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Corporate M&A

Austria: Trends & Developments

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Trends and Developments

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M&A Market Trends

M&A market

After a decline in 2018, Austria's M&A market is now steady, perhaps even seeing a small increase in the number of deals with Austrian involvement. In 2019, there were 328 M&A transactions involving Austrian companies, compared to 324 in 2018. This increase of four deals corresponds to a slight increase of 1.2% in M&A transactions.

The transaction volume, however, increased much more and accounted for EUR12.1 billion in 2019, which is an increase of approximately 50% compared to the amount of EUR7.9 billion in 2018. This increase was mostly driven by mega-deals, of which the biggest deal was the takeover of Osram by ams AG.

In 2019, 121 (37.5%) of the 328 M&A transactions, compared to 123 transactions in 2018, were inbound M&A transactions, ie, where foreign investors sought to acquire Austrian targets or their shares. The number of outbound M&A transactions (where Austrian investors sought to acquire foreign targets or their shares) decreased slightly by two transactions compared to 2018, which reached 130 (39.6%) transactions.

The volume of outbound transactions in 2019 amounted to EUR8.7 billion, compared to EUR3.2 billion in 2018. The top five outbound transactions in 2019 represented a volume of EUR8.2 billion. Foreign companies spent EUR3.1 billion on inbound transactions, with the top five inbound transactions accounting for a volume of EUR2.2 billion.

Domestic M&A transactions, where both the target and the buyer are Austrian, accounted for 23.5%, or 77 out of 328 M&A transactions in 2019, compared to a total of 69 domestic transactions in 2018.

Key trends

Strategic investors are still involved in the vast majority of transactions in the Austrian M&A market. Of the 328 transactions in 2018, 308 involved strategic investors. Compared to 2018, transactions that involved financial investors, such as private equity or venture capital firms, again dropped back to the level of 2017, with only 20 transactions.

Austrian companies are still attractive targets for German investors. This is demonstrated by the fact that transactions involving German investors remain steady at a rate of 35.5% of all M&A transactions involving foreign investments in Austrian companies.

Furthermore, 28.9% of all M&A transactions involved European investors. The vast majority of transactions in the Austrian M&A market, approximately 64.5% involved investors whose headquarters are located in Europe.

Germany still remains the most attractive target for Austrian investors. 30% of all transactions occurred in Germany, with a further 56.9% in the European market. Without doubt, Europe is still the top investment target for Austrian investors.

Key industries

Although the most deals took place in the tech sector with 75 transactions in 2019, the highest transaction volume was generated in the industrial sector with EUR5.5 billion compared to EUR0.7 billion in the tech sector.

The most attractive industry for inbound M&A transactions in Austria is the tech sector, with 66 deals in 2019, followed by the real estate and construction sector with 28 deals and the industrial sector in the third place with 17 deals. Foreign investments in the consumer sector accounted for 15 deals and six deals took place in the automotive sector.

As for outbound transactions, Austrian investors are continuously active in the industrial sector, with 34 transactions in 2019 compared to 37 transactions in 2018. Other attractive sectors that saw considerable outbound M&A activity in 2019 include the real estate and construction sectors with 24 transactions, and the tech sector with 23 transactions.

The Austrian M&A market is expected to remain robust and for the trend towards larger transactions to continue. Although Austria is a relatively small market, Austrian companies have a strong reputation worldwide for having excellent expertise, especially in the high-end tech area. As the modern M&A market is driven by tech transformation, Austria's expertise in this field will drive growth in Austrian M&A transactions. Another reason for optimism is Austria's strong economic position, which is firmly embedded in the EU. Persistently low interest rates and high rates of liquidity in the market will also continue to push the M&A market forward.

Recent Legal Developments

Recent changes in law

Under corporate law, after closing an M&A transaction, the management of the target company is obliged to file a notification with the Ultimate Beneficial Owners (UBOs) Register to update the registration with respect to the beneficial owners who ultimately own or control a legal entity. This is generally the case if a direct or indirect owner holds shares or voting rights of more than 25% in a company. If no beneficial owner can be identified, the members of the top management level of the legal entity (for example, the managing director and/or board of directors) are considered to be beneficial owners.

The Austrian Beneficial Owner Register Act (*Wirtschaftliche Eigentümer Registergesetz*) entered into force on 15 January 2018 as part of the transposition of the fourth Anti-Money Laundering Directive (Directive (EU) 2015/849). All legal entities pursuant to Section 1, paragraph 2 of the Act were required to register their beneficial owners by 16 August 2018. If, however, the respective legal entity becomes aware of any change of or relating to its beneficial owners, a change notification must be filed within four weeks.

One recent change that will affect M&A transactions was the Amendment of the Austrian Law on the Ultimate Beneficial Owners (UBOs) Register (UBO Register, *Wirtschaftliche Eigentümer Registergesetz*). The amendment was part of the EU Financial Adaptation Act 2019 (*EU-Finanz-Anpassungsgesetz*), which was published on 22 July 2019 and came into force on 10 January 2020. The law amendment increases access to the database on UBOs.

