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Venture Capital

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MARKET AND PURPOSE

General role and purpose
How would you describe the role of venture capital in the financing markets in your jurisdiction?

Venture capital (VC) provides seed funding and early-stage expansion and growth capital for start-ups and emerging growth companies. Individual angel investors and VC funds supply the funding and capital primarily in (priced) equity financing transactions and via (unpriced) convertible loans or forward equity instruments (eg, simple agreement for future equity (SAFE) or simple equity investment contracts (SEICs)). Angels and VCs fund fast-growing start-ups led by promising entrepreneurs at negotiated private company valuations that are intended to be attractive enough to yield significant upside gains as the portfolio companies grow, generate revenues and eventually exit in a company sale or an initial public offering (IPO). Exits via an IPO are rather the exception and,, if completed, happen on a foreign exchange.

Market conditions
How would you describe the current market conditions for venture capital in your jurisdiction?

The year 2022 was relatively busy for venture capital. Despite the ongoing war in the Ukraine, surging inflation, debt tightening and supply chain issues the number of reported financing rounds increased by 16 per cent while the amount of capital raised decreased by around 18 per cent to just a little over €1 billion with the financing rounds for GoStudent and TTTech Auto accounting for more than 50 per cent of capital raised. In the first half of 2023, activity slowed down considerably. Investors became more cautious and selective in their investment decisions and valuations went down more generally as a result of general market conditions. There were a couple of new startups that were able to raise capital from new investors despite but in general the market was dominated by convertibles, SAFEs and bridge rounds from existing investors.

PARTIES AND DEAL STRUCTURES

Issuers – typical profile
How would you describe the types of companies, and their different stages of development, that typically receive venture capital investment in your jurisdiction?

Companies receiving venture capital financing in Austria include the full spectrum and range from early-stage startups to companies already nearing an exit. A pre-seed or seed financing typically describes a financing for a company that is pre-revenue and has not launched a product or service. A series A financing is typically for a company that has launched a product or service and is starting to generate revenue, but is usually not profitable. Series B and later financings are to fund companies at the growth stage that are typically already generating significant revenue and may be profitable, but need additional funding to continue their (often very rapid) growth.

Issuers – domicile and company structures

Are there any preferred or required legal domicile or company structures for issuers in venture capital transactions?

There are no (legal) requirements with regard to company form for venture capital investments but the vast majority of VC-backed companies are limited liability companies (GmbH). This is mainly because a limited liability company (GmbH) has lower minimum share capital requirements and is cheaper to maintain and operate than joint stock corporation (AG). Thus, joint stock corporation (AG) is usually only found where the type of business requires or is typically linked to a joint stock corporation. Some US investors require as a condition for their investment that companies flip to the US (US flip). This is mainly because available capital and valuations in the US are typically higher than in continental Europe.

In November 2023 a new company form for start-ups called 'Flexible Company' (FlexCo) was introduced. The FlexCo is a hybrid form between a limited liability company (GmbH) and a joint stock corporation (AG) and is based on the Austrian Limited Liability Companies Act (GmbHG). The main benefits are (1) lower minimum share capital requirements (€10,000 of which €5,000 must be paid), (2) more flexible financing instruments (including shares reserved for issuance by authorisation to the management) and (3) a new specific type of share reserved for employee incentives called 'Company Value Share' (CVS). A CVS does not grant voting rights, but will provide a share in the company's dividends and liquidation proceeds. CVS can represent up to 25 per cent of the share capital and can be issued for as little as one cent. It is too early to tell, but the prediction is that at least early stage companies will make use of the FlexCo regime.

Investors – typical profile

How would you describe the types of investors that make venture capital investments, including by stage of company development, in your jurisdiction?

Angels and seed investors are usually domestic investors and primarily fund start-ups in their initial stages, often shortly after the company's formation. Early-stage VCs provide Series Seed or Series A funding rounds for companies to hire larger teams, develop products and generate initial sales and are quite often domestic or from the DACH region. Series B investors provide expansion capital to grow the company, its infrastructure and its revenues. Later-stage VCs and growth equity firms fund larger amounts to accelerate the growth and revenues of companies towards exits. Series B and later stage investors are typically from the US, UK or sometimes the Nordic countries.

