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Edited by Dirk Van Gerven

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PART II

Application in the EU Member States

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1

Austria

FLORIAN KHOL AND VIKTORIA EBNER

Binder Grösswang Rechtsanwälte OG

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I Introduction

- 1.1 In Austria, the Prospectus Directive was implemented by a comprehensive amendment¹ of the ‘Capital Market Act’² (the ‘CMA’). The CMA applies to all public offers³ of securities or investments within Austria and governs the necessity, content and publication requirements of a prospectus in the event of a public offer of securities or investments, as well as the content and publication requirements of

1.1 Prospectus for the Public Offering of Securities in Europe

a prospectus for admission to trading on a regulated market of an Austrian stock exchange. The amended CMA entered into force on 10 August 2005.

- 1.2 Until the implementation of the Prospectus Directive in August 2005, as in most other Member States, different rules applied in Austria for prospectuses in connection with the public offer of securities or investments and in connection with the listing admission of securities on an Austrian stock exchange: (i) The CMA provided, inter alia, for the publication of a prospectus in any case of an initial public offer of securities or assets or investments in Austria; and (ii) the ‘Stock Exchange Act’⁴ as amended, provided, inter alia, for the publication of a prospectus for the listing admission of securities or investments on the official and semi-official market of an Austrian stock exchange.
- 1.3 Since the implementation of the Prospectus Directive in August 2005, the content and publication requirements for prospectuses are exclusively governed by the CMA. The Stock Exchange Act governs, inter alia, the rules for listing admission of securities, insider trading and transparency.
- 1.4 In addition to the CMA and the Stock Exchange Act, the competent national supervisory authority (the Financial Market Authority (‘FMA’)) issued several regulations and circular letters on specific topics, mainly to clarify the CMA and Stock Exchange Act.⁵

II Competent authority

- 1.5 In Austria, until the implementation of the Prospectus Directive in August 2005, the Vienna Stock Exchange (*Wiener Börse*) was competent for the approval of prospectuses for the admission to trading but not for the approval of prospectuses for public offers without admission to trading. As the Vienna Stock Exchange during the discussion of the implementation of the Prospectus Directive refused to become competent for the approval of all prospectuses, the competence for such approvals has been allocated to the FMA (Art. 8a CMA).
- 1.6 The FMA is an independent, autonomous and supervisory authority for the Austrian financial market, established as an institution under public law. It is responsible for the supervision of credit institutions, insurance undertakings, pension funds, staff provision funds, investment funds, investment service providers, companies listed on the stock exchange, as well as stock exchanges themselves. The FMA monitors both stock market and over-the-counter (OTC) trades.
- 1.7 To supervise the Austrian financial market, the FMA takes any measures necessary to ensure compliance with provisions of law; defines minimum standards and publishes regulations putting legal provisions into concrete terms; works out, in discussions with market participants, proposals to ensure

that the Austrian financial market permanently adheres to high standards; represents Austria's interests in EU and other international bodies; and supports cooperation with other supervisory authorities, such as the International Organisation of Securities Commissions (IOSCO), the Committee of European Securities Regulators (CESR) and in the expert groups of the European Commission.

- 1.8 With respect to public offers of securities and admissions to trading the FMA is especially competent for:
- (i) the public offer of securities in the territory of Austria;
 - (ii) approval of prospectuses for public offers in Austria and admissions to trading on Austrian regulated (official and semi-official) markets; and
 - (iii) admissions to trading on a regulated market of another Member State of the EEA in the event that Austria is the home Member State⁶ of the issuing company.
- 1.9 In addition to the FMA, *Oesterreichische Kontrollbank Aktiengesellschaft* ('OeKB') serves as Austria's main financial and information service provider for the export industry and the capital market. In this function, OeKB is the competent notification office (*Meldestelle*), which acts as a depository for the prospectuses to be issued in compliance with the CMA and the Investment Fund Act.⁷ The notification office examines prospectuses, submitted as required for the admission to trading on a regulated market and for public offers of securities and investments as defined in the CMA, as to whether the liability of drawing up a prospectus has been formally complied with. A further task is the safekeeping of prospectuses for a period of fifteen years from the date of submission of the prospectus to ensure preservation of evidence in case of possible future compensation claims. The notification office has to answer inquiries regarding compliance with the formal publication regulations according to the CMA within three working days, and provides, upon request, copies of prospectuses filed (Art. 12(2) CMA).
- 1.10 Further, within the framework of implementing the EU Transparency Directive⁸ in Austria, OeKB was assigned to establish a system for central storage of regulated information on Austrian issuers (see no. 40 of this chapter). OeKB acts as the officially appointed storage system and operates this system named IssuerInformationCenter Austria. The purpose of the IssuerInformationCenter Austria is to receive, store and make available on an anonymous basis regulated information on Austrian issuers, whose securities are admitted to trading on a regulated market. Issuers can quickly and easily transfer regulated information via OeKB's web-based EmittentenPortal Austria (IssuersPortal) within a secure environment, i.e., via electronic upload of the documents, either in pdf- or txt-format. Subsequently, the documents are forwarded to the IssuerInformationCenter. All documents are filed in their original format and are available for download in their original format free of charge.⁹

