Austria

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Market overview

The Austrian M&A market in 2022 was characterised by a fading COVID pandemic that led to the challenges of the virus gradually being replaced by other economic challenges created by the invasion of Ukraine by Russia, such as increasing inflation, energy prices, interest rates and raw material prices, and supply chain difficulties. Despite these issues, the overall number of reported transactions stayed roughly the same. However, the total transaction volume decreased significantly.

According to the M&A Index 2022 published by EY Austria, the number of transactions with Austrian participation even rose, from 293 in 2021 to 297 in 2022, while the transaction volume decreased significantly, from €9.1 billion (about $9.7 billion) to €2.3 billion.

However, it must be noted that the number of published deal volumes decreased significantly, which means that the drop in transaction volume has limited informative value. Furthermore, public takeover bids with an aggregate potential deal volume of up to €1.1 billion have not been included because they were still pending at the time of writing, and nor have the plans of XXXLutz to take over the online trader Home24.

In terms of the reported number of transactions, the industry sector took the lead in 2022 with 89 deals, followed by companies from the real estate sector, with 68 deals, and the technology sector, with 60 deals.

In terms of published transaction volumes, the real estate sector was the clear winner, at €1.5 billion, driven by the purchase of the Austrian-based company IMMOFINANZ AG by CPI Property Group S.A. The industrial sector took second place, with a total transaction volume of €500 million.

Opportunities amid challenging economic conditions

The overall economic impact and post-pandemic effects on companies continue to be as diverse as the economic sectors in which they operate.

Initially, the end of the COVID restrictions and globally increased M&A activities sent positive signals to the whole economy. However, rising interest rates and high inflation have dampened the positive effects. Thus, the environment for M&A transactions remained complex and uncertain for some sectors, notably tourism and hospitality, but also offered opportunities to buyers willing to take a bit more risk.

Besides supply and material shortages, the market is dealing with the increasingly severe effects of high inflation and energy costs. The European Central Bank (ECB) stopped its multibillion bond purchase programme in mid-2022 and started raising interest rates in the euro area for the first time in 11 years. The consequence is that sellers will find it increasingly difficult to argue for a high valuation of the target company.

At the same time, the present environment will make it much more difficult for buyers to value takeover candidates correctly. Coupled with the recent change in the ECB's interest rate policy, which will make it harder and more expensive to raise debt capital, and rising energy prices, this signals challenging times ahead.

As a global decrease of the M&A market has already been set in motion, it is to be expected that this will also be felt in Austria in 2023. However, this may be offset by distressed M&A activities after companies came under considerable economic pressure in 2022.

In response to the economic effects of the pandemic and state subsidies that saved many companies from insolvency in the previous years, bankruptcies substantially increased in 2022. According to a study by the Austrian *Kreditschutzverband* (an association for the protection of creditors), insolvencies in 2022 shot up by approximately 60%.

Consequently, many companies are restructuring, looking for strategic acquisition targets, or divesting parts of their business to realign their portfolios. Thus, strategic investors continue to play an important role in the Austrian market, because 286 deals were of a strategic nature in 2022, which was an increase of 10 on the previous year.

Private equity investors, however, continue to play a subordinate role in the Austrian transaction market (which is in contrast to the global trend), with only 10 transactions. Consequently, there is significant potential for such transactions in Austria.

The top Austrian M&A transactions in 2022

The following deals together accounted for over 48% of Austria's total transaction volume in 2022:

- The purchase of 12.7% of IMMOFINANZ AG by CPI Property Group S.A. for €403.5 million;
- The takeover of Essentra Packaging by Mayr-Melnhof Karton AG for €363.5 million; and
- The purchase of 24.5% of the shares in S IMMO AG by IMMOFINANZ AG for €337.5 million.

These transactions show the strength of strategic players in the Austrian M&A market.

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Paul is a US native partner at the firm specialising in the full range of M&A transactions and has a specific focus on cross-border transactions, in particular in the Central and Eastern Europe and US regions. His other fields of specialisation are contract law and commercial dispute resolution. Paul is also a frequent lecturer at the University of Vienna on M&A and joint ventures.

