

# ESTABLISHING A BUSINESS IN AUSTRIA

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## Preface

This brochure is intended to help Austrian, as well as foreign entrepreneurs and investors, to establish their business in Austria. It will provide initial, basic information on this topic. Our objective is to enable interested parties to conduct informed and expedient discussions with their legal or tax advisor.

Part 1 presents the different corporate forms which exist for operating a business under Austrian law and also deals with alternative options for establishing a branch office in Austria. We will, of course, provide an overview of the rules governing the formation of legal entities and branch offices. The Austrian *Gesellschaft mit beschränkter Haftung (GmbH)* is by far the most popular corporate form with both Austrian entrepreneurs and foreign investors. We will provide a more detailed description of this form, as it is of great practical significance.

We will also deal with practical issues such as how to rent business premises in Austria or how to acquire property. We will then go on to include issues of property acquisition by foreign aliens, questions of employment law, as well as the employment of foreign aliens. Questions of the permits and licenses required, as well as tax law, will likewise be covered. Furthermore, issues regarding equity and debt financing (granting of loans to Austrian subsidiaries) and foreign exchange law are of particular relevance and will thus be touched upon as well.

It is also possible to establish a business presence by acquiring an existing business in the context of an M&A transaction. We shall therefore also discuss this option.

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

This brochure can be no substitute for professional, individually-tailored advice and the establishment of all the grounds needed to reach a decision. Our firm would be pleased to be of assistance to you in this regard.

Vienna, January 2018

University Professor Dr Johannes Reich-Rohrwig, attorney  
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH, Vienna

# Section I: Overview of, and legal basis for, 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. They thus bear full personal liability.

Sole proprietorships can be created by any person holding Austrian or Swiss citizenship, or by anyone who is a citizen of an EEA country. A license will also be issued to any person holding a residency permit for Austria authorising said person to conduct business or a trade. Persons from other countries will only be permitted to conduct a trade in Austria if there are reciprocal agreement in place between the person's home country and Austria granting such permits.

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

Sole proprietors wishing to operate a business covered by the Austrian Trade, Commerce and Industry Regulation Act 1994 (German acronym: *GewO*) (e.g. sales, commercial sector trade, industry) require a trade licence (on this point, see section IV below), and they are also obliged to notify the Austrian tax office of their commercial activity (see page 11).

Registration of sole proprietorships in the Austrian Commercial Register (*Firmenbuch*) is only legally required if, during two successive fiscal years, the sole proprietor generated a turnover of more than € 700,000 per two fiscal years, or more than € 1,000,000 in a single fiscal year. However, sole proprietors may voluntarily register in the Commercial Register, even where these requirements do not apply.

Sole proprietorships not registered with the Commercial Register may calculate their income (profits/losses) by keeping a record of their payments and receipts. If, by contrast, the law requires them to have their business registered on the Com-

mercial Register, then, as a rule, they will be obliged to perform financial accounting in accordance with the accounting rules of the Austrian Commercial Code (German acronym: UGB).

The legal form of an incorporated entity without minimum capital – such as the German “*Unternehmergeellschaft haftungsbeschränkt*” (company with limited liability) – does not exist in Austria. However, it is possible to form a “privileged GmbH” in Austria. In this case the founding shareholders are only required to deposit € 5,000 in cash and are only personally liable for a further € 5,000 for the first ten years.

Because they bear unlimited personal liability for all their 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*. Please 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 here (*Zweigniederlassung*)<sup>1</sup>. The criteria described in subsection 1.1 apply here in regards to citizenship status as a requirement to obtaining a license for conducting a business or trade.

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 from the Austrian branch office's transactions. 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 their personal liability, then a subsidiary should be formed in Austria for business activities. This could be in the legal form of a GmbH, AG or GmbH & Co KG and so on. Please see subsection 1.3 below.

The foreign entrepreneur or business entity will be subject to tax in Austria on the income from 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 fax machine in Austria may suffice for such purposes, providing it can be used for business purposes and transactions may be initiated and carried out from said object.

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1 § 12 UGB

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

### 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 also the option of forming a partnership or company through which the business can be operated. At least two partners are required to form a *partnership entity* or *Personengesellschaft*. 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. This is legally independent from its parent company, meaning the foreign parent company 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 the 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 or an SE) or in certain circumstances maintain a legal form as **private foundations**. Even though private foundations cannot issue shares, there are legal structures 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, the co-operative (*Genossenschaft*) corporate entity and the legal association (*Verein*), 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 its shareholders' assets with the benefit of fewer formalities when compared to an *Aktiengesellschaft*. There is also no statutory requirement to appoint a supervisory board in the case of small and mid-sized GmbHs. In the case of a 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 generally no requirement to audit annual financial statements (unless the company is required to form a supervisory board). Moreover, small GmbHs are not required to file detailed annual financial statements with the Commercial Register Court; a summary balance sheet is sufficient in this respect. Micro "GmbHs (*Kleinst-GmbH*) are provided with even more relief.

Likewise, the *Aktiengesellschaft*, or joint-stock company (German acronym: AG), is an incorporated entity shielding shareholders from personal liability for the debts of the *Aktiengesellschaft*. However, in order to form an AG, at least *four* persons are needed (this requirement continues to apply during the life of the company). Specifically, at least *one* management board member and at least *three* supervisory board members are required, which means that the number of individuals who need to be involved (and who are then liable to creditors for exercising due care during management and supervising management) 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 not itself engage in the management of the company.

There are far greater formalities for an AG than there are in the case of a GmbH: in the case of an AG, a notary must take minutes 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. They should also be filed in such a way that, even in the case of smaller companies, third parties are more easily able to scrutinise the AG's financial condition.

<sup>2</sup> See J. 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), but only in such a way that both of these legal entities are 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 appear in the **Commercial Register**, which is a record of listed companies that is publicly available and may be electronically reviewed at any time.

## 1.6. The European Company

The European Company (Societas Europaea or SE)<sup>3</sup> 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 acting as the parent company.

One benefit of an SE is that there are two options in terms of structuring the corporate organisation. The statutes of the SE may either allow a monistic board system (management board) to be set up, 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 *Aktiengesellschaft in Austria and Germany*. 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, the formation of a European Company will be substantially more complicated and costly. This is true in particular if employee participation plays a role or might play one in the future. This could be the case if the SE already owned a business when it was founded or if it acquires a business or equity interests in other companies in the future.

## 1.7. Partnership entities

The legal forms of partnership entities tend, in practice, to play less of a role for foreign entrepreneurs than for local entre-

preneurs: 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 in a limited company bear, as the name suggests, only limited liability. A mixed form of partnership entity, the GmbH & Co KG, should also be mentioned and shall be discussed in the following section.

## 1.8. GmbH & Co KG

**The GmbH & Co KG is a combination of partnership and corporate entity. It can, in certain cases, be an interesting option:** This corporate form limits personal liability to the GmbH, which acts as the general partner, whilst allowing the shareholders to act as limited partners. As a result, the investor or investors generally only bear limited liability to the partnership's creditors, both in their capacity as the general partner GmbH's shareholders and in their capacity as limited partners.

A GmbH & Co KG may likewise be founded by *a single person*, who may also act as its managing director.

The reason why the GmbH & Co KG is sometimes preferred over the GmbH is rooted in tax law. The GmbH acting as general partner in a typical GmbH & Co KG has neither a stake in the capital, nor do they receive profits from the KG. The general partner only receives a remuneration for their management activities. Furthermore, *all* of the profits ordinarily go 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 profits and losses to be balanced between the parent company and 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. A group tax agreement will be required for this purpose. This makes it possible

<sup>3</sup> See *J. Reich Rohrwig*, Societas Europaea-SE, Die Europäische Aktiengesellschaft (2006)

for results to be offset against each other, not only between the group companies domiciled in the EU or EEA. In this way, the “separation principle” that otherwise applies with respect to the taxation of corporate entities is *de facto* disregarded for taxation purposes, 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, a **trade licence** is required in order to conduct a trading business in Austria. This license is issued by the public authorities (municipal authority or *Magistrat*, district council authority or *Bezirkshauptmannschaft*). As is discussed in greater detail in section IV, it is not difficult to obtain a trade licence for many types of commercial and industrial activities, 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 for said individual to be identified to the authorities. Generally speaking, this individual must either be both statutory manager and managing director (director) of the business or both statutory manager and an employee engaged at least part-time. Said employee must actually be working in the business. In the latter case, the statutory manager is *not* required to be the company’s managing director for corporate law purposes (in the case of a GmbH). Similarly, they are not required to be statutory manager and director in the case of an AG. They only have to “be entitled to give instructions within the business”.

In several cases, however, the statutory manager must hold a “relevant qualification”, which they are required to present to the trade authority by demonstrating the relevant education credentials and practical experience.

