

Acquisition finance in Austria: overview

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MARKET OVERVIEW AND METHODS OF ACQUISITION

Acquisition finance market

1. What parties are involved in acquisition finance?

The main parties involved in acquisition finance on the financing side usually depend on the companies involved.

The majority of Austrian businesses fall into the category of small to medium enterprises (SME), and are often family owned. On the lender side, the financing for deals involving such companies are typically done by Austrian-based banks, especially if the buyer is also a domestic entity. International banks take over the scene for transactions where large corporations are the targets.

Methods of acquisition

2. What are the main methods used for acquiring business entities in your jurisdiction?

Asset acquisition

Asset acquisition in Austria refers to the purchase of key assets of a company. Through an asset deal, ownership is transferred to the buyer by way of singular succession (*Einzelrechtsnachfolge*) which means that the acquisition has to be contractually agreed on between the buyer and seller for each asset individually, in contrast to universal succession (*Gesamtrechtsnachfolge*) by which all rights and obligations are transferred *uno acto* to the buyer. As a result, asset acquisitions often entail more complex issues than share acquisitions. However, it also gives the buyer the opportunity to only purchase those assets which are actually desired and to leave unwanted assets, including any connected unwanted risks, behind.

The specific advantages of asset acquisitions are the:

- Possibility to acquire only a certain part of a company's business independent from the underlying shareholder structure.
- Purchase price can generally be depreciated for tax law purposes.

Potential drawbacks can arise in relation to liability. The buyer can become liable for debts in connection with the acquired assets, if the buyer was aware of, or was deemed to be aware of, the existence of such debts at the time of the takeover (section 1409, *Austrian General Civil Code (Allgemeines bürgerliches Gesetzbuch) (ABGB)*). This liability is limited to the value of the assets purchased. Furthermore, according to section 38 of the Austrian Company Code (*Unternehmensgesetzbuch*) (UGB) a transfer of contracts is subject to third party rights.

Other disadvantages of asset acquisitions can be:

- The buyer may need to renegotiate supply, employment and technology agreements due to the singular succession.

- Asset acquisitions are not exempt from VAT even if a whole business is acquired as a going concern.

Due diligence is conducted for significant asset deals.

In general, the transfer of (movable) assets is not subject to transfer taxes. However, depending on the structure of the deal, the transfer or assignment of rights or contracts under certain circumstances can trigger stamp duty in the amount of 0.8% of the consideration, provided that a written document as stipulated in the Austrian Stamp Duty Act (*Gebührengesetz*) (GebG) is executed in, or brought into, Austria.

No specific formalities are required for an asset acquisition and the assets that are to be transferred, including any rights and obligations which are part of the deal.

Share acquisition

Acquisitions of shares in a corporation (that is, a private limited company or a joint stock company) are frequently made in Austria because of the transaction's simplicity. All rights and obligations of the target company are transferred at once (*uno acto*) by way of universal succession (*Gesamtrechtsnachfolge*).

Attention has to be paid to the formalities in regards to the purchase of shares and the transfer thereof. In accordance with section 76 of the Act on Companies with Limited Liabilities (*Gesetz über Gesellschaften mit beschränkter Haftung*) (GmbHG), it is obligatory to conduct the signing of the sale purchase agreement as well as the transfer by way of a notarial deed. The succeeding shareholder has to be registered in the companies register (*Firmenbuch*) without undue delay after closing.

Advantages of share purchases include:

- Less administrative burden due to share deals being exempt from VAT (for acquirers not entitled to input VAT, there is also a lower tax burden).
- Unless "change of control" clauses are included, existing supply or technology contracts remain unchanged.
- Interest deduction is available unless participation is acquired from an affiliated company.

Possible disadvantages are the limited deduction of the purchase price compared to an asset deal and that prior undisclosed risks and liabilities vested in the target company remain in place. Therefore, warranties are included in the sale purchase agreement and financial, legal and tax due diligence is typically conducted in Austrian share deals.

Mergers

Mergers in regards to acquisition financing are the exception, rather than the rule, in Austria.

By way of a merger, two legal entities are combined. All assets and liabilities are transferred from the transferring company by way of general universal succession to either an already existing company (merger by absorption) or a new company (merger of several entities into one new company; merger by formation). Mergers can

occur in the form of an upstream, downstream and side-stream merger and are usually preferred for corporate reorganisations.

