Private Equity 2021

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Getting The Deal Through

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Atif Azher
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Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Private Equity*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Russia. The report is divided into two sections: the first deals with fund formation in 13 jurisdictions and the second deals with transactions in 18 jurisdictions.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Atif Azher of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume, and also extend thanks to Bill Curbow of Simpson Thacher & Bartlett LLP, the former contributing editor, who helped to shape the publication to date.

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TRANSACTION FORMALITIES, RULES AND PRACTICAL CONSIDERATIONS

Types of private equity transactions

1 | 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. Auctions have become quite unpopular with a lot of funds because of fierce competition. Negotiated deals, on the other hand, typically involve a large amount of management time. On the debt side, dedicated debt funds are becoming more and more active in Austria, most of them focusing on the term loan in a leveraged buyout (LBO) (with a commercial bank typically providing the working capital facility for the target) or standalone growth capital debt financings (with or without equity kicker). Non-performing loan transactions (that is, the purchase of secured and unsecured loans by a private equity fund from a financial institution aiming to restructure its balance sheet) and 'loan to own' transactions (that is, where a private equity fund acquires (often shareholder) debt or grants a loan with the ultimate aim to convert that debt into equity (which can either be through a contractual mechanism (for example, under a convertible loan or note) or forced in the course of a restructuring) have become less frequent.

In a typical private equity acquisition shares or a business, the private equity fund will acquire the shares or assets 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 or a debt fund). Debt transactions are structured similarly to bank lending transactions, with rather limited specifics in the loan documentation in case of growth capital deals and certain additional complexities related to intercreditor issues in case of LBO deals.

Corporate governance rules

2 | 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 later become public companies?

The level of regulation for a joint stock company (JSC) is greater than for a limited liability company (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 mandatory disclosure and reporting regulations as well as additional disclosure and reporting obligations of the Code of Corporate Governance, some require the issuer to 'comply or explain' and others are recommendations only). For that reason, private equity firms will typically seek to take a listed target private to benefit from reduced regulation as well as 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 the case of an LLC.

Issues facing public company boards

3 | What are some of the issues facing boards of directors of public companies considering entering into a going-private or other private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? 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?

As a general rule, the management board of a JSC is required to promote the interests of the company, considering the interests of its shareholders, employees and other stakeholders. Where the JSC is listed, the management board must also take measures to prevent market manipulation and insider trading and must not make any inaccurate public statements. Additional obligations apply whenever a takeover bid is involved. Most importantly, the management board must not take measures that could prevent the shareholders of the JSC from taking a free and informed decision with respect to the takeover bid, and they must seek the approval of the shareholders' meeting prior to implementing measures that could frustrate an announced takeover bid. The solicitation of a competing bid, however, is specifically allowed.

Where members of the management board or the supervisory board are participating in a transaction or otherwise have an interest in a 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 statement on the takeover bid (which is required to be issued by the management board and supervisory board following announcement of the takeover bid under the Takeover Act).

Disclosure issues

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

The disclosure requirements in connection with going-private transactions differ depending on the transaction structure applied. The usual 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 of the minority shareholders

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and a delisting. In the case of shares traded on the regulated free market, there is a specific provision in the Stock Exchange Act allowing a standalone delisting by notice to the Securities Commission. No such provision exists for shares traded on the official market and, as such, a delisting can only be effected through a transaction resulting in the admission criteria no longer being satisfied. The most common way to achieve this is a squeeze-out pursuant to the Shareholders Exclusion Act. Certain types of reorganisations (eg, a merger of the business of the listed company into a non-listed company or a transfer of the business of the listed company to its main shareholder by way of a merging conversion) are also an option and may from time to time yield benefits compared to squeeze-out pursuant to the Shareholders Exclusion Act.

There are enhanced disclosure requirements with respect to squeeze-outs, which differ from structure to structure but they are all aimed at protecting the interests of the minority shareholders, employees and creditors. The notification requirements in connection with the delisting itself differ depending on the market segment in which the securities concerned are trading. A ruling of the Securities Exchange Commission is not required for such squeeze-out.

In addition, a person directly or indirectly acquiring or disposing of shares (the scope is actually broader and includes various instruments such as options) of a listed company admitted to trading on a regulated market is required to notify the target, the stock exchange and the Financial Market Authority if, as a result of such transaction, they reach, exceed or fall below a certain voting rights thresholds (4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75 and 90 per cent of the votes; if the articles of association provide for it, the entry threshold is as low as 3 per cent) under the Stock Exchange Act.

