

THE PRIVATE EQUITY  
REVIEW

TENTH EDITION

Editor  
Stephen L Ritchie

THE LAWREVIEWS

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REVIEW

TENTH EDITION

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# PREFACE

The tenth edition of *The Private Equity Review* follows a turbulent year for dealmakers in 2020. Uncertainties created by the global covid-19 pandemic triggered a significant slowdown in deal activity in the first and second quarters. However, a combination of central bank interventions, fiscal stimulus, optimism about a vaccine and better virus management led to frenetic third and, especially, fourth quarters. The net result was that the number and value of global buyouts increased significantly over 2019's already robust activity, while there was a noticeable decline in private equity exits. The year 2020 also saw a flurry of IPO and merger and acquisition activity by special purpose acquisition corporations, or SPACs, some formed by private equity sponsors and others formed by other dealmakers. Fundraising activity was also strong, notwithstanding the pandemic, with aggregate capital of nearly US\$1 trillion raised, as institutional investors remained extremely interested in private equity as an asset class because of its continued strong performance. As a result, private equity funds have record amounts – by one estimate, nearly US\$1.5 trillion – of available capital, or dry powder. PE funds' dry powder (and the need to deploy it), together with competition from SPACs, sovereign wealth funds, family offices and pension funds, led to very competitive transactions being completed at increasing leverage levels and purchase price multiples. This has caused private equity firms to become even more creative as they seek opportunities in less competitive markets or in industries where they have unique expertise.

The year 2020 showed once again the resilience of the private equity market and the creativity of private equity dealmakers. Given PE funds' creativity and available capital, we are confident that private equity will continue to play an important role in the global economy, not only in North America and Western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa, and to further expand its reach and influence, even in the face of potential political, regulatory and economic challenges.

Private equity professionals need practical and informed guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. *The Private Equity Review* has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 25 different countries, with observations and advice on private equity dealmaking and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

I want to thank everyone who contributed their time and labour to making this tenth edition of *The Private Equity Review* possible. Each of these contributors is a leader in their

respective markets, so I appreciate that they have used their valuable and scarce time to share their expertise.

**Stephen L Ritchie**

Kirkland & Ellis LLP

Chicago, Illinois

March 2021

Part I

# FUNDRAISING

# AUSTRIA

*Martin Abram and Clemens Philipp Schindler<sup>1</sup>*

## I GENERAL OVERVIEW

At the time of writing, no information was available about the fundraising market in 2020. The most recent information available is for 2019, for which the Austrian Venture Capital Association reported that Austrian private equity and venture capital funds raised €192 million, compared with €162 million in 2018 and €216 million in 2017.

The number and volume of Austrian private equity and venture capital funds continues to be well below the European average.

The announcement of the Austrian government in 2020 that it intends to implement a programme to provide incentives for private equity investment into start-ups and small and medium-sized enterprises (SMEs), which includes potential tax incentives as well as a new corporate form (akin to a Luxembourg SICAV) for alternative investment funds (AIFs), was not pursued mainly because of the covid-19 pandemic and its economic impact. As two major Austrian banks have announced their intention to set up AIFs to provide equity and debt financing primarily to Austrian SMEs to counteract the economic effects of the covid-19 pandemic, it is expected that this will provide new impetus to the Austrian government to actually implement the announced programme.

## II LEGAL FRAMEWORK FOR FUNDRAISING

Since the introduction of the Alternative Investment Manager Act (AIFMG), which implements the Alternative Investment Fund Managers Directive,<sup>2</sup> most private equity funds established in Austria will qualify as AIFs under the AIFMG. An AIF is defined as a collective investment undertaking that raises capital from a number of investors to invest it in accordance with a defined investment policy for the benefit of those investors, and that does not use the capital for direct operational purposes. Funds pursuant to the Austrian Investment Funds Act as well as funds qualifying under the Austrian Real Estate Investment Funds Act are not captured by the AIFMG.

The formation of an AIF requires the prior approval of the Austrian Financial Market Authority (FMA) if the fund is managed by a licensed alternative investment fund manager (AIFM). If the fund is managed by a registered AIFM, it only has to be registered with

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1 Martin Abram and Clemens Philipp Schindler are partners at Schindler Attorneys.