Investors – structures

How are venture capital investors usually structured and does their structure affect their investment approach or terms?

Domestic VC funds are usually set up as a limited partnerships with the general partner (GP) being a limited liability company (GmbH) and the investors being the limited partners (LPs). The main benefit of the limited partnership structure is that it allows the fund to distribute returns to its LPs without being taxed at the fund level. In the most basic limited partnership structure, the general partner of the partnership directly manages the partnership, in more complex structures the partnership is managed by a separate management company.
In either case, the management company must be licensed or registered as alternative investment fund manager (AIFM) under the Alternative Investment Manager Act (AIFMG), which implements the Alternative Investment Fund Managers Directive (AIFMD).

Seed financings
What structures and types of investments are typically used for seed-stage investments in your jurisdiction?

Austrian start-ups benefit from a wide array of public funding and other public support from national, regional as well as supranational support schemes typically taking the form of (research) grants, guarantees or subsidised loans and Austrian start-ups frequently make use of such funding or support.

Private funding at the seed-stage level is often structured as a convertible loan or forward equity instruments (eg, simple agreement for future equity (SAFE) or simple equity investment contracts (SEICs)). The main benefit is that such instruments avoid valuing the company prematurely and have simpler documentation, with the primary difference being that convertible loans are loans with interest rates and maturity dates while forward equity instruments have neither and, like convertible loans, simply convert at a discount or at a capped valuation into the first priced equity round of the company.

Priced equity rounds are relatively rare but do happen. In particular, where a startup is eager to onboard an angel investor offering support going beyond just providing financing (eg, market access, marketing).

Early-stage and later investments
What structures and types of investments are typically used for early-stage and later investments, following seed-stage investments, in your jurisdiction?

Following the seed-stage, investors typically acquire preferred shares in a priced equity round that typically benefit from 1x non-participating liquidation preference. To avoid being viewed as too mature for relevant operating metrics after a few financing rounds, companies often label earlier rounds as Series Seed before labelling later rounds as Series A (the first real institutional round), Series B (expansion capital) and Series C (late-stage financing).

PROCESS

Term sheets

Do parties normally use term sheets? If so, what is normally covered in such term sheets?

Yes, there is usually a term sheet that will typically come from the investor. Continental European investors tend to be more specific in the term sheets to avoid discussion in documentation phase while UK and particularly US investors often just refer to certain standards (eg, as proposed by BVCA or NVCA documentation).

Documentation

What are the standard documents for a venture capital transaction, and who prepares them? Are there popular forms for such documentation in your jurisdiction?

Standard documentation for priced round usually includes the following:

- a confidentiality agreement (usually prepared by the company);
- a term sheet (usually prepared by the investor);
- an investment agreement (usually prepared by investor counsel), which is the framework of the investment covering, among other things, the terms of the capital increase, the conversion of outstanding convertibles and SAFEs (if any), warranties and indemnities (including ancillary legal provisions, such as remedies, limitations and exclusions, and share compensation mechanics);
- the restated shareholders' agreement (usually prepared by investor counsel) covering, among other things, governance, information rights, share transfer restrictions, pro-rata rights, a liquidation preference, vesting terms (US investors sometimes prefer this to be dealt with in a separate agreement), covenants of the company in relation to IP, employees and future incentives, restrictive covenants on the founders);
- the (rather technical) capital increase documentation;
- the restated articles of association;
- IP transfer deeds;
- new service agreements for founders and key employees; and
- incentive schemes.

There are no particular popular forms of such agreements but a lively ecosystem and main market participations are well familiar with the documentation of other firms.

Key steps and timing

What is the normal process and timing of venture capital investments in your jurisdiction?

