Chambers
AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Corporate M&A 2023

Definitive global law guides offering comparative analysis from top-ranked lawyers

Austria: Trends & Developments

Markus Fellner, Paul Luiki
and Peter Blaschke
Fellner Wratzfeld & Partners

Trends and Developments

Contributed by:
Markus Fellner, Paul Luiki and Peter Blaschke
Fellner Wratzfeld & Partners

Fellner Wratzfeld & Partners (fwp) is one of Austria's leading business law firms, offering with its 70 lawyers full legal services to its clients. The firm's clients include leading banks and other financial institutions, privately and publicly owned companies, industrial manufacturers and public sector authorities. The firm's expertise covers the full spectrum of industry sectors. fwp's approach to providing legal services places particular emphasis on combining in-depth legal expertise and well-founded business knowledge with an entrepreneurial focus to meet client needs. In addition to their legal expertise, the firm's lawyers have either supplementary degrees in economics, complementary professional experience or have studied or worked abroad. fwp has an established international practice and handles on an on-going basis major cross-border matters.

Authors

Markus Fellner is a founding partner at Fellner Wratzfeld & Partners and advises on high-profile corporate and M&A transactions, banking and finance law, as well as on complex corporate restructurings/insolvencies. He was admitted to the Austrian Bar in 1998 and lectures at various institutions. Markus Fellner is well-known for his outstanding track record advising often banking clients and leading companies on major acquisitions. Markus Fellner continues to advise the Steinhoff Group on all corporate matters. Another key highlight is advising UniCredit Bank Austria in connection with the enforcement of its minority rights resulting from UniCredit Bank Austria's position as shareholder of the institutions forming the 3Banken Gruppe (3-banks group), which is the most prominent corporate litigation in Austria.

Paul Luiki is a US native partner at Fellner Wratzfeld & Partners specialising in the full range of M&A transactions. He has a specific focus on cross-border transactions, in particular in the CEE and US regions. His other fields of specialisation are contract law and dispute resolution involving corporate matters. Paul Luiki is also a frequent lecturer at the University of Vienna on M&A and joint ventures.

Peter Blaschke is an attorney at law at Fellner Wratzfeld & Partner specialising in corporate and M&A and dispute resolution. He obtained a law degree from the University of Vienna and was admitted to the Austrian Bar in January 2003.

Fellner Wratzfeld & Partner

Schottenring 12
1010 Vienna
Austria

Tel: +43 1 537 70 – 351
Fax: +43 1 537 70 – 70
Email: marketing@fwp.at
Web: www.fwp.at

Overview of the Austrian M&A Market

The massive 2021 boom did not extend into 2022 due to an uncertain geopolitical and economic environment, which is reflected in particular in rising energy prices, inflation and interest rates. Notwithstanding this development, the worldwide M&A market continues to be driven primarily by active private equity investors and a large number of special purpose acquisition companies (SPACs), ie, shell companies that raise money via an IPO and then invest in unlisted companies. These market drivers on the global stage still play a subordinate role in Austrian transactions.

Despite the challenging market conditions, the M&A market in Austria remains stable regarding the number of deals concluded. The number of deals with Austrian involvement actually further increased from 293 M&A transactions in 2021 to 297 M&A transactions in 2022; this corresponds to an increase of 1.4% in M&A transactions according to the M&A Index 2022 published by EY Austria (Ernst & Young Global Limited). However, the number still is below the 2019 pre-COVID-19 level.

The number of reported transaction volumes declined sharply, partly because far fewer parties published their transaction volumes. Thus, the total reported transaction volume significantly decreased from EUR9.1 billion to EUR2.3 billion, which is below the long-term deal volume average. A majority of the deal volume was made up by five top deals, representing 70% of the total transaction volume. The remaining 30% was divided primarily among 24 other M&A deals.

CPI Property Group S.A.'s purchase of 12.7% of IMMOFINANZ AG for around the equivalent of EUR403.5 million accounted for the biggest single deal in 2022.

