



# PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2012/13

## CAPITAL MARKETS

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# Austria

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## MAIN EQUITY MARKETS/EXCHANGES

### 1. What are the main equity markets/exchanges in your jurisdiction? Outline the main market activity and deals in the past year.

#### Main equity markets/exchanges

The only securities exchange in Austria is the Vienna Stock Exchange (VSE), operated by Wiener Börse AG ([www.wienerborse.at](http://www.wienerborse.at)). Financial instruments traded on the VSE are grouped into the following segments:

- Equity market.at (stocks and depository certificates), comprising, among other things:
  - prime market: companies that fulfil more stringent reporting, quality and disclosure requirements than required by law;
  - mid market: companies that fulfil less stringent requirements than the prime market but still more stringent than required by law.
- Bond market.at (bonds).
- Derivatives market.at (options and futures).
- Structured products.at (certificates, exchange traded funds, investment funds and warrants).
- Other securities.at (securities that cannot be allocated to any other segment, for example, profit-sharing rights as well as stocks and participation certificates).

These market segments are operated as an Official Market (*Amtlicher Handel*), Second Regulated Market (*Geregelter Freiverkehr*) or Multilateral Trading Facility (known as the Third Market (*Dritter Markt*)).

The Official Market and Second Regulated Market are regulated markets under Directive 2004/39/EC on markets in financial instruments (MiFID).

Allocation to a particular market segment is determined by:

- Market type (Official Market, Second Regulated Market or Third Market).
- Type of financial instrument (shares, participation certificates, bonds, certificates, and so on).
- More stringent reporting, quality and disclosure requirements.

- Provision of liquidity (for example, specialist or market maker).
- Trading system and type of trading.

#### Market activity and deals

At the end of 2011, 158 issuers were listed on the VSE's Official Market and Second Regulated Market, including six from foreign jurisdictions. Total capitalisation at the end of 2011 was EUR87.3 billion (as at 1 February 2012, US\$1 was about EURO.76) with an annual trading volume of EUR61.9 billion.

2011 was a quiet year for equity offerings on the VSE. The most significant were:

- OMV Aktiengesellschaft (capital increase, with a volume of EUR725 million).
- AMAG Austria Metall AG (initial public offering (IPO) and secondary public offering (SPO), with a volume of EUR366 million).
- Lenzing AG (re-IPO, including a secondary offering, with a volume of EUR619 million).

The re-IPO of Lenzing AG was postponed for a few months due to adverse market conditions; the planned IPO of Isovoltaic AG early in 2011 was cancelled. There is no formal procedure for postponing or cancelling an offering in Austria. Usually, public announcements are launched during the different stages of an offering. However, statutory disclosure requirements must be adhered to if the offering company is already listed.

In addition, there were several bond issues, in particular by credit institutions and corporate issuers, for example, Wienerberger AG and Frauenthal Holding AG.

### 2. What are the main regulators and legislation that applies to the equity markets/exchanges in your jurisdiction?

#### Regulatory bodies

The main regulatory bodies are the Financial Market Authority (*Finanzmarktaufsicht*) (FMA), which is the competent authority for, among other things, prospectus approval and post-listing obligations of issuers, and the VSE.

#### Legislative framework

The main legislation concerning equity markets and exchanges is as follows:

- Stock Exchange Act (*Börsengesetz*) (SEA).



- Capital Market Act (*Kapitalmarktgesetz*) (CMA).
- Securities Supervision Act 2007 (*Wertpapieraufsichtsgesetz 2007*).
- Investment Funds Act 2011 (*Investmentfondsgesetz 2011*).
- Real Estate Investment Funds Act (*Immobilien-Investmentfondsgesetz*).
- Several regulations (*Verordnungen*), mostly enacted by the FMA based on the above legislation.

## EQUITY OFFERINGS

### 3. What are the main requirements for a primary listing on the main markets/exchanges?

#### Main requirements

To list on the VSE an application must be filed with the VSE. There are different admission requirements depending on the market (Official Market, Second Regulated Market or Third Market), and the market segment (*see Question 1*).

Each company must file an approved (passported) prospectus with the VSE unless an exemption applies (for example, if less than 10% of new shares are to be listed within 12 months).

In addition to the legal requirements, the following criteria must be fulfilled:

Prime market:

- The shares must be included in the continuous trading procedure of XETRA (a trading system).
- Only common stocks (*Stammaktien*) that do not carry more than one vote can be listed.
- The company must submit a declaration of compliance with a Code of Corporate Governance.

Mid market:

- The shares must be included in the trading procedure continuous trading or auction of XETRA.
- Only common stocks (*Stammaktien*) that do not carry more than one vote can be listed.
- The company must nominate a capital markets coach for consultation and support.

