

THE TECHNOLOGY
M&A REVIEW

SECOND EDITION

Editor
Michael J Kennedy

THE LAWREVIEWS

THE TECHNOLOGY
M&A REVIEW

SECOND EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in October 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Michael J Kennedy

THE LAWREVIEWS

PUBLISHER

Clare Bolton

HEAD OF BUSINESS DEVELOPMENT

Nick Barette

TEAM LEADERS

Joel Woods, Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS

Rebecca Mogridge, Katie Hodgetts, Joey Kwok

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Leke Williams

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Louise Robb

SUBEDITOR

Katrina McKenzie

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2021 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at September 2021, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-833-8

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BIRD & BIRD

ÇİFTÇİ ATTORNEY PARTNERSHIP

CLEARY GOTTlieb STEEN & HAMILTON LLC

CMS

GOODMANS LLP

HOGAN LOVELLS

PAUL HASTINGS LLP

SALABERREN & LÓPEZ SANSÓN

TRILEGAL

VEIRANO AVOGADOS

CONTENTS

PREFACE.....	v
<i>Michael J Kennedy</i>	
Chapter 1 ARGENTINA.....	1
<i>Juan Manuel Campos Alvarez</i>	
Chapter 2 AUSTRIA.....	11
<i>Peter Huber and Irene Ng (Huang Ying)</i>	
Chapter 3 BRAZIL.....	24
<i>Augusto Cesar Barbosa de Souza, Fábio Pereira and Diego Rodrigues</i>	
Chapter 4 CANADA.....	42
<i>Richard Corley, Allan Goodman, Michelle Vigod and Jessica Bishop</i>	
Chapter 5 CZECH REPUBLIC.....	57
<i>Vojtěch Chloupek, Lubomír Brečka, Radomír Pivoda and Jiří Švejda</i>	
Chapter 6 FINLAND.....	72
<i>Maria Carlsson and Johanna Rein</i>	
Chapter 7 FRANCE.....	81
<i>Olivier Deren, Sébastien Crepy and Camille Paulbac</i>	
Chapter 8 INDIA.....	94
<i>Harsh Pais, Arnav Dayal, Anindita Basu and Kastubh Madhavan</i>	
Chapter 9 MEXICO.....	107
<i>Juan Francisco Torres Landa Ruffo, Pablo Corcuera Bain, Valentina Schmid, Ana Rumualdo, Francisco Palmero Rivera Cambas and Regina Torrero Ordaz</i>	
Chapter 10 POLAND.....	119
<i>Błażej Zagórski and Grzegorz Pączek</i>	

Contents

Chapter 11	RUSSIA	131
	<i>Yulia Solomakhina, Andrey Lipin, Nikita Klepalov and Dmitriy Sokolov</i>	
Chapter 12	SWEDEN.....	148
	<i>Ahmed Al-Rahma, Victor Stålblad, Lucas Magnusson and Karin Tukiainen</i>	
Chapter 13	TURKEY.....	158
	<i>İtir Çiftiçi, Umut Özdoğan and Aslı Kural</i>	
Chapter 14	UNITED KINGDOM	170
	<i>Anu Balasubramanian, Jamie Holdoway, Sarah Pearce and Ashley Webber</i>	
Chapter 15	UNITED STATES	185
	<i>Michael J Kennedy</i>	
Appendix 1	ABOUT THE AUTHORS.....	243
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	259

PREFACE

Welcome to the second annual *Technology M&A Review*. This addition to The Law Reviews series grew out of discussions between the publisher and editor in late 2019 and early 2020. Like every contributor to this book, I am an active M&A practitioner. As such, it seemed fair to agree to an annual review in late 2019, well before covid took the reins.

I know I do not need to explain why 2020 was a different year than most. The first quarter of 2020 M&A activity was comparatively awful. Then the second quarter was consumed by trying to understand what covid meant, not only for the M&A legal market, but for each contributor to this book, and her or his family.

And yet, the publisher and each member of its staff continued to support the project, and gently nudged it forward. It and they each deserve credit in large part for whatever is well done in this book and its latest edition.

And so we have an annual update review that keeps 30 June 2020 as its base, and that both distorts and understates the power and vibrancy of the technology industry over this unusual period. The book's contents show technology M&A's growth and march to ascendancy over the past 30 years. Even compared to the awful decline registered by all M&A activity measured at 30 June 2020, technology M&A far outpaced every other category of M&A, and it showed its resiliency and power even more so in the first half of 2021. Technology M&A, in terms of growth in value and numbers, continues the champion's jog around the track; the race is not even close.

Why? Growth and resiliency. While the technology M&A sector shares its DNA with other sectors, it is a growth sector even though it is ubiquitous, and in its nature is designed to be changeable. We all intuitively know one cannot change the design of a gas turbine on the fly, but one can change a lot in the technology space very quickly.

