CHAMBERS
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Corporate M&A

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AUSTRIA

LAW & PRACTICE: p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Contributed by Graf & Pitkowitz Rechtsanwälte GmbH ***Authors:*** *Ferdinand Graf, Andreas Edlinger, Marija Križanac*

Law & Practice

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Graf & Pitkowitz Rechtsanwälte GmbH is a full-service law firm positioned to advise clients in all aspects of Austrian and European business law. Graf & Pitkowitz negotiates and structures business transactions and successfully represents its clients before Austrian and international institutions. The firm provides a full range of M&A services, covering everything from initial planning and structuring measures to due diligence reviews and the deal implementation. Due diligence reviews are conducted by a team of experts recruited from all practice groups so that all business law aspects are fully covered. The M&A practice group also handles cross-border transactions and has recently assisted in acquisitions in Italy, Moldova and Bosnia. Graf & Pitkowitz consists of more than 30 highly motivated specialists with outstanding national and international credentials, among which is a number of attorneys being admitted in other jurisdictions. Most of the lawyers have benefited from experience gained working for foreign law firms or international companies.

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1. Trends

1.1 M&A Market

The Austrian M&A market started slow into 2015 with a lower number of M&A deals in the first quarter. It is to be expected that – once the statistics are all in – the overall volume will be lower than 2014.

Highly publicised transactions included: (i) the sale of key business outlets (stores, megastores) of the insolvent BAUMAX chain of hardware and building supply stores to OBI; (ii) the acquisition of the app Runtastic by Adidas for a reported EUR220 million; (iii) the takeover of the frozen vegetable group Iglo Group by Nomad Foods; (iv) the failed takeover attempt by Deutsche Wohnen of the publicly listed CONWERT; and (v) the takeover of the listed BENE AG by a group of investors comprising Grossnigg and Bartenstein (their investment vehicles). Still ongoing and with unclear outlook is the struggle for control over the Casinos Austria AG, the state-owned holders of the Austrian casino and gambling licence.

1.2 Key Trends

Austria's banking sector is still suffering from the aftermath of the banking crisis in 2008/09. The Hypo Alpe Adria collapse is now being cleaned up via the HETA bad bank structure. Other banking groups also failed, though less spectacularly, including Volksbanken and Kommunalkredit. In a small country such as Austria such failures do not happen without having an impact on the general economic situation. While enterprises have cash reserves, the banks are hesitant to support risky deals; thus the lower number of transactions at the beginning of 2015.

We expect strong distressed M&A activities. The banks are sitting on their securities for bad loans (pledges on shares and land) and need to find buyers; these are often competitors of the debtors or international funds. We expect further M&A activity in the IT, hotel, and food and beverage industries. Real estate is always strong, though the key buyer group of past years – Russians – are suffering from a slow Russian economy and the EU sanctions in connection with the Ukraine crisis. Finally, nobody can yet assess whether the significant refugee influx from Syria and Turkey will have a long-lasting impact.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Private transactions rather than takeovers of listed companies account for the lion's share of M&A in Austria. The private sector is dominated by limited liability companies (*Gesellschaft mit beschränkter Haftung*); only a few larger

entities are operated via stock corporations (*Aktiengesellschaft*). Share deals outnumber asset deals. Share purchase agreements for shares in limited liability companies must be recorded in notarial deeds (*Notariatsakt*), otherwise no binding contract is entered into.

2.2 Primary Regulators
Private M&A deals require – depending on the turnover of the enterprises involved – merger clearance by the Federal Competition Authority (*Bundeswettbewerbsbehörde*).

Acquisitions of interests of 25% or more in enterprises located in Austria and active in certain sensitive industries require preapproval by the Ministry for Economic Affairs. Certain industries have regulators appointed who must be notified of transactions and sometimes must approve of shareholder changes and/or changes in the management (eg the 'fit and proper' test in the banking industry).

