



**Country report: (3) Transposition**

**A - Transposition of the SCE Regulation and Directive in Austria**

**B - Transposition of the EU Directive on Takeovers in the Austrian Takeover Act**

**by Walter Gagawczuk (Chamber of Labour Vienna)**

**July / August 2006**

## A - Transposition of the SCE Regulation and Directive in Austria

The SCE Regulation and the associated Directive on employee involvement in European Cooperative Companies (SCEs) have now been transposed in Austria.

In February 2006 the competent ministries published drafts for the transposition of the Regulation and the Directive. After formal appraisal the bill was adopted in parliament in June 2006, published in the Federal Law Gazette on 26 June and will enter into force on 18 August 2006.

The transposition is part of the *Genossenschaftsrechtsänderungsgesetz 2006-GenRÄG 2006* (BGBl. I Nr. 104/2006) and can be found at: <http://ris1.bka.gv.at/authentic>.

The content of the transposition of the Directive is very similar to that of the Directive on employee involvement in the SE. There was no public discussion in relation to the legislative process, and the discussions in parliament were brief and without substantial disagreements.

The main difference as regards transposition of the Directive on employee involvement concerns the possibility of establishing an SCE exclusively by natural persons or by a single legal entity and natural persons (Article 8 of the Directive).

Before the formal appraisal procedure the draft was discussed in the competent ministries with the social partners and others. Some reservations and criticisms on the part of the trade unions and the Chamber of Labour have been taken into consideration, some not.

The main points still controversial are:

### regarding transposition of the Directive:

- As in the case of transposition of the SE Directive there is no deadline by which the first meeting of the SNB must take place (the meeting of the SNB is convened by the management).
- Again as with the transposition of the SE Directive there is no provision for electing or appointing members of the SNB from Austria if none of the participating entities and relevant subsidiaries or establishments in Austria has a works council.
- In common with transposition of the SE Directive the standard rules provide that in some cases employee representatives do not have the same rights as representatives of cooperative

members (election of the chairman of the supervisory board; appointment and dismissal of executive directors; committee dealing with relations between the company and the executive directors).

#### Regarding transposition of the Regulation:

- One requirement for registration of an SCE is that an agreement must be reached on arrangements for employee involvement pursuant to the Directive, or a decision pursuant to Articles 3(6) (Art. 11 of the Regulation). Experience shows that judges or officials responsible for registration do not always check this requirement properly. Therefore the Chamber of Labour has made a number of proposals (an application for registration should include a management declaration that the requirements regarding employee involvement have been met – this declaration should also be signed by the SNB and the Chamber of Labour should be informed in case of doubt). These proposals have not been taken up so far.

### **B - Transposition of the EU Directive on Takeovers in the Austrian Takeover Act**

The EU Directive on takeovers has been transposed into the Austrian Takeover Act. The amended Act came into force on 20 May 2006. However, the most important sections of the EU Directive on takeovers and mergers had already been incorporated into the Austrian Takeover Act and so few changes were necessary in the course of transposition.

The Austrian Takeover Act (*Übernahmegesetz*) came into force in January 1999. The main motivation for creating the Act was to develop Austria's capital market by setting up minimum standards for public takeover bids. The Act regulates voluntary public takeover bids for the acquisition of securities, as well as so-called 'mandatory' bids if control of a listed company is transferred (for example, by the sale of a block of shares by the former controlling entity). The regime of the Takeover Act covers only stock corporations listed on the Vienna Stock Exchange.

**The basic principles of the Austrian Takeover Act after transposing the takeover directive are as follows:**

1. Equal treatment of all shareholders.
2. The investing public shall be given sufficient time and information to enable them to make an informed decision on acceptance of a bid.
3. Employee representatives shall be given sufficient information concerning the impact of the takeover bid on the employees (for example, the bidder's intended future business policy). Employee representatives shall have the opportunity to make a written statement which must be published by the management board.
4. The managing board and the supervisory board have a duty to act neutrally. They may not frustrate the bid and must inform the shareholders concerning whether, in its view, the bid is appropriate.
5. Strict avoidance of any market irregularities or market manipulation (insider trading) via disclosure rules.
6. Takeover procedures shall be conducted expediently.

### **Mandatory Bid**

If a bidder acquires a controlling stake in a target company he must issue a mandatory offer to all holders of shares in the offeree company. The mandatory offer has to be a cash bid beyond that a share offer is possible. Minority shareholders of freefloating stocks must be treated the same as major shareholders and strategic shareholders. Therefore the price obtained by a major shareholder who is giving up his controlling interest should also serve as the basis on which minority shareholders are paid (at least the average market value over the last 6 months).

Before transposing the EU Directive on takeovers into the Austrian Takeover Act, in the case of mandatory bids a discount of (maximum) 15% on the package price obtained by a major shareholder was allowed.

Another important question in the context of changes in controlling interests in stock corporations is what level of shares transfers control in a listed company. Depending on the structure of the shareholders and the turnout at the shareholders' meeting the previous rule before adoption of the EU Directive contained concrete assumptions regarding controlling interests that were open to repudiation. The threshold for transferring a controlling interest was 30%, but a threshold between 20% and 30% was also possible depending on the turnout at the shareholders' meeting. Exemptions may be granted, for example, if a controlling holding is acquired for the purpose of restructuring.

The amended Takeover Act contains new regulations regarding controlling stakes in listed companies:

- <26%: No transfer of controlling interest.
- 26%–30%: no mandatory bid, but no right to vote over 26%.
- >30%: Transfer of controlling interest, and the bidder must issue a mandatory offer to all shareholders.

### **Takeover Commission**

The Austrian Takeover Commission (*Übernahmekommission*) has exclusive jurisdiction over all matters regulated in the Takeover Act. The Commission is independent and consists of 12 members appointed for a period of five years. The Commission works within the framework of three committees, each with four experts, including a judge, and they are charged with supervising the offer procedure and deciding whether a mandatory bid must be made. Recourse against formal decisions by any of the three committees of the Takeover Commission may only be lodged with the Constitutional Court, a measure aimed at ensuring that final decisions are reached rapidly.<sup>1</sup>

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<sup>1</sup> More information on the homepage of the Austrian Takeover Commission: [www.takeover.at](http://www.takeover.at)