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Recent developments in Austrian takeover law

Christian Herbst Schönherr Rechtsanwälte Vienna

Since January 1 1999 public offers have been subject to the detailed regulation of the Takeover Act 1998 (the Act). If the target has parallel listings on foreign exchanges, only those shares that are listed on the Vienna Stock Exchange (the VSE) for official trading are subject to the Act. The Act regulates the procedure for both voluntary and mandatory public offers. The latter are triggered by the acquisition of a controlling holding. The Act also provides for anticipatory mandatory public offers, that is, offers to more than 50% of the shareholders that lead, if successful, to the acquisition of a controlling interest.

Set up at the VSE, the Takeover Commission (the Commission) has exclusive competence to supervise public offers. It can issue official statements, provide advice, settle disputes and issue regulations. Regulation 1 (1999) of the Act defines, among other things, controlling holdings (presumption: 30% of voting rights, but this presumption may be rebutted), acting in concert and specifies action parameters for banks involved in takeover transactions. Regulation 2 (2000) of the Act requires controlling shareholders who do not yet have majority of voting rights to launch a mandatory bid if they acquire 2% or more voting shares within 12 months (on a creeping basis). The Commission General Ruling 2001/V/1 on the relation of merger control and takeover law provides flexibility to structure even acquisitions of controlling interests as conditional offers. The Commission has issued various guidance rulings that are accessible at www.takeover.at

The first five years

From the time the Act came into force to December 31 2003 there were 26 public offers, including 12 mandatory offers and 14 voluntary offers, among them four anticipatory mandatory offers. The two largest offers related to the sale of Austria Tabak to Gallaher Group plc (2001) and the takeover by the Heineken Group of BBAG and Brau Union (2003/2004), each in the €1 billion range in terms of acceptance volume.

The issues the Commission had to resolve during these first five years of practice were the typical issues relating to takeover practice. The focus was on the disclosure requirements in, and transparency of, offer documents, the calculation of offer prices in mandatory offers, the relationship between takeover law and company law and the definition of control in relation to determining when a mandatory bid must be launched. In particular, in terms of control, the Commission had to opine and rule on various shareholder agreements and structures involving private foundations, which often raise challenging issues as to when control under the Commission will be constituted – although sections 24 and 25 (exemption from mandatory offer) of the Act provide for detailed rules. The Commission developed a sophisticated regime in determining whether

changes within a syndicate – even contractual modifications of syndicate arrangements – may constitute a change of control. Interestingly, in several cases the Commission was also called upon by core shareholders with controlling interests who tried to use takeover rules to enforce or improve their control position against other large shareholders.

In 2000 the Commission issued a controversial ruling on the HVB/Bank Austria merger holding that the transaction – a complex cross-border merger preceded by a spin-off and a share swap – was not subject to the Act and did not trigger a mandatory public offer. The ruling, which provides for a controlling shareholder test, is the lead opinion on schemes of arrangement against which other structures are likely to be tested.

In a 2002 ruling, the Commission approved an exemption from the mandatory offer requirement where the acquisition of control by private transaction relates to a majority shareholding exceeding 90% (the squeeze-out threshold) and is immediately followed by a squeeze-out. The Commission will grant such a waiver provided, in the execution of the squeeze-out, the guarantees of the Act – particularly those relating to price determination and equal treatment – are secured.

In 2003 seven public offers were launched. These included the mandatory offers by the Heineken Group for BBAG and Brau Union and the anticipatory mandatory offer by General Electric for all shares in Jenbacher. General Electric's successful offer for Jenbacher, with subsequent squeeze-out, involved a mixed conditional share purchase from the core shareholders combined with a voluntary public offer to the free float. The public offer included a 90% acceptance condition and – as a novel feature – a material adverse change (MAC) clause. In admitting the MAC condition, the Commission defined the requirements for MAC conditions and the criteria under which fulfilment of the conditions must be determined.

