Austria

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1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Austria has seen the full spectrum of private equity transactions, from seed and growth capital to buyout transactions. A more recent trend is the private equity fund-backed investment in non-performing loan portfolios. Many buyout transactions had a distressed background driven by the banks' efforts to clean up balance sheets and to require borrowers to sell certain assets or the borrowing entity as such. For such reason, providing debt to a potential target is becoming quite a popular in-route for private equity funds, with the eventual plan of a debt-equity swap. In the non-distressed space, secondary transactions and bolt-on acquisitions (that is, acquisitions of private equity-backed portfolio companies aimed at consolidating the market or enhancing the portfolio company's value (for example, by acquiring neighbouring lines of business)) represented the largest number. We have not seen any notable management buyouts.

In a typical private equity transaction, the private equity fund will acquire the shares through a special purpose vehicle (SPV), which is funded by a combination of equity (provided by the private equity fund and sometimes management) and debt (provided by the financing banks). In recent years, the SPV was typically a domestic limited liability company (LLC) to benefit from the goodwill amortisation, which was also available for a share deal. Given that this tax benefit was repealed, we expect to see more foreign-based SPVs in the future.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or become public companies?

The level of regulation for a joint stock company (JSC) is greater than for a LLC or a partnership (eg, a JSC is subject to stricter rules on corporate governance and accounting) and again increases if the JSC is listed (eg, a JSC that is listed on the Prime Market of the Vienna Stock Exchange is subject to disclosure and reporting requirements under the Austrian Corporate Governance Code, some of which are mandatory, others follow the comply or explain concept and others the recommendations only). For that reason, private equity firms will typically seek to take a listed target private to benefit from reduced regulation and reduced costs. Further, it should be noted that changes to the management board and supervisory board of a (listed) JSC are more difficult and time-consuming to implement than in a LLC.

3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What procedural safeguards, if any, do public companies use when considering transactions? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

The management board of a JSC is required under the Stock Corporation Act to promote the interests of the company, considering the interests of its shareholders, employees and the public. Where a public JSC is involved, the management board is called upon to take measures preventing market manipulation and insider trading and not to make any inaccurate public statements. In addition, whenever a takeover bid is involved, the management board and supervisory board are subject to additional obligations, namely they are prohibited from taking any measure which could prevent the shareholders from taking a free and informed decision with respect to the takeover bid, and they have to seek the approval of the shareholders' assembly for any measure which could frustrate the bid. The solicitation for a competing bid, however, is specifically allowed.

Where members of the management board or the supervisory board are participating in a transaction (see question 8) or otherwise have an interest in the transaction, they have to notify the company accordingly and will generally not be permitted to vote with respect to the transaction or to participate in associated meetings. In addition, where the transaction involves a takeover bid, the relevant member of the management board or supervisory board must not participate in the preparation of the opinion on the takeover bid required to be issued by the management board and supervisory board under the Takeover Act.

Special committees are rather uncommon in Austria, but if the management or the supervisory board are involved in a takeover bid, they have to carefully consider and publish any conflict of interest they may have or advantage offered to them.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

A typical going-private transaction involves a voluntary takeover bid aimed at control conditional upon the acceptance of 90 per cent of the outstanding share capital followed by a squeeze-out pursuant to the Act on the Exclusion of Shareholders or a disproportionate spin-off pursuant to the Spin-Off Act, which ultimately results in delisting. The takeover offer as such is subject to the same disclosure issues and requirements as any other takeover offer for the shares of a public company. The enhanced disclosure requirements with respect to the squeeze-out differ in detail but are generally aimed at protecting the interests of the minority shareholders, employees and creditors. Also other types of reorganisations may be used for a delisting, the legal consequences thereof are still unsettled and accordingly subject to uncertainties.

In addition, a person directly or indirectly acquiring or disposing of shares of a public company admitted to trading on a regulated market is required to notify the target, the stock exchange and the Austrian Financial Market Authority if as a result of such transaction they reach, exceed or fall below a certain voting rights threshold (4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75 and 90 per cent of the votes) under the Austrian Stock Exchange Act.

5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

As mentioned in question 4, going-private transactions usually involve a takeover bid followed by squeeze-out. The takeover procedure typically takes around six months from the beginning of the internal preparatory steps and usually three to four months from the first contact with the Takeover Commission. The time required to complete the squeeze-out depends on the structure and may take up to three months.

