

# ESTABLISHING A BUSINESS IN AUSTRIA

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# Inhalt

Preface	6
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Section I: Overview and legal bases of the establishment of a business	7
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<b>1. Formation of a company or a branch office in Austria</b>	<b>7</b>
1.1. Sole proprietor status	7
1.2. Branch of foreign business	7
1.3. Formation of a company or subsidiary in Austria	8
1.4. Advantages of a GmbH relative to an AG	8
1.5. Disadvantages of a GmbH	9
1.6. The European Company	9
1.7. Partnership entities	9
1.8. GmbH & Co KG	9
1.9. Group taxation of Austrian incorporated entities	10
1.10. Trade licensing law	10
1.11. Employment of foreign employees	10
1.12. Tax law: notification of commencement of entrepreneurial activity (business, branch establishment) to the Austrian tax authorities (tax office)	11
1.13. Purchasing real estate	11
1.14. Landlord-tenant law	11
1.15. Foreign exchange law	11
1.16. Money laundering	11
<b>2. Forms of business entities</b>	<b>12</b>
2.1. Limited liability company or Gesellschaft mit beschränkter Haftung (GmbH)	12
2.1.1. General remarks on the GmbH	12
2.1.2. Formation of a GmbH	12
2.1.3. Share capital: contributions in cash and in kind	12
2.1.4. Notification of the newly formed GmbH; registration with the Austrian Commercial Register	13
2.1.5. What types of business may a GmbH not transact?	13
2.1.6. Who may be a shareholder of a GmbH?	13
2.1.7. Number of managing directors; who is eligible to be a managing director of a GmbH?	13
2.1.8. Costs of formation	14
2.1.9. How long does it take to form a GmbH?	14
2.1.10. Liability for transactions carried out prior to registration of the GmbH	14
2.1.11. Constitutive bodies of the GmbH	14
2.1.12. Dividends (profit shares)	16
2.1.13. Transactions between the GmbH and its shareholders within the corporate group	16
2.1.14. Shareholder loans to the GmbH	17
2.2. Joint-stock company or Aktiengesellschaft (AG)	17
2.2.1. Formation of an AG	17
2.2.2. Management board	17
2.2.3. Supervisory board	18
2.2.4. Audit of annual financial statements and consolidated statements by the financial auditor	18
2.2.5. General meeting of shareholders	18
2.3. European Company (Societas Europaea – SE)	18
2.3.1. Formation of an SE	18
2.3.2. Legal bases of an SE	18
2.4. General partnership or Offene Gesellschaft (OG)	19
2.5. Limited partnership or Kommanditgesellschaft (KG)	19
2.5.1. General remarks	19
2.5.2. GmbH & Co KG	19

2.6. Branches of foreign companies .....	20
2.6.1. General remarks .....	20
2.6.2. Registration of a branch with the Austrian Commercial Register .....	20
2.6.3. Appointment of a permanent representative for the branch .....	20
2.6.4. No independent legal personality, liability, capital .....	20
2.6.5. Bookkeeping, tax reporting .....	20
2.6.6. Details on registering the branch; filing changes with the Commercial Register .....	21
2.6.7. Is it expedient to form a Limited Company abroad and to establish a branch of that Limited Company within Austria? .....	21
2.7. Private foundation .....	21

## Section II: Asset and share deals (M&A) 21

<b>1. General remarks .....</b>	<b>21</b>
<b>2. Asset deals .....</b>	<b>22</b>
<b>3. Share deals .....</b>	<b>22</b>
<b>4. Austrian corporate takeover law .....</b>	<b>22</b>
<b>5. Merger control .....</b>	<b>23</b>
5.1. Austria .....	23
5.2. Merger control in the European Union – MR .....	24
<b>6. Approval requirements for acquiring equity interests in banks, stock exchanges and the like .....</b>	<b>24</b>
<b>7. Duty of third-country nationals to obtain approval in cases of acquisitions in sensitive sectors .....</b>	<b>25</b>
7.1. Acquisitions of entities relating to “public security and order” .....	25
7.2. Direct and indirect acquisitions; acquisition of a controlling stake .....	25
7.3. Application for approval .....	25
7.4. Legal consequences .....	26

## Section III: Employment law, alien employment authorisation 26

<b>1. Basics of Austrian employment law .....</b>	<b>26</b>
<b>2. The employment agreement .....</b>	<b>26</b>
<b>3. Foreign employees .....</b>	<b>26</b>
3.1. General remarks .....	26
3.2. Key workers .....	27
3.3. Red-white-red card .....	27
3.4. Secondment of foreign employees to Austrian construction sites .....	27
<b>4. Compensation (salary, wages) .....</b>	<b>27</b>
4.1. Minimum wage levels .....	27
4.2. Prevention of wage dumping .....	28
4.3. Employees from the new EU member states .....	28
<b>5. Annual leave .....</b>	<b>28</b>
<b>6. Working time .....</b>	<b>28</b>
<b>7. Termination of employment agreement (notice, dismissal) .....</b>	<b>29</b>
7.1. Termination of employment by notice .....	29
7.2. Challenging a notice of termination .....	29
7.3. Social plan in favour of employees .....	29
7.4. Termination of employment without notice (dismissal, resignation) .....	29
<b>8. Distinction between wage earning employees and salaried employees .....</b>	<b>29</b>
<b>9. Works constitution .....</b>	<b>29</b>
<b>10. Collective agreements .....</b>	<b>30</b>

Section IV: Trade licensing and other approval requirements	30
<b>1. Trade licence</b>	<b>30</b>
1.1. General remarks	30
1.2. Conditions precedent to the grant of a trade licence	30
<b>2. Types of trades and the different preconditions to the grant of a licence</b>	<b>31</b>
2.1. Carrying on a trade with/without evidence of formal qualifications	31
2.2. Commencing trading operations	31
<b>3. Statutory manager for trade licensing law purposes</b>	<b>31</b>
<b>4. Further approval requirements under public law</b>	<b>31</b>
4.1. Business facility permit	31
4.2. Permits under water protection law	32
4.3. Waste control law	32
4.4. Environmental impact assessment	32
Section V: Tax law	33
<b>1. Taxation of company formation</b>	<b>33</b>
1.1. Incorporated entities	33
1.2. Partnership entities	33
1.3. Branch of foreign business	33
1.4. Tax exemption	33
<b>2. Current taxation and taxation upon liquidation of business entities in Austria</b>	<b>33</b>
2.1. Incorporated entities	33
2.1.1. Corporation tax	33
2.1.2. Capital gains tax on profit distributions by an Austrian GmbH, AG, SE	34
2.1.3. Taxation upon liquidation of incorporated entities in Austria	34
2.2. Sole proprietorships, partnership entities	34
2.2.1. Sole proprietorships	34
2.2.2. Partnership entities	34
2.3. Taxation of foreign businesses or companies with and without double taxation treaties	35
2.3.1. Foreign sole proprietors with a sole proprietorship or branch office in Austria	35
2.3.2. Alien holding an interest in an Austrian partnership entity	35
2.3.3. Alien holding an interest in an Austrian incorporated entity	35
<b>3. Taxes in the case of employment – incidental wage costs</b>	<b>35</b>
<b>4. Value-added tax</b>	<b>35</b>
<b>5. Land transfer tax</b>	<b>36</b>
5.1. Purchase of real property	36
5.2. Acquisition of all of the shares of a company; unification of all shares in a single owner	36
<b>6. Fees applicable to leases</b>	<b>36</b>
Section VI: Industrial property rights and protection of intellectual property	36
<b>1. Trade marks</b>	<b>36</b>
<b>2. Internet domain law</b>	<b>37</b>
<b>3. Protection of corporate name and corporate logo</b>	<b>37</b>
<b>4. Patent law</b>	<b>37</b>
<b>5. Protection of seed</b>	<b>38</b>
<b>6. Design protection</b>	<b>38</b>
<b>7. Copyright</b>	<b>39</b>
Annex: Checklists	40

## Preface

This brochure has the objective of assisting Austrian and foreign entrepreneurs and investors in establishing a business in Austria. It is intended to provide initial, basic information. Such information is provided in order to enable interested parties to conduct informed, expedient discussions with their legal or tax advisor.

Part 1 presents the different corporate forms under Austrian law of operating a business under Austrian law and – alternatively – the option of establishing a branch office in Austria. Of course, we will, in particular, provide an overview of the rules governing the formation of legal entities and branch offices. The Austrian *Gesellschaft mit beschränkter Haftung (GmbH)* is by some considerable distance the most popular corporate form both with Austrian entrepreneurs and foreign investors. Given its practical significance, we will provide a more detailed description of this form.

We also will treat practical issues such as how to rent business premises in Austria or to acquire property, including issues of property acquisition by aliens, questions of employment law and employment of aliens. Questions of necessary permits and licences as well as tax law will likewise be covered. In addition, issues regarding equity and debt financing (granting of loans to Austrian subsidiaries) and foreign exchange law are of relevance and will thus be touched upon as well.

One may also establish a business presence by acquiring an existing business in the context of an M&A transaction; for this reason, we will also discuss this option.

The aim of this brochure is to provide readers with a broad overview. It is thus neither feasible nor practical to delve into all relevant details. For that reason, we will, in some cases, have to make statements of a very general nature, which inevitably may be imprecise in certain respects.

This brochure cannot substitute professional, tailored advice and elaboration of all of the material bases for decision-making. Our firm would be pleased to be of assistance to you in this regard.

Vienna, January 2013

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# Section I: Overview and legal bases of the establishment of a business

## 1. Formation of a company or a branch office in Austria

### 1.1. Sole proprietor status

The easiest way to establish a business is to set up as a “sole proprietor”. What this means is that a natural person forms a business and operates that business as its sole owner, bearing full personal liability.

Sole proprietorships can be created by any person holding Austrian citizenship or the citizenship of an EEA country or Switzerland. A permit will also be issued to any person holding a residence permit for Austria authorising him or her to carry on a trade. Persons from other countries will only be permitted to carry on a trade in Austria if there is reciprocity in granting such permits between the person’s home country and Austria.

With respect to certain professions (e.g. attorneys, tax advisors and the like) there are in part more restrictive rules on professional practice.

Sole proprietors wishing to operate a business covered by the Austrian Trade and Industry Regulation Act (German acronym: GewO) (e.g. sales, commercial sector trade, industry) require a trade licence (on this point, see section IV below), and they must notify the Austrian tax office of their entrepreneurial activity (see page 11).

Registration of sole proprietorships with the Austrian Commercial Register (*Firmenbuch*) is only legally required if, during two successive fiscal years, the sole proprietorship generated a turnover of more than € 700,000 per fiscal year. However, sole proprietorships may in any event voluntarily register with the Commercial Register even where this requirement does not apply.

Sole proprietorships that are not registered with the Commercial Register may determine their income (profits/losses) by recording their payments and receipts. If, by contrast, they bear a statutory obligation to have the business registered on the Commercial Register, then, as a rule, they will be obliged to

perform financial accounting in accordance with the accounting rules of the Austrian Entrepreneurial Code (German acronym: UGB).

In view of the unlimited personal liability of the sole proprietor for all liabilities arising out of his or her business operations, entrepreneurs often seek to limit the risk of liability and for this reason form a GmbH, an AG, an SE or a GmbH & Co KG. See subsections 1.3 to 1.8 and section II for further details on these types of business entities.

### 1.2. Branch of foreign business

Foreign entrepreneurs or business entities wishing to perform entrepreneurial activities in Austria may establish a branch office (“**branch**” or “*Zweigniederlassung*”)<sup>1</sup>. In terms of citizenship status as a condition precedent to obtaining a license to carry on a trade, the criteria described above in subsection 1.1 apply analogously.

From a legal perspective, a branch office means that the foreign entrepreneur or business entity is itself the direct holder of all rights and obligations arising out of all transactions of its Austrian branch office. Thus, all business transactions by the Austrian branch office will entail personal liability on the part of that entrepreneur or business entity. Where the foreign entrepreneur or business entity wishes to limit his personal liability, then for business activities in Austria a subsidiary should be formed, e.g. in the legal form of a GmbH, AG or GmbH & Co KG; see subsection 1.3 below.

The foreign entrepreneur or business entity will be subject to tax in Austria on the income of the Austrian branch office. Even if the Austrian branch office is not registered with the Commercial Register, the office maintained in Austria can constitute a “branch establishment” for tax law purposes. Potentially, a mere room, e-mail address or facsimile machine in Austria which can be used for business purposes and from which transactions are initiated and carried out may suffice for such purposes.

With respect to branch offices, see also the further remarks in subsection 2.6 below.

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<sup>1</sup> § 12 UGB.

### 1.3. Formation of a company or subsidiary in Austria

Any Austrian citizen or foreign national may establish a business in Austria. As noted above, a business operated subject to the entrepreneur's full personal liability (i.e. without any further partners or shareholders) is referred to as a "**sole proprietorship**". As an alternative, there is the option of forming a partnership or company through which the business can be operated. To form a **partnership entity** or **Personengesellschaft**, at least two partners are required. By contrast, one individual is sufficient to establish an **incorporated entity** or **Kapitalgesellschaft** (GmbH, AG).

Frequently, foreign business owners wish to establish a **subsidiary** in Austria, which is legally independent from its parent; the foreign parent company thus does *not* bear direct and unlimited liability for the subsidiary's obligations. The corporate forms typically chosen for such subsidiaries are the **Gesellschaft mit beschränkter Haftung** or **limited liability company** (German acronym: **GmbH**) and the **Aktiengesellschaft** or **joint-stock company** (German acronym: **AG**). An alternative is the "European Company" (also referred to as "Societas Europaea" or **SE**).

In terms of partnership entities, the **Offene Gesellschaft** or **general partnership** (German acronym: **OG**) and the **Kommanditgesellschaft** or **limited partnership** (German acronym: **KG**) may be used. Alternatively, business owners may establish a **GmbH & Co KG** (which is a form of partnership entity that combines characteristics of each of the two aforementioned entity types).

Austria is also popular as a location for holding companies. In practice, holding companies are usually incorporated entities (i.e. a GmbH, AG, SE) or in certain circumstances **private foundations**: even though private foundations cannot issue shares, there are legal constellations that may nevertheless make it advantageous to form a private foundation in Austria.

We will not delve in any further detail into other corporate forms such as the civil-law partnership or *Gesellschaft bürgerlichen Rechts*, the silent partnership and the corporate entities of the co-operative (*Genossenschaft*) and the legal association (*Ver-ein*), because they are of little practical significance to foreign investors.

### 1.4. Advantages of a GmbH relative to an AG

Usually, investors will choose the corporate form of the **GmbH**, although other corporate forms are also available to them.<sup>2</sup> The GmbH corporate form combines the benefit of limited shareholder liability and the ability to separate the liabilities of the company from the assets of its shareholders with the benefit of fewer formalities as compared with an *Aktiengesellschaft*: In the case of small and mid-sized GmbHs, there is no statutory requirement to appoint a supervisory board. In the case of the GmbH, it is sufficient for *a single person* to be appointed as the managing director. The managing director may simultaneously be a shareholder. In the case of "small" GmbHs, there is no requirement to file audited annual financial statements. Furthermore, the annual financial statements for a small GmbH can be submitted to the Commercial Register court without notes or other accompanying details, by providing merely a summary breakdown of the accounts.

By contrast, the *Aktiengesellschaft* or joint-stock company (German acronym: AG) is likewise an incorporated entity shielding shareholders from personal liability for the debts of the *Aktiengesellschaft*. However, in order to form an AG, one will at any rate require at least *four* persons (and this requirement continues to apply during the life of the company). Specifically, one needs at least *one* management board member and at least *three* supervisory board members, such that the number of individuals who must be involved (and who then will also bear liability to creditors for complying with their duty of care) is accordingly larger. The supervisory board oversees the management board; the management board must obtain the consent of the supervisory board for certain transactions stipulated by law. However, the supervisory board may no itself engage in the management of the company.

There are much greater formalities in respect of an AG than there are in the case of a GmbH: in the case of an AG, a notary must create an official record of every shareholders meeting, and the annual financial statements must be audited by an Austrian chartered accountant (formalities that make AGs a more costly alternative to a GmbH). In addition, the annual financial statements of an AG must be filed in their entirety with the Commercial Register, such that even in the case of smaller companies, third parties are more easily able to scrutinise the AG's financial condition.

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<sup>2</sup> See Reich-Rohrwig, Das österreichische GmbH-Recht, 2<sup>nd</sup> edition.



Both of these legal entities (GmbH and AG) may be formed by single individuals (one-person formation), such that both of these legal entities are very well suited for use as a corporate group company.

## 1.5. Disadvantages of a GmbH

In the case of a GmbH, not only the managing directors, but also the shareholders show up in the **Commercial Register**, which is a register of registered companies that is publicly available and may be reviewed electronically at any time.

If a shareholder wishes to remain anonymous (i.e. with his or her identity undisclosed), then that shareholder must either make use of a trustee (which is generally permitted), or should choose the legal form of the *Aktiengesellschaft* (AG) instead. However, the Austrian legislature has recently largely foreclosed the option of preserving anonymity by setting up an AG and having it issue bearer shares: the legislation provides that bearer shares are now permitted only for exchange-listed AGs. Thus, AGs will generally be required to issue registered shares; the shareholders must be registered on a share register maintained by the AG (and which, whilst not a public document, may nevertheless be reviewed by the public authorities). A shareholder holding 100% of all of the shares ("sole shareholder") must, in addition, be registered with the Commercial Register. However, it is likewise generally permissible in the case of an AG for shares to be held by a trustee.

