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Contributing Editors:
Lorenzo Corte & Scott C. Hopkins
Skadden, Arps, Slate, Meagher & Flom LLP

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Austria

Christian Herbst

Sascha Hödl

Schoenherr

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The Takeover Act

Public bids are regulated under the 1999 Takeover Act (TA), as thoroughly amended by the 2006 TA Amendment Act. The TA is applicable, provided that the target is a joint-stock corporation (AG) based in Austria, and its shares are admitted to trading on the Vienna Stock Exchange (*Wiener Boerse*; VSE) at a regulated market. If the AG is incorporated in Austria but the shares of the AG are not admitted to trading on the VSE but at a regulated market in another Member State of the EU, and a public bid is, or must be, launched, the Austrian Takeover Commission (TC) is the authority in charge of the public bid and the TA provisions regarding, *inter alia*, the "control" threshold triggering a mandatory bid, exemptions from the duty to launch a mandatory bid and defensive measures apply. If a public company is not incorporated in Austria but in another EU Member State and its shares are not admitted to trading on a stock exchange at the seat of the incorporation but on the VSE (if shares are trading on different exchanges within the EU, the first admission of trading takes place on the VSE), the TA provisions regarding the tender offer content and tender offer proceedings apply.

Other regulations

Other legislation relevant to public bids includes:

- The 1965 Joint Stock Corporation Act (*Aktiengesetz*; SCA), *inter alia*, with respect to equal treatment of shareholders and directors' statutory duties. The SCA is applicable to AGs incorporated in Austria, irrespective of whether the AG is a public or a private company (thus, admission to trading is irrelevant).
- The 1989 Stock Exchange Act (*Börsegesetz*; SEA) relates to, *inter alia*, stakebuildings, *ad hoc* disclosure duty and insider trading. The SEA is only applicable to public companies admitted to trading on the VSE. It is irrelevant whether the company is incorporated in or outside of Austria.
- The 2007 EU Merger Act (EU *Verschmelzungsgesetz*) and the SEA allow takeovers by cross-border mergers.
- The Squeeze-Out Act (*Gesellschafterausschlussgesetz*) regulates the squeeze-out of up to 10% of the remaining shareholders in an AG or an Austrian limited liability company (*GmbH*).
- The 2005 Cartel Act (*Kartellgesetz*; CA) applies to mergers not subject to European Commission (EC) merger control. The applicability of the CA only focuses on turnover generated in Austria. It is irrelevant whether the company is incorporated or admitted to trading in or outside of Austria.

The 2020 Investment Control Act (*Investitionskontrollgesetz* or *InvKG*; ICA) regulates investments by foreign investors.

There are regulatory control provisions in certain sectors such as the banking, insurance, utilities, gambling and telecommunications industries, whereby the scope of applicability is differently regulated. The admission of trading (either in or outside of Austria) is irrelevant.

1.2 Are there different rules for different types of company?

As to the applicability of the TA, the SEA, the SCA, the CA and the regulatory control provisions, see question 1.1 above. The TA and the SEA cease to apply after the delisting of a company, irrespective of whether these companies continue to have a dispersed shareholder base or not; however, the SCA, the CA and the regulatory control provisions, if any, are still applicable within the scope outlined under question 1.1 above.

1.3 Are there special rules for foreign buyers?

FDI approval

Under the ICA, acquisition by foreign investors (i.e. investors with their seat outside of the EU, Iceland, Liechtenstein, Norway or Switzerland) of an interest of 10% (for certain highly sensitive sectors), 25%, 50% or more, or of a controlling interest in an Austrian enterprise engaged in specific protected industry sectors (for details on protected sectors, see question 1.4 below), requires advance approval from the Austrian Ministry for Digital and Economic Affairs.

Regulated industries

Except for the requirement for FTA approval, there are no direct Austrian inward investment restrictions. Furthermore, governmental agencies cannot influence or restrict the completion of an acquisition by foreign buyers unless: (i) "fit and proper" tests or regulatory approvals are required; or (ii) licences are subject to revocation in the case of unapproved shareholder changes. Such clearances to close a transaction are required in regulated industries such as the banking, insurance, telecommunications, airline and gambling sectors.

Merger control

Where an acquisition has a community dimension, the EC Merger Regulation applies and fully replaces the Austrian merger control regime. Under the CA, mergers must be notified if: (i) the undertakings participating in the acquisition had a turnover in the business year prior to the merger of more than

EUR 300 million worldwide; (ii) the undertakings participating in the acquisition had a turnover in the business year prior to the merger of more than EUR 30 million in Austria; and (iii) at least two of the undertakings each had a turnover of more than EUR 5 million worldwide. As to transactions that have been implemented since 1 November 2017, a new additional notification threshold applies, which is built on a combination of turnover, transaction value and the target being active in Austria as follows: a notifiable concentration also applies, if cumulatively: the combined worldwide turnover of the undertakings concerned exceeds EUR 300 million; the combined Austrian turnover exceeds EUR 15 million; the value of the concentration (purchase price plus liabilities taken over) exceeds EUR 200 million; and the target undertaking has significant activity in Austria (e.g. a site in Austria or in the digital context, e.g. monthly active users with an Austrian nexus). The CA provides for an explicit exemption for mergers where only one undertaking concerned has a national domestic turnover of more than EUR 5 million and all other undertakings concerned have a total worldwide turnover not exceeding EUR 30 million. Additionally, the CA provides for an effects doctrine limiting the notification requirements for merger transactions to those transactions that have an effect on the Austrian market. Turnover is group turnover; direct or indirect participations of at least 25% must be taken into account. Special rules apply to the calculation of turnover of banks, insurance companies and media mergers.

Real estate

The acquisition of real estate, including certain long-term leases, or of Controlling Shareholdings in companies owning Austrian real estate by non-EU citizens, is subject to notification or approval requirements. The competent real estate authority (i.e. the authority where the real estate is located) will usually grant approval, especially if the property serves business and not private purposes.

