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LEXOLOGY
Getting the Deal Through

Market Intelligence

M&A 2022

Global interview panel led by Eric Swedenburg of
Simpson Thacher & Bartlett LLP

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.

Keynote deals
Sector focus
Shareholder activism
2023 outlook

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About the editor



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Eric Swedenburg is a Partner at Simpson Thacher & Bartlett LLP, where he is the Global Head of the Firm's Mergers and Acquisitions Practice and a member of the Executive Committee. Eric focuses on representing companies in a wide range of mergers, acquisitions and divestitures, spin-offs, joint ventures and other significant corporate transactions. He also regularly counsels clients on shareholder activism, corporate governance and general corporate and securities law matters. In addition to his work with public companies and special committees of boards of directors, Eric has extensive experience in advising non-public corporations, private equity firms and financial advisors in both US domestic and cross-border M&A transactions across a number of industry verticals.

Some of his recent transactions have included representing SiriusXM in its \$3.5 billion acquisition of Pandora, Mars in its strategic partnership with KIND, Dover in the spin-off of Apergy, Genesee & Wyoming in its \$8.4 billion sale to affiliates of Brookfield Infrastructure and GIC, and The Mosaic Company in its \$2.5 billion acquisition of Vale Fertilizantes. Other clients of his have included Ingersoll Rand, La Quinta, McKesson and Vodafone Group. Among other recognitions of his work, in 2009, *The American Lawyer* named him "Dealmaker of the Year." He is a frequent commentator on M&A issues

Contents

<u>Global trends</u>	1
<u>Argentina</u>	4
<u>Austria</u>	13
<u>Bolivia</u>	22
<u>Egypt</u>	29
<u>Germany</u>	35
<u>Japan</u>	47
<u>Norway</u>	58
<u>Switzerland</u>	71
<u>Taiwan</u>	83
<u>Turkey</u>	95
<u>United Kingdom</u>	105
<u>United States</u>	113

<u>About Market Intelligence</u>	122
----------------------------------	-----



While reading, click this icon to return to the Contents at any time



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Contents

<u>Global trends</u>	1
<u>Argentina</u>	4
<u>Austria</u>	13
<u>Bolivia</u>	22
<u>Egypt</u>	29
<u>Germany</u>	35
<u>Japan</u>	47
<u>Norway</u>	58
<u>Switzerland</u>	71
<u>Taiwan</u>	83
<u>Turkey</u>	95
<u>United Kingdom</u>	105
<u>United States</u>	113

<u>About Market Intelligence</u>	122
----------------------------------	-----



While reading, click this icon to return to the Contents at any time



1

2

3

4

5

6

7

8

9

10

INSIDE TRACK



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Austria

Thomas Lettau is partner and co-head of the Corporate/M&A practice group at bpv Huegel. He specializes in M&A transactions, joint ventures and cross border reorganizations. He also provides high-level, strategic advice to the boards and senior management of companies

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

As in many other countries, Russia's invasion of Ukraine and the economic downturn are having an impact on the M&A market in Austria and there is considerable uncertainty for market participants due to the sharp increase in energy costs, supply shortages, rising inflation and the increase in interest rates. Furthermore, some of the keynote transactions of last year did not have the positive effect investors had hoped. The rise of the Austrian unicorn Bitpanda, for example, was slowed by the cryptocurrency crisis.

Nevertheless, the Austrian M&A market remained stable in the first half of 2022 at the level of the previous year. The number of acquisitions with Austrian participation fell only by one transaction from 147 to 146 in the first half of 2022 compared to the previous year according to the EY M&A Index. Transaction volumes have dropped significantly by 75.6 percent from 4.5 billion euros to 1.1 billion euros. However, this is not very meaningful, as the transaction volume only includes those deals where the purchase price was announced and this was only the case in every tenth deal according to EY.

The vast majority of Austrian transactions are strategic transactions. This may also be the reason why the Austrian transaction market is so stable, as strategic investors stick to their long-term strategy and acquisition targets.

Private venture capital still plays a minor role in Austria compared to the global M&A market. However, we see clear signs that this will change in the near future. Private equity funds often participate in limited auction procedures. However, they are in many cases unable to match the prices offered by the strategic investors.

In 2022, Austrian investors have done more acquisitions of foreign companies than foreign investors have bought Austrian targets.



