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Contributing Editors:

Dr. Markus P. Bolsinger & Christopher Field
Dechert LLP

ICLG.com

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1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions?

Austria has seen the full spectrum of private equity transactions.

In the large-cap (buyout) segment (deal values of EUR 100 million and above) the main trend over the last few years was the increased use of vendor due diligence and warranty and indemnity insurance as well as the increased interest of debt funds to finance the term loan facilities in leveraged buyout transactions ("LBO"). In terms of sectors, there was no discernible trend. This is mainly due to the limited number of transactions within that segment. In the mid-cap (buyout) segment (comprising deals with values between EUR 10 million and EUR 100 million, which make up the vast majority of Austrian deals) and typically target family- or founder-owned businesses, tax-optimised roll-over structures were often used, which allow founders or other sellers to reinvest part of the sale proceeds. In terms of sectors, technology, healthcare, industrials and business services accounted for most of the deal flow in this segment. Another trend that continued is increased activity in the growth capital segment and the venture capital segment, where corporate accelerator and venture capital funds are becoming increasingly active, causing significant competition for traditional venture capital funds. Investors from Asia (in particular, China and India) are also regularly playing significant roles.

On the debt side, debt funds have become increasingly active over the last years, offering a wide array of instruments, ranging from growth capital, stressed financing, and acquisition financing to bridge loans and DIP loans.

1.2 What are the most significant factors currently encouraging or inhibiting private equity transactions in your jurisdiction?

Austrian companies often have substantial CEE exposure, which is perceived as an opportunity by some private equity funds, but it is an issue for other funds who must not invest in targets in the CEE, or with considerable CEE exposure, pursuant to their investment mandate. With the CEE markets maturing, we have seen this becoming a lesser issue over the last couple of years for most funds. However, due to the latest political uncertainties and the war in Ukraine there is a change in momentum and investors are putting more emphasis on country risk and potential related sanctions.

1.3 Are you seeing any types of investors other than traditional private equity firms executing private equity-style transactions in your jurisdiction? If so, please explain which investors, and briefly identify any significant points of difference between the deal terms offered, or approach taken, by this type of investor and that of traditional private equity firms.

We have seen a significant increase in investment holding activity over the last two to three years, which mainly comes from Germany. Investment holdings tend to have an entrepreneurial background and their capital is usually sourced from entrepreneurial families only. The main difference to traditional private equity is their evergreen structure, which allows them to remain invested for the long term and puts less focus on drag and exit provisions. Their entrepreneurial background often gives them a competitive advantage in auctions where family-owned businesses are up for sale.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction?

The typical onshore acquisition structure involves one or more holding companies ("HoldCos") and an acquisition vehicle ("BidCo"), which then enters into the purchase agreement and acquires the shares. From a tax perspective, this multi-layer holding structure is no longer necessary (see question 2.2). In leveraged transactions, interim holding companies are, however, often still needed as senior lenders typically insist that junior lenders lend a level higher in the structure to achieve structural subordination.

Private equity funds will usually try to maximise debt in the financing structure for a transaction. The difference between available debt and the purchase price is financed by the fund through a combination of debt (so-called "institutional debt") and equity. How much institutional debt can be employed is determined by "thin cap" rules. While there are no statutory rules, debt-to-equity ratios of 3:1 to 4:1 are generally accepted.

Where bank debt is employed, the target company is usually required to accede to the financing documents on an exclusive lender basis (to avoid structural subordination to existing lenders) and to grant guarantees and security interests securing acquisition debt, as well as the refinanced target company debt on or shortly after completion. To the extent that guarantees and security interests secure acquisition debt, capital maintenance and, where a joint-stock company ("JSC") is involved, financial assistance rules are a concern. Transactions violating capital maintenance rules

are null and void between the parties as well as any third party (e.g. the financing bank) if that third party knew, or should have known, of the violation. In addition, the members of the management and supervisory board who approved the transaction may be subject to liability. Transactions violating financial assistance rules, on the other hand, are not void but may result in the liability of the members of the management and supervisory board who approved the transaction. Both issues are usually addressed in the financing documents by "limitation language", which limits the obligations of Austrian obligors to an amount and terms compliant with capital maintenance and financial assistance rules.

2.2 What are the main drivers for these acquisition structures?

The main drivers for the acquisition structures described under question 2.1 are onshore tax groups and structural subordination of junior lenders (see above). Any Austrian HoldCos and BidCos can enter into a tax group with the target company allowing for a set-off of interest expenses at the HoldCo (or BidCo) levels with the taxable profits of the target company (for a more detailed discussion, please see questions 10.1 and 10.4).

2.3 How is the equity commonly structured in private equity transactions in your jurisdiction (including institutional, management and carried interests)?

Institutional equity is usually given offshore and passed onto the Austrian HoldCo and BidCo structure through (direct or indirect) capital contributions or shareholder loans.

Management equity is often given in the form of actual shares, either in the target company itself (or the entity in which the exit is expected to occur) or shares in entities further above. From a tax perspective, actual shares (and certain other equity interests) may have benefits relative to phantom stock and contractual bonus scheme arrangements, as gains realised upon an exit may be eligible for capital gains taxation.