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

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

## 1.11. Employment of foreign employees

The question of whether an investor may employ foreign employees in Austria depends on the employees’ home country: The “European Fundamental Freedoms” give nationals from European Union or EEA countries the right to free movement and the right to work in Austria. However, pursuant to the transitional rules of the accession treaties, restrictions continue to apply on Croatian nationals: work permits continue to be required, to some extent, for employees coming from this country until June 30, 2020. Both a residence permit and a work permit continue, as a general rule, to be required for employees coming from countries outside the EU/EEA (even though such individuals are often able to enter Austria as tourists without any visa). For further details, see section II, subsection 3.

## 1.12. Tax law: notification of entrepreneurial activity (business, permanent 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 cases where such activities are in the form of a branch office or permanent establishment. The entrepreneur will receive a questionnaire that he or she is required to complete and return to the tax office (this is usually dealt with for them 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 refer you to the laws governing municipal tax (for wages paid to employees), insurance tax, electricity tax, natural gas tax and coal levies, motor vehicle tax, real estate 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, their purchase will be subject to the Austrian real estate transfer tax act (German acronym: GrEStG). The real estate transfer tax and land register registration fees amount to 3.5% and 1.1% of the purchase price respectively (4.6% in total).

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

The acquisition of agricultural properties or forestry is subject to additional restrictions that apply both to Austrians and aliens alike under the Real Estate 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 recorded in the land register (although this is usually not really necessary), non-EU/EEA citizens may be subject to restrictions in this case, as a result of the Land Transfer Acts adopted by 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 this does not apply in all cases. Because of the Austrian landlord-tenant law's many unique features, 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 “*common EU position*” (2001/931/CFSP) concerning the application of specific measures to combat terrorism. The Official Journal of the European Union lists the persons, groups and organisations mentioned in Council decisions.<sup>4</sup> Further information regarding these persons, groups and organisations can be derived from the sanctions imposed by EU regulations against a variety of states and/or citizens, in particular Iran, Syria, Ukraine and the Russian Federation.

<sup>4</sup> A summary of the sanctions currently imposed by Council decisions and EU regulations is available at [http://eeas.europa.eu/cfsp/sanctions/docs/measures\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf)

**Reporting obligations:** With regards to certain transactions (e.g. capital investments in forming or acquiring a business entity or shares in a business entity, but also when purchasing real property), reports have to be made to the *Oesterreichische Nationalbank* (the Austrian Central Bank) for the purposes of foreign and trade statistics. Pursuant to these rules, investors must file a report within one month of cash flows to Austria beginning.

See section II for information on asset deals, share acquisitions (M&A) and the approval requirements.

## 1.16. Money laundering, Register of Beneficial Owners

Austria has adopted the EU Money Laundering Directive into its national law as part of the international drive to combat and prevent money laundering. These laws impose obligations on the following institutions to report suspicious transactions to the public authorities: Banks, attorneys, notaries and tax advisors, among others.<sup>5</sup>

Previously, it was possible for a person wishing to remain anonymous (unrecognised) as a partner in a partnership or limited company, or founder of a foundation or trust, to make use of a trustee. Based on European Directives for the prevention of money laundering and the financing of terrorism, Austria has now introduced the “Beneficial Ownership Register Act”<sup>1</sup>, according to which, at the latest with effect from 1 June 2018, in the case of all registered partnerships, limited companies and foundations, any “beneficial owner” having a direct or indirect holding of over 25% must be entered in the “Beneficial Ownership Register”. In the case of trusteeships, the trustor rather than the trustee must be registered. In this way, official bodies and third parties are able to establish the identity of the person behind a company or foundation in their role as controlling partner, shareholder or donor/beneficiary.

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

The following sections will provide very brief explanations of the individual corporate forms available to investors for establishing a business entity. See our comments in subsection 1.1 for information on “sole proprietorship”.

<sup>5</sup> See § 165 of the Austrian Criminal Code (German acronym: StGB) on the question of whether money laundering is punished as a crime

## 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 identity independent of that of its shareholders.<sup>6</sup> 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 towards the GmbH’s creditors for the GmbH’s obligations (“separation principle”). A GmbH must have a nominal capital of at least € 35,000 when it is formed. Normally, at least € 17,500 of this must be paid in cash. If, on the other hand, a “privileged formation” (*gründungsprivilegierte*) GmbH is formed, then only € 5,000 must be paid at the time of formation. The shareholders are also personally liable for another € 5,000 during the first ten years after the privileged formation GmbH has been registered and are also liable for the residual amount of the nominal capital after this period has expired.

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 for 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 the purposes of forming the GmbH in Austria, provided that the agent holds 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 contract is referred to as “the articles of association”. Where a GmbH is only formed by a single shareholder, the articles are referred to as a “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 article of association also contains rules on 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 on rights of pre-emption for 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, GmbH shareholders 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.

With effect from 1 January 2018, a simplified procedure will be introduced for forming a GmbH with a single shareholder, whereby the formal requirement of a notarial deed will be removed providing the following preconditions are fulfilled:

- The sole shareholder must be a natural person;
- It must be possible to clearly establish and confirm the sole shareholder’s identity;
- The sole shareholder must simultaneously also be appointed as the sole managing director;
- The deed of formation relating to the GmbH may essentially only comprise the minimum statutory content;
- The share capital must total EUR 35,000.00;
- Formation of the company must take place electronically.

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

The statutory minimum capital (“share capital”) of a GmbH is € 35,000. The capital may be provided through contributions in cash or in kind.

When a “privileged GmbH” is founded, the shareholders are only liable for cash contributions totalling € 10,000 in the first ten years. The shareholders are obliged to pay in at least € 5,000 of this amount in cash at the time of the company’s formation.

<sup>6</sup> See J. Reich-Rohrwig, Das Österreichische GmbH-Recht, 2<sup>nd</sup> Edition

Contributions in kind and services performed in lieu of required cash contributions are not permitted.

Cash contributions must be paid into the company's Austrian bank account. Likewise, a bank confirmation must be produced when registering the GmbH with the Commercial Register. When the GmbH's capital is contributed either exclusively or predominantly in kind, then the corporate formation must, as a rule, be reviewed by a court-appointed auditor.

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. Filing a 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 file the application for *Firmenbuch* registration to the competent commercial court or regional court. The Austrian *Firmenbuch* corresponds to the German *Handelsregister*. The filing process requires notarised signatures from all of the GmbH's managing directors. The managing director(s) is/are also obliged to provide notarised specimen signatures to the court. In addition, the managing director(s) must deliver a declaration confirming that both the cash contributions and any contributions in kind are available to him/her for deposit, without restriction. They are furthermore 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, then it must obtain prior approval from the Austrian Financial Market Authority (FMA) and also 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 cases, a non-objection notice must be submitted by the competent competition authority.

#### **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 in the insurance broker business.

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

Any Austrian or foreign natural person or legal entity (i.e. in particular, incorporated entities), all registered partnership entities (such as OG or KG) and all 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 their 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, then they must provide evidence of their legal existence by acquiring confirmation of this from the competent court or Chamber of Commerce. A certified translation of this must be provided where it is not issued in German.

#### **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. This is why she/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 for issues such

as liability to creditors and compliance with statutory regulations-.

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

However, it is *not* necessary for the managing director to be a shareholder at the same time. The managing director is likewise *not* required to have their normal residence in Austria.

Nevertheless, in urgent cases (where managing directors who are needed to represent the GmbH are not available), the court may, on the 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”. It must be possible to contact this director in Austria. To avoid this, it is advisable either to appoint a managing director or at least a *Prokurist* (authorised signatory) whose normal residence is within Austria.

Where a company has the legal form of a GmbH, the shareholders may issue instructions to the managing director(s) through adopting shareholder resolutions. If the intention is to remove or restrict this right in relation to the managing directors, this would need to be specified in the articles of association.

### 2.1.8. Costs of formation of a GmbH

There are various costs associated with preparing the articles of association and any other documentation needed when founding a GmbH (registration with the Commercial Register, specimen signatures, etc.). Cost also arise when engaging the notary to prepare the notarial deed. (In the case of simplified formation of a GmbH with a single shareholder, the formal requirement of a notarial deed does not apply).

The court fees for entering the GmbH in the Commercial Register are, generally, between € 350 and € 500.

Under the Austrian Promotion of Start-Ups Act (German acronym: NeuFöG), newly formed business may be allowed to obtain an exemption from court fees.<sup>7</sup>

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. The upper limit to these costs are set at maximum of 10% of its share capital.

<sup>7</sup> For further details on the Austrian Promotion of Start-Ups Act, see section V, subsections 2 and 4.1

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

The GmbH can be registered with the Commercial Register within one to two weeks of the following having taken place: the shareholders have executed the notarial deed of formation, the application for registration with the Commercial Register has been signed by the managing director(s) and notarised, the capital contributions have been made and all of the required documents are in place.

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

Certified translations must be submitted for official documents that are not in German.

