Experiences from the Implementation of the Cross-Border Mergers Directive in Austria

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1 Introduction

With the implementation of the EU Cross-Border Mergers Directive\(^1\) by the Corporate Law Amendment Act 2007 (Gesellschaftsrechtsänderungsgesetz 2007),\(^2\) the Austrian legislator introduced the EU Merger Act as a new and separate legal framework for cross-border mergers under participation of Austrian corporations (Kapitalgesellschaften) as well as certain amendments to the existing Austrian merger regime. The EU Merger Act entered into force on 15 December 2007 and transferred most of the core provisions of the EU Cross-Border Mergers Directive, including the requirements for the documentation and scrutiny of the merger, the proceedings before the Austrian courts as well as specific provisions on the exit of dissenting (minority) shareholders and the protection of creditors. Any other aspects not expressly covered by the EU Merger Act have been addressed by reference to existing national laws on domestic mergers in Austria. These include, for instance, relevant provisions of the Austrian Act on Limited Liability Companies (Gesetz über Gesellschaften mit beschränkter Haftung) or the Austrian Stock Corporations Act (Aktiengesetz). The provisions of the EU Cross-Border Mergers Directive regarding employee participation rights have been implemented by an amendment (expansion) of the Austrian Labour Constitution Act (Arbeitsverfassungsgesetz).

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According to the Austrian legislator, the introduction of the EU Merger Act as a separate legal framework has been chosen over the (sole) expansion of existing national laws in order to facilitate the structure and understanding of the Austrian legal system and allow an easier reaction to future developments on the European level.\textsuperscript{3} Although, it can be confirmed that the EU Merger Act indeed facilitated the general understanding of the Austrian (cross-border) merger regime, it will be shown that many practical issues experienced in the course of cross-border mergers in Austria stem from provisions applicable on domestic mergers, which are consequently applied on the European scale.

2 Scope of Application

The EU Merger Act generally applies to cross-border mergers of Austrian limited liability companies (Gesellschaften mit beschränkter Haftung) and Austrian stock corporations (Aktiengesellschaften) with corporations (Kapitalgesellschaften) founded or having their registered office, principal administration or main establishment in another EU member state or a member state of the EEA. Although not expressively mentioned, the EU Merger Act also covers cross-border mergers of (existing) European companies (SEs) provided that the concerned merger does not involve the establishment of a new SE.\textsuperscript{4} The EU Merger Act governs inbound mergers (Hineinverchromelzungen), where a corporation from another EU/EEA member state is merged into an Austrian corporation as absorbing corporation, as well as outbound mergers (Hinausverschmelzungen), where an Austrian corporation is merged as transferring corporation into a corporation from another EU/EEA member state.\textsuperscript{5} The EU Merger Act further applies to absorbing mergers (Verschmelzungen zur Aufnahme) as well as mergers by formation of a new corporation (Verschmelzungen zur Neugründung).\textsuperscript{6} Exceeding the minimum requirements imposed by the European legislator, whereas cross-border mergers shall only be possible between types of companies which may merge under the national laws of the relevant EU member state,\textsuperscript{7} Austria generally enabled Austrian corporations to merge with any kind of corporations of other EU/EEA member states in the sense of the EU Cross-Border Mergers Directive.\textsuperscript{8}

Against the background of its focus on corporations, the EU Merger Act does not apply to mergers involving other corporate forms, such as the general partnership

\textsuperscript{3}Government Explanations to the GesRÄG 2007, ErläutRV 171 BlgNR 23, GP 1.
\textsuperscript{4}The cross-border merger by formation of a new SE is generally covered by Council Regulation (EC) No 2157/2001 (see Gassner et al. 2010, para 2).
\textsuperscript{5}See Frotz and Kaufmann (2013), § 2 VerschG, paras 6–7.
\textsuperscript{6}See Aburumieh et al. (2014), p. 434.
\textsuperscript{7}Art. 221 para 1 (a) Company Law Directive.
\textsuperscript{8}Government Explanations to the GesRÄG 2007, ErläutRV 171 BlgNR 23, GP 1.
(Offene Gesellschaft), the limited partnership (Kommanditgesellschaft), the European economic interest group (Europäische wirtschaftliche Interessenvereinigung), the savings bank (Sparkasse) or the private trust (Privatstiftung). In addition, the Austrian legislator chose to exclude mergers involving an Austrian cooperative society (Genossenschaft) from the scope of the EU Merger Act. In accordance with the EU Cross-Border Mergers Directive, the EU Merger Act further excludes cross-border mergers involving a company, the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders’ request, repurchased or redeemed, directly or indirectly, out of the assets of that company.

3 Outline of Cross-Border Merger Proceedings in Austria

3.1 Documentation

3.1.1 Common Draft Terms of the Cross-Border Merger (Verschmelzungsplan)

The common draft terms of the cross-border merger (common draft terms) constitute the basis for a cross-border merger under Austrian law. Similar to domestic mergers, the common draft terms must be prepared and concluded by the management bodies of the merging corporations in the form of a notarial deed (Notariatsakt).

