Global Private M&A Guide - Limited External Content - Austria

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*This majority of this content was last reviewed around October 2023. Note: Given the significance of the reform introducing a new limited liability company form, the flexible company (FlexCo), into Austrian company law as of 1 January 2024, a brief summary has been included.*

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*This content was last reviewed around September 2021.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

The focus of the legal due diligence will largely depend on the target company's business. Therefore, as a first step, it is advisable to precisely determine the target company's business to ensure an efficient legal due diligence review.

In the vast majority of cases, the following issues are considered in legal due diligence: corporate matters (e.g., title to shares), commercial contracts (e.g., change of control or exclusivity provisions), financing/loan agreements (e.g., change of control provisions), real estate (e.g., lease agreements), employment and pension matters, regulatory/public law matters (e.g., repayment of granted funds), litigation (e.g., pending lawsuits) and IP/IT/software matters (e.g., data protection compliance). Increasingly, compliance and ESG matters are receiving increased attention in due diligence exercises.

Vendor due diligence reports and legal fact books are becoming more common in auction processes involving larger target companies in Austria.

For quite some time now, warranty and indemnity (W&I) insurance is becoming increasingly popular for mid-cap or small-cap transactions, as well as the larger transactions. Typically, parties will consider at an early stage of a transaction whether W&I insurance will be sought as this will have implications on the scope, depth and reporting of the due diligence exercise.

Issues identified in the due diligence are typically dealt with by: (i) having them rectified by the seller before signing/closing (e.g., obtaining waivers from third parties if change-of-control provisions have been identified in commercial contracts);(ii) specific indemnities regarding specific known risks identified in the course of the due diligence (e.g., environmental risks, ongoing/threatened litigation); or (iii) general representations and warranties (e.g., existence and ownership of title to sold shares).

**Pricing and payment**

Austrian purchase agreements commonly provide for escrows (i.e. a portion of the purchase price may either be withheld or placed in an escrow account for a fixed period as security for the payment of any claims under the representations and warranties to meet any warranty or indemnity claims) but not for deposits.

**Acquisition methods**

Austrian businesses are acquired mainly by means of a share deal. For the acquisition of smaller businesses and, in particular, in distressed situations (that is, where the relevant company faces financial adversity), buyers also choose to undertake asset deals. The choice of the transfer method will depend on a number of considerations, in particular, tax implications, the scope and complexity of the target business, and liability risks connected with the acquisition.

*Share sale*

The acquisition of a corporation (that is, a limited liability company or a stock corporation) by means of a share deal may be effected by purchasing all or part of its shares, or by increasing its share capital and subscribing to new shares. In share deals, the legal entity of the target company remains unchanged and all rights and obligations of the target company are transferred uno actu by way of universal succession (Gesamtrechtsnachfolge). The buyer of a share is usually not liable for the debts of the target company, but if the share capital is not fully paid up or has been repaid, the buyer may be liable to pay up the remainder. For buyers of shares in an Austrian limited liability company (Gesellschaft mit beschränkter Haftung (GmbH)), this would even include liability for the remainder of other shareholders.

*Transfers of title to shares*

An Austrian notarial deed is required for the purchase of shares in a GmbH and the transfer thereof. However, pursuant to Section 90a of the Notarial Code, the required notarial deed may be performed digitally. The articles of association may subject the transfer to additional conditions (which would also have effect vis-à-vis third-party acquirers), such as prior consent requirements, drag-along and tag-along rights, put and call options. The GmbH must be notified of the transfer to allow the new shareholders to exercise their rights against the company.

In principle, for Austrian stock corporations (Aktiengesellschaft (*AG*)), no specific form requirements apply to the transfer of shares. Shares in non-listed companies must be issued in the form of registered shares (Namensaktien). Registered shares are transferred by means of written endorsement by the seller. The company must be notified of the transfer of registered shares. The articles of association of a company may impose additional shareholder consent requirements for registered shares but, due to the principle of free disposal of shares, the Austrian Stock Corporation Act (Aktiengesetz (AktG)) does not provide for the possibility of preemptive rights for other shareholders or third parties in the articles of association. However, a shareholders' agreement may provide for preemptive rights.

As described in further detail below (see "Common deal structures—What are the different types of limited liability companies?"), a new company form was introduced into Austrian company law as of 1 January 2024, the Austrian flexible company (FlexCo). The transfer of shares in a FlexCo may be effected by way of an Austrian notarial deed, or by way of a private deed.