A trend that continued in 2022 was an increasing internationalisation of the Austrian M&A market. According to the M&A Index 2022 published by EY Austria, the number of true domestic transactions decreased by 12.5%. The number of 'inbound' transactions fell by 18 deals to 115, which is a decrease by 13.5%. The number of acquisitions of foreign companies by Austrian companies ('outbound') increased by 27.9% to 133 in 2022, after 104 deals in 2021. German investors made 31.3% of the purchases of Austrian companies (36 transactions), which makes that country the No. 1 in inbound transactions. Likewise, 27.8% of all outbound transactions concerned German targets.

Favourable conditions for investors

As with any other crisis, the COVID pandemic offers possibilities for seasoned, crisis-resilient buyers and strategic and financial investors to purchase targets under favourable conditions. It is foreseeable that despite the national and European aid packages that have already been paid out, many companies will come under increasing economic pressure in 2023 as aid packages will probably be postponed in many cases because of the need to file for bankruptcy.

Thus, even companies that have not been available for sale and/or have been offered at a much higher purchase price will enter the transaction market. An increase in distressed M&A deals is expected in 2023.

Furthermore, increased interest rates have become a significant factor, particularly in the real estate sector. This is especially true in cases where variable interest rates have been agreed upon. As regards energy costs, purchasers and sellers alike are struggling to incorporate the uncertainty about future developments into their valuation models. This often leads to protracted discussions about pricing and the valuation of the target company.

Legislation and policy changes

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

For asset deals, the regulations of Section 1409 of the General Civil Code and Section 38 of the Commercial Code are the most pertinent. For further details, and to understand the role that Austrian regulatory bodies play with regard to M&A transactions, see Fellner Wratzfeld & Partners' article in IFLR's M&A Report 2022.

If a non-EU/EEA/Swiss company intends to make a direct investment into an Austrian company which is active in "particularly sensitive sectors" or other areas where a threat to security or public order may arise, the acquisition may be subject to approval under the Austrian Investment Control Act (*Investitionskontrollgesetz*), which implements the FDI Screening Regulation (Regulation (EU) 2019/452).

As a result of the pandemic, the Austrian legislator was quick to take advantage of the existing benefits of digitalisation and introduced a package of measures that were aimed at facilitating M&A transactions without the physical presence of the parties. While such measures were meant to be temporary, some were so successful that they have been fully incorporated into law.

For example, the Austrian legislator implemented a new Section 90a into the Notarial Regulation, which makes it possible to draw up all notarial acts and other public or publicly certified deeds by use of electronic means of communication without the need for physical presence before the notary (see here for further details).

The applicability of other temporary measures has been extended until June 30 2023 but it is unlikely that they will be extended beyond that date. As regards companies and partnerships, this includes:

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- Companies and partnerships can convene their general meetings virtually without the presence of any shareholders;
- General meetings concerning the approval of the annual financial statements, the distribution of profits, and the discharge of the management board members can be convened within the first 12 months of the fiscal year instead of the first eight months;
- The deadlines for preparing the annual financial statements and, if required, the management and corporate governance report can be postponed for up to four months if an earlier preparation was not possible due to COVID-related reasons; and
- Annual financial statements, consolidated financial statements (if required) and the management and corporate governance report must be filed within 12 months after the respective balance sheet date, instead of the usual nine months.

There are, however, requests from the business side to keep the possibility of virtual shareholder meetings in the future. In particular with respect to big companies, virtual shareholder meetings turned out to be very cost effective and contributed to the protection of minority interests, because more shareholders attended virtual meetings than physical meetings.

ESG

As noted in the corresponding article in 2022, the topic of environmental, social and governance (ESG) plays an important role in M&A transactions, and due diligence request lists regularly target ESG risks.

The public awareness with respect to ESG issues has increased significantly and warranties and indemnities dealing with ESG issues have consequently become more and more common.

Practice insight/market norms

The Austrian legal system has a few peculiarities that are commonly misunderstood. Given that most M&A deals in Austria are private M&A transactions where the target company is an Austrian limited liability company, any share purchase agreement must be drawn up as a notarial deed in front of an Austrian notary public.