Embedded in the previous paragraph is a rate of change equation of sorts. For most technology applications that do not involve life or death functions, there is no competitive limit on the rate of change. There was, in effect, no social media industry in 2000, and now it is quite difficult to actually describe it – and yet it is huge. There have been unbelievable advances in, inter alia, food production and power plants since that same date, but no one thinks of these as growth industries. These industries' advances are thought of, consciously or unconsciously, as recipients of technology but not creators.

This book's goal is to both highlight the similarities and differences between technology M&A and 'normal' M&A, without taking too much time to try to define what technology and normal are. One of its unstated premises is that because of technology's importance, effective M&A technology lawyering necessarily involves and requires a broad set of legal skills across many practice areas; and that requirement will likely increase as governments

and interest groups from all spectrums focus on the sector. The sector is critical because it is 'where the money is', where the anticipated growth is and where, at least in the Western world, the political battles are and will be waged.

At least as of the time of this writing in September 2021, technology M&A in the US is robust, reflecting its advantage in a digital world. Despite any changes in regulation or monetary policy, compared to other sectors its prospects are, and will continue to be, relatively better.

Michael J Kennedy

Paul Hastings LLP

San Francisco

September 2021

AUSTRIA

*Peter Huber and Irene Ng (Huang Ying)*¹

I OVERVIEW

Similar to 2020, the Austrian technology M&A landscape has continued to be active notwithstanding the ongoing pandemic in Austria. Austria, which is home to numerous high-tech companies that produce both cutting-edge hardware and software solutions, has an information, communication and technology (ICT) sector that generates about 8.6 per cent of total value creation.²

In 2020, 61 M&A transactions took place in the technology, media and telecom sector. This was the second largest amount of deals after the industry sector with 85 deals. The total deal value in the telecommunications, media and technology sector amounted to €1.8 billion compared to €700 million in 2019. This significant increase is mainly because of the acquisition of CK Hutchison Networks (Austria) GmbH, a provider of telecommunication services, for €1.1 billion by Cellnex Telecom, SA from Spain.³ Startups that provide software as a service remain of great interest to investors, such as the recent Series-A financing of Bikemap, a Vienna-based startup.⁴ Intra-European Union (EU) M&A is likewise active, as can be seen by the acquisition of software company dataformers GmbH by German Bechtle AG⁵ and the sale of high-tech paper impregnation company Deurowood Holding GmbH to German Freudenberg Chemical Specialities Munich GmbH.⁶

The technology M&A market continues to be impacted by the Austrian Investment Control Act (ICA), which came into force in July 2020. Briefly, foreign investors that wish to invest in Austrian businesses operating in highly sensitive sectors or other sectors that may

1 Peter Huber is a partner and Irene Ng (Huang Ying) is a senior attorney at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.

2 Austrian Business Agency, ICT Sector in Austria, <https://investinaustria.at/en/sectors/information-technology/>, accessed 19 August 2021.

3 EY Österreich M&A-Index 2020, 7-8.

4 CMS, CMS Wien berät VC Fund PONOOC bei siebenstelliger Investition in Bikemap, <https://cms.law.de/aut/news-information/cms-wien-beraet-vc-fund-ponooc-bei-siebenstelliger-investition-in-bikemap>, accessed 19 August 2021.

5 CMS, CMS advises IT group Bechtle on acquisition of software developer Dataformers, <https://cms.law/en/deu/news-information/cms-advises-it-group-bechtle-on-acquisition-of-software-developer-dataformers>, accessed 19 August 2021.

6 Deurowood, Freudenberg Chemical Specialities acquires Deurowood, <https://deurowood.com/news/freudenberg-chemical-specialities-acquires-deurowood/>, accessed 19 August 2021.

affect security or public order are required to obtain approval from the government.⁷ As most ICT companies theoretically fall into the ambit of the ICA, it remains an important issue for foreign investors. This will be further elaborated upon in Section IV.vi.

II YEAR IN REVIEW

Although 2020 has been a challenging year because of the repercussions of covid-19, it was an active year for the technology M&A market in Austria, with both regional and international buyers involved. Foreign buyers have shown interest in the market and acquired Austrian companies. In addition to the acquisition of CK Hutchison Networks (Austria) GmbH, which was by far the largest (see above), various somewhat smaller transactions took place: for example, the German TeamViewer AG acquired Chatvisor GmbH (doing business as Xaleon) from eQventure and other shareholders for an undisclosed lower double-digit million amount.

Atms Telefon- und Marketing Services GmbH (an Austrian provider of telecommunications-based customer dialogue solutions) and Sms.at mobile internet services GmbH (an Austrian company operating as an internet community that offers mobile entertainment services) were acquired by Link Mobility Group Holding ASA. High-tech hardware manufacturers were also attractive targets: for example, Gantner Electronics GmbH was sold to Salto Systems, a Spanish-based electronic locking company backed by Alantra Private Equity. Gantner is a specialist in electronic access, ticketing and billing systems as well as smart locks for lockers.