1.4 Are there any special sector-related rules?

Regulatory control provisions in certain sectors such as the banking, insurance, utilities, gambling and telecommunications industries may affect the process of an acquisition. Changes of target ownership will usually require advance notification to the relevant government agencies in cases where certain thresholds of stake ownership are reached or exceeded; this government agency can prohibit the acquisition based on the various "fit and proper" tests or approvals required, or by revoking licences in the case of an unapproved shareholder change (e.g. in the banking, insurance, telecommunications, airline and gambling sectors). For example, the acquisition or sale of a shareholding in an Austrian bank, upon which the thresholds of 10%, 20%, 33% or 50% are reached or exceeded, requires notification or approval of the Financial Market Authority (FMA). In addition, every transaction involving a merger or a demerger of Austrian banks needs FMA approval.

Under the new ICA, the direct or indirect acquisition by foreign investors (that is, investors domiciled outside of the EEA and Switzerland) of an interest of 10% (applicable to certain highly protected sectors) and 25%, 50% or more, or a controlling interest in an Austrian enterprise engaged in specific protected industry sectors specified in the Act (including, but not limited to, defence equipment, energy and digital infrastructure, energy and telecoms, semiconductors, cybersecurity as well as supply with vaccines, medical products, etc.) requires advance approval by the Austrian Minister of Digital and Economic Affairs. Lack of approval renders the investment transaction null and void.

1.5 What are the principal sources of liability?

Market manipulation

Market manipulation can take place through: (i) misusing a dominant position; (ii) purchasing or selling financial investments at close of trading with the consequence that investors will be misled; or (iii) misusing occasional or regular access to the media by issuing a statement in relation to a financial investment, where the issuer has acquired a position in the financial investment and will benefit from the statement without revealing the conflict of interest to the public. Fines for the violation of rules on market manipulation have recently been increased and will now amount to up to EUR 5 million for natural persons and EUR 10 million or up to 5% of annual net turnover for legal persons.

Insider dealing

An insider is either a member of a corporate body of the issuer or any person who has access to insider information due to his occupation, duties or his shareholding in the issuer. Whether the bidder qualifies as an insider or not, in either case, if he uses insider information to gain an advantage, he can be punished with a prison sentence of up to five years or a fine. A bidder can also be imprisoned or fined if he uses insider information or is aware that such information qualifies as insider information without the intent to gain advantage of such use.

Takeover law

The civil law penalties for non-compliance with the TA include suspending the voting rights of shares held in the target by a non-compliant bidder. Following publication of a TC suspension order, sellers to a non-compliant bidder can rescind their contracts and require the return of their shares, in consideration for either: (i) the sale price they received; or (ii) the cash value of the shares at either the date on which the contract is rescinded or the date on which the shares are returned. Additionally, administrative and criminal law penalties exist for non-compliance with the TA.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Types of public offers

The TA distinguishes between mandatory offers, voluntary offers, and voluntary offers aimed at control:

(i) Mandatory offers are triggered if a Controlling Shareholding (see below) is acquired; a mandatory offer is subject to minimum pricing rules, must not be made conditional (except for legal conditions like regulatory approvals) and requires a cash offer, but can have a paper alternative in addition.

(ii) Voluntary offers (which are offers that do not lead to a Controlling Shareholding or are launched by an already controlling shareholder) have no restriction in pricing, the consideration may be in cash or securities, and the offer may be subject to justified conditions including minimum or maximum acceptance thresholds of shares that the bidder is willing to acquire.

(iii) Voluntary offers aimed at control are triggered if a non-controlling shareholder (i.e. with a shareholding of less than 30%) makes an offer aimed at control; such offers are subject to the rules on mandatory bids, particularly on cash offers and minimum price. However, voluntary offers aimed at control are subject to a mandatory statutory

50% acceptance threshold; in addition, voluntary offers aimed at control can be made conditional, particularly upon reaching or exceeding a higher acceptance threshold.

Controlling Shareholding
A shareholding of voting stock exceeding 30% triggers the obligation to launch a mandatory offer (the Controlling Shareholding). Concerted actions among shareholders holding together more than 30% of the voting stock also qualify as a Controlling Shareholding triggering the obligation to launch a mandatory offer. A holding of up to 30% of the voting stock does not trigger a mandatory bid (safe harbour provision). However, a shareholding of between 26% and 30% must be notified to the TC; the voting rights on the stock exceeding 26% (up to a maximum of 30%) are suspended *ex lege*.

The suspension of voting rights does not apply, *inter alia*, if there is another shareholder with a shareholding exceeding 26%.

A shareholder who has become subject to the suspension of voting rights has the following options: he can accept the suspension; sell a part of the stock; or launch a public offer by acquiring additional shares and thus exceeding the 30% threshold. The shareholder can also apply to the TC for the suspension of voting rights exceeding 26% (up to a maximum of 30%) to be lifted against submission to and subsequent compliance with the shareholder, with restrictions and conditions protecting the minority shareholders, as imposed by the TC.

Recommended offer scheme
Share purchase agreements will be concluded with large target shareholders, if any, subject to the condition precedent of a successful closure of a (subsequent) voluntary offer aimed at control (e.g. the 90% acceptance threshold is met).

A voluntary tender offer aimed at offering control to the remaining free-float shareholders is subsequently launched subject to the condition that, for example, the 90% acceptance threshold is met. Upon successful closure of the voluntary tender offer, the remaining shareholders (up to 10%) can be squeezed out under the Squeeze-Out Act.

Mergers
Acquisitions of public companies by mergers have been the exception rather than the rule. In 2000, the TC issued a landmark ruling on schemes of arrangement in the HypoVereinsbank and Bank Austria merger (*TC 12.09.2000 GZ 2000/1/4-171*). Highly criticised, the TC applied a new controlling shareholder test, stating that the TA did not apply if the shareholders of the listed target, on completion of the transaction, are not confronted with a new controlling shareholder in the merged legal entity. The 2005 EU Cross-Border Mergers Directive and its implementation in Austria by the 2007 EU Merger Act allows (reverse) takeovers by cross-border mergers. As for listed companies, the 2010 reverse takeover of VSE-listed bwin (Austria) by LSE-listed PartyGaming (UK), which resulted in a delisting of bwin, is the most prominent example. The 2012/13 cross-border SE merger of VSE-listed Intercell AG as transferring company and French Vivalis SA is a case in point regarding a merger of equals/reverse takeover of two EU-listed (biotech) companies.

