THE MERGERS & ACQUISITIONS REVIEW

FIFTEENTH EDITION

Editor
Mark Zerdin

THE LAWREVIEWS

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Editor
Mark Zerdin

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PREFACE

As highlighted by the previous edition of *The Mergers & Acquisitions Review*, the resilience of companies was severely tested in 2020 by the covid-19 pandemic. However, the second half of 2020 saw a rebound in M&A activity, with deal totals 122 per cent higher in value (US$2.5 trillion) and 5 per cent higher in volume (16,700 deals) compared to the first half of the year.[1]

The figures for the first half of 2021 tell a similar, and equally promising, story – deal value has almost tripled from €849.8 billion in the first half of 2020 to €2.4 trillion in the first half of 2021.[2] This strong rebound has taken place in tandem with the broader recovery of the global economy, and the re-surfacing of countries from national lockdowns.

Leading the charge were the North American M&A markets, which saw deal value almost quadruple from €285.6 billion in the first half of 2020 to €1.2 trillion in the first half of 2021.[3] US dealmaking, in particular, has benefited from a substantial injection of capital into the economy by the Biden administration, most notably the US$1.9 trillion coronavirus relief bill approved by Congress in March, as well as a proliferation in the number of special purpose acquisition companies (SPACs) and the unprecedented levels of funds raised thereby. In the Americas more broadly, the leading sectors for the first quarter of 2021 were technology, media and telecoms (548 deals totalling US$206.1 billion), industrial and chemicals (300 deals totalling US$100.8 billion) and financial services (170 deals totalling US$99.5 billion).[4]

The buoyancy of M&A activity in North America has meant that Europe's share of global M&A value has decreased from 28 per cent in 2020 to 21 per cent in the first half of 2021.[5] Notwithstanding this proportionate decline, European dealmaking has also enjoyed a prosperous first half of 2021, with volume up 44 per cent and value rising 89 per cent year-on-year.[6] Private equity was particularly active in this period, with private equity firms investing €193.2 billion in buyouts during the first half of 2021, almost equalling the €194.5 billion of buyout activity recorded across the whole of 2020, and exceeding the

1 Mergermarket, 'Global dealmakers: Cross-border M&A in 2021'.
2 CMS, 'Road to recovery: European M&A Outlook 2022'.
3 ibid.
4 Mergermarket, 'Deal Drivers: Americas Q1 2021'.
5 CMS, 'Road to recovery: European M&A Outlook 2022'.
6 ibid.

€168.8 billion and €174.7 billion recorded in 2019 and 2018, respectively.[7] In the first half of this year, private equity firms substantially reconfigured their portfolios, with 614 exits worth a total of €101.4 billion (in excess of pre-pandemic levels) taking place.[8]

Looking forward to the remainder of 2021 and beyond, there is plenty of cause for optimism. The unique challenges posed by the pandemic appear, at least for now, to be behind us, and the restoration of normality (or at least a new normal), in global M&A and in the broader sense, is taking shape.

I would like to thank the contributors for their support in producing the 15th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 36 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
November 2021

7 Mergermarket, 'Deal Drivers: EMEA HY 2021'.
8 ibid.

Chapter 6

AUSTRIA

Clemens Philipp Schindler and Martin Abram[1]

I OVERVIEW OF M&A ACTIVITY

Compared to 2019, M&A saw a significant decrease in the numbers of transactions in 2020 – from 328 to 275. The transaction volume, however, increased slightly from 12.1 billion to 12.6 billion (as per the EY M&A Index Austria 2020). True 'blockbuster' deals with a volume in excess of €1 billion increased to four in 2020. As previously, the vast majority of transactions were entered into by strategic investors; investments by private equity and venture capital investors regressed by roughly one-quarter (from 27 to 20 deals).

In terms of statistics, the EY M&A Index Austria 2020 reveals that:

a domestic deal activity decreased by nine deals or 11.7 per cent;

b inbound investment by foreign investors into Austrian companies decreased by 20 deals or 16.5 per cent);

c outbound investment by Austrian investors also decreased by 24 deals or 18.5 per cent); and

d the overall number of 275 transactions during 2020 was segmented into 68 domestic transactions (24.7 per cent), 101 inbound transactions (38.5 per cent) and 106 outbound transactions (representing 38.5 per cent of the number of deals).

