Austria

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION

1.1 History of M&A in Austria, important recent developments in relevant statutory law, trends, impact of Covid-19, etc

In line with Germany and other European Union markets, the Austrian private M&A market is highly developed. Investors from outside of Austria will rarely meet unexpected negative surprises in their transactional activity as to targets in structuring, obtaining clearance and in implementing a transaction. Following the recent worldwide trend and the European Commission´s focus to strengthen foreign direct investment (FDI) regimes within the EU, Austria introduced the 2020 Investment Control Act. This covers a broad range of technology sectors; while approval will usually not be a real block to a transaction, the new regulatory regime requires, in case of investors from outside the EU/European Economic Area (EEA)/Switzerland, a review as to applicability and (if applicable) a waiting period between sign and close of a transaction which may exceed that of the merger control clearance. Covid-19 has not negatively impacted private M&A activity; rather, medical technology-related transactions became an additional focus of M&A.

1.2 Legal landscape applicable to M&A transactions (including foreign investment policy, relevant statutes, and relevant statutory bodies or regulators)

Private M&A in Austria primarily relates to limited liability companies (GmbH), the most frequent type of company involved in a share or asset deal, while stock corporations (AG) are primarily used for public companies. Other types of companies may be involved as targets as well, including limited liability partnerships, usually with a limited liability company as the sole general partner (GmbH & CoKG), or unlimited partnerships.

Relevant regulations governing private M&A include civil and commercial, corporate, tax, employment, antitrust and investment control laws. The statutory bodies involved for merger control clearances is the Austrian Federal Competition Authority (BWB), and the European Commission if the target group´s turnover warrants Commission merger control clearance. If the transaction qualifies for FDI clearance, filings need to be made with the Ministry of Digital and Economic Affairs. If the target operates in a regulated industry, clearances may also have to be obtained from the regulator for the respective industry. In the case of banks and financial institutions, clearance must be obtained from the Financial Market Authority or the European Central Bank (ECB); as to other industries, clearance may need to be obtained from specific industry regulators. As the case may be, approval or notification requirements may apply.

1.3 M&A market in Austria

Attractive targets – including so-called 'hidden champions' – are being chased by both private equity buyers and strategic investors. The market has been seller friendly for a considerable time, which is also evidenced by the increased use of warranty and indemnity (W&I) insurance, limiting buyers' recourse to claims against the insurer. In auction processes, bidders frequently try to pre-empt the auction from going its full length.

2. TYPE OF TRANSACTION STRUCTURES ADOPTED IN PRIVATE M&A TRANSACTIONS

2.1 Advantages and disadvantages of each structure

Private M&A transactions in Austria are commonly structured as a share deal.

Asset deals are less frequent, due to their increased complexity, including the need to precisely define the assets and liabilities to be transferred, the challenges involved, such as the right of third parties to object to the transfer of contracts and statutory successor liabilities, and the usually limited advantages under beneficial tax structuring aspects. Asset deals are usually only seen in the context of smaller transactions and where a transfer of parts of a business (unit) involves a limited number of assets.

Sale and transfer of shares are rarely structured as merger or spin-off transactions. However, demergers of businesses and, in particular, of business units may be used to prepare a later sale of shares.

Joint ventures are usually achieved by combining assets in an existing or newly established company, including by tax-neutral demergers or contributions of those assets from existing businesses or companies.

2.2 Typical documentation used in each structure

In a share deal, the typical documentation is a share sale and transfer agreement (SPA); the case of share deals involving limited liability companies (GmbH) needs to be a notarial deed (drawn up before an Austrian or German notary). In case of a sale and transfer of shares in a stock corporation, there is no specific form requirement, yet share certificates may have to be handed over and/or endorsed.

In asset deals, the asset purchase agreement must precisely define the assets and liabilities taken over and must address additional issues, such as third parties objecting to the transfer of the contract or payments being made to the wrong party (wrong pocket clauses). Subject to the following, there is no specific form requirement for asset deals. Under statutory law, the sale of all or substantially all assets (being interpreted as more than 75 per cent) by a stock corporation requires approval by a shareholder resolution with a 75 per cent majority, and a sale and transfer agreement in the form of a notarial deed; these requirements also apply to asset sales of limited liability companies according to (recent) Supreme Court precedent and legal writing.

In asset deals, the transfer and/or registration of specific assets generally have certain requirements: eg, notarised signatures of parties for transferring real estate.

In more complex transactions, and in both share and asset deals, side agreements may also be drawn up, including but not limited to service level agreements. Additional documents may be negotiated and /or signed during the pre-signing phase (see section 3).

