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Preslmayr Rechtsanwälte OG
Attorneys-At-Law

and

Taxand Austria
Steuerberatungsgesellschaft mbH

10th completely revised
edition

# INVESTING IN
# AUSTRIA

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# Investing in Austria

10., aktualisierte Auflage

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herausgegeben von
**Preslmayr Rechtsanwälte OG**
**Taxand Austria Steuerberatungsgesellschaft mbH**

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# Other publications and articles in publications by partners of Preslmayr

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(Data Protection Act), Manz, 2010

**Kommentar zum Datenschutzrecht**
(Commentary on Data Protection Law,
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**Leitfaden für richtiges Registrieren, Verarbeiten, Übermitteln, Zustimmen, Outsourcen, Werben uvm.**
(Handbook on Data Protection Law, 2nd edition), 2012

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# Authors

**Mag. Lisa-Maria Fidesser,** Attorney-at-Law and partner of Preslmayr Rechtsanwälte, Vienna, as editing co-author.

**Dr. Bernhard Vanas,** Certified Public Accountant, Tax Advisor and partner of Taxand Austria, Vienna.

**Mag. Christoph Puchner,** Certified Tax Advisor and partner of Taxand Austria, Vienna.

Other **partners of Preslmayr Rechtsanwälte** have also contributed to this booklet.

We thank **Dr. Nikolaus Pitkowitz**, who was editing co-author of the first edition, **Mag. Dieter Hauck**, who was editing co-author of the second to eighth editions, **Mag. Oliver Walther**, who was editing co-author of the ninth edition, and the other co-authors of Preslmayr Attorneys-at-Law past and present as well as **Dr. Bettina Hörtner** (Attorney-at-Law) and **Dr. Herta Vanas** (Certified Public Accountant and partner of Taxand Austria) for their contributions.



Editor (*Herausgeber*):

**Preslmayr Rechtsanwälte OG**

(Preslmayr Attorneys-at-Law General Partnership)

A-1010 Vienna, Universitätsring 12

Tel: (+43 1) 533 16 95, Fax: (+43 1) 535 56 86

E-mail: office@preslmayr.at

http://www.preslmayr.at

Editor (*Herausgeber und Medieninhaber*):

**Taxand Austria Steuerberatungsgesellschaft mbH**

A-1010 Vienna, Teinfaltstraße 9

Tel: (+43 1) 533 86 33, Fax: (+43 1) 25 33 033 1656

E-mail: bernhard.vanas@taxand.at

http://www.taxand.at

# 1. Introduction

Austria, a member of the European Union since January 1, 1995, is well known for its stable and prosperous economy, highly skilled labor force and geographic location in the heart of Europe. Austria is a party to the Maastricht Treaty and a participant in the Economic and Monetary Union (EMU). With a corporate income tax (*Körperschaftsteuer*) of 25% and a modern group taxation regime (*Gruppenbesteuerung*) Austrian tax legislation is attractive for investors.

A substantial part of the Austrian economy is foreign owned. The Austrian government, which formerly controlled about one quarter of the Austrian economy, has pursued a liberalization program aimed at enlivening the domestic capital market and attracting foreign investors. In recent years, many state-owned enterprises in traditional Austrian industries have been privatized (parts of e.g. Telekom Austria, OMV, Österreichische Post AG and the complete divestment of Austria Tabak AG, Postsparkasse, VA Stahl AG, Austrian Airlines, Casinos Austria), a course that might continue to be pursued in the future (parts of e.g. ÖBB (national railways), national and regional utilities).

This booklet – in its tenth, completely revised edition – serves to introduce potential foreign investors to the Austrian tax and legal system. It also offers an overview of the law as relevant for foreign investors already active in Austria. For many important terms the German original is provided in parentheses following the English translation.

However, this booklet cannot and is not intended to exhaustively cover the Austrian law and it is not a substitute for qualified legal and tax advice required in connection with business activities in Austria.

# 2. General Political and Economic Information

## 2.1. Facts and Politics

Austria is a **federal republic** with a total area of 83,858 square kilometers and consists of nine provinces (*Bundesländer*). Based on the latest population estimates, Austria has a population of more than eight million people (8,699,000 in 2015), 1.8 million of whom (1,840,000 in 2015) live in the capital, Vienna. Other large cities are Graz, Linz, Salzburg, Innsbruck, Klagenfurt, Villach and Wels with populations between 50.000 and 280.000.

Austria is a **parliamentary democracy**. Parliament consists of two chambers. The National Council (*Nationalrat*) is elected directly by the people and has 183 members. The Federal Council (*Bundesrat*) represents the provinces according to their population, its members being delegated by the provincial parliaments.

The Austrian government is formed by a coalition of the Austrian Social Democratic Party (*SPÖ*) and the Austrian People's Party (*ÖVP*) since December 2, 2008. Head of government is Federal Chancellor (*Bundeskanzler*) Christian Kern (*SPÖ*). Vice-Chancellor is Reinhold Mitterlehner (*ÖVP*), who is also Federal Minister for science, research and development and economy. In the last elections in 2013 the Austrian Social Democratic Party (*SPÖ*) won a relative majority, taking 26.8% of the votes. The Austrian People's Party (*ÖVP*) received 24.0%. The Austrian Freedom Party (*FPÖ*) (20.5%), the Greens (12.4%), the New Austria and Liberal Party (*NEOS*) (5.0%) as well as the Team Stronach (5.7%) represent the opposition.

The nine **federal provinces** (*Bundesländer*) of Austria are ruled by provincial governments presided over by a governor (*Landeshauptmann*), who, in most cases, heads a coalition composed of all parties represented in the provincial parliament (*Landtag*).

## 2.2. Economy

The Austrian **Gross Domestic Product (GDP)** was EUR 39,120 per capita in 2015. GDP grew by 0.9% in 2015 and is expected to grow by 1.6% in 2016. In 2015, the service sector accounted for an estimated 70.6%, industry for an estimated 28.1% and agriculture for 1.3% of GDP. Imports of about EUR 136 billion exceeded exports of about EUR 135 billion in 2015, but services and tourism turned the trade deficit into a EUR 5.8 billion current account surplus.

In May 2016, the **unemployment rate** of about 5.8% was one of the lowest in the European Union.

The **inflation rate** was about 1.5% in 2015. For 2016, 0.9% is expected.

Austria fulfilled the Maastricht criteria for joining the **European Economic and Monetary Union** in the first group of participants. In January, 2002, the former currency, the Austrian Schilling (ATS), was replaced by the **Euro (EUR)**. 1 Euro equals 13.7603 ATS.

## 2.3. Austria and the European Union

The European Economic Area (EEA) came into being on January 1, 1994, when the European Free Trade Association (EFTA) and the European Union (EU) signed an agreement to allow EFTA countries to participate in the European Single Market without having to join the EU. So Austria, as one of the founders of the EFTA, took its first steps towards EU membership.

**Austria joined the European Union (EU) on January 1, 1995.** At that time the member states of the EU increased to 15. Ten further countries (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) joined the EU on May 1, 2004. Bulgaria and Romania joined on January 1, 2007 and on July 1, 2013, Croatia joined the EU as its 28th member state. Austria is also a member of the Schengen Accord (normally there are no border controls when somebody enters or leaves a state party of that treaty).

Austria, with its well-developed market economy and high standard of living, is closely tied to other EU economies, especially Germany's. The Austrian economy also benefits greatly from strong commercial relations, especially in the banking and insurance sectors, with central, eastern, and southeastern Europe.

Membership in the EU has drawn an influx of foreign investors attracted by Austria's access to the European Single Market and proximity to the new EU economies.

As a member country of the EU, Austria has taken part in the Economic and Monetary Union (EMU) from the very beginning. Furthermore, Austria is not only a member of the EU but also of numerous international organizations, such as the World Trade Organization (WTO) and the Organization for Economic Cooperation and Development (OECD). For more detailed information see 25.2.

# 3. Business Opportunities in Austria

## 3.1. General Information

### 3.1.1. Overview of Business Activities

At first a foreign company usually only sends one or more of its **employees** to Austria (see 3.2). At a later stage often a **commercial agent** (*Handelsvertreter*) is appointed (see 3.3) or a **distribution agreement** (*Vertriebsvertrag*) is concluded with an Austrian distributor (see 3.4). When the involvement intensifies, a **company** (*Gesellschaft*) is established in Austria or an Austrian company is bought. The following types of companies are the most common:

- Company with Limited Liability – *GmbH* (see 3.5),
- Stock Company – *AG* (see 3.6),
- General Partnership – *OG* (see 3.7),
- Limited Partnership – *KG* (see 3.8).

In certain cases a foreign company may decide to set up a **branch office** (*Zweigniederlassung*) in Austria (see 3.9).

Apart from the above-mentioned companies and branch offices, other forms of business also exist in Austria which are of less practical importance to foreign investors. However, since these may be encountered while doing business in Austria, they are described in chapter 4.

Several forms of companies enjoy **legal personality** (*Rechtspersönlichkeit*). The two main types, the company with limited liability (*GmbH*) and the stock company (*AG*), are here referred to as **corporations.** But the cooperative (*Genossenschaft* – see 4.2), the association (*Verein* – see 4.5) and the various types of **partnerships** (general partnership, limited partnership) have legal personality as well. In contrast, the silent partnership (see 4.6) is not a legal person and cannot even appear under a common name.

Business can be transacted not only by a company, but also by an individual whose enterprise is then referred to as a **sole proprietorship** (*Einzelunternehmer* – see 4.4).

### 3.1.2. Commercial Register (Firmenbuch)

Corporations, partnerships and sole proprietorships are registered in the **commercial register** (*Firmenbuch*), which is open to the public. The following information is, *inter alia*, contained in the commercial register:

- Name,
- seat and address,
- legal representatives (names and dates of birth of persons entitled to act on behalf of the company),
- *Prokuristen* (see 3.1.3),
- Shareholders of companies with limited liability and partnerships.

In general, everybody may rely on the accuracy of the information in the commercial register, unless they knew otherwise. **Due diligence** requires a contracting party to check the registration of a business partner prior to entering into an agreement with them to determine that an authorized person is signing the agreement.

The commercial register is accessible online. An **excerpt from the commercial register** (*Firmenbuchauszug*) can be obtained from a court, a notary public or a lawyer or, by registered users, on the Internet, e.g. at www.lexisnexis.at or www.rdb.manz.at.

### 3.1.3. Legal Representative; Prokurist

The powers of a person acting on behalf of a corporation or partnership as its **legal representative** are, in most cases, unlimited. In particular, representative powers are generally not limited to actions within the scope of the company's business. Furthermore, representative powers cannot normally be limited by the articles of association. An enforceable limitation of the powers of a representative can usually only be achieved by binding the representative powers to those of (one or more) other representatives, meaning that they can only act jointly.

A special form of representative is the ***Prokurist***, who has full commercial powers to represent a company or a sole proprietorship, but who may not conclude real estate transactions.

## 3.2. Employees of Foreign Companies

It is possible for employees or representatives of foreign companies to conduct business directly in Austria. A **work permit** is necessary in certain cases, depending on nationality (EEA or not) and duration of stay (see 11.5).

Under Austrian tax law and certain double-taxation treaties the fact that persons with signatory powers conduct business in Austria may create a **permanent establishment** and thereby subject the enterprise to Austrian taxation.

## 3.3. Commercial Agent

A commercial agent (*Handelsvertreter*) is permanently entrusted by a principal (e.g. a foreign company) with the solicitation of customers or the conclusion of business deals in the principal's name and for its account. The legal status of a commercial agent in Austria has been brought into line with EU directives. The commercial agent has a claim for a compensation payment (*Ausgleichsanspruch*) if the agency agreement is terminated and the principal has obtained, through the agent's activities, new customers who are likely to stay in a business relation with the principal.

## 3.4. Distribution Agreements

The EU competition rules are applicable to distribution agreements (*Vertriebsverträge*). In certain cases Austrian courts have applied, by analogy, the law relating to commercial agents (see above) to distribution agreements.

## 3.5. Company with Limited Liability (Gesellschaft mit beschränkter Haftung)

### 3.5.1. General

The **company with limited liability** (*GmbH*) is a corporation (see 3.1.1) and the most popular legal form for business enterprises. Since the transfer of shares (*Geschäftsanteile*) in a *GmbH* is more difficult (a notarial deed is required) than that of stock in a stock company (*AG*), the *GmbH* is less suitable if widespread ownership or frequent transfer of shares is planned. On the other hand, the articles of association of a *GmbH* can be designed to be more flexible than those of a stock company.

It is permissible to establish *GmbHs* for almost all business purposes, with only a few exceptions.

### 3.5.2. Establishment

A *GmbH* is set up by one or more **shareholders** (*Gesellschafter*). Individuals, corporations and partnerships, residents and non-residents, Austrians and foreign citizens as well as foreign corporations can be founders and shareholders. Deals between the shareholders and the *GmbH* are possible at arm's length (the transactions need only to be documented in writing).

The **articles of association** (*Gesellschaftsvertrag*) or, in case of a sole-shareholder company, the **declaration of establishment** (*Erklärung über die Errichtung der Gesellschaft*) must be executed before a **notary public** (*Notar*) by means of a notarial deed (*Notariatsakt*).

A *GmbH* comes into legal existence upon its **registration in the commercial register**. A person acting in the name of the company prior to its registration may be held personally liable for obligations arising from such acts.

### 3.5.3. Share Capital, Liability, Transfer of Shares

The **minimum share capital** (*Stammkapital*) of a *GmbH* is **EUR 35,000**. At least half of the minimum share capital has to be contributed in cash; exceptions apply for the continuation of an enterprise and for contributions in kind (*Sacheinlagen*). The share capital comprises the **contributions** (*Einlagen*) of the individual shareholders. The amount of the contribution determines the **share** (*Stammeinlage*) of a shareholder. While each shareholder can hold only one share, shares can have different par values. The minimum share (and therefore the minimum contribution of an individual shareholder) is EUR 70. For each contribution made in cash, at least one quarter (but not less than EUR 70), though in total not less than EUR 17,500 of the minimum share capital, must be paid up. An initial audit (*Gründungsprüfung*) is mandatory if more than 50% of the initial share capital is contributed in kind.

The **liability** of shareholders of a *GmbH* is limited to the (total) unpaid share capital unless they act malevolently. For up to five years after divestment former shareholders may therefore be liable for the unpaid amount of their own shares as well as that of their fellow shareholders. The articles of association can provide for **additional contributions** (*Nachschüsse*).

Shares of a *GmbH* can be **transferred** only by means of a notarial deed (*Notariatsakt*). A transfer (including an undertaking to transfer) which does not comply with this formal requirement is null and void. Consequently, such shares cannot be traded on the stock exchange (*Börse* – see 22.2.1). The articles of association may make the transfer dependent on further conditions, in particular on the consent of the company.

### 3.5.4. Corporate Bodies

The *GmbH* must have one or more **managing directors** (*Geschäftsführer*). Unlike the board of directors (*Vorstand*) of an *AG*, the managing directors are appointed by the shareholders' meeting (see below). The managing directors represent the company and run its day-to-day business. They are under a statutory obligation not to compete with the *GmbH*. There is no legal requirement that one or all managing directors have to

be domiciled in Austria. However, if no managing director resides in Austria and, as a consequence, the *GmbH* cannot act, any affected person may demand that the court appoints a temporary managing director (*Notgeschäftsführer*).

The **shareholders' meeting** (*Generalversammlung*) is convened from time to time to decide on important matters. It must decide, for example, on the appointment (and dismissal) of managing directors, approval of financial statements, profit distribution, appointment of the auditor (after hearing the advice of the supervisory board) if an audit is required (see below), appointment of a supervisory board (*Aufsichtsrat* – see below) and on changes to the articles of association, including increases of the share capital. The shareholders' meeting may also issue instructions to the managing directors. Resolutions of the shareholders' meeting can be passed in writing provided that all shareholders agree. Resolutions usually require only a simple majority of the shareholders present in order to pass unless the law or the articles of association provide otherwise. In certain cases (e.g. increase of share capital) a 75% majority is necessary.

A **supervisory board** (*Aufsichtsrat*) must be established, *inter alia*, for *GmbHs* which employ more than 300 persons. In other cases, a supervisory board may be set up voluntarily. Whenever a supervisory board has been created members of the **works council** (*Betriebsrat*) form one third of the board's members.

*GmbHs* sometimes also establish an **advisory board** (*Beirat*), which advises the managing directors. Generally, no staff representatives need to be appointed as members of the advisory board as long as it exercises no controlling influence over the managing directors.

Provided the *GmbH* does not have a mandatory supervisory board, an **audit of the financial statements** (*Jahresabschluss und Lagebericht*) is not mandatory for *GmbHs* fulfilling at least two of the following three criteria: balance sheet total less than EUR 5 million, turnover less than EUR 10 million, employees less than 50. However, all *GmbHs* have to file their financial statements with the commercial register within nine months after the end of the fiscal year. Non-compliance is subject to a fine between EUR 700 and 3,600 (reduced fines for certain small-sized corporations) and may be (repeatedly) imposed on the company **and** all of its directors.

### 3.5.5. "Privileged" Foundation of a Company with Limited Liability

The Limited Liability Company Act provides for a foundation privilege (*Gründungsprivilegierung*). Under the foundation privilege part of the company's share capital qualifies as "privileged shares" (*gründungsprivilegierte Stammeinlagen*) with a nominal value of at least EUR 10,000 of which EUR 5,000 have to be contributed in cash. This privilege expires upon a shareholders' resolution or after a maximum term of ten

years. Thereafter, payup on each share must be at least one quarter and in total not less than half of the minimum share capital (i.e. EUR 17,500).

## 3.6. Stock Company (Aktiengesellschaft)

### 3.6.1. General

Like the *GmbH*, the **stock company** (*AG*) is a corporation (see 3.1.1). The most significant advantage of the *AG* is the easy transfer of stock (*Aktien*), which allows it to raise funds on capital markets. However, in contrast to the *GmbH*, an *AG* must always have a supervisory board and the stockholders' assembly is subject to stricter formal requirements (see 3.6.4).

### 3.6.2. Establishment

A formation by just one founder is permitted. In contrast to an establishment by two or more founders, the name of the sole founder has to be registered with the commercial register (*Firmenbuch*). The same applies if a single person acquires all the stock of a company.

The **articles of association** (*Satzung*) of an *AG* must be executed before a notary public (*Notar*) by means of a notarial deed (*Notariatsakt*).

The *AG* comes into legal existence upon its **registration in the commercial register**. A person acting in the name of the company prior to its registration may be held personally liable for obligations arising from such acts.

### 3.6.3. Stock Capital, Liability, Transfer of Stock, Stock-Option Plan

The minimum **stock capital** (*Grundkapital*) of an *AG* is **EUR 70,000**. The stock capital is divided either into **stock** (*Aktien*) with a par value of at least EUR 1 (*Nennbetragsaktie*) or into stock representing a percentage of the stock capital without a par value (*nennbetragslose Stückaktie*). Whereas stock can be issued as **registered stock** (*Namensaktie*) for all stock companies, **bearer stock** (*Inhaberaktie*) can be issued only for stock companies whose stock is traded at a stock exchange. While stock may be issued at a premium (*Agio*), it must not be issued below par value. At least one quarter of the par value and the full premium must be paid up prior to registration of the *AG* in the commercial register. If the stock is not fully paid up, it must be issued in the form of registered stock. When an *AG* is founded with contributions in kind (*Sacheinlagen*), an initial audit (*Gründungsprüfung*) by an independent certified public accountant is mandatory. Up to one third of the stock capital of the *AG* may be non-voting preferred stock (*stimmrechtslose Vorzugsaktien*), which grants a right to a preferred dividend without voting rights.

The **liability** of each stockholder (*Aktionär*) is **limited** to the unpaid portion of his stock, except in case of malevolence.

The stock of an *AG* can be **transferred** easily (without a notarial deed). For bearer stock, the mere handing-over of the stock certificate (*Aktie*) is sufficient. Registered stock must be endorsed (*Indossament*) to the new owner, who must also be registered in the stockholders' list.

The *AG* must not acquire its own stock unless the acquisition is necessary to avert a severe and imminent damage; the stock is acquired free of charge, through universal succession or on the basis of a stockholders' resolution valid for a maximum of 30 months for the purpose of offering stock to employees, senior managers or board members, to compensate minority stockholders or in preparation of a reduction of the stock capital.

### 3.6.4. Corporate Bodies

Austrian stock company law is based on a two-tier management system (board of directors, supervisory board).

The representative corporate body of an *AG* is the **board of directors** (*Vorstand*), consisting of one or more members (referred to as *Vorstandsdirektor*). The members of the board of directors are appointed by the supervisory board (see below). The board of directors not only represents the *AG*, but also runs its day-to-day business. Its members are subject to statutory non-competition rules. Members of the board of directors are appointed for a maximum term of five years, but reappointments are permitted. In contrast to the *GmbH*, members of the board of directors cannot be given instructions in the course of the day-to-day business, neither by the supervisory board nor by the stockholders' meeting. Financial statements must be prepared by the board of directors, and, regardless of the *AG's* size, audited and approved by the supervisory board and then presented to the stockholders' assembly.

A **stockholders' meeting** (*Hauptversammlung*) must be held annually within eight months after the end of each accounting year and may be held on other occasions as well. Since 2009 the law also provides for participation in the meeting by electronic means. The stockholders decide, *inter alia*, on the distribution of profits, formal approval (*Entlastung*) of the actions of the members of both the supervisory board and board of directors and on the appointment of auditors. For certain fundamental decisions, e.g. the increase or reduction of stock capital, other changes to the articles of

association, mergers, liquidation, etc., a **qualified majority** of 75% of the votes is required. The law also provides for certain **minority rights** for stockholders or groups of stockholders representing at least 5% of the stock capital. All decisions of the stockholders' meeting must be certified by a notary public in order to become legally effective.

A **supervisory board** (*Aufsichtsrat*), which is independent of the board of directors, is mandatory, regardless of the *AG's* size or business. Supervisory board members are appointed by the stockholders' meeting. As with the *GmbH*, staff representation on the supervisory board is mandatory (see 3.5.4). Specified transactions of the board of directors need the approval of the supervisory board.

An **audit of the financial statements** *(Jahresabschluss und Lagebericht)* is mandatory for all *AGs*. Large *AGs*, which fulfill at least two of the following three criteria: balance sheet total more than EUR 20 million, turnover more than EUR 40 million, employees more than 250, have to publish their financial statements in the official gazette *(Amtsblatt zur Wiener Zeitung)*. All *AGs* also have to file their financial statements with the commercial register within nine months after the end of their fiscal year. Non-compliance is subject to a fine between EUR 700 and 3,600 (reduced fines for certain small-sized corporations) which may be (repeatedly) imposed on the company **and** all board members.