An acquisition by way of a merger is advantageous for the lender, as in this case it has direct access to the assets of the target company. However, restrictions due to the mandatory Austrian capital maintenance rules have to be taken into account (see *Question 8, Types of security*).

Certain requirements regarding merger control have to be complied with at national as well as at European level. The Austrian Takeover Act (*Übernahmegesetz*) (ÜbG) stipulates certain provisions that go beyond Directive 2004/25/EC on takeover bids (Takeover Directive).

Other

Rather than acquiring shares, another possibility to secure control over a company is on the basis of an agreement (*Beherrschungsvertrag, Gewinnabführungsvertrag*), which is however very rarely conducted in acquisition financing in Austria.

STRUCTURE AND PROCEDURE

Procedure

3. What procedures are typically used for gaining acquisition finance in your jurisdiction?

The most common form used for gaining acquisition finance is credit agreements.

Due to declining interest rates in recent years, the conclusion of syndicated credit agreements has become more important for gaining acquisition finance in Austria. Usually full documentation is used for the financing and the lender's counsel is typically responsible for the drafting of the financing documents (such as the credit agreements and security agreements) while the borrower's counsel usually drafts the corporate approvals and reviews and comments on the drafts of the financing documents.

In Austria, companies are in most cases acquired in private (not through public auctions).

In the majority of acquisition finance transactions that have an international background and exceed a certain amount, the financing documentation is governed by English or German law. Transactions of a smaller scale are usually governed by Austrian law. Security interests granted in relation to assets located in Austria are also governed by Austrian law.

Loan Market Association (LMA) standard credit agreements are regularly used in Austria in case of international financing transactions. In recent years it has become more and more common to base local transactions on "light versions" of the LMA-standard credit agreements.

In cross-border/large scale transactions, the English language applies, whereas national transactions are carried out in the German language only. Typically, once a language is agreed on in relation to the financing documentation, it remains the same for every document throughout the entire deal (with the exception of security that needs to be filed for perfection).

Vehicles

4. What vehicles are typically used in acquisition finance?

The establishment of special purpose vehicles (SPVs) is often seen in the Austrian financing landscape. In most cases SPVs are established in the form of a limited liability company (*Gesellschaft mit beschränkter Haftung*) (GmbH). The SPV is party to the purchase agreement and the financing documents and does not necessarily need to be an Austrian entity (although in most cases, it

is established in the form of an Austrian limited liability company). The shares are usually held by the sponsors and pledged to the lenders.

In the vast majority of cases, the SPV acts as the borrower and buyer of the target company and the sponsor often provides a down-stream guarantee in favour of the lenders.

EQUITY FINANCE

5. What equity financing structures are typically used in acquisition finance?

Equity financing structures are not commonly used for acquisition financings in Austria. Apart from that, the most common types are either equity in the form of an equity capital contribution or in the form of subordinated inter-company loans (or both methods combined). If non-Austrian law governed documents are used, certain forms of equity financing available under such law(s), can be used.

DEBT FINANCE

Structures and documentation

6. What debt financing structures are typically used in acquisition finance?

Credit agreements have represented, and still represent, the most important instrument in terms of debt financing. However, more and more diverse financing products have been developed and are used in financing transactions with an Austrian background, such as mezzanine debt financing ("subordinated debt"), including equity kickers, as well as hybrid instruments.

High yield bonds are, in contrast to mezzanine/hybrid financing instruments, not commonly used in acquisition financing transactions in Austria. However, hybrid bonds are beginning to play an increasing role.

Equity kickers are usually used in relation to companies that have the potential to strongly increase their value and in the case of short term financings, as an early exit otherwise may result in a low (interest) return on the debt financing. Generally, equity kickers are granted in the form of an exit payment depending on the valuation of the company or an option providing for the right to acquire shares of the company for a pre-arranged fixed price and date. Alternatively, equity kickers can be provided through the issuance of convertible bonds (*Wandelanleihen*).

From a company's perspective, equity kickers provide for a lower financing cost. The costs of equity kickers arise only when the increase of the company's value is in fact realised. Depending on the legal form of the company, the financing of companies by way of equity kickers requires the approval of the shareholders.

