# Distressed M&A 2021

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LEXOLOGY
Getting The Deal Through

# Austria

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## MARKET CLIMATE AND LEGAL FRAMEWORK

### Market climate

1 | How would you describe the general market climate for distressed M&A transactions in your jurisdiction?

The global economy has been disrupted in an unprecedented manner and the economic, financial and socio-political effects of several waves of covid-19 can still not be fully captured. Governments, central banks and supranational agencies and banks are aiming to create further stimulus incentives to secure the financial liquidity of companies and consumer markets. Similar to the disruptions to the global economy, the Austrian economy has also suffered as a result of the covid-19 crisis. In particular, experienced and crisis-proof strategic buyers with cash reserves or an intact stock price are waiting to use high-profile collapses and are eager to purchase distressed targets at favourable valuations. In the coming months we expect a further increase in distressed transactions and transactions involving the sale of non-core assets.

### Legal framework

2 | What legal and regulatory regimes are applicable to distressed M&A transactions in your jurisdiction?

In Austria, insolvency proceedings are either restructuring proceedings or bankruptcy proceedings. Bankruptcy proceedings aim at liquidating all assets and distributing the funds to the creditors, whereas restructuring proceedings continue the operation of the debtor's business without liquidating the debtor. In Austria, there is no specific legal and regulatory regime that is applicable only to distressed M&A transactions, but there are various customary market standards to be considered in the course of distressed M&A transactions. Further, there are various legislative and regulatory frameworks that apply to insolvency proceedings and may apply to distressed M&A transactions depending on their structure. The principle sources of law in this regard are found in the Insolvency Act, the Contestation Code, the Equity Capital Replacement Act and the Company Reorganisation Act.

The transposition of Directive (EU) 2019/1023 has been initiated in Austria through a so-called draft 'Restructuring Code' published on 22 February 2021. The review period ends on 6 April 2021 and the Restructuring Code is expected to enter into force in the third quarter of 2021. The new law will mark a turning point for pre-insolvency restructuring law in Austria. The draft code allows the restructuring of a company even against the will of individual creditors, which in the past could have resulted in the failure of a consensual, out-of-court restructuring.

### Main risk in distressed M&A transactions

3 | Summarise the main risks to all parties involved.

Distressed M&A transactions encompass transactions involving a company in crisis before insolvency, as well as during insolvency proceedings. Depending on the structure and phase of a distressed M&A transaction, different risks should be considered (the main risks can be analysed on a case-by-case basis). For example, the insolvency administrator has the right to:

- decide whether to fulfil bilateral contracts that have not been fully fulfilled by both parties prior to the opening of the insolvency proceedings (and to request the fulfilment of outstanding obligations); or
- refuse the fulfilment of any outstanding obligations and withdraw from the agreement pursuant to Section 21 of the Insolvency Act.

Typically, the insolvency administrator refuses the fulfilment of any outstanding obligations to the extent that the other party has already fulfilled its obligations (in part) (eg, in the case of advance payments). In such case, the claims of the other party are limited to the insolvency quota as a creditor in insolvency. To the extent that both parties have fulfilled their obligations under the relevant agreement equally, the insolvency administrator will, on a case-by-case basis, assess to what extent the further fulfilment of the obligations is in favour of the insolvency estate.

### Director and officer liability and duties

4 | What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of distressed M&A transactions in your jurisdiction?

In addition to the general duties of the managing directors (ie, to act with the care of a prudent and diligent business manager in the best interest of the company), the following duty applies in a distressed scenario:

- To the extent that the company is illiquid or over-indebted pursuant to the Insolvency Act, the managing directors must file for insolvency without undue delay and in any case within 60 days following the material insolvency (subject to an extension of the filing period and temporary statutory relief based on the covid-19-legislation).
- The violation of the duty to file triggers the liability of the managing directors for all damages caused by such violation.
- Further, managing directors may be held personally liable pursuant to the Criminal Code.

**Differences from non-distressed M&A**

5 In general terms, what are the key legal and practical differences between distressed and non-distressed M&A transactions in your jurisdiction?