Subsequently, 2021 became the year of the unicorns in Austria. In March 2021, Valar Ventures and DST Global invested €143 million in the Vienna-based Bitpanda GmbH, which operates a platform for trading cryptocurrencies. This investment increased the valuation of the company to around €1 billion, and Bitpanda became Austria's first 'unicorn'. Just three months later, the Vienna-based Ed-Tech GoStudent GmbH, which provides one-to-one video-based online tutoring, achieved unicorn status too, following a successful funding round of €205 million. The investment involved, among others, DST Global, SoftBank, Tencent and Dragoneer. With a valuation of €1.4 billion, GoStudent became the highest valued K12 Ed-Tech company in Europe to date. Considering the uncertainty surrounding the government's decisions made to control the covid-19 situation in 2021, investment in ICT companies is expected to remain of strong interest and in demand for 2021.

III LEGAL AND REGULATORY FRAMEWORK

With a civil law tradition, Austria's legal and regulatory framework is predominantly premised on established codes, such as the Austrian Civil Code (ABGB) and the Austrian Commercial Code (UGB). As a Member State of the European Union, Austria is required to adhere to EU regulations and directives. EU laws are transposed into Austrian national law either through the promulgation of a new act or amendments of existing Austrian laws.

⁷ Dieter Zandler and Vanessa Horacek, 'The new Austrian Investment Control Act - increased supervision of foreign direct investments in Austria' (CMS Law Now, 27 July 2020) https://www.cms-lawnow.com/%20ealerts/2020/07/the-new-austrian-investment-control-act?sc_lang=en%20accessed, accessed 19 August 2021.

M&A transactions in Austria have always been subject to a few key regulatory frameworks that were later amended to take into account subsequent EU regulations or directives. For instance, certain acquisitions may require the approval of the Austrian Federal Competition Authority. In principle, a notification obligation is triggered when there is an acquisition of shares constituting at least 25 per cent of the capital of a target if the target and the buyer exceed certain defined turnover thresholds. If a merger has significance within the EU – for example, it has community-wide significance – additional merger control rules could apply.

The EU also regulates securities law, with key legislative provisions being the Prospectus Regulation,⁸ the Market Abuse Regulation (MAR)⁹ and the Markets in Financial Instruments Regulation.¹⁰ Provisions in the MAR were transposed into the Austrian Stock Exchange Act. Key provisions include a prohibition on market manipulation¹¹ and a prohibition on insider dealing.¹² Compliance with such laws is critical, as criminal penalties may be imposed in cases of severe market abuse.¹³

If a buyer is acquiring a direct or indirect controlling interest in an exchange-listed joint-stock company (AG), whereby a controlling interest is generally deemed to be present if a stake of more than 30 per cent of the voting capital of the AG is acquired, additional steps need to be taken. This includes notifying the Austrian Takeover Commission pursuant to the Austrian Takeover Act (ÜbG) and a public offer has to be made to all shareholders. While the ÜbG predates the Takeover Directive,¹⁴ the ÜbG was materially amended in 2006 to conform with the Takeover Directive.¹⁵

IV KEY TRANSACTIONAL ISSUES

i Company structures

The most common company structure in Austria by far is the limited liability company (GmbH). Another common company structure is the AG. A key difference between the GmbH and the AG is the mandatory requirement to appoint a supervisory board, which is required for an AG but not a GmbH. Nonetheless, a GmbH must change its structure to become an AG if it has more than 250 employees. Most small to mid-cap acquisitions involve acquisitions of GmbHs while larger transactions, particularly if the target is listed on the Austrian stock exchange, involve acquisitions of AGs.

In some cases, a private foundation is involved. A private foundation itself is, however, generally not a suitable target, as control of a private foundation can be changed easily (e.g., based on an agreement among the founders or beneficiaries). However, a private foundation can be used as a family vehicle for holding shares of a target. Such company structures are

8 Prospectus Regulation 2017/1129.

9 Market Abuse Regulation No. 596/2014.

10 Markets in Financial Instruments Regulation No. 600/2014.

11 Stock Exchange Act, Section 154(1)(3); Section 164.

12 id., Section 154(1)-(2).

13 id., Section 164.

14 Takeover Directive 2004/25/EC.

15 Amendment of the Takeover Law Act 2006 – ÜbRÄG 2006.

not infrequently encountered in Austria; adequate due diligence should be undertaken and relevant conditions precedent should be drafted in a share purchase agreement (SPA) if such structures are used.

ii Deal structures

The typical deal structures in Austria are the share deal (GmbH or AG) and the asset deal. The choice of structure is largely driven by:

- a* tax considerations;
- b* relative benefits of universal versus singular succession;
- c* regulatory considerations; and
- d* a desire to ringfence against certain legal risks of the target.