The normal process would begin with term sheet negotiations where some investors already seek help from outside counsel while other investors cover term sheet negotiations in-house. This is largely dependent on the level of detail discussed in the term sheet, which differs significantly from deal to deal. Following term sheet phase there is usually a high-level due diligence followed by the documentation phase. The entire process typically takes from six to 12weeks up to signing. The timeline for closing (ie, registration of the capital increase followed by wiring of the investment amount (less nominal value already paid) is largely dependent on the requirement to obtain regulatory approvals and the competent court. Experience with venture capital significantly differs from court to court, which sometimes causes unexpected delays for court clerks requesting (unnecessary) adjustments.

Closing conditions
What closing conditions are common in venture capital transactions?

Venture capital transactions often sign and close on the same date (ie, there is no gap). Where filing thresholds are met merger control clearance under the Austrian Cartel Act (CA) or a transaction involves foreign investors (ie, non-EU, non-EEA or non-Swiss) and relates to one of the protected sectors pursuant to the Austrian investment control act (ICA), the documentation will require CA and ICA clearance as a condition to the funding and closing.

Due diligence findings rarely result in a closing condition. More commonly, covenants to address such findings by a certain date post- closing are included, leaving questions as to the appropriate remedy as a condition subsequent (similar those found in a lending transaction) is not really an option. This is why in most deals due diligence matters are addressed informally or by management instruction letters.

Multiple closings
Are venture capital transactions ever divided into multiple closings? If so, how and why?

Venture capital financing rounds are sometimes divided into a first closing for a lead investor (or group of investors) and second closing for other investors to be completed over a subsequent period of typically 60 to 90 days. This allows the company to bring in investors who are late in the process or may need longer to call capital. The second close investors usually sign the same documentation as the first close investor or investors and typically do not get any updated warranties. Further, investors may be contractually obliged to complete future investments depending on the financial result of the company or other milestones agreed. This is more common in life sciences and deep tech transactions than in general tech investments.

DUE DILIGENCE

Legal due diligence
What legal due diligence is typically undertaken for venture capital transactions, and what specialists are typically involved?

Investor counsel will often present a legal due diligence request list covering corporate organisation, shareholder matters, financing documents, governmental support, material contracts, employment, patents, trademarks and other intellectual property (IP) materials, litigation and regulatory matters. Depending on the stage of the investment, materiality thresholds are usually relatively high and the due diligence is focused. Typical focus points include confirming the cap table, employment and social security law, availability of critical patents, trademarks and other intellectual property (IP), research and development partnerships and joint ventures, business critical regulatory issues, data protection and governmental support. In later stage financings investors sometimes also look at customer and supplier relations. In early-stage financings reporting is usually in the form of an issues list, in later stage-financings red flag reports are the norm, but this varies from deal to deal.

Critical due diligence areas
What are normally critical areas of due diligence focus or red flags in venture capital transactions?

The most common red flag relates to unrestricted title issues in relation to critical (IP) or rights of other parties to proceeds of commercial exploitation of such IP under research and development partnerships and joint ventures or arrangements with universities (in case of university spin-outs), lack of business critical regulatory permits (eg, in medtech) or use of personal data consistent with data protection laws.

Other due diligence
What other types of due diligence are commonly undertaken in venture capital transactions?

Apart from legal due diligence tax due diligence is usually outsourced. Given that venture capital firms often have strong domain expertise in the target sector they usually rely on internal due diligence teams for tech and commercial due diligence. In later stages of financing financial due diligence also plays a role.

ECONOMIC TERMS

Valuation and pricing
How is the company valuation and investors’ purchase price usually determined in venture capital transactions?

At the seed stage investors often use convertible loans loan or forward equity instruments (eg, simple agreement for future equity (SAFE) or simple equity investment contracts (SEICs)) as it is particularly difficult to value a company at this stage in a meaningful way. In later stage financings where a target company already has a service or product and can show revenues more traditional valuation methodologies are applied with one of the usual key metrics often being recurring revenues (ARRs).

