Global Legal Insights

# Mergers & Acquisitions

# 2020

## Ninth Edition

Editors:
**Lorenzo Corte & Scott C. Hopkins**

global legal group

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# GLOBAL LEGAL INSIGHTS – MERGERS & ACQUISITIONS

## 2020, NINTH EDITION


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# FROM THE PUBLISHER

Dear Reader,

Welcome to the ninth edition of *Global Legal Insights – Mergers & Acquisitions*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to mergers and acquisitions regulations around the world, and is also available at www.globallegalinsights.com.

The chapters, which in this edition cover 20 jurisdictions, provide detailed information for professionals dealing with mergers and acquisitions.

As always, this publication has been written by M&A lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Lorenzo Corte and Scott C. Hopkins of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their leadership, support and expertise in bringing this project to fruition.

Rory Smith
Group Publisher
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# Austria

Horst Ebhardt, Hartwig Kienast & Sarah Wared
Wolf Theiss

## Introduction

While Austria had a fairly robust M&A year in 2019, the global effects and disruptions brought about by COVID-19 as well as the legislative measures introduced in order to combat its further spread render any forecasts related to M&A activity in 2020 speculative. The global economy has been shaken up in an unprecedented manner, and at the time of writing this chapter (early June 2020), the economic, financial and socio-political effects of the shockwaves created by the pandemic still cannot be fully measured.

Global markets are struggling to evaluate and price-in the longer term effects of the crisis, as evidenced by 30 million new jobless claims in the US in March and April 2020 (with 40 million employees in the Eurozone being at risk of losing their jobs), a share price increase of 23% of the global stock market from a perceived bottom at the end of March 2020 (Sources: Refinitiv; and FTSE All-World index) and the S&P 500's biggest monthly rally since 1987. Governments, central banks and supranational agencies and banks are working intensely to both protect the lives of countless individuals and to create stimulus incentives which are aimed at securing the financial liquidity of companies and consumer markets. Global supply chains have been severely disrupted and many companies have been pushed to the brink of bankruptcy by closures, an extreme reduction in demand for certain goods and services, massive lay-offs and, as a consequence, eroding revenues.

Governments are currently trying to mitigate these effects with enormous financial means which appear to be largely built on the premise that COVID-19 is a short- to medium-term phenomenon and that the shortfall of revenues and personal income due to the global lockdown can, at least to a significant degree, be replaced by stimulus funds and accompanying legislation.

For example, based on an emergency law in Austria, companies that are technically insolvent can benefit from a more relaxed maximum term to file for bankruptcy (120 days instead of 60 days). Such measures are aimed at buying time in order to provide companies with breathing space until the economy rebounds to at least a limited degree, and to allow for new liquidity provided by way of government funding schemes to actually reach companies. In Austria, such emergency funding can be secured by state guarantees for new loans of up to EUR 120 million per company, with the government providing a guarantee for either 90% or 100% of the amount of the new loan. The size of such funding depends on a range of factors, including the size of the company and the adverse impacts suffered by COVID-19 in the current financial year compared to 2019. Another option includes a government grant of up to EUR 90 million per company which does not have to be repaid (again, the actual amount depends on a range of detailed criteria). It is still too early to say whether and to what extent such measures will be successful in avoiding a wave of bankruptcies in Austria stemming from COVID-19. Not all of the rules are clear, and there are almost daily changes in the more detailed regulations or conditions that allow for access to government support schemes.

The Austrian government has also launched a large job protection programme whereby companies are incentivised financially to avoid laying off staff. Under this scheme, the government effectively pays up to 90% of the net salary of an employee for three months and potentially even six months (subject to detailed rules and conditions such as the obligation not to dismiss employees who are funded by the programme). This programme is designed to avoid mass lay-offs and an unemployment rate the likes of which the US has suffered, to enable companies to easily restart operations once the spread of the crisis slows down and to maintain consumer spending in the hope that it will prevent a domino effect in the economy. The scheme is intended in particular for businesses that had to close down because of new health regulations and governmental closure orders; these include, for example, retail, restaurants and hotels. However, as practice shows, the programme is widely available now to companies in a variety of industries.