2.2 What advisers do the parties need?

The bidder is generally supported by a legal adviser (who prepares the legal documentation required in a bid), a tax adviser (who assesses the tax structure and the selection of the bid vehicle), an investment bank (which supports the bidder during the whole bid process) and a qualified independent expert (who reports on the offer document and certifies that the bidder can finance the offer). The target is generally supported by a legal adviser (who prepares the legal documentation) and an independent expert (reports on the terms of the bid). Recently, target boards have also been hiring an investment bank for the issuance of a comfort opinion regarding the price offered by the bidder.

2.3 How long does it take?

Announcement of the intention to make a bid or mandatory offer trigger
From the announcement of a bid or the date on which a fact situation is created triggering the obligation to launch a mandatory offer (see question 4.3 below), certain steps need to be taken and strict filing timelines must be observed.

Preparing and auditing the bid
Following the announcement, the bidder must prepare the offer document and must appoint a qualified independent expert (an auditor or an investment bank) to: (i) report on the offer document, confirming that it is complete and complies with the TA; and (ii) certify that the bidder can finance the offer.

Filing of the offer document
The bidder must file the offer document with the TC within 10 trading days of announcing its intention to make a bid (an extension of up to 40 trading days is possible; for mandatory offers, the period from the acquisition of a Controlling Shareholding to the filing of the offer document with the TC is 20 trading days). The TC may, within a period of 15 trading days, review the bid, request additional information, prohibit the bid or allow the offer document to be published.

Publishing the offer document
The bidder must publish the offer document no earlier than 12 and no later than 15 trading days after filing the offer document with the TC (a copy of the offer document must be sent to the target in advance).

Offer period
The publishing of the offer document triggers the offer period. Such a period must be set at a minimum of four weeks (the minimum offer period was extended from two to four weeks as from 3 January 2018) and a maximum of 10 weeks (an extension by the TC is possible).

The target's obligations
The target boards must appoint an independent expert to report on the terms of the bid and to make a recommendation to the target's shareholders on whether to accept the offer. Furthermore, the target boards have to file a response statement to the bid to the TC, inform the works council and publish their response statements together with the report of the target's independent expert.

Publication of the outcome
The bidder must publish the outcome of the bid immediately after the offer period expires.

Changes to the timetable
If the bid is a mandatory bid or a voluntary bid aimed at control, the offer period is automatically extended for another three months from the date of the announcement of the outcome of the bid; shareholders who have not tendered their shares within the initial offer period thus have another three-month period to decide whether to accept the offer or not.

If the bid is subject to merger control (or subject to other regulatory approvals), the need to apply to the competition (regulatory) authority for clearance may delay the closure of the tender offer.

The maximum period for obtaining regulatory approval must already be mentioned in the offer document and is often subject to negotiations with the TC. Generally, the TC accepts that such a period can be extended beyond the maximum offer period to a total period of about 90 trading days from the date of publication of the offer, in order for government approvals to be obtained. In exceptional cases, especially if tendered shares have been made tradeable on the VSE, this period can be longer (e.g. in the 2004 *Siemens/VA Tech* offer, this period was 140 trading days, and in the *Lufthansa/Austrian Airlines* offer, this period was 114 trading days).

2.4 What are the main hurdles?

The main hurdles tend to be:

(1) announcement of the bidder's intention to make a bid;
(2) notification of the bid to the TC;
(3) publication of the offer document;
(4) response to the offer by target boards; and
(5) publication of the outcome of the bid.

As regards a more detailed description of the milestones, see question 2.3 above.

2.5 How much flexibility is there over deal terms and price?

All shareholders of the target shall be treated equally (Equal Treatment Rule). In a voluntary bid, the bidder can offer cash or securities, usually in companies owned or controlled by the bidder. There are no minimum pricing rules or cash requirements in voluntary bids. The Equal Treatment Rule, however, applies. In a mandatory offer and a voluntary bid aimed at control, the consideration must be the higher of either the: (i) average share price during the six-month period prior to the announcement of the offer; or (ii) highest price paid or offered for target shares by the bidder in the 12 months before the offer is filed with the TC. However, in exceptional cases, the average share price may not be applicable in the case of illiquid markets (*TC 06.11.2012 GZ 2012/1/4-24*). Securities as consideration in a mandatory offer or a voluntary offer aimed at control can only be offered as an alternative to a 100% cash offer. As to the other deal terms, see question 2.9 below. As of 3 January 2018, public offers in connection with an intended voluntary delisting from the VSE by the 75% plus shareholder need to meet an additional minimum pricing test (see question 10.1 below).

2.6 What differences are there between offering cash and other consideration?

In a voluntary offer, the bidder can offer cash or securities, usually in companies owned or controlled by the bidder (or a mixture of cash and securities). In a mandatory offer and voluntary offer aimed at control, the bidder must offer an all-cash consideration but may offer securities in addition to the cash offer. The cash offer must always meet the minimum offer price requirements set out in the TA (see question 2.5 above). The alternative paper offer may, however, be higher than the all-cash offer. If the bidder offers securities as (alternative) consideration: (i) it is up to the shareholder whether to accept securities instead of cash; (ii) securities must have at least the same value as the cash offered (the bidder, however, is free to provide a paper (securities) offer, which is more attractive than the cash offer); and (iii) the bidder must give the target's shareholders enough information to enable them to form an opinion of the securities offered.

2.7 Do the same terms have to be offered to all shareholders?

Based on the applicable Equal Treatment Rule, all shareholders of the target must be treated equally. If the bidder declares that it is aiming for an acquisition of the shares of a target's shareholder on better terms than stated in the offer document, this shall already be regarded as an improvement of the public bid in favour of all recipients.

2.8 Are there obligations to purchase other classes of target securities?

Under a mandatory offer, the bidder is obliged to purchase all (equity) securities of the target company, including (i) listed shares and other listed securities conveying a profit participation or participation in the liquidation proceeds, and (ii) transferable securities entitling the holder to acquire the aforementioned instruments, if such transferable securities have been issued by the target company or an affiliated company. Thus, the bidder is obliged to purchase not only (listed) ordinary shares, but also (listed) non-voting preference shares, call options, convertible and warrant bonds, (listed) participation certificates, (listed) profit certificates and (listed) participating bonds. Partially listed instruments must be purchased as to all securities issued, irrespective of whether the individual security is listed or not.