Other timing considerations that apply equally to public and private transactions include the time required for due diligence, the time required to obtain antitrust and regulatory clearance or required third-party approvals or to implement any agreed pre-closing restructuring. In addition, where an organised auction process is involved, timing will largely depend on the process. The usual time frame for transactions in Austria is three to six months.

6 Dissenting shareholders' rights

What rights do shareholders have to dissent or object to a going-private transaction? How may dissenting shareholders challenge a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

Minority shareholders may choose whether to tender their shares in the takeover bid. Once the private equity fund has acquired the required majority to implement the squeeze-out (see question 4), the minority shareholders do not have any possibility of blocking it. Their rights are limited to receiving adequate cash consideration in exchange for their shares and requesting a review of the cash consideration offered before court as to its adequacy (ie, a fairness review). If the squeeze-out is implemented pursuant to the Act on the Exclusion of Shareholders and the shareholders' resolution on the squeeze-out is passed within three months of the lapse of the offer period, there is a rebuttable presumption that the consideration offered is adequate if it amounts to the highest consideration paid during the offer period.

7 Purchase agreements

What purchase agreement provisions are specific to private equity transactions?

Provisions specific to private equity transactions relate to the financing of the transaction (see questions 10 and 11), the scope of warranties (if on the sell side the private equity firm will typically not be willing to provide business warranties but try to limit warranties to title and capacity – in such circumstances the purchaser will have to rely on its own due diligence and warranties of management) and limited recourse for breach of warranty or indemnification to amounts put in escrow at signing or recoverable from warranty and indemnity insurance (see question 15). We see an increasing interest in obtaining insurance coverage as either a substitute for some warranties or to substantially limit their scope, for instance, as to their duration.

8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations of when a private equity sponsor should discuss management participation following the completion of a going-private transaction?

In buyout transactions the private equity firm often involves future management in the due diligence process and the financial modelling. Typically, management is offered the opportunity (and is sometimes even required) to acquire an interest in the target to ensure management's commitment. Senior management is sometimes also given the opportunity to invest in the very same instrument ('institutional strip') acquired by the private equity firm, which ensures that the interests of senior management and the interests of the private equity firm are fully aligned.

In some cases, the incentive provides for a ratchet mechanism entitling management to an enhanced return once the return of the private equity firm exceeds a certain threshold. The detailed structuring of the incentive packages is dependent on the tax treatment of the benefits in the relevant jurisdictions. For example, management will have a strong interest in ensuring that any gains in relation to the interests acquired are taxed as capital gain and not as income.

Management members who hold real shares (as opposed to phantom stock) are usually required to restrict their shares (restricted stock) by way of a restricted stock agreement or by acceding to the shareholders' agreement with the private equity firm. Such restrictions will typically include a right to drag of the private equity firm upon an exit and compulsory transfer provisions if the employment with the target group terminates. The consideration due in the case of such transfer will typically depend on the reason for termination ('good' or 'bad' leaver provisions).

9 Tax issues

What are the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

Tax group and goodwill amortisation

Until recently, provided the target was Austrian and had an active trade or business, it was common to set up a tax group between the purchaser and the target following a share purchase. Such tax group enabled the purchaser to deduct interest expenses for the acquisition of the target from the operational profit of the target and to amortise the goodwill (up to 50 per cent of the purchase price) over a period of fifteen years. Whereas the deduction of interest expenses (in a narrow sense, other financing expenses are not deductible, for instance, arrangement fees and capital loss deriving from foreign exchange loans) from the operational profit of the target is still possible, goodwill amortisation is not available any more for acquisitions made after 28 February 2014. For that reason, private equity firms (as well as other purchasers) now sometimes consider using asset deals or foreign-based acquisition vehicles which may also be beneficial with regard to any future exit, as most Austrian double tax treaties attribute the sole right of taxation in relation to capital gains in the shares of the target to the state of residence of the acquisition vehicle; assuming that such jurisdiction offers a participation exemption, a sale will be tax free.

Financing

Interest expenses on loans obtained from unrelated parties are generally fully deductible (ie, there is no interest barrier rule that limits the amount of interest expenses). Also, interest on loans from related parties is deductible, provided that:

- the terms are at arm's length and properly documented;
- the debt is not requalified as equity; and
- no limitations apply.