Further 2003 rulings and official statements of the Commission covered: (i) the introduction of the concept of substantive control, stating that even an ownership stake of below 20% in the target could trigger a mandatory bid if certain criteria on qualified control were met; (ii) the examination of various syndicate arrangements, including the termination of such shareholder arrangements and simultaneous exit by an SPO; and (iii) the scope of the restructuring exemption under the Act, allowing the acquisition of control during a restructuring without triggering a mandatory public offer.

Reform requests by the Commission

Based on five years of practice, the Commission is lobbying for a reform of the Act suggesting: (i) measures to improve the protection of free float shareholders securing equal treatment; (ii) the introduction of share exchange offers for mandatory public offers; and (iii) amendment of the Act to regulate schemes of arrangement, involving control changes to protect the free float against avoidance measures. It is likely that, after the implementation of the EU Takeover Directive, some of these reform requests will be implemented into the Act.

As far as the equal treatment of all target shareholders is concerned, in respect of mandatory offers the proposed reform

aims at abolishing the 15% permitted price discount to the highest price paid for the shares by the bidder within 12 months. The Commission also wants a statutory post-acquisition 12 months payment warranty to ensure that free float shareholders receive equal treatment where the successful bidder pays a higher consideration for shares acquired after the public offer. In the absence of such statutory rule, the Commission has usually insisted on 6 to 9 months voluntary undertakings from bidders to that effect when approving the offer document on a mandatory offer.

In a mandatory public bid, and on anticipatory mandatory public offers, the consideration must be in cash; an exchange offer by the bidder may only be in addition to a cash offer. It will be at the sole discretion of the shareholder to accept anything other than cash. Following the introduction of the EU Takeover Directive, which allows exchange offers for all types of public offers, the Commission proposes to amend the Act to also allow straight share exchanges for mandatory public offers under strictly defined terms. Restrictions proposed by the Commission include that the shares offered are limited to liquid listed securities of non-group companies, and that such exchange offers will not be permitted if other shareholder groups had previously received cash consideration.

Finally, the Commission proposes to amend the Act by also covering company law restructuring transactions including mergers, transformations, demergers and delistings. The Commission wants to secure that the core principles of the Act will also apply to the above-mentioned corporate transactions. This is aimed at reducing the possibilities of acquirors to circumvent the provisions of the Act by structuring the transaction by schemes of arrangement. In this context, the Commission also proposes changes to the applicable squeeze-out procedures, which are currently carried out by company law restructuring transactions not originally designed to provide the basis for squeeze-outs. Available structures include the disproportionate spin-off of the free float shareholders into a cash box, which will be liquidated at a later stage. Alternatively, the minority shareholders can be squeezed out by merging transformation under the Transformation Act.

Legislative changes affecting takeovers

Under the Draft Tax Reform Act, corporate income tax will decrease from 34% to 25% as of January 1 2005. The existing regulation for the creation of a fiscal unity will be substantially broadened by introduction of a group tax regime. Depreciation of goodwill over 15 years, limited to 50% of the acquisition price, will be possible if a participation is acquired and is part of a tax consolidation.

The new regulations will also provide for tax deductibility of debt financing costs.

The changes in corporate income taxation and the possibilities to structure transactions tax efficiently could increase transactional activity in Austria, as its companies become even more attractive takeover targets.

Banking

Recommended firms

Binder Grösswang Rechtsanwälte

Wolf Theiss

Cerha Hempel Spiegelfeld Hlawati

Dallmann & Juranek

Dorda Brugger Jordis

Freshfields Bruckhaus Deringer

Ortner Pöch Foramitti

Schönherr Rechtsanwälte

DLA Weiss Tessbach

Doralt Seist & Csoklich

Hausmaninger Herbst

Preslymayr & Partners

Saxinger Chalupsky Weber & Partners

Binder Grösswang Rechtsanwälte

Binder's banking and finance practice has strengthened its presence in both the international and domestic markets in recent years, and now stands apart from most of its Austrian rivals. The seven-partner group, led by Michael Binder and the "influential" Tibor Fabian, advises large corporates as well as banks such as Lehman Brothers, HypoVereinsbank, and Bank Austria Credinstalt on all types of banking deals, and has one of the country's leading leasing practices.