2.9 Are there any limits on agreeing terms with employees?

There are no restrictions on agreeing a deal-related package of benefits for the target's employees. With regard to notification of a bid to, and a possible statement by, the works council, see question 2.10 hereinafter.

2.10 What role do employees, pension trustees and other stakeholders play?

In a public takeover, the statutory role of the employee is limited to the works council of the target being notified of the public offer. The works council may issue a statement commenting on the public offer; however, there is no legal requirement to issue such a statement. In the past, works councils have not issued formal statements on bids. The TA requires the supervisory board of the target to issue a statement on the public offer. Austrian corporate law provides for employee representation totalling one-third in supervisory boards. Given their minority position on supervisory boards, employee representatives cannot control the contents of the supervisory board's statement on a public offer, in particular whether the statement is positive on the bid, rejects it or is neutral. However, the employee representatives can exercise informal influence and, in exceptional cases, may have actual influence on the board's statement.

Pension trustees have not played a role in Austrian takeovers to date. Hedge funds have played a limited role. To the extent that hedge funds did intervene, such intervention has been in acquiring either a significant stake below 10% or slightly above

10%. With 90% being the squeeze-out level, this was to gain leverage in the attempt of the majority shareholder(s) to take the company private or in trying to drive up compensation as a squeezed-out shareholder.

2.11 What documentation is needed?

The offer document
This is the formal legal document making the offer, which contains detailed information to allow the target's shareholders to decide whether they should sell their shares. It must include a brief expert statement on the completeness of the offer, the compliance of the offer with the TA and the capability of the bidder to finance the offer, and must further contain information about: (i) the terms and conditions of the bid; (ii) the bidder; (iii) the securities for which the bidder is making an offer; (iv) the consideration and the valuation method used; (v) the conduct of the bid, particularly relating to the agents authorised to receive acceptances and pay the consideration; (vi) the maximum and minimum percentages of shares that the bidder undertakes to acquire; (vii) the bidder's existing shareholdings in the target; (viii) the conditions for withdrawing the bid; (ix) the bidder's intentions in relation to the target's business and employees; (x) the period for accepting the bid and paying the consideration; and (xi) the financing of the bid.

The target's documents
The boards of the target must issue their statutory response statements to the bid and submit an independent expert report. Both documents, the target board's response statement and the target's independent expert report, will be published.

Others
Additionally, certain follow-up statements need to be filed by the bidder with the TC and then published (e.g. improvement of the bid statement, a statement on the satisfaction of conditions of the offer, a statement on the outcome of tender proceedings, etc.).

2.12 Are there any special disclosure requirements?

The bidder must disclose in the offer document: (i) the valuation methods used for the determination of the consideration; and (ii) information regarding its liquidity. Furthermore, the bidder is obliged to appoint an independent expert who must issue a separate report to the TC on the completeness of the offer and the correctness of the valuation methods (outlining the valuation parameters in greater detail), and who must confirm in the report to the TC that the bidder can finance the offer. The report issued by the independent expert will only be filed with the TC but will not be published.

The target must appoint an independent expert to report on the consideration and the terms of the bid and must include this report in the target board's response statement. The report of the independent expert of the target will be published together with the target board's response statement.

2.13 What are the key costs?

The key costs incurred in a bid are: (i) fees of advisers (i.e. investment banks, legal advisers, independent experts, etc.); (ii) fees to be paid to the TC (depending on the transaction volume of the takeover); and (iii) any internal costs.

2.14 What consents are needed?

The following consents are required: (i) the bidder's management board and supervisory board (or bidder's board of directors) must pass a resolution to launch a bid; (ii) the appointment of independent experts by the bidder's management board and by the target's management board; and (iii) *de facto* consent by the TC on the contents of the offer document before it is published (see question 2.3). In addition to merger control clearance, and depending on the industry, other regulatory consents may be required.

2.15 What levels of approval or acceptance are needed?

In a voluntary offer aimed at control, the offer is successful only if the bidder receives acceptance declarations that account for more than 50% of the voting shares of the target (statutory acceptance threshold). Voting shares acquired in connection with the offer, e.g. under conditional off-market purchase agreements with core shareholders, i.e. shares acquired parallel to the offer, count towards the threshold. In a straight mandatory and a straight voluntary offer, there are no statutory acceptance thresholds for the offer to be successful. However, straight voluntary offers may have maximum or minimum acceptance conditions. In voluntary offers aimed at control, the bidder may introduce a higher minimum acceptance threshold as condition precedent (e.g. 75% or 90%).

Thresholds are usually set at more than 50% (statutory acceptance threshold), at 75% and sometimes even at 90% of the shares (voting rights) for the following reasons: (i) 50% plus one vote enables a shareholder to take majority decisions in the general meeting, e.g. distribution of dividends and electing members of the supervisory board, which in turn decides on the management board's composition; (ii) 75% of the votes enables a shareholder to pass material decisions for the target's business, amend important provisions of the articles of association and implement most types of corporate restructurings (such as mergers and spin-offs); and (iii) 90% of the shareholding enables a shareholder to initiate a squeeze-out of minority shareholders with the aim to acquire up to 100% ownership.

2.16 When does cash consideration need to be committed and available?

In mandatory offers and in voluntary offers that have a cash component, the independent expert appointed by the bidder and approved by the TC must confirm to the TC that the bidder has the financial means to fully fund the offer. This certificate, which is part of the independent expert's report, needs to be in place before the TC will allow the offer document to be published. In practice, the expert's requirements as to such certification will depend on the size of the offer and the bidder's financial strength. In the case of a financially strong bidder, the bidder's balance sheet and bidder's binding statement to the expert might be sufficient to allow the expert to issue the certificate. With other bidders, a legally binding bank funding commitment or a proof of cash reserves may be necessary.

In mandatory bids and voluntary bids aimed at control, the date of settlement of the consideration may not be later than 10 trading days after the unconditional legal effectiveness of the bid. This is the latest date on which the cash consideration must actually be available. The consideration will be transferred to the respective bank account of the shareholder as mentioned in the shareholders' acceptance notice.

In voluntary bids, the date of settlement of the consideration may be chosen freely by the bidder. Thus, if the offer was a cash offer or a mixed paper and cash offer, the cash consideration must be available at the latest on the date of settlement.

