Securities Finance

Contributing editor
Andrew Pitts

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GETTING THE DEAL THROUGH

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Andrew Pitts

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Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Securities Finance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Qatar.

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

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

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew Pitts of Cravath, Swaine & Moore LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
March 2018

Austria

Christoph Moser
Weber & Co

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 2018 (BörseG 2018); and the Securities Supervision Act 2018 (WAG 2018).

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 2018 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.

In addition to the provisions of the KMG, BörseG 2018 and the WAG 2018, 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 2018 and WAG 2018 are primarily administered and enforced by the Austrian Financial Market Authority (FMA). Any public offer of securities or investments pursuant to the KMG is subject to a prospectus publication, either approved by the FMA or passported into Austria. 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 regulated market in Austria: the Official Market (*Amtlicher Handel*). The former Second Regulated Market (*Geregelter Freiverkehr*) was merged with the Official Market as of 3 January 2018. In addition, any prospectus for an offer of securities in Austria has to be filed with Oesterreichische Kontrollbank AG (OeKB). If the FMA approves a prospectus, the FMA directly procures for the filing with OeKB.

In June 2014, the European Commission adopted new rules revising the Markets in Financial Instruments Directive (MiFID) framework. These consist of the Markets in Financial Instruments Directive (Directive 2014/65/EU, MiFID II) and the Markets in Financial Instruments Regulation (Regulation (EU) No. 600/2014, MiFIR). In Austria, MiFID II and the implementation measures for MiFIR were implemented in the WAG 2018 and the BörseG 2018, which both entered into force as amended laws on 3 January 2018. The main intention of MiFID II and MiFIR is to protect investors from the market uncertainty and market abuse by, for example an improvement of governance and organisational requirements for investment firms, improving the conduct of business rules that cover firms' relationships with all categories of clients or strengthening the supervisors with new powers at national and European level. MiFID II and MiFIR cover the conduct of investment firms, authorisation requirements for regulated markets, reporting and trade transparency. MiFID II aims to reinforce and replace the current European rules on securities markets.

The significant changes to the former WAG 2007, as amended in the WAG 2018 are:

- adaption of the organisational requirements for investment firms and investment service providers;
- adaption of the rules of conduct for credit institutions, investment firms and investment service providers, in particular through higher transparency and information obligations and better supervisory and intervention powers of the supervisory authorities, among other things through product monitoring including product bans;
- regulation of the algorithmic trading, especially the high-frequency trading;
- extension of the disclosure requirements for the financial instruments concerned; and
- unification and tightening of the possible sanctions.

In the BörseG 2018, the following significant changes were made to the former BörseG due to the implementation of MiFID II:

- the merging of the two regulated markets in Austria, the Official Market and the Second Regulated Market, into one regulated market (the Official Market);
- introduction of the possibility for a legal delisting from the Official Market and requirements for such delisting;
- extended requirements for existing trading platforms (eg, Multilateral Trading Facility (MTF)) as well as the implementation of a new obligation to seek permission for the previously unsupervised Organised Trading Facilities (OTF);
- establishment of small and medium-sized enterprise growth markets;
- new duties in relation to the authorisation and supervision of data reporting services providers; and
- increased monitoring of commodity derivatives by implementation of position limits and position controls.

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing Directive 2003/71/EC (the Prospectus Regulation) was published on 30 June 2017. In addition to Austrian law, the Prospectus Regulation lays down requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a member state of the European Union. Most of the rules will apply from 21 July 2019 onwards. Some specific provisions will apply from 21 July 2018 and some already entered into force on 20 July 2017. The rules entered into force on 20 July 2017 provide for the following two prospectus exemptions for admission to trading:

- the obligation to publish a listing prospectus does not apply to securities fungible with securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 20 per cent (up from currently less than 10 per cent) of the number of securities already admitted to trading on the same regulated market. Now, this exemption applies to all types of listed securities, rather than only shares as was previously the case; and
- shares resulting from the conversion or exchange of securities, provided that the resulting shares represent, over a period of 12 months, less than 20 per cent of the number of shares of the same class already admitted to trading on the same regulated market are also exempted from the obligation to publish a prospectus.