Additionally, mezzanine loans are provided in the form of unsecured or subordinated loans (*Nachrangdarlehen*) combined with a high interest rate or an equity kicker. In such cases, the mezzanine creditors' claims are subordinated to all other creditors' claims. The relation between mezzanine creditors and other creditors can be provided for in an inter-creditor agreement, or the security documentation contractually subordinating the claims of the mezzanine creditors, or by way of structural subordination described above.

Documentation

See *Question 3*.

Inter-creditor arrangements

7. What form do inter-creditor arrangements take in your jurisdiction?

Inter-creditor arrangements are regularly used in acquisition finance and debt restructurings and are usually governed by the law governing the underlying financing documents. A fundamental issue in relation to inter-creditor arrangements is the rather questionable binding force of the agreement in case of insolvency proceedings.

Contractual subordination

Contractual subordination is common in the case of lender classes in international acquisitions or between junior and senior lenders.

Austrian statutory or case law does not set out whether it is effective or not. However, regarding insolvency proceedings, contractual subordination stipulated in the inter-creditor arrangements may be effective, if it does not give rise to any disadvantages for the other lenders.

Structural subordination

Structural subordination (that is, the granting of loans at different levels of a corporate structure) is regularly used if, for example, different classes in relation to hybrid agreements exist.

Payment of principal

Payment of principal is not usually regulated in Austrian inter-creditor arrangements.

Interest

Interest payments are not usually regulated in Austrian inter-creditor agreements.

Fees

The repayment of fees is not usually stipulated in the inter-creditor agreement.

Sharing arrangements

Sharing of security is common in acquisition financing and the provisions providing for the sharing of security can typically be found in the credit agreement or the inter-creditor agreement.

However, attention has to be paid if the security constitutes an accessory (*akzessorisch*) security interest which is dependent on the secured obligation. Accordingly, accessory security interests granted under an Austrian law security document can only be validly granted to, and maintained for the benefit of, the creditor of the secured obligation (in its own name and not on behalf of the lenders). Therefore, in most cases a separate parallel debt structure is established in the inter-creditor agreement (not governed by Austrian law) under which a security agent is the holder of the parallel debt owed by each debtor. Although there are no statutory provisions under Austrian law, or any case law in respect to parallel debt structures to confirm this approach, parallel debt structures are commonly used in syndicated finance transactions with the involvement of Austrian borrowers and/or guarantors. In Austrian law governed documents it is doubtful whether a separate parallel obligation can be validly created and other ways are usually relied on.

Subordination of equity/quasi-equity

See above, *Contractual subordination*.

Secured lending

8. What security and guarantees are generally entered into for an acquisition financing?

Extent of security

The most common form of security granted in the context of acquisition financing transactions in Austria is the pledge of shares in limited liability companies (*Gesellschaft mit beschränkter Haftung*) (GmbH) or joint stock companies (*Aktiengesellschaften*) (AG).

In addition, receivables, bank accounts kept in Austria and intellectual property rights (patents, trademarks or designs as well as internet domains) are regularly pledged to the financing banks.

Due to the costs involved, mortgages over real estate are commonly not part of a security package (see below, *Types of security: real property*). Further, the granting of a security over machinery, commodities, inventory or vehicles is also commonly not part of a security package due to the legal restraints in relation to the perfection of any such security interest.

In order to create a valid pledge in tangible assets such as machinery, commodities, inventory or vehicles, possession of the pledged property has to be transferred to the pledgee or a third party (in order to comply with mandatory publicity requirements) which holds possession in the pledged assets on behalf of the pledgee. However, very often such a transfer of possession is not commercially feasible for the pledgor as it needs to be able to dispose of the pledged assets in its ordinary course of business and is therefore not included in the security packages. Under very limited circumstances, a security interest in such assets can alternatively be perfected by attaching plates, marks or other signs to the assets evidencing the creation of a security interest.

Non-accessory guarantees can also serve as security. Sureties (in contrast to guarantees) are, principally, subject to Austrian stamp duty, which is why they are commonly not used in financings.

In recent years, in significant financing deals, borrowers regularly started to provide asset security interests (shares, receivables and accounts) and guarantees, followed by the shareholders providing pledges of shares and guarantees to the lender. Furthermore it became more and more common in international financing that, within a certain period of time, material subsidiaries of the borrower accede to the credit agreement as additional security providers and guarantors.

Types of security

The most common form of security granted in the context of acquisition financing transactions is the pledge of shares in limited liability companies or joint stock companies.