*Asset sale*

In an asset deal, all or part of the assets of a going concern are acquired. Through an asset deal, ownership is transferred to the buyer by way of singular succession (Einzelrechtsnachfolge), which means that the acquisition has to be contractually agreed on between the buyer and the seller for each asset individually and further specify all relevant individual assets and contracts in an itemized form as well as specify all relevant in-rem acts to transfer the transferred assets in accordance with the relevant civil and property law (see also below). In addition, certain statutory liabilities apply in an asset deal. As a result, asset acquisitions often entail more complex issues than share acquisitions. However, asset deals can be attractive to buyers for tax reasons and because of the opportunities to carve out only certain parts of a legal entity. An asset sale does not typically require notarization unless the seller is selling all or the majority of its assets.

*Transfers of title to assets*

Austrian corporate and civil law does not contain any comprehensive set of provisions relating to the acquisition of a business as a going concern. In principle, every single asset must be transferred in compliance with the transfer and form requirements applying to such asset (for exemptions, see below). As such, the following transfer requirements apply:

Property rights must be transferred according to applicable property law provisions (e.g., transfer of real estate must be recorded in the real estate register).

Claims need to be transferred by means of an assignment, which is subject to notification requirements.

Tangible assets are transferred by physical delivery, if physical delivery is not possible or only possible with unreasonable effort, a symbolic delivery will suffice.

Intangible property rights must be entered into the relevant public registers according to applicable intellectual property laws.

The rights of a contractual party can be transferred only by assumption of contractual rights, with the approval of all other contractual parties. However, the Austrian Commercial Code (Unternehmensgesetzbuch (UGB)) facilitates this requirement by adopting a legal presumption of approval by the contractual parties (see Section 38 of the UGB).

Some contracts/rights will transfer automatically by operation of law to the buyer (e.g., employment contracts, some insurance contracts and certain tenancy rights) subject to a notification to the buyer. A shareholders' resolution is required to approve the transfer by a GmbH or an AG of all its assets. The resolution in these two cases will require approval by a majority of at least three-quarters of the nominal capital represented or by a greater quorum if required by the articles of association. This approval requirement also applies where a substantial part of the company's business is to be transferred (according to legal academics).

**Signing/closing**

Due to regulatory approval requirements (in particular foreign investment approval and/or merger control clearance requirements or other regulatory approval requirements depending on the business, e.g. banking supervisory law approvals) signing and closing regularly do fall apart and do not occur simultaneously. Hence, a separate closing appointment often takes place. At the closing, the share transfer or asset transfer takes place and the purchase price is paid.

## Approvals/registrations

**Foreign investment restrictions**

Austria has a mandatory and suspensory foreign investment screening procedure, which means that transactions that meet the relevant criteria need to be notified to the relevant authority and cleared before they can be completed.

The foreign investment review regime is targeted at certain sectors. For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Austria has a mandatory and suspensory merger control regime which means that transactions which meet the relevant criteria need to be notified to the competition authority and cleared before they can be completed. It is also necessary to consider EU merger control rules. Mergers involving companies active in several Member States and reaching certain turnover thresholds are examined at European level by the European Commission. This allows companies trading in different EU Member States to obtain clearance for their mergers in one go. As of 12 October 2023, the EU Foreign Subsidies Regulation (FSR) requires qualifying transactions, and bids in response to certain large public tenders in the EU, to be notified for upfront clearance by the European Commission where the companies involved have benefited from foreign financial contributions (a broad concept) that exceed certain (low) thresholds. Acquisitions of a target with annual revenues in the EU of at least EUR 500 million will trigger FSR deal notifications. Acquisitions of smaller targets will not, regardless of deal value. Outright mergers and large joint ventures will trigger a notification requirement if the EUR 500 million EU-wide revenue threshold is met by one of the merging parties or the joint ventures.

For further information, see the more detailed section on "Antitrust/merger control".

**Other regulatory or government approvals**

With respect to target companies that are subject to specific regulatory supervision, additional approvals may be required in connection with a share transfer or asset deal, e.g. in case of financial institutions approvals by the relevant financial market authority.

## Employment

**General**

In share acquisitions, the employment conditions of the target company's employees remain unchanged as the employer remains the same entity.

An asset acquisition will likely qualify as a transfer of business pursuant to Austrian TUPE rules. Where a business transfer takes place, the affected employees are automatically transferred by operation of law to the buyer, which becomes the new employer. Generally, the employees transfer with all existing rights and obligations.

