Starting a Business in Austria

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In the interest of improved readability, no distinction has been made between male, female and diverse(m/f/d). All personal designations apply equally to all genders.

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Preface

The objective of this brochure is to assist Austrian and foreign entrepreneurs and investors to establish a business in Austria. This brochure has been designed to provide initial, basic information. We want to supply fundamental information to interested parties as a means of enabling them to conduct informed and target-oriented discussions with lawyers or tax advisors on setting up a company.

The first section presents the different corporate forms of operating a business under Austrian law or, as an alternative, the option of establishing a branch office in Austria. In particular, we will, of course, provide an overview of the rules governing the formation of legal entities and branch offices. The limited liability company in Austria i.e., the Gesellschaft mit beschränkter Haftung (GmbH) is by far the most popular corporate form, both with Austrian entrepreneurs and foreign investors. Due to its great importance, the GmbH will be treated in more detail.

We will also focus on practical issues, for example how to rent business premises or acquire property in Austria, issues relating to property acquisition by foreigners, labour laws, other required permits, and licences as well as tax law. In addition, issues regarding equity and debt financing (granting of loans to Austrian subsidiaries) and foreign exchange law are naturally relevant and will thus be briefly dealt with as well.

It is also possible to launch business operations by acquiring an existing company within the context of an M&A transaction. For this reason, this option will also be dealt with.

The aim of this brochure is to provide readers with an overview. Accordingly, it will inevitably not delve into all relevant details and thus include statements which are general in nature and sometimes vague.

This brochure cannot replace professional, individualized consultations nor can it focus on all decisive, decision-making criteria. Our law firm would be happy to assist you in this regard.

Vienna, December 2023

Prof. Dr. Johannes Reich-Rohrwig, attorney

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Section I: Overview and foundations of starting a business

1. Founding a company or branch office in Austria

1.1. Sole proprietorship

The easiest way to start a business is to establish a "sole proprietorship" (Einzelunternehmen). This means that a natural person starts a business and operates the company as its sole owner, bearing full personal liability.

Any Austrian national or a citizen of an EEA or EU member state or Switzerland can be a sole proprietor. Permission to create a sole proprietorship is also granted to any person with a residence permit for Austria authorising him to carry on a trade. Third-country nationals are only allowed to carry on a trade in Austria if a reciprocal agreement is in effect to grant trade licences between the person's home country and Austria.

More restrictive rules on professional practice apply in some cases to independent professions (e.g., attorneys, tax advisors).

Sole proprietors aiming to carry on a trade regulated by the Austrian Trade Act (Gewerbeordnung – GewO; e.g., in retail, commerce and industry) require a trade license (Gewerbeberechtigung – refer to Section IV. below). Moreover, they are obliged to notify the Austrian tax office of their entrepreneurial activity (see page 11).

The registration of sole proprietorships with the Austrian Commercial Register (Firmenbuch; in Germany: Handelsregister) is only legally mandated if the sole proprietorship generated more than € 700,000 in revenue in each of two consecutive fiscal years or more than € 1 million in a given fiscal year. In any case, sole proprietorships may be voluntarily entered into the Commercial Register, even if these revenue thresholds have not been exceeded.

Sole proprietorships which are not entered into the Commercial Register may determine their income (profits/losses) by means of keeping an income and expenditure account. By contrast, if they are legally required to be formally entered into the Commercial Register, as a rule their accounting must be in accordance with the financial reporting stipulations contained in the Austrian Business Code (Unternehmensgesetzbuch – UGB).

The legal form of a corporation with a minimum capital requirement of just € 1 does not exist in Austria, whereas in Germany there is the possibility to set up the entrepreneurial company with limited liability - Unternehmergesellschaft (haftungsbeschränkt). However, the legally stipulated minimum amount of capital for the sole proprietorship equals € 10,000, of which € 5,000 must be paid up.

In light of the full personal liability of the sole proprietorship for all liabilities arising out of its business operations, the wish frequently arises to limit the liability risk and, for this purpose, to establish a GmbH, a flexible company (FlexKapG - FlexCo), a joint stock company or public limited company (AG), European Company (SE) or a GmbH & Co KG (refer to subsections 1.3 – 1.8 and Section II.)

