

Mergers & Acquisitions

Fifth Edition

Editors: Michael E. Hatchard & Scott V. Simpson
Published by Global Legal Group

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Austria

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Overview

This chapter seeks to give an overview of the most important laws and regulations relevant for M&A transactions in the public and private sector in Austria and shall briefly discuss the typical forms of M&A transactions in the year 2015. Subsequently, an analysis of the Austrian M&A market and its development in recent months is given. A further section of this chapter will deal with the most important and most interesting transactions that took place in Austria during the year 2015 and another section will give a short overview of key developments in the year 2015, which might have an impact on the structuring of M&A transactions in Austria for 2016. The chapter will be concluded with a short outlook for the year 2016.

Relevant laws that govern M&A and the principal regulators

Private sector

M&A transactions are most commonly executed in the form of an asset or a share deal. Among the most relevant regulations that apply to asset deals are Article 1409 of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch – ABGB*) and Article 38 of the Austrian Commercial Code (*Unternehmensgesetzbuch – UGB*).

Under the general liability provision of Section 1409 ABGB, a purchaser in an asset deal generally is jointly and severally liable with the seller towards the seller's creditors for any pre-existing liabilities of the acquired business. This is mandatory law. Purchaser's liability under Section 1409 of the General Civil Code applies if the purchaser knew or should have known at the time of the purchase of the pre-existing liabilities.

Even if the buyer is not liable under the ABGB because, for example, the purchase price was used to pay off the debts of the business sold, the buyer still might be liable under the UGB.

According to the basic rule of Article 38 UGB, a legal entity which acquires and continues a commercial business is liable for all debts the former owner incurred in the course of business conduct, even those which are not taken over by the purchaser. In contrast to the ABGB provision, Article 38 UGB provides for liability which is not limited to the value of the assets taken over by the purchaser. However, in contrast to the ABGB, purchaser liability under the UGB can be limited to assets which were purchased by submitting a timely notification to the commercial registry. In addition, an agreement between the purchaser and the seller that the purchase price funds will be used to pay off the debts of the business sold does not reduce the purchaser's liability under the UGB. However, in contrast to the ABGB, purchaser liability under the UGB can be avoided by submitting a timely notification to the commercial register.

Also, the Limited Liability Companies Act (*Gesetz über Gesellschaften mit beschränkter Haftung – GmbHG*) and the Joint Stock Corporations Act (*Aktiengesetz – AktG*) contain a number of relevant provisions. According to the GmbHG, shares in a limited liability company (*GmbH*) are freely transferable, though the transfer requires the form of a notarial deed. Most articles of association, however, provide for transfer restrictions such as the approval of the company (*Vinkulierung*). Nevertheless, the possibility to transfer shares cannot be precluded entirely. The GmbHG and the AktG prohibit the return of equity to shareholders (*Einlagenrückgewähr*). Based on this principle, Austrian courts have established that a company cannot make any payments to its shareholders outside arm's length transactions except in the following cases: for the distributable balance sheet profit; in a formal reduction of the registered share capital; or for the surplus following liquidation. These limitations often come as unexpected for foreign investors after the completion of the transaction.

Also relevant for M&A transactions in particular are the regulations of the AktG with respect to equal treatment of shareholders and directors' statutory duties. This Act also 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.

With regard to labour law and in accordance with the EC Acquired Rights Directive, Section 3 of the Law Amending the Labour Contract Law (*Arbeitsvertragsrechts Anpassungsgesetz*) provides for a mandatory transfer of all existing employment contracts (with benefits) pertaining to the entire business or operational unit sold (e.g., asset deal), leased or transferred (e.g., by a merger) to another company. In a share deal, the benefit plans of the legal entity whose shareholder changes will continue to apply.

Public sector

The most relevant legislation that regulates public bids on the primary and secondary market is the 1999 Takeover Act (TA – *Übernahmegesetz*), amended by the Takeover Act Amendment Act (*Übernahmerechtsänderungsgesetz*) 2006.

The TA is applicable to listed Austrian companies. It regulates voluntary public takeover bids and sets out the conditions that trigger compulsory take-over bids. The Austrian takeover rules do not apply to non-public bids and bids for shares that are not listed on a stock exchange. If in the course of a non-public bid, however, a person obtains a controlling interest in an offeree company, such person will then be subject to the rules on mandatory public bids of the TA.