2.4 If a private equity investor is taking a minority position, are there different structuring considerations?

Private equity investors taking a minority position typically insist on new governance documents (for a description, see question 3.1). Where that request is rejected, the investor must carefully analyse what rights are available to him following completion under the existing governance documents and, where necessary, request amendments. In that process, it is important to become familiar with the minority protections already available under the law, which of them are mandatory, which of them can be amended to the benefit of minority shareholders only, and which of them can be amended without restriction. The types of available minority protections differ, but, generally, protection includes information rights, rights to call a shareholders' meeting, quorum, and voting requirements for major corporate actions (such as corporate restructurings, a change of the company's purpose, changes to the articles of association, dealings involving all or substantially all of the business or assets, and squeeze-outs of shareholders).

2.5 In relation to management equity, what is the typical range of equity allocated to the management, and what are the typical vesting and compulsory acquisition provisions?

Management equity is typically subject to vesting over a period of three to five years. Compulsory transfer provisions apply upon termination of the manager, with consideration varying depending on the reason for termination (a "good" or a "bad" leaver), although structures have become less aggressive in that regard due to recent developments in Austrian labour and tax law. In addition, the private equity fund will require a right to drag-along the management shares upon an exit and will often insist on pooling of the management shares in a pooling vehicle (often a partnership).

2.6 For what reasons is a management equity holder usually treated as a good leaver or a bad leaver in your jurisdiction?

In their simplest form, good and bad leaver provisions refer to employment law and treat a manager as a bad leaver if he is dismissed (*entlassen*) by the company for good cause or if he resigns on his own initiative without cause (*ohne wichtigen Grund*). More sophisticated provisions specifically define good leaver and bad leaver cases (this includes dismissal for pre-defined "causes", which covers felonies against the company, such as fraud or embezzlement, and breaches of material obligations). Resignation without cause is typically seen as a bad leaver case unless the manager has "good reasons" for his resignation (e.g. health, relocation). Attaining retirement age, death or permanent incapacity or disability are typically seen as good leaver case.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

The governance documents typically include:

- a shareholders' agreement;
- new articles of association; and
- by-laws for the management board and supervisory board (if any).

The main areas of concern in the governance documents are the private equity fund's rights to appoint sponsor representatives (and/or observers) to the supervisory board (if any) or advisory board (if any), sponsor representative liability, D&O and conflicts of interest, veto rights of the fund (and/or the sponsor representative) (see question 3.2), dilution protection for the fund, a liquidation preference or exit waterfall, restrictions on dealings with shares (typically including a lock-up, rights of first refusal, tag-along, and drag-along rights), exit rights for the fund (via a trade sale, an initial public offering ("IPO") or a shotgun mechanism) as well as reporting, information and access rights. On platform deals, it is also important to secure that the decision on if and when acquisitions are made rests with the fund and that this cannot be blocked by the other shareholders.

In the majority of cases, the fund will also insist that senior management signs up to an incentive scheme (see question 2.3) and that all of the management team (and sometimes also certain other key personnel) enter into new employment agreements.

To the extent the above arrangements are included in the articles of association (which has some benefits for some (but not all) of them from an enforcement perspective (see question 3.3)), they are publicly accessible through the companies register. In addition, certain arrangements may have to be disclosed under Securities Law requirements.

3.2 Do private equity investors and/or their director nominees typically enjoy veto rights over major corporate actions (such as acquisitions and disposals, business plans, related party transactions, etc.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

The governance documents will typically include veto rights of the private equity fund (and/or a sponsor representative on a supervisory board or advisory board) over major corporate actions and strategic decisions (such as acquisitions and disposals, major litigation, indebtedness, changing the nature of the business, business plans and strategy), although the specific requirements vary widely from fund to fund and deal to deal. Usually, such veto rights are structured to fall away if the relevant fund's interest is reduced below a certain threshold. Where multiple private equity funds invest, they will generally insist that all investors agree and vote on a set of veto matters, with quorum and majority voting requirements varying widely from deal to deal.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

If a veto (or majority) requirement is included in the articles of association (and/or by-laws), resolutions violating the arrangement can be challenged. In contrast, if a veto right (or majority requirement) set forth in the shareholders' agreement is violated, only actions for damages and cease and desist orders are available. It should be noted, however, that in one decision the Austrian Supreme Court also accepted a challenge of a shareholders' resolution in breach of a majority requirement set forth in a shareholders' agreement, where all shareholders were party to the agreement. This will usually be the case in private equity transactions where the shareholders' agreement typically provides for a mandatory accession clause. Regarding management board member actions, it must be noted that, towards third parties, the power of representation cannot be limited in the shareholders' agreement, the articles of association, the by-laws or elsewhere in such a way that the company is not bound if a member transacts in violation of a contractually agreed veto (or majority) requirement.

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or *vice versa*)? If so, how are these typically addressed?

Austrian courts have consistently held that shareholders owe a duty of loyalty (*Treuepflicht*) towards one another, requiring them to consider the interests of their fellow shareholders in good faith (*Treu und Glauben*) and in line with *bonos mores* (*gute Sitten*). That duty is more pronounced for closely held companies than for widely held companies and differs from shareholder to shareholder, depending on their ability to cause a certain action to be taken or not to be taken. A majority shareholder may therefore be exposed to liability in circumstances where a minority shareholder is not (because his appearance or vote would not have mattered in the circumstances anyway). A violation of the duty of loyalty may result in claims for damages, cease and desist orders, or a challenge (*Anfechtung*) of shareholder resolutions.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

Shareholders' agreements are typically governed by Austrian law and the competent courts at the seat of the company typically have jurisdiction. This is mainly because disputes related to shareholders' agreements are usually supported by arguments based on Austrian corporate law and corporate law disputes must be brought before the courts at the seat of the company. However, where Austrian court judgments are not enforceable in the jurisdiction of a particular shareholder, arbitration is sometimes agreed as an option.

