principle, additional pension rights for employees can be introduced by way of collective agreement (*Kollektivvertrag*), works agreement (*Betriebsvereinbarung*), through individual stipulation by the employer or through contractual agreement with the employee.

**Employee Rights** Industrial relations in Austria are determined by what is referred to as the "Social Partnership" (*Sozialpartnerschaft*). This frequently used term denotes a principle rather than an institution: it is a mixture of a spirit of cooperation and compromise and high-level and centralized problem-solving within a loose organizational framework.

Sources of labor law in Austria are:

- employment contracts and generally established business practice (*Betriebsübung*)
- statutes (*Satzungen*)
- collective agreements (*Kollektivverträge*) between trade unions and statutory employer organizations, regulating issues like payment and working conditions; such agreements are applicable to all employees who fall within the scope of the respective agreement, not only to members of the trade union;
- works agreements (*Betriebsvereinbarung*): are agreed upon in writing between the company and the works council; the scope of such agreements is determined by law or by collective bargaining agreements;
- the Patent Act provides for special rules regarding employees' inventions.

### Compulsory Transfer of Employees

In the transfer of a business or part of a business by way of an asset deal, the employment relationships of the workforce employed will, as a general principle, be transferred automatically and by operation of law to the new employer, and the rights and obligations of employer and employee will be unaffected.

If the position of an employee is adversely affected by the transfer, with regard, in particular to severance payments, the employee is entitled to terminate the employment agreement, while enjoying the same



claims as in the case of a termination without cause by the employer. Termination of the employment contract by the new employer in connection with the transfer of the business is generally void, subject to an exception for reorganizations.

The new employer is fully liable not only for all current obligations as of the date of transfer, but also for all accrued rights of the transferred employee. The old employer is jointly and severally liable with the new employer for all such accrued rights. The liability of the former employer for severance payments and for company pensions is limited to five years after the transfer of business.

The parties to an asset deal would be well advised to regulate the allocation of burdens from the statutory transfer of employees in detail in the acquisition agreement.

A share purchase generally does not affect employees' individual rights or the applicability of collective agreements, company work agreements or the structure of the works council.

## **8. Tax Aspects**

### **8.1 Taxes Affecting the Structure and the Calculation of the Price**

Under Austrian law, as in other jurisdictions, the treatment of asset deals and share deals differs significantly. The tax consequences of an acquisition also differ depending on the legal form and the tax domicile of the acquirer. The acquisition of an Austrian business by a foreign acquirer will typically be conducted through an Austrian vehicle.

#### **Asset Deal**

A step-up in the tax basis of the acquired assets is generally available. Goodwill originating from an asset deal may generally be amortized for tax purposes. The transfer of tax loss carry-forwards to the acquirer is restricted.

Generally, the transfer of assets is not subject to transfer taxes. This does not apply to real properties where the transfer is subject to property transfer tax (*Grunderwerbsteuer*) at a rate of 3.5% of the consideration. Registration of the buyer as owner of the real property with the Austrian land register (*Grundbuch*) triggers an additional registration fee of 1.1% of the consideration (see 8.3. below).

Subject to the structure of the deal, the assignment of claims and other rights in the course of an asset deal may be subject to a stamp duty of 0.8% of the consideration, provided that a document within the meaning of the Austrian Stamp Duty Act (*Gebührengesetz 1957*) is executed (see 8.3. below).

#### **Share Deal**

In a share deal, a step-up in the tax basis of the target company's assets is not generally available. Limited goodwill depreciation of up to 50% of the allocated acquisition costs may be available to the buyer, if certain conditions are satisfied.

The transfer of shares is not subject to transfer taxes. However, the transfer of a 100% participation triggers real property transfer tax amounting to 3.5% of the double standard tax basis (Einheitswert) of the respective property. The standard tax basis is usually significantly lower than the market value of such property. Property transfer tax can be avoided easily by transferring nominal minority participation to another group company of the acquirer.

## 8.2 Tax Deductibility of Acquisition Expenses

If the acquirer is an Austrian taxpayer, as a general rule, the acquisition costs are deductible to the extent that they qualify as operating expenditures and reduce the acquirer's taxable income in Austria. If the take-over is effected by way of an asset deal, the costs arising in connection with the financing of the purchase price are deductible as business expenses by the purchaser. In share deals, interest on loan/credit facilities (*Fremdkapitalzinsen*) for the acquisition of domestic or foreign participations is generally tax deductible since 2005, irrespective of whether or not the companies are part of a tax group. However, other costs of financing are not deductible.