The EU Merger Act basically follows the content requirements provided by the EU Cross-Border Mergers Directive. In addition, the EU Merger Act requires the management bodies to include information regarding the cash settlement offered to (minority) shareholders dissenting to an intended outbound merger (see Sect. 4.2.2). This information can only be omitted if all shares in the transferring corporation are held by the absorbing corporation (100% cross-border upstream merger) or all shareholders waive their right for cash compensation, either by written declaration or in the course of the shareholders’ meeting resolving on the merger (see Sect. 3.2). In the case of a 100% cross-border upstream merger, it is further not required to include information on the exchange ratio, the allocation of shares in the corporation evolving from the merger or the date from which these shares grant profit participation rights.

9See Gassner et al. (2010), para 3.
11Art. 120 para 3 EU Company Law Directive.
12Sect. 4 EU Merger Act.
13Sect. 5 para 4 EU Merger Act.
14Sect. 5 para 3 EU Merger Act.
The common draft terms must be submitted to the shareholders of the merging corporations within one month prior to the shareholders’ meeting resolving on the merger (see Sect. 3.2). Furthermore, the common draft terms must be published within the same one-month period. In this connection, the EU Merger Act provides for two alternatives. First, the common draft terms can be filed with the Austrian commercial register and a reference to such filing published in the Austrian Official Gazette (Amtsblatt zur Wiener Zeitung). Second, the common draft terms and the reference can be published in the Austrian edicts archive (Ediktsdatei). In any case, the reference must include (1) the legal form, company name and official seat of the merging corporations, (2) the register and registration number for the documents deposited by each merging corporation pursuant to article 3 Sect. 3 of Directive 2009/101/EG, as well as (3) an indication of the arrangements for the exercise of the rights of creditors and minority shareholders and the addresses where the relevant information can be obtained free of charge (see Sects. 4.1.2 and 4.1.3). If the sum of the share capital and fixed reserves of the corporation evolving from the cross-border merger is less than of the Austrian transferring corporation, known creditors of the Austrian transferring company must be directly notified (see Sect. 4.1.2).

### 3.1.2 Management Report

The management bodies of the merging corporations must further prepare a management report on the intended cross-border merger. The minimum contents of the management report are stipulated by the Austrian Stock Corporation Act (as for domestic mergers) and supplemented by the EU Merger Act.

In detail, the management report must provide a legal and economic explanation of (1) the presumed consequences of the merger, (2) the common draft terms, (3) the exchange ratio and the amount of cash compensations (not applicable in the case of a 100% upstream merger), as well as (4) the measures undertaken for the protection of creditors. According to the EU Merger Act, the management report must further include an explanation of the consequences for the creditors and the employees of the merging corporations and their claims. In the case of an outbound merger, the...
management bodies of the merging corporations must also include information regarding the amount of the share capital and fixed reserves of the merging corporations (see Sect. 4.1.2).

The management report must be submitted to the shareholders within one month prior to the shareholders’ meeting resolving on the merger (see Sect. 3.2). Further, it must also be submitted to the works council (or the employees when no works council has been established) of the concerned corporation within the same one-month period. Provided that the works council issues a (written) opinion to the management report, such opinion must be attached. Other than for domestic mergers, the shareholders cannot waive the requirement for a management report.23

3.1.3 Report of the Merger Auditor

The common draft terms must be audited by an external and independent expert as merger auditor. The requirements for such audit are provided by the relevant provisions of the Austrian Stock Corporations Act applicable to domestic mergers and further modified by the EU Merger Act. The merger auditor is generally appointed by the supervisory board of the concerned corporation.24 If a corporation does not dispose of a supervisory board (see Sect. 3.1.4), the management body is obliged to apply for the appointment of a merger auditor to the competent court.25 Provided that the supervisory boards (or management bodies) of the merging corporations file a joint application, the court may appoint a joint merger auditor for all merging corporations.26 According to the EU Merger Act, the merging corporations may file such application either with the competent court for the transferring corporation or the absorbing corporation.27 The audit requirement can be omitted in the case of a 100% cross-border upstream merger or if all shareholders waive the requirement for an audit report, either by written declaration or in the course of the shareholders’ meeting resolving on the merger (see Sect. 3.2).28

The audit report must be submitted to the shareholders within one month prior to the shareholders’ meeting resolving on the merger (see Sect. 3.2). The audit report shall particularly indicate whether the proposed exchange ratio and/or cash compensation can be considered as reasonable (angemessen). In detail, the auditor shall indicate (1) the methods pursuant to which the proposed exchange ratio has been determined, (2) the reasons for the application of the chosen methods, (3) differentiations of values obtained from the applied methods, (4) potential difficulties in the valuation of the exchange ratio and/or the cash compensation, as well as (4) an

25 Sect. 100 para 2 Act on Limited Liability Companies.
26 Sect. 220b para 2 Stock Corporations Act.
27 Sect. 7 para 2 EU Merger Act.
28 Sect. 232 para 1 and 2 Stock Corporations Act; Sect. 7 para 1 EU Merger Act.
opinion on how the different values have been weighted for the final determination. In the case of an outbound merger, the audit report must also provide information regarding the share capital and fixed reserves of all involved corporations (see Sect. 4.1.2).