1.2. Branch office

Foreign entrepreneurs aiming to perform entrepreneurial activities in Austria may establish a branch office (**Zweigniederlassung**)[1] for this purpose. The criteria described above in subsection 1.1 apply analogously to the question of citizenship status as the prerequisite for obtaining a trade licence.

From a legal perspective, a branch office means that the foreign entrepreneur is the direct holder of all rights and obligations arising out of all transactions carried out by its Austrian branch office. Accordingly, all business liabilities incurred by the Austrian branch office result in a personal liability borne by the entrepreneur. If the foreign entrepreneur wants to limit his personal liability, he must establish a subsidiary in Austria e.g., in the legal form of a GmbH, FlexKapG, AG or GmbH & Co KG (refer to subsection 1.3).

The foreign entrepreneur is required to pay taxes on the income of the Austrian branch office. Even if the Austrian branch office is not entered into the Commercial Register (Firmenbuch, in Germany: Handelsregister), the office operated in Austria may constitute a permanent establishment (Betriebsstätte) for tax purposes. Potentially, a room, e-mail address or fax machine used for business purposes and from which business transactions are initiated and processed may suffice to be categorised as a permanent establishment.

1 § 12 Austrian Business Code (UGB).

1.3. Establishing a company or subsidiary in Austria

An Austrian citizen or foreign national is permitted to establish a company in Austria. As mentioned previously, a company in which the entrepreneur himself bears full personal liability (i.e., without any other partners or shareholders) is referred to as a **sole proprietorship**. As an alternative, an option exists of forming a company as the basis for operating the business. At least two partners are required to set up a **partnership** (Personengesellschaft). By contrast, only one individual is needed to establish a corporation or **incorporated company** (Kapitalgesellschaft; e.g., GmbH, FlexKapG, AG).

Foreign businesspersons frequently want to establish a **subsidiary in Austria**, which is legally independent from its parent company. In this case, the foreign parent company does not bear direct and unlimited liability for the subsidiary's liabilities. The legal forms typically selected for such subsidiaries are the **limited liability company** (Gesellschaft mit beschränkter Haftung – GmbH), the **flexible company (FlexKapG)** and the **joint stock company** (Aktiengesellschaft – AG). In this context, it is also important to mention the **European Company** (Societas Europaea - SE).

With regard to partnerships, the **general partnership** (Offene Gesellschaft - OG) and the **limited partnership** (Kommanditgesellschaft - KG) may be established. It is also permissible to set up a **GmbH & Co KG** (a partnership fusing features of the limited liability company and the limited partnership).

Austria is also popular as a location for holding companies. In practice, holding companies are usually incorporated companies (i.e., GmbH, FlexKapG, AG or SE). Under certain circumstances, the preferred legal form may also be a private foundation (Privatstiftung). However, even if private foundations are not allowed to issue shares, there are legal constellations that may make it advantageous to form a private foundation in Austria.

At this point, other corporate forms such as the civil law partnership (Gesellschaft bürgerlichen Rechts), the silent partnership (stille Gesellschaft) and the corporate entities of the cooperative (Genossenschaft) and the legal association (Verein) will not be discussed, because they are of little practical significance to foreign investors in Austria.

1.4. Advantages of the GmbH and FlexKapG compared to the AG

Usually, investors choose the legal form of the limited liability company (GmbH) although other legal forms are available to them.[2] This is because the GmbH combines the benefit of limited shareholder liability, separation of the liabilities of the company from the assets of its shareholders as well as the benefit of fewer formalities compared to the limited liability company or joint stock company (AG). In the case of small and medium-sized GmbHs, there is no statutory requirement to appoint a supervisory board. It is sufficient for a single person to be appointed as the managing director of a GmbH. The managing director may simultaneously be a shareholder. In the case of "small" GmbHs, there is generally no requirement to file audited annual financial statements (unless a legal obligation exists for the company to appoint a supervisory board). Furthermore, the annual financial statements for a small GmbH can be submitted to the Commercial Court without going into detail, but by merely providing a rough breakdown of the balance sheet. There are further simplifications for micro GmbHs. The newly created legal form of the **flexible company (FlexKapG)** offers the same advantages as the GmbH. The main difference is that the obligation to set up a supervisory board already applies to medium-sized companies. In contrast to the GmbH, the FlexKapG involves fewer formalities in transferring the ownership of shares, and the simplified issuing of enterprise value shares makes it more attractive, in particular when it comes to enabling employee participation in the success of the company.