If at the time of formation of a GmbH or capital increase, the entirety of the GmbH's share capital is not paid in, or where contributions in kind by shareholders have been overvalued, there is statutory **subsidiary joint liability** of each of the shareholders for the unpaid capital contributions of the other shareholders. The same applies in the case of prohibited repayments of capital to shareholders. In that regard, the Austrian law treats shareholders of a GmbH who fail to fully pay in their shares or whose contributions in kind are overvalued more strictly than shareholders of an AG in similar situations.

## 1.6. The European Company

The European Company (*Societas Europaea* or SE) is likewise an incorporated entity subject to the same limitations of liability as are applicable to an *Aktiengesellschaft*. However, as a rule, an SE cannot be formed as easily as a (normal) *Aktiengesellschaft*, because, an SE generally requires two or more businesses with registered offices in different European Union/EEA member states. It would only be possible for a single person to establish

an SE where this is done by a European Company as the parent company.

One benefit of an SE is that there is a right of election in terms of structuring the corporate organisation: thus, the charter may either set up a monistic board system (management board), as is customary both in the Anglo-American world and in France, or it may opt for the dualistic system of management board and supervisory board corresponding to that of the Austrian *Aktiengesellschaft*. In the case of the dual system, the shareholders appoint a supervisory board which, in turn, appoints and exercises oversight over the management board: the supervisory board has no authority to manage the company's affairs or to represent it *vis-à-vis* third parties.

Overall, however, formation of a European Company will, as a rule, be substantially more complicated and costly. This is true in particular if employee participation plays a role or might play one in the future, e.g. because the SE already owns a business at the time of its formation or acquires a business or equity interests in other companies in the future.

## 1.7. Partnership entities

The legal forms of partnership entities tend to play less of a role in practice for foreign entrepreneurs: in the case of the **Offene Gesellschaft** or **general partnership** (German acronym: OG), all of the partners bear immediate and unlimited personal liability to the creditors. In the case of a **Kommanditgesellschaft** or **limited partnership** (German acronym: KG), at least one person (the general partner) bears direct, unlimited and personal liability to the creditors of the partnership; by contrast, the limited partners bear only limited liability. However, a mixed form of partnership entity, the GmbH & Co KG, should also be mentioned, which is discussed in the following section.

## 1.8. GmbH & Co KG

**In certain cases, the GmbH & Co KG may be an interesting option as it combines the advantages of partnership and corporate entities:** This corporate form limits personal liability to the GmbH, which acts as the general partner, while the GmbH's shareholders act as limited partners. As a result, the investor or investors generally only bear limited liability to creditors of the partnership both in their capacity as shareholders of the general partner GmbH and in their capacity as limited partners.

A GmbH & Co KG may likewise be formed by *a single person*, who may simultaneously be its managing director.

The reason why the GmbH & Co KG is sometimes preferred over the GmbH in practice is rooted in tax law: in a typical GmbH & Co KG, in which the GmbH acting as general partner neither has any stake in the capital or profits of the KG and only receives a remuneration for its management activities, all of the profits will ordinarily accrue to the limited partners. Under **Austrian tax law**, the profits of the limited partner will be taxed at the level of the limited partners, which makes it easier for the group parent company to allocate profits and losses between group companies.

Where the limited partners are non-resident for tax purposes, the tax status of the GmbH & Co KG's profits will depend on the applicable double taxation treaty: Generally, the business profits arising out of the Austrian GmbH & Co KG will have to be reported in Austria by the foreign limited partners (limited tax obligation).

## 1.9. Group taxation of Austrian incorporated entities

Austrian tax law permits the offsetting of profits and losses within Austrian corporate groups where the group companies constitute a single group for tax purposes. To this end, a group tax agreement will be required. In this way, results will be offset against each other not only as between the group companies domiciled in Austria, but also consolidate foreign subsidiaries of an Austrian group parent company. In this way, the “separation principle” that otherwise applies in respect of taxation of corporate entities is *de facto* disregarded for purposes of taxation, provided that the relevant conditions (in particular a three-year minimum period) are complied with (see section V, subsection 2.1.1., for further details).

## 1.10. Trade licensing law

As a rule, in order to carry on a trading business in Austria, a **trade licence** will be required, which is issued by the public authorities (municipal authority or *Magistrat*, district council authority or *Bezirkshauptmannschaft*). As discussed in greater detail in section IV, for many types of commercial and industrial activities, it is not difficult to obtain a trade licence, but it does entail a certain amount of administrative red tape. Usually, the only thing required is for the firm to designate a “statutory manager for trade licensing law purposes” who is domiciled either in Austria or in a member state of the EU/EEA, and to identify that individual to the authorities. Generally speaking this statutory manager must either simultaneously be the managing director (director) of the business or an employee employed at least half-time and actually working in the busi-

ness. In the latter case, the statutory manager is *not* required to simultaneously be its managing director for corporate law purposes (in the case of a GmbH) or be its director (in the case of an AG); he must only “be entitled to manage and direct” the business.

In several cases, however, the statutory manager must hold a “relevant qualification”, which he is required to demonstrate to the trade authority by producing relevant education credentials and practical experience.

Entrepreneurial (trading) activities can generally be commenced as soon as the authorities have been notified of the commencement of trading operations (e.g. in the case of ordinary trades); in that case, it is not necessary to wait for the grant of the licence by the authority. In some cases, trading activities cannot be commenced until the authority has reviewed whether all the prerequisites have been met and has verified the “soundness” of the business and its representatives and has issued the trade licence.

On this point, see the more detailed remarks contained in section IV.

## 1.11. Employment of foreign employees

Whether an investor may employ foreign employees in Austria depends on the employees' home country:

Nationals of a country in the European Union or the EEA have a right of free movement and a right to work in Austria based on the “European Fundamental Freedoms”. However, restrictions still apply to nationals of *Romania* and *Bulgaria* pursuant to the transitional rules of those countries' accession agreements: in part, work permits continue to be required for employees coming from those countries.

In respect of employees coming from countries outside the EU/EEA, as a general matter, both a residence permit and a work permit will be required (even though such individuals are often able to enter Austria as tourists without any visa). See further details in section II, subsection 3.

### 1.12. Tax law: notification of commencement of entrepreneurial activity (business, branch establishment) to the Austrian tax authorities (tax office)

Under Austrian tax law, each business is required to notify the competent tax office of its commercial or business activities, including where such activities are in the form of a branch office or permanent establishment. The entrepreneur will receive a questionnaire that he is required to complete and return to the tax office (this is usually handled for him by the firm's legal or tax advisor). However, tax liability for entrepreneurial activities in Austria will arise even where such notification is not made to the Austrian tax office.

Austria (like most Western countries) has a robust and comprehensive tax system. Major forms of tax to be considered here are value-added tax (VAT) on goods and services, tax on profits including income tax (for natural persons) and corporation tax (for corporate entities). We would also point to the laws governing municipal tax (for wages paid to employees), insurance tax, electricity tax, natural gas tax and coal levies, motor vehicle tax, capital transfer tax, land transfer tax and public fees and duties (see further details of this in section V).

### 1.13. Purchasing real estate

Where an investor intends to acquire a business property, his purchase of such real estate will be subject to the Austrian Land Transfer Tax Act (German acronym: GrEStG). The land transfer tax and registration fees amount to 3.5% and 1.1% of the purchase price, respectively (4.6% in total).

Real estate purchases by aliens who are not EU/EEA citizens, however, are subject to certain restrictions under the laws governing the acquisition of real estate by aliens.

The acquisition of agricultural properties or forestry is subject to additional restrictions that apply both to Austrians and aliens alike under the Land Transfer Acts of the Austrian federal states.

### 1.14. Landlord-tenant law

Austrians and aliens alike are permitted to rent office space, production facilities and real estate premises.

Where a tenancy right is to be registered on the land registry (although this is usually not really necessary), in the case of

non-EU/EEA citizens, this may be subject to restrictions as a result of the Land Transfer Acts of the Austrian federal states.

Austrian landlord-tenant law frequently affords special legal protections to the tenant, in particular protecting the tenant against termination of the lease without cause, but not in all cases. In respect of the many unique features of Austrian landlord-tenant law, it is recommended that you involve an experienced Austrian attorney when negotiating and entering into any lease!

### 1.15. Foreign exchange law

As a very broad general rule, the Austrian foreign exchange law permits aliens to make investments in Austria. Thus, aliens may (as far as foreign exchange law is concerned) establish businesses in Austria, make capital contributions or acquire businesses and shares in businesses in Austria.

The exception to this are persons, associations and corporate entities subject to EU sanctions based on the EU's "*common position*" (2001/931/CFSP) on the application of specific measures to combat terrorism. The Official Journal of the EU (most recently at the time of publication: 26.6.2012, OJ L 165/72) lists the persons, groups and organisations referenced in Council Decision 2012/333/CFSP of 25.6.2012 and the sanctions against among others Iran and Syria<sup>3</sup> imposed by EU Regulations.

**Reporting obligations:** In respect of certain transactions (e.g. capital investments in forming or acquiring a business entity or shares in a business entity, but also in respect of purchasing real property), there are reporting obligations to Oesterreichische Nationalbank (the Austrian Central Bank) for purposes of foreign and trade statistics. Pursuant to those rules, investors must file a report within one month of the flow of money to Austria.

With respect to asset deals and share acquisitions (M&A) and to approval requirements see section II.

### 1.16. Money laundering

In connection with international efforts to combat and prevent money laundering, Austria has transposed the EU Money Laundering Directive into its national law by domestic legislation. These laws impose obligations, in particular on banks, attor-

<sup>3</sup> Council Regulation (EU) No. 267/2012 of 23 March 2012 concerning restrictive measures against Iran (OJ L 88), Council Regulation (EU) No. 442/2011 of 9 May 2011, concerning restrictive measures in view of the situation in Syria (OJ L 121).

neys, notaries and tax advisors, to report suspicious transactions to the public authorities.<sup>4</sup>

We have now completed our initial foray into the Austrian “legal landscape”.

In the following, we will provide very brief explanations of the individual corporate forms available to investors for establishing a business entity. With respect to “sole proprietorship”, see our comments in subsection 1.1 above.

## 2. Forms of business entities

### 2.1. Limited liability company or Gesellschaft mit beschränkter Haftung (GmbH)

#### 2.1.1. General remarks on the GmbH

A GmbH is an “incorporated entity” with a legal personality independent of that of its shareholders. It may be formed by either one or several shareholders. One characteristic of the GmbH is that the shareholders of a GmbH do not, as a general rule, bear liability to the GmbH’s creditors for the GmbH’s obligations (“separation principle”). At the time the GmbH is formed, it must have a nominal capital of at least € 35,000 and, if cash contributions have been agreed, at least one-half of the GmbH’s equity capital (i.e. € 17,500) must be fully paid in. The paid-in equity capital may be used for the GmbH’s business activities.

#### 2.1.2. Formation of a GmbH

There are several formalities to be complied with in order to form a GmbH: the articles of association of a GmbH must be set out in the form of an Austrian notarial deed. A foreign investor not wishing to travel to Austria may appoint an agent for purposes of forming the GmbH in Austria, provided that the agent must hold a notarised power of attorney. The power of attorney must cover the main points of the articles of association, such as the name of the company, its registered office, the purposes for which the company is formed, the authorised share capital and the amount of capital to be contributed by the shareholder.

Where a GmbH is formed by two or more shareholders, the articles of association are referred to as “contract to form a company”; where a GmbH is formed by only a single shareholder, the articles are referred to as “declaration on the formation of a company”. As previously mentioned, both documents must be prepared in the form of an Austrian notarial deed.

The substance of the articles of association (whether in the form of a contract or a declaration) must include the corporate name of the GmbH, its registered office, the amount of share capital and the capital contributions of the shareholder(s). In addition, the articles of association usually contain rules on the term for which the company is set up (i.e., whether it is formed for a limited or unlimited amount of time), the date on which the company’s fiscal year ends, and the appointment and the powers of the managing directors as well as of those individuals holding a special power of *Prokura* (a special form of power of attorney). Where there are two or more shareholders, the articles of association frequently set forth detailed contractual terms governing the relationship between the shareholders in terms of rights of pre-emption with respect to the company’s shares tag-along and drag-along rights, termination and exclusion of shareholders for good cause, etc. In addition, the articles of association will often stipulate the types of transactions and measures for which the managing directors are required to obtain the consent of the shareholders or the supervisory board or advisory board, if indeed there is one. Shareholders of a GmbH may give directions to the managing director(s) by adopting an appropriate resolution. The shareholders’ right to give directions to the managing directors may be excluded or altered by the articles of association.

#### 2.1.3. Share capital: contributions in cash and in kind

The shareholder(s) must furnish capital to the GmbH (“share capital”) in an amount totalling at least € 35,000. The capital may be provided through contributions in cash or in kind. At least 25% of the cash contributions must be paid in, subject to a minimum of € 17,500. Shareholders may not receive credit for any services they perform in lieu of required cash contributions.

Cash contributions must be paid into an Austrian bank account of the company. Likewise, upon registration of the GmbH with the Commercial Register, a bank confirmation must be produced. Where the capital is to be contributed either exclusively or predominantly in kind, as a rule, the GmbH’s corporate formation must be reviewed by a court-appointed auditor.

<sup>4</sup> As to the punishability of money laundering as a crime, see § 165 of the Austrian Criminal Code (German acronym: StGB).

Measures intended to circumvent this formation audit (“concealed contributions in kind”) are not permitted in Austria and may give rise to liability on the part of the shareholder in question.

#### **2.1.4. Notification of the newly formed GmbH; registration with the Austrian Commercial Register**

In order to validly form a GmbH, one must register it with the Commercial Register or *Firmenbuch*. The managing director(s) must report the GmbH to the competent commercial court or regional court. The Austrian *Firmenbuch* corresponds to the German *Handelsregister*. The notification requires notarised signatures of all of the managing directors of the GmbH. The managing director(s) must also provide notarised specimen signatures to the court. In addition, the managing directors must deliver a declaration confirming that both the cash contributions and any contributions in kind are available to them for disposition without restriction. They furthermore are required to submit a confirmation by the company’s bank stating that all of the capital contributions have been paid in.

Where *Prokuristen* (authorised signatories) are appointed, their specimen signatures must likewise be filed with the Commercial Register court, together with a notarial certification.

Where a supervisory board is appointed during the formation phase (which, as a rule, is not necessary), the members of the supervisory board and the identity of the chairman and his deputy must be reported to the Commercial Register.

It is *not* necessary to furnish evidence to the Commercial Register court of the receipt of a trade licence. However, if the GmbH engages in banking business, it must obtain prior approval from the Austrian Financial Market Authority (FMA) and to submit this approval to the court at which the Commercial Register is located. The same applies where the formation of the GmbH simultaneously entails a merger for competition law purposes; in such case, the non-objection notice by the competent competition authority must be submitted.

#### **2.1.5. What types of business may a GmbH not transact?**

GmbHs may be used for nearly all legal types of business – including, but not limited to: commerce and trade, industry, retail and wholesale businesses and services.

However, it may not be used for pharmacies, pension funds, employee provision funds, mortgage banking business, private equity funds, political activities and the insurance business. By contrast, GmbHs may be used for trading as an insurance broker.

#### **2.1.6. Who may be a shareholder of a GmbH?**

Any natural person or legal entity (i.e. in particular, incorporated entities) and all registered partnership entities (such as OGs or KGs) and comparable foreign entities are eligible to become shareholders of a GmbH. It is not required for a shareholder to be an Austrian citizen or to have his domicile or place of residence in Austria. A GmbH may be formed by a single shareholder (one-person formation). That sole shareholder of the GmbH may also act as the GmbH’s (sole) managing director.

If a GmbH in Austria is formed by foreign entities, they must furnish evidence of their legal existence by a confirmation from the competent court or Chamber of Commerce; where such confirmation is not issued in German, a certified translation must be provided.

#### **2.1.7. Number of managing directors; who is eligible to be a managing director of a GmbH?**

A GmbH must have at least *one* managing director (except in the case of banks where at least two are required). The managing director represents the GmbH in all of its dealings with external parties and manages the company, which is the reason he is referred to as the “managing director” or *Geschäftsführer*.

Only natural persons may be appointed as managing directors. Legal entities (such as an AG or GmbH) or partnership entities cannot be appointed as managing directors, because that would allow individuals to manage a GmbH through the smokescreen of a legal entity and thereby avoid responsibility (i.e., liability to creditors and public authorities for compliance with the law).

The appointed managing director must also be of legal age and possess legal competence.

However, it is *not* necessary for the managing director to simultaneously be a shareholder. The managing director is likewise *not* required to have his ordinary residence in Austria.

Nevertheless, in urgent cases (where managing directors who are needed to represent the GmbH are not available), the court



may, upon application of an interested party (e.g. a business partner of the GmbH, a creditor, an employee or a public authority), appoint an “emergency managing director” who may be reached within Austria. To avoid this, it is advisable either to appoint a managing director or at least a *Prokurist* (authorised signatory) whose ordinary residence is within Austria.

### 2.1.8. Costs of formation

In connection with the formation of a GmbH, there are costs associated with preparing the articles of association and further documentation (registration with the Commercial Register, specimen signatures, etc.) and engaging the notary to prepare the notarial deed.

As a rule, the formation of an incorporated entity is subject to corporation tax at a rate of 1% of the capital contributions made. This tax must be paid to the Commercial Register prior to registering the GmbH. The court fees for entering the GmbH on the Commercial Register are, generally, between € 350 and € 500.

Under the Austrian Promotion of Start-Ups Act (German acronym: NeuFöG), in the case of a newly formed business, it may be possible to obtain an exemption from the corporation tax and court fees.