Restrictions can principally arise in regard to Austrian capital maintenance rules, (*Kapitalerhaltungsvorschriften*), which prohibit the granting of up-stream or cross-stream security by a company. According to these rules, shareholders are only entitled to (most importantly) net profits in accordance with the financial statements of the relevant company, subject to a shareholders' resolution resolving a distribution (that is, declared dividends) and liquidation proceeds.

The infringement of these rules results in the invalidity of the security also vis-à-vis the lenders where the lenders had knowledge, or were negligently unaware, of the infringement. Usually, banks engaged in the setting-up of the finance structure are considered to have knowledge.

Shares. The pledge of shares in limited liability companies or joint stock companies is the most common form of security granted in Austria.

The type of entity (joint stock company or limited liability company) from which the shares will be pledged is important, as it will determine the perfection mode for the pledge. The shares of a joint stock corporation are deemed physical assets. Therefore, the pledge is perfected by either a physical transfer (in the case of bearer shares) or by endorsement of the share certificate and physical transfer (in the case of registered shares). Pledges over shares are perfected by delivering a notice of the pledge to the relevant third party (*Drittschuldnerverständigung*).

Unlike the shares of a joint stock corporation, the share (*Geschäftsanteil*) in a limited liability company is deemed a right to a quota in the company and as a result is not certificated. Therefore, the pledge is perfected by either notification of the company of the pledge or by book entry (*Buchvermerk*) in the pledgor's respective books.

Interests in partnerships are rights rather than tangible assets. Therefore, perfection follows the same rules as applicable to the limited liability company.

Inventory. In general, under Austrian law all types of assets can be charged as security (that is, tangible and intangible as well as movable and immovable assets). However, due to strict publicity and perfection rules, the creation and perfection of a security interest over inventory is a rather difficult exercise and hence very rarely seen in Austria.

Bank accounts. Under an account pledge agreement the credit balance of bank accounts is pledged.

As Austrian banks usually hold a pledge over accounts on the basis of their general terms and conditions, the consent of the account bank is required. A waiver should be obtained to ensure that the pledge ranks ahead of the bank's pledge.

In order to perfect the security interest over a bank account, it is required to either set a book-entry (*Buchvermerk*) or notify the account bank.

Due to the Austrian Act on Financial Collateral (*Finanzsicherheitengesetz*) (FinSG) which implements Directive 2002/47/EC on financial collateral arrangements (Financial Collateral Arrangements Directive), account pledges created between financial market professionals (*professionelle Finanzmarktteilnehmer*) and traditional companies (legal entities, individual companies, partnerships) are granted the advantage of an easier enforcement. The FinSG is considered *lex specialis* in regards to general Austrian civil law and therefore supersedes the Austrian General Civil Code (*Allgemeines bürgerliches Gesetzbuch*) (ABGB). However, the explicit consent of the parties on the applicability of the FinSG is required in order to enjoy its benefits.

Receivables. Receivables can be pledged or assigned. To perfect the pledge/assignment over receivables, it is required to either notify the third party debtor or to set a book entry (*Buchvermerk*) in the pledgor's/assignor's respective books. Usually only insurance companies, sellers (in case rights under acquisition agreements are pledged) and intra-group debtors (but not trade debtors) are notified of the pledge/assignment prior to an event of default and instructed to pay exclusively to the pledgee/assignee on an event of default. The pledge/assignment of trade receivables is usually perfected by book entry (*Buchvermerk*) in the respective books of the pledgor/assignor.

Assignments of rights are generally subject to stamp duty in the amount of 0.8% of the receivable, however, assignments of rights for the securing of credit securities are exempt.

Intellectual property rights. In general, all types of intellectual property rights can be pledged. In the case of IP rights it has to be distinguished between registered (for example, trademarks, patents or designs) and unregistered IP rights (such as copyrights).

In order to validly perfect the pledge over IP rights the pledgor has to either register the pledged rights in the respective public register

at the Austrian Patent Office (*Österreichisches Patenamts*) or in case the IP rights are not registered set a book-entry (*Buchvermerk*) in its respective books.