3 Friendly or Hostile

3.1 Is there a choice?

Hostile bids are permitted. However, hostile bids and, thus, takeover battles (the 2004 *Siemens/VA Tech* offer was initially perceived as "hostile") have been rare due to: (i) the two-tier board structure of Austrian stock corporations; (ii) the limited number of publicly held shares (free floats); and (iii) the ability of companies to resist hostile bids.

3.2 Are there rules about an approach to the target?

There are no special rules about an approach to the target other than the following:

- Any approach to the target may either lead to: (i) voluntary disclosure by the target of a bidder's approach to the target management, with the effect of possibly endangering or aborting a later bid; or (ii) a statutory obligation under the TA or the SEA by the target to disclose a possible bid to the public before the official announcement by the bidder of its intended bid (for details on secrecy *versus* disclosure, see question 4.2 below).
- Any approach to the target will also increase the risk of an undesired leak. In the case of a listed bidder, any approach to the target must also take into account disclosure obligations, if any, in the listing jurisdiction of the bidder.

3.3 How relevant is the target board?

As soon as the intention to launch a bid has been announced by the bidder or, prior to such announcement, when the target boards (management board and supervisory board) have been approached by a bidder or have knowledge of the intention of a bidder to launch a bid, the target boards must stay objective (*Objektivitätsgebot*) and may not prevent the public bid (*Verhinderungsverbot*). In particular, the target boards may not take any measures that could prevent the shareholders from making a free and informed decision on the bid or take any action likely to frustrate the bid, unless the shareholders' meeting has approved any specific defence measures after the announcement of the bidder's intention. In the case of a breach of these duties, the target's managing directors could face administrative fines of up to EUR 50,000 and could face additional damage claims under the SCA and the TA (director's liability).

Moreover, target boards must: (i) respond to the bid by way of the target board response statement; and (ii) protect the interests of shareholders, employees, creditors and the public.

As to the defence measures that can be taken by the target boards, see question 8.2 below. The search for a white knight is explicitly permitted under the TA; no approval of the shareholders' meeting is required for this defence measure.

3.4 Does the choice affect process?

In a hostile bid, the bidder and the target typically issue a series of documents, including newspaper advertisements, to persuade shareholders and counter each other's arguments. Furthermore, the target boards will likely take certain defence measures (within the permitted scope of the TA, e.g. they will search for a white knight) and will use the target response statement as an instrument to oppose the public bid.

In a friendly bid, the main document that the target's shareholders receive is the offer document. No defensive measures are taken by the target boards. The target response statement will be a brief statement containing the legal minimum requirements for target response statements. There is no statutory distinction with respect to the offer timetable.

4 Information

4.1 What information is available to a buyer?

Certain information is recorded in the electronic public company register (*Firmenbuch*), including basic corporate documentation and annual accounts and auditor reports. Further information is available on the target's website; in particular, targets must post their comprehensive audit reports and all capital markets publications, including the history of their *ad hoc* statements, on their website. Information on company assets including real estate, patents and trademarks can also be obtained from the relevant public registers. Further, information as to a pending insolvency proceeding can be obtained from the insolvency register. Currently, it is difficult to access shareholder information on an AG, as company law allows bearer shares and also nominee shareholdings, and does not require them to be disclosed, other than in limited circumstances, such as during litigation.

4.2 Is negotiation confidential and is access restricted?

In general, the boards of the target are also bound to comply with the strict rules of *ad hoc* disclosure under the SEA. Under these rules, the boards of the target are required to disclose any information on new facts or occurrences that could materially influence the quoted price, including any information on planned restructuring. In general, price fluctuations of 5% or more are considered to be material. However, an exemption to the *ad hoc* disclosure duty exists when the boards of the target are approached by a potential bidder, provided that such a bidder complies with the confidentiality rules set out under the TA.

Confidential negotiations with the target and/or the target shareholders are therefore possible prior to the announcement of the intention to launch a bid. However, secrecy must be maintained until a bid is announced, to avoid the creation of a false market, unfair disclosure of its bid (or plans that may cause a mandatory bid) and the abuse of insider information. The bidder must notify all persons involved in the bid of their secrecy obligations under the TA and the prohibition of the abuse of insider information under the SEA. Furthermore, according to the TA, a confidentiality agreement must be entered into by all persons involved in the bid.

If the bidder has negotiated with the target before announcing the intention to launch a bid, the boards of the target must also maintain secrecy before the bid is announced, according to the TA (exemption to *ad hoc* disclosure duty). The bidder must again notify all persons involved at target level of their secrecy obligations under the TA and the prohibition of the abuse of insider information under the SEA. A confidentiality agreement must be entered into by all persons involved at target level.

Any leaks of the intention to launch a bid evidenced by share price movements or rumours and speculations on the market

will force the bidder to publish its intention to launch a bid. If the target has been approached for negotiations, the target boards are also independently obliged to publish the intention of the bidder to launch a bid in case share price movements take place or rumours and speculations enter the market following a leak. A leakage strategy must therefore be prepared before negotiations with the target and/or target shareholders are commenced.

4.3 When is an announcement required and what will become public?

The bidder must immediately inform the public (including the FMA and the VSE) and the target of its intention to launch a bid if: (i) its management and supervisory boards have passed a resolution to launch a bid; (ii) there is a leak of the intention to launch a bid evidenced by way of share price movements or by rumours and speculations in the market; or (iii) circumstances arise that trigger the obligation to make a mandatory bid (i.e. the Controlling Shareholding threshold has been exceeded).

Only the mere intention to launch a bid must be announced. No further details must be announced at this stage (including details of prior negotiations or the transfer of information between the bidder and the target), although the bidder generally announces the intended offer price in order to lock in the current share price.

4.4 What if the information is wrong or changes?

If the bidder improves the consideration or makes other modifications to the bid, it is obliged to publish the updated, improved or otherwise modified bid in accordance with the announcement and publication rules under the TA.

The bidder may introduce a condition precedent into the offer document that certain information (e.g. target's solvency) is correct or that there is no material adverse change in the state of the target (on the admissibility of material adverse change clauses, see question 7.1 below).

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Prior to announcement of the bid

To increase its chances of success, a bidder can take an initial stake in the target. However, a controlling shareholder who does not yet have voting rights exceeding 50% must make a mandatory bid if it acquires 2% or more of voting shares within 12 months (known as "creeping in"). As to the disclosure requirements when certain thresholds are met, see question 5.2 below.