In terms of industry sectors, investments in industrial sector targets (85 deals) outnumbered investments in the real estate sector (53 deals) and the technology sector (61 deals). As in previous years, among foreign investors into Austrian targets, German investors formed the strongest and most active group (with a total of 35 deals equalling a 34.7 per cent share).

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The main corporate law statutes are the Stock Corporation Act and the Limited Liability Company Act for corporations, and the Enterprise Act for partnerships. The Takeover Act and the Stock Exchange Act, supplemented by the Market Abuse Regulation, are relevant for listed companies (in relation to public takeovers, stake-building, ad hoc disclosure, insider trading, directors' dealings, etc.), whereas for private companies they do not apply. Merger control issues are governed by the Cartel Act, unless the EU Merger Regulation applies. In relation to corporate reorganisations, such as mergers, spin-offs and squeeze-outs, in particular the EU Merger Act, the Demerger Act, the Shareholder Squeeze Out Act and the Transformation Act complement the general corporate law statutes, while from a

1 Clemens Philipp Schindler and Martin Abram are partners at Schindler Rechtsanwälte GmbH.

tax perspective the Reorganisation Tax Act provides for roll-over treatment under certain conditions. From a general tax perspective, the Corporate Income Tax Act as well as the Individual Income Tax Act are of most relevance, with, inter alia, transfer taxes being primarily subject to the Stamp Duty Act and the Real Estate Transfer Tax Act. In the employment law area, the Labour Constitution Act and the Act on the Amendment of Employment Contracts (AVRAG) are to be taken into account. In addition, for specific industries, sector-specific laws apply, such as the Banking Act, the Securities Supervisory Act, the Insurance Supervisory Act or the Telecom Control Act.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

A notable recent change in the legal framework relates to listed companies; historically, companies admitted to trading to the regulated Official Market of the Vienna Stock Exchange could not be voluntarily delisted unless in the form of a 'cold delisting' (as a consequence of a restructuring or if the preconditions for a listing ceased to apply). Thus, an admission to a regulated market was tantamount to a one-way street. In 2018, the legislator finally introduced an optional voluntary delisting (upon application of the issuer) subject to a vote or request of shareholders representing 75 per cent of the share capital; and, as alternatives, a takeover offer addressed to the remaining shareholders or an alternative listing in a different Member State being maintained. However, apart from one such offer being made in respect of Pankl Racing Systems AG, promptly upon the introduction of the new law, no such offers were made since then.

Partial takeover bids (addressed to all shareholders of a listed company, but with an acceptance cap) also remain a popular tool for purposes of increasing an existing shareholding below the formal control threshold of 30 per cent (unless lowered in the articles of association, as implemented by several Austrian companies in particular in the recent past); partial takeover bids may also be submitted by the issuer itself, thus acquiring its own shares, for example, for purposes of acquiring treasury shares (which may be cancelled or designated for other purposes such as an acquisition currency, or for employee or management stock option programmes).

No change has been made to the formal control threshold of 30 per cent, which has been in place since 2006 and which triggers a mandatory bid obligation for all shares in the target, or are even limited to only 26 per cent, which is the *ex lege* cap of exercisable voting rights (unless another shareholder holds voting rights in excess of that threshold or a bid is launched). Often, however, this bid is followed by subsequent bids, which usually triggers a mandatory offer.

Another recurrent topic is access to documents and information to conduct due diligence. In this context, certain differences depend on the legal form under which the target is established (largely based on the differentiation between whether a company is privately held, forms part of a group or is publicly listed).

