

Corporate Finance/M&A - Austria

Court clarifies disclosure requirements in asset deals

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November 14 2012

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Introduction

According to Article 3(1) Z 15 of the Commercial Register Code, asset deals involving Austrian entities must generally be registered with the Commercial Court. Although this obligation is one of the most pertinent provisions in relation to Austrian asset deals, it does not specify the exact documents that must be attached to such filing in order to prove the asset transfer in reasonable detail to the court. The responsibility for defining these standards is instead allocated to the courts.

As the Commercial Register (including filings and attachments) may be inspected by any interested party, even without a particular relationship to a registered entity, the question of whether an asset purchase agreement (or any other related documents) must be disclosed to the court is of importance when drafting transaction documentation, in order to avoid the disclosure of sensitive business data to the wider public.

Disclosure

In two recently published decisions of the Higher Regional Court of Vienna,⁽¹⁾ the court clarified the documents necessary for the registration of asset deals. The court held that in order to fulfil the registration obligations, a notarised extract of the purchase agreement needs to reveal only:

- the relevant object of purchase; and
- its transfer from the seller to the purchaser.

Disclosure of the purchase price is not necessary. Although the court did not specify how to proceed with other provisions of the asset purchase agreement or related transaction documents, it appears that they need not be disclosed as long as they do not materially interfere with the object of purchase and the transfer proof as included in the extract.

Limitations

Under Austrian law, Articles 228 and 244 of the Commercial Code distinguish between affiliated and unaffiliated undertakings. Accordingly, affiliated undertakings exist where:

- an affiliated group is under unified management; or
- a parent corporation holds at least 20%, directly or indirectly, in the nominal capital of the subsidiary and:
 - has a majority of votes in the subsidiary;
 - has the right to appoint or dismiss the majority of the members in the administrative, management or supervising body of the subsidiary;
 - has a right to predominant management; or
 - resulting from a voting agreement with other shareholders, has the right to appoint or dismiss the majority of the members in the administrative, management or supervising body of the subsidiary.

In the above-mentioned decisions, the assets were sold to an unaffiliated undertaking. However, in an *obiter dictum* the court had already argued that stricter publicity standards could be justified for asset deals between affiliated undertakings, in order to maintain protection for creditors and minority shareholders.

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Endnotes

(1) 28 R 96/06b, 28 R 97/06z.

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