No specific thin capitalization rules are stated in Austrian tax law. However, case law has established criteria in which shareholder loans are treated as quasi-equity, and the interest payments on such loans are not tax deductible, but are treated as disguised dividends.

## 8.3 Levies on Acquisition Agreements and Collateral Documents

### Land transfer tax (*Grunderwerbsteuer*)

The transfer of real estate by way of an asset deal is subject to a land transfer tax. The tax amounts to 3.5% of the sale price. Furthermore a registration fee of 1.1% is levied. Real estate transactions are generally exempt from VAT.

Land transfer tax is also levied, where 100% of the shares of a corporation owning real property are transferred or where unification (of either an individual or a legal entity) of 100% of the shares of a corporation occurs (the tax assessment base equals 300% of the property's assessed value). Consequently, taxation can be easily avoided by retaining a minimum holding.

### Capital transfer tax (*Gesellschaftssteuer*)

Capital transfer tax at 1% is levied on the issuance of shares and on any increase in capital stock or other capital contribution in a corporation (capital transfer tax, *Gesellschaftssteuer*).

### Stamp Duties (*Rechtsgeschäftsgebühren*)

Stamp duties are levied on various types of legal transactions concluded in written form. Austria's stamp duties are often levied on the basis of transaction volumes (without caps), and therefore may be higher than stamp duties in other jurisdictions. It is generally not the legal transaction which triggers the stamp duty but – with a few exceptions – the written instrument executed to document such a transaction. Unlike in other areas of Austrian tax law, the principle of substance over form does not apply to stamp duties. The avoidance of stamp duties, therefore, often determines transaction structures.

Transactions triggering stamp duties include: commercial and residential leases, assignment of receivables, settlements and bills of exchange.

Percentage rates frequently range between 0.8% and 2% of the relevant transaction value.

Fees for public notaries and the fees for registration of ownership and mortgages in the land register are also related to the values involved and may therefore be substantial

### 8.4 Exchange Controls and Repatriation of Profits

There are, as a general matter, no restrictions on payments from Austria to foreign countries, but for statistical purposes, notification is obligatory in various cases under Austrian National Bank regulations. The transactions to be reported include: foreign exchange transactions and holdings of securities, the maintenance of foreign bank accounts, certain money transfers and netting operations, transit transactions and balances held abroad.

Dividends distributed by an Austrian corporation are, at the shareholder's personal level, subject to capital yields tax (*Kapitalertragssteuer*) at a current rate of 25%, which is withheld at source. On the basis of the "affiliation privilege" (*Schachtelprivileg*), which is available both at the national and the international level, capital yields tax is not payable where an Austrian resident company directly holds a 25% participation in the share capital of another resident company and dividends are paid by virtue of that holding. Dividends received by an Austrian corporation from another Austrian tax resident corporation are tax-exempt.

A similar rule applies when an Austrian resident corporation has held a holding of at least 10% of a foreign corporation for a minimum period of one year. The affiliation privilege is also accorded to Austrian branch offices of foreign companies. If the dividends are paid to an EU resident parent company, withholding tax may be claimed back under the refund procedure (or relief at source is granted if additional criteria are fulfilled), provided that the parent company has held a shareholding of at least 10 % for a minimum period of one year. If none of the above mentioned tax exemptions apply, the capital yields tax may be reduced or even eliminated under applicable Double Taxation Treaties.

## 8.5 Groups of Companies

### Accounting

Parent companies (private-limited companies and joint-stock corporations) with their corporate seat in Austria are required to prepare consolidated financial statements for all domestic and foreign subsidiaries (*Konzernabschluss*) and a consolidated report on the state of the group (*Konzernlagebericht*).

Parent companies are exempt from the obligation to prepare consolidated financial statements and a consolidated group report if they are themselves included as subsidiaries in consolidated financial statements and group reports that have been prepared and audited pursuant to Austrian or equivalent foreign standards. Austrian parent companies are also exempt from the requirement to prepare consolidated financial statements if the total group assets, the total sales or the total number of employees do not exceed certain materiality thresholds.

### Corporate

Austrian corporate law, unlike German law, does not include a body of rules regarding corporate groups (*Konzernrecht*). The enforceability of certain types of group agreements, like domination agreements (*Beherrschungsverträge*), customary in other jurisdictions, is therefore doubtful.

### Taxation

As of 1 January 2005, a new scheme of group taxation enabling the pooling of earnings within a group of companies was introduced in Austria. Members of such a tax group may be corporations or cooperative societies that are subject to unlimited taxation in Austria as well as foreign entities which are comparable to Austrian corporations or Austrian cooperative societies and which are held by an Austrian group member or the Austrian group parent company. A corporation domiciled in a Member State of the European Union which is subject to limited taxation in Austria and has an Austrian-registered branch (*Zweigniederlassung*) may also act as group parent company.