2.3 Tax considerations for each structure

There are no transfer taxes levied on the sale of shares in corporations, limited liability companies or partnerships, or the sale of assets. The sale of assets is, however, subject to VAT.

However, under Austrian law, several types of transactions may be subject to stamp duty if evidenced by written documentation in Austria. Such transactions include lease agreements, assignments of contracts, rights and receivables, settlement agreements, sureties and agreements on real estate mortgages.

The stamp duty for those transactions ranges, depending on the type of legal transaction, from 0.8 (assignments) to 2 per cent (settlement agreements) of the calculation basis, which is usually the consideration for or value of the transaction. No stamp duty is triggered if contracts, rights or receivables transfer in a transfer of business automatically by operation of the law. Debtors of stamp duties are typically all parties to the agreement; therefore, stamp duty may be triggered if the transactions are concluded as ancillary transactions to the share or asset deal.

The sale of shares in a corporation is exempt from VAT; the sale of assets, including the sale of a business as a going concern in respect of the underlying business assets, is subject to 20 per cent VAT at the standard rate, with certain assets being subject to a reduced rate of 13 or 10 per cent.

Real estate transfer tax (RETT) is levied on the acquisition of domestic real estate and, in some cases, also if shares in corporations and interests in partnerships that directly own real estate are transferred. Under current tax laws, RETT is triggered if 95 per cent of the shares of:

- a company that holds real estate are consolidated in the hands of one shareholder or a group of shareholders within the meaning of the Austrian group taxation regime; or
- a partnership that has held real estate over a five-year period.

RETT on direct acquisitions of real estate is 3.5 per cent (standard rate) of the purchase price or value. Upon registration of a new owner of the real estate, an additional 1.1 per cent registration duty will be triggered. RETT on indirect acquisitions of real estate, via acquisition of companies and partnerships, or via acquisitions by corporate reorganisation under the Reorganisation Tax Act, is 0.5 per cent.

In the case of a disposal of shares, a capital gain is subject to corporate income tax at a rate of 25 per cent or at the special income tax rate of 27.5 per cent if the seller is an individual. Any capital gain resulting from the disposal of assets or a business is subject to corporate income tax at the standard rate of 25 per cent if the seller is a corporation, and up to 55 per cent if the seller is an individual.

Share-for-share exchanges are generally also taxable but may qualify for rollover relief under the Tax Reorganisation Act.

Austrian corporations may qualify for tax exemption on capital gains in the sale of shares if they meet the requirements for a special participation privilege, or in cross-border transactions under applicable double tax treaties.

3. PRE-AGREEMENT DOCUMENTATION

3.1 Advantages and disadvantages of each type.

Pre-agreement documentation include non-disclosure agreements (NDA), term sheets (TS) or letters of intent (LOI).

The number of documents and steps involving pre-agreement documentation depends on the type of sales process. In a private M&A transaction involving only one seller and one (potential) buyer, the parties will usually only enter into a NDA before negotiating and agreeing the final transaction documentation, and only enter into an LOI in exceptional circumstances. In transactions involving private equity, a detailed TS may be negotiated which may form the initial basis for later full contractual documentation.

In an auction process, the seller will usually provide an information memorandum and sell-side due diligence reports after agreeing the NDA. The bidders will then be invited to one or more rounds of bids before the definitive transaction documents are negotiated and concluded with the final bidder.

Especially in the private equity or the real estate transaction context, sellers may already pre-discuss and arrange for W&I insurance with a broker and W&I insurers. Process implications specifically in relation to timing and limited coverage regarding certain risks may speak against W&I insurance in specific transaction settings.

3.2 Binding nature of clauses in pre-agreement documentation

Statutory pre-agreements (*Vorvertrag*), which have strict requirements, are rarely used in the M&A context. Austrian courts will usually interpret LOIs as non-binding. Thus, if a TS or an LOI is drawn up and executed, the parties will specifically state that the TS or LOI is non-binding and subject to agreeing signed documentation – except for certain clauses like confidentiality, applicable law and venue and, if applicable, exclusivity. Penalties for violation of terms (except for violation of an exclusivity clause) will be the exception rather than the rule. TS or LOIs sometimes provide for the reimbursement of due diligence costs usually, with a capped euro amount.

4. DILIGENCE STAGE

4.1 Key points

Formalised due diligence procedures with document disclosure made in virtual or physical data rooms have become the rule in private M&A transactions. The scope of disclosure and due diligence will usually be determined by the size of the transaction and the industry involved. Private equity transactions or competitive auctions may require vendor due diligence and information memoranda, and/or vendor due diligence reports provided by seller followed by buyer due diligence. Extensive disclosure by sellers will usually be combined with a request by sellers to buyer to accept, as one of the contract terms, that the disclosed facts will relieve sellers from warranty obligation or liability.