Tax considerations are important when choosing a deal structure. In a share deal, generally no stamp duty is triggered, a deduction of interest resulting from the acquisition is possible, and a sale of shares is exempted from taxation under the Austrian VAT laws; however, there is generally no goodwill capitalisation and depreciation or step-up of asset book values. In the case of an asset deal, goodwill capitalisation and depreciation is permitted over 15 years, a sale of assets is generally subject to Austrian VAT (although subject to relevant tax exemptions depending on the assets), and stamp duties may be payable for the assignment of receivables or the amendment or extension of lease agreements. Specific provisions under Austrian law include a real estate transfer tax, which may be triggered in a share deal involving partnerships or corporations when 95 per cent of the shares are transferred or unified by a single shareholder.

One key distinction in Austrian law is the liability regime for asset deals, whereby extensive statutory liabilities apply, such as the mandatory liability under ABGB Section 1409 and UGB Sections 38–39. In principle, anyone who takes over a business or company by means of an asset deal is also mandatorily liable for the company-related liabilities that he or she knew or must have known at the time of transfer. However, the liability of a transferee is limited to the amount of the assets taken over. Regardless of a share or asset deal, foreign ownership rules may apply if a foreign buyer intends to buy real properties owned by an Austrian target (see Section IV.vi, ‘Foreign ownership limitations’).

iii Acquisition agreement terms

Austrian acquisition agreement terms are generally consistent with M&A deals in the DACH region,¹⁶ although it has certain defining characteristics:

- a* Requirement of a notarial form of SPAs for GmbHs or AGs: English may be used as the language for an SPA, but this limits the choice to notaries who are also qualified as sworn translators. This, among other factors, may also dictate a split between a notarial transfer deed and a (non-notarial) SPA.
- b* Representations and warranties: Austrian law and M&A practice distinguishes between representations and warranties pursuant to Section 880(a) ABGB. The latter is generally preferred by buyers because, as a matter of statutory law, it affords the buyer full indemnification in the event of breach, irrespective of any fault on the seller’s part. Such indemnification is, however, regularly restricted in M&A agreements, for

16 Comprising Austria, Germany and Switzerland.

example by the exclusion of consequential or indirect damage. Warranty and indemnity insurance is currently on the rise in Austria, even for smaller to medium-sized deals, and usually comes in the form of buyers' policies.

- c Material adverse change (MAC) clauses: MAC clauses were often comprehensively detailed in Austrian SPAs even prior to covid-19. Parties have the discretion to define what constitutes a MAC and Austrian law provides flexibility in such definitions (Brexit, terrorism, US–China trade tariffs, etc.). MAC clauses in relation to pandemics or massive governmental sanctioned lockdowns will most certainly be negotiated in future SPAs.
- d Litigation potential of purchase price adjustments and earn-out clauses: similar to other jurisdictions, purchase price adjustments and earn-out clauses, while frequently used, are also the most litigated SPA clauses in Austria.
- e Escrow arrangements: frequently, escrow arrangements are put in place to secure payment of the purchase price at closing, earn-out payments or payments under representations and warranties. Austrian notaries will often act as escrow agents for smaller to medium-sized deals. If a transaction involves a transfer of software source code, a software escrow account may be used (see Section V).
- f Contracting out of specific international law: Austrian SPAs generally contract out of the application of the United Nations Convention on Contracts for the International Sale of Goods.

iv Financing

Austrian law does not provide for specific thin capitalisation rules. Nonetheless, shareholder loans are treated as quasi-equity if they fulfil the established criteria pursuant to case law and such interest payments are treated as disguised dividends, resulting in a situation whereby these loans are not tax-deductible.

Austrian regulations and court practices regarding the prohibition of repayment of capital to shareholders of limited liability companies other than by way of profit distributions (or distributions of proceeds arising from liquidation) are among the strictest in Europe. This limits the availability of certain post-closing structuring options, including leveraged SPVs, such as upstream or downstream mergers.

v Tax and accounting

Corporate tax (for GmbHs, AGs and *Societas Europaea*, SEs) is applied at a flat rate of 25 per cent. Austria has a tax on capital gains from transactions, resulting in sellers of shares trying to optimise their tax situations by maximising dividend payouts prior to a transaction, if possible. Liquidation profits are subject to a tax rate of 25 per cent. If a buyer is located outside the EU and if profits are distributed to the buyer as a shareholder, the general rule of a 25 per cent capital gains tax will apply, unless a double taxation treaty (DTA) is in place. Austrian corporations are generally subject to a withholding tax of 25 per cent as well. A DTA would impact the capital gains tax by reducing it in line with the provisions of the applicable double taxation treaty. DTAs may thus allow significant savings (taxwise) for the buyer.

Deductibility of the acquisition costs largely depends on the tax domicile of the buyer, and whether the deal is a share or an asset deal. An Austrian taxpayer may deduct acquisition costs if they qualify as operating expenditures and reduce the buyer's taxable income in Austria. In an asset deal, financing costs in relation to the purchase price are generally deductible as business expenses by the buyer, while in a share deal, interest expenditures on loan or credit

facilities for the acquisition of domestic or foreign participations are generally tax-deductible if the buyer is a legal entity, the target is not part of the same group of companies and the interest is not paid to a low-taxed affiliated company. Other financing costs are generally not tax-deductible.