The new regulations brought in via the amendment implement the fifth Money Laundering Directive. One of the most important single changes is that the UBO Register will become accessible to the general public. As of 10 January 2020, any person can request an extract from the register about any legal entity without having to demonstrate any specific reason or legitimate interest. Previously, only authorities and certain groups of persons such as lawyers, notaries or credit institutes had access. The public extract contains information on the legal entity's name, address, register and register number and legal form as well as information regarding the period of time for which the legal entity has been in existence, the direct or indirect beneficial owner's forename and surname, date of birth, nationality and country of residence and the nature and scope of the beneficial ownership.

Furthermore, the notification obligations for legal entities have been made more stringent. An annual statement regarding the completeness and correctness of the data on the UBO Register is required regardless of whether any changes have occurred. Apart from this annual statement, changes must be reported on an ongoing basis within four weeks of the change taking place. The Austrian Ministry of Finance, as the competent register authority, is obliged to ensure the accuracy and completeness of the registrations, which can be enforced by penalties that have been increased.

Another change to the UBO Register concerns the voluntary provision of a "KYC compliance package" by a professional party representative. The UBO Register will be able to store and exchange KYC-relevant documents about beneficial owners, and these will only be accessible to certain persons, such as financial institutions, tax advisors, attorneys and notaries, to make KYC due diligence more efficient. Access to this data can be limited to individual persons and entities.

Regulatory changes under discussion

In many countries, laws are being discussed to prevent foreign buyers from taking over companies in sensitive industries. Austria is one of the EU member states that already has such a control mechanism in place: Section 25a of the Foreign Trade Act 2011 (AußWG 2011). This mechanism allows the government to prevent and control purchases of shares in companies in sensitive industries by foreign investors. In short, foreign direct investments (FDI) in companies involved in public security and public order, as defined by Art 52 and Art 65 (1) TFEU, are subject to approval. This primarily impacts the defence goods industry, security services and services of general interest (in particular energy and water supply, telecoms, transport and certain infrastructure for healthcare education and training).

Since May 2019, a ministerial draft has been in existence, and under consideration by the government, to amend the Foreign Trade Act. The draft foresees a change to Section 25a. The minimum threshold for shareholdings acquired by foreign investors in Austrian companies will be reduced from 25% to 10%. Anything above the 10% threshold will require approval. Certain companies in the media industry which contribute to the formation of public opinion via broadcasting, tele media or print products and which are characterised by their particular topicality and broad impact, will also be included in the group of companies where foreign investors need approval.

Furthermore, the obligation to obtain approval would not only apply to the foreign acquirer of the Austrian company – as is now the case – but also to the Austrian target company, which will have to obtain approval and to submit the application for approval. As a new Austrian government was only appointed in January 2020, the timeline as to when and to what extent the amendment will come into force is unclear.

Also of note is that the new government's 2020-24 programme provides for a further acceleration and simplification the process for business start-ups, for example by promoting the development of digitisation in corporate law.

COVID-19 – M&A Will Not be Spared Either

As in many other countries, the COVID-19 crisis has already hit the economy and has also lead to uncertainties in the field of upcoming or already ongoing M&A transactions. Cross-border transactions, particularly large transactions and transactions concerning automotive, transportation, gastronomy and the energy sector, are particularly affected in this context. However, risks arising from the crisis can be contained by designing the transaction processes and drafting the contractual regulations accordingly.

Consequences for due diligence

Identifying risks within the target company is the main focus of due diligence. Buyers should consider the specific consequences of COVID-19 for the target company in the due diligence process to determine whether the target company is adequately protected against the negative impact caused by the virus. Disrupted supply chains, loss of production and decline in revenue, but also existing insurance policies, if any, measures ordered by public authorities, crisis management processes and consequences entailed by remote working, if applicable, should be taken into consideration. Sellers, however, should approach this issue with particular sensitivity and proactively provide the corresponding information. The risks identified in this step will form the basis of further negotiations and the drafting of the agreement.

Drafting tips

Material adverse change (MAC) clauses native to Anglo-American transactions are agreed upon to cover any material changes between signing and closing of the SPA. 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 buyer leverage to renegotiate SPA conditions without being liable for a breach of contract. In particular, new transactions require increased care when it comes to wording of the MAC clause. Even if the extent of the pandemic cannot be estimated at the moment, it has become a known event by now. Nevertheless, it will certainly be possible to find an appropriate wording taking into account the specific COVID-19 risk. In this context, the parties should carefully weigh the risks (and how they are addressed in the wording) in each individual case.

From the seller's perspective, agreeing to a break-up fee would be advisable. A break-up fee is a penalty determined in advance, which becomes due if a party withdraws from the deal. The purpose of the break-up fee is to reimburse the other party for the time and expenses it has invested in the deal. However, in particular from the buyer's perspective, break-up fees will not be easy to negotiate due to the current uncertainty.