To ensure that the GmbH (and not the shareholder/s) bears the costs of formation, an appropriate provision should be included in the articles of association. A GmbH may bear the costs of formation up to a maximum of 10% of its share capital.

### 2.1.9. How long does it take to form a GmbH?

As soon as the notarial deed of formation has been executed by the shareholders and the application for registration with the Commercial Register has been signed by the managing director(s) and notarized, the capital contributions have been made and the corporation tax has been paid and all of the required documents are in place, registration of the GmbH with the Commercial Register will, typically, take one to two weeks.

It is possible to issue a notarised power of attorney for the formation of a GmbH.

With respect to official documents that are not in German, certified translations must be submitted.

### 2.1.10. Liability for transactions carried out prior to registration of the GmbH

Where the founders transact business in the name of the GmbH prior to its entry with the Commercial Register (e.g. a lease, commercial transactions, employment agreements, etc.), they bear personal liability. As a rule, the GmbH may ratify these transactions once it has been formed, but it must notify the counterparty to those transactions (landlord, party to the contract, employee) thereof within three months of its registration with the Commercial Register. Where formation of the GmbH fails or where the equity capital is lost either in part or fully prior to registration of the GmbH on the Commercial Register, the persons who performed the transactions on behalf of the GmbH (and in certain circumstances the shareholders) will continue to be personally liable.

### 2.1.11. Constitutive bodies of the GmbH

#### a) General meeting of shareholders as the top-level constitutive body of the GmbH

The top-level constitutive body of the GmbH is the general meeting of shareholders. The shareholders adopt resolutions either at the general meeting of shareholders or by written consent. However, it is also permissible for them to adopt resolutions of the shareholders orally, even tacitly.

The shareholders appoint the managing director(s) and conclude an employment agreement with each of them on behalf of the GmbH. They also have the right to adopt resolutions dismissing the managing director(s) and terminating their employment agreement(s). The shareholders furthermore adopt annual resolutions with respect to the discharge of the managing directors, which under Austrian law constitutes a waiver of any potential claims for identifiable compensatory damages.

As the top-level constitutive body, the general meeting of shareholders is entitled to take action in all matters involving the company. In particular, it may prescribe rules of procedure for the managing directors, issue binding directions and adopt approving resolutions on matters submitted to the general meeting of shareholders by the managing directors for a resolution (such an approval has the effect of discharging the managing directors from any potential claims with respect to the transaction in question). General meetings of shareholders must be held at least once per fiscal year, in each case during the first eight months of such year. This “ordinary general meeting of shareholders” has the purpose of reviewing and adopting the an-

nual financial statements, allocation of net profits, discharge of the managing directors and supervisory board (if any).

Further general meetings of shareholders may be held as needed, in particular in the event of poor business performance of the GmbH or where transactions are to be carried out requiring a consent resolution of the general meeting of shareholders. Pursuant to Austrian law, the managing director(s) and the supervisory board are competent to call general meetings of shareholders. The articles of association may also grant the shareholders a direct right to call a meeting. The notice period for the call of a general meeting of shareholders is eight days. Where all of the shareholders are in agreement, they may hold the general meeting of shareholders immediately (i.e., on an ad hoc basis), waiving all of the formalities of call and notice, or may adopt resolutions in writing by written consent. A copy of the resolutions the shareholders have adopted must be forwarded to each shareholder by registered mail without delay.

As the top-level constitutive body of the GmbH, the general meeting of shareholders also adopts resolutions on amendments to the articles of association, capital increases, capital decreases, mergers, spin-offs, conversion of corporate form and liquidation of the GmbH.

## b) Managing directors

One or more managing directors must be appointed as the body managing and representing the GmbH.

Managing directors are generally appointed by means of a notarised shareholder resolution. Shareholders may also be appointed as managing directors in the articles of association.

As a general rule, managing directors may be dismissed from office at any time without notice; any claims they may have under employment agreements are unaffected by any such dismissal. The articles of association may place restrictions on the dismissal of managing directors where they are simultaneously shareholders; however, in such case every other shareholder has the right to bring an action for a judicial dismissal of the managing director for good cause.

Managing directors are permitted to resign from office; a managing director may resign for good cause at any time; without good cause, the managing director must provide 14 days' prior notice.

The managing directors' authority to represent the GmbH is governed primarily by the articles of association. By default, the

managing directors represent the company jointly. However, the company may grant individual power of representation to one or more managing directors. In practice, it is customary to establish a "four eyes principle", by which the company may only be represented by two or more managing directors jointly or by a managing director jointly with a *Prokurist*.

**Duties and liability of managing directors:** The central role of the managing directors is to manage the company. In doing so, they are required to proceed in a manner that is commercially viable and preserves the company's interests. The managing directors must comply with all relevant provisions of law. By its nature, given the number and complexity of applicable rules, this duty entails a significant risk of liability for each managing director. In this connection we would mention the rules on book-keeping, financial statements, accounting, internal control systems, tax rules, trade law rules, employee protection rules, environmental rules, unfair competition law and competition law itself, etc. In the interest of the company's creditors, the managing directors must at all times keep up to date on the GmbH's financial condition, report it to the shareholders and, where applicable, initiate restructuring measures (where such measures have a prospect of success) or, in the event of insolvency or over-indebtedness, initiate insolvency proceedings (bankruptcy, reorganisation).

Managing directors must also comply with provisions of criminal law in connection with the management of the GmbH's business: for instance in the context of occupational accidents involving negligent injury to persons or death, harm to the environment and the like, even if the managing director is "merely" culpable in respect of a breach of his duty to monitor or bears mere organisational culpability. Other relevant criminal law provisions are those relating to fraud and bankruptcy crimes, criminal tax law and the like.

Every Austrian GmbH must keep complete books and accounting records and prepare financial statements. The managing directors are obliged to maintain a financial accounting system and internal system of controls in line with the requirements of the business. Within five months of the end of each fiscal year, they must prepare **annual financial statements** and a management report. Where the GmbH is a "parent company", the GmbH will, as a rule, also be required to prepare consolidated financial statements and a consolidated management report. Where the GmbH exceeds a certain size and is classified as a "mid-sized" or "large" incorporated entity or for other reasons must have a supervisory board, an annual audit of the financial statements by a licenced chartered accountant must be carried out.

As with all other incorporated entities, a GmbH must file its annual financial statements and management report (together with the proposal of the managing directors on appropriation of profits) with the Commercial Register no later than nine months from the end of the fiscal year. The documents so submitted are available for public inspection. The filing must be done electronically. In the case of small and mid-sized GmbHs, reliefs available regarding the annual financial statements to be submitted to the Commercial Register court; small GmbHs are generally required only to submit a summary balance sheet and summary explanatory notes to the accounts.

The law imposes liability on managing directors where they fail to exercise the care of a prudent businessperson (*Sorgfalt eines ordentlichen Geschäftsmannes*). This is relevant, in particular, for transactions where there has been a breach of law or breach of the duty of care; to the extent such liability is required in order to satisfy claims of the GmbH's creditors, not even a resolution by the shareholders approving the managing director's action nor any resolution discharging the director will eliminate his liability for breaches of his duty of care.

### c) Supervisory board

The Austrian GmbH Act (German acronym: GmbHG) does not generally require the GmbH as an incorporated entity to set up a supervisory board. Such an obligation applies only in particular cases. A duty to establish a supervisory board will typically arise where the number of employees of the GmbH exceeds 300 on an annual average. Other cases in which a statutory duty to install a supervisory board applies are of lesser importance in practice. A supervisory board or another constitutive body (such as an advisory board) may also be set up voluntarily.

The supervisory board of a GmbH must consist of at least three members selected or delegated by the shareholders. Members of the supervisory board must be natural persons.

#### **Employee co-determination on the supervisory board:**

Where a works council has been established at the GmbH or where the GmbH is a top-level group company, the works council or the group works council may delegate employee representatives to the supervisory board, subject to the so-called “one-third parity rule”, i.e. for every two members of the supervisory board appointed by the shareholders, one employee representative may be delegated; where the number of supervisory board members appointed by the shareholders is uneven, a further employee representative may be delegated.

The one-third parity rule also applies to committees set up by the supervisory board.

The role of the supervisory board is to oversee management, to review the annual financial statements and to furnish reports to the shareholders. Furthermore, the supervisory board must be consent to certain transactions of significance as contemplated by statute or the articles of association, such as on transactions involving the acquisition and sale of equity interests, businesses, real properties and investments. In such cases, the managing directors must obtain the prior consent of the supervisory board.

In contrast to the supervisory board of an Austrian *Aktiengesellschaft*, there is no competence vested in the supervisory board of a GmbH either to appoint and dismiss the managing directors or to approve the annual financial statements.

The law requires the supervisory board to meet at least four times per fiscal year (at quarterly intervals).

The members of the supervisory board of a GmbH are not required to have their domicile or ordinary residence within Austria, nor are they required to be Austrian citizens. There is no statutory rule as to whether it is permitted to hold meetings of the supervisory board abroad, and in cases in which employee representatives belong to the supervisory board this will presumably only be permitted where it is possible and reasonable for the employee representatives to travel to the meeting abroad and where the GmbH reimburses them for the expenses associated with this.

### **2.1.12. Dividends (profit shares)**

For reasons of creditor protection in respect of the GmbH, the GmbH may not distribute its assets to shareholders, whether openly or in a concealed fashion. It is only permitted to distribute shares of its profits based on the net profits shown in its annual financial statements.

### **2.1.13. Transactions between the GmbH and its shareholders within the corporate group**

A GmbH may enter into transactions with its shareholders or group companies, such as purchase and supply agreements, lease and licence agreements, etc. However, any such transactions must be on an “arm's length terms”. Situations that merit scrutiny from this perspective may arise where the GmbH grants loans to its shareholder (top-level group company) or to a peer-level group affiliate, or grants guarantees for the benefit



of its shareholders or affiliates, etc. Even cash pooling within a corporate group may be problematic from this perspective.

### 2.1.14. Shareholder loans to the GmbH

It is entirely permissible for shareholders to grant loans to the GmbH or assume liabilities (e.g. guarantees) for loan or leasing obligations of the GmbH. The GmbH may also pay arm's length compensation to its shareholders in exchange for this.

There are no statutory maximum limits on lending (loan-to-equity ratio), and neither are there thin capitalisation rules in Austria such as exist in some other countries. However, in extreme cases, the tax authorities may qualify loans as "hidden equity contribution" and treat the interest payable on such loans as not being deductible as an operating expense.

Where a loan or line of credit is granted during a crisis, i.e. at a point in time at which the GmbH is either overindebted or insolvent or where the parameters for a presumption of mandatory reorganisation are present under the Austrian Corporate Reorganisation Act (German acronym: URG), then as a rule the grant of the loan will be deemed a "substitution of equity" subject to the Austrian Equity Substitution Act (German acronym: EKEG). In the event of a grant of an equity-substituting loan the incorporated entity must not repay the loan or pay interest to shareholders until the crisis is resolved. In cases of insolvency, equity-substituting shareholder loans are not treated pro rata to claims of other creditors.

If the repayment prohibition is breached, both the recipient and the managing director will be personally liable.

## 2.2. Joint-stock company or *Aktiengesellschaft* (AG)

The second legal form of incorporated entity is that of the *Aktiengesellschaft* (AG). As a legal entity, the AG has independent legal personality and possesses rights and obligations of its own, and its shareholders will, as a general matter, bear no liability for the AG's obligations.

### 2.2.1. Formation of an AG

The statutory minimum share capital of an AG is € 70,000 and at least one quarter of it must be paid in at the time of forming the company. An AG may be formed by one or more natural persons or legal entities. Thus, one-person formation is permitted. Where only a single shareholder is present in the AG, that

shareholder must be identified by name in the Commercial Register.

The formation of an AG is more complicated than the formation of a GmbH in that, at the time of formation, the application for registration of the AG with the Commercial Register must be signed and notarised not only by the director(s), but also by all of the supervisory board members (of which there must be at least three) and of all of the shareholders. The formation document (approval of the articles of association) must be prepared in the form of a notarial deed. Powers of attorney in notarised form are permitted. The members of the AG's management board must provide notarised specimen signatures, certified by a notary.

The supervisory board appointed by the founders of the AG shall appoint the AG's initial management board by adopting a resolution.

Where the AG is formed not exclusively based on paid-in cash contributions, but also by contributions in kind (which are permitted), a court-appointed formation auditor must undertake a formation audit. Just as in the case of a GmbH, cash contributions must be paid into a bank account of the "AG in formation" and a confirmation from the bank must be submitted to the Commercial Register court.

For banking transactions, as well as the allocation of the costs of formation and the way they may be covered by the articles of association, we refer to what has been said above in respect of GmbHs and the approval by the Austrian Financial Market Authority (FMA) (see subsections 2.1.4. and 2.1.8. above).

The constitutive bodies of an AG are its management board, its supervisory board and the general meeting of shareholders.

### 2.2.2. Management board

The constitutive body that manages and represents the AG is its management board. Only natural persons (no legal entities) may be appointed as members of the management board. They must be of full legal age and possess full legal competence. Members of the management board are not required to hold any shares in the AG.

In managing the business of the AG, the management board is not subject to direction by the shareholders, in contrast with the managing directors of a GmbH. The members of the management board are appointed by the supervisory board for a limited term; the maximum term for which they may be appointed is

five years. The supervisory board is only able to dismiss members of the management board for good cause. Members of the management board may be reappointed upon expiry of their term of office.

### 2.2.3. Supervisory board

In contrast with a GmbH, a supervisory board is compulsory for every AG. The members of the supervisory board (of whom there must be at least three) are elected by the general meeting of shareholders; the articles of the AG may grant shareholders a certain degree of rights of delegation to the supervisory board. Elected members of the supervisory board are appointed for a maximum term of approximately five years. It is permissible to appoint members of the supervisory board for a shorter term, and members may be reappointed.

As with GmbHs, AGs are subject to employee co-determination in the form of the one-third parity rule on the supervisory board; for further information, we refer to our remarks regarding the GmbH above (subsection 2.1.11.c). As in the case of the GmbH, the supervisory board of the AG must meet at least four times a year. In certain cases, the supervisory board is obliged by statute to set up an “audit committee” to review the company’s annual financial statements. That committee then undertakes a special review of the annual financial statements prepared by the management board. If the supervisory board approves the annual financial statements, then they are deemed to have been adopted. In such case, the general meeting of shareholders is bound by the adopted annual financial statements.

### 2.2.4. Audit of annual financial statements and consolidated statements by the financial auditor

The annual financial statements and management report (and, where applicable, the consolidated financial statements and consolidated management report) for every AG must be audited by an independent chartered accountant. The annual financial statements must be submitted to the Commercial Register within nine months, at the latest, from the end of the AG’s fiscal year. In the case of a “large AG”, annual financial statements must also be published in the official gazette of *Wiener Zeitung*.

### 2.2.5. General meeting of shareholders

The general meeting of shareholders must be held at least once per year, within the first eight months of the year, for the purpose of presenting the annual financial statements, granting a

discharge to the management board and the supervisory board, adopting resolutions on appropriation of profits and appointing a chartered accountant to audit the financial statements. This meeting is referred to as the “ordinary general meeting”. Where necessary, it is also possible for additional “extraordinary” general meetings of shareholders to be held. The period of notice and call of an ordinary general meeting of shareholders is at least 28 days, and for extraordinary general meetings of shareholders the period is 21 days. The general meeting of shareholders is chaired by the chairman of the supervisory board.

All transactions between the AG and its shareholders must be entered into on an arm’s length basis. For further information on financing by shareholders, shareholder loans, interest on such loans and to equity-substituting shareholder loans, we refer to what has been said above regarding the GmbH.

## 2.3. European Company (Societas Europaea – SE)

### 2.3.1. Formation of an SE<sup>5</sup>

Since 2004, Austrian law knows the concept of a “European Company” (Societas Europaea – SE). We hereinafter refer to this type of incorporated entity as an **SE**. However, it is only possible to form an SE in certain limited circumstances: an SE may only be formed by “reorganisation” or where existing companies act jointly together to form it, specifically by merger, conversion of a national AG or the creation of a holding or subsidiary SE.

By contrast, it is not possible for an SE to be formed by natural persons or by companies that do not already have an existing business or that are domiciled in one and the same EU/EEA member state.

A foreign entity which itself has a subsidiary located in another EU member state may, however, easily establish an SE jointly with its Austrian subsidiary. The same applies if a foreign SE wishes to form a subsidiary SE in Austria.

### 2.3.2. Legal bases of an SE

An SE is based primarily on European law (SE Directive); in addition, it is governed by the Austrian SE Act (German acronym: SEG) and, subsidiarily, Austrian joint-stock company law. In terms of its legal character, an SE is a joint-stock company. However, in contrast to an Austrian joint-stock company, it is

<sup>5</sup> See *Reich-Rohrwig*, Societas Europaea-SE, Die Europäische Aktiengesellschaft (2006).

possible in the case of an SE to set up a monistic board comprising both managing and non-managing directors. Alternatively, there is the option of choosing the dual model of the Austrian *Aktiengesellschaft*, under which the management board is set up as the constitutive body with management authority and the power to represent the company, and the supervisory board is set up as a monitoring body. Where the SE chooses the monistic “board system”, the members of the board are elected by the general meeting of shareholders. Where, by contrast, the SE opts for the dual system, the general meeting of shareholders elects the members of the supervisory board and the supervisory board is, in turn, responsible for appointing and dismissing the members of the management board.

From a tax law perspective, an SE should be regarded as an incorporated entity subject to Austrian corporation tax.