As a general rule, in the case of stock corporations, third parties do not have a right to obtain information from the stock corporation apart from those pieces of information that are publicly available; the disclosure of any non-public information by a company is subject to a decision of its management (the management board in the case of joint-stock corporations, and managing directors in the case of limited liability companies), which must be taken in consideration of, inter alia and most importantly, the interests of the company (and not its shareholders). A board is thus not obliged to disclose confidential information to a prospective buyer. Even shareholders' information rights are subject to important restrictions. Shareholders can request financial statements, including the management report as well as the supervisory board report. Furthermore, shareholders have an individual information right at the shareholders' meeting in relation to items contained in the agenda, and to the extent such information is necessary to properly assess an agenda item. Given that such information will usually not suffice for the purposes of due diligence by a potential investor, shareholders will often request the management to disclose additional information. The decision on the disclosure of confidential information, and thus the decision on the admission or refusal of due diligence, is a management measure, and thus generally does not require the consent of the supervisory board or the shareholders. The management has to avoid any damage to the company, and must consider all potential advantages, risks and disadvantages. Positive impacts may include, for example, new or cheaper means of financing, access to new customers or markets, access to product or technical know-how, and advantages for the company's production or procurement or access to additional funding. Negative impacts could arise if, for example, a competitor or a major supplier or customer of the target can access the information. The decision to allow due diligence is not necessarily an all-or-nothing decision; the greater the interest of the company in a transaction underlying the due diligence request, the greater amount of sensitive data can be disclosed as well. The interest of shareholders also has to be taken into account by the management, whereby shareholders should generally be treated equally in equal situations. Another aspect to consider is the time frame. The more advanced the stage of the acquisition process, the more comprehensive and detailed the information that can be made accessible to the buyer. Due diligence will mostly only be permitted if the buyer's intention to commit to a purchase has become more specific; for example, by the buyer signing a letter of intent. At the same time, the prospective buyer should also sign a non-disclosure agreement as a standard precautionary measure.

The situation for limited liability companies is generally comparable to that of stock corporations. Although its shareholders have only limited access to information rights, the Austrian case law has long established that every shareholder has to be granted a comprehensive information claim. Therefore, managing directors are, in general, obliged to provide requested information to shareholders. However, this information claim does not apply without restriction. The purpose of the comprehensive information right is to monitor managing directors, to control the business situation of the company and to prepare for general meetings. This information claim should thus only be used for these objectives. Accordingly, there is some legal argument in Austria that the information claim would not include due diligence for the sale of shares; meanwhile, others argue that managing directors may not deny access to documents or information for purposes of due diligence. Overall, a due diligence claim by a shareholder of a limited liability company must be honoured, if and to the extent that it is essential for selling the shares to a potential buyer, and the shareholder's request is not a misuse of the law (e.g., if the shareholder intends to avoid disclosure of the information to a prospective buyer), but only to the extent that is necessary to sell the shares, and only insofar as the interests of the company are not negatively affected. Regarding the question of what information the seller is allowed to share with a potential buyer, the company's confidentiality interests must be carefully weighed against the shareholder's interests in the dissemination of information, and will often require a shareholder resolution (at least in scenarios in which the sale of the shares is subject to shareholders' approval). The shareholders of a limited liability company are subject to the duty of loyalty to the company and to the other shareholders. The nature of this duty of loyalty among the shareholders means paying due regard to the legitimate interests of the other shareholders even when exercising their voting rights.

M&A data protection is also in the spotlight since the introduction of the General Data Protection Regulation (GDPR). For the seller side in an M&A process, there are important GDPR concerns to be aware of. During due diligence, there are potential risks of data and privacy breaches, when sensitive information is shared between potential buyers and the seller company. For the buyer side, the company's GDPR compliance or readiness must be taken into account during the due diligence process if the potential acquisition target does business in Europe or deals with data related to European citizens, even if the company does not have a physical office location in the EU. The GDPR is a comprehensive set of rules and regulations, and there are several important steps organisations must carry out in order to comply, such as a classification of all personal data being processed by a company, performance of risk assessments, implementation of specific processes, and notifications of the competent authorities and, in some scenarios, the individuals who have been affected by a breach. Further, individuals have important rights under the GDPR (such as the right to be informed, the right of access and rectification, right of data portability, etc.). To avoid fines for non-compliance, which can be substantial, companies need to have an in-depth understanding of where personally identifiable information is stored and processed throughout the organisation and will have to transfer such information into a record of all processing activities. Various opening clauses provide Member States with discretion to introduce additional national provisions to further specify the application of the GDPR. In this context, the Austrian legislation provides that declarations of consent to the processing of personal data lawfully obtained according to the current data protection framework shall remain valid under the GDPR if such declarations also comply with the new regulations of the GDPR. Compliance can potentially be very expensive, and these costs should be considered very carefully when it comes to the purchase price of a target company. Further, fines related to non-compliance with the GDPR can be very high – in some cases, up to 4 per cent of the company's prior year worldwide revenue or up to €20 million.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

As one of so far 18 EU Member States, Austria established a new investment control regime in July 2020.