2 Directive 2011/61/EU on alternative investment fund managers, as amended.

the FMA. AIFMs must obtain a licence if they manage funds with assets of more than €100 million (where leverage is used) or more than €500 million (where no leverage is used); otherwise, only a registration is required.

To obtain a licence under the AIFMG, the manager must fulfil the following requirements.

- a A licensed AIFM must have minimum capital of €125,000 if it is an external manager of an AIF. If the AIFM is an internal manager of an AIF, the minimum capital requirement is €300,000. In addition, the AIFM must have sufficient equity to cover 25 per cent of its annual running costs. Increased equity requirements apply if the assets under management exceed €250 million; in any case, the maximum capital requirement is €10 million. The persons tasked with the management of the AIFM must be sufficiently experienced, and have to pass a 'fit-and-proper' test if so requested by the FMA.
- b The AIFM has to appoint at least two individual persons as its managers.
- c In the application to the FMA, the AIFM must provide information on shareholders holding qualified participations in the AIFM (i.e., shareholdings exceeding 10 per cent), on any closely related entities (i.e., a third party that holds a stake of more than 20 per cent of the AIFM or that controls the AIFM, or is controlled by the AIFM or in which the AIFM holds a stake of more than 20 per cent), its business plan, its remuneration, risk management, valuation, internal audit and conflict of interest policies, its investment strategies, a description of any competences delegated to third parties and information on the contractual basis pursuant to which it manages its AIFs.

The decision of the FMA regarding the licensing of an AIFM has to be made within three months of the applicant providing all required information. If the AIFM intends to register an AIF as a European long-term investment fund (ELTIF) (see Section II.vi), he or she has to apply to the FMA for prior approval.

### **i Vehicles used for private equity funds**

The main vehicles used for private equity funds established in Austria are limited partnerships (LPs), typically with a corporation as the general partner, or corporations, namely limited liability companies (LLCs) and joint-stock companies (JSCs). Each of these types of entity has a separate legal personality, but partnerships are transparent for tax purposes.

#### ***LPs***

Typically, investors become limited partners in an LP. The general partner is usually an LLC that receives a fee for assuming unlimited liability. In some structures, the general partner manages the partnership; in other structures, a separate management company (usually an LLC) manages the partnership. As private equity funds in most cases fall under the AIFMG, the entity managing the fund must be a legal person licensed or registered as an AIFM under the AIFMG. There are generally no minimum capital requirements for newly incorporated LPs.

#### ***Corporations***

Investors become shareholders in an LLC or a JSC. An LLC is managed by a managing director; a JSC by a managing board. JSCs (as opposed to LLCs) are required by law to also have a supervisory board. Managing directors, as well as members of the managing board,

have to be natural persons. However, as with LPs, corporations can outsource management functions to a management company, which in most cases must be licensed or registered as an AIFM under the AIFMG. Austrian law has minimum share capital requirements for LLCs (€35,000, or €10,000 in the case of a privileged incorporation) and JSCs (€70,000).

In the past, sponsors also structured vehicles in the form of LLCs or JSCs as a medium-sized business financing company (MFG) under the Corporate Income Tax Act (KStG), as this gave rise to several tax benefits. MFGs had to fulfil certain requirements, such as higher capitalisation, participation of public bodies and certain investment restrictions. As those tax benefits no longer apply for vehicles founded after 2012 and ceased to apply in respect of participations held by existing MFGs (founded before 2012) by the end of 2015 (in special circumstances, by the end of 2018), the importance of the MFG has decreased significantly. The tax benefits for MFGs were reintroduced in 2017; however, only to a limited extent. In particular, the tax benefits only apply for minority investments in early-stage enterprises.

## **ii Key legal terms**

In addition to terms imposed by mandatory provisions of Austrian law, in particular the investor protection provisions of the AIFMG for private equity funds classified as AIFs, the key terms of the relationship between the investor and the fund are governed by the partnership agreement (for LPs) or the articles of association and shareholders' agreements (for LLCs and JSCs). Terms of a private equity fund typically subject to negotiation include:

- a* investment restrictions, such as target size, concentration limits, geographic limitations, diversification of industries, limits on borrowing and related-party transaction restrictions;
- b* limitations on the fund's size and the investors' capital commitments;
- c* investment period;
- d* key-man provisions;
- e* provisions permitting the removal of the manager by a qualified majority of investors;
- f* remuneration of the manager (i.e., management fee, investment-related fees and carried interest);
- g* reinvestments; and
- h* exclusivity.