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

The founders bear personal liability for any business transacted in the name of the GmbH before its entry onto the Commercial Register (e.g. a lease, commercial transactions, employment agreements, etc.). As a rule, the GmbH may ratify these transactions once the GmbH has been formed, but it must notify the counterparty to those transactions (landlord, party to the contract, employee) within three months of its registration with the Commercial Register. If formation of the GmbH fails or if the equity capital is lost (either in part or in full) before the GmbH is registered on the Commercial Register, then the persons who performed the transactions on behalf of the GmbH (and in certain circumstances the shareholders) will 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 shareholders resolutions orally, or 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’

liability. Under Austrian law, this discharge 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 for resolution by the managing directors (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 annual 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 the GmbH performing poorly or where transactions are to be carried out which require the consent resolution of the shareholders’ general meeting. 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 they may adopt resolutions in writing. Written consent is required for this. A copy of the resolutions the shareholders have adopted must be immediately forwarded to each shareholder by registered mail.

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. Where managing directors are simultaneously shareholders, the articles of association may place restrictions on the dismissal; however, in such cases every other shareholder has the right to bring an action for a judicial dismissal of the managing director, if there is good cause to do so.

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 or by a managing director along 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 the relevant provisions of law. By its nature and given the number and complexity of applicable rules, this duty entails a significant risk of liability for each managing director. We would here like to 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 the competition law itself, etc. In the interest of the company’s creditors, the managing directors must at all times keep themselves up to date on the GmbH’s financial condition, report on this 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).<sup>8</sup>

Managing directors may also be subject to the provisions of criminal law in connection with their management of the GmbH’s business. Criminal law can come into play in cases involving occupational accidents resulting in injury or death caused by negligence, harm to the environment and the like,

<sup>8</sup> For further information about the duties of managing directors see *Johannes Reich-Rohrwig* in *Straube/Ratka/Rauter*, Wiener Kommentar zum GmbHG, zu § 25, 2<sup>nd</sup> Edition

even if the managing director is “merely” culpable regarding the breach of their duty to monitor or also if they merely bear organisational culpability. Other relevant criminal law provisions are those relating to the misappropriation of assets, fraud and bankruptcy crimes, criminal tax law and the like.

Every Austrian GmbH must keep complete books and accounting records. They must also prepare annual financial statements. The managing directors are obliged to maintain a financial accounting system and an internal system of controls in line with the requirements of the business. They must also ensure compliance with tax regulations. As a rule, cash register receipts must be issued in Austria, starting from the 1 January 2016. In addition, they are also obliged to file monthly, quarterly and annual tax returns and, obviously, pay their taxes. The managing directors must prepare **annual financial statements** and an annual management report within five months of the end of each fiscal year. 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 where it is required to 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 annual management report (together with the proposal of the managing directors on appropriation of profits) to the Commercial Register no later than nine months after the end of the fiscal year. The documents submitted are publicly available. The documents must be filed electronically. The rules for submitting annual financial statements to the Commercial Register court are also not as strict for micro, mid-sized and small GmbHs. Small GmbHs are generally only required to submit a summary balance sheet and summary notes to the accounts, and the requirement to submit notes to the annual financial statements can also be waived for micro GmbHs.

The law imposes liability on managing directors where they fail to exercise the care of a prudent businessperson (*Sorgfalt eines ordentlichen Geschäftsmannes*). This is in particular relevant for transactions where there has been a breach of law or breach of the duty of care. Where such liability is required in order to satisfy the claims of a GmbH’s creditors, neither a resolution by the shareholders approving the managing director’s action nor any resolution discharging the director will eliminate their liability for breaches of their duty of care.

### c) Supervisory board

The Austrian GmbH Act (German acronym: GmbHG) does not generally require the GmbH to set up a supervisory board in its form as an incorporated entity. 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, in practice, of lesser importance. A supervisory board or another constitutive body (such as an advisory board) may also be set up as an option.

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*”. This means that, for every two members of the supervisory board appointed by the shareholders, one employee representative can be delegated to the board. 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 is required by statute or by the articles of association to give its consent to those transactions listed in said statutes or articles of association. 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)

The GmbH may not distribute its assets to shareholders, whether openly or in a concealed fashion. This is because of the need to protect creditors in relation to the GmbH. The GmbH is only permitted to distribute the profits shown in its annual financial statements as net profits.

### 2.1.13. Related party 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 “arm’s length terms”. Situations that merit scrutiny from this perspective may arise when the GmbH grants loans to its shareholder (top-level group company) or to a peer-level group affiliate, or if it grants collateral 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 the GmbH’s loan or leasing obligations. 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”. The interest payable on such loans can, in this case, not be deducted as an operating expense for tax purposes.

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 over indebted or insolvent or where the parameters for a presumption of mandatory reorganisation are present under the Austrian Corporate Reorganisation Act (German acronym: URG), then the following rule may apply: If a loan is granted by a shareholder with a controlling share in the company, or by a shareholder who

has a share in the company no less than 25% (see § 5 of the Austrian Equity Substitution Act for more details), then this will be deemed a “substitution of equity” subject to the Austrian Equity Substitution Act (German acronym: EKEG). Equity-substituting shareholder loans are treated as subordinated to all other debt during an incorporated entity’s insolvency period. As a result, the shareholder providing the equity substituting loan will not participate in the pro rata distribution of assets during the insolvency proceedings. In addition, any shareholder with a relevant share in the incorporated entity providing a collateral for a third-party loan in the company’s crisis is covered by the equity substitution law and treated in the same manner.

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

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

The second legal form of an incorporated entity is the *Aktiengesellschaft* (AG). As a legal entity, the AG has an independent legal identity and possesses rights and obligations of its own. 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 when the company is founded. An AG may be formed by one or more natural persons or legal entities. A single person is therefore permitted to found the company. That single shareholder must be identified by name in the Commercial Register in such cases.

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

The formation of an AG is more complicated than the formation of a GmbH in that, at the time of formation, the application to register 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.

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

In reference to banking transactions, 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 to GmbHs and 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 to 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 must have good cause if they wish to dismiss members of the management board. Members of the management board may be reappointed upon expiry of their term of office.

### 2.2.3. Supervisory board

In contrast to 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 you 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 cases, the shareholders’ general meeting is bound by the annual financial statements which have been adopted.

### 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 a nine month period (at the latest) after 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 the *Wiener Zeitung* (Vienna newspaper).

### 2.2.5. General meeting of shareholders

The general meeting of shareholders must be held at least once a year and within the first eight months of the year. Their purpose is to present the annual financial statements, grant any discharges necessary to the management board and the supervisory board, adopt resolutions on appropriation of profits and to appoint a chartered accountant to audit the annual 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 is at least 28 days for an ordinary general meeting of shareholders, and 21 days for extraordinary general meetings of shareholders. The general meeting of shareholders is chaired by the chairperson of the supervisory board.

All transactions between the AG and its shareholders must be entered into on an arm’s length basis. Please see the section dealing with GmbHs for further information on financing by shareholders, shareholder loans, interest on such loans and equity-substituting shareholder loans (2.1.12 and 2.1.13).

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

### 2.3.1. Formation of an SE<sup>9</sup>

The concept of a “European Company” (Societas Europaea – SE) has existed in Austrian law since 2004. 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 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 in joint partnership 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, in addition, by the 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 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 a constitutive body with management authority and the power to represent the company, whilst 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.

<sup>9</sup> See J. Reich-Rohrwig, *Societas Europaea-SE, Die Europäische Aktiengesellschaft* (2006)

## 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, agricultural or silvicultural activities. It 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 into the Commercial Register. All of the partners must submit this application for registration by way of notarised signatures.

The OG possesses a legal identity, 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 to be a “partnership for tax purposes” with regards to which income (profits/losses) is apportioned to the partners. Said methods of apportioning income is in direct relation to their partnership interests.

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 for them to be granted *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). In contrast to an OG, not all of the partners in a KG 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 (the “general partner”). The remaining partners only have 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 their limited partnership share (liability share) has been fully paid in. Their liability is revived in the event of that share being refunded to them.

### 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 a typical setup, the shareholders of the GmbH are, at the same time, 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). This means that the duty of the GmbH's managing director(s) is/are to manage the affairs of the GmbH & Co KG and fulfil all the 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 based on the unlimited personal liability of at least one shareholder) is modified in the case of a GmbH & Co KG, the Austrian legislature, has, in many ways, put the typical GmbH & Co KG<sup>10</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,

<sup>10</sup> In which there is no natural person fulfilling the role of general partner with agency authority

the duty to file a petition of bankruptcy and the law governing equity substitution. For further information, we refer you to the observations made in subsection 2.1.11.b regarding the GmbH.

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

## 2.6. Branch offices of foreign companies

### 2.6.1. General remarks

Foreign legal entities (**sole proprietors, partnership entities and incorporated entities**) may establish branch offices in Austria. This is not only an expression of the freedom of establishment under EU law (see also the EU Directive regarding branch offices 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 Commercial Code or UGB).

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

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

Austrian law requires Austrian branch offices 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. A certified German translation must be provided for these.

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

Where the branch office being established is for a foreign joint-stock company or a limited liability company with its registered offices outside the EU/EEA, then said company must appoint a “permanent representative” for its Austrian branch. That representative must have their 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 with relation to branch office

operation. It is also possible for two or more permanent representatives to be appointed. These representatives would only be authorised to represent the branch when they did so together.