One misconception is that the notarial requirement poses a large hurdle. This is not true, because share purchase agreements can also be executed in the English language with notaries public. There are an increasing number of notaries public who are qualified to do so. With the increasing foreign involvement in Austrian M&A transactions, it has become increasingly common that such notarial deeds are drawn up in English.

Furthermore, before the end of 2020, the Austrian legislator implemented a significant improvement for M&A transactions by allowing electronic notarisation. The introduction of the new Section 90a of the Notarial Regulation by the fourth Covid-19 Act opens up the possibility to draw up all notarial deeds and other public or publicly certified deeds by use of electronic means of communication without the need for physical presence before the notary public. The regulation came into force on January 1 2021.

The amendments to the law now bring a clear simplification and an acceleration of the performance of the official notarial deeds required under corporate law, which are often associated with a high level of travel and time expenditure, especially if the parties involved are located abroad.

An area that requires specific attention is Austrian stamp duty tax. Typically, stamp duty tax can become payable based upon the simple fact that a written document is being drawn up in Austria. Though a share purchase agreement is not subject to stamp duty tax, suretyship arrangements whereby one company is obliged to step in and fulfil a liability if, for example, a subsidiary does not perform can trigger stamp duty.

For real estate transactions, care needs to be taken in the structuring so as not to trigger real estate transfer tax, which can also apply to share deals.

The pandemic brought liberation by accelerating digitalisation in M&A transactions. Since mid-March 2020, the Austrian government has issued new laws and regulations that enhance the use of technology in corporate law.

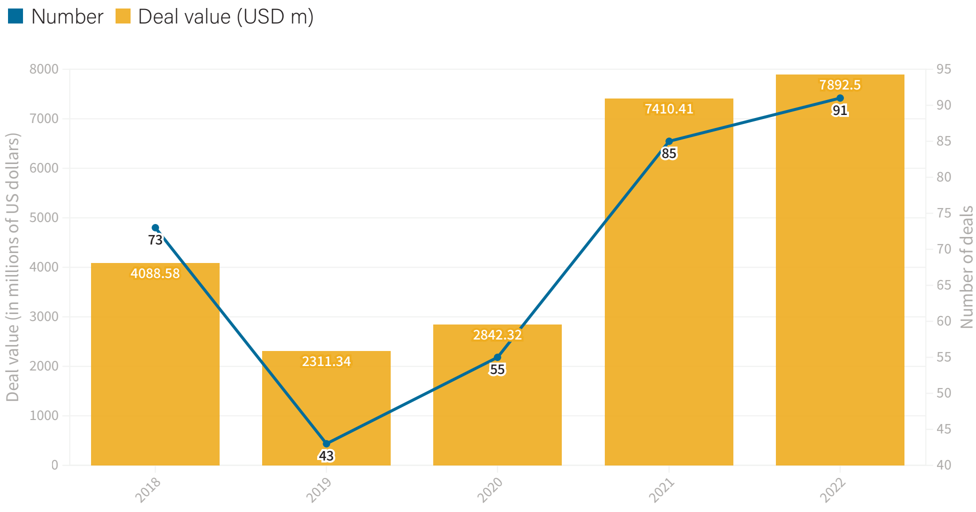
The new regulations enabled shareholders, as well as executive and supervisory board members, to hold virtual corporate meetings, and pass legally binding resolutions while maintaining physical distance. This can be important for board decisions that need to be taken to get an M&A transaction to the finish line. Unfortunately, these measures will expire by June 30 2023. It can only be hoped that such measures will be extended or incorporated into law on a permanent basis.

Moreover, the virtual execution of notarial deeds was provided for by the legislator. Given that notarial deeds are often required in Austrian corporate law and M&A transactions, this represents a relief for M&A transactions.

