PUBLICATION UPDATE

INTERNATIONAL SECURITIES LAW AND REGULATION

RELEASE 1 • 2011

HIGHLIGHTS

Juris Publishing is pleased to present Release 1 of *International Securities Law and Regulation.* This release contains comprehensive revisions to the chapters on:

- **Austria**
- **Hong Kong**
- **Italy**
- **Mexico**
- **Portugal**
- **Switzerland**

This release also contains a new chapter on:

- **China**
- **Colombia**

Juris Publishing and the authors welcome your questions, suggestions and comments. Please contact us at Juris Publishing, Inc, 71 New Street, Huntington, N.Y. 11743 USA.

Austria

Austria

Otto Wächter and Andreas Sereinig
Graf & Pitkowitz Rechtsanwälte GmbH
Vienna, Austria

Introduction

Regulatory System

Austrian securities regulations, and in particular the rules concerning trading on the stock exchange, underwent major reforms beginning in the late 1990s. In March 2006, the Austrian Parliament (*Nationalrat*) passed legislation implementing Takeover Directive 2004/25/EC. The Takeover Act simplifies the definition of 'controlling interest' and introduces a new 'squeeze out' procedure that may be used by a bidder following a successful takeover.

Membership in the exchange is no longer limited to credit institutions with a banking licence in Austria. Foreign investment firms and other institutions that provide securities services can now apply for admission as full members of the exchange. New European Community EC Directives concerning the harmonisation of market supervision and trading rules have been issued and already implemented by Austrian law. Fully automated electronic trading and market maker systems (Xetra® and OMex®[1]) were introduced offering the possibility to conclude transactions on the exchange without going through admitted brokers. In April 2007, the Austrian Parliament implemented the Market in Financial Instruments Directive (MIFID) 2004/39/EC.[2] Therefore, the Austrian legislator amended the Banking Act, Stock Exchange Act, Investment Fund Act, Capital Market Act, and Financial Market Supervision Act, and enacted the Securities Supervision Act 2007. It came into force on 1 November 2007. Thus, this chapter can only provide an outline of some of the most relevant issues in the field of securities regulations in Austria.

Legal Sources

Regulations relevant for securities and investment business can be found in a large number of federal laws. The most important sources of federal law containing securities regulations are:

- The Stock Exchange Act (*Börsegesetz*);
- The Banking Act (*Bankwesengesetz*);

1 OMex® has been replaced by the Eurex® trading system as of 26 April 2010. For a more detailed information, see text relating to 'Electronic Trading Systems'.
2 Amended through Directive 2008/10/EC.

- The Stock Corporations Act (*Aktiengesetz*);
- The Securities Supervision Act 2007 (*Wertpapieraufsichtsgesetz*);
- The Takeover Act (*Übernahmegesetz*);
- The Capital Market Act (*Kapitalmarktgesetz*);
- The Depositories Act (*Depotgesetz*);
- The Investment Funds Act (*Investmentfondsgesetz*); and
- The Financial Market Supervision Act (*Finanzmarktaufsichtsgesetz*).

Austria has implemented numerous EC Directives on securities business and market supervision, including:

- The Capital Adequacy Directive;[3]
- The Money Laundering Directive;[4]
- The Second Directive on the Coordination of Banking Law;[5]
- The Transparency Directive;[6]
- The Securities Admission Directive;[7]
- The Disclosure Directive;[8]
- The Public Offer Prospectus Directive;[9]
- The Insider Dealing Directive;[10] and
- The Market in Financial Instruments Directive.[11]

Authorities

Market supervision, in general, lies within the competence of the exchange operating company that is operating the exchange and is empowered to decide on the admission of market participants and securities. These competences are granted by public law.

The exchange operating company supervises the trade by electronic means and is able to gather all necessary information from the market participants. All

3 European Community Directive 93/6/EEC, amended through Directive 2005/1/EC.
4 European Community Directives 91/308/EEC and 2001/97/EC.
5 European Community Directive 89/299/EEC, amended through Council Directive 92/16/EEC.
6 European Community Directives 88/627/EEC and 2004/109/EC, amended through Directive 2008/22/EC.
7 European Community Directive 79/279/EEC.
8 European Community Directive 82/121/EEC.
9 European Community Directives 89/298/EEC and 2003/71/EC, amended through Directive 2008/11/EC.
10 European Community Directives 89/592/EEC and 2003/6/EC, amended through Directive 2008/26/EC.
11 European Community Directive 2004/39/EC, amended through Directive 2008/10/EC.

members of the exchange have wide-ranging disclosure duties towards the stock operating company.

The Stock Exchange Commissioner and his Deputies must be appointed by the Minister of Finance. They have access to the meetings of the managing and supervisory board and the shareholder of the exchange operating company and have a veto right on all decisions made in such meetings. They must report to the competent supervisory authority.

On 1 April 2002, the Austrian Financial Market Authority (FMA) was established through the Financial Market Supervision Act. All supervisory tasks and resources were transferred from the Federal Ministry of Finance and the Austrian Financial Market Authority to the new supervisory body.

Thus, the Austrian Financial Market Authority is now the single, statutory supervisory body directly responsible for banking, insurance and pension funds, securities, and stock exchange supervision. The Austrian Financial Market Authority is vested with administrative penal power and the power to enforce its supervisory rulings as well as to issue ordinances.

Within the Austrian Financial Market Authority, an Executive Board and a Supervisory Board are established. The Executive Board manages all of the FMA's operations and conducts the FMA's business. The Supervisory Board oversees the management and the conduct of business of the FMA.

The Takeover Commission decides on the lawfulness of voluntary takeover bids, as well as on the duty to make mandatory bids. Relevant information about the acquisition of controlling holdings must be transmitted to the Takeover Commission.

Procedures

The Stock Exchange Act, the Securities Supervision Act 2007, and the Takeover Act state special procedural rules for the competent authorities. Nevertheless, all the main procedures concerning securities are administrative procedures according to the General Administrative Procedures Act 1991.

Parties to procedures concerning the admission of securities can appeal to the Appellate Committee for the Stock Exchange established by the Minister of Finance. Decisions made by the exchange operating company, and decisions imposing penalties by the FMA or the Takeover Commission, can always be appealed to the Administrative Court.

Legal Order and Regulatory Interests

Admission

Market Participants

Domestic Exchanges. The only domestic securities exchange is the Vienna Stock Exchange. This is operated by a legal entity under private law (Vienna Stock Exchange AG — *Wiener Börse AG*) licensed by the Federal Minister of Finance. Membership in the Stock Exchange is, according to article 15 of the Stock Exchange Act, limited to:

- Credit institutions, according to article 1, paragraph 1, of the Banking Act, which are licensed to carry on any business specified in article 1, paragraph 1(7), of the Banking Act;
- Credit institutions in member states of the European Union (EU) other than Austria (a) licensed in their home member state to provide services according to section A(1)–(3) of the Annex to Council Directive 2004/39/EC or authorised pursuant to article 3(1), *litera* p, of Council Directive 2006/49/EC, with such authorisation including the freedom of establishment and services, (b) in compliance with the capital requirements according to Council Directive 2006/49/EC and, unless the respective company is a local firm, are, as far as the compliance with these regulations is concerned, subject to the supervision by the competent authorities of the home member state, and (c) notified by the competent authority of the home member state, according to article 9, paragraph 2 or 6, of the Banking Act;[12]
- Local firms require confirmation by the competent authority of the home member state or any other evidence with respect to the compliance with the requirements pursuant to article 6 of Council Directive 2006/49/EC;[13]
- Investment firms whose office is not in an EEA member state, provided they fulfil the requirements of article 2, paragraph 31(b), of the Banking Act;
- Admitted clearing agents with their registered office or admission in a European Economic Area (EEA) member state so long as they only participate in clearing/settlement pursuant to article 2(33) of the Banking Act;[14]
- Companies with their registered office in Austria or in another EEA member state who are licensed to trade for their own account in commodity derivatives pursuant to article 1(6)(e)–(g) and (j) of the Securities Supervision Act 2007,

12 In the case of local companies, a confirmation of the competent authority of the home member state or any other evidence which certifies compliance with the provisions pursuant to article 6 of Council Directive 2006/49/EC will be considered sufficient.

13 Stock Exchange Act, art 15, para 1(2)(c).

14 Stock Exchange Act, art 15, para 1(5).

even if their licence is not based on article 1(1)(7)(a) of the Banking Act;[15] and

- Undertakings with their registered office in a third country (article 2, figure 8, of the Banking Act) that are licensed to carry out at least one of the businesses pursuant to article 1, paragraph 1, figure 7, letters b–f, of the Banking Act.

Credit institutions, according to article 1, paragraph 1, of the Banking Act, are holders of a complete banking licence for Austria. As securities business is a part of banking business, according to the Banking Act, they may become members of the Stock Exchange and most of them, in fact, are.

Credit institutions, investment firms under the Investment Services Directive, and local firms whose registered office is in an EEA member state other than Austria may be admitted as members to the Stock Exchange if they are allowed to conduct securities business in their home member state and are subject to supervision by their home authorities. Their competent authorities may notify the relevant facts to the exchange operating company, which decides on the applicant's membership.

Investment firms whose registered office is in a non-EEA state may be admitted if they have a banking licence in a country that is a member of the Basel Committee of Banking Supervision, and if they are subject to supervision requirements that are at least equal to European Union (EU) standards.

Undertakings with their registered office in a third country may be admitted to the Stock Exchange, provided that they are licensed to carry out at least one of the specified businesses there. According to the Stock Exchange Act, membership in the exchange also requires that:

- No facts are known which indicate that the applicant might not be as reliable as necessary to be able to take part in trading on the exchange;[16]
- The applicant is not restricted in its capacity to do business, in particular due to insolvency or because it has been put under receivership;[17]
- The applicant or one of its officers has not been convicted by law for an offence under article 13 of the Business Code (*GewO*), unless the violation of article 13 is insignificant or the sentence has become extinct in the criminal record;[18]
- The applicant or one of its officers has not been punished finally and conclusively pursuant to article 48, 48b, and 48c of the Stock Exchange Act, unless the violation of article 48 has been insignificant or the sentence has become extinct in the criminal record;[19]

15 Stock Exchange Act, art 15, para 1(6).
16 Stock Exchange Act, art 14(1)(1).
17 Stock Exchange Act, art 14(1)(2).
18 Stock Exchange Act, art 14(1)(3).
19 Stock Exchange Act, art 14(1)(4).