Timing considerations

5 | What are the timing considerations for negotiating and completing a going-private or other private equity transaction?

The time required to complete a going-private transaction depends very much on the structure applied. As a rough guideline, squeeze-outs generally take between two and three months. Reorganisations not involving a squeeze-out can sometimes be completed more quickly.

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.

Dissenting shareholders' rights

6 | What rights do shareholders of a target have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

The rights of minority shareholders differ depending on the way the delisting is effected. In structures involving a squeeze-out, minority shareholders cannot block the transaction but they can seek to challenge the squeeze-out transaction for breach of procedure. They can also request a review of the cash consideration offered for their shares by a court (ie, a fairness review). If the squeeze-out is implemented following a takeover bid pursuant to the provisions of the Shareholders Exclusion Act 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. This presumption is not available if the squeeze out is effected through other structures. Where no squeeze-out is involved in a going-private transaction (eg, a stand-alone delisting on the free regulated market or a merger of the business of a listed company into an unlisted company), Austrian courts have so far not granted a cash-out right to minority shareholders.

Purchase agreements

7 | What notable purchase agreement provisions are specific to private equity transactions?

Provisions specific to private equity transactions relate to the financing of the transaction, the scope of warranties (if on the sell side a private equity firm will typically not be willing to give business warranties but try to limit warranties to title, capitalisation 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. With regard to the financing of the transaction, the purchase agreement will typically require an equity commitment letter from the fund and copies of the definitive financing agreements, together with documents evidencing that all conditions precedent (other than those within the private equity fund's sole control) have been satisfied on or around the signing date. Sometimes sellers are also able to push for an equity underwrite of the full purchase price.

Participation of target company management

8 | How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity acquirer 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, the business planning and the financial modelling. Typically, management is offered the opportunity (and is sometimes even required by the private equity firm) to acquire an interest in the target to ensure management's commitment post acquisition. Senior management is sometimes also given the opportunity to invest in the very same instrument ('institutional strip') into which the private equity firm invests, 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. Where management is asked to participate in the institutional strip, options are by definition limited (although ratchet arrangements and the like are still possible and quite common). Where asked (or given the opportunity) to acquire an interest on target level, share options (in case of JSCs), restricted stock (for a description, see below), profit participation rights (that is a contractual arrangement that can be structured either as equity or debt and by contrast to shares never carries voting rights) and phantom stock (that is a contractual arrangement giving the member a bonus depending on operational performance) are the most common forms. 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 to ensure that any gains are taxed as capital gain and not as employment income. From a tax perspective, it is also important to ensure that upon the investment by the management members economic ownership actually transfers. Real shares are usually pooled and almost always restricted (restricted stock) by way of a restricted stock agreement or shareholders' agreement with the private equity firm. Such restrictions will typically include a right of the

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private equity firm to drag-along the shares of the management member upon an exit and compulsory transfer provisions if the employment with the target group terminates. The consideration due in the case of such compulsory transfer will often depend on the reason for termination ('good' and 'bad' leaver provisions), although because of associated employment law issues the approach taken by private equity firms is much more conservative today than in the past.

Tax issues

9 What are some of 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 issues are crucial in private equity transactions. Investors regularly require that the acquisition of the target is structured in a tax efficient manner and that financing costs related to the acquisition of the target company can be offset. Further, the distribution of dividends as well as tax considerations with respect to future exit strategies are typically decisive in choosing the acquisition vehicle with respect to Austrian and non-Austrian target companies.

Financing of an Austrian acquisition vehicle

Equity contributions into an Austrian corporation are no longer subject to capital duty. Since 1 January 2016, the previously applicable capital duty of 1 per cent has been abolished and, according to EU law, cannot be reintroduced. This has simplified funding structures as multitier structures (grandparent contributions) are no longer used to avoid capital duty.

Debt-financed acquisitions are usually structured to allow general deductibility of interest as well as an offset from the profits of the target company. In general, interest paid on loans from unrelated parties is fully tax deductible. Interest paid on loans from related parties is only tax deductible if the following criteria are met:

- the terms are at arm's length and properly documented;
- the debt is not requalified as equity; and
- there is no low taxation of group lenders.