Based on a persistent decline of new virus infections, Austria is one of the first countries in the world to start gradually relaxing COVID-19 measures: all shops were allowed to reopen on 2 May; restaurants will open again in mid-May; and hotels by the end of May, subject to certain health-related conditions. The goal is to get back to a new normal as soon as possible, recognising that no government scheme would be able to fund such a massive revenue shortfall over a longer period of time.

As one of the wealthiest countries in Europe and on the back of a historically healthy state budget, Austria is, in principle, well placed to continue funding a downturn for longer than other countries. On the other hand, Austria's economy is closely intertwined with other major economies. It is also part of the global supply chain because it is largely built on specialised medium-sized companies which are global niche players. This means that Austria also depends on wider global economic recovery in order to avoid more significant financial and economic impacts over the long term.

Let us briefly look at the M&A environment in Austria in 2019 before we turn to the strong market in Q1/2020. Then, despite a significant degree of unpredictability, we will look at likely M&A trends in Austria for 2020.

## M&A trends in 2019

Austria saw 328 M&A transactions in 2019, compared to 324 transactions in 2018 based on a recent study by EY, which essentially constitutes a steady number of transactions year on year. A significant number of transactions were announced during the final weeks of the year, which was a very positive surprise after the more cautious outlook that had persisted through the end of Q3/2019. The total value of transactions increased to EUR 12.1 billion, compared with EUR 7.9 billion in 2018. The increase is largely the result of one large outbound transaction: the EUR 4.6 billion acquisition of listed German OSRAM Lighting by ams AG, the Austrian semiconductor manufacturer (SIX:AMS). It is therefore fair to say that 2019 was a stable M&A year in Austria, broadly similar to the country's M&A environment over the last four years. The funding of the transaction by ams AG by way of a rights issue was affected by the adverse stock market developments in March 2020 and the poor take-up of the newly issued shares (only 70% of the new shares were successfully sold to investors according to company filings) so that the underwriting banks ended up owning a USD 550 million stake in ams AG (the largest ever shortfall in banks placing a rights issue since 2008, based on a report by the FT).

OMV's purchase of a 15% stake in the Abu Dhabi Oil Refining Company for a consideration of EUR 2.2 billion marks the second-largest transaction involving an Austrian transaction party in 2019. The third-largest was TELUS's EUR 915 million acquisition of CCC Holding, a leading business process outsourcing provider for the EU, from Ardian, the European Private Equity fund. What was unique in 2019 is that the two largest Austrian M&A transactions were outbound acquisitions by Austrian companies.

Additionally, there were two other notable transactions in the banking sector in 2019 which technically qualify as Private Equity exits, though both were equity capital markets transactions which did not count towards the year's M&A totals. Firstly, US-based Advent International listed Addiko Bank, one of its portfolio companies, on the Vienna Stock Exchange in July 2019. The IPO raised EUR 172 million and valued Addiko, an Austrian bank active in several markets in Central and Southeastern Europe, at EUR 312 million. Secondly, in November 2019, following several prior sales of portions of its shareholding, US-based distressed assets specialist Cerberus sold a 13.5% stake in listed Austrian bank BAWAG P.S.K. for EUR 420 million via an accelerated bookbuild (BAWAG P.S.K. is a bank it had initially acquired in 2007 out of distress for a purchase price of EUR 3.2 billion).

We saw significant investor appetite for Austrian target companies by trade buyers as well as Private Equity in 2019. Private Equity has become even more active in scouting for suitable targets, and in almost every auction sale, Private Equity will make up at least 50% of the bidder group. This includes the world's leading Private Equity fund managers as well as smaller funds that target mid-sized companies. Additionally, large-cap Private Equity now partly uses different fund structures to be more flexible and to be able to pursue smaller transactions than its flagship funds. Some Private Equity funds use special situations vehicles that allow for a more opportunistic approach in the way they can pursue transactions. Private Equity portfolio company acquisitions fuelled by the desire to optimise the earnings potential and diversification of Private Equity platform companies are also on the rise. These acquisitions are conducted by the portfolio company, but Private Equity deal teams support and optimise such M&A processes by safeguarding Private Equity investment criteria and a swift deal execution.

Despite the modest decline of economic growth in Q4/2019 and a somewhat less optimistic outlook, company valuations remained high, such that the Austrian M&A market in 2019 can rightly be called a sellers' market, in line with the overall European trend in 2019. Debt funding for acquisitions remained easily accessible through banks throughout the year.

