

PRIVATE M&A

Austria



Private M&A

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Quick reference guide enabling side-by-side comparison of local insights, including structure and process, legal regulation, consents and filings; advisers, negotiation and documentation; due diligence and disclosure; pricing, consideration and financing; conditions, pre-closing covenants and termination rights; representations, warranties, indemnities and post-closing covenants; tax considerations; employees, pensions and benefits; and recent trends.

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

Private M&A transactions in Austria are commonly structured as share deals. The specific details of each transaction vary depending on the parties involved.

The buyer and seller begin by defining their objectives, conducting a preliminary due diligence and evaluating the transaction's strategic fit. They may engage advisors such as investment bankers, lawyers and accountants to assist in the process.

Once the parties agree to proceed, they negotiate the key terms of the transaction. A non-binding letter of intent is frequently signed to outline the proposed terms and facilitate further discussions.

The buyer conducts a thorough investigation of the target company's financial, legal and operational aspects. This process aims to assess risks, uncover potential liabilities and verify the accuracy of information provided by the seller. The duration of due diligence can vary depending on the complexity of the transaction. After completing due diligence, the parties negotiate and finalise a definitive agreement, which includes detailed provisions (eg, transaction structure, warranties, indemnities and conditions precedent).

Depending on the nature of the transaction, certain regulatory or third-party approvals may be required. For example, antitrust authorities might need to review and approve the deal. The timing of these approvals can vary significantly and may impact the overall duration of the transaction.

The duration of the entire transaction process can vary depending on numerous factors, such as the complexity of the deal, the size of the transaction and the industry involved. While auction processes often take several months, direct seller to buyer transactions in smaller deals may be signed quickly, potentially in four to six weeks, provided no regulatory approvals are required.

Law stated - 01 August 2023

Legal regulation

Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

There is no general overarching law governing the acquisition and disposal of businesses in Austria. The most relevant statutes are the Austrian Civil Code (ABGB) the Austrian Commercial Code, the Austrian Stock Corporation Act (AktG) and the Austrian Limited Liability Companies Act (GmbHG).

It is not mandatory that acquisitions are governed by Austrian law, but certain mandatory provisions of Austrian law may still apply to the acquisition (in particular, formal requirements).

Cross-border share deals on Austrian targets involving at least one non-Austrian party usually follow the Europeanised form of a US-style share purchase agreement, even if the share purchase agreement is subject to Austrian law.

Law stated - 01 August 2023

Legal title

What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

The legal title is prescribed by law, which sets out the requirements and procedures for transferring ownership. The ABGB and specific company laws, such as the AktG and the GmbHG, govern the transfer of legal title to shares in companies. For the transfer of assets or a business, the relevant provisions of contract and property law apply.

In Austria, there is a distinction between legal title and beneficial title. Legal title refers to the ownership rights recognised by law, while beneficial title refers to the right to enjoy the economic benefits and use of the shares or assets. Legal title is reflected in the legal records and ownership documents, while beneficial title may be held by a different party, such as a nominee shareholder or a trustee.

Law stated - 01 August 2023

Multiple sellers

Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

In a situation where a buyer wishes to acquire all the shares in a company, this is generally only possible if all shareholders agree to sell, unless the articles of association (or the shareholders' agreement) contain a drag-along clause that enables certain shareholders or a majority of the shareholders to force all other shareholders to sell their shares along with the majority shareholders.

In addition, Austrian law enables a buyer, who acquired at least 90 per cent of the shares in a limited liability company or a stock corporation, to squeeze out the remaining minority shareholders. This requires a resolution by the general meeting of the company and payment of fair compensation to the minority shareholders. This statutory squeeze-out right is, however, not mandatory, and can be excluded in the articles of association of a company.

Law stated - 01 August 2023

Exclusion of assets or liabilities

Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

When acquiring a business, the rights and obligations vis-à-vis the employees of such business transfer automatically to the buyer, pursuant to the provisions of the Austrian Employment Contract Law Adjustment Act and the EU Transfer of Undertakings (Protection of Employment) Regulations 2006. This includes employment contracts, benefits and liabilities related to the workforce. These provisions cannot be excluded; otherwise, the parties may contractually define the scope of assets, liabilities and contracts to be transferred in an asset deal.