Its importance for private equity investors ultimately controlled by persons hailing from outside of the European Economic Area or Switzerland can hardly be overstated. Direct and indirect acquisitions of (1) voting rights of 25 per cent or 50 per cent (in critical sectors 10 per cent); (2) a decisive influence in an Austrian company; or (3) significant assets in sectors such as defence, energy, digital infrastructure, R&D, but also IT, public transport, health, telecommunications, chemicals, robotics, semiconductors, nuclear and biotechnology, food supply, supply of pharmaceuticals, vaccines, medicinal products and media, which are considered to be of critical importance for security and public order in Austria, will require approval by the Austrian Ministry of Digital and Economic Affairs. Approval may be granted subject to conditions. An investor failing to obtain approval before closing may face administrative and even criminal sanctions. In addition, an investment is deemed void until approval has been obtained. Because the investment control proceeding will take between two and a half months in simple cases and five to six months in more complex cases, the transaction documents should provide for sufficient time between signing and closing.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Significant transactions

During 2020, in terms of deal volume, the market saw several notable transactions.

The four largest deals involving Austrian targets or other participants involved the following:

a OMV Aktiengesellschaft, a publicly listed oil and gas company that counts Austria and Abu Dhabi among its core shareholders, increased its stake in Borealis AG to over 70 per cent though a €4.1 billion transaction;

b Cellnex Telecom acquired CK Hutchison Networks Austria GmbH for a purchase price of €1.1 billion;

c UNIQUA acquired AXA-subsidiaries in Poland, Czech Republic and Slovakia for a purchase price of €1.0 billion; and

d Austria-based ams AG increased its majority stake in Germany-based OSRAM Licht AG that was acquired in 2019 through a €1.2 billion transaction.

ii Key trends and hot industries[2]

Overall, the value of transactions remained stable during 2020, whereas the transaction volume significantly decreased.

The number of outbound transactions by Austrian investors also decreased as compared to 2019.

Most of the deals were made with companies in the industrial, technology and real estate sector, a trend that is expected to continue in 2021.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Until the outbreak of the covid-19 pandemic, corporates found that the financing environment had somewhat improved, particularly for those with strong financials. After an initial significant downturn in lending activities in Q2 2020, banks have again become more active.

Structurally, the financing environment for buyout transactions has remained more or less unchanged and is quite different for domestic market participants (as opposed to international players), which typically seek financing from domestic banks, and international financial sponsors, which are able to tap international banks (at least on large-cap deals). Leverage levels for large-cap transactions have gone up slightly to about five times EBITDA, and relative debt-to-equity ratios of 40 to 50 per cent. Small to mid-cap transactions are sometimes financed through equity alone, or by domestic or German banks. Leverage levels and relative debt-to-equity ratios generally tend to be lower for small to mid-cap transactions than for large-cap deals.

2 EY M&A Index Austria 2020.

Where leverage is employed on small and mid-cap transactions, there is usually only senior and institutional debt, as mezzanine structures tend to add another layer of complexity that is often not supported by the limited transaction size. On large-cap transactions, mezzanine financing is sometimes considered but, given the limited transaction size, is ultimately seldom employed. High-yield instruments are usually only considered for post-completion refinancing, as the time and cost involved tend to be disproportionate to any gains on the pricing side.

Experience shows that certain limitations under Austrian corporate law are often unexpected for foreign investors when structuring a deal, particularly in relation to intragroup (financing) transactions: Austrian law generally prohibits the return of equity to shareholders (i.e., up-and-side-stream transactions) of both a limited liability company as well as a stock corporation (and is applied by the Austrian courts by analogy to limited partnerships with only a limited liability company or stock corporation as unlimited partner). Based on this principle, Austrian courts have established that a company cannot make any payments to its shareholders outside arm's-length transactions except for the distributable balance sheet profit, in a formal reduction of the registered share capital or for the surplus following liquidation.

The prohibition on return of equity covers payments and other transactions benefiting a shareholder where no adequate arm's-length consideration is received in return; in relation to acquisition financing, typical examples for critical and potentially inadmissible transactions include upstream, side-stream and cross-stream loans as well as security rights (such that, for instance, a target company is typically prohibited from granting personal or asset security for the acquisition debt of its (new) parent for the acquisition of target shares). To the extent a transaction qualifies as a prohibited return of equity, it is null and void between the shareholder and the subsidiary (and any involved third party, if it knew or should have known of the violation.) Breaches may also result in liability for damages. Most of the above principles are also applied by the Austrian courts by analogy to limited partnerships with a limited liability company or stock corporation as (the sole) unlimited partner.