Distressed M&A transactions encompass all transactions before or during the insolvency of a company. Depending on the structure of such transaction, one of the key differences compared with other M&A transactions is that the insolvency administrator takes control of the target once a target becomes insolvent and, to a certain extent, the agreements between the parties are subject to mandatory regulations. Further, the number of relevant stakeholders in distressed M&A transactions may be higher than in other M&A transactions. Distressed mergers and acquisitions are characterised by the need to find a resolution among the different interests represented by shareholders, creditors (banks) suppliers, customers and employees.

Further, the terms of the transaction documents and related market standards in a distressed M&A transaction differ fundamentally from a non-distressed M&A transaction. For example, material adverse change clauses are unusual and operational warranties are not, or rarely, accepted by the insolvency administrator or the seller in a distressed transaction.

**Timing of transactions**

6 What key considerations should be borne in mind when deciding when to acquire distressed companies or their assets?

An acquisition prior to the initiation of formal insolvency proceedings has the advantage that the purchaser and seller can decide the terms of the transaction (eg, the seller can decide to exclusively negotiate the transaction with one bidder), whereas in an acquisition following the initiation of formal insolvency proceedings, the insolvency administrator will commonly control the M&A process.

One of the key considerations with respect to acquisitions from insolvency is that the buyer can purchase certain assets (known as 'cherry picking') and leave behind the liabilities.

If insolvency proceedings are opened over the assets of the seller after signing but before closing, the insolvency administrator has the right to:

- decide whether to fulfil bilateral contracts that have not been fully fulfilled by both parties prior to the opening of the insolvency proceedings (and to request the fulfilment of outstanding obligations); or
- refuse the fulfilment of any outstanding obligations and withdraw from the agreement pursuant to Section 21 of the Insolvency Act.

It is common for the insolvency administrator to refuse the fulfilment of any outstanding obligations to the extent that the other party has already fulfilled its obligations (in part) (eg, in the case of advance payments).

## TRANSACTION STRUCTURES AND SALE PROCESS

**Common structures**

7 What sale structures are commonly used for distressed M&A transactions in your jurisdiction? What are the pros and cons of each, and what procedures and legal requirements apply?

The sale structure of a private acquisition before the initiation of formal insolvency proceedings depends on a number of considerations, in particular:

- tax considerations;
- the scope and complexity of the relevant business;
- the results of the due diligence; and
- liability risks connected with the acquisition.

The main advantage of a share deal is that the identification of the object of the acquisition is simple and all the assets of the target are simultaneously acquired (unless the parties decide to exclude certain assets). The main advantage of an asset deal is that the buyer can choose whether to acquire all or only certain assets. This can be advantageous in distressed cases and where a company would like to avoid certain liability risks (which would ordinarily be encompassed in a share deal). Generally, third-party rights at the company level (eg, pre-emption rights) are not triggered in the course of an asset deal. Following the initiation of formal insolvency proceedings, asset sales are commonly used.

**Packaging and transferring assets**

8 How are assets commonly packaged and transferred in a distressed M&A transaction in your jurisdiction? What procedural, documentary and other requirements apply?

In general, all or a part of a company's business or assets in distressed M&A transactions can be transferred through a carve out and transfer into a (new) company.

In a pre-insolvency scenario, pre-packaged deals are common in Austria. Before the initiation of formal insolvency proceedings, the sale of all or a part of a company's business or assets is negotiated with the potential buyer. Following the initiation of formal insolvency proceedings, the insolvency administrator effects the sale of all or a part of a company's business or assets following his or her appointment. Under Austrian law, pre-packaged deals are not subject to regulations. However, creditors or third parties may raise a voidance claim to the extent that they do not agree with the pre-packaged deal.

**Transfer of liabilities**

9 What legal requirements and practical considerations should be borne in mind regarding the acceptance and transfer of any liabilities attached to the distressed company or assets?

