Austria

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The key laws applicable to securities offerings in Austria are:

- the Capital Markets Act (KMG);
- the Stock Exchange Act (BörseG);
- the Securities Supervision Act 2007 (WAG 2007); and
- the Alternative Financing Act (AltFG).

The KMG implements Directive 2003/71/EC, the Prospectus Directive (PD), as amended, and is the primary source governing the offering of securities and 'investments' in Austria, including in particular the prospectus obligation (publication of an approved prospectus for public offers of securities or investments) as well as exemptions from the prospectus obligation. The BörseG constitutes the primary framework for the admission of securities to a regulated market in Austria as well as for ongoing obligations of issuers of listed equity and debt instruments. The WAG 2007 implements Directive 2004/39/EC (MiFID) and regulates the legal framework for investment services in regulated markets. The main objectives of the WAG 2007 are to support market transparency, to strengthen competition among providers of financial services and improve investor protection.

In addition to the provisions of the KMG, BörseG and the WAG 2007, parts of other relevant laws and regulations have to be considered, including the Austrian Stock Corporation Act (AktG) as well as the Austrian Takeover Code in relation to takeover bids for listed companies.

The KMG, BörseG and WAG 2007 are primarily administered and enforced by the Austrian Financial Market Authority (FMA). If a listing of securities is sought, the prospectus, along with other documents, has to be filed with Wiener Börse AG (Vienna Stock Exchange – VSE), which operates the only two regulated markets in Austria: the Official Market and the Second Regulated Market. In addition, any prospectus for an offer of securities in Austria has to be submitted to Oesterreichische Kontrollbank AG (OeKB).

In addition, the AltFG, also called 'crowdfunding act', entered into force in September 2015. The AltFG established in particular the legal basis for financing of SMEs (small and medium-sized enterprises) and NGOs (non-governmental organisations) through alternative financial instruments, especially through crowdfunding and citizen participation models. Alternative financial instruments are shares, bonds, shares in a business of a corporation and cooperatives, participation rights, silent partnerships and certain subordinated debts. As well, the AltFG provides for a legal framework for the operators of crowdfunding platforms. In view of the AltFG, the KMG was amended in a way that offerings of securities in a total amount of less than €1.5 million within the EU are excluded from the prospectus obligation if the offering is covered by the scope of the AltFG (see also question 7).

The AltFG does not apply to issuers with a licence according to the Banking Act, the Payment Service Act and the E-Money Act 2010, the Alternative Investment Fund Act, the Insurance Supervision Act, the WAG 2007 (section 1 paragraph 2 AltFG) and to issuers, whose securities are listed (or determined to be listed) on a regulated market. Such issuers are fully covered by the provisions of the KMG.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Unless a prospectus exemption applies, an issuer will be required to publish an approved prospectus whenever conducting a public offer of securities in Austria or filing a request for the admission to trading of securities on a regulated market in Austria, namely, on the Official Market or the Second Regulated Market.

Public offer

Public offering within the meaning of the KMG is considered as any communication to the general public in any form whatsoever that: contains adequate information on the terms and conditions of an offering (or an invitation to subscribe) for securities or an investment, and on the securities or investment themselves; and gives potential investors a basis on which to reach an informed decision on the purchase or subscription to securities or the investment. The Austrian definition also applies to the placement of securities or investments by financial intermediaries. The definition of a public offer in section 1, paragraph 1 No. 1 KMG covers the scope of the definition of the term 'offer of securities to the public' as provided by the PD. In addition, the Austrian definition of public offer extends the scope of the PD definition not only to legally binding offerings but also to any invitations to subscribe.

According to the FMA, 'general public' means more than one person. Therefore, even an offer to two persons may be seen as a public offer which would, however, be exempt from the obligation to publish a prospectus (public offer to less than 150 persons – private placement exemption). In contrast, an offer to a well-defined and not a general group of persons could be seen as non-public. By way of example, an offer to existing customers according to the address files, to members of a certain wealth class or to shareholders in a company would usually constitute a public offer. Communication in the form of an offer or an invitation to subscribe covers not only legally binding offers but, in case of invitations to subscribe, also intentions to sell securities (or investments) by means of an invitation to subscribe.

If sufficient and adequate information about the offer or invitation is included in the communication or determinable on the basis of the communication this would usually enable an informed investment decision by the addressee. Communications imposed by law, activities in connection with market making or information in banking-specific news channels not open for the public (Reuters, Bloomberg, etc) would not qualify as public offers. Mere acts of stock trading, for example, the inclusion for trading on a stock exchange, usually also do not qualify as public offerings as long as no accompanying distribution measures (advertising, information on the website of the issuer, investor presentations, etc) are taken. Further, if no acts of marketing are taken and information is presented in a neutral way upon a request by a customer (without any prior marketing efforts), this may also not qualify as an offer or invitation.

In contrast, if information about offered securities was available free of charge over the internet, a public offer would usually be made. Further, all means of communications may constitute communication leading to a public offer (eg, an oral presentation of the management of an issuer, e-mails, website advertising or information, press releases, etc). Clear, precise and binding disclaimers on a website may prevent qualification as a public offer, but only provided their text does not differ from the factual possibility that the addressee of the information may accept the offer or subscribe for the securities.