## 2.4. General partnership or *Offene Gesellschaft* (OG)

The general partnership or *Offene Gesellschaft* (OG), which used to be called *offene Handelsgesellschaft*, is a type of partnership entity consisting of at least two physical persons or legal entities. Each of the partners in an OG bears personal, unlimited, direct and joint liability to the partnership’s creditors for its obligations. It is not possible to limit the partners’ personal liability to the OG’s creditors (unless there is an agreement to that effect in place with those creditors).

An OG may undertake any and all commercial, industrial, professional or agricultural and silvicultural activities and may be used for any other purpose permitted by law. Partnership entities (OGs, KGs) may not, however, engage in certain activities, such as those of insurance businesses, pension funds and employee provision funds.

In contrast to incorporated entities, OGs may be set up without any initial capital. An OG comes into legal existence as soon as it is entered in the Commercial Register. The filing must be made by all of the partners, by way of notarised signatures.

The OG possesses legal personality, and thus constitutes an independent entity with rights and obligations *vis-à-vis* external parties. For this reason, it must be legally distinguished from its partners.

Under Austrian law, an OG is classified as a form of partnership entity (and not as an incorporated entity); in terms of tax law, an OG is deemed a “partnership for tax purposes” as to which

income (profits/losses) is apportioned to the partners directly in proportion to their partnership interests (*Bilanzbündel* theory). The authority to manage and represent the OG is vested directly in the partners. Individual partners may be excluded from managing and representing the company either by contract or by court order.

However, the partners of an OG are not required to participate in the partnership’s -day-to-day operations: it is entirely permissible for them to engage business managers and grant them *Prokura* or special power of attorney to manage the affairs of the OG.

## 2.5. Limited partnership or *Kommanditgesellschaft* (KG)

### 2.5.1. General remarks

A further type of partnership entity is that of the Austrian limited partnership or *Kommanditgesellschaft* (KG). By contrast to an OG, in a KG not all of the partners bear full and unlimited liability for the partnership’s obligations. Rather, it is only required that there be (at least) one partner who – just as in the case of an OG – bears unlimited liability to the partnership’s creditors (“general partner”). The remaining partners have only limited liability *vis-à-vis* the creditors; they are referred to as limited partners or *Kommanditisten*.

The liability of each limited partner ends as soon as his limited partnership share (liability share) has been fully paid in. His liability is revived in the event that that share is refunded to him.

### 2.5.2. GmbH & Co KG

A special form of KG is that of the GmbH & Co KG: the characteristic of this corporate form is that its sole personally liable general partner is a GmbH. In the typical setup, the shareholders of the GmbH are simultaneously also limited partners of the KG.

In a typical GmbH & Co KG, sole managerial and agency authority over the KG is vested in the GmbH acting as the general partner. The GmbH, in turn, is represented by its managing director(s), such that the duty of the managing director(s) of the GmbH is/are to manage the affairs of the GmbH & Co KG and perform all related obligations. It follows that the managing director(s) of the general partner GmbH is/are liable to the creditors and the limited partners of the GmbH & Co KG for breaches of duty.

Given the way in which the liability of the various parties involved in a KG (which is premised on unlimited personal liability of at least one shareholder) is modified in the case of a GmbH & Co KG, the Austrian legislature, in many ways, has put the typical GmbH & Co KG<sup>6</sup> on the same footing as true incorporated entities: this relates in particular to the rules on creditor protection, and to those on annual financial statements and audits, the Austrian Corporate Reorganisation Act, the duty to file a petition of bankruptcy and the law governing equity substitution. For further information, we refer to the observations made above regarding the GmbH in subsection 2.1.11.b.

In practice, the GmbH & Co KG entity is usually selected for reasons of liability and tax law considerations.

## 2.6. Branches of foreign companies

### 2.6.1. General remarks

Foreign legal entities (**sole proprietors, partnership entities and incorporated entities**) may establish branches in Austria. This is not only an expression of the freedom of establishment under EU law (see also the EU Directive in respect of branches opened in a member state), but is an option that is available to every foreign legal entity, including those coming from non-EU countries (§ 12 of the Austrian Entrepreneurial Code or UGB).

Regarding the aspects of Austrian law on the employment of aliens and regarding the need to obtain a residence permit, see section III, subsection 3. In addition, the Austrian Joint-Stock Companies Act (German acronym: AktG) and the Austrian GmbH Act provide special rules on branches of foreign incorporated entities.

### 2.6.2. Registration of a branch with the Austrian Commercial Register

Austrian law requires Austrian branches of foreign legal entities to be reported to and registered with the Austrian Commercial Register; evidence of the valid existence of the foreign legal entity must be proven by means of official documents, for which a certified German translation must be provided.

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<sup>6</sup> in which there is no natural person in the role of general partner with agency authority.

### 2.6.3. Appointment of a permanent representative for the branch

Where the branch being established is that of a foreign joint-stock company or a limited liability company with its registered offices outside the EU/EEA, it must appoint a “permanent representative” for its Austrian branch. That representative must have his ordinary residence within Austria.

The permanent representative is authorised to represent the business entity both in and out of court. Limitations on the scope of the permanent representative’s agency powers are ineffective *vis-à-vis* third parties; however, it is certainly possible to limit his or her agency authority to the operation of the branch. It is also possible for two or more permanent representatives to be appointed who are only authorised to represent the branch jointly.

In cases of incorporated entities with their registered offices within the EU/EEA, there is, by contrast, *no* obligation to appoint such a permanent representative for the branch although they *are permitted* to appoint “permanent representatives” for that branch, as well.

### 2.6.4. No independent legal personality, liability, capital

A branch does not possess separate legal personality. All obligations and liabilities it incurs constitute obligations on the part of the foreign legal entity (business owner).

The branch likewise has no share capital of its own. However, the assets/capital which are/is allocated *de facto* to the branch are subject to Austrian corporation tax at a rate of 1%. However, this does not apply to foreign incorporated entities having their registered offices or headquarters within the EU; in this respect, an exemption applies.

### 2.6.5. Bookkeeping, tax reporting

For branches, there is an obligation to keep separate books and to file tax returns in Austria.

Branches of foreign incorporated entities are required to submit and disclose their annual financial statements in German to the Austrian Commercial Register court. The accounts must be prepared, audited and disclosed under the law governing the foreign incorporated entity (headquarters).

### 2.6.6. Details on registering the branch; filing changes with the Commercial Register

Where a foreign incorporated entity registers a branch with the Austrian Commercial Register, it must submit a notarisation by a public notary of the foreign company's articles of association to the Austrian court (with a certified translation into German, where required). Similarly, all of the entries and deletions on the foreign Commercial Register must likewise be entered in the Austrian Commercial Register. In practice, this requirement is often complicated and costly. The perceived benefit in terms of cost-effectiveness of establishing a business in Austria as a "branch" as opposed to an incorporated entity or partnership, which does not require allocation of any additional capital, is strongly offset by the disadvantages described above.

### 2.6.7. Is it expedient to form a Limited Company abroad and to establish a branch of that Limited Company within Austria?

In many cases, investors (even Austrians) will opt to form incorporated entities (Limited Companies) in countries in which there is no prescribed share capital or where the share capital required is significantly lower than that in Austria. These foreign "Limiteds" will then frequently establish a branch in Austria in order to do business in Austria without any minimum capital. However, the consequential costs of this are significantly greater if one considers that among other things two sets of annual financial statements (one for the branch governed by Austrian law, the other under the law of the company headquarters) have to be filed, as well as two tax returns, etc.

The Austrian market often mistrusts foreign limited companies, which in many cases creates its own set of disadvantages.

## 2.7. Private foundation

A private foundation is a legal entity (legal person) endowed by one or more founders with assets of at least € 70,000. The purpose of the foundation, which is determined by the founder, must be achieved through the use, management and dispositions over those assets. It is by no means required that the purpose of the foundation be charitable. Rather, it is permitted for the purpose of the foundation to be for gain, i.e. to convey financial benefits to one or more beneficiaries.

A private foundation has no owner, i.e. it is not possible to issue any shares in the private foundation. The equitable beneficiar-

ies of the private foundation are its designated beneficiaries. Beneficiaries of a private foundation may be natural persons or domestic and foreign foundations, as well as partnership entities and incorporated entities. It is not required that the deed of foundation stipulate who the beneficiaries are. Instead, this may be kept flexible by making appropriate provisions in the deed of foundation.

Whilst a private foundation is not itself permitted to operate businesses, it may hold shares in other businesses, in particular limited partnership shares, GmbH shares and joint-stock company shares. In this way, it may be used as a quasi-group holding company.

It is compulsory for a private foundation to have two constitutive bodies, the *management board*, consisting of at least three individuals, and a *foundation auditor*. In addition, where the number of employees of a private foundation or of its equity interest (group entities) exceeds 300, a *supervisory board* must be established.

Not only can natural persons be the founders of private foundations, but private foundations may also be founded by domestic and foreign incorporated entities, domestic and foreign foundations, etc.

An Austrian private foundation may be used not only as (intermediate) holding company as a tool for managing a business, it may also be used to govern commercial "universal succession" of a business.

In very general respects, the tax consequences for Austrian founders and beneficiaries are similar to those arising in the case of incorporated entities. However, in cases involving foreign elements, an in-depth analysis of the possible tax consequences must be carried out.

## Section II: Asset and share deals (M&A)

### 1. General remarks

Companies (businesses, corporate divisions) may be acquired as a whole by acquiring **all of its assets** (so-called asset deals) or – in economic terms – by **acquiring all of the shares** in the busi-



ness - the latter alternative is viable where the business belongs to a *company* or *co-operative* (so-called share deals).

The main advantage of an asset deal is that the purchaser is better able to legally protect himself from unknown or concealed liabilities or liability risks than in the case in which he acquires the business by purchasing the shares in the company. The advantage of a share deal lies primarily in the fact that it is easier to preserve the contractual relationships pertaining to the business because the sale of all of the shares in the company will ordinarily not entitle the counterparties of the company to prematurely terminate contracts unless there are so-called change-of-control clauses in place or unless there is – exceptionally – some other good cause present which would make it unreasonable to require the counterparty to continue to adhere to the business's contractual relationships (long-term obligations).

## 2. Asset deals

In cases of asset deals<sup>7</sup> the buyer acquires the individual assets of a business separately. Under Austrian law, this is known as “singular succession”. This can cause problems in particular for transferring contracts to the party acquiring the business because, as a rule, for the contract to be validly transferred, the consent of the parties to the contract would be required under Austrian civil-law principles.

In the realm of landlord-tenant law, an asset deal (but also a share deal) can cause the landlord under certain circumstances to be entitled to raise the previous rate of rent for the rented premises to a market level (this applies only to tenancies in “old structures”)<sup>8</sup>.

<sup>7</sup> As to asset and share deals, see

*Reich-Rohrwig*, Unternehmens- und Anteilsübertragung aus zivil- und gesellschaftsrechtlicher Sicht in Unternehmensnachfolge, published by Bank Austria (1999) 10 *et seq.*;  
*Reich-Rohrwig*, Rechtsfragen beim Unternehmenskauf und Beteiligungserwerb in *Hanzel/Wunderbaldinger* (eds), Mergers & Acquisitions in Austria (1993) 243 *et seq.*;  
*Reich-Rohrwig*, Gewährleistungsfragen beim Anteilskauf, *ecolex* 1991, 89 *et seq.*, jointly with Dr. Thiery;  
*Reich-Rohrwig*, Haftung des Käufers einer Beteiligung in *Bertl/Mandl/Mandl/Ruppe* (eds), Kauf und Verkauf von Unternehmungen (1992) 91 *et seq.*;  
*Reich-Rohrwig*, Auslegung und Reichweite von Bilanzgarantien, in *Althuber/Schopper* (eds), Handbuch Unternehmenskauf (2010) 387 *et seq.*;  
*Reich-Rohrwig*, M&A: Auslegung von Kaufpreisanpassungs-, Earn-out- und Besserungsklauseln, *Festschrift für F. Rödler* (2010) 763 *et seq.*

<sup>8</sup> On this point, see *Reich-Rohrwig*, Mietzinserhöhung bei Geschäftsraum-Hauptmiete (1994).

Under Austrian law, buyers may bear liability for obligations which belong to the sold business. The liability rules are found in various statutes (Austrian Entrepreneurial Code or UGB, Austrian Civil Code or ABGB, Austrian Social Insurance Act or ASVG, Austrian Federal Tax Code or BAO, and the Tax Codes of the Austrian federal states). Some of these liabilities are mandatory, whereas in other cases they may be disclaimed by agreement between the buyer and seller and the registration of a notice with the Commercial Register.

## 3. Share deals

In the case of an asset deal (purchase of partnership shares in an OG or KG; purchase of the shares in a GmbH or a co-operative; purchase of shares of stock in an AG), the buyer acquires shares in the “legal entity”, i.e. in the firm that operates the business. Where the buyer acquires all of the shares or the majority of the shares, the buyer is placed in a situation enabling him to manage or control that business following the acquisition.

In the case of acquisition of a controlling interest in an *exchange-listed Aktiengesellschaft*, the Austrian Takeover Act (German acronym: ÜbG) provides for special rules regarding a duty to make a tender offer to all of the company's shareholders (see subsection 4 below).

In light of the fact that the buyer will ordinarily be interested in more closely scrutinising the object of sale, the buyer himself will conduct a due diligence review with the support of advisors. In the context of that review, the legal, tax, commercial, business, technical and environmental aspects of the object of sale will be scrutinised. The legal position in this respect is complex: the buyer will, *per se*, have claims based on warranty, breach of duties of information, claims to challenge a sale for error and claims for damages if the company the buyer acquires does not live up to the warranties given or the qualities which are ordinarily presumed or if the buyer was misled in any way. However, these rights of the buyer are usually modified, limited or disclaimed in the share purchase agreement. For this reason, it is advisable to consult an experienced, reputable law firm when conducting contract negotiations and any due diligence review.

## 4. Austrian corporate takeover law

A party wishing to acquire a direct or indirect “controlling interest” in an *exchange-listed Aktiengesellschaft* has an obligation under the Austrian Takeover Act (ÜbG) to notify the Austrian

Takeover Commission of its intention to do so without delay and to launch a public “mandatory tender offer”. There is a double statutory lower limit on mandatory tender offers: the offer price may not be lower than either the average share price over the last six months or the highest price paid by the bidder for shares in the target company within the last twelve months.

Regarding the definition of “**controlling interest**”: as a general matter, there is a presumption of a controlling interest when a stake of more than 30% of the voting capital in a company is acquired. In such case, the buyer is obliged to make a public mandatory tender offer.

However, there are exceptions to this obligation, specifically

- where the greater than 30% stake is incapable of vesting control, specifically because
  - there is, for example, another shareholder with a larger stake [e.g. 51%] of the voting shares,
  - there is a formal change of control, but that change of control is not material because, for example, the transfer occurs within a corporate group, or
- where the acquisition is being made as part of an effort to rescue a company in distress.

A “*group of legal entities acting in concert*” (members of a corporate syndicate) which – in the aggregate – acquires a controlling interest is likewise subject to the duty to make a tender offer under the Austrian Takeover Act. Major restructurings within such groups may likewise trigger a duty to make a public tender offer.

The goal of the Austrian Takeover Act is to afford sufficient protection to the remaining shareholders in the target company, to adhere to the principle of equal treatment of shareholders, to provide them with sufficient time and information in order to enable them to make an informed decision as to whether they wish to accept the takeover bid or not. In the same way, it is intended to prevent market distortions on the stock exchange in respect of the traded securities.

Consistent with the European Takeover Directive, the Austrian Takeover Act, firstly, imposes detailed obligations on the bidder, and secondly, imposes duties on the management board and supervisory board of the target company during the takeover process.

In light of the complexity of the bidder’s obligations and the rules to be complied with under the Austrian Takeover Act (in particular duties of confidentiality and disclosure to avoid market distortion and to prevent abusive insider information),

the bidder in takeover proceedings will ordinarily make use of a reputable law firm<sup>9</sup>. There is a statutory requirement to consult an expert (chartered accountant or bank) on takeover procedures, both on the part of the bidder and on the part of the target company.

## 5. Merger control

### 5.1. Austria

Just as in most of the EU member states and the EU itself, the acquisition of businesses and equity interests is subject to merger control under competition law. The goal of merger control is to prevent a market-controlling position from arising or to prevent one which already exists from becoming strengthened as a result of the merger. In the realm of “media mergers”, another goal is to preserve media plurality.

Based on the relevant laws, “merger control” will apply *inter alia* both to the acquisition of businesses and to the acquisition of shares (stock) constituting a least 25% of the capital of the target company, if the business/target company being purchased, and the buyer, exceed certain defined turnover thresholds. Where other shareholders retain a stake in the target company of at least 25%, their turnover will also be taken into consideration. What matters in each of these cases is the turnover during the most recent fiscal year; turnover of corporate affiliates is aggregated.

**Under Austrian merger control law**, pursuant to § 9 (1) of the Austrian Competition Act (German acronym: KartG), the following **turnover thresholds** have to be cumulatively met for a merger to trigger “reporting obligations”:

turnover of all affiliated entities worldwide is more than	€ 300 million
turnover of all affiliated entities within Austria is	€ 30 million
and global turnover of each of at least two affiliated entities is more than	€ 5 million

**Exception:** there is an exception for mergers where the companies involved achieved the following revenue figures in the last fiscal year prior to the merger:

1. only one of the affiliated entities had more than € 5 million in turnover

<sup>9</sup> For further details, see *Peter Huber* (ed.), *Kommentar zum Übernahmegesetz* (2007).