Non-compete and non-solicitation provisions are generally enforceable for the period of the shareholding (for that period, contractual restrictions compete with the corporate law-based duty of loyalty (see question 3.4)), and for up to two (in exceptional cases, three) years thereafter. Where a shareholder was also an employee (which could be the case for management shareholders), the restriction will also be scrutinised under employment law and is generally only valid for a period of up to one year and to the extent that the restriction does not unduly limit the employee's future prospects. If backed up by a contractual penalty, only its payment can be requested (but not the employee's compliance).

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies?

Austria has a two-tier board structure. The management board is responsible for the day-to-day management of the company, while the supervisory board is responsible for monitoring and resolving the matters brought before the supervisory board for a vote (which is a matter for the governing documents). Sponsors usually request rights to nominate one (or more) members of the supervisory board (*Aufsichtsrat*) or observers to the supervisory board, but are hardly ever involved in management. For that reason, the answers under questions 3.6 and 3.7 will focus on supervisory board nominees.

Restrictions

Restrictions with respect to the aggregate number of supervisory board positions and provisions aimed at preventing conflicts of interest exist: supervisory board members must not be managing directors of the portfolio company or of a subsidiary, or employees of the portfolio company (employee representatives are exempt from that restriction). They must not hold more than 10 (eight for a listed JSC) supervisory board positions (with chairman positions counting double and exceptions for group positions), or be appointed a managing director of a subsidiary or of another company to whose supervisory board a member of the management board of the portfolio company is appointed (unless that company belongs to a group *(Konzern)*).

Requirements

Corporate law does not require a specific qualification or experience for supervisory board members. Such requirements can be introduced in the articles of association. However, every

supervisory board member must be able to meet its duty of care (*Sorgfalspflicht*) requiring the relevant member to exercise the level of care of a proper and diligent supervisory board member of the particular company (that is, a supervisory board member of a biotech company will have to have different knowledge and skills from a supervisory board member of a company that is in the retail business). In general terms, a supervisory board member must have at least a basic understanding of the business brought before the supervisory board, understand financial statements and be able to assess when an expert opinion is required and to devote sufficient time.

Risks and liability

Members of the supervisory board owe to the portfolio company (and not to the private equity investor appointing them or to any other constituents):

- a duty of care (*Sorgfaltspflicht*) (see above – which includes an obligation to be reasonably informed and to articulate any concerns he may have);
- a duty of loyalty (*Treuepflicht*) (requiring the member to act in the best interest of the company and its shareholders and not in his own interest); and
- a duty of confidentiality.

A supervisory board member is not prohibited to compete with the business of the portfolio company, as long as there is no breach of the duty of loyalty. Absent a breach of their corporate duty of care, supervisory board members can generally not be held liable for a portfolio company's breach of administrative law or criminal law. A supervisory board member may, however, become liable for his own conduct, including, without limitation: for fraud (*Betrug*) (e.g. by entering or approving a transaction intended to mislead another); for breach of trust (*Untreue*) (e.g. by entering or approving a transaction that is adverse to the interests of shareholders); for misrepresentation (e.g. with regard to the portfolio company's assets, financial or earning position or related information in the financial statements or in a public invitation to acquire shares, statements in a shareholders' meeting, statements to the company's auditors, in companies register filings); or breach of anti-bribery legislation (see question 11.5).

A private equity investor will generally not be held responsible for an act or a failure to act as a member of the supervisory board just because that member was nominated by that investor. However, whenever there is involvement beyond that, the investor could face criminal law penalties and civil law liability for damages (e.g. where the investor has collaborated with the member on a transaction intended to mislead another or which is adverse to the interests of shareholders (see above)). In addition, in circumstances where a sponsor nominee who, at the same time is a decision-maker of the investor within the meaning of the Association Responsibility Act *(Verbandsverantwortlichkeitsgesetz – "VbVG")*, commits a criminal offence for the benefit of the investor, the private equity investor may face criminal law penalties and civil law liability for damages. Further, the private equity investor could face civil law liability based on corporate law for trying to influence members of the management or supervisory board to his own benefit or the benefit of another (e.g. requiring the company's management to pay the fund's transaction costs, or influencing management so that a business opportunity is not pursued and remains available for another portfolio company of the investor).

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

Where a sponsor nominee director has a conflict of interest concerning any matter, he must inform the chairman of the supervisory board accordingly. It is then the responsibility of the chairman of the supervisory board to make sure that the sponsor nominee director does not vote with respect to the matter in question and does not participate in any related meetings.

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including antitrust, foreign direct investment and other regulatory approval requirements, disclosure obligations and financing issues?

The following clearance requirements are typically a factor for the timetable:

- Antitrust clearance (which takes four weeks if cleared in Phase I proceedings (if no exemption is granted) and up to five months if cleared in Phase II proceedings).
- Regulatory clearance (e.g. the acquisition of a qualified or controlling interest in the banking, insurance, utilities, gambling, telecoms or aviation sector is subject to advance notification or advance approval of the competent regulatory authority).
- Real estate transfer clearance (the acquisition of title and certain other interests in real estate by non-EEA nationals, or control over companies holding such interests, is subject to advance notification or advance approval (depending on state law)).
- Foreign direct investment ("FDI") clearance (please see the discussion under question 11.1 for further details).
- FSR clearance (please see the discussion under question 11.1 for further details).

With regard to timing aspects related to public-to-private transactions, see question 5.1.