Transfer pricing rules have to be considered in relation to related-party debt. While the Austrian tax authorities suggest that the comparable uncontrolled price method shall be applied, a comparison of inter-company financing transactions to those with commercial banks is generally not accepted because of the differing objectives and goals of an unrelated lender. As a result, the interest rate of banks can only be considered as the upper limit of the arm's-length interest rate. In general, in determining the interest rate, factors such as currency, term, creditworthiness of the borrower and refinancing costs need to be taken into account. If the related-party lender has sufficient own liquidity, the tax authorities see the deposit interest rate as the appropriate interest rate for the related-party loan.

There are no statutory rules on thin capitalisation in Austria, but the Austrian tax authorities generally accept debt to equity ratios of around 3:1 to 4:1. Beyond that, interest deduction may be denied and the shareholder loans may be qualified as deemed equity. Besides the non-deductibility, this would also result in the interest payments being treated as deemed dividends, which – unlike interest on shareholder loans – would be subject to withholding tax in Austria.

There is an important new statutory limitation on related-party debt. Based thereon, interest expenses are not deductible from the Austrian tax base if the lender is a corporation and a related party, and the interest payments in the state of residence of the lender are not effectively taxed at 10 per cent or more. From the Austrian tax authorities' point of view, it is not relevant whether the tax at a rate lower than 10 per cent is based on the domestic law of the state of residence of the lender or the applicable double taxation treaty. The new rule is effective to all payments after 28 February 2014, irrespective of when the corresponding contract is concluded.

Equity contributions

The contribution of equity by a shareholder (or its direct or indirect subsidiaries) to an Austrian company is subject to 1 per cent capital duty. The current position of the Austrian tax authorities is that 'shareholder' only means the direct shareholder of the receiving company (or its direct or indirect subsidiaries). Accordingly, contributions by an indirect shareholder (grandparent contributions) should not trigger capital duty if they are properly structured. The capital duty on contributions of a direct shareholder was abolished, effective as of 1 January 2016. Based on EU law, the capital duty cannot be reintroduced.

Management packages

Management incentive packages are usually structured through share options or equity participation rights. Another possible incentive is profit participation rights.

Share options (a preferential regime applies to options granted before 1 April 2009) are taxed as follows. Non-transferable share options are not taxed at the time of the grant, but upon exercise of the option because they are not considered an asset for tax purposes. Upon exercise, the difference between the (discounted) cost of acquisition and the fair market value of the shares received based on the option is taxed at the progressive income tax rate. In contrast, transferable share options are taxed at the time of the grant as they are considered an asset for tax purposes.

After a broad reform of the taxation of investment income, income from shares typically triggers a 25 per cent tax for individuals resident in Austria, both for capital gains and dividends. Former models that granted shares to the management relied on an exemption for capital gains if the percentage of the investor's (weighted) shareholding in the Austrian company was below 1 per cent and held for more than one year, but this exemption is no longer available following said reform. In the case of non-resident individuals, capital gains are taxable at a rate of 25 per cent if the percentage of the investor's (weighted) shareholding in the Austrian company amounts to at least 1 per cent during the last five years. Double taxation treaties, however, usually restrict Austria's right to tax such capital gains (article 13, paragraph 5 of the OECD Model Tax Convention on Income and on Capital), whereas dividends are subject to withholding tax at a rate of 25 per cent (which is usually reduced by double tax treaty).

Profit-participation rights typically grant a right to receive a share of the profit of the company, and sometimes also to liquidation proceeds. Depending on the rights and obligations attached to such profit participations rights (which unlike shares never carry voting rights), the funds given to the company by the subscriber either qualify as equity or as debt. Ongoing income will accordingly be taxed like income from dividends or interest, as the case may be. Regarding the exit, profit-participation rights generally give more room for a tax-optimised structuring than share options. The issue of profit participation rights will usually trigger capital duty at the rate of 1 per cent.

10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? What issues are raised by existing indebtedness at a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Going-private and private equity transactions generally involve senior debt and, particularly for larger transactions, subordinated mezzanine debt. Senior bank debt is typically provided by one or more commercial banks, and syndicated to other financial institutions and investors, in the form of a term loan (to finance the acquisition and the costs of the acquisition) and a working capital facility (to fund the working capital requirements of the target). The term loan is sometimes divided into 'alphabet loans': a term loan 'A' repayable in annual instalments and a term loan 'B' repayable by a single bullet repayment (that is, a lump sum payment for the entire loan amount at maturity). We have seen high-yield bonds to supplement, or to be used instead of, senior bank debt on pan-European deals but not on Austrian deals. Subordinated debt is typically made up of either a mezzanine facility (which may also contain warrants to purchase equity). Vendor financing is also sometimes used. To meet certain funds requirements in public-to-private transactions involving a takeover bid (see question 11), bridge financing is sometimes used, under which one or more commercial banks agree to provide bridge or interim loans if the long-term debt financing cannot be put in place in time. Where several layers of debt are involved, the private equity firm and financing banks will typically enter into an inter-creditor agreement which regulates the rights of each debt provider to receive payment and enforce security.