The TA also applies to certain cross-border takeover transactions. In case a public company is incorporated in Austria but the shares are not admitted to trading in Austria but on a regulated market of another member state of the EU, takeover bids are only subject to a number of basic provisions of the TA, including, *inter alia*, the provisions regarding mandatory public bids.

Among other relevant legislative acts are the Stock Exchange Act (*Börsegesetz*) that relates to stake-building, *ad hoc* disclosure and insider trading. The AktG is also applicable to public joint stock companies (applicable regulations including those mentioned above).

As of December 2007 takeovers by cross-border mergers are allowed. The EU Merger Act (EU *Verschmelzungsgesetz*) provides the legal framework for such takeovers. Under the Squeeze-Out Act (*Gesellschafterausschlussgesetz*), squeeze-outs of minority shareholders (up to 10% of the remaining shareholders) are possible. The Act allows squeeze-outs in both listed and unlisted companies.

As of December 2011, the Foreign Trade Act (*Außenwirtschaftsgesetz*) imposes a substantial barrier on foreign investors when acquiring shares in an Austrian company operating in certain sectors. A foreign investor requires advance approval from the Austrian Ministry of Economic Affairs when acquiring an interest of 25% or more, or when acquiring a dominating interest in an Austrian enterprise engaged in specific protected industry sectors, such as defence equipment, energy, water supply, traffic, education and telecoms.

Regulatory bodies

Public M&A matters in Austria are subject to the supervision of the Austrian Takeover Commission (ATC – *Übernahmekommission*). The ATC is an independent body that supervises compliance with Austrian takeover regulations and decides on all matters related to the TA.

The Cartel Act (*Kartellgesetz*) applies to mergers not subject to the merger control of the European Commission and contains substantive rules concerning unfair competition and cartels as well as procedural rules on judicial proceedings, and the enforcement of judgments and fines. Under the Cartel Act's merger control provisions, parties to M&A transactions often need to file with the Austrian Competition Authority (*Bundswettbewerbshörde*) for clearance of the merger. The Austrian Competition Authority is an independent administrative body assigned to the Federal Minister of Science, Research and Economy. Other relevant authorities are the Federal Cartel Prosecutor (*Bundeskartellanwalt*) and his Deputy, who belong to the Ministry of Justice, as well as the Cartel Court (*Kartellgericht*). Both authorities deal with cartels, abuse of market power and merger control.

Typical forms of acquisitions

In the private sector, especially in the mid-market segment, share deals are the primary means of acquiring a company, followed by asset deals. With a share deal the buyer will purchase shares or stakes from the company owner and thus become the legal owner of the entity. The buyer acquires the company's assets as well as all existing and potential liabilities and debts. The transfer of shares in limited liability companies (*GmbH*) requires the form of a notarial deed; notarisation must be by an Austrian notary or a notary subject to a comparable regime (e.g. a German notary).

With an asset deal, the buyer takes over assets and a part of precisely defined liabilities. The buyer acquires the business and not the legal entity.

Less commonly, acquisitions are carried out by corporate reorganisations, namely mergers or demergers, contributions of assets or transformations, or by corporate or contractual structures setting up joint ventures.

The sale of private companies often takes place by auction. There is no specific legislation for such auction processes. However, when a state-controlled seller is involved, the process should be transparent and non-discriminatory so that the prevailing bidder can defend itself against any argument of other bidders that the seller effectively granted a subsidy by selling to the prevailing bidder.

The M&A market in 2014 and 2015

The continued growth of the global M&A market was also reflected in the Austrian economy. During the year 2014, 242 transactions having an Austrian target took place, an increase of 13% from 2013. After a lull early in 2015, the rotating M&A carousel gained pace. By mid-November 153 transactions were concluded, which constitutes a rise of 23% compared to the previous year. The increase on the Austrian M&A market

was, however, substantially lower than the increase both in the DACH region (Germany, Austria, Switzerland) and internationally. On the positive side, the number of public bids reached a peak since the introduction of the TA in 1999 and remained solid in early 2015. Particularly noteworthy was deal activity in the real estate, finance and industrial sectors. Austria has seen more purchasers aiming for public-to-private transactions in 2015. Typically, the purchaser launches a voluntary takeover bid aimed at acquiring a controlling interest, conditional upon the acceptance of shareholders holding at least 90% of the company's shares. Should the purchaser be successful, the remaining minority shareholders are squeezed out. These minority shareholders have no means to block the squeeze-out but can request a compensation review. If the squeeze-out follows a takeover offer not later than three months after the end of the offer period, there is a rebuttable presumption that the compensation is adequate if it is equal to the highest compensation that was paid during the offer period.