3.1.4 Report of the Supervisory Board

Austria generally implemented a two-tier board system, whereas the supervisory board is established as a separate body from the operative management (the managing directors in the case of an Austrian limited liability company and the management board in the case of an Austrian stock corporation). Austrian stock corporations mandatorily dispose of a supervisory board. Austrian limited liability companies are basically only required to establish a supervisory board when they reach a certain size in terms of their share capital, number of shareholders and/or employee count. Provided that a corporation disposes of a supervisory board, the supervisory board must mandatorily be involved in the (cross-border) merger proceedings. Since the EU Cross-Border Mergers Directive as well as the EU Merger Act remain silent on this requirement, it can be seen as example of the national law on domestic merges affecting cross-border mergers under Austrian participation in the EU.

The supervisory board report must be submitted to the shareholders within one month prior to the shareholders’ meeting resolving on the merger (see Sect. 3.2). Since the report of the supervisory board is based on the management report and the report of the independent auditor, these reports should be prepared well before this one-month period. The report of the supervisory board may be omitted if the transferring corporation does not exceed a certain book-value generally determined by the supervisory board for transactions in advance. The report of the supervisory board can further be omitted in the case of a 100% cross-border upstream merger or if all shareholders waive the requirement for an audit report, either by written declaration or in the course of the shareholders’ meeting resolving on the merger (see Sect. 3.2). In any case, the supervisory board must be involved in and informed by the management of the cross-border merger proceedings.

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29 Sect. 220b para 4 Stock Corporations Act.
30 Among other scenarios, where the corporation is part of a group of companies (see Sect. 29 Act on Limited Liability Companies).
31 Schindler and Stingl (2009), Chap. I, Sect. 5.3.
32 See Gassner et al. (2010), para 21.
33 Sect. 220c Stock Corporations Act.
34 Sect. 232 para 1 and 2 Stock Corporations Act; Sect. 7 para 1 EU Merger Act.
3.1.5 Balance Sheet Requirements

One of the most vital aspects in terms of the timing and preparation of a (cross-border) merger under Austrian law concerns the preparation and audit of required balance sheets on which the intended merger is based. From a corporate law perspective, Austrian law provides for the requirement of a closing balance sheet (Schlussbilanz) of the transferring corporation as well interim balance sheets (Zwischenbilanzen) of the transferring and/or absorbing corporation (serving as additional information source for the shareholders). In the case of a of cross-border merger by formation of a new corporation, Austrian law additionally requires the preparation of an opening balance sheet (Eröffnungsbilanz) of the newly established corporation. Austrian reorganization tax law mandates the preparation of a so-called merger balance sheet (Verschmelzungsbilanz).

The closing balance sheet must be prepared by an Austrian transferring corporation as of the effective date of the merger (Verschmelzungstichtag). The effective date of the merger must be determined at a date within 9 months prior to the submission of the merger filing to the Austrian commercial register (see Sect. 3.3). To avoid the requirement for the preparation of an additional balance sheet, the common practice in Austria regularly utilizes the last annual accounts of the concerned corporation as closing balance sheet. The closing balance sheet is subject to the regular requirements for the financial statements of the concerned corporation, whereas the merger balance sheet must be drawn-up in the same manner. Depending on whether the concerned corporation is subject to a mandatory audit of its annual accounts, the closing balance sheet must be audited.

The requirement for an interim balance sheet can be waived by all shareholders of the merging corporation(s). Otherwise, the interim balance sheet could be required from the transferring as well as the absorbing corporation. In general, the management bodies shall prepare an interim balance sheet if the latest annual accounts of the concerned corporation are prepared on the basis of a balance sheet date, which is more than 6 months before the conclusion or preparation of the common draft terms. The interim balance sheet must be prepared as of a balance sheet date, which is not before the first day of the third month prior to the conclusion or

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35 Sect. 220 para 3 Stock Corporations Act; Sect. 96 para 2 Act on Limited Liability Companies.
36 Sect. 220 para 3 Stock Corporations Act; Sect. 96 para 2 Act on Limited Liability Companies.
37 See Aburumieh et al. (2014), p. 94.
38 Under Austrian law, the requirement to audit the financial statements of a corporations depends on its size by means of balance sheet total, turnover and/or employee count (see Sect. 221 Austrian Companies Act (Unternehmensgesetzbuch)).
39 In the case of a stock corporation such waiver must be unanimously declared by the shareholders of all merging corporations. In the case of a limited liability company, it has been contested that the unanimous waiver of all shareholders of the concerned limited liability company is sufficient (see Aburumieh et al. 2014, p. 100).
41 Sect. 221a para 2 item 3 Stock Corporations Act.
preparation of the common draft terms. Similar to the closing balance sheet, the interim balance sheet is subject to an independent audit if such requirement generally applies to the concerned corporation.