It must be evaluated on a case-by-case basis to what extent an asset deal or share deal makes sense. In general, a buyer of assets in a distressed M&A transaction will be interested in avoiding taking over any liabilities associated with the company that it purchases, and this could be one of the main advantages of an asset deal over a share deal.

In asset deal transactions – as long as the target is sold outside of insolvency proceedings – the buyer is, in particular, liable for:

- debts related to assets that are not transferred in the course of the asset deal, whereby such liability can be excluded by agreement between the parties, which, in addition, needs to be duly announced (meaning that it needs to be registered with the commercial register, by way of publication in a newspaper or similar, or by way of notifying the third parties concerned);
- all social security contributions that accrued in the 12-month period before the transfer of the business, according to article 67(4) of the Employment and Social Security Act; and
- any other liability that he or she knew of or should have known of up to an amount corresponding to the value of the acquired company.

These are mandatory law provisions.

However, if the target is sold within insolvency proceedings, a restructuring privilege applies. Particularly in the case of an already materially insolvent target, it may therefore be advisable to wait with the acquisition until insolvency proceedings have been formally opened.

Should the transaction be carried out as a share deal, the buyer – in any case – automatically presumes the position of the seller. Any liability remains with the company.

**Consent and involvement of third parties**

10 What third-party consents are required before completion of a distressed M&A transaction? What are the potential consequences of failure to obtain these consents? In what other ways are third parties commonly involved in the transaction?

Prior to the initiation of formal insolvency proceedings, no special approval is required. In particular, change-of-control consents of financing banks or counterparties to material agreements are often required (as in the case of non-distressed transactions).

Following the initiation of formal insolvency proceedings, the sale of all or a part of a company's business or assets is subject to the consent of the insolvency administrator, the company's creditors committee, as well as the insolvency court. Failure to comply with such requirement may invalidate the underlying agreement.

**Time frame**

11 How do the time frames and timelines for the various transaction structures differ? Can these be expedited in any way?

In general, companies in crisis must be sold under extremely tight time constraints. Transaction documents are sometimes negotiated overnight, and due diligence is limited to weeks or even days, in what would otherwise have been months. However, following the initiation of formal insolvency proceedings, specific time frames set by the insolvency administrator and the insolvency court, in particular with respect to the submission of offers, must be considered.

**Tax treatment**

12 What tax liabilities and related considerations arise in relation to the various structures for distressed M&A transactions in your jurisdiction?

In general, an asset deal may trigger:

- (corporate) income tax on the capital gains realised at the level of the seller;
- value added tax on the individual assets transferred;
- 3.5% real estate transfer tax if Austrian real estate forms part of the assets transferred; and
- 0.8% stamp duty if receivables are sold or contracts are transferred.

If a business is transferred entirely, the buyer will be liable for certain taxes of the seller connected with such business, provided that the buyer was aware or should have been aware of such taxes at the time of the transfer and to the extent that the buyer has not already paid an amount of tax debts equal to the value of the transferred assets (without deducting debts taken over).

By contrast, a share deal may trigger:

- (corporate) income tax on the capital gains realised at the level of the seller; and
- 0.5% real estate transfer tax if a corporation holds Austrian real estate and if at least 95% of the shares are unified in the hand of one single shareholder or in the hands of shareholders forming a tax group.

**Auction versus single-buyer sale process**

13 What are the respective pros and cons of auction sales and single-buyer sales? What rules and common practices apply to each?

In general, disposals carried out by auction sale are more stringent and seller-friendly and allow the seller to maximise the sale proceeds. Typically, no specific provisions apply with respect to an auction process (ie, the seller determines the rules and procedure of the auction to the extent that such sale is conducted prior to an insolvency).Where the company is already subject to insolvency proceedings, the potential buyer is required to negotiate the transaction preliminary with the insolvency administrator, whereby the insolvency administrator is required to sell to the best bidder. Further, the committee of creditors and the insolvency court are involved, and disposals are subject to their approval.