In principle, any person may at any time make a voluntary public takeover bid. However, if a public bid fails, the offeror and any parties acting in concert are blocked for one year, calculated from the publication of the offer results, from making a voluntary public bid for shares in the same offeree company, and from acquiring shares in the offeree company, that would trigger the obligation to make a mandatory public bid.

Significant deals and highlights

As mentioned above, in early 2015 activity in the real estate sector received a great amount of attention. For some time already international investors have shown interest in listed Austrian real estate companies. The majority of international investors come from the DACH area followed by the USA. In February 2015, Deutsche Wohnen, one of the largest publicly listed real estate companies in Germany, offered to buy Conwert Immobilien Invest SE (Conwert). Conwert was valued at about €1.1bn. The transaction failed because the acceptance threshold of 50% (under the TA) was not met. However, the Austrian Haselsteiner Familien-Privatstiftung and Albona Limited sold their 24.79% participation in Conwert to MountainPeak Trading Limited, a company owned by the Israeli investor Teddy Sagi.

One of the other most interesting transactions that took place in Austria over the previous months was the sale of Unicredit Bank Austria AG's (Bank Austria – Austria's largest bank) 16.35% stake in CA Immobilien Anlagen AG (CA Immo) to the Russian O1 Group Ltd (O1) for €295m. O1 then launched a voluntary partial offer to the shareholders of CA Immo to acquire an additional 9.85% to hold a total of up to 26% of CA Immo.

With the backing of O1, CA Immo went on to launch a voluntary partial bid for 13.5% in Immofinanz AG (Immofinanz – one of the largest commercial real estate companies), which responded with the announcement of a reverse (voluntary partial) bid for up to 29% in CA Immo. As a result, CA Immo and Immofinanz battled for months for each other's shares. As a defensive measure, Immofinanz lowered the threshold that triggers a mandatory bid obligation from the statutory 30% to 15%, while CA Immo increased the majority to remove supervisory board members to a 75% majority, making it more difficult for Immofinanz to change the supervisory board of CA Immo, had they acquired up to the suggested 29%. In response, Immofinanz surprisingly declared not to launch the bid as planned and the transaction failed.

Also, in early 2015, Bank Austria commenced the sale of its real estate portfolio of Immobilien Holding GmbH-Group (Immobilien Holding) in Austria and Central Eastern

Europe. Immobilien Holding holds interests in about 80 real estate companies throughout Austria, in property management and estate agent companies as well as in hotels and shopping centres. The total value amounts to €1bn. Particularly noteworthy was the sale of the newly built shopping centre at “Wien Mitte” to a consortium of industrial investors under the lead of Morgan Stanley Real Estate Investing, which was closed in December of 2015. The media described this deal as one of the largest real estate deals ever concluded in Vienna.

The biggest transaction in Austria in the industrial sector was the acquisition of the packaging specialist Duropack GmbH by the British DL Smith Plc, the leading provider of recycled corrugated packaging in Europe, for about €300m. Also, the sale of the Austrian start-up company runtastic GmbH (runtastic), which was established in 2009 and offers fitness software and hardware to adidas International Trading B.V. (adidas), for about €220m, caused a stir.

Aside from these larger transactions, the Austrian M&A year was mainly characterised by small and medium-sized M&A activity.

Already a significant aspect in M&A in Austria in 2013 and 2014, buy-outs of companies or parts of companies out of insolvency proceedings formed a further significant part of 2015 M&A deals. The Austrian retail market was hit hard by large insolvencies in 2015, notable of which were the bankruptcies of the hardware store BAUMAX and the retail chain ZIELPUNKT. BAUMAX had been subject to restructuring proceedings since 2012. In 2015, Austria’s largest distressed M&A asset deal took place, when the German hardware chain OBI acquired 67 former BAUMAX premises, thus becoming Austria’s largest hardware “do it yourself” supplier. At the end of 2015, ZIELPUNKT, an Austrian chain of supermarkets, surprisingly applied for bankruptcy proceedings. Around half of the premises were bought by competitors, however, at the end of the year; due to outstanding merger control clearances, these transactions were not yet closed.