2. the remaining affiliated entities had global aggregate turnover of not more than € 30 million (§ 9 (2) of the Austrian Cartel Act).

Under § 9 (3) of the Austrian Competition Act, lower turnover thresholds apply to **media entities** and **media services** (such as publishing companies, news agencies) and to **media sector auxiliary business** (e.g. printing businesses, advertising agencies, film distribution companies).

If the above-referenced turnover thresholds under § 9 (1) of the Austrian Competition Act are exceeded, there is a requirement to register the merger with the Austrian **Federal Competition Authority**. Within four weeks from the date of registration, the Federal Competition Authority and the Federal Competition Prosecutor may apply to the Competition Court (Kartellgericht) to review the merger.

Prior to approval of the merger, the share or asset deal may not be completed.

If the target company and/or the buyer or another entity holding a stake in the target company itself operate abroad or hold corporate group companies located abroad, then under certain circumstances it may *also* be necessary to perform further merger applications abroad.

## 5.2. Merger control in the European Union – MR

Where a **merger has “community-wide significance”** within the **EU** or within the **EEA**, then in lieu of Austrian merger control (and any accompanying merger control of other EU member states which may apply), the merger will be covered by the merger control rules under the **EC Merger Control Regulation (MR)**<sup>10</sup>. The EU authority with jurisdiction over such proceedings is the **European Commission** in Brussels.

In addition to other differences, which we will not go into any further, the MR provides, above all, significantly higher turnover thresholds before “community-wide significance” of the merger is assumed. There are two variants of these threshold values, and merger control under the MR will apply if the thresholds of *only one* of these two alternatives are met.

However, **no jurisdiction** is vested in the European Commission under the MR (on either variant model) if the entities involved in the merger each **derive more than two-thirds of**

**their community-wide aggregate turnover within one and the same member state.**

The thresholds under the MR are:

### Test I:

- a. Global total turnover of all entities involved in the merger equals, in the aggregate, more than € 5 billion, and
- b. community-wide total turnover of each of at least two entities involved in the merger equals more than € 250 million.

### Test II:

- a. Global total turnover of all entities involved in the merger equals, in the aggregate, more than € 2.5 billion,
- b. total turnover of each of all of the entities involved in the merger in at least three member states exceeds € 100 million,
- c. in each of at least three of the member states covered by subsection b, the total turnover of each of at least two entities involved in the merger is more than € 25 million, and
- d. the community-wide total turnover of each of at least two entities involved in the merger exceeds € 100 million.

As noted, under the MR, as a general matter, jurisdiction over European merger applications is vested in the **European Commission** in Brussels; however, under certain circumstances, the European Commission may delegate merger applications to the national competition authorities.

## 6. Approval requirements for acquiring equity interests in banks, stock exchanges and the like

There is special legislation imposing further duties to obtain approval where a party performing a purchase or a sale of shares in **banks** meets, exceeds or falls short of certain equity ratios (10%, 20%, 30% or 50% of the bank’s capital) (§ 20 of the Austrian Banking Act – German acronym: BWG) or where Austrian banks acquire equity interests in banking institutions in non-EU countries (§ 21 of the Austrian Banking Act).

The thresholds applicable in the case of **stock exchange** companies are 10%, 20%, 33% or 50% of the voting rights or capital in the stock exchange company (§ 7 of the Austrian Stock Exchange Act – German acronym: BörseG).

Approval in each such case must be obtained from the Austrian Financial Market Authority (FMA).

<sup>10</sup> Council Regulation No. 139/2004 of 20 January 2004, OJ L 24 of 29.1.2004.



In the case of **gambling enterprises**, any direct disposition over the shares in a concessionaire company during the term of the gambling concession is subject to the prior approval of the Austrian Federal Ministry of Finance. In addition, in the case of lotteries and casinos, the concessionaire requires the approval of the Federal Minister of Finance (FMF) if the concessionaire wishes to acquire a “qualified stake” in another entity whose annual financial statements will be incorporated into the consolidated financial statements of the concessionaire under § 244 of the Austrian Entrepreneurial Code (UGB). Furthermore, the concessionaire is required to provide written notice without delay to the FMF of every case in which it exceeds the 25% threshold of voting rights or capital in a direct or indirect stake. The FMF may demand that the concessionaire divest such a stake within a reasonable time where it is anticipated that the stake will impair the income of the federal government from concessions or gambling taxes (§§ 15, 18 and 24 of the Austrian Games of Chance Act – German acronym: GSpG).

There are furthermore approval and notice obligations with respect to private radio and television companies under § 15b and § 22 of the Austrian Private Radio Act (German acronym: PrR-G) and pursuant to §§ 10, 25 and 25a of the Austrian Audiovisual Media Services Act (German acronym: AMD-G).

## 7. Duty of third-country nationals to obtain approval in cases of acquisitions in sensitive sectors

### 7.1. Acquisitions of entities relating to “public security and order”

Following the example of Germany, under the Austrian Foreign Trade Act 2011 (German acronym: AußWG 2011), Austria has issued special rules for acquisitions of companies and stakes in companies by “**third-country**” **purchasers** in respect of companies operating in any sector relating to “**public security and order**”. **Third-country purchasers** are defined as persons (natural persons and legal entities) who are neither nationals of the EU nor nationals of Switzerland, Liechtenstein, Norway or Iceland.

Under this statute, acquisition of companies, significant stakes in companies or the acquisition of a controlling stake in companies may, under certain circumstances, be subject to approval by the Austrian Federal Minister of Economics, Family and Youth (“Ministry of Economics”).

The approval requirement covers the acquisition of incorporated entities (including GmbH & Co KG and the like) as well as all other entities having annual turnover of more than € 700,000, where the entity in question operates in a business sector relating to “public security and order”. These include, in particular, entities in the following industries:

- defence goods,
- security services,
- hospitals, emergency and first-response physician services,
- fire brigades and disaster management,
- energy providers (electrical power, gas),
- water providers,
- telecommunications,
- public transport (railways, aviation, navigation, federal roads),
- universities, polytechnics, etc.

The acquisition of an equity interest in any of these types of entities will be subject to approval by the Ministry of Economics where the buyer would hold at least 25% of the voting rights following the completion of the acquisition. Equity stakes of buyers who are acting in concert are aggregated. The approval requirement relates to **direct** acquisitions by third-country persons. In addition, **indirect** acquisition processes by third-country nationals are covered if there are well-founded suspicions that the approval requirement is being circumvented and that Austria’s interests in respect of public security and order are being put at risk. In such case, the Minister of Economics is required to impose an approval requirement *ex officio*.

### 7.2. Direct and indirect acquisitions; acquisition of a controlling stake

While the legislature has excluded immaterial cases from the approval requirement, it does, on the other hand, expressly subject certain indirect acquisitions to approval. The catch-all rule relating to *acquisitions of a controlling stake* subjects even indirect corporate acquisitions (such as those undertaken via a foreign holding company) and unusual contractual terms (for example where the majority of voting rights are granted to a minority shareholder holding a 24% stake) to the approval requirement.

### 7.3. Application for approval

The application for approval to the Ministry of Economics must describe, among other things, the business activities of the entity and the planned acquisition process. An application for approval must be submitted prior to the conclusion of the contractual agreement on the acquisition or, in the case of a public tender offer, prior to notification of the decision on submitting a public tender offer.

The Austrian Minister of Economics must issue a decision within one month from the date of receiving the application stating either that it has no objections to the acquisition or that a more detailed review procedure is to be carried out. In the latter case, the Minister of Economics must, within two months' time, either approve the acquisition or – where there is a concern that it poses serious risks to substantial interests of “public security and order” – approve it subject to conditions or refuse it. Where no decision is rendered within these periods, the acquisition is deemed to have been approved. In respect of indirect acquisitions, only the two-month period applies in respect of *ex officio* proceedings.

## 7.4. Legal consequences

There are legal penalties on completing an acquisition without observing the approval procedures, for breaching conditions that have been imposed and for obtaining an approval by stealth by making false or incomplete statements. The scope of penalties include custodial sentences of up to 3 years or, in cases in which the crime is committed as part of a commercial enterprise or where it is committed by means of forgeries of official documents and data or by means of another falsified piece of evidence, custodial sentences of six months up to 5 years, and in cases of criminal negligence, custodial sentences of up to 1 year or a fine of up to 360 daily rates. A breach of the duty to obtain official approval also results in the acquisition in question being invalidated.

In M&A transactions, this approval requirement plays a central role in many cases, particularly in light of the criminal and civil consequences imposed.

# Section III: Employment law, alien employment authorisation

## 1. Basics of Austrian employment law

Employment law is the area of the law pertaining to those working for gain on a non-independent basis, i.e. employees. Traditionally, employment law is broken down into individual and collective employment law. **Individual employment law** refers to the bilateral relationship of the parties to an employment agreement (employer and employee) i.e. the employment agree-

ment. **Collective employment law** covers, in particular, the law pertaining to collective agreements and works constitutions.

## 2. The employment agreement

As a general principle, employer and employee may negotiate the content of the employment agreement on a private contractual basis. However, the applicable statutes and collective agreements often prescribe minimum standards (e.g., in the case of minimum wage, overtime supplements, maximum permitted working hours, annual leave) that may not be departed from to the detriment of the employee.

As a general principle, there is no particular form prescribed for concluding an employment agreement. An employment agreement may be made orally, in writing or implicitly by action. Where a contract is made only orally, a notice of employment (*Dienstzettel*) must be issued. A notice of employment is a confirmation of the material rights and obligations arising out of the parties' employment agreement.

## 3. Foreign employees

### 3.1. General remarks

For reasons of labour market policy, employment of (non-EU) aliens in Austria is subject to various restrictions and controls under the Austrian Employment of Aliens Act (German acronym: AuslBG). As a basic principle, all persons are deemed **aliens** if they do not possess Austrian citizenship.

An entrepreneur in Austria may only employ an alien if an **employment authorisation** or **secondment authorisation** has been issued for that employee or if a **confirmation of notice** or an **EU secondment confirmation** (for seconded aliens; see also subsection 3.4) has been issued or the employee holds a valid **work permit** or **exemption certificate**. The public authority in which jurisdiction is vested is the regional office of the Austrian labour market service (German acronym: AMS).

**Exceptions:** The Employment of Aliens Act does not apply to employment of EU/EEA citizens (with an exception currently still applicable to *Romania* and *Bulgaria*).

In addition, the following types of individuals are, in particular, exempted from the Employment of Aliens Act: refugees, spouses and children of Austrians or EU/EEA citizens, of certain management-level staff or of employees in diplomatic/consular

missions or aliens to whom the status of a so-called “*person eligible for subsidiary protection*” has been granted.

Based on the EU Association Agreement with *Turkey*, relief is available for the extension of employment permits for Turkish employees employed legally for a least one year or for the first-time issuance of an employment authorisation for that employee’s family members.

### 3.2. Key workers

There is a special (facilitated) authorisation option up to a maximum of one year for **key workers** who have a particular education which is in demand on the Austrian labour market or who possess special knowledge, skills and experience.

### 3.3. Red-white-red card

The introduction of the **red-white-red card** on 1.7.2011 created a new, flexible system of immigration in Austria. The aim of this measure is to enable qualified workers from outside the EU, as well as their family members, to migrate to Austria on a permanent basis, pursuant to criteria that apply both in individual respects and in line with labour market policy. The red-white-red card is issued for a twelve-month period and grants an authorisation for temporary residence and employment with a specified employer. Especially highly qualified persons, specialists in occupations in short supply, other key workers, graduates of Austrian universities and self-employed key workers may apply for the red-white-red card. The most important criteria governing the grant of a red-white-red card are qualifications, professional experience, age, language skills, a firm job offer and a particular minimum level of compensation that depends on the qualifications of the worker.

For specialist workers in fields that are in short supply, the minimum salary under law, regulation or collective agreement must be paid. Other key workers must earn a minimum gross salary of 50% (for those under the age of 30) or 60% (for those over the age of 30) of the monthly ASVG maximum contribution basis (since January 1, 2013, this amount has been € 4,040) plus bonuses. University graduates must earn a monthly gross salary that is customary in the local market and which equals at least 45% of the ASVG maximum contribution basis, plus bonuses.

The authority issues two types of red-white-red cards: Firstly, there is the **ordinary red-white-red card**, which constitutes authorisation to reside in Austria and be employed with a particular employer.

Secondly, there is the option of obtaining a **red-white-red card plus**, which conveys residence authorisation and *unlimited* access to the labour market. The “red-white-red card plus” is issued to the holder of a red-white-red card if that person was employed for at least 10 months during the previous twelve months subject to the conditions applicable to the grant of authorisation, as well as to family members of holders of a red-white-red card, blue EU card or to family members of aliens who are already permanent residents, following a review by the AMS and the competent alien residents authority (district council authority/municipal authority; in Vienna: municipal department 35).

### 3.4. Secondment of foreign employees to Austrian construction sites

Foreign employees employed by a foreign employer who lacks an office within the Austrian federal territory (e.g. on a construction site) will, as a general matter, require **employment authorisation**. Where the works being performed do not last longer than six months, aliens will require a **secondment authorisation**, which may not be issued for longer than a four-month period.

No employment or secondment authorisation is required for work that is short-term, provided it is not possible to make use of employees from the domestic market (e.g. business meetings, visiting trade fair events and conferences).

## 4. Compensation (salary, wages)

### 4.1. Minimum wage levels

The amount of compensation the employer must pay to the employee is governed primarily in accordance with the parties’ contractual agreement. There is no statutory minimum wage in Austria. However, there are collective agreements (= tariff agreements) which provide for a “minimum wage level” in major industry sectors and which employers must meet or exceed due to the relatively compulsory effects of these collective agreements.

One Austrian idiosyncrasy is the fact that, for tax optimisation reasons, salaries are generally paid out in fourteen instalments (monthly – i.e. twelve times per year, plus one special bonus each for annual leave and Christmas).

## 4.2. Prevention of wage dumping

There are numerous statutory rules, such as those under § 7 of the Austrian Act Amending the Law Governing Employment Agreements (German acronym: AVRAG), which prescribe a minimum wage level for employees who are actually employed in Austria by employers without any business offices within Austria or within an EEA member state. This is intended to prevent wage dumping. Cross-border temporary employment from non-EEA countries is subject to the terms of § 16 of the Austrian Temporary Staff Act (German acronym: AÜG). The hiring party (employer) must obtain an additional permit (in addition to employment authorisation under the Employment of Aliens Act). § 10 of the Temporary Staff Act ensures that temporary staff will receive the collective agreement wage paid in the employer's business and will be covered by the working time rules applicable to that business under the applicable collective agreements.

## 4.3. Employees from the new EU member states

As of May 1, 2011, the transitional periods applicable to employees from the new EU member states expired. Since that time, employees from those member states (with **the exception** of *Bulgaria* and *Romania*) enjoy free access to the Austrian labour market. In order to avoid wage dumping due to the prevailing pay gaps, since May 1, 2011, the Austrian **Combating Wage and Social Dumping Act** (German acronym: LSDB-G) has been in force. The Combating Wage and Social Dumping Act authorizes public authorities to check the prescribed wages and salaries. In the event of non-compliance, severe sanctions are imposed: the scope of penalties for wage dumping ranges from € 1,000 to € 10,000 per employee. In the event of repeated wage dumping offences, a higher range of penalties applies.

For employees from *Bulgaria* and *Romania*, the restrictions on freedom of movement of workers codified in the Employment of Aliens Act will remain in force until December 31, 2013. Austrian employers must obtain an employment authorisation from the Labour Market Service in order to employ Bulgarian and Romanian citizens.

## 5. Annual leave

Employees are entitled to uninterrupted paid leave during the annual leave year. The period of annual leave is 30 business days (Monday to Saturday) and increases to 36 business days after 25

years of service. Entitlement to annual leave lapses 2 years after the end of the annual leave year in which it accrued.

## 6. Working time

The normal daily working time is 8 hours, and the weekly normal working time may not exceed 40 hours. However, several collective agreements prescribe a reduced weekly normal working time (such as the collective agreement for retail workers and the IT collective agreement, at 38.5 hours per week).

A collective agreement may permit a daily normal working time of 10 hours but it is generally not possible to extend the weekly normal working time. Where normal working times are exceeded, this will give rise to a claim for an overtime bonus, which is generally 50% of the base remuneration.

However, Austrian working time law provides a host of options for allocating normal working time differently than envisaged by law in order to adapt working time to business needs by way of derogating from the above-referenced less flexible limits, thus avoiding overtime which is subject to mandatory salary supplements. Typically, collective agreements contain detailed rules on different working time allocations of normal working time. Thus, for example, the collective agreement for the retail sector, the collective agreement for industry, the collective agreement for commercial trades and the IT collective agreement provide the option of aggregating weekly normal working time and averaging it out over a longer reference period.

The absolute maximum limits on working time are:

- daily working time: 10 hours
- weekly working time: 50 hours

However, there are further restrictions that apply within those maximum limits: working time may (only) be extended by 5 overtime hours per week where there is an increased need for staff (a collective agreement may permit up to 5 and, in particular cases, up to 10 further overtime hours) and, in addition, by no more than 60 overtime hours within any calendar year. Finally, no more than 10 overtime hours in total are permitted each week.

## 7. Termination of employment agreement (notice, dismissal)

### 7.1. Termination of employment by notice

“Termination by notice” is the unilateral, ordinary termination of employment which complies with notice periods and dates. As a general rule, no particular grounds of termination are required. Particular rules apply to certain groups of employees, such as disabled persons afforded special recognition, staff representatives, pregnant women, employees who have taken part-time parental leave, etc.