With regard to the arm's-length test, the Austrian tax authorities generally apply the comparable uncontrolled price method. However, a comparison of inter-company financing transactions to those with commercial banks is generally not accepted by the Austrian tax authorities (because of differing objectives and goals of an unrelated lender, as well as the different risk profile). As a result, the interest rates 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 a related-party loan. In any event, proper documentation is essential in order to evidence that the arm's-length test is met.

As to the requalification of debt into equity, it is worth noting that there are no statutory rules on thin capitalisation in Austria. From a practical perspective, tax authorities usually accept debt to equity ratios of around 3:1 to 4:1. Beyond that, interest deduction may be denied based on a requalification of shareholder loans into equity. Besides the non-deductibility of interest from the tax base, this would also mean that any interest payments made are being treated as hidden dividends, which – unlike interest on shareholder loans – would be subject to withholding tax in Austria (see below).

Interest payments under a loan from a foreign related party lender are not deductible in Austria if the interest payments are not taxed at an effective tax rate of at least 10 per cent at the level of the foreign related party lender. According to the Austrian tax authorities, it is not relevant whether such low taxation is owing to the domestic law of the jurisdiction of the lender or the result of an applicable double taxation treaty (DTA).

An interest barrier rule was introduced as of 1 January 2021. Financing costs are only tax deductible up to 30 per cent of the taxable EBITDA of a company. The new rule applies for financial years after 2020. However, in any case interest expense surplus up to an amount of €3 million per assessment period (tax-free amount) is deductible. Exemptions and special provisions for tax groups apply.

Austrian group taxation regime

The use of an Austrian acquisition vehicle allows for the establishment of a tax group between the acquisition vehicle and the target. Such tax group allows for the offsetting of interest expenses at the level of the acquisition vehicle from the business profits of the target.

The previously applicable goodwill amortisation regime on share deals (up to 50 per cent of the purchase price over a period of 15 years) is no longer available (it is only available for acquisitions made until 28 February 2014, if the purchaser can evidence that the goodwill amortisation was considered relevant in determining the purchase price).

Non-Austrian corporations may also be part of an Austrian tax group. However, the group taxation regime aims to limit the inclusion of non-Austrian corporations (to corporations resident in EU member states or other countries with which Austria has concluded comprehensive administrative assistance procedures) and the attribution of their losses (which can only be offset by up to 75 per cent of the taxable income, with the balance being carried forward to future years).

Withholding tax

Dividends and interest payments are generally subject to withholding tax of 27.5 per cent (25 per cent if received by corporations). However, limitations and exemptions apply under domestic law as well as applicable double taxation agreements (DTAs). In particular, withholding tax on dividend payments to non-Austrian investors is typically subject to the limitations under the EU Parent-Subsidiary Directive and applicable DTAs. Interest payments on loans to non-Austrian lenders are no longer subject to withholding tax, since withholding tax on interest payments under loans secured by Austrian real estate has been abolished.

Exit scenario

Private equity investors will usually seek a structure that allows for a tax-efficient exit. As there is no tax exemption for capital gains realised from the sale of shares in an Austrian company (as opposed to shares in a foreign company), foreign investors tend to choose an acquisition vehicle in a foreign jurisdiction which has concluded a favourable DTA with Austria providing that only such other jurisdiction is entitled to tax capitals gains.

Austrian tax law provides for a sophisticated exit taxation regime under which capital gains taxation is – simplified – triggered under any circumstances that result in Austria losing its taxation right with respect to assets subject to taxation in Austria. If such taxation right is lost in relation to EU/EEA countries providing for comprehensive mutual assistance, the taxpayer may apply for payment of the exit tax in instalments over a period of up to five years (unless the capital gain is actually triggered beforehand).

Real estate

For real estate deals, a tax reform (applicable since 1 January 2016) brought significant changes for companies owning Austrian real estate directly. First, the taxable event, 'unification of shares', that once required

TRANSACTIONS

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a unification of all shares in a company that directly owns Austrian real estate by one shareholder, now foresees a lower threshold of 95 per cent. Furthermore, shares held by trustees are now attributed to the trustor in determining whether this threshold is met. Second, if within five years in total 95 per cent or more in a partnership that directly owns real estate are transferred (also if in different transactions and to different purchasers), real estate transfer tax is now also triggered.

Management incentive packages

Management incentive packages usually take the form of share options, restricted stock, profit participation rights or phantom stock.