## **iii Disclosure of information**

In recent years, Austria has seen an increasing number of court proceedings by private investors against managers and promoters of funds to recover losses suffered during the financial crises. These proceedings highlight the importance of full disclosure to investors at the time they invest in a fund.

Managers of funds have to ensure that all documents given to investors, in particular the offering documentation and all advertising material, disclose all facts and circumstances relevant to prospective investors fully and correctly. Additionally, special care should be taken that any opinions and plans disclosed to investors are reasonable and based on verifiable facts. Special care must also be taken to ensure that the wording of documents is not too complicated or technical, otherwise there is a risk that this could be seen as insufficient disclosure. Austrian courts do, by and large, take into account the types of investors to which

such offering documentation is addressed, and may take a less restrictive position in cases where an offer is solely addressed to institutional investors (as opposed to offers addressed to retail investors).

In the case of insufficient disclosure, managers are faced primarily with damage claims, rescission claims, or a combination of both by investors; additionally, regulatory sanctions and – in extreme cases – criminal sanctions may apply.

The key items for disclosure vary depending on whether the offer of the fund interest falls under the scope of the Austrian Capital Markets Act or the EU Prospectus Regulation. Typically, the main items for disclosure are:

- a* investment strategy;
- b* market overview and regulatory environment;
- c* key terms of the investment (see above);
- d* risk factors;
- e* track record of the manager and its executives; and
- f* tax matters.

Whether an offer of interests in a private equity fund falls under the scope of the Austrian Capital Markets Act or the EU Prospectus Regulation depends on the type of interest offered. For securities, the EU Prospectus Regulation applies, and thus – if no private placement exemption applies – a prospectus complying with the EU prospectus regime has to be prepared. If the interest are not securities (such as partnership interests or shares in Austrian limited liability companies), the offer falls under the scope of the Austrian Capital Markets Act. In this case and if no private placement exemption applies, the issuer has to prepare a prospectus complying with the regime of the Austrian Capital Markets Act, except for offers encompassing fund interests with a total value of (1) less than €5 million during a 12-month period, in which case a simplified prospectus can be used or (2) less than €2 million during a 12-month period, in which case the disclosure obligations of the Alternative Financing Act apply.

#### **iv Solicitation**

The method of solicitation is mainly influenced by regulatory constraints. Most commonly, solicitation is made by way of an information or offering memorandum. Potential key investors are typically contacted at an early stage to gauge their initial interest. Unless there are regulatory constraints (such as in the case of public offers falling under the scope of the Austrian Capital Markets Act or the EU Prospectus Regulation), investors are invited to follow-up meetings or given the opportunity for a limited due diligence. Depending on the size of the fundraising, managers may also appoint third-party promoters to assist in identifying potential investors; in addition, outside counsel is retained to prepare the documentation for the fundraising.

#### ***Limitations on solicitation***

Offers and sales of interests in private equity funds formed in Austria are subject to the following selling restrictions, which depend on the category of the private equity fund.

For AIFs managed by a licensed AIFM:

- a* interests in the fund may only be offered or sold after the AIF is approved by the FMA; and

- b* interests in the fund may be offered or sold to private investors, if the prerequisites of Sections 48 and 49 AIFMG are met, except if the fund is registered (1) as a European venture capital fund (EuVECA) (see Section II.v); in this case, it may be offered to private investors subject to certain restrictions (in particular, a minimum investment commitment of €100,000 and a written acknowledgment of the risks associated with the investment by the private investor) or (2) as an ELTIF (see Section II.vi); in this case, it may be offered to private investors subject to certain restrictions (in particular, an offer is only possible to private investors having an investment portfolio of at least €100,000 after the investor has received appropriate investment advice).

For AIFs managed by a registered AIFM:

- a* interests in the fund may only be offered after the AIF was notified to the FMA; and
- b* interests in the fund may not be offered or sold to private investors, except if the fund is registered as an EuVECA; in this case, it may be offered to private investors subject to certain restrictions (in particular, a minimum investment commitment of €100,000 and a written acknowledgment of the risks associated with the investment by the private investor). No ELTIF registration is available for funds managed by registered AIFMs.