By contrast, the **joint stock company** (Aktiengesellschaft - AG) is also an incorporated company in which the shareholders do not bear personal liability for the debts of the AG. However, at least four persons are required to establish an AG (and this requirement applies throughout the entire life of the company) i.e., at least one management board member and at least three supervisory board members. Accordingly, the number of individuals who must be involved (and who subsequently assume liability for ensuring compliance with due diligence obligations and monitoring the management board) is larger. The supervisory board oversees the management board, which is required to obtain the formal approval of the supervisory board for certain business transactions regulated by law. However, the supervisory board itself does not have the authority to be directly responsible for managing the affairs of the company.

2 Refer to J. Reich-Rohrwig, Das österreichische GmbH-Recht, 2nd edition

Formal procedures for an AG are more demanding than in the case of a GmbH. When it comes to an AG, notarial certification of every shareholder meeting is required, and the annual financial statements must be audited by a chartered accountant. These formalities make AGs a more costly alternative to a GmbH. In addition, the annual financial statements of an AG must be completely entered into the Commercial Register. Accordingly, even in the case of smaller companies, third parties have easier access to the facts as the basis for evaluating the AG's actual financial condition.

Each of these legal forms i.e., the GmbH, FlexKapG and AG may be established by a single individual (single person founding), such that all three of these legal forms of business are very well suited for use as a corporate group company.

1.5. Are there any disadvantages to the GmbH and FlexKapG?

However, in the case of both the limited liability company (GmbH) and the flexible company (FlexKapG), not only the managing directors but also the shareholders are named in the **Commercial Register**, (Firmenbuch; in Germany: Handelsregister). This is a list of registered companies that is publicly available and may be reviewed electronically at any time.

If the entire share capital of a GmbH or FlexKapG is not completely paid up at the time of founding, or if a capital increase or the contributions in kind on the part of shareholders have been overvalued, a **statutory subsidiary liability of every GmbH or FlexKapG shareholder applies** for the unpaid capital contributions or overvalued contributions in kind of the other shareholders. The same exists with regard to prohibited repayments of capital to shareholders. In this regard, the Austrian regulations pertaining to the GmbH and FlexKapG are more stringent towards shareholders who fail to fully pay up their shares or whose contributions in kind are overvalued than with shareholders of an AG. Shareholders of a GmbH or FlexKapG can hold the managing director liable if he is guilty of negligence in issuing directives which fail to exercise reasonable care. Similarly, a legally stipulated liability of the majority GmbH or FlexKapG shareholder applies to both the advance payment of insolvency costs and the timely declaration of insolvency proceedings on the part of an overindebted or insolvent GmbH or FlexKapG if no managing director has been appointed.

1.6. The European Company

The European Company (Societas Europaea or SE[3]) is also an incorporated company with the same limitations of liability applying to a joint stock company (Aktiengesellschaft - AG). However, as a rule, an SE cannot be established as easily as a (normal) AG. This is because establishing an SE generally requires two or more businesses with registered offices in different EU/EEA member states. It would only be possible for a single person to establish an SE if this is done by a European Company serving as the parent company.

One benefit of an SE is the right to vote in designing the organisational structure of the company. Accordingly, the articles of association may set up either a monistic board system (administrative board or management board), which is customary both in the Anglo-Saxon countries and in France, or it may opt for the dualistic system of having a management board and supervisory board corresponding to the AG in Austria and Germany. In the case of the dual system, the shareholders appoint a supervisory board which, in turn, appoints and exercises oversight over the management board. The supervisory board has no authority to manage the company's affairs or to represent it vis-à-vis third parties.

However, on balance, the establishment of a European Company is substantially more complicated and costly. This particularly applies if employee participation plays a role or might play one in the future, e.g., because the SE already owns a business at the time of its formation or acquires a business or equity inter-ests in other companies in the future.