Regulatory filings

A public offer of securities or investments in Austria triggers the obligation to publish a prospectus approved by the FMA or a respective competent authority of an EU member state, unless a prospectus exemption pursuant to the KMG applies. The prospectus has to be published at least one banking day prior to commencement of the offer or, if the securities shall be listed on a regulated market for the first time, six banking days before the offering commences. The issuer may decide between different ways to publish the prospectus, including on its website or by making it available at the issuer's seat. Usually, the prospectus is additionally provided to investors at the financial intermediaries' offices.

The approved prospectus has to be submitted to the OeKB as registration office. In addition, prior to commencement of the offer in Austria, the offeror is obliged to submit a notification to the New Issue Calendar maintained by the OeKB for statistical reasons.

Stock exchange filings

Applications for admission to listing of securities or of an issue programme on the Official Market or on the Second Regulated Market must be made in writing by the issuer and must be signed by an exchange member of the VSE. The issuer must state, among other things, the type and denomination of the securities as well as the total amount of the issue to be admitted by stating the nominal value or in the case of no-par value securities, the expected market value and the number of securities. In case of an application for admission to listing of an issue programme, the total amount of the maximum issue volume stated in the prospectus shall refer to all potential non-dividend paying securities. The filing with the VSE must be accompanied by, inter alia, the approved prospectus, an excerpt from the companies' register relating to the issuer not older than four weeks and proof of any other legal requirements for the issue of securities (eg, corporate resolutions).

The VSE also operates the Third Market, an MTF (Multilateral Trading Facility), which is not a regulated market within the meaning of Directive 2004/39/EC (MiFID). Securities are usually admitted to trading on the Third Market if securities need to be listed but the extensive governance and disclosure framework applicable to the Official Market and Second Regulated Market should be avoided. The Third Market is governed by the Rules for the Operation of the Third Market of the VSE. Most of the provisions and requirements set forth in the BörseG do not apply to financial instruments traded on the Third Market.

Public offer pursuant to AltFG

The AltFG determines issuer-related and investor-related thresholds for offerings of securities under the scope of the AltFG. An issuer of securities in the meaning of the AltFG:

- has to provide investors with a standardised information form (including, eg, details about the issuer, investment and further details necessary for investor protection) for an issue volume between €100,000 and €1.5 million;
- is not obliged to publish a prospectus if the aggregated issue volume is less than €1.5 million;
- has to publish a simplified prospectus for an issue volume between €1.5 million and €5 million; and
- may not raise more than €5 million in capital over a seven-year period, deducted by the amounts already paid back to investors. If this threshold is exceeded, the issuer must publish a prospectus.

Investor-related thresholds under the AltFG determine that:

- an investor can only invest up to €5,000 per project and per year (but with an exemption for qualified investors);
- this €5,000 limit can be surpassed if the investor informs the issuer or the crowdfunding platform that he or she invests not more than double the amount of his or her average net income (calculation period 12 months); and
- this €5,000 limit can be surpassed if the investor informs the issuer or the crowdfunding platform that he or she invests not more than 10 per cent of his or her financial assets.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

In order to commence a public offer, a prospectus must be drawn up in accordance with the KMG and Commission Regulation (EC) No. 809/2004, as amended (the Prospectus Regulation), and filed with the FMA for approval. Pursuant to section 8a KMG, the FMA is responsible for the examination of the prospectus in respect of its completeness, coherence and comprehensibility. The accuracy of the information contained in a prospectus, however, is not subject to the FMA's review.

The FMA must notify the issuer, the offeror or the entity asking for admission to trading on a regulated market, as the case may be, of its decision regarding the approval of the prospectus within 10 banking days of the filing of the prospectus. An extended review period of 20 banking days applies if the issuer's securities have not yet been admitted to trading on a regulated market. Usually, the first version submitted to the FMA is not complete and still includes placeholders for missing parts and information. The FMA provides comments on the submitted prospectus at the end of the review period. In such case, the issuer adds further missing information, addresses the FMA's comments and re-submits an amended prospectus version to the FMA. After that, the FMA again reverts within the respective review period. The review period of 10 or 20 banking days applies to each prospectus version submitted. Accordingly, it is common practice to have several review rounds for debt prospectuses and even more for prospectuses for equity offerings.

Once approved, the prospectus must be published as soon as practicable and at least one or six banking days prior to the commencement of the offering (see above). The publication may, inter alia, be undertaken on the issuer's website, in the Official Gazette (Amtsblatt) of Wiener Zeitung or by providing prospective investors with copies free of charge at the issuer's registered office or at the offices of financial intermediaries.

Subsequent to the approval, the prospectus must also be provided to OeKB as registration office (Meldestelle). The issuer must notify the New Issue Calendar maintained by OeKB for statistical purposes prior to commencement of the offering.

Any offering of securities or investments to the public without approval by the FMA or any other competent authority of an EU member state (including the passporting of the approved prospectus into Austria) or without publication of the prospectus in accordance with the KMG is subject to criminal penalties under Austrian criminal law of up to two years of imprisonment; moreover it may give rise to civil liability.

Each important new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the end of the public offer or, as the case may be, the time when trading of the securities on a regulated market begins, must be published in a supplement to the prospectus. The supplement must also be approved by the FMA or the respective EU member state authority having approved the prospectus and needs to be published in the same way as the original prospectus.