Key developments

In July of 2015 the Austrian Parliament approved the Tax Reform Act 2015 which introduced several changes in all areas of tax law as of 2016. This significant tax law reform will also have some impact on M&A transactions, especially in the real estate sector. Among the most important amendments is the increase of the real estate capital gains tax from 25% to 30%. At the same time the inflation discount for so-called new real estate properties (real estate property acquired after March 30, 2002) was abolished. Due to these changes the capital gains tax on real estate will increase in total between 1.2 fold and a maximum of 2.4 fold. The Tax Reform Act 2015 also means that the withholding tax rate for income from capital investment is raised from 25% to 27.5%. This withholding tax is applicable to dividends, capital gains and interest on debt securities as well as profit from derivatives. Nonetheless, the bill sets out certain exemptions: if the recipient of the income of capital investment is an Austrian company, the withholding tax rate still amounts to 25% (which equals the Austrian corporate income tax rate of 25%) unless the company is tax-exempt for withholding tax purposes under Austrian law.

The Tax Reform Act also restricts the possibility to treat a dividend for tax purposes either as profit distribution or as repayment of equity (whilst dividends are generally subject to withholding tax, a repayment of equity is not). According to a change in the law, the repayment of share capital will always be treated as repayment of equity provided that the repayment is covered by the equity account for tax purposes.

The Real Estate Transfer Act (*Gründerwerbssteuergesetz* – GrEstG) was also subject to various amendments in the past years. Before the reform, the consolidation of all shares in one hand in a company owning Austrian real estate triggered real estate transfer tax. Under the new provision this threshold will be decreased to 95% of the shares in a company that owns property. Furthermore, instead of the VAT group requirement, shares acquired or owned by more than one entity will be deemed held “in one hand” to the extent the corporations are part of one corporate income tax group (*Unternehmensgruppe*). The transfer of ownership of at least 95% of the interest in a partnership to a new partner within a five-year period will be subject to real estate transfer tax. The applicable tax rate is a uniform 0.5%. This significant change will also have an impact on the structuring of real estate acquisitions.

Austria for some time now has been a growing harbour for start-ups. The year 2015 gave a boost in this regard with the introduction of new crowdfunding legislation making it easier for start-up businesses to finance themselves. With the Alternative Financing Act of 2015 (*Alternativfinanzierungsgesetz* – AltFG) Austria assumed a pioneer role in Europe, giving crowdfunding platforms a legal framework to navigate in, and companies seeking financing through crowdfunding easier access to funds, by reducing the disclosure and prospectus requirements for small financing sums and raising thresholds up to €5m for a full prospectus requirement. By these means, companies such as Mc Cube Home GesmbH, which offers ready-made houses that come as modules and can be matched together depending on the size of the house, raised several 100,000 euros, gaining a lot of market exposure as a positive side effect.

Industry sector focus

As mentioned above, many Austrian M&A transactions were concluded in the real estate sector. It is to be expected that this trend will continue, since real estate provides an attractive investment opportunity in times of debt crisis and instability.

Also noteworthy are the developments in the finance and the industrial sector. As described above, the biggest transactions in Austria were the sale of the manufacturer of paper and corrugated board Duropack to DS Smith Plc, and the takeover of runtastic by adidas.

The year ahead

The outlook for 2016 is rather difficult due to macroeconomic developments (e.g. Grexit, Brexit). However, according to surveys the Austrian M&A market – in particular in the real estate, finance and industrial sectors – should continue its strong performance in 2016. One of the main reasons for this development might be economic uncertainty due to fluctuation of raw material prices and currency exchange rates that support the desire for cross-border transactions. Secondly, many companies are forced to compensate for lack of own innovations with inorganic growth strategies. Thirdly, many players will enter the M&A market after a hiatus. Also, as mentioned above, international investors have shown interest in Austrian companies for some time and likely will continue to do so. In general, the continuing low level of interest rate and the flooding of the market with liquidity currently make transactions strategically interesting.

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