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

In terms of deal count, the technology, media and telecommunications (TMT) sector led the way with 31 deals or 21% of all deals with Austrian targets or Austrian investors in 2022, as our deal search in October 2022 Mergermarket showed. This is clearly due to the digitalization of the economy and society. The majority of deals in the TMT sector were inbound transactions.

The TMT sector is followed by the industrial sector with 20 deals, the consumer sector with 13 deals and the construction sector with 11 deals.



“Foreign investors have recently become increasingly active in Austria. They are particularly active in the IT, the real estate and the pharmaceutical sector.”

The transaction value was reported by Mergermarket for about 25% of the transactions. For about half of these transactions, the transaction value was above 50 million euros.

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

The sale of a 12.7 % stake in Vienna listed Immofinanz by s-Immo to CPI Property for € 403.5 million was one of the largest M&A transactions in Austria in 2022 and we are proud that our law firm bpv Huegel was involved as advisor to the target. Later in 2022, CPI Property also acquired s-Immo. These two transactions are likely to bring to an end the turbulent times in the real estate sector in Austria over the last few years, during which we have seen a series of package deals and public takeover bids.

The purchase of 51% of the shares in the telecommunications tower division of German Telekom in Germany and Austria for EUR 17.5 bn

by Digital Bridge and Brookfield was another keynote transaction, but the transaction only partly took place in Austria.

An important deal with Austrian participation was also the sale of the nitrogen business of the Austrian-based chemical group Borealis to Agrofert for 810 million euros, after Mubadala Petroleum had sold Borealis to OMV last year. Furthermore, ESNT Packaging and Essentra Packaging were acquired by Mayr-Melnhof for 363.5 million euros and the Haid-Center in Linz by ECE Real Estate Partners for 130 million euros. In December it was announced that Mubadala, the Abu Dhabi sovereign wealth fund, would sell its 24.9 percent stake in OMV to the Abu Dhabi National Oil Company (Adnoc).

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?

In the majority of M&A transactions in Austria, the consideration is cash. This is also true for transactions on the Austrian capital market.

However, there are also situations in which Austrian sellers often receive shares as consideration. This is the case, for example, in add-on transactions in the emerging start-up and venture capital industry, because it is a win-win situation for both buyer and seller. The buyer can make more acquisitions with the available liquidity and the seller receives more value for his shares because he participates in the synergy effects at the buyer.



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

In general, Austria has a stable legal and regulatory environment for M&A transactions but significant changes can be observed because of legislation relating to FDI and ESG:

The new rules under the Investment Control Act have led to a massive increase in FDI procedures, according to the first Investment Control activity report published in 2022. Since the entry into force, a total of 50 applications for approval and applications for the issuance of clearance certificates had been processed, another 20 procedures were pending. Under the old law regulating foreign direct investment, only 25 procedures have been carried out in the last 8 years.

The high number of procedures shows the attractiveness of Austrian target companies also for foreign investors from outside the EU and the EEA. None of the approval procedures had been rejected.

Affected areas for the FDI procedures were, for example, the health sector (14 proceedings), data processing and the IT sector (11 proceedings) and finance (4 proceedings). Most of the countries of origin were the United States (31) and the United Kingdom (12).

In addition, ESG is playing an increasingly important role in M&A transactions due to existing and in preparation for upcoming EU legislation. For some time now, parties have been paying more and more attention to this area in their due diligence. In addition, we are seeing more and more transactions where ESG is one of the reasons for selling or buying a business, as this is also a way to achieve ESG goals. On the one hand, those who are not yet well positioned in terms of ESG can buy targets with better sustainability standards and thus enhance their image and economic success. On the other hand, companies are selling lines of business that do not conform to ESG.

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Last but not least, the legal form requirements for SPAs regarding Austrian GmbHs were recently improved. As private M&A dominates the Austrian M&A market and the vast majority of Austrian targets are GmbHs whose shares can only be transferred by entering into a notarial deed, the introduction of electronic notarisation is a major step forward to simplify M&A transactions in Austria. Now the parties can conclude a notarial deed in a virtual meeting without the physical presence of a notary being required. It is to be hoped that the requirement of a notarial deed for the transfer of GmbH shares will be dropped altogether in the future.