### 7.2. Challenging a notice of termination

Notwithstanding the foregoing, one must not overlook the fact that under the general protections against unfair termination under § 105 of the Austrian Works Constitution Act or ArbVG (which applies to businesses with at least 5 employees, even where no works council has been appointed), an employer will bear an onerous duty of providing justifications for terminating an employee. In such businesses, the employee himself or the works council may *challenge* notices of termination and dismissals *for incompatibility with social policy* where the works council has not expressly consented to the notice of termination.

Grounds justifying notice of termination by the employer include **grounds which relate to the identity of the person being terminated**, where such aspects are disruptive to the carrying on of the business (e.g. conduct that contravenes instructions given, incompatibility, lack of punctuality, etc.) or **organisational reasons** (e.g., changes in the economic environment; restructuring measures; closure of business units or entire departments; headquarter relocations, etc.) entailing redundancies in workforce.

Overall, it should be noted that, in respect of terminations by employers, Austrian employment law is significantly more liberal than that of many other European employment law systems (e.g., Germany, France, Italy).

### 7.3. Social plan in favour of employees

Where a business change (e.g. in connection with staff redundancies) entails material disadvantages to all or significant sections of staff, under § 109 (3) of the Works Constitution Act “*measures to prevent, eliminate or attenuate such consequences may be governed by works council agreement*” in businesses employing at least 20 members of staff on a permanent basis. Where no

agreement is reached between the owner of the business and the works council with respect to conclusion, amendment or rescission of any such works agreement (“*social plan*”), the mediation office (*Schlichtungsstelle*) will issue a ruling upon application of one of the parties to the dispute.

### 7.4. Termination of employment without notice (dismissal, resignation)

Just as in the case of any other long-term contractual relation, an employment agreement may be terminated not only by ordinary notice of termination, expiry of its fixed term or by rescission by mutual agreement, it may also be terminated prematurely with immediate effect for good cause. Where the employer terminates the employment for good cause, one speaks of *dismissal* (without notice), where this is done by the employee one speaks of (premature) *resignation*. Good cause entitling an employer to dismiss an employee or an employee to resign is met where the relevant party could not reasonably be expected to adhere to that contract until the termination notice period expires.

## 8. Distinction between wage earning employees and salaried employees

Austrian employment law furthermore makes a distinction between *salaried employees* and *wage earning employees*. Salaried employees within the meaning of the Austrian Salaried Employees Act (German acronym: AngG) are employees performing commercial work, other higher non-commercial services or work within a professional firm for a merchant or an entrepreneur who is the equivalent of a merchant. Any person not meeting these conditions is deemed to be a wage earning employee.

This distinction between *wage earning employees* and *salaried employees* is relevant in particular in light of notice periods and termination dates, the length of time that compensation continues to be paid in the event of illness and the grounds of unfitness for work rooted in an employee’s personal situation.

## 9. Works constitution

The Austrian Works Constitution Act (German acronym: ArbVG) prescribes that, as a general rule, two constitutive bodies of co-determination and representation of employee interests may be appointed/called in every business (with 5 employees or



more): these are the *works council* and the *general staff meeting*. As the constitutive staff body, the works council has comprehensive responsibility for representing the commercial, social, health-related and cultural interests of the company staff. The staff representational bodies are supposed to perform their activities wherever possible without disrupting the business.

The authorities of the works council may be broken down roughly as follows:

- Involvement in social matters, in particular by entering into works council agreements.
- Involvement in human resources matters, in particular in respect of employment termination (general protection against unfair termination).
- Involvement in commercial matters, in particular co-determination within the supervisory board of an AG or GmbH (see section I, subsection 2.1.11.c, above) (“one-third parity rule”).

## 10. Collective agreements

Collective agreements (referred to in Germany as “*Tarifverträge*” and in Switzerland as “*Gesamtarbeitsverträge*”) are agreements made in writing between employer entities competent to make collective agreements (e.g. the Austrian Economic Chamber or *Wirtschaftskammer Österreich* – WKÖ) and employees (Austrian Trade Union Confederation or *Österreichischer Gewerkschaftsbund* – ÖGB). Their regulatory effect is similar to that of a statute. Minimum working conditions set out in collective agreements must be met or exceeded.

The significance of collective agreements lies in the balancing of interests between employees and employers across companies and businesses by establishing minimum labour conditions which must be met or exceeded. Wages and salaries are increased at regular intervals (usually annually) by amendments to the collective agreements. On a case-by-case basis, additional terms are agreed, e.g. dirty-work or hardship bonuses. Generally, collective agreements also provide for annual leave bonuses and a Christmas bonus (so-called 13<sup>th</sup> and 14<sup>th</sup> salary instalments). In addition to compensation, collective agreements cover other material terms of employment such as working time, entitlements to unpaid leave or termination dates/notice periods.

## Section IV: Trade licensing and other approval requirements

### 1. Trade licence

#### 1.1. General remarks

In order to carry on a trade, both sole proprietors as well as partnership entities and incorporated entities require a trade licence.

By contrast, no Austrian trade licence is required where EEA nationals and companies with their registered office within the EEA (and this applies to a limited extent also to Switzerland), holding a relevant license in their country of origin, render services in Austria on a temporary and only occasional basis.

“Trade” is an independent, regular activity carried on with the intention of deriving an economic benefit. Agriculture and silviculture, artists and certain other professions covered by special laws (e.g. professional activities, banking business) are exempted from the scope of the Austrian Trade and Industry Regulation Act 1994 (German acronym: GewO). Activities covered by special statutory rules are likewise subject to approval requirements (e.g. banks, insurance providers, pension funds and the like).

#### 1.2. Conditions precedent to the grant of a trade licence

For sole proprietors, the condition precedent to obtaining a trade licence is holding the citizenship of Austria, an EEA convention state or Switzerland.

An entrepreneur who is a national of a non-EEA country may be granted a licence to carry on a trade if this is covered by an international treaty that provides for reciprocity or where he furnishes evidence of a residence permit for Austria entitling him to carry on a trade.

As a condition precedent to carrying on a trade in Austria, foreign partnership entities or incorporated entities must furnish evidence of the establishment of a branch registered with the Austrian Commercial Register (see section I, subsection 2.6., above).

A further condition precedent to the grant of a trade licence is that there are no grounds precluding the grant of the licence (e.g. tax offences, convictions). In addition, the entrepreneur

must have be at least 18 years old. In the case of partnership entities and incorporated entities, the above-referenced grounds for preclusion from carrying on a trade must not be present in respect of the entity's corporate officers and directors (managing directors, other directors) or in respect of persons exercising substantial control over the company.

## 2. Types of trades and the different preconditions to the grant of a licence

### 2.1. Carrying on a trade with/without evidence of formal qualifications

The Austrian Trade and Industry Regulation Act 1994 (German acronym: GewO) distinguishes between “*free*” and “*regulated*” trades. All trades not expressly listed in the statute are free trades. **Free trades** include, for example, trading in retail goods (but not trade in weapons, pharmaceuticals and the like), IT services or advertising agencies. No “evidence of formal qualifications” is required in order to carry on *free* trades. On the other hand, **regulated trades** (e.g. the catering and hotel trade, mechatronics, etc.) require certification of proficiency.

Certification of proficiency is furnished by providing proof of a relevant course of training or studies, professional qualifications and/or proof of work experience in an EEA country.

In exceptional cases, the trade authority may grant an exemption from the requirement to submit certification of proficiency after consulting with the Economic Chamber.

### 2.2. Commencing trading operations

In the case of *free* and in the case of many *regulated trades*, a trader may commence trading operations immediately following the application with the trade authority: the application itself suffices if all of the conditions precedent (see subsections 1. and 2.1. above) have been met. In this case, it is not necessary to await the authority's grant of the trade licence.

By contrast, in respect of certain *regulated trades* (“*sensitive trades*”, e.g. master builders, electrical engineers, gas and sanitation technology), the trade may not be carried out until a favourable approval notice by the trade authority has been issued and takes legal effect. In the case of these “sensitive trades, the trade authority scrutinises the reliability of the business owner.

## 3. Statutory manager for trade licensing law purposes

The holders of trade licences may both be natural persons (sole proprietors) and incorporated entities (GmbH, AG) or partnership entities (OG, KG), as well as associations and branches of foreign companies. Incorporated entities and partnership entities are required to designate a “statutory manager for trade licensing law purposes” to the trade authority, even where the trade carried on is one of the “free” trades. The statutory manager has responsibility for compliance with the rules of Austrian trade licensing law.

The statutory manager may be a managing director registered with the Commercial Register with the authority to represent the entity under commercial law, but this is not a requirement. Accordingly, even a simple employee may be appointed as statutory manager if that employee is employed within the business on at least a half-day basis and has corresponding authority to give instructions within the business.

Where the business carries on a regulated trade, the statutory manager must hold the required certification of proficiency. Where a sole proprietor does not himself hold the required proof of qualifications in order to carry on a regulated trade, then he may/must appoint a statutory manager holding the relevant qualifications.

As noted, no “certification of proficiency” is required in order to carry on free trades.

As a rule, the statutory manager must be domiciled within Austria or, if he is an EEA national, in an EEA country. However, a certain level of presence within the business of the statutory manager (where he is not domiciled in Austria) will be required in any event.

## 4. Further approval requirements under public law

### 4.1. Business facility permit

**Business facilities** are any geographically fixed locations regularly used for the purposes of commercial operations. Business facilities include plants, buildings, rooms, open areas and operational facilities which constitute a unit for purposes of the business and are regularly used for purposes of carrying on a trade (e.g. a restaurant; a production site with machines; ware-

houses for chemicals or flammable liquids), but, by contrast, not sole/pure office facilities.

Where the business premises are capable of generating risks, nuisances or impairments in respect of the business owner, customers or neighbours, a “business facility permit” will be required.

The approval notice of the trade authority ordinarily imposes certain conditions. These are obligations the respective owner of the business facilities must meet. Approved business facilities must be regularly reviewed (usually every 5 or 6 years) to confirm that they are in line with the approval notice and the applicable rules under trade law. Any variations (such as the installation of new machines, structural alterations) will generally be subject to further approval.

An integrated business facilities permit will be required for certain facilities which are capable of causing particular nuisances to the environment as a result of air, water and soil emissions (“**IPPC facilities**”). These include *inter alia* facilities in the power sector, chemical industry, metal industry, etc. Special requirements in terms of environmental protection, technology, accident prevention, etc. must be met in order to obtain such approvals. The approval notice will stipulate emissions thresholds and other conditions. The owner of an IPPC facility will bear special record-keeping and reporting obligations as well as the obligation to review on a regular basis whether the business facilities comply with the state of the art.

For purposes of accident prevention, so-called **Seveso II business facilities**, working on a larger scale with certain hazardous materials (chlorine, ammonium nitrate, etc.) bear enhanced obligations. For example, the owner is required to prepare a safety plan and a safety report, which are subject to regular audits. The owner furthermore bears duties of information *vis-à-vis* the public authorities and the public at large.

## 4.2. Permits under water protection law

Permits under water protection law are a condition precedent to any use of public bodies of water that exceeds the scope of public use as well as any construction or modification of facilities used for the purposes of using public bodies of water. These include, for example, operation of power plants, water abstraction (e.g. for purposes of irrigation or for plant water supply facilities), usage of ground water, impacts on public bodies of water (e.g. discharge of waste water), constructions along the banks of bodies of water, drainage works and hydraulic constructions

which protect from or regulate the flow of water. Permits under water protection law are issued only for a limited time.

Although liability under water protection law attaches primarily to the party causing the risk of water pollution (i.e., the owner of the business), in respect of incorporated entities even managing executives and directors bearing culpability for damages (even where the culpability is merely that of oversight or organisational in nature) may be held accountable. Subsidiary liability may also attach to the owner of a property and even the purchaser of such property if the owner or purchaser had or should have had knowledge of the facilities or of measures from which the risks emanate.

## 4.3. Waste control law

Businesses that generate waste in their production processes (“owners of waste”) are subject to special duties in respect of handling waste (collection and treatment, mixing of waste, etc.). In particular, the owner of waste will be responsible for ensuring that the waste is delivered to a licenced waste collector or handler and that the environmentally sound processing or removal of such waste is directed. Owners of waste are additionally required to keep ongoing records on the type, quantity, origins and whereabouts of waste.

In businesses with more than 100 employees, there is the further requirement to appoint a professionally qualified waste management officer, who is responsible for compliance with the waste management statutes and regulations pertaining to that business.

For example, a special business facilities permit under waste management law is required for constructing, operating or substantially modifying certain geographically fixed and mobile facilities used for the purposes of treating waste (collecting, removing or processing), i.e. particularly dumps and interim waste storage facilities.

## 4.4. Environmental impact assessment

On certain large projects that are potentially expected to create substantial impact on the environment upon completion, such as waste treatment facilities, amusement parks, shopping centres, power plants, ground water extraction facilities, large-scale animal husbandry, land clearing projects, industrial facilities (paper and cellulose factories, foundries, cement plants, etc.), an environmental impact assessment audit is required before a permit can be issued. A potential duty to submit an environmental impact assessment audit will ordinarily be governed by



threshold values or a particular criterion (e.g. production capacity, usage of larger land areas), and sometimes by the physical location of the facility.

Environmental impact assessment audits are carried out with the involvement of the general public.

## Section V: Tax law

### 1. Taxation of company formation

#### 1.1. Incorporated entities

Where an **incorporated entity** (**GmbH, AG, SE**) is being formed, the amount of capital paid in or furnished by contributions in kind will be subject to a 1% corporation tax.

Capital increases and any other contributions of equity to incorporated entities (such as in the form of voluntary capital contributions) are likewise subject to corporation tax. In the case of voluntary capital contributions, it is possible to avoid corporation tax by making use of particular structures.

#### 1.2. Partnership entities

No corporation tax arises when the business is operated as a **general partnership** or *Offene Gesellschaft*. Where a **limited partnership** or *Kommanditgesellschaft* is formed, tax will only be payable (specifically: 1% corporation tax) where the general partner of the limited partnership is an incorporated entity (e.g. GmbH & Co KG). In that case, the capital contribution of the limited partners will be subject to a corporation tax at a rate of 1%. The capital contribution of the general partner will not be subject to corporation tax.

#### 1.3. Branch of foreign business

Where the Austrian branch of a foreign incorporated entity is endowed with equity, such funding will likewise be subject to corporation tax. There is a tax exemption for EU incorporated entities establishing a branch within Austria.

#### 1.4. Tax exemption

Subject to certain conditions, it is possible to claim exemptions from corporation tax under the Austrian Promotion of Start-ups Act (German acronym: NeuFöG).

## 2. Current taxation and taxation upon liquidation of business entities in Austria

Business entities in Austria are taxed based on the legal form in which the business is operated. In other words, the type of taxation depends on whether an entity is an incorporated entity (see subsection 2.1. below), a sole proprietorship or a partnership entity (see subsection 2.2. below).

### 2.1. Incorporated entities

#### 2.1.1. Corporation tax

Profits of incorporated entities (GmbHs, AGs, SEs) are subject to a **25% rate of corporation tax** (flat tax) in Austria.

Losses attract a **minimum tax**, which is € 1,750 in the case of a GmbH and € 3,500 in the case of an AG. The minimum tax is credited against corporation tax in subsequent years.

**Tax loss carryforwards:** Losses may be carried forward for an unlimited time and be offset by later gains. However, loss carryforwards are limited at 75% such that 25% of annual profits will be taxable irrespective of the amount of loss carryforwards available in the relevant year.

**Exemptions on dividends:** Distributions of profits received by an Austrian incorporated entity from equity interests held in domestic or foreign “corporations” (these are incorporated entities and co-operatives) are, as a rule, exempt from corporation tax at the level of the recipient. In the case of equity interests in corporations whose registered office lies outside the EU or is located in a country with which there is no bilateral administrative assistance agreement, this exemption from corporation tax for dividends will only apply on the condition that the equity holding equals at least 10% of the foreign corporation’s total share capital and has been held for at least one year without interruption.

Gains upon sale and liquidation received by an Austrian incorporated entity from a foreign corporation are likewise exempt from corporation tax, subject to the above-referenced conditions.

**Group taxation:** A parent company may form a tax group together with all or any of its subsidiaries or affiliates. The condition precedent to this is that the parent company’s equity stake amounts to more than 50% of the stated capital of the affiliate;

the minimum duration of a tax group is three years. There are various tax benefits available for tax groups, for example losses by individual members of the group may be immediately offset by profits of other group members. The Austrian group taxation rules are amongst the most modern in Europe; in particular, even foreign subsidiaries may be included within the group and, in this way, it is possible to make particularly rapid use of foreign losses.<sup>11</sup>

### 2.1.2. Capital gains tax on profit distributions by an Austrian GmbH, AG, SE

As a general rule, distributions of profits by an Austrian incorporated entity to its shareholders are subject to a **25% rate of capital gains tax**, which is charged at source, i.e., the incorporated entity must retain the tax and remit to the Austrian tax authorities (tax office).

Where the shareholders of the incorporated entity are natural persons domiciled in Austria (where the focal point of their life interests is located within the country), their Austrian income tax is deemed settled by the 25% capital gains tax deduction (discharge of tax liability).

Where the recipient of distributed profits of an Austrian incorporated entity is another Austrian incorporated entity, there is an exemption from capital gains tax which applies if the equity holding equals at least 10% of its capital. Distributions of profits to EU parent companies are exempt from capital gains tax if the equity stake held equals at least 10% of the entity's capital and has been held for at least one year without interruption.

