

## Corporate Finance/M&A - Austria

### Consumer protection in M&A deals

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#### Introduction

Under the Consumer Protection Law, every (natural) person for whom a certain transaction does not form part of its business must be regarded as a consumer and, as a consequence, will benefit from the relevant consumer protection rules.

Therefore (although such fact is often ignored in M&A transactions involving natural persons), contrary to the company itself, neither shareholders nor managing directors of corporations are automatically regarded as entrepreneurs; instead, they would generally be regarded as consumers, unless they are in a position to exercise a dominant influence on the company (eg, by holding a majority stake and acting as managing director at the same time). Typical boiler-plate provisions in M&A transaction documents could thus be inapplicable in certain transactions.

#### Recent rulings

In contrast to certain legal scholars, who would qualify shareholders of a limited liability company as entrepreneurs if their stake in the company exceeds between 20% and 25%, the Supreme Court again confirmed in a recent ruling<sup>(1)</sup> that shareholders of limited liability companies would be regarded as entrepreneurs only if:

- their stake in the company amounts to at least 50%; or
- they are granted extensive veto rights which enable them to exercise control over the company.

Lower stakes in the company are regarded as mere financial investments which do not qualify as entrepreneurial activities, as defined by the law.

Although the Supreme Court deliberately did not decide in the above-mentioned case whether the shareholder also has to serve as a managing director of the company, a prior decision<sup>(2)</sup> granted consumer protection status even to a majority shareholder who was not at the same time managing director of the company. As a result, it is possible that future decisions may apply a double standard for assessing the entrepreneur status of a shareholder. Consequently, only shareholders owning a majority stake who are a managing director at the same time could thus be regarded as entrepreneurs.

#### Comment

Even though most recent decisions dealing with the consumer qualification of shareholders were not taken directly in connection with M&A transactions, the court confirmed that a uniform consumer definition must be adhered to under Austrian law. The thresholds elaborated by the court are therefore also likely to apply in relation to share deals or asset deals involving natural persons.

In the context of M&A transactions, consumer protection laws could in particular become relevant in relation to special protection in connection with:

- the assumption of joint responsibilities and guarantees;
- dispute resolution clauses, particularly arbitration clauses; and
- certain contractual provisions, such as lesion beyond moiety and default interest rates.

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Although the exact scope and limits of consumer protection laws in the context of M&A transactions have not yet been clarified by the Supreme Court in detail, practitioners should be aware of the consequences which could result from natural persons being a party to transaction agreements.

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#### Endnotes

(1) 2 Ob 169/11 i.

(2) 7 Ob 266/06 b.

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