#### Minimum size requirements

The following size requirements apply under the SEA and the VSE's trading rules:

- **Official Market.** For shares, the total nominal value admitted to trading must be at least EUR2.9 million. For other securities, the total nominal value must be at least EUR725,000.
- **Second Regulated Market.** The securities to be listed must have a total nominal value of at least EUR725,000. For admission of no-par value securities, the issuer must certify that the market value is expected to be at least EUR362,500 and the total number of such securities must be at least 10,000.

- **Third Market.** There are no minimum size requirements for the Third Market.

There are no further minimum size requirements in the trading rules of the VSE.

#### Trading record and accounts

The following requirements apply pursuant to the SEA and the VSE's trading rules:

- **Official Market.** For a first listing, the company must have existed for at least three years and published its financial statements according to applicable statutory regulations for such period. The three-year period can be shortened if it is in the public interest and the interest of the issuer, and the company has published financial statements for at least one full financial year.
- **Second Regulated Market.** For a first listing, the company must have existed for at least one year and have published financial statements according to applicable regulations for the complete financial year preceding the application.
- **Third Market.** The company must submit financial statements for at least one full business year. Special purpose vehicles (SPVs) must also submit the parent company's financial statements for at least one full business year.

The following requirements are set out in the trading rules of the VSE:

- **Prime market.** The company must have existed for at least three years and published financial statements for the three full financial years preceding the admission. The three-year existence period can be waived if the company provides the public with a listing prospectus that is equivalent to the financial statements for the last three years with respect to the company's economic and legal position. Regardless, the company must have published financial statements for one full financial year.
- **Mid market.** The company must have published financial statements for one full financial year.

#### Shares in public hands

The following requirements apply under the SEA and the VSE's trading rules:

- **Official Market.** A minimum free float of EUR725,000 nominal value for shares, and at least 10,000 shares for no-par value shares.
- **Second Regulated Market.** A minimum free float of EUR181,250 nominal value for shares, and at least 2,500 shares for no-par value shares.
- **Third Market.** There are no minimum free float requirements.

The following requirements apply under the trading rules of the VSE:

- **Prime market.** Free float of at least 25% which must have a market capitalisation of at least EUR15 million or lower free float with a market capitalisation of more than EUR30 million.
- **Mid market.** There is no additional free float requirement.



#### 4. What are the main ways of structuring an IPO?

An IPO can be structured either as an offer for subscription, where the issuer offers new shares in the course of a capital increase, or as an offer for sale, where one or more major shareholders offer their existing shares to the public without a capital increase.

IPOs often combine capital increases with an offer of existing shares. In practice, the shares are placed via investment banks which underwrite the offered shares (soft or hard underwriting (see Question 15)).

#### 5. What are the main ways of structuring a subsequent equity offering?

Subsequent equity offerings can be structured in the same ways as an IPO, that is, by way of an offer for subscription or an offer for sale, or a combination of these two (see Question 4).

#### 6. What are the main steps for a company applying for a primary listing of its shares? Is the procedure different for a foreign company and is a foreign company likely to seek a listing for shares or depositary receipts?

The company must prepare (and publish, if it is a public offering) a capital markets prospectus approved by the FMA. For shares, the content of the prospectus is mostly determined by Regulation (EC) 809/2004 implementing Directive 2003/71/EC as regards prospectuses and dissemination of advertisements (Prospectuses Regulation). Preparation of the prospectus requires comprehensive due diligence which can take several months.

To ensure a smooth process, the timing of the listing and the prospectus approval should be co-ordinated with the FMA in advance. It usually takes about six to eight weeks from the time of filing for the FMA to approve a prospectus draft. The first and final prospectus versions must be filed in hardcopy and contain original signatures of the company's representatives. The in-between versions can be filed electronically by e-mail. To date, the fully electronic approval procedure available in other EU member states is not foreseeable in Austria.

Foreign companies headquartered in the European Economic Area (EEA) can have a prospectus approved in their home member state and then notify the approved prospectus into Austria (which is known as passporting). The same prospectus can therefore be used for an offering or listing in several countries within the EEA.

For an offering in Austria, the issues calendar (*Emissionskalender*) kept by the Austrian Control Bank (*Oesterreichische Kontrollbank Aktiengesellschaft*) must be notified in advance of several details concerning the planned offering (for example, issuer, volume, subscription period, and so on). A copy of the prospectus must also be filed with the Austrian Control Bank.

For admission to trading on the VSE, the company must file an application with the VSE attaching the approved prospectus,

among other documents. Several criteria must be fulfilled to list on the VSE, depending on the market and market segment (see Question 3). In practice, the timing of the listing is co-ordinated with the VSE in advance.

There are very few foreign companies listed on the VSE compared to (larger) stock exchanges in other member states.

### ADVISERS: EQUITY OFFERING

#### 7. Outline the role of advisers used and main documents produced in an equity offering. Does it differ for an IPO?

##### Advisers

**Investment banks (lead managers).** The main tasks of investment banks (lead managers) include:

- Prepare a time plan and organise the IPO.
- Prepare an analysis and assessment of the company.
- Form a bank syndicate to allocate the shares.
- Bookbuilding and underwriting guarantee.
- Structure the issue.
- Advise on pricing.
- Co-ordinate the share allocation.
- Provide support after admission to trading on the stock exchange.

