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In-Depth: Mergers & Acquisitions (formerly The Mergers & Acquisitions Review) provides a practical overview of global M&A activity and the legal and regulatory frameworks governing M&A transactions in major jurisdictions worldwide. With a focus on recent developments and trends, it examines key issues including relevant competition, tax and employment law considerations; financing; due diligence; and much more.

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Austria

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Summary

Introduction

In line with other EU markets, the Austrian mergers and acquisition (M&A) market is highly developed. Investors from outside Austria will rarely meet unexpected negative surprises in their transactional activity regarding targets in structuring, obtaining clearance and in implementing a transaction. The majority of M&A transactions involving Austria are private M&A deals, as the Austrian capital market is comparatively small.

Apart from targets in the financial industry, consumer goods and infrastructure sectors, a considerable part of deal activity throughout the past few years has concerned Austrian real estate companies. Aside from commercial and economic factors, this increased deal activity may partly be a consequence of the dispersed ownership structures of Austrian real estate companies.

Austrian law does not have one specific law regulating all issues on the acquisitions of companies, but rather various different statutes apply, depending on the specific type and form of the acquisition.

Year in review

i Overview of M&A activity

In 2022, M&A saw a slight increase in the numbers of transactions – from 293 to 297 – compared to 2021. The transaction volume, however, sharply decreased from 9.1 billion to 2.3 billion (as per the EY M&A Index Austria 2022). Over 70 per cent of the total transaction volume was covered by the top five deals of 2022. As previously, the vast majority of transactions were entered into by strategic investors; investments by private equity and venture capital investors regressed from 17 to 11 deals.

In terms of statistics, the EY M&A Index Austria 2022 reveals that:

1. domestic deal activity decreased by deals or 12.5 per cent;
2. inbound investment by foreign investors into Austrian companies decreased by 13.5 per cent; and
3. outbound investment by Austrian investors increased by 27.9 per cent.

In terms of industry sectors, investments in industrial sector targets (89 deals) outnumbered investments in the real estate sector (68 deals) and the technology sector (60 deals).

ii Developments in corporate and takeover law and their impact

At the beginning of 2023, the Austrian Ministry of Justice released the draft law for the implementation of this Directive, which was passed in July 2023 (Austrian EU Reorganisation Act). Before that, Austrian statutory law only regulated cross-border mergers. The EU Reorganisation Act now regulates cross-border conversions, divisions and mergers and tries to fill the existing gaps in legislation on cross-border reorganisations.

Cross-border reorganisations were already possible before the passing of the legislation due to rulings by the European Court of Justice. Nevertheless, the uniform legislation in all EU countries alongside the new law in Austria will lead to higher legal certainty. The Austrian Ministry of Justice expects a noticeable but not exorbitant increase in cross-border reorganisations from 70 to 90 cases per year (which is an approximate increase of 30 per cent).

One additional change relevant for M&A transactions is the new Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market. This new Regulation provides for two notification requirements:

1. an obligation for companies to notify the European Commission of concentrations involving a financial contribution by a non-EU government where:
    - the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500 million; and
    - the foreign financial contribution involved is at least €50 million; and
2. an obligation for companies to notify the European Commission of a participation in public procurement procedures, where:
    - the estimated contract value is at least €250 million; and
    - the foreign financial contribution involved is at least €4 million per non-EU country.

For all other market situations, the European Commission can commence an investigation on its own initiative (*ex officio*) if it suspects that distortive foreign subsidies may be involved. These *ex officio* powers can be exercised from 12 July 2023, whereas the obligations to notify will apply from 12 October 2023. This new regime is expected to have an additional impact on M&A transactions going forward.

Legal framework

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, inter alia, public takeovers, stake-building, ad hoc disclosure, insider trading and directors' dealings), 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 tax perspective the Reorganisation Tax Act provides for roll-over treatment under certain conditions. From a general tax perspective, the Corporate Income Tax Act and 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 and the Telecoms Control Act.

Foreign involvement in M&A transactions

The Austrian investment control regime introduced in July 2020 remains very important for private equity investors that are ultimately controlled by persons hailing from outside the European Economic Area or Switzerland. The following direct and indirect acquisitions are considered to be of critical importance for security and public order in Austria, and therefore require approval by the Austrian Ministry of Digital and Economic Affairs:

1. voting rights of 25 or 50 per cent (in critical sectors 10 per cent);
2. a decisive influence in an Austrian company; and
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.

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.

Significant transactions, key trends and hot industries

Austrian M&A activity in 2022 mirrored broader regional trends with a decline in large-cap transactions and more cautious buyers, mainly driven by political (war in Ukraine) and economic (inflation and interest rates) uncertainty.

Similar to prior years, large-cap activity was dominated by strategic transactions. The largest transaction involved a 24.9 per cent stake in Austrian-listed oil and gas group OMV by the Abu Dhabi National Oil Company from Abu Dhabi's state fund Mubadala (at the time of writing, it is subject to regulatory approval).

The overall M&A market has been driven by the renewable energy, technology, media and telecoms (TMT) and industrial sectors. In the private equity and venture capital space, transaction activity for education related assets was relatively high in 2022. Distressed M&A did not yet play a major role in 2022.

The large-cap segment (comprising deals with values above €100 million) saw limited activity in Austria in 2022. While transaction value was not disclosed, the acquisitions of education providers Aspire Education by EMZ Partners from Quadriga Capital and eduPRO by Invision were among the largest relevant buyout transactions in Austria in 2022, probably counting towards the lower large-cap segment.

In the mid-cap segment (comprising deals with values of between €10 million and €100 million), transaction activity was muted with a number of aborted deals. Among the noteworthy transactions is the acquisition of Siemens' building and facility management subsidiary SGS by PAI-backed Apleona.

One of the recurring topics in M&A transactions remains data protection and compliance with 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 European Union. 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. Furthermore, individuals have important rights under the GDPR (e.g., the right to be informed, the right of access and rectification and right of data portability). 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. Furthermore, 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.

Financing of M&A: main sources and developments

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.

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). On the basis of 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:

1. it receives adequate consideration in return;
2. 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
3. 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.

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 of the 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 cease 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:

1. 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;
2. 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;
3. 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;
4. the works council must be given an opportunity to comment on the transaction and propose measures mitigating adverse effects for employees;
5. 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
6.

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).

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. In addition to the non-deductibility, the breach of this ratio would 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).

In addition to 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.

Competition law

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

1. the acquisition of an undertaking or a major part of an undertaking, especially by merger or transformation;
2. the acquisition of rights in the business of another undertaking by management or lease agreement;
3. the (direct or indirect) acquisition of shares, if thereby a shareholding of 25 or 50 per cent is attained or exceeded;
4. 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;
5. any other concentration by which a controlling influence over another undertaking may be exercised; and
6. 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; or
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.

Outlook and conclusions

Market participants have adapted to the covid-19 pandemic and supply chain issues, which resulted in robust private equity activity until around mid-2022. From mid-2022, activity started to slow down in general, but in particular in the venture capital sector and less so in the growth capital segment, as investors got more cautious given the macro-economic downturn. This may cause certain auctions scheduled for 2023 to be postponed until there is better overall visibility. We would also expect distressed M&A to pick up in 2023 as this time around no government support schemes are planned.

Endnotes

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