Option pool

What do investors typically require for option pools or equity incentive arrangements in connection with venture capital transactions?

Venture capital investors typically require a 10 to 15 per cent post-money available unallocated pool following their investment, with sizing depending on the staffing requirements going forward. The unallocated pool shares are usually added to the outstanding pre-closing (or pre-money) shares for purposes of determining the issue price per share in the financing round, so that the new investors are not immediately diluted by the new additional unallocated pool.

Dividends, distributions and redemptions

What are the normal provisions governing dividends, distributions, redemptions or other profit distributions in venture capital transactions? Are there any legal limits thereon in your jurisdiction?

Dividends (while uncommon for startups) are typically covered by the liquidation preference for the benefit of the holders of preference shares. The decision on whether dividends shall be paid is declared by the general meeting following proposal from the management board of the company. The same applies to distributions following a liquidation or deemed liquidation. It is common that later-stage preferred share series rank senior to earlier series of preference shares in the liquidation preference.

Redemption of shares is typically negotiated in relation to certain specified events including, insolvency of a shareholder, enforcement into shares of a shareholder, death of a shareholder, material breach of contract or fiduciary duties or the occurrence of a leaver event with respect to a founder. Given that a limited liability company (GmbH) cannot acquire own shares redemption is structured as a pro rata option for the benefit of all shareholders to acquire the shares of the affected shareholder at the specified price. Limitations apply with respect to the price payable upon exercise of such option.

The liquidation preference will normally be dealt with in the shareholders' agreement only. The redemption right (option to acquire shares) is usually regulated in the articles, sometimes in the shareholders' agreement only (which has some disadvantages in enforcement) and sometimes in both.

Company sales and liquidations

How are venture capital investments treated in portfolio company sales or liquidations?

Venture capital investors often have a board representative on the advisory board who participates in the deliberations over whether to liquidate or put the company up for sale or in responding to third party offers. They almost always have a separate preferred class or later-stage preferred series class vote on liquidating or selling the company. In addition, the liquidation preference applies to any liquidation and sale that lets them recoup their investment amount before holders of common stock and earlier preferred series receive proceeds. Further, the exercise of drag-along right (requiring all shareholders to participate in a sale) usually also has a separate preferred class or later-stage preferred series class vote and sometimes (in particular for US investors) investors are not required to sell into the drag along transaction at all.

Anti-dilution protection

What anti-dilution protections are typically built into the terms of venture capital securities?

Investors typically benefit from pro-rata rights allowing them to participate in any future equity (or quasi equity) issuance. In addition they sometimes negotiate protection against dilutive issuances (ie, an issuance below the issue price paid by the investor) where the investor will get a certain number of shares for nominal value. The most common form is calculated on a 'broad based weighted average' basis (factoring in outstanding shares on a fully diluted basis (ie, including reserved but unissued shares)). More rarely, a calculation on a 'narrow-based weighted average' basis (only factoring in outstanding shares but not reserved and unissued shares) or on a 'full-ratchet' basis (lowering the conversion price to the dilutive issuance price) is agreed. All variants have certain standard exceptions for issuances not undertaken primarily for financing purposes (such as, issuances under converting instruments or incentive schemes).

Future investments

What pre-emptive or pro rata investment rights do venture capital investors usually receive?

The Austrian limited liability company act (GmbHG) provides for a general pro rata right for share issuances that can be waived and excluded by qualified majority shareholder vote in exceptional circumstances. In addition, investors typically benefit from contractual pro-rata rights for all equity (and quasi equity) issuances to the extent necessary to maintain their voting or fully diluted ownership percentages. These rights are sometimes limited to major investors (in particular where there is a US lead investor) and participating investors usually have a limited period in which to pick up declining investors' potential allotments. The contractual pro-rata rights have exceptions similar to those for price-based anti-dilution adjustments.

Insider sales

What rights do venture capital investors normally have over insider sales of securities of portfolio companies?