- No facts are known that would be detrimental to the reputation of the domestic market or hinder the maintenance of orderly and fair trading;[20]
- The applicant joins an existing trading and settlement system or a suitable settlement and clearing system pursuant to article 15a of the Stock Exchange Act[21] and deposits the respective collateral;[22] and
- The applicant nominates at least one dealer who will either participate in the trading on the floor or has access to the automated trading system.[23]

Admitted investment firms and other firms with their registered office in a non-EEA state may retain their membership with a securities exchange only so long as the following remain in place. On the derivatives market, at least one authorised clearing participant (article 2(48) of the Banking Act) and, on the cash market, at least one authorised credit institution has its registered office and licence in an EEA member state and is a member of the domestic securities exchange, steps into deals handled on the domestic exchange by admitted investment firms or companies, and guarantees the fulfilment of exchange transactions *vis-à-vis* the exchange operating company.[24]

Admitted investment firms and other firms with their registered office in a non-EEA state may retain their membership with a securities exchange only so long as the following remain in place. On the derivatives market, at least one authorised clearing participant (article 2(48) of the Banking Act) and, on the cash market, at least one authorised credit institution has its registered office and licence in an EEA member state and is a member of the domestic securities exchange, steps into deals handled on the domestic exchange by admitted investment firms or companies, and guarantees the fulfilment of exchange transactions *vis-à-vis* the exchange operating company.[25]

Official brokers (*Sensale*) are the officially appointed self-employed intermediaries of the exchange. The Austrian Financial Market Authority must appoint an adequate number of official brokers in so far as the conclusion of dealings is not carried out exclusively by means of an automated trading system. These appointments must be confirmed by the governor of the province and published in the *Official Gazette* of the *Wiener Zeitung* and in the organ of the exchange. Official brokers can be appointed for all or for some particular types of intermediary dealings. To become an official broker, a person must:

- Be at least 24 years of age;
- Have full legal capacity;
- Have successfully passed the official broker examination;

20 Stock Exchange Act, art 14(1)(5).
21 Stock Exchange Act, art 15, para 3.
22 Stock Exchange Act, art 15(3)(1).
23 Stock Exchange Act, art 15(3)(2).
24 Stock Exchange Act, art 15, para 4.
25 Stock Exchange Act, art 15, para 4.

- In the case of the appointment as official broker for the securities exchange *(Wert- papierbörse)*, have at least three years of experience in the field as an official broker's assistant or as an employee of a non-official broker; or
- In the case of the appointment as official broker for the commodity exchange *(Warenbörse)*, have at least five years of professional experience in a corresponding line of business or be a judicially certified expert for such a line of business.[26]

Official brokers have the duty and the right to fix the official exchange price. They have the right to mediate contracts for negotiable instruments, as well as for the admissible auxiliary transactions concluded on the exchange and are entitled to a brokerage (broker's fee). Official brokers for the Commodity Exchange are also entitled to render expert opinions as standard practice in their line of business.[27] Official brokers are required to be present on the exchange during the whole of the trading hours and to keep records. The official brokers are under a duty to carry out the transactions entrusted to them with the proper care of registered commercial businesspersons.

They must avoid any activities causing a negative impression and/or influence on their impartiality, the credibility of the prices they determine, or the certificates they issue.[28] The activities of official brokers are supervised by the exchange operating company, which in particular has the right to look into all the books of the broker for this purpose. The official brokers can be removed from office for certain offences and are obliged to retire at the age of 65.[29]

Non-official brokers act as intermediaries in dealings for those negotiable instruments that have been assigned to them by the exchange operating company. Non-official brokers may be admitted by the exchange operating company if they are authorised to conduct the banking activities mentioned in article 1, paragraph 1(7), of the Banking Act with other credit institutions licensed to perform the activities, as referred to in article 2(23) of the Banking Act or investment firms according to article 4(1) of Council Directive 2004/39/EC. Non-official brokers may not officially fix exchange prices.

Dealers are physical persons who are authorised to place orders and to conclude dealings in the name of members on the exchange or within the trading system and who have been admitted as dealers to the exchange by the exchange operating company. To be admitted as dealers, physical persons have either to be a member of the exchange themselves, to belong to the management, or to be employed by the management of one of the members. They must meet the requirements stated in article 14 of the Stock Exchange Act (see text, above). Furthermore, they must have the experience and qualifications to participate in Stock Exchange trading without causing disruptions.

26 Stock Exchange Act, art 33, para 1(3a and b).
27 Stock Exchange Act, art 35, para 1, sent 2.
28 Stock Exchange Act, art 36, para 1.
29 Stock Exchange Act, arts 32–44.

Electronic Trading Systems. Electronic trading systems are only available to Stock Exchange members. The two systems used in Austria are Xetra® and Eurex®. Xetra® (Exchange Electronic Trading) is the electronic trading system of the exchange of Frankfurt (GE), which was introduced to the Austrian exchange in 1999 for the trading in securities. Xetra® consolidates all orders in a central and open order book.

Nevertheless, it is still the official brokers who fix the exchange prices; they only use the electronic system for calculating the prices from the electronic order books. The prices that allow the maximum number of transactions are fixed as the official prices. The market participants can have an overview of the entire market situation but cannot view the orders of other members.

Through the Eurex® trading system, which replaced OMex® as of 26 April 2010, financial futures contracts and options are traded. Trading is carried out exclusively at continuously determined prices (continuous trading). All new orders received are immediately checked to see if they can be executed against existing orders in the order book. The execution of orders takes place according to a price and time priority. The following types of orders are available:

- Limit Order;
- Market Order;
- Stop Order (only for futures); and
- One-cancel-the-other-Order (only for futures).[30]

Off-Market Transactions. Off-market transactions also can be carried through by Stock Exchange members, eg, between credit institutions. Even the securities listed on the official or semi-official market may be traded off the floor. Exchange members do not have the duty to trade listed securities exclusively on the stock market.

Credit institutions have the possibility to adjust buy-and-sell offers sent to them by different clients themselves, or to sell their own securities to a bidder-client.

Nevertheless, such off-floor turnovers must be reported to the exchange operating company by the exchange members on every exchange trading day.[31] Members who also deal in officially listed securities off the exchange must publish these turnovers in an official bulletin, unless bonds and other forms of secured debt, block transactions, or highly illiquid instruments are concerned. For the purpose of insider dealing investigations, off-floor turnovers also must be reported according to article 64 of the Securities Supervision Act 2007 (WAG).

30 See http://en.wienerborse.at/marketplace_products/trading/tradingsystems/eurex.html.
31 Stock Exchange Act, art 65.

Securities

National Treatment

In general, foreign issuers may list on the Austrian Stock Exchange under national conditions. Shares of a company with its registered office outside of Austria, which are not listed on an exchange in the company's home country or in the country where they are mainly being traded, may only be admitted if the company can give a plausible explanation confirming that it is not for reasons of investor protection that its shares have remained unlisted in these countries.[32]

Issuer Requirements

Admission to the Official Market. The establishment of the issuer's company and the statutes or the articles of association agreement of the issuer must comply with the laws of the country in which the issuer has its registered office. A joint-stock company whose shares are being admitted for the first time must have existed for a period of at least three years and have published annual accounts in accordance with applicable regulations for the three complete financial years preceding the application.

If the joint-stock company is the universal successor to another joint-stock company and the accounting is continuous, the period of existence of this other company is to be taken into consideration.

The requirement of the three-year period of existence may not apply if this is in the interests of the issuer and of the public and documents are provided containing information equivalent to the annual accounts of the past three years as regards the evaluation of the economic and legal status of the issuer. In any case, the joint-stock company must have published at least one full year's accounts. Capital-market-oriented companies must publish their consolidated accounts in accordance with the accounting regulations IAS/IFRS.

Admission to the Semi-Official Market. The rules promulgated for the admission to the Official Market also apply to the Semi-Official Market. In case shares are being admitted for the first time, the joint-stock company must have existed for a period of at least one year.

Securities Requirements

Admission to the Official Market. The securities must have at least a total nominal value of €2.9 million for shares and of €725,000 for other securities. In the case of admission of no-par securities, the issuer must certify that the market value is predicted to reach at least €725,000; the total number of such securities must be at least 20,000. In the case of non-voting preferred shares issued by Austrian stock corporations whose ordinary shares are not admitted

32 Stock Exchange Act, art 71.

to listing on the Official Market, the nominal value of the preferred shares must exceed €1 million.[33]

This restriction does not apply to the admission of debt securities that are issued constantly without being restricted to a subscription period or to a certain limited maximum amount. The securities must be in compliance with federal and state laws governing securities; this applies *mutatis mutandis* to foreign regulations of the country in which the security has been issued. If the securities must be entered into an official register, this entry must have been effected.

The denominations of the securities and the number of certificates must correspond to trading requirements and the needs of potential investors. The application for admission must be made for all shares already issued of the same kind or for all securities of the same offering; however, shares which may not be traded for a certain period for legal reasons can be excluded from admission if this exception does not prejudice the bearers of the shares to be admitted, and the prospectus or the decree announcing the admission refers to this exception.

Furthermore, the securities must have a certain distribution in the general public. As far as shares are concerned, at least €725,000 nominal share capital or, in the case of no-par shares, at least 10,000 shares must be in public possession or must be offered to the public for sale. These requirements do not apply if the shares have already been admitted to the official listing of one or more foreign exchanges and have an adequate distribution outside the country, or in the case of subsequent listing of further securities of the same type.

Securities that grant conversion or subscription rights to other securities to the owners may not be admitted later than the underlying securities. Exceptions can be made if the issuer proves that the owners will have all the information to judge the value of the underlying securities. This will be assumed if the underlying securities are officially listed on an internationally recognised Stock Exchange and the admission prospectus contains all necessary information.[34]

For the admission of debt securities that are issued continuously without any restriction to a subscription period or a certain maximum amount, the restriction of article 66a(1) figure 2 of the Stock Exchange Act will not apply.[35]

Debt securities of international organisations that are legal entities under public law must be freely negotiable to be admitted to official listing; the application for admission to listing must be made for all debt securities of one issue. Debt securities issued by the federal government, the provinces, and countries party to the EEA Agreement must be admitted to official listing on every Stock Exchange. Certificates that represent shares may be admitted if the issuer meets the requirements of article 66a(1)(1)–(3) of the Stock

33 Stock Exchange Act, art 66a, para 1(2).
34 Stock Exchange Act, art 66a, para 1(8).
35 Stock Exchange Act, art 66a, para 4.

Exchange Act, the certificates meet the requirements of article 66a(1)(4)–(8) of the Stock Exchange Act, and the issuer offers a guarantee for the fulfilment of its obligations to the bearers of the certificate.