2.3 Restrictions on Foreign Investment
The Austrian Act on International Trade (*Außenwirtschaftsgesetz*) provides - roughly speaking - that an acquisition of 25% or more of the voting rights in an enterprise located in Austria and active in sensitive industries should acquire the prior approval of the Austrian Ministry for Economic Affairs. Such sensitive industries are, among others, defence, security, energy, water supply, telecommunications and infrastructure.

2.4 Antitrust Regulations
Under the Austrian Cartel Act (*Kartellgesetz*) a (pre-merger) notification of certain corporate combinations (as defined in the Cartel Act) is required, provided that the parties to the merger exceed certain turnover thresholds, namely, a combined worldwide turnover of at least EUR300 million, a combined Austrian turnover of at least EUR30 million and a worldwide turnover in excess of EUR5 million of at least two of the undertakings concerned. Different thresholds apply to media, bank and insurance businesses.

The Cartel Act does not define any additional requirements for its applicability, such as minimum market shares and/or a structural basis in Austria of one or more of the undertakings concerned. Thus even a merger occurring outside of Austria might still require Austrian merger clearance.

If the merger has a 'Community dimension', it falls only under the EU regulations but not under the Austrian regulation.

The authorities involved in the merger clearing proceedings are the Federal Competition Authority and the Federal Cartel Prosecutor (*Bundeskartellanwalt*). The initial filing is made with the Federal Competition Authority; in the event of dispute the matter goes to a special branch of the civil courts, the Cartel Court (*Kartellgericht*) and the Supreme Cartel Court (*Kartellobergericht*).

2.5 Labour Law Regulations
The Labour Constitution Act (*Arbeitsverfassungsgesetz*) provides for an obligation to notify the works council (*Betriebsrat*) of significant changes to the enterprise.

Companies that employ a certain minimum number of employees must establish a supervisory board with mandatory employee representation on such board. Thus, works council members will obtain information via their supervisory board delegates.

In the case of an asset deal, special regulations (*AVRAG*) provide that no termination of employment relationships may occur solely due to the sale of a business.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments
In 2015, the Supreme Court held that holders of participation capital (hybrid capital issued in connection with failing banks) have no shareholder rights but are to be treated solely as creditors.

In 2014, the Supreme Court held that the rule that any transfer of a share in a limited liability company needs to be made in the form of a notarial deed does not include cases of trust relationships (*Treuhandvereinbarungen*).

3.2 Significant Changes to Takeover Law
Before 2014, decisions issued by the Takeover Commission (*Übernahmekommission*) - leaving aside decisions on administrative law penalties - were not subject to ordinary appeal through administrative channels; only an appeal to the Austrian Constitutional Court was possible. As of 2014, decisions issued by the Takeover Commission are subject to ordinary appeal with the Austrian Supreme Court.

There were no statutory changes to takeover law in 2015 – currently, no major statutory changes are foreseen in the near future.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies
Stakebuilding has to comply with the disclosure requirements as described in **4.2 Material Shareholding Disclosure Thresholds**, which also cover financial instruments. Stakebuilding will thus trigger the danger of creating publicity. If shares are acquired from a large shareholder, it is not uncommon to simultaneously launch a takeover procedure.

4.2 Material Shareholding Disclosure Thresholds

Any person who directly or indirectly acquires or sells listed shares must notify the Financial Market Authority (*Finanzmarktaufsicht*), the Vienna Stock Exchange and the target as soon as their voting rights reach, exceed or fall below the thresholds of 4%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 75% and 90%.

The statutory disclosure rules also cover financial instruments such as derivatives. In the third quarter of 2015 the disclosure requirements of Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, have been implemented in the Stock Exchange Act (*Börsegesetz*), which further harmonises the disclosure requirements in connection with financial instruments.

There are further notification requirements pursuant to the Takeover Act (*Übernahmegesetz*) (see **6.2 Mandatory Offer Threshold**).

4.3 Hurdles to Stakebuilding

The statutory reporting thresholds are mandatory. Statutory law provides for the option to introduce an additional reporting threshold of 3% in the Articles of a company. The Articles may furthermore reduce the controlling interest threshold of more than 30% established in the Takeover Act. Such reduced threshold also triggers a disclosure obligation.