## 3.7. General Partnership (Offene Gesellschaft)

A **general partnership** (*OG*) – similar to the former *Offene Handelsgesellschaft* (*OHG*) - is a company consisting of two or more individuals or corporations. Each partner (*Gesellschafter*) is fully liable for the *OG's* debts. Liability vis-à-vis creditors cannot be limited.

The *OG* has **legal personality.** It may acquire rights and titles to real estate, incur liabilities and be a party to a lawsuit. The *OG* is represented by its partners.

The OG may operate any type of enterprise, including the so-called "liberal professions" (lawyers, physicians, architects, etc. – *Freie Berufe*), small businesses and businesses in agriculture and forestry.

## 3.8. Limited Partnership (Kommanditgesellschaft)

A limited partnership (*KG*) consists of at least one **general partner** (*Komplementär*) with unlimited liability and of at least one **limited partner** (*Kommanditist*), whose liability is restricted to the amount of the contribution (*Einlage*) registered in the

commercial register. The general partners manage the business. The *KG* has a legal personality.

To limit liability, but also owing to tax and management considerations, the general partner of a *KG* is frequently a *GmbH*. A *KG* with a *GmbH* as general partner is called a ***GmbH & Co KG***.

## 3.9. Branch Offices of Foreign Corporations

### 3.9.1. General

Foreign corporations, i.e. those domiciled outside of Austria, can do business in Austria by establishing a **branch office** (*Zweigniederlassung*). Branch offices do not enjoy separate legal personality. The decision whether to establish a subsidiary (e.g. a *GmbH*) or a branch office depends mainly on liability and tax considerations.

Branch offices must be registered in the **commercial register** (see 3.1.2). The prerequisites for registration differ according to the type of corporation.

### 3.9.2. Branch Offices of Foreign Companies with Limited Liability

If the seat of a company with limited liability is located outside Austria, the managing directors (*Geschäftsführer*) must file for registration of the branch office in the **commercial register** (*Firmenbuch*). Companies not domiciled within the EEA must name an authorized representative of the branch office who resides in Austria; companies domiciled within the EEA may do so. The foreign company must file legalized copies of its registration documents and the articles of association currently in force. If the articles of association are not in German, a legalized translation must be provided. Each year, the foreign company has to file (a translation of) its annual financial statements (= foreign financial statements of the head office). Non-compliance is subject to a fine between EUR 700 and 3,600 (reduced fines for certain small-sized corporations) that can be (repeatedly) imposed on the company and all of its directors.

Due to the minimum share capital of only GBP 1, a number of branch offices of UK limited companies have been established in Austria for small businesses that in fact only operate in Austria. Since many of these operations have not been very successful (and due to the strict requirements to file financial statements in the UK), their number is now decreasing.

### 3.9.3. Branch Offices of Foreign Stock Companies

If the seat of a foreign stock company is located outside Austria, the members of the board of directors (*Vorstand*) must file for registration of the branch office in the **commercial register** (*Firmenbuch*). Companies not domiciled within the EEA must name an authorized representative of the branch office who resides in Austria; companies domiciled within the EEA may do so. The foreign company must file legalized copies of its registration documents and the articles of association currently in force. If the articles of association are not in German, a legalized translation must be provided. Each year, the company has to file and publish (a translation of) its annual financial statements. Non-compliance is subject to a fine between EUR 700 and 3,600 (reduced fines for certain small-sized corporations) that can be (repeatedly) imposed on the company and all of its directors.

## 3.10. Formation Cost

From the beginning of 2016 neither the establishment of a ***GmbH*** **or an** ***AG*** nor a capital increase attracts a **capital duty** (*Gesellschaftsteuer*), which accounted for 1% of the capital (increase) including any premium until 2015.

Setting up a corporation or a partnership triggers a **registration fee** (*Eintragungsgebühr*) of approximately EUR 450 for the commercial register, depending on the complexity of the registration. A capital increase is subject to a registration fee of approximately EUR 250.

Additionally, lawyer's, notary's and accountant's fees as well as costs for the **publication** of the registration in the commercial register will accrue. Depending on the type of company and the complexity of its formation, total fees range from EUR 3,000 to EUR 10,000.

# 4. Other Forms of Business Enterprises

## 4.1. European Economic Interest Grouping (EWIV)

An EU regulation offers smaller-sized enterprises acting in cross-border activities a new type of company: the **European Economic Interest Grouping** (*EWIV*). The purpose of an *EWIV* is not to make profits for itself, but to increase those of its members. Therefore, its activities must not be more than ancillary to the economic activities of its members. At least one member of an *EWIV* must carry out its activities or have its central administration in a member state of the EU or EEA different from that of the rest of the participants. However, not all members of the *EWIV* must have EU nationality. Important provisions of the *EWIV* regulation (e.g. liability) are similar to those of the law governing the *OG*.

## 4.2. Cooperative (Genossenschaft)

The **cooperative** (*Genossenschaft*) is a company with legal personality and flexible membership. It has no minimum share capital. Shares (Genossenschaftsanteil) must have a minimum nominal value of EUR 1. Cooperatives are primarily intended to further their members' businesses. Liability depends on the form of the cooperative and the provisions of its articles of association. Cooperatives are common in the agricultural sector.

## 4.3. Civil Law Association (Gesellschaft nach bürgerlichem Recht [GesbR])

A common form for (permanent and temporary) **joint ventures** is the civil law association (*Gesellschaft nach bürgerlichem Recht [GesbR]*). A *GesbR* is not a legal person and its members are subject to joint and unlimited liability for its debts.

Temporary joint ventures – especially in the construction business – are often formed as *GesbRs* and referred to as collaborative partnerships (*Arbeitsgemeinschaft [ARGE]*).

## 4.4. Sole Proprietorship (Einzelunternehmer)

An individual may operate a business as a sole proprietorship (*Einzelunternehmer*). He or she is **solely liable** for the enterprise's debts with all their personal and business assets. Sole proprietors have to register with the commercial register if the business exceeds a certain size (in general annual turnover exceeding EUR 700,000 for two years in a row, or EUR 1,000,000 in one year).

## 4.5. Association (Verein)

An association (*Verein*) is a legal entity mainly used as a vehicle for running a non-profit organization and is therefore usually not appropriate for operating a business.

## 4.6. Silent Partnership (Stille Gesellschaft)

A silent partnership (*Stille Gesellschaft*) has one person, the **silent partner**, who provides an existing business with capital, but does not participate in management. The silent partner receives a percentage of the profits and bears a percentage of the loss, though participation in the losses may be excluded. In any case the silent partner is not liable for the debts of the business. It can be agreed that the silent partner shares in the assets and the goodwill.

The silent partnership has no legal personality and cannot act under a common name. There is no obligation to disclose its existence to the public.

## 4.7. Societas Europaea (SE)

Following a political accord reached by the Council of the European Union in 2000, the Regulation establishing a **European Company Statute** and the related **Directive** concerning **Worker Involvement** was formally adopted in 2001 and entered into force in 2004. Concurrently additional national provisions went into effect, implementing details of registration, transfer of seat, establishment etc.

The European Company Statute enables enterprises active in several EU member states to set up a public limited-liability company with the Latin name ***Societas Europaea*** (*SE*) and to operate throughout the European Union under a single legal and management system, instead of being subject to the national legislation of the various member states. The *SE* must be entered in a register in the member state where its registered office is situated. In Austria this is the commercial register (*Firmenbuch*). Every registration must be published in the Official Journal of the European Community. The statute permits a choice between a one- or two-tier management system. Companies are able to merge, form a holding company, create joint subsidiaries or convert themselves into an *SE* without going into liquidation.

## 4.8. European Cooperative Society (SCE)

Following the adoption of the legislation on the *Societas Europaea* (*SE*) hearings on the **European Cooperative Society** (*SCE*) were resumed. Subsequently the Council Regulation on the Statute for a European Cooperative Society was passed. It entered into force in 2006. Concurrently additional national provisions went into effect to implement details of registration, transfer of seat, establishment, etc.

The *SCE* provides for transnational collaboration between cooperatives and removes previous legal and administrative restrictions.

# 5. Taxation of Partnerships, Corporations and Individuals

## 5.1. Common Principles of Taxation

The annual financial statements prepared in accordance with commercial law are the **starting point for determining taxable income**. Valuation methods used for commercial law purposes are also applicable for tax purposes unless the tax law provides otherwise. The profit or loss shown in the financial statements is adjusted to take into account differences between the requirements of tax and commercial law.

### 5.1.1. Non-deductible Expenses

Some of the main non-deductible items are:

- 100% of representation expenses,
- 50% of entertainment expenses (wining and dining),
- a portion of depreciation and expenses relating to a passenger car if the acquisition costs (including value-added tax [VAT]) exceed a certain amount,
- 50% of supervisory board members' remuneration,
- salaries (in cash and in kind) and other remunerations exceeding EUR 500,000 per person per year,
- voluntary severance payments, insofar as they are not subject to a preferential tax of 6%,
- donations (except for donations made to qualifying institutions listed on the homepage of the Ministry of Finance),
- penalties and fines,
- payments that constitute a criminal act (e.g. bribes),
- expenses whose recipient is not disclosed,
- salaries for construction work paid in cash and exceeding EUR 500 (from the beginning of 2016).

### 5.1.2. Depreciation

**Depreciation** for tax purposes is generally in line with depreciation in financial statements. If the depreciation charges required for financial statement purposes exceed the amounts acceptable under tax law, those allowed under tax law prevail, resulting in a difference between taxable and financial statement income.

The following regulations concerning depreciation rates apply:

- Goodwill acquired in the course of an asset deal may be amortized over a period of 15 years.

- From the beginning of 2016 the depreciation rate for buildings is generally 2.5%, except for buildings for residential purposes where the depreciation rate is 1.5%. Land cannot be depreciated.
- Passenger cars must be depreciated over a minimum period of eight years.

### 5.1.3. Restrictions in Connection with Accruals

There are certain **restrictions** with regard to **accruals**, particularly to

- general expense accruals (i.e. a liability against a third party does not exist at the point of time when the accrual has been built up),
- lump-sum accruals, and
- long-term accruals (i.e. retention period > 12 month; have to be discounted at a rate of 3.5% on their actual/estimated duration)

In addition, deviating tax regulations apply for social capital accruals (e.g. accruals for severance payments, anniversary bonus payments, payments for unused vacation or pension).

### 5.1.4. Transfer Pricing

Austrian tax legislation has no specific **transfer pricing rules except documentation requirements**. The arm's-length principle applies and the OECD Transfer Pricing Report was adopted. Apart from that the Austrian Ministry of Finance has issued Transfer Pricing Guidelines (*Verrechnungspreisrichtlinien 2010*) based on the above-mentioned principles that provide detailed guidance.

Related-parties' transactions that do not comply with the arm's-length principle may be recharacterized as hidden profit distribution or hidden equity contribution. A hidden dividend distribution is not deductible for corporate income tax purposes and is basically subject to withholding tax in the same way as an actual dividend. From the beginning of 2016 a hidden equity contribution does no longer trigger capital duty.

In 2016 the Austrian government has introduced transfer pricing documentation requirements with a master file and a country file as well as country by country reporting requirements. Only the country by country report has to be filed annually with the Austrian tax authorities whereas the master and country files have to be submitted only upon request. Such request is generally made in the course of a tax audit. However, master file and country files have to be finalized by the time the tax returns are filed with the tax authorities.

## 5.2. Taxation of Partnerships

Profits of a partnership are taxed at partner level rather than at partnership level. The partnership is a unit for the computation of income, which is then allocated to the partners and taxed in their hands. If the partner is an individual, his/her share in the partnership's profits is subject to **income tax** (*Einkommensteuer*). If the partner is a corporation, its share is liable to **corporate income tax** (*Körperschaftsteuer*). A non-resident partner's income from the partnership is subject to Austrian income or corporate income tax. The allocation of losses to limited partners is limited with their amounts at stake, i.e. broadly speaking their capital contribution. Any excess losses can only be offset against future income from the same partnership. Those restrictions do not apply to a corporation being a limited partner.

Basically, no **withholding tax** (*Kapitalertragsteuer*) is attracted by the repatriation of a partner's profit share.

**Capital gains** from the disposal of a partnership interest are subject to Austrian income or corporate income tax. Corporate income tax is invariably levied at the full rate of 25%. Income tax is reduced to half the normal rate if the partnership interest has been held for a minimum of seven years and the disposal is made upon retirement. Otherwise, capital gains are subject to the full tax rate, but may be spread evenly over three years after a holding period of seven years.

For tax purposes, a silent partnership is treated as a partnership (thus the partners' profit share qualifies as business income) if the silent partner is not only entitled to a share in the profits but also to a share in the goodwill and the assets of the enterprise. Otherwise, the silent partner's share in the profits is a deductible expense for the partnership.

## 5.3. Taxation of Corporations

### 5.3.1. Tax Rate and Minimum Corporate Income Tax

The taxable income of a corporation is determined by applying the common principles outlined under 5.1. An Austrian corporation's profits are subject to **corporate income tax** (*Körperschaftsteuer*) at a flat rate of 25%. Payments where the recipient is not disclosed attract a 25% surcharge.

Even if no or an insufficient positive income is generated, a *GmbH* basically triggers a minimum corporate income tax of EUR 1,750, whereas an *AG* owes at least EUR 3,500. For newly established *GmbHs* the minimum corporate income tax amounts

to EUR 500 per year during the first five years, EUR 1,000 per year for the next five years and EUR 1,750 per year in every following year.

### 5.3.2. Tax Loss Carry Forward

Tax losses from previous years can be carried forward indefinitely and may as a rule be offset against up to 75% of the current year's positive income, in which case 25% of the current income remains taxable. However in certain cases it is possible to offset tax loss carry forwards by up to 100% (e.g. sale of a separable part of a business operation).

Austria does not permit any loss carry-back.

### 5.3.3. Participation Privilege

*National participation privilege*

The national participation privilege requires neither a minimum shareholding nor a minimum holding period. Dividends received from a domestic company are exempt from corporate income tax under the national participation privilege (*nationales Schachtelprivileg*).

Write-downs and capital losses concerning the shareholding of domestic subsidiaries are tax deductible, but have to be spread over seven years. Capital gains or appreciations are subject to corporate income tax.

*International participation privilege*

Dividends received from a foreign company are exempt from corporate income tax under the international participation privilege (*internationales Schachtelprivileg*). The international participation privilege is granted if an Austrian company has directly or indirectly held at least 10% of the foreign company's equity for a minimum of 12 months and the foreign company is comparable to an Austrian corporation.

For gains/losses in value the international participation privilege provides an option model, allowing a corporate taxpayer to choose between the tax neutral or tax effective status when acquiring an international stake from a third party:

- tax effective status: any capital losses or write-downs reduce the company's taxable income. However, such capital losses and write-downs must be spread over seven years. On the other hand capital gains or appreciations increase the company's taxable income.

- tax neutral status: in this case any expenses resulting from capital losses or write-downs are not tax deductible. Correspondingly any income resulting from capital gains or appreciations is not taxable. An exceptional rule is available for actual and final liquidation losses, which can be utilized for tax purposes over seven years under certain conditions.

The option concerning the tax neutral or tax effective treatment of an international affiliation must be exercised in the year a stakeholding is acquired and can be exercised differently for each international stakeholding. These are one-time options and bind the holding company with regard to this specific investment.

*International portfolio participation exemption*

In case of an international participation of less than 10% any dividends received from a foreign company (comparable to an Austrian corporation) resident in the EU or a state that has entered into an extensive administrative assistance agreement with Austria are exempt from corporate income tax under the international portfolio participation exemption (*Beteiligungsertragsbefreiung für Portfoliobeteiligungen*). An international portfolio stakeholding does not require a minimum shareholding or a minimum holding period.

Depreciations and capital losses concerning international portfolio stakeholdings are tax deductible, but have to be spread over seven years. Capital gains or appreciations are subject to corporate income tax.

*Anti-avoidance regulation concerning international stakeholdings*

A switchover from the exemption method to the indirect credit system applies for qualified international participations (≥ 10%) if the foreign distributing company generates mainly a passive-type income and is subject to low taxation in its country of residence:

- a foreign subsidiary earns mainly a passive-type income by way of interest, royalties, rental and lease income or capital gains from the disposal of shareholdings (except shareholdings which would qualify for the international participation privilege from an Austrian tax perspective),
- a low tax rate in the country of residence is defined as an effective tax rate of not more than 15%.

Apart from that, a switchover between regimes is also applicable for international portfolio participations (≤ 10%) if the foreign distributing company is subject to low

taxation in its country of residence, irrespective of the type of income. A low tax is defined as an effective tax rate of not more than 15%.

*Interest in connection with share deals*

**Interest** on the leveraged acquisition of investments, even if qualifying for the domestic participation privilege or the international participation privilege, is generally **deductible**, unless it relates to an acquisition from a related party. Costs of procuring money or incidental costs (*Geldbeschaffungs- und Nebenkosten*) are, however, not deductible in the case of a debt-financed share deal.

### 5.3.4. Restriction on the Tax Deductibility of Interest and License Payments

Austria has enacted restrictions on the tax deductibility of interest and license payments at the level of an Austrian company if the following criteria are fulfilled:

- interest or license payments are made to an Austrian corporation or to a comparable foreign corporation; and
- the recipient of such payments is a direct or indirect affiliated corporation or is under the controlling influence of the same shareholder; and
- the interest or license payment is in the hands of the receiving corporation
  - not taxable due to a personal or objective tax exemption,
  - subject to a nominal tax rate of under 10%,
  - subject to an effective tax rate of under 10% due to a specific tax allowance for interest and licence payments,
  - a tax refund to the receiving entity or the shareholders of the receiving entity is granted, resulting in an effective tax burden of below 10%.

The deductibility of interest and license payments is, however, not affected if the effective tax rate of under 10% is the result of tax loss carry forwards or a tax group regime. If the receiving corporation is not the beneficial owner, the tax regime applied to the beneficial owner is relevant. In this way, back-to-back financing is covered as well. In case of a partnership as receiving entity, the tax rate of the corporate shareholders behind the partnership determines the level of taxation.

### 5.3.5. Group Taxation

*Conditions for a tax group*

Austria has implemented a group taxation regime (*Gruppenbesteuerung*). Under the group taxation regime profits or losses of group members are attributed to the group parent for corporate income tax purposes.

A tax group consists of a group parent and at least one group member:

- **Group parents** may be stock corporations, limited liability corporations, economic cooperatives, mutual insurance associations and banks provided they are subject to unlimited tax liability. Corporations established in member countries of the European Union and the European Economic Area which are subject to limited tax liability only also qualify as group parents if they register a branch in Austria and if the shareholding in a group member is attributable to this branch. Moreover a combination of corporations may act as a group parent if one of the corporations holds a share in the subsidiary of at least 40% and the others of at least 15%.
- Stock corporations, limited liability corporations and commercial cooperatives subject to unlimited tax liability qualify as **group members**. Furthermore first-tier subsidiaries resident in an EU member state or in a state that has entered into an extensive administrative assistance agreement with Austria can be included in a tax group if they qualify as comparable foreign corporations and if they are controlled by a domestic group member or group parent.

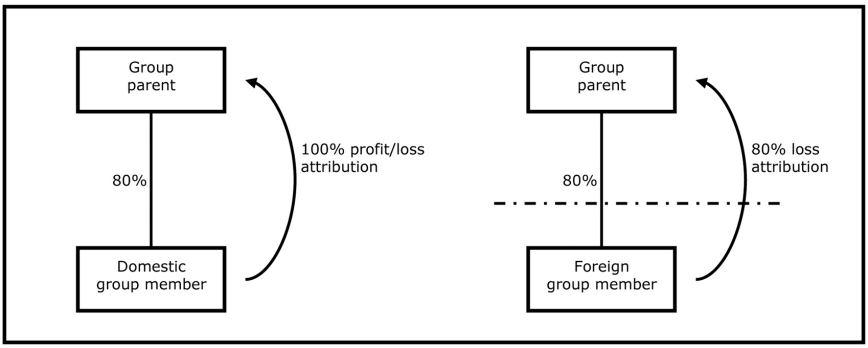
A precondition for group membership is a **direct or indirect** (e.g. via a partnership) **majority shareholding and the majority of the voting rights in a corporation**. The requisite stake must be held during the whole fiscal year.

The group members must file an application for group taxation with the tax authorities. Additionally for company law purposes a tax sharing agreement (*Steuerumlagevereinbarung*) needs to be concluded between the domestic group members and the group parent.

The group must exist **for at least three years**. If a group member leaves the group for whatever reason before expiration of this period, tax will be retroactively assessed for the group member and the remaining tax group as if that group member had never been included in the tax group.

*Attribution of profits and losses within a tax group*

With regard to domestic group members 100% of profits/losses are attributed to the group parent even when the actual stakeholding is less. For foreign group members losses are attributable to the group parent only according to the percentage of the stakeholding. Profits of foreign group members are not attributed to the group parent.




Losses of foreign group members can be temporarily utilized within the tax group, but have to be recaptured under certain circumstances in subsequent periods (e.g. foreign tax losses are or may be offset against profits abroad in subsequent years, or the foreign group member ceases to be a group member). In the case of a recapture of foreign tax losses the 75% cap on utilizing tax loss carry forwards does not apply.

Since 2015, the deduction of foreign losses of qualifying subsidiaries has been capped at 75% of the income of all domestic group companies (including domestic group members and the group parent). As a consequence any foreign losses that cannot be offset immediately within the tax group can be carried forward at the level of the group parent.

While group relief is applied, depreciations on stakeholdings of group members are not tax deductible.

## 5.4. Dividend Withholding Tax

*Private individuals*

Dividends paid to a private individual generally attracts a 27.5% **withholding tax** (*Kapitalertragsteuer*). A resident individual's dividend income from Austrian sources is not subject to further income tax if 27.5% has been withheld at source. Thus the withholding tax is a comprehensive tax (*Endbesteuerung*) for the individual shareholder.

Foreign recipients have their withholding tax rate regularly reduced under Austria's double-tax treaties (see Annex 1). Although most tax treaties require the company to withhold the full rate and the recipient of the dividend to apply to the tax authorities for a refund, in general unilateral relief is available if the foreign recipient submits a certificate of residence.

*Domestic corporate shareholders*

A resident company's dividend income from Austrian sources is exempt from corporate income tax under the **domestic participation privilege** (*Schachtelprivileg*). Withholding tax of 25% is nevertheless withheld if the shareholder's stake is less than 10%. Any withholding tax payable is however refunded or credited against corporate income tax.

*Foreign corporate shareholders*

Dividend distributions to a foreign corporate shareholder basically attract withholding tax of 25%. Unilateral relief under an applicable double-tax treaty rate is available only if the foreign corporate recipient provides a certificate of residence and confirms that its activities exceed those of a mere holding company, that staff is employed and office space is occupied.