**Transfer of business**

Employers must inform the works council (where there is one) of any proposed transfer of business prior to the transfer.

If no works council exists, the transferor or transferee must inform affected employees in writing before the transfer. That information must include the date of the transfer, the reasons for the transfer, as well as legal, economic and social consequences that may be triggered due to the transfer for the employees, and any measures that may be taken as a result of the transfer.

Mergers also qualify as a transfer of business, triggering notification and/or consultation requirements.

**Approval or consultation requirements**

In the course of corporate restructuring, the works council obtains further participation rights. Hence, employers must inform the works council (where there is one) of potential operational changes to the business. Examples of operational changes (see Section 109 (1) Labor Constitution Act (Arbeitsverfassungsgesetz (ArbVG))) include, among others, the downsizing or closure of a business or parts of the business, or merger with other companies. Such information has to be provided vis-à-vis the works council in a timely and effective manner that enables it to evaluate possible effects and conduct meaningful consultation before such changes become implemented. If certain conditions are met, the works council may also enforce social plans mitigating detrimental effects on the workforce.

## Tax

**Acquisition of shares**

Following the abolishment of capital transfer tax (Gesellschaftsteuer) on 1 January 2016, equity contributions of a direct shareholder in its Austrian subsidiary are no longer taxable. However, waivers on impaired receivables may trigger corporate income tax at the level of the Austrian subsidiary.

**Acquisition of assets**

The transfer of real estate generally triggers a real estate transfer tax (RETT) of 3.5% of the purchase price of any property located in Austria. Registration fees add on at least an additional 1.1%.

RETT, in the amount of 0.5%, may also apply to a share deal if 95% or more of the shares in a domestic entity owning real estate is acquired (i) by one buyer or (ii) by members of the same tax group (within the meaning of Section 9 of the Austrian Corporate Income Tax Act (Körperschaftsteuergesetz)). In this event, RETT may be avoided by transferring a minor share (more than 5%) in the Austrian subsidiary to a second shareholder.

Austria also imposes stamp duty on various legal transactions, such as assignments of receivables (0.8%) or lease agreements (1%) — whereas lease agreements concerning living space concluded  are no longer subject to stamp duty. In practice, these fees can be avoided by undertaking appropriate structuring.

**Mergers**

Under certain conditions, a merger is exempt from capital transfer tax and value-added tax (VAT), and the rate of RETT can be lowered.

**VAT**

There is no exemption from VAT for the transfer of a going concern, so asset acquisitions are subject to VAT at statutory rates (i.e., 10%, 13% or 20%, depending on the relevant goods or service) unless assets that are exempt from VAT (i.e., receivables) are transferred. The export of goods is zero-rated and intra-community supplies are exempt from Austrian VAT, but intra-community acquisitions trigger VAT at the statutory rates. Intragroup services supplied within a domestic group are disregarded for VAT purposes.

Share sales are usually exempt from VAT.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

The sale and purchase of private companies usually takes place by means of a share deal where the legal entity of the target company remains unchanged and thus, in principle, agreements entered into by that company and the respective parties also remain unchanged. The buyer of a share is usually not liable for debts of the target company; but if the share capital is not fully paid up or has been repaid, the buyer may be liable for settling the remainder (for buyers of shares in a GmbH, this would even include liability for the rest of the other shareholders).

In instances of smaller businesses and in distressed situations, in particular, buyers also choose to undertake asset deals where all or part of the assets of a going concern are acquired. There is no comprehensive code in Austrian corporate and civil law relating to acquisitions of a business as a going concern but, in principle, every single asset must be transferred in compliance with the respective transfer and form requirements for that particular asset.

The legal framework applicable to a transaction will differ, depending on the type of company involved and whether the transaction is structured as a purchase of shares or a purchase of assets. The choice of the transfer method will depend substantially on a number of considerations, in particular: tax implications, the scope and complexity of the target business, and liability risks connected with the acquisition.

In recent years, it has been increasingly popular for buyouts of a private company to take place following an auction process, where several competing bidders are invited by the seller to bid for the target company and where the seller ordinarily concludes a sale and purchase agreement with the bidder that offers the highest price and the most favorable contractual terms. Further, auction processes are common in Austria for stakes in larger businesses. Bid process letters are frequently used, whereas both nonbinding indicative bid letters and binding letters at the final offer stage are seen.