## DUE DILIGENCE

**Key areas**

14 What are the most critical areas of due diligence in a distressed M&A transaction?

As most distressed M&A transactions are subject to tight deadlines, it is important to prioritise the due diligence on areas that are most critical, whereby such areas do not usually differ essentially from non-distressed M&A transactions. The scope of the due diligence is also dependent on whether the respective transaction is structured as a share deal or an asset deal.

In the case of a distressed M&A transaction following the initiation of insolvency proceedings, the assessment of the relevant business or assets is relevant.

**Searches**

15 What searches of public records should be conducted as part of a due diligence exercise in distressed M&A transactions in your jurisdiction?

As distressed companies are often threatened by impending insolvency, a search of the Austrian edict data base should be conducted as a first step of the due diligence in order to determine whether the target is subject to any insolvency proceedings.

General information regarding the target and its property can be gathered from the Austrian companies register and the Austrian land register.

**Contractual protections and risk mitigation**

16 What contractual protections and other strategies are commonly used to mitigate diligence gaps in a distressed M&A transaction?

Seller warranties and indemnities must be considered carefully in transaction documents of a distressed M&A transaction prior to the initiation of insolvency proceedings and depend to a large extent on the specific financial situation of the target and the field of operation of such target. However, the insolvency administrator does not usually agree to any guarantee, with the exception of the guarantee of ownership of the assets sold in the course of distressed M&A transactions following the initiation of formal insolvency proceedings.

In recent years, insurance covering damages resulting from breaches of warranties and indemnities has become part of transactions, including transactions in the Austrian M&A market. Such warranty and indemnity insurance may be considered to a certain extent, also with respect to distressed M&A transactions.

## VALUATION AND FINANCING

### Pricing mechanisms and adjustments

17 What pricing methods, adjustments and protections are commonly used in the valuation of distressed M&A transactions in your jurisdiction and what are the pros and cons of each? How are they used to balance the interests of the parties?

In general, in a share sale the parties agree on either a locked-box consideration structure or a closing-accounts consideration structure. In recent years, there has been an increase in the application of locked-box structures compared to previous years. The pricing mechanism of a distressed M&A transaction prior to the initiation of insolvency proceedings often corresponds to non-distressed M&A transactions. In the case of distressed M&A transactions following insolvency proceedings, no such pricing mechanism applies and the purchase price for the assets or the business of the insolvent company is usually a fixed purchase price.

### Fraudulent conveyance

18 What rules govern fraudulent conveyance of distressed assets sold undervalue in your jurisdiction? How can clawback risks be mitigated when negotiating the deal price?

In the case of a fraudulent transfer of distressed assets sold under value, the insolvency administrator or creditors may raise a voidance claim to the extent that they do not agree with the mentioned transfer.

Based on the doctrine of *laesio enormis*, a transaction can be challenged if the true value of the purchase object is less than half of the consideration paid. However, parties can explicitly exclude the applicability of *laesio enormis* in the agreement. Such exclusion is particularly relevant from a seller's perspective in the course of distressed M&A transactions, as valuations are favourable and buyers usually buy the company or the assets at a low purchase price.

### Financing

19 What forms of financing are available and commonly used in distressed M&A transactions? How can financing be secured?

Bridge financing is often used in distressed M&A transactions. The Insolvency Act is reluctant to provide for special rules or safe harbour provisions when it comes to bridge financing; however, this may change once the Restructuring Code enters into force (as the planned amendments to the Insolvency Act, accompanying the entering into force of the Restructuring Code, are intended to give privileges to new or interim financing as well as other transactions under certain conditions and to provide (limited) protection against rescission in subsequent insolvency proceedings). In general, creditors who provided bridge financing in the case of a distressed target may be at risk that such bridge financing (including any securities provided in connection therewith) would be subsequently challenged by the insolvency administrator if the turnaround is unsuccessful.

Shareholders may grant a bridge loan to a subsidiary (that is in distress) without triggering the stay of redemption as set out under the provisions of the Equity Capital Replacement Act. This holds true for cash loans with a maturity of up to 60 days, commercial credits not exceeding a six-month period or credit extensions and deferrals (if credit has been provided before the crisis). To allow corporate reorganisations, the Equity Capital Replacement Act allows the acquisition of a stake in the distressed company for the purpose of overcoming that company's financial crisis coupled with the grant of a loan in the context of feasible reorganisation.