An important aspect is whether, upon the investment by the management members, economic ownership in the shares (or other instruments) actually transfers. In relation to shares this mainly depends on the management members' entitlement to dividends (if any), voting rights and the applicability of transfer restrictions. From a tax perspective, management incentive packages are typically structured to ensure such transfer. In the case where economic ownership transfers and the management members receive the shares without paying an arm's-length consideration, the grant will be taxed as employment income at the fair market value of the shares received. Otherwise, the full return received at exit may be subject to taxation as employment income.

In the case of stock options, non-transferable stock options are not taxed at the time of the grant, but upon exercise of the option based on the difference between the (discounted) acquisition cost and the fair market value of the shares received upon exercise of the option. In contrast, transferable stock options are considered an asset for tax purposes and, consequently, are already taxed at the time of the grant.

Income from shares received by individuals resident in Austria is taxed at 27.5 per cent. Such income includes dividends as well as capital gains. Former models that granted shares to the management relied on an exemption for capital gains (if the percentage of the shareholding in the Austrian company was below 1 per cent and was held for more than one year) are no longer applicable as realised capital gains are generally subject to taxation. However, in the case of non-resident individuals, capital gains are only subject to taxation in Austria at a rate of 27.5 per cent if the percentage of the employee's (weighted) shareholding in the Austrian company amounts to at least 1 per cent during the last five years. DTAs, 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 27.5 per cent (which is usually reduced by DTAs).

Recurring income from profit participation rights that classify as equity at the level of the company is taxed similar to income from dividends, at a rate of 27.5 per cent. If, owing to its features, profit participation rights qualify as debt at the level of the company, income is taxed similar to interest at a rate of 27.5 per cent. Regarding the exit, profit participation rights generally give more room for a tax-optimised structuring than other incentives, such as stock options or restricted stock.

Income from phantom stock (not qualifying as profit participation rights) is generally taxed similar to ordinary income from employment at the progressive income tax rate.

Apart from the developments mentioned above, tax audits in relation to M&A deals are becoming more common and burdensome. In particular, transfer pricing issues, for example, in relation to interest on shareholder loans or certain fees payable to related entities, are under scrutiny. Accordingly, tax rulings are also becoming more popular.

DEBT FINANCING

Debt financing structures

10 What types of debt financing are typically used to fund going-private or other private equity transactions? What issues are raised by existing indebtedness of 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 other private equity transactions generally involve senior debt and, particularly for larger transactions, subordinated debt. Senior debt is typically provided by commercial banks or debt funds or both in combination. Where a debt fund is involved, the debt fund typically underwrites the term loan facilities (to finance the acquisition and the costs of the acquisition) and the commercial bank the working capital facilities (to fund the working capital requirements of the target group). More recently we have seen debt funds underwriting the entire financing package with a commercial bank in the background that provides the working capital facility. Vendor financing is also sometimes used, but this is not very frequent lately. To meet 'certain funds' requirements in private equity transactions involving a takeover bid, bridge financing is often required, which more frequently comes from debt funds as they have quicker turnaround times than commercial banks. Where several layers of debt are involved, the private equity firm and financing banks will typically enter into an inter-creditor agreement that regulates the rights of each layer of debt to receive payment and to realise the security in case of an enforcement event.

The terms of the existing indebtedness often require prepayment upon a change of control and typically contain limits on additional leverage or dividend stoppers that 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 by the private equity firm in the overall timing of the transaction.

Leveraged transactions typically involve upstream and sidestream security interests, guarantees and indemnities by the target group that are a concern under Austrian capital maintenance and, where a joint stock company (JSC) is involved, Austrian financial assistance rules. Transactions violating Austrian capital maintenance rules are null and void as between the parties as well as any involved third party that knew or should have known of the violation. In addition, any members of the management or supervisory board who approved the transaction may be subject to liability for damages. Transactions violating Austrian financial assistance rules are not void, but may result in liability of the members of the management or supervisory board who approved the 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 their priority.

Debt and equity financing provisions

11 What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements for private equity transactions? What other documents typically set out the financing arrangements?