A private equity firm may wish to either retain or prepay any existing indebtedness in the potential target. The terms of the existing indebtedness often require prepayment upon a change of control and typically contain limits on additional leverage or dividend stoppers which will require a refinancing or renegotiation of the existing indebtedness. More often, existing indebtedness is prepaid, in which case prepayment notice requirements, prepayment fees, breakage costs and security releases will have to be considered in the timing of the transaction.

Leveraged going-private and private equity transactions typically involve upstream and side-stream security interests, guarantees and indemnities by the target group which are a concern under Austrian capital maintenance and, where a joint stock company is involved, Austrian financial assistance rules. Transactions in violation of Austrian capital maintenance rules are null and void as between the parties as well as any involved third party if it knew or should have known of the violation. In addition, any members of the management or supervisory board who approved such transaction may be subject to liability for damages. Transactions violating Austrian financial assistance rules are not void but may result in liability of any members of the management or supervisory board who approved such transaction. It is widely accepted to include limitation language in the financing documents to prevent liability and to ensure that security interests and guarantees will at least remain valid in part to preserve priority.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in a going-private transaction? What other documents set out the expected financing?

As mentioned under question 4, a going-private transaction typically involves a takeover offer. Under the Takeover Act, the private equity firm may only announce a takeover bid if it is certain of the necessary funds available to pay the consideration in full; this must be confirmed in the opinion on the takeover bid made by the private equity firm's expert. Unless a financing condition has been permitted (which could be the case in a voluntary takeover bid not aimed at control), the expert will usually require a copy of the executed equity commitment letter from the private equity fund and copies of the definitive finance agreements (documenting the facilities described in question 10) together with documents evidencing that all conditions precedent (other than those within the private equity firm's control) have been satisfied.

Where a purchase agreement with one or more block shareholders is involved in a going-private transaction, the purchase agreement will typically include a condition that the acquisition vehicle will acquire an aggregate 90 per cent of the shares (and thus be able to implement the squeeze-out (see question 4)) for the benefit of the acquisition vehicle. It will also normally include warranties by the vehicle regarding the equity-financing commitment of the private equity firm and, where leverage is used, the third-party debt-financing commitments obtained from the financing banks. In addition, the seller will usually require a copy of the equity commitment letter from the private equity firm and copies of the definitive agreements with the financing banks at signing for assurance that the acquisition vehicle will be able to complete the transaction.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving leverage raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Under Austrian insolvency law, when an Austrian company has entered into insolvency proceedings, the administrator may challenge certain transactions (eg, transactions that aim to discriminate against other creditors, transactions at an undervalue or preferences) entered into by the company prior to the opening of the insolvency proceedings. In leveraged transactions, there is a concern that security interests and guarantees can be set aside on such grounds. For that reason, purchase and debt-financing agreements typically include warranties that no insolvency proceedings are pending and that the target is not insolvent. Where, in a particular transaction, there is a concern regarding insolvency, the private equity firm will typically require additional evidence, such as an officer's certificate from the chief financial officer or a special audit opinion, or both, for assurance that there are no fraudulent conveyance or other bankruptcy issues. In addition, actions taken with the intention to deprive other creditors may constitute a criminal offence.

Another concern related to leveraged transactions is personal civil or even criminal liability of members of the management board or supervisory board, or both, who approved the granting of upstream or side-stream security interests, guarantees or indemnities as these may constitute a violation of Austrian capital maintenance or financial assistance (see question 10).

13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms? Are there any statutory or other legal protections for minority shareholders?