**Accountants and auditors.** The main tasks of accountants and auditors include:

- Advise on financial and tax aspects of the float and on the reorganisation as a public company, as well as general financial and tax issues.
- Conduct financial and tax due diligence on the company.
- Prepare profit forecasts and estimates for the prospectus.
- Prepare audited historical financial information for the last three years, as well as the audited report for each year.
- Generally assist the company with its accounting.

Investment banks may appoint their own auditors to examine the documents of the potential issuer. Usually separate due diligence is also conducted in such cases.

**Lawyers.** The main tasks of lawyers include to:

- Advise on legal issues in relation to the offering.
- Review and advise on the prospectus.
- Advise on legal issues relating to the reorganisation of the company.
- Conduct legal due diligence on the company.
- Prepare most of the "additional information" section of the prospectus, as well as the "material contracts" section.
- Register the capital increase with the Austrian Companies Register.



- Negotiate and draft the underwriting agreement with the underwriter.
- Draft other documents required for the IPO, for example, the new constitution for the company, employee share ownership plans and service contracts for key employees.

#### Public relations consultants (or financial marketing consultants).

The main tasks of public relations consultants include:

- Organise press conferences, presentations on the company, experts meetings and road shows.
- Prepare documents for the press and advertising campaigns.
- Design publications and financial reports.
- Advise on investor relations issues.

#### Documents

The main documents produced in an equity offering include:

- Engagement letter between the issuer and the lead manager.
- Research and publicity guidelines.
- Prospectus.
- Underwriting agreement between the issuer, any selling shareholders and the underwriters.
- Documents in connection with the capital increase in the case of a subscription offer, such as:
  - extraordinary shareholders' meeting or board resolutions on the capital increase;
  - subscription forms;
  - application to the Austrian Commercial Register.
- Ad hoc announcements if the company is already listed.
- Press releases.
- Legal opinions on the due diligence and the prospectus.
- Comfort letter issued by the auditors.
- Listing application with the VSE.

There are no structural differences between an equity offering and an IPO. However, the scope of responsibility of the individual advisers may be different. For example, there is likely to be a higher public relations effort and lawyers may be more involved in restructuring the company to make it fit for an IPO.

### EQUITY PROSPECTUS/MAIN OFFERING DOCUMENT

#### 8. When is a prospectus (or other main offering document) required? What are the main publication, regulatory filing or delivery requirements?

A prospectus is required for a public offering of shares as well as for admission to trading on the Official Market or Second Regulated Market, unless an exemption applies (see Question 9).

For listing on the Third Market, a prospectus is generally not required if no securities are offered to the public (however, a short information memo on the issuer must be filed with the VSE).

The prospectus must be approved by the FMA or passported into Austria from another member state (see Question 6).

The prospectus must be published at least one bank trading day before the public offer (for example, by handing out free copies on request, or electronically on the websites of the issuer and financial intermediaries).

After publication, a notice must be published in the Official Austrian Gazette (*Amtsblatt der Wiener Zeitung*) noting that the prospectus has been published and explaining where it is available.

One original prospectus copy must be submitted to the Austrian Control Bank.

Before a public offer begins, notification must be filed with the issues calendar containing certain statistical data on the offering (for example, issuer, volume, subscription period and so on).

#### 9. What are the main exemptions from the requirements for publication or delivery of a prospectus (or other main offering document)?

The Prospectus Directive has recently been amended and changes must be implemented in each member state by 1 July 2012. The changes to the exemptions are noted in brackets after the current exemption requirements.

The main exemptions from the requirements for publication or delivery of a prospectus are:

- An offer with a minimum of EUR50,000 per investor (as of 1 July 2012, EUR100,000).
- An offer addressed exclusively to qualified investors, such as credit institutions, investment firms, insurance companies, pension funds (as of 1 July 2012, qualified investors will be defined as professional clients or eligible counterparties under MiFID).
- Offers addressed to fewer than 100 natural or legal persons per member state who are not qualified investors (as of 1 July 2012, 150).
- Non-equity securities issued in a continuous or repeated manner by credit institutions provided that these securities:
  - are not subordinated, convertible or exchangeable;
  - do not give a right to subscribe to or acquire other types of securities, and are not linked to a derivative instrument;
  - do not constitute the receipt of repayable deposits; and
  - are covered by a deposit guarantee scheme under the meaning of Directive 94/19/EC on deposit guarantee schemes (Deposit Guarantee Schemes Directive).

- Securities offered to managing directors or employees by their employers if the securities are of the same class as the securities already on the same regulated market, and a document has been published that contains information on the number and type of securities and the reasons and details of the offer. (As of 1 July 2012, this exemption also applies to companies located outside the EU provided that its shares are admitted to trading on a regulated market or the market of a third state and provided that satisfactory information has been published equivalent to EU standards.)