Venture capital investors usually negotiate a lock-up for the founders for the duration of the vesting. Following the lock up period share transfers of founders are subject to a pro rata rights of first refusal and pro rata co-sale right for the benefit of all shareholders that typically apply to sales by all shareholders. Where US investors are involved, they usually try to negotiate that the pro rata right of first refusal is only for their benefit or they have a preference over holders of earlier series of preferred and holders of common shares. If successful, the concept is then also applied to redemptions. They will typically also negotiate carve-outs for their shares, so that they can freely dispose over their shares.

CONTROL RIGHTS

Voting rights
What voting rights, including veto or consent rights, do venture capital investors normally have as shareholders of their portfolio companies? Do they typically have special voting or consent rights as shareholders?

Venture capital investors are usually minority shareholders that do not control voting the in the company's shareholders' meeting. They may have representatives on the advisory board (*Beirat*) but also rarely control the advisory board alone or in concert with other investors. However, they typically benefit from separate class (simple or qualified majority) voting on certain matters brought before the advisory board or the shareholders' meeting, where the advisory board typically deals with operational matters and structural matters are reserved for the shareholders meeting.

Board rights
What rights to representation on the board of directors or at meetings of the board of directors of portfolio companies do venture capital investors typically receive?

Austrian limited liability company startups are – due to their limited size – typically not required to establish a supervisory board (*Aufsichtsrat*). Where they exceed the relevant thresholds, employee representatives may designate one-third of the members and the supervisory board is (by mandatory law) competent to deal with certain matters. An Austrian stock corporation (AG) always has a supervisory board (*Aufsichtsrat*).

Irrespective thereof, the shareholders agreement will almost always provide for (a contractually established) advisory board who is tasked with advising the management board of the company and dealing with certain matters (contractually) assigned to its competence. The size of the advisory board and the rights to designate members of the advisory board are a matter of negotiation but the lead investor (or investors holding a majority of a preferred class) will almost always negotiate a right to designate one or two members of the advisory board and one or two (non-voting) observers to the advisory board.

Investors will almost never negotiate rights to appoint members of the management board as venture capital investors typically do not get involved in operational business. This remains true even in distress.

Board protections

What fiduciary duties and liability protections normally apply to investor directors in your jurisdiction? Do directors typically have special voting or consent rights?

The advisory board (***Beirat***) is a contractually established forum and as such the advisory board members are by law not subject to (direct) fiduciary duties. The bylaws for the advisory board however typically provide for certain duties (including duties of confidentiality and non-disclosure and not to use information other than for performing a mandate) which – by contract – are binding on the members of the advisory board. Moreover, shareholders are – by law – subject to fiduciary duties to the company and their fellow shareholders and may be required to exercise influence on their designees in certain circumstances.

Albeit exceptional circumstances liability exposure for advisory board members is rather remote, major investors will almost always negotiate D&O insurance at satisfactory terms and at company expense.

At the level of the advisory board each member typically has one vote. Investors will typically negotiate that certain matters require consent of a (simple or qualified) majority the investor members and, in some instances, also the consent of individual lead investor.

Financial reports
What rights to financial reporting or company access do venture capital investors normally receive?

Shareholders of an Austrian limited liability company (GmbH) by law have comprehensive information and inspection rights. Irrespective thereof, investors will usually negotiate (specific) contractual information and inspection rights that are sometimes expressed to benefit only the lead investors or investors holding a certain minimum ownership percentage. Typically, the company is required to provide annual, quarterly and monthly financial reports, together with an annual budget and (more generally) be required to inform investors of exceptional events (such as litigation). In addition, investors will typically negotiate rights to access to financial information and premises (subject to agreeing to confidentiality).

PUBLIC OFFERINGS AND LISTINGS

Securities law requirements
What are the securities law requirements in your jurisdiction for venture capital investors to sell their securities in the public markets?

There are no specific rules in Austria restricting venture capital investors ability to trade shares admitted to trading on a regulated market or a multilateral trading facility (MTF). As every market participant venture capital investors must comply with the EU's Market Abuse Regulation (MAR) and with the statutory notification requirements in case of sales of significant stakes.