Looking back at 2019, a few transaction- and risk-related developments are worth mentioning:

Locked Box and Completion Accounts mechanisms were used widely in M&A transactions, with Private Equity sellers favouring the Locked Box approach in pricing arrangements. We likely saw Completion Accounts mechanisms used more often again compared to previous years, though it is difficult to measure objectively because deal information is mostly kept confidential.

The Austrian Data Protection Authority issued its first large fine for an alleged breach of data protection rules. The fine of EUR 18 million against Austrian Post was an unusually high amount for Austrian standards and constitutes one of the largest penalties issued so far in the European Union. The Austrian Data Protection Authority determined that Austrian Post had improperly sold the personal data of its customers. Appeal proceedings against this decision are pending. However, a large number of individuals, whose data was allegedly misused, have also brought private enforcement damage claims for non-material damage before ordinary courts by using the decision of the Austrian Data Protection Authority as a basis. These cases are currently pending before numerous courts (first instance judges have wide discretion as to how they award damages in such cases). Ultimately, the Austrian Supreme Court will decide whether and to what degree individual damage claims are permitted in the context of data breaches. In the context of M&A transactions, this means that buyers of companies, in particular companies that have a large retail customer base, must now expand their due diligence to assess a target's risk exposure under data protection regulations and to request indemnity protection outside of total claim caps for any such breaches by the target prior to closing in the acquisition documentation.

Bank loans taken out by a target company are typically subject to a change of control clause. In 2019, we noted an increasing reluctance among banks to waive such clauses and a more intense scrutiny on the financial position of the buyer, in particular Private Equity buyers and the specific fund structure used for an acquisition. This also applied in relation to prominent global Private Equity funds. Such scrutiny is based on Know Your Customer (KYC) and Ultimate Beneficial Owner (UBO) regulations that apply to financial institutions and increasingly focuses on the control rights of limited partners in the fund structure and their potential UBO status. We have observed that such processes are becoming very time-consuming and burdensome, including the level of detail required in the context of disclosures sought by banks. While KYC and UBO considerations are formally the primary focus of the compliance departments of banks, we have also occasionally seen banks consider the leverage position of the buyer group in the context of assessing change of control waivers.

In a few cases, we had to assist clients with refinancing targets locally prior to closing, or within a short termination term after closing, because the existing lenders did not grant a waiver or unduly delayed the decision-making process. Unless a buyer intends to refinance the target's debt out of its existing funding lines and by substituting local lenders in any event, we recommend fast-tracking the dialogue with Austrian financing banks early in the transaction process. This will avoid an untimely delay in the completion process and allow for arranging alternative debt funding without adversely affecting the transaction timeline. It should be noted that about 80% of the debt funding of European companies is provided by banks, so that banks have a fairly strong position in conducting such discussions.

The public M&A market in Austria was very quiet in 2019: even though stakes in listed companies were acquired below control thresholds on a number of occasions, no company listed on an Austrian stock exchange was subject to a public takeover in 2019 (the acquisition of a controlling stake) by way of a mandatory or voluntary bid.

## M&A trends in HY1/2020

There were several notable M&A transactions involving Austrian companies that were announced in the first six months of 2020, continuing the positive transactions trend of 2019.

Interestingly, and in sharp contrast with the disruptions brought about by COVID-19 starting in March, the first quarter of 2020 alone saw more large (and larger) transactions involving Austrian parties than in all of 2019. In addition, some other large transactions are either ongoing or likely to take place in 2020.

At the end of May, Merck acquired all shares in Themis Bioscience GmbH, an Austrian pharma company, for an undisclosed cash consideration. Themis Bioscience is said to have a pipeline of vaccine candidates and immune-modulatory therapies, which have been developed using its measles virus vector platform. In March 2020, the Austrian vaccine-maker joined a consortium alongside France-based Institut Pasteur and The Center for

Vaccine Research at the University of Pittsburgh for developing a vaccine candidate, which will target the SARS-CoV-2 virus for the prevention of COVID-19.