Admission to the Semi-Official Market. The securities must have at least a total nominal value of €725,000. In the case of admission of no-par securities, the issuer must certify that the market value is expected to reach at least €362,500 and the total number of such securities must be at least 10,000. This restriction does not apply to the admission of debt securities that are issued constantly without being restricted to a subscription period or to a certain limited maximum amount. The securities must be in compliance with federal and provincial laws governing securities; this applies *mutatis mutandis* to foreign regulations of the country in which the security has been issued. If the securities must be entered into an official register, this entry must have been effected.

The securities must have a certain distribution in the general public. As far as shares are concerned, at least €181,250 nominal share capital or, in the case of no-par shares, at least 2,500 shares must be in public possession or must be offered to the public for sale. These requirements do not apply if the shares have already been admitted to official listing of one or more foreign exchanges and have an adequate distribution outside the country or in case of subsequent listing of further securities of the same type.

The securities to be listed must be freely negotiable, but there are two exemptions. Securities that are not fully paid up may be admitted subject to guarantee that trading on the exchange will not be prevented by this and provided the prospectus or the decree announcing the admission refers to the lack of full payment and the measures taken in this respect. Shares that can only be purchased subject to prior authorisation may be admitted if trading on the exchange is not prevented by the authorisation requirement.

The denominations of the securities must meet trading requirements. The application for admission must be made for all shares already issued of the same kind or for all securities of the same offering, but shares that may not be traded for a certain period for legal reasons can be excluded from admission provided this exception does not prejudice the bearers of the shares to be admitted and the prospectus or decree announcing the admission refers to this exception.

Securities that give the bearer conversion rights or subscription rights to other securities may not be admitted later than the underlying securities. Exceptions can be made if the issuer proves that the bearers will have all the information necessary to judge the value of the underlying securities. This will be assumed if the underlying securities are officially listed on an internationally recognised Stock Exchange and the admission prospectus contains all the necessary information.

Certificates that represent shares may be admitted if the issuer meets the requirements of article 68(1)(1)–(3) of the Stock Exchange Act, the certificates meet the requirements of article 68(1)(4)–(9) of the Stock Exchange Act, and the

issuer offers a guarantee for the fulfilment of its obligations to the bearers of the certificate.

The print of securities must be counterfeit-proof and must facilitate the simple and rapid settlement of securities transactions. The Austrian Financial Market Authority can decree directives for the print of securities and state additional security characteristics. If the securities of a foreign issuer do not fulfil these directives, the shares will only be admitted when:

- The issuer certifies that the securities fulfil the requirements of the listing authorities of the country of its registered office;
- The public is informed that the print does not meet Austrian standards;
- The deviation from Austrian standards does not endanger investors' interests of protection; and
- The country of the registered office of the issuer is prepared to admit Austrian securities under the same conditions.

Prospectus Requirements

In General. When securities are offered to the public for the first time or when the issuer applies for admission to listing on the exchange, a prospectus must be published at least one banking day before the offering or before the announcement of the listing.[36]

The prospectus must be written and published in German, English, or in another language accepted by the Financial Market Authority if the securities may only be offered to the public in Austria or admission to the regulated market may only be applied for in Austria.[37]

A prospectus which has been notified to the Financial Market Authority pursuant to article 18 of EC Directive 2003/71/EC can be published in German, English, a language accepted by the Financial Market Authority, or in any other language commonly used on international financial markets. The Financial Market Authority may require publication of a German summary of the prospectus.[38]

The prospectus must contain information enabling the investor to make well-founded judgments on the securities, the company's assets and liabilities, the earnings situation, future prospects of the issuer and every guarantor, and the rights related to the securities and predispositions. In particular, it must contain:

- Information about the issuer and the securities;
- A summary listing the major characteristics and risks regarding the issuer, the guarantors, and the securities; and

36 Stock Exchange Act, art 74; Capital Market Act, art 2.
37 Capital Market Act, art 7b.
38 Capital Market Act, art 7b, para 3.

- Certain warning statements pursuant to the Capital Market Act.[39]

If the final issuing price and the issuing volume have not been determined, the prospectus must contain either the criteria and/or conditions used to determine the price and volume and the market price respectively or the confirmation that the consent to purchase/subscribe the securities can be revoked within two banking days after the deposit of the final issuing price and the issuing volume with the Financial Market Authority.[40]

Outlook. Commission Regulation (EU) 583/2010 of 1 July 2010,[41] which was to be in force as of 1 July 2011, implements Directive 2009/65/EC[42] as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website. Directive 2009/65/EC specifies the main principles that should be followed in preparing and providing key investor information. Directive 2009/65/EC further defines the requirements of the key investor information concerning the format and presentation, the objectives, the main elements of the information that is to be disclosed, who should deliver the information to whom, and the methods that should be used for such delivery.

Details on the content and format have been implemented by Regulation 583/2010[43] in accordance with the European Securities Committee.[44] By using the implementing measure of a Regulation, all stakeholders should benefit from a harmonised regime on the form and content of the disclosure, which will ensure that information about investment opportunities in the UCITS[45] market is consistent and comparable.[46]

Due to the transparency for the investors, whether or not a fund is likely to be suitable for their needs, Regulation 583/2010 specifies in Chapters III and IV the content of the information on investment objectives (articles 7–24) and the investment policy of UCITS (articles 25–37). For this reason, the information should indicate whether returns can be expected in the form of capital growth, payment of income, or a combination of both. The description of the investment policy should indicate to the investor what the overall aims of the UCITS are and how these objectives are to be achieved. With regard to the financial

39 Capital Market Act, art 7, para 2.
40 Capital Market Act, art 7, para 5.
41 Commission Regulation (EU) 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website (Regulation 583/2010).
42 Directive 2009/65/EC of the European Parliament and of the Council ('Directive 2009/65/EC).
43 Recital 1 of the Regulation 583/2010.
44 Recital 20 of the Regulation 583/2010.
45 Undertakings for Collective Investment in Transferable Securities (UCITS).
46 Recital 2 of the Regulation 583/2010.

instruments in which investments are to be made, only those that may have a material impact on UCITS' performance need to be mentioned, rather than all possible eligible instruments.[47]

In order to appropriately inform the investors about the charges they will have to incur and their proportion to the amount of capital actually invested into the fund, Regulation 583/2010 further specifies the common format for the presentation and explanation of charges, including relevant warnings.[48]

Article 9 of Regulation 583/2010 stipulates that consistency should be ensured between the explanation of risks in the key investor information document and the management company's internal processes related to risk management, established in accordance with Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC as regards organisational requirements, conflicts of interests, conduct of business, risk management and content of the agreement between a depositary and a management company. These changes are not yet reflected in this chapter.

Issuers with a Registered Seat in a Non-European Economic Area State. The Financial Market Authority can approve a prospectus completed pursuant to the legal provisions of a non-EEA state if:

- The prospectus has been completed in accordance with the international standards defined by international organisations of securities regulatory agencies, including the disclosure standards of the IOSCO; and
- The disclosure duties are equal to the duties contained in the Capital Market Act.[49]

Co-operation in the European Economic Area. At least once a year, issuers must provide a document containing or referring to all information that has been published and made available to the public within the last 12 months in an EEA member state or another state pursuant to regulations regarding the supervision of securities, issuers, and securities markets.[50]

The issuers must refer to the information required by the rules of Company Law Directives 2003/71/EC and 2004/109/EC and Regulation EC 1606/2002 on the application of international accounting standards. If an issuer whose registered office is in another EEA member state notifies its prospectus to the Financial Market Authority pursuant to article 18 of Directive 2003/71/EC, the Financial Market Authority will recognise the prospectus provided that the approval of the EEA state's listing authority has been obtained.[51]

47 Recital 5 of the Regulation 583/2010.
48 Chapter II, Articles 4 –6 of the Regulation 583/2010.
49 Capital Market Act, art 7c, para 1.
50 Stock Exchange Act, art 75a.
51 Capital Market Act, art 8b, para 1.

The Financial Market Authority provides the competent authorities of other EEA member states with a certification that the prospectus of an issuer with its registered seat in Austria has been approved and has been completed in accordance with Directive 2003/71/EC.[52] The Financial Market Authority informs the competent EEA state's listing authority about the violation of the relevant provisions by an issuer with its registered seat in this EEA member state or by its financial intermediaries. If the violation continues, the Financial Market Authority is entitled to take all necessary measures to protect the investors' interests.[53]

Exemptions from the Obligation to Publish a Prospectus. A prospectus is not required if the application for admission to listing on the exchange is made for certain securities as defined in article 75 of the Stock Exchange Act (eg, shares issued in substitution for others already listed on the same exchange without raising the company's capital).[54]

Exemptions from Publication. The Financial Market Authority can, on application, authorise the omission of certain information in the prospectus which must be included pursuant to the Capital Market Act or EC Regulation 809/2004 if:

- The disclosure of the information is contrary to the public agenda;
- The disclosure of the information will be seriously detrimental to the issuer and, in case of non-disclosure, the public would not be deceived regarding essential circumstances in its judgment of the issuer, the offeror, or the guarantor and the rights related to the securities mentioned in the prospectus; or
- The information is of little importance for a special offer or a special admission to trade on a regulated market and does not influence one's judgment on the financial situation and future prospects of the issuer, the offeror, or the guarantor.[55]

Examination of the Prospectus. The prospectus required for public offerings must be examined by one of the credit institutions or associations specified in article 8 of the Capital Market Act. The Financial Market Authority must approve the prospectus provided that it is complete, coherent, comprehensible, and in compliance with the requirements set forth in the Capital Market Act.

The Financial Market Authority is entitled to delegate the approval of the prospectus to the competent authority of another EEA member state provided that this authority accepts such delegation.[56] After admission to the listing on the exchange, the Financial Market Authority is entitled to:

52 Capital Market Act, art 8b, para 3.
53 Capital Market Act, art 8c.
54 Stock Exchange Act, art 75, para 1(2).
55 Capital Market Act, art 7, para 6.
56 Capital Market Act, art 8a, para 6.