### Pre-closing funding

20 What provisions are typically agreed to secure pre-closing funding of distressed businesses and assets?

Please see our response to question under 'Valuation and financing – Financing'.

## DOCUMENTATION

### Closing conditions

21 What closing conditions are commonly agreed in distressed M&A transactions? How do these differ from non-distressed transactions?

In distressed M&A transactions, there are usually either no or only very few closing conditions. Therefore, the closing conditions are mostly limited to any regulatory approval, required third-party consent or corporate approval.

### Representations, warranties and indemnities

22 What representations, warranties and indemnities are commonly given in distressed M&A transactions?

Please see our response to question under 'Due diligence – Contractual protections and risk mitigation'.

### Remedies for breach

23 What remedies are available and commonly sought for breaches of closing conditions, representations, warranties and indemnities in distressed M&A transactions?

Usually, the seller is entitled to remedy a breach of a warranty within a certain time frame (eg, two weeks from the buyer's request). If the seller fails, or is unable to remedy the breach, the buyer is entitled to monetary damages. Statutory legal consequences are usually excluded to the extent legally permitted. The breach of a closing condition may result in a claim against the breaching party for damages.

### Insurance

24 Is warranty and indemnity (W&I) insurance available for distressed M&A transactions in your jurisdiction? If so, what provisions and exclusions are commonly included in W&I policies?

In recent years, warranty and indemnity insurance covering damages resulting from breaches of warranties and indemnities has become a key part of transactions, whereby such insurance is less common in distressed M&A transactions and depend on the structure of the transaction. Commonly known risks or statements where the due diligence exercise has been weak are excluded from the insurance package.

## REGULATORY AND JUDICIAL APPROVALS

### Merger control

25 What merger control rules and filing requirements govern the acquisition of distressed businesses and assets in your jurisdiction? Is the 'failing firm' defence recognised in your jurisdiction?

In general, the Austrian competition rules also apply to mergers and acquisitions of companies in distress. In particular, the general jurisdictional thresholds and the standstill obligation are applicable until clearance by the Austrian competition authorities. Austrian merger control, however, also allows for taking account of the specific feature of distressed M&A with regard to the substantial assessment and procedure.

M&A deals which would create or strengthen a dominant position, and as such would risk being blocked on competition grounds, may benefit from a 'failing firm defence' under certain conditions. These conditions are strict and mirror the conditions developed under EU merger control.

On the procedural side, it is possible to shorten the normal four-week review period if both competent authorities waive their right to instigate an in-depth review. This 'early clearance' is usually granted only if the parties present compelling reasons for the urgency.

**Foreign investment review**

26 Are distressed M&A transactions subject to foreign investment review in your jurisdiction? What rules, procedures and common practices apply?

The Investment Control Act has recently been adopted in order to further tighten the regulatory framework for foreign direct investments.

Pursuant to the Investment Control Act, a mandatory filing requirement is necessary if at least one of the investors is a foreign person (ie, non-EU/EEA/Swiss individual/entity) and directly or indirectly intends to carry out an investment in an Austrian undertaking (ie, has its seat or central administration in Austria) that is active in a sector listed in an Annex to the Act. Such investment encompasses the acquisition of the following:

- shares in an Austrian company reaching or exceeding 10%, 25% or 50% (voting rights);
- control in such company; or
- material assets of an undertaking (asset deal).

The above-mentioned annex to the Investment Control Act distinguishes between particularly sensitive sectors, for which an additional materiality threshold of 10% applies, and other sectors, for which only the materiality thresholds of 25% and 50% apply, respectively.

The highly sensitive sectors subject to the 10%, 25% and 50% thresholds (exhaustively) are as follows:

- defence goods and technologies;
- the operation of critical energy infrastructure;
- the operation of critical digital infrastructure, especially 5G infrastructure;
- water;
- the operation of systems securing the data sovereignty of the Republic of Austria; and
- research and development in the fields of medicinal products, vaccines, medicinal devices and personal protective equipment.