Where profits are distributed to shareholders located outside the EU, the general rule is that the capital gains tax of 25% will apply. Where a double taxation treaty is in place with the country of the recipient, the capital gains tax (source taxation) will be reduced in line with the provisions of the applicable double taxation treaty. Austria has entered into double taxation treaties with more than 80 countries around the world, most of which conform to the OECD model convention.

### 2.1.3. Taxation upon liquidation of incorporated entities in Austria

Where an incorporated entity is liquidated, the liquidation profits are subject to a 25% rate of corporation tax.

Distribution of the proceeds of liquidation to the shareholders is not subject to capital gains tax (source taxation). There is no requirement that the proceeds of liquidation be divided into retained earnings and pure liquidation proceeds (EAS 3279 of 14.05.2012). As a general matter, any liquidation surplus will be taxable in the hands of an Austrian recipient.

## 2.2. Sole proprietorships, partnership entities

### 2.2.1. Sole proprietorships

Sole proprietors (natural persons) are subject to income tax on their income, in particular on the income they derive in Austria from commercial operations or from self-employment. The Austrian Income Tax Act (German acronym: EStG) imposes a progressive tax rate on income of more than € 11,000; the top tax rate for **income tax** in Austria is **50%**, which applies only to portions of income above € 60,000. In certain circumstances, a reduced tax rate will be applied on liquidation profits where a business is being given up or sold.

### 2.2.2. Partnership entities

The profits of a partnership entity are not taxed at the level of the entity itself. Rather, the share of each partner's profit (depending on whether the partner is a natural person or legal entity) is subject to income or corporation tax, respectively. Consequently, for assessing income or corporation tax of the partner in the case of partnership entities (by contrast with incorporated entities) it is irrelevant whether the profits are distributed from the partnership entity to its partners or not.

In respect of income taxation on profit shares of natural persons arising out of partnerships, the information set forth in subsection 2.2.1. applies.

Where the partner of the Austrian partnership is an incorporated entity, its profit share is subject to a 25% rate of corporation tax.

In contrast to incorporated entities, there is no capital gains tax withheld against shares of profit in the case of partnership entities.

<sup>11</sup> See *Reich-Rohrwig in Wiesner/Kirchmayr/Mayr* (eds), *Gruppenbesteuerung*, 2<sup>nd</sup> edition, 507 *et seq.*

## 2.3. Taxation of foreign businesses or companies with and without double taxation treaties

### 2.3.1. Foreign sole proprietors with a sole proprietorship or branch office in Austria

Foreign entities are, as a general matter, subject to taxation in the country in which they have their registered office or their headquarters (“country of domicile”).

Furthermore, in certain circumstances, foreign entities are subject to limited tax liability in Austria on the income derived by them in Austria. Income from commercial operations will be subject to taxation in Austria where a **branch establishment** is maintained within Austria. Income from self-employment and regular employment will be subject to taxation in Austria where **the activities are performed within Austria**.

Where there is no double taxation treaty between Austria and the country of domicile, double tax liability may arise with respect to the foreign entity. Where a double taxation treaty is in place, then profits of the foreign entity may only be taxed in one of the two countries. As a general matter, profits will be subject to taxation in the country of domicile, while Austria only has a right of taxation on aliens where there is a branch establishment within Austria.

Even where profits from the branch establishment are subject to taxation in Austria, the country of domicile may apply the higher tax rate to the entity’s other income when setting its tax rate, which it calculates by taking the profits of the branch establishment into account (progression clause).

### 2.3.2. Alien holding an interest in an Austrian partnership entity

The profits of a partnership are not taxed at the level of the partnership itself, but rather in the hands of its individual partners (see subsection 2.2.2. above).

The income from profit shares in an Austrian partnership derived by a foreign partner is, under certain circumstances, subject to limited tax liability in Austria. In particular, Austria will have a right of taxation where the partnership maintains a branch establishment within Austria. The remarks at subsection 2.3.1. apply by way of analogy.

### 2.3.3. Alien holding an interest in an Austrian incorporated entity

As a general rule, distributions of profits from an Austrian incorporated entity to aliens are subject to a 25% rate of capital gains tax. In cases of profits distributed to EU parent companies, under certain circumstances, an exemption from capital gains tax applies. Where a double taxation treaty applies, there may be a reduced rate of source taxation (see subsection 2.1.2. above). Thus, for example, in the case of aliens domiciled in Germany, Switzerland, Russia, France, the United Kingdom or the United States, the maximum source rate of taxation based on the respective double taxation treaty is 15%.

## 3. Taxes in the case of employment – incidental wage costs

Where the business entity employs members of staff within Austria, the following main ancillary wage costs will arise:

- 3% municipal tax on gross salaries
- 4.5% employer contribution to the Family Compensation Fund or *Familienlastenausgleichfonds*
- 0.5% supplement to employer contribution
- approx. 21% employer contribution to social insurance

These ancillary wage costs are deductible business expenses; they thus reduce the profits of the business and its basis for purposes of corporation tax or income tax.

Pursuant to the Promotion of Start-ups Act (German acronym: NeuFöG), relief may be available for the first 12 or 36 months.

## 4. Value-added tax

Austrian **value-added tax (VAT)** applies to turnover generated by profit-oriented business entities within Austria, irrespective of whether the entrepreneur is domiciled in Austria or not. The rate of VAT is, as a general rule, 20%, and in certain circumstances a reduced rate of 10% will apply, and in exceptional cases 12%. There are also cases of complete exemption from VAT (“true” and “non-true” VAT exemption, such as in the case of banks and insurance providers).

**Deduction of input tax:** As a rule, entrepreneurs may deduct VAT invoiced to them by other entities for their goods or services as input tax. However, businesses will not be entitled

to deduct input tax where the good and services are used for purposes of generating tax-exempt turnover.

**Cross-border supplies of goods and other services:** Supplies of goods within the EU and in third countries will be exempt from VAT under certain circumstances. As a general rule, other services will be subject to VAT in the country in which the recipient of the service has his registered office.

## 5. Land transfer tax

### 5.1. Purchase of real property

Acquisition of Austrian real property is subject to land transfer tax at a rate of 3.5% of the consideration exchanged (purchase price, assumption of debt, and the like). In addition, a 1.1% registration fee on the same assessment basis applies to registration of the new owner with the land registry.

In certain cases, there are exemptions from land transfer tax (under the Promotion of Start-ups Act – NeuFöG – and the like).

### 5.2. Acquisition of all of the shares of a company; unification of all shares in a single owner

Where a buyer acquires the entirety of the shares in a company, i.e. a 100% equity interest in a company owning a real property, or where a shareholder acquires all of the remaining shares in a company (“unification of all shares in a single owner”), this will likewise trigger land transfer tax at a rate of 3.5%. The basis of assessment is the threefold “uniform value” or *Einheitswert* of the property.

## 6. Fees applicable to leases

With respect to leases and commercial lease agreements made in writing, there is a fee in Austria to be paid under the Austrian Fees and Duties Act (German acronym: GebG), totalling 1% of the assessment basis.

As a basic principle, the assessment basis for the 1% fee is the threefold annual gross compensation (i.e. rent, ancillary charges and VAT). For fixed-term agreements, the assessment basis is the gross fee arising over the term of the agreement.

## Section VI: Industrial property rights and protection of intellectual property

### 1. Trade marks

As is the case in most countries throughout the world, trade marks, corporate names and other corporate emblems enjoy protection in Austria.<sup>12</sup>

A **trade mark** is a means of designating goods and services and, at the same time, constitutes **intellectual property**. The use of a trade mark is governed in Austria by the Austrian Trade Mark Act (German acronym: MSchG). The trade mark law of the European Union member states was harmonised in major respects by the Trade Mark Directive (Council Directive 2008/95/EC).

A trade mark performs four main functions: **protection**, **indication of origin**, **warranty** and **advertising**. For some time now, registered trade marks are not limited only to **word marks**, **figurative marks**, or (as a combination of the two) **figurative and word marks**. Rather, even **sound marks**, **colour marks** or **olfactory marks** are capable of registration, provided that they can be **graphically depicted** in some way or form.

However, there are obstacles to registration of certain marks, and in this respect one must distinguish between absolute and relative **grounds of refusal**. *Absolute* grounds for refusing registration apply, for example, to the flags or official coats of arms of countries. Descriptive terms or figures which are of low distinctive quality and generic terms may, *per se*, not be registered (*relative grounds of refusal*). However, where a mark has obtained “acquired distinctiveness”, it may still be registered. Whether a mark has obtained acquired distinctiveness is assessed in advance by the trade mark authority.

The **Austrian Patent Office (ÖPA)** has jurisdiction over registrations of national Austrian trade marks, and in the case of **community marks**, which are applied for with greater frequency, jurisdiction is vested in the **Office for Harmonisation in the Internal Market (OHIM)**, the registered office of which is located in Alicante, Spain. The goods and services for which trade marks are registered and for which they provide protec-

<sup>12</sup> See *Engin-Deniz*, Kommentar zum Markenschutzgesetz, 2<sup>nd</sup> edition (2010).

tion are assigned to certain **classes**, which can be found in the Nice Classification. After **the application** is filed, the authority reviews it to see whether there are grounds for refusal. Proof of acquired distinctiveness must be submitted at this stage. Where the authority regards its review as complete, the trade mark is **published**. As from the date of publication, a three-month period begins to run within which other owners of trade marks or rights may file a **notice of opposition** to registration of the new mark. In order to avoid any such opposition, it is recommended that before registering the mark, the applicant perform thorough research to determine whether there are prior rights. Where no opposition is filed against the new trade mark or where disputes regarding the new trade mark are resolved by mutual agreement or in favour of the applicant, the trade mark is **registered** and entered on the trade mark register. The term of protection for a trade mark is 10 years and may be extended by payment of fees.

By registering a trade mark, the owner is granted **exclusive rights**, enforceable against any person. Where anyone infringes the trade mark right, the trade mark owner may, *inter alia*, request that such party cease the infringement and that any goods designated with its mark be destroyed. In addition, it may claim compensatory damages and (within a reasonable time) deletion of any improperly registered new trade mark. Intentional interference with trade marks is also punishable under criminal law.

Trade mark protection extending beyond Austria is provided, firstly, by the European community mark referred to above, which is governed throughout the EU by the Trade Mark Regulation (TMR, Council Regulation (EC) No. 207/2009), and secondly by the so-called IR mark (internationally registered mark). Upon registration of a previously registered trade mark with the WIPO in Geneva, the IR mark provides protection covering all WIPO member states for which such registration is requested. Where the IR registration is applied for within six months from the date of registration of the original trade mark, the protection applies retroactively from the date of registration of the original trade mark.

## 2. Internet domain law

The address of a website on the internet is referred to as “domain”. Domains break down, firstly, into top-level domains (such as .at, .com or .org) and, secondly, into sub-level domains, also referred to as second-level or third-level domains. The latter refer to the portion of the address appearing prior to the top-level domain. The domain does not have **any distinctiveness per se**, but rather such distinctiveness must first be extrapolated

from other rights such as trade mark law, or the law referring to corporate designations or names.

However, because a domain (just like a trade mark) performs a role in indicating presumed origin and thus is a strong marker of advertising, there are frequent **clashes between various trade mark rights and other business identifiers** in connection with registering domains. Specifically: a previously registered trade mark does not always provide sufficient protection against a registered domain where that domain, for example, originates with the name of a company that might already have existed for longer than the registered mark and which was registered even prior to the trade mark registration.

Since 2012, top-level domains (which were previously limited to country codes and 22 generic codes) may be registered *using any designation* (for example .auto, .music or .wien). This opens the possibility of having designations of registered trade marks entered at the top-level.

## 3. Protection of corporate name and corporate logo

**Corporate names** and **corporate logos** are protected in Austria even without registration of a word mark. However, protection may be regionally limited. Just like in the case of trade marks, corporate names have an identifying function as well as a function in indicating origin. For this reason, competitors are not permitted to use another business's older corporate name or logo in a manner which is apt to create confusion.

Where there is sufficient acquired distinctiveness for them, even business symbols (such as logos) and the presentation and packaging of goods or services of a company in a manner which is typical for its business will be protected.

Corporate name protection may also be applied to meta tags (search engine advertising, key word advertising) and domains.

## 4. Patent law

The purpose of patents is to provide protection for **technical inventions**, which protects them in a manner similar to a monopoly for a limited period of time. In order for an invention to be patentable, *four prerequisites* must be met. The first prerequisite is its **technical nature**, a further prerequisite is the **industrial application** of the invention. In addition, there are



also requirements regarding **novelty** and **inventiveness** of the invention.

A patent application in Austria is filed with the **Austrian Patent Office (ÖPA)**. The patent applicant must, in particular, formulate one or more **patent claims**, i.e. he must indicate for what he is requesting patent protection and how the four conditions of patentability are met in this case. Initially, the Patent Office conducts a preliminary review of the application in formal and substantive respects. Following the subsequent publication of the application, it is possible to, within four months, file a **notice of opposition** to the grant of a patent. Where no opposition is filed, the patent is registered and officially published.

The patent owner is entitled to **sole and exclusive use**, manufacture, placement on the market, and sub-licencing of the patented invention. In the event of an infringement against his patent, the patent owner has claims against the infringer *inter alia* for injunctive relief, remuneration of the infringement, publication of a judgement, accounting and payment. Intentional interference with patents is also subject to criminal prosecution.

Whereas trade mark applications have been harmonised throughout Europe and there is the option of registering a trade mark covering the entire European Union, a similar course of action is currently not available for patents. Although the European Patent Convention (EPC), which has as its members the EU member states as well as eleven further states, has harmonised a host of national provisions, the situation is still not comparable to that in the realm of trade mark law. The currently existing **European patent** offers only a *bundle of national individual patents*, but does not provide the option of registering a single patent covering the entire EU territory. A European patent may be applied for both at the European Patent Office (EPO) in Munich and at the Austrian Patent Office (ÖPA).

It is also possible – in a manner similar to trade mark protection law – to obtain *international protection* for inventions via the **Patent Cooperation Treaty (PCT)**. So far, over 120 countries have acceded to the PCT. Where a patent is applied for under the PCT, it is possible, for payment of additional fees, to use simplified procedures to obtain patent protection in other countries that have acceded to the treaty. The application may also be carried out in Austria at the Austrian Patent Office (ÖPA).

## 5. Protection of seed

As a general matter, the Austrian Patent Act (German acronym: PatG) excepts protection of plant varieties from patentability.

The only way to protect plant varieties is under the **Austrian Plant Variety Protection Act** (German acronym: SortSchG). Under that act, protection is not provided for an entire plant or certain genetic sequences, but only rather certain varieties which are distinctive, homogenous, stable and new.

Protection is limited by cultivator's rights (the variety may be used as precursor material for other varieties) and by farmer's rights (small farmers may, subject to certain conditions, cultivate protected varieties).

The term of protection for certain plant varieties is 30 years, and for the remaining varieties it is 25 years. Plant variety protection law is not harmonised throughout the EU, but there is a parallel variety protection law under EU law.

Following the promulgation of the **Biotechnology Directive** in 1998, businesses have the option to seek an EU patent on **biological material**. This applies in particular to genetically modified material. Whereas, in the past, there were only occasional patents on life forms such as yeast cultures, the number of patent applications in the biotechnology sphere has by now become unmanageable and there are several tens of thousands of them nowadays. The Biotechnology Directive was transposed into national law in Austria in 2005. Pursuant to § 1 (2) of the Austrian Patent Act, it is now also possible to have products consisting of biological material patented. These even include biological material which has been isolated from its natural environment by means of a technological process, even where such material was already pre-existing in nature.

## 6. Design protection

In respect of **registered designs** – referred to as **Geschmacksmuster** in Austria – one may obtain protection both for two-dimensional and for three-dimensional designs. The subject matter of the protection, which is of great significance to the economy, is the appearance of an entire product or portion thereof. In this regard, the product features are determinative, such as its lines, contours, colours, shape or surface structure.

Just like trade marks and patents, design applications may be filed and registered with the Austrian Patent Office (ÖPA). Because a registered design is only reviewed to determine whether the formal prerequisites are met, one also speaks here of an “untested right of protection”. Publication of a new design is undertaken at the same time as registration. The initial period of protection is 5 years. It is only possible to obtain four extensions

of this period, and thus the maximum period of protection is 25 years.

Just like the intellectual property rights described above, the registered design will vest a right of exclusion in its owner. On a comparison of similarity as between two opposing designs, what matters is the **overall impression**.

Because an Austrian registered design is protected only with respect to the territory of Austria, there is (in a manner similar to a community mark) also a **community registered design**, which one may register with the **Office of Harmonisation for the Internal Market (OHIM)**. As in the case of the IR trade mark application, it is also possible to perform international registration of registered designs with the WIPO in Geneva, to cover all member states.

## 7. Copyright

Copyright is one of the intellectual property rights. Copyright protects works of literature, sound art, visual art and cinematic art. Software, too, is subject to copyright protection as a linguistic work.

The subject matter of copyright protection is not the corporeal expression of the work, but the intellectual concept underlying it. The purpose of copyright is to protect the creator of a creative work and ultimately to secure income for him. Protection is provided not only for original works, but also for adaptations (translations are also deemed included as such), provided that they constitute unique intellectual creations.

Copyright commences as of the creation of the work and ends 70 years following the death of the creator; or, in the case of joint copyright, 70 years following the death of the longest living co-creator. For the purposes of copyright law, a work is deemed to be a “unique intellectual creation”. However, by contrast with intellectual property rights, copyright is not entered on any register.

Creators may only be natural persons. Legal entities may only obtain rights of exploitation to works. In cases of creation by employees, copyright resides with the employee or the contractor. Rights of exploitation to the created work will pass to the employer if the work was created by the employee in the course of his employment duties.