4.2 Have there been any discernible trends in transaction terms over recent years?

Vendor due diligence is becoming increasingly common in auctions (sometimes coupled with reliance and/or warranties given by the seller or the management on the vendor due diligence report, sometimes without). Similarly, warranty and indemnity insurance is employed in most deals, particularly where investors are sellers.

Dedicated debt funds (see question 1.1) have become increasingly relevant.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

A typical going-private transaction involves a voluntary takeover offer aimed at control (*freiwilliges Angebot zur Kontrollerlangung*), subject to the condition that 90% of the outstanding shares are tendered, followed by a squeeze-out pursuant to the Shareholders Exclusion Act (*Gesellschafterausschluss-Gesetz*) and the delisting.

A regular delisting pursuant to the Stock Exchange Act (*BörseG*) requires that the securities were listed for at least three years, that a takeover bid was published no earlier than six months ahead of the request and a shareholder resolution with at least 75% majority or a request of a qualified shareholder majority.

In the context of the takeover offer, the private equity investor must ensure that the necessary funds are secured prior to the announcement of the takeover offer. The latter must be confirmed by an independent expert pursuant to the Austrian Takeover Code (*Übernahmegesetz*). The expert will typically require (i) a copy of the equity commitment letter from the fund, and (ii) copies of the definitive finance agreements, together with documents evidencing that all conditions precedent (other than those within the private equity investor's sole control) have been satisfied, to satisfy itself that the necessary funds requirement has been complied with.

5.2 What deal protections are available to private equity investors in your jurisdiction in relation to public acquisitions?

Break-up fees and cost cover arrangements are quite common in private transactions (that is, transactions not involving a public takeover bid).

In public acquisitions (that is, transactions involving a public takeover bid) where the target company would have to pay, they are sometimes discussed but they are not common as there is little guidance as to what extent they would be valid. The common opinion is that this should primarily depend on two factors: (i) the amount of the fee (a break-up fee in an amount that will keep management from considering competing bids or deter others from considering a competing bid will probably not be valid); and (ii) the circumstances in which it is triggered (a break-up fee that is solely triggered upon active solicitation of competing bids should be valid, whereas a break-up fee triggered because a bid is not supported for good reason, or because a better competing bid is supported, is probably not valid).

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

Private equity investors tend to prefer locked box structures, particularly when they are on the sell-side. Where the gap between signing and the anticipated date of closing is long (e.g. because of antitrust or other clearance requirements), closing adjustments are the norm. Which parameters are included in a closing adjustment depends on the target business, with the most common combination being adjustments for net debt, working capital, and (sometimes) capex. Equity adjustments are the exception.

6.2 What is the typical package of warranties / indemnities offered by (i) a private equity seller, and (ii) the management team to a buyer?

Experienced private equity sellers will try to avoid business warranties and indemnities (and instead just provide warranties on title and capacity). In addition, experienced private equity sellers will be very keen to limit recourse for warranty claims (e.g. to an amount paid into escrow) as well as any other post-closing liability.

Where private equity sellers must give business warranties, they often seek back-to-back warranties from management and underwrite warranty and indemnity insurance or offer the buyer management warranties instead (then usually linked to buyer's warranty and indemnity insurance). The latter option has the benefit that the private equity fund need not concern itself with post-closing warranty litigation.

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

Private equity sellers will try to limit post-closing covenants to access to books and records and sometimes assistance in relation to pre-closing affairs. Usually, buyers will insist on non-compete and non-solicitation covenants (which private equity sellers will typically try to resist). Other post-closing covenants will depend on the particular case and may include covenants on de-branding, migration, transitional services and group security interests and guarantees.

6.4 To what extent is representation & warranty insurance used in your jurisdiction? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such insurance policies, and what is the typical cost of such insurance?

Seller policies (which protect the seller from its own innocent misrepresentation) are sometimes used but this is fairly uncommon. Buy-side policies (which protect the buyer from the seller's misrepresentation (innocent or otherwise)) or flipping policies (that is a policy organised by the seller as part of the auction process that flips into a buyer's policy) are more common, particularly in auctions.

The typical excess is around 1% of the policy limit. Policy limits vary between seller policies (usually they match the overall cap under the purchase agreement) and buyer policies (usually they start at around 20% of the enterprise value but can also cover the full enterprise value). The premium will depend on the transaction but tends to be in the range of 1%–3% of the cover purchased. Typical carve-outs and exclusions include fraud, matters disclosed, matters the insured was aware of, pension underfunding and forward-looking warranties (e.g. the ability to collect accounts receivables). Indemnities for risks identified in the course of the due diligence can usually be insured as well, provided that materialisation risk and quantum can be assessed.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

Common limitations on warranties include:

- Time limitation for bringing claims:
  - title and capacity: three to 10 years;
  - business warranties: 12 to 24 months;
  - tax warranties: relative (three to six months plus) or fixed at seven years; and
  - environmental warranties: five to 10 years.
- Financial limits, including:
  - a cap on the total liability and a sub-cap for warranty claims;
  - an aggregate claims threshold ("basket" or "deductible"); and
  - an exclusion of *de minimis* claims.
- Limitation to direct loss (as opposed to indirect and consequential loss).
- Exclusion of claims to the extent caused by:
  - agreed matters;
  - acts of the purchaser (outside of the ordinary course of business);
  - change of law or interpretation of law; or
  - change of tax or accounting policies.

- No liability for contingent liabilities.
- No liability if the purchaser knew or could have known.
- No liability for mere timing differences (*Phasenverschiebung*).
- No liability if covered by insurance.
- Obligation to mitigate loss.
- No double recovery under warranties, indemnities and insurance policies.