The main exemptions for admission to trading on the VSE are:

- Admission of shares that account for less than 10% of the number of shares of the same category over a period of 12 months and which have already been admitted to listing on the same regulated market.
- Admission of shares issued in exchange for shares of the same category already listed on the same market, as long as this share issue is not related to any capital increase by the issuer.
- Securities offered within the scope of a takeover as an offer to exchange shares, as long as a document has been published containing information that is deemed by the FMA to be equivalent to the information contained in a prospectus.
- Securities offered or allotted within the scope of a merger as an offer to exchange shares, or which are planned to be allotted, as long as a document has been published containing information that is deemed by the FMA to be equivalent to the information contained in a prospectus.
- Shares offered to existing shareholders free of charge, as well as dividends in the form of shares, as long as these are shares of the same category as the shares already admitted to trading on the same regulated market and on the condition that a document has been published containing information on the number and type of shares and explaining the reasons and details of the offer.
- Securities offered to managing directors or employees by their employers on the condition that the securities are of the same category as the securities already admitted to trading on the same regulated market, and a document has been published that contains information on the number and type of securities and the reasons and details of the offer.
- Shares issued within the scope of a conversion or exchange for other securities or as a consequence of the exercise of rights attached to other securities, as long as the shares belong to the same category as the shares already admitted to trading on the same regulated market.

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#### 10. What are the main content or disclosure requirements for a prospectus (or other main offering document)? What main categories of information are included?

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As a minimum requirement, a prospectus must contain all information required for investors to make an educated decision on the assets and liabilities, financial situation, profits and losses and future prospects of the issuer and any guarantor, as well as the rights attached to the offered securities.

For shares, the prospectus content requirements are set out in the Prospectuses Regulation. These include:

- General information on the issuer (history, share capital, corporate structure, holdings, and so on).
- Overview of the issuer's business operations.
- A detailed description of all material risks associated with the offering, the issuer and the shares (risk factors).
- Information on the issuer's current financial situation, including:
  - financial condition in general and operating results;
  - capital resources and cash flows; and
  - borrowing requirements and funding structure.
- Historical financial information, including audited historical financial information covering the last three financial years (or such shorter period that the issuer has been in operation) and the audit report in respect of each year.

This financial information must be prepared according to Regulation (EC) 1606/2002 on the application of international accounting standards (IAS Regulation), or if not applicable to a member state, according to national accounting standards. For third country issuers, such financial information must be prepared according to the international accounting standards adopted by Article 3 of the IAS Regulation or to a third country's national accounting standards equivalent to these standards. If the financial information is not equivalent to these standards, it must be presented in the form of restated financial statements.
- Related party transactions.
- Material contracts.
- Patents and licences, property, plants and equipment.
- Information on the issuer's administrative, management and supervisory bodies.
- Information on major shareholders.
- Relevant tax principles relating to shares.

For international offerings, the prospectus usually contains more than the minimum information prescribed by Austrian and EU law. In particular, a more extensive description of the issuer's business operations and its financial position will be included.

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#### 11. How is the prospectus (or other main offering document) prepared? Who is responsible and/or may be liable for its contents?

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Usually, the prospectus is drafted by the issuer and its lawyers. Investment banks and their lawyers often draft certain sections, for example, the industry overview, business section and management's discussion and analysis of the financial condition and results of the issuer. The issuer's auditors check and verify certain financial information in the prospectus. Usually, there will be several drafting sessions in which all relevant advisers are present and the prospectus is discussed and finalised.



Liability for the prospectus contents is as follows (*CMA*):

- The issuer is liable for any incorrect or incomplete information that it provided, or was provided by other persons it engaged to provide such information.
- If the issuer is located outside Austria, the party making the offer in Austria is liable to the same extent as domestic issuers.
- Those acting as intermediaries between the investor and issuer, who are professional traders and brokers, are liable if they or their staff knew that information was incorrect or incomplete, or were unaware of this due to gross negligence.
- The auditor of the annual accounts is liable if he knowingly gives incorrect or incomplete information, knowing that the annual accounts confirmed by him form part of the prospectus.

Further liability principles include (*CMA*):

- If liability affects more than one party, they are jointly liable. Their liability is not reduced by the fact that others are also liable to compensate the same damages.
- Liability towards investors cannot be restricted nor excluded in advance.
- If securities were not acquired by investors due to incorrect or incomplete information contained in the prospectus, this may not entitle such investors to damages.
- Unless the damaging action was done intentionally, liability towards each individual investor is limited to the purchase price paid plus fees and interest from the date of purchase.

In addition to the *CMA*, liability claims can also be based on general civil law principles. Besides damages for losses, these also allow for an annulment of the investment with retroactive effect so that the investor can claim its initial investment in exchange for the securities acquired. This approach has gained increasing importance in recent years.