An application to list the securities to the Official Market, the Second Official Market or to include the securities in trading on the Third Market has to be filed with the VSE and include in particular the approved prospectus and ancillary documents (see question 2). The issuer and the VSE usually agree on the date of the public listing. Where the securities are offered publicly prior to their listing, the listing may only commence one day after expiration of the underwriting period for the securities at the earliest. The VSE is obliged to reach a decision on applications for admission of securities within 10 weeks after submission.

In practice, issuers usually file a preliminary prospectus without the final price and the final volume of securities offered as this information can be provided only after completion of the book-building process. The book-building process starts with investors submitting bids for purchasing the securities at prices that must be within a predefined offer price range or maximum limit. At the same time, marketing activities are usually

undertaken by the issuer and the underwriters (eg, press conferences, road shows or advertising). The offer price is usually determined after the book-building phase. Finally, the issuer is obliged to file and publish a supplement to the preliminary prospectus including the final offer price, the gross proceeds as well as the net proceeds of the issues.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Commencement of public offering

Advertising measures that refer to a public offering of securities or investments or to the admission to trading on a regulated market must not be approved by the FMA or any other Austrian regulatory body; however, marketing must comply with the principles set forth in section 4 KMG. Any pre-marketing of a public offering or any advertising during the offering period must thus be monitored carefully and assessed on a case-by-case basis. In practice, extensive publicity guidelines are particularly agreed upon by the issuer and the underwriters of equity transactions. Such publicity guidelines are intended to ensure that each communication by the issuer is previously approved by the transaction parties, including all marketing communications as well as mandatorily published information (ad hoc announcements, financial reporting, etc).

All advertising must in any case indicate that a prospectus including any amended or supplemented information has been published in line with Austrian law or will be published. It must also indicate where prospective investors are able to obtain the prospectus and any supplements thereto. Information stated in the marketing material must be consistent with the information contained in the prospectus or in the supplements or with the information mandatorily required to be published in the prospectus, if the prospectus is published afterwards. Advertisements must be clearly recognisable as such and the information contained in an advertisement must not be inaccurate or misleading. Advertisements only emphasising the merits of securities without adequately reflecting the associated risks are likely to be considered as misleading.

It is common practice that, prior to a public offering, research reports on the issuer are published by the underwriters' research analysts. The publication of such research reports is only permissible if the reports are not targeted at influencing investors to invest in the securities of the issuer, as any such influence could already constitute a public offering triggering the prospectus requirements.

Advertising measures regarding alternative financial instruments pursuant to the AltFG have to be clearly recognisable as such. Information stated in the marketing material must be consistent with the information contained in the standardised information form and annual financial statement and must not be inaccurate or misleading.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Secondary public offerings are subject to prospectus requirements according to the KMG like primary offerings. Therefore, it has to be assessed whether a public offer takes place and whether any prospectus exemption applies, especially in the case of a later resale of securities by financial intermediaries. No further prospectus publication is required if a valid listing prospectus exists that is up to date and the issuer or the person responsible for the preparation of the listing prospectus has agreed to its use in a written agreement. Any subsequent resale of securities or investments, which were previously the subject of exemptions from the obligation to publish a prospectus, shall be regarded as a separate offer. The placement of securities or investments through financial intermediaries shall be subject to the publication of a prospectus, if none of the conditions are met for the final placement and a public offering exists. The issue of securities is only privileged if a prospectus has been filed within the preceding 12 months regarding the same issuer. The original prospectus can be used for any later offering of the same issuer. Any changes to the material information must be included in a supplement to the original prospectus (see question 3). Liability of sellers in secondary offerings may occur if the seller trades on information not available to the public or has relied on a private placement exemption applicable to institutional investors and resells the securities to the public without publishing a prospectus in respect of such securities. The scope of the selling shareholder's liability follows the general civil law liability rules.

6 What is the typical settlement process for sales of securities in a public offering?

Sales of securities in a public offering are usually settled through a clearing system. The settlement process, whereby securities are delivered, usually against payment, is subject to the rules and procedures of the respective clearing system. In most issues, individual certification of the security is excluded. Therefore, global certificates are deposited with a securities clearing bank (eg, OeKB). In certain cases, temporary and permanent global notes are used.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Private placements may be exempt from the obligation to publish a prospectus. Pursuant to section 3, paragraph 1 No. 14 KMG, an offer addressed to fewer than 150 natural or legal persons per EEA member state not being qualified investors is considered as a prospectus exempt 'private placement'.

In addition, there are several other prospectus exemptions excluding certain types of offers form the obligation to publish a prospectus. Pursuant to section 3, paragraph 1 No. 11 KMG, the publication of a prospectus is not required if the securities are offered exclusively to qualified investors which includes credit institutions, investment firms, insurance companies, investment funds, pension funds, the government, certain small and medium-sized enterprises and also certain natural persons applying for a classification as qualified investors. Other relevant prospectus exemptions include security offerings addressed to investors subject to a minimum investment amount of €100,000 per investor as well as offerings of securities with a minimum denomination of €100,000 (section 3, paragraph 1 No. 9 KMG), offerings in a total amount of less than €250,000 during a period of 12 months (section 3, paragraph 1 No. 10 KMG, and certain offerings by preferred issuers or security offerings to employees. Pursuant to section 7, paragraph 8a KMG, just a simplified prospectus has to be published ('prospectus light'), if the issue volume is between €250,000 and €5 million in the EU within 12 months.