- Request the issuer to provide all relevant information which may influence the valuation of the securities;
- Suspend the trading in securities or request its suspension in case that the trading may be detrimental to the interest of the investors;
- Ensure that the issuer fulfils the obligations pursuant to articles 102 and 103 of Directive 2001/34/EC and the investors in every EEA member state receive equal information and are treated equally by the issuer; and
- Carry out inspections to check compliance with the provisions of the Capital Market Act and the implementation measures of Directive 2003/71/EC.[57]

Publication of the Prospectus. The prospectus is considered published if:

- Published in the *Official Gazette* of the *Wiener Zeitung* or in at least one newspaper with nationwide circulation;
- Made available without charge in the form of a brochure at the competent authorities of the relevant market, at the registered office of the issuer, or at the financial intermediaries including the paying agents;
- Published on the issuer's website and, if applicable, on the website of the financial intermediaries including the paying agents;
- Published on the website of the regulated market for which the admission is applied; or
- Published on the website of the Financial Market Authority if this service is being offered there.[58]

In any case, a public notice must be published in the *Official Gazette* of the *Wiener Zeitung*, in at least one newspaper with nationwide circulation, or on the issuer's website (if applicable, also on the website of the financial intermediaries including the paying agents), indicating where the prospectus has been published and where it may be obtained.[59]

The issuer is obliged to publish an addendum containing all new relevant information or pointing out all false or incomplete information given in the prospectus. The addendum must be forwarded to the Financial Market Authority for examination and approval at the same time.[60] Investors are entitled to revoke their promise to buy securities given after the changes of the situation and before the publication of the addendum.[61]

Advertising. Advertisements referring to the offering of securities to the public or the admission to listing on the exchange must be in compliance with the provisions set forth in article 4 of the Capital Market Act. They must contain

57 Capital Market Act, art 8a, para 8.
58 Capital Market Act, art 10, para 3.
59 Capital Market Act, art 10, para 4.
60 Capital Market Act, art 6, para 1.
61 Capital Market Act, art 6, para 2.

information about the publishing and availability of the relevant prospectus and addenda and be in accordance with the information given therein.[62]

Liability for the Prospectus. Article 11 of the Capital Market Act lays down the liability for the contents of the prospectus. The following persons are liable to every investor for the damage incurred by the investor relying on the facts in the prospectus or other information requested by the Capital Market Act:

- The issuers, for false or incomplete information for which they are responsible themselves or for which their staff or any other persons whose services were used to draw up the prospectus are responsible;
- The prospectus auditors for false or incomplete audits for which they are responsible themselves or for which their staff or any other persons whose services were used to audit the prospectus are responsible;[63]
- Any person who, in his own name or for third parties, has accepted the investor's offer, and the mediator of the contract if the person acting as intermediary is professionally engaged in trading or mediating securities or investment transactions and these persons or their staff knew of the incorrectness or incompleteness of the information or audition or were unaware of this due to gross negligence; and
- The auditor of the annual accounts who, knowing of such acts and of the fact that the annual accounts audited by him are the basis of the examination of the prospectus, has given his approval to the annual accounts.

Liability towards investors cannot be restricted nor excluded in advance to the detriment of the investors.[64] Claims must be filed with the court within 10 years after the offering subject to the publication of the prospectus expires; otherwise, the right to claim damages expires.[65]

Failure to publish an approved prospectus in time and misleading investors by providing false information in a prospectus are criminal offences carrying a maximum penalty of two years' imprisonment or a fine.[66] The party liable for compensation may ward off such claims by paying the holder of the security the price of purchase, including expenses, in return for the security.[67]

---

62 Capital Market Act, art 4.

63 The prospectus auditors for predispositions (*Veranlagungen*) are liable only for false or incomplete audits due to their own gross negligence or that of their staff or of any other person whose services were used to audit the prospectus are responsible. The *Wiener Börse AG* is liable regarding a prospectus for securities which are listed on the Vienna Stock Exchange only for a false or incomplete statement for which its staff or any other person whose services were used to draw up the statement are responsible.

64 Capital Market Act, art 11, para 4.

65 Capital Market Act, art 11, para 7.

66 Capital Market Act, art 15, para 1.

67 Capital Market Act, art 15, para 3.

Consumer Transactions. If an issuer does not publish a mandatory prospectus or an addendum to the prospectus, respectively, the investor who is considered a consumer pursuant to section 1, paragraph 1(2), of the Consumer Protection Act[68] has the right to cancel the bid or the contract in writing within one week after the publication of the prospectus or the addendum.[69] Any agreements contrary to the provisions of article 5 of the Capital Market Act to the disadvantage of the consumer are invalid.

Stock Corporations Act

The Stock Corporations Act does not give a direct statement on the corporate action required for the issuance of securities. The application for admission to listing can be made by the management board according to article 71 of the Stock Corporations Act. The supervisory board must at least be informed and, in most cases, its approval is necessary. Increase of share capital requires the consent of the shareholders at the general meeting and must be registered in the Commercial Register.

Each shareholder has the right to subscribe to newly issued shares in proportion to his holdings in the existing share capital. All joint-stock companies whose shares are officially quoted must guarantee equal treatment of all their shareholders and inform them about their rights, the shareholders' meetings, and the dividend payments by publishing announcements or circulars.

Registration of public offerings is not required by Austrian law. Issuers who want to offer securities to the public must prepare a prospectus that is then examined by one of the credit institutions or associations specified in article 8 of the Capital Market Act and which fulfils the requirements stated by the Capital Market Act. The issuer and the examining institutions are responsible for the content of the prospectus. This prospectus must be published at least one banking day before the offering begins.

Registration of Placements

Austrian law does not require registration of private placements.

Registration of Secondary Trade

The exchange operating company supervises trading with an electronic surveillance system that guarantees the systematic and complete gathering and evaluation of all transaction data and facilitates any necessary investigations. The Austrian Financial Market Authority has the right to use the surveillance system when conducting investigations, especially in the case of insider trading. The Securities Supervision Act 2007 (WAG) states the duty of credit institutions

68 Capital Market Act, art 5.
69 Capital Market Act, art 5.

and other market participants to give relevant information to the Austrian Financial Market Authority.

All intermediaries (official brokers and non-official brokers acting as intermediaries for the instruments traded on the semi-official market) must keep order books in which they register all orders and the cancellation of orders they receive in chronological order. The intermediaries must record the transactions they conclude on a daily basis in their order books and take note of the names of the parties, the prices, the conditions of the contract, time of conclusion, and whether the contract has been concluded on or off the exchange.

Nevertheless, it is the broker's duty not to name the other party of the transaction (anonymous transactions). The order books may be kept by hand or with the support of computers. The intermediaries must retain the order books for six years after the last entry, and they are obliged to give the parties certified excerpts on request. The exchange operating company and the Exchange Commissioner have the right to inspect the books of the intermediary at any time. In case of legal dispute the court may order the order book to be presented, even if this is not requested by one party.

Securities Admission Procedures

The application for admission to listing on the official market or on the semi-official market must be made in writing to the exchange operating company and must be signed by an exchange member if the issuer is no member of the exchange.

The application must include the name and registered office of the applicant, the type and denomination of the securities, and the total amount of the issue to be admitted by stating the nominal value or, in the case of no-par value securities, the number of securities. It also must specify any other exchanges on which an application for admission to listing has been made at the same time, or within the past 30 days, or will be made in the near future. The application must be accompanied by:

- A valid copy of the articles of association or shareholders' agreement of the issuer;
- An excerpt not older than four weeks from the commercial register in which the issuer is registered;
- Any official authorisation certificates if such are required for the establishment of the issuer's company, the pursuit of its business activities, or the issue of securities;
- Proof of any other requirements for the issue of securities;
- Any such proof of registration of the issue in a register as is required for the issue to be legal;

- If shares are to be admitted for the first time for listing on the official market, the annual audited accounts with the statement of the auditor and the financial reports for the past three complete business years;
- Two copies of the prospectus approved pursuant to article 74 of Directive 2003/71/EC, together with the confirmation of the Financial Market Authority about its notification (*Notifizierung*);[70]
- If securities are printed, two sample prints of each of the denominations for which admission is applied; and
- If the securities or certificates are to be secured by a global certificate, a declaration of which depository has care of such global certificate.

The exchange operating company must decide on the application within 10 weeks after submission. The issuer filing the application is under obligation to give the exchange operating company any information that might be necessary to determine whether the conditions for the admission to trading on the exchange exist. An appeal may be lodged with the Appellate Committee established by the Minister of Finance against the denial of admission to listing or against the revocation of the admission of listing.

The appeal has suspensory effect only if the protection of investors or the guaranteed fulfilment of Stock Exchange requirements is not endangered thereby. The decisions of the Appellate Committee are not subject to changes or annulments by administrative proceedings. It is possible to lodge an appeal with the Administrative Court. An appeal also may be lodged by the FMA on the grounds of unlawfulness.

Pursuant to article 47 of Directive 2004/39/EC, the Financial Market Authority must keep a register of all domestic regulated markets (ie, the Official Market and the Semi-Official Market) that it will submit to the European Commission and the other member states.[71]

Third Market on the Exchange

The exchange operating company operates the Third Market as a Mulitlateral Trading System (MTF).[72] All financial instruments, with the exception of options and (financial) futures contracts, may be traded on the Third Market.

Membership in the Vienna Stock Exchange is required for the participation in trading and clearing. The admission to trading of financial instruments and issuance programmes to the Third Market may be granted on the initiative of the

70 Stock Exchange Act, art 72, para 3(7).

71 Stock Exchange Act, art 76.

72 Rules for the Operation of the Third Market, promulgated in the *Bulletin of the Exchange Operating Company of Wiener Börse AG*, Number 1672 of 25 October 2007, changed by Bulletin Number 966 of 15 June 2009.

exchange operating company or on the request of an exchange member. A condition for the admission to trading is that the legal statutes of the issuer and the issuance of the financial instruments comply with the laws of the country in which the issuer has its registered office or in which the financial instruments have been issued, and the issuer meets the prospectus requirements according to national law or EU law. The application for admission to trading must be submitted by an exchange member in writing. The exchange member submitting the application must include the following information in the application:

- Registered office and company name of the issuer of the financial instruments or issuance programme for which an application is being submitted;
- Type of financial instrument and denomination;
- Total amount of issue by indicating the nominal value; should such information be lacking, the probable price and number of securities to be issued;
- If applicable, exemption pursuant to the Capital Market Act from the obligation to publish a prospectus;
- Name of the central securities depositary or custodian with which the global certificate will be deposited in the case of global securities; and
- Regulated markets, respectively the MTF, on which the financial instruments are admitted to listing or for which an application for listing has been submitted or will be submitted in the near future.