Austria has implemented the **EU Parent-Subsidiary Directive** that exempts dividends to an EU parent company from taxation if the following conditions are met:

- the shareholder is a corporation resident in another EU member state,
- the shareholder has held a minimum 10% interest for one year.

Any withholding tax collected during the first year will be refunded as soon as the minimum holding period has elapsed.

**Anti-directive shopping** legislation has been enacted. Under that legislation an Austrian company is required to withhold the full rate and the shareholder has to apply to the tax authorities for a refund, unless:

- the corporate shareholder confirms in writing that its activities exceed those of a mere holding company, that staff is being employed and office space is occupied,
- a certificate of residency is produced.

Corporate shareholders resident in another EU member state or with qualified EEA state (currently Norway, Lichtenstein and Island) are entitled to a full refund of Austrian withholding tax on dividend distributions if the shareholder can prove that they cannot obtain a tax credit for Austrian withholding tax abroad.

## 5.5. Taxation of Individuals

Individuals resident in Austria are subject to **income tax** (*Einkommensteuer*) on their worldwide income. An individual is treated as a resident if his/her permanent accommodation or habitual abode is in Austria. If an individual has a secondary residence

in Austria, its use for less than 70 days (which has to be proved by records) per calendar year does not trigger unlimited Austrian tax liability, unless the individual opts for it. Non-resident individuals are subject to income tax only on their income from Austrian sources, e.g. from their share in an Austrian partnership's profits or from rental income derived from real estate located in Austria.

**Capital gains** from the disposal of business assets are invariably subject to tax. The following capital gains from the disposal of privately held assets are also subject to tax:

- disposal of shares, bonds, derivatives and other financial instruments, irrespective of how long those assets have been held,
- disposal of other moveable assets within 12 months after their acquisition,
- disposal of real estate, irrespective of how long the property has been held. An exemption is available for the main residence of the taxpayer and subject to conditions,
- disposal of a going concern or a partnership interest.

If assets are privately held, capital losses can neither be set off against other sources of income nor be carried forward. However, there is a limited offset of gains and losses from the disposal of real estate and gains and losses from financial assets.

Progressive **income tax rates** of up to basically 50% apply to both resident and non-resident individuals. For income exceeding a threshold of EUR 1 million a temporary income tax rate of 55% is applicable from 2016 to 2022.

Reduced income tax rates apply to:

| **Income tax at a reduced rate** | **Tax rate** |
|---|---|
| Capital gains from the disposal of a **business or a separable part of a business** or the disposal of a partnership interest after a minimum holding period of seven years if the disposal is made upon **retirement.** | income tax rate is reduced to half of the normal tax rate<br>if the preconditions are not fulfilled, such capital gains are subject to the full income tax rate, but may be spread evenly over three years after a holding period of seven years. |
| Capital gains from the disposal of shares, bonds, derivatives and other financial instruments | 27.5% |

| Income tax at a reduced rate | Tax rate |
|---|---|
| Distributions by an Austrian foundation (*Privatstiftung*) to its beneficiaries | 27.5% |
| Dividends from both resident and non-resident corporations | 27.5% |
| Interest from cash deposits in Austrian as well as foreign banks | 25% |
| Interest on Austrian and non-Austrian bonds | 27.5% |
| Income from derivatives | 27.5% |
| Capital gains from the disposal of real estate | 30% |

With respect to interest or dividend income and capital gains from financial instruments the accrued tax is withheld by the Austrian bank involved. With respect to capital gains from real estate it is withheld by a notary public or a lawyer. If no tax is withheld, then the reduced tax rate is granted in the course of the tax assessment.

Capital gains from the disposal of real estate acquired prior to April 1, 2002, are subject to a special tax rate of 4.2% of the sales proceeds.

The reduced rates generally also apply if an individual earns interest or dividend income or capital gains through a partnership. Furthermore the reduced rates are equally available to non-resident individuals.

# 6. Holding Companies and Foundations

## 6.1. Holding Company

A **holding company** does not require a specific status. Any Austrian corporation, regardless of its other business activities, may function as a holding company. The holding company can be formed as a company with limited liability (*GmbH* – see 3.5) or a stock company (*AG* – see 3.6).

Foreign investors may obtain numerous tax benefits by establishing an Austrian holding company:

- national and international participation privilege available (see 5.3.3);
- only few specific anti-avoidance rules exist, but the Austrian tax authorities are empowered to prevent abuse; the main anti-avoidance rules are:
  - the international participation privilege is not available for repatriation of passive income from a low-tax jurisdiction (see comments above),
  - in order to combat hybrid structures, the international participation privilege is not available when the foreign subsidiary can take a tax deduction for the dividend payment,
  - tax deductibility of interest on the leveraged acquisition of stakeholdings from a third party;
- Austrian tax law provides for a system of group relief under the group taxation concept (see 5.3.5);
- Austria has entered into a broad **network of double-tax treaties,** which either eliminate withholding taxation or reduce the withholding tax rate for "inbound and outbound investments" (see Annex 1);
- a strict **debt-equity ratio** is not applicable under Austrian tax law, although the tax authorities may recharacterize shareholder loans as hidden equity under a substance-over-form approach, in case the subsidiary is not properly funded;
- in many cases the Austrian **Reorganisation Tax Act** (*Umgründungssteuergesetz*) facilitates tax-free reorganization of corporations and partnerships and applies to both national and cross-border transactions; the Reorganization Tax Act implemented the EU Merger Directive.

## 6.2. Foundation (Privatstiftung)

### 6.2.1. General Aspects

A *Privatstiftung* is a legal entity. Its internal organization and purpose are largely determined by the grantor (*Stifter*), who provides the assets necessary to achieve the *Privatstiftung's* aims.

Any person (including legal persons) may form a ***Privatstiftung***, which may have one or more grantors (*Stifter*). The *Privatstiftung* must be endowed with assets of at least EUR 70,000 (cash or contributions in kind). If capital is raised as contributions in kind, an audit is required.

A foundation may be established *inter vivos* or *mortis causa*. The grantor must draw up a **declaration of establishment** (*Stiftungserklärung*). The foundation's purpose (*Stiftungszweck*) defines the framework and legal intent for the use of the assets. The grantor's wishes prevail (*Primat des Stifterwillens*). Neither the foundation's establishment nor its practices are subject to supervision by public authorities. The by-laws (*Stiftungszusatzerklärung*), which include, inter *alia*, the names of the beneficiaries, the assets, etc., need not be known to the public. The declaration of establishment, which has to be filed with the commercial register, and the by-laws must be executed as a notarial deed. Upon inspection of the commercial register, a third party will usually be informed only that a certain person has formed a private foundation and has paid up the minimum amount. However, the declaration of establishment and the by-laws as well as the names of the beneficiaries have to be disclosed to the Austrian Revenue Service to qualify for the beneficial tax regime for foundations.

The foundation **must not carry on a trade or business**. It must not be a personally liable partner in a partnership. However, it may operate as a holding company and can therefore participate in companies. Most foundations are used as a means of preserving the unity of shareholdings in family businesses. Every foundation is subject to an annual statutory audit and must prepare financial statements.

A foundation must have a **board of directors** (*Stiftungsvorstand*) consisting of at least three members, two of whom maintain their permanent residence in the EU or EEA (but must not necessarily be Austrian nationals). Neither a beneficiary nor a person whose family members are beneficiaries may be a member of the board, even if s/he is the grantor. An advisory board is optional. In addition to the directors, a foundation must by law have an auditor (*Stiftungsprüfer*).

## 6.2.2. Taxation

*Entrance fee*

The contribution of assets except real estate to an Austrian foundation is subject to an **entrance fee** (*Stiftungseingangssteuer*) of 2.5%. Supplementary contributions made by the grantor are also taxed at 2.5%. However, all contributions are subject to an increased rate of 25% if the declaration of establishment, by-laws and similar arrangements are not disclosed to the tax authorities.

The contribution of domestic real estate is subject to real estate transfer tax (*Grunderwerbsteuer*) at a graduated tax rate and any deviating calculation of a special tax value (*Grundstückswert*) has to be considered.

*Current taxation*

Some ongoing revenues of an Austrian foundation are **tax-exempt**, such as dividend income from investments in Austrian companies under the national participation privilege (see 5.3.3). The international participation privilege for dividend income is also applicable unless the dividend is paid out of passive income from a low-tax jurisdiction. Interest income from bank deposits, bonds or mutual funds as well as capital gains from the disposal of substantial shareholdings, i.e. 1% or more, are subject to a 25% tax rate (*Zwischensteuer*). That tax will be credited against withholding tax on distributions to beneficiaries (see below). Furthermore, such a capital gains tax can be deferred if the capital gain is rolled over into a new qualifying investment in shares of at least 10% in a domestic or foreign company within the next 12 months. Other ongoing income of a foundation is subject to a 25% corporate income tax and an additional 27.5% withholding tax when distributed.

**Distributions to beneficiaries** attract a 27.5% withholding tax, which may be reduced by tax treaties. There is no further Austrian income tax on the distribution, but non-resident beneficiaries may be subject to income or gift tax in their country of residence. Taxation of beneficiaries resident in other countries depends on their national tax laws and the applicable double-taxation treaty.

The generous tax exemptions and privileges for income from both domestic and foreign capital and direct investments as well as limited setting-up expenses make the Austrian *Privatstiftung* highly attractive, in particular when the roll-over relief for capital gains is utilized or when the annual dividend income of the foundation exceeds the amount of distributions to beneficiaries so that the foundation facilitates a significant tax deferral

# 7. Mergers and Acquisitions

## 7.1. General Information

An existing business is usually either acquired by purchasing its shares (share deal) or its assets (asset deal). Acquisition by means of a lease agreement (*Unternehmenspacht*) is also possible. Corporations may furthermore lawfully demerge so that only a part of a given business may be acquired.

**Mergers** (*Verschmelzungen* or *Fusionen*) **and demergers** (*Spaltungen*) **of corporations** are allowed under Austrian law. Usually, one corporation is merged into another; however, two corporations may be merged in such a way that a new (third) corporation comes into existence. It is not only possible to merge two or more stock companies (or two or more companies with limited liability). A stock company may also merge with a company with limited liability. In such case the surviving company can either be a stock company or a company with limited liability.

If the target company owns **real estate**, special approval may be necessary for its acquisition, depending on the province in which the real estate is located (see 12.2). In both share and asset deals, rent agreements may be affected by the deal (see 12.3).

For acquisitions in connection with **insolvency**, special regulations exist which usually reduce the liability of the purchaser for debts of the acquired business (see 23.3).

Mergers exceeding certain thresholds require the approval of Austrian competition authorities. If even higher thresholds are exceeded, EU merger control regulations may apply (see 15.1.3).

## 7.2. Share Deal

The acquisition of a corporation by means of a **share deal** can either be made by purchasing all or part of the shares of a company or by increasing its share capital and issuing new shares for subscription. The legal identity of the target company is unchanged and thus agreements concluded by that company as a rule remain unchanged (except, for instance, lease agreements regarding real estate – see 12.3). The purchaser of shares (stock) is usually not liable for business debts of the target company; however, if the share capital is not fully paid up, the purchaser may be liable for paying up the remainder, even that of the other shareholders (see 3.5.3). Furthermore, the purchaser may be liable for the debts of the seller if the shares sold were substantially all the seller's assets and the debts were known or should have been known to the purchaser. The acquisition of shares in a **company with limited liability** (*GmbH*) requires a notarial

deed to be effective (see 3.5.3). A notarial deed is also required for an increase in the capital of a *GmbH* and an *AG*.

The **Takeover Act** (*Übernahmegesetz*) regulates publicly made bids for the takeover of shares in companies listed on the stock exchange (see 22.2.5).

## 7.3. Asset Deal

In an **asset deal** all or part of the assets of an enterprise are acquired. Since the legal identity of the target is changed, all contracts previously concluded by the target must be transferred to the purchaser to remain effective. Unless agreed otherwise or opposed by the contracting party, the purchaser of an enterprise automatically becomes party to all enterprise-related contracts if the acquired business continues operating, even under a different name. Under certain conditions, the seller remains liable for obligations resulting from such transferred contracts. The same applies to **labor contracts**. They follow the business and employees thus transfer automatically to the purchaser. However, the seller may remain liable for certain claims of transferred employees (see 11.4).

The purchaser of the business assets is also liable for all business debts which have not been transferred to it. This unlimited liability can only be excluded by an agreement between the seller and the purchaser which is, at the time of the acquisition of the business assets, either entered into the commercial register or published in another medium or about which the creditor is directly informed either by the seller or the purchaser. Additionally, there is a statutory liability of the purchaser of a whole business (unit) or of substantially all the seller's assets for all debts of the transferred business which were known or should have been known to the purchaser. This liability is limited to the total value of the assets acquired and cannot be reduced by agreement. Additional liability provisions exist with respect to taxes and social security contributions. Special provisions also regulate the fate of insurance agreements in connection with acquisitions.

## 7.4. Taxation of Asset Deal or Share Deal

| Taxes | Asset deal | Share deal |
|---|---|---|
| **CIT** | • If a business is acquired in the course of an asset deal the acquirer may receive a step-up in the assets' book value. The same applies to the acquisition of a partnership interest.<br>• Assets are depreciated over their estimated useful lives, and goodwill is amortized over a period of 15 years.<br>• Tax loss carry forwards cannot be transferred in the course of an asset deal.<br>• **Interests** resulting from an asset deal are tax deductible. | • The assets' book value cannot be stepped up in the course of a share deal.<br>• No goodwill amortization available.<br>• Tax loss carry forwards will cease to exist after the share deal if the so-called "Mantelkauf" (purchase of a corporate shell) provision applies. In this context the use of tax loss carry forwards is denied if, from an overall point of view, the company is considered to have lost its identity. This is assumed if there was, cumulatively, a substantial change in the economic structure, the organizational structure and in the ownership of the company. The limitation does not apply if those changes take place in the course of a reorganization which is intended to preserve jobs.<br>• Interest resulting from a share deal is tax deductible, provided that the shareholding has not been acquired from an affiliate. In the case of intra-group debt financing, interest deduction is denied if the recipient of the interest is subject to low taxes (see 5.3.4). |

| Taxes | Asset deal | Share deal |
|---|---|---|
| **VAT** | • In the course of an asset deal each single asset has to be evaluated separately for VAT purposes. Therefore the VAT base is calculated based on the purchase price plus transferred liabilities, less tax-exempt (e.g. accounts receivables, transfer of a partnership interest and of shares in a corporation) or non-taxable items (e.g. passenger cars).<br>• The purchaser can recover the appropriate input VAT, provided that the seller issues an invoice which is in line with the regulations of the Austrian VAT Act. | • The transfer of a shareholding is tax-exempt in terms of Austrian VAT. |
| **RETT** | • The purchase of assets of a business (asset deal) and the purchase of a business from a sole proprietorship attracts real estate transfer tax (RETT) and registration fees in case real estate is transferred.<br>• From 2016 the applicable tax rate depends on the transaction (i.e. free of charge, for valuable consideration or partly free of charge and partly for valuable consideration). In case of a free-of-charge transaction a progressive tax rate applies (0.5%–3.5%), while for transactions in connection with a valuable consideration a flat tax rate of 3.5% applies. The tax assessment base is basically the consideration, but the special tax value (*Grundstückswert*) is seen as the minimum tax assessment base. | • From 2016 onwards RETT is triggered if at least 95% of the shares in a company that owns Austrian real estate are acquired by a single shareholder or by group companies of a corporate income tax (CIT) tax group.<br>• RETT amounts to 0.5% based on the special tax value (*Grundstückswert*). |

| Taxes | Asset deal | Share deal |
|---|---|---|
| **Stamp Duty** | • The renewal of certain agreements (e.g. with landlords) and the assignment of receivables and other rights to the new owner in the course of an asset deal may be subject to stamp duty.<br>• Precondition is that a document within the meaning of the Austrian Stamp Duty Act is executed. | • No stamp duty issues. |

## 7.5. Tax-neutral Reorganisations

The Austrian Reorganisation Tax Act allows certain reorganisation measures (e.g. mergers, contributions, de-mergers, etc) without any tax impact by carrying over the book values. Thus the reorganisation is made at basis and does not result in any taxation of hidden reserves in the transferred assets.

Furthermore the reorganisation measures are not taxable for VAT purposes and any existing loss carry forwards can be transferred under certain conditions. Restructuring measures can be basically carried out with retroactive effect for (corporate) income tax purposes (but not for, e.g. VAT purposes).

# 8. State-owned Enterprises, Liberalized Markets and New Technologies

## 8.1. State-owned Enterprises

**ÖIAG** (*Österreichische Industrieholding Aktiengesellschaft*) was a fully state-owned company. In 2015 ÖIAG was converted into **ÖBIB** (Österreichische Bundes- und Industriebeteiligungen GmbH). After several privatizations in the last two decades, ÖBIB still holds shares in three important Austrian enterprises: Österreichische Post AG (2015 turnover EUR 2.40 billion; 24,000 employees, ÖBIB holds 52.85%), OMV AG (2015 turnover EUR 22.57 billion, 24,000 employees, ÖBIB holds 31.5%) and Telekom Austria AG (2015 turnover EUR 4.0 billion, 16,000 employees, ÖBIB holds 28.42%). ÖBIB, moreover, holds shares of less important companies, namely APK Pensionskasse Aktiengesellschaft, Casinos Austria AG, GKB-Bergbau GmbH and FIMBAG Finanzmarktbeteiligung Aktiengesellschaft des Bundes.

Among many other enterprises, the state directly owns **ASFINAG** (Autobahnen- und Schnellstraßen–Finanzierungs-Aktiengesellschaft) which is responsible for constructing, financing and running of the motorway and expressway networks in Austria.

In 1992 the state-owned railways (***ÖBB***) were transformed into a stock company, but the state is still the sole owner.

## 8.2. Liberalized Markets: Telecommunications, Energy and Railways

Since the liberalization of the telecommunications market in 1997, many telecommunications companies have entered the Austrian market. **GSM licenses** were auctioned off by the Telecommunications Control Commission. At present, three companies hold GSM licenses: *A1 Telekom Austria AG* (*Telekom Austria* subsidiary), *T-Mobile* (subsidiary of the German *T-Mobile*) and *Hutchison Drei Austria GmbH* (subsidiary of *Hutchison Whampoa Ltd*). Mobile number portability, as prescribed by the New Regulatory Telecommunication Framework of the EU, has made the market even more competitive. A bidding for all available GSM frequencies took place in 2013; and the frequencies were re-allocated according to that bid in 2015.

In the fixed-line market the incumbent, *A1 Telekom Austria*, still has the strongest market position with over 50%. *A1 Telekom Austria* holds the "last mile", i.e. the connection between the end-user and the nearest switch of the telephone company. Hence, *A1 Telekom Austria* has only a few serious competitors in the landline market and, consequently, the internet-access market, among them *Tele2* and cable providers such as *UPC* that have created their own infrastructure.

As one of the last countries in Europe, Austria auctioned off six **UMTS mobile-phone licenses** in 2000. The auction ended after two days with a total bid of ATS 11.443 billion (EUR 832 million). Each of the six bidders - *Telekom Austria*, *T-Mobile*, *One (*now *Hutchison Drei Austria GmbH)*, *tele.ring, Telefonica* and *Hutchison Whampoa* - acquired at least one paired-frequency package. The first company to operate the UMTS network was *Hutchison Whampoa* with its brand "3". *Telefonica* never started its UMTS service in the Austrian market. Instead it sold its frequencies to *Mobilkom Austria* with consent of the regulatory authority in 2003.

Under the Telecommunications Act – in compliance with the New Regulatory Telecommunication Framework of the EU – a GSM license is no longer a prerequisite for operating a mobile network. There are several active Mobile Virtual Network Operators (**MVNO**), namely *Vectone Mobile GmbH, Yesss! Telekommunikation GmbH*, *Ventocom GmbH* and *UPC Austria*.

In 2001 the Austrian Communications Authority Act (*KommAustria-Gesetz*) established a new regulatory authority to control and regulate the broadcasting and telecommunications sector: the **Austrian Communications Authority** (*Kommunikationsbehörde Austria [KommAustria]*), whose operating arm and agent is the **Telecommunications and Broadcasting Regulation GmbH** (*Rundfunk und Telekom Regulierungs-GmbH*). The main responsibilities of the Telecommunications and Broadcasting Regulation GmbH are the administrative support of the **Telecommunications Control Commission** (*Telekom-Kontroll-Kommission*) and the **Austrian Communications Authority** as well as number assignment. Appeals against decisions of the Austrian Communications Authority can be brought to the **Federal Administrative Court** (*Bundesverwaltungsgericht* – see 27.3.).

The liberalization of the energy sector began with the enactment of the **Energy Liberalization Act**. The regulatory authority, **Energy Control GmbH** (*E-Control GmbH)*, and the **Energy Control Commission** (*E-Control Kommission)*, started work in 2001. Their structure and functions were analogous to those of the telecommunications sector. In 2011 the company was transformed into a public authority. Since then, two bodies have replaced the Energy Control Commission: the Regulation Commission (*Regulierungskommission*) and the Regulation Advisory Board (*Regulierungsbeirat*).

Although the **railway market** was liberalized in 2000, the state-owned *ÖBB* is still the major market player (about 90%). On the main line, Westbahn, an important competitor (WESTbahn Management GmbH), started its business in December 2011.

## 8.3. New Technologies

Austria has implemented the EC Directive concerning **Electronic Signatures**, intended to remove one of the supposedly main obstacles to cross-border electronic commerce, by adopting the Electronic Signature Act (*Signaturgesetz*). There are various kinds of electronic signatures, depending on the degree of security required. Thus, any electronic signature may be legally valid and effective, but only specially certified signatures (*qualifizierte elektronische Signaturen*) fulfill the writing requirement and the requirement of personal signature prescribed by law for certain legal acts. Additionally, Austria enacted the **E-Government Act** (*E-Government-Gesetz*) in 2004, which regulates electronic communications between citizens and government. Among other things, it introduced a new kind of electronic signature for public authorities (*Amtssignatur*). To foster the use of electronic signatures, a procedure to apply electronic signatures via the use of mobile phones was established (*Handy-Signatur*). In addition more and more public sector proceedings can or must be conducted via the use of electronic signatures. As of January 1, 2007, the **Laws of the Professions Amendment Act** (*Berufsrechts-Änderungsgesetz 2006*) introduced further kinds of electronic signatures, gave legally binding status to documents stored in electronic databases of the professions, including attorneys-at-law and notaries public, and declared that, under civil procedure law, electronic documents have the same legal quality as paper ones. Attorneys-at-law are obliged to use electronic signatures in civil and public sector proceedings.

