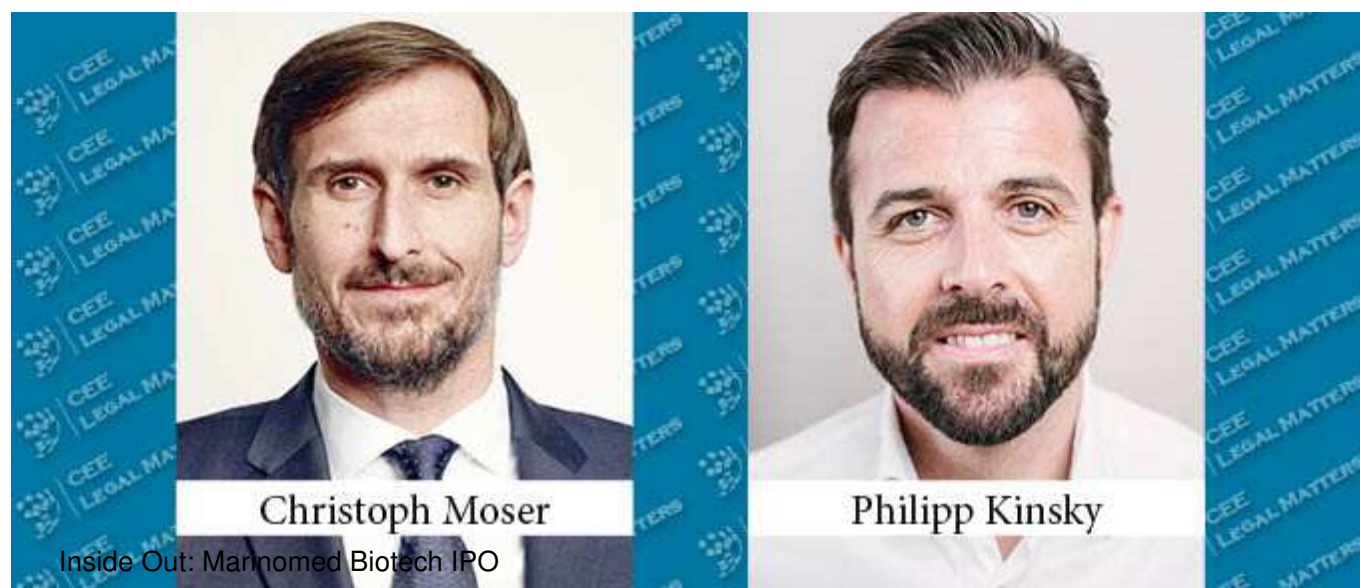




Inside Out: Marinomed Biotech IPO

DAVID STUCKEY / 02 SEPTEMBER 2019



Earlier this year, CEE Legal Matters reported that Herbst Kinsky Rechtsanwälte had advised Marinomed Biotech AG on its February 1, 2019 debut on the Vienna Stock Exchange, with Weber & Co. advising Erste Group Bank AG (as sole global coordinator) and Goetzpartners Securities Ltd (as co-lead manager) on the IPO. Marinomed's was the first successful IPO in Austria since BAWAG's in 2017.

The Players:

- Counsel for Marinomed Biotech: Philipp Kinsky, Partner, Herbst Kinsky
- Counsel for Erste Group Bank and Goetzpartners Securities: Christoph Moser, Partner,

Weber & Co.

CEELM: Philipp, can you tell us what exactly Marinomed Biotech is?

Philipp: Marinomed specializes in the development of innovative products based on patent protected technology platforms in the field of respiratory and ophthalmic diseases. Marinomed has developed two platforms to date: the Marinosolv technology platform and the Carragelose platform. The Marinosolv technology platform enhances the efficacy of hardly soluble compounds. This innovative technology has the potential to sustainably change a number of therapies for allergies and auto-immune diseases. The flagship product, Budesolv, is currently being investigated in a pivotal Phase III approval study. The Carragelose platform is already used in six different products – sold globally via the company’s partners – to treat viral infections of the respiratory tract.