Royal DSM, a global science-based company in nutrition, health and sustainable living, announced on 12 June 2020 that it has reached an agreement to acquire ERBER Group, a world-leading animal nutrition and health specialty business headquartered in Austria, for an enterprise value of EUR 980 million. ERBER Group's specialty animal nutrition and health businesses, Biomin and Romer Labs, specialise primarily in mycotoxin risk management, gut health performance management, and food and feed safety diagnostic solutions, expanding DSM's range of higher value-added specialty solutions. Romer Labs also complements DSM's human nutrition and health offering to food industry customers. The acquired businesses have combined sales of EUR 330 million and an adjusted EBITDA margin above 20% for the 12 months to the end of March 2020, with a high single-digit organic sales growth rate over the past five years. The value of the transaction represents an EV/EBITDA multiple of about 14× the 2020 EBITDA (fiscal year ending September 2020).

Wiener Stadtwerke, the utilities arm of the City of Vienna, acquired a 28.35% stake in listed EVN GROUP, a regional energy company, for a rumoured consideration of EUR 870 million (details of the transaction have so far not been disclosed), from the German energy group EnBW. The closing of this public-to-public transaction is subject to regulatory clearances. The stake acquired is slightly below the 30% threshold that would require Wiener Stadtwerke to launch a mandatory takeover bid for all shares in EVN. There is still some speculation regarding whether a mandatory offer may become necessary based on possible contractual arrangements between the parties to the transaction that could qualify as "acting in concert" from a takeover law perspective and other existing corporate affiliations among such parties.

In early February 2020, Austria's listed insurance group UNIQA, an insurance provider with a staff of 20,000 people that is active in 15 countries in Central and Southeastern Europe, acquired AXA's insurance subsidiaries in Poland, the Czech Republic and the Slovak Republic for a total consideration of *ca.* EUR 1 billion. This is part of UNIQA's long-term strategy to achieve a strong market position in the key high-growth insurance markets in Central Europe. As a result of the transaction (which is still subject to regulatory clearances and is debt-financed), UNIQA will rank fifth in Poland and the Czech Republic and fourth in the Slovak Republic in terms of insurance premium income. The transaction was conducted as an auction sale by AXA and had attracted the interest of a number of large insurance companies from around Europe.

In early March 2020, OMV, the listed Austrian incumbent, active in oil and gas, innovative energy and high-end petrochemical solutions with sales of EUR 23 billion, purchased an additional stake of 39% in the Austrian company Borealis AG. Borealis is one of Europe's leading petrochemical companies with global sales of EUR 9.8 billion and a net profit of EUR 872 million. The seller is Mubadala Investment Company, the sovereign investor controlled by the government of Abu Dhabi, and the purchase price amounts to USD 4.86 billion. By way of the transaction, OMV is increasing its total stake in Borealis to 75%. The closing of the transaction is expected by the end of 2020 and is subject to regulatory approvals. OMV describes this acquisition as a transformative transaction aimed at repositioning the company on ESG principles and for a low carbon future. The transaction makes OMV a leading provider of polyolefins and base chemicals. The joint production capacities make OMV the number one producer of ethylene and propylene in Europe and one of the top 10 polymer producers worldwide and marks a strategic extension of OMV's value chain into high-value chemicals. According to OMV, the financing of the transaction (which includes debt financing) is supported by a divestment programme, synergies and active cash flow management. With the transaction, OMV announced a divestment programme of EUR 2 billion until the end of 2021. The recent dramatic plunge in oil prices in combination with the adverse effects of COVID-19 has put significant strain on the transaction, and OMV had to significantly increase the large-scale cost efficiency programme only recently.

As part of its divestment programme, OMV intends to sell its 51% stake in Austrian GCA GmbH, which operates a high-pressure gas grid of *ca.* 900 km across Austria. Verbund AG, the listed Austrian energy company which is controlled by the Republic of Austria, is currently in exclusive negotiations to acquire that stake from OMV. A due diligence process is currently ongoing. GCA is 49% co-owned by a company jointly owned by Allianz Capital Partners, the investment arm of the Allianz insurance group, and Italy's SNAM S.p.A., one of the largest gas grid operators in Europe, which had acquired its stake from OMV only in 2016 for a purchase price of EUR 601 million. Market observers believe that the 51% sale transaction might involve a consideration in the range of EUR 600–800 million.