4.4 Dealings in Derivatives

Dealing in derivatives is allowed.

4.5 Filing/Reporting Obligations

Financial instruments are subject to disclosure rules as pointed out in **4.2 Material Shareholding Disclosure Threshold**. There are no specific statutory competition rules covering financial instruments. In principle, only the exercise of option rights to acquire shares will trigger national merger control unless the option right itself bestows significant influence over the target company and its management.

4.6 Transparency

If disclosure-triggering thresholds pursuant to the Stock Exchange Act are met, the respective notification does not have to include the purpose of the acquisition. A takeover offer needs to disclose the bidder's intentions with respect to the future business operation of the target and to the extent that the offer concerns the bidder. If the bidder launches a takeover offer to acquire control, the intention of the bidder to acquire control will be evident and such offer will only be successful if more than 50% of the voting share capital is acquired.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

In private M&A there are no general disclosure obligations; as regards information given to the workforce see **2.5 Labour Law Regulations**.

Listed companies must publish insider information without delay. An approach over a deal and the signing of a non-binding letter of intent is usually not considered insider information. An ad hoc publication might be triggered well before the signing of an agreement, eg if contract negotiations are in a phase in which it is most likely that a deal will be reached. A listed company may, however, delay an ad hoc publication if such publication may harm its legitimate interests, there is no danger of misleading the public and the company can secure confidentiality.

5.2 Market Practice on Timing

The judgement of whether information qualifies as insider information is difficult to make and companies therefore struggle to comply with legal requirements. Companies hesitate to make negotiations for a deal public because they fear the disadvantages. A delay of ad hoc publication as explained **5.1 Requirement to Disclose a Deal** gives at least a legal instrument to overcome some of the disadvantages of having to go public early.

5.3 Scope of Due Diligence

The scope of due diligence significantly differs between private M&A and acquisitions of publicly listed companies.

In regard to publicly listed companies, only very limited due diligence is permitted; the board of directors is limited in its ability to grant access to the books (obligation to treat all the shareholders equally).

In private M&A deals, extensive due diligence is the standard. Physical and/or virtual data rooms are prepared as a basis for the due diligence exercise. Due diligence encompasses not only legal, tax and financial aspects, but also technical and environmental issues. The respective M&A agreements provide for specifically tailored representations and warranties taking into account the results of the due diligence. Usually the buyer also requests a warranty as to the correctness of the information provided.

5.4 Standstills or Exclusivity

In a private M&A deal the usual procedure would be that first the seller collects expressions of interest from several potential buyers; the basis therefore is an information memorandum or even just a "teaser." Out of such group of potential buyers usually a small number are permitted to do a first-phase due diligence. Those who wish to progress must give – depending on the strength of the seller – binding

or non-binding offers. Subsequently the remaining bidders enter into negotiations with the aim of concluding the deal. It is usually the buyer that demands exclusivity from that stage on, in order to be sure that serious negotiations are conducted.

5.5 Definitive Agreements
Pursuant to the Takeover Act and subject to strict confidentiality, the potential bidder is allowed to notify the potential target company of its intention to make an offer and to enter into respective negotiations with the target company even before such information is disclosed or published. The outcome of these negotiations can be documented.

6. Structuring

6.1 Length of Process for Acquisition/Sale
It is difficult to state an average time span from start to finish of an M&A transaction. Especially in the area of distressed M&A there can be very quick transactions (without representations and warranties, sale of business "as is"). In situations where complex shareholder structures need to be dealt with and where competition concerns or other regulatory issues need to be resolved, a transaction can drag on for half a year or longer.

6.2 Mandatory Offer Threshold
Up to an amount of 26% of voting share capital there is a safe haven without any notification or mandatory offer requirement.

An amount of voting share capital exceeding 26% but not exceeding 30% triggers a notification obligation to the Takeover Commission but does not trigger a mandatory offer (it may, however, lead to a suspension of voting rights above 26% and other regulatory measures).