Recent highlights include advising Fleet Capital Corporation on a €115 million (\$140 million) financing of the Hexcel Group, and acting for Bank Austria Credinstalt, as the lead arranger, on a €500 million syndicated loan facility. Binder also recently advised paper technology group Xerium on its €125 million refinancing.

Key contact partners

Michael Binder
Tibor Fabian
Christian Klausegger

Leading lawyers

Michael Binder
Tibor Fabian
Christian Klausegger

Wolf Theiss

Wolf Theiss easily remains in the top tier on the strength of its work for blue-chip clients such as Erste Bank, Bear Stearns HypoVereinsbank, CSFB and GE Capital. The firm is particularly well known for its leading acquisition finance and syndicated lending practices as well as its banking regulatory expertise.

Over the past year the firm advised Splitska Bank, a subsidiary of Bank Austria Creditanstalt, on a cooperation agreement with Fina, the state-owned agency for payment transactions, in relation to the operation of 30 Splitska branch offices within Fina locations. Other highlights include advising global private equity sponsors Candover and Cinven, as the borrowers, on the €1 billion (\$1.2 billion)-plus financing of their high-profile acquisition of Bertelsmann Publishing, acting for CSFB and Nordea on the financing of their buyout of Danish pharmaceuticals group Nycomed, and advising ABN AMRO as lead manager and security agent on a €525 million credit facility to refinance an existing bridge facility for a European industrial group.

Wolf Theiss also recently represented CIBC World Markets on the Austrian law security documentation for senior and mezzanine financing facilities in connection with the €220 million acquisition of phone directory business Herold Business Data. The seven-partner practice is lead by the "absolutely superb" Markus Heidinger, along with Andreas Schmid and Richard Wolf.

Key contact partners

Markus Heidinger
Andreas Schmid
Richard Wolf

Leading lawyers

Markus Heidinger
Andreas Schmid
Richard Wolf

Cerha Hempel Spiegelfeld Hlawati

Although better known for its market-leading capital markets work, Cerha Hempel also has a solid banking team, led by banking law experts Volker Glas and Peter Knobl. The firm often advises on the more complex or innovative deals and on the development of sophisticated financial products for clients such as Société Générale, Fifth Third bank, Telekom Austria, OIAG and private bank Sal Oppenheim jr & Cie. Cerha Hempel also has strong asset finance and cross-border leasing practice, particularly in the energy and utilities industry.

Key contacts

Volker Glas
Edith Hlawati
Peter Knobl

Leading lawyers

Volker Glas
Peter Knobl

Dallmann & Juranek

Led by name partner Armin Dallmann, one of the leading figures in Austrian banking circles, Dallmann's five partners and three associates regularly advise clients such as Bawag, Erste Bank, RZB, Volksbank-ÖVAG and Bank Gutman on a wide range of financing transactions, with particular expertise in real estate finance. The firm also does a significant amount of work on behalf of Austrian banks in central Europe. In recent years, for example, Dallmann has acted for on several large real estate development project finance transactions in Hungary and the Czech Republic, most of which involved financing office and shopping centres or real estate projects for mixed use.

Key contact partners

Armin Dallmann
Johannes Juranek
Laurence Yansouni

Leading lawyer

Armin Dallmann

Dorda Brugger Jordis

Dorda's seven-partner banking team has strengthened its presence in the Austrian banking market in recent years, advising both domestic and international clients, such as Bank Austria Group, Merrill Lynch, CSFB and Raiffesen Zentralbank Österreich. Recently the firm acted for Bank Austria Creditanstalt and RZO, as arrangers, on one of the largest revolving syndicated facilities in Austria, and represented the Sarajevo Privatization Venture, a subsidiary of Volksbanken/Banque Populaire group, on the sale and privatization of Bosnian bank Central Profit Banka.