The application must include:

- Extract from the Companies Register (or an equivalent document) that is not older than four weeks;
- Bylaws or articles of association of the issuer in their valid versions;
- Financial statements including the notes and report of the management board with the confirmation of the auditor of the last full financial year;
- Approval documents if the establishment of the issuer, the exercise of its business, or the issuance of financial instruments require a permit from government bodies;
- Evidence of the legal status required for the issuance of financial instruments;
- Evidence for the entry of the issue into a register if this is required for the issue to be legally valid;
- Approved prospectus if required according to the Capital Market Act pursuant to article 8a of the Capital Market Act or approved pursuant to Directive 2003/71/EC, including a confirmation of the FMA on the notification pursuant to article 8b of the Capital Market Act; and
- In the case of printed securities certificates, two specimen prints for every denomination.

The exchange operating company may, in well-founded individual cases reasonably explained by the applicant, waive the requirement of submitting the individual documents listed, if this is in the interest of the issuer and is not against the interests of the investing public. The admission of financial instruments to trading on the Third Market is decided by resolution of the management board of the exchange operating company.

Periodic Disclosure

Official Trade

All issuers must publish their most recent annual financial report, including the (consolidated) audited financial statements and the report of the management board.

Furthermore, the explanations of the legal representatives confirming that they have drafted the annual financial statements in line with the applicable accounting standards and that the report of the management board presents the development of business, the earnings, and the situation of the companies, including the scope of consolidation providing for a fair and true view of the assets and earnings and financial position of the issuer also describing the major risks to which the companies are exposed, must be published.[73]

Issuers of shares must guarantee that, in their home member state, shareholders have the information needed to exercise their rights and the integrity of that data.[74] The joint-stock company must inform the Austrian Financial Market Authority and the public immediately in the event that:

- Changes in the rights attached to shares come into effect; and
- Important changes occur in the capital structure, meaning that information previously published on that subject is no longer valid as soon as such changes come to its attention.

The joint-stock company must inform the exchange operating company and the Austrian Financial Market Authority in writing of any intentions to make changes in the company's articles of association or articles of incorporation before or at the latest simultaneously with the call to hold the general meeting which is to decide on the proposed amendments and which must be published.

If a foreign issuer of debt securities has an obligation to publish annual accounts in its home country, the annual accounts must also be published in Austria. The issuer must inform the exchange operating company in writing, before or at the same time as the call to hold a meeting of a body empowered to make such changes, of any changes planned in its statutes or instrument of incorporation in so far as these changes affect the rights of the bondholders.

73 Stock Exchange Act, art 82, para 4.
74 Stock Exchange Act, art 83, para 2.

The issuer must publish any changes in the rights of bearers of debt securities immediately, in particular such changes as arise out of changes in the bond terms or interest rates. Furthermore, the issuer must immediately inform the public of any new issue of bonds and, in particular, of the guarantees furnished for these bonds. If the official listing is for bonds with exchange rights or subscription rights, the issuer must publish all changes in the rights that are attached to the different classes of underlying securities.

Semi-Official Trade

Issuers of shares must draw up, within the legal limits, annual accounts, including business reports and suggestions for the distribution of profits, and must publish these. If the annual accounts are not published in time, an interim report must be published containing preliminary results of the business year concluded. The reports must be delivered immediately to the exchange operating company. The issuer must communicate the content of the propositions to be dealt with at the general meeting to the exchange operating company at least 14 days in advance. In the event that the annual accounts are not published in time, the exchange operating company must be informed of the period of extension granted by the supervisory board.

The exchange operating company must be notified at least one month in advance of shares to be withdrawn from the semi-official market and this must be published simultaneously in the *Official Gazette* of the *Wiener Zeitung*.

The issuers must inform the exchange operating company immediately in writing of all significant circumstances concerning shareholders, in particular of general meetings to be held, changes in the statutes, for example, capital increase or decrease, changes validated by placing a stamp on the share certificate, of the conclusion of contracts on the exclusion of profits or losses, of the distribution of dividends, invitations to exercise subscription rights, exchange of share certificates and of the issuing of new coupon sheets.

Issuers of debt securities must deliver their annual accounts and business reports to the exchange operating company at the latest 14 days before the general meeting is held. The exchange operating company must be notified at least one month in advance of shares to be withdrawn from the semi-official market and this must be published simultaneously in the *Official Gazette* of the *Wiener Zeitung*.

The issuers are obliged to inform the exchange operating company immediately in writing of all significant circumstances concerning bondholders, especially of resolutions regarding the conversion of securities, the issue of new interest coupon sheets, and the numbers of securities redeemed or drawn by lots and must publish the information in the *Official Gazette* of the *Wiener Zeitung*.

Interim Reports

Issuers of shares or debt securities must publish interim reports regarding the first six months of the business year giving potential investors the information necessary to properly evaluate the business activities of the issuer company during this period. The interim report must be published within two months after the report period is over and must also be sent to the exchange and to the Austrian Financial Market Authority at least by this time.

The interim report must contain, in particular, information on the activities and the results of the joint-stock company for the report period and give explanations of these. The interim report must include the abbreviated financial statements, a half-year report of the management board, and declarations of the legal representatives of the issuers confirming that they prepared the abbreviated financial statements in accordance with applicable accounting standards and that the half-year report of the managing board truthfully describes all assets, earnings, and the financial position of the company.[75]

When the issuer may not prepare consolidated financial statements, the abbreviated financial statements must contain at least an abbreviated balance sheet, abbreviated profit/loss account, and explanatory notes to the financial statements. Furthermore, if audited, the abbreviated financial statements must contain the full text of the auditor's opinion.[76]

At a minimum, the interim report must include any major events in the first six months of the financial year and their effects on the abbreviated financial statements. Furthermore, the report must describe the principal risks and uncertainties for the remaining six months of the financial year. Issuers of shares must disclose: deals with affiliated companies and individuals during the first six months of the current business year and all changes pertaining to deals with affiliated companies and individuals set forth in the last annual financial report that affect the financial situation/net operating profit.[77] Issuers of shares, at a bare minimum, must disclose deals with affiliated companies and individuals as referred to in article 43(1)(7)(b) of Directive 78/660/EEC.

If the interim report has been audited, the auditors' statement and any restrictions must be stated in full. If necessary, the explanations are to give a breakdown of the sales, comments on the order situation, the development of costs and prices, the number of employees, and any investments and activities which might affect the company's business results. The explanations shall also facilitate the comparison with the figures of the previous period. If possible, they shall also mention the company's prospects for the current business year.

The exchange operating company may allow joint-stock companies to publish their results in the form of estimated figures if the company certifies that this is

75 Stock Exchange Act, art 87, para 1.
76 Stock Exchange Act, art 87, para 2.
77 Stock Exchange Act, art 87, para 4.

necessary to avoid higher costs and if the additional information content would be of little value to the public. The estimated figures must be explicitly named as such.

Credit institutions may use their monthly returns or quarterly reports according to article 74 of the Banking Act as a basis for the interim reports. Insurance companies must state the premium income from contributions in each insurance class, as well as the volume of their life insurance contracts, instead of sales and operating results, and in the explanations they also must report on the level of damages, costs, and earnings from investments as components of their results.

The interim report must be written in German. The exchange operating company can grant companies with their registered offices outside of German-speaking countries permission to write the interim report in another language if this language also is commonly used in the securities and the capital market business in Austria and if adequate information is provided to the public.

Exemptions

The following issuers are exempted from the reporting obligation:[78]

- Central states, regional authorities, international bodies under public law with at least one member state, the ECB, and the National Central Banks of member states, irrespective of the issue of shares or other securities; and
- Issuers of debt securities are admitted to trade only on a regulated market with a minimum denomination of €50,000 or — in case of debt securities denominated in a currency other than Euro — with a minimum denomination at a value of at least €50,000 on the first day of listing.

The following issuers are exempted from the obligation to publish half-year financial reports:[79]

- Credit institutions whose shares have not been admitted to trading on the regulated market and that have continuously issued debt securities, provided that the total nominal value of the debt securities issued does not exceed €100 million and no prospectus, pursuant to Directive 2003/71/EC, has been published; and
- Issuers existing on or before 31 December 2003 that issue debt securities only on regulated markets, which are irrevocably guaranteed by the origin member state or its regional authorities.

Ad Hoc Publicity

Any issuer whose securities have been admitted to the official or semi-official market must communicate to the Austrian Financial Market Authority any new

78 Stock Exchange Act, art 90, para 1.
79 Stock Exchange Act, art 90, paras 2 and 3.

facts taking effect in the company's field of activity in so far, due to their impact on the course of business, assets, or earnings situation, as they are likely to have a significant influence on the prices of the securities or, in the case of bonds, facts that could hinder the issuer's capacity to fulfil its commitments.

These facts must be published. Furthermore, an issuer of shares admitted to listing on the official market or to the semi-official market has to disclose to the public a report on any stock options granted, as well as the resolution of the general meeting and the duration of any stock buyback programmes. The Austrian Financial Market Authority may exempt the issuer from the obligation to publish this information if it serves to prevent the issuer from suffering damages with regard to its legitimate interests. In this case, the issuer must certify that investors will not suffer damages.

Trading Rules

Securities Offerings

Austrian law does not state many specific rules for the offering of securities to the public except the obligation of the offeror of listed, as well as of unlisted, securities to publish a prospectus at least one day before the offering begins. According to the Capital Market Act, this prospectus must be examined and signed by one of the credit institutions or associations listed in article 8 of the Capital Market Act.

Both the offeror and the examining institution are liable for the prospectus, and the purchasers of the security have the right to withdraw their binding offers if the prospectus does not meet the legal requirements.

Disclosure of Acquisition of Substantial Holdings

Shareholder Duties. Anyone who, directly or indirectly or together with a third party acting in concert, acquires or sells holdings in a stock corporation whose registered office is in Austria and whose stock is quoted on the official or semi-official market of the Austrian Stock Exchange is obliged to inform the Austrian Financial Market Authority, the exchange operating company, and the target company without delay, at the latest within two trading days, if their proportion of voting rights held reaches, exceeds, or falls below five per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 35 per cent, 40 per cent, 45 per cent, 50 per cent, 75 per cent, or 90 per cent.[80]

This does not apply if the acquisition or sale is effected in the course of securities dealings business conducted by credit institutions and other investment services providers.

Company Duties. If the proportions of the voting rights in a stock corporation change considerably and these changes lead to a discrepancy in the figures

80 Stock Exchange Act, art 91, para 1.

previously published on the proportion of voting rights and on the capital structure, the company has the duty to inform the public as soon as it receives this information, at the latest within two trading days.[81] In any case, the public must be informed if the percentage of voting rights held reaches, surpasses, or falls below 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 35 per cent, 40 per cent, 45 per cent, 50 per cent, 75 per cent, or 90 per cent. Publication must be made in the *Official Gazette* of the *Wiener Zeitung*.