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

#### **2.6.4. No independent legal identity, liability or capital**

A branch office does not possess separate legal personality. Any obligations and liabilities it incurs constitute obligations on the part of the foreign legal entity (business owner). The branch office likewise has no share capital of its own.

#### **2.6.5. Bookkeeping, tax reporting**

Branch offices are obliged to keep separate books and to file tax returns in Austria.

Branch offices of foreign incorporated entities are required to submit and disclose their annual financial statements to the Austrian Commercial Register court. They are also required to submit and disclose said statements in German. 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**

A foreign incorporated entity must submit a notarisation from a public notary to the Austrian court when registering a branch office with the Austrian Commercial Register. Said notification deals with the foreign company's articles of association and should also include a certified translation into German, where required. Similarly, all of the entries and deletions in the foreign Commercial Register must likewise be entered into the Austrian Commercial Register. In practice, this requirement is often complicated and costly. The perceived cost-effectiveness of establishing a business in Austria as a "branch office", as opposed to an incorporated entity or partnership, is strongly offset by the disadvantages described above.

#### **2.6.7. Is it expedient to form a Limited Company abroad and 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 in Austria. These foreign "limited companies" will then frequently establish a branch office in Austria in order to do business in Austria without any minimum capital. However, the costs arising from this are significantly greater if one considers the fact that 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. This fact can, in many cases, create 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 founder determines the foundation's purpose, and this purpose must be served by the use, management and disposition of said assets. It is by no means required that the purpose of the foundation be charitable. Rather, the foundation may be used for one's own purposes, 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 beneficiaries 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 for the deed of foundation to 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 virtual 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 not only be used as a (intermediate) holding company and as a tool for managing a business, but it may also be used to govern the commercial “universal succession” of a business between parents and their descendants.

Generally speaking, the tax consequences for Austrian founders and beneficiaries of a private foundation 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 purchasing **all of their assets** (so-called asset deals) or – in economic terms – by **acquiring all of the shares** in the business. The latter alternative becomes 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 themselves from liability risks or unknown and concealed liabilities, than if they acquire 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.- This is because the sale of all the company shares 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 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>11</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 when transferring contracts to the party acquiring the business. This is because the parties’ consent to the contract would be required under Austrian civil-law principle for the transfer of the contract to be legally valid.

<sup>11</sup> As to asset and share deals, see:

*J. Reich-Robrwig*, Unternehmens- und Anteilsübertragung aus zivil- und gesellschaftsrechtlicher Sicht in Unternehmensnachfolge, published by Bank Austria (1999) 10 *et seq.*;

*J. Reich-Robrwig*, Rechtsfragen beim Unternehmenskauf und Beteiligungserwerb in *Hanzel/Wunderbaldinger* (eds), Mergers & Acquisitions in Austria (1993) 243 *et seq.*;

*J. Reich-Robrwig*, Gewährleistungsfragen beim Anteilskauf, *ecolex* 1991, 89 *et seq.*, jointly with Dr. Thiery;

*J. Reich-Robrwig*, Haftung des Käufers einer Beteiligung in *Bertl/Mandl/Mandl/Ruppe* (eds), Kauf und Verkauf von Unternehmen (1992) 91 *et seq.*;

*J. Reich-Robrwig*, Auslegung und Reichweite von Bilanzgarantien, in *Althuber/Schopper* (eds), Handbuch Unternehmenskauf<sup>2</sup> (2014) 387 *et seq.*;

*J. Reich-Robrwig*, M&A: Auslegung von Kaufpreisanpassungs-, Earn-out- und Besserungsklauseln, Festschrift für *F. Rödler* (2010) 763 *et seq.*, *Grossmayer/Hanslik*, Big Deal? M&A-Verträge richtig verhandeln! (2013)

In the realm of landlord-tenant law, an asset deal (but also a share deal) can mean the landlord is, under certain circumstances, entitled to raise the previous rent rate to a market level for the premises they are leasing (this only applies to tenancies in “old structures”)<sup>12</sup>.

Under Austrian law, buyers may bear liability for any obligations belonging to the business sold. The liability rules are found in various statutes (Austrian Commercial 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 excluded, on agreement between the buyer and seller and by registering this 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. If the buyer acquires all of the shares or the majority of the shares, then they are placed in a situation enabling them to manage or control that business following the acquisition.

Where a controlling interest has been acquired in an *exchange-listed Aktiengesellschaft*, the Austrian Takeover Act (German acronym: ÜbG) provides special rules regarding the need 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 usually be interested in more closely scrutinising the object of sale, the buyer themselves will conduct a due diligence review using advisors’ support. In the context of that review, the legal, tax, commercial, business, technical and environmental aspects of the object of sale will be scrutinised. If the company the buyer acquires does not fulfil the warranties given, if the ordinarily assumed qualities are not fulfilled, or if the buyer was misled in any way, then the buyer has claims based on the following: warranty, breach of duties of information, challenges to a sale for error and damages. However, the buyer’s rights are usually modified, limited or excluded by 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.

<sup>12</sup> On this point see: J. Reich-Rohrwig, Mietzinserhöhung bei Geschäftsraum-Hauptmiete (1994)

## 4. Austrian corporate takeover law

A party wishing to acquire a direct or indirect “*controlling interest*” in an *exchange-listed Aktiengesellschaft (target company)* has an obligation under the Austrian Takeover Act (ÜbG) to immediately notify the Austrian Takeover Commission of its intention to do so 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 A) either the average share price over the last six months or B) 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 cases, the buyer is obliged to make a public mandatory tender offer.

However, there are exceptions to this obligation, in particular where a stake greater than 30% cannot assert 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 essential 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) are subject to the duty to make a tender offer under the Austrian Takeover Act if they acquire a controlling stake in a company. 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 make sure all shareholders are treated equally and 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. The Act should also prevent market distortions on the stock exchange with regards to the securities of the target company.

The Austrian Takeover Act firstly imposes detailed obligations on the bidder, and secondly, imposes duties on the target company’s management board and supervisory board during the takeover process. This is in line with the European Takeover Directive.

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 which are designed 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>13</sup>. There is a statutory requirement to consult an expert (chartered accountant or bank) on takeover procedures, and this requirement applies both to the bidder and to the target company.

## 5. Merger control

### 5.1. Austria

As in most of the EU member states and the EU itself, the acquisition of businesses and equity interests is subject to merger controls 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 case of "media mergers", media plurality is also a goal.

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

**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 in the last fiscal year 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 the global turnover of at least two

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

In addition, registration is required if, during the last financial year, the participating entities achieved global sales totalling over EUR 300 million and domestic sales totalling over EUR 15 million, the value of the consideration (e.g. purchase price) in respect of the merger totals over EUR 200 million and the entity to be acquired is engaged in significant business operations within Austria (section 9 (4) of the Austrian Anti-Trust 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-mentioned turnover thresholds under § 9 (1) of the Austrian Competition Act are exceeded, then the merger must be registered with the Austrian **Federal Competition Authority**. The Federal Competition Authority and the Federal Competition Prosecutor may apply for the Competition Court (Kartellgericht) to review the merger within four weeks of the date of registration.

The share or asset deal may not be completed before the merger has been approved.

It may be the case that the target company, the buyer or another entity with a stake in the target company operate abroad or hold corporate group companies located abroad. If this is the case then it may under certain circumstances, *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 the merger will be covered by the control rules under the **Merger Control Regulation (MR)**<sup>14</sup>, rather than by the Austrian merger control (and the accompanying merger control of any other EU member states which may apply here). The EU authority with jurisdiction over such proceedings is the **European Commission** in Brussels.

<sup>13</sup> For further details see *Peter Huber* (ed), *Kommentar zum Übernahmegesetz* (2007)

<sup>14</sup> Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.1.2004

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

**No jurisdiction** is vested in the European Commission by 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 from companies based in 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, altogether, more than € 5 billion, and
- b. community-wide total turnover of each of at least two of the entities involved in the merger equals more than € 250 million.

Test II:

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

As noted, jurisdiction over European merger applications is, under the MR and as general matter, 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, inter alia, equity interests in banks, stock exchanges

Special legislation exists which imposes further obligations 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). They also apply 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 shall, in each case, be obtained from the Austrian Financial Market Authority (FMA).

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, the concessionaire for lotteries and casinos 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 were to be incorporated into the consolidated financial statements of the concessionaire under § 244 of the Austrian Commercial Code (UGB). Furthermore, the concessionaire is required to provide immediate written notice 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 said 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).

Approval and notice obligations with respect to private radio and television companies exist under § 15 and § 22b of the Austrian Private Radio Act (German acronym: PrR-G) and pursuant to §§ 10, 25 and 25a of the Austrian Audio-Visual 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, Austria has issued special rules for the acquisition of companies and stakes in companies by **“third-country” purchasers. These rules apply to** companies operating in any sector relating to **“public security and or-**

*der*”, and are referred to as the Austrian Foreign Trade Act 2011 (German acronym: AußWG 2011). **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 requirements cover the acquisition of incorporated entities (including GmbH & Co KG and the like) as well as all other entities who have an annual turnover of more than € 700,000. They apply where the entity in question operates in a business sector relating to “public security and order”. These include entities in the following industries:

- Defence goods,
- Security services,
- Hospitals, emergency and first-response medical services,
- Fire brigades and disaster management,
- Energy providers (electrical power, gas),
- Water providers,
- Telecommunications,
- Public transport (railways, aviation, navigation, federal roads),
- Universities, polytechnics, etc.