Qualifying warranties by disclosure

Warranties are usually qualified by matters that have been disclosed (in a certain manner) or are deemed disclosed by operation of the provisions of the acquisition agreement or the disclosure letter (e.g. information that can be obtained from publicly accessible registers). The seller will always push for general disclosure (i.e. everything disclosed to the purchaser and its advisors at whatever occasion qualifies all warranties) while the purchaser will push for specific disclosure (i.e. separate disclosure for each warranty) and try to introduce a disclosure threshold requiring that a matter must be "fully and fairly" disclosed. This is usually heavily negotiated.

Limitations on indemnities

Indemnities are generally not qualified by disclosure or knowledge. The tax indemnity is usually only subject to a specific tax conduct provision, a direct loss limitation and the overall cap. Other limitations are a matter of negotiation. If other indemnities (e.g. for contamination and environmental compliance or specific due diligence findings) are accepted, limitations are usually heavily negotiated.

6.6 Do (i) private equity sellers provide security (e.g., escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

Private equity sellers are generally prepared to provide security but will, in turn, often require that the buyer's recourse is limited to such security (see question 6.2). Whether or not private equity buyers insist on security depends on various factors, including the set of agreed warranties and the credit of the seller (that is, where the seller is a listed corporate there is less need for security than in the case of a secondary transaction where the seller is an SPV or where business warranties come from management only).

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain in the absence of compliance by the buyer (e.g., equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

Private equity buyers will typically be willing to provide a copy of the executed 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 investor's sole control) have been satisfied on or around the signing date, to provide comfort that the necessary funds will be available at closing. If those financing commitments are not complied with, sellers are typically limited to claims for damages. An equity underwrite of the debt component of the purchase price is rather the exception but, where definitive financing agreements are not in place at signing, experienced sellers will insist on an equity underwrite, particularly in auctions.

6.8 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

Reverse break fees as a means to limit a private equity buyer's exposure in case the necessary financing is not available at closing are not very common in Austria. If they are agreed, they are typically linked to a financing condition (that is where the financing is not available at closing, the private equity buyer can withdraw from the contract but has to pay the reverse break fee to the seller). If structured that way (i.e. a condition linked to a withdrawal right), the amount of the fee should not be subject to judicial review. Conversely, if the reverse break fee is structured as a contractual penalty for failure to close, the amount of the fee would be subject to judicial review.

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

An IPO exit requires that the articles of association and by-laws be adjusted, due diligence performed and a prospectus prepared. In addition, the company will have to enter into an underwriting agreement and management will have to participate in road shows. All of that requires the cooperation of the company and (at least) where no new shares are issued, the management will typically ask the private equity seller to bear most of the associated costs (based on an argument related to capital maintenance rules). Any new shares issued in the IPO will naturally limit the number of shares the private equity seller can sell into the IPO. In addition, the underwriting agreement will usually provide for lock-up restrictions (see question 7.2) that limit the private equity seller's ability to sell any shares it has retained following the IPO. Finally, the private equity seller will usually be asked to give warranties in the underwriting agreement. In most cases, the private equity seller will be able to limit those warranties to matters relating to the private equity fund and the shares it sells into the IPO. Sometimes, director nominees are also required to give warranties in the underwriting agreement.

7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

The underwriting banks will usually expect some of the private equity seller's shares to be locked up for a period of about 180 days after the IPO. In addition, lock-up requirements may already be included in the shareholders' agreement, but this is rather the exception.

7.3 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

Dual-track processes are rare in Austria. As far as we are aware, there have only been a few attempts in the last couple of years, all of which ultimately resulted in a trade sale.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (including the syndicated loan market, private credit market and the high-yield bond market).

Sources of debt finance for private equity transactions differ substantially for domestic private equity funds (which usually finance all equity or seek debt finance from domestic banks), and international private equity funds, which are able to tap the international markets. In mid- and small-cap transactions, there is usually just one single term loan facility, a working capital facility and the institutional debt from the fund. In large-cap transactions, there are usually more term loan facilities with different repayment profiles, a working capital facility and the institutional debt from the fund. Where time is of relevance and the cost benefit is outweighed by increased complexity, funds have in the past employed unitranche facilities. Due to the increase of interest rates, there has been a shift towards more traditional structures for total cost reasons. High yield only plays a role in the large-cap segment or post-completion refinancing.

Overall, the financing environment remains difficult and resilience against political risk, interest rate changes and supply chain issues are a top priority for lending desks, which makes it difficult if not impossible to raise debt in certain segments. Healthcare and tech transactions usually can be financed, albeit not at the same terms as in 2021. In general, banks are still very cautious, resulting in a shift towards private debt funds.

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

Lending is regulated by the Austrian Banking Act ("*BWG*"), which requires a lender to have an Austrian or passported EU licence if lending takes place (or is deemed to take place) in Austria. Private debt funds managed by a licensed AIFM do not require such a licence as long as the lending business is covered by their AIFM licence.

8.3 What recent trends have there been in the debt-financing market in your jurisdiction?

Please see the discussion in question 8.1.

9 Alternative Liquidity Solutions

9.1 How prevalent is the use of continuation fund vehicles or GP-led secondary transactions as a deal type in your jurisdiction?

Most transactions are primary transactions.

The increased use of continuation vehicles and secondary transactions has, however, given rise to additional discussions related to transfer restrictions and Drag and Exit clauses in the shareholders' agreement as funds want to reserve that exit route while other shareholders tend to have concerns related to the arms'-length nature of the transaction and the impact on their own exit timeline.