In February 2020, a company indirectly jointly owned by investors Ronny Pecik, a prominent corporate raider, and Peter Korbacka acquired 10.7% of the shares in listed Immofinanz AG, for a consideration of EUR 29.50 per share (stock market value of the stake: EUR 286 million). While it was a sizeable transaction on its own footing, the transaction is widely seen as a prelude to a future merger of Immofinanz AG and S IMMO AG, another Austrian listed real estate investment company. Together with other investors, Ronny Pecik is also a 14.1% shareholder in S IMMO. S IMMO and Immofinanz AG also own shares in each other and Ronny Pecik's shareholder group, together with S IMMO, now jointly own *ca.* 29% of Immofinanz AG. Both companies together own commercial real estate with a value of *ca.* EUR 7 billion. The merger rumours have intensified because Ronny Pecik was appointed CEO of Immofinanz AG on 23 April 2020, and important minority investors support a tie-up on the basis of expected synergies of EUR 19–28 million, which is said to have a positive combined valuation impact of EUR 300–500 million. Due to COVID-19, concrete merger talks appear to have been suspended but are expected to resume later in 2020.

As one can see, all the mentioned M&A transactions that are taking place, or are likely to take place in 2020, have a specific strategic or even transformative component, and the businesses concerned are either largely unaffected by the current crisis, or the long-term impact or valuation potential of the transaction is seen as an overriding feature.

In terms of the valuations used in Q1/2020, according to *Mergermarket* the YTD Median EBITDA multiples in Private Equity buy-outs in Europe have shown a decline to 10.7× from 12× recorded in 2019.

We expect such multiples to fall further in the course of 2020, though there will be positive exceptions in the form of companies that will be able to demonstrate resilience in the current difficult environment. Sellers will be slow to recognise the falling valuations and to engage in transactions on the back of the decline, which is a trend we also observed in the 2008 financial crisis. This will obviously not apply to distressed transactions, which we expect to see more of in 2020 than in the last financial crisis due to the widespread impact of COVID-19 measures and the large-scale increase in indebtedness of companies.

## 2020 M&A trends – the impact of COVID-19

With a decline of 72% in the value of announced transactions compared to March 2020 according to Refinitiv, April 2020 had the lowest monthly value of M&A transactions globally since September 2002.

In Q1/2020, the total value of transactions announced globally was down 39% compared to Q1/2019.

In the last week of April, no single transaction with a value exceeding USD 1 billion took place globally for the first time since 2003, according to the FT.

Looking at the volume of transactions involving European targets in April 2020 (EUR 5.6 billion), the decline was 91% compared to March 2020, and the lowest monthly value since August 1992. Interestingly, on the back of several large transactions in the period of January to April 2020, the volume of transactions with a European target in that period is still 28% higher than in the same period in 2019.

Against this background of the trends in the first four months of the year, the outlook for M&A activity and some of the expected key themes for M&A transactions in Austria in 2020 can be summarised as follows:

- As a firm we saw a busy first quarter in terms of transaction activity. M&A transactions that had been ongoing for some time (for example, with the due diligence completed) were in many cases continued in April and are on track to be completed. This is because the target businesses of these transactions were not significantly exposed to the crisis-driven downturn (technology, infrastructure, healthcare/pharmaceuticals, food).
- In other cases, and in particular in early phase transactions, deals were put on hold with the notion to revisit their possible continuation in July or September 2020. Sale processes that were scheduled to be launched in April or May 2020 were pushed back to September 2020 by the sellers' corporate finance advisors due to the limited potential to launch a truly competitive process in the current environment.
- We also saw several new M&A transactions starting in April, also including sizeable transactions.
- In addition, many target companies are in the process of assessing the actual implications of the crisis on their customers and suppliers, effects that may in many cases not become visible until Q3/2020. Many companies are busy securing financial support through government-sponsored schemes (please see above), and whether and to what extent such funding will actually be made available will only become known in Q2/2020 or, as regards the availability of non-repayable grants, in Q2/2021.
- In Austria, M&A transactions rarely contain a Material Adverse Change (MAC) clause. In most M&A transactions, achieving transaction certainty has historically been the main objective of a seller in our market. While we had occasionally tried to introduce a MAC clause to protect a buyer, proposing that concept in a sellers' market carried the risk that a bidder would not be allowed to continue in the process. Consequently, this legal concept has been of limited relevance for transaction parties seeking to get out of a signed transaction prior to closing on the basis of the harsh immediate effects and resulting negative outlook caused by COVID-19-related measures. It is likely that such clauses will become more popular in the current environment, also as a result of sellers' weaker comparative position than in the recent past.
- The biggest underlying theme for companies right now is to determine the likely long-term impact of COVID-19 on a company and the additional debt-funding required to overcome the – hopefully temporary – loss of income. The immediate need for many companies is to simply buy time and to secure short-term liquidity even when it is uncertain if the additional debt can actually be repaid (including new debt that benefits from government guarantees up to 90% or 100% of its nominal amount). Companies that have applied for government-guaranteed debt funding can, in addition, also apply for non-repayable grants. If such grants do in fact become available, the excess debt can (and, based on applicable regulations, must) at least partly be repaid.