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

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

Whilst the legislature has excluded immaterial cases from the approval requirement, it does, on the other hand, expressly cover certain indirect acquisitions. The catch-all rule relating to *acquisition 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 of the date upon which they receive the application. In this decision, they must state either that they have 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 of issuing the decision, either approve the acquisition or – where there is a concern that it poses serious risks to “public security and order” – refuse it. They may also approve the acquisition, subject to conditions. Where no decision is rendered within these periods, the acquisition is deemed to have been approved. Only the two-month period applies to *ex officio* proceedings for indirect acquisitions.

## 7.4. Legal consequences

There are legal penalties on completing an acquisition without observing the approval procedures, for breaching the conditions 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. If the crime is committed as part of a commercial enterprise, by means of forging official documents and data, or by means of another falsified piece of evidence, then custodial sentences from six months to 5 years apply. Custodial sentences of up to 1 year or a fine of up to 360 daily rates apply in cases of criminal negligence. A breach of the duty to obtain official approval also results in the acquisition in question being invalidated.

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

# Section III: Employment law, foreign alien employment authorisation

## 1. Basics of Austrian employment law

Employment law is the area of private law pertaining to persons 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 both parties to an employment agreement (employer and employee) i.e. the employment agreement (and “employment agreement law”). **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., for minimum wage, overtime supplements, maximum permitted working hours, annual leave). Said standards may not be deviated from when this is to the detriment of the employee.

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 not made in writing, 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. The notice of employment must contain, at the very least, the disclosures stipulated in § 2 (2) of the Austrian Act Amending the Law Governing Employment Agreements (German acronym: AVRAG).

## 3. Foreign employees

### 3.1. General remarks

Employment of (non-EU) aliens in Austria is subject to various restrictions and controls under the Austrian Employment of Aliens Act (German acronym: AuslBG). These restrictions exist

for reasons related to labour market policy. 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 Aliens Act does not apply to the employment of EU and/or EEA nationals (with exceptions currently still in place, at the longest until 30 June 2020, for Croatia).

In addition, the following types of individuals are exempted from the Employment of Aliens Act: refugees, spouses and children of Austrians or EU/EEA citizens, management-level staff, 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 to Turkish employees who have been legally employed for at least one year. This relief also applies when employment authorisation is being issued to that employee’s family members for the first time.

### 3.2. Key workers

There is a special (eased) authorisation option for **key workers** who have particular training which is in demand on the Austrian labour market or who possess special knowledge, skills and experience. In addition, professionals in shortage occupation, graduates of a university and relatives of those mentioned can run this chance.

### 3.3. Red white red card

**The red white red card was created** in 2011; its colours are intended as a **deliberate imitation of the Austrian flag**. It was created in order to introduce 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 24-month period and grants authorisation for temporary

residence and employment with a specified employer. Highly qualified persons, specialists in occupations in short supply, 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 granting of a red white red card are qualifications, professional experience, age, language skills, a firm job offer and a particular minimum level of reimbursement, depending on the employee's qualifications.

The minimum salary under law, regulations or collective agreements must be paid to specialist workers in fields that are in short supply. 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 1.1.2018, this has amounted to a gross monthly salary of expected € 5,130) plus bonuses. University graduates must earn the monthly gross salary 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 a fixed term authorisation to reside in Austria and be employed by a particular employer.

Secondly, there is the option of obtaining a **red white red card plus**, which conveys fixed term 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 has been employed for at least 21 months during the previous 24 months, subject to the conditions applicable to the grant of authorisation. It may also be granted to the family members of holders of a red white red card, blue EU card or to family members of aliens who are already permanent residents. It may be granted for one year (under further conditions for three years) following a review by the AMS and the competent alien residents authority (district council authority/municipal authority. In Vienna, the municipal department 35).

### 3.4. Secondment of foreign employees from third countries to Austria

Foreign employees employed by a foreign employer from a third country who lack an office within the Austrian federal territory will, as a general rule, require **employment authorisation**. Where the work being performed does not last longer than six months, aliens will require a **secondment authorisation**, which may not be issued for longer than a four month period. However, in the construction sector employees always need employment authorization.

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 primarily governed by 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. Employers must meet or exceed these levels, due to the relatively compulsory nature of these 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 ("inadequate wages")

Since 1 January the new and stand-alone Austrian Act Combating Wage and Social Dumping (German acronym: LSD-BG) is effective. It applies to circumstances that took place after 31 December and on all employment relationships based on a private-law contract, on the employment of workers according to the Austrian Temporary Staff Act (German acronym: AÜG) as well as on employment relationships on which the Austrian Act regarding homeworkers (German acronym: Heimarbeitsgesetz 1960) applies.

The LSD-BG also regulates the legitimacy of the Austrian minimum level, based on law or collective agreement, for employees posted to Austria. At that, there is no difference between EU Member State, EEA State and third country.

§ 19 LSD-BG states that a company that employs workers of any nationality for secondment to Austria, and who have their base in a EU/EEA country or in Switzerland, must notify the Central Coordination Office for the Control of Illegal Employment (Zentrale Koordinationsstelle, ZKO) of this fact. They must do so at the latest one week before work begins. Notifica-

tion may only be made using the electronic form provided by the Austrian Ministry of Finance.<sup>15</sup>

According to whether it is a posting of workers or a cross-border secondment, different ZKO-forms exist. For the judgement, whether it is a posting or a cross-border secondment, the true economic content and not the outer appearance of the circumstances is decisive. Furthermore, the cross-border secondment from third countries is tied to conditions of § 16 of the Austrian Temporary Staff Act (German acronym: AÜG). The employer (who occupies) has to seek an additional authorisation (along with the employment authorisation). § 10 AÜG ensures that secondment-employees get the collectively agreed payment of the employer company (place of work – who occupies) as well as the collectively agreed working time that applies in this company.

In addition to the requirement to store and keep the secondment notification (also in electronic form), the employer must also keep and store the documents for the employees' social security registration (social security document A 1 or E 101), if the seconded workers are not required to make social security contributions. The employer must also keep and store the wage documents (in the German language) which are needed to determine the remuneration due to the employee under Austrian law. They must keep and store these throughout the entire period of the employee's secondment to the Austrian place of work. These documents may include the employment agreement, pay slips, wage payment records or bank transfer slips, payroll records, work time records and documents concerning wage categories.

Violations of the regulations of the LSD-BG, also especially the reporting- and store and keep regulations can lead to major administrative penalties up to € 10,000 per employee. Are more than three employees affected and in the event of repetition, the maximum penalty per employee can come to € 50,000.

### 4.3. Employees from the new EU member states

Employees from Poland, Hungary, Slovakia and Slovenia have enjoyed free access to the Austrian labour market since May 1, 2011, employees from Bulgarian and Romania since January 1, 2014.

On 1 July 1 2013, *Croatia* joined the EU. As was the case in the course of the EU enlargement in 2004 and 2007, a transitional

<sup>15</sup> Form ZKO 3 is currently available at <https://english.bmf.gv.at/combating-fraud/Cross-border-posting-of-workers-in-the-EU.htm>

period of seven years is also applicable here, during which Croatian citizens are not entitled to move freely as workers. Austrian employers are hence required to obtain a work permit from the Labour Market Service (AMS) in order to employ Croatian citizens.

## 5. Working time

The normal daily working time is 8 hours, and the weekly normal working time may not exceed 40 hours. However, many collective agreements stipulate a reduced weekly normal working time (for example, the collective agreement for retail workers and the IT collective agreement sets a 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. If normal working times are exceeded, then this results in a claim to an overtime bonus. This is generally 50% of the base remuneration.

However, Austrian working time law provides a host of options for allocating normal working time in manner which differs to that which has been envisaged by law. This allows working time to be adapted to business needs by diverging from the less flexible limits mentioned above, thus avoiding overtime which is subject to mandatory salary supplements ("aggregating" or "rolling"). Typically, collective agreements contain detailed rules on different working time allocations for normal working time. Thus, for example, the collective agreements for the retail sector, for the industry sector, for commercial trades and for the IT sector provide the option of aggregating weekly normal working time and averaging it out over a longer average 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). In addition, working time may only be extended by no more than 60 overtime hours within any calendar year. Finally, no more than 10 overtime hours in total are permitted each week.

If more than 48 hours of working time are permitted per week then, under European law, the average working time per week during an aggregate period of 17 weeks must not exceed 48

hours per week. Under a collective agreement, the aggregate period can be extended to a maximum of 52 weeks.

## 6. 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 said leave days were accrued.

## 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 above, the general protections against unfair termination provided by § 105 of the Austrian Works Constitution Act or ArbVG (which applies to businesses which continuously employ at least 5 employees, even where no works council has been appointed) must also be borne in mind. The provision states that, if an employer terminates an employee’s contract and the employee *challenges* the notice of termination *because it is unjustified on social grounds*, and if the works council has not expressly consented to the notice of termination, then the employer must have very solid grounds for justifying their decision.