A direct or indirect participation of the group parent company of at least 50 % of the capital and the voting rights is required for the company to qualify as a group member.

Within the tax group, the depreciation of the participation of other group members is not tax-deductible. Upon acquisition of a participation in a corporation with an operating business being subject to unlimited taxation in Austria, the group parent or another group member may claim a tax-deductible depreciation of the goodwill of the target company limited to 50% of the acquisition cost, provided that the target is not a member of the tax group. The goodwill may be depreciated over a period of 15 years.

To achieve recognition of the tax group, a written group application, signed by the Austrian group members, has to be filed. The application has to include an agreement between the group members concerning the intra-group compensation of tax effects of the pooling of earnings and losses.

The tax group has to remain in existence for at least three years. A premature withdrawal from a tax group triggers a re-calculation of profits for tax purposes.

## 9. Other Issues

### 9.1 Non-competition Clauses

Non-competition clauses, entered between the seller and the purchaser of a business, are generally enforceable, provided that the duration and scope are reasonable. Non-competition undertakings of the seller are generally unenforceable for a period in excess of five years.

### 9.2 Environmental Considerations

A large number of environmental regulations under federal and state laws affect the operation of businesses in Austria. Many aspects of environmental protection are regulated in the Trade Act (Gewerbeordnung). The Trade Act requires a permit for the operation of plants and facilities (Betriebsanlagen), provides for waste-management plans and regulates clean-ups and remediation requirements upon the closure of plants. Other important provisions can be found in the Act on the Remediation of Old Waste Sites (Altlastensanierungsgesetz), the Water Act (Wasserrechtsgesetz), the Waste Management Act (Abfallwirtschaftsgesetz 2002), and the Forestry Act (Forstgesetz 1975). These laws, apart from clean-up obligations, provide for monetary fines for non-compliance. Pollution of the environment, under certain conditions, constitutes a criminal offence. The acquired owner of property may be held liable for the acts and omissions of its predecessor.

In view of potential risks, buyers should consider undertaking an environmental due diligence investigation of the property. It should be noted that Austrian civil engineers are under an obligation to notify the competent authorities of certain contaminations detected in the course of a due diligence investigation. Appropriate environmental presentations and warranties should be included in the acquisition agreement.

### 9.3 Responsibility for Liabilities of an Acquired Subsidiary

Shareholders of an Austrian corporation are, as a general rule, not liable for the corporation's debts. A liability of shareholders may arise where a parent company has exercised its powers of direction continuously and intensively, has thereby acted as a de facto manager of the subsidiary and infringed upon the interests of the subsidiary. Co-mingling of the parent's and the subsidiary's funds may also justify piercing the corporate veil. Directors of an Austrian corporation may *inter alia* be personally liable for the corporation's obligations if they did not file for bankruptcy in a timely manner.

## 9.4 Governing Law of the Contract

The choice of law made by the parties in sale and purchase agreements is generally recognized by Austrian courts if the choice is expressed or demonstrated with reasonable certainty through the terms of the contract. The chosen law also prevails over all mandatory Austrian rules, unless it infringes upon community law, public policy (*ordre public*) or is contrary to mandatory provisions protecting Austrian consumers or employees. In the absence of a choice of law, the law of the jurisdiction with the closest connection applies. Freedom of choice is limited in the areas of property law and corporate law. The relevant rules are set forth in the Austrian Conflict of Laws Act (*IPRG*) as well as bi- and multilateral treaties.

## 9.5 Dispute Resolution Options

A choice-of-forum clause in a business acquisition agreement is generally recognized by Austrian courts if no exclusive jurisdiction exists. It is also common for parties to an agreement for the sale and transfer of an Austrian business to stipulate arbitration clauses. The Austrian Code of Civil Procedure contains regulations applicable to arbitration proceedings, but such provisions are usually contracted out by the parties to international transactions. The parties may agree on arbitral proceedings before the International Arbitral Centre of the Austrian Economic Chamber in Vienna if at least one of the parties has its seat outside of Austria.

Foreign arbitral awards may generally be enforced in Austria under the condition of reciprocity, as manifested in bi- or multilateral agreements to which Austria is a signatory state. Austria has ratified nearly all important enforcement conventions, such as the Geneva Protocol and the Geneva Convention, the New York Convention on the Enforcement of Foreign Judgments and Foreign Arbitral Awards of June 10, 1958, the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano (2007/712/EC), the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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