Two basic structures of mergers can be distinguished. Either the target company is merged into an existing company, with the shareholders of the target company receiving shares in the surviving company as compensation (absorption), or a new company ("**NewCo**") is formed, to which all the assets and liabilities of two or more companies are transferred, with the shareholders of both/all companies receiving shares in NewCo (consolidation). In both cases, the target companies are dissolved by operation of law. Austrian corporate law allows mergers between two or more GmbHs and two or more AGs. Mergers of GmbHs with AGs are also possible.

Mergers are mainly used for internal reorganizations within groups rather than for acquisitions of an unrelated business.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

The predominant forms of legal entities used for doing business in Austria are the GmbH and the AG. The number of GmbHs exceeded 100,000, with AGs at around 1,200. Another legal form for doing business in Austria is the European company (Societas Europaea (SE), which is rarely used). As described in further detail below (see "—What are the different types of limited liability companies?"), a new company form was introduced into Austrian company law as of 1 January 2024, the Austrian flexible company (FlexCo). As the concept of a FlexCo has only just been introduced, it remains to be seen how common it will become in practice.

## What are the different types of limited liability companies?

Austrian company law provides for four types of companies with limited liability: GmbH, FlexCo, AG and SE.

A GmbH is the most frequently used business organization in Austria, and it is governed by the Austrian Limited Liability Companies Act (Gesetz über Gesellschaften mit beschränkter Haftung (GmbHG)). GmbHs are required to have at least one director and this may not be a legal entity.

A GmbH may be established and owned by a single shareholder, including multiple layer structures of sole shareholding. Generally, the minimum share capital of a GmbH is EUR 10,000. There are no requirements for the shareholders to be Austrian nationals. Shares in a GmbH may not be publicly traded. Shareholders must be registered with the Austrian company's register, but registration is declaratory in nature, so it is not a required prerequisite to a share transfer. The GmbH's general assembly is deemed to be the supreme body of the company, in particular, enjoying an extensive instruction right vis-à-vis the company's management.

A new limited liability company form, the flexible company (FlexCo), was introduced into Austrian company law as of 1 January 2024. The flexible company can be treated as a hybrid form between a GmbH and an AG. In addition, options for structuring capital measures, that were previously only found in the AktG, have been adopted.

The minimum share capital of a FlexCo is the same as that of a GmbH (EUR 10,000). The capital contribution to be made by the individual shareholder amounts to EUR 1 (whereas in the case of a GmbH, the minimum share capital contribution amounts to EUR 70). By comparison to a GmbH¸ additional flexibilities were implemented in respect of the FlexCo (e.g. voting in text form and simplifications in connection with the transfer of shares). The FlexCo also offers an additional form of participation in addition to the traditional shareholding, the so-called, "enterprise value shares". Shareholders in this class of shares participate in the net profit and liquidation proceeds of the company. However, they cannot (as a rule) participate in the decision-making process of the company.

While the FlexCo benefits from numerous simplifications (as compared to a GmbH) and is designed to give start-ups more flexibility in the type of corporate vehicle that they use to incorporate, some requirements that apply to FlexCo's are more onerous. For example, the requirement to have a supervisory board applies to a FlexCo and is triggered at a lower threshold than a GmbH. A FlexCo is required to have a supervisory board if: (i) it has more than 50 employees; and (ii) one of the two other size criteria is exceeded (balance sheet total of EUR 5 million, or turnover of EUR 10 million). By comparison, a GmbH is only required to have a supervisory board if it has more than 300 employees.

AGs are governed by the provisions of the AktG. As with the GmbH, in principle, the shareholders of an AG may not be held liable for liabilities of the company. One main difference with the GmbH relates to the focus of the AG: whereas a GmbH is designed as a legal entity for a few individuals (usually involved in the company's management), an AG is designed to attract a large number of investors who are not personally involved in the management of the company. Accordingly, shares in an AG may be publicly traded. However, in practice, only about 70 out of approximately 1,200 AGs are listed on a stock exchange. The legislator has also begun to differentiate between listed and non-listed AGs in various legal reforms. AGs must have managing directors and a supervisory board, which are, unlike the managing director of a GmbH, independent from, and not subject to, shareholders' instructions. Generally, the minimum share capital of an AG is EUR 70,000.

## Is there a restriction on shareholder numbers?

Under Austrian law, there is no restriction on the number of shareholders.