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1.11 Prospectus for the Public Offering of Securities in Europe

1.11 The competence of the FMA is interrelated with the question of whether Austria may be considered the home Member State as set forth in the CMA (Art. 1(1)(12) CMA). It depends on a number of circumstances whether the FMA is competent to approve a prospectus:

- (i) the issuer's place of business in accordance with applicable law or its articles of association (i.e., situated in Austria, in another Member State or outside the European Union);
- (ii) the type of securities which are offered (i.e., equity or non-equity securities);
- (iii) the place where the offer of securities is made.

In the most relevant cases the competence of the FMA further depends on whether the offer includes equity securities or non-equity securities with a nominal value per security of less than €1,000 by an issuer with a registered office in Austria.

1.12 If Austria is not the home Member State, the FMA can transfer its authority to approve a prospectus to the Member State where the offer or admission to trading takes place (Art. 8(6) CMA). Such transfer of authority will only occur when the link with Austria is remote and the FMA considers another regulatory authority to be better qualified to examine the prospectus. Likewise, the FMA can in similar circumstances also accept a transfer of power from the national regulatory authority of another Member State provided that this authority agrees with the transfer to the FMA (Art. 8(6) CMA).

III Procedure of prior approval and appeal

1 Offer of securities to the public

A Procedure

1.13 A public offer of securities and assets shall be permissible within Austria only if a prospectus that has been prepared and approved in accordance with the CMA by the FMA (or by a competent authority of another EU Member State) is published at least one working day in advance (Art. 2 CMA).

A public offer is a declaration of the intention to sell securities or assets or investments addressed to the general public. Such declaration of intention addressed to the general public is in any case deemed to be given if the identity of the persons to whom the offer is addressed has not been specified by the offeror before submitting the declaration (Art. 1(1)(1) CMA).

1.14 To receive the approval for a prospectus an application has to be filed with the FMA with, inter alia, the following documents attached: (i) a signed prospectus; and (ii) a cross-reference list if the prospectus is not drawn up exactly

in the manner as provided for pursuant to the relevant Annexes of the Prospectus Regulation.

- 1.15 Within ten working days of receipt of the application for approval of a prospectus, the FMA shall announce whether it needs more information or if the prospectus is approved. This period is statutorily extended to twenty working days if the prospectus is filed for an initial public offer. If the FMA does not react within the said time periods the prospectus shall not be deemed approved (Art. 8a(3) and (4) CMA). The FMA shall approve the prospectus if it is complete, coherent, clear and complies with the CMA.

In practice, the draft prospectus as well as the timetable for the offer are filed and discussed with the FMA prior to the formal application to ensure approval in time.

- 1.16 Private placements are not subject to the prospectus requirement as they do not qualify as public offers of securities or investments. In case of a private placement, the offeror is entitled to publish an offering memorandum or any other information without the approval of the FMA to the extent that this memorandum and/or information concerns a private placement addressed only to a limited circle of persons (for further exemptions see nos. 17 to 18 of this chapter). In this case, the content and publication requirements of the Prospectus Directive and Prospectus Regulation will not apply. However, certain notification requirements have to be considered (see V. Publications and Advertisements of this chapter).

B Exemptions

- 1.17 The CMA provides exemptions from the obligation to publish a prospectus for certain public offers (Art. 3 CMA). The exemptions correspond more or less with the exemptions set forth in Article 4(1) of the Prospectus Directive (for details see chapter 1, no. 15).