To rely upon one or more prospectus exemptions, no specific formalities must be followed. However, anyone having the intention of offering securities for the first time is obliged to notify the New Issue Calendar which provides an insight into the extent and manner of the expected capital market utilisation. The New Issue Calendar is maintained by OeKB for statistical purposes (see question 2). The issuer must refer to a specific exemption from the obligation to publish a prospectus and expressly indicate the facts pertaining to this exemption.

Private placement memoranda or promotional material on the offering that are circulated to potential investors usually include appropriate disclaimers stating that investors are exclusively targeted on a private placement basis and that the document is not a securities prospectus approved according to the PD or Austrian law. Nevertheless, information provided shall not be inaccurate or misleading and shall not deviate from other information provided to potential investors in order to avoid civil law liability.

8 What information must be made available to potential investors in connection with a private placing of securities?

Austrian law does not impose any mandatory requirements for information to be made available to potential investors in a private placement as long as no listing of securities on a regulated market in Austria (ie, on the Official Market or Second Regulated Market of the VSE) takes place. In the absence of a mandatory requirement, potential investors will, nevertheless, require certain information about the issuer and the offered securities to decide on an investment in the securities. Such information is commonly provided in a voluntarily supplied information memorandum providing information and certain standard disclaimers. If the offeror provides potential investors with such information, the information should in any case be understandable, accurate, true and not misleading in order to avoid any claims by potential investors resulting from culpa in contrahendo. Further, care should be taken that no material information is missing in the information memorandum and that potential investors are treated equally.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no statutory restrictions on the transferability of debt or equity securities acquired in a private placement. Such securities can be transferred pursuant to the rules on transferability of the relevant security.

If the securities shall be listed on a regulated market in Austria, a prospectus exemption provided for in the BörseG has to be relied upon. As soon as the securities are admitted to the regulated market they can be traded in accordance with applicable laws and regulations. If no listing is sought, any transfer restrictions provided for in the issuer's articles of association (registered shares) have to be assessed.

As a resale of securities acquired under the private placement exemption by way of a public offering may trigger a prospectus obligation pursuant to the KMG, unless a prospectus exemption can be relied upon, respective selling and transfer restrictions and corresponding investor representations for resales of such securities are typically included in the information or private placement memorandum.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Prospectus law is harmonised throughout the EU and securities offerings thus are subject to and governed by rather similar provisions. A prospectus approved by a competent authority in one member state of the EU may be used for an offering in another by means of notification of the approving authority. Only minor dissimilarities in securities offerings may exist because of different procedural approaches of different competent authorities. Based on our experience, the prospectus obligation not only for securities but also for 'investments' pursuant to the KMG is different from concepts in some other EU member states. When offering securities in non-EU jurisdictions, foreign securities law must in any case be taken into account and applied.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings fall under the scope of application of the KMG and BörseG. Issuers and offerors intending a public offer or an admission to trading of such securities must therefore assess whether a prospectus has to be published or whether they may rely upon a prospectus exemption. Issuers and offerors must evaluate to the same extent if the securities used for the substitution or originated as a result of the conversion require a prospectus. In relation to the said securities, several prospectus exemptions set forth in section 3, paragraph 1 KMG and section 75, paragraph 1 BörseG should be considered. In this regard, issuers and offerors have to check whether the prospectus exemptions of the KMG for public offerings and those set forth in the BörseG in relation to listing prospectus exemptions deviate. If a transaction involves both a public offer and the admission of securities to a regulated market, both exemptions are required in order to avoid the obligation to publish an approved prospectus. This has to be assessed on a case-by-case basis.

Shares issued in substitution for shares of the same class already issued, if the issuance of such new shares does not involve any increase in the issued capital, as well as securities offered in connection with a takeover by means of an exchange offer, or – under certain circumstances – offered or allocated on the occasion of a merger or split up, are exempted from the obligation to publish a prospectus. Further, the obligation to publish a listing prospectus does not apply to shares that account for, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market (section 75, paragraph 1 No. 1 BörseG). Therefore, most minor capital increases that are privately placed do not require the drawing up, approval and publication of a prospectus. A listing prospectus is also not required for shares issued within the scope of a conversion or exchange for other securities or as a consequence of the exercise of rights attached to other securities, as long as the shares belong to the same category as the shares already admitted to trading on the same regulated market (section 75, paragraph 1 No. 7 BörseG).

In addition to the KMG and BörseG, Austrian corporate law provisions may be relevant as well. By way of example, pursuant to the AktG, the issue of convertible bonds requires a resolution of the shareholders' meeting adopted by at least 75 per cent of the share capital represented, unless a different majority is set in the articles of association.