Other sectors subject to the 25% and 50% thresholds, in which a threat to security or public order might arise, are as follows:

- critical infrastructure (ie, facilities, systems, plants, processes, networks or parts of them) in certain fields, such as energy, information technology, traffic and transport, health, finance and the chemical industry, among others;
- critical technologies and dual-use goods, such as AI, robotics, semiconductors and nano-technologies, among others;
- security of supply with critical resources, such as energy supply, supply of raw materials, food, vaccines and other medicinal products, among others;
- access to sensitive information or personal data, including the possibility to control such; and
- freedom and plurality of the media.

An approval of the responsible member of the federal government (currently the MDEA) is not required with respect to investments in an undertaking that has fewer than 10 employees and an annual turnover or balance sheet total of less than €2 million.

MDEA approval must be obtained before signing an applicable transaction. Generally, the MDEA has a one-month review period from the date of the delivery of the relevant notification that only begins following a 35-day period within which the European Commission and/or member states can comment on the transaction. A case is deemed cleared if the MDEA does not issue a decision within these periods.

**Bankruptcy court**

27 What rules and procedures govern the bankruptcy court's approval of distressed M&A transactions in your jurisdiction?

The following transactions require the approval of the creditors' committee and the insolvency court irrespective of the value of such transaction:

- the sale or lease of the debtor's business or his or her interest in a business;
- the sale or lease of the entire movable fixed and current assets or any part thereof required for the business; and
- the voluntary sale or lease of immovable property.

The insolvency administrator is required to publish the envisaged sale or lease, in particular, by including it in the official database of court publications for 14 days, whereby the debtor will have the possibility to provide his or her comments with respect to the initiated sale or lease process. The relevant approval will presuppose that at least 14 days have passed since the beginning of the publication of the envisaged sale or lease.

## DISPUTE RESOLUTION

**Common disputes and settlement**

28 What issues commonly give rise to disputes in the course of distressed M&A transactions and what practical considerations should be borne in mind when seeking to settle such disputes out of court?

A breach of a warranty or indemnity may give rise to disputes. Voidance claims may be initiated by insolvency administrators in order to increase the insolvency estate. However, the frequency of litigation is volatile, and practical considerations generally depend to a significant extent on the structure of the transaction.

**Litigation and alternative dispute resolution**

29 What litigation forums are used to resolve disputes arising from distressed M&A transactions in your jurisdiction and what procedures apply? Is alternative dispute resolution (ADR) commonly used?

In the case of insolvency proceedings which have been initiated, disputes are mostly held in front of state courts with common civil procedure rules applying. This is (partly) due to certain actions being exclusively subject to court proceedings (eg, voidance claims). Further, insolvency administrators generally insist on the jurisdiction of Austrian (state) courts and typically are unwilling to agree to arbitration or ADR. No special rules apply with respect to distressed M&A transactions prior to the initiation of insolvency proceedings.

## UPDATE AND TRENDS

**Recent developments and outlook**

30 What have been the most significant recent developments and trends affecting distressed M&A in your jurisdiction, including any notable court decisions, regulatory actions and deals? What is the general outlook for future transactions?

Due to covid-19, the duty to file in Austria for insolvency resulting from over-indebtedness is suspended until March 2021. This means that the number of distressed M&A transactions may further increase after March 2021.

Similar to many other jurisdictions, the Austrian M&A market has suffered from the covid-19 crisis both in terms of volume and the number of deals. In the months to come, we expect an uptick in distressed mergers and acquisitions. Such distressed M&A transactions may offer opportunities for buyers as well as sellers, if they are prepared and know how to act swiftly. In particular, experienced investors and crisis-proof strategic buyers with cash reserves or an intact stock price are using high-profile collapses and are eager to purchase distressed targets at favourable valuations. Further, the sale of non-core business reduces costs and simultaneously increases much-needed liquidity in times of crisis.

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