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

Foreign investors have recently become increasingly active in Austria. They are particularly active in the IT, the real estate and the pharmaceutical sector. This is also demonstrated by the keynote deal



“As is the case almost everywhere else in Europe, an increase in shareholder activities vis-à-vis listed companies can be expected in Austria in the coming years. This is due to the Shareholders’ Directive, which was implemented in 2019 in the Austrian Stock Corporation Act. The directive has provided shareholders of Austrian listed companies with new instruments (eg provisions to say on pay) that could be used for activist activities in Austria.”

in 2022 - the purchase of the shares in Immofinanz by the Czech CPI Property Group. It should not go unmentioned, however, that more and more Austrian companies are also going on a “shopping tour” abroad. Outbound transactions therefore also play an important role. This reflects the approach of many Austrian companies to expand their portfolio and grow.

Moreover, the Corona crisis has weighed heavily on many companies in recent years. There is also still uncertainty about the future course of the pandemic. In addition, many governmental funding measures have expired. This could still be reflected in distressed M&A movements. Construction companies and their suppliers in particular could be affected. Corona has caused buyers also to seek protection via more elaborated MAC clauses.

Furthermore, the Austrian M&A market has become more buyer-friendly. This is also due to the Corona pandemic, as many companies are still feeling the economic consequences badly. Consequently, these companies are looking for new investors or buyers.

Increasingly, price negotiations are getting tougher. At the moment, the parties’ ideas are drifting very strongly apart. While sellers enter negotiations with high price expectations (they are not (yet) willing to deviate from the previous peak prices), buyers are often already pricing in current economic problems, supply chain problems and higher financing costs. As a result, the parties are increasingly unable to agree on the purchase price. This has caused quite a few transactions to fail.

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

In Austria, activist shareholders traditionally do not play a major role. This is mainly due to the rather weak Austrian capital market and



the comparatively small number of listed companies as well as the predominantly concentrated shareholder structure. In recent years, however, activist shareholders have also reached Austria, albeit to a limited extent compared to the market environment in the USA or in other European countries. In Austria, for example, the hedge fund Elliott has tried to prevent a shareholder squeeze-out by acquiring a relevant stake or to obtain a higher payment in the event of a shareholder squeeze-out.

As is the case almost everywhere else in Europe, an increase in shareholder activities vis-à-vis listed companies can be expected in Austria in the coming years. This is due to the Shareholders' Directive, which was implemented in 2019 in the Austrian Stock Corporation Act. The directive has provided shareholders of Austrian listed companies with new instruments (eg provisions to say on pay) that could be used for activist activities in Austria.

ESG aspects are also becoming increasingly important in the context of shareholder activism, so that social and environmental aspects will also play a greater role in the future and could eventually lead to a "social activism" in Austria.

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

The course of the transaction depends on the individual case and in particular on the structure of the sales process as either a share deal or an asset deal. Share deals are more common in Austria.

Intermediaries are often involved in an M&A transaction. This particular applies to auction processes, which are very common in Austria. In general, an auction process follows a strict structure and is more seller friendly. The competitive situation between the bidders normally lead to conditions that are more favourable for the seller,

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in particular a higher purchase price. Usually, investment banks and other M&A advisors accompany the auction process.

Although each transaction is unique, the process of a typical M&A transaction in Austria can be outlined as follows:

In the preparation phase, the sales strategy (exclusive vs bidding process) is defined, potential buyers are identified, the data room for the due diligence is organized, the bidding criteria are defined, etc.

After this preparatory phase, potential buyers are contacted and the sales process enters the offer phase. An external consultant usually initiates this contact. If bidders show interest in a purchase, they receive an information memorandum and sign a confidentiality agreement beforehand. Subsequently, interested buyers can submit indicative offers. The interested parties with the most favourable terms are then invited to conduct due diligence.

Within the scope of the due diligence, amongst others tax, legal and economic opportunities and risks, in particular, are to be uncovered



through careful examination in a wide variety of factual areas. Management presentations and other Q&A sessions are usually also held during the due diligence phase.

After completion of the due diligence, interested parties can submit their binding offers. The seller then enters into contract negotiations with the interested parties. Negotiations are either conducted with several interested parties at the same time or only with the best bidder because the latter insisted on an exclusivity commitment.

After that, the transaction enters the signing phase (Signing). In a share deal, the most important document is the share purchase agreement. In an asset deal, the main document is the asset purchase agreement. It is generally customary for the seller to prepare the first draft. However, if add-on transactions are carried out, usually the buyer will be the larger and more experienced partner in the transaction, which often results in the buyer providing the first draft of the purchase agreement.