The unclear further development of the virus and its economic consequences are a major factor of uncertainty, which entails major difficulties in the determination of a purchase price. Thus, from the perspective of the buyer, particularly locked box and fixed pricing concepts are not recommended. Particular caution is also called for in case of price adjustment clauses based on historical working capital.

Caution should also be used in the context of warranties and guarantees. Often, these are the subject of tough negotiations even under normal circumstances. Buyers should keep a particularly good eye on those fields which are the most affected by the uncertainty caused by the virus. These include, for instance, the collectability of the target company's claims, its financial projections and a possible breakdown of its supply chain. From the seller's perspective, demands for more extensive warranties and guarantees can be counteracted by way of more transparency.

Exit possibilities

If the agreement has already been executed, the question arises whether the buyer can still exit the deal. In this respect, various possibilities could offer themselves. First of all, the written agreement is to be examined in great detail with regard to possibilities of termination and/or an adjustment of the purchase price. In some cases, agreements may already include exit possibilities.

In particular international transactions often contain so-called force majeure clauses, which provide, in particular, for the at least temporary cancellation of performance obligations, for the exclusion of liability and for the right of withdrawal in case of an event of force majeure. But even without explicitly agreeing upon such a clause, the remedy of force majeure may be applicable. However, this needs to be treated with caution. Even if epidemics and pandemics can generally be considered an event of force majeure, this does not necessarily mean that the parties to the agreement can actually invoke this circumstance successfully. Rather, it is necessary to specifically interpret the actual circumstances on a case-by-case basis.

A termination of concluded agreements or at least an adjustment can also be achieved on the basis of frustration of contract if certain prerequisites are met. For this to apply, the circumstances typical of this kind of transaction must have become the basis of the agreement and material changes in circumstance that are unforeseeable must have occurred after conclusion of

the agreement. Case law has allowed avoidance or rectification of contract due to frustration of contract only in exceptional cases so far. Ultimately, however, this, too, depends on the actual circumstance of the individual case.

Opportunities with respect to distressed M&A

As any other crisis, the COVID-19 crisis also offers possibilities for seasoned, crisis-resilient buyers and strategic financial investors to purchase the desired target company under favourable conditions. It is foreseeable that despite the national and European aid packages already announced, many companies will come under economic pressure. Thus, even companies that have not been available for sale and/or have been offered at a much higher purchase price will find themselves entering the transaction market. In our view, an increase in new distressed M&A deals is to be expected in the short term.

Regulatory changes

The COVID-19 crisis triggered a series of regulatory amendments that will be in place until the end of 2020. Also M&A transactions may be impacted by some of these changes.

With regard to corporate law, the legislator was quick to take advantage of the already existing benefits of digitilisation and thus enacted a law that allows all companies to hold their general meetings and pass shareholder resolutions virtually via video conferencing so that the physical presence of persons is no longer necessary. The new amendment triggered by COVID-19 also enables the vital execution of notarial deeds during the COVID-19 crisis. These changes enable M&A transactions to be conducted, while maintaining physical distance and promoting health. This is important for the typical Austrian target N&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.

In the context of deals subject to reporting obligations, the Second Covid-19 Act (2. Covid-19-Gesetz) brought about an extension of the time limits to be considered. In case of merger filings received by the Federal Competition Authority (Bundeswettbewerbsbehörde) after the Second Covid-19 Act has entered into force but before 30 April 2020, the four and sicxweek time limits within which the Federal Competition Authority and/or the Federal Cartel Prosecutor (Bundeskartellanwalt) can file an examination application with the Austrian Cartel Court (Kartellgericht) will not start to run until 1 May 2020.

Also, for examination applications which have already been pending before the Cartel Court at the time when the Second COVID-19 Act entered into force or will become pending before 30 April 2020, the five and six-week time limits for the passing of decisions will not start running until 1 May 2020. These new time limits, however, do not necessarily have to lengthen the period of time between signing and closing as the possibility to waive examinations remains unaffected by this amendment. It is to be expected that in the current situation, authorities will assess applications to waive examinations in a more generous manner in order to enable deals to be processed as fast as possible under the given circumstances.

Forecast

Though many M&A deals will ultimately be postponed or cancelled due to COVID-19 in the short-term, M&A is expected to bounce back in the medium-term, and the recovery process may be accelerated for Austrian target companies due to the strict recovery measures instituted that have led to a cautiously optimistic view of economic recover in the near term.

Fellner Wratzfeld & Partners has a team of more than 130 highly qualified legal personnel. The firm's major fields of specialisation include banking and finance, corporate/mergers and acquisitions, real estate, infrastructure and procurement law, changes of legal form, reorganisation and restructuring. Fellner Wratzfeld & Partners (fwp) advises renowned credit institutions and financial services providers on financing projects, representing mainly Austrian and international private companies, but also has clients from the public sector. The firm's expertise has proven its worth repeatedly, not only in connection with project and acquisition financing, but also in regard to financing company reorganisation; fwp is also able to draw upon substantial experience gained in the financing of complex consortia in the last few years.

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