

Market Intelligence

M&A 2020

Global interview panel led by
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Austria

Peter EJ Winkler leads Eisenberger & Herzog's corporate and M&A and banking and finance practice groups. He focuses on large-scale M&A, capital markets and banking transactions. Peter is adept at handling time-sensitive, highly complex, multi-disciplinary matters, often also involving capital markets and regulatory aspects. International rankings such as *Chambers and Partners* and *Juve* consistently rate Peter as a Tier 1 lawyer, and Austrian media and market observers regularly cite him as an influential leader.

Josef Schmidt practises in corporate and M&A, and banking and finance. After working with Eisenberger & Herzog for many years, he joined a top-tier US firm in London, before recently returning to E&H. Josef is essential to E&H's integrated approach to client services, which is based upon our ability to offer expertise in corporate law, financial regulations and capital markets. Josef has repeatedly been involved in large public and private M&A deals, as well as capital markets transactions, in Austria in the past couple of years.

1 | What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

The global covid-19 crisis caused an unprecedented paradigm shift for M&A in Austria, as for business in general. No analysis would make sense without structuring observations along this arc. We will therefore try to separate trends that were pandemic-specific from those that appear likely to continue in the future.

Until March 2020, the number of M&A deals and the overall deal volume had been steadily increasing in Austria over the past several years. The economic environment was extremely strong, despite nervousness based on first indicators of a slowdown and potentially a downward correction. In early 2020, a couple of headline deals were still either closed or a structured process was at least initiated.

Inbound transactions by private equity, and from China, other Asian countries and Middle Eastern countries, have continued to rise. This activity preceded the onset of covid-19 and we would expect this trend to intensify in the future, ushering in new challenges in bridging the gaps between cultural negotiation styles and work modes.

Meanwhile, Austrian actors have continued to conduct significant outbound activities in the Central, Eastern and South Eastern Europe regions. Many of these transactions have come to halt recently, with only a slow restart given the uncertainties and newly-established border regimes in this area. We anticipate that outbound activity will potentially take a while to reach pre-crisis levels.

In general, the private M&A market continues to dominate the public M&A market, both in the number and size of transactions. While publicly listed companies are only involved in a couple of transactions per year, they are naturally high volume deals that generate considerable media coverage.

Since the covid-19 lockdown in Austria in March 2020, we have seen unprecedented volatility in M&A market activity. Although no longer as noticeable as in the past, business usually slows down in the summertime and around the New Year. However, the covid-19 pandemic has completely upset the regular seasonal patterns and the past couple of months have been highly unpredictable. In the first phase, only some deals that were in a later stage of negotiations progressed to a signing and many sales processes that were either about to start, or were still in an early stage, were abandoned. At the beginning of summer, the market significantly ticked up again.

While many buyers and sellers were hesitant to jump right back in, things have started to normalise again and to some extent market activities have now significantly exceeded typical summer levels. While there seems to be a sizeable pipeline of deals for the upcoming fall, a second lockdown or slow economic recovery could hold things back.



- 2 | Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

Until March 2020, the real estate sector had certainly been the most dynamic for transactions in Austria over the past years. This was not only true for singular asset or portfolio deals, but also for transactions involving real estate corporations or groups, whether publicly listed or not. For example, the shares in the publicly listed Immofinanz AG, S IMMO AG, CA IMMO AG, BUWOG AG and Conwert Immobilien Invest SE have seen significant transactions in the past several years. In the pre-crisis economy, this trend was driven by record low interest rates, low financing costs, a high pressure to invest for many actors and the considerable price increases of the past few years. It is unclear whether this will continue, given the more challenging environment.

Especially in the private equity industry, international investors have been purchasing targets from Austrian founders and families. Many private equity funds have recently discovered Austria as a new playing field that has not been penetrated

“We expect a marked increase in corporate workout situations in the fall of 2020 and early 2021.”

as much in prior years, in contrast to Germany for example. Supply and demand are equally responsible for this development. Pressure to find targets has intensified, but targets in major markets have already seen a lot of activity, so funds are broadening their focus to include smaller jurisdictions and also smaller deals. Now that the investment stage has matured, Austria's relatively smaller market is therefore growing in appeal. This development has continued even after the commencement of the covid-19 crisis, because there is intense pressure for funds to invest and Austria's economy has remained comparably intact even in these challenging times.