The Austrian **E-Commerce Act** (*E-Commerce-Gesetz*) covers certain aspects of information society services and institutes country-of-origin control, as well as exceptions thereto (e.g. the regulation of spamming). Furthermore, it contains basic principles governing online conclusion of contracts, such as the information to be provided to the customer, the technical means to recognize and correct data entry mistakes prior to submitting an electronic order, immediate electronic confirmation of orders received and access to contract terms and conditions. Infractions of the information obligations may constitute unfair competition.

Moreover, the E-Commerce Act also addresses the liability of service providers, exempting access providers from all liability. Host providers are freed from liability for illegal content transmitted over their servers, provided that they were ignorant of the illegal nature of the content. The Austrian E-Commerce Act went even further than the EU's E-Commerce Directive as it also excluded liability of providers of search engines and link setters for illegal content of links, provided they were ignorant of the illegal content of the link.

For information on Austrian law concerning distance contracts and financial services, see 17.

In 2003 Austria adopted the **Telecommunications Act** (*Telekommunikationsgesetz 2003*) to comply with the EU Regulatory Framework for Electronic Communication. The framework consists of five directives (Framework, Access, Authorization, Universal Service and Data Protection) and was intended to provide a coherent, reliable and flexible approach to the regulation of electronic communication networks and services in fast moving markets. The EC Directive concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (E-Communication Data Protection Directive) amended the general Data Protection Directive and focuses on special privacy threats resulting from modern communication, such as spamming and protection of communications as well as traffic data content. In March 2006, the spamming and communication provisions of the Telecommunications Act were amended and it is now generally prohibited to call or send faxes, emails or text messages without prior consent (with particular exceptions for email and text messages to a company's own customer).

The Austrian Telecommunications Act of 2003 includes "cookie provisions". In November 2011, Austria implemented the EU's E-Privacy Directive and simply translated Art 5 para 3 of the Directive. There is no case-law in these matters so far in Austria.

The general EC Data Protection Directive was implemented by the **Data Protection Act of 2000** (*Datenschutzgesetz 2000*), which protects the right to privacy and prescribes the following principles of data processing: personal data must be (1) processed fairly and lawfully, (2) collected for specified, explicit and legitimate purposes and processed in a way compatible therewith, (3) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or processed, (4) accurate and, where necessary, kept up to date, (5) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are processed.

The **Data Protection Authority** (*Datenschutzbehörde*) is responsible for safeguarding data protection in Austria.

All data applications are subject to notification to the **Data Processing Register** (*Datenverarbeitungsregister*), unless an exception applies. Transnational groups are particularly affected since some data applications with cross-border data flow must not only be notified, but may also be subject to prior approval by the Data Protection Authority, e.g. when the subsidiary is based outside the EEA. Notifications of data applications must be filed by using an online platform which is available at https://dsb.gv.at. The system requires an Austrian electronic signature (see 8.3.) and is available in German only. The online platform enables a name search for companies

to see their registration status and allows directly searching for data applications by name. This feature is open for all comers free of charge and anonymously. Due to the upcoming European General Data Protection Regulation, it is unclear whether the Data Processing Register will survive.

On January 1, 2010, an amendment to the Data Protection Act 2000 introduced a data breach notification duty for companies which forces them to inform data subjects if they find out that data from one of their data applications have been used in a systematic, grave and unlawful manner and the data subjects may suffer damage. Austria was the second country in the European Union to introduce such an obligation. Furthermore specific provisions regarding the use of CCTV were introduced in the Data Protection Act 2000.

# 9. Investment Incentives

## 9.1. Government Investment Incentives

Austria offers a comprehensive system of both national and regional **incentive programs**. The type of funding ranges from cash grants and interest subsidies to loan guarantees, depending on the location, the potential for creating new jobs or setting up new or expanding old facilities, the technology used, the size of enterprise and various other factors.

The following business activities may attract public subsidies:

- **investments** in plants and equipment are typically encouraged by investment grants in the context of regional subsidy programs; moreover, the New Business Promotion Act *(Neugründungsförderungsgesetz)* provides for some tax relief as well as tax and fees exemptions for start-ups and successions;
- **research and development**: typical research and development projects can be subsidized by up to 50% depending on research focus, region, etc.
- **recruitment and personnel development**: human-resource subsidies of up to 50% are normally granted in connection with personnel development and training; furthermore, job creation grants are often available, as well as subsidies to meet initial salary costs or reduce social security costs of employees; moreover, there are special benefits for hiring older workers, like an integration assistance of the Austrian Labour Market Service *(Arbeitsmarktservice – AMS)* of up to 66.7% of the expenses or some relief from social security contributions;
- any activity that leads to an **improvement of the environment** may be entitled to environmental subsidies of up to 40%, depending on region and degree of exceeding minimum legal requirements;
- **commodity exports** are supported by numerous export promotion programs, like co-funding of up to 50% of the direct market entry costs or export financing guarantees provided by the Austrian Control Bank;
- **transnational cooperation**: costs related to transnational projects may also be eligible for subsidies.

The range of incentives is broad: from regional to national, from cash grants, tax exemptions and low-interest loans to export guarantees. Therefore professional advice is required to determine the available incentives. Nevertheless, Austria, like every other EU Member State, must not grant subsidies in excess of the level accepted by the EU.

Three block exemption regulations concerning state aid to small and medium-sized enterprises (SMEs) as well as *de minimis* aid (EUR 200,000 within three years) facilitate state supports and contain exemptions from the prior-notification requirement. The new Block Exemptions Regulations became effective on December 18, 2013. In Austria, various Austrian regions qualify for extensive state and EU aid, as approved by the European Commission to promote and facilitate economic development.

## 9.2. Tax Incentives

Since income and corporation tax are governed by **federal laws**, tax incentives are uniform throughout Austria. Tax incentives always relate to qualifying assets or expenditure and not to an operation as such. Thus no tax holidays or reduced tax rates are available.

Tax incentives available under the Austrian tax law include:

- For certain qualified **research and development** expenses a R&D premium of 12% can be claimed. In this context two types of R&D are promoted:
  - **In-house research:** For in-house research a R&D premium is available to domestic companies conducting research activities internally in Austria. The appropriate R&D premium is not capped, but companies claiming such an R&D premium are required to obtain approval from the Austrian Research Promotion Agency (Österreichische Forschungsförderungsgesellschaft, FFG) after the end of the fiscal year.
  - **Contract research:** If a company (= principal) instructs a third party contractor to execute R&D activities for the company, the principal can claim an R&D premium for R&D expenses of up to altogether EUR 1 million. The contracted R&D activities can be performed outside Austria but must be performed within the European Union (EU) or European Economic Area (EEA). Furthermore the contractor must not be under the controlling influence of the principal and there should not be a tax group according to Section 9 of the Austrian Corporate Income Tax Act in place between the principal and the contractor. For contract research no approval is required from the Austrian Research Promotion Agency.
- **Subsidies** (up to three times the monthly remuneration) are available from the **Austrian Economic Chamber** for the employment of apprentices.

- Tax incentives available to **individuals only:**
  - a tax-free **profit allowance** conditional upon qualifying capital expenditure; the allowance is capped at EUR 45,350 p.a.;
  - a tax deferral on capital gains from the sale of fixed assets after a minimum holding period conditional upon qualifying capital expenditure **(roll-over relief).**

# 10. Trade and Industry Law

Most business activities in Austria require a **trade license** (*Gewerbeberechtigung*) under the **Trade Regulation Act** (*Gewerbeordnung*). The requirements for obtaining a trade license depend on the type of business. For regulated trades (*reglementierte Gewerbe*) a **certificate of proficiency** (*Befähigungsnachweis*) is required to prove that the person planning to engage in such trade fulfills certain educational criteria and has previous practical experience. The trade authority may grant an exemption from the certificate of proficiency (*Nachsicht vom Befähigungsnachweis*) under certain circumstances. Other activities (*freie Gewerbe*) do not require a certificate of proficiency.

Provided that the above-mentioned requirements are met, the **filing of a notification** is sufficient to start a business. However, a limited number of regulated trades (such as manufacturing of medicinal products, medical devices, financial consulting or security service providers) require prior authorization (*Bewilligung*).

If the trade is conducted by a **corporation or a partnership**, it is further necessary to name an **individual** who meets the proficiency requirements for the type of business to be carried out. The individual must either be a person authorized to represent the company (partner, managing director of a *GmbH* or member of the board of directors of an *AG*) or an employee working at least half-time for the company who contributes to the social security system. The person is responsible for the correct conduct of the business and is commonly referred to as the ***gewerberechtlicher Geschäftsführer***.

An **industrial license** (*Betriebsanlagengenehmigung*) must be obtained if the business operates a plant or factory. The trade authority issuing the industrial license usually imposes a number of conditions which the business must fulfill during operation. Even after an industrial license has been issued, the authorities may impose additional conditions if new safety or environmental considerations arise. Usually strict limits on permissible noise emission, dust, smoke and other forms of pollution as well as on interference with neighbors are prescribed and regulations for the protection of employees are imposed.

**Breaches of trade law** may constitute an offense punishable by the administrative authorities. Furthermore, competitors may take legal action in court to remedy violations under the Unfair Competition Act (see 15.3).

# 11. Labor Law and Social Security

## 11.1. General Information

Austria has reached a very high level of protection of employees' rights. Legislation restricts the free contracting of employment, limits working-time, grants employees minimum standards of payment, termination protection, benefits, etc.

The **works council** (*Betriebsrat*) represents employees' interests and has significant statutory powers and co-determination rights (e.g. information, supervision, intervention, consultation, veto rights, etc.). The staff of companies having at least five employees may establish a works council. The works council has the right, *inter alia*, to negotiate with the employer, monitor compliance with regulations protecting employees and obtain information, including financial statements. In particular, the works council must be informed of certain intended changes of the business.

The sources of Austrian labor law are not limited to statutes, but also comprise **collective bargaining agreements** (*Kollektivverträge*) and **company agreements** (*Betriebsvereinbarungen*). Collective bargaining agreements are concluded between trade unions and statutory employer organizations, regulating issues like pay and working conditions. They are applicable to all employees who fall within the scope of the respective agreement, not just to union members. Company agreements are concluded in writing between the company and the works council. They regulate specific issues assigned to them either by law or by collective bargaining agreements.

Mainly for historical reasons, a distinction is drawn between **white-collar workers** (*Angestellte*), i.e. persons employed in business, higher non-business and clerk services, and **blue-collar workers** (*Arbeiter*). In many cases the present social and working conditions no longer justify a different approach. In recent years statutes have adopted identical or similar standards for blue-collar and white-collar workers, e.g. provisions concerning vacation entitlement (*Urlaubsgesetz*), redundancy payment (*Arbeiter-Abfertigungsgesetz*), sick pay and non-competition provisions. However, different principles still exist regarding, *inter alia*, notice periods concerning employment termination (see below).

## 11.2. Wages, Working Time, Worker Protection

**Minimum wages** are provided for by collective bargaining agreements and in some cases by law. Wages (i.e. minimum and actual wages) are normally raised annually as a result of negotiations between employer organizations and trade unions.

The collective bargaining agreements provide for extra payments of one monthly salary each for summer vacation and Christmas, thus giving employees **14 payments a year**. The so-called 13th and 14th salaries (or Christmas and vacation pay) are taxed at a significantly reduced income tax rate of 6% (see 11.6).

All employees are entitled to **paid vacation** of five weeks a year (extended to six weeks after 25 years of employment).

Regular **working time** is eight hours a day and 40 hours a week. Shorter working hours apply to employees under many collective bargaining agreements (the current standard is about 38 hours a week). Working time can be allocated differently to the respective working days, but, with a few exceptions, working time must not exceed 10 hours a day or 50 hours a week. Employees are entitled to a break of 36 consecutive hours at least once a week. Overtime work either has to be paid at the normal hourly rate plus at least 50% or the employee has to be given time off (also plus 50%).

Detailed provisions for **worker protection** exist (e.g. mandatory health care and safety regulations for enterprises of a certain size). Compliance with these provisions (as well as with working time provisions) is monitored by the Works Inspection Authority (*Arbeitsinspektorat*).

Mothers and/or fathers, though in general not concurrently, are entitled to **parental leave** (*Karenz*) until the child is two years old. Subsequently the employee is entitled to return to his/her job. Social security pays **childcare compensation** (*Kinderbetreuungsgeld*) to a parent living in the same household as the child provided that the parent does not earn more than a certain amount. There are different models, depending on the utilized period of time and whether parents share the responsibility for childcare (the longest option is until the child is 36 months old). The general rule is: the shorter the parental leave, the higher the compensation.

Mothers and/or fathers are entitled to **part-time work** (*Elternteilzeit*) until the child is seven years old if they are employed in a business with more than 20 employees, have been employed by their current employer for at least three years and live in the same household as the child. The parent must inform the employer in writing at least three months in advance of the intended part-time work. Special termination protection exists for employees on parental leave or part-time work (until four weeks after the fourth birthday of the child).

Employees are entitled to full **sick pay** from their employer for at least six to 12 weeks (depending on the term of employment) and additional **half sick pay** for another four weeks. Thereafter social insurance benefits are received.

## 11.3. Termination of Employment and Dismissal Restrictions

Employment may be terminated by mutual agreement, ordinary termination or dismissal/resignation for cause with immediate effect. A **dismissal with immediate effect** by the employer (*Entlassung*) or an **immediate resignation** by the employee (*Austritt*) has to be for material cause. An **ordinary termination** (*Kündigung*) requires no cause, but both compliance with certain notice periods (*Kündigungsfristen*) as well as notice dates (*Kündigungstermine*) and – if a works council exists – prior notification of the works council. For blue-collar workers notice periods and dates are mainly prescribed by the collective bargaining agreements. The general rule for ordinary termination of a contract with a white-collar worker is that the longer the employee has been employed by the employer, the longer the notice period for a termination by the employer becomes. Unless a notice date on the 15th and/or the last day of each month has been expressly agreed and the collective bargaining agreement does not provide otherwise, the employer may only terminate the employment relationship at the end of each quarter (March 31, June 30, September 30 and December 31). White-collar workers are entitled to terminate their employment contract on the last day of each month by giving one month's notice. The works council or the employee may **challenge ordinary termination** of employment in labor court on the grounds that, *inter alia*, the termination was socially unjustified or prompted by unfair motives. However, the interests of the employer must also be considered.

In enterprises where a **works council** is established, termination is, in general, void if the works council was not **informed** by the employer at least one week before giving notice to the employee.

Furthermore, statutory provisions protect members of the works council, apprentices, expectant mothers, parents on parental leave or part-time work, the handicapped, and employees drafted into military or non-military services from termination. Their contracts may only be terminated with the consent of a labor court or an appropriate administrative body.

If a larger number of employees is made redundant, the termination may be void unless the Public Employment Agency (*Arbeitsmarktservice*) has been informed in advance under the **Early Warning System** (*Frühwarnsystem*).

Employment contracts, since January 1, 2003, fall under the Employee Retirement Scheme Act (*Betriebliches Mitarbeiter- und Selbständigenvorsorgegesetz*). Under this act, the employer has to pay 1.53% of the monthly remuneration (including benefits and before taxes) into a fund. In case of ordinary termination by the employee, resignation by the employee without cause, dismissal for cause or if there have not yet been three years of continuous contributions, the employee may not demand immediate severance payment, but the accrued amount remains in the fund and the employee is entitled to later payment. In all other cases the employee is entitled to immediate payment of the accrued amount from the fund.

However, for all contracts that began before January 1, 2003 (if not agreed otherwise in writing) the old scheme is applicable. Under the old scheme, the employee is entitled to **severance payment** (*Abfertigung*) in case of ordinary termination by the employer, termination by mutual consent or immediate resignation for cause by the employee if the term of employment has lasted for at least three years without interruption. Severance payment ranges between 2/12 and one annual salary depending on the duration of employment. A severance payment must also be made upon retirement (see 11.8.1).

## 11.4. Transfer of a Business

If a business or parts of it are transferred to another owner (especially in case of an asset deal, see 7.3), the employment contracts are automatically transferred to the new owner, who is regarded as the employer with all the relevant rights and obligations. However, if the position of the employee deteriorates because of the transfer, the employee is entitled to terminate the employment relationship, but still enjoys the same claims as in the case of ordinary termination by the employer. The former employer (seller) remains jointly and severally **liable** with the new employer (purchaser) for claims of employees arising from the time before the transfer. However, the liability of the former employer for severance payments and company pensions is limited to five years after the transfer. Termination of the employment contract by either the former or the new employer in connection with the transfer of the business is void.

## 11.5. Employment of Foreigners

### 11.5.1. Employment of Non-EEA Nationals

The employment of a non-EEA national requires an **employment permit** (*Beschäftigungsbewilligung*) to be obtained by the employer prior to the start of employment or a **work permit** (*Arbeitserlaubnis*) to be obtained by the employee. A **certificate of exemption** (*Befreiungsschein*) can be issued to employees who have, as a general rule, spent at least five of the last eight years in employment in Austria or to employees who have been married to an Austrian citizen for the last five years and have their residence in Austria or to certain juvenile employees for whom less strict requirements apply.

On July 1, 2011, Austria introduced a new criteria-based integration scheme, the **Red-White-Red Card** (*Rot-Weiß-Rot-Karte*) which aims at more flexible immigration of qualified third-country workers and their families. The Red-White-Red Card is available to highly qualified workers, skilled workers in shortage occupations, other key workers and graduates of universities and colleges of higher education in Austria (*Schlüsselarbeitskräfte*); it entitles to residence and labor market access. In addition, holders of certain residence titles, such as the **residence permit** (*Niederlassungsbewilligung*), the **residence certificate** (*Niederlassungsnachweis*), the **Long-term Resident – EU** (*Daueraufenthalt – EU*) or the **EU Blue Card** (*Blaue Karte EU*), are entitled to work in Austria without a work permit.

### 11.5.2. Employment of EU / EEA Nationals

For nationals of EEA member states and Switzerland, the rules of **free movement of workers** apply substantially in the same way as for nationals of EU member states. No employment or work permit is required.

Although Croatia joined the EU already on July 1, 2013, labor market access of its citizens is governed by the transitional regulations of the Act on the Employment of Foreigners (Ausländerbeschäftigungsgesetz, AuslBG) for a maximum of seven years (till 2020). Workers from Croatia who want to take up employment in Austria during the transitional period need a labor market permit granted by the Public Employment Service (*Arbeitsmarktservice*, *AMS*). However, if its nationals have been legally employed in Austria for the last 12 months, they are entitled to a **free movement certificate** (*Freizügigkeitsbestätigung*) and no work permit is required.

## 11.6. Taxation of Employment Income

Employment income for work performed in Austria is subject to Austrian income tax at a progressive rate of basically up to 50%. For income exceeding a threshold of EUR 1 million a temporary income tax rate of 55% is applicable from 2016 – 2022. Please note that the EUR 500.000 exceeding portion of an employee's compensation is not tax deductible at the employer's level.

Income tax is withheld by the employer under a **pay-as-you-earn system** (*Lohnsteuer*). Under the pay-as-you-earn system approximately 1/7 of annual income is subject to a favoured tax rate in the range between 6% and 36 % provided that this portion is paid on top of the normal remuneration. This is the main reason why wages and salaries are paid 14 times per annum in Austria. Furthermore, severance payments where the employment commenced before 2003 are subject to a reduced rate of 6% under certain conditions and within certain limits that depend on the length of service.

The employer has to pay the following payroll taxes on top of gross remuneration:

- 4.5% contribution to the Family Allowance Fund (*Dienstgeberbeitrag – DB*),
- 0.36% to 0.44% contribution to the Austrian Economic Chamber (Zuschlag zum DB – DZ),
- 3% community tax (Kommunalsteuer),
- 1.53% contribution to the severance payment fund (see 11.3).
- only in Vienna: EUR 2 per employee and week *(Dienstgeberabgabe, U-Bahn-Steuer).*

## 11.7. Social Security

Austria operates a compulsory social security scheme for all employees covering mainly:

- health insurance,
- accident insurance,
- pension insurance,
- unemployment insurance.

Both the employee and his/her **dependents** are covered by the social security scheme.

**Social security contributions** are partly withheld from the employee's remuneration and partly paid by the employer in addition to the gross remuneration. Currently (in 2016), the employee's contributions amount to 18,12% of gross salaries (*Gehälter*). The employee's contributions from the 13th and 14th salaries amount to 17.12%. In addition, the employer contributes 21.48% on monthly salaries and 20,98% on the 13th and 14th salaries. Total social security contributions thus amount to 39,60% on monthly salaries and 38.10% on the 13th and 14th salaries. However, there is a ceiling for calculating the basis of contributions of EUR 68,040 in 2016 per year so that the monthly maximum employee's contribution amounts to EUR 880.63, the maximum employer's to EUR 1,043.93. The ceiling is indexed and adjusted annually. Social security contributions on (blue-collar) wages (*Löhne*) are slightly higher than those on (white-collar) salaries.

**Freelancers** must also pay into the social security scheme.

Basically, expatriates fall under the scope of the compulsory social security scheme. EU Regulation 883/2004 defines when an employee has to pay contributions. In case employees are seconded to another EU member state, they may remain under the

system of their home country for two years and this period may upon application be extended to five years. With respect to non-EU member states, including EEA states, Austria has concluded a number of **social security treaties** which also allow expatriates to remain under their native country's scheme for a limited period.

## 11.8. Old-Age Pensions

### 11.8.1. Retirement

The retirement age is 65 for men, 60 for women. Starting in 2024 the retirement age for women will be raised gradually until it reaches 65. In 2003 the provisions for early retirement were abolished. However, during a transitional period lasting until 2017, early retirement is still possible. Upon retirement (*Pension*), employees are entitled to a severance payment (see 11.3) and those who have contributed to social security for at least 15 years receive a social security pension.

### 11.8.2. Pension Plans

Companies are free to establish pension plans giving their employees additional income after retirement. However, the provisions of the pension plan must comply with the Company Pension Act (*Betriebspensionsgesetz*).

# 12. Real Estate Law

## 12.1. Land Title Register

Rights with respect to real estate, such as ownership and mortgages, are recorded in the **land title register** (*Grundbuch*), which is administered by the district courts (*Bezirksgerichte*). These rights usually only come into existence upon registration.

The land title register is open to the public, so that everybody has the right to **access the register** and to obtain excerpts thereof. Attorneys-at-law, notaries public and other registered users can obtain excerpts from the register online.

## 12.2. Acquisition of Real Estate by Foreigners

All nine Austrian provinces have established regulations under which the acquisition of real estate and certain rights with respect to real estate (e.g. usufructuary rights) by foreigners (in some cases also by Austrians) is subject to the approval of **Land Transfer Authorities** (*Grundverkehrsbehörden*). The restrictions imposed vary from province to province and mainly depend on how the real estate is zoned.