Local Austrian law aspects that are particularly relevant for foreign buyers are usually the regulatory requirements (specifically public law requirements), employment law, rental and tenant laws, and tax aspects.

As to share deals, key review items will include change of control clauses, shareholder arrangements if any (particularly in the case of minority stake acquisitions), and third-party consent requirements or other restrictions on the shareholdings.

As for asset deals, the review will usually focus on whether contracts can be taken over or need to be terminated and on the requirement for third-party consents (section 38 of the Austrian Commercial Code; section 69 et seq. Insurance Contracts Act; and section 12a Tenancy Act). Additionally, following the EU Acquired Rights Directive, the rules of the Employment Contract Law Harmonisation Act (Arbeitsvertragsrechts-Anpassungsgesetz or AVRAG) must be observed as to employment and pension agreements.

4.2 Typical issues and how they are addressed

It is difficult to generalise, but in the case of limited liability companies, issues may include:

- the lack of complete documentation of prior notarial transfer agreements to document a full title chain;
- issues relating to non-arms-length transactions or other illegal distribution of equity to shareholders;
- exposure to tax, including from prior corporate reorganisations or to stamp duty; or
- relating to potential violation of laws including but not limited to environment, data protection or competition.

If deficiencies cannot be remedied prior to signing, findings – if significant and disclosed – are typically addressed by pricing them in: ie deducting a negotiated fixed amount from the purchase price stated in the agreement or otherwise by covering those in representations, warranties or (specific) indemnities.

5. MAIN TRANSACTION AGREEMENT

5.1 Formal requirements

If shares in a limited liability company are being transferred, the sale and transfer of the shares must be documented in an agreement in the form of a notarial deed, drawn up in front of an Austrian notary (it is debatable if and to what extent notarial deeds prepared by foreign notaries may, depending on the jurisdiction of the foreign notary, be sufficient). The agreement can be signed under power of attorney with notarised, and if applicable, super-legalised signatures.

Transaction agreements relating to stock corporations and asset deals have no such form requirement. Additional acts may apply: to effect the valid transfer of shares in a stock corporation, shares or share certificates will he handed over and/or endorsed at closing. In asset deals, the transfer of real estate requires a specifically worded transfer clause in the agreement and notarised signatures; to effect the valid registration of particular assets like trademarks or other intellectual property (IP), notarised signatures on transfer instruments may be required.

5.2 Typical key clauses in agreements, including representations, warranties and indemnification

5.2.1 Format

In larger transactions, cross-border M&A and multijurisdictional transactions, the United Kingdom/United States style of contractual documentations have been increasingly adopted, albeit with some modifications. As a rule – and especially if governed by Austrian law – the agreements tend to be shorter and less detailed than their common law counterparts. Sometimes, mostly in multijurisdictional asset deals, there is a split between a master agreement and short-form local (law)transfer deeds.

5.2.2 Purchase price

In line with international practice, purchase price clauses can be straightforward cash price arrangements and may also involve earn-out or complex price adaptation mechanisms linked to net equity, net assets or a closing balance sheet. Holdbacks and escrows will be the exception rather than the rule. If a security is required to back up warranty or other liability claims, this will usually be a bank guarantee.

5.2.3 Representations and warranties

The scope and number of representations, warranties and indemnities given to a buyer varies, depending on whether the market is a sellers' or buyers' market, whether the target (business) is highly attractive, and whether it is sold in an auction or in the context of a distressed sale.

The warranty catalogues usually start with the fundamental warranties in respect of title, corporate aspects, and authority and power to enter into the agreement. The fundamental warranties are usually followed by warranties on the financial statements and warranties on the business, including on material contracts, tax (in addition to a tax indemnity, if any), IP, labour and compliance.

Except for fundamental warranties, and depending on the negotiation power of the respective party, knowledge qualifiers and materiality qualifiers may apply to individual representations and warranties.

Regarding taxes and, sometimes, the environment or – for example, in the context of tech deals – IP, indemnities will usually be agreed. Indemnities that, apart from the standard tax indemnity, are often agreed for risks identified in due diligence are not subject to the usual limitations of business warranties.

Representations and warranties are not fault based but, as with business warranties, are usually subject to agreed limitations. Violation of representations and warranties and of indemnities is usually contractually agreed to be indemnified on a euro-for-euro basis.