Even before the crisis, restructuring and distressed M&A were on the rise. While public measures have so far delayed a wave of restructurings and insolvencies, we expect a marked increase in corporate workout situations in the fall of 2020 and early 2021, with many banks already ramping up their head counts in these areas.

The special situation deal is finding new footholds in our practice. Transactions are more intricate than in the past and are often highly influenced by either complicated shareholder or stakeholder situations or regulatory challenges.

3 | What were the recent keynote deals? What made them so significant?

Austrian M&A was very active in 2019, with a variety of headline deals taking place. In terms of high volume outbound deals, ams's controversial public takeover of German OSRAM comes to mind, with a leveraged structure that was conceived prior to the covid-19 crisis. This kept the market back on its heels for a while as to whether the deal as announced would proceed to closing. Another significant outbound transaction was UNIQA's acquisition of AXA's business in Poland, Czech Republic and Slovakia, thus advancing to the top five market positions in these jurisdictions.

In the inbound M&A category, Allianz Capital Partners purchased Lower Austria's fibre optic grid, showing novel opportunities for infrastructure monetisation in conjunction with private equity investors. Also, internationally-leading energy sector player ENGIE purchased Powerlines Group in the course of an auction. Similarly, Royal DSM, a global, science-based company in nutrition, health and sustainable living purchased Austria-based Erber Group in an auction. The latter two transactions are evidence that, while private equity still drives many M&A transactions in Austria, strategic investors are equally likely to prevail in auctions.

Austria's largest listed real estate companies have, again, seen significant activity, topping public M&A like in the past years, in particular Immofinanz and S IMMO. After partnering with Norbert Ketterer to purchase a significant stake in S IMMO AG late in 2019, investor Ronny Pecik joined forces with Peter Korbacka to purchase a sizeable stake in Immofinanz and, after the onset of the covid-19 crisis, has been appointed CEO of Immofinanz.

4 | In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

For deal consideration, cash is still king in Austria. The country only has a few listed companies and even fewer have a liquid market for their shares. Consideration in stock is much less common here than in jurisdictions with more developed capital markets and more listed companies. Therefore, both in the public and in the private M&A context, we almost exclusively see cash as the consideration for shares. But we begin to see that this may change going forward. The Vienna Stock Exchange has introduced two new market segments called 'Direct Market' and 'Direct Market Plus', that have effectively and legally opened up equity listings to smaller and medium-sized companies, and earlier stage companies. They are expeditiously promoting this and are working closely with government and other stakeholders to raise awareness. While there have been some listings in these markets recently, it is unclear whether public sentiment will embrace the new move. The emerging start-up and venture capital industry is embracing a change of mindset in using equity participations more frequently as a means of structuring and as a general business device, such as using them as deal currency. In this corner of the market, it may not be an obstacle for shareholders to receive shares issued by foreign issuers, although it is far from common.

Boosted by the Vienna Stock Exchange's initiatives, share participations in the company or the acquirer are gaining importance in management incentive programmes. Even when they are not used as deal currency, shares in the acquirer are commonly offered to key employees or key shareholders as an incentive to remain on board post-transaction.

5 | How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

In general, the legal framework for M&A deals in Austria has been quite stable in the past couple of years. We see that compliance and regulatory topics are now considered more crucial aspects of transactions than they were in the past. Many practitioners think that data protection is the new competition law. Since the General Data Protection Regulation (GDPR) has come into effect, with potentially harsh fines for breaches, companies are paying significantly more attention to getting the process right during the actual deal and conducting proper diligence around past and present data protection compliance. We are now applying the sophisticated procedures and in-depth analysis that are customary in competition and antitrust law to data protection.



Austria has recently implemented their version of the new European foreign investment framework, which is mainly designed to control investments by non-EU residents. This very recent change in the law is already significantly impacting how non-EU investors structure transactions. Previously, an intermediate EU vehicle could be used to avoid a substantive review, but now the authorities will likely have to be involved in order to achieve complete certainty for the transaction. Specific modes of operations have not yet been established and we expect significant delays in closings for non-EU investors until experience paves the way.

Clients and practitioners are more frequently discussing and addressing sanctions and compliance with money laundering and bribery laws. In deals with significant acquisition financing from international banks, or by publicly listed debt, most clients and practitioners are aware of these issues.

Even though the law has not changed, the courts continue to interpret Austrian capital maintenance rules evermore strictly and practitioners must consider them when structuring transactions. A debt push-down, which is common in many buyout structures internationally, is therefore much harder, if not impossible, to implement and these rules limit the value of upstream guarantees for acquisition financing.