For tax optimisation, the acquisition structure would normally involve an Austrian holding company that is established to acquire shares in the target. The holding company and target would form a tax group, and in such a tax group, interest deduction is generally possible without many restrictions and the interest would eventually reduce the overall taxable profits of the tax group.

Austria's accounting standards are in line with EU Regulation No. 1606/2002, as stipulated by the UGB. The UGB requires financial statements to be prepared using the Austrian Generally Accepted Accounting Principles (GAAP) in accordance with Austrian law, although certain companies, such as Austrian parent companies whose securities are listed on a regulated market of any EU Member State, are required to prepare their consolidated financial statements in accordance with the International Financial Reporting Standards as adopted by the EU.

vi Cross-border issues

Foreign ownership limitations

Foreign ownership limitations in Austria depend on the type of asset involved. There is no limitation to ownership of shares of an Austrian entity, although approval may be required by the government pursuant to the recent ICA. There is, however, a restriction on ownership of real property under Austrian law in certain states. The state of Vienna, for instance, does not allow direct foreign ownership of a real property, although indirect ownership is permitted. As aforementioned at Section IV.ii, foreign ownership limitations can apply to both share and asset deals, depending on how the deal structure is involved.

Export and import licensing regimes

The export and import licensing regime in Austria is largely derived from EU law. In principle, the EU has a liberal approach, although for the purposes of technology M&A, the EU has trade controls on 'dual-use' goods (i.e., 'software and technology that can be used for both civilian and military applications').¹⁷ Austria has imposed further requirements with regard to dual-use items¹⁸ when they are intended for use in chemical, biological or nuclear warfare.¹⁹ Furthermore, Austria has four national general export authorisations that impact dual-use exports based on re-exportation, goods below a certain value threshold, specified valves and pumps to certain destinations, specific frequency chargers, and related software and technology.²⁰

17 European Commission, Dual-use trade controls, <https://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/> accessed 19 August 2021.

18 Information on measures adopted by Member States in conformity with Articles 5, 6, 8, 9, 10, 17 and 22 of Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (2016/C 304/03).

19 *ibid.*

20 *ibid.* Conditions of such use can be found in Article 16 of the First Foreign Trade Ordinance, BGBl. II No. 343/2011 (as amended by Ordinance BGBl. II No. 430/2015).

Austrian ICA 2020

The ICA is of critical importance and relevance to foreign investors acquiring software companies as, based on the broad reading of the law, the ICA applies to all software companies. Foreign investors directly or indirectly investing in Austrian target companies that operate in highly sensitive sectors or other sectors that may affect security or public order are required to obtain approval from the government unless the *de minimis* exception of the target having less than 10 employees and a yearly revenue or total assets not exceeding €2 million is fulfilled.²¹ The requirement to seek approval is triggered as long as one of the acquiring parties is a non-European Economic Area (EEA) or Swiss investor (a requirement that can be met already if non-EEA or Swiss entities or persons directly or indirectly hold 10 per cent or 25 per cent in the Austrian target company following the investment, even if these are ultimately controlled by EEA/Swiss persons) and specific conditions are fulfilled. These specific conditions include that the target is active in a highly sensitive sector or other sectors that may affect security or public order and that the investment directly or indirectly entails the acquisition of: (1) an Austrian target company; (2) a defined percentage of voting rights (at least 10 per cent or 25 per cent) in an Austrian target company; (3) a decisive influence over an Austrian target company; or (4) substantial assets of an Austrian target company.

Technology businesses may fall readily into either of the two categories of target companies covered by the ICA as a result of the broad definitions of highly sensitive sectors and other sectors that may affect security or public order. Almost any technology deal could potentially fall under the ambit of the ICA: providing or operating critical energy or critical digital infrastructure (in particular 5G infrastructure) as well as providing or operating systems that safeguard the data sovereignty of the Republic of Austria are considered as highly sensitive sectors; furthermore, information technology is deemed a critical infrastructure and therefore as a sector that may affect security or public order and any technology that impacts certain key industries such as energy, food, traffic and transportation could also easily be subject to approval by the government under the ICA. Based on its broad scope of application, many transactions are covered by an approval requirement under the ICA even though they do not have any effect on security or public order. In case a transaction requires an approval under the ICA, it must not be implemented before receiving approval (standstill obligation). The minimum time required to obtain an approval in practice is about two and a half to three months in most cases that do not raise any substantive concerns. There is no real 'fast-track' option for this approval process, even for transactions that are clearly not critical. In this regard, foreign investors should therefore be aware of the critical nature of this approval process insofar as time is concerned, as there are at present no shortcuts around this approval process for either the national or EU phase.

V IP PROTECTION

Attention should be accorded to the type of intellectual property (IP) assets owned by the target; the extent of the ownership rights of the IP assets by the target; and the protection regimes that apply to the IP assets.