Shareholders' agreements for a minority investment or a club deal involving investments made by two or more private equity firms will typically include provisions dealing with the following matters:

- composition of management board and supervisory board (if any);
- rights to nominate members or observers, or both, to boards (if any);
- veto rights requiring the prior consent of the investor or the investor director (or the shareholders' meeting or the supervisory board with qualified majority);
- anti-dilution provisions (allowing the private equity fund to subscribe for nominal value in case any future round of investment is completed at a lower valuation);
- liquidation preference (preferential treatment of the private equity fund upon certain exits);
- exit rights (right of the private equity fund to request initiation of a trade sale or an IPO process);
- a prohibition on selling for a certain minimum period of time (which may apply to all or only some of the shareholders, for example, the founders only, and may differ in length from shareholder to shareholder (lock-in)) and rights of first refusal, drag-along, tag-along and similar rights;
- requirements for management and annual accounts, business plan and budget;
- rights of access to information and management upon request; and
- covenants not to compete and not to solicit customers, suppliers and employees.

Statutory protection for minority shareholders differs. For corporations, minority shareholder protection includes information rights, rights to call a shareholders' assembly, minimum voting requirements for major measures (eg, corporate restructurings, changes of purpose, changes to governing documents, dealings involving substantially all of the business or assets and squeeze-out transactions). Some of these protections are mandatory, others may only be adjusted to the benefit of the minority shareholders and others can be amended without restriction.

14 Acquisitions of controlling stakes

Are there any requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

The acquisition of a controlling interest in a private company is not subject to any specific requirements other than as stated in question 18. In contrast, the acquisition of a controlling interest in a public company is subject to the Takeover Act which requires notification of the acquisition to the Takeover Commission without delay and triggers a mandatory takeover bid for the remaining shares that must be launched within 20 trading days and is subject to, among other things, minimum pricing requirements. The consideration must:

- not be lower than the highest price agreed or paid in the 12 month-period before the announcement of the takeover bid; and
- be at least equal the average quoted share price (weighted according to the trading volumes) in the six-month period before the day on which the intention to launch the takeover bid was announced by the purchaser).

The Takeover Act captures direct controlling interests (ie, where the bidder directly holds more than 30 per cent in a public company) and indirect controlling interests (ie, where the bidder holds a controlling interest in another public company that holds a controlling interest in the target or in a private company (or other entity) controlled by it, whether through shareholding or based on contract, that in turn holds a controlling interest in the target).

In addition, an acquisition of a direct or indirect interest conferring more than 26 per cent but not more than 30 per cent of the voting rights of a public company must be notified to the Austrian Takeover Commission without delay within 20 trading days; the voting rights exceeding 26 per cent are suspended but there is no obligation to launch a mandatory bid for the remaining shares.

15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a buyer? Does the answer change if a private equity firm sells a portfolio company to another private equity firm?

A private equity firm will generally seek to retain flexibility in its ability to sell its stake in a portfolio company, which may include having the right to require an initial public offering or a trade sale after a minimum holding period (usually not exceeding five years) and the right to drag along other shareholders in the event of a sale by the private equity firm of all or a significant portion of his shares. Both exit rights and drag-along rights are usually subject to certain restrictions (eg, a pre-emption right or minimum return requirement), which may affect the private equity firm's ability to sell its stake in the portfolio company.

When private equity sellers sell their stake in a portfolio company, they are usually not prepared to accept substantial continuing liability to purchasers. As a consequence, they do not give business warranties and indemnities and instead just provide warranties on title and capacity. As mentioned in question 6, a purchaser must therefore often rely on its own due diligence and warranties from management, and accept limited recourse, for example, for a purchase price holdback, an escrow amount or the amount insured under warranty and indemnity insurance. The cost of warranty and indemnity insurance is usually part of the purchase price negotiations.

On an IPO, the portfolio company will have to satisfy the listing requirements of the relevant stock exchange. In addition, registration rights agreed in the shareholders' agreement may limit the percentage the private equity firm can sell into the IPO and lock-up restrictions agreed in the course of the IPO may limit the private equity firm's ability to sell any shares retained.

Dual track processes are rather uncommon. Last year, a private equity investor considered an IPO in Germany as a response to the rather unattractive capital market in Austria. Ultimately, this IPO was cancelled and the portfolio company was sold in an auction process.

Update and trends

Generally, the fact the deal volumes have decreased in recent years has shifted the spotlight of funds also to smaller jurisdictions such as Austria. Accordingly, Austria has seen increasing deal activity in recent years, with 2014 being quite an active year and the fourth quarter of 2013 being very busy. Most of that deal activity resulted from distressed situations (eg, Triton acquiring Alpine Energie), restructurings of corporate sellers (often forced by financing banks to sell non-core or non-performing assets), secondary transactions and non-performing loan transactions. With the macroeconomic environment remaining substantially unchanged, we do not expect to see any substantial shift in terms of deal flow source, but we see increased interest of private equity investors in Austrian targets.