CEELM: And how did you and Herbst Kinsky become involved with helping the company in this matter?

Philipp: We have been legal adviser to Marinomed since its foundation in 2006, so based on this longstanding and profound relationship and due to our reputation in the capital market law area Herbst Kinsky was the logic choice for Marinomed. A high level of trust connects us with founders Andreas Grassauer and Eva Prieschl-Grassauer. Knowing what Marinomed means for the founders we are especially proud to be chosen as the company’s legal representative.

CEELM: And Christoph, how did you and Weber & Co. become involved?

Christoph: The assignment of our firm for the IPO is the result of trusted relationships with national and international investment banks and a long-standing track record of advising banks as underwriters and bookrunners on Austrian equity capital market transactions. Our firm is well known in the market as a go-to-firm for underwriters in ECM matters. Further, the IPO assignment was a follow-up assignment to the issue of pre-IPO convertible debt instruments by the issuer back in 2017, when we also worked for Erste Group Bank AG as arranger’s and sole coordinator’s legal counsel. In that 2017 transaction, Philipp Kinsky was involved as issuer’s counsel as well.

CEELM: What, exactly, was the initial mandate when you were retained for this project?

Christoph: The initial mandate did not change later. But of course during an IPO process lasting for more than three quarters of a year new issues and tasks always pop up. As an experienced ECM lawyer you know the rules of the game and are aware that in particular

transaction structures and involved parties may change. However, the focused and wonderful Marinomed Biotech team knew right from the beginning that they want to go for an IPO and all parties involved ensured that even after rough capital market developments in October and November 2018 the transaction could be completed in early 2019.

Philipp: Herbst Kinsky was mandated in the course of the convertible bond issuance in 2017; as this bond included the right to convert debt into equity upon an IPO, initial preparations for the IPO commenced soon after the issuance of the convertible bond in 2017. Initial preparations also included the development of a legal structure to convert existing silent partnerships held by ARAX.

CEELM: What is ARAX?

Philipp: ARAX Capital Partners manages several funds (limited partnerships, predominantly funded by private investors) that invest in Austrian tech and life science companies via silent partnerships. Those partnerships become repayable by the target companies upon certain conditions. To retain as many IPO proceeds as possible for the company's operations, Marinomed and ARAX agreed on the conversion of the silent partnerships into equity (instead of repayment of silent partnerships) by transferring shares from existing shareholders to ARAX funds against contribution in kind of their silent partnerships into Marinomed.

CEELM: Who were the members of your teams, and what were their individual responsibilities?

Christoph: Our Weber & Co. team consisted of a mix of partners and associates, all with significant experience in capital market transactions. I took over the overall project lead and transaction structuring and acted as the central contact for involved parties from the issuer's side and our client banks' side. Further, I supervised the responsibilities for the due diligence, prospectus, and documentation work on the banks' side. Our firm's team also included Partner Stefan Weber, who contributed in particular on matters related to the underwriting agreement, as well as Associates Angelika Fischer (who jointly took over the project management lead with me), Yvonne Gutsohn and Clemens Nostler.

Philipp: Our team at Herbst Kinsky consisted of partners and associates specialized in capital market law, as well as IP experts and an employment lawyer. I have been in the capital market business since 2000, and I led and supervised the team. I was supported by our new partner – Philipp Baubin – who was responsible for drafting the prospectus. Furthermore, Associate David Pachernegg was in control of the due diligence process and guided our team of Felix Kernbichler, Georg Durstberger and Magdalena Wagner. Our IP/IT Partner Sonja Hebenstreit,

with the support of Christina Perez and Alexander Holler, was responsible for all IP/IT related issues in connection with the offering. Tanja Lang was in the lead regarding various employment law matters.