- The Austrian government is considering measures that exempt companies "located in tax havens" from receiving government support (loan guarantees and grants as described above). There is no draft law available as yet, but it is possible that new legislation will be introduced, whereby companies that are owned through corporate holding structures, in particular holding structures used by Private Equity, involving so-called "tax havens", may not be able to benefit from financial support measures. The development of legislation in that context should be carefully monitored.
- The Austrian share index (ATX) lost 30% of its value in the period of 1 January to 30 April 2020. This makes the acquisition of stakes (and controlling stakes) in Austrian listed companies potentially attractive. The Austrian government is very concerned about foreign buyers exploiting the weak share price level and is about to promulgate a new Investment Control Act which will provide it with the right to veto the acquisition of stakes of at least 25% (or even 10%) in companies considered to be "strategic". Please see the below summary of the expected key features of the new law.
- The focus of due diligence has been expanded to allow for a more substantial assessment of a target company's exposure to the effects of COVID-19. The financial and liquidity position of a company, and thus the cash cushion available to fund a company's operations through the current crisis, are key items to analyse in detail. Apart from existing cash reserves and the continuing availability of financing lines (also based on the covenants' regime), this includes the access of a company to government-funded wages and other financial support schemes as well as the resulting effect on a company's long-term debt position.
- Due diligence must also look closely into the supplier arrangements in place and how COVID-19 has affected the operations and financial position of a company's key suppliers, including whether alternative suppliers are available to the company at comparable costs and on a short-term basis (in a worst-case scenario). Generally, supply chain security and flexibility will become a significantly more important feature in assessing a company's operational sustainability.
- Also, the reliance on customer relationships must be scrutinised from a legal and financial perspective in order to assess whether a target company can rely on continuing sales or whether an adverse impact on sales and resulting revenues can be expected. This includes an assessment of the operational and financial exposure of key customers due to the implications of COVID-19 and recent changes in payment terms offered to such customers by the target company.
- Target companies that have retail operations (for example, in shopping malls) may have entered into special contractual arrangements concerning the payment, deferral or partial waiver of rent payments, which may have a significant impact on the current and future cost base of a company. In many cases, companies, while closed down due to governmental orders, did not pay rent. Therefore, there is a risk of litigation around the actual amounts owed combined with the risk of being evicted due to non-payment.
- Ordinary course of business covenants will have to address the specific new effects of the current environment both from the perspective of a buyer and a seller.
- Warranty and indemnity (W&I) insurance cover arrangements will address the current situation with insurance providers seeking to limit their exposure in relation to adverse implications brought about by COVID-19.
- We expect an increase of closing accounts mechanisms as well as of purchase price earn-out components in order to overcome valuation gaps among buyers and sellers.

- We expect that small and medium-sized transactions will continue to take place, although on a reduced level. We also see a potential for transformative large transactions but, depending on the buyer and the sector, such transactions may come under scrutiny by the Austrian government under the new Investment Control Act (please see below). Companies active in TMT, technology, infrastructure, energy, healthcare and pharmaceuticals will continue to be much sought-after target companies throughout the downturn, with valuations remaining fairly robust. Chinese buyers and Private Equity buyers will be particularly active in the pursuit of transactions that offer attractively low valuations.
- We expect a significant increase of distressed transactions as well as transactions involving the sale of non-core assets in order for companies to reduce excess debt.