1.7. Partnerships

In practice, the legal forms of partnerships tend to play less of a role for foreign entrepreneurs. In the case of the **general partnership** (Offene Gesellschaft – OG), all the partners bear immediate and unlimited personal liability to the creditors. When it comes to a **limited partnership** (Kommanditgesells-chaft – KG), at least one individual (i.e., the general partner) bears direct, unlimited, and personal liability to the creditors of the partnership. By contrast, the limited partners bear only limited liability. However, a mixed form of a partnership i.e., the GmbH & Co KG, should also be mentioned and is discussed in the following sub-section.

3 Also refer to J. Reich-Rohrwig, Societas Europaea-SE, Die Europäische Aktiengesellschaft (2006).

1.8. GmbH & Co KG

The GmbH & Co KG is a hybrid form combining features of partnerships and corporations. In certain cases, it may provide benefits. This corporate form limits personal liability to the GmbH, which acts as the general partner, while the GmbH's shareholders (investors) act as limited partners. As a result, the investor or investors generally only bear limited liability to creditors of the partnership both in their capacity as shareholders of the general partner GmbH and in their capacity as limited partners.

A GmbH & Co KG may likewise be established by a single person, who may simultaneously serve as its managing director.

The underlying reason why the GmbH & Co KG is sometimes preferred over the GmbH in practice is rooted in tax law. In a typical GmbH & Co KG, in which the general partner GmbH does not have any stake in the capital or profits of the KG and only receives remuneration for its management activities, the limited partners receive all of the profits. Under Austrian tax law, the profits of the limited partner will be taxed at the level of the limited partner, which makes it easier for profits and losses to be allocated between the group parent company and group companies.

If the limited partner is a non-resident for tax purposes, the tax status of the GmbH & Co KG's profits naturally depends on the applicable double taxation convention. Generally, the business profits arising out of the Austrian GmbH & Co KG must also be reported in Austria by the foreign limited partners (limited tax obligation).

1.9. Group taxation of Austrian corporations

Austrian tax law permits the offsetting of profits and losses within Austrian corporate groups if the group companies actually constitute a single group for tax purposes. For this purpose, a group tax agreement is required. In this way, the business results will be offset against each other - not only among the group companies domiciled in Austria, but also among subsidiaries domiciled in the EU or EEA. The separation principle usually applicable to the taxation of incorporated companies is, de facto, disregarded for tax purposes, assuming compliance with the relevant regulations, in particular a minimum three-year period (refer to Section V, subsection 2.1.1., for further details).

1.10. Trade law

As a rule, a **trade licence** (Gewerbeberechtigung) is required to carry business operations in Austria. It is issued by the public authorities (municipal authority or Magistrat, district administrative authority or Bezirkshauptmannschaft). As discussed in greater detail in Section IV, it is not difficult to obtain a trade license for many types of commercial and industrial activities, but it entails a certain amount of administrative red tape. Usually, the only thing required is for the firm to designate a "managing director under trade law" (gewerberechtlichen Geschäftsführer) who is domiciled either in Austria or in an EU/EEA member state, and to inform authorities of the name of this individual. Generally speaking, this managing director under trade law must either simultaneously be appointed to serve as the managing director (CEO) of the business or must formally be on the staff, employed at least half-time and actually work at the company. In the latter case, the managing director under trade law is not required to simultaneously be its managing director under commercial law (handelsrechtlicher Geschäftsführer) which applies in the case of a GmbH, or to be the CEO (in the case of an AG). He must only be "entitled to manage and direct" the business.

However, in several cases, the managing director under trade law must have appropriate "professional qualifications," which he is required to demonstrate to the trade authority by showing relevant educational certificates and proof of having gained practical experience.

Entrepreneurial (commercial) activities can generally be commenced as soon as the trade authority has been notified of the commencement of business operations (e.g., in the case of ordinary trades). In this case, it is not necessary to wait for the trade license to be issued by the trade authority. However, in some cases, the company is not permitted to pursue the trade until the trade authority has reviewed whether all the prerequisites have been met, has verified the "soundness" of the business and its representatives, and has actually issued the trade licence.

Refer to Section IV for more detailed information on this.