If securities are to be offered to the public (ie, to 150 persons or more per member state in the EU who are not classified as qualified investors and not through a sale on a regulated marked or on an MTF), or if the securities are to be admitted to trading on a regulated market for the first time, a prospectus must be prepared and submitted to the Austrian Financial Market Authority (FMA) for approval.

Registration and listing rights
What registration rights, listing rights or other rights do venture capital investors normally receive?

In early state investments registration and listing rights are not a primary focus. Sometimes there is a more generic exit clause that broadly says that the exit (including timing and process) shall be within the control of the lead investor. That would include appointing advisors, determining secondary allocations and reasonable lock up periods. In later stage financings investors and, in particular, UK and US investors typically demand more specific registration and listing rights broadly mirroring BVCA or NVCA standards.

Other resale rights
What other resale rights in the public markets do venture capital investors usually receive?

Financial instruments admitted to trading on regulated markets or MTF in Austria are by definition freely negotiable. As such there is no need for resale rights as in the US (see Rule 144 of the US Securities Act).

COMPANY SALES (M&A)

Standard sale structures
What are the standard structures or methods for venture capital portfolio companies to be sold in your jurisdiction?

The vast majority of exits are structured as a sale of all or substantially all shares.

Role of investors
What is the role of venture capital investors in a portfolio company sale? Do they have rights to force or block a company sale?

Except for the founder lock up share sales are generally permitted (and must be approved by the shareholders pursuant to the terms of the shareholders agreement) as long as the pro rata right of first refusal and co-sale right are observed. Investors will almost always negotiate a drag-along right (requiring all shareholders to participate in a share sale approved by majority founder vote and majority preferred class or series vote. US investors will typically require a general carve out so that they are not required to sell into the drag along transaction at all, which effectively means that they have a blocking right, assuming that they hold a sizeable stake. A company sale structured as a sale of (all or substantially all) assets of the company typically qualifies as a structural measure requiring a (qualified majority) shareholder vote and a separate (qualified majority) preferred class or series vote. In Series

B and later stage financings investors typically negotiate specific exit clauses providing that any matters related to an exit, whether structured as a share or asset sale or via a merger transaction (including timing and process) is the exclusive responsibility of the lead investor.

Proceeds of an exit (including if enforced via a drag-along or exit clause) are subject to the liquidation preference. As such, interests are often not aligned and holders of earlier series and holders of common shares sometimes try to negotiate minimum return or minimum hold on requirements. Similar considerations apply in bridge financings where incumbent investors top up their investment in return for an additional portion of the proceeds otherwise allocable to the holders of the same series on the basis that they are willing to bridge while other holders of the same series are not willing to bridge.

Post-closing protections

What post-closing matters or protections do venture capital investors typically obtain, for example to address ongoing company sale indemnities or director tail liabilities?

Founders are typically expected to back up business warranties and indemnities (if any) while investors will usually only be willing give warranties as to capacity and unencumbered title. This if often already negotiated in the exit and drag-along provisions of the shareholders agreement. Investors will usually also be reluctant to sign up to non-compete and non-solicit covenants. A purchase agreement will typically also include a 'white wash' or 'clean cut' whereby the purchaser agrees not to bring (and cause the target company not to bring) any claims against a seller, managing director or board member for pre-closing conduct (including breach of duties of loyalty and care or with respect to any leakage based on capital maintenance rules).

In addition, venture backed exit are almost always backed by warranty and indemnity insurance backing up the warranties and indemnities to be given under the purchase agreement, also for title and capacity.

LEGAL AND REGULATORY CONSIDERATIONS

Disputes

What types of disputes typically arise in venture capital transactions and how are disputes commonly handled? What provisions normally govern disputes, including choice of governing law, choice of forum and alternative dispute resolution mechanisms?