While parties have some flexibility in negotiating the terms of the transaction, there are certain assets and liabilities that cannot be excluded from the transaction by agreement between the parties. Several provisions of Austrian law provide for a statutory successor liability of the buyer vis-à-vis third parties for liabilities pertaining to the business, even if the parties have agreed among themselves that the liabilities shall remain with the seller. Such statutory successor liabilities may only be partially excluded with effect to third parties.

In an asset deal, counterparties of agreement pertaining to the business must be individually notified of the transfer of their contract and have a right to object to the transfer of their contract.

Law stated - 01 August 2023

Consents

Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Regulatory or governmental restrictions can vary depending on the specific circumstances and industries involved. Austria generally does not impose strict restrictions on foreign ownership. However, specific industries may have limitations or requirements regarding foreign investment.

For instance, there are restrictions on foreign ownership in certain sectors like defence, energy, telecommunications and media, and transactions in these industries may require prior approval from relevant regulatory bodies. In exceptional cases, transactions may be subject to public or national interest considerations. These considerations may arise in sectors deemed critical to national security, public order or strategic interests. In such cases, the Austrian government or relevant authorities may have the power to review and potentially block or impose conditions on the transaction.

In recent years, the Austrian Federal Investment Control Act (ICA) has gained significant importance for M&A transactions. If buyers from outside of the EU, European Economic Area or Switzerland want to acquire shares in an Austrian company in a sensitive sector over a certain threshold (depending on the industry, 10, 25 or 50 per cent), a government approval needs to be obtained. If the transaction is carried out without the approval, it is deemed null and void. As the approval procedure is quite time-consuming, it is prudent to determine early on in a transaction if an approval is required under the ICA.

Transactions that meet certain thresholds may be subject to merger control regulations and antitrust scrutiny. The Austrian Federal Competition Authority (Bundeswettbewerbsbehörde) assesses transactions that could lead to a significant concentration of market power. Approval may be required before the transaction can proceed.

Law stated - 01 August 2023

Are any other third-party consents commonly required?

Austrian law does not require co-shareholders to consent to the sale of shares of another shareholder, but such consent requirements can be (and frequently are) included in the articles of association. In addition to such consent rights, articles of association typically also contain pre-emptive rights to enable the shareholders to keep control over the ownership structure of their companies.

In the case of an asset deal that involves the transfer of contracts, the consent of the respective contractual partners needs to be obtained. If the asset deal involves the transfer of an operating business, there is no active consent

requirement, but contractual partners can object to the transfer of their contracts. Furthermore, contractual change of control clauses can play a significant role in M&A transactions.

Also, the consent of the financing banks of the target company is frequently required both in share deals and asset deals.

Law stated - 01 August 2023

Regulatory filings

Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

The transfer of shares of a limited liability company or (in certain circumstances) a public limited company must be registered with the Austrian companies register, which is maintained by the regional courts. Besides shareholders, the companies register also displays all representatives (such as managing directors) of a company, as well as other information on the company.

Every registration to the companies register requires a formal electronic application. The cost for a registration is minimal and amounts to a few hundred euros. The share transfer is not dependent on the registration in the companies register; the registration has only declaratory effect.

Additionally, a change in the ultimate beneficial owner of a company following an M&A transaction needs to be notified to the Register of Beneficial Owners.

The acquisition of real estate in an asset deal requires the registration of the new owner in the Austrian land register. Such registration also requires a formal electronic application. In several Austrian provinces, the acquisition of real estate by purchasers domiciled outside of the EU, European Economic Area or Switzerland also requires prior approval by the respective land transfer authority.

Law stated - 01 August 2023

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

In addition to external lawyers, buyers and sellers commonly engage various advisers to assist with a transaction. These advisers may include tax advisers, accountants and other professionals with specific expertise relevant to the transaction.