Public M&A

Most factors regarding the acquisition of a controlling stake in a public company are regulated in the Austrian Takeover Act. A mandatory public offer has to be made to the other shareholders

Annual inbound M&A
Austria



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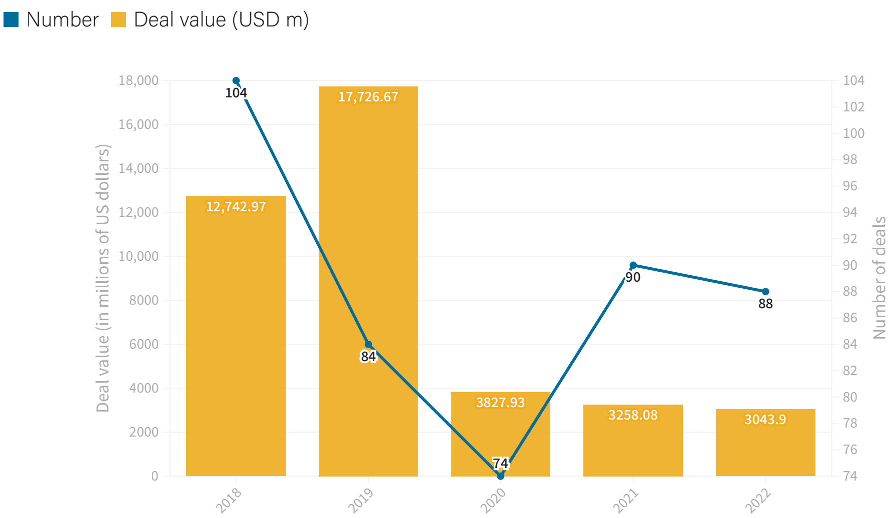
Annual outbound M&A
Austria



Source: Dealogic

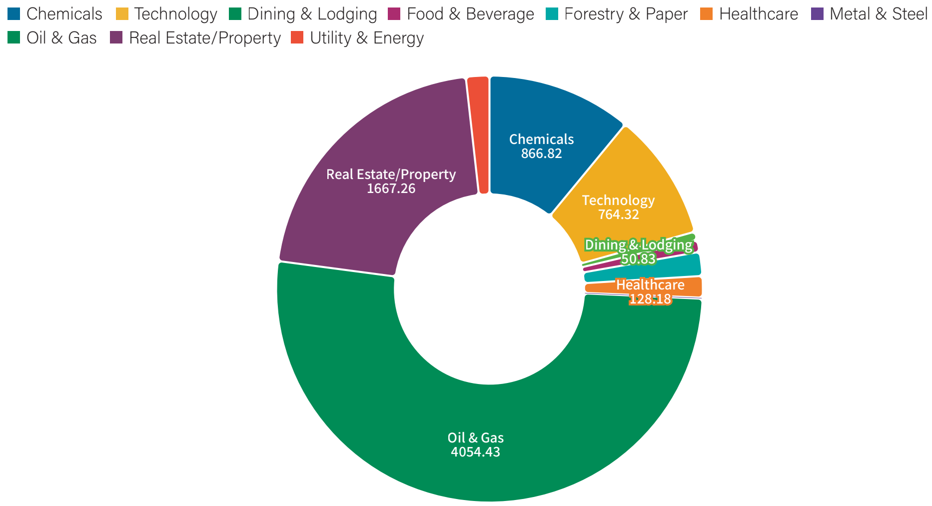
when a shareholder acquires a stake of 30% or more. Since mid-2022, there have also been new rules concerning creeping in. Based on such rules, a mandatory offer also needs to be made if within a calendar year a shareholder already holding a controlling stake in a listed company acquires shares accounting for at least 3% of the voting rights. Sales and purchases of shares within a calendar year may be set off against each other.

The rules do not distinguish between friendly and hostile bids. While the bidder is commonly given the opportunity to carry out due diligence in a friendly bid, the bidder is generally restricted to publicly available information in a hostile bid. In hostile takeovers, the management board is obliged to remain neutral. Due to the limited number of Austrian-listed companies, hostile bids are unusual in Austria.

The bid may not be conditional to the extent that a mandatory takeover bid needs to be made due to a stake of 30% or more having been acquired or a creeping-in having occurred, and unless conditions are required by law, such as merger control clearance. In all other cases, conditions are only permissible if they are objectively justified, in particular if they are based on the legal obligations of the bidder, or if the occurrence of the condition or the assertion of the right of withdrawal does not depend exclusively on the discretion of the bidder. In the past, material adverse change conditions have been seen, but this was not driven by COVID in particular.

In public M&A transactions, break fees are uncommon, which is partly due to legal restriction.