## MARKETING EQUITY OFFERINGS

### 12. How are offered equity securities marketed?

Before the public offer, equity securities are marketed by:

- Research reports by members of the underwriting syndicate or independent analysts.
- Non-deal road shows by the issuer's management.
- "Soft" press releases.
- Individual meetings (one-on-ones) with interested institutional investors.

Following the public offer, equity securities are marketed by:

- Any kind of public marketing (television, internet, radio, newspapers, information services, flyers, and so on).
- Press meetings.

- Deal road shows.
- Press releases.

Once a public offering has been made, any kind of advertising relating to a public offering must (*CMA*):

- Indicate that a prospectus has been published and where it is available.
- Not be misleading or inaccurate.
- Be consistent with the information contained in the prospectus.

### 13. Outline any potential liability for publishing research reports by participating brokers/dealers and ways used to avoid such liability.

Generally, any information that is misleading or incorrect can lead to the liability of the person that prepared, distributed or otherwise used such information in relation to third parties. Similarly, misleading or incorrect research reports can lead to the liability of the researcher, the distributing investment banks, the issuer and any other person using, publishing or distributing such reports in relation to investors and any persons relying on such research reports.

Liability might be avoided by using disclaimers and limitation language. From the issuer's perspective, it should always ensure that research reports are prepared independently of the issuer. Investment banks must ensure that there are effective Chinese walls between the research team and the advisory team working on the IPO.

In practice, particularly in international offerings, a blackout period is set during which research reports cannot be published and distributed.

## BOOKBUILDING

### 14. Is the bookbuilding procedure used and in what circumstances? How is any related retail offer dealt with? How are orders confirmed?

A bookbuilding procedure is commonly used for institutional and international offerings.

Usually, at pre-offer stage institutional investors are contacted, and at offer stage the price range will be announced publicly. The orders received during the subscription periods are collected in an order book and weighted according to their price and volume by the bookrunners. At the end of the subscription period, the final offer price is set by the issuer and the investment banks based on the order book. In an accelerated bookbuilding procedure, institutional investors are approached within a shorter period and the subscription period usually is also shorter.

For a combined institutional and retail offer, the same offer price applies to all investors or subscribers.



## UNDERWRITING: EQUITY OFFERING

### 15. How is the underwriting for an equity offering typically structured? What are the key terms of the underwriting agreement and what is a typical underwriting fee?

Usually, the underwriting is structured as a soft underwriting, meaning that the underwriters agree to buy the offered shares when an agreement on the offer price has been reached. The underwriters usually hold an option to invoke a force majeure clause if there are certain factors beyond the underwriters' control that affect their ability to place the shares with investors.

Hard underwriting means that the underwriters agree to buy a fixed amount of offer shares from the issuer before the offer starts and therefore before the pricing is complete. If the offer is not fully subscribed, the underwriters must subscribe for the residual shares. The underwriters bear a higher risk than in soft underwriting.

Key terms of underwriting agreements include:

- General underwriting obligations including any conditions precedent.
- Stabilisation measures, if any.
- Lock up periods for the selling shareholders, if any.
- Comprehensive representations and warranties by the issuer.
- Extensive indemnification of the underwriters by the issuer in connection with the offering and the underwriting.
- Underwriting fee.

Underwriting fees usually range between 2% and 3% of the aggregate gross sales proceeds of the offering.

## TIMETABLE: EQUITY OFFERINGS

### 16. What is the timetable for a typical equity offering? Does it differ for an IPO?

Timetables vary depending on the size of the issuer, the volume of the offering and in which other jurisdictions the offering will take place. Large scale IPOs can take up to a year, if for example, major restructuring measures must be completed before the offering.

For a secondary offering the initial phase is shorter, since less effort is required to develop an equity story and a business plan. The documents and experience from the IPO (in particular the prospectus) can be used as a base.

The following example timetable is based on a medium-sized IPO.

**Initial phase (about four months).** This includes:

- Appointment of advisers (investment banks, lawyers, accountants, public relations and marketing advisers).

- Due diligence.
- Preparation of the prospectus.
- Necessary corporate actions in connection with a capital increase (such as shareholders' meetings, and changes to the articles of association).
- Non-deal road shows, pre-marketing.
- Analyst presentations and research.

**Offering phase (main phase) (about two months).** This includes:

- Prospectus approval from the FMA.
- Board resolutions.
- Setting the price range.
- Offer period (at least and usually not longer than two weeks).
- Deal road shows and marketing.
- Bookbuilding and setting the final price and volume, as well as allocation to investors.

**Post-offering phase (about one week).** This includes:

- Filing for registration of the capital increase.
- Application for listing with the VSE.
- Allocation of shares.
- Closing and settlement.

## STABILISATION

### 17. Are there rules on price stabilisation and market manipulation in connection with an equity offering?

The general market manipulation regime applies. Market manipulation includes giving false or misleading information regarding the supply of, demand for or price of financial instruments, or influencing the price of financial instruments in any transaction so that an abnormal or artificial price level is reached. Disseminating false or misleading information about financial instruments in the media (for example via the internet) also qualifies as market manipulation.