As a result of Austria's accession to the EEA and thereafter to the EU, Austria has **liberalized its restrictive laws** on purchase of real property by foreigners with regard to EEA and EU citizens who now have equal status with Austrian citizens if they purchase real estate in exercising a freedom granted by the EEA Agreement and the TFEU, e.g. by setting up their principal residence or an undertaking.

In some provinces with substantial tourist industries, e.g. Tyrol and Salzburg, acquisition of real estate **not to be used as a principal residence or to establish an undertaking** is restricted for both foreigners and Austrians.

In addition to the above-mentioned rules, a **land transfer permit** is necessary for foreigners as well as Austrians if the real estate is used for agriculture or forestry.

## 12.3. Lease of Apartments, Homes and Business Premises

The **Rent Act** (*Mietrechtsgesetz*) places considerable limits on the free contracting of lease (rental) agreements, mostly in favor of the lessee. The Rent Act (or at least parts of it) applies to the lease of apartments, business premises and premises in business parks. To the extent the Rent Act is not applicable, the provisions of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch [ABGB]*) apply.

The Rent Act prescribes the **maximum rent** the lessor may demand. Rent control applies to many old private premises and limits the permissible rent to a certain amount per square meter, depending on the location and condition. If business premises, condominiums or luxury apartments are newly rented, a fair (market value) rent may be agreed. Newly built premises which have received no subsidies are not subject to rent control.

The Rent Act restricts options of the lessor to **terminate lease agreements**. In general, lease agreements can only be terminated by the lessor for cause (e.g. non-payment of the rent, lack of proper maintenance). Notice of termination by the lessor must be filed in court. In contrast, the lessee may terminate the lease agreement by a mere written notice. By concluding written contracts of limited duration (careful wording of the limitation clause is decisive), a lessor can avoid the restrictions in terminating lease agreements (but has to accept a reduction of 25% of the permissible rent). The minimum duration for the lease of apartments is three years. The lessee of an apartment is, however, entitled to terminate the contract after one year regardless of the agreed minimum duration.

If **a business is transferred** (including significant changes of ownership in a company), the business remains a party to the lease contract. However, if the rent is of a submarket level, the lessor has the right to raise it to market value.

## 12.4. Taxes and Duties on Real Estate

### 12.4.1. Real Estate Tax

An annual **real estate tax** (*Grundsteuer*), payable in quarterly installments, is collected by the municipalities (*Städte*) and communities (*Gemeinden*). The tax rate ranges from 0.5% to 1%. A further tax is collected by the federal tax authorities for undeveloped building lots. This tax is also payable in quarterly installments. Both taxes are based on the special value (*Einheitswert*) of the real estate, which is far below the property's market value.

### 12.4.2. Value-added Tax

Rental income from residential property is subject to **value-added tax** (VAT) at a rate of 10%. Rental income from other real estate is exempt from VAT or optionally subject to VAT at a rate of 20%. However, the latter option cannot be exercised if the lessee of the commercial property is not – almost – fully entitled to recover input VAT, e.g. if the lessee is a government body, a bank, an insurance company or a doctor. In this case, no input VAT can be recovered by the lessor.

### 12.4.3. Stamp Duty

Rental agreements are subject to a 1% **stamp duty** (*Rechtsgeschäftsgebühr*), provided that a document within the meaning of the Austrian Stamp Duty Act is executed.

The tax assessment base refers to the total rental payments under the rental agreement and depends on the contract period:

- In the case of an indefinite contract period there is a cap of three years' rental payments.
- For rental agreements with a limited contract period, the yearly rental payments multiplied with the contract period form the basis of the stamp duty (maximum 18 times the yearly rental payments).

For residential properties the basis is capped at 3 years' rental payments in any event.

### 12.4.4. Income Tax

Rental income derived from real estate located in Austria is invariably subject to Austrian **income** or **corporate income tax**. Capital gains of an investor from the disposal of such real estate are also subject to Austrian income or corporate income tax. The reduced income tax rates on such capital gains are equally available to non-resident individuals.

## 12.5. Taxes Upon Transfer of Real Estate

### 12.5.1. Real Estate Transfer Tax

**Real estate transfer tax** (*Grunderwerbsteuer*) is levied on all real estate transactions, including the transfer of real estate in connection with the formation of a company. From 2016 the applicable tax rate depends on the transaction (i.e. free of charge, for valuable consideration or partly free of charge and partly for valuable consideration). In the case of a free-of-charge transaction basically a progressive tax rate applies (0.5%–3.5%), while for transactions in connection with a valuable consideration a flat tax rate of 3.5% applies. A transfer between close relatives is invariably treated as a free-of-charge transaction. The tax assessment base is basically the consideration, but the special tax value (*Grundstückswert*) is seen as the minimum tax assessment base.

If at least 95% of the shares in a company that owns Austrian real estate are acquired by a single shareholder or by group members of a CIT group, real estate transfer tax is triggered in the amount of 0.5% based on the special tax value (*Grundstückswert*).

The same applies if the real estate is owned by a partnership and a 95% change of ownership occurs within five years.

If real estate is transferred in the course of a reorganization under the Austrian Reorganisation Tax Act (e.g. a merger), real estate transfer tax is based on the special tax value (*Grundstückswert*) at a tax rate of 0.5%.

A tax return must be filed by the 15th of the second month following the taxable event. The tax must be paid one month after its assessment. Alternatively, real estate transfer tax may be paid to an attorney or notary public who is entitled to collect it on behalf of the tax authorities. The parties to the transaction are jointly liable for the tax. However, in general it is contractually agreed that the purchaser must bear the tax burden. If the transfer of the real estate is reversed within three years after the taxable event, the tax can be refunded.

### 12.5.2. Registration Fee

Upon registration with the land title register (*Grundbuch*) the purchaser has to pay a **registration fee** (*Eintragungsgebühr*), which is 1.1%.

# 13. Protection of Creditors

## 13.1. General Information

Austrian law provides various forms of security. Security can be divided into two categories, security *in personam* and security *in rem*. Whereas **security *in personam*** (*obligatorische Sicherheit*) only creates a relationship between the contracting parties, **security *in rem*** (*dingliche Sicherheit*) can also be enforced against third parties, which is especially important in case of bankruptcy. The most commonly used types of security are described below. However, *inter alia*, security:

- may be rescinded (*anfechten*) under certain conditions (see 23.4),
- is not enforceable for a loan recharacterized as equity capital (see 23.5),
- may be void if given by the company in favor of a shareholder in contravention of the statutory principle that shareholders must not be repaid equity unless certain conditions are met (*Kapitalerhaltungsvorschriften*).

## 13.2. Security in Personam

### 13.2.1. Suretyship

A **suretyship** (*Bürgschaft*) is an agreement whereby the surety (*Bürge*) undertakes to pay another's debt if the latter does not fulfill their obligation. The enforceability of the suretyship depends on the existence and the enforceability of the underlying obligation. The extent of the original debt determines the extent to which the surety is liable. When a company or an individual agrees to serve as surety, the debtor and the surety are jointly and severally liable for the repayment of the debt.

The surety's undertaking **must be in writing**; a fax declaration is not sufficient. A suretyship agreement triggers a 1% stamp duty.

### 13.2.2. Guarantee

The **guarantee** (*Garantie*) is similar to the suretyship, except that it may (depending on its wording) be independent of the existence and validity of the underlying obligation (abstract guarantee). Like the suretyship, the declaration of the person giving a guarantee must be in writing. An abstract guarantee does not trigger any stamp duty.

### 13.2.3. Letter of Responsibility

Often used, although statutorily not regulated, is the **letter of responsibility** (*Patronatserklärung*). Depending on the wording, a letter of responsibility can create far-reaching legal obligations similar to those of a guarantee.

## 13.3. Security in Rem

### 13.3.1. Pledge

A **pledge** (*Pfand*) may encompass both tangibles and intangibles. Like the suretyship, the enforceability of a pledge depends on the existence and the validity of the underlying obligation. The enforceability of a pledge also depends on the observation of strict disclosure provisions. Under these **public disclosure rules**, a pledge can only be perfected if it is clearly visible to everybody. Thus, a pledge over tangible items requires their physical delivery to the pledgee. Accordingly, rights stemming, e.g., from bearer bonds, debentures and negotiable instruments are pledged by delivering those papers to the pledgee. A pledge on receivables can be created by notification to the debtor or by appropriate marking of the customer accounts in the books of the pledgor. The markings must clearly show when and in whose favor the pledge was made. The priority of rank of a pledge depends upon when the disclosure requirements were met.

### 13.3.2. Mortgage

A mortgage (*Hypothek*) is a **pledge of real estate** and is acquired upon registration in the land title register (*Grundbuch* – see 12.1). Owing to the fact that the public may trust in the accuracy of the land title register (principle of reliance – *Vertrauensgrundsatz*), the mortgage is a highly effective security. The ranking of various mortgages on the same piece of real estate usually depends on the order in which they were recorded in the land title register. The registration of a mortgage in the land title register attracts a 1.2% registration fee (see 12.5).

### 13.3.3. Assignment

Lenders, especially banks, often make use of an **assignment** (*Zession* or *Abtretung*) as means of security (*Sicherungszession*). In this context an assignment requires the observation of disclosure provisions similar to those of a pledge. The requirements for publicity of the assignment as a means of security are either fulfilled by notification to the debtor or by appropriate marking of the customer accounts in the books of the assignor. In marking the books the bookkeeping structure used must ensure that individual assignment notes appear in customer accounts as well as in the list of receivables. Assignment of future receivables is valid if they can be individualized. This is the case when the legal grounds of each assigned claim can be determined. For instance, the assignment of all future receivables of the borrower or the assignment of future trade accounts receivable is admissible. The assignment of salaries as a means of security is restricted by the Consumer Protection Act (*Konsumentenschutzgesetz*). Assignments trigger a 0.8% stamp duty, provided that a document within the meaning of the Austrian Stamp Duty Act is executed. However, an assignment given as security for a bank loan is exempted from stamp duty under certain conditions.

### 13.3.4. Transfer of Title

A transfer of title as a means of security (*Sicherungsübereignung*) is often used instead of a pledge since the transfer of title gives the creditor more rights than a pledge. The public disclosure rule applies.

### 13.3.5. Retention of Title

A retention-of-title agreement (*Eigentumsvorbehalt*) is a popular form of security since it **requires no disclosure**. Retention of title means that the seller transfers the possession of an object to the purchaser, whereby it is agreed that the seller maintains ownership until the purchase price has been fully paid. Retention of title must be agreed upon before the object is delivered to the buyer. Property acquired under an extended retention of title (*erweiterter Eigentumsvorbehalt*) means that the retention of title not only serves as security for the purchase price, but also for any other claims of the seller against the buyer. In Austria the extended retention of title is unenforceable.

# 14. Foreign Exchange Control

As an EU and EEA member, Austria is obliged to permit the **free movement of capital**. In 2004, Austria enacted the Foreign Exchange Act (*Devisengesetz*) to fulfill its obligations under EU law. The foreign exchange control system is administered by the Austrian National Bank acting as central bank. Apart from certain exceptions, transactions are not subject to any restrictions under the Foreign Exchange Act. Such exceptions include provisions under EU law and Austrian National Bank regulations in accordance with EU law. Hence, the Austrian National Bank may require prior approval for certain transactions. Notification is obligatory in various cases for statistical purposes. Transactions to be reported by non-banks to the Austrian National Bank include the holding of foreign bank accounts.

The European Parliament and the Council have adopted directives that call on credit and financial institutions to combat money laundering. The Austrian Banking Act obliges banks to conduct customer due diligence for all transactions to prevent money laundering and terrorist financing.

Since the beginning of 2005, domestic and international payment transactions processed via the Austrian National Bank accounting systems are automatically checked by a transaction monitoring system designed to ensure compliance with embargo guidelines on listed individuals and entities.

# 15. Competition Law

## 15.1. Austrian Cartel Law

### 15.1.1. General Procedure

The main sources of the Austrian cartel law are the **Cartel Act** (*Kartellgesetz*) and the **Competition Act** (*Wettbewerbsgesetz*). A 2006 reform harmonized the Austrian substantive law on cartels with the competition rules of the European Union and a 2013 reform aimed at extending the scope of its applicability (by reducing exemptions), stipulating specific provisions for claims for damages because of cartel law infringements and strengthening the powers of the **Federal Competition Authority** (**FCA** (*Bundeswettbewerbsbehörde*)). Presently, a reform is discussed and under way to implement **Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union,** to be enacted by December 2016.

The Cartel Act contains special antitrust regulations (on cartels, merger control and abuse of a dominant market position). The Competition Act contains provisions on the establishment and the powers of the FCA. Proceedings in cartel (antitrust) matters take place before a special panel of judges of the Higher Regional Court Vienna, the **Cartel Court** (*Kartellgericht*), and before the FCA (e.g. the first phase of a merger control procedure). Since the Cartel Court is not permitted to initiate cartel proceedings *ex officio,* they may be initiated, in particular, by:

- the so-called official parties (*Amtsparteien*), which are the FCA and the Federal Cartel Prosecutor (*Bundeskartellanwalt*),
- every enterprise and association of undertakings that has a legal or economic interest in the decision, and
- the Austrian Economic Chamber (*Wirtschaftskammer Österreich*), the Federal Chamber of Labor (*Bundesarbeitskammer*) and the Standing Committee of the Presidents of the Austrian Chambers of Agriculture (*Präsidentenkonferenz der Landwirtschaftskammern Österreichs*).

The Federal Cartel Prosecutor represents the public interest in competition matters and is accountable to the minister of justice.

The FCA is established at the economic affairs ministry and is headed by a director general, who is independent and therefore may not be given instructions by the minister. One of the FCA's tasks is to prepare cartel proceedings. In this process it can

consult the competition commission, which is established at the FCA. Among other things, the FCA is empowered to examine potential restraints on competition on a case-to-case basis and entire business sectors if it suspects that competition is being threatened. In the course of its investigations, the FCA may also call on and question companies or individuals and examine relevant business documents. The Cartel Court has to allow the FCA to carry out house raids in case of a substantiated suspicion of an abuse of a dominant position or the implementation of a prohibited cartel or merger. Furthermore, the FCA is empowered to apply EC competition rules.

Violations of cartel regulations can result in fines – demanded by the FCA and imposed by the Cartel Court – upon enterprises of up to 10% of the previous year's global revenue. All criminal sanctions against individuals under the cartel law have been abolished, with the exception of certain agreements restricting competition in connection with (public) procurement procedures now included in the Criminal Code (*Strafgesetzbuch*).

In order to effectively implement the cartel law, Austria has introduced a **leniency program**, in line with the European model. Under this rule, the FCA may refrain from demanding the imposition of a fine against enterprises which have stopped their participation in an infringement of the cartel ban, informed the FCA of the infringement before the FCA gained knowledge of it, cooperate with the FCA in order to fully clarify the facts of the case and have not forced any other undertaking to participate in the infringement. If the facts of the case are already known to the FCA, it may demand a reduced fine, provided that the other requirements have been met.

Agreements and decisions violating the ban on cartels as well as unapproved mergers (if such approval is necessary) are null and void and consequently cannot be enforced among the members or parties. Violations of antitrust regulations may also give rise to cease-and-desist orders or claims for damages.

### 15.1.2. Cartels

Agreements between enterprises, decisions by associations of undertakings and concerted practices which have as their object or effect the **prevention, restriction or distortion of competition** (i.e. **cartels** – *Kartelle*) are prohibited unless exempted under law. Enterprises must themselves assess whether any competition restraints they envisage or that unintentionally occur are exempted from the cartel ban. Exemptions are essentially designed to ensure that consumers adequately benefit from improvements in product manufacturing and the promotion of technological and economic progress. It is only when such economic justification can be furnished that competition restraints are permitted. The enterprises' self-assessment is (slightly) facilitated by regulations in

Austria (none yet enacted) and Europe (many) which exempt certain groups of cartels from the ban (block exemption regulation). As Austrian antitrust legislation has been harmonized with European cartel law, it is possible to apply the numerous regulations and decisions rendered by the European Commission and the European courts assessing competition restraints.

### 15.1.3. Merger Control

Mergers include acquisition of the whole or substantial parts of one undertaking by another, acquisition (directly or indirectly) of certain portions of shares, measures that create a controlling influence over decision-making bodies and certain joint ventures.

Mergers must be notified to the FCA if the undertakings involved in the financial year prior to the merger achieved:

- a **combined worldwide** turnover of more than **EUR 300 million** (for the purpose of calculating the threshold, the turnover of a media undertaking or media service has to be multiplied by 200; the turnover of a bank is replaced by the value of its interest earnings and other earnings figures; the turnover of insurance undertakings is replaced by the value of gross premiums); and
- a **combined domestic** turnover of more than **EUR 30 million** (turnover is generated **in Austria** if the recipient of goods or services is domiciled in Austria); and
- at least two undertakings involved achieved a turnover of **EUR 5 million each worldwide**.

Even when these thresholds are met, mergers are exempt from the notification obligation if the Austrian turnover of only one of the undertakings concerned exceeds EUR 5 million but the combined worldwide turnover of the other undertaking(s) concerned does not exceed EUR 30 million.

Although competitors do not have the right to request an investigation by the Cartel Court (this is a privilege of the *Amtsparteien* – see 15.1.1), the Cartel Act gives competitors affected by the merger the right to **file comments** with the FCA or the Federal Cartel Prosecutor within two weeks of publication of the merger on the FCA's website. If the FCA or the Federal Cartel Prosecutor demands an investigation of the merger, they have to file a request for examination. This initiates a second phase in which the notification of the merger is submitted to the Cartel Court. The Cartel Court must prohibit the merger if it expects the merger to create or intensify a dominant position. The non-prohibition of a merger can be made contingent upon restrictions and the imposition of certain duties. Mergers may be reversed if approval was based on false information provided by the parties or if the conditions for approval were infringed.

### 15.1.4. Dominant Market Position

The **abuse of a dominant market** position is prohibited. The Cartel Court may order the undertaking to cease abusing its position. Consequently, such orders might entail the sale of parts of the undertaking or its reorganization.

## 15.2. European Competition Law

Competition law plays a key role in the European Union. European Union competition rules are intended to support the realization of the **Internal Market** (*Binnenmarkt*) **and its four freedoms** and have, to a large extent, direct effect in national law. **Article 101 TFEU (Treaty on the Functioning of the European Union)** prohibits agreements and concerted practices that have the object or effect of preventing, restricting or distorting competition. **Article 102 TFEU** prohibits exclusionary and exploitative conduct by holders of a dominant market position. Additionally, the **EC Merger Control Regulation** is directly applicable in Austria.

According to these provisions all **agreements between undertakings**, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the European Market are **prohibited and void**, unless the *de-minimis* principle (minimum standard for a noticeable effect on competition) applies. However, individual exemptions or block exemption regulations may apply. Undertakings relying on an exemption must evaluate by themselves whether certain agreements or practices are justified even though they may have a negative competitive effect. This places a considerable burden on undertakings. For **vertical restraints** the European Commission has enacted a **Block Exemption Regulation** on Categories of Vertical Agreements and Concerted Practices, exempting certain exclusive distribution, exclusive purchasing and other potentially restrictive agreements from the applicability of Article 101 TFEU. Various other block exemption regulations for specific industry sectors (e.g. car distribution) also exist.

Intentional or negligent infringement of Article 101 TFEU may lead to the European Commission imposing fines of up to 10% of the previous year's worldwide turnover. Furthermore, the **abuse of a dominant position** within the European Market or a substantial part of it is prohibited insofar as it may affect trade between member states, and may also result in fines in the same amount.

Certain **concentrations** (such as mergers, acquisitions and joint ventures) between undertakings with a combined worldwide turnover of more than EUR 5 billion, in which at least two of the undertakings concerned have a combined European-wide turnover of more than EUR 250 million each, require approval by the European

Commission. Additionally, a merger must be notified to the European Commission if a combined worldwide turnover of more than EUR 2.5 billion is concerned and the combined turnover exceeds EUR 100 million in at least three member states whereby in each of those three member states the revenues of at least two of the merging parties exceed EUR 25 million and the community-wide turnover of at least two of the undertakings concerned is more than EUR 100 million. In both cases, the merger does not have a community-wide dimension and, thus, does not require approval of the European Commission if each of the undertakings concerned achieves more than two-thirds of its aggregate European-wide turnover within one and the same member state. A merger which does not exceed these thresholds but would have to be notified in at least three member states may be referred to the European Commission upon request of the applicant if no member state objects. Likewise, the Commission may refer a merger to the authorities of a member state under certain conditions and the authorities of the member states may do so *vice versa* to the Commission.

The European Union law competition rules are not only enforced by the **European Commission** and the **European courts** (European Court of Justice, General Court), but also by national authorities. Furthermore, European Union law is applicable before national courts, e.g. with regard to invalidity of illegal cartel agreements under civil law. The relationship between European Union competition law and **national cartel law** is complex. However, the harmonization of Austrian and European Union competition law has lessened the practical relevance of this problem. Cooperation between European and national competition authorities has intensified and is organized in a European Competition Network (ECN).

## 15.3. Advertising Law

The **Unfair Competition Act** (*Gesetz gegen den unlauteren Wettbewerb – UWG*) is strongly influenced by EU law. The Unfair Competition Act explicitly prohibits a number of advertising practices, such as:

- misleading advertising (handled very strictly by courts),
- abuse of trade names and other well-known signs of another enterprise (trademarks are protected by the Trademark Act against identical, misleading or unfair usage),
- unfair passing-off as a competitor,
- breaches of law (national and European law, collective bargaining agreements) if the breach is based on a legal concept that cannot be argued with good reason.

In addition, the *UWG* generally prohibits unfair commercial practices which are used in the course of business, such as the exertion of moral pressure on potential customers to buy goods.

**Comparative advertising** is allowed if it is neither misleading nor unethical.

It is permitted to offer **discounts** (*Rabatte*) or **promotional gifts** (*Zugaben*) to the consumer. It may, however, be prohibited under cartel law and the *UWG* to sell systematically below costs.

According to the Cartel Act (*Kartellgesetz*) a company not acting as a retailer is prohibited from recommending prices for goods to the consumer (**price maintenance**), unless it is explicitly stated that these prices are not binding.

## 15.4. Public Procurement / Tender Provisions

Tender provisions regulate the procurement (*Vergabe*) of works, supply and service contracts by **public authorities** (e.g. federal government, provinces, municipalities and social security institutions) and certain related entities. In the so-called sector area (*Sektorenbereich*), which includes energy, water and traffic supply, postal, port and airport services, even **private tenderees** may have to obey such regulations.