If the shares also are quoted on a foreign exchange, at least such information must be published as is given to the public in the country where this foreign exchange is located. If the company fails to publish such information, the Austrian Financial Market Authority shall make it public at the expense of the company.

Insider Trading and Fraud

In General. On 1 November 2007, the Austrian Securities Supervision Act 2007 came into force. It implemented Directive 2004/39/EC on markets in financial instruments and Directive 2006/73/EC. MIFID provides for a standardised level of protection for investors and standardised practice conditions for a service provider. To facilitate investigations, the following institutions are obliged to report all transactions in instruments admitted to the official or semi-official market to the Austrian Financial Market Authority by the next banking day at the latest:

- Credit institutions which hold a full banking licence in Austria;
- Domestic branch offices of credit institutions, financial institutions, and investment firms;[82]
- The Austrian National Bank (*Österreichische Nationalbank*); and
- Recognised investment firms and similar institutions whose registered office is not in an EEA member state if they are members of a securities exchange as defined by the Austrian Stock Exchange Act, as well as members of any cooperating partner stock exchange operating on a securities exchange.[83]

These reports must include the details listed in Table 1 of Annex I of Commission Regulation (EC) Number 1287/2006 (eg, firm identification, trading day, trading time buy/sell indicator, trading capacity, instrument identification, maturity date, derivative type, unit price, quantity, and counter party).

81 Stock Exchange Act, art 93, para 2.

82 Securities Supervision Act 2007, art 64, para 1(2).

83 Only for those instruments admitted to listing on a stock exchange in Austria and for which trades have been concluded in Austria. Securities Supervision Act, art 64, para 1(4).

Pursuant to the Resolution on Reporting Requirements of Securities 2007,[84] reports must include additional details (eg, unit of marketable securities, open/close mark, market maker mark, and SWIFT code of counter party).[85]

The reports must be transmitted electronically. When an institution has issued a declaration pursuant to article 13(1), second sentence, of Regulation 1287/2006/EC,[86] they may omit individual reporting issues. Credit institutions and investment firms are obliged to gather information about their customer's identity for the purpose of these reports. According to article 40, paragraphs 1 and 5, of the Banking Act, credit institutions must discover their customer's identity when establishing commercial relations for the purpose of securities transactions, when concluding single transactions with a value of at least €15,000, or when establishing a securities depot.

Exemptions. The Securities Supervision Act 2007 exempts investment management companies pursuant to article 2 of the Investment Funds Act, investment management companies for real estate, employee pension funds, and the Austrian National Bank from the report duties. Irrespective thereof, they are obliged to submit information to the Financial Market Authority on its request.[87]

Rules of Conduct. According to articles 3 and 4 of the Securities Supervision Act 2007, any person or legal entity that intends to provide investment services in Austria must apply for permission from the Austrian Financial Market Authority to conduct such business. To prevent insider trading, fraud, and improper manipulation of the market and to ensure adequate protection of the customers, the Securities Supervision Act 2007 provides detailed rules of conduct.

Persons and legal entities providing business services which involve securities or other forms of investment of customer assets, as well as the employees of such persons and legal entities, are specifically prohibited from:

- Promoting via telephone and fax listed or unlisted securities or contracts involving precious metals and commodities and investments pursuant to the Banking Act, unless the customer has agreed to such contact; and
- Sending electronic mail, including SMS messages, to consumers without the recipient's prior consent if the sending takes place for purposes of direct marketing or is addressed to more than 50 recipients.[88]

Prior consent to electronic mail is not required if:

- The sender has received the contact details for the communication in the context of a sale or a service to his customers;

84 'Wertpapier-Meldeverordnung 2007', *Federal Law Gazette* II, Number 217/2007.
85 Resolution on Reporting Requirements of Securities 2007, article 2.
86 Securities Supervision Act 2007, art 64, para 3.
87 Securities Supervision Act 2007, art 64, para 6.
88 Telecommunications Act 2003, art 107, para 2.

- The communication is transmitted for the purpose of direct marketing of his own similar products or services;
- The customer has been given clearly and distinctly the opportunity to object to such use of electronic contact details;[89]
- The customer has not declined *a priori* that electronic mail is sent to him, in particular not through registration to a list according to section 7 of the E-Commerce Act;[90] and
- Under section 7 of the E-Commerce Act, the *Rundfunk und Telekom Regulierungs GmbH* maintains a list where people and companies who decline to receive commercial email can register.

Compensation may be claimed in the case of infringement of these duties. Any violation of these rules of conduct stated in the Securities Supervision Act 2007 is an administrative offence prosecuted by the Austrian Financial Market Authority.

'Abuse of inside information' is defined by law as deliberately taking advantage of information consisting of specific confidential facts related to securities or issuers which may considerably influence the prices of securities if made public, to gain pecuniary benefit for oneself or a third party by:

- Buying or selling such securities or recommending the sale or purchase to a third party; or
- Passing on such information to a third party without being instructed to do so.

Insiders are persons who, as members of an administrative, management, or supervisory board of an issuer,[91] or due to their occupation, profession, duties, or participation in the capital of an issuer, have access to confidential facts such as may influence the prices of securities.

A person having obtained inside information through criminal acts is deemed to be an insider. In the case of a legal entity, the natural persons who were involved in the decision to carry out a transaction are considered insiders.[92] Securities subject to the rules of insider trading and market manipulation are financial instruments listed on a regulated market in at least one EEA member state, or for which an application has been submitted for listing on such a market, irrespective of whether or not the transaction itself actually takes place on that market, including:

- Securities in the meaning of article 1(4) of the Securities Supervision Act 2007;
- Shares in organisms for joint investments in securities;

89 Telecommunications Act 2003, art 107, para 3.
90 Stock Exchange Act, art 48a, para 1(3).
91 Stock Exchange Act, art 48b, para 4.
92 Stock Exchange Act, art 48b, para 4.

- Money market instruments;
- Financial futures contracts including equivalent instruments settled in cash;
- Forward-rate agreements;
- Interest and foreign exchange swaps and swaps on shares or stock indices (equity swaps);
- Call and put options on all instruments set forth above, including equivalent instruments settled in cash such as, in particular, foreign exchange and interest rate options;
- Commodity derivatives; and
- All other instruments listed on a regulated market in an EEA member state or for which the application has been submitted for listing on such a market.

The rules on insider trading also apply to any financial instrument not listed on a regulated market in an EEA member state, the value depending on an above-mentioned financial instrument.[93]

Penal Provision for Insider Trading. Insiders who commit an abuse of inside information can be punished by imprisonment of up to three years and, if the benefit gained exceeds €50,000, by a prison sentence of six months to five years.[94]

Persons who are not insiders and who knowingly take advantage of information they receive or somehow gain knowledge by committing an abuse of inside information as defined above can be punished by imprisonment of up to one year or a fine but, if the pecuniary benefit gained exceeds €50,000, by imprisonment of up to three years.[95] 'Market manipulation' is defined by law as transactions or buy/sell orders which:

- Send or are likely to send false or misleading signals regarding the supply or demand or price of financial instruments; or
- Influence or have the capacity to influence the price of financial instruments placed by one or several persons acting in collaboration with the intent to drive up prices to an abnormal or artificial level, unless the person who entered into the transaction or has placed such an order has legitimate reasons and the transactions or orders are in conformity with accepted market practices in the regulated market concerned.[96]

Penal Provisions for Market Manipulation. Persons who are engaged in market manipulation infringe administrative law and are punished by the Financial Market Authority with a fine of up to €75,000 unless the act is a criminal offence punishable under the jurisdiction of the courts.

93 Stock Exchange Act, art 48e, para 3.
94 Stock Exchange Act, art 48b, para 1.
95 Stock Exchange Act, art 48b, para 2.
96 Stock Exchange Act, art 48a, para 1(2).

Any pecuniary benefit gained from such acts must be declared void by the Financial Market Authority.[97]

Release of Inside Information to the Public. Issuers having inside information relating directly to them are obliged to immediately make such information and any amendment to it available to the public. The dissemination must be executed at the same time for all categories of investors in the EEA member states. The inside information must be available for the public on the issuer's website.[98] The issuer may postpone the release if it could be potentially damaging to the issuer's legitimate interests unless:

- The suppression of such inside information would be misleading for the public; and
- The issuer would not be in a position to guarantee the confidentiality of the information.[99]

The issuers are obliged to control access to inside information and to take effective and required measures to:

- Prevent unauthorised persons from gaining access to such information;
- Guarantee that every person who has access to the information is familiar with the legal obligations resulting from such knowledge, the sanctions of abuse, as well as improper dissemination; and
- Permit immediate release of the information.[100]

Issuer Compliance Resolution 2007. On 1 November 2007, the Issuer Compliance Resolution 2007 (*Emittenten-Compliance-Verordnung*) came into force. The Resolution provides guidelines for the transfer of information within companies and organisational measures to prevent the abuse of insider information.

The resolution applies to issuers of shares or securities on the regulated market in Austria. The regulations do not apply to issuers of financial instruments that only trade on multilateral trading systems, municipalities, and international and supranational organisations.[101]

The issuer has a duty to issue an internal compliance policy and to notify the Financial Market Authority. Therefore, confidential areas (*Vertraulichkeitsbereiche*) must be specified. Furthermore, the issuer must establish an insider register and transfer it to the Financial Market Authority on request.[102] The compliance policy must include the:

97 Stock Exchange Act, art 48c.
98 Stock Exchange Act, art 48d, para 1.
99 Stock Exchange Act, art 48d, para 2.
100 Stock Exchange Act, art 48d, para 2, ch 2.
101 Issuer Compliance Resolution 2007, art 2.
102 Issuer Compliance Resolution 2007, art 11.

- Groups subject to confidentiality;
- Implementation of duties with respect to the dealing with inside information;
- Regulations regarding the transfer of inside information;
- Duration of retention periods prior to the planned publishing of figures;
- Transfer of director's dealing reports;
- Insider register;
- Rights and duties of the compliance department; and
- Consequences of a violation of the compliance policy under civil and labour law.