Austrian courts have developed case law suggesting that a subsidiary may lend to a shareholder, or guarantee or provide a security interest for a shareholder's loan, if:

a it receives adequate consideration in return;

b it has determined (with due care) that the shareholder is unlikely to default on its payment obligations, and that even if the shareholder defaults, such default would not put the subsidiary at risk; and

c the transaction is in the interest of the Austrian subsidiary (corporate benefit).

In addition, the Austrian Stock Corporation Act prohibits a target company from financing or providing assistance in the financing of the acquisition of its own shares or the shares of its parent company (irrespective of whether the transaction constitutes a return of capital). It is debated whether this rule should be applied by analogy to limited liability companies. Transactions violating this rule are valid but may result in liability for damages.

VII EMPLOYMENT LAW

In the case of a transfer of a business within the meaning of the Act on the Amendment of Employment Contracts implementing Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive), the employment relationships of the employees associated with the business transfer together with the business to the purchaser (Section 3, Act on the Amendment of Employment Contracts). Employees can object to the transfer of the employment relationship within one month if the purchaser does not maintain dismissal protection pursuant to a collective bargaining agreement or take over pension commitments based on a single contract. This does not apply if the seller's business transfers by way of universal succession to the purchaser and the seller subsequently ceases to exist (e.g., in the case of a legal merger).

The Austrian Supreme Court has held that a dismissal of employees in the course of an asset sale (both by the seller and the acquirer) is against good morals (*bonos mores*) and therefore invalid, unless there are valid economic, technical or organisational reasons unrelated to the asset sale. If dismissals occur in close proximity to an asset sale, there is a (rebuttable) presumption that such exceptions do not apply. In addition, the general rules of Austrian employment law concerning appeals against dismissals apply.

There is no special protection against a dismissal in the context of a share sale (i.e., where not the business as such but the company is transferred). Only general rules of Austrian employment law concerning appeals against dismissals apply.

Another area of interest to investors is whether there are obligations to inform or consult employees or their representatives, or to obtain employee consent to a share sale or an asset sale. If a works council is established at the target company, the target company must inform the works council in accordance with Section 109 of the Labour Constitution Act, and consult with the works council on request in relation to a share deal. If no works council is established, no information or consulting requirements apply. In relation to an asset deal, the following has to be observed:

a The Labour Constitution Act provides for information and consultation rights of the works council in general, as well as specifically in relation to certain transactions and changes to a business;

b the information must be given sufficiently in advance, in writing and in a manner that allows the works council to assess the relevant transaction or change;

c the information must specifically include the reason for the transaction or measure, and the legal, economic and social consequences as well as any associated measures that may affect employees;

d the works council must be given an opportunity to comment on the transaction and propose measures mitigating adverse effects for employees;

e where no works council is established, an asset sale only triggers information requirements if a transfer of a business is concerned. In that case, the seller or the purchaser must provide certain information to the employees affected (in particular, the date of the transfer of business, the reason for the transfer of business, its legal, economic and social consequences and any planned measures concerning the employees); and

f affected employees do not, however, have consultation rights. There is no obligation to obtain the consent of the employees affected. However, where by operation of Section 3 of the Act on the Amendment of Employment Contracts, a transfer of a business results in the transfer of an employee to the purchaser together with the business, the employee can object to the transfer in certain limited circumstances (see above).

VIII TAX LAW

As there is no tax exemption for capital gains realised from the sale of shares in an Austrian company (as opposed to shares in a foreign company), foreign investors will often choose an acquisition vehicle in a foreign country with which Austria has concluded a double taxation treaty that provides that only such other jurisdiction is entitled to tax the capital gains.

However, an Austrian acquisition vehicle allows the establishment of a tax group between the acquisition vehicle that incurred the debt and the target, which enables the purchaser to offset the interest expenses for the acquisition from the operational profits of the target. In general, non-Austrian corporations may also be part of an Austrian tax group, and their respective losses may reduce the Austrian tax burden under certain circumstances. However, such attribution of losses is limited to 75 per cent of the income subject to tax in Austria. Remaining losses may be carried forward.