Stabilisation measures are exempt from these rules and do not qualify as market manipulation if they are carried out according to Regulation (EC) 2273/2003 implementing Directive 2003/6/EC as regards exemptions for buy-back programmes and stabilisation of financial instruments (Buyback and stabilisation Regulation).

Stabilisation can only be carried out for a limited time period. For shares in an IPO, the time period starts when the relevant securities begin trading and ends no later than 30 calendar days after. A company must disclose stabilisation measures, and notify the FMA of the details and time period during which it will occur.



## TAX: EQUITY ISSUES

### 18. What are the main tax issues when issuing and listing equity securities?

The issue of new shares is subject to a 1% capital duty on the capital raised, payable by the issuer.

Dividends distributed by an Austrian public company to individuals who are Austrian tax residents (individuals who have a domicile or habitual abode in Austria) are subject to a withholding tax (*Kapitalertragsteuer*) levied at a flat rate of 25% and withheld by the distributing company.

Dividends received by companies that are Austrian tax residents (companies with a corporate seat or a place of management in Austria) are exempt from corporate income tax. Nevertheless, the 25% withholding tax is imposed with respect to corporate shareholders that do not, directly or indirectly, hold at least 10% of the nominal capital of the distributing company. This withholding tax can be credited against corporate income tax liability, or is refunded.

Capital gains realised by individuals after 31 March 2012 from the sale of shares that were acquired after 31 December 2010 are subject to a special tax of 25%. This is withheld if an Austrian paying agent or custodian is involved in the realisation of the capital gains and, in the context of private investors, no further income tax is levied on the dividends and a tax return does not need to be filed (final taxation (*Endbesteuerung*)). If no withholding was imposed, the 25% taxation will be imposed when the investor files a tax return.

For shares disposed of before 1 April 2012, special provisions apply. For companies that are Austrian tax residents, the standard corporate income tax rate of 25% applies; generally no withholding tax is imposed on capital gains in this context.

## CONTINUING OBLIGATIONS

### 19. What are the main areas of continuing obligations applicable to listed companies and the legislation that applies?

#### Periodic financial and general reporting

The following obligations apply:

- An issuer must disclose its annual financial statements by latest four months after the close of the financial year and must ensure that they are available to the public for at least five years.
- Issuers of shares or debt securities must prepare half-yearly reports for the first six months of the financial year, immediately, but at the latest two months after the close of the reporting period. This report must be available to the public for at least five years.
- If an issuer does not prepare quarterly reports according to International Financial Reporting Standards (IFRS) under the IAS Regulation, the issuer must publish interim reports of the management board on the first and the third quarters of the financial year immediately, but at the latest six weeks after the close of the reporting period.

#### Other disclosure obligations

The following disclosure obligations apply:

- Persons who directly or indirectly buy or sell shares admitted to trading on a regulated market must inform the FMA, the VSE and the issuer of the share of voting rights held after completion, if their proportion of voting rights reaches, exceeds or falls below 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 75% and 90%. As soon as the issuer receives such notification, but at the latest two trading days after receipt, the issuer must disclose all of the information contained in the notification.
- Issuers must make inside information relating directly to them immediately available to the public. Inside information is information on an issuer or financial instruments that has not been made public, and its disclosure could have a significant effect on the price of an issuer's financial instruments or their derivatives, because the information would assist investors to make investment decisions.
- Issuers must disclose the total number of voting rights and capital at the end of every calendar month on which an increase or reduction of voting rights or capital has occurred.
- If an issuer buys or sells its own shares, the issuer must disclose the percentage of shares it owns, if these shares reach, exceed or fall below the threshold of 5% or 10% of voting rights.

#### Significant transactions and related party transactions

There are no specific regulations on significant transactions and related party transactions. However, if such transactions qualify as inside information (particularly if they are price relevant), they must be publicly disclosed according to ad hoc disclosure rules.

#### Significant shareholder voting restrictions

An issuer of shares must immediately disclose any change to the rights attached to the different categories of shares, including any rights attached to derivative instruments issued by the issuer or which grant access to the shares of the concerned issuer.

### 20. Do the continuing obligations apply to listed foreign companies and to issuers of depositary receipts?

In general and with only minor modifications, the continuing obligations described under *Question 19* also apply to foreign companies listed in Austria and to issuers of depositary receipts.

### 21. What are the penalties for breaching the continuing obligations?

The CMA and the SEA provides a wide range of penalties for breaching disclosure obligations, including:

- Fines of up to EUR50,000.
- Rights of information and on-site investigation.
- Temporary suspension of trading.
- Revocation of admission to a regulated market.
- Publication of any violations.



## DE-LISTING

### 22. When can a company be de-listed?

Although not explicitly regulated by law, de-listing a company requires a shareholders' resolution with a capital majority of at least 75% at the shareholders' meeting. Further, in the absence of a respective statutory rule, there is consensus that shareholders must be compensated in cash for the potential illiquidity of shares resulting from de-listing. The management and supervisory board must pass a resolution and put the issue on the agenda of the shareholders' meeting. An ad hoc publication on the proposed de-listing must be made to inform investors and the general public immediately after the management and supervisory board pass their resolution. In addition, the VSE must be notified at least a month in advance of the intended de-listing.