Securities Financing Transactions (SFTs)

SFTs allow market participants to access secured funding (eg, to use their assets to finance themselves). This involves the temporary exchange of assets as a guarantee for a funding transaction. Examples of SFTs are lending or borrowing of securities, repurchase or reverse repurchase transactions, buy-sell back or sell-buy back transactions, or margin-lending transactions. The Regulation (EC) 2015/2365 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No. 648/2012 aims to improve the transparency of SFTs in three ways:

- transactions (except where one of the parties is a central bank) must be reported to a central database to allow supervisors to better identify the links between banks and shadow banking entities. As a consequence, supervisors will be able to monitor the exposures to, and risks associated with, SFTs and, if necessary, take better-targeted and timelier actions;
- improvement of the transparency towards investors on the practices of investment funds engaged in SFTs and total return swaps by requiring detailed reporting on these operations, both in the regular reports of funds and in pre-investment documents;
- improvement of the transparency of the reuse of financial instruments by setting minimum conditions to be met by the parties involved, including written agreement and prior consent.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

Underwriting agreements for Austrian transactions usually follow international capital market practice and include the (joint) lead managers acting also for the other underwriters, the issuer and the selling shareholders, if any. Most underwritings are best effort underwritings including book-building procedures (in most cases for about two weeks). In a book-building the price for and the final amount of securities offered is determined on the basis of investors' bids before the underwriting takes place. After the book-building process, the final amount of securities and their price is agreed between the underwriters and the issuer, leading to an underwriting commitment of the underwriters.

In contrast, in a few recent Austrian transactions so-called 'hard underwritings' were applied. In this scenario, the underwriters – subject to certain requirements – provide a firm commitment for a portion of securities offered, even if the hard-underwritten amount of shares eventually cannot be sold to investors in the offering. In general, nevertheless, best effort underwritings are still market practice and frequently used for most transactions.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Indemnities are typically provided for losses, claims, damages or liabilities which arise out of or in connection with any breach of the issuer's representations and warranties. Further, the issuer (or a selling shareholder, if applicable) frequently indemnifies the underwriters against claims in relation to any untrue statement of material facts contained in the prospectus or any omission of a fact required to be stated therein.

Underwriting agreements usually include contractual rights of termination, if one or more of the conditions set out in the agreement is not satisfied or cannot be satisfied as well as in the event of a material adverse change (such term is frequently defined and constitutes a nomenclature). Material adverse change events include events of force majeure, significant market disruptions and serious deteriorations in the issuer's financial condition or operations. Underwriters usually receive a portion of the respective gross proceeds from the offering as aggregate commission. Success fees are negotiable and in most cases are paid by the issuer (or the selling shareholder, if applicable) at their full discretion.

Over-allotment options are typically agreed upon where the underwriters undertake stabilisation activities in accordance with EU regulation No. 2273/2003 (implementing Directive 2003/6/EC as regards exemptions for buy-back programmes and stabilisation of financial instruments).

14 What additional regulations apply to underwriting arrangements?

Usually, equity offerings require the overall amount of the underwriting commission and the placing commission to be disclosed in the prospectus.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Upon listing on the Official Market or the Second Regulated Market of the VSE, which are both regulated markets under Directive 2004/39/EC (MiFID), issuers become subject to ongoing reporting requirements set forth in the BörseG. Provisions on the reporting obligations are harmonised as a result of the implementation of Directive 2004/109/EC (Transparency Directive), amended by Directive 2013/50/EC, including major shareholding disclosure, ad hoc disclosure and mandatory publications of financial information (see question 16).

16 What information is a reporting company required to make available to the public?

Issuers whose debt or equity instruments are admitted to trading on a regulated market are essentially subject to ad hoc disclosure requirements, financial reporting and the notification of any substantial changes in the shareholding of the issuers. With minor modifications, these requirements also apply to foreign companies listed on the VSE if Austria is the home member state (as defined in the Transparency Directive). Austria is the home member state if the issuer has its corporate seat in Austria (and the denomination of the debt securities is less than €1,000) or has chosen Austria as its home member state from among the member states in which the issuer has its registered office and those member states that have admitted its securities to trading on a regulated market on their territory or, in certain cases, if the issuer has its corporate seat in a non-EU country.

Ad hoc disclosure

Pursuant to section 48d, paragraph 1 BörseG, issuers of financial instruments possessing inside information relating directly to them shall make such information immediately available to the public. Inside information is any information of a precise nature which has not been made public and relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, which, if disclosed to the public, could have a significant effect on the price of those financial instruments or their derivatives because said information would serve an informed investor as a basis on which to reach investment decisions (see question 17 for additional information). Inside information has to be disclosed ad hoc with the intention of an EU-wide distribution via certain channels, including Reuters, Bloomberg and Dow Jones Newswire. Any major changes with respect to inside information, which has already been disclosed, must be disseminated immediately after any such change takes place.

In certain cases, an issuer possessing inside information is entitled to postpone the ad-hoc disclosure in order to protect its justified interests. In such case, the issuer is obliged to ensure confidentiality and to inform the FMA about the fact that inside information is available and currently not disclosed, the text of the postponed ad hoc announcement as well as the reasons and the ways to ensure confidentiality. The Austrian procedure differs from practice in other EU member states (eg, Germany) where the regulator is not notified at first that inside information is available to the issuer and its publication is postponed. The Austrian procedure will, nevertheless, change owing to the MAR (see 'Update and trends').

Pursuant to section 82, paragraph 7 BörseG, an issuer is obliged to inform the FMA and the VSE about the inside information just before the disclosure to the public pursuant to section 48d BörseG.

Financial reporting

Issuers of debt and equity securities must disclose annual financial statements no later than four months after the close of the financial year (section 82 paragraph 4 BörseG) and half-year reports no later than three months after the close of the reporting period (section 87, paragraph 1 BörseG). Moreover, issuers whose shares are listed on the Prime Market at the VSE must additionally publish quarterly financial statements for the first and third quarters.