9.2 Are there any particular legal requirements or restrictions impacting their use?

There are no particular legal requirements or restrictions.

10 Tax Matters

10.1 What are the key tax considerations for private equity investors and transactions in your jurisdiction? Are off-shore structures common?

Usually, the private equity fund will seek to implement a tax offset structure to offset interest expense at the Austrian BidCo level with profit generated at the target company level (however, see question 10.4 regarding the interest limitation rule). In principle, there are two methods to achieve this:

(1) The first method is to establish a tax group between an Austrian BidCo and the target company. In such tax group, the fiscal result of BidCo and the target company is consolidated at the BidCo level. If the aggregated fiscal result of the BidCo and the target company is negative, the loss can be carried forward by the BidCo to future periods. The formation of such tax group requires a tax allocation agreement and an application to the tax office. If the tax group is collapsed prior to the lapse of three years (which is the minimum period), the group members are retroactively taxed on a standalone basis.

(2) A second method, which is sometimes discussed but rarely implemented because of the significant risk it involves, is an upstream merger of the target company into BidCo. Based on past decisions of the Austrian Supreme Court, it is pretty clear that where the BidCo carries the acquisition debt for the purchase of the shares of the target company, a downstream merger of the BidCo into the target company will not be registered. In certain exceptional cases, an upstream merger of the target company into BidCo may, however, be feasible. The result of such upstream merger would be that the shares in the target company pass to the BidCo parent, interest expense on the acquisition debt can be offset against profit, and guarantees and security interests granted by the merged entity (holding the cash-generating assets) are not subject to the limitations under the Austrian capital maintenance rules (see above) and thus will be of greater value to the financing banks. In particular, the last point is of great interest to the financing banks, which is why this route is sometimes explored when a particular case supports the necessary arguments.

In addition, please note that, as a general rule, tax authorities may request the disclosure of the eventual recipient (whether related or non-related) of any expenses deducted and that such rule also applies to interest expenses. In particular, such disclosure rule may be burdensome to comply with in relation to funds acting as lenders.

Regarding a future exit, it should be taken into account that double taxation treaties usually assign the right to tax capital gains to the state of residence of the exiting shareholder. If the seller is an Austrian tax resident, capital gains taxation applies (i.e. no participation exemption is available for Austrian tax residents in relation to Austrian target companies).

Avoidance of withholding taxes on dividends is usually less of an issue, since pre-exit distributions are very rare. Still, to address that issue, EU entities are usually preferred over non-EU entities and, among the latter, entities from non-EU countries with which Austria has concluded a double taxation treaty over entities from other non-EU countries. In such structures, we

also see an increased level of substance (in terms of own premises and personnel) in the foreign entities, which then usually provide internal services to related entities.

10.2 What are the key tax-efficient arrangements that are typically considered by management teams in private equity acquisitions (such as growth shares, incentive shares, deferred / vesting arrangements)?

There is no specific regime that provides for tax reliefs or other tax benefits of substantial nature to management teams. It is therefore important to ensure that capital gains taxation (27.5%) applies as opposed to taxation as employment income (up to 55%) (see question 2.3).

10.3 What are the key tax considerations for management teams that are selling and/or rolling over part of their investment into a new acquisition structure?

An exchange of shares is treated in the same way as a sale of shares and thus triggers capital gains taxation. In a typical case, where the management only holds a small stake in the target company, the only option to roll-over into a new structure without triggering capital gains taxation is a contribution (*Einbringung*) under the Reorganisation Tax Act (*UmgrStG*) of their shares into a holding, which thereby acquires or enlarges an already existing majority holding in the target company. Recently, the rules for individuals applicable to such transactions in a cross-border context have been adopted to expand the options for managers to avoid taxation upon the roll-over.

10.4 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors, management teams or private equity transactions and are any anticipated?

Corporate income tax rate

As part of the "eco-social" tax reform package, the corporate income tax rate dropped from 25% to 24% for FY 2023 and will drop to 23% for FY 2024 and subsequent years. Tax incentives for certain ecological investments have also been introduced.

CFC legislation

Since 1 January 2019, CFC rules for "controlled foreign companies" and permanent establishments have been implemented that provide that passive and low-taxed income (e.g. interest payments, royalty payments, taxable dividend payments and income from the sale of shares, financial leasing income, and activities of insurances and banks) of controlled foreign subsidiaries can be attributed to, and included in, the corporate tax base of an Austrian parent.

Interest limitation rule

As of 2021, Austria has implemented an interest limitation rule in order to comply with the EU Anti-Tax-Avoidance Directive ("ATAD"). The purpose of the interest limitation rule is to limit the deductibility of loan costs depending on the company's earnings before interest, tax, depreciation and amortisation ("EBITDA") if the debt leverage is higher in Austria than the average of the whole group. The deductibility of interest surplus (*Zinsüberhang*) is, in principle, limited to 30% of the tax EBITDA of the respective year. In the case of a tax group, the aforementioned generally applies at the level of the group head. There are four significant exceptions to the interest limitation rule:

- Up to EUR 3 million of interest surplus is fully deductible. The amount exceeding this sum is subject to the interest limitation rule. In the case of a tax group, the allowance applies to the entire group, not per group member.
- The interest limitation rule does not apply to standalone entities. A standalone entity is considered an entity, which is not (fully) included in consolidated financial statements, has no affiliated companies, and has no foreign permanent establishments.
- The interest surplus can be fully deducted if the company can prove that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the corporate group it belongs to (equity-escape clause). A two-percentage points tolerance exists.
- For contracts concluded before 17 June 2016, the interest limitation rule is not applicable until 2025.