1.11. Employment of foreign nationals

If an investor wants to employ foreign nationals in Austria, this will ultimately depend on the employee's home country. Nationals of an EU or EEA member state enjoy the right to free movement and the right to engage in work and pursue

an occupation in other member states, also in Austria. These freedoms are based on the EU Charter of Fundamental Rights.

Employees from countries which do not belong to the EU/EEA generally require both a residence permit and work permit in Austria (although such persons are often allowed to enter Austria as tourists without any visa). Further details are provided in Section III, subsection 3.

1.12. Tax law: notification of the start of the business (business operations, permanent establishment) to the tax authority (tax office)

Under Austrian tax law, each company is required to notify the responsible tax office of its commercial or business activities, including the location where such activities take place i.e., at a branch office or permanent establishment. The entrepreneur subsequently receives a questionnaire that he is required to complete and return to the tax office (which is usually handled for him by the firm's legal or tax advisor). However, tax liability for entrepreneurial activities in Austria arises even when the tax office is not notified.

Like many Western countries, Austria has a well-established and comprehensive tax system. In this regard, the most important taxes worth mentioning are the value added tax (VAT) on goods and services, the tax on profits including the income tax (for natural persons) and the corporate income tax (for corporations). It is also important to mention laws regulating the municipal tax (for wages paid to employees), the insurance tax, electricity tax, natural gas tax and coal levies, motor vehicle tax, the real estate transfer tax as well as duties and fees (refer to Section V for further details).

1.13. Purchasing real estate

If an investor intends to acquire a commercial property, the purchase of real estate is subject to the stipulations contained in the Austrian Real Estate Transfer Tax Act (Grunderwerbssteuergesetz- GrEStG). The real estate transfer tax and registration fee for the Austrian Land Register (Grundbuch) equal 3.5% and 1.1% of the purchase price, respectively (4.6% in total).

However, real estate purchases by foreign nationals who are not EU/EEA citizens are subject to certain restrictions under the Acts on Land Acquisition by Foreign Nationals (Ausländergrunderwerbsgesetz).

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

1.14. Tenancy law

Both Austrians and foreign nationals are permitted to rent office space, production facilities and real estate.

If the tenancy right is registered in the Austrian Land Register (though this is usually not necessary), persons who are not EU/EEA nationals may be subject to restrictions as a result of the Land Transfer Acts of the Austrian federal states.

Austrian tenancy law frequently affords special legal protections to the tenant, in particular protection against termination of the lease without cause. However, this does not apply in all cases. Regarding the many unique features of Austrian tenancy law, it is recommended to involve an experienced Austrian attorney when negotiating and finalising a lease!

1.15. Foreign exchange law

As a rule, Austrian foreign exchange law permits foreign nationals to make investments in Austria. As a consequence, prevailing foreign exchange regulations allow foreign nationals to establish businesses in Austria, make capital contributions or acquire companies and shareholdings in companies.

The exceptions are persons, associations, and corporate entities subject to EU sanctions based on the EU's Common Position 2001/931/CFSP on the application of specific measures to combat terrorism. The relevant persons, groups and organisations defined by the European Council are listed in the Official Journal of the European Union.[4]

Reporting obligations: Certain transactions (e.g. capital investments in establishing or acquiring a company or shares in a company, but also for purchasing real estate) must be reported to the Austrian National Bank (Österreichische Nationalbank) for the purpose of compiling foreign trade statistics. Accordingly, investors are obliged to file a report within one month of the flow of money to Austria. Refer to Section II for more information on acquiring a company or a shareholding (M&A) as well as licensing and approval requirements.

4 Eine Suche nach durch Verordnungen der EU sanktionierte Personen, Unternehmen und Organisationen findet sich unter: https://www.sanctionsmap.eu/

1.16. Money laundering; Register of Beneficial Owners

In connection with international efforts to prevent money laundering, Austria has transposed the EU Money Laundering Directive into its national law through its own domestic legislation. These laws impose obligations to report suspicious transactions to the public authorities.[5] This particularly applies to banks, attorneys, notaries and tax advisors.