The terms of appointment for these advisers can vary depending on the nature of the transaction, the scope of work and the specific arrangements negotiated between the parties. It is common for advisers to enter into engagement letters or professional services agreements that outline the scope of work, fees, confidentiality provisions and other relevant terms. Key-man clauses are not very common in Austria.

Law stated - 01 August 2023

Duty of good faith

Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

There is no specific statutory duty to negotiate in good faith. However, parties engaged in transaction negotiations are generally expected to act in a manner consistent with good faith and fair dealing. While not explicitly mandated by law, the principle of good faith is recognised in Austrian contract law as a general principle that underlies contractual relationships. The parties enter into contract negotiations and assume pre-contractual duties by operation of law (the concept of *culpa in contrahendo*).

Directors of both the buyer and seller have certain fiduciary duties towards their respective companies and shareholders. These duties generally include acting in the best interests of the company, exercising due care and loyalty and avoiding conflicts of interest. Directors are expected to act honestly, diligently and in accordance with the principle of good faith throughout the negotiation process.

Law stated - 01 August 2023

Documentation

What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

The buyers and sellers typically conclude various legal documents to formalise the transaction. In the case of acquiring shares in a company, the share purchase agreement is the key document, while in the case of the acquisition of a business or parts thereof, an asset purchase agreement is typically used.

The respective document sets out the terms and conditions of the (share or asset) transfer, including the purchase price and purchase object, representations and warranties of the parties, conditions precedent, and post-closing obligations.

An asset purchase agreement is usually more complex than a share purchase agreement, as asset purchase agreements need to outline the terms of the transfer of identified assets, including tangible and intangible assets, contracts, licences, permits, and other relevant property.

Law stated - 01 August 2023

Are there formalities for executing documents? Are digital signatures enforceable?

The sale and transfer of shares in a limited liability company require a notarial deed. Notarial deeds generally require that the signatories be physically present in front of the notary. However, following the covid-19 pandemic, notarial deeds can now also be signed virtually.

The transfer of shares in a public limited company does not require a notarial deed. According to statutory law, the sale of all or a substantial amount of assets of a public limited company requires a resolution of the general meeting with a 75 per cent majority. According to the Austrian Supreme Court, this requirement is also applicable to limited liability companies, if they sell all or a substantial amount of their assets.

Digital signatures, when created using qualified electronic signature certificates, are considered equivalent to handwritten signatures and are legally enforceable. Qualified electronic signatures are based on cryptographic technology and provide assurance of the signatory's identity and the integrity of the signed document.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

The scope of due diligence in a typical transaction can vary depending on the nature of the acquisition and the specific concerns of the parties involved. Buyers usually conduct due diligence on legal, tax and financial matters.

Law stated - 01 August 2023

Liability for statements

Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

Yes, under Austrian law, the seller can be liable for pre-contractual or misleading statements. It is common practice to exclude sellers' and buyers' liabilities for statements preceding the contract within the share purchase agreement or asset purchase agreement.

Law stated - 01 August 2023

Publicly available information

What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

There are various public registers in Austria that provide information on private companies online.

General information about private companies, such as shareholder structure with names and addresses, the list of managing directors, the articles of association, and financial statements, can be found in the companies register.

Information on trade licences held by the company can be found in the trade register.

Furthermore, there is an insolvency database with current and past insolvencies, as well as a database for merger and division agreements.

If applicable, on a national level the land register and the database of the Austrian Patent Office provide further information, while on an international level the European Patent Office, the EU Intellectual Property Office and WHOIS can be used.

Law stated - 01 August 2023

Impact of deemed or actual knowledge

What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

According to the Austrian Civil Code, warranty is excluded if the defects of an asset are apparent from public registers.

Public registers include, for example, the land register or the companies register.

Furthermore, Austrian law provides that liability is excluded for matters or circumstances that are known by or should have been known to the buyer, if the buyer acts in gross negligence. This is not the case if a characteristic is expressly warranted or its absence is fraudulently concealed by the seller. In these cases, warranty rights shall exist even if the defect is obvious. Thus, it is common in Austrian M&A transactions to exclude the statutory liability of the seller for facts or matters that were disclosed during the due diligence process.