For private equity funds falling outside the AIFMG:

- a* any public offer of interests in private equity funds falling outside the AIFMG requires the publication or approval, or both, of a prospectus by the FMA, unless a private placement exemption applies;
- b* the private placement exemption applies, in particular, for offers to qualified investors only, offers with a minimum investment amount of €100,000, and offers to fewer than 150 investors; and
- c* even if the private placement exemption applies, the intended offer has to be notified to the issue register maintained by Oesterreichische Kontrollbank AG.

## **v EuVECA Regulation**

The EuVECA Regulation<sup>3</sup> was introduced to create a new pan-European designation for small AIFMs, the EuVECA. Austria-based AIFMs may register an AIF as a EuVECA provided that they comply with the EuVECA Regulation and have supplied certain information with regard to themselves and the relevant AIF to the FMA. The main advantage the AIFM gains by doing so is the option to market the relevant AIF throughout the EU under the EuVECA designation to certain categories of investors defined in the EuVECA Regulation under an EU-wide passporting regime. Passporting allows a firm authorised under an EU single market directive to market the designated fund to certain qualified investors in another EU Member State, on the basis of its home state authorisation.

The EuVECA Regulation is not compulsory; if an AIFM does not want to use the EuVECA designation, then it does not have to comply with the EuVECA Regulation for a particular fund (or at all). If the AIFM chooses not to use the EuVECA designation, national laws and EU regulations apply, such as national private placement regimes.

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<sup>3</sup> Regulation (EU) No. 345/2013 on European venture capital funds.

## **vi ELTIF Regulation**

The ELTIF Regulation<sup>4</sup> was introduced in November 2015 to channel capital raised through AIFs towards European long-term investments in the real economy. Austria-based AIFMs who have received approval to manage ELTIFs may register an EU-based AIF (or a compartment thereof) as an ELTIF, provided that they comply with the authorisation requirements set out in the ELTIF Regulation and submit an application to the FMA. The main advantage of such a registration is the option to market the relevant AIF throughout the EU under an EU-wide passporting regime similar to the regime under the EuVECA Regulation. Additionally, the designation of an AIF as an ELTIF allows its marketing to high-net-worth individuals throughout the EU.

The ELTIF Regulation is not compulsory; if an AIFM does not want to use the ELTIF designation, it does not have to comply with the ELTIF Regulation for a particular fund (or at all). If the AIFM chooses not to use the ELTIF designation, national laws and EU regulations, such as national private placement regimes, apply.

## **vii Fiduciary duties to the investors**

Typically, the scope of the sponsor's fiduciary duties is determined by the AIFMG (which most private equity funds fall under), the constitutional documents of the fund vehicle (supplemented by pertinent rules of law) and other contractual arrangements (if any).

Under the AIFMG, the manager has, *inter alia*, to act in the best interests of the investors in the AIF (as well as of the AIF itself) and the integrity of the market. The manager has to introduce appropriate procedures to deal with conflicts of interest, to treat the investors in an AIF fairly and to use the required diligence in the performance of his or her duties.

Managers of Austrian private equity funds are most frequently general partners of an LP or fulfil their function based on management agreements with the fund vehicle. Thus, the scope of the managers' duties and the extent of their liability in relation to the investors (and the fund vehicle) derive from the partnership agreement (supplemented by the mandatory provisions of the Commercial Code) or, as the case may be, the management agreement.

Unless the private equity fund is an AIF, it is possible to limit the liability of the sponsor in relation to the investors or limit the liability of the fund vehicle by contractual provisions (e.g., to exclude liability for 'ordinary negligence'). However, such contractual provisions would still be subject to judicial review.

## **III REGULATORY DEVELOPMENTS**

Private equity funds established as AIFs and their managers are subject to the ongoing supervision of the FMA. The FMA has a wide range of inspection and audit rights with respect to both the AIFM and the individual AIFs.

Austrian law distinguishes between AIFMs that require licensing by the FMA and AIFMs that only have to register with the FMA. Licensed AIFMs do not require any additional licences for their management activities for the fund. Registered AIFMs may require a business permit for asset managers.