If an employer wishes to terminate an employee’s employment contract, then they essentially have two sets of justifications that they may use. The first set of justifications relate to the behaviour of the person in question. **This is where** aspects of the person’s behaviour are disruptive to conducting the company’s business in a normal manner (e.g. conduct that contravenes instructions given, incompatibility with employer, lack of

punctuality, etc.). The second set of justifications are based on **organisational reasons** (e.g. changes in the economic environment; restructuring measures; closure of business units or entire departments; headquarter relocations, etc.) which entail redundancies in the workforce.

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

### 7.3. Social plan in favour of employees

Where a legally essential business change (e.g. in connection with staff redundancies) entails material disadvantages to all or significant sections of staff, then “*measures to prevent, eliminate or attenuate such consequences may be governed by works council agreement*”, as stated in § 109 (3) of the Works Constitution Act (ArbVG). *These measures apply* 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 the conclusion, amendment or rescission of any such works agreement (“*social plan*”), the mediation office (German acronym: *Schlichtungsstelle*) will issue a ruling after one of the parties to the dispute has applied for said ruling. The works council can therefore force a social plan if certain requirements are satisfied.

### 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 through rescission by mutual agreement, but it may also be terminated prematurely with immediate effect, if there is good cause for doing so. 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*. If the employer dismisses an employee or an employee resigns, then good cause is met when the relevant party could not reasonably be expected to adhere to that contract until the specific termination notice period expired.

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

Austrian employment law furthermore makes a distinction between *salaried employees* and *wage earning employees*. Salaried employees are, according to the Austrian Salaried Employees Act (German acronym: AngG), employees performing commercial work, including 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 *salaried employees* and *wage earning employees* is particularly relevant in light of notice periods and termination dates, the length of time that compensation continues to be paid during a period of illness and the grounds for unfitness to work which are rooted in an employee's personal situation.

Attention should be paid to the recently enacted law decision, whereupon continued remuneration regulations of salaried employees will step-by-step approach to the respectively more favorable regulations of wage earning employees. This regulation come effective by 1 July 2018, the transitional provisions do not refer to the time of agreement, but to the time of termination.

## 9. Works constitution

The Austrian Works Constitution Act (German acronym: ArbVG) stipulates that two constitutive bodies of co-determination and representation of employee interests may be appointed/called in every business businesses which continuously employ at least 5 employees: These are the *works council* and the *general staff meetings*. 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 without disrupting the business, where possible. The works council has many rights to information, involvement and co-determination vis-à-vis the owner of the business.

The works council's competencies may be roughly broken down into the following sections:

- Involvement in social matters, in particular by entering into works council agreements.

- Involvement in human resources matters, in particular in respect to 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 the employer entities competent to make collective agreements (e.g. the Austrian Chamber of Commerce 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, and can be exceeded. Determining which collective agreement normally applies to an employee is of fundamental importance to the shaping of the employment relationship and to deciding which employment agreement is used.

The fundamental 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 and can be exceeded. Wages and salaries are increased at regular intervals (usually annually) by amendments to the collective agreements. Additional terms are agreed on a case-by-case basis, 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 also include other material terms of employment such as working time, entitlements to unpaid leave or termination dates/notice periods that deviate from the law to the benefit of the employees involved.

## Section IV: Trade licensing and other approval requirements

### 1. Trade licence

#### 1.1. General remarks

In order to conducting a trade, both sole proprietors as well as partnership entities and incorporated entities require a trade licence, or “Gewerbeberechtigung”.

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

“Trade” is an independent, regular activity carried out with the intention of deriving an economic benefit. Professionals engaged in 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 Commerce 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 required for a trade licence to be granted

For sole proprietors, the pre-condition for obtaining a trade licence is that said person is an Austrian citizen, is a citizen of an EEA state or has Swiss citizenship.

An entrepreneur who is a national of a non-EEA country may be granted a licence to carry out a trade if this is covered by an international treaty that provides for reciprocity or where they furnish evidence of a residence permit for Austria (and when said license entitles them to carry out a trade).

As a pre-condition to carrying out a trade in Austria, foreign partnership entities or incorporated entities must furnish evidence that the establishment of a branch office has been registered with the Austrian Commercial Register (see section I, subsection 2.6., above).

A further pre-condition to the granting of a trade licence is that there are no grounds which prevent the license from being

granted (e.g. tax offences, convictions). In addition, the entrepreneur must be at least 18 years old. In the case of partnership entities and incorporated entities, none of the reasons mentioned above for excluding a person from carrying out a trade may be present with respect to the entity’s corporate officers and directors (managing directors, other directors) or with respect to persons exercising substantial control over the company.

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

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

The Austrian Trade Commerce 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 out *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, after consulting with the Economic Chamber, grant an exemption from the requirement to submit certification of proficiency.

#### 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 after applying for said license with the trade authority: the application itself suffices if all of the conditions (see subsections 1. and 2.1. above) have been met. In this case, it is not necessary to wait for the authorities to grant the trade licence.

In contrast persons engaged in certain *regulated trades* (“*sensitive trades*”, e.g. master builders, electrical engineers, gas and sanitation technology) must wait until a favourable approval notice has been issued by the trade authority before they can begin with their trade. They must also wait until this notice 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 be natural persons (sole proprietors), incorporated entities (GmbH, AG), partnership entities (OG, KG), or foreign company’s associations and branch offices. 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 out is one of the “free” trades. The statutory manager is responsible for complying with the rules of Austrian trade licensing law.

The statutory manager may, but does not have to be, a managing director registered with the Commercial Register. They may, but do not have to, also bear the authority to represent the entity under commercial law. Accordingly, even a simple employee may be appointed as statutory manager if that employee is employed within the business on a half-day basis (minimum) and has the corresponding authority to give instructions within the business.

If the business carries out a regulated trade, then the statutory manager must hold the certification of proficiency required in this area. Where a sole proprietor does not themselves hold the required proof of qualifications in order to carry out a regulated trade, then they may/must appoint a statutory manager who holds the relevant qualifications.

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

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

### 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 required for the business and which are regularly used for the purposes of carrying out a trade (e.g. a restaurant; a production site with machines; warehouses for chemicals or flammable liquids). They may not, however, be the sole/pure office facilities.

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

The approval notice from the trade authority ordinarily imposes certain conditions. These are obligations which 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 the purposes of accident prevention, the so-called **Seveso III business facilities bear** enhanced obligations. These are facilities which work on a larger scale with certain hazardous materials (chlorine, ammonium nitrate, etc.). In such cases, the owner is required to prepare a safety plan and a safety report. These are subject to regular audits. The owner must prepare emergency plans, create organisational structures for preventing serious accidents and appropriately document the measures taken. 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 required before public bodies of water can be used for purposes which exceed normal public use. Furthermore, said permits are required for the construction or modification of facilities used for the purposes

of exploiting public bodies of water. These include, for example, the operation of power plants, water abstraction (e.g. for purposes of irrigation or for plant water supply facilities), usage of ground water, impact on public bodies of water (e.g. discharge of waste water), construction along the banks of bodies of water, drainage works and hydraulic constructions which regulate the flow of water. Permits under water protection law are only issued for a limited time.

Although liability under water protection law is primarily attached to the party causing the risk of water pollution (i.e., the owner of the business), even managing executives and directors bear culpability and may therefore be held accountable for damages if incorporated entities have carried out the pollution. This is even the case where the culpability is merely caused by oversight, or is organisational in nature. Subsidiary liability may also attach to the owner of a property and even the purchaser of said property if the owner or purchaser had or should have had knowledge of the facilities or the measures from which the risks emanated.

### 4.3. Waste control law

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

There are further requirements for businesses with more than 100 employees. They have 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. dumps and interim waste storage facilities.

### 4.4. Environmental impact assessment

Certain large projects are potentially expected to create substantial impact on the environment upon completion. These include waste treatment facilities, amusement parks, shopping centres, power plants, ground water extraction facilities, large-scale

animal husbandry, land clearing projects or industrial facilities (paper and cellulose factories, foundries, cement plants, etc.). Therefore, 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 particular criteria (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. 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).

#### 1.1. Incorporated entities

##### 1.1.1. 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. A newly established GmbH shall be subject to a minimum corporate tax of € 500 for the first five years and € 1,000 for the following five years.

**Tax loss carry-forwards:** Losses may be carried forward for an unlimited time and be offset by later gains. However, loss carry-forwards are limited at 75%. This means 25% of annual profits will be taxable, irrespective of the amount of loss carry-forwards 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. If a registered office is in a third country or is located in a country with no bilateral administrative assistance agreement, then 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.