Disclosure of major shareholdings

In terms of major shareholding disclosure, such obligation applies to all shares carrying voting rights and to financial instruments provided that they may result in an acquisition of shares carrying voting rights (eg, options, ADRs, exchangeable bonds, etc). Any acquisition or disposal of shares carrying voting rights of an issuer with Austria being the home member state, whose shares are admitted to trading on a regulated market, triggers disclosure obligations if certain thresholds for major holdings are affected. The reporting obligation arises as soon as the proportion of voting rights reaches, exceeds or falls below a threshold of 4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75 or 90 per cent in the course of acquisition or disposal transactions (section 91, paragraph 1 BörseG). Issuers may also provide for a lower first threshold of 3 per cent of voting rights in their articles of association. A reporting obligation also arises if the proportion of voting rights changes without the shareholder's active interference, for example, as a result of events that change the proportion of voting rights (eg, dilution).

Pursuant to section 92 BörseG, the disclosure obligation also extends to persons who are authorised to exercise voting rights under a shareholders agreement or a similar arrangement, under shares which have been given to them as collateral if they may exercise the voting rights without express instructions, under other arrangements where the person may exercise the voting rights without being the owner of such shares or in case such voting rights attach to shares of other parties acting in concert with the addressee of the disclosure obligation.

The disclosure obligation is based on a dual-stage mechanism. The shareholder must inform the FMA, the VSE and the issuer about the voting rights held within two trading days after the trigger event. As soon as the issuer receives the notification of the shareholder pursuant to section 92a paragraph 1 BörseG, it must publish all information contained therein no later than after two trading days.

In addition to the disclosure requirements set forth in the BörseG, issuers whose financial instruments are listed in particular market segments of the VSE are subject to disclosure requirements under private law. These disclosure requirements are based on a contractual relationship between the issuer and the VSE (eg, the agreement on the inclusion in the Prime Market, the highest market segment of the VSE, with reference to the VSE's Prime Market Rules). The Prime Market Rules go beyond reporting requirements of the BörseG and set additional standards.

Additional obligations

According to the Prime Market Rules, issuers must commit to comply with the rules of the Austrian Code of Corporate Governance. Issuers that are subject to the company law of another EU member state or EEA member state and are admitted to the Prime Market must comply with a Code of Corporate Governance recognised in the respective economic area. Issuers must include a declaration of commitment in the annual financial report or in a corporate governance statement which shall be published on the company's website.

English language listing prospectuses used for admission to the Prime Market require a German language translation of the summary for listing purposes. The issuer must make the German language summary available together with the listing prospectus on its website and ensure it stays available to the public for at least one year after the end of the offer period.

Moreover, issuers must prepare a corporate action timetable two months before the beginning of the respective business year in German and English and keep it up-to-date and available to the public on their website. The timetable must contain at least the following dates:

- publication of the financial results for the year;
- record date for the general meeting;
- annual general meeting;
- dividend ex day;
- record date for dividends;
- dividend pay-out day; and
- publication of the half-yearly financial information and the quarterly results, if published.

Update and trends

Capital Markets Union
On 30 September 2015, the European Commission published its Capital Markets Union Action Plan (CMU Action Plan), which provides for the establishment of a true single market for capital across the member states. The European Commission intends to support access to finance, to remove barriers to cross-border investments and to lower the costs of funding. The main objectives of the CMU include: providing more diverse sources of capital to business, causing markets to work more efficiently, and creating additional investment opportunities for investors and savers, resulting in enhanced growth and creation of jobs. The CMU is intended to provide an environment where small and medium-sized enterprises (SMEs) can easily raise financing under aligned legal and supervisory rules and converged costs among EU member states.

The CMU is based on various key principles, for example, creating a real single market for capital for all EU member states, building on the firm foundations of financial stability and helping to attract investment from all over the world.

Proposal to revise the Prospectus Directive
As part of the CMU Action Plan, the European Commission proposed a review of the Prospectus Directive 2003/71/EC on 30 November 2015 (COM (2015) 583 final). The proposed prospectus rules will simplify the rules for companies that wish to issue shares or debt and foster cross-border investments in the European Single Market. The proposal contains, inter alia, following changes:

- exemption of the prospectus obligation: There will be a higher threshold to determine when companies must issue a prospectus. No EU prospectus will be required for capital raisings below €500,000;
- 'prospectus light' and new threshold for SMEs: The European Commission proposed a lighter regime for less complex prospectuses and to double the existing threshold for SMEs from €100 million market capitalisation to €200 million;
- simplifying secondary issuance for listed firms: Companies already listed on a public market that want to issue additional shares or raise debt (corporate bonds) will benefit from a new, simplified prospectus. This provides more flexibility and less paperwork for those companies that wish to tap into capital markets more than once; and
- single access point for all EU prospectuses: The European Securities and Markets Authority (ESMA) will for the first time provide free and searchable online access to all prospectuses approved in the European Economic Area.