Records of Insiders. The issuers or any person acting on their behalf or for their account must keep a record of the persons who work for them with a regular, or on an *ad hoc* basis, access to inside information. This record must be updated regularly and be forwarded to the Financial Market Authority on request.[103]

The provisions regarding the release of inside information and the records of insiders do not apply to issuers who have not applied for admission of their financial instruments to trading on a regulated market in an EEA member state or have not been granted such admission.[104]

Reporting Duties. Persons who have a management position with an issuer of financial instruments with its registered office in Austria or the obligation to submit documents pursuant to article 10 of Directive 2003/71/EC and persons who have close ties with issuers must report all trades concluded for their own account in trading in equities and equity-like securities admitted to the regulated markets of the issuer or any related trades in derivatives or associated companies to the Financial Market Authority.[105]

The report must be made within five working days after execution but may be extended until the total volume of the trade executed reaches €5,000. If the total volume of the trade executed is below this amount by the end of the calendar year, the report may be omitted.

Furthermore, persons having their registered office or branch office in Austria who are professionally engaged in trading of securities must immediately inform the Financial Market Authority of any well-founded suspicion they may have with regard to a transaction that could be an inside deal or constitute market manipulation.[106] The aforementioned prohibitions and requirements apply to acts:

103 Stock Exchange Act, art 48d, para 3.
104 Stock Exchange Act, art 48e, para 4.
105 Stock Exchange Act, art 48d, para 4.
106 Stock Exchange Act, art 48d, para 9.

- Carried out in Austria or abroad concerning financial instruments that are admitted to trading on a regulated market in Austria or for which an application for admission has been made;
- Carried out in Austria concerning financial instruments admitted to trading on a regulated market in an EEA member state or for which an application for admission has been made;[107] and
- Carried out in Austria relating to financial instruments listed on a market in a third country regulated and supervised by authorities approved by the government and operated regularly and accessible by the public directly or indirectly or for which the relevant application has been submitted for the listing on such a market.[108]

The provisions regarding abuse of inside information and market manipulation do not apply to trading with own shares within the scope of buy-back programmes or price stabilisation measures provided such transactions are carried out in accordance with Commission Regulation 2273/2003/EC.[109]

Recommendations. A recommendation is defined by law as an analysis or other information intended for information dissemination channels or for the public recommending or suggesting an investment strategy regarding financial instruments or issuers of financial instruments including an assessment of value or price.[110] The issuer of a recommendation is obliged to:

- Specify the identity of the issuer and the legal entity who is responsible for its preparation;
- Specify the identity of the competent authority if the relevant entity is a securities firm or credit institution;
- Refer to the standard and rules mentioned if the issuer is neither a securities firm nor a credit institution; and
- In the case of non-written recommendations, specify where the information mentioned above is available to the public.[111]

A recommendation must contain detailed information as set forth in article 48f of the Stock Exchange Act (eg, reference to all sources, basis for the valuation, used methods, warning of potential risks, and conflicts of interest).[112]

Supervisory Power of the Financial Market Authority. The Financial Market Authority is responsible for supervising compliance with the relevant provisions set forth in article 48a–f of the Stock Exchange Act. For this

107 Stock Exchange Act, art 48e, para 5.
108 However, the obligations pursuant to article 48d and article 48f will not apply in connection with such financial instruments. Stock Exchange Act, art 48e, para 5a.
109 Stock Exchange Act, art 48e, para 6.
110 Stock Exchange Act, art 48f, para 1(3).
111 Stock Exchange Act, art 48f, para 2.
112 Stock Exchange Act, art 48f.

purpose, it has certain rights (eg, conduct investigations, inspect the results of telecommunication surveillance, order the exchange operating company to suspend trading in a financial instrument, and issue a ban on accused persons from exercising their profession) and the authority to impose fines.[113]

Due to the international financial markets crisis and its impact on domestic regulated markets, Austria has devised a comprehensive and sustainable package of measures for the protection of savers and the strengthening of banks.

The central aspects of the Austrian package address the need for liquidity in the financial sector, set the groundwork for a possible measure to strengthen the equity of banks, provide retroactive safeguards on an individual's deposit from 1 October 2008, and include a prohibition of the speculative short selling of securities.

Measures Addressing the Need for Liquidity in the Financial Sector. The Interbank Market Support Act (*Interbankmarktstärkungsgesetz*; IBSG), which came into force on 27 October 2008 in order to re-invigorate the interbank market, expired after a prolongation of its initial time limit of one year on 31 December 2010.

According to the IBSG, the banks established an organisation dedicated to acting as a clearing house through which they will transact their business. Insurance companies could also participate in the clearing house. Along with appropriate equity capitalisation, the Federal Government could accept liability for the organisation to ensure that bad-debt losses would not afflict the clearing house.

The clearing house forwarded acquired funds to those banks that exhibited a need for liquidity and it received appropriate collateral. In order to create liquidity, the Federal Government could attach a guarantee to these loans to enable the clearing house to issue bonds. The Federal Government could also issue guarantees on the behalf of credit institutions to facilitate the issuing of securities.

After the expiry of the ISBG, the Regulation of the Federal Minister of Finance, specifying in greater detail the conditions and requirements for measures pursuant to the Financial Market Stability Act (*Finanzmarktstabilitätsgesetz*) and the IBSG (*Verordnung des Bundesministers für Finanzen zur Festlegung näherer Bestimmungen über die Bedingungen und Auflagen für Maßnahmen nach dem Finanzmarktstabilitätsgesetz und dem Interbankmarktstärkungsgesetz*),[114] which came into force on 31 October 2008, still remains in force, but its field of application is, due to the expiry of the IBSG, in future limited to measures pursuant to the Financial Market Stability Act.

113 Stock Exchange Act, art 48q and t.

114 Federal Law Gazette II, Number 382/2008.

Equity-Strengthening Measures for Banks. The Financial Market Stability Act (*Finanzmarktstabilitätsgesetz*) that came into force on 27 October 2008 enables the Federal Minister of Finance to inject equity capital by way of capital increases. In principle, the regulation provides for the use of all forms of permissible equity capital measures for this purpose. The government can impose appropriate conditions in providing equity capital. In special cases, in the interests of the relevant institution, the Government can intervene in the ownership structure.

The flexibility of the legal framework makes it possible to include the individual measures of a state-owned organisation. Furthermore, the provisions provide for the Federal Government to transfer holdings associated with the measures described above to private owners once the measures have achieved their objective and when the capital market situation allows it.

Prohibition of Speculative Short Selling of Securities. Austria amended the Stock Exchange Act (effective 27 October 2008) to enable the Financial Market Authority to prohibit short selling of any security or to impose restrictions with regard to short selling for a period of up to three months. On approval of the Minister of Finance, the Financial Market Authority may extend this period by up to six months in the case of an ongoing exposure on the financial market. The restrictions imposed on short selling may include:

- Obligating a seller to report each short sale;
- Imposing a duty to publish details of each short sale; or
- Requiring a short seller to hold a certain percentage of the securities sold.

On 10 October 2008, the Vienna Stock Exchange amended its Trading Rules in agreement with the Financial Market Authority. The amendments now authorise the Vienna Stock Exchange to temporarily suspend trading in a security in the case of volatility of a financial instrument of 10 per cent and to temporarily prohibit short selling in individual or in all traded securities.

Public Takeover Bids

In General. The Takeover Act sets out the rules and procedural and supervision requirements of takeover bids according to the following principles:

- Equal treatment of all shareholders of the target company;
- Protection of shareholders in case of taking control of a company;[115]
- Full information of the shareholders;
- Protection of the interests of all shareholders, employees, and creditors of the target company and of public interests;

115 Takeover Act, art 3, *cipher* 1a.

- Prevention of the creation of false markets by simulated influence on the stock price and by corruption of the markets' operation; and
- Fast takeover transactions.

The Takeover Act established the Takeover Panel, an authority with the competence to supervise the application of the takeover rules, to draw up official statements, and to initiate proceedings on its own behalf.

Territorial Application. The requirements stated by the Takeover Act apply to any takeover bid where the target company has its registered office in Austria and the shares issued by the target company are admitted to listing on a regulated market of the domestic Stock Exchange. Part 4 of the Takeover Act provides requirements for foreign bidders, as follows:

- The rules regarding general aspects, procedure of the Takeover Panel, and sanctions that may be imposed, information on the employees of the target company, prohibition of prevention (*Verhinderun- gsverbot*),[116] impartiality rule (*Objektivitätsgebot*), duty to make an offer and the exemption hereto, duty to notify a controlling interest, infringement of the secured blocking minority (*gesicherte Sperrminorität*), declaratory proceedings (*Feststellungsverfahren*), amendment of statutes, and lifting of restrictions (*Durchbrechung von Beschränkungen*) apply to public offers for the purchase of shares with voting rights circulated by a stock corporation registered in Austria, and the shares are not listed on a market of the domestic Stock Exchange but are listed on a regulated market of another member state of the EU or the EEA or the bid is subject to the Takeover Act as far as the shares are admitted to the listing on a regulated market in Austria;[117] and
- The rules regarding the offer's content and price also apply to listings in Austria by corporations registered abroad.[118]

Procedural Requirements. To avoid insider trading and the creation of false markets, the bidder has the duty to keep his intention to make a bid confidential and to inform the offeree company if any substantial price movements of the office's shares occur due to the acquisition of shares by the offeror or to takeover rumours caused by the perception of the bid. The offeror must disclose the facts related to his intention to make a bid if this is necessary to avoid insider trading. During the negotiations, the offeree company and its shareholders must also ensure confidentiality, as well as immediate disclosure in the case of substantial price movements of the shares and takeover rumours.

116 The supervisory and management boards are prohibited from taking actions preventing the shareholders from being free in taking decisions on the offer.

117 Takeover Act, art 27b.

118 Takeover Act, art 27c, para 1.

The offer documents must be examined by an Austrian credit institution, a certified auditor, or by the domestic branch office of a credit or financial institution with its seat in another EEA member state and authorised to provide such services in its state of origin. The examining person or entity ('expert) must certify that the documents are complete and in compliance with the law and that the bidder has the means to finance the offer. The offeror may notify the offer documents and the expert's report to the Takeover Panel and make all the information public between 12 and 15 trading days after receipt by the Takeover Panel.

The offer must be published either in a newspaper distributed in Austria or in a brochure provided to the public for free at the seat of the company. If the offer has not entirely been published in the *Official Gazette*, information on where to obtain the documents or where the offer has been published must be disseminated on the Austrian market.[119]

Foreign offerors must nominate an Austrian agent authorised to accept the necessary documents. The agent can be a person or legal entity permitted to examine takeover documents (see text, above) or a lawyer or public notary. Before publication, the offer documents and the expert's report must be transmitted to the managing board and the chairman and vice chairman of the offeree company. The Takeover Panel may give an official statement on the documents or prohibit the public offer if it is unlawful.