Law stated - 01 August 2023

PRICING, CONSIDERATION AND FINANCING

Determining pricing

How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

In early stages, the value of the target is roughly determined by the use of multiples on disclosed key financial indicators, such as Earnings Before Interest, Taxes, Depreciation and Amortisation (EBITDA). After an offer is submitted and financial due diligence can be deducted, the price is commonly calculated using the discounted cash flow method (DCF method). The result of the DCF method is usually the basis for further negotiation between the buyer and the seller or their legal representation.

In Austria, both the locked-box approach as well as closing accounts are used. There is no clear preference for a locked-box approach or a closing accounts structure. Nonetheless, the more fitting approach must be decided on an individual basis and targeted towards the specifics of the transaction at hand.

Law stated - 01 August 2023

Form of consideration

What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

In Austria, cash consideration can be seen as the norm. Transactions with a mix of cash and shares or only shares as consideration are rare. Companies often take out financing loans in order to cover the cash liquidity needs.

In private M&A transactions, there is no obligation to pay multiple sellers the same consideration.

Law stated - 01 August 2023

Earn-outs, deposits and escrows

Are earn-outs, deposits and escrows used?

Yes, all of these mechanisms are also used in Austria.

For example, earn-outs are used, if the seller is a start-up without a long-standing track record or if the seller does business in a fairly unstable market and has an overly high idea of the purchase price from the perspective of the buyer.

It is common practice in Austria to use notaries or lawyers for the process of escrows and deposits regarding the transfer of the purchase price.

Law stated - 01 August 2023

Financing

How are acquisitions financed? How is assurance provided that financing will be available?

The type of financing is strongly dependent on the specific transaction. One deciding component is the type of buyer involved in the transaction (strategic or financial). Depending on the transaction, bank financing, equity financing or alternative financing instruments are used. In recent years, the use of mezzanine capital has also been spotted as a trend in Austria.

Assurance is provided by bank or corporate guarantees, as well as by equity and debt commitment letters.

Law stated - 01 August 2023

Limitations on financing structure

Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

There are generally no restrictions for the seller when it comes to giving financial assistance to a buyer. The seller is allowed to give out a loan to the buyer in connection with the transaction (vendor loans).

As to the overall financing structure, Austrian capital maintenance rules restrict the possibility of debt pushdown by the acquisition company or any similar structures, including the post-closing merger of the acquisition company and the target. Financial assistance that violates these rules is deemed null and void under Austrian law. Furthermore, the managing directors and members of the supervisory board can be held personally liable, if they violate the statutory capital maintenance rules.

Law stated - 01 August 2023

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Yes, transactions are normally subject to closing conditions. They usually contain legally obligatory approval requirements, but also various other circumstances that are within the buyer's sphere.

The most important ones are governmental approvals for merger control and foreign direct investment under the Austrian Federal Investment Control Act, as well as other approvals depending on the specific industry (such as for banks and certain financial services providers).

Frequently, there are further closing conditions agreed upon depending on the interests of the seller and buyer and their negotiation power. As these are highly individualised topics, closing conditions must be determined on a case-by-case basis. A common closing condition is the 'no material adverse change' condition, which is often demanded by buyers.

Law stated - 01 August 2023

What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Buyers are usually obliged to obtain the legally obligatory approvals, such as the merger control or foreign direct investment (FDI) approvals, or to undertake the best efforts to do so. The closing conditions for which the seller is typically responsible include pre-closing restructurings, the conclusion of transitional service agreements and the resolution of legal issues identified during the due diligence phase.

It is also common practice to agree on a long stop date for the fulfilment (or, if permissible, the waiver) of the closing conditions.

Law stated - 01 August 2023

Pre-closing covenants

Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Pre-closing covenants are regularly agreed upon by the parties to a transaction. The seller usually undertakes to continue the business between signing and closing only in the ordinary course of business. Also, as long as it does not lead to the violation of gun jumping rules, it can also be agreed that certain measures are subject to the approval of the buyer. If a locked-box mechanism is used in the agreement, the agreement typically also includes a non-leakage covenant.