Key contact partners

Florian Kremslehner
Tibor Varga
Andreas Zahradnik

Leading lawyer

Tibor Varga

Freshfields Bruckhaus Deringer

The Austrian operation of London firm Freshfields remains one of the premier firms for high-end syndicated lending and

acquisition finance work, with clients such as Bank Austria Group, Sappi Paper Holding, ABN AMRO and Porsche Bank. Partner and banking law expert Maria Th Pflügl leads the practice, while Friedrich Jergitsch is recommended for his asset and structured finance expertise.

Key contact partners

Friedrich Jergitsch
Maria Th Pflügl

Leading lawyer

Maria Th Pflügl

Capital markets**Recommended firms**

Cerha Hempel Spiegelfeld Hlawati

Binder Grösswang Rechtsanwälte

Schönherr Rechtsanwälte

Wolf Theiss

Dorda Brugger Jordis

Freshfields Bruckhaus Deringer

Saxinger Chalupsky Weber & Partners

CMS Reich-Rohrwig Hainz

Doralt Seist & Csoklich

Haarmann Hügel Rechtsanwälte

Hausmaninger Herbst

Cerha Hempel Spiegelfeld Hlawati

IFLR's Austrian law firm of the year, Cerha Hempel Spiegelfeld Hlawati remains the clear leader in the Austrian capital markets, acting on high-profile international deals as well as larger domestic offerings. Led by highly respected partner Edith Hlawati, the firm has developed an enviable list of clients, including companies ranging from large corporates such as Telekom Austria to leading domestic and international retail and investment banks such as JP Morgan, Merrill Lynch, CSFB and Morgan Stanley.

The firm had another stand-out year in 2003, particularly in the equity markets. Cerha Hempel represented JP Morgan and Goldman Sachs as the underwriters of Bank Austria's €1.1 billion (\$1.33 billion) initial public offering (IPO), Europe's largest IPO in 2003, and acted for Morgan Stanley on industrial steelmaker Böhler Uddeholm's €134 million secondary offering.

Meanwhile, in the debt markets the firm advised state privatization agency Österreichische Industrieholding on two deals: the issuance of \$325 million exchangeable bonds in connection with the privatization of Telekom Austria, and the secondary offering and exchangeable bond offering in connection with the privatization of Voestalpine, in a deal worth €491.5 million.

Key contacts

Volker Glas
Edith Hlawati
Peter Knobl

Leading lawyer

Edith Hlawati

Binder Grösswang Rechtsanwälte

Binder Grösswang has a particularly strong presence in the debt markets as a result of its well-established track record acting on behalf of global clients such as JP Morgan and Lehman Brothers, as well as for leading Austrian banks. Led by the “extremely clever” structured finance specialist Tibor Fabian, the firm recently acted for the dealers on multibillion dollar updates of Austrian mortgage banks Hypo Landesbank Voralberg and Pfandbriefstelle der österreichischen Landes-Hypothekenbanken’s debt issuance programmes, and advised JP Morgan on Voestalpine’s secondary offering. In addition to Fabian, Michael Kutschera is singled out by peers and clients for capital markets work.

Key contact partners

Michael Binder
Tibor Fabian
Ivo Rungg

Leading lawyers

Tibor Fabian
Michael Kutschera

Schönherr Rechtsanwälte

While best known for its leading structured finance practice, Schönherr’s banking and finance group has also had a busy year in the equity markets. The firm recently advised international papermaker Andritz on a €139 million (\$169 million) secondary offering, HVB on the restructuring of a €8 billion Argentine bond, and UBS Warburg and Deutsche Bank, as the underwriters, on a Swiss-listed secondary offering by semiconductor company SEZ. Other highlights include representing Uniqua Alternative Investments on two new collateralized debt obligations, and acting for ABN AMRO on several structured offerings.