Real property. Security over immovable property is created by entering into a mortgage agreement and perfected by registration of the mortgage in the Austrian land register (*Grundbuch*) after filing an application for registration together with a notarised deed of mortgage with the competent district court (*Bezirksgericht*). The amount to be secured by the mortgage can either be fixed (*Festbetragshypothek*) or determined not to exceed a specific maximum amount (*Höchstbetragshypothek*). The registration will trigger fees in the amount of 1.2 % of the registered amount.

On some occasions it is sufficient for lenders to receive a notarised mortgage agreement or two certificates on which the amount of the mortgage is split up. On the event of closing, the mortgage is only registered (and thus perfected) with one document and hence the fee of 1.2% will only be triggered on the amount registered.

Movable assets. See above, *Inventory*.

Guarantees. A guarantee is an abstract security interest as it is independent of the validity of the underlying claim and legal relationship between the beneficiary as creditor and his debtor. The guarantor (*Garant*) undertakes to pay a certain amount on the beneficiary's request without reviewing the merits of the request. Like in the case of a suretyship the rights of the beneficiary (creditor) passes to the guarantor (*Garant*) as a new creditor on payment without an underlying title agreement or an act of assignment.

The validity of a guarantee follows the same formal requirements as the suretyship (that is, it has to be made in writing).

Attention has to be paid regarding stamp duty. A surety is subject to stamp duty whereas a guarantee is exempt. Therefore, in order to secure that a guarantee contained in a facility agreement is not interpreted as a surety, it is standard market practice in Austria to include an interpretation clause.

Security trustee

Security trustees as known in English law are not permitted in Austria, therefore parallel debt structures are commonly used instead. For parallel debt structures see *Question 7*.

RESTRICTIONS

Thin capitalisation

9. Are there thin capitalisation rules in your jurisdiction? If so, what is their impact on an acquisition finance transaction?

In Austria there are no specific thin capitalisation rules or safe harbour debt/equity ratios. In general a debt/equity ratio of 4:1 (in a holding context even higher) is accepted by the tax authorities. The debt/equity ratio is measured on a consolidated basis. In the case of a leveraged acquisition, this usually means that the debt incurred by the special purpose vehicle (SPV) has to be consolidated with the already existing debt of the target. For those purposes, debt from a third party lender may be considered shareholder debt if secured by a related party. Further, more important than the debt/equity ratio is the possibility that the respective debt can be serviced and repaid or refinanced and that group internal financing complies with the arm's length principle.

Interest paid on internal financing may not be tax deductible if the interest income is taxed below 10% at the level of the lender. This also applies to third party debt (for example, granted from a bank) if the underlying financing is a back-to-back financing actually received from a related party (or guaranteed by a related party).

The debt finance interest for the acquisition of a target may be deductible for income tax purposes. In this respect a debt push

down from the acquiring entity into the target is possible based on the Austrian tax group regime.

Financial assistance

10. What are the rules (if any) concerning the prohibition of financial assistance?

Under Austrian law the repayment of capital to shareholders (of limited liability companies, stock corporations or partnerships in which only such entities are unlimited partners) of public or private companies is generally not permissible. Shareholders are only entitled to (most importantly):

- The net profits in accordance with the financial statements of the relevant company, subject to a shareholders' resolution resolving a payout (for example, declared dividends).
- Payments in the course of a formal reduction of statutory capital and liquidation proceeds.

In this case every shareholder can permissibly pledge its claim to dividends. Consequently, the provision of up-stream or side-stream security by a company would be considered (an illegal) repayment of share capital. It follows that the amount the secured creditor(s) would receive under such security may be limited. Up-stream security over a company's assets is therefore possible only with certain limitations.

An illegal repayment of share capital will lead to the invalidity of the legal transaction (that is, the security provider may reclaim any excess payment made under the security) and can lead to the personal liability of the members of the security provider's management board. In theory, the invalidity of the security does not affect the third party. However, if the third party had knowledge or was negligently unaware of the breach of corporate law, the invalidity of the security will also be effective vis-à-vis the third party. See *Question 8, Types of Security* regarding the capital maintenance rules.

Payments and benefits not within the scope of these rules are qualified as a violation of the Austrian capital maintenance rules and therefore the respective transaction will be invalid.

Regulated and listed targets

11. What industries are regulated in your jurisdiction? How can the fact that a target is a regulated entity affect an acquisition finance transaction?

Regulated industries

Most industries are regulated insofar as licences are required to access the market. Moreover, the conduct of business is regulated.