Further, provisions of the Prospectus Regulation, which will apply from 21 July 2019 (and 21 July 2018) onwards, provide for a variety of key elements, including:

- the obligation to publish a prospectus shall not apply to an offer of securities to the public if the denomination per unit amounts to at least €100,000;
- no prospectus is required for an offer of securities with a total consideration of less than €1 million (total consideration of the offer over a period of 12 months) (this provision will apply from 21 July 2018);
- the threshold for which a prospectus is mandatory increases from €5 million to €8 million; member states should be free to set out in their national law a threshold between €1 million and €8 million (total consideration of the offer over a period of 12 months) (this provision will apply from 21 July 2018);
- a new type of prospectus (EU growth prospectus) will be available for SMEs, companies with up to 499 employees (small mid-caps) admitted to an SME growth market or small issuances by unlisted companies and the offer does not exceed €20 million (total consideration of the offer over a period of 12 months);
- the scope of the relevant prospectus information will be defined more precisely, intending prospectuses to be drawn up shorter and clearer;
- the prospectus summary will be shortened to a maximum of seven, easily readable and more user-friendly pages;
- facilitation of a new simplified prospectus for secondary issuances;
- any issuer whose securities are admitted to trading on a regulated market or an MTF may draw up every financial year a universal registration document describing the company's relevant information. This enables an accelerated approval of a new prospectus within five (instead of 10) trading days; and
- all prospectuses will be provided for free within a new central prospectus database.

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 when conducting a public offer of securities in Austria or filing a request for the admission to trading of securities on the regulated market in Austria, namely, on the Official Market (*Amtlicher Handel*), which is operated by the VSE.

According to the BörseG 2018, which entered into force on 3 January 2018, the former Second Regulated Market (*Geregelter Freiverkehr*), which was also considered a regulated market, was abolished. Financial instruments and emission allowances, which had been admitted to the Second Regulated Market were transferred to the Official Market without further admission procedure by the VSE, provided they fulfilled the requirements according to the BörseG 2018.

Public offer

A 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 of the 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 that would, however, be exempt from the obligation to publish a prospectus (a private placement exemption applies for public offers made to fewer than 150 natural or legal persons). In contrast, an offer to a well-defined and not 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 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 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 communication may constitute communication leading to a public offer (eg, an oral presentation of the management of an issuer, emails, website advertising or information, press releases). 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. Further, the issuer – if Austria is its home member state – has to publish a notice about how the prospectus was published and where it is available in the Official Gazette (*Amtsblatt*) of *Wiener Zeitung*.

The approved prospectus has to be submitted to the OeKB as registration office. This is done by the FMA directly. 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 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, which is not a regulated market within the meaning of MiFID II. 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 should be avoided. The Third Market is governed by the Rules for the Operation of the Third Market of the VSE. Some of the provisions and requirements set forth in the BörseG 2018 do not apply

to financial instruments traded on the Third Market. However, the key MAR provisions (dissemination of inside information, directors' dealing reports and maintaining of insider lists) apply also for issuers having securities admitted to trading on the Third Market.

Apart from the regulated market and the MTF, MiFID II introduces OTFs, a new, third form of multilateral trading venue. Within an OTF, multiple third parties buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in a way that results in a contract. Equities are not permitted to be traded through an OTF. A key difference between OTFs and MTFs is the ability to use discretion when matching buying and selling interests. The measure should not only increase overall market transparency, but should also ensure a level playing field across the different markets offering multilateral trading by establishing the additional duty. The introduction of OTF means that many transactions currently categorised as off-venue will come within a multilateral trading environment. This should reduce the prevalence of opaque market models and products, and increase the quality of price discovery, investor protection and liquidity.

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 of the 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 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 the OeKB as registration office (*Meldestelle*). The issuer must notify the New Issue Calendar maintained by the 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 that is capable of affecting the assessment of the securities and that 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 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 (or, in case of the MTF, an information memorandum) 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 the expiry 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 pre-defined 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 cannot be approved by the FMA or any other Austrian regulatory body; however, marketing must comply with the principles set forth in section 4 of the 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.

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 will take 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 of the KMG, an offer addressed to fewer than 150 natural or legal persons per EEA member state that are not qualified investors is considered as a prospectus-exempt 'private placement'.

In addition, there are several other prospectus exemptions excluding certain types of offers from the obligation to publish a prospectus. Pursuant to section 3, paragraph 1, No. 11 of the 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 SMEs 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, offerings of a total amount of less than €250,000 during a period of 12 months, and certain offerings by preferred issuers or security offerings to employees.