## 3.2 Shareholders’ Approval

To allow the shareholders an informed decision on the intended cross-border merger, Austrian law provides for extensive information and disclosure obligations. The resolution of the shareholders is generally based on (1) the common draft terms, (2) the management report, (3) the report of the merger auditor (if not waived), as well as (4) the report of the supervisory board (if established and not waived). These documents must be submitted to the shareholders of an Austrian limited liability company or made available for inspection at the offices of an Austrian stock corporation (or on its website) at least one month before the shareholders’ meeting resolving on the merger.\(^{42}\) In the case of an outbound merger, the creditors of the transferring Austrian corporation are entitled to receive copies of the above documents free of charge.\(^{43}\) In addition, the following requirements must be met prior to this one-month period:

- The shareholders must be provided with the financial statements (including the annex and the potentially prepared corporate governance report) of the merging corporations for the last three business years, a potentially required and already audited (separate) closing balance sheet, as well as potentially required interim balance sheets.\(^{44}\)
- The common draft terms must be filed with the competent court of the involved Austrian corporation and a reference published in the Austrian Official Gazette. Alternatively, the common draft terms and the reference can be published in the Austrian edicts archive (see Sect. 3.1.1).
- The management report must be submitted to the works council (or the employees when a works council has not been established) of the merging Austrian corporation (see Sect. 3.1.2).

Provided that the articles of association do not provide for more stricter requirements (facilitations are not possible), the approval of the intended cross-border merger by the shareholders of an Austrian Stock Corporation requires a double majority by means of at least 50% of the votes cast (Stimmenmehrheit) and at least 75% of the represented share capital (Kapitalmehrheit).\(^{45}\) In the case of an Austrian limited liability company, the resolution must be supported by at least 75% of the

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\(^{42}\)See Gassner et al. (2010), paras 23–24.

\(^{43}\)Sect. 8 para 3 EU Merger Act.

\(^{44}\)Sect. 221a para 2 item 2 Stock Corporations Act.

\(^{45}\)See Aburumieh et al. (2014), p. 145.
votes cast.\textsuperscript{46} The Austrian Act on Limited Liability Companies provides for further requirements in the case of a potentially required consent of shareholders with special rights or specific provisions of the articles of association.\textsuperscript{47} The resolution by the shareholders of the absorbing corporation is not required if the absorbing corporation is holding at least 90\% of the shares in the transferring corporation or if the shares granted to the shareholders in the transferring corporations do not exceed 10\% of the share capital of the absorbing corporation.\textsuperscript{48} In these cases, a minority of 5\% can nevertheless demand the conduct of a shareholders’ meeting.\textsuperscript{49} For a 100\% upstream merger, Austrian law provides for the possibility to waive the requirement of a shareholders’ resolution by the transferring corporation.\textsuperscript{50} Other than for domestic mergers, the shareholders may resolve their approval under the condition that the details of the employee representation in the corporation evolving from the merger (see Sect. 4.3) are subsequently confirmed by the shareholders.\textsuperscript{51} As regards to the limits of potential recourses of (minority) shareholders against the validity of the shareholders’ resolution, see Sect. 4.2.

3.3 \textit{Court Proceedings and Effects of the Merger}

3.3.1 \textit{Outbound Mergers}

The proceedings regarding the registration of an outbound merger in the Austrian commercial register are mandated in detail by the EU Merger Act. The registration process regarding the cross-border merger of an Austrian transferring corporation is divided into two steps.

In the first step, the management body of the transferring Austrian corporation has to file the intended cross-border merger with the competent court at its registered office.\textsuperscript{52} This filing must include the (1) the common draft terms, (2) the minutes of the shareholders’ meeting approving the merger, (3) potentially required governmental approvals, (4) the management and (if applicable) supervisory board report of the Austrian transferring corporation, (5) the report of the merger auditor (if not waived), (6) the closing balance sheet of the Austrian transferring corporation, (7) a

\textsuperscript{46}See Aburumieh et al. (2014), p. 145.
\textsuperscript{47}Sect. 99 Act on Limited Liability Companies provides for certain (majority) requirements in the case of (1) shareholders with special rights attached to their shares, (2) special provisions in the articles of association regarding the resolution on the merger or the (general) transferability of shares as well as (3) not fully-paid in cash contributions by the shareholders at the time of the merger.
\textsuperscript{48}Sect. 231 para 1 Stock Corporations Act.
\textsuperscript{49}Sect. 231 para 3 Stock Corporations Act.
\textsuperscript{50}Sect. 9 para 2 EU Merger Act.
\textsuperscript{51}Sect. 9 para 1 EU Merger Act.
\textsuperscript{52}Sect. 14 para 1 EU Merger Act.
proof for the publication of the common draft terms, (8) a proof for the safeguarding of the cash compensation for shareholders dissenting to the intended outbound merger (see Sect. 4.2.2), as well as (9) a proof for the safeguarding of potential claims of creditors of the Austrian transferring corporation and a declaration that no (other) creditors have claimed security for their claims (see Sect. 4.1).53 In terms of timing, it must be noted that the latter generally involves a waiting period for the issuance of the pre-merger certificate of 2 months after the common draft terms have been published (see Sect. 3.1.1).54 The application must further include two declarations. First, all members of the management body must declare that no lawsuit seeking the challenge or the determination of nullity of the shareholders’ resolution has been filed within one month after the resolution or that all shareholders have declared their waiver to such lawsuit.55 Second, all members of the management body of the Austrian transferring corporation must declare if and how many shareholders have opposed to the intended outbound merger and exercised their right to cash compensation (see Sect. 4.2.2).56 Such statement must further confirm that the shares of these shareholders can be taken over by the remaining shareholders. Provided that the Austrian transferring company is listed on the Austrian stock exchange, provisions of Austrian takeover law (such as a mandatory public offering) must be considered.57 If all preparatory actions have been conducted, the Austrian court issues a pre-merger certificate and registers the intended cross-border merger in the Austrian commercial register.58

In a second step and after the effectiveness of the merger by registration in the commercial register in the other EU/EEA member state (at the seat of the absorbing corporation), the management body of the Austrian transferring company must apply for the deletion of the Austrian transferring company from the Austrian commercial register.59 This application must include the certificate of the commercial register at the seat of the corporation emerging from the merger confirming that the merger is effective (see Sect. 3.3.3).