Tax rulings

Tax rulings are becoming more common, after a new ruling regime providing for binding tax rulings in the areas of reorganisations, group taxation and transfer pricing was introduced a couple of years ago. Binding tax rulings are meanwhile also available in the areas of international taxation and for questions in connection with abuse (since 1 January 2019) and value-added tax (since 1 January 2020). In practice, we increasingly see ruling requests in relation to pre-exit reorganisations, but also in relation to transfer pricing issues.

Anti-hybrid rules

The Tax Reform Act 2020 foresees anti-avoidance rules targeting hybrid cross-border structures. Specific structures leading to a tax deduction in one state without any corresponding taxable income in the other state (deduction/no inclusion) as well as structures enabling a double tax deduction in two different states (double deduction) shall be prevented. The new provisions shall apply to specific structures defined by law (e.g. hybrid financial instrument, hybrid transfer, hybrid entities, hybrid private equity and unconsidered private equity) and shall lead to a tax deduction of expenses failed and/or taxable income in Austria as well as to tax deduction of expenses failed in Austria. The new rules for hybrid cross-border structures apply as of 1 January 2020.

Transfer tax

There have been certain changes in relation to real estate transfer taxation (that is, a lower share consolidation threshold (now 95% compared to 100% previously) and full attribution of shares held in trust to the trustor) that should be considered where real estate is involved.

Reporting regime

On 1 July 2020, the EU Reporting Obligation Act came into effect, which requires the reporting of certain cross-border tax arrangements. This act implements an EU directive (DAC 6) that must also be applied in the other 26 EU Member States.

A cross-border arrangement is subject to reporting if it involves a potential risk of tax avoidance or circumvention of the reporting obligation under the Common Reporting Standard or preventing the identification of the beneficial owner and: (i) its first step was implemented between 25 June 2018 and 30 June 2020 (so-called "old cases"); or (ii) its first step is implemented from 1 July 2020 or it is designed, marketed, organised, made available for implementation, or managed from 1 July 2020. A distinction is made between arrangements that are subject to mandatory reporting and those that are subject to conditional reporting. In any case, arrangements that are subject to a

mandatory reporting obligation must be reported, regardless of whether a potential tax advantage has been obtained. The obligation to report a cross-border tax arrangement is generally imposed on the so-called intermediary. An intermediary is any person who designs, markets, organises, makes available for implementation, or manages the implementation of an arrangement subject to reporting requirements. Accordingly, in each transaction, it must be analysed whether such new reporting regime applies or not.

11 Legal and Regulatory Matters

11.1 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

FDI – clearance

In July 2020, the Investment Control Act ("ICA") came into force, which requires advance clearance for certain FDIs by investors from outside the European Economic Area ("EEA") or Switzerland. Direct and indirect acquisitions of:

- voting rights of 25% or 50% (in critical sectors 10%);
- decisive influence in an Austrian company; or
- significant assets,

in sensitive sectors such as defence, energy, digital infrastructure, R&D, but also IT, public transport, health, telecommunications, chemicals, robotics, semiconductors, nuclear technology, biotechnology, food supply, supply of pharmaceuticals, vaccines, medicinal products and media, which are considered to be of critical importance, require advance clearance by the Austrian Ministry of Digital and Economic Affairs.

Exempt from the approval requirement are FDIs in micro-enterprises, including start-ups with less than 10 employees and an annual turnover or balance sheet total of less than EUR 2 million. Approval may be granted subject to conditions. An investor failing to obtain approval before closing may face administrative and even criminal sanctions. In addition, an investment is deemed void until approval is granted. Proceedings take between two-and-a-half months (in simple cases) and five to six months (in more complex cases). Clearance certificates can be applied for but are only advisable for clearcut cases. They are generally issued quickly.

FSR – clearance

On 12 January 2023, the Foreign Subsidies Regulation (EU) 2022/2560 ("FSR") came into force to address distortions of competition caused by third-country subsidies in the EU's internal market. In July 2023, a regulation is due that will provide further guidance on the application and interpretation of the FSR. Under the new rules, transactions must be notified to and cleared by the European Commission if:

- either (a) at least one of two (previously independent) merging undertakings, (b) the acquired undertaking, or (c) a JV to be formed is established in the EU and has achieved an EU turnover of at least EUR 500 million in the last business year; and
- either (a) the acquiring undertaking and the acquired undertaking, (b) the merging undertakings, or (c) the created JV and the undertakings creating the JV have received so called foreign financial contributions ("FFC") (that is, financial contributions from non-EU governments) in the last three years prior to the transaction. FFC is construed broadly and does not only comprise financial assistance (e.g. (capital injections, loans, guarantees, etc), but also other types of assistance (e.g. tax reliefs).

Phase I proceedings take 25 working days from filing. If Phase II proceedings are initiated, there is an additional review period of 90 working days. Clearance may be granted subject to conditions. If the transaction is prohibited, it may not be implemented.

11.2 Are private equity investors or particular transactions subject to enhanced regulatory scrutiny in your jurisdiction (e.g., on national security grounds)?

With regard to regulatory scrutiny over private equity funds, please see question 11.1. With regard to transactions, there is no private equity specific scrutiny. Private equity funds should, however, be aware of the general clearance requirements (see question 4.1).