CEELM: Please describe the IPO in as much detail as possible.

Christoph: The IPO consisted of a cash capital increase aimed at raising new equity funds for the issuer for developing its product pipeline. It became clear at an early stage that the transaction would not include any sales of shares by existing shareholders as management and core shareholders believed in the issuer and its future and therefore committed to stay on board and partially also bought new shares in the IPO. Therefore, the transaction structure was set at a rather early stage. The IPO process was commercially managed from the banks' side and in particular Erste Group Bank played a leading role in the support of the prospectus drafting by the issuer and its legal counsel Herbst Kinsky.

On the issuer's side, Philipp Kinsky and his team did a fantastic job managing numerous tasks to be completed, including dealing with all corporate law issues, holding the pen on the prospectus drafting, assisting the issuer and the auditor on the intense prospectus work, managing the due diligence process and ensuring that the conversion of the pre-IPO convertible bond will work in the end after the IPO. As to certain matters of US law, Herbst Kinsky and the issuer were assisted by Clifford Chance LLP Frankfurt, which focused on the US-law-related offering aspects (Rule 144A offering to US investors).

Our firm primarily focused on tasks such as commenting the prospectus, conducting a legal due diligence for the banks' side, commenting on corporate documentation, drafting and negotiating the underwriting agreement, negotiating the comfort letter, issuing legal opinions vis-à-vis the bank, advising on the offering structure, and taking a lead in the overall transaction management on behalf of the underwriters.

Overall, an IPO provides for numerous tasks to be completed and it was a true pleasure having the right counter-parties on the transaction: a great Marinomed team, diligent, hard-working and experienced lawyers of Herbst Kinsky, an auditor (BDO) who knows the rules of the game and supported with advisory and audit feedback in a stunning way, the experienced US team of Herbst Kinsky and, of course, highly professional bank teams, with Erste Group in particular being true experts for Austrian ECM transactions and IPOs.

Philipp: The IPO process consisted of the several work streams, including the various corporate law measures in connection with the capital increase, the due diligence work, and

prospectus drafting, as well as establishing the underwriting documentation between the banks and the issuer.

Another challenge of this transaction was the conversion of the pre-IPO convertible bond and silent partnerships held by ARAX. However, while this was demanding, we also benefitted from the fact that cooperation between the various teams was kind of “tested” and already well-attuned before we entered into the IPO work and that we could also build our work on certain preparations made in the course of work for the Pre-IPO convertible bond (for example, the due diligence and parts of the prospectus documentation).

Throughout the entire process, we have definitely benefited from the great cooperation between the various teams. The Erste Bank team, Clifford Chance as US counsel, BDO as auditor, Weber & Co. as issuer counsel, PR-advisor Metrum, and not least the entire Marinomed team, all did a great job solving the numerous challenging tasks and situations and bringing the project over the finish line against all obstacles, in particular the difficult market environment.

CEELM: What was the most challenging or frustrating part of the process?

Christoph: Due to adverse market conditions, the transaction had to be pulled at the end of the initial offering period in November 2018. It wouldn't have made sense to go to the market in a time where all investors tried to stay out of the markets. For some days, it looked like true turmoil in the market and nobody knew how the situation would evolve in December 2018 and early January 2019. In this situation, Erste Group, Herbst Kinsky, and we found a quite smart, never-before-tested way of keeping the prospectus “alive” by publishing a supplement and announcing that the transaction was aimed to be re-commenced in early 2019. Technically, the IPO was not stopped but only paused and we were able to convince the Austrian regulator of this new model. This was challenging but eventually a great success for the legal teams of Herbst Kinsky, Erste Group and Weber & Co.

Philipp: One of the most challenging and frustrating situation definitely was to learn that the market environment did not allow for the completion of the first attempt to close the transaction at the end of 2018, so that we had to postpone into January 2019. Another critical point was when Kempen made its last-minute decision not to proceed with the transaction. Quite frankly, there were certain points throughout the process where we had our doubts that the project would be successfully completed in the end. We were very glad and impressed to see how these situations could be solved with joined forces between the teams and a very solution-oriented, hard-working, and flexible approach by everybody.