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

**Group taxation:** A parent company may form a tax group together with all or any of its subsidiaries or affiliates. The precondition 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 to tax groups, for example losses by individual members of the group may be immediately offset by profits from other group members. The Austrian group taxation rules are amongst the most modern in Europe. In particular, even foreign subsidiaries which have their registered office in the EU may be included within the group, allowing for a particularly rapid use of foreign losses. This also applies if the foreign subsidiaries have their registered office in a country for which a legal instrument relating to mutual assistance exists.<sup>16</sup>

##### 1.1.2. Withholding tax on profit distributions by an Austrian GmbH, AG or SE

As a general rule, distributions of profits by an Austrian incorporated entity to its shareholders are subject to a **27.5% rate of withholding tax**. This is charged at source, i.e., the incorporated entity must withhold the tax and remit it 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 to have been settled by the 27.5% withholding tax deduction (discharge of tax liability).

Where the recipient of distributed profits from an Austrian incorporated entity is another Austrian incorporated entity, there is an exemption from withholding tax which applies if the equity holding equals at least 10% of its capital. Distributions of profits to EU parent companies are exempt from withholding tax if the equity stake held equals at least 10% of the entity’s capital and has been held for at least one year.

Where profits are distributed to shareholders located outside the EU, the general rule is that a withholding tax of 27.5% will apply. Where a double taxation treaty is in place with the country of the recipient, the withholding tax (source taxation) will be reduced in line with the provisions of the relevant 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.

<sup>16</sup> See *J. Reich-Rohrwig in Wiesner/Kirchmayr/Mayr* (eds), *Gruppenbesteuerung*, 2<sup>nd</sup> Edition, 507 *et seq.*

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

Where an incorporated entity has been 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 withholding tax (source taxation). There is no requirement that the proceeds of liquidation be divided into retained earnings and pure liquidation proceeds. As a general rule, any liquidation surplus in the hands of an Austrian recipient will be subject to taxation.

## 1.2. Sole proprietorships, partnership entities

### 1.2.1. Sole proprietorships

Sole proprietors (natural persons) are subject to income tax, 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 to portions of income above € 60,000. Starting on the 1st January 2016, the top tax rate is 55% for portions of income above € 1 million. In certain circumstances, a reduced tax rate will be applied on liquidation profits where a business is being given up or sold.

### 1.2.2. 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. Therefore, in contrast to incorporated entities, the distribution of profits to the partners does not affect the partner's tax burden (tax base) in relation to income tax or corporation tax.

The information set forth in subsection 1.2.1 applies in respect to income taxation on the profit shares of natural persons arising from the partnerships.

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, no withholding tax is withheld against profit shares for partnership entities.

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

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

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

Furthermore, foreign entities are, in certain circumstances, subject to limited tax liability in Austria on the income derived by them in Austria. Income from commercial operations is, as a rule, only subject to taxation in Austria where a **branch establishment** is maintained within Austria. Income from self-employment and regular employment is only 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, the foreign entity's profits may only be taxed in one of the two countries. As a general rule, 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. This is calculated by taking the profits of the branch establishment into account (progression clause).

### 1.3.2. 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 at the amount in the hands of its individual partners (see subsection 1.2.2. 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.

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

As a general rule, the distribution of profits from an Austrian incorporated entity to aliens are subject to a 27.5% rate of withholding tax. In cases of profits distributed to EU parent companies, an exemption from withholding tax may, under certain circumstances, apply. Where a double taxation treaty applies, there may be a reduced rate of source taxation (see subsection 1.1.2. above). Thus, for example, the maximum source rate of taxation based on the respective double taxation treaty is 15% for aliens domiciled in France, Germany, Russia, Switzerland, the United Kingdom or the United States.

## 2. Taxes for employment – ancillary wage costs

The following main ancillary wage costs will arise for business entities which employ members of staff within Austria:

3% municipal tax on gross salaries

4.15% employer contribution to the Family Compensation Fund or *Familienlastenausgleichsfonds*

0.5% supplement to employer contribution

Approx. 22% rate of employer contribution to social insurance

These ancillary wage costs are deductible business expenses; they thus reduce the profits of the business and the tax base for the 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.

## 3. 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% or 13% will apply. 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 VAT:** As a rule, entrepreneurs may deduct as input VAT invoiced to them by other entities for their goods or services. However, businesses will not be entitled to deduct input VAT where the good and services are used for the purposes of generating tax-exempt turnover, except for export deliveries.

**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 their registered office.

## 4. Real estate transfer tax

### 4.1. Purchase of property

Acquisition of property in Austria is generally subject to real estate transfer tax at a rate of 3.5% on the consideration exchanged (purchase price, assumption of debt, and the like). In addition, a 1.1% registration fee (using the same assessment basis) applies when the new owner submits their application to the land registry.

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

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

A real estate transfer tax rate of 0.5% on the market value is triggered in the following cases: Where a buyer acquires an interest of 95% or more in a company owning a property, or where a shareholder acquires equivalent interest in a company (“unification of all shares in a single owner”).

## 5. Fees applicable to leases

There is a fee to be paid in Austria under the Austrian Fees and Duties Act (German acronym: GebG) for leases and commercial lease agreements made in writing. This totals 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. Trademarks

As is the case in most countries throughout the world, trademarks, corporate names and other corporate emblems enjoy protection in Austria.<sup>17</sup>

A **trademark** is a means of designating goods and services and, at the same time, constitutes **intellectual property**. The use of a trademark is governed in Austria by the Austrian Trademark Act (German acronym: MarkSchG). The essential points of the European Union member states' trademark laws were harmonised by the Trademark Directive (Council Directive (EU)2015/2436).

A trademark performs four main functions: **protection, indication of origin, warranty** and **advertising**. For some time now, registered trademarks have not been limited solely to **word trademarks, figurative trademarks**, or (as a combination of the two) **figurative and word trademarks**. Rather, even **sound trademarks, colour trademarks** or **olfactory trademarks** can be registered, provided that they can be **depicted** in some way or form.

However, there are obstacles to the registration of certain trademarks 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 trademark has obtained acquired distinctiveness, it may still be registered. Whether a trademark has obtained acquired distinctiveness or not is assessed in advance by the trademark authority.

The **Austrian Patent Office (ÖPA)** has jurisdiction over the registration of national Austrian trademarks. In the case of **community trademarks**, 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 trademarks are registered and for which they provide protec-

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 trademark is **published**. A three-month period begins following the date of publication. Within this period, trademark or rights owners may file a **notice of opposition** to register this new trademark. Furthermore, other owners of trademarks or rights may file a **notice of opposition** to the registration of this new trademark within this period. In order to avoid any such opposition, it is recommended that the applicant perform thorough research to determine whether there are prior rights before registering the mark. Where no opposition has been filed against the new trademark or where disputes regarding the new trademark are resolved by mutual agreement or in favour of the applicant, the trademark can be **registered** and entered into the trademark register. The term of protection for a trademark is 10 years and may be extended by the payment of fees.

By registering a trademark, the owner is granted **exclusive rights**, enforceable against any person. If anyone infringes the trademark right, the trademark owner may, *inter alia*, request that said party cease their infringement and that any goods designated with its trademark be destroyed. In addition, they may claim compensatory damages and (within a reasonable time) also assert their right to any improperly registered new trademark being deleted. Intentional interference with trademarks is also punishable under criminal law.

Trademark protection extending beyond the borders of Austria is possible firstly under the EU Trademark already mentioned, which is governed across the EU by the EU Trademark Regulation (Regulation (EU) 1001/2017), and secondly under the so-called IR trademark (international registered trademark). Upon registration of a previously registered trademark with the WIPO in Geneva, the IR trademark provides protection covering all WIPO member states in which such registration has been requested. If IR registration has been applied for within a six months period from the date upon which the original trademark was registered, then protection applies retroactively from the date upon which the original trademark was registered (Convention priority).

## 2. Internet domain law

The address of a website on the internet is referred to as a "domain". Domains can be broken down into top-level domains (such as .at, .com or .org) and, secondly, into sub-level domains,

<sup>17</sup> See *Engin-Deniz*, Kommentar zum Markenschutzgesetz, 2<sup>nd</sup> Edition (2010)

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 trademark law, or the law referring to corporate designations or names.

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

Since 2012, (which were previously limited to country codes and 22 generic codes) it has become possible to register top-level domains *using any designation* (for example .auto, .music or .wien). This makes it possible to enter designations of registered trademarks 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 trademark. However, protection may be regionally limited. Just as in cases of trademarks, 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.

Even business symbols (such as logos) and the presentation and packaging of a company's goods or services can be protected where said goods or services are distinct enough, and where they are presented or packaged in a manner typical for the business.

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**. This 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**, the second its **industrial application**, the third its **novelty** and the fourth its **inventiveness**.

A patent application in Austria is filed with the **Austrian Patent Office**. The patent applicant must formulate one or more **patent claims**, i.e. they must indicate what they are requesting patent protection for and how the four conditions of patentability are met in this case. The Patent Office first conducts a preliminary review of the application in its formal and substantive respects. Following the subsequent publication of the application, it is possible, within four months, to 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, sale, placement on the market, and licencing of the patented invention. In the event of an infringement against their patent, the patent owner is entitled to make claims against the infringer for, *inter alia*, injunctive relief, remuneration of the infringement, publication of a judgement, accounting and payment. Intentional interference with patents is also subject to criminal prosecution.