21 Zandler and Horacek, footnote 7.

i Type of IP assets

Austrian law recognises and has corresponding protection regimes for the following IP assets: trademarks, patents and utility models, copyright and industrial designs. Protection for such IP assets is mainly derived from various pieces of Austrian legislation such as the Trademark Act, the Patent Act, the Utility Models Act, the Design Act and the Copyright Act. Owners of such IP assets are then granted the relevant IP rights (IPRs) pursuant to the provisions of these acts.

ii Ownership and licensing rights

Special care should be paid to the IP assets of a target during due diligence, particularly the ownership and licensing rights of an IP asset. In some cases, such as where the target is a family-owned company, IP assets such as patents may be held by the managing director or by individual members of the family in their personal names, and such IPRs are sometimes freely used by the target company without any exclusive licence or existing agreement delineating the terms and rights of use. A condition precedent in an SPA that transfers these IPRs from any individual person to the target is thus essential.

Inventions made by employees are regulated in Austria by the Patent Act (Section 6 et seq.). In principle, employees themselves are the owners of their inventions, unless an invention qualifies as a 'service invention'²² and a written agreement exists. An employee has the duty to report any service invention to his or her employer immediately. The employer must then claim the invention within a certain period, otherwise the claim expires and the property remains with the employee.

Furthermore, unless a licence agreement provides for a change-of-control (CoC) provision, the transfer of shares in a company holding IPRs generally has no direct impact on the IPRs pursuant to the licence agreement. Therefore, due diligence should be done on any restrictive CoC provision that may negatively affect the buyer's rights to the IPRs.

iii Trade secrets

Trade secrets, which are defined as secrets of commercial value and are subject to appropriate confidentiality measures, are protected by both Austrian and EU law. The Directive on the Protection of Trade Secrets²³ has been transposed into Austrian law, such as in the Federal Act Against Unfair Competition and the UGB.

iv IP infringement

IP infringement is a crucial subject during due diligence. Significant efforts should be undertaken to verify whether a given IP right is indeed wholly owned by the rights user, or if an IPR relies on third-party IPRs, and whether such third-party rights are correctly attributed or used in accordance with the corresponding licensing agreement. Under Austrian law, a party may file a lawsuit at the Commercial Court of Vienna if it believes that its IPR is infringed.

22 Patent Act, Section 7(3).

23 Directive on the Protection of Trade Secrets 2016/943.

Upon completion of the IPR due diligence, sellers should provide for appropriate representations and warranties in their SPA to protect themselves in the event of a claim by a third party against infringement. A specific indemnity clause to cover such situations should also be drafted in the SPA.

v EU and international IP conventions

Austria is a party to numerous international IP conventions and treaties, such as the WIPO Copyright Treaty, the Patent Law Treaty, the Berne Convention and the Madrid Agreement Concerning the International Registration of Marks, to name a few. It has also transposed EU regulations and directives on IPRs.

vi Source code escrow accounts

If a target is a software company and the source code owned by the target is a key asset, a source code escrow account agreement may be used. This is a relatively new development in M&A deals: the source code is deposited into a source code escrow account and, upon fulfilment of the relevant conditions precedent, the source code is transferred to the buyer.

VI EMPLOYMENT ISSUES

Employment issues are of particular relevance in asset deals. Pursuant to Section 3(1) of the Employment Contract Law Amendment Act (AVRAG), in the event of a transfer of a business, the new owner enters into the employment relationships existing at the time of the transfer as an employer with all rights and obligations. Depending on whether a deal is a share deal or an asset deal, there are differences in Austrian law regarding the liabilities of the buyer. In a share deal, the AVRAG would apply, but there are certain information obligations towards work councils. In an asset deal, the employees concerned must be informed about the deal and other details and they can also terminate their employment contract and thus decline an offer to continue their employment relationship with another employer.

However, whether a transaction relates to the transfer of a business or singular asset is sometimes doubtful, such as in deals that focus on the transfer of a bundle of IPRs. In determining whether a transaction relates to the transfer of a business pursuant to the AVRAG, Austrian courts would consider the factual matrix, criteria such as customer data and databases, and a close connection to employees, among other things.

Non-compete clauses restricting former employees or employees whose employment is terminated in the course of a transaction are valid under certain conditions in Austrian law. They are generally valid for a maximum of one year after the termination of the employment relationship, but broad restrictions amounting to an outright prohibition of employment generally are not permitted.