CEELM: What was Kempen's involvement here?

Philipp: Kempen & Co is a Dutch merchant bank providing financial services in securities broking, corporate finance and asset management. It has built a strong position as dedicated specialist player in the European Real Estate, Life Sciences & Healthcare and Financial Institutions & FinTech sectors. Kempen acted initially as Joint Global Coordinator and Bookrunner together with Erste Group Bank and, following suspension of transaction in 2018, decided not to proceed with the IPO. Erste Group Bank, therefore, became Sole Global Coordinator and Bookrunner of the IPO.

CEELM: Was there any part of the process that was unusually or unexpectedly easy?

Christoph: Yes, the interaction with the involved persons. We never had a better team spirit, internally and externally, in IPO transactions. All involved parties, irrespective of their different views and interests, focused on the success of the transaction, did not engage in any game-playing or useless discussions. This was so unique and I will remember the special spirit among the group for the rest of my career. This was truly outstanding and unexpected as we all worked on transactions before were parties primarily focused only on their respective interests but not enough on the overall success of a transaction.

Philipp: Underwriting Agreement negotiations did not end up being too lengthy as Weber & Co., Marinomed Biotech, and we all had a very pragmatic approach to solving legal issues. Also the Comfort Letter discussions went quiet smoothly with BDO as a solution-oriented and very pragmatic partner.

CEELM: Did the final result match your initial mandate, or did it change somehow from what was initially anticipated?

Christoph: Yes, it did, subject only to minor amendments structural-wise and the postponement of the IPO from beginning of December 2018 to beginning of February 2019.

Philipp: Disregarding the fact that things always turn out to be a little more demanding and time-consuming than initially expected and also mostly require certain adjustments of the intended structure and timing, the result finally matched our initial mandate.

CEELM: How successful was the IPO, ultimately?

Philipp: Given the difficult market environment in Q1/2019, the IPO was extremely successful with EUR 22.4 million in proceeds and stable stock price following the IPO (no stabilization measures were necessary within applicable post-IPO stabilization period). Since the first listing,

Marinomed's stock price has never fallen below issue price of EUR 75 per share.

CEELM: What specific individuals at Erste Group Bank AG and Goetzpartners Securities Ltd. directed your team's work, and how did you interact with them?

Christoph: Our team worked very closely with the ECM team of Erste Group, which acted as lead manager and were the true stars on the banks' side. They made the transaction happen, never lost faith, and pushed all involved parties to their limits in a positive way. The core ECM team of Erste Group included, among others, Guenther Artner, Markus Koller, Ignaz Bodenstorfer, Karin Heitzing-Daxbock, and Fabian Ketzler, but so many others as well, including the head Bernhard Leder, a great sales team and many more. In such a long process, you work together seamlessly, with numerous telephone calls, emails and meetings. And from my point of view the collaboration could not have been any better.

CEELM: How about you, Philipp? What specific individuals directed your team's work, and how did you interact with them?

Philipp: Throughout all phases and work streams of the IPO process, we received excellent support and instructions from both Marinomed's top management team as well as all other team members and departments. It was impressive to experience how the relatively small management team at Marinomed was well-organized and efficient and interacted in very well-coordinated and professional manner with perfect allocation of responsibilities.

For instance, when it comes to prospectus drafting, all scientific topics were excellently covered under the lead of CSO Eva Prieschl-Grassauer, all corporate and management topics by CEO Andreas Grassauer, and all financial and accounting topics by CFO Pascal Schmidt. It was impressive how fast Pascal Schmidt, who was appointed CFO during the transaction, became an integral part of the management team. The entire team had a focused, constructive, and solution-oriented approach, at all times remained calm and professional even in very difficult and stressful situations throughout the process, and proved to be highly responsive and available for our requests anytime with impressively short reaction times – even late at night, on weekends, and even during the periods of their time-consuming and stressful roadshow and other non-IPO related management duties.