Certain industries are subject to a more stringent regulatory regime, mostly influenced by EU legislation, in particular in the fields of health and safety, consumer protection, financial services and access to infrastructure.

Effect on transaction

This is dependent on the kind of transaction:

- Asset deals: in many cases business licences (*Gewerbeberechtigung*) must be obtained.
- Share deals: typically no consents required.

In case certain turnover thresholds of the involved companies are met, a transaction may be subject to merger control approval.

Austrian law also provides for an investment control approval. Such approval basically needs to be obtained only in case the target company is active in the field of public safety and order

including, in particular, the following industries (*section 25a, Foreign Trade Act (Außenwirtschaftsgesetz)*):

- Military defence.
- Security services.
- Energy supply.
- Water supply.
- Telecommunications.
- Traffic infrastructure.
- Education.
- Health care.

Further sector specific approvals may be required regarding energy, insurance and land transactions, and so on.

The acquisition of targets in regulated industries may require the prior approval of the respective regulatory body or may be subject to notification requirements. Further, the granting of a security interest over a regulated target or the shareholding in it and/or the realisation of any such security in case of an event of default may involve approval or notification requirements.

The Austrian Banking Act requires any natural or legal person, or such persons acting in concert, who have taken a decision to acquire (directly or indirectly) a qualifying holding in an Austrian credit institution to notify the competent supervisory authority (Austrian Financial Market Authority). A participation in a credit institution is a qualifying holding when it represents 10% or more of the capital and/or voting rights in the credit institution or reaches the other relevant thresholds (20%, 30% or 50%). In addition, obtaining rights to appoint the (majority of) the management board or other means of providing significant influence over the management of the credit institution also falls within the scope of a "qualifying holding".

It should be noted that as a consequence of the Banking Union (in particular the Single Supervisory Mechanism (SSM)) it is the European Central Bank, and not the national regulator, that ultimately assesses the acquisition of qualifying holdings in credit institutions in the Euro area.

The assessment is intended to ensure that the proposed acquirer meets certain criteria (such as good reputation, necessary financial soundness). If the criteria are not met the regulator may prohibit the acquisition or impose certain conditions.

In the event that a required notification is not made, the voting rights associated with all shares held by the proposed acquirer (not only the additionally acquired shares) are suspended. Furthermore, the regulator can take additional measures (such as a prohibition on the distribution of capital or profits or the appointment of a competent supervisor who may prohibit certain transactions).

Additionally if the target in the regulated industry is a listed company listed on a regulated market, section 91 *et seqq* of the Austrian Stock Exchange Act (*Börsegesetz*) sets out certain significant shareholder notification requirements. In particular, if a person, directly or indirectly, acquires or sells shares it is obliged to notify the Financial Market Authority (FMA), the Austrian Stock Exchange and the target company, if as a consequence of such transaction, the share in the target company reached, exceeds or falls below certain thresholds between 4% to 90%. The target can set a lower threshold at 3% in its articles of association. The notification obligation also applies to a lower takeover threshold set by the target in its articles of association under the Austrian Takeover Act (*Übernahmegesetz*). The notification must be made immediately, or at the latest within two trading days. Additional notification requirements apply with respect to certain financial instruments held in the target company and in instances where the person can exercise or can influence the exercise of the voting rights without being the owner (for example, parties acting in

concert or who hold a controlling interest in the direct holder, and so on).

12. How does the fact that a target is listed impact on a transaction?

Specific regulatory rules / Methods of acquisition / Funding

If the target is a listed company, in addition to general civil law, certain regulatory provisions have to be considered in order to reduce asymmetric information between issuers and investors (for example, ad-hoc publicity, significant shareholding notifications). The Austrian Takeover Act (*Übernahmegesetz*) requires, inter alia, a public offering to be made to all shareholders on the direct or indirect acquisition of a controlling interest (that is, more than 30% of the voting rights attached to the shares with permanent voting rights) in a company listed on a regulated market (mandatory bid). Therefore, the provisions of the Austrian Takeover Act may in particular impede the realisation of a pledge in shares of a publicly traded company or the granting of voting rights to a pledgee.

In case of Initial Public Offerings the initial shareholders of the company are usually prevented from selling their remaining shares for a certain period of time, called the "lock-up period". Any such contractual agreement on a lock-up period entered into, such as the book runners, should provide for a carve-out with respect to a sale of the shares by a pledgee having to realise such shares.