The content and scope of the representations and warranties will also be determined by the industry of the target, which may lead to industry specific warranties. Additionally, clauses confirming the accuracy of information and the completeness of disclosure and of stipulations, as well as misrepresentations, are standard. Sellers will usually try to limit the scope of many warranties to best knowledge by the shareholder, whereas buyers will want blanket, broad warranties, limited qualifications of best knowledge and, if qualified by best knowledge, will want to include the knowledge of the target executive and second-tier target managers. Parties need to also focus on the regulations regarding burden of proof, since this will often be decisive in whether a warranty claim can later be pursued or successfully defended against.

5.2.4 Covenants

In line with international practice, covenants between signing and closing will usually relate to limitations in the conduct of business until closing (ordinary course), information obligations on the buyer as to business development, and provide for a prohibition of dividend payments to the seller by target between signing and closing. Sometimes covenants provide for the seller to procure the resignation of managing directors or (supervisory) board members as of closing.

5.2.5 Indemnification

Parties and advisers should pay particular attention to the section of the agreement which regulates the legal consequences of a contract breach, particularly a breach of the representations and warranties. The clauses on indemnification will not only set out the remedies available but also define, and usually thereby limit, the kind of remedies available, their scope, limitations as to amount and the cut-off date for pursuit of a claim.

Given the difficulty to re-transact, rescission of the sale and purchase agreement will usually be excluded, whether based on impossibility to cure substantial (value) defects or error or on other grounds. On an exception basis, some contracts do allow for rescission, for example in the case of title defects. The indemnification regime usually also provides a notification duty by the buyer of a breach of a warranty or defect within a stated time, and for the possibility for the seller to cure the defect and, failing such remedial action, for the buyer to be entitled to claim for damages, payable either by the seller or the target.

The buyer will aim for a broad definition of loss; a point of negotiation is usually also whether, and to what extent, lost profit or certain types of indirect damage are excluded. Caps, floors, and baskets defining and limiting the amount of damage entitlement are consistent with international practice and are usually determined by the bargaining power of buyer and seller. Title, tax and, if applicable, environmental warranties are usually carved out from the regime of floors and may be governed by a special remedy regime and special limitations. Under Austrian law, unless otherwise provided contractually, claims for the recovery of losses due to a violation of a purchase contract can be based on either a violation of representations or warranties or on contractual tort. Fault is not a requirement for a claim, but it is a requirement for tort claims. Prudent contract drafting will provide clarity as to which type of claims will be excluded under the contract.

The indemnification section usually also provides for a special regime applying to third-party claims against the target company or against the buyer (including, but not limited to, claims by tax authorities).

5.2.6 Limitation periods

The minimum general time limit a buyer will usually seek is two years from closing, allowing the buyer to have at least one full year of operation, a subsequent audited balance sheet and sufficient time for claims, if any, to unravel. In seller-friendly contracts the general time limitation for contractual (warranty) claims may be as short as 12 or 18 months from closing. However, for tax (including social security) claims, it is usually agreed that the applicable legal statute of limitation will apply; for title warranties and environmental warranties, specific periods are being agreed anywhere between 3, 5, 10 and 30 years.

5.2.7 Non-compete arrangements

Depending on the type of transaction and industry, non-compete clauses relating to sellers (legal and individual persons) for particular segments of the industry could be part of the transactional documentation as ancillary constraints. To be valid and enforceable, non-compete arrangements need to be defined and limited in scope and time. Competition law, in particular EU law considerations, play a role and result in non-competes usually being limited to two years, or three years in the case of the transfer of know-how, from closing. Under Austrian court practice, non-compete clauses going beyond such time limitations will not be invalidated *in toto*, but reduced to the permissible limitations (ie, partial invalidity). To avoid problems of proof, it is not uncommon to define penalty amounts for violation including repeat violation.

5.2.8 Governing law

Under Austrian private international law, parties are free to choose the law governing the asset or share sale and purchase agreement. However, rights *in rem* and the so-called *modus* – ie the requirements governing the transfer of the shares and of other assets (if located in Austria or otherwise subject to Austrian law according to Austrian private international law rules) – must comply with local, thus Austrian, law requirements (for example, see formal requirements in section 5.1).

Agreements governed by a foreign law will need some localisation and/or local implementation. Whether the transaction documentation will be entirely or partly governed by Austrian law will depend on the respective negotiation power of the parties involved; sometimes a neutral law may be chosen as the governing law. This is typically German or Swiss law because of the similarity of rules in company and corporate law matters. As for language, in larger cross-border transactions it has become standard to use English as the governing language. Bilingual agreements are rare, although parties may always procure translations, which are then non-prevailing.