Furthermore, foreign investors will usually opt for structures that avoid or minimise withholding tax. Dividends and interest payments are generally subject to withholding tax of 27.5 per cent (25 per cent in cases of corporations as the recipient). However, limitations and exemptions apply under domestic law as well as applicable tax treaties. In particular, withholding tax on dividend payments to non-Austrian investors is typically subject to the limitations under the EU Parent-Subsidiary Directive and applicable double taxation treaties. Interest payments on loans to non-Austrian lenders are, in principle, not subject to Austrian withholding tax.

Debt-financed acquisitions should be structured carefully to secure the deductibility of interest as well as the offsetting of such interest expenses from business profits of the target company. Interest expenses are, for instance, not deductible in Austria if the interest is not taxed at the level of the related party lender at an effective tax rate of 15 per cent or more. However, there are no statutory rules on thin capitalisation in Austria. From a practical perspective, tax authorities usually accept debt-to-equity ratios of around 3:1 to 4:1. Besides the non-deductibility, the breach of this ratio would also result in interest payments being treated as deemed dividends, which – unlike interest on shareholder loans – would be subject to withholding tax in Austria (see below). Finally, there is currently no interest barrier rule providing for a general limit on the deductible amount of interest expenses paid to unrelated parties (see below).

Besides the developments mentioned above, tax audits in relation to M&A deals are becoming more common and burdensome. In particular, transfer pricing issues – for example, in relation to interest on shareholder loans or certain fees payable to related entities – are under scrutiny. Accordingly, tax rulings are also becoming more popular.

Since 2019, controlled foreign company rules and a legal definition for abuse of law are in place. In this context, the inclusion of the existence (or non-existence) of an abuse of law in the scope of binding tax rulings is likely to have high practical relevance. In Austria, the introduction of an interest barrier rule foreseen under the BEPS Anti-Avoidance Directive has been deferred for now. Although the European Commission initiated respective infringement proceedings against Austria, financing structures with unrelated parties should not be challenged by the tax authorities for the time being. If combined with intragroup financing, limitations, in particular thin capitalisation and the arm's-length principle, have to be observed.

IX COMPETITION LAW

The following types of concentrations are subject to merger control (intragroup transactions are exempt) under the Austrian Cartel Act:

- *a* the acquisition of an undertaking or a major part of an undertaking, especially by merger or transformation;
- *b* the acquisition of rights in the business of another undertaking by management or lease agreement;
- *c* the (direct or indirect) acquisition of shares, if thereby a shareholding of 25 per cent or 50 per cent is attained or exceeded;
- *d* the establishment of interlocking directorships where at least half of the management or members of the supervisory boards of two or more undertakings are identical;
- *e* any other concentration by which a controlling influence over another undertaking may be exercised; and
- *f* the establishment of a full-function joint venture.

A concentration must be notified to the Federal Competition Authority (FCA) if the following cumulative thresholds, which in an international comparison context are rather low, are fulfilled (based on the revenues of the last business year): (1) the combined worldwide turnover of all undertakings concerned exceeds €300 million; (2) the combined Austrian turnover of all undertakings concerned exceeds €30 million; or (3) the individual worldwide turnover of each of at least two of the undertakings concerned exceeds €5 million. A *de minimis* exception exists, if the Austrian turnover of only one of the undertakings concerned exceeds €5 million; or the combined worldwide turnover of all other undertakings concerned does not exceed €30 million. If the thresholds above are not reached, a transaction still has to be notified if (1) the combined worldwide turnover of all undertakings concerned exceeds €300 million; (2) the combined Austrian turnover of all undertakings concerned exceeds €15 million; (3) the consideration paid in the transaction exceeds €200 million and the target is active in Austria to a significant extent.

For calculating the turnover thresholds, the revenues of all entities that are linked with an undertaking concerned as defined under the Cartel Act are considered one entity (thus, the turnover of a 25 per cent subsidiary must be attributed fully). Indirect shareholdings only have to be considered if the direct subsidiary (of at least 25 per cent) holds a controlling interest in the indirect subsidiary. Revenues of the seller are disregarded (unless the seller remains linked with the target undertaking as defined under the Cartel Act). Specific provisions for the calculation of turnover apply for mergers in the banking, insurance and media sectors.

Transactions that are notifiable in Austria may have an EU dimension under Article 1 of Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (Merger Regulation). In that case, the European Commission generally has sole jurisdiction to assess the case. However, the Cartel Act contains specific rules regarding media mergers, which require a filing with both the European Commission and the FCA.