## What are the key features of a share sale and purchase?

In a share deal, the legal entity of the target company remains unchanged and, therefore, in principle, agreements entered into by that company and respective parties also remain unchanged. The buyer is not usually liable for the debts of the target; however, if the share capital is not fully paid up or has been repaid, the buyer may be liable to pay up the remainder.

## What are the key features of an asset sale and purchase?

In an asset deal, all or part of the assets of a going concern are acquired. Austria currently has no comprehensive code in relation to the acquisition of a business as a going concern. However, in principle, every single asset must be transferred in compliance with the respective transfer and form requirement for that particular asset. Asset transfers are appealing to the buyer for tax reasons and the opportunity to limit the buyer's risks. Further, the buyer can choose whether to acquire all or only certain assets.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

Negotiations usually begin with the circulation of a letter of intent or term sheet. Usually, letters of intent/term sheets are nonbinding for both parties, but may include an (binding) exclusivity clause. Confidentiality obligations are usually binding.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity:** Exclusivity provisions are usually included in term sheets and letters of intent.

**Break fee:** Break fees are increasingly being seen, particularly during an auction process.

**Confidentiality:** Confidentiality provisions are usually included in term sheets and letters of intent.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Separately negotiated confidentiality or nondisclosure agreements are almost always drafted as a first step in a potential transaction. Depending on the transaction setup, it is also common to include exclusivity agreements. Break fees (if any) are usually not supplemented with separately negotiated agreements.

## Is there a duty or obligation to negotiate in good faith?

Under Austrian law, the parties are free to abstain from concluding a contract at any point until they have reached full consensus on all issues still outstanding; that is, until one party has fully accepted the other party's offer. Until such full consensus has been reached, in principle, no party should assume that a contract will, in the end, be concluded, and, therefore, each party generally acts at its own risk. This principle, however, is modified by the general duty to act in good faith. Legal academics and Austrian courts, therefore, provide that as soon as the parties enter into contractual negotiations, there is a pre-contractual duty to safeguard the other party's interests. Neither party may mislead the other concerning its own willingness and honesty to conclude the contract, especially if one party is aware that the other party is incurring expense in leading to the conclusion of the contract but knows it is not itself willing to close the deal (for whatever reason).

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Very common, especially in a share sale.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Purchase price adjustments are usually based on a cash-free/debt-free mechanism (usually combined with (minimum) working capital adjustments or equity adjustments).

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: The buyer usually prepares the closing balance sheet, whereas measures protecting the seller's interests (e.g., inspection and objection rights/consultation obligations) are implemented.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely; however, a review by auditors is common.

## Is an earn-out common?

Frequency/market practice: Rarely; although IP/IT related acquisitions tend to include earn-out provisions more frequently.

## Is a deposit common?

Frequency/market practice: The buyer is rarely asked to pay the seller a deposit (i.e., nonrefundable deposit for granting an exclusivity period to the buyer, during which period the seller will not negotiate with any other potential buyer).

## Is an escrow common?

Frequency/market practice: Fairly common (in particular if there are concerns about the financial strength of the seller and/or in a scenario where certain risks cannot be covered by the W&I insurance); a portion of the purchase price may either be withheld or placed in an escrow account for a fixed period as security for the payment of any claims under the representations and warranties to meet any warranty or indemnity claims.

## Is a break fee common?

Frequency/market practice: Rarely, no.

# Agreeing to the acquisition agreement → Conditions precedent

## Conditions precedent

Frequency/market practice: Fairly common; besides merger control clearance, which regularly has to be covered by conditions precedent, the agreement may also be subject to the obtaining of certain (legally required) approvals (e.g., by authorities or shareholders) or nonoccurrence of certain material adverse changes prior to completion of the transaction.

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Rarely actually agreed, although negotiations on MAE clauses have been seen more often since COVID-19.

## Is the MAE general or specific?

Frequency/market practice: This will depend on the negotiations, whereas in the current market environment sellers only accept specific MAE clauses.

## Is the MAE quantified?

Frequency/market practice: Very common, if MAE is accepted, it is very common to quantify such events.

# Agreeing to the acquisition agreement → Covenants

## Covenants

Frequency/market practice: Fairly common; to the extent permitted by mandatory law.

## Is a noncompete common?

Frequency/market practice: Very common; a noncompete is very common.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Blue pencil clauses are fairly common, whereas waterfall provisions are rarely used.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common; these are fairly common (in conjunction with a noncompete).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common; these are fairly common (in conjunction with a noncompete).