Acquisition of a direct or indirect controlling interest or a qualified expansion of such controlling interest triggers a mandatory offer. An amount of voting share capital exceeding 30% is a controlling interest that triggers a mandatory offer although some exemptions apply, eg if there is another shareholder that holds the same amount of voting share capital.

Furthermore, a mandatory offer needs to be launched if the bidder acquires at least 2% of the voting share capital within 12 months and has a controlling interest as well as an amount of voting share capital not exceeding 50% (a 'creeping-in' provision which prevents the expansion of a controlling interest and unequal treatment of the equity holders, especially by a holder of a controlling interest that has been built up before the Takeover Act came into force).

6.3 Consideration
In the case of mandatory and voluntary offers to acquire control, a cash consideration must be offered (alternatively, an additional exchange offer for securities is possible).

An exclusive exchange offer for securities is only permitted in the case of a voluntary offer (an offer which is not aimed at acquiring a controlling interest or which is made by a shareholder with a controlling interest of 50%).

6.4 Common Conditions for a Takeover Offer
A mandatory offer must not be made conditional, with the exception of regulatory or merger control approvals. In the case of a voluntary offer or a voluntary offer to acquire control, such offers may be made subject to justified conditions whose fulfilment is totally out of control of the bidder (objectively verifiable MAC clauses have been permissible in past offers). In the case of unjustified conditions, the Takeover Commission may declare the offer unlawful and prohibit its implementation. Discussing conditions prior to the offer with the Takeover Commission is therefore recommended.

6.5 Minimum Acceptance Conditions
In the case of a voluntary offer, a bidder may seek a minimum acceptance threshold of 50.1%, 75% or 90% of the voting share capital. A 50.1% threshold will enable the bidder to take simple majority decisions. A 75% threshold will enable the bidder to amend almost all provisions of the Articles and a 90% threshold will enable the bidder to initiate a squeeze-out procedure of minority shareholders.

In the case of a voluntary offer to acquire control, such offer is ex lege conditional upon an acceptance threshold of more than 50% of the voting share capital – a higher threshold is thus possible.

6.6 Requirement to Obtain Financing
In the case of an offer subject to the Takeover Act, financing of the offer has to be secured before the offer is made. Furthermore, financing will be checked by an independent expert appointed by the bidder.

6.7 Types of Deal Security Measures
A break-up fee payable by the target must not be of a punitive nature and should therefore be limited to compensation for costs and expenses. There is a certain danger that a large break-up fee could be seen as a deterrent to competing bidders, which would violate the Takeover Act.

Exclusivity agreements between the bidder and the target may cover no-shop (the target is obliged to not actively seek other bidders) and no-market-test provisions (the target is obliged to not seek other bidders within a certain time period). The management of the target company is not obliged to actively seek other bidders and the absence of such an ob-

ligation serves as the basis for the argument that such exclusivity agreements are permissible. However, no-talk agreements (the target is obliged to not talk to other bidders) will most likely be considered as a breach of the Takeover Act, as the Takeover Act aims at promoting the interests of the investors whereas such no-talk agreements are in most cases detrimental to the investors (no-talk agreements can have a deterrent effect on competing bidders that can prevent the target from achieving a higher price).

An irrevocable commitment by a principal shareholder to tender its shares to the bidder will secure shares for the bidder even before the public offer is made (for details see **6.11 Irrevocable Commitments**).

Standstill clauses prohibit the bidder from acquiring or selling shares. Usually, the standstill clauses prevent the bidder from exploiting its informational advantage in the event of an unsuccessful bid. In the event of an unsuccessful bid, the bidder will be blocked already by the Takeover Act from a further bid or an acquisition which would trigger a mandatory offer for a period of one year as of publication of the failure of the offer.

6.8 Additional Governance Rights

Major shareholders may enter into an agreement pooling voting or request the right to nominate members of the supervisory board.

6.9 Voting by Proxy

Shareholders may appoint representatives who can exercise voting rights on their behalf in the shareholders' meeting. A listed company will make details of the process available on its internet page and in the invitation to the shareholders' meeting.