A going-private transaction usually involves a takeover followed by a delisting. Under the Takeover Act, the private equity firm may only announce a takeover bid if it is certain that the funds necessary to pay the consideration in full are available (certain funds requirement); this must be confirmed in the opinion on the takeover bid of the independent expert, who is required to be appointed by a bidder under the Takeover

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Act. Unless a financing condition has been permitted by the Takeover Panel (which could be the case in a voluntary takeover bid not aimed at control), the independent expert will usually require a copy of the executed equity commitment letter from the private equity firm. Where the equity commitment letter only covers the equity portion of the offer price, the independent expert will also want to see copies of the definitive finance agreements documenting the term loan facilities together with documents evidencing that all conditions precedent for drawdown of those facilities (other than those within the private equity firm's control) are 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 the necessary number of shares in the takeover, so that it is able to proceed with the squeeze-out or reorganisation, which then ultimately results in the delisting. Conversely, the seller in a private equity transaction will usually require a copy of the equity commitment letter from the private equity firm and copies of the definitive agreements documenting the term loan facilities (or at least a warranty that enforceable debt financing commitments have been obtained and obligations to ensure that definitive agreements will be in place by closing, failing which the purchaser will usually be required to pay the termination costs) to be sure that the acquisition vehicle will be able to pay the purchase price at completion of the transaction.

Fraudulent conveyance and other bankruptcy issues

12 Do private equity transactions involving debt financing 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 insolvency proceedings, the administrator may challenge certain transactions if this increases the prospects of recovery for the estate's creditors. Most notably, the administrator can challenge transactions intended to discriminate against other creditors (if completed 10 years or less prior to the opening of the insolvency proceedings (if the counterparty was aware of that intent) or two years (if the counterparty should have been aware of that intent)), transactions for no value (if completed two years or less prior to the opening of insolvency proceedings), or the granting of security benefitting a creditor's debt or the settlement of a creditor's debt (if completed 60 days or less prior to the company becoming insolvent or the application for the opening of 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 neither the target nor the seller is 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, to get comfortable that there are no insolvency-related issues. In addition, actions taken with the intention to deprive other creditors of their rights may constitute a criminal offence.

Another concern related to leveraged transactions is liability of members of the management board or supervisory board, or both, who approve upstream or side-stream security interests, guarantees, indemnities or similar commitments as these transactions may constitute a violation of Austrian capital maintenance or financial assistance rules as well as embezzlement (if certain additional requirements are met).

SHAREHOLDERS' AGREEMENTS

Shareholders' agreements and shareholder rights

13 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 or other equity co-investors? 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 or other equity co-investors 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 the management board or supervisory board (if any);
- veto rights requiring the prior consent of the investor or an investor director (or the shareholders' meeting or the supervisory board with qualified majority);
- anti-dilution provisions (allowing the private equity firm 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 firm upon a liquidation or an exit transaction);
- exit rights (right of the private equity firm to request initiation of a trade sale or an IPO process);
- a prohibition to sell for a certain minimum period (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' meeting and minimum voting requirements for major measures (eg, corporate restructurings, changes of purpose, changes to articles of association, 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 in the articles of association without restriction.

ACQUISITION AND EXIT

Acquisitions of controlling stakes

14 Are there any legal 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. In contrast, the acquisition of a controlling interest in a listed 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, as follows:

- 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

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- the consideration must at least equal the average quoted share price (weighted according to trading volumes) in the six-month period before the day on which the intention to launch the takeover bid is announced).

The Takeover Act captures direct controlling interests (ie, where more than 30 per cent of the voting rights in a listed target company are directly held by a bidder) and indirect controlling interests (ie, where more than 30 per cent of the voting rights in a listed target company are held by the bidder through another listed company in which the bidder holds more than 30 per cent of the voting rights or an unlisted company (or other entity) over which the bidder can exercise control). There is, however, an exception: where (i) the interest acquired by the bidder cannot confer control on the bidder (eg because another shareholder has as many or more voting rights, because of the usual representation at shareholders' meetings the interest acquired does not confer a majority of voting rights or the voting rights are limited to 30 per cent by operation of the articles of the target company); or (ii) the bidder already had control, the bidder is only required to notify the Takeover Commission without delay and in any event within 20 trading days, but there is no obligation to launch a mandatory bid. Target companies may lower the 30 per cent threshold through a provision in their articles of association and several companies have done so in response to takeover bids.

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 listed company must be notified to the Takeover Commission without delay and in any event within 20 trading days; the voting rights exceeding 26 per cent are suspended (unless another shareholder has as many or more voting rights, the voting rights of the bidder are limited to 26 per cent by operation of the articles of the target company or the bidder already had such voting rights), but there is no obligation to launch a mandatory bid for the remaining shares.