MiFID II & MiFIR
MiFID II and MiFIR (MiFID II) were published in the Official Journal of the EU on 12 June 2014. MiFID II, transposed into national law by 3 July 2016, and MiFIR will apply across the EU from 3 January 2018. MiFID II amends WAG 2007 relating to securities trading, investor protection, reporting requirements and supervisory powers for regulators. MiFID II can be broadly broken down into six key areas:

- market transparency: MiFID II contains new pre-trade transparency rules for equities, applying to shares, depositary receipts, exchange-traded funds, certificates and other similar instruments traded on an MTF or organised trading facility (OTC) and extends pre-trade transparency requirements to non-equities and trading requirements to systematic internalisers;
- market infrastructure: MiFID II introduces a new category of OTF and systems and risk controls on algorithmic traders, as well as requirements for algorithmic trading strategies;
- transaction reporting: MiFID II widens the range of instruments subject to transaction reporting obligation to transactions in all financial instruments traded on a regulated market;
- investor protection: MiFID II determines requirements for investment advisers to make it clear on what basis they provide advice, specifying whether it is on an independent basis and whether it is based on a broad or restricted analysis of the market;
- OTC and commodity derivatives: MiFID II regulates rules to support liquidity, prevent market abuse and provide for orderly functioning of commodity derivatives markets. In addition, MiFID II empowers ESMA with intervention powers in order to preserve market integrity and orderliness and
- third-country access: MiFID II provides for new rules and requirements for the establishment of branches and provisions of services without a branch by third-country firms.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The BörseG aims to prevent insider dealing and market manipulations as a result of the implementation of EU Directive 2003/6/EC (Market Abuse Directive). The FMA has extensive investigative and supervisory powers in order to protect the financial markets and to prevent the abuse of inside information and market manipulations.

Misuse of inside information
Inside information is defined as any information of a precise nature that has not been made public and relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, which, if disclosed to the public, could have a significant effect on the price of those financial instruments or their derivatives because said information would serve an informed investor as a basis to reach investment decisions. Information is deemed to be precise if it covers a number of existing facts and events that could occur in the future with a sufficient degree of likelihood. In particular the question whether future events constitute inside information is difficult to assess and subject to several cases where the FMA took a rather strict view on the question of when the inside information emerged. This, in particular, also applies to cases consisting of several interim events that may already constitute inside information. By way of example, in an M&A scenario the decision of the core shareholders to divest their shareholding may already constitute an interim event to be disclosed by means of an ad hoc announcement (see question 16) as it qualifies as inside information. Eventually, the agreement with a purchaser would also constitute inside information. In such case, not only the sale but also the interim event would be subject to the prohibition to misuse inside information as well as the issuer's ad hoc obligation.

According to section 48b, paragraph 1 BörseG, the use of inside information by an insider with the intention to gain a pecuniary benefit is a criminal offence. An insider can be any person who has access to inside information as member of administrative, managing or supervisory bodies of the issuer or owing to his or her profession, occupation, responsibilities or shareholding. The use of the inside information for the insider him or herself or a third party by buying, selling, offering or recommending financial instruments affected by inside information to third parties or submitting, modifying, withdrawing or offering a bid to third parties or providing access to such information to third parties without a respective requirement is subject to a criminal penalty of up to three years of imprisonment. If the financial advantage achieved by such insider transaction exceeds €50,000 the criminal penalty ranges between six months and five years of imprisonment. Anyone who is not an insider but uses inside information received or otherwise obtained is subject to a criminal penalty of up to one year of imprisonment; if the financial advantage achieved in such a case exceeds €50,000 the penalty is up to three years of imprisonment. Even the use of inside information without the intention to gain a pecuniary benefit is subject to a penalty of up to six months of imprisonment.

Market manipulation
Market manipulation is defined as transactions or trade orders that may give false or misleading signals for supply of or demand for the quoted value of financial instruments or that may influence the price of one or more financial instruments by one or more parties collaborating with the intent to drive prices of said financial instruments to an abnormal or artificial price value. Market manipulation also includes transactions or trade orders that make use of fictitious devices or any other form of deception as well as dissemination of information that gives false or misleading signals in relation to financial instruments. This particularly includes distribution of information through the media and the internet (eg, spreading of rumours or of false or misleading news). Issuers publishing information should therefore carefully assess whether information to be published may have a misleading meaning. Among others, transactions known as 'marking the close',

matched orders of financial instruments, wash sales or scalping practices are considered to be prohibited acts of market manipulation.

Suspected transactions may be justified if the trader has legitimate reasons for his or her acts and the transactions or orders comply with the accepted market practice. Acts of market manipulation are subject to administrative fines by the FMA of up to €150,000 per incident (section 48c BörseG), unless the market manipulation constitutes a criminal offence pursuant to the Austrian Penal Act, for example, fraud. In this case, the offence falls under the jurisdiction of Austrian criminal courts.

MAR and CSMAD

The Market Abuse Regulation No. 596/2014 (MAR) and Directive 2014/57/EU on criminal sanctions for market abuse (CSMAD) were published in the Official Journal of the European Union on 12 June 2014 and will apply as of 3 July 2016.

The MAR provides for a significantly extended scope of application, being applicable also to market abuse occurring across both commodity and related derivative markets. The MAR provides for updated harmonised prohibition of insider trading, improper disclosure of inside information and market manipulation. Further, suspicious unexecuted orders and suspicious OTC transactions are subject to reporting obligations, and market participants must have a system for detecting suspicious transactions. In reaction to the LIBOR-rigging scandal, the MAR also prohibits the manipulation of benchmarks. Subject to adequate and effective safeguards, regulators are equipped with supervisory powers to investigate possible cases of market abuse, and an EU member state must ensure that whistle-blowing over actual or potential breaches to competent authorities is possible. Finally, any attempted market abuse will lead to sanctions. Notably, the MAR will be fully extraterritorial.