6.10 Squeeze-Out Mechanisms

Pursuant to the Austrian Act on the Squeeze-out of Minority Shareholders (*Gesellschafter-Ausschlussgesetz*), a majority shareholder holding no less than 90% of the share capital of a limited liability company or a stock corporation may squeeze out the remaining minority shareholders at an equitable price. The squeeze-out right is not limited to a preceding takeover offer. The minority shareholders are not entitled to block the squeeze-out but have the right of separate judicial review of the fairness of the compensation paid for their minority shares. If a squeeze-out follows a takeover offer, the consideration offered in the takeover bid is presumed to be fair where, through the acceptance of the offer, the bidder has acquired shares representing more than 90% of the voting share capital in the target. The Articles of a limited liability company or a stock corporation may exclude the squeeze-out right or may introduce a higher threshold than 90%.

6.11 Irrevocable Commitments

An irrevocable commitment by a principal shareholder to tender its shares to the bidder will secure shares for the bidder even before the public offer is made. The agreed price will also serve as a benchmark for the minimum price in a case of a mandatory or voluntary offer to acquire control.

Although there are good arguments for an irrevocable commitment by a principal shareholder being permitted under the Takeover Act, clearance of such agreements with the Takeover Commission is advisable.

A principal shareholder selling its shares before a takeover offer will usually ask for a top-up payment if a higher price is paid under a subsequent takeover offer.

7. Disclosure

7.1 Making a Bid Public

The bidder has to inform the target immediately about its intention to make an offer and has to publish such information as soon as its management and supervisory board have taken the decision to launch an offer or as soon as certain events trigger the obligation to make an offer (eg execution of a shareholder agreement which leads to a controlling interest triggering a mandatory offer). The information requirement may also be triggered by rumours (rumours that an offer is to be launched) or in case of market distortions (considerable fluctuation of the share price presumably due to preparation of an offer). The information triggers a period of ten trading days to notify the offer to the Takeover Commission. For mandatory offers the notification period is 20 trading days as of acquiring a controlling interest.

7.2 Types of Disclosure

Following the announcement of the bid the bidder has to prepare an offer document and to appoint an independent expert who reviews the offer document.

After filing of the offer document and the report of the expert (including their opinion) with the Takeover Commission, the bidder has to publish these documents within 12 to 15 trading days unless the Takeover Commission prohibits publication. The offer publication triggers the deadline for the acceptance of the offer and the target's statement.

The management (and the supervisory board) of the target have to consider and review the offer. They have to make a mandatory statement which also needs to cover the offer price. Furthermore, a recommendation should be given whether the offer should be accepted or rejected. The target's statement together with the statement of its independent expert needs to be published within ten trading days after publication of the offer but no later than five trading days before the end of the acceptance period. Prior to the publication the

documents need to be filed with the Takeover Commission and the works council.

After expiration of the offer period the bidder must publish the result of the offer procedure.

7.3 Requirement for Financial Statements
If the consideration totally or partially consists of shares, a prospectus has to be prepared. Financial statements will need to be part of the prospectus, which will usually be IFRS financial statements on a group level and Austrian GAAP financial statements on a standalone level.

7.4 Disclosure of the Transaction Documents
All relevant documents have to be disclosed to the Takeover Commission.

8. Duties of Directors

8.1 Principal Directors' Duties
In general, the principal directors' duties in a business combination do not differ from those in any other business situation. Stock corporations have two governing bodies: the management board (*Vorstand*), which is responsible for the overall management of the company, and the supervisory board (*Aufsichtsrat*), which supervises the management board's activities. Both governing bodies have one main duty, which is to apply the diligent care of a prudent and conscientious business representative while fulfilling their tasks. This main duty is owed to the company as such and is aimed at its wellbeing. For this wellbeing, not only the interests of the stakeholders, but also those of the employees and the public are to be taken into consideration. In the case of a business combination, the Takeover Act explicitly states that also the interests of holders of participation instruments and of the creditors of the company are to be taken into consideration.