Strategic investors

Strategic investors are still involved in the vast majority of transactions in the Austrian M&A market: 286 out of the 297 transactions in 2022 involved strategic investors, corresponding to an increase of ten deals compared to 2021. On the other hand, transactions involving financial investors, such as private equity or venture capital firms, still play a minor role in Austria's M&A market. With only ten deals (3.4% of total transactions) compared to 17 deals in 2021, there is a slight decline in investors looking for strategic acquisition targets or divesting parts of their business to realign their portfolios.

Sector dominance in the last year

Regarding the number of reported transactions, most deals took place in the industrial sector (89 deals), followed by the real estate sector (68 deals) and companies from the technology sector (60 deals).

In terms of published transaction volumes, the real estate sector clearly took the lead with EUR1.5 billion, which is the result of the purchase of the Austrian-based company IMMOFINANZ AG by CPI Property Group S.A. The industrial sector took the second place with a total transaction volume of EUR500 million.

Regarding foreign M&A transactions, the number of acquisitions of foreign companies by Austrian companies that pursued their international growth targets (“outbound”) strongly increased in 2022 to 133 from 104 deals the year prior – an increase by 27.9%. With a decrease of 13.5% in the “inbound” segment (the number of transactions fell by 18 deals) foreign investors still continued to be active in Austria in 2022. The largest foreign players on the Austrian M&A market are clearly German investors who conducted a total of 36 inbound transactions – corresponding to 31.3% of all inbound purchases of Austrian companies. Likewise, 27.8% of all outbound transactions concerned German targets.

Recent Legal Changes

Digitising notarisation

Since 1 January 2021, all notarial acts and other public or publicly certified deeds can be drawn up by use of electronic means of communication without the need for physical presence before the notary public. This was the result of the Austrian legislature implementing the new Section 90a into the Notarial Regulation (NO). Electronic notarisation – like physical notarisation – can also be performed in a multilingual form and is thus especially relevant for parties located abroad, since this brings a substantial benefit with regard to avoiding travel expenditures and time delays. The official notarial acts that are required under Austrian corporate law for most transactions were clearly simplified and accelerated.

Cartel Act going “green”

With the Cartel and Competition Law Amendment Act 2021, the Austrian legislature has not only implemented EU legal requirements (Directive (EU) 2019/1), but above all adapted cartel law to more recent developments in economic life. The amendment takes particular account of the digital platform economy and climate change. The most important changes in practice are in merger control.

The new version of Section 2 paragraph 1 of the Austrian Cartel Act expands the few legal exceptions to the ban on cartels: cartels are now also exempted if their profits contribute significantly to an ecologically sustainable or climate-neutral economy. The provision thus creates legal certainty and a free space for entrepreneurial co-operation in favour of sustainable agreements that would otherwise be prohibited under national law.

As regards merger control, the new version of Section 9 paragraph 1 no 2 of the Austrian Cartel Act amends the previous provision requiring notification of any merger with a total domestic turnover of more than EUR30 million in the last business year to the effect that at least two of the companies involved must also have generated domestic turnover of more than EUR1 million each.

Possible future changes

Digitisation in general and thus digitisation in corporate law is one key point in the current government's 2020–24 programme. The objective is to provide for further acceleration and simplification of the process for business start-ups. In this context, the Austrian government intends to introduce a new form of corporation – the Austrian limited. This new form is intended to offer an internationally competitive option to innovative start-ups and founders in an early stage of their business. Furthermore, unbureaucratic establishment, including savings models for building up share capital, e-government and English as the official language, as well as flexible share allocations to investors and employees are intended to be implemented. The exact cornerstones are currently being discussed with experts on corporate law. Moreover, businesses have requested certain COVID-19-related regulations to be implemented into law, for instance the possibility to virtually convene shareholders' meetings.