11.3 Are impact investments subject to any additional legal or regulatory requirements?

There is no regulation specific to Austria.

11.4 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g., typical timeframes, materiality, scope, etc.)?

Private equity buyers often split due diligence in different phases (particularly in auctions), with the first phase only covering a few value-driving items and the latter phases then covering the rest of the scope. The timeframe depends very much on whether it is a proprietary situation (in which case the due diligence can take eight to 10 weeks) or an auction (in which case the timing is driven by the auction process). Private equity buyers usually engage outside counsel to conduct all legal due diligence. Compliance due diligence is sometimes done in-house.

11.5 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g., diligence, contractual protection, etc.)?

Anti-bribery and anti-corruption legislation had a significant impact on private equity transactions in Austria. Since their enactment, more emphasis has been placed on those areas in the due diligence process as well as in the purchase or investment agreement. Also, private equity funds (in particular, bigger international investors) will make sure that a compliance system is put in place following closing if not already existing at the time of the transaction. Provided such system is appropriately monitored, it can serve as a defence for management and portfolio company liability in case there is an administrative or criminal offence by any representatives of the portfolio company under Austrian law. In addition, international private equity investors will be concerned with any additional requirements under the UK Bribery Act and the US Foreign Corrupt Practices Act, as both of them claim extra-territorial jurisdiction.

11.6 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the portfolio companies); and (ii) one portfolio company may be held liable for the liabilities of another portfolio company?

In principle, a private equity investor is not liable for the liabilities of an underlying portfolio company. Exceptions apply, *inter*

alia, under concepts of piercing the corporate veil, including: (i) where the private equity investor factually manages, or substantially controls the management of, the underlying portfolio company (*faktische Geschäftsführung*); (ii) in cases of undercapitalisation (only where there is an obvious imbalance between the risks of the business and the equity, which is likely to result in a default); (iii) where based on the accounting records, the assets of the company cannot be separated from the assets of the private equity investor (*Sphärenvermischung*); and (iv) in cases of shareholder action putting the portfolio company at risk (*existenzvernichtender Eingriff*) (where the investor takes action causing insolvency (*Insolvenzverursachung*), e.g. acceleration of a loan in distress).

In addition, a private equity investor may become liable to a creditor up to the amount secured where the private equity investor granted a guarantee or security interest securing a loan of a portfolio company in "crisis" (defined in the Company Reorganisation Act ("*URG*")). In such circumstances, the portfolio company can request the creditor to claim against the private equity investor first (in which case the recourse claim of the private equity investor against the portfolio company is suspended until the crisis is over); in addition, if the portfolio company pays the creditor, the portfolio company can take recourse against the private equity investor.

The above principles apply *mutatis mutandis* in relation to the risk of potential liability of one portfolio company for the liabilities of another portfolio company.

12 Other Useful Facts

12.1 What other factors commonly give rise to concerns for private equity investors in your jurisdiction or should such investors otherwise be aware of in considering an investment in your jurisdiction?

In the recent past it was sometimes difficult for private equity investors to access Austrian businesses, particularly where the business is family owned. That has changed as the market matured and well-advised sellers meanwhile consider private equity as a viable and often very attractive option for an exit. Still, due to the increased complexity it is important to have the right advisory teams on both sides of the table.

Investors should also be aware that the Austrian Ministry of Digital and Economic Affairs is taking a rather strict approach when it comes to FDIs by non-EEA/non-Swiss investors in sectors qualifying under the ICA (see question 11.1) and typically requires the transaction to be notified. Clearance typically takes approximately three months, which must be taken into account in the overall timing. Notifications can be made on the basis of preliminary documentation (e.g. a term sheet).

In relation to listed target companies, investors should be aware that there is often limited free float and one or two major controlling block shareholders.

Florian Philipp Cvak's practice focuses on corporate and corporate finance work with a particular focus on private equity, venture capital, M&A, mezzanine and LBO financings. Furthermore, he specialises in US lease and project finance transactions. His practice is complemented by Restructuring, General Corporate and Contracts work.
Florian holds law degrees from the University of Vienna and New York University ("NYU") School of Law (LL.M.) and attended extra-curricular classes on private equity, corporate finance, investment banking and accounting at New York University (NYU) Stern School of Business. He is admitted to the Austrian Bar and the New York Bar. Before establishing the firm as a co-founder, Florian was a partner at Schoenherr, where he co-headed the private equity practice and was involved in some of the firm's most prestigious private equity transactions in Austria as well as the wider CEE region.

Schindler Attorneys
Kohlmarkt 8-10
1010 Vienna
Austria

Tel: +43 1 512 2613 500
Email: florian.cvak@schindlerattorneys.com
URL: www.schindlerattorneys.com

Clemens Philipp Schindler's transactional practice is focused on corporate and tax. He is admitted as both a lawyer and a certified public tax advisor in Austria. Before establishing the firm as a co-founder, Clemens spent six years as a partner at Wolf Theiss, where he led some of the firm's most prestigious transactions. Previously, he practised with Haarmann Hemmelrath in Munich and Vienna, as well as with Wachtell Lipton Rosen & Katz in New York. Clemens' practice focuses on corporate and tax advice in relation to public and private M&A, private equity and corporate reorganisations (such as mergers, spin-offs and migrations), most of which have a cross-border element.

Schindler Attorneys
Kohlmarkt 8-10
1010 Vienna
Austria

Tel: +43 1 512 26 13 205
Email: clemens.schindler@schindlerattorneys.com
URL: www.schindlerattorneys.com

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