To rely upon one or more prospectus exemptions, no specific formalities must be followed. However, anyone that has 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 the 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 takes place (ie, on the Official Market of the VSE). 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 or offering circular 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 2018 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 are therefore subject to and governed by 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 due to 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 2018. 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 of the KMG, section 47 of the BörseG 2018 and article 1 of the Prospectus Regulation should be considered. In this regard, issuers and offerors have to check whether the prospectus exemptions of the KMG for public offerings, those set forth in the BörseG 2018 and those stated in the Prospectus Regulation 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 securities that account for, over a period of 12 months, less than 20 per cent of the number of securities of the same class already admitted to trading on the same regulated market (article 1, paragraph 5, first subparagraph (a) of the Prospectus Regulation). 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 47, paragraph 1, No. 7 of the BörseG).

In addition to the KMG and BörseG 2018, 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.

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 market standard book-building procedures (in most cases for about two weeks, in accelerate book buildings within one day). 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 '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 overallotment options?

Indemnities are typically provided for losses, claims, damages or liabilities that 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.

Overallotment options are typically agreed upon where the underwriters undertake stabilisation activities in accordance with the Regulation 2014/596/EU (Market Abuse Regulation (MAR)).

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 of the VSE, which is a regulated market under MiFID II, issuers become subject to ongoing reporting requirements set forth in the BörseG 2018. Provisions on the reporting obligations are harmonised as a result of the implementation of Directive 2004/109/EC (Transparency Directive, amended by Directive 2013/40/EU), including major shareholding disclosure, ad hoc disclosure and mandatory publications of financial information (see question 16).

Further, in case of admission of securities to trading on the Third Market of the VSE, the issuer will become subject to key MAR provisions (dissemination of inside information, directors' dealing reports and maintaining of insider lists).

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 (dissemination of inside information)

Pursuant to article 17 of MAR, which entered into force in July 2016, issuers of financial instruments shall inform the public as soon as possible of inside information that directly concerns that issuer. Inside Information according to article 7 of the MAR is any information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and that, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

The issuer shall ensure that the inside information is made public in a manner that enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, in the officially appointed mechanism referred to in article 21 of Directive 2004/109/EC of the European Parliament and the Council. The issuer shall not combine the disclosure of inside information to the public with the marketing of its activities. The issuer shall post and maintain on its website for a period of at least five years, all inside information it is required to disclose publicly.

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. Issuers are permitted to delay disclosure of inside information to protect their legitimate interests, as long as the public is not misled and confidentiality can be maintained (article 17, paragraph 4 of the MAR). In such case, the issuer is obliged to ensure confidentiality. The FMA has to be notified immediately after the disclosure of inside information via email. In order to preserve the stability of the financial system, an issuer that is a credit institution or a financial institution, may, on its own responsibility, delay the public disclosure of inside information, under certain circumstances.

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 and half-year reports no later than three months after the close of

the reporting period, and shall ensure that this report is available to the public for at least 10 years (sections 124 and 125 of the BörseG 2018). Moreover, issuers whose shares are listed in the VSE's Prime Market segment (a special segment with higher transparency requirements) 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). 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. Issuers may also provide for a lower first threshold of 3 per cent of voting rights in their articles of association. A special condition for this to become effective is the publication of the clause of the by-laws on the issuer's website and the notification of the FMA.

The notification obligation pursuant to section 130 of the BörseG 2018 shall also apply to persons who directly or indirectly hold financial instruments pursuant to section 1, No. 7 of the WAG 2018 (eg, shares in companies, bonds or other forms of securitised debt, options, futures, swaps) or other similar instruments (section 131, paragraph 1 of the BörseG 2018).

Pursuant to section 133 of the BörseG 2018, the disclosure obligation also extends to persons who are authorised to exercise voting rights under a shareholders' agreement or a similar arrangement, under shares that 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 134, paragraph 1 of the BörseG 2018, 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 2018, 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 2018 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 that 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;
- annual general meeting;
- dividend ex day;
- dividend pay-out day; and
- publication of the half-yearly financial information and the quarterly results, if published.

Anti-manipulation rules

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

The BörseG 2018 and MAR aim to prevent insider dealing and market manipulations. 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. The MAR establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation (market abuse) as well as measures to prevent market abuse to ensure the integrity of financial markets in the EU and to enhance investor protection and confidence in those markets.