Key contact partners

Martin Ebner
Peter Feyl

Leading lawyers

Martin Ebner
Peter Feyl

Wolf Theiss

Wolf Theiss has one of the largest capital markets teams in Austria, with eight partners representing clients such as Deutsche Bank, Erste Bank and UBS on a broad range of debt and equity offerings. The firm has had another busy year in 2003 to 2004, advising Voestalpine, a leading central European steel manufacturer, on a €250 million (\$304 million) secondary public offering and ABN AMRO, as co-lead arranger, on Telekom Austria’s €750 million bond offering in August 2003.

Wolf Theiss also represented Erste Bank, as lead manager, on a €100 million offering by Andritz, as well as on the bank’s establishment of its own employee and management stock option programme. Richard Wolf and Markus Heidinger are highly recommended.

Key contact partners

Markus Heidinger
Peter Oberlechner
Richard Wolf

Leading lawyers

Markus Heidinger
Richard Wolf

Dorda Brugger Jordis

Dorda’s capital markets practice has continued to expand since the hiring of high-profile partner Andreas Mayr in early 2003. This past year the firm also added partner Cristoph Stibble, formerly of Hausmaninger Herbst Rechtsanwälte, and two associates, to the team, which now serves blue-chip clients such as Telecom Italia, Bank Austria Creditanstalt and Erste bank in the debt and equity capital markets.

Recent highlights include advising steel toolmaker Böhler Uddeholm on a secondary offering of 2.8 million shares and representing Austrian real estate investment company SEG Immo on its initial public offering. Dorda also acted for Bank Austria Creditanstalt, as the seller and arranger, on the secondary offering of 16 million shares by Wienerberger in February, as well as on a €250 million debt offering by OMV Atkiengesellschaft.

Key contact partners

Andreas Mayr
Andreas Zahradnik

Leading lawyer

Andreas Mayr

Freshfields Bruckhaus Deringer

Although not as dominant a presence in Austria as in other markets, Freshfields' capital markets practice has leveraged the firm's international reach and client base to build market share in larger debt and equity deals. This past year, for example, the firm acted for Bank Austria Creditanstalt on a €270 million (\$328.3 million) offering of bonds convertible into shares of Wienerberger, one of the year's biggest deals. Freshfields also recently represented the Carlyle Group and other private equity sponsors on the sale of their stake in Andritz through a €139 million secondary public offering.

Key contact partners

Paul Luiki
Maria Th Pflügl
Thomas Zottl

Leading lawyer

Maria Th Pflügl

Mergers and acquisitions

Recommended firms

Cerha Hempel Spiegelfeld Hlawati

Freshfields Bruckhaus Deringer

Schönherr Rechtsanwälte

Wolf Theiss

Binder Grösswang Rechtsanwälte

Dorda Brugger Jordis

CMS Reich-Rohrwig Hainz

Fiebinger Polak Leon & Partner

Haarmann Hügel Rechtsanwälte

Saxinger Chalupsky Weber & Partners

Cerha Hempel Spiegelfeld Hlawati

Having advised Heineken on its €1.9 billion (\$2.31 billion) acquisition of Austrian brewer BBAG in one of the largest European deals of 2003, Cerha Hempel Spiegelfeld Hlawati's mergers and acquisitions practice remained active in 2004. The four-partner team, led by name partners Edith Hlawati and Benedikt Spiegelfeld, recently acted for leading global beverages company Coca-Cola on its acquisition of Römerquelle. Cerha also represented Telekom Austria on the sale of some of its shares in Herold Business

Data to private equity sponsors Veronis Suhler Stevenson and the 3i Group, as well as advising regional Austrian bank Salbruger Landes-Holding on a share sell to Raiffeisen Landesbank.

The firm is equally well known for its expertise in privatization and post-privatization projects, and continues to be involved in most sales by the state privatization agency, Österreichische Industrieholding. Its telecoms practice is also highly recommended.