3.3.2 Inbound Mergers

The proceedings regarding the registration of an inbound merger are provided by the EU Merger Act and supplemented by the Austrian Stock Corporation Act. Other than in the case of outbound mergers, the registration of an inbound merger is conducted by a single application.

53 Sect. 14 para 1 EU Merger Act.
55 Sect. 14 para 2 item 1 EU Merger Act.
56 Sect. 14 para 2 item 2 EU Merger Act.
57 Sect. 14 para 2a EU Merger Act.
58 Sect. 14 para 3 EU Merger Act.
59 Sect. 14 para 5 EU Merger Act.
The management bodies of the merging corporations must apply for the registration of the cross-border merger at the competent court at the seat of the (Austrian) corporation evolving from the cross-border merger. The application must include originals or notarized copies of (1) the common draft terms, (2) the minutes of the shareholders’ meeting of the merging corporations approving the cross-border merger, (3) potentially required governmental approvals, (4) the management and (if applicable) supervisory board report, (5) the report of the merger auditor (if required), (6) the closing balance sheet of the transferring corporation as well as (7) a proof for the publication of the common draft terms in the Austrian Official Gazette or Austrian edicts archive. In addition, the EU Merger Act requires a proof that the negotiations regarding the employee participation in the (Austrian) corporation evolving from the merger have been duly conducted and concluded in accordance with the Austrian Labour Constitution Act (see Sect. 4.3). The application must also include the pre-merger certificate of the competent authority of the transferring corporation, which must not be older than 6 months. In the case of a cross-border merger by formation of a new corporation in Austria, the application must also include the documentation required for the establishment of the new corporation in the Austrian commercial register, such as the articles of association or the documents regarding the establishment of the supervisory board (if applicable) and the appointment of the management body. The Austrian court particularly scrutinizes whether the common draft terms have been executed by the merging corporations and whether the merging corporations have duly conducted and completed the negotiations regarding the employee participation (see Sect. 4.3).

The cross-border merger becomes effective on the date following the registration in the Austrian commercial register. Austrian courts are instructed to directly inform the courts of the transferring corporations of the registration in the Austrian commercial register.

### 3.3.3 Effects of the Merger

Under Austrian law, the effects of a cross-border merger are similar to the effects of a domestic merger. As a general principle, the transferring corporation is transferred to the absorbing corporation by way of universal succession (Gesamtrechtsnachfolge). In detail, the merger causes (1) that any company-related rights, obligations and assets of the transferring corporation are transferred ex lege to the absorbing
corporation as well as (2) that the transferring corporation ceases to exist. The cross-border merger becomes effective with the registration in the commercial register at the seat of the absorbing corporation. The subsequent registration in official registers (such as the commercial register at the seat of the transferring corporation or the land register) are conducted with declaratory effect.

4 Selected Issues of Cross-Border Mergers in Austria

4.1 Creditor Protection

4.1.1 General Remarks

In principle, Austrian law differentiates between the protection of creditors prior to the intended merger (vorgelagerter Gläubigerschutz) and following the completion and effectiveness of the merger (nachgelagerter Gläubigerschutz).

4.1.2 Pre-Merger Protection

The cornerstone of pre-merger creditor protection in Austria is the principle of capital maintenance (Kapitalerhaltung). In essence, this principle means that the assets of a corporation may not be transferred or released to the shareholders other than in the course of the fulfilment of an arm-length contract, the (annual) distribution of profits or the implementation of a structured capital reduction of the concerned corporation. Since the creditors are generally not entitled to assert their claims directly against the shareholders of the corporation, the corporations’ capital serves as main liability fund and may, therefore, not be (unjustifiably) transferred to the shareholders. The Austrian capital maintenance principle has been intensively discussed in the area of intra-group mergers following a leverage buyout (LBO) or management buyout (MBO). According to the Austrian Supreme Court (Oberster Gerichtshof), the main issue in this connection concerns the transfer of assets of the transferring corporation to the absorbing corporation (which has entered into the acquisition credit agreement) in the course of a 100% upstream merger. As a result, the transferring corporation would be liable for the acquisition credit of the absorbing corporation (its shareholder) without receiving an adequate

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67 See Schindler and Stingl (2009), Chap. I, Sect. 3; See Gassner et al. (2010), para 6.
68 Sect. 15 para 4 EU Merger Act.
69 See Schindler and Stingl (2009), Chap. I, Sect. 3.
compensation. To address the principle of capital maintenance in Austrian merger law, Austrian practice developed two basic rules for the scrutiny by the Austrian courts.