Following the financial crisis in 2008, the European Commission identified various problems in the Market Abuse Directive, making a review necessary; in particular, the Commission considers minimum rules on criminal offences and on criminal sanctions for market abuse essential for ensuring the effectiveness of the EU policy on market integrity. The CSMAD defines the specific offences: insider dealing, recommending or inducing another person to engage in insider dealing, unlawful disclosure of inside information and market manipulation. Those offences constitute criminal offences, at least in serious cases and when committed intentionally, and EU member states are required to put in place effective, proportionate and dissuasive criminal penalties. In Austria, this will lead to an amendment of the market manipulation prohibition. Any offence will then constitute a criminal offence and not just an administrative offence subject to fines. Also, inciting, aiding and abetting an offence, as well as attempting insider dealing or market manipulation, will be punished. Finally, legal persons can also be held liable, if the offence was committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, or if the lack of supervision or control by such person made an offence for the benefit of the legal person by a person under its authority possible.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Price stabilisation in connection with an offering of securities, for example, by means of over-allotment or the exercise of 'greenshoe' options, may contravene the restrictions on market manipulation set forth in the BörseG. Nevertheless, pursuant to section 48e, paragraph 6 BörseG, price stabilisation is permitted provided that such stabilisation measures are carried out in accordance with Commission Regulation (EC) No. 2273/2003 (Safe Harbour Regulation). To benefit from the exemption under the Safe Harbour Regulation, the following key obligations have to be complied with:

- stabilisation measures are only permitted during a stabilisation period of 30 days from the commencement of trading of shares after an IPO or the date of allotment of shares;
- stabilisation transactions related to an equity offering must not be executed above the offering price of the shares;
- the greenshoe option may not amount to more than 15 per cent of the original offer volume. Further, a position resulting from the exercise of an overallotment facility by an investment firm or credit institution which is not covered by the greenshoe option may not exceed 5 per cent of the original offer volume; and
- certain ex ante and ex post disclosure and reporting conditions have to be fulfilled. Before the opening of the offer period of the relevant securities, issuers, offerors or entities undertaking stabilisation have to adequately publicly disclose:
  - the fact that stabilisation may be undertaken;
  - the fact that stabilisation transactions are aimed to support the market price of the relevant securities;
  - the beginning and end of the period during which stabilisation may occur;
  - the existence and maximum size of any over-allotment facility or greenshoe option; and
  - the exercise period and any conditions for the use of such options.

Issuers, offerors or entities undertaking stabilisation have to notify details of all stabilisation transactions to the competent authority of the relevant market no later than the end of the seventh daily market session following the date of execution of such transaction. Within one week of the end of the stabilisation period, issuers, offerors or entities undertaking stabilisation have to adequately publicly disclose: whether or not stabilisation was undertaken; the date at which stabilisation started; the date at which stabilisation last occurred; and the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out.

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When conducting stabilisation measures and exercising an over-allotment facility or green shoe option outside the permitted frame of the Safe Harbour Regulation, although the European Securities and Markets Authority has indicated that stabilisation will not necessarily be regarded as abusive solely because it falls outside the safe harbour, a risk remains that the FMA considers such measures as market manipulation, which may lead to criminal sanctions or administrative fines of up to €150,000.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Section 11 KMG imposes liability upon the issuer and other entities associated with an offering of securities, including the prospectus-reviewing entity, if any, the VSE, brokers and the auditor for the damages that result from the lack of accuracy and completeness of the prospectus, and for any misstatement or material omission of information that should be included in the prospectus. This specific provision does not affect the general civil liability rules, for example, if no prospectus has been published. In this respect, investors may also be entitled to claim damages caused by any other person involved in securities transactions if such person is responsible for the investors' damages due to any wilful or negligent behaviour in connection with the transaction. This may particularly include the issuer's board members. These two options are the most important instruments for seeking remedies in connection with securities transactions.

A distinction has to be made in respect of the range of liability. Brokers may only be liable for wrongful intent or gross negligence; the auditor only in an unlikely case of having knowledge that the financial statement would serve as a basis for a prospectus and of any misstatement of the prospectus. Investor damage claims under section 11, paragraph 7 KMG have a limitation period of 10 years from expiry of the public offer, whereas general civil law provides for a limitation period of three years from the date of investor's knowledge of the damage and the person responsible for such damage.

Section 5 KMG with reference to section 1, paragraph 1 No. 2 Austrian Consumer Protection Act states that consumer investors are entitled to withdraw from contracts regarding securities purchased if no prospectus or, if applicable, no supplement for a prospectus has been duly published as required in case of a public offering of securities.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

The KMG and the BörseG each contain provisions in respect of criminal relevance for securities violations. Conducting a public offering of securities without publishing an approved prospectus is considered a criminal offence just as is trading on, recommending on or providing access to inside information. After the effectiveness of the MAR, market manipulation enforcement actions by the FMA and civil litigation are the main mechanisms for seeking remedies and sanctions for improper securities activities. FMA is empowered to initiate administrative proceedings in a wide range of matters, in particular the following types of legal action:

- imposing administrative fines up to €150,000;
- investigation rights in respect of suspicious trading in financial instruments;
- examination order of a revocation of admission to the VSE according to BörseG;
- the publication of violations; and
- imposing administrative fines up to €30,000 under the scope of the AltFG.