Exit strategies

15 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 strategic or private equity acquirer?

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 request an initial public offering (IPO) 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 its shares. Both exit rights and drag-along rights are usually subject to certain restrictions (eg, a pre-emption or a tag-along right or a minimum return requirement on the drag-along right), which may affect the private equity firm's ability to sell.

Private equity sellers 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. A purchaser must therefore often rely on its own due diligence and warranties from management, and accept limited recourse (eg, to 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 shareholders agreement or at the time of the IPO may limit the private equity firm's ability to sell any shares retained following the IPO.

Portfolio company IPOs

16 What governance rights and other shareholders' rights and restrictions typically 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 agreed between the shareholders. However, the underwriting banks will often push the private equity firm to give up any preferred rights prior to an IPO.

In an IPO, the underwriter will usually expect part of the shares retained by the existing shareholders following the IPO to be locked up for a certain period to avoid downward pressure on the share price. Such lock-up obligations may already be included in the original shareholders' agreement, but this is rather the exception. It is more common to discuss lock-up obligations (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.

Target companies and industries

17 What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in industry 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 identify typical target industries. The difference between a going-private transaction compared to other transactions from a private equity firm's perspective is the additional complexity and transaction costs because of the minimum pricing requirements under the Takeover Act and minority shareholder resistance, in particular where there is a significant free float.

Transactions involving a change of control of targets in regulated industries may be subject to advance notice or approval requirements, or both, which may affect timing. That applies equally to going-private transactions and other transactions.

SPECIAL ISSUES

Cross-border transactions

18 What are the issues unique to structuring and financing a cross-border going-private or other 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 of the business.

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

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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.

Investment Control Act

Part 1 and Part 2 of the Annex to the Austrian Investment Control Act (ICA) list economic sectors in which foreign direct investments by a foreign investor (being, an individual that is not a citizen of an EU/EEA country or Switzerland or entity having its seat or head office outside the EU/EEA or Switzerland) – above certain quantitative and qualitative thresholds – must be notified to the Ministry for Digitalisation and Economic Affairs immediately following the signing on the basis that these sectors are considered relevant to public security and public order (including crisis management and services of general interest). In case of concerns, the investment can be prohibited or be requirements and conditions can be imposed. Implementation without approval of a transaction requiring ICA approval constitutes a criminal offence with a penalty of imprisonment of up to a maximum of one year (and up to three years in case of certain qualified offences). The same penalties apply if incorrect or misleading information is supplied.

Club and group deals

19 | What are some of the key considerations when more than one private equity firm, or one or more private equity firms and a strategic partner or other equity co-investor is participating in a deal?

Austrian law does not restrict multiple private equity firms, or a private equity firm and a strategic partner or other co-investor in any way, to participate 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 listed 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 the various thresholds under the Takeover Act and the Stock Exchange Act.

As a practical matter, club and group deals tend to add another layer of complexity, in particular, where the partners in a club or group deal have different objectives (eg, a private equity firm usually has a different investment horizon and investment objective compared to a strategic investor) 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 shall hold a purely financial interest).

Issues related to certainty of closing

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

Austrian sellers have been generally 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 condition in a debt commitment letter (but this is rather the exception) or where limited to adverse changes to the business (business MAC). Warranties being true and correct or pre-completion covenants having been satisfied, which is fairly standard in the US, were the exception and only discussed where US investors and US law firms were involved.

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UPDATE AND TRENDS

Key developments of the past year

21 | Have there been any recent developments or interesting trends relating to private equity transactions in your jurisdiction in the past year?

No updates at this time.

Coronavirus

22 | What are some of the significant developments and initiatives relating to the covid-19 pandemic that have impacted private equity transactions in your jurisdiction?

The past year has been impacted by the covid-19 pandemic. Except for transactions that were close to the finishing line when the pandemic hit Austria in February 2020, all major deals were put on hold and new transactions did not come to the market. There were a few exceptions, however: most of the technology sector was not as heavily affected, and after a couple of weeks on hold most deals were picked up again. Also, deals with an overriding strategic rationale (such as mergers or add-on acquisitions) were further pursued, despite the crisis. Venture capital activity was also relatively robust, which is not surprising as most funded businesses were new tech. Since September 2020, we have seen general activity picking up again throughout all sectors (with the exception of retail). We expect this trend to continue on the basis that there is also better visibility for most target company business models.

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