Alternatively, a de-listing can be the result of a structural corporate measure such as merging the listed company into an unlisted company, known as a cold de-listing. In this case, the above principles also apply.

The VSE can impose a de-listing if the listing requirements are not met (for example, the minimum free float obligation).

In 2011, eight de-listings took place from the Regulated Market and Second Regulated Market. These included transfers of listings from a regulated market to the unregulated Third Market and market suspensions because of bankruptcy on the VSE, for example, bwin Interactive Entertainment AG, AvW Invest AG and JoWood Entertainment AG. The number of de-listings in 2010 and 2011 substantially increased on previous years because of an increasing number of restructurings and the financial crisis.

## MAIN DEBT CAPITAL MARKETS/EXCHANGES

### 23. What are the main debt securities markets/exchanges in your jurisdiction (including any exchange-regulated market or multi-lateral trading facility (MTF))? Outline the main market activity and deals in the past year.

#### Main debt markets/exchanges

The main debt securities markets are the Official Market, the Second Regulated Market and the Third Market of the VSE. The debt securities market features different categories of issuers and is divided into different segments accordingly (public sector, corporate sector, financial sector and performance-linked bonds). Further details are available at the VSE website ([www.wienerbourse.at](http://www.wienerbourse.at)).

#### Market activity and deals

Due to the limited number of equity deals as a result of the adverse market conditions on the equity market, bond market activity has substantially increased in recent years. Issuers include governments, state-owned corporations (for example, ASFINAG and ÖBB), financial institutions as well as companies. In 2011, the major deals included the following debt issues:

- ÖBB Infrastruktur AG: EUR2.05 billion.

- voestalpine AG: EUR1 billion (programme), issued EUR500 million.
- OMV AG: EUR500 million.
- EVN AG: EUR300 million.
- Egger Holzwerkstoff GmbH: EUR200 million.

### 24. What are the main regulators and legislation that applies to the debt securities markets/exchanges in your jurisdiction?

#### Regulatory bodies

The regulatory bodies are the same as for the equity markets see *Question 2*.

#### Legislative framework

The legislative framework is the same as for the equity markets see *Question 2*.

## LISTING DEBT SECURITIES

### 25. What are the main listing requirements for debt securities?

#### Main requirements

To list debt securities on the VSE the issuer and a stock exchange member for one of the two admission segments regulated by law (Official Market and Second Regulated Market) must apply. In addition, on the request of a stock exchange member, debt securities are included in trading on the Third Market.

#### Minimum size requirements

Size requirements for bond issues are:

- Official Market: The minimum size of a bond issue is EUR725,000. No minimum free float is specified but it must be sufficient (*SEA*).
- Second Regulated Market: The minimum size of a bond issue is EUR725,000. No minimum free float is required.
- Third Market: There are no size requirements.

#### Trading record and accounts

There is no minimum trading record required for issuing bonds. Sometimes there is no trading record, for example when an SPV issues notes.

#### Minimum denomination

There is no minimum denomination requirement, but the denomination must meet the needs of exchange trading.

## STRUCTURING A DEBT SECURITIES ISSUE

### 26. What are the main types of debt securities issued in your jurisdiction?

Both individual debt securities and notes under an issuance programme are common. Banks generally issue notes under a



programme (typically a European Medium Term Note (EMTN) programme), whereas corporate issuers mostly use standalone issues.

However, in 2011 the first significant programme with a volume of up to EUR1 billion was issued by an Austrian corporate issuer, stock exchange listed voestalpine AG.

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**27. Are different structures used for debt securities issues to the public (retail issues) and issues to professional investors (wholesale issues)?**

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The main method of issuing debt securities on the debt capital markets is an offer of the newly issued debt securities to the public, either on a standalone basis or under a programme.

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**28. Are trust structures used for issues of debt securities in your jurisdiction? If not, what are the main ways of structuring issues of debt securities in the debt capital markets/exchanges?**

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Trust structures are not common in Austria. Usually the newly issued debt securities are underwritten by a bank or a consortium of banks and then offered to the investors (retail or institutional).

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**ADVISERS: DEBT SECURITIES ISSUE**

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**29. Outline the role of advisers used and main documents produced when issuing and listing debt securities.**

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The advisers involved are the same as for an equity offering but the tasks are different in view of the different security to be issued (see *Question 7*).

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**DEBT PROSPECTUS/MAIN OFFERING DOCUMENT**

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**30. When is a prospectus (or other main offering document) required? What are the main publication/delivery requirements?**

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The prospectus requirements are the same as for equity securities see *Question 8*.

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**31. Are there any exemptions from the requirements for publication/delivery of a prospectus (or other main offering document)?**

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The exemptions are the same as for an equity issue see *Question 9*.