On the one hand, a merger is only possible if the assets of the transferring corporation dispose of a positive fair market value (positiver Verkehrswert). Also, the assets of the absorbing corporation should generally dispose of a positive fair market value. From the Austrian perspective, the fair market value of the transferring corporation in a cross-border merger is particularly relevant for inbound mergers. In the case of outbound mergers, the application of the Austrian capital maintenance requirements has not yet been clarified but could be relevant if the negative fair market value of the absorbing corporation is threatening the claims of Austrian creditors (this would then apply in addition to the creditor protection safeguards of the EU Merger Act).

On the other hand, it is essential that the merger does not lead to a release of capital by means of a capital releasing effect (kapitalentsperrender Effekt). In principle, the capital releasing effect applies when a corporation is merged as transferring corporation with a corporation as absorbing corporation with a lower share capital amount. From an Austrian perspective, this principle primarily applies in the case of outbound mergers, where the share capital of the absorbing corporation of the other EU/EEA member state is less than the share capital of the Austrian transferring corporation.

On the European scale, it must be noted that Austrian courts are only competent to assess the protection of creditors of involved Austrian corporations. Further, the Austrian Supreme Court ruled on the application of the Austrian capital maintenance principle in the case of an Austrian reference (Österreichbezug) of the cross-border merger, which would, for instance, be the case if the Austrian absorbing corporation is a 100% parent company of the transferring corporation. Although the EU Merger Act does not explicitly mandate the capital maintenance principle, it has been established that it shall apply similarly as for domestic mergers. The EU Merger Act touches the principle of capital maintenance in relation to outbound mergers and provides that the management report and the merger auditor report must include information on the share capital and fixed reserves of the merging corporations (see Sects. 3.1.2 and 3.1.3). In addition, the EU Merger Act imposes specific pre-merger creditor protection measures. Within a period of 2 months after the

75 See Aburumieh et al. (2014), p. 457.
78 See Aburumieh et al. (2014), pp. 455 and 457.
80 See Aburumieh et al. (2014), pp. 454–458.
publication of the common draft terms (see Sect. 3.1.1), the creditors of an Austrian transferring corporation may demand the safeguarding (Sicherstellung) of their claims, which are not yet due for payment. Such safeguarding must be granted, if the creditor can credibly show (glaubhaft machen) that the collection of the claim would be threatened by the intended merger or (in any case) if the share capital and fixed reserves of the absorbing corporation in the other EU/EEA member state are less than of the Austrian transferring corporation.  

Further, the EU Merger Act addresses the holders of debentures (Schuldverschreibungen) or profit participation certificates (Genussrechten) to which the corporation evolving from the merger must grant equal rights. The safeguarding of creditors and holders of debentures or profit participation certificates is a requirement for the issuance of the pre-merger certificate in accordance with the EU Merger Act (see Sect. 3.3.1).

4.1.3 Post-Merger Protection

Inbound mergers are generally subject to post-merger creditor protection safeguards, which are similarly applicable to domestic mergers in Austria. In detail, the Austrian Stock Corporation Act provides that creditors may demand the safeguarding of their undue claims within 6 months following the effectiveness of the merger. Safeguards must be granted, if the creditor can credibly show (glaubhaft machen) that the successful collection of the claim is threatened by the merger. Further, the holders of debentures (Schuldverschreibungen) or profit participation certificates (Genussrechten) must be granted rights of equal value or a reasonable compensation for the alteration or cancellation of the concerned rights following the completion and effectiveness of the concerned merger.

The issue of investor protection in the course of a cross-border inbound merger has recently been subject to proceedings before the Austrian Supreme Court and a preliminary ruling of the European Court of Justice (CJEU). The background of the case KA Finanz AG v Sparkassen Versicherung AG concerned the cross-border merger of Kommunalkredit (Cyprus) as transferring corporation with KA Finanz (Austria) as absorbing corporation. Before the merger took place in 2010, Sparkassen Versicherung AG (claimant) subscribed two subordinated loans with Kommunalkredit. The parties agreed on the application of German law. In the

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81 Sect. 13 para 1 EU Merger Act.
82 Sect. 13 para 2 EU Merger Act.
83 Sect. 13 para 2 EU Merger Act.
85 Art. 226 para 1 Stock Corporation Act.
86 Art. 226 para 3 Stock Corporation Act.
87 OGH, 20 July 2016, 6 Ob 80/16g.
88 Case C-483/14 KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group.
89 Case C-483/14, para 19.
course of the proceedings in Austria, Sparkassen Versicherung AG claimed interest payments for 2009 and 2010, alternatively, the allocation of equal rights in KA Finanz as legal successor of Kommunalkredit. KA Finanz contested the claim and basically argued that the subordinated loans have been terminated in accordance with Sect. 226 para 3 Stock Corporation Act. The court of first instance and the court of recourse denied the (interim) motion of KA Finanz to confirm the termination of the subordinated loans. After having submitted the case to the CJEU for a preliminary ruling, the Austrian Supreme Court confirmed these decisions and ruled that the subordinated loan contracts have been transferred due to the principle of universal succession. As regards the applicable law, the Austrian Supreme Court followed the CJEU and ruled that the chosen law (German law) remains applicable on the termination of the contracts following the merger. Consequently, the Austrian Supreme Court examined the relevant provision of Sect. 23 German Conversion Act (deutsches Umwandlungsgesetz), whereas the absorbing corporation must grant rights of equal value or a reasonable compensation and concluded that this provision does also not automatically result in the termination of the concerned loan contracts. As regards to the legal framework on creditor protection, the Austrian Supreme Court confirmed that the law to which the transferring corporation has been subject to prior to the merger remains applicable. Based on the scope of the proceedings (limited to the application of Art 226 para 3 Stock Corporations Act and Sect. 23 German Conversion Act), the Austrian Supreme Court did, however, not examine relevant provisions of Cyprian creditor protection laws. This approach has been criticized by Austrian scholars as missed opportunity to provide for legal certainty on the interpretation of creditor protection safeguards in the course of cross-border mergers in the EU.