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Fairly common; these are fairly common to the extent permissible under applicable antitrust laws.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; generally, there is (to the extent permissible under applicable antitrust laws) broad access.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Fairly common; common to update only such schedules that were not available at signing (e.g., contracts). Notification of possible breach has been seen. Breach might lead to the right to terminate (usually depending on the seriousness of the infringement).

# Agreeing to the acquisition agreement → Representations and warranties

## Representations and warranties

Frequency/market practice: Very common; share purchase agreements usually provide for a contractual liability regime of their own kind. However, in case of distressed transactions, representations and warranties will be limited.

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; this is often not quantified, but defined in an abstract manner. In addition, de minimis amounts are agreed upon.

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: This is often limited to actual knowledge and to due and careful inquiry with key persons (e.g., managing directors).

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Fairly common; yes.

## Is disclosure of the data room common?

Frequency/market practice: Fairly common; yes, although certain limitations may apply (e.g., only such facts are deemed disclosed as can be derived (i) using the efforts and having the knowledge of a common buyer or (ii) from an individual document included in the data room (i.e., without having to read various documents and combine the information contained therein)).

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Repetition of representations and warranties

Frequency/market practice: This is fairly common with respect to key warranties (title, no insolvency or others, depending on the business of the target).

## Is it common to repeat warranties at closing?

Frequency/market practice: Fairly common; both repetition at completion and at all times between the signing and completion have been seen. Bring-down certificates are rarely seen.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: Fairly common; both repetition at completion and at all times between signing and completion have been seen. Bring-down certificates are rarely seen.

## Is a bring-down certificate at closing common?

Frequency/market practice: Fairly common (depending on whether W&I insurance is involved).

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: The general standard is true and accurate, whereas qualification (true and accurate in all material aspects) may apply.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: No, this is rarely used.

# Agreeing to the acquisition agreement → Limitations on liability

## Limitations on liability

Frequency/market practice: Very common; both limitations on the amount of liability (caps, baskets, de minimis) as well as time limitations are very common.

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: Usually 100% as to title (and potentially tax) and between 5% and 35% in respect of other liabilities.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: This usually applies only to warranties.

## What are the common exceptions to the cap?

Frequency/market practice: Title and tax (in which case 100% cap applies) and certain covenants (e.g., noncompete).

## Is a deductible or basket common?

Frequency/market practice: Fairly common; a basket is more common.

## Is a de minimis common?

Frequency/market practice: Very common; yes, this is basically seen in every transaction (however, potentially not applicable to tax warranties).

## How long does seller liability survive?

Frequency/market practice: Usually between one and three years. Exceptions for fraud, tax, environmental and title warranties are common.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: Exceptions for fraud, tax, environmental and title warranties are common.

## Is warranty insurance common?

Frequency/market practice: This is rarely used in Austria, but is increasingly seen.

# Agreeing to the acquisition agreement → Set-offs against claims

## Set-offs against claims

Frequency/market practice: Rarely; other than a set-off against claims for tax benefits, the right to set off is usually excluded.

## Is a set-off against claims for tax benefits common?

Frequency/market practice: This is very common.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: This is fairly common for amounts actually received (or amounts that could have been received).

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: It is fairly common for amounts actually received (or amounts that could have been received).

# Agreeing to the acquisition agreement → Damages, knowledge

## Damages, knowledge

Frequency/market practice: Fairly common.

Analysis: Limitation of liability for matters are fairly disclosed.

## Is there an obligation to mitigate damages?

Frequency/market practice: An obligation to mitigate damages is required by law (and contractually specified).

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Fairly common (exclusions relating to tax may apply).

# Agreeing to the acquisition agreement → Dispute resolution

## Dispute resolution

Frequency/market practice: Very common; we see a trend showing that arbitration is becoming less popular, also in cross-border transactions.

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes

## What is the common governing law?

Frequency/market practice: Austrian law.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Fairly common; international investors still tend to prefer arbitration, despite arbitration becoming less common. Common places of arbitration include Vienna, Zurich, Paris and London.

# Agreeing to the acquisition agreement → Stamp duty and tax

## Stamp duty and tax

Frequency/market practice: Very common; usually costs, including fees, expenses and charges, are borne by the party having commissioned such costs. Stamp duty is usually borne by the buyer. Costs for notarization of the transfer agreement (if any) are usually borne by the buyer.

## If stamp duty is payable, is it normally shared?

Frequency/market practice: This is usually paid by the buyer.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: Very common; yes, this can be seen in almost every transaction.

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