Despite the fact that trademark applications have been harmonised throughout Europe and there is the option of registering a trademark covering the entire European Union, a similar course of action is not currently available for patents. Although the European Patent Convention (EPC), which has as its members the EU member states as well as ten further states, has harmonised a host of national provisions, the situation is still not comparable to that of trademark law. The current **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 at the European Patent Office (EPO) in Munich and at the Austrian Patent Office (ÖPA).

The so-called unitary patent will shortly offer standard protection across a number of Member States of the European Union, likely to number 20, as well as also in the United Kingdom, despite "Brexit" being imminent. However, entry into force is currently being blocked by a constitutional challenge in Germany. Once it does become operative, a European Patent Court will decide on the validity of a unitary patent, operating via regional chambers in various Member States (including Austria) and the United Kingdom, the highest instance of the court being the ECJ.

International protection of inventions is subject to a **patent cooperation treaty**, similar to trademark protection.

## 5. Protection of seed and biological material

As a general rule, the Austrian Patent Act (German acronym: PatG) accepts 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 rather only for 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 25 years for the remaining varieties. 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 now have the option of seeking 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 now several tens of thousands of them. The Biotechnology Directive was implemented in 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. This even includes 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 to **registered designs** – referred to as *Geschmacksmuster* in Austria – one may obtain protection 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. This means its lines, contours, colours, shape or surface structure.

Just like trademarks and patents, design applications may be filed and registered with the Austrian Patent Office (ÖPA). Because a registered design is only reviewed in order to determine whether the formal prerequisites are met, it is also possible to speak 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 to its owner. When comparing the similarity of two opposing designs, what matters is the **overall impression**.

Because an Austrian registered design is only protected with respect to the territory of Austria, there is (in a manner similar to a community trade 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 trademark application, it is also possible to perform international registration of registered designs with the WIPO in Geneva. This covers 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 an individual's intellectual creation in the fields of literature, fine arts, music and cinematography. The purpose of copyright is to protect the creator of a creative work and ultimately to secure income for them. 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 when the work is created 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 a “unique intellectual creation”. However, by contrast with intellectual property rights, copyright is not entered in any register.

Creators may only be natural persons. Only legal entities may obtain rights of exploitation to works. In cases of creation by employees, copyright resides with the employee or the contrac-

tor. Rights of exploitation to the created work will pass to the employer if the work was created by the employee in the course of their employment duties.

The creator has both property rights and personality rights. These include the right of exploitation, which refers to the creator's right to make commercial use of their 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 may speak of a "right to use the work"; where there is no exclusivity, one speaks of a "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, for dissemination or publication, for damages, for restitution of unjust enrichment, for publication of a judgement, and for elimination of works created in violation of copyright. Intentional infringements of copyright are criminally punishable as offences subject to private complaints.

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

Austria is a member of all 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 in notarised form for this purpose.
- In the case of simplified formation of a GmbH with a single shareholder by a natural person simultaneously appointed as the sole managing director, in electronic form, with secure documentary evidence of identity, there is no requirement for a notarial deed
  - Minimum contents of articles of association:
    - » Name and registered office of GmbH
    - » Portion of share capital amount to be paid in by shareholder
    - » Subject matter of the company
    - » Amount of capital
    - » Reimbursement for costs of formation
- The minimum capital amounts to € 35,000. In principle, contributions in cash or in kind are permitted. Contributions in kind must be provided in full without delay. At least one quarter of the cash contributions must be paid in at the time of the company's formation. A minimum amount of € 17,500 must be paid in. In the event that a "privileged formation" GmbH is formed, the obligation to make such a contribution shall only extend to € 10,000 for the first 10 years following the GmbH's registration in the Commercial Register. € 5,000 of this amount needs to be paid in cash immediately at the time of the company's formation.
- As a rule, if it is agreed that contributions in kind shall comprise more than half of the share capital, an audit of the company's formation by a court-appointed auditor shall be required.
- Confirmation by bank or notary 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 extracts from foreign Commercial Registers or confirmation by foreign Commercial Registers or Chambers of Commerce)
- Application to register on the 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 and in case of "small" GmbH, when a supervisory board is required by law
  - Annual financial statements for every GmbH must be submitted to the Commercial Register court each year
  - Exemption from commercial register registration fees may be possible under the Austrian Promotion of Start-Ups Act (NeuFöG)
  - Minimum corporation tax per year: € 1,750. € 500 for new GmbHs in the first five years and € 1000 per year in the subsequent five years

## 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 at 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
- Founders' report (shareholders) on formation of an AG
- Management board and supervisory board's formation audit report
- 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 extracts from foreign Commercial Register or confirmation by foreign Commercial Registers or Chambers of Commerce)
- Specimen corporate signatures of management members (in notarised form)
- Application for registration in 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 every AG
  - Annual financial statements must be submitted to Commercial Register. They must also be published in the case of large AGs
  - 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 on which 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 in 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 general partners and limited partners
    - » Name and registered office of partnership
    - » Legal form
    - » Terms governing agency authority of general partners
    - » Date on which 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 for general partner GmbH 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. 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:**
  - There is, in certain circumstances, 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 an annual average
  - Audited annual financial statements prescribed by law in the case of “mid-sized” and “large” GmbH & Co KGs and when the law requires a supervisory board.
  - Legal requirement to submit annual financial statements to Commercial Register

## 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 deeds of foundation may be prepared
- Minimum capital € 70,000
- Bank confirmation on deposit of minimum capital
- Specimen signatures and declaration of the 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, 6% of the value of endowed real estate

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

- Proof of the foreign (legal) entity's legal existence. This applies to foreign entities with a domestic Austrian branch office ("branch") wishing to be entered into the Austrian Commercial Register. To be done 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 to 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 the foreign incorporated entity's power of representation 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 whose legal status is not covered by 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 extra judicially. This person's normal residence must be 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.
  - Notarised specimen signatures – accompanied by a certified translation – must be furnished by the following persons: The constitutive officers of the foreign incorporated entity (managing director(s), members of the management board) and the „representatives“ appointed for the domestic branch office (who must be registered on the Commercial Register)..
- In all cases, the activities of the branch office (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 office.

## 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 for „privileged GmbH” /AG/ GmbH & CoKG	€ 5,000	€ 17,500	€ 5,000
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 are appointed: 3	3	Where supervisory board are appointed: 3
Shareholders may issue directions to management body	YES	No, management board is not subject to directions	YES (shareholders of GmbH)
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” or “micro” GmbH, provided a supervisory board is not required by law	YES	YES, except in the case of a “small” or “micro” GmbH & Co KG, provided a supervisory board is not required by law
Duty to disclose and publish annual financial statements (consolidated financial statements)	YES, to be submitted to Commercial Register, in the case of “small” or “micro” 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” or “micro” GmbH & Co KG, abridged statements
General meeting of shareholders/ annual general meeting	Generally no prescribed form	Is recorded as a notarial deed	Generally no prescribed form
Amendments to articles of association require notarial certification	YES	YES	In respect to general partner GmbHs: YES
No-fault liability of shareholders			
a) for payment of capital contributions	YES	YES	YES
b) for outstanding or over-valued contributions of co-shareholders (shareholders/limited partners)	YES	As a general rule, NO	YES (regarding GmbH), NO (regarding KG)
c) for prohibited returns of capital contributions to the respective shareholder/limited partner	YES	YES	YES
d) for prohibited returns of capital contributions to other partners (shareholders)	YES, limited to amount of share capital	No	For general partner GmbHs, see GmbH; limited partners: NO
e) 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, 47/5 GmbHG and § 25 URG	YES; conceivable, see also §§ 100, 133/4 and 198/2 AktG	YES, conceivable, see also § 25 URG
Liability of managing directors and members of management board towards company and creditors*	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
Liability of majority shareholder towards creditors	YES In the absence of a managing director, majority shareholder is liable for filing bankruptcy petition	YES In the absence of a management board, majority shareholder is liable for filing bankruptcy petition	YES In the absence of a managing director, majority shareholder is liable for filing bankruptcy petition

\* For further details, see *J. 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 managing directors 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 management board 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 - reduction to € 500 p.a. in the first 5 years and to € 1,000 in years 6 to 10	€ 3,500/year	for general partner GmbH: € 1,750/year - reduction to € 500 in the first 5 years and to € 1000 in years 6 to 10
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, 55% for amounts in excess of € 1 million), irrespective of whether profits are distributed to limited partner or not
Dividend payment to partner/shareholder	As a general rule, subject to 27.5% withholding 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 27.5% withholding 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

## 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 branch offices 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 annual turnover exceeds € 700,000 twice, or exceeds € 1,000,000 once, the obligation exists to register the sole proprietorship on the Commercial Register	YES, in the case of an Austrian BR, all amendments in the Commercial Register regarding 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 on profits of Austrian branch establishment – progressive scale up to income tax rate of 55%	Limited tax liability on profits from Austrian branch establishment (25% corporation tax; where applicable, up to 55% income tax)



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