8.2 Special or Ad Hoc Committees
Due to the two-tier board system described in **8.1 Principal Directors' Duties**, it is rather uncommon for special or ad hoc committees to be established in business combinations. Only very large stock corporations with a large number of board members sometimes tend to establish such committees.

8.3 Business Judgement Rule
Austrian courts are familiar with the business judgement rule. Throughout the years, they developed precedent that showed tendencies towards its application. At the beginning of 2016, the business judgement rule was even expressly incorporated into Austrian law. The (new) Austrian business judgement rule says that board members are acting in compliance with the diligent care standard described above – and are thus not liable to the company – if their business decisions are based on adequate information and are not guided by considerations that do not concern the business and if they can assume that they are acting in the best interest of the company. This business judgement rule also applies to takeover situations.

8.4 Independent Outside Advice
Austrian targets tend to seek outside advice from external experts. In the case of a public takeover, both the bidder and the target company are even obliged to appoint an independent expert (usually an auditor) each. Both experts have to assess the offer in a written statement; the expert appointed by the target company further has to assess the obligatory statements of the target company's boards in which the boards take a view on whether or not to accept the offer.

8.5 Conflicts of Interest
The main task of the supervisory board is to supervise the management board's activities. Checking for conflicts of interest of management board members with regard to certain business decisions also falls within the scope of this task. Shareholders have the right to initiate special audits to check on the business activities of the management board by voting in favour of such special audit in the shareholders' meeting. Conflicts of interest have also to be taken into consideration in these special audits. However, no big conflict of interest cases regarding M&A transactions became public in 2015.

9. Defensive Measures

9.1 Hostile Tender Offers
The Takeover Act does not distinguish between friendly and hostile takeovers; both takeover forms are permitted – hostile takeovers are less common in Austria. In both cases the management of the target must be neutral and is not allowed to limit the shareholders' free discretion to come to a decision to accept or reject the offer.

9.2 Directors' Use of Defensive Measures
As explained above, there is a requirement of the management (and the supervisory board) of the target to remain neutral in the event of a takeover offer and even before as soon as the bidder's intention to launch an offer becomes known to the target. In principle, no measures that frustrate the outcome of the offer must be taken unless the shareholders' meeting specifically consents to such a measure (the Takeover Act mentions eg the issuance of securities). The Takeover Act explicitly allows for the management of the target to search for a competing bidder ("white knight") without the consent of the shareholders' meeting.

9.3 Common Defensive Measures
Defensive measures may be set before the bidder's intention to launch an offer becomes known to the target (preventive measures), either based on the approval of the shareholders' meeting or in the interest of the target. Such defensive meas-

ures may comprise employee stock option plans, a staggered supervisory board (overlapping terms of supervisory board members), conferring nomination rights to the supervisory board on certain shareholders and change of control clauses in important contracts.

9.4 Directors' Duties
Defensive measures must be in the interest of the target; measures that aim to prevent takeover offers altogether may be in breach of the law.

9.5 Directors' Ability to "Just Say No"
The management (and the supervisory board) of the target have to consider and review the offer. They have to make a mandatory statement. The management may propose to the shareholders in such statement not to accept the offer and explain their reasoning.

10. Litigation

10.1 Frequency of Litigation
It is not common that litigation arises in connection with M&A transactions. In light of the large number of (especially private) M&A transactions, the actual number of court cases evolving in connection with M&A transactions is small. However, in times of financial crises and lack of funds, litigation becomes more frequent.

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11. Activism

11.1 Shareholder Activism
Shareholder activism is an important force in Austria. There are various groups supporting small shareholders. There is a consumer group (VKI) that supports court proceedings brought by individual investors. These groups try to push up the price in the case of public takeovers and fight for shareholders' interests in squeeze-out situations (ie less than 10% is left on the market and the 90%-plus shareholder wishes to squeeze the minority shareholders out).

11.2 Aims of Activists
It is rare that these shareholder activist groups try to actively push their companies into certain business combinations; usually they are only responding to shareholder interests in the case of ongoing business transactions.