CEELM: How would you describe the working relationship with Herbst Kinsky on the deal?

Christoph: Honestly, the set-up with Herbst Kinsky working as issuer's counsel and us working as banks' counsel could not be any better from our point of view. There is a professional but

extremely trusted relationship between the firms' teams and in particular between Philipp Kinsky and myself, who headed the respective teams. A huge part of the legal success of the transaction is the result of this relationship as we did not waste any time discussing responsibilities but focused on getting things done. Philipp Kinsky is outstanding in this respect, has stunning know-how and experience but also finds amicable and problem-avoiding solutions all parties can live with. He is the go-to-guy for innovation companies aiming for capital markets in Austria. Therefore, I would say that irrespective of the way the communication was done there was a constant flow of smaller and larger negotiations, alignments, discussions, and development of solutions. In an IPO transaction there is usually no "final negotiation" but a constant flow of steps to be completed and this worked wonderful in this IPO matters.

Philipp: You may describe our work relationship with Weber & Co - and here especially with Christoph Moser - as a perfect match. Especially on sensitive matters like an IPO, it is crucial to have an experienced and super fit lawyer as bank's counsel on the other side of the table. It is ideal if the negotiations are focused and based on a trustful relationship. Christoph Moser is an outstanding capital market lawyer, with immense expertise in this field. The communication was flawless, either e-mail, meetings or telcos, and Weber & Co's team was always accessible. This attainability is very important since quick decisions are indispensable. We never had been at a potential dead end point; constant communication led us to constructive negotiations, which were resolved always very quickly. In particular, the content and release of ad-hoc announcements (being always very crucial) could be arranged and agreed with highly committed Christoph Moser within very short time frames, sometimes within minutes.

CEELM: How would you describe the significance of the IPO to Austria?

Christoph: Personally, I believe that the IPO of Marinomed Biotech is to be seen as an icebreaker transaction not only for Austrian biotech companies aiming for an IPO and a listing on a stock exchange but also for the Austrian capital market as such. After late 2017 there was not a single IPO in the market and for 2019 it did not look good either. Following the enormous success of the Marinomed IPO, there has now been a second attempt to go public in the market (Frequentis, which was listed in mid-May). The positive signal of the Marinomed IPO that companies can still go public in Vienna will further other issuers in conducting their ECM transactions. Erste Group Bank may also be able to establish a capital market focus for biotech companies after the successful IPO of Marinomed and I trust that other issuers will follow Marinomed's path. The whole transaction is a perfect example of what Austrian innovative companies are about and how successful they can be even in a growth phase. And finally, I

may admit that for Herbst Kinsky as counsel for other issuers and for our firm as one of the few true experts on the banks' side in capital market transactions the IPO is truly an important marketing issue and will help both firms to continue playing a leading role in Austrian capital market matters.

Philipp: Since BAWAG, Marinomed was the first IPO in Austria; but it was also the first IPO in Europe in 2019; although the market environment was not supporting the transaction at all, we realized that all stake-holders, including the Austrian Financial Market Authority, Vienna Stock Exchange, the Commercial Court, and Austria-based investors were highly interested in getting this deal done. Marinomed was an enormous signal for other IPO candidates and investors that Austria is an interesting listing market. For Erste Bank the transaction was in particular important, as it showed their sales power, in particular in the DACH region and with biotech investors, a sector which Erste Bank has focused on for many years. For us it is a clear signal that we can assume senior roles in such transactions and advise on any exits of tech companies and that an IPO does not necessarily require a foreign lead counsel to execute the transaction. For Weber & Co. it is another milestone being one of the most reputable law firms in Capital Markets in Austria.

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