With the signing - if conditions precedent have been agreed - the process enters the closing phase, ie the phase in which these conditions precedent must be fulfilled. Often, the fulfilment of all these conditions precedent is formally approved at a separate meeting and recorded in a closing protocol. With the Closing, the transaction is formally concluded and the transfer of ownership takes place. The parties still have to meet any post-Closing obligations thereafter.

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

The continuing expansive monetary policy of the central banks ensured sufficient liquidity on the markets in 2021 and early 2022. This was strongly reflected in the increase in M&A transactions as

“The Austrian M&A market is comparatively resistant to both strong economic growth on the one hand as well as recessions (with the exception of external substantial shocks) on the other hand.”

well as in company valuations. Companies were also benefiting from the low interest rate environment and could borrow more easily to finance growth and acquisitions. Interest rate hikes by central banks are now clouding the positive outlook. In the fight against persistently high inflation, the US Federal Reserve System (Fed) has already raised the interest rate several times in 2022. As of 15 December 2022, the Fed raised the interest rate to 4.5% (federal funds rate range of 4.25 to 4.5%). The European Central Bank's interest rate was also raised and stays at 2,5% since 21 December 2022. Both central banks are expected to raise their respective interest rates further. This could have a negative impact on economic growth and thus affect the M&A market.

In addition, the major development drivers of globalisation and digitalisation are also having an impact on the Austrian M&A market: Advancing digitalization is creating more and more technology-based M&A solutions that simplify processes between investors and customers. Digital tools for deal sourcing or for the automatic creation and readout of contracts as part of due diligence are among



the most interesting innovations in this area. Further developments in the direction of a technologized M&A market can be expected.

Furthermore, in line with the global trend, we have also noticed a clear trend in Austria towards increased government regulation and more restrictive world trade policies - the reasons for this are the threat of migration and the sale of system-relevant know-how, which governments are trying to prevent through increased regulation.

As already mentioned, sustainability will play a central role on the M&A stage in Austria in the coming years, even more so than in the other countries, as Austria claims a leading role in this area.

Of course, the Corona pandemic has not left Austrian companies unscathed. Shortages of raw materials and higher energy prices are just two of the many problems that companies are currently facing because of the lockdowns caused by Corona. In some cases, severe consequences have been mitigated by Corona relief measures. However, much of this funding has now expired. This could in turn boost the M&A market. For a company in crisis, an M&A transaction is often the solution. Possible solutions include the creation of new liquidity through partial sales or the addition of new investors. Moreover, distressed M&A could increase after all.

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?

The Austrian M&A market is comparatively resistant to both strong economic growth on the one hand as well as recessions (with the exception of external substantial shocks) on the other hand. However, the Russian invasion of Ukraine, high inflation, rising interest rates and more generally geopolitical uncertainties, a looming recession

coupled with uncertainties about how Corona might fare, represent unknown variables in future market developments. Recently, there has been a lot of valuation uncertainty, and the ATX has fallen sharply since February 2022.

So far, the most active sector in the transaction market has been the TMT sector. However, a really well founded forecast on the development of the M&A market is hardly possible due to the current geopolitical situation. The industrial sector, consumer goods sector and TMT will certainly be in focus again. In addition, there may also be M&A activity in the defense industry and in the energy utilities sector.

Lastly, ESG will play an important role in the future in target selection, deal preparation, due diligence and contract drafting, among other things, and will become even more of an important deal driver.

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The Inside Track

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

Austria is in the heart of Europe and the EU. It is a hub to the East and West, has a stable economy and well-trained and motivated skilled workers. Austria is one of the countries with the highest spending capacity and many attempts have been made in Austria in previous years to make the tax and subsidy framework more attractive for investors. Last but not least, the legal system is highly developed, Austria has a very well functioning judicial system and arbitration is also at a very high level in Austria. All these factors increase the attractiveness of Austrian target companies for foreign investors.

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

Your counsel's team should have excellent knowledge and deep insight into the legal issues of the target company's business and industry. The team must be able to handle all aspects of the transaction work, i.e. combine corporate law know-how with expertise in the other areas of law relevant to the specific transaction. In many cases, this will be competition, tax and capital markets law and if the target company is active in a regulated industry, the team must have a leading legal expert for this regulated area on board as well.

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

We have a well-earned reputation for overcoming legal challenges and resolving complex legal issues to ensure that our clients always achieve their desired outcome. Accordingly, many of our matters are unique and require advanced and, in some cases, ground-breaking strategies. Moreover, we are often involved in transactions in industries that are undergoing transformation. It is extremely exciting to be able to support our clients in this transformation process.