In practice, the most relevant exemptions from the obligation to publish a prospectus are:

- (i) offers of securities addressed only to Qualified Investors (see no. 18 of this chapter);¹⁰
- (ii) offers of securities addressed to fewer than 100 persons in a given Member State, other than qualified investors;
- (iii) offers of securities addressed to investors who acquire the securities for a total consideration of at least €50,000 per investor for each separate offer;
- (iv) offers of securities whose denomination per unit amounts to at least €50,000; and/or
- (v) offers of securities having a total consideration of less than €100,000, calculated over a period of twelve months.

The above described offers do not qualify as public offers of securities and can be marketed without a prospectus. Moreover, any publication of information

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about the offer, so long as it remains within the above limits, will not be subject to prior approval by the FMA and the content and publication requirements for prospectuses will not apply (see V. Publications and Advertisements of this chapter).

Any subsequent resale of the securities shall be considered as a separate offer subject to the prospectus obligation if it does not fall within one of the above exemptions.

1.18 Qualified investors are deemed not to require the protection of a prospectus as they are thought to have sufficient expertise and knowledge to ascertain the risks attached to the securities offered. The following entities/persons are considered qualified investors:

- (i) legal entities regulated or authorised to operate in the financial markets, including credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment vehicles and their management companies, pension funds and their management companies, commodities dealers, and entities not authorised or regulated for this purpose whose sole object is to invest in securities;
- (ii) national and regional governments, central banks, international and transnational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and similar international organisations;
- (iii) legal entities that do not qualify as small-and medium-sized enterprises (SMEs);¹¹
- (iv) natural persons who reside in Austria and who expressly apply to be deemed a Qualified Investor by the FMA to be so characterised if they meet at least two of the following criteria: (1) the person has carried out an average of at least ten transactions of significant value on the securities markets per quarter during the past four quarters; (2) the value of that person's securities portfolio exceeds €500,000; and (3) the person works or has worked for at least one year in the financial sector in a position that requires knowledge of securities investments.

C Appeal

1.19 Any decision of the FMA can only be appealed before the Austrian Administrative Court (*Verwaltungsgerichtshof*) or under certain circumstances before the Austrian Constitutional Court (*Verfassungsgerichtshof*) within six weeks as from the notification of the decision.

1.20 In principle, such appeal has no suspension effect with regard to the decision of the FMA unless suspended execution is granted by the Administrative Court or Constitutional Court. In addition, the courts may under certain circumstances grant interim measures to safeguard interests of the parties.

2 Admission to trading on a regulated market

- 1.21 As mentioned above, securities may not be admitted to trading on a regulated market unless a prospectus has been approved by the FMA or the competent regulator of another Member State and was duly published. In this case, the procedure to request approval of the prospectus is the same as the procedure applicable to a public offer (see nos. 13 through 18 of this chapter).

IV Content and format, language and supplements of the prospectus

1 Content

- 1.22 A prospectus shall contain all information that is needed in order to enable investors to reach an informed decision on the financial situation of the issuer, in particular on its assets and liabilities, the earnings situation, future prospects and rights attached to the securities or investments (Art. 7(1) CMA). Specifically, a prospectus has to be drawn up pursuant to the information referred to in Article 3 to Article 24 of the Prospectus Regulation and the Annexes thereto (for details see chapter 1, nos. 29 to 33).

- 1.23 In case the final amount of securities or investments to be offered or the final offer price or exchange ratio is not known at the beginning of the public offer, which is usually the case in initial public offerings (IPOs), such information must not be included in the approved prospectus. However, the final amount of securities to be offered or the final offer price has to be filed with the FMA and published accordingly (see no. 33 of this chapter) (Art. 7(5) CMA).

- 1.24 Thus, the main rule for contents of the prospectus contained in Article 5 of the Prospectus Directive is almost literally implemented into Austrian law.

2 Summary

- 1.25 As a general rule, each prospectus should contain a summary.¹² The summary must briefly convey the essential characteristics and risks associated with the issuer, any guarantor and the securities (Art. 7 CMA).

- 1.26 Further, the summary must contain a warning (Art. 7(2) CMA) that:
- (i) it should be read as an introduction to the prospectus;
 - (ii) any decision to invest in the securities should be based on the prospectus as a whole;
 - (iii) if a claim with respect to the information contained in the prospectus is brought before the courts, the issuer has to bear the cost of translating the prospectus before the commencement of legal proceedings; and
 - (iv) those persons who have prepared the summary, including any translation thereof, and applied for its notification, shall be held civilly liable but only if the summary is misleading, inaccurate or inconsistent when read together with the rest of the prospectus.