The complexity of this area results from the multitude of sources of law to be observed on national and international levels. These include the Austrian **Federal Procurement Act** (*Bundesvergabegesetz 2006*) and the Austrian **Federal Procurement Act for Defence and Security** (*Bundesvergabegesetz Verteidigung und Sicherheit 2012*), but also nine provincial acts (one for each Austrian province). Both Federal Acts contain **all substantial rules** for procurement proceedings as well as procedural rules for legal remedies during pending procurement and review of completed procurement proceedings which have been conducted by federal public authorities or by certain entities which are publicly owned or controlled by federal legal bodies.

The **nine provincial acts** only contain procedural rules for legal remedies during pending procurement proceedings and review of completed procurement proceedings which have been conducted by public authorities or certain publicly owned or controlled entities of the respective province or of municipalities situated within the territory of the respective province.

Apart from these, EU law (especially procurement directives) and international treaties – such as the Agreement on Government Procurement (GPA) concluded within the scope of the World Trade Organisation – may also apply.

Tender provisions, which generally pursue the objective of ensuring fair and equal treatment of tenderers in public and semi-public economic areas, depend in particular

on the authority inviting and on the amount and the object of the tender. After a strict, and in most cases, public tender procedure, the tenderee must award the contract to the tenderer that has submitted the best or cheapest offer.

To ensure transparency of tender procedures, tenderees must also discharge extensive notification duties.

During the tender procedure every tenderer has recourse to the Federal Administrative Court (*Bundesverwaltungsgericht*), which replaced the Federal Procurement Authority (*Bundesvergabeamt*), or to one of the Provincial Administrative Courts to protect its interests in the award of the contract. The authorities may issue an order either to stop the tendering procedure or to cancel decisions of the tenderee.

After the contract has been concluded, a review of the procurement proceeding by the Administrative Court may be requested, which may affect the concluded contract. In its decision the court declares whether or not the contract was awarded in compliance with the procurement rules to the tenderer with the best or cheapest offer. If the contract is found to have been awarded illegally, the court will in certain cases decide that the contract is ineffective or impose alternative penalties on the tenderee, such as fines or the shortening of the duration of the contract. Furthermore, the tenderer with the best or cheapest offer may claim costs incurred in participating in the tendering procedure and/or lost profit. Such claims for costs/damages are decided by the civil courts.

# 16. Product Liability

Austria has implemented the EC Directive on **Liability for Defective Products** by enacting the Product Liability Act (*Produkthaftungsgesetz*). Producers, importers, own-branders and, where the producer and importer cannot be identified, any supplier that has put the product into circulation, are required to compensate losses caused by a defective moveable product (including energy) as follows: damage caused by death or by personal injury must always be compensated. Similarly, consumers must be compensated for any damage to any item of property. Business persons, however, only need to be compensated for a damage caused to such items of property dedicated mainly to personal use. Negligence does not need to be proven (strict, i.e. no-fault liability). Liability applies regardless of any contractual relationship with the injured persons (innocent-bystander liability). Suppliers are exempt from liability if they inform the damaged party within a reasonable period of the identity of the producer (importer) or of any preceding supplier. A producer is not only the manufacturer of the finished product but also that of any raw material or component parts as well as anybody who, by putting their name, trademark or other distinguishing feature on the product, present themselves as its producer. The Products Liability Act provides for a EUR 500 deductible with regard to property damage, so that only losses exceeding EUR 500 can be claimed.

Defendants may raise the **development-risks defense**. The producer is not liable if it proves that the state of scientific and technical knowledge at the time of the product launch was not sufficient to discover the existence of the defect.

All businesses are obliged to take measures to be able to satisfy product liability claims (**insurance coverage**).

In addition to the strict liability regime, damages may also be recoverable under the **fault liability system**. Managers of companies can be held directly accountable under the provisions of the Criminal Code (fault liability), which can result in civil liability as well.

According to the Austrian Supreme Court, producers have an obligation to monitor their products after they have been marketed (*Produktbeobachtungspflicht*). Thus, they are liable according to the general principles of tortuous liability if damage occurs due to a breach of this obligation.

Under the **Product Safety Act** (*Produktsicherheitsgesetz*), producers and importers are obliged to monitor the product introduced into the market and to recall it if necessary.

# 17. Consumer Protection

The **Consumer Protection Act** (*Konsumentenschutzgesetz*) contains special mandatory rules for contracts between enterprises and consumers. Some of its provisions also apply to other contracts.

Under the Consumer Protection Act certain **clauses in contracts concluded with consumers** are void. The act distinguishes between clauses which are not binding on the consumer *per se* and others which bind the consumer only if they have been individually negotiated. Clauses which are prohibited *per se* include an unreasonably long period during which consumers are bound to their offer or the waiver of the consumer's right to refuse payment if the enterprise does not properly fulfill the contract. Special organizations such as the **Consumer Information Association** (*Verein für Konsumenteninformation*) may take **legal action** to prevent the contractor from using such clauses (*Verbandsklage*). All clauses in standardized contract terms must also be transparent, i.e. comprehensible to consumers. Under certain conditions consumers **may cancel transactions** if the contract was negotiated off business premises (e.g. mail orders, promotional trips).

The Act Implementing the Consumer Rights Directive (*Verbraucherrechte-Richtlinie-Umsetzungsgesetz – VRUG*), entered into force on June 13, 2014, incorporates into Austrian national law the EU directive governing the rights of consumers (2011/83/EU), thereby fundamentally affecting all transactions involving consumers. The new regulations focus on contracts made within the scope of distance selling (e.g. by telephone or web) or negotiated away from business premises (e.g. by a craftsman working in a customer's home). Such contracts are now chiefly governed by the entirely new Act Governing Distance and Off-Premises Transactions (*Fern- und Auswärtsgeschäfte-Gesetz – FAGG*). The VRUG requires traders to adapt their ordering system and contract forms to the new regulations. Failure to do so may have drastic consequences: formal defects may cause the contract to become ineffective or even lead to performance without payment. Moreover, traders are faced with administrative fines and sanctions under the rules of fair trading.

Contracting with consumers is now subject to new pre-contractual information requirements, regardless of how and where (on or off business premises) the transaction comes about. When a trader fails to furnish any or all of the required information (including the main characteristics of the goods or services, the identity of the trader, the total price, terms and conditions, etc.) the consumer is no longer bound by the contract (while the trader continues to be bound by it). Where distance and off-premises transactions are concerned, the information requirements to be met before a contract comes about are extended: the trader needs to observe up to 19 rules; particularly the

information to be given on the right to withdraw needs fully to comply with the stipulations of the FAGG. The withdrawal right already applicable to doorstep and distance contracts is extended: where off-premises or distance transactions are involved, consumers now have fourteen (rather than seven) days to reconsider. If the trader has given the consumer wrong or no information on his/her right to withdraw from the contract, the period is prolonged to one year and two weeks.

**Financial services** are explicitly excluded from the scope of the provisions regarding distance contracts. They are subject to the Distance Financial Services Act (*Fern-Finanzdienstleistungs-Gesetz*).

To implement the Consumer Credit Directive (2008/48/EC), the Consumer Credit Act (*Verbraucherkreditgesetz*) entered into force on June 11, 2010. The lender has to provide standardized information as well as adequate explanations of the credit conditions and costs to make credit offers easier to compare. Lenders are also obliged to thoroughly check the debtors' creditworthiness before offering credit and, if necessary, to warn the consumer. Consumers are entitled to cancel a credit agreement within 14 days (except mortgage loans and leasing contracts) and to make partial early repayments. The regulations also contain requirements concerning credit reference databases and impose disclosure obligations on credit intermediaries.

On March 21, 2016 the Mortgage and Real Estate Credit Act (*Hypothekar- und Immobilienkreditgesetz – HIKrG*) entered into force implementing the Mortgage Credit Directive 2014/17/EU. It is applicable to loans taken out by consumers to buy property or to consumer credits secured by mortgages. The regulations are similar to the Consumer Credit Act. The creditor has to provide the consumer with the personalised information needed to compare the loans available on the market, to assess their implications and make an informed decision on whether to conclude a loan agreement or not. The European Standardised Information Sheet (ESIS) has to be used for pre-contractual information. The creditor has to make a thorough assessment of the consumer's creditworthiness before offering the loan, ensuring that the loan is made available to the consumer only when the result of the creditworthiness assessment indicates that the obligations resulting from the loan agreement are likely to be met in the manner required under such agreement. Consumers are entitled to cancel a loan contract within two days without reason; this period is prolonged to one month if no ESIS has been previously provided to the consumer. When a loan agreement relates to a foreign currency loan, the consumer has a right to convert it into an alternative currency under specified conditions and arrangements must be in place to limit the exchange rate risk to which the consumer is exposed under the loan agreement.

For information on the **E-Commerce Act**, see 8.3.

Special rules apply to **package tours**. They are not consumer-specific rules, although they are contained in the Consumer Protection Act.

In 2004 provisions concerning **retirement homes** were added to the Consumer Protection Act by the Retirement Home Contract Act (*Heimvertragsgesetz*).

# 18. Foreign Trade Law

## 18.1. Export and Import Control

When Austria acceded to the European Union (EU), the EU's foreign trade regime became applicable. However, under the **Foreign Economy Act** (*Außenwirtschaftsgesetz 2011, replacing the Foreign Trade Act – Außenhandelsgesetz 2005*) certain imports and exports which involve military or strategic goods may be restricted. The competent minister has issued regulations (*Erste, zweite und dritte Außenwirtschaftsverordnung*) stipulating which third party countries are subject to a ban of military weapons and which imports or exports are restricted, require authorization (e.g. weapons, high-tech goods) or need to be notified. A block exemption regime exists. Breach of the restrictions may result in criminal prosecution; possible sanctions amount to three years of imprisonment for intentional violations.

In addition, the new Foreign Economy Act stipulates a new duty to have the acquisition of more than 25% of the shares or of a controlling influence in Austrian corporations in one of the specified sectors (e.g. defense, security, telecommunications, utilities) authorized. The acquisition of the shares does not become effective before the competent minister has authorized it or a given period has elapsed from the date of the application.

## 18.2. UNCITRAL Sales Law

Austria is a member to the **United Nations Convention on Contracts for the International Sale of Goods** (**CISG** – *UN-Kaufrecht*). Hence, this Convention is applicable to sales agreements on goods concluded between Austrians and foreigners having their place of business in another member state or if the choice of law rules (see 24.) of the forum state specify Austrian law, since CISG prevails over Austrian civil law. Similarly, CISG also applies if Austrian law is chosen by parties having their place of business in different jurisdictions. However, CISG applicability can be excluded by agreement.

CISG does not differentiate between impossibility to perform, warranty, default, etc. If a party fails to perform its contractual obligations, this constitutes a breach of contract. The buyer has to give notice to the seller within a reasonable time after discovering the breach or after the buyer ought to have discovered it, but not later than two years from the time the goods were actually handed over. The buyer may then demand performance, as well as repairs of the goods by the seller. The buyer may insist on the delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract. Furthermore, the law provides for a reduction in price if the goods do not conform with the contract. The seller may require the buyer to pay the price

and to take delivery. Damages for breach of contract include the loss of profit; liability is not based on fault.

# 19. Environment / Waste

Environmental protection is a vital issue in Austrian politics. Significant amounts are spent on environmental measures.

Many aspects of environmental protection are regulated by the **Trade Regulation Act** (*Gewerbeordnung* – see 10). The Trade Regulation Act requires a permit for operating plants; it provides for waste management plans and regulates clean-ups when plants close down. Such clean-ups are also regulated by the **Legacy Waste Site Decontamination Act** (*Altlastensanierungsgesetz*), which provides for the compilation of a list of suspected contamination sites (*Verdachtsflächen*) and a list of sites requiring clean-up (*Altlastenatlas*) to clear existing contamination. The owner of the land (also the new owner) can be held liable.

Another major role in the Austrian environmental law system is played by the **Water Law Act** (*Wasserrechtsgesetz*), which provides for the proper use of water (including ground water) and regulates the discharge of waste water. The water authority is obliged to make the granting of permits conditional on the use of the best available technology in practice. Like the Trade Regulation Act, the Water Law Act also provides for strict clean-up provisions to prevent contamination. If the plant causing water contamination can neither undertake the necessary clean-up nor reimburse the water authority for the costs of a clean-up carried out *ex officio,* the owner of the land can be held liable for the damage.

Furthermore, the **Federal Act on Environmental Liability** (*Bundes-Umwelthaftungsgesetz*) applies to water and land damage caused by specific occupational activities. The operator has to bear the costs of preventive and remedial actions taken pursuant to this act (polluter-pays principle).

The **Waste Management Act** (*Abfallwirtschaftsgesetz*), governing trade in and disposal of waste, contains similar provisions. In addition, the Waste Management Act gives the competent minister the power to issue regulations imposing restrictions on the use of certain packaging materials and setting up rules for their disposal and recycling. Special ordinances apply, e.g., for spent electrical devices, batteries and packaging which stipulate that – as a general rule – producers or distributors have to take back waste or join a collecting and recycling system. Air pollution is dealt with by the **Boiler Facilities Clean Air Act** (*Luftreinhaltegesetz für Kesselanlagen*) which establishes uniform standards for boiler facility emissions and obligations to comply with air emission limits in order to avoid harm or nuisance to neighbors. Protection against harmful air emis-

sions is furthermore offered by the **Forest Act** (*Forstgesetz*) which also regulates forest zoning and forest use.

All these acts impose administrative fines on violators. In addition, the **Criminal Code** (*Strafgesetzbuch*) makes polluting the environment, under certain conditions, a criminal offense.

# 20. Value-Added Tax, Stamp Duty and Other Taxes

## 20.1. Value-Added Tax (VAT)

The VAT Act 1994 (*Umsatzsteuergesetz 1994*) came into force on January 1, 1995, when Austria joined the EU. It brought the Austrian VAT regime in line with EU directives.

*Tax rate and tax exemptions*

The **standard VAT rate** on the delivery of goods and the provision of services is 20%. A reduced rate of 10% applies to, *inter alia*, food, rental of residential property and the transportation of passengers. Another reduced tax rate of 13% was introduced, e.g. for hotel stays, agricultural products, tickets to cultural events, etc., in 2016.

Among other things, exports and certain services related to exports and imports are zero-rated. Banking and insurance industries are exempt from VAT. Furthermore the rental of immovable property except for residential purposes is VAT-exempt, though the lessor may elect otherwise (see 12.4). Hospitals, doctors and dentists are also exempt from VAT.

Entrepreneurs not exempt from VAT can **recover VAT** paid provided they have invoices which meet certain formal requirements.

Specific rules apply to the **deliveries of goods and rendering of services within the EU**. Intra-community deliveries to enterprises having a VAT identification number (UID) are zero-rated. In contrast, the receipt of intra-community deliveries is subject to VAT (intra-community acquisition).

When a non-resident entrepreneur provides services to an entrepreneur resident in Austria where the place of performance is in Austria, tax liability is generally shifted to the Austrian party according to the application of the reverse-charge system.

*Place of performance*

Insofar as there is no special rule on determining the place of performance for services, the general rules apply. As a consequence B2B services are taxable at the place of business of the recipient of the services. With regards to end-consumers (B2C) the services are basically taxable from where the entrepreneur renders its services.

For most purchases by consumers the country-of-destination principle has been replaced by the country-of-origin principle, i.e. VAT accrues in the country in which the goods are bought and not in the country to which the goods are delivered.

From January 1, 2015, electronically supplied services, telecommunications and broadcasting services are – in general – taxable at the customer's location irrespective of whether the customer is a taxable person (B2B) or a consumer (B2C). Taxpayers providing services which are covered by these new rules have to determine the customer's residence for every supply. To minimize the resulting compliance burden, standardized presumptions are enacted EU-wide. Furthermore for simplification purposes the mini-one-stop-shop concept has been implemented (see comments below).

Distance sales (*Versandhandel*) remain basically subject to the country-of-destination principle if certain thresholds are exceeded.

*Reporting requirements*

Entrepreneurs have to make **quarterly/monthly VAT prepayments** (depending on the turnover) due on the fifteenth of the second month following the reporting period in which the goods were supplied or services provided. Preliminary tax returns must be filed quarterly/monthly. Finally, an annual tax return has to be filed, based on which the tax is assessed by the tax authorities (*Finanzamt*) and prepayments are credited against the annual VAT liability.

Information on intra-community deliveries and services must be provided to the Austrian tax authorities on a quarterly/monthly basis, in a so-called European Sales List (*Zusammenfassende Meldung*).

*Mini-one-stop-shop concept*

Austria has implemented the mini-one-stop-shop (MOSS) concept for electronically supplied services, telecommunications and broadcasting services provided to private individuals resident in EU countries where the service provider does not have its seat or a permanent establishment.

MOSS provides the opportunity to register in one EU member state (member state of identification), declare all supplies covered by the special scheme and pay the VAT due on these supplies. If a taxpayer exercises the option for MOSS, there is no obligation to register, file tax returns and issue VAT payments in each member state where electronically supplied services, telecommunications and broadcasting services are

rendered. However input VAT cannot be deducted by using MOSS, so that the refund mechanism needs to be used.

## 20.2. Customs Duties

**EU customs law** has been in force since Austria's accession to the European Union on January 1, 1995. As a member of the EU, Austria had to implement the bilateral and multilateral agreements (e.g. free-trade agreements) concluded by the EU with third countries. The EEA Agreement remains applicable to non-EU parties (e.g. Norway) to this treaty.

According to the principle of the **free movement of goods**, no customs duties are levied on the trading of goods – both industrial and agricultural – between EU Member States. Trade movements are, however, registered for statistical purposes (INTRASTAT).

In general, goods entering the EU are subject to European customs duties as stipulated in the Common Customs Tariff, which is patterned after the **Harmonized Tariff System**. European customs law also provides for customs exemptions and preferences in various forms and for different purposes (e.g. aid to developing countries). With regard to the export of goods, *inter alia*, export licenses and subsidies on exports of certain agricultural products are stipulated. The large number of international agreements concluded by the EU makes it impossible to provide even a brief outline of all provisions.

Both the EU and its Member States are members of the **World Trade Organization** (**WTO**), which was established on January 1, 1995, after completion of the Uruguay Round of negotiations lasting from 1986 to 1994. The WTO is the decision-making body and administrative institution to the General Agreement on Tariffs and Trade (GATT) of 1994. The European Customs Tariff and the Harmonized Tariff System have been adapted to comply with GATT provisions.

## 20.3. Import Value-Added Tax

**Import value-added tax** (*Einfuhrumsatzsteuer*) is levied on imports of goods from non-EU countries and is either collected by customs or may alternatively be paid to the tax authorities if an Austrian entrepreneur is liable for the tax.

Import VAT is levied at the normal VAT rate (currently reduced VAT rates of 10% or 13% [from the beginning of 2016] and the standard VAT rate of 20% – see 20.1).

## 20.4. Stamp Duties

**Stamp duties** (*Rechtsgeschäftsgebühren*) are levied on numerous legal transactions, provided that a document within the meaning of the Austrian Stamp Duty Act (*Gebührengesetz*) is executed. Stamp duties are payable after being assessed by the tax authorities, in certain cases after self-assessment. The following written agreements – *inter alia* – attract stamp duty:

- lease and rental agreements (1%),
- assignments of rights, e.g. receivables (0.8%),
- suretyships (1%).

Stamp duty on loans and overdraft facilities was abolished with effect from January 1, 2011. Securities agreed with the lender do not attract stamp duty either. Only registration fees for mortgages may be incurred.

The Stamp Duty Act contains a number of **anti-avoidance rules**. However, it is still possible to avoid stamp duties in some cases.

## 20.5. Inheritance and Gift Tax

Following a Constitutional Court (*Verfassungsgerichtshof* [*VfGH*]) decision, the inheritance and gift tax (*Erbschafts- und Schenkungssteuer*) expired on July 31, 2008. On August 1, 2008, a notification requirement was introduced for gifts exceeding certain thresholds (EUR 50,000 within one year among close relatives, EUR 15,000 within five years in other cases). Non-compliance with this requirement constitutes a criminal offense.

The transfer of assets (other than real estate) to an Austrian **foundation** attracts an entrance fee (*Stiftungseingangssteuer*) at a flat rate of 2.5% (see also 6.2).

## 20.6. Other Taxes

Further taxes levied by Austria include, *inter alia*:

- The first **registration of a car** in Austria attracts a **duty** (*Normverbrauchsabgabe*) based on the purchase price. The rate depends on the standard fuel consumption of the car and can be as high as 16%. Under a bonus-malus system the rate may vary depending on the car's emissions. The *Normverbrauchsabgabe* forms part of the VAT basis for the car.
- Insurance premiums are subject to **insurance tax** (*Versicherungssteuer*) at rates ranging between 1% and 11%.

- Certain advertising services (e.g. advertising in print media) rendered within Austria for consideration attract advertising tax (*Werbeabgabe*) that amounts to 5%.
- Some municipalities and communities collect **tourism contributions**.

Since it is impossible to enumerate all Austrian taxes in this brochure, the main taxes of interest to foreign investors are dealt with here instead.

## 20.7. Contributions to the Austrian Economic Chamber

Any sole proprietor, partnership and corporation that has a trade license is required to pay mandatory chamber contributions (*Kammerumlagen*) to the Austrian Economic Chamber (*Wirtschaftskammer Österreich*), which are collected by the federal tax authorities. There are two types of contributions:

- 0.36%–0.44% of gross wages and salaries (*Zuschlag zum Dienstgeberbeitrag – DZ*),
- 0.3% of total input VAT.

# 21. Accounting, Auditing and Publication Requirements

Austrian accounting law was brought in line with the Fourth and Seventh EU Directives by the **Accounting Act** (*Rechnungslegungsgesetz 1993*) and with the EU Accounting Directive 2013 by the Austrian Law on Changes in Accounting (*Rechnungslegungs-Änderungsgesetz 2014*). The accounting regulations apply to all entities registered in the commercial register, particularly to corporations (*GmbH* and *AG*) and partnerships (*OG* and *KG*). The law requires that bookkeeping and financial statements also correspond to Austrian Generally Accepted Accounting Principles (GAAP). Special accounting laws are in force for some industries, e.g. banks, insurance companies and investment funds.

It is the management's responsibility to prepare the **financial statements** (*Jahresabschluss*) within five months after the end of the financial year. They require the approval of the shareholders' meeting (*GmbH*) or the supervisory board (*AG*).

A statutory **audit** is required for:

- banks, insurance companies and investment funds,
- every *AG* (stock corporation),
- large or medium-sized *GmbHs* (companies with limited liability) or *GmbH & Co KGs* or a small-sized *GmbH* with a mandatory supervisory board.
    - Specific requirements apply to the audit of a public interest entity (listed companies, banks and insurance companies) due to an EU regulation as from 2016.