The relevant merger authorities in Austria are the FCA and the Federal Cartel Prosecutor, collectively referred to as the Official Parties, and the Cartel Court.

The Official Parties assess notifications in Phase I proceedings. Should a notification raise competition concerns, either official party may apply to the Cartel Court to open Phase II proceedings. Decisions of the Cartel Court may be appealed before the Supreme

Cartel Court. The Competition Commission is an advisory body that may give (non-binding) recommendations to the FCA as to whether to apply for an in-depth Phase II investigation of a notified transaction.

A notifiable transaction must not be implemented prior to formal clearance. Possible sanctions for the infringement of this suspension clause are that the underlying agreements or acts are declared null and void, or the undertakings may be fined up to 10 per cent of their worldwide annual turnover (by the Cartel Court on application of the Official Parties).

Non-compliance with remedies imposed on the parties is equivalent in seriousness to breaching the suspension clause and may lead to similar fines.

A merger must be prohibited if it is expected to create or strengthen a market-dominant position. An undertaking is generally considered market-dominant for that purpose if it can act on the market largely independently of other market participants (the Austrian Cartel Act contains a rebuttable presumption of market dominance if certain market share thresholds are achieved). Even where a merger is expected to create or strengthen a market dominant position, it must nevertheless be cleared if either it will increase competition, and therefore the advantages gained by implementing the transaction will outweigh the disadvantages; or it is economically justified and essential for the competitiveness of the undertakings concerned.

A media merger will be assessed not only against its compatibility with the competition rules, but also as to its adverse effects against media plurality.

X OUTLOOK

Generally, the first half of 2021 saw a slight increase in the number transactions but a significant decrease in deal volume, mainly because of the absence of highlight deals. Overall, the Austrian M&A market did not experience the same boom in the first half of 2021 as in other countries. However, the outlook for the second half of 2021 points towards a sizeable increase in deal numbers and volume.

Appendix 1

ABOUT THE AUTHORS

CLEMENS PHILIPP SCHINDLER

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Clemens Philipp Schindler is a founding partner of Schindler Attorneys. Before establishing the firm, he spent six years as partner at Wolf Theiss, where he led some of the firm's most prestigious transactions and headed its Brazil operations.

Prior to that, he practised with Haarmann Hemmelrath in Munich and Vienna, and with Wachtell Lipton Rosen & Katz in New York.

Mr Schindler's practice focuses on corporate and tax advice in relation to public and private M&A, private equity and corporate reorganisations (such as mergers, spin-offs and migrations), most of which have a cross-border element. Furthermore, he is specialised in international holding structures, including charter financing and leasing operations. His practice is complemented by private client work (e.g., as counsel to families owning stakes in large corporations).

Mr Schindler holds law degrees from University of Vienna (*Dr iur*) and New York University Law School (LLM), and a degree in business administration from the Vienna University of Economics and Business Administration (*Dr rer soc oec*).

Mr Schindler is admitted in Austria as both an attorney-at-law and a certified public tax adviser. He has authored and co-authored more than 50 articles, books and commentaries in his fields of expertise, for which he is also much sought after as a speaker at conferences and seminars.

Mr Schindler is ranked by international legal directors such as *Chambers Global*, *Chambers Europe*, *The Legal 500*, *IFLR1000*, *Best Lawyers* and *Who's Who Legal*. The German legal directory *JUVE* lists him as one of Austria's top 20 corporate and M&A lawyers, while the Austrian business magazine *TREND* has named him among Austria's top 10 corporate lawyers and among Austria's top 10 tax lawyers. Besides their Austrian listings, *Chambers Global* and *Chambers Europe* acknowledge his Brazilian expertise in a special ranking on outstanding expertise in foreign jurisdictions.

MARTIN ABRAM

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Martin Abram is a founding partner at Schindler Attorneys. Prior to joining the firm, he was a partner at Wolf Theiss, being a member of its corporate and M&A and real estate teams.

Abram's practice comprises the full spectrum of corporate and financial transactions with a particular focus on M&A, real estate and insolvency and capital markets transactions, both in a cross-border and domestic context.

He is a graduate of the Law School of Vienna University and obtained a post-graduate law degree at the University of Nottingham.

Abram is admitted as an attorney-at-law in Austria (Vienna Bar). He is the author of several publications in his fields of practice.

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