2022 inbound M&A by sector
Austria



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2022 outbound M&A by sector
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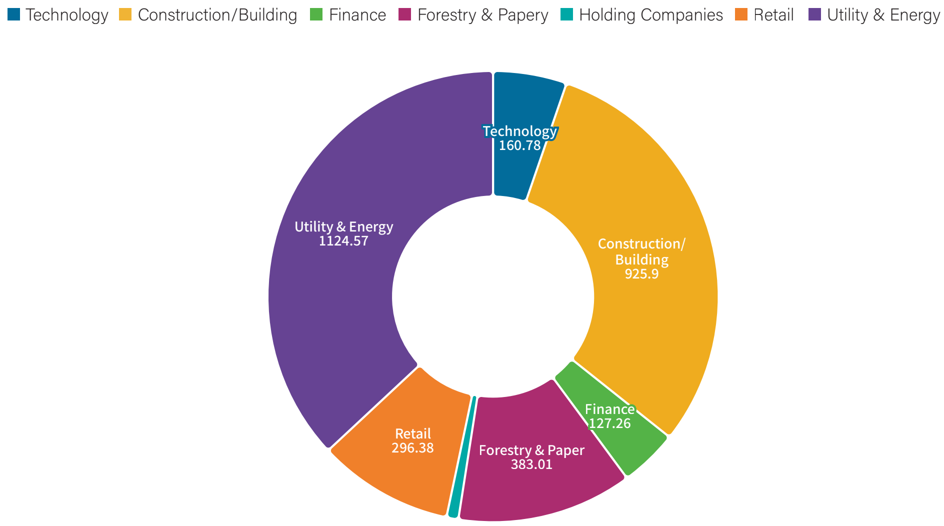

Source: Dealogic

Private M&A

As reported in 2022, one of the biggest developments in the Austrian M&A market in recent years is that warranty and indemnity insurance has been increasingly used. Private equity buyers are at the forefront of this development.

IPOs

IPOs do not play a significant role in the Austrian market. Generally, a shareholder interested in selling its shareholding will seek potential purchasers, negotiate exclusively, or initiate a structured bidding process to which interested parties are invited.

Given that the Austrian market is rather small, the shareholder will often be aware of potentially interested parties in the domestic market and address them directly.

Looking ahead

The COVID crisis and Russia's invasion of Ukraine had severe economic impacts on the global market and the future is still characterised by a large degree of uncertainty. Consequently, the players in the M&A market have become more cautious. This is expected to continue, at least as long as the energy market has not stabilised, thereby removing a significant obstacle to a serious valuation of the target company.

The flip side of this is that such times also offer opportunities to players focused on distressed M&A. This is expected to become more of an issue in 2023 than it was in 2022, because COVID subsidies are running out and the situation in the energy market will make survival very difficult for economically troubled companies. The M&A market is also expected to feature a significant number of carve-outs and divestitures, thereby creating investment opportunities for others.

Digitalisation received an immense boost in 2022 and M&A transactions can now run completely digitally. Those that were willing to embrace digitalisation in the past can now be expected to have an edge in getting deals done quicker than those that did not, giving them a competitive edge.

Overall, the transition of the market from a seller's market – in which sellers were able to select the suitable buyer from several interested parties, achieve high purchase prices, and enforce seller-favourable provisions in purchase agreements – towards a more buyer-friendly market continued.

As the economy recovers, companies with resilient business models – in many cases, large companies from the industrial or technology sector – will try to expand their market shares and acquire assets and know-how at low prices through strategic acquisitions of competitors and start-ups that have come under pressure.

Private equity funds are expected to become more active, to the extent that they have accumulated liquidity. Otherwise, high interest rates and challenges in raising financing through leveraged loans may slow down activity. In any event, there is still a particularly good outlook for companies in the pharmaceutical and healthcare sectors; technology companies; companies concerned with energy, sustainability and the environment; and online retailers. In these areas, investor demand is likely to increase.

What is still difficult to gauge is the impact of the turmoil in financial and other markets that resulted from Russia's invasion of Ukraine. It is unclear whether the energy market will stabilise or if there are more upheavals to come. In 2023, it will become increasingly important to come up with contractual solutions which divide the risk of the future in a fair way because proper valuations in times of great volatility become more and more difficult.