From the beginning of 2016, new thresholds to determine whether a company is small, medium-sized or large apply and a new size range for micro-entities has been implemented, which enjoy certain simplifications (at least two of the three following criteria have to be met):

| | Micro entities | Small-sized company | Medium-sized company | Large company |
|---|---|---|---|---|
| Total assets | > TEUR 350 | > EUR 5m | > EUR 5m | > EUR 20m |
| Net turnover | > TEUR 700 | > EUR 10m | > EUR 10m | > EUR 40m |
| Employees | > 10 | > 50 | > 50 | > 250 |

The **publication** of the financial statements in the daily newspaper *Wiener Zeitung* is compulsory for:

- public interest companies: companies listed on the stock exchange, banks and insurance companies,
- large *AGs* (same criteria as above).

Most other companies need only to file their financial statements electronically with the commercial register. In this case a notice is published in the *Wiener Zeitung* stating that the financial statements have been filed. The filing deadline is nine months after the balance sheet date. Non-compliance is subject to a fine between EUR 700 and 3,600 (reduced fines for certain small-sized corporations) that may be (repeatedly) imposed on the company and all of its directors.

Partnerships (except for those with a corporation acting as unlimited partner, e.g. *GmbH & Co KG*) need not even file their financial statements with the commercial register.

A group of companies is required to prepare **consolidated financial statements** (*Konzernabschluss*) if certain thresholds for total assets, turnover and staff are exceeded. Consolidated financial statements must be audited before they are submitted to the supervisory board of the parent company. They must be published in the *Wiener Zeitung* if one of the group companies is either a public interest company or a large Austrian stock company (*AG*). Otherwise, it is sufficient to file them with the commercial register.

Companies falling under the scope of Article 4 EU Regulation Concerning the Application of International Accounting Standards (in particular companies listed on the stock exchange) are obliged to prepare the consolidated financial statements according to IFRS/IAS. Other companies may optionally prepare their consolidated financial statements according to IFRS/IAS. A company must expressly refer to the fact that it uses International Accounting Standards.

# 22. Banking and Capital Markets

## 22.1. Banking System

Austria's well-organized and highly developed banking system plays a major role in the economy because the small capital market requires companies to use bank loans to finance a large part of their investments. Most Austrian banks offer the full range of banking and financial services. In recent years the major Austrian banks have successfully penetrated Central and Eastern European countries and now play an important role there. Banks generally tend to have very close relations with their customers through an extensive network of local branches. However, this approach of having local branches close to customers seems to change since new distribution channels such as online banking become more and more important, especially for standardised banking products.

The **Austrian National Bank** (*Oesterreichische Nationalbank [OeNB]*) is Austria's central bank. The introduction of the Euro has significantly changed the role of central banks, as the European Central Bank (ECB) sets out the guidelines for EU monetary policy. Some of the Austrian National Bank's powers have been transferred to the respective governing bodies of the ECB, e.g. the power to set interest rates on deposits. The Austrian National Bank now merely implements the decisions of the ECB. However, it still plays a role in supervising Austrian credit institutions. The OeNB is responsible for performing off-site analysis as well as on-site inspections of credit institutions. Off-site analyses involve the economic examination of the prudential and financial reports of Austrian credit institutions and branches of foreign credit institutions.

The **Austrian Control Bank** (*Oesterreichische Kontrollbank*) has a centralized clearing function for the transfer of securities, which are generally deposited there. Furthermore, it issues guarantees to foster exports and foreign investments. It also operates as the notification office under the Capital Market Act (*Kapitalmarktgesetz*).

The **Financial Market Authority** (*Finanzmarktaufsichtsbehörde [FMA]*) is the supervisory authority for credit institutions and investment services providers. Its major tasks include, in particular, licensing, authorization, notification, supervision, analysis of results of official measures and the involvement in legislation related to banking supervision. To do business as a bank in Austria requires a license from the **FMA**. Compared to other relevant legislations in Europe, the Austrian Banking Act (*Bankwesengesetz*) contains a comprehensive list of banking activities which require a banking license. Besides the core banking activities like the deposit taking and lending business, banking transactions in Austria include a wide range of additional activities such as the current account, factoring and guarantee business as well as trading in financial

instruments, etc. Each kind of banking transaction under the Austrian Banking Act requires a separate banking license. There are several minimum requirements stipulated which have to be fulfilled in order to receive a banking license. The minimum requirements concern, *inter alia*, a minimum initial capital amounting to at least EUR 5 million, professional experience and personal integrity and soundness of the managing directors, and the (beneficial) owner(s) have to pass a "fit and proper" test.

Since the Single Supervisory Mechanism (SSM), which is based on Council Regulation (EU) No 1024/2013, has entered into force, the system of supervision of banks in Europe has changed. Based on this regulation, the ECB took over the supervision of banks within the euro area (currently 19 EU member states) on November 4, 2014. Significant credit institutions (SIs) are subject to direct supervision by the ECB, while the less significant credit institutions (LSIs) continue to be subject to national supervision, in the case of Austria by the Austrian Financial Market Authority (FMA), and are only indirectly supervised by the ECB. Furthermore, Common Procedures were introduced for matters relating to licensing of and qualifying holdings in credit institutions, which have an identical form for both SIs and LSIs. Under the auspices of the SSM, banking supervision in the euro area and in other EU member states, which choose to join the SSM, is carried out in a decentralised system under the direction and responsibility of the ECB in close cooperation with the national competent authorities (NCAs), which in Austria is the FMA. The FMA's remit is to provide the necessary supervisory and administrative contributions from an Austrian perspective to ensure successful operation of the SSM. Particular duties have been assigned to the FMA within the SSM. These duties concern, *inter alia*, the direct supervision of LSIs and reports sent regularly to the ECB. Prevention of money laundering and terrorist financing, prevention of unauthorized banking operations, as well as consumer protection issues remain with the FMA as well. Furthermore the FMA is responsible for enforcing special legal acts relating to banking supervision (e.g. the Austrian Building Society Act (BSpG), the Austrian Mortgage Banks Act (HypBG) and the Austrian Mortgage Bond Act (PfandbriefG)).

Under the EU Acquisitions Directive, ownership supervision has become subject to more stringent rules. The new regulations were implemented in April 2009, by amending the Banking Act and issuing the Ownership Supervision Regulation (*Eigentümerkontrollverordnung*).

However, if a license has already been obtained in another EEA or EU Member State, no further approvals are necessary, but certain notifications must be made to the Home State regulator, who will subsequently inform the Austrian FMA (Single Passport Principle). The **Banking Act** and the Solvency Regulation (*Solvabilitätsverordnung*) have implemented the Basel II and Basel III principles for credit institutions in Austria.

The current regulatory framework contains provisions regarding minimum equity and solvency requirements for credit, market and operational risk as well as liquidity requirements and restrictions to minimize exposure to risks (e.g. large-exposure rules and risk management). The Banking Act also deals with accounting, auditing and the publication of financial statements of credit institutions. Credit institutions are usually of the all-purpose type that offer the full range of banking services: they grant all sorts of credit and loan facilities, accept securities and other valuables in safe custody, underwrite share and bond issues and trade in securities for customers and on their own account. Savings banks (*Sparkassen*) and credit cooperatives for trade (*Volksbanken*) as well as agriculture (*Raiffeisenkassen*) are organized mainly on a local level with central institutions serving as clearing houses. The large credit institutions often offer additional services through their subsidiaries, such as leasing, factoring, investment funds, real estate property funds, insurance, travel facilities, credit cards and building society activities.

One of the basic principles of the Austrian banking system is **banking secrecy** (*Bankgeheimnis*), which must be distinguished from anonymity, the latter meaning that not even the bank knows its customer's identity. There are many provisions to safeguard banking secrecy. Following a heated, well-publicized dispute between Austria and the European Commission, the **Banking Act** had to be amended in 2000 to provide for mandatory identification requirements also for bank customers opening saving accounts (*Sparbücher*) and making securities deposits as well as those carrying out securities transactions. Under this amendment the anonymity of saving accounts was abolished. In 2009 banking secrecy was relaxed by a new law on bilateral information exchange in tax affairs (*Amtshilfe-Durchführungsgesetz*). The new law complies with OECD principles and enables foreign authorities to receive relevant information for tax purposes. However, the abolishment of banking secrecy is still under discussion. With respect to tax authorities banking secrecy has already been abolished to a large extent.

A **deposit insurance scheme** (*Einlagensicherungssystem*) covers deposits up to EUR 100,000 (for legal entities up to EUR 50,000 or, starting on January 1, 2011, up to EUR 100,000). Any credit institution which receives deposits from the general public must join the insurance scheme of the sector or the banking system to which it belongs. A credit institution which is not a member of a deposit insurance scheme must not accept deposits. A similar scheme was established for certain investment services rendered by credit institutions and securities firms. In September 2015 a federal act on a new deposit insurance scheme was adopted. This *Einlagensicherungs- und Anlegerentschädigungsgesetz* will replace the existing system of sectoral deposit insurance by a general system for all Austrian credit institutions without direct payment obligations of the Republic of Austria, starting in 2019 after a period of transition. Claims

will be covered by payments of the credit institutions which will build up appropriate funds. In accordance with the Single European Payment Area ("SEPA") and the relevant EC Directive, a new legal framework for **payment services** was implemented at the end of 2009. The Payment Services Act (*Zahlungsdienstegesetz)* contains provisions on prudential requirements, the access of new payment service providers to the market, information requirements and the respective rights and obligations of payment services users and providers as well as license requirements for payment services providers.

## 22.2. Capital Markets

### 22.2.1. Stock Exchange

The **Vienna Stock Exchange** (*Wiener Börse*), the only securities exchange in Austria, trades in securities, options, futures and foreign currencies. It is regulated by the **Financial Market Authority** (*Finanzmarktaufsichtsbehörde*). In 2004, the Vienna Stock Exchange bought, together with two Austrian banks, a major stake in the Hungarian Stock Exchange in Budapest. In further steps, the Vienna Stock Exchange acquired a majority stake in the Ljubljana Stock Exchange, followed by a major stake in the Prague Stock Exchange in 2008. The Vienna Stock Exchange recently established the CEE Stock Exchange Group (CEESEG AG).

The **Stock Buyback Act** (*Aktienrückerwerbsgesetz*) allows the reacquisition of own shares of up to 10% of the nominal capital. The following conditions must be met: prior authorization of the board of directors by the stockholders' meeting to buy back shares (for a period not exceeding 18 months) in stock companies, substantial own funds (only non-bound funds [*Eigenmittel*] which could be contributed as dividends may be used), the stock must be listed on the Vienna Stock Exchange or on the stock exchange of any other OECD Member State or on any other recognized public securities market. Therefore the buyback of shares is possible not only for Austrian companies listed on the Vienna Stock Exchange but also for those listed, *inter alia*, on the London, Frankfurt, Swiss or New York stock exchanges. Furthermore, the **Takeover Act** (*Übernahmegesetz*) applies to the buyback of shares listed on the Vienna Stock Exchange if the shares are to be acquired by public offer (see 22.2.5).

### 22.2.2. Insider Trading

Austria has implemented the EU Insider Trading Directive by amending the **Stock Exchange Act** (*Börsegesetz*). Accordingly, anybody who is an insider and takes advantage of inside information relating to one or several issues of transferable securities or to one or several transferable securities, by:

- acquiring or disposing of transferable securities for their own account or for the account of a third party,

- disclosing inside information, unless such disclosure is made in the normal exercise of their employment, profession or duties, or
- recommending to a third party, on the basis of inside information, to acquire or dispose of transferable securities,

commits a crime if they acted with the intention to gain profit for themselves or for a third party.

Inside information is information that, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question.

An insider is defined as anybody who, as a result of their profession, employment, duties or by virtue of holding capital of the issuer, has access to inside information as mentioned above.

### 22.2.3. Capital Market Act

The **Capital Market Act** (*Kapitalmarktgesetz*) – for the most part reflecting Austrian implementation of the EU Listing Particulars Directive and the Common Prospectus Directive – prescribes with regard to first public offers of transferable securities or other investments:

- an obligation to publish a prospectus,
- scrutiny of the prospectus by qualified persons, and
- liability for the prospectus and other mandatory information to the public.

The Capital Market Act is also applicable to transferable securities traded on the Vienna Stock Exchange. However, the **Stock Exchange Act** also contains provisions on publishing a prospectus and on prospectus liability.

### 22.2.4. Investment Fund Act

The **Investment Fund Act** (*Investmentfondsgesetz*) regulates in detail the organization of Austrian capital investment funds as well as the promotion and the sale of shares in foreign capital investment funds in Austria. Further provisions regulate the distribution of shares in funds subject to the laws of an EEA member state (EEA funds). Investment funds are mutual funds that need a specific license.

A complicated procedure applies to **foreign investment funds** which are to be offered publicly in Austria. However, an investment fund from an EEA country is not required

to undergo this procedure, though an Austrian paying agent or representative is invariably required and may passport the respective authorization of its home state.

Following implementation of the relevant EU provisions, Austrian law permits the establishment of funds of funds, profit-retention funds as well as pension investment funds (*PIF*). Pension investment funds enjoy not only with a state subsidy but also certain tax privileges. UCITS IV has been implemented in Austria in the Investment Fund Act 2011 and further amendments or a new federal act were passed to implement the AIFM (Alternative Investment Fund Manager) Directive. The latter was implemented by the Alternative Investment Fund Managers Act (*Alternative Investmentfonds Manager-Gesetz*) of 2013 which governs the activities of managers of alternative investment funds and states the licensing requirements and procedures and how an AIFM has to be organised. Real estate funds are regulated in a separate act, the **Real Estate Investment Fund Act** (*Immobilien-Investmentfondsgesetz*).

### 22.2.5. Takeover Act

The **Takeover Act** (*Übernahmegesetz*) applies to public bids to acquire stock issued by an Austrian stock company admitted to the official list or the regulated market of the Vienna Stock Exchange.

The law provides that anybody who acquires a direct or indirect controlling interest in such a company must make a public bid for *all* of its stock. Direct controlling interest means a holding of more than 30% of the voting stock. An indirect controlling interest enables the bidder (the person making a purchase offer for stock) to exercise alone or together with other entities a dominant influence over the target company. The controlling interest must be notified immediately and the purchase offer within 20 stock exchange days to the **Takeover Commission**. Criteria to be considered are the percentage of the stock and the voting capital, the distribution of the other voting capital, the voting capital which is usually represented in stockholders' meetings and the provisions of the articles of association.

The **mandatory purchase offer** must include a price. The purchase price must be the highest price paid for the relevant stock by the bidder during the last 12 months. However, it must not be less than the stock's average price on the stock exchange during the six months prior to the notification of the purchase offer. Owners holding stock worth at least 1% of the nominal capital or at least EUR 70,000 may apply for a **review** of the legality of the purchase price offered within three months of publication of the results of the takeover bid.

In order to prevent insider trading a bidder must immediately make his offer public and inform the management of the target company.

The Takeover Commission may either recommend or order that the bidder or the target company make supplementary information or corrections public. The decisions of the Takeover Commission, with the exception of penal rulings, are subject to appeal to the **Supreme Court** (*Oberster Gerichtshof*); penal rulings are subject to appeal to the **Federal Administrative Court** (*Bundesverwaltungsgericht*).

The Takeover Act contains private-law sanctions and administrative fines. The most important private-law sanction is automatic suspension of voting rights. This suspension not only affects the illegally acquired shares or the most recent acquisition triggering a mandatory offer but all shares of the owner who is acting illegally.

### 22.2.6. Securities Supervision Act

Under the **Securities Supervision Act of 2007** (*Wertpapieraufsichtsgesetz 2007*), which implemented the EU Markets in Financial Instruments Directive (**MiFID**), investment firms, investment services undertakings and banks providing investment services to customers must comply with the applicable rules of conduct.

The **Financial Market Authority** (*Finanzmarktaufsichtsbehörde [FMA]*) maintains orderly and fair trading in instruments on the regulated market, safeguards the interests of investors, provides information to other supervisory authorities and competent bodies of other EU Member States, prevents and investigates insider trading and prosecutes administrative offenses.

The **Securities Supervision Act of 2007** defines investment firms (*Wertpapierfirma*) and investment services undertakings (*Wertpapierdienstleistungsunternehmen*) as providers of one or more of the investment services under the Securities Supervision Act of 2007. The commercial provision of investment advice, discretionary portfolio management, or the reception and transmission of orders in relation to one or more financial instruments requires a license granted by the FMA. Due to higher standards, portfolio management may only be carried out by investment firms. Compared to investment services undertakings, the minimum requirements for investment firms demand an even higher level of minimum capital and set a higher standard for senior managers and the organizational structure. Under the freedom to provide services (EU passport), investment firms are furthermore allowed to provide investment services in any EU Member State if they have been authorized to do so in their home state. In Austria, investment firms and investment services undertakings are not banks and are therefore not allowed

to engage in any banking transactions (e.g. trading in financial instruments) that require a license under the Austrian Banking Act.

# 23. Liquidation, Insolvency and Fraudulent Conveyance

## 23.1. Liquidation

Significant costs may be incurred in closing a business owing to legal provisions relating to long term contracts, especially contracts of employment. In businesses in which a works council (*Betriebsrat* – see 11.1) exists, it is mandatory to consult and to cooperate with it prior to closing. Conciliation proceedings are provided for dispute resolution. Furthermore, prior notification to the Public Employment Agency (*Arbeitsmarktservice*) is necessary if more than a certain number of employees is to be made redundant (see 11.3). For certain changes of business, the works council can demand the implementation of a social plan to avoid social hardship.

A formal winding-up procedure exists for companies. If the shareholders agree to dissolve the company, the liquidators have to prepare a liquidation balance sheet and to publish the liquidation of the company in the commercial register. Assets remaining after the payment of all debts may be distributed among the shareholders.

Companies with no assets can be deleted from the commercial register without any formal liquidation proceedings.

## 23.2. Insolvency

### 23.2.1. Insolvency Proceedings

If a company is insolvent or its liabilities exceed its assets and this is known or must be known to management, its managing director is obliged to file for insolvency proceedings without delay. The management may, however, try to reorganize the company within a maximum of 60 days. If management does not file for insolvency in time, they can be held personally liable for any resulting loss (including newly created liabilities or shortfalls of dividend payments [*Quote*] in insolvency). Shareholders are liable only if they misuse their position or exercise a dominant influence on the management.

The **Austrian Insolvency Act** (*Insolvenzordnung*), effective since **July 1, 2010**, consolidated the former Bancruptcy Act (*Konkursordnung*) and the Composition Act (*Ausgleichsordnung*). The primary goal of the new consolidated **insolvency proceedings** is to enhance opportunities for successful restructuring and to save the business. The new law is applicable on all proceedings instituted after June 30, 2010. However, if a debtor in already pending proceedings files a restructuring plan after June 30, 2010, the new regulations also apply.

The debtor may apply for a settlement with its creditors by presenting a **restructuring plan** (*Sanierungsplan*), which is also possible in case of imminent insolvency.

If the debtor presents such plan in conjunction with filing for insolvency and offers a minimum 30% dividend to the creditors to be paid within a period of not more than two years, the business/property may be continued in self-administration (*Sanierungsverfahren mit Eigenverwaltung*). The court then appoints an administrator (*Sanierungsverwalter*) who supervises the management. The *Sanierungsverfahren mit Eigenverwaltung* resembles the former judicial composition proceedings (*Ausgleichsverfahren)*, except that the minimum dividend has decreased from 40% to 30%.

In case the restructuring plan provides for a dividend of less than 30% (however, minimum is 20% within two years), the court does not grant self administration to the debtor and appoints an administrator who assumes control over the insolvent debtor's business and property *(Sanierungsverfahren ohne Eigenverwaltung)*.The debtor may also file a restructuring plan later in the insolvency proceedings. This is similar to the former compulsory composition (Zwangsausgleich).

In either case, the majority of the creditors by headcount and total value of claims present at the hearing must vote in favor of the reorganization plan for it to be approved. Upon fulfilment of the reorganization plan, the debtor is discharged from all liabilities.

If a reorganization plan fails or none is filed, the remaining assets are sold by the administrator. The proceedings are then called bankruptcy proceedings (*Konkursverfahren*).

Security *in rem* (see 13.3) is not affected by insolvency proceedings. However, enforcement can be postponed for six months.

Clauses aimed at dissolving contracts solely for the reason that insolvency proceedings have been filed are without effect and, therefore, unenforcable. In addition, it may not be allowed to dissolve agreements with the debtor for the period of six months after institution of insolvency proceedings if such termination would endanger the debtor's business operations.

Loans given by dominating shareholders to a company in financial crisis are recharacterized as equity capital (*eigenkapitalersetzende Gesellschafterdarlehen*) and therefore subordinated to claims of other creditors. Consequently, security provided by the company for such loans is not enforceable (see also 23.5).

### 23.2.2. Administrator

The court-appointed administrator (*Insolvenz-, Sanierungs- and/or Masseverwalter – see 23.2.1 above*) usually is an attorney-at-law. Without doubt, the administrator is the key player in the insolvency proceedings. The success of the proceedings depends mainly on the administrator's qualifications. In spite of this, the necessary qualifications have been insufficiently defined by the Austrian Insolvency Act. Every prospective administrator now has to be listed with the Linz Court of Appeal (*Oberlandesgericht Linz*). The list contains a description of their qualifications. The insolvency court is obliged to appoint the most qualified person in each case. The administrator can only liquidate the business if authorized to do so by the court and when this is the only way to prevent further damage to creditors. Administrators are entitled to cancel long-term contracts (especially contracts of employment), giving them an opportunity to shrink or close the business on favorable terms. Claims of most employees in insolvency cases are covered by a public insurance fund (*Insolvenzentgeltsicherungsfonds*).

Creditors wishing to obtain a dividend payment must file their claims with the court. During insolvency proceedings, legal action and enforcement measures are inadmissible. However, legal action and enforcement measures related to security *in rem* and legal action against the insolvent estate resulting from business transacted after the opening of the insolvency proceedings as well as legal action filed by the insolvent estate remain possible.

If the administrator intends to sell a company or its main assets, he or she must inform all prospective buyers at least two weeks in advance through a special online database (*Ediktsdatei*). In addition, the sale of all or main assets must be approved by both the court and by the creditors' committee (*Gläubigerausschuss*), whose members are normally representatives of the main creditors.

## 23.3. Acquisitions in Connection with Insolvency

Purchasers of businesses or assets from an undertaking subject to insolvency proceedings enjoy certain legal privileges. Obligations relating to the business remain with the insolvent estate. The buyer is not liable for old debts. This also applies to tax debts and to social-security contributions. Lease contracts relating to real estate remain with the business, although the lessor has the right to raise the rent to market value. On the other hand, transactions that involve buying a business or assets of an insolvent undertaking lack the usual representations and warranties. Acquisitions must be approved by the court and by the creditors' committee.