The creator has both property rights and personality rights: these include the right of exploitation; this refers to the creator’s

right to make commercial use of his work and to grant third parties rights in the work. Rights of exploitation are conceived of as rights of exclusion and they include the right of performance, lecture and presentation, rental and hire, the right to make the work available (e.g. online), the right of transmission, the right of duplication, the right of dissemination and the right of adaptation. Where the right is transferred on an exclusive basis, one speaks of “right to use the work”; where there is no exclusivity, one speaks of “licence to use the work”.

The Austrian legislature has acknowledged that certain other persons may perform work meriting protection and it grants this protection in the form of related rights (ancillary copyrights). The object of protection here is not the work itself, but rather the actions of the performing artists (interpreters), producers of audio media, event promoters, broadcasters, manufacturers of photographs, publishers of posthumous works and database creators.

The Austrian Copyright Act (German acronym: UrhG) grants claims under civil law, in particular for identification as the author, for injunctions against unauthorised duplication, dissemination or publication, for damages, for disgorgement of unjust enrichment, for publication of a judgement, and for elimination of works created in violation of copyright. Intentional infringements of copyright are punishable criminally as offences subject to private complaints.

Works may be exploited either by the author or his publisher directly or, in certain cases, by a collecting society (e.g. AKM, Austromechna).

Austria is a member of all of the international copyright conventions (e.g. Berne Convention and the Universal Copyright Convention).

## Annex:

### 1. Checklist – formation of a limited liability company (GmbH)

- Articles of association contractually agreed by shareholders as a notarial deed before an Austrian notary; it is permitted for shareholders to provide a signed power of attorney for this purpose in notarised form.
  - Minimum contents of articles of association:
    - » Name and registered office of GmbH
    - » Amount of portion of share capital to be paid in by shareholder
    - » Subject matter of the company
    - » Amount of capital
    - » Reimbursement for costs of formation
- Minimum capital of € 35,000, of which at least € 17,500 must be paid in in cash; where the amount of capital is higher, at least one-quarter of the cash contribution must be paid in, contributions in kind must be made in full.
- Bank confirmation on payment of minimum contributions
- Resolution on appointing at least one managing director
- Specimen corporate signature of managing director (in notarised form)
- Where there are foreign companies as shareholders, evidence of their identity must be provided (e.g. by means of extract from foreign Commercial Register or confirmation by foreign Commercial Register or Chamber of Commerce)
- Application for registration on Commercial Register by all managing directors (with notarised signatures)
- **Further notes:**
  - In certain circumstances, there may be an obligation to appoint a supervisory board, in particular where, on an annual average, the GmbH employs more than 300 members of staff
  - Audit of annual financial statements prescribed by law in the case of “mid-sized” and “large” GmbHs
  - Annual financial statements of every GmbH must be submitted to the Commercial Register court each year
  - Corporation tax payable at time of formation: 1% on capital contributions
  - Minimum corporation tax per year: € 1,750



## 2. Checklist – formation of a joint-stock company (AG)

- Articles of association (established as a notarial deed before an Austrian notary)
  - Minimum contents of articles of association:
    - » Corporate name and registered office of company
    - » Shares to be issued as par-value or no-par value shares
      - › In the case of par-value shares, the par value and in the case of no-par value, the number of shares and the issue price
    - » Subject matter of the company
    - » Amount of registered share capital
    - » Composition of management board, number of directors
    - » Form of official publications by the company
    - » Reimbursement for costs of formation
- Minimum capital of € 70,000, at least one-quarter of which must be paid in; contributions in kind must be made in full
- Appointment of initial supervisory board (at least 3 persons)
- Resolution on appointment of management board by supervisory board
- Report of the founders (shareholders) on formation of an AG
- Formation audit report of management board and supervisory board
- In certain cases, additional formation audit by court-appointed formation auditor
- Where there are foreign companies as shareholders, evidence of their identity must be provided (e.g. by means of extract from foreign Commercial Register or confirmation by foreign Commercial Register or Chamber of Commerce)
- Specimen corporate signatures of members of management (in notarised form)
- Application for registration on Commercial Register by all founders (shareholders), members of the management board and members of the supervisory board (with notarised signatures)
- **Notes:**
  - Supervisory board mandatory in the case of an AG
  - Audit of annual financial statements mandatory for AG
  - Annual financial statements must be submitted to Commercial Register, in the case of large AGs, they must also be published
  - Corporation tax at time of formation: 1% on paid-in share capital plus premiums
  - Minimum corporation tax per year: € 3,500

### 3. Checklist – formation of a general partnership (OG)

- Partnership agreement (no form prescribed)
  - Minimum contents:
    - » Name and date of birth of partners
    - » Name and registered office of partnership
    - » Legal form
    - » Terms governing agency authority of partners
    - » Date partnership agreement was concluded
    - » Subject matter of the company
- Specimen signatures of partners (in notarised form)
- Where there are foreign companies as partners, evidence of their identity must be provided (e.g. by submitting extracts from a foreign Commercial Register or confirmation by a foreign Commercial Register or Chamber of Commerce)
- Application for registration on Commercial Register by all of the partners (with notarised signatures)

### 4. Checklist – formation of a limited partnership (KG)

- Partnership agreement (no form prescribed)
  - Minimum contents:
    - » Name and date of birth (if applicable) of partners
    - » Name and registered office of partnership
    - » Legal form
    - » Terms governing agency authority of general partners
    - » Date partnership agreement was concluded
    - » Contributions of general partners, limited contributions of limited partners
    - » Subject matter of the company
- Specimen signatures of partners (in notarised form)
- Where there are foreign companies as partners, evidence of their identity must be provided (e.g. by submitting extracts from a foreign Commercial Register or confirmation by a foreign Commercial Register or Chamber of Commerce)
- Application for registration with Commercial Register by all of the partners, including all of the limited partners (with notarised signatures)

### 5. Checklist – formation of a GmbH & Co KG

- Formation of a GmbH as a general partner
    - Articles of association of general partner GmbH (established as a notarial deed) and further steps: see checklist for formation of GmbH
  - Formation of a limited partnership (KG), together with a GmbH as general partner (GmbH & Co KG)
    - Partnership agreement of KG (no form prescribed)
      - » Minimum contents of partnership agreement
        - › Name and Commercial Register number of general partner GmbH and name and date of birth of limited partners
        - › Name and registered office of partnership
        - › Legal form
        - › Date partnership agreement was concluded
        - › Subject matter of the company
  - Specimen signatures of managing directors of general partner GmbH (in notarised form)
  - Where there are foreign companies as partners, evidence of their identity must be provided (e.g. by submitting extracts from a foreign Commercial Register or confirmation by a foreign Commercial Register or Chamber of Commerce)
  - Application for registration with Commercial Register by all of the partners, both by general partner GmbH and all of the limited partners (with notarised signatures)
- **Notes:**
- In certain circumstances, there will be an obligation to appoint a supervisory board for the general partner GmbH, when a total of more than 300 members of staff are employed on annual average
  - Audited annual financial statements prescribed by law in the case of “mid-sized” and “large” GmbH & Co KGs
  - Legal requirement to submit annual financial statements to Commercial Register
  - Corporation tax upon formation: 1% on limited partner capital contributions

## 6. Checklist – formation of a private foundation

- Deed of foundation
  - Minimum contents
    - » Name and date of birth/Commercial Register number of founder(s)
    - » Designation of assets contributed to private foundation
    - » Purpose of foundation
    - » Provisions on beneficiaries
    - » Name and registered office of private foundation
    - » Term of foundation and rules on agency authority
    - » Appointment of first foundation board
    - » The founders may reserve the right in the deed of foundation to modify and (if the founders are natural persons) even revoke the foundation
- Supplemental deed of foundation may be prepared
- Minimum capital € 70,000
- Bank confirmation on deposit of minimum capital
- Specimen signatures and declaration of impartiality of all members of the foundation board (in notarised form)
- Application for registration with Commercial Register by all members of foundation board (with notarised signatures)
- **Notes:**
  - Supplemental deed of foundation not available for public inspection
  - Minimum number of members of foundation board: three
  - Foundation auditor required by law
  - As a rule, no supervisory board required
  - Advisory board may be set up
  - Detailed rules on beneficiaries may be incorporated into supplemental deed of foundation or the right to designate the beneficiary/beneficiaries may be delegated to the foundation board, the founders, the advisory board or some other “official person or body” (individual)
  - Basic rule on term of private foundation: 100 years
  - Tax on initiating a foundation (Stiftungsseingangssteuer) for Austrian private foundations: generally 2.5% on assets with which foundation is endowed

## 7. Checklist – formation of a branch office by a foreign legal entity (sole proprietor, partnership or incorporated entity)

- Proof of legal existence of the foreign (legal) entity for which a domestic Austrian branch office (“branch”) is to be entered on the Austrian Commercial Register, by submission of a confirmation from the foreign authority (local court, Commercial Register, chamber of commerce or similar) – foreign-language documents must be accompanied by a certified German translation.
- For a **branch of a foreign partnership**, all of the same details must be reported to the Austrian Commercial Register as are required in respect of an Austrian partnership – see the checklists for OGs and KGs above.
  - Specimen signatures (notarised and accompanied by a certified translation) must be filed for general partners with power of representation and for the “representative(s)” appointed for the domestic branch (who must also be registered as such).
- For a **branch of a foreign incorporated entity (GmbH, AG, SE)**, all of the same details must be reported to the Commercial Register as are required in respect of an Austrian incorporated entity – see the checklists for GmbHs and AGs above.
  - A certified German translation of the articles of association/charter must likewise be submitted.
  - Evidence showing in whom power of representation of the foreign incorporated entity is vested (managing director(s), members of the management board) must be furnished in the form of a confirmation from the relevant foreign authorities (local court, Commercial Register, chamber of commerce or similar) – foreign-language documents must be accompanied by a certified German translation.
  - Legal entities as to which the law governing their legal status is not the law of an EU or EEA member state *must* appoint at least one person with durable agency authority to represent the company both in court and extrajudicially, whose ordinary residence is located within Austria (“representative”); legal entities from EU or EEA member states *may*, but are not obliged to, appoint such a person, as well. It is permitted for the company to appoint two or more domestic representatives with collective agency authority.
  - With respect to the constitutive officers of the foreign incorporated entity (managing director(s), members of the management board) and with respect to the “representatives” appointed for the domestic branch (who must be registered on the Commercial Register), notarised specimen signatures – accompanied by a certified translation – must be furnished.
  - Only in the case of foreign legal entities from outside the EU/EEA: submission of a tax clearance certificate or a self-assessment return showing payment of 1% corporation tax on the property allocated to the branch.
- In all cases, the activities of the branch (objects of the enterprise) and the law governing the legal status of the foreign legal entity must be noted on the Austrian Commercial Register filing for the branch.

## Comparison of forms of incorporation

	GmbH	AG	GmbH & Co KG
Minimum capital	€ 35,000	€ 70,000	€ 35,000 for general partner GmbH
Minimum paid-in capital	€ 17,500	€ 17,500	€ 17,500
Minimum number of managing directors/directors, as a rule	1	1	1
Duty to set up supervisory board	No, as a rule (only if number of employees exceeds 300)	Generally YES	No, as a rule (only if number of employees exceeds 300)
Minimum number of supervisory board members	Where supervisory board appointed: 3	3	Where supervisory board appointed: 3
Shareholders may issue directions to management body	YES	No, management board is not subject to directions	YES
Financial accounting obligation	YES	YES	YES, as a rule
Requirement to audit annual financial statements and consolidated financial statements	YES, except in the case of a “small” GmbH	YES	YES, except in the case of a “small” GmbH & Co KG
Duty to disclose and publish annual financial statements (consolidated financial statements)	YES, to be submitted to Commercial Register, in the case of “small” GmbHs, abridged financial statements	YES, in the case of a “large” AG, additional obligation to publish in the Wiener Zeitung	YES, to be submitted to Commercial Register; in the case of a “small” GmbH & Co KG, abridged statements
General meeting of shareholders/annual general meeting	Generally no prescribed form	Always recorded as a notarial deed	Generally no prescribed form
Amendments to articles of association require notarial certification	YES	YES	In respect of general partner GmbH: YES
No-fault liability of shareholders for payment of capital contributions	YES	YES	YES
for outstanding or over-valued contributions of co-shareholders (shareholders/limited partners)	YES	As a general rule, NO	YES (regarding GmbH), NO (regarding KG)
for prohibited returns of capital contributions to the respective shareholder/limited partner	YES	YES	YES
for prohibited returns of capital contributions to other partners (shareholders)	YES, limited to amount of share capital	No	For general partner GmbH, see GmbH; limited partners: NO
for tax debts of the company	NO as a general rule, except in cases covered by § 16 BAO	NO as a general rule, except in cases covered by § 16 BAO	As a general rule NO, but liability for municipal tax
Fault-based liability of partners/shareholders	YES; conceivable; see also § 42/7 GmbHG and § 25 URG	YES; conceivable, see also § 100 and § 198/2 AktG	YES, conceivable, see also § 25 URG
Liability of managing directors and members of management board to company and creditor*	YES Fault-based liability as a general rule; objective liability pursuant to § 22 URG	YES Fault-based liability as a general rule; objective liability pursuant to § 22 URG	YES Fault-based liability as a general rule; objective liability pursuant to § 22 URG

\* For further details, see *Reich-Rohrwig* in *Straube*, Wiener Kommentar zum GmbHG, with respect to § 25 thereof.

	GmbH	AG	GmbH & Co KG
Do directions by resolution of the shareholders discharge the managing directors from liability/does a consent resolution of the general meeting of shareholders relieve the management board of liability?	Legally valid instructions will, as a general rule, relieve their recipients of liability provided that claims for compensatory damages are not required to satisfy claims of creditors	Legally valid consent resolution of the general meeting of shareholders will, as a general rule, relieve directors of liability provided that claims for compensatory damages are not required to satisfy claims of creditors	See GmbH
Does consent by the supervisory board relieve the managing director/member of the management board of liability?	No	No	No
Minimum corporation tax	€ 1,750/year	€ 3,500/year	for general partner GmbH: € 1,750/year
Tax losses of company can be offset against shareholder's/partner's gains:	As a basic rule, NO, due to principle of separation, except in cases of "tax groups" between incorporated entities	As a basic rule, NO, due to principle of separation, except in cases of "tax groups" between incorporated entities	As a basic rule: YES
Rate of profit tax	25% corporation tax (flat)	25% corporation tax (flat)	Profits are taxed at the level of the limited partner (25% corporation tax, natural persons: up to 50% income tax), irrespective of whether profits are distributed to limited partner or not
Dividend payment to partner/shareholder	As a general rule, subject to 25% capital gains tax on the amount disbursed if shareholder is not an incorporated entity holding at least 10% equity interest; in cross-border cases, see EU Directive on parent companies and subsidiaries and double taxation treaty (tax at source)	As a general rule, subject to 25% capital gains tax on the amount disbursed if shareholder is not an incorporated entity holding at least 10% equity interest; in cross-border cases, see EU Directive on parent companies and subsidiaries and double taxation treaty (tax at source)	Distribution of profits to limited partners not subject to any further taxation in Austria; in cross-border cases, see double taxation treaty
Main disadvantages of this legal form	<ul style="list-style-type: none"> <li>As compared with the AG, greater risk of liability on the part of shareholders of a GmbH</li> <li>Personal liability in kind on the part of the main shareholders for certain tax debts of the GmbH where those shareholders permit the GmbH to use economic assets belonging to them (§ 16 BAO)</li> </ul>	<ul style="list-style-type: none"> <li>High degree of formalism at annual general meeting</li> <li>Members of management board appointed for a defined period, i.e. limited to a maximum five-year term and may be dismissed prior to that time only for good cause</li> <li>Mandatory audit of annual financial statements</li> <li>Mandatory supervisory board</li> <li>Personal liability in kind of major shareholders for certain tax debts of the AG where such shareholders allow the AG to use economic assets belonging to them</li> </ul>	<ul style="list-style-type: none"> <li>As compared with the AG, greater risk of liability of the complimentary GmbH</li> <li>Preparation of two annual financial statements – one each for the GmbH and for the KG – is costly</li> <li>Personal liability of limited partners for municipal tax liabilities of the KG</li> </ul>



## Advantages and disadvantages of sole proprietorships, branches

	Sole proprietorship (SP)	Branch (BR)
Personal liability for all debts from business operations	SP has unlimited personal liability	Company (headquarters) liable for all debts of BR on unlimited basis
Statutory duty to set up supervisory board	None for SP	None for BR in Austria
Duty to have annual financial statements and consolidated financial statements audited	None for SP	None for BR in Austria However, BR must perform a distribution of profits and file tax returns for purposes of Austrian taxation
Duty to submit annual financial statements and consolidated financial statements to Austrian Commercial Register	None for SP	In cases involving branches of foreign incorporated entities, the representatives of the branch are required to disclose the accounting documents (which have been prepared, audited and disclosed in line with the law applicable to the company's headquarters) in German to the Austrian Commercial Register
Certain minimum capital requirements	No	No
Formalities:	None as a general rule, where an annual turnover of € 700,000 is exceeded twice, the obligation exists to register the sole proprietorship on the Commercial Register	YES, in the case of an Austrian BR, all amendments on the Commercial Register of the (foreign) headquarters are likewise required to be registered on the Austrian Commercial Register, where applicable including certified translations and evidentiary documents
Taxation of profits	Personal income tax – progressive scale up to a maximum of 50%	Limited tax liability on gains from Austrian branch establishment (25% corporation tax; where applicable, up to 50% income tax)

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