16 Portfolio company IPOs

What governance rights and other rights and restrictions typically included in a shareholders' agreement are permitted to survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

An IPO does not invalidate rights or restrictions contained in a shareholders' agreement. However, the underwriters will often push the private equity firm to give up any preferred rights prior to an IPO. Also, as a purely practical matter, the parties to the shareholders' agreement will often not have the required majority to enforce such rights and restrictions following an IPO.

In an IPO, the underwriter will usually expect part of the shares retained by the private equity firm (and other shareholders) to be locked up for a certain period (to avoid downward pressure on the share price). Such lock-up provision may already be included in the shareholders' agreement but this is rather the exception. It is more common to discuss the lock-up (in particular, in which proportion it applies to each shareholder that retains shares and the duration of the lock-up period) at the time of the IPO accounting for the circumstances at the time.

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

There have only been a handful of completed going-private transactions in recent years, which makes it difficult to determine typical target industries. Generally, hot sectors for private equity firms in 2014 included health care, financial institutions, packaging, retail, education and fintech (financial technology).

Transactions involving a change of control of targets in regulated industries (see question 18) may be subject to advance notice or consent requirements, or both, which may impact timing.

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

Regulated industries

In regulated industries (eg, banking, insurance, utilities, gambling, telecoms or aviation) the acquisition of a qualified or a controlling interest is typically subject to advance notification or approval. Sanctions for failure to notify or obtain approval in advance differ and range from monetary penalties to ordering a suspension of voting rights, or a partial or total shutdown.

Real estate

The acquisition of ownership and certain other interests in real estate by non-EEA nationals or the acquisition of control over companies owning such interests is subject to notification or approval by the local Real Estate Transfer Commission. What interests are covered and whether notification or approval is required varies across Austria from state to state. Where the real estate is used for commercial rather than residential purposes approvals are usually granted.

Foreign Trade Act

The acquisition of an interest of 25 per cent or more or a controlling interest in an Austrian business involved in defence and security services or public order and public services (for instance, hospitals, emergency and rescue services, energy and water supply, telecoms, traffic and universities) by a foreign investor (ie, an investor domiciled outside of the EEA and Switzerland) is subject to advance approval by the Minister of Economic Affairs under the Foreign Trade Act. Within one month of application, the Minister of Economic Affairs must either approve the transaction or initiate Phase II investigations. If Phase II investigations are initiated, the decision is due within two months of the application. If no decision is adopted within those time limits, the transaction is ex lege deemed approved. The application for approval must be filed prior to signing. Transactions subject to approval may not be completed pending approval. Failure to obtain approval is subject to imprisonment and criminal penalties. If the foreign investor relies on the exception for EEA and Swiss residents, the Minister of Economic Affairs may initiate ex officio investigations as to whether reliance on such exception was made in an abusive manner.

19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

Austrian law does not restrict multiple private equity firms, or a private equity firm and a strategic partner, from participating in a club or group deal. However, a club or group deal may raise additional antitrust concerns, which need to be analysed. In addition, where the transaction involves a public company, the partners in such deal will usually be considered to 'act in concert' and as such any shares held or acquired by them will be aggregated for determining various thresholds under the Takeover Act and the Austrian Stock Exchange Act.

As a practical matter, each partner in a club or group deal may have different objectives (eg, a private equity firm usually has a different investments horizon from the strategic partner and may have a different horizon from another private equity fund) or target rates of return and structuring requirements which must be accounted for in the structuring of the transaction and the shareholders' agreement and ancillary documentation (eg, by introducing a special exit right or a liquidation preference for the private equity firm or a buyout option or special governance rights for the strategic partner where the strategic partner shall have control over the business and the private equity firm holds a purely financial interest in the portfolio company).

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity buyer related to certainty of closing? How are these issues typically resolved?

Generally, Austrian sellers were usually successful in resisting closing conditions other than in relation to antitrust clearance or other regulatory approvals, material third party consents and completion of agreed pre-closing restructurings. Sometimes material adverse change conditions have been accepted where required by a private equity purchaser to mirror a material adverse change provision in the financing documents in a leveraged transaction or where limited to adverse changes to the business (and not the economy or financial markets as a whole). Bring-down conditions for warranties or pre-completion covenants were the exception.

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