## Foreign Direct Investment Control – the new Investment Control Act

Already for some time, the EU and several of its Member States have been concerned that companies in Europe that are considered to be of strategic relevance could be bought up by non-European investors with no regard for public interest considerations. This concern has been based on a) certain buyers not being obliged to meet arm's-length standards in the way they price deals and thereby outbidding traditional investors, b) the lack of reciprocity in relation to freedom of capital rules in the buyer's home jurisdiction, and c) "strategic assets" coming under foreign control. Chinese buyers, certain sovereign wealth funds and companies under significant foreign state influence have been singled out as potentially problematic investors on that basis. While the EU has created a soft framework regime for its Member States to apply in evaluating whether to disallow certain transactions, Member States are, in principle (and within EU law boundaries), free to enact national legislation that – similar to CFIUS in the US – requires governmental approval for certain transactions involving strategic national targets.

This approach has received increasing attention and a new focus due to the effects of COVID-19. There is now significant additional concern that European companies can be bought up at discounted valuations. As a result, the government of Austria is about to propose to Parliament a new "Investment Control Act" which is to expand the Austrian government's right to block transactions involving the acquisition of shares in Austrian companies active in critical sectors by non-European buyers. The acquisition of a stake of at least 25% of the shares or corresponding corporate control rights in companies active in certain industry sectors will generally fall under the new approval regime. These sectors are (in our view, too) broadly defined and include critical infrastructure within the meaning of the law, i.e. "systems, networks or parts thereof that have a strategic relevance for the maintenance of important functions of society, which, if interrupted or eliminated, would create material adverse consequences for the health, security and the economic and social wellbeing of the population or the effective functioning of state agencies". In addition, the draft law mentions the following specific sectors by way of example: energy; information technology; transport; health; food; telecommunications; data processing or data storage; defence; constitutional (sovereign) functions; finance; R&D; social welfare and distribution; the chemical industry; artificial intelligence; robotics; semiconductors; cyber security; defence technology; quantum or nuclear technology; nanotechnology; biotechnology; supply of energy; supply of raw materials; supply of food; supply of pharmaceutical products, vaccines or protective equipment; access to sensitive information (including personal data); and freedom and plurality of media. This is obviously a very wide catalogue which, if enacted in its current scope, will subject many transactions to the new approval regime.

For certain industries, an even lower qualifying threshold of at least 10% of the share capital or corresponding corporate control rights applies and triggers the approval requirement: military defence products or technologies; the operation of critical energy infrastructure; the operation of critical digital infrastructure, in particular 5G infrastructure; water; the operation of systems that ensure the data sovereignty of Austria; and *R&D in the fields of pharmaceutical products, vaccines, medical products and personal security equipment* (the same approval requirement again applies once the stake is increased to 25% and 50%). In relation to the items set in *italics*, the 10% threshold will cease to apply as from 1 January 2023.

According to the draft law, only companies that have more than 10 employees and annual revenues exceeding EUR 2 million fall under the approval requirement.

The approval must be applied shortly after the signing of a transaction, and the regulator (the Ministry of Economy) has one month to issue a decision in principle on whether a transaction requires an approval. If that decision confirms the approval requirement, the regulator must issue its final decision on whether the approval is granted within an additional two-month term. If no decision is rendered within two months, the approval is deemed to have been granted. It is also possible to apply for a non-objection letter prior to the implementation of the transaction, thereby clearing the transaction from the approval requirement. This technique will be helpful in situations where it is not clear whether an approval is in fact required (given the broad definitions used).

We expect that the new law (if enacted in the wording of its current draft, which is widely expected) will delay transactions due to increased regulatory scrutiny in relation to M&A transactions in a fairly broad range of industries and will make acquisitions by non-EEA shareholders more difficult. The new law will most likely come into effect in July 2020.

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Horst Ebhardt heads the firm-wide Corporate/M&A team. He specialises in complex cross-border transactions in the fields of M&A, privatisation and restructuring in Austria and throughout the CEE/SEE region. He has also been advising companies from a broad range of industries – with a particular focus on financial institutions, life sciences and private equity – on corporate finance and governance matters. Having worked on approximately 80 transactions as lead attorney over the last 10 years (including several transactions involving a value of more than EUR 1 billion), Horst offers a wide range of experience concerning legal and tax aspects in connection with complex cross-border transactions, combined with a thorough understanding of clients' needs from a business perspective. He has been in private practice for 25 years focusing on corporate law and M&A. Horst holds degrees from the University of Graz Law School (*Dr. iur.*) and the London School of Economics and Political Science (LL.M.). Horst is admitted to the Bar in Austria and teaches an M&A programme at the law school of the University of Vienna.

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