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**32. What are the main content/disclosure requirements for a prospectus (or other main offering document)? What main categories of information are included?**

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For the prospectus contents see *Question 10*. Under the CMA, the format and annexes for debt securities implement the requirements of the Prospectus Directive.

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**33. How is the prospectus (or other main offering document) prepared? Who is responsible and/or may be liable for its contents?**

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Preparation of the prospectus is the same as on an equity issue see *Question 11*.

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**TIMETABLE: DEBT SECURITIES ISSUE**

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**34. What is a typical timetable for issuing and listing debt securities?**

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A bond issue is normally completed within four to ten weeks, and a programme within four to 12 weeks.

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**TAX: DEBT SECURITIES ISSUE**

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**35. What are the main tax issues when issuing and listing debt securities?**

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The coupon under a debt instrument and the difference between a higher redemption and a lower issue amount is subject to a 25% withholding tax withheld by a paying agent situated in Austria. Certain exemptions from withholding tax apply for corporate investors and for non-Austrian tax resident investors if they are not physical persons resident in the EU.

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**CLEARING AND SETTLEMENT OF DEBT SECURITIES**

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**36. How are debt securities cleared and settled and what currency are debt securities typically issued in? Are there special considerations for holding, clearing and settling debt securities issued in foreign currencies?**

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Debt securities are usually denominated in Euro.

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**CONTINUING OBLIGATIONS: DEBT SECURITIES**

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**37. What are the main areas of continuing obligations applicable to companies with listed debt securities and the legislation that applies?**

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**Periodic financial reporting**

Periodic financial reporting obligations are the same as for equity securities see *Question 19*.

**Other disclosure obligations**

The issuer must, among other things, provide information on:

- Place, time and agenda of meetings of debt securities holders.
- Payment of interest.

- Exercise of any conversion, exchange, subscription or cancellation rights, and repayment, as well as the right of debt securities holders to participate.

The rule on ad hoc publicity (see *Question 19*) also applies to issuers of debt securities listed on the Official Market or the Second Regulated Market.

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### 38. Do the continuing obligations apply to foreign companies with listed debt securities?

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The rules on ad hoc publicity apply to domestic and foreign issuers. The disclosure obligations concerning financial information and the further information obligations outlined above only apply to issuers in relation to which Austria is home member state under Directive 2004/109/EC on transparency requirements for securities admitted to trading on a regulated market and amending Directive 2001/34/EC (Transparency Directive).

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### 39. What are the penalties for breaching the continuing obligations?

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The penalties for a breach of the continuing obligations are the same as on the equity markets see *Question 21*.

## REFORM

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### 40. Are there any proposals for reform of both equity and debt capital markets/exchanges? Are these proposals likely to come into force and, if so, when?

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On 11 October 2010, the EU Council adopted Directive 2010/73/EU amending the Prospectus Directive and the Transparency

Directive (Amending Directive). The Amending Directive must be implemented by member states into national law by 30 June 2012. By then, the European Commission must issue delegated Acts to specify certain formats, such as for the prospectus summary.

The most important amendments are:

- Prospectus exemptions have been altered (see *Question 9*).
- Form and content of the prospectus must, in concise and non-technical language, provide all of the following:
  - certain key information on the issuer and the securities (including risks);
  - the terms of the offer including expenses charged to the investor;
  - details of the admission to trading;
  - reasons for the offer and use of proceeds.
- Statutory withdrawal rights of investors following publication of a supplement to a prospectus have been fixed at two working days.

At the time of publication, the Austrian legislator has not yet published draft amendments of the CMA and SEA to implement the Amending Directive.



## CONTRIBUTOR DETAILS



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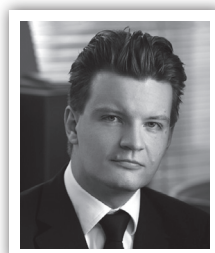
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**Qualified.** Austria, 2002

**Areas of practice.** Capital markets; corporate; M&A and takeovers.

#### Recent transactions

- Capital increase and secondary of Lenzing AG (issuer's counsel).
- Corporate bond of Lenzing AG (transaction counsel).
- Capital increase of BKS Bank AG (issuer's counsel).
- Capital increase of Oberbank AG (issuer's counsel).
- Capital increase of Wiener Städtische Versicherung AG Vienna Insurance Group (underwriter's counsel).
- Counsel to voestalpine AG in its public takeover bid of stock exchange listed Böhler Uddeholm AG and subsequent squeeze out.

**Qualified.** Austria, 2009

**Areas of practice.** Capital markets; corporate; M&A and takeovers; equity and bond emissions.

#### Recent transactions

- Capital increase and secondary of Lenzing AG (issuer's counsel).
- Corporate bond of Lenzing AG (transaction counsel).
- Capital increase of BKS Bank AG (issuer's counsel).
- Capital increase of Oberbank AG (issuer's counsel).
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