The management and supervisory board of the target company must guarantee the shareholders opportunity to make a free and informed decision on the offer. They are prohibited from taking measures to frustrate the bid, unless the general meeting has decided to do so after gaining knowledge about the bid. The management board of the offeree company must prepare a response to the offer containing a statement on whether the offer serves the interests of the shareholders, the employees, and the creditors of the target company. An expert appointed with the consent of the supervisory board of the target company must examine the bid, the response, and any response of the supervisory board and must provide a report. The documents must be notified to the Takeover Panel and be published within 10 trading days after the publication of the offer.

After the disclosure or publication of the bid, the offeror may not take any measures to obtain the securities concerned for a lower price and is prohibited from selling any of these securities. The offeror has the chance to improve the offer if the improvements also apply to the acceptances already given and are made public, as well as notified to the Takeover Panel. In general, an amendment of the bid is not allowed if the offeror pledged not to amend the bid. Only in the case of an existing competing offer or the permission of the Takeover Panel may the offeror amend its bid.[120] Anyone having a specific

119 Takeover Act, art 11, para 1a.
120 Takeover Act, art 15.

interest in the outcome of the bid may notify to the Takeover Panel any acquisitions or sales of the securities of the target company.

If a certain number of shares are to be acquired and a larger number of shares is offered to the bidder, the offeror must acquire the same percentage of shares from each shareholder who accepted the offer. The shareholders of the offeree company have the right to withdraw their acceptances if a competing offer is made. The bidding period must last at least two weeks and may not end earlier than 10 weeks after the publication of the offer documents. The Takeover Panel may define a shorter bidding period. Only with the offeror's permission can the period be shorter than six weeks.

The offeror may extend the bidding period unless he pledged not to do so. In the case of competing offers, the bidding period must last at least two weeks and may not end before the ending of the primary offer's bidding period.[121] At the end of this period, the offeror must make the results of the bid public. In the case of a bid for a minimum number of shares or of a mandatory bid, the period for accepting the offer is extended for three months after the publication. One year after a takeover bid has failed or the offeror has disclosed his intention to make a bid without having done so, the offeror is excluded from making any further bids.

Mandatory Bids. Persons or legal entities who, alone or together with a party acting in concert, obtain a controlling interest in a company have the obligation to offer the purchase of all shares of that company for payment in cash and to notify this bid to the Takeover Panel within 20 trading days. Anyone who has a controlling interest, but not the majority of voting rights, in the target company has the duty to make such a bid when acquiring shares carrying more than two percent of the voting rights within a period of 12 months ('creeping in').

In this case, the Takeover Panel must be informed immediately, and an offer for the shares of the target company must be notified to the target company within 20 trading days.[122]

Voluntary bids that may result in acquiring a controlling interest depend on the offeror's receipt of acceptance agreements containing more than 50 per cent of the voting rights. In the case of an exclusive acquisition or the acquisition of voting rights with parties acting in concert during the ongoing offer period, the acquired voting rights must be added to the voting rights of the acceptance agreement.[123]

Parties acting in concert are persons or legal entities who, on the basis of any agreed course of action, co-operate in acquiring or exercising voting rights. If parties act in concert, the shares held by these parties are reciprocally allocated to the contracting parties. Shares are allocated to only one contracting party if a

121 Takeover Act, arts 19 and 21.
122 Takeover Act, art 22, para 4.
123 Takeover Act, art 25a, para 2.

party or parties acting in concert exert influence directly or indirectly on the exercise of voting rights of third parties. A summing up of holdings occurs if:

- The holdings are held by a third party for account of the legal entity;
- The legal entity may exercise voting rights without being the owner of the holdings;
- The holdings have been given as security to a third party and the legal entity is still in the position to exercise its voting rights without an express instruction or the influence of the assignee;
- The legal entity has been conferred usufructuary rights in the shares and is in the position to exercise his voting rights without an express instruction or influence of the shareholder; or
- The legal entity purchases shares by a unilateral declaration of intent and is in the position to exercise its voting rights without an express instruction or influence of the shareholder.[124]

A mandatory bid is not allowed to be subject to a condition except this condition is provided by law. Mandatory bids must provide for the purchase against cash. The payment must occur at the latest 10 trading days after the binding offer. The offeror also may make an offer in trade for other securities.[125]

The minimum price for holdings in the target company in a mandatory or voluntary offer aimed at the acquisition of a controlling interest must be higher than the average share price traded on the stock exchange during the six months. The acquisition of the controlling interest must precede immediately. The minimum price also may be the highest price paid by the bidder during the last 12 months.[126]

The offeror and all parties acting in concert must disclose any facts relevant to the price determination to the expert examining the offer and to the Takeover Panel. Within three months after the publication of the result of the bid, any shareholder can apply for the verification of the lawfulness of the price by the Takeover Panel.

Exemptions. The Takeover Act exempts persons or legal entities from the obligation to make a bid if the taken holding in the target company does not have a controlling influence on the target company.

Furthermore, making a bid is not required if the legal entity that may exert a controlling influence on the target company persists unchanged.

The Takeover Panel must be notified within 20 trading days after acquisition of the target company's holding. In particular, there is no controlling influence regarding the holding in a target company if:

124 Takeover Act, art 23.
125 Takeover Act, art 25b.
126 Takeover Act, art 26.

- A shareholder holds at least the same amount of voting rights of the target company as the offeror;
- The shares do not constitute the majority of the voting rights by reason of the general presence of the other shareholders in the shareholders' meeting of the target company; and
- The articles of association limit the exercise of the voting rights to 30 per cent.[127]

Although there is no duty to make an offer, the Takeover Panel must be notified within 20 trading days after obtaining controlling interests if:

- An indirect controlling interest is obtained and the holding's book value is less than 25 per cent of the book value of the net assets of the direct holdings held by the legal entity;
- The shares are purchased for restructuring purposes or as securities for outstanding debts;
- The number of voting rights required for generating a controlling interest is exceeded temporarily or accidentally, provided that the infringement is reversed immediately;
- The shares are obtained by donation between related persons, inheritance, or division of property on occasion of divorce, dissolution, or nullification of a marriage;
- The shares are transferred to another legal entity that is held indirectly or directly by affiliated shareholders; and
- The party excludes (squeezes out) the old shareholders within five months after obtaining the controlling interest if the indemnification is not less than the mandatory bidding price and complies with the highest price for the shares that has been paid or agreed on by the party until the registry with the Commercial Register.[128]

Companies also have the possibility to include restrictions on the transfer of shares in their articles of association. If provided for, the bidder holding 75 per cent or more of the voting rights in the target company is entitled to convoke a shareholders' meeting following the announcement of a takeover bid, and is free to remove supervisory board members delegated by shareholders and to appoint new members ('lifting-rule).[129]

127 Takeover Act, art 24.
128 Takeover Act, art 25.
129 Takeover Act, art 27a.

Jurisdictional Conflicts

In General

Although jurisdictional conflicts are likely to occur in the global securities business, convincing multilateral solutions are often missing. The EC and the EEA have established systems of procedural management of jurisdictional conflicts, as well as substantial law solutions.

An increasing number of EC Directives and Regulations will ensure the harmonisation of national regulations and help to avoid international delinquency in the field of securities business. Austrian law lays down specific rules for jurisdictional conflicts concerning contracts in general in the Rome I Regulation[130], which replaced (together with the Rome II Regulation[131]) the Rome Convention of 1980 in the year 2009, as well as transactions concluded at stock exchanges in the International Private Law Act (IPRG).

Multilateral Approaches

Substantive Law Solutions

The Rome Convention of 1980, which was signed by all members of the EU, provided for solutions of jurisdictional conflicts for contract law in general, but obligations resulting from the negotiable character of instruments were not included. The Rome Convention stated the freedom of the contracting parties to choose the law governing their contractual relationship or single aspects of the contract. As already mentioned above, the Rome Convention was replaced by two Regulations: the Rome I Regulation, which is effective as of 17 December 2009, and the Rome II Regulation, effective as of 11 January 2009. The Rome I Regulation stipulates the law applicable on contractual obligations arising from all contracts with EU member states, with the exception of Denmark, concluded after 17 December 2009.

Concerning all contracts concluded before this date, the Rome Convention of 1980 is still applicable. According to the Rome I Convention, the contractual parties are still free to choose the applicable law with an exception regarding the facts which are only domestic (*'Inlandssachverhalte*): Regarding those facts the contractual parties may not choose a foreign law in order to avoid obligatory domestic provisions.

The Rome II Regulation stipulates the law applicable to non-contractual obligations as, for example, unjust enrichment (*ungerechtfertigte Bereicherung*), *culpa in contrahendo* (*Verschuldens bei Vertragsverhandlungen*), and unfair competition (*unlauterer Wettbewerb*).

130 Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

131 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

Procedural Solutions

In 2002, the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EUGVVO) came into effect and replaced the Brussels Convention on the recognition and enforcement of judgments (except in relation to Denmark). The EFTA states signed the nearly identical Lugano Convention, so that in effect there is one regulatory system for all EU and EFTA member states. According to the regulations, parties have the freedom to submit to a jurisdiction of their choice. If the submission agreement between the parties has not been expressed clearly or if such an agreement does not exist, the general rules apply: A person must be sued in his or her country of residence and legal entities must be sued in the country of their registered office.

A party to a contract also may be sued in the country that is determined to be the place of performance. The Council Regulation and the two conventions state a number of detailed provisions for the determination of the jurisdiction in special cases, but securities transactions are not specifically mentioned.

In procedures concerning the validity of the constitution or dissolution of a company or of the decisions of the administrative organs, the country where the company has its registered office has exclusive jurisdiction. If the validity of entries in official books or registers is concerned, the exclusive jurisdiction is conferred to the country where the books or registers are kept. Proceedings regarding the enforcement of judgments always must be conducted at the courts of the state where the judgment concerned was made.

Unilateral Approaches

The International Private Law Act regulates the determination of the governing law under Austrian jurisdiction. In general, parties are free to agree on the law of any country as governing law if the application of that law by Austrian courts does not violate the public order. When there is no such agreement, contracts are governed by the law of the country where the party whose performance is non-monetary resides or has its registered office.

In the case of contracts that create duties for only one party (eg, donations), the law of that country applies where the obliged party resides or has its registered office. Contracts belonging to banking business are governed by the law of the country where the credit institution has its registered office. If both of the parties are credit institutions, the law of the country where the instructed credit institution is seated applies. Transactions concluded on a Stock Exchange or a market are governed by the law of the country where the Stock Exchange or the market is situated.