Key contact partners

Albert Birkner
Edith Hlawati
Benedikt Spiegelfeld

Leading lawyers

Volker Glas
Edith Hlawati
Benedikt Spiegelfeld

Freshfields Bruckhaus Deringer

Freshfields' Austrian office has drawn on the strength of the firm's international reach and client base to develop one of the leading M&A practices in Austria, serving clients such as German publisher Gruner + Jahr and Bombardier as well as Austrian corporates such as Bank Austria. The firm's three-partner corporate group is also well known for its expertise in the energy and utility sectors; its clients include Austrian utility EVN and Gaz de France.

Recent highlights include representing Australian agrochemicals business NuFarm on the €50 million (\$60.7 million) acquisition of a large part of BASF's agrochemical unit. Freshfields also recently represented investment company Warburg Pincus on the acquisition of the Austrian holding company for shares in publicly listed Slovakian agribusiness Slovakofarma. Head of corporate Willibald Plesser is one of the leading players in the energy market

Key contact partners

Paul Luiki
Willibald Plesser
Thomas Zottl

Leading lawyer

Willibald Plesser

Schönherr Rechtsanwälte

Schönherr continues to be rated one of the best M&A firms in Austria, advising leading domestic clients and international companies such as Microsoft, Vivendi and General Electric. Five associates joined the M&A team last year, bringing the number advising on this work to 12 partners and 24 associates.

Last year Schönherr represented General Electric on its €195 million (\$237 million) acquisition of turbine maker

Jenbacher, achieved through a public tender offer. The team also advised VS&A and the 3i Group on their acquisition of Herold Data, and acted on the exit of the private investors from Andritz, involving a secondary public offer. At the time of writing the firm is acting for Agrana International on its acquisition of the ATYS Group, the global leader in industrial fruit juice production.

The team, led by partners Christian Herbst and Cristoph Lindinger, also offers particular expertise in eastern Europe, with offices in Croatia, Serbia and Slovenia.

Key contact partners

Christian Herbst
Christof Lindinger

Leading lawyers

Stefan Frotz
Christof Lindinger
Christian Herbst

Wolf Theiss

In terms of deal volume and value, few Austrian firms can compete with Wolf Theiss, which now boasts 15 partners and 25 associates in the firm's M&A group alone. The past year was another busy one for the firm. Highlights include representing Hogg Robinson Holdings, a European business travel services provider, on its €150 million (\$182.3 million) acquisition of the Austrian and Hungarian unit of rival Swiss travel services company Kuoni Reisen Holdin, and advising McArthur Glen, the leading European factory outlet center, on the \$80 million sale of its Austrian designer outlet. Wolf Theiss also acted for Bank Austria Creditanstalt on its acquisition of Sarajevo's Central Profit Banka from the city's privatization authority. Richard Wolf comes in for frequent praise from peers and clients.

Key contact partners

Markus Heidinger
Peter Oberlechner
Richard Wolf

Leading lawyers

Horst Ehardt
Richard Wolf

Binder Grösswang Rechtsanwälte

Although perhaps not as dominant as some of the firm's other practice groups, Binder's M&A practice does a steady volume of work for its financial institution and corporate clients. Over the past year the firm acted on Telekom Austria's sale of its stake in Herold Business Data, and represented engineering group Tigas on its merger with Innsbrucker Kommunalbetriebe. Binder also advised state privatization agency Österreichische Industrieholding on the recent privatization of steelmaker Voestalpine.

Key contact partners

Michael Binder
Michael Kutschera
Horst Lukanec

Leading lawyer

Michael Kutschera

Dorda Brugger Jordis

Christian Dorda leads the firm's 10-partner M&A group, which is particularly well known for its work in the privatization sector. The firm recently represented Verbund, Austria's largest electricity provider, on the merger of its customer services branch with EnergieAllianz, a group of five regional Austrian electricity providers. Other highlights include acting for the Magna Group on its acquisition of Eurostar Automobilwerk Gesellschaft from Daimler Chrysler and advising Andlinger & Company on the purchase of building and infrastructure subsidiary ABB.

Key contact partners

Martin Brodey
Christian Dorda
Theresa Jordis

Leading lawyers

Martin Brodey
Christian Dorda