After announcement of the bid

The bidder may also acquire a stake in the target after the announcement of the bid. However, the bidder may not acquire shares in the target on better terms than the terms of the bid (i.e. consideration), unless the bidder improves the bid or the TC permits an exception on important grounds. Any acquisitions of shares after the announcement of the bid must be disclosed to the TC.

After closure of the bid

The TA further provides for a post-offer improvement. The bidder will have to make a payment to the shareholders who accepted the offer corresponding to the balance between the share price received in the offer and any higher-per-share consideration paid nine months after the expiry of the offer period. As to the disclosure requirements when certain thresholds are met, see question 5.3 below.

5.2 Can derivatives be bought outside the offer process?

As to derivatives being bought outside the offer process, the rules applicable to the purchase of shares prior to and after announcement and closure of the bid apply. Therefore, such purchases need to be notified to the TC; they impact the statutory minimum price calculation and may thus, *inter alia*, also trigger an improvement of the bid or a price warranty payment after closure of a bid, depending on circumstances; although, difficult calculations as to the price impact, if any, will apply. Since the 2012 and 2015 amendments of the disclosure rules, a broadened definition of financial instruments will now require stakebuilders to disclose relevant stakebuilding even if the instrument does not grant an enforceable right to acquire voting shares but does make the acquisition of voting stock (economically) possible.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

If a buyer acquires or sells, directly or indirectly, listed target shares so that its voting rights reach, exceed or fall below 4%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 75% or 90%, the shareholding must be notified to the FMA, the VSE and the target. The target's articles may provide for a 3% triggering disclosure. Furthermore, under 2007/2010 legislation as amended in 2012 and 2015, most derivative instruments have been caught by the disclosure rules, following the implementation of the EU Transparency Directive into Austrian law. Anyone who obtains a Controlling Shareholding in the target is obliged to notify the TC of such acquisition and must launch a mandatory bid within 20 trading days following such acquisition. Regarding Controlling Shareholdings, see question 2.1 above. A bidder must not sell its shares in the target after the announcement of the bid.

5.4 What are the limitations and consequences?

There are no limits and disclosure duties on the ability to make market purchases or otherwise accumulate shareholdings outside the general bid process, other than those limitations and disclosure duties described in questions 5.1 and 5.2 above.

6 Deal Protection

6.1 Are break fees available?

Break fees are not prohibited. However, they are not common because the payment of a break fee must be disclosed in the offer document and, if excessive, may violate the TA, provided that they hinder competing offers. Even without an agreement on a break fee, under a general rule available under Austrian law, breaking off negotiations without cause may entitle negotiating partners to reimbursement of frustrated costs.

6.2 Can the target agree not to shop the company or its assets?

A standstill agreement between bidder and target, under which

the boards of the target are prevented from actively shopping the company or its surrounding assets, is possible. However, if the target is approached by a potential bidder, it must nevertheless objectively evaluate the competing bid and support such competing bid if it is in the best interest of shareholders, employees, creditors and the public.

6.3 Can the target agree to issue shares or sell assets?

The target may issue shares, sell its own available shares or dispose of "crown jewel" assets to the preferred bidder in order to support the preferred bidder, provided that these actions have been approved by a shareholders' resolution. If this specific shareholders' resolution has not been obtained, such actions will most likely be considered a breach of the duties of the target boards under the TA to stay objective and to not frustrate or prevent the public bid.

6.4 What commitments are available to tie up a deal?

The target boards may recommend the preferred bidder's offer in the statutory target response statement and may publish adverts in favour of the preferred bidder.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Voluntary offers and voluntary offers aimed at control
Under the TA, conditions or rights of withdrawal from a bid must be objectively justified and must not depend entirely on the bidder's discretion. Admissible withdrawal conditions include non-acceptance of a public bid by a sufficient percentage of shareholders (introduction of a minimum acceptance level) and substantial changes in the target's assets or financial position during the bid term (possibly because of certain defence measures initiated by the target boards). The 2003 *GE/Jenbacher* takeover is the lead case on offer conditions, including material adverse change conditions. To date, the practice of the TC on offer conditions has been settled under cases including *VA Tech*, *Austrian Airlines* and *Christ Water Technology*, and *Conwert* (2016).

Mandatory offers
Mandatory bids may not be conditional (except for legally required conditions such as merger control, other regulatory approvals and the approval of the bid by the bidder's shareholders, if required by the bidder's articles or the law where it is incorporated) and may not provide for a right of withdrawal.

Offer invocation
The TC has allowed invocation of offer conditions, provided that certain requirements have been met. In the *Dicom/Topcall* and *Siemens/VA Tech* takeovers, the TC allowed for the possibility of a unilateral waiver of certain conditions by the bidder during the offer term, deeming such a waiver to be an improvement of the offer under the TA. In the *Austrian Airlines* takeover, the TC again qualified the potential waiver of an antitrust clearance condition as an improvement of the offer, provided that shareholders were granted a right to withdraw their declarations of acceptance. The subsequent extension of the term to fulfil the antitrust clearance conditions to obtain EC clearance was considered admissible as an improvement of the offer to prevent failure of the offer.

Finally, also under the heading "improvement of the offer in the interest of the free float", the TC will allow it if a minimum acceptance condition is subsequently waived or lowered.

The TC will require the offer document to clearly state whether and until when, at the latest, a particular offer condition can be waived or, in the case of an acceptance threshold, the threshold can be lowered.

7.2 What control does the bidder have over the target during the process?

The bidder does not have control over the boards of the target during the process and is thus vulnerable to a change of circumstances in the target during the bid process, e.g. due to defensive measures initiated by the target boards. As to the duties of the target boards not to frustrate a bid and to stay objective, see question 3.2 above. The bidder, as shareholder, may claim damages in the case of a breach by the target boards of these duties.

7.3 When does control pass to the bidder?

The bidder can take day-to-day control of the target after the successful closure of the bid by replacing the supervisory board with a qualified majority of 75% of the votes cast (the qualified majority is generally reduced in the target articles to a simple majority of votes cast). Corporate restructurings such as mergers and demergers (other than sales of assets or subsidiaries and in-kind contributions) are possible with a qualified majority of 75% of the shares present at the shareholders' meeting. Members of the management board may, however, only be replaced by the supervisory board of the target prior to expiry of their respective office terms on good cause.

