

Corporate Finance/M&A - Austria

New payment regime: considerations for M&A practitioners

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Introduction

Should the parties to a share or asset purchase agreement not stipulate the exact conditions for the payment of consideration, or not decide on default interest rates for late payments, Austrian dispositive law includes a set of default rules which must be applied.

On March 16 2013 a law based on the EU Directive on Combating Late Payment in Commercial Transactions (2011/7/EU) came into force in Austria. M&A practitioners should take note of the provisions introduced by the new law when evaluating whether it is better to rely on the default rules or whether separate contractual clauses should be drafted.

Place of fulfilment

Austrian civil law differentiates between three types of obligation, determined in relation to the place of their respective performance:

- obligations to be performed at the debtor's domicile or place of business;
- obligations to be performed at the creditor's domicile or place of business; and
- obligations to be fulfilled by transporting the goods from the creditor to the debtor.

Under existing law, monetary obligations were considered to be fulfilled by way of transport (ie, the debtor could discharge its debt by sending the moneys to the creditor). The place of performance was the domicile or place of business of the debtor. However, the risk and expense for the transfer of funds also remained the debtor's responsibility.

With the introduction of the new law, monetary obligations are now considered to be fulfilled at the creditor's domicile or place of business.

Performance of monetary obligations

The new law entitles the debtor to choose between the fulfilment of obligations by:

- delivery of cash to the creditor's domicile or place of business; or
- wire transfer of the funds to the creditor's bank account.

However, a legal obligation to inform the debtor of the bank account to which such funds should be transferred has not been included in the law.

Therefore, in order for debtors in M&A transactions to avoid being forced to make burdensome physical payments or being subject to possible claims by the creditor for interest on late payments in circumstances where the notification of bank account details was not made on time, clear default bank account details should be requested and the creditor obliged to provide such information to the debtor before the transaction takes place.

Payment date

Under the former legal regime, in line with the qualification of monetary obligations as

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those to be fulfilled by way of transport, a timely instruction to the bank on the payment date on which the necessary funds should be wired to the creditor was considered to be sufficient. However, under the new rules, the monetary debt must already be available in the creditor's bank account on the due date. Therefore, it is now the debtor's obligation to ensure that the wire transfer is made on time.

Should the due date not be determined in advance but, for example, depend on the fulfilment of certain conditions (eg, performance of the return service or submission of an invoice), payment must be made without undue delay. Unless the parties have agreed on a time period or the creditor has informed the debtor about longer payment terms, this period will be interpreted restrictively. Only a payment made within a few days (the legal literature mentions two to four days) will conform to this requirement. Later payments will trigger the following consequences.

Consequences of late payment

Following a late payment, the creditor can charge interest on the transaction, beginning from the day following the due date. The new law has increased the default interest rate to 9.2% above the base interest rate as published by the Austrian national bank (although this is not identical to the reference interest rate of the European Central Bank). However, if the debtor is not responsible for the delay in payment, a default interest rate of 4% will apply.

In light of these consequences, M&A practitioners should not only think about the interest rate for the purchase price between signing and closing a transaction, but also carefully consider the risks and consequences of late payments under the agreement, in particular in relation to claims for breach of representations and warranties or indemnity provisions.

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