5.3 Specific considerations when drafting dispute resolution clauses

In cross-border or multi-jurisdictional transactions, parties usually agree on arbitration as the mechanism for dispute resolution. The most frequently chosen arbitration rules are the so-called Vienna Rules administered by the Austrian Federal Economic Chamber, the arbitration rules of the ICC Paris or the rules of the London Court of International Arbitration (LCIA). In relation to non-EU countries, it is imperative or highly advisable to choose arbitration clauses to secure enforceability of an award; arbitral awards may be secured under the New York Convention. Under Austrian law, attorneys in fact executing an arbitration agreement under power of attorney may require a special power of attorney making specific reference to the arbitration clause to be executed. Depending on the specifics of the transaction, arbitration clauses may not work for private individuals and private foundations.

6. TYPICAL CONDITIONS FOR CLOSING AND THE RELEVANT REGULATORY REGIME

6.1 Typical conditions for closing

A key (and in smaller deals usually the only) closing precedent (CP) typically is merger control (MC) clearance. This can either be on a local level for Austria; for jurisdictions outside Austria where the target has a relevant turnover or in larger transactions, EU merger clearance may be required (plus possibly local MC clearance for certain non-EU jurisdictions).

Clearance with land regulatory authorities may be required in both asset and share deals where the target holds estates and where a controlling stake is acquired. This may depend on the specifics of the transaction, the identity of the buyer (EU/EEA/Switzerland or other) and the real estate concerned (type, location).

Given deal certainty requirements by sellers, private agreements rarely include shareholder consent or financing as a CP. However, the specifics of a transaction could require CPs tailored to the deal, eg, the availability of a change of control provision in key target contracts by suppliers or customers, the spin-off of certain assets pre-closing, etc.

If the target operates in a regulated industry, clearance with the telecoms or media regulator, with financial market authorities or other regulatory agencies may be required (see section 6.2 on FDI).

6.2 Relevant regulatory requirements and issues when dealing with foreign investment

Under the 2020 Investment Control Act, the direct or indirect acquisition by foreign investors (investors domiciled outside of the EU/EEA/Switzerland) of an interest of 10 per cent (in highly protected sectors like defence etc), 25 per cent, 50 per cent or more, or of a controlling interest in an Austrian enterprise engaged in specific industry sectors specified in the Act (including energy and telecoms, semiconductors, cybersecurity, supply of vaccines and medical products) requires advance approval by the Austrian Minister of Digital and Economic Affairs. Lack of approval renders the investment transaction null and void.

In case of an FDI approval requirement, which the Ministry interprets broadly, a CP must be included into the acquisition documents. Given no informal clearance (or advance ruling) is practical, acquirers from outside the EU acquiring targets in sectors requiring FDI approval would ideally prepare such filing ahead of signing, to be submitted immediately after signing of the transaction to keep the approval period for clearance of the transaction to two to three months from submission of the filing.

7. CLOSING ACTIONS

7.1 Typical steps to be undertaken for consummation of the proposed transaction

Closing actions typically include the production of clearance certificates from the respective authorities on regulatory clearances like merger control or FDI, confirmation of the payment of the purchase price; and, in the case of a stock corporation, delivery of shares or interim certificates for shares with endorsements to the buyer.

Depending on the CPs of a particular transaction, the consummation of the transaction may require the production of additional documentary evidence regarding resignation of board members, the spin-off of certain assets pre-closing, or waivers by contract partners of target of change of control clauses in key target contracts. Transactions involving a larger number of closing deliveries will usually require a closing protocol to be drawn up at closing and signed.

7.2 Additional inputs for cross-border M&A

Except for heightened early scrutiny well ahead of signing as to which merger control, FDI or other regulatory clearances (if any) may be required, and which timelines are to be expected for any required clearances, parties are well advised to front load ‘know your customer’ (KYC) information, bank account information and information for draft regulatory filings ahead of signing. Parties should also analyse and manage, including by procuring appropriate powers of attorney, any required documentary and form requirements for later signing and closing of contractual documentation.

8. POST-CLOSING

8.1 General actions for post-closing

In share deals, post-closing actions are mostly limited to changes in corporate documentation including registrations of new shareholders and, as the case may be, of directors or board members or sending required notifications – in particular, in case of change of controls to contract partners.

Measures may be required if post-closing adjustments are to be calculated based on closing balance sheets drawn up post-closing or if an earn-out mechanism applies. In practice, parties often fail to implement a proper program to monitor potential claims and secure evidence for warranty and damage claims.

Implementing an asset deal is usually a challenge in relation to transferring and integrating employees and individual assets. Also, compliant stamp duty (avoidance) aspects must be observed in asset deal transactions.

8.2 Regulatory filings

Mostly in the context of asset deals, operational licences may need to be transferred, such transfers notified or re-application made for new licences.