Under the Austrian Takeover Act, a bidder can publish its intention to launch a public offer only if he has ensured sufficient financing for the complete cash consideration offered. Also, the offer documentation has to include the conditions of the financing.

Squeeze-out procedures

According to the Squeeze-Out Act (*Gesellschafter-Ausschlussgesetz*) which applies to limited liability companies as well as stock corporations, majority shareholders are entitled to ask the shareholders' assembly to pass a resolution on the squeeze-out of minority shareholders. Consequently, if such a resolution is passed and registered with the commercial register, the shares of minority shareholders are transferred *ex lege* to the majority shareholder in exchange for adequate cash compensation. A shareholder qualifies as a majority shareholder if it (including its affiliated companies) holds at least 90% of the issued share capital of the company. The shareholders' resolution can be passed with a simple majority.

Pension schemes

13. What is the impact, if any, of pension schemes held by the target or purchaser on the acquisition?

Since there are only very limited possibilities for the purchaser to exclude existing pension schemes from the acquisition, pension schemes beyond the statutory obligations can be an essential financial factor when determining the purchase price.

According to section 3 of the Amendment of Employment Contracts Act (*Arbeitsvertragsrechts-Anpassungsgesetz*) (AVRAG) in case of a transfer of business (*Betriebsübergang*), generally the employment contracts of the target automatically transfer to the purchaser with all rights and obligations. According to section 5 of AVRAG it is only in the case of a singular succession (such as a transfer of the target by way of an asset deal) that the purchaser can refuse to take over individual pension schemes (that is pension schemes based on individual contracts as opposed to those based on a collective bargaining agreement or a shop agreement). However, if the purchaser decides against taking over the pension

scheme, the employees of the target have the right to object to their employment being transferred to the purchaser.

Lender liability

14. What are potential liabilities of the lender on an acquisition?

Under the Austrian Equity Substitution Act (*Eigenkapitalersatz-Gesetz*) (EKEG), a lender who is granted extensive rights of control over the borrower, together with decisive influence on the borrower's business in the loan agreement or any related security document may, for the purposes of the Act, be qualified as a shareholder of the borrower. A loan made by such a lender to a borrower which is in a "crisis" is considered as equity subordinated to the claims of all secured and unsecured creditors of such subsidiary. The definition of the term "crisis" follows the rules set out in the Companies Reorganisations Act (*Unternehmensreorganisationsgesetz*) which determines the insolvency or over-indebtedness of a company as an equity ratio of lower than 8% and an assumed debt amortisation period of more than 15 years as indicators for a company's financial crisis.

However, the extending of loans that were initially granted before a crisis was imminent is not considered as equity in order to help with keeping up liquidity of a struggling company to a certain extent.

When such a crisis situation is at hand, new loans are considered equity of the receiving company for the duration of the crisis and any repayment (including interest) of such a loan may be considered an illegal repayment of capital. Payments effected during the lock-down period of a crisis are subject to clawback claims of the struggling company against the respective lender.

DEBT BUY-BACKS

15. Can a borrower or financial sponsor engage in a debt buy-back?

Generally debt buy-backs, such as the purchase of a share in a syndicated loan by a borrower or a financial sponsor, are permitted. However, restrictions can usually be found in the relevant financing agreements.

Additionally if a borrower is in financial difficulty, and there is a "crisis" at the time of the debt acquisition by a company associated with the borrower, the buyer's claim may be categorised as quasi-equity and therefore subordinated to the rights of the other creditors.

POST-ACQUISITION RESTRUCTURINGS

16. What types of post-acquisition restructurings are common in your jurisdiction?

Common techniques for post-acquisition restructurings are mergers and demergers. Generally, the preferred legal form involved is a limited liability company.

REFORM

17. Are there reforms or impending regulatory changes that are likely to affect acquisition finance transactions in your jurisdiction?

There are no reforms currently planned.

ONLINE RESOURCES

Bundeskanzleramt – Rechtsinformationssystem (RIS)

W www.ris.bka.gv.at/Bund/ (German); www.ris.bka.gv.at/Englische-Rv/ (English)

Description. The *Bundeskanzleramt – Rechtsinformationssystem* (RIS) contains all law provisions which are in force in Austria. It is part of the official Austrian legal information system. The German version is regularly updated.

Practical Law Contributor profiles

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