Additional pre-closing covenants depend on the specifics of the transaction at hand and the type of the involved businesses. Covenants may also involve the seller ensuring that the management or supervisory board members resign upon the closing of the deal.

If pre-closing covenants are breached, it is unlikely that specific performance claims will be pursued. Instead, the injured party would typically seek damages and indemnification, without being subject to minimum thresholds or other limitations. Regarding the no-leakage covenants, any leakage would result in a payment claim equal to the amount of the leakage.

Law stated - 01 August 2023

Termination rights

Can the parties typically terminate the transaction after signing? If so, in what circumstances?

A termination of the transaction after signing usually only occurs if certain closing conditions are not met by the pre-agreed long stop date or – to the extent permissible – if they can be waived. Otherwise, unilateral rescission of the agreement is not provided for in most transaction agreements.

Law stated - 01 August 2023

Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees are not provided for by Austrian statutory law, but can be contractually agreed upon. They are generally

used in the stages before the signing, in connection to exclusivity agreements or letters of intent.

It is not common to use break-up fees in acquisition agreements. If they are agreed, it is frequently in the context of an auction or a scenario with many potential buyers. Break-up fees are also used to protect parties from regulatory clearance risks, such as merger control or FDI approvals.

The amount of the break-up fee depends on the agreement between the involved parties as well as their negotiation positions. If the break-up fees are too high, they can be modified and reduced by the courts.

Law stated - 01 August 2023

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

What type of representations, warranties or indemnities are agreed upon is dependent on the specific transaction as well as the position of the buyer and seller, general interest in the target, and the mode of sale.

The fundamental warranties cover the title, corporate aspects, authority and power to enter into the acquisition agreement. Further warranties can include warranties on financial statements or the business (such as warranties on contracts with third parties or IP held by the target). Buyers often use the findings of the due diligence to negotiate representations and warranties, as well as indemnities.

Besides indemnities, knowledge qualifiers and materiality qualifiers can also be applied to representations and warranties.

Representations and warranties are not fault-based. They are subject to limitations agreed upon by the parties. The consequences of the violation of representations and warranties are also subject to mutual agreement between the buyer and the seller. It is commonly agreed that the violations are indemnified on a euro-for-euro basis.

Law stated - 01 August 2023

Limitations on liability

What are the customary limitations on a seller's liability under a sale and purchase agreement?

Customary restrictions include de minimis thresholds, tipping or deductible baskets, and liability caps. General guidelines for share deals, which may vary depending on the negotiating power of the parties involved, the specific transaction and the deal size, are as follows:

- de minimis: a minimum of 0.1 per cent of the purchase price;
- baskets: a minimum of 1 per cent of the purchase price; and
- liability caps: typically ranging from 10 per cent to up to 50 per cent of the purchase price, often with separate caps based on specific types of warranties, with title and other fundamental warranties usually being capped at the purchase price.

Liability is generally excluded for matters adequately disclosed in the (virtual) data room by the seller during the due diligence process. The use of disclosure letters is uncommon. However, fundamental warranties and indemnities are

usually not qualified by disclosure or subject to knowledge qualifiers, de minimis thresholds, or other limitations, other than overall cap).

Additional limitations on claims typically include a contractual definition of loss to be compensated by the seller, which may involve discussions regarding compensation for indirect damages or lost profit. The buyer's contribution to the damage and the violation of mitigation duties are often agreed upon to reduce or exclude claims.

Time limitations are usually agreed upon for representations and warranties claims, with the specific time limits varying depending on the type of representation, warranty or claim. A typical time limitation is 18 months from the closing date, while time limitations for breaches of fundamental representations, tax-related claims (often linked to longer statutory limitation periods) and other indemnities are usually considerably longer.