7.4 How can the bidder get 100% control?

Under the Squeeze-Out Act, applying to both listed and unlisted companies, the majority shareholder that owns directly or indirectly 90% of the stated capital of the target may adopt a shareholders' resolution on the squeeze-out of the remaining shareholders (holding up to 10% of the stated capital of the target) with a simple majority of votes. Minority shareholders may not block the squeeze-out but can, under certain circumstances, request a review of the compensation. If the squeeze-out takes place following a public offer no later than three months after the end of the offer period, there is a rebuttable presumption that the compensation for the squeeze-out is adequate if it amounts to up to the highest cash consideration paid in the offer period. As a consequence of the 90% squeeze-out threshold, the anticipated mandatory offer often contains a minimum acceptance threshold of 90% to ensure an immediate follow-up squeeze-out and ultimately the acquisition of 100% of the shares in the target following closure of the tender offer.

8 Target Defences

8.1 What can the target do to resist change of control?

Unsolicited approaches (such as the 2004 *Siemens/VA Tech* offer) are not very common and the engagement of the target boards in frustrating actions (defence measures) has rarely been tested. Further, as a general principle under the TA, the target boards must stay objective and may not prevent or frustrate a public bid (see question 3.2 above).

In line with international practice, the defences available can be categorised into measures affecting: (a) the target's organisational structure (staggered terms of office for members of the target boards can delay the bidder from establishing effective control; registered shares that grant power to nominate members to the supervisory board of target); (b) the target's assets (sale of strategic "crown jewel" assets; acquisition of a direct competitor of the bidder); and (c) the target's capital structure. As to defensive measures regarding the target's capital structure, the following types of measures exist: (i) self-tenders, i.e. the acquisition of own shares, are possible yet subject to strict requirements (maximum 10%); (ii) employee stock ownership plans (ESOPS) may qualify as a defence response; most Austrian listed companies have ESOPS in place; (iii) voting power restrictions (maximum voting rights) are admissible but rare; and (iv) certain US-type poison pills (like "flip-overs") do not work because of the prohibition of unequal treatment of shareholders.

All defensive measures by the boards of the target will require a specific (new) shareholder resolution approving the defence measure. This also includes the use by the management board, with approval by the supervisory board, of pre-authorised capital for the capital increase. Generally, capital increases are admissible, yet may not prove effective because of strict Austrian rules on exclusion of subscription rights.

Under the TA, the target articles may provide that certain restrictive provisions in the articles will be suspended in the case of public offers (e.g. voting power restrictions, or nomination rights of holders of registered shares).

Short-term defence measures available to the target boards in direct response to the offer will, in practice, largely be limited to negatively commenting in the statutory target boards' response statement to the offer, and to soliciting a better tender offer from a friendly third party (white knight). The search for such a white knight is also explicitly permitted under the TA without the prior approval of the shareholders.

8.2 Is it a fair fight?

There are no specific rules in the TA that are designed to create a level playing field between a preferred bidder and a hostile bidder. However, if a competing bid is made (preferred or hostile), the shareholders of the target are entitled to rescind previous acceptances of bids in view of another bid. An indirect level playing field, however, is created by the option for each bidder to improve or modify its bid during the offer period. Further, the TC may permit an extension of the maximum 10-week offer period if a competing bid has been launched within the original offer period. Finally, the boards of the target must stay objective and must refrain from any actions that may prevent or frustrate the bids (with regard to permitted defensive measures or permitted support actions for the preferred bidder, see question 8.1 above).

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The major "success drivers" for the success of an acquisition (bid) are: (i) the consideration offered to the shareholders of the target by the bidder; and (ii) the statutory response statement of the target boards to the bid. Moreover, press releases and advertisements may influence the outcome of the offer process.

9.2 What happens if it fails?

If an initial bid fails, the bidder (and parties acting in concert) cannot make a further bid for the target (or acquire shares triggering a mandatory bid) for one year from publication of the bid's failure (the "one-year blocking period"). If the bidder has announced its intention to make a bid or stated publicly that it does not rule out a bid, and then fails to notify the TC of its bid, the one-year blocking period will begin 40 trading days after the intention to make a bid was announced. If the bidder announces its intention not to proceed with a bid, or that it has triggered an obligation to make a bid when it did not intend to do so, the one-year blocking period starts from the date of this announcement. The TC can reduce the length of the one-year blocking period, provided that it is not detrimental to the interests of the target and its shareholders.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

On 22 February 2021, Starwood Capital launched an anticipatory mandatory offer on VSE-listed CA IMMO, valuing CA IMMO at EUR 3.6 billion; under the successful offer, Starwood Capital increased its participation in CA Immo from below 30% to 58.28%. On 19 May 2021, VSE-listed S-IMMO launched a voluntary offer aimed at controlling VSE listed S-IMMO, which, as one of the offer conditions, listed the cancellation of the maximum voting right in S-IMMO; as such cancellation did not reach the required majority at an extraordinary shareholders meeting held by S-IMMO in May 2021, IMMOFINANZ subsequently cancelled the offer rather than waiving the condition. These offers for CA IMMO and S-IMMO came two years after the public M&A market being substantially depressed, given that no public offer was launched in Austria in 2020 and only one partial offer was launched in 2019.

On 3 December 2021, CPI Property Group SA, announced it: (i) held 21.59%, and under a purchase option an additional 10.47% in IMMOFINANZ; and (ii) intended to launch an anticipatory mandatory offer on VSE-listed IMMOFINANZ at EUR 21.20 per share. On 6 December, SIMMO, which at the time of the announcement held a 14.23% participation in IMMOFINANZ, announced a (defensive) partial offer for up to additional 10% in IMMOFINANZ at EUR 23 per share. The SIMMO/IMMOFINANZ partial offer was launched on 23 December 2021 and the CPI/IMMOFINANZ full offer was published on 11 January 2022. On 26 January 2022, CPI announced that it had acquired additional 8% in IMMOFINANZ from activist shareholder Petrus at 22.70 per share, thus increasing the offer for IMMOFINANZ to that price. Between 26–31 January 2022, the bidder CPI announced the following: it had requested an extraordinary shareholders' meeting of SIMMO with the agenda item to cancel the maximum voting right in SIMMO's articles, and that CPI and SIMMO had reached an agreement that CPI would increase its offer price for IMMOFINANZ shares to EUR 23 per share; in turn SIMMO would tender its entire shareholding held in IMMOFINANZ into the CPI/IMMOFINANZ offer and also pass on to CPI all shares that would be tendered into the SIMMO/IMMOFINANZ. partial offer. Given that the CPI/SIMMO/IMMOFINANZ situation thus turned from hostile to friendly, it is expected that CPI will take full control of IMMOFINANZ upon completion of the public offer and ultimately achieve the intended IMMOFINANZ/SIMMO merger.