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1.27 Prospectus for the Public Offering of Securities in Europe

1.27 The summary must be drawn up in the language in which the prospectus was originally prepared. The CMA neither provides for a translation of the summary into German¹³ if the prospectus is drawn up in English or another language accepted by the FMA in a regulation (see no. 32 of this chapter) nor for a limit of 2,500 words as recommended by the Prospectus Directive (see Chapter 1, vol. I, of this book, no. 35).

3 Format

1.28 At the offeror's/issuer's discretion the prospectus can be drawn up as a single document or as multiple separate documents. A prospectus consisting of multiple separate documents shall allocate the content to:

- (i) a registration document (with information relating to the offeror or the issuer);
- (ii) a securities note (with information relating to the securities to be offered or admitted to trading); and
- (iii) a summary note (Art. 7(3) CMA).

1.29 Using a tripartite prospectus may be useful if the issuer intends to make multiple offers of different types of securities within one year (being the term within which the approval by the competent authority of a registration document remains valid).

1.30 For the public offer or admission to trading of certain types of securities (such as non-equity securities, including warrants in any form issued under an offering programme, or non-equity securities issued in a continuous or repeated manner by credit institutions), the prospectus can, at the discretion of the issuer, offeror or person requesting admission to trading on a regulated market, consist of a base prospectus containing all relevant information about the issuer and the securities offered or to be admitted (Art. 7(4) CMA). Using a base prospectus may be useful in the event the issuer intends to offer non-equity securities in the framework of a debt issuance programme. The final terms of the offer can be omitted from the base prospectus and can be published and deposited with the FMA at the time of each individual offer of debt securities. These final terms do not need to be approved by the FMA. It is important to note that the FMA will see to it that final terms are only used to communicate information to the market which has already been provided for as an option in the base prospectus.

4 Supplements

1.31 In the event that a significant new factor arises or a material mistake or inaccuracy of the approved prospectus occurs in the period between approval of the prospectus and the close of the offer or the admission to trading, the issuer shall prepare a supplement to the prospectus. This supplement must be

immediately published in the same way as the prospectus has been published (see no. 33 of this chapter) and simultaneously filed with the FMA. The FMA has to approve the supplement within a maximum period of seven working days (Art. 6(1) CMA).

5 Language

- 1.32 The prospectus for public offers in Austria or an admission to trading on an Austrian stock exchange shall be prepared in German and English.¹⁴ The summary must be drawn up in a generally understandable language. In practice, English is commonly accepted as a generally understandable language. Nevertheless, it may be argued from a consumer protection point of view that only German qualifies as a generally understandable language. Therefore, it is common practice that, for example, terms of conditions of a bonds offer are drawn up in both the English and the German language irrespective of whether the other parts of the prospectus are drawn up in English only.

V Publication and advertisements

1 Method of publication

- 1.33 The German version of Article 14(1) and (2) of the Prospectus Directive was more or less literally copied into the CMA (Art. 10(2) and (3) CMA). The prospectus is therefore deemed to have been duly published if:
- (i) it is (entirely) published in the *Amtsblatt zur Wiener Zeitung* (Austria's official gazette) or in a newspaper distributed throughout Austria;¹⁵ or
 - (ii) is made available free of charge in printed form at the market where the securities will be admitted for trading or at the registered office of the issuer or¹⁶ at the offices of the financial intermediaries, including paying agents; or
 - (iii) is published in electronic form on the issuer's website and as the case may be on the website of the financial intermediaries including paying agents; or
 - (iv) in electronic form on the website of the regulated market where the admission to trading has been applied for; or
 - (v) in electronic form on the website of the FMA or a website of a third party retained by the FMA, provided that the FMA has decided to provide such services.¹⁷
- 1.34 In a circular letter (the 'Circular Letter'),¹⁸ the FMA stated that for publication to be deemed valid in Austria the prospectus must be available in Austria or may be obtained within Austria. This statement implies that for the purpose of a public offer in Austria it may not be sufficient to make the prospectus available solely at a registered office of an issuer outside of Austria without at the