“We have seen a decisive uptick in asset deals as opposed to share deals.”

6 | Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Both traditional Austrian companies and international corporations have been quite active in the M&A market in the past couple of years. Many industries have seen significant consolidation, both domestically and from abroad. Austria only has a small private equity industry, as already mentioned, but international private equity is increasingly focusing on companies in Austria as targets, as many are 'global hidden champions' in niche markets.

Moreover, plenty of targets change hands among private equity investors. Since the covid-19 pandemic began, however, these trends have rather accelerated.

In terms of deal structure, we have seen a decisive uptick in asset deals as opposed to share deals, in particular with targets that are founder or family-owned and do not have sophisticated financial reporting, compliance and risk management infrastructure in place. Buyers are wary of taking on substantial liability risks or simply want to have a clear cut with the past, which is often unknown and difficult to scrutinise. Many sellers also use such a deal structure to carve out certain pockets

of their operations that they would rather wind down themselves. Taxes are often the decisive factor in determining the deal structure. However, Austrian law provides for strict successor liability, also for asset deals, which requires careful deal structuring.

7 | Are shareholder activists part of the corporate scene? How have they influenced M&A?

While still not as prevalent as in the United States, the United Kingdom or even Germany, shareholder activists have emerged in the major listed Austrian corporations over the past couple of years. Most listed corporations in Austria have one or more anchor shareholders that can steer the company's direction through their majority position or major stakes in all elections at the general meetings, which deters activism other than in special situations such as mergers and squeeze-outs. Naturally, the few companies with a higher free float and no decisive shareholders have been more susceptible to activism. As in all jurisdictions, activists rigorously scrutinise management decisions and dividend policies. Thus, activists have impacted M&A activities in two directions: in some cases they have pushed for more, or specifically strategic, purchases, on other occasions they have criticised past deals or the terms of those already consummated.

8 | Take us through the typical stages of a transaction in your jurisdiction.

An M&A transaction in Austria is not materially different from other jurisdictions, in particular in continental Europe. The main distinction is that generally deals are smaller, and the market is tighter in Austria. Therefore, investment banks are typically only involved in higher volume deals, but not in the vast majority of transactions. Founder or family-owned businesses are often advised by their tax or general financial adviser, but not M&A bankers, at least at the beginning of a transaction. Thus, counsel tends to more actively assist the seller in making strategic decisions and in terms of market intelligence and structuring.

The process and specific steps of a transaction depend initially on whether the transaction is a bilateral negotiation or the seller structures it as an auction. In both cases, an initial vendor due diligence is usually conducted to identify major legal risks up front that may require additional steps prior to starting a sales process.

If there is an auction, the seller and its advisers will invite potential purchasers to participate in the sales process with a process letter and request some form of a signed confidentiality agreement and, after the seller has provided an initial information package, an indicative offer. The indicative offer is typically the deciding factor in who will get to a second phase, which involves in-depth due diligence and negotiating a share (or asset) purchase agreement.

In a bilateral negotiation, the seller will require the potential buyer to sign some sort of confidentiality agreement, such as a non-disclosure agreement, or a letter of intent already outlining the terms and potential steps of a share or asset purchase agreement, before the due diligence phase.

There have been a number of significant developments in the due diligence phase recently. On the one hand, most clients now require only limited red flag reports, rather than longer, descriptive reports. Often, entire subjects are carved out and either conducted in-house or only on a much higher level. Warranty and indemnity insurance is now considered in the majority of transactions and almost always when there is a private equity seller. It can often bridge the gap between the seller's desire to have a clear cut after a sale and the purchaser's desire to be protected against unforeseen costs or liabilities. On the other hand, sellers are more aware that they must carefully select the data to share with the buyer (in particular when the potential buyer is a competitor of the target), because violating competition and antitrust law can be costly. The GDPR coming into effect has also raised concerns about data protection in the course of a due diligence, which has increased the complexity of setting up a data room.

In most cases, due diligence still takes place before or during contract negotiations. However, because of these complexities, in some sales the confirmatory due diligence has taken place only after the share (or asset) purchase agreement has been signed.

While Austrian law firms have been incorporating artificial intelligence software into the due diligence process for years, across the board and apart from specialised circumstances, these tools are not yet sophisticated enough to render human oversight redundant.