## 23.4. Fraudulent Conveyance

The administrator in insolvency proceedings is **entitled to rescind** (*anfechten*) acts (especially payments and contracts) of the insolvent party if:

- the insolvent party intended to defraud its creditors and the contracting party had or must have had knowledge of that fact,
- property was sold at rock-bottom prices or transferred without any compensation,
- after insolvency a creditor was treated in a preferential way,
- after insolvency a payment was made or a contract was concluded and the creditor must have been aware that the debtor was insolvent.

Outside of insolvency proceedings any creditor may rescind a debtor's transaction under similar circumstances, provided enforcement measures against the debtor have been unsuccessful.

## 23.5. Shareholder Loans and Insolvency

In general, loans given by shareholders to a company are treated the same way as the claims of any other creditor. However, according to the **Equity Capital Substitution Act** (*Eigenkapitalersatzgesetz*) loans by shareholders given to a company in financial crisis are recharacterized as equity capital (*eigenkapitalersetzende Gesellschafterdarlehen*) and therefore subordinated to claims of other creditors. Consequently, security given by the company for such loans is not enforceable. A company is considered to be in financial crisis if it is insolvent or if its liabilities exceed its assets or if its balance sheet shows an equity ratio of less than 8% and the anticipated debt repayment period exceeds 15 years. The regulations apply only to shareholders with a majority of votes in the company, or a minimum total share of 25%.

## 23.6. European Insolvency Proceedings

The Council Regulation on Insolvency Proceedings is applicable to cross-border European insolvency procedures with universal scope, encompassing all the debtor's assets in the entire European Union and providing for automatic recognition of judgments concerning the institution, conduct and closing of insolvency proceedings. In general, the main insolvency procedure has to be opened in the member state in which the debtor has its main business interests.

## 23.7. Taxation in the Course of Liquidation

*Liquidation*

Capital gains from the disposal of assets in the course of liquidation proceedings are subject to tax at company level. A company will be taxed only on the total excess of

liquidation proceeds over liquidation expenses, but the tax period in most cases comprises several years.

A shareholder is also subject to tax on capital gains, calculated as the difference between the liquidation proceeds and the cost of the stake (in case of an individual, the tax rate is generally reduced to 27.5%). However, there is no withholding tax on the distribution of liquidation proceeds.

*Restructuring profit (Sanierungsgewinn) without liquidation*

When a company presents a restructuring plan and pays a certain portion of its liabilities, the profit created by the creditors' waiver is taxable. However, only the tax liability equivalent to the dividend payment must be paid.

Furthermore, input VAT with regard to trade payables which need not fully be settled is recaptured by the Revenue.

# 24. Choice of Law and Choice of Forum

A contract is governed by the law chosen by the parties. The law chosen prevails over all mandatory rules which would otherwise have been applicable if no choice-of-law clause (*Rechtswahl*) had been stipulated, unless it infringes European law, *ordre public* (i.e. general principles of law) or mandatory provisions protecting consumers or employees. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. If no choice is made, the law of the country with the closest connection applies. In general, this is the law of the country in which the party which is to effect the characteristic performance has its habitual residence. If it runs a business, the place of business is decisive. Special rules apply to employment contracts and to contracts with consumers.

The **choice-of-law clause** determines the substantive law applicable. In contrast, the **choice-of-forum clause** (*Gerichtsstandvereinbarung*) selects the venue for litigation. Under the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and EC Council Regulation No. 1215/2012 (replacing the former EC Council Regulation No. 44/2001, effective since 10 January, 2015), parties may agree (if no exclusive jurisdiction exists) that a specific court or the courts of a contracting/member state shall have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship. Such an agreement must be in writing, or evidenced in writing or in a form in accordance with practices which the parties have established among themselves or in international trade or commerce. The new Council Regulation No. 1215/2012 strengthens choice of forum-clauses by granting the court agreed among the parties the power to decide the case, even if the matter has been filed by the other party with a court of another member state (protection from the so-called "Italian torpedo"). Special rules (concerning the validity of the clause) apply to employment cases and those involving consumers.

Under the **Austrian Jurisdiction Act** (*Jurisdiktionsnorm*) the choice-of-forum clause may refer to **Austrian jurisdiction** in general as well as to a specific court. The clause is only enforceable if it is in writing and if the dispute for which it applies is specified. Restrictions exist in connection with employment cases and those involving consumers. Certain choice-of-forum clauses are not enforceable. The Jurisdiction Act does not render clauses unenforceable which choose a foreign forum even if the EC Council Regulation No. 1215/2012 or the Lugano Convention is not applicable.

Before the contractual parties agree upon a forum, they should assess whether the judgments of the courts of the country to be stipulated are **enforceable** in their home countries. If no bi- or multilateral treaties on the mutual recognition and enforcement of judgments exist, it is advisable to include an arbitration clause in the contract since

arbitral awards are, in general, easier to enforce than foreign judgments (see also 26.4). Within the EU, mutual recognition and execution is granted by the new EC Council Regulation No. 1215/2012; it even accelerates the execution of (preliminary) judgements in foreign member states by omitting the exequatur procedure (procedure of recognition).

# 25. Basic Aspects of the Constitution and International Relations

## 25.1. Constitution

### 25.1.1. Principles of the Constitution

The **fundamental principles** of the **Austrian Constitution** are the democratic, the republican, the federal and the liberal principles as well as the separation of powers and the rule of law. According to the democratic principle, Austrian laws reflect the will of the people since they are made by a directly elected parliament. The republican principle states that Austria is a republic, as opposed to a monarchy. In accordance with the federal principle, legislative and executive powers are shared between the federation (*Bund*) and the provinces (*Bundesländer*). The rule of law dictates that public authorities (executive branch and judiciary) may only act if the law authorizes such action. The liberal principle provides for the protection of human rights and fundamental freedoms. Those rights and freedoms are guaranteed by the Austrian Constitution (*Bundes-Verfassungsgesetz*), federal constitutional laws (*Bundesverfassungsgesetze*) and the **European Convention on Human Rights**, which has been incorporated into Austrian constitutional law. The separation of powers consists of a system of checks and balances. This means that legislative, executive and judicial powers are strictly separated, so that no branch can monopolize power, and that each branch of government has certain control rights over others, e.g. the right to appoint certain public judges.

Under the Treaty of Lisbon (see 25.2.1), the **Charter of Fundamental Rights of the European Union** of December 7, 2000, as adapted at Strasbourg on December 12, 2007, is legally binding on the European Union and its Member States in the execution of European law (except for those member states – not including Austria – that have opted out). It sets out in a single text, for the first time in EU history, civil, political, economic and social rights of European citizens and all persons resident in the EU.

### 25.1.2. Law

In Austria, there are various categories of law which are organized into a **hierarchical system**. Each category derives its validity from and is limited by a higher one. The main source of constitutional law is the **Constitution** (*Bundes-Verfassungsgesetz*), enacted in 1920. Numerous statutes also enjoy the status of constitutional law. Constitutional law is at the top of the hierarchy of norms. However, even Austrian constitutional law is subordinate to parts of the **European law**. Austrian law that conflicts with EU law is inapplicable, though still in force. Subordinate to constitutional law are ordinary **statutes** (*einfache Gesetze*). This category comprises any statute not expli-

citly enacted as a constitutional law. Based on and limited by statutes, administrative authorities may issue **regulations** (*Verordnungen*) on matters within their competence. Under the rule of law, regulations merely implement a statute and – with certain exceptions – do not replace, abrogate or amend it. **Decrees** (*Erlässe*), issued by administrative authorities and addressed only to the officials of the authority, do not create law binding on the public. **Orders** (*Bescheide*) are administrative decisions that address an individual. **Court judgments** (*Urteile, Erkenntnisse*) and administrative orders legally bind only the parties to a dispute. However, judgments are commonly used in legal argument.

The Constitution provides for the adoption of **international law**, e.g. international treaties or customary international law, on the appropriate level of the hierarchy of norms. This generally depends on the level on which a comparable law would have been enacted in Austria.

The most important **legislative powers** as enumerated in the Constitution are held by the **federation** and exercised by parliament. However, significant law-making authority is vested in the **provinces**, e.g. laws governing the acquisition of certain types of real estate (in particular by foreigners), the construction of buildings, environmental protection and land zoning.

### 25.1.3. Executive Branch

Under the Constitution, the **executive** (*Verwaltung*) and the **judicial** (*Gerichtsbarkeit*) branches must be separated at all levels of procedure. However, the Constitution provides for mechanisms to control the executive branches, such as appeals to the eleven administrative courts (one in each province and two federal administrative courts) and subsequently to the High **Administrative Court** (*Verwaltungsgerichtshof*) as well as the **Constitutional Court** (*Verfassungsgerichtshof*) against orders and acts of administrative authorities.

The federal **president** (*Bundespräsident*) is elected directly by the people for a six-year term (eligible for a second consecutive term). The president is only marginally involved in day-to-day government. Apart from his/her powers to appoint and dismiss the cabinet and to dissolve parliament, he or she may act only at the request of the cabinet or the competent minister. Important presidential powers include the appointment of civil servants and Austria's representatives abroad. However, the president's powers are limited to rejecting proposals.

The president appoints the federal chancellor (*Bundeskanzler*) and, upon the latter's recommendation, the remaining cabinet members, including the vice-chancellor. The

president may also dismiss the chancellor or the entire cabinet at any time. Despite these powers, the president normally appoints the cabinet agreed by the parliamentary majority.

The cabinet *as a whole* performs only those tasks the law has explicitly assigned it. The competent minister carries out all other duties. By law the chancellor is only *primus inter pares* and has no authority to give instructions to ministers. Nevertheless, the chancellor has a strong position since the Constitution gives him/her the right to recommend to the president the appointment or dismissal of other cabinet members.

### 25.1.4. Judicial Branch

The judiciary comprises **courts of law** (*Gerichte*) with independent judges. A distinction needs to be made between civil courts, the eleven administrative courts, the High Administrative Court and the Constitutional Court. The **Constitutional Court** (*Verfassungsgerichtshof*) has jurisdiction to decide whether international treaties, statutes, administrative regulations and orders comply with constitutional law. For further details on the judiciary, see 26.

### 25.1.5. Legislative Branch

Parliament consists of the **National Council** (*Nationalrat),* whose 183 members are directly elected by the people every five years, and the **Federal Council** (*Bundesrat)*, whose current 61 members are chosen by the provincial parliaments (*Landtage*). Each province has between three and twelve members, depending on its population. The Federal Council is of little importance, since the National Council can overrule a veto of the Federal Council (*Beharrungsbeschluss*).

## 25.2. International Relations

### 25.2.1. European Union

After a referendum in which two-thirds of the electorate voted in favor of accession, Austria became a member of the European Union (EU) on January 1, 1995, and thus part of the **Common Market**. Previously, Austria had been member of EFTA. It is still a member of the **EEA** (European Economic Area). The entire primary and secondary EU law, as amended by the Accession Treaty, came into force in Austria. Within the EU the so-called **four economic freedoms**, i.e. the free movement of goods, persons, services and capital, are established and, in general, any discrimination against citizens of EU Member States is prohibited. Additionally, a system preventing distortion of competition has been set up.

With the enlargement of the EU, the European institutions had to be adapted. The Treaty of Lisbon (initially known as the Reform Treaty) was signed by the member states on December 13, 2007, and entered into force on December 1, 2009. It amends the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC). In this process, the TEC was renamed Treaty on the Functioning of the European Union (TFEU).

The European Parliament is currently composed of 751 members from all 28 EU countries. Austria now has 18 seats. Austria has 10 of 352 votes in the Council of the EU. Germany, on the other hand, whose population is about 10 times that of Austria's, only has 29 votes. That is evidence of the small member states' relative overrepresentation in the Council. Austria presided over the Council in the second half of 1998 and in the first half of 2006; the next time will be in the first half of 2019. Jean-Claude Juncker has been president of the European Commission since November 2014. Under the Treaty of Lisbon a permanent president of the European Council is elected by the Council to a two-and-a-half-year term. The current president is Donald Tusk. The position of the High Representative of the Union for Foreign Affairs and Security Policy and vice-president of the European Commission is currently held by Federica Mogherini. The former Austrian minister for science and research, Johannes Hahn, has been Commissioner for European Neighbourhood Policy & Enlargement Negotiations since 2014.

### 25.2.2. Membership in International Organizations

Austria is a member of the United Nations Organization (**UN**); Vienna is the UN's third headquarters after New York City and Geneva. The following **UN organizations** are headquartered in Austria: the International Atomic Energy Agency (**IAEA**), the United Nations Industrial Development Organization (**UNIDO**), the United Nations Office for Outer Space Affairs (**OOSA**) and the United Nations Office on Drugs and Crime (**UNODC**).

Furthermore, Austria is a member of numerous international organizations, including the World Trade Organization (**WTO**), the Organization for Economic Cooperation and Development (**OECD**), the International Monetary Fund (**IMF**), the International Finance Corporation (**IFC**), the International Development Association (**IDA**), the **World Bank**, the World Health Organization (**WHO**), the United Nations Educational, Scientific and Cultural Organization (**UNESCO**), the Organization for Security and Cooperation in Europe (**OSCE**), the World Intellectual Property Organization (**WIPO**) and the European Space Agency (**ESA**).

The Organization of Petroleum Exporting Countries (**OPEC**) has its headquarters in Vienna.

# 26. Court System and Arbitration

## 26.1. Civil Law Courts

The Jurisdiction Act (*Jurisdiktionsnorm*) provides for the following **types of ordinary courts** that have jurisdiction over all civil and commercial disputes, unless they are referred to special courts, e.g. to the labor court or cartel court:

- district courts (*Bezirksgerichte*),
- superior courts (*Landesgerichte*),
- courts of appeal (*Oberlandesgerichte*),
- the supreme court (*Oberster Gerichtshof*).

A claim must be filed in the first instance either with a district court or a superior court, depending on the nature of the claim and the amount in litigation. The courts of first instance do not normally decide as panels. However, if a claim is brought before a superior court and exceeds a certain value, litigants may motion that the decision be made by a panel of three judges. Appeals from the district courts are decided by the superior courts (in panels of three judges). Appeals from the superior courts as trial courts are decided by the courts of appeal. There are four courts of appeal, in Vienna, Graz, Linz and Innsbruck. The courts of appeal decide as panels of three judges. In significant cases a further appeal to the supreme court, in Vienna, is possible. Whether or not a case is significant depends on the amount in litigation, but also on its nature. An appeal to the supreme court is, for example, admissible if the case involves questions of substantial importance which have not previously been ruled on by the supreme court or if the decision of the court of the second instance contradicts prior supreme court decisions. The supreme court generally decides as panels of five, with respect to certain procedural questions as panels of three judges. While supreme court decisions play an important role in legal argument, they legally bind only the parties to the case.

With respect to commercial matters, a special **commercial court** (*Handelsgericht und Bezirksgericht für Handelssachen*) exists only in Vienna. Elsewhere, the ordinary courts decide as commercial courts. Commercial matters include actions against entrepreneurs or companies registered in the commercial register in connection with commercial transactions, unfair competition matters, etc. Other special courts are the **labor courts** (*Arbeits- und Sozialgerichte*), which have jurisdiction over all civil law disputes between employers and employees resulting from employment or former employment as well as over social security and pension cases. In both commercial (insofar as commercial courts decide as panels) and labor matters, lay and professional judges decide together.

The Court of Appeal in Vienna decides as the **cartel court** (*Kartellgericht*) on the trial level. This is the only cartel court in Austria. Appeals are decided by the supreme court as the appellate cartel court (*Kartellobergericht*). In cartel matters, both lay and professional judges decide together.

## 26.2. Civil Procedure

**Litigation** commences when the plaintiff (*Kläger*) files an action (*Klage*) with the competent court. In general, the defendant (*Beklagter*) is given an opportunity to answer the claim within a period of four weeks. The parties determine the matter in dispute. The hearings before the court are oral and public. The claim, the answer of the defendant, the appeals etc. are submitted in writing. Judges are not bound by set rules of evidence. The Civil Procedure Code (*Zivilprozessordnung [ZPO]*) requires the parties be represented by attorneys if the amount in litigation exceeds EUR 5,000 (exceptions: labor and some other cases in the first instance). The amount in litigation also serves as the basis for calculating attorneys' and court fees. Attorneys' fees are regulated by a special schedule. Court costs are incurred by filing an action or an appeal. In general the losing party must pay the winner's court and attorneys' fees.

International treaties and national provisions determine whether Austrian courts are competent to decide on international disputes. The most important sources to determine the competent jurisdiction are **Regulation No. 1215/2012** of the European Parliament and of the EC Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters which entered into force on January 10, 2015, and the **Lugano Convention** on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which regulates the judicial relations among EU and EFTA member states.

## 26.3. Other Courts

**Criminal matters** are decided by district or superior courts in the first instance. Appeals are decided either by superior courts, courts of appeal or the supreme court.

The **Constitutional Court** (*Verfassungsgerichtshof*) reviews the constitutionality of laws and acts, also in respect of human rights and fundamental freedoms. It also decides competence conflicts.

The **Supreme Administrative Court** (*Verwaltungsgerichtshof*) reviews the lawfulness of acts of administrative authorities / administrative courts.

On January 1, 2014, nine **administrative courts** at state level and two at federal level replaced the higher-level government authorities, the Independent Administrative Senates (*UVS*) and more than 120 special authorities run by the federal and state governments. Since then, administrative courts decide on complaints against a decision by an administrative authority. Decisions by the administrative courts may be litigated against by an appeal (*Revision*) to the Supreme Administrative Court or by a complaint to the Constitutional Court.

## 26.4. Arbitration

Due to continuous modernizations of the Austrian arbitration system, Austria is a very suitable venue for international arbitration proceedings.

When parties agree on arbitral proceedings to settle either potential or concrete disputes, they may choose between an **ad-hoc tribunal** (in the absence of an agreement the Civil Procedure Code regulates its establishment) or a **constitutional tribunal**.

Constitutional arbitral tribunals include:

- the **International Arbitral Centre of the Austrian Federal Economic Chamber** (*Internationales Schiedsgericht der Wirtschaftskammer Österreich*) in Vienna (the *Vienna Rules* apply and the proceedings take place in Vienna, unless the parties decide otherwise; all written statements must be filed in the language of the arbitration agreement; at least one party must not be domiciled or habitually reside in Austria); the recommended arbitration clause reads as follows:
  *"All disputes or claims arising out of or in connection with this contract including disputes relating to its validity, breach, termination or nullity shall be finally settled under the Rules of Arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) by one or three arbitrators appointed in accordance with the said Rules."*
- the **Permanent Court of Arbitration of the Vienna Economic Chamber** (for disputes between Austrian residents);
- the **Court of Arbitration of the International Chamber of Commerce** in accordance with the ICC rules; the recommended arbitration clause reads as follows:
  *"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."*

The **arbitration agreement or clause** must clearly designate all disputes which may be brought to court. Therefore clauses such as "*the parties agree to arbitrate in connection with all disputes for any reason whatsoever"* would be invalid. The arbitration

agreement or clause needs to be signed by both parties or documented in a letter, fax message, email or other type of communication exchanged between the parties. An oral agreement would thus be insufficient. In general, all matters concerning pecuniary claims may be subject to arbitration. In some law fields (such as labor law) and in contracts between enterprises and consumers, the scope for arbitration is very limited; in matters such as status, matrimonial and public law as well as adoption and criminal cases arbitration is prohibited.

The **arbitral award** is final. There are no appeals unless the parties have agreed to them. However, it is possible to nullify the award by filing an action in an ordinary court (*Aufhebungsklage*) if some particularly critical errors have occurred. This includes the lack of a valid arbitration agreement, or if one of the parties has not been heard in the proceedings, or if the arbitral tribunal was not properly constituted, or if the arbitrators have exceeded their authority, or if the arbitral proceedings or the award are contrary to Austrian *ordre public* or for other similar important reasons enumerated in the Civil Procedure Code. If the tribunal's evaluation of evidence was unfavorable to the party's own legal position or its *ratio decidendi* was legally faulty (apart from a violation of the *ordre public*), this does not suffice to bring an action for nullification. The action must be brought before an Austrian court within three months after receiving the arbitral award.

Foreign arbitral awards may be enforced in Austria under the condition of reciprocity, as provided by bi- or multilateral agreements. Austria has ratified nearly all important enforcement conventions, such as the Geneva Protocol and the Geneva Convention, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention. Additionally, various bilateral treaties on the **recognition of foreign arbitral awards** exist. The Austrian Federal Economic Chamber has also entered into cooperation agreements with respect to commercial arbitration with the chambers of commerce of certain countries.

# Annex 1: Tax-Treaty Network

Austria has concluded tax treaties with the following countries:

Albania
Algeria
Argentina (terminated)
Armenia
Australia
Azerbaijan
Bahrain
Barbados
Belarus
Belgium
Belize
Bosnia-Herzegovina
Brazil
Bulgaria
Canada
Chile
China
Croatia
Cuba
Cyprus
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Georgia
Germany
Greece
Hongkong
Hungary

India
Indonesia
Iran
Israel
Italy
Japan
Kazakhstan
Kuwait
Kyrgyzstan
Latvia
Libya
Liechtenstein
Lithuania
Luxembourg
Macedonia
Malaysia
Malta
Moldova
Mongolia
Montenegro
Mexico
Morocco
Nepal
Netherlands
New Zealand
Norway
Pakistan
Philippines
Poland
Portugal
Qatar
Republic of Ireland
Romania
Russia

San Marino
Saudi Arabia
Serbia
Singapore
Slovakia
Slovenia
South Africa
South Korea
Spain
Sweden
Switzerland
Syria
Taiwan
Tajikistan
Thailand
Tunisia
Turkey
Turkmenistan
UK
Ukraine
United Arab Emirates
USA
Uzbekistan
Venezuela
Vietnam

Tax Information Exchange Agreements have been concluded with Andorra, Gibraltar, Guernsey, Jersey, Mauritius, Monaco and St. Vincent & the Grenadines.

The purpose of the treaties is to avoid double taxation. For royalties, interest and dividends the credit method, in which the country of residence grants a tax credit for tax paid at source, is generally used. With regard to other income, under some treaties the exemption method is used, in which the country of residence exempts other income from taxation. In a few cases the credit method applies to all types of income. Tax

treaties regularly reduce the rate of withholding taxes on royalties, interest and dividends.

With regard to **inheritance tax** Austria has entered into tax treaties with the following countries:

| | |
|---|---|
| Czech Republic | Netherlands |
| France | Poland |
| Germany (terminated) | Sweden |
| Hungary | Switzerland |
| Liechtenstein | USA |

If no treaty exists, the finance minister may grant unilateral relief from double taxation. In certain cases, there is even a legal right to unilateral relief.