Investors holding qualified participations in the AIFM (i.e., shareholdings exceeding 10 per cent) must be disclosed to the FMA, but only by licensed AIFMs.

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<sup>4</sup> Regulation (EU) No. 760/2015 on European long-term investment funds.

Private equity funds established as AIFs must be registered with the FMA. Private equity funds established as AIFs and managed by a licensed AIFM also require approval by the FMA. Austrian AIFs are also listed in an informal register maintained by the FMA.

Private equity funds not established as AIFs require no special registration, except for the registration with the Companies Register upon incorporation.

If the sponsor also acts as the manager of a fund established as an AIF, it has to be registered or, as the case may be, licensed with the FMA. In addition, if the sponsor holds a qualified participation in the fund, this fact has to be disclosed to the FMA.

Otherwise, no specific licence requirements exist for the sponsors of a fund.

## ***Taxation***

### *Taxation of the fund*

The most common private equity fund vehicle in Austria is a partnership. Different from corporations, Austrian partnerships are typically viewed as transparent for tax purposes, provided that the partnership's sole activity qualifies as asset management for tax purposes, and it is not deemed to operate a business or commercial operation.

Any income derived by the partnership is allocated to its investors and taxed at their level in accordance with the rules of the tax regime applicable to the individual investor.

Since 1 January 2016, Austria has not levied capital duty on equity contributions. However, stamp duty, in particular in relation to guarantees that the formation documentation may entail, is still an area to be considered. In this context, surety agreements (including any form of assumption of a debt as joint debtor) are subject to stamp duty at a rate of 1 per cent of the secured amount provided that the surety is of an accessory nature, which means that the guarantor may avail itself not only of all defences that it personally has against the creditor, but also of all defences that the debtors of the secured debt have against the creditors. However, if the guarantee is of an abstract nature, meaning that the guarantor has to pay upon first demand and has recourse only to those defences that arise from the guarantee itself, then the transaction is not subject to stamp duty. Therefore, guarantee wordings explicitly stating that a specific guarantee is intended as an abstract are commonly used.

### *Taxation of investors*

Domestic individual investors are taxed as follows: capital gains are subject to a preferred tax rate of 27.5 per cent; and dividends are subject to withholding tax at a rate of 27.5 per cent.

Domestic corporate investors are taxed as follows: capital gains are taxed at a rate of 25 per cent if they relate to an Austrian-resident portfolio company, and may be tax-exempt if they relate to a foreign-resident portfolio company in which a minimum shareholding of 10 per cent is (indirectly) held for an uninterrupted period of at least one year (Section 10, KStG); and dividends are tax-exempt if they relate to an Austrian-resident portfolio company or an EU-resident portfolio company, and may be tax-exempt under certain conditions if they relate to another foreign portfolio company (Section 10, KStG). On 1 January 2019, new provisions in connection with international participations and foreign portfolio shareholdings came into force, along with new controlled foreign corporation taxation rules.

Foreign individual investors are taxed as follows: capital gains are only taxable (at a rate of 27.5 per cent) if the percentage of the investor's (weighted) shareholding in the Austrian portfolio company (through the partnership) exceeded 1 per cent at any time during the past five years. Note that double-tax treaties usually restrict Austria's right to tax such capital gains (Article 13, Paragraph 5 of the Organisation for Economic Co-operation and Development

Model Tax Convention on Income and on Capital (MTC)); and dividends are subject to withholding tax at a rate of 27.5 per cent (as of 1 January 2016) (subject to a reduction under applicable double tax treaties).

Foreign corporate investors are taxed as follows: capital gains are only taxable (at a rate of 25 per cent) if the percentage of the investor's (weighted) shareholding in the Austrian portfolio company (through the partnership) exceeded 1 per cent at any time during the past five years. Double-tax treaties usually restrict Austria's right to tax such capital gains (Article 13, Paragraph 5, MTC); and dividends are subject to withholding tax at a rate of 25 per cent in cases where the exemption for foreign investors that are corporations resident in an EU Member State is not applicable (but will usually be subject to a reduction under applicable double tax treaties).