As in other jurisdictions, the transaction is executed by signing and closing the purchase agreement. However, Austrian M&A has a peculiar notary requirement for the sale and transfer agreements of Austrian limited liability companies. In order to be valid under Austrian law, a notary public must literally read the entire text of the share purchase agreement, which can last several hours. Foreign investors often find this surprising and noteworthy. As a relief measure for the covid-19 crisis, Austria has adopted legislation to allow notarial deeds to be executed through video conferences. This measure has proven to be quite useful in many international transactions, where business travel was not feasible or consular authorities were closed and unable to provide necessary apostilled powers of attorney. While the measure is limited to the end of 2020, we hope this will be allowed indefinitely, eliminating many burdensome documentary steps.

To end on a high note, foreign investors find it quite easy to transact in Austria because the documents can be produced in English, in a format that is very accessible to those familiar with doing business in common law jurisdictions. Share or asset



purchase agreements here have a similar structure to those in the United States, the United Kingdom and, in particular, Germany. Many lawyers who specialise in the field have an excellent command of English and have been trained or gone to school in common law jurisdictions and practised in international law firms in those countries. This greatly facilitates communication and clarity.

9 | Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

Traditionally, banks have been major shareholders in Austrian industrial corporations. This connection has not diminished greatly in the past years and remains strong in comparison to most other jurisdictions. The recently proposed Basel IV banking regulations would significantly increase the risk weights for a bank's equity exposure. This may lead banks to sell off significant parts of their industrial holdings in order to avoid having to post increased risk buffers. In the next couple of years, the market could be driven by major stakes in sizeable Austrian companies becoming available for M&A transactions.

10 | What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

Like the collapse of Lehman Brothers about a decade ago, covid-19 was a turning point for the economy and thus for the M&A market. But, judging from the earliest indicators we have, it was not so much a disruptor and rather an accelerator. Prior to March 2020, many practitioners were expecting the record high M&A activity levels to flatten out. The crisis hit the economy in a late phase of the economic cycle and particularly in an almost unprecedented upward trajectory in real estate prices and corporate deal valuations.

Thus, we expect a significant uptick for distressed M&A in the upcoming fall and winter and would expect this to be a driving area of the market in the next couple of years. Paradoxically, even though real estate prices reached record levels prior to March 2020, for prime real estate, the crisis may have even stabilised or driven prices up. Other market segments might struggle.

Also, what was true prior to covid-19 is in most cases still true: many companies and funds have amassed significant amounts of cash that they are pressured to put into productive use, given the continued low interest rate. The costs of debt financing are still also at historically low levels, so leverage can be used to facilitate acquisitions (although this is not true for all borrowers anymore). These factors are still driving deal volume. After only a couple of months of waiting, many sales processes have restarted and deal flow in the late summer is as high as it has ever been for this season.

To end on an optimistic note, in the long run, we believe that the covid-19 pandemic will only be a bump in the road and that a high volume M&A market is here to stay. Technological innovation, automation and continuing pressure to invest large amounts of cash by both private and institutional players will drive deal flow and shape tomorrow's transactions.

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The Inside Track

What factors make mergers and acquisitions practice in your jurisdiction unique?

The M&A process in Austria will feel quite familiar to international investors and practitioners. This is both true as to how the process is structured, but also as to how the share or asset purchase agreement is drafted. Documentation and negotiations in English are as common as in German.

We should mention that Austrian stamp duty on sureties and assignments of rights is an idiosyncrasy that can require unusual structuring. Also, Austria has some of the strictest capital maintenance rules, which sometimes causes structural issues when financing acquisitions.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Your team should have a proven record of excellence in similar transactions and should consist of experts in the various fields of law that affect the specific transaction, which often involve regulatory aspects. Good M&A lawyers should have an understanding and command of these other fields, but only the whole team can solve complex, multidimensional issues. We also cannot overstate the importance of cultural fit. As a client, you should find a legal team that has a compatible working style and speaks your professional language.

What is the most interesting or unusual matter you have recently worked on, and why?

We advised an Austrian active investment group in its stake-building to become one of the largest shareholders in the publicly listed Immofinanz AG and S IMMO AG, including an acquisition financing that involved debt and equity financings. This series of transactions was not only one of the largest in Austria by deal size, but also highly complex and required a diverse skill set to execute smoothly.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Simpson Thacher & Bartlett LLP, this *M&A* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

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