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90 Case C-483/14, para 26.
91 Case C-483/14, para 27.
92 The court of recourse (Oberlandesgericht Wien) concluded that subordinated loans are generally not covered by Sect. 226 para 3 Stock Corporations Act, as subordinated loans only grant a claim for interest and principal payments but no “special rights” in the sense of this provision (see Klampfl 2016, p. 350).
93 OGH, 20 July 2016, 6 Ob 80/16g, para 3.
94 OGH, 20 July 2016, 6 Ob 80/16g, para 3.
95 Sect. 23 German Conversion Act states that the holders of rights in the transferring corporation, which do not grant voting powers, especially the holders of shares without voting power, convertible bonds, profit participation rights as well as profit shares, are to be granted equal rights in the absorbing corporation.
4.2 Shareholder Protection

4.2.1 General Remarks

The protection of (minority) shareholders is one of the most vital aspects of Austrian merger law. In principle, Austrian law provides that the shareholders of a transferring corporation are to be reimbursed for the loss of their shares in the transferring corporation with shares in the absorbing corporation. The nominal value of shares granted in the absorbing corporation is determined by the exchange ratio—in other words: How many shares in the absorbing corporation are granted in exchange for the lost shares in the transferring corporation. In Austria, additional cash payments are only permitted if they do not exceed 10% of the value of the shares allocated to the shareholders of the transferring corporation.

The protection of (minority) shareholders is generally positioned after the effectiveness of the concerned merger (post-merger protection). In the case of cross-border mergers, Austrian law provides for two legal institutions.

4.2.2 Exit and Cash Compensation

First, the EU Merger Act expressively addresses the protection of minority shareholders in the case of outbound mergers. In detail, each minority shareholder of an Austrian transferring corporation is granted the right to oppose an outbound merger and exit the corporation against an adequate cash compensation for the shares held in the concerned corporation. The cash compensation offer must already be included in the common draft terms (see Sect. 3.1.1) and scrutinized by the merger auditor (see Sect. 3.1.3).

According to Austrian scholars, the cash compensation shall be offered by the Austrian transferring corporation. Alternatively, it can be agreed that the cash compensation is paid by the (foreign) absorbing corporation or any other person (related or not related to the concerned cross-border merger). Minority shareholders intending to exit the corporation must oppose to the intended cross-border merger in the course of the shareholders’ meeting resolving on the merger. The offered cash compensation may be accepted directly in the shareholders’ meeting or within one month after the shareholders’ meeting resolving on the merger. If accepted, the claim for cash compensation is due with the effectiveness of the merger and subject to a statute of limitations of 3 years.

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99See Gassner et al. (2010), para 5.
100Sect. 10 para 1 EU Merger Act.
The claim for the cash compensation of dissenting minority shareholders must be safeguarded to ensure the proper payment. In addition, each dissenting minority shareholder has the right to apply to the competent Austrian court to examine the adequacy of the offered cash compensation. The application must be filed with the court within one month after the shareholders’ resolution approving the merger.\textsuperscript{103} The alleged lack of the adequacy of the offered cash compensation or related defects in the merger documentation may generally not justify the (overall) challenge of the shareholders’ resolution approving the merger.\textsuperscript{104}

4.2.3 Examination of the Exchange Ratio

Second, Austrian law provides for the right of the shareholders to apply to the Austrian courts to examine the adequacy of the applied exchange ratio.\textsuperscript{105} Such application may only be asserted within one month after the merger has been registered in the Austrian commercial register (not before).\textsuperscript{106} The challenge of the shareholders’ resolution resolving on the cross-border merger or an application regarding the determination of its nullity may not be based on the grounds of an alleged defect of the exchange ratio.\textsuperscript{107}

As for cross-border mergers, the EU Merger Act provides for a diverging regime to this principle.\textsuperscript{108} In detail, a challenge of the shareholders’ resolution on the grounds of an alleged defect of the exchange ratio shall only be excluded when all merging corporations in another EU/EEA member state (which does not provide for a similar procedure in their national laws) expressively declare to allow proceedings before the Austrian courts to examine the adequacy of the exchange ratio.\textsuperscript{109} In the case of an outbound merger, the shareholders of the transferring Austrian corporation must declare their intention to initiate proceedings to examine the exchange ratio in the shareholders’ meeting approving the merger or within one month after such shareholders’ meeting.\textsuperscript{110} The pre-merger certificate must indicate the such application.\textsuperscript{111} In the case of an inbound merger, the shareholders of the transferring corporation with the seat in another EU/EEA member state are only permitted to initiate proceedings to examine the exchange ratio if the merger certificate indicates that all of the shareholders of the transferring corporation have waived their right to challenge the shareholders’ resolution approving the merger and all transferring