Law stated - 01 August 2023

Transaction insurance

Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Warranty and indemnity (W&I) insurance has seen an increase in popularity in Austria over recent years. Nevertheless, it is still not as commonly used as in the UK, the USA or in other European countries. The use of W&I insurance is especially common for large transactions and transactions involving private equity sellers or sellers who are individuals. W&I insurance is frequently used in the real estate industry.

Different insurance categories that can be identified are:

- tax liability insurance;
- environmental impairment liability insurance;
- intellectual property risk insurance;
- litigation buyout insurance; and
- contingent risk transfer insurance.

Premiums are in the range of just under 1 per cent and – less frequently – up to 2.5 per cent of the insured risk plus taxes and commissions. Due to increasing competition from the growing number of insurance providers, premiums of 0.7 per cent or 0.8 per cent are also being seen (even lower premiums can sometimes be seen in the real estate sector, but higher in financial industries). Often, the policy provides for a policy retention of the buyer of about 0.5 per cent to 1 per cent of the purchase price or value of the business (as an incentive for careful contract drafting and due diligence).

Law stated - 01 August 2023

Post-closing covenants

Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Post-closing covenants are commonly used in Austrian transactions. The scope depends on the parties involved in the transaction – usually, there are only limited covenants in the case of a deal only involving strategic investors, whereas if the buyer is a financial investor, the scope is usually broader.

The seller also frequently agrees to non-compete and non-solicitation covenants. To avoid any antitrust issues, the time and scope of such covenants need to be limited.

Law stated - 01 August 2023

TAX

Transfer taxes

Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

There are no transfer taxes payable on the transfer of shares in a company, a business or assets. However, the registration in the Austrian Business Register (if necessary) is subject to (minor) court fees. Additionally, there are other types of taxes, as below, that may apply in the case of such a sale.

Value-added tax

The transfer of shares in a corporation or limited liability company is exempt from value-added tax (VAT), whereas the sale of assets, including the sale of a business as a going concern with its underlying business assets, is generally subject to 20 per cent VAT at the standard rate. Certain assets may be subject to a reduced rate of either 13 per cent or 10 per cent. All existing exemptions (eg, for real estate) are applicable as well.

Real estate transfer tax

This may be payable on the direct transfer of real estate in Austria, as well as on the transfer of shares in corporations or partnerships whose assets include domestic real estate. In the case of shares in corporations, real estate transfer tax (RETT) is triggered if 95 per cent of the shares of a corporation are consolidated in the hands of one shareholder or a group of shareholders within the meaning of the Austrian group taxation legislation. In the case of partnerships, RETT is also triggered if, within a period of five years, 95 per cent or more of the partnership interests of a partnership are transferred.

The RETT rate is different for the direct acquisition of real estate and the acquisition of shares in corporations or partnerships that directly hold real estate:

- for the direct acquisition of real estate: 3.5 per cent of the purchase price (standard rate); and
- for the acquisition of partnerships or corporations that hold real estate: 0.5 percent of the value of the real estate.

Stamp duty

In Austria, various transactions are subject to stamp duty. Transactions subject to stamp duty include assignment of contracts, rental agreements or easement contracts. Stamp duty is either a fixed euro amount or a percentage of 0.8 to 2 per cent calculated from a certain base value, which is usually the value of the transaction. Stamp duty is not triggered if contracts or rights are automatically transferred by operation of law.

Law stated - 01 August 2023

Corporate and other taxes

Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

If shares in a corporation are sold, capital gains tax is levied on the sales proceeds. If the seller is an individual, the tax rate is 27.5 per cent, while if the seller is a corporation, the tax rate is 25 per cent.

If the seller is a corporation and capital gains arise from the disposal of assets or a business, the applicable tax rate is 24 per cent (as of 2024: 23 per cent). If the seller is an individual and capital gains arise resulting from the disposal of assets or a business, the applicable tax rate is up to 55 per cent.

Law stated - 01 August 2023

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

In a share deal, the employment contracts of employees of the target company are not affected by the transaction and remain in full effect.

