

## WORLDWATCH

# FOREIGN INVESTMENT



## Foreign investment in Austria

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AUSTRIA

# Foreign investment in Austria

BY PAUL LUIKI

In line with many other jurisdictions, the Austrian M&A market overall has suffered from the financial crisis both in terms of volume and number of deals. Compared with 2008, the number of transactions in 2009 decreased by more than 30 percent. While it is always difficult to look into the crystal ball, most observers expect a moderate increase in Austrian M&A activity for the year 2010.

**M&A and joint venture market trends**

For all the downsides associated with the financial crisis, it has spawned growth in one core area: distressed M&A. Companies in financial difficulty often must be sold on extremely tight timeframes. This presents a myriad of challenges to lawyers. Time for reflection is a rare commodity. Transaction documents are sometimes negotiated overnight. In extreme cases, due diligence is squeezed from what otherwise would have been done over months into a timeframe of weeks or even days. Distressed M&A is also characterised by the need to find a resolution among the varying interests represented by shareholders, lenders, management, suppliers, customers and employees. A basic issue often quickly arises as to securing short-

term financing to stabilise the target.

For foreign buyers, this means that there will continue to be opportunities in Austria for acquiring distressed targets, which is a trend that is expected to continue in 2010. Some of the most spectacular and recent examples of distressed M&A in Austria have taken place in the banking sector, including the Austrian state's purchase of the shares of Kommunalkredit AG (a leading public finance bank) and the purchase of the shares in Hypo Alpe-Adria Bank AG. It may well be that the Austrian financing sector experiences further consolidation.

Austria is renowned for the strength of its small and medium-sized companies that have established themselves in niche markets. One major weakness of such companies, however, has been their relatively low level of capitalisation. Since obtaining loans continues to be difficult, the time is ripe for foreign investors to enter into joint ventures with Austrian companies. Having a strong foreign partner, even one having only a minority stake in the Austrian company, can add leverage for the Austrian company in obtaining external financing. There is of course also the possibility of the foreign investor itself providing equity capital to the Austrian target as part of the joint venture.

**Successor liability**

Foreign buyers of Austrian companies generally have two basic options: either to purchase the shares in the company or to purchase the company's assets. One major element of Austrian law that surprises many foreign buyers is the legal regime relating to successor liability for asset purchases. Generally, any buyer of assets will be keenly interested in not taking over any liabilities associated with the company it is purchasing.

Austria is fairly unique in Europe in that it has wide-reaching provisions imposing successor liability on purchasers in asset deals for pre-existing liabilities of the business sold. Provisions on purchaser liability for asset deals are contained in both the General Civil Code as well as the Company Act and apply cumulatively. Provisions of the Austrian Company Act were changed in 2007 and thereby substantially altered the parameters of purchaser successor liability. It thus is key for buyers

to be aware of the implications and interplay between these two separate statutory liability successor regimes. Austrian law also has further successor liability provisions in tax and social security law.

Under Section 1409 of the General Civil Code, 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 liability applies under Section 1409 of the General Civil Code if the purchaser knew or should have known at the time of the purchase of the pre-existing liabilities. In order to minimise the purchaser's exposure, it generally is regarded as prudent to undertake a detailed due diligence review instead of simply relying upon representations and warranties. In the distressed M&A environment, however, time is a rare commodity so that focus often will need to be limited to key specific areas.

The purchaser's liability, however, is limited in amount to the value of the assets actually acquired. Under the General Civil Code, there is a further important limitation to purchaser liability. If the purchaser has agreed with the seller that the purchase price funds are to be used to pay off debts of the seller, liability is reduced on a Euro for Euro basis.

Even if there is no liability under the General Civil Code (e.g., the purchase price has been used to pay off debts of the business sold), a purchaser may still be liable under the Company Act. In contrast to the General Civil Code provision, Section 38 of the Company Act provides for liability which is not limited to the value of the assets taken over by the purchaser.

Nevertheless, the purchaser and seller to an asset deal in Austria have an important mechanism at their disposal to allocate liability. The purchaser and the seller can provide explicitly that the purchaser is not to be liable at all under the Company Act. The validity of any such agreement vis-à-vis third party creditors requires that: (i) the agreement be entered into the commercial register at the time of the asset transfer; (ii) a public announcement be made that is customary in the market; or (iii) third party creditors be individually notified. It is important to keep in mind, however, that even ►►

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if liability can be avoided under the Company Act, the separate liability regime under the General Civil Code still applies.

### Gateway to the East

At the heart of Europe, Austria continues to act as a hub for many international groups in structuring their activities in the CEE region. Often there is an Austrian holding company, under which these subsidiaries in CEE are placed. In addition, independent Austrian companies,

both large and small, that are not part of an international group historically have invested heavily into the CEE region. The specific forms of investment range from establishing independent subsidiaries and branch offices to entering into joint venture arrangements.

Foreign buyers acquiring Austrian companies therefore often will be purchasing at the same time the CEE activities of the Austrian company. This in turn will require the coordination of due diligence and legal assistance

in a variety of jurisdictions. It is common for Austrian law firms to take a lead role in doing so given their familiarity with the region. The CEE region is indeed a diverse one, consisting of more than 20 independent countries.

The use of Austria as a platform for CEE investments may also have the benefit of bilateral investment treaty protection in case of discrimination by a CEE country. Austria has concluded a wide net of such treaties with many CEE countries. ■



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With a staff of over 90 highly qualified legal personnel, **Fellner Wratzfeld & Partners** is one of Austria's leading business law firms. Our major fields of specialisation include M&A, company law, real estate, competition and procurement law, company reorganisations and restructuring and insolvency. The firm represents Austrian and international clients as well as the public sec-

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