Austria implemented the "Beneficial Owners Register Act"[6] based on European guidelines to prevent money laundering and terror financing. Accordingly, all registered partnerships, incorporated companies and foundations are required to enter the "beneficial owner or owners" who hold a direct or indirect stake of more than 25% into the "Register of Beneficial Owners." It is not possible for a shareholder of a partnership or incorporated company domiciled in Austria or the founder of a foundation or trust in the country to remain anonymous (unknown). In the case of trusteeships, the trustor and not the trustee is to be entered into the register. Accordingly, public authorities and third parties can find out who is behind a company or foundation in his capacity as the dominant or controlling partner, shareholder, or foundation founder/beneficiary.

This subsection completes an initial introduction into Austria's "legal landscape."

Subsequently, our objective is to briefly explain the individual legal forms of business available to investors for establishing a business entity. With respect to "sole proprietorship," refer to the previous information provided in subsection 1.1.

2. Legal Forms of Business

2.1. Limited liability company (GmbH)

2.1.1. General information on the GmbH

The limited liability company (Gesellschaft mit beschränkter Haftung – GmbH) is an "incorporated company" with its own separate legal personality[7]. It may be formed by either one or several shareholders. One characteristic of the GmbH is that the shareholders of a GmbH do not, as a rule, bear liability to the GmbH's creditors for the GmbH's liabilities ("separation principle"). At the time the GmbH is formed, it must have a share capital of at least € 10,000, of which € 5,000 must be paid up in cash. The paid-up equity capital may be used for the GmbH's business activities.

2.1.2. Founding of the GmbH

There are several formalities required to establish a GmbH. The GmbH's articles of association must be set out in the form of an Austrian notarial deed. If a foreign investor does not wish to come to Austria, it is sufficient for him to appoint an authorised representative for the purpose of establishing the GmbH in Austria, provided this person has been granted a notarised power of attorney. The power of attorney must cover the fundamental cornerstones of the articles of association, such as the name of the company, its registered office, the purposes for which the company is formed, the authorised share capital and the amount of capital to be contributed by the shareholder.

If a GmbH is formed by two or more shareholders, the articles of association are referred to as a "contract to form a company." If a GmbH is only set up by a single shareholder, the articles are referred to as "declaration on the establishment of a company." As previously mentioned, both documents must be prepared in the form of an Austrian notarial deed.

The contents of the articles of association (whether in the form of this contract or a declaration) must include the corporate name of the GmbH, its registered office, the amount of share capital and the capital contributions of the shareholder(s). In addition, the articles of association usually contain rules on the duration of the company (limited or unlimited period of time), the reporting date for the annual financial statements, and the appointment and powers of representation of the managing director as well as of the authorised signatory (Prokura) who holds a commercial power of attorney. If there are two or more shareholders, the articles of association frequently set forth detailed rules, from pre-emptive rights for company shares, tag-along and drag-along rights to the termination and exclusion of shareholders for good cause. In addition, the articles of association often stipulate the types of transactions and measures for which the managing director requires the formal approval of shareholders or the supervisory board (advisory board).

5 For details on money laundering being treated as a punishable crime, refer to § 165 Austrian Criminal Code (StGB).

6 BGBl I 2017/136.

7 In this regard, refer to J. Reich-Rohrwig, Das österreichische GmbH-Recht, 2nd edition

The simplified founding of a single-person limited company (Ein-Personen-GmbH) is possible without a notarial deed if the following prerequisites are met:

- The only shareholder must be a natural person.
- It must be possible to establish the shareholder's identity beyond all doubt.
- This single shareholder must also be appointed as the sole managing director.
- The declaration of establishment of the GmbH may only include the legally stipulated minimum contents.
- The share capital must equal € 10,000.
- The founding of this type of GmbH must take place electronically.

2.1.3. Share capital: contributions in cash and in kind

The legally stipulated minimum amount of capital ("share capital") equals € 10,000. The capital may be provided through contributions in cash or in kind. Services provided for the purpose of being credited as payment for the share capital are not permitted.

If the share capital is completely or partially paid up as cash contributions, this must be paid into an Austrian bank account of the company. Likewise, a corresponding bank confirmation must be shown upon registration of the GmbH with the Commercial Register. If the capital is completely or predominantly contributed in kind, as a rule the establishment of the GmbH must be reviewed by a court-appointed formation auditor.