VII DATA PROTECTION

Austria has implemented the EU's General Data Protection Regulation (GDPR (and in Austria, DSGVO)). The Austrian Data Protection Authority is the national supervisory authority for Austria and the focus on data protection issues in technology transactions has increased significantly. Parties should pay attention to compliance with the GDPR during the M&A process and the extent of a target's compliance with the GDPR.

i GDPR compliance during the M&A process

The GDPR applies at every stage of the M&A process. Each party should be aware of their individual roles and responsibilities and comply with the GDPR. For practical purposes, the buyer and seller should at the preliminary stages extend their data protection statements to allow for the transfer of personal data to third parties in connection with a merger, sale, disposal of assets or restructuring. Appropriate data processing agreements should also be in place for consultants (e.g., financial advisers, legal advisers).²⁴

While there are no specific prohibitions against a buyer obtaining employee information pre-closing, the seller, the buyer and their consultants must comply with the GDPR rules when handling such employee information. Employee data that falls under special categories (e.g., health data, medical records, biometric data) will be subject to more stringent data protection rules.²⁵ Good practices would involve having a checklist or framework for GDPR compliance during a transaction when working with a data room (the compilation of data and use of a data room) at signing, closing and post-closing.²⁶

ii GDPR compliance of the target

Targets in the ICT sector must comply with the GDPR. Accordingly, due diligence of the extent of a target's GDPR compliance is imperative. Representations and warranties may be drafted in the SPA to protect a buyer from issues arising from non-compliance with the GDPR; failure to do so may result in relatively severe consequences for the buyer, as the data protection authorities may impose a fine on the buyer for non-compliance with the GDPR or earlier data protection laws by the seller prior to an acquisition.²⁷

iii Penalties for non-compliance of the GDPR

The GDPR prescribes relatively harsh penalties for parties that do not comply with the GDPR. The Austrian Data Protection Authority may impose a fine of up to €20 million or 4 per cent of an entity's previous financial year's worldwide turnover. Such penalties have been imposed on the buyer of a target for the target's breach or non-compliance with data protection rules prior to an acquisition.²⁸ The Austrian Data Protection Authority in 2019 meted out a fine of €18 million, one of the heftiest penalties for non-compliance with the GDPR that has been seen thus far.²⁹

24 CMS, Checklist M&A and GDPR, <https://cms.law/en/deu/publication/checklist-m-a-and-gdpr>, accessed 19 August 2021.

25 DSGVO, Article 9.

26 See CMS, Checklist M&A and GDPR, <https://cms.law/en/media/local/cms-hs/files/publications/broschueren/checklist-mua-und-gdpr-04-2020>, accessed 19 August 2021.

27 Parmy Olson, 'Marriott Faces \$124 Million Fine Over Starwood Data Breach' (*The Wall Street Journal*, 9 July 2019), www.wsj.com/articles/marriott-faces-123-million-fine-over-starwood-data-breach-11562682484, accessed 19 August 2021.

28 *ibid.*

29 Kirsti Knolle, 'Data privacy fine to hit Austrian Post's 2019 profit, (Reuters, 29 October 2019), <https://www.reuters.com/article/us-austrian-post-fine/data-privacy-fine-to-hit-austrian-posts-2019-profit-idUSKBN1X81R7>, accessed 19 August 2021.

VIII SUBSIDIES

The government maintains a strong interest in developing its ICT sector and provides various incentives and subsidies. An overview of the current innovation funding can be obtained from the Austrian Chamber of Commerce or the Austrian Business Agency. The type of subsidies available for technology companies depends on the individual criteria of a specific subsidy. A research premium or bonus of 14 per cent is also available to all companies, regardless of company size, sector or company structure, for research conducted after 2018.³⁰ Companies are entitled to this research premium even if little or no profit is generated and can apply for this premium even if the research is conducted either in-house or commissioned from a third party.³¹

The real transactional issue lies in whether the terms of a subsidy contain a CoC provision, that is, they become repayable upon closing or when a majority stake of the company is sold. This may also apply in asset deals if a subsidised asset (e.g., a grant for a patent) is being sold. Care must therefore be taken during the due diligence stage to ensure whether any CoC provision is in place and whether any active step must be taken by the buyer to continue benefiting from the subsidy.

IX DUE DILIGENCE

Buyers normally conduct a red flag due diligence (at the very least), with special attention paid to IPRs (in particular, employee inventions) and data protection issues. For IPR, due diligence should be conducted on the following:

- a* the parties involved in the development of the IPR;
- b* whether the IPR is developed independently or relies on third-party licences;
- c* ownership of the IPR;
- d* the maintenance of the IPR and its current use; and
- e* whether the IPR is subject to any encumbrance or contractual relationship.

For data protection, the key issues are:

- a* GDPR compliance;
- b* the presence of data breaches (potential, reported or under investigation); and
- c* the risk of non-compliance of the target (e.g., as a result of it developing artificial intelligence software or operating a social networking platform).

A comprehensive due diligence report is usually prepared if a legal due diligence report is required to obtain financing.

In certain cases, greater detail is placed on employment agreements and relevant employee arrangements. This normally arises when certain key employees possess critical information or know-how about the target's IPR assets and when any sudden departure of such employees may result in a substantial loss for the company in terms of the loss of

30 Daniela Stastny, 'Forschungsprämie: Zusätzlicher Impuls für den Forschungsstandort Österreich' (Austrian Business Agency, 14 June 2017), <https://investinaustria.at/de/blog/2017/06/forschungspraemie.php>, accessed 19 August 2021.

31 *ibid.*

essential information or, in some cases, the company's inability to continue regular business operations. Adequate due diligence – if necessary, by requesting further information or a management interview of the target's key employees – should uncover such issues.