Misuse of inside information

Pursuant to article 7 of the MAR, inside information shall comprise the following types of information:

- information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and that, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments;
- in relation to commodity derivatives, information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and that, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this is information that is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets;
- in relation to emission allowances or auctioned products based thereon, information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more such instruments, and that, if it were made public, would be likely to have a significant effect on the prices of such instruments or on the prices of related derivative financial instruments; and
- for persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and relating to the client's pending orders in financial instruments, which is of a precise nature, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and that, if it were made public, would be likely to have a significant effect on the prices of those financial instruments, the price of related spot commodity contracts, or on the price of related derivative financial instruments.

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.

Insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered to be insider dealing.

An insider can be any person who has access to inside information as member of administrative, managing or supervisory bodies of the issuer or the member of the market for emission allowances. Further an insider may be someone who is a shareholder of the issuer or the member of the market for emission allowances.

Pursuant to section 154 of the BörseG 2018 the abuse of inside information and market manipulation shall be deemed to have committed an administrative offence and shall be sanctioned by the FMA by a fine of up to €5 million or up to three times the benefit gained from the infringement including any losses avoided, provided the benefit gained can be stated in figures. According to section 163, paragraph 1 of the BörseG 2018, the use of inside information by an insider to buy or sell for himself or herself or a third party financial instruments that the inside information refers to, is a criminal offence and punishable by a court of law, if the price is exceeding €1 million. The criminal penalty may be between six months and five years of imprisonment. The same applies to insiders who recommend third parties to use the inside information accordingly.

Market manipulation

Market manipulation is defined in article 12 of the MAR as transactions or trade orders or any other behaviour that may give or be likely to give false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances, or 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. Pursuant to the MAR, market manipulation shall comprise entering into a transaction, placing an order to trade or any other behaviour that gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances; or secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level; unless the person entering into a transaction, placing an order to trade or engaging in any other behaviour establishes that such transaction, order or behaviour has been carried out for legitimate reasons, and conforms with an accepted market practice.

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 €5 million per incident or up to three times the amount of the benefit gained taking into account any losses avoided due to the infringement committed provided such benefit can be expressed in figures, 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.

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 overallotment or the exercise of 'greenshoe' options, may contravene the restrictions on market manipulation set forth in the MAR. Pursuant to article 5 of the MAR, price stabilisation is permitted provided that such stabilisation measures are carried out in accordance with Commission Regulation (EU) 1052/2016 (regulatory technical standard (the RTS Regulation)). To benefit from the exemption under the RTS 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 that 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, but may not necessarily occur, and that it may cease at any time;
  - 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 be carried out;
  - the identity of the entity undertaking the stabilisation, unless unknown at the time of disclosure, in which case it shall be subject to adequate public disclosure before the stabilisation begins;
  - the existence and maximum size of any overallotment facility or greenshoe option;
  - the exercise period and any conditions for the use of such options; and
  - the place where the stabilisation may be undertaken including, where relevant, the name of the trading venues.

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 the following: whether or not stabilisation was undertaken; the date at which stabilisation started; the date at which stabilisation last occurred; the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out; and the trading venues on which the stabilisation transactions were carried out, where applicable.

When conducting stabilisation measures and exercising an overallotment facility or greenshoe option outside the permitted frame of the RTS 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 MAR and the RTS Regulation, a risk remains that the FMA considers such measures as market manipulation, which may lead to criminal sanctions or administrative fines of up to €5 million or up to three times the amount of the benefit gained taking into account any losses avoided due to the infringement committed provided such benefit can be expressed in figures.

Liabilities and enforcement

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

Section 11 of the 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 of the 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 the investor's knowledge of the damage and the person responsible for the damage.

Section 5 of the KMG with reference to section 1, paragraph 1, No. 2 of the 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 2018 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, which is also the case for 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. The FMA is empowered to initiate administrative proceedings in a wide range of matters, in particular the following types of legal actions:

- imposing administrative fines up to three times the benefit gained from the violation including any loss avoided, provided the benefit can be stated in figures, or, with respect by a fine of up to €1 million;
- imposing administrative fines to legal entities up to €2.5 million or two per cent of the total annual net revenues pursuant or up to three times the amount of the benefit gained taking into account any losses avoided due to the infringement committed, provided such benefit can be expressed in figures;
- the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined;
- investigation rights in respect of suspicious trading in financial instruments;
- examination order of a revocation of admission to the VSE according to BörseG 2018; and
- the publication of violations.

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