\textsuperscript{103}Sect. 11 para 2 EU Merger Act.
\textsuperscript{104}Sect. 11 para 1 EU Merger Act.
\textsuperscript{105}Sect. 225c para 2 Stock Corporations Act; See Kålså (2017), 3/1158.
\textsuperscript{106}Sect. 225e para 2 Stock Corporations Act.
\textsuperscript{107}Sect. 225b Stock Corporations Act.
\textsuperscript{108}See Gassner et al. (2010), para 49.
\textsuperscript{109}Sect. 12 para 1 items 1 and 2 EU Merger Act.
\textsuperscript{110}Sect. 12 para 2 EU Merger Act.
corporations expressively allow the shareholders to initiate such proceedings before the Austrian courts.\textsuperscript{112}

Based on the implementation of domestic shareholder safeguards within the EU Merger Act, the Austrian regime on post-merger shareholder protection takes a rather unique position among the EU member states. According to the legislative materials to the EU Merger Act, the official examination of the exchange ratio after the completion and effectiveness of the merger is only provided in Austria and Germany.\textsuperscript{113}

\subsection*{4.3 Employee Participation}

As a general principle, an Austrian corporation evolving from a cross-border merger (inbound merger) would be subject to Austrian labour law. Relevant aspects in the area of employee participation include the participation of employees in the potentially established supervisory board.\textsuperscript{114} In line with the EU Cross-Border Mergers Directive,\textsuperscript{115} the Austrian Labour Constitution Act (\textit{Arbeitsverfassungsgesetz}) provides for a special chapter (chapter VIII) derogating the regular provisions of Austrian labour law. In the case that (1) one of the merging corporations involved in a cross-border merger employed more than 500 employees in aggregate within the last 6 months preceding the conclusion or preparation of the common draft terms, the law applicable to this corporation is applicable as long as it provides for an employee participation system,\textsuperscript{116} (2) the law applicable to the corporation evolving from the cross-border merger (Austrian law) does not provide for the same level of employee participation as another law of one of the transferring corporations, the law applicable to this transferring corporation is applicable,\textsuperscript{117} or (3) the law applicable to the corporation evolving from the cross-border merger (Austrian law) does not provide employees of an establishment in another EU/EEA member state the same participation rights as Austrian employees, the law of the respective establishment shall be applicable.\textsuperscript{118}

Provided that one of the above exceptions applies, the competent employee representatives of the merging corporations must form a special negotiation body (\textit{Besonderes Verhandlungsgremium}), which negotiates and agrees with the management bodies of the merging corporations on the employee participation in the corporation evolving from the cross-border merger.\textsuperscript{119} In the case that the

\begin{itemize}
\item \textsuperscript{112} Sect. 12 para 3 EU Merger Act.
\item \textsuperscript{113} Government Explanations to the GesRÄG 2007, ErläutRV 171 BlgNR 23. GP 15.
\item \textsuperscript{114} See Hasenauer and Hiller (2008), p. 188.
\item \textsuperscript{115} Sect. 133 EU Company Law Directive.
\item \textsuperscript{116} Sect. 258 para 1 item 1 Labour Constitution Act.
\item \textsuperscript{117} Sect. 258 para 1 item 2 Labour Constitution Act.
\item \textsuperscript{118} Sect. 258 para 1 item 3 Labour Constitution Act.
\item \textsuperscript{119} See Gassner et al. (2010), para 55.
\end{itemize}
negotiations are not successful, the application of the law with the highest level to which one of the merging corporations is subject shall be applicable.\textsuperscript{120} The management bodies must comply with detailed information obligations and duly include information on the proper conduct of negotiations within the cross-border merger documentation (see Sect. 3.1.2).

Since the registration of the merger is dependent on the proper compliance with the provisions of the Austrian Labour Constitution Act (see Sect. 3.3.2),\textsuperscript{121} the duly consideration of these provisions (if applicable) are essential for the success of an intended cross-border merger.

5 Conclusion

Concluding, it has been shown that the Austrian legislator conducted a rather close implementation of the EU Cross-Border Mergers Directive. Most provisions of the EU Cross-Border Mergers Directive have been introduced by the EU Merger Act as separate legal framework. Given the general scope of European harmonization in the area of cross-border mergers, the Austrian regime is supplemented by its national laws applicable on domestic mergers. Thus, the Austrian regime on cross-border mergers in the EU provides for certain specific particularities. Examples of these rules include, for instance, the mandatory involvement of the supervisory board in the course of the cross-border merger proceedings, the principle of capital maintenance and concerned creditor protection safeguards or the national provisions on the post-merger protection of (minority) shareholders. These issues must be particularly considered by practitioners involved in cross-border mergers under participation of one or more Austrian corporations.

References


\textsuperscript{120}See Gassner et al. (2010), para 58.
\textsuperscript{121}Sect. 15 para 2 EU Merger Act.

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