COVID-19, Geopolitical and Other Economic Impact

As in many other countries, due to the fading COVID-19 pandemic impacts and the Russian-Ukrainian war, the economic situation in Austria is experiencing some uncertainties in completing M&A transactions. Core issues such as purchase price calculations are much more challenging when high inflation and steadily rising interest rates affect the target's prospects. Conversely, the unstable climate offers possibilities for distressed M&A, ie, seasoned, crisis-resilient buyers and strategic and financial investors purchase desired targets under favourable conditions.

Many companies have already come under increasing economic pressure in 2022, which results in an increase in bankruptcies of around 60% according to a study of the Austrian creditor's protection association (KSV 1870). This trend is likely to continue in 2023 since government aid packages have already been paid out and bankruptcies were often just postponed. Therefore, even companies that have not been available for sale and/or have been offered at a much higher purchase price will become suitable targets for many buyers. An increase in new distressed M&A deals is thus expected in 2023.

Both the real estate sector and the industrial sector are likely to be affected by the current developments. The real estate sector is particularly dependent on interest rate developments as these developments have a significant impact on customer behaviour and the ability to finance projects. A central aspect will probably be how quickly the increased inflation can be reduced back to the targeted level and thus interest rates first stop rising and then fall again. The industrial sector, especially old economy companies, is largely dependent on energy prices. In both sectors, rising inflation and interest rates as well as higher energy prices will probably have the effect that the number of M&A deals will continue to decrease only to a small extent if at all, but the volume of the individual M&A deals could continue to decrease to a significant extent.

Increasing importance of due diligence

Identifying risks within the target company is the main focus of due diligence. Buyers increasingly have to consider various legal and economic aspects in M&A transactions. Particular attention is currently being paid to issues such as potential sanctions regimes, as well as COVID-19-related and also purely economic consequences. In general, due diligence is about whether the target company is sufficiently protected against potential negative impacts. Interrupted supply chains, production downtime, lost sales, existing insurance policies (if any), measures ordered by the authorities, crisis management processes and the consequences of remote work should be carefully examined.

Drafting clauses

Buyers should increasingly seek protection via material adverse change (MAC) clauses. These clauses aim at providing for circumstances that were not predictable and adversely affect the target company. The MAC clause entitles the buyer to rescind the agreement between signing and closing, which gives a buyer leverage to renegotiate SPA conditions without being liable for a breach of contract. Given that the pandemic has been ongoing and thus is no longer unforeseeable, MAC clauses will need to be carefully drafted to reflect this.

The negotiation of purchase price provisions also has become more challenging with the pandemic and the accompanying uncertainties. From the perspective of the buyer, agreeing to locked box concepts where the purchase price is essentially set in stone has become much riskier.

Certain representations and warranties that received less attention in the past are now often a focal point. These include the collectability of the target company's claims and supply chain issues. From the seller's perspective, full disclosure is key and ideally can be coupled with an exclusion of warranty claims to the extent adequate disclosure has been made to the buyer.

Changes in regulation related to COVID-19

Regulatory amendments, which were initially triggered by the COVID-19 crisis, were extended shortly before Christmas 2022. Some of these changes have a relevant impact on M&A transactions that will be conducted in 2023. These measures were designed to be temporary and, due to the fading COVID-19 pandemic, only extend until 30 June 2023. However, businesses are requesting that certain measures are kept, like the possibility of virtual shareholders' meetings. This is because such meetings turned out to be very cost-effective and also contributed to the protection of minority interests.

Virtual meetings

At the beginning of the COVID-19 pandemic, the Austrian legislature quickly took advantage of digitalisation and enacted a law that allows all companies to hold their general meetings and pass shareholder resolutions virtually via videoconferencing. This resulted in the protection of the rights of minority shareholders as the physical presence of persons was no longer necessary and shareholders could attend virtual meetings more easily than physical meetings. Due to the ongoing pandemic, the legislature extended the measures until 30 June 2023 as a first step. Virtual meetings will therefore remain an integral part of corporate practice in 2023.