In an asset deal that includes a transfer of a business within the meaning of the Act on the Amendment of Employment Contracts implementing Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive), the employment relationships of the employees associated with the business transfer together with the business to the purchaser. Employees can object to the transfer of the employment relationship within one month if the purchaser does not maintain dismissal protection pursuant to a collective bargaining agreement or take over pension commitments based on a single contract. This does not apply if the seller's business transfers by way of universal succession to the purchaser and the seller subsequently ceases to exist.

Terminations because of an asset deal are null and void. They are only valid if the employer can show that there are other (eg, personal) reasons that justify the termination.

Law stated - 01 August 2023

Notification and consultation of employees

Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

If a works council is established at the target company, the target company must inform the works council in accordance with section 109 of the Labour Constitution Act and must consult with the works council upon request in relation to a share deal. If no works council is established, no information or consulting requirements apply.

In an asset deal, the Labour Constitution Act provides for information and consultation rights of the works council. The information on the transaction must be given sufficiently in advance, in a manner that allows the works council to

assess the relevant transaction or change. The works council must be given an opportunity to comment on the transaction and propose measures mitigating adverse effects for employees. Where no works council is established, an asset sale only triggers information requirements if a transfer of a business is concerned. In that case, the seller or purchaser must provide certain information to the employees affected. Affected employees do not, however, have consultation rights. There is no obligation to obtain the consent of the employees affected. However, employees can object to the transfer of their employment relationship in certain limited circumstances.

Law stated - 01 August 2023

Transfer of pensions and benefits

Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

In a share deal, pensions and other benefits of the employees of the target company remain unchanged by the transaction.

In an asset deal, there is also a transfer of pensions and other benefits to the buyer. However, the buyer may object to the transfer of contractual pension entitlements (except in cases of universal succession). If the buyer objects, the employee has the right to object to the transfer of their employment relationship to the buyer. In such cases, the employee will remain employed with the seller.

Law stated - 01 August 2023

UPDATE AND TRENDS

Key developments

What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

Cross-border reorganisations are of high importance to corporations, especially within the EU internal market. EU legislators have tried to simplify the process over the past few years, significantly following various landmark rulings of the European Court of Justice (ECJ). Most recently, the EU passed the EU-Mobility Directive (Directive (EU) 2019/2121) on this topic.

At the beginning of 2023, the Austrian Ministry of Justice released the draft law for the implementation of this Directive, which was passed in July 2023 (Austrian EU Reorganization Act). Before that, Austrian statutory law only regulated cross-border mergers. The EU Reorganization Act now regulates cross-border conversions, divisions and mergers and tries to fill the existing gaps in legislation on cross-border reorganisations.

Cross-border reorganisations were already possible before the passing of the legislation due to rulings by the ECJ. Nevertheless, the uniform legislation in all EU countries alongside the new law in Austria will lead to higher legal certainty. The Austrian Ministry of Justice expects a noticeable but not exorbitant increase in cross-border reorganisations from 70 cases to 90 cases per year (which is an approximate increase of 30 per cent).

Law stated - 01 August 2023

Jurisdictions

	Austria	Schindler Attorneys
	Brazil	Campos Mello Advogados
	Denmark	Gorrissen Federspiel
	Dominican Republic	Guzmán Ariza
	Egypt	Soliman, Hashish & Partners
	Finland	Waselius & Wist
	Greece	Karatzas & Partners Law Firm
	Hong Kong	Davis Polk & Wardwell LLP
	Indonesia	Makes & Partners
	Japan	Mori Hamada & Matsumoto
	Latvia	VILGERTS
	Malaysia	Foong and Partners
	Myanmar	Myanmar Legal MHM Limited
	Norway	Aabø-Evensen & Co
	Philippines	Zambrano Gruba Caganda & Advincula
	Romania	MPR Partners
	Serbia	Stankovic & Partners NSTLaw
	Singapore	WongPartnership LLP
	South Korea	Yulchon LLC
	Switzerland	Homburger
	Turkey	Turunç
	United Kingdom	Davis Polk & Wardwell LLP
	USA	Davis Polk & Wardwell LLP
	Zambia	Dentons Eric Silwamba Jalasi & Linyama