#### *Taxation of carried interest*

Carried interest, which is defined as the compensation of a partner of an asset management partnership received because of outstanding contributions to the successful management of the investments, is included in the investment income according to the Department of International Taxation of the Ministry of Finance.<sup>5</sup> Income qualifying as investment income received by an individual who is subject to unlimited taxation in Austria is taxable in Austria with the special tax rate of 27.5 per cent. Despite this administrative guideline, a case-by-case analysis is recommended, as the line between self-employed and employee income and investment income is rather unclear.

The management fees received by a partner of an asset management partnership are not subject to VAT. According to the Austrian tax authorities, the managing partner of a partnership is not an entrepreneur; his or her services are supplied in the exercise of a corporate function, and not as a result of an exchange of services. If the fund vehicle is a corporation, however, the fees of a managing partner will usually be subject to VAT, unless the manager is employed by the corporation.

## **IV OUTLOOK**

Fundraising by Austria-based private equity remains low compared to other European countries. However, two of the main Austrian banks have announced the setting up of AIFs to provide equity and debt financing primarily to Austrian SMEs to counteract the economic effects of the covid-19 pandemic.

It remains to be seen whether this announcement will lead the Austrian government to introduce legislation to provide incentives for private equity investment SMEs, as it previously announced on several occasions.

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<sup>5</sup> EAS 3280 as of 14 May 2012, EAS 2698 as of 6 February 2006 and BMF 15 December 2008 (BMF 010221/3364-IV/4/2008).

## ABOUT THE AUTHORS

### **MARTIN ABRAM**

*Schindler Attorneys*

Martin Abram is a founding partner of Schindler Attorneys. Before establishing the firm, he spent 15 years at Wolf Theiss, where he became a partner in 2002.

Mr Abram's practice focuses on corporate, real estate and financing work, with a particular focus on corporate and real estate mergers and acquisitions, corporate reorganisations and project and real estate financing. He is also active in equity capital market transactions and commercial and residential leasing transactions. His practice is complemented by general real estate work and contracts work.

Mr Abram holds law degrees from the University of Vienna and the University of Nottingham School of Law. He is admitted to the Austrian Bar.

Mr Abram has published articles regarding corporate and energy law, has contributed to several Wolf Theiss publications, and is an author and co-editor of a book on the general meeting of Austrian stock corporations.

### **CLEMENS PHILIPP SCHINDLER**

*Schindler Attorneys*

Clemens Philipp Schindler is a founding partner of Schindler Attorneys. Before establishing the firm, he spent six years as a partner at Wolf Theiss after practising with Haarmann Hemmelrath in Munich and Vienna, and with Wachtell Lipton Rosen & Katz in New York. His track record includes some of the largest and most prestigious Austrian and Austria-related transactions, such as the initial investment of América Móvil into Telekom Austria or Infineon's sale of its wireless business to Intel, as well as many private equity deals for international funds such as ARES, ARDIAN, Apax, DBAG, EQT, HIG, Internos, Kennet, Melrose, MDP, OpCapita, Riverside, Sankaty, Triton and TVM Capital.

Mr Schindler's practice focuses on corporate and tax law advice in relation to public and private M&A, private equity and corporate reorganisations (including mergers, spin-offs and migrations), most of which have a cross-border element. Furthermore, Clemens is specialised in international holding structures. His practice is complemented by private client work (e.g., as counsel to families owning stakes in large companies).

Mr Schindler is ranked by leading international legal directories, including *Chambers Global*, *Chambers Europe*, *The Legal 500*, *IFLR1000* and *Who's Who Legal*. The German legal directory *JUVE* singles him out as one of Austria's top 20 corporate and M&A lawyers,

while the Austrian business journal *Trend* named him among the country's top 10 corporate law experts. In addition to the listings for the Austrian market, both *Chambers Global* and *Chambers Europe* acknowledge his Brazilian expertise in a special ranking.

Mr Schindler is admitted in Austria both as an attorney-at-law and a certified public tax adviser, holding law degrees from the University of Vienna and New York University (LLM in international taxation) as well as a degree in business administration from the Vienna University of Economics and Business Administration. He has authored and co-authored more than 50 articles, books and commentaries in his fields of expertise, where he is also a much sought-after speaker at conferences and seminars.

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