The vast majority of disputes relate to leaver events and other (potential) breaches of the shareholders agreement. Disputes based on a breach of warranties under the investment agreement are the exception as they typically have disproportional effects on the business and in particular motivation of the founder team going forward. This is slightly different where the investment agreement provides for optional share compensation but even in that case diluting the founders on the back of a warranty breach is usually not an option, unless there is a plan for replacement.

Where bilateral or multilateral enforcement treaties are in place, the courts at the seat of the company usually have jurisdiction of and, where no such treaties are in place, arbitration is typically agreed.

Regulatory consents and filings

What regulatory consents, notifications and filings are required for all investors in venture capital transactions in your jurisdiction? Are there ownership restrictions?

There are no specific rules or restrictions for venture capital transactions. Like any other transaction, they may however be subject to merger control clearance under the Austrian Cartel Act (CA) and investment control clearance under the Austrian Foreign Direct Investment Control Act (ICA). In addition, certain sectors (eg, banking) licensing requirements apply which must be taken into account.

In Austria, transactions exceeding the Austrian turnover thresholds and conferring a capital or voting interest of 25 per cent or more or a controlling interest in a company must be notified to the Austrian Competition Authority under the CA. Since venture capital investors typically acquire smaller non-controlling interests and usually do not benefit from strategic veto rights under the transaction documents (which would be construed to confer control) merger control is rarely an issue for venture capital transactions. Arguably, the same logic applies for investment control proceedings under the ICA.

Foreign investment

What foreign investment restrictions and other domestic regulatory issues arise for venture capital investors based outside your jurisdiction?

Investments of foreign investors (ie, a non-EU, non-EEA or non-Swiss individual or entity) may be subject to review under the Austrian Foreign Direct Investment Control Act (ICA), which has largely transposed the EU Foreign Direct Investment Screening Regulation. Under the ICA a transaction is notifiable if:

1. a foreign investor (i.e., a non-EU, non-EEA or non-Swiss individual or entity), intends to directly or indirectly invest in an Austrian undertaking and acquires a voting interest representing 10, 25 or 50 per cent of the voting rights or acquires control over all or material assets of the undertaking;
2. the undertaking is active in a sector listed in an annex of the ICA; and
3. the undertaking has its seat or its central administration in Austria.

The annex of the ICA is split in a part 1 listing (on an exhaustive basis) particularly sensitive sectors, where the acquisition of a voting interest representing 10 per cent of the voting rights already triggers a filing requirement, being (1) defence equipment and technologies, (2) operating critical energy infrastructure, (3) operating critical digital infrastructure, (4) water, (5) operating systems ensuring Austrian data sovereignty and (6) research and development in the areas of pharmaceuticals, vaccines, medical devices and personal protective equipment and a part 2 listing (on a non-exhaustive basis) other sectors which are less sensitive but may still be considered critical being, (1) critical infrastructure particularly in energy, information technology, telecommunications, traffic and transport, data processing and storage, (2) critical technology and double use goods, (3) security of supply with critical resources, (4) access to sensitive information (including personal data) or ability to control such data and (5) freedom and plurality of media.

Start-ups (defined as businesses with (1) less than 10 employees and (2) either annual turnover or balance sheet total of less than €2 million) are exempt. In practice, this exemption rarely applies since most start-ups exceed at least one threshold.

The Austrian regulator takes a proactive approach and advocates a very broad interpretation of the protected sectors.

UPDATE AND TRENDS

Key developments

What are the most noteworthy current trends and recent developments in venture capital transactions in your jurisdiction? What developments are expected in the coming year?

Since Q2 2023 we have seen a noticeable slowdown in new investments. This is mainly because valuations have collapsed in certain sectors meaning funding would inevitably mean a down round, which may trigger anti-dilution protection to an extent where founders may no longer be sufficiently incentivised, in particular since some investors recently ask for 2x or even 2.5x on the back of uncertainty. All of this results in difficult cap table discussions. As a result, most companies in need of capital try to raise via convertible loans or SAFEs, which avoids updating valuations.