X DISPUTE RESOLUTION

Arbitration is a popular dispute resolution mechanism for Austrian technology transactions; in 2019, arbitration was chosen in 34 per cent of deals in Europe and is more popular in German-speaking countries as compared to the United Kingdom, France and Benelux.³² The Vienna International Arbitral Centre³³ has consistently sought to promote itself as an international arbitration hub and retains a strong regional presence.

Considering how sensitive certain source codes or trade secrets may be for specific technologies, arbitration is an attractive dispute resolution mechanism that provides the advantage of confidentiality while retaining the flexibility of arbitration proceedings (relative to litigation in court) and the choice of arbitrators by parties. Enforcement of an Austrian arbitral award is made easier in most commercially important jurisdictions as Austria is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The ability to pursue the global enforcement of arbitral awards thus gives more credence to arbitration as a dispute resolution mechanism for technology M&A deals.

Mediation is another dispute resolution method that is gaining interest among commercial parties. Where trade secrets are concerned, mediation has an added advantage over arbitration as, depending on how the mediation proceedings are conducted, trade secrets owned by one party can be prevented from being disclosed to the other party. In the M&A context, mediation is normally initiated as an intermediate stage followed by arbitration.

If parties do not expressly contract for alternative dispute resolution mechanisms in their SPA, litigation is normally commenced before the Commercial Court of Vienna. As decisions by the Austrian commercial courts are made available to the public, disputes that involve trade secrets or confidential information are preferably not resolved in court. The enforcement of judgments rendered by an Austrian court is straightforward as per the Brussels Regulation;³⁴ otherwise, enforcement of an Austrian judgment in another jurisdiction is premised on reciprocity.

XI OUTLOOK

Every major impact on the global economy presents new challenges to, but also uncovers fresh opportunities for, buyers. While the Austrian economy has been severely affected by the onset of covid-19, technology M&A deals have continued to flow, although both buyers and sellers are approaching any deal with caution. MAC clauses and earn-outs are likewise adjusted to reflect reality and future economic uncertainty, although technology companies – in particular companies that provide ICT infrastructure to permit employees to work remotely and companies that provide e-commerce solutions – remain attractive targets in the shorter term. Therefore, unlike in other sectors, opportunistic buyers should not generally expect to find attractive distressed targets in the Austrian technology M&A space.

32 CMS European M&A Study 2020, 78.

33 Vienna International Arbitral Centre, <https://www.viac.eu/en/>, accessed 19 August 2021.

34 Brussels Regulation 44/2001.

Covid-19 notwithstanding, Austria remains a country with sound ICT infrastructure and numerous high-tech and industry-specialised companies operate therein. Appetite for Austrian technology companies will continue to grow, especially as ICT becomes an integral part in all aspects of life, whether for public, commercial or civil use. It remains to be seen, however, whether the ICA will be a practical or only a theoretical hurdle for non-EU investment in Austrian technology companies.

ABOUT THE AUTHORS

PETER HUBER

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Dr Peter Huber is a partner and head of the CMS Austria international transaction team and has decades of professional experience in the field of corporate transactions, including more than four years with leading investment banks. His areas of expertise are M&A (including privatisations and public takeovers) and corporate law (including corporate governance) in Austria as well as in Central and Eastern Europe. Peter Huber advises numerous large Austrian companies and major shareholders as well as shareholder groups on corporate transactions, restructurings, shareholder agreements and management structures as well as on legal issues arising from shareholder activism. He also advises large private equity firms on investments and exits. He is the author of numerous publications in the field of corporate and takeover law as well as the leading commentary on the Austrian Takeover Act. Peter Huber is named by *Chambers Global* and *Chambers Europe* as a leading (Band 1) expert on corporate law and M&A in Austria and Southeast Europe and has also achieved top rankings in other directories and publications.

IRENE NG (HUANG YING)

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Dr Irene Ng (Huang Ying) is a senior attorney (Singapore, New York) in the corporate law and M&A practice area. As one of the few lawyers in Austria admitted to practise in Southeast Asia and with professional experience in both Asia and Europe, she acts as a link between the two regions. Before joining CMS Reich-Rohrwig Hainz, she worked as group legal counsel for a listed company in Singapore, where she was responsible for the group's expansion into Europe. She has also worked for the Secretariat of the United Nations Commission on International Trade Law in Vienna. Through her academic work as a research affiliate at the Centre for AI and Data Governance of the Singapore Management University and as a fellow of the Stanford–Vienna Transatlantic Technology Law Forum, Irene Ng (Huang Ying) maintains a strong interest in the technology space. She publishes and teaches in the fields of artificial intelligence, legal technology and e-commerce.

CMS

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Gauermannngasse 2

1010 Vienna

Austria

Tel: +43 1 40443 0

Fax: +43 1 40443 90000

peter.huber@cms-rrh.com

irene.ng@cms-rrh.com

www.cms.law

an LBR business

ISBN 978-1-83862-833-8