On 9 September 2021, the ECJ ruled that the proceedings before the Austrian Takeover Commission have a rule of law deficit: in the ECJ's opinion, the Takeover Commission does not meet the requirements of an independent and impartial tribunal within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union. The Austrian legislator will now need to amend the takeover law, allowing for a separation of the investigative and decision-making roles of the Takeover Commission and providing separate judicial review possibilities of issues of fact and the law. Moreover, current competences between the ATC and the FMA relating to notifications on participations in listed companies relating to "acting in concert" need to be fixed by such reform.

Under the new ICA, enacted in 2020, a broadened governmental approval requirement will apply to listed Austrian targets engaged in certain industry sectors or having certain (digital) infrastructure. A condition precedent on clearance of the transaction by the Austrian Ministry for Digital and Economic Affairs will thus need to be included in the offer documentation.

Legislative changes in 2019 relevant for listed companies included new rules on related party transactions and "say on pay". The rules first showed effect in the 2020 general shareholder meeting (AGM) season. The Directive 2017/628/EU to encourage long-term shareholder engagement was implemented in Austria with the aim of minimising the administrative burden on listed companies by avoiding any "gold plating". When implementing the rules on the identification of shareholders, the Austrian legislator utilised the scope provided by the Directive, requiring listed companies to obtain information from intermediaries (banks) only on such stockholders that own more than 0.5%. As to "say on pay", the implementation again opts for a board-friendly implementation by giving the shareholders a non-contestable advisory vote on the remuneration policy and the remuneration report. On material-related party transactions, the amendment law makes extensive use of the exceptions provided by the Directive, subjecting disclosure only of certain material-related party transactions and leaving approval of relevant transactions with the supervisory board rather than the shareholders' meeting. Materiality thresholds as to approval and publication requirements differ; it is 5% for approval and 10% for publication, in each case of the balance sheet total. Listed companies must thus approve and disclose material transactions with related parties that cross a materiality threshold of 5% (approval) and 10% (publication), respectively, in each case of the balance sheet total of the company under the annual accounts of the previous year, as to publication no later than upon conclusion of the transaction.

The new disclosure rules on board recommendation and relevant third-party transactions and the requirement for boards to regularly put board remuneration (policy) on the agenda of shareholders' meetings will allow activists to increase pressure on the management without having to request specific agenda items on these topics in shareholders' meetings.

COVID-19 legislative measures provided the basis for virtual AGMs for Austrian companies in 2020. Given that the pandemic has not ended, the statutory authorisation was extended and allows listed companies to continue to hold their AGMs virtually throughout 2022.

Christian Herbst has been a partner at Schoenherr Vienna since 1990. Christian's main areas of practice are M&A, venture capital, takeover and corporate finance transactions. Christian advises and represents mostly foreign clients in cross-border financial and corporate transactions, including acquisitions and divestitures by way of open bids or otherwise, public tender offers, restructurings and joint ventures, as well as related corporate litigation and arbitration. In over 25 years of transactional practice, Christian has been involved in many cases as lead counsel, in highly publicised privatisations, M&A deals and public takeovers in Austria and the CEE region, including recently on public M&A advising on *Starwood Capital/CA Immo* (2021), *Vonovia/BUWOG* (2018), *Starwood Capital/Immofinanz* (2018), *Cubic* (London) *Limited/C-Quadrat/HNA* (2018/19), and *America Movil/Telekom* Austria (2014). Recent high-end private M&A transactions advised by Christian include *Cerba Health/Lifebrain* (2021), *AddlLife/DACH MedicalGroup* (2020), *Liechtensteinische Landesbank/Constantia PB* and *Kansai Paint KK/Helios Coatings*. Christian holds law degrees from the University of Salzburg (*Dr. iur.*, 1982) and Harvard University (LL.M., 1984), and has practised with an NYC firm. Christian is a lecturer on international M&A transactions at the Vienna University of Economics and Business Administration, and has published extensively on issues relating to M&A, corporate and takeover law. Christian also served as Co-Chair of the Corporate & M&A Law Committee of the International Bar Association (2015–2016).

Schoenherr
Schottenring 19
A–1010 Vienna
Austria

Tel: +43 1 534 37 50129
Email: ch.herbst@schoenherr.eu
URL: www.schoenherr.eu

Sascha Hödl is a partner at Schoenherr Vienna, focusing on M&A, public takeovers and restructurings in the banking sector. He has been involved in high-profile public takeover transactions in Austria and continuously represents domestic and international blue chips in highly publicised M&A deals in Austria and the CEE region. Most recently, he has advised on the ECJ ruling with respect to the concerted action decision of the ATC in the *ADLER/CONWERT* case, triggering a necessary reform of the ATC. Since the outbreak of the global financial crisis, Sascha has been representing Austrian banks in bail-outs and high-profile banking M&A transactions, in particular as successful advisor on the sales of participations and assets held by the wind-down units established by Austrian banks during the financial crises. During the COVID-19 pandemic, he assisted the Republic of Austria in establishing the state agency COFAG and in structuring the financial aid measures granted by COFAG to the Austrian economy. Sascha graduated from the University of Graz, Austria, in 1993, received his doctoral degree in 1996 and was admitted to the Austrian Bar in 2001. He is also a graduate of Harvard Law School (LL.M., 2000) and practised with a now UK-based international law firm before joining Schoenherr in 2000. Sascha is a lecturer on international M&A transactions at the Vienna University of Economics and Business Administration.

Schoenherr
Schottenring 19
A–1010 Vienna
Austria

Tel: +43 1 534 37 50266
Email: s.hoedl@schoenherr.eu
URL: www.schoenherr.eu

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