Virtual notarial deeds

The new regulations triggered by COVID-19 also enable the virtual execution of notarial deeds even after the COVID-19 crisis, as the legislature decided to implement the rules permanently. These changes enable M&A transactions to be conducted while maintaining physical distance and promoting health. This is important for the typical Austrian target M&A transaction, which involves the sale of shares in a limited liability company (GmbH), which must be completed in the form of a notarial deed.

Ordinary general meetings

Furthermore, the legislature has again extended the eight-month period for the holding of an ordinary general meeting to 12 months (Section

2 paragraphs 1 to 3 COVID-19 Corporate Law Act), after this had already been determined for the previous years. This applies to the ordinary general meeting of stock corporations pursuant to Section 104 paragraph 1 of the Austrian Stock Corporation Act and limited liability companies according to Section 35 paragraph 1 of the Austrian Limited Liability Companies Act. General and shareholders' meetings therefore can also be held at a later date within the 12 months of the financial year.

Financial statements

The extension by up to four months of the deadline for the preparation and submission to the members of the Supervisory Board of annual financial statements and documents specified by law has also been approved by the legislature for 2023. The deadline for the preparation of annual financial statements and – if required – the management and corporate governance report thus ends at the latest after the first nine months of the financial year. The same applies to other accounting documents that must be submitted within the deadlines applicable to the submission of annual financial statements.

In deviation from Section 277 of the Austrian Business Enterprise Code (UGB), the annual financial statements, the management report documents and other reports as appropriate must now be submitted to the Commercial Court and published no later than 12 months after the balance sheet date.

Looking to the Future

M&A transactions have experienced a rather difficult and uncertain environment in recent years – be it due to the COVID-19 pandemic, Russia's invasion of Ukraine or other economic impacts. All these events seriously affected valuations of target companies. It could be observed that M&A players have become more cautious; for example, buyers need increased contractual protection, and sellers – for various reasons – may not be willing to provide this. As a trend for 2023, it is expected that distressed M&A as well as carve-outs and divestitures where companies seek to divest their non-core assets will increase due to phased out COVID-19 relief programmes. All these developments provide a good basis for investors looking for investment opportunities.

After a short downfall of the EBIT of Austrian companies in 2020, the numbers have been steadily increasing and are now even higher than pre-COVID-19 numbers. The industrial, real estate and technology sectors will likely remain the key drivers and growth in turnover is expected for 2023. All of this will be supported by enhanced digitalisation, which has progressed substantially, enabling M&A transactions to run completely digital.

The market already shifted from a seller friendly market to a more buyer friendly market, in which buyers were able to negotiate favourable clauses and were able to put significant pressure on the purchase price. It is anticipated that these effects will be amplified in 2023. In addition, once the economy recovers more fully, distressed companies will be seeking new investors.

In general, high interest rates and financing costs tend to slow M&A activity down, but on the other hand private equity funds that have accumulated liquidity are on the lookout for investment opportunities and thus are expected to become more active. A particularly good outlook exists regarding companies in the pharmaceutical and healthcare sectors, technology companies, companies concerned with energy, sustainability and the environment and online retailers. Investor demand is likely to increase in these areas.

Just when it seemed that businesses had brought the effects of the COVID-19 pandemic under control, the Russian invasion of Ukraine added a new crisis. The impacts of this conflict on M&A deals is ubiquitous as all-time high energy costs, supply shortages, high inflation and increasing interest rates have put tremendous pressure on all market participants. Buyers are advised to conduct the due diligence process more thoroughly with special attention to the potential involvement of a Russian or Ukrainian element. The objective is to take a very close look at the target's economic and financial situation as well as whether possible sanctions are likely to arise and result in the heightened need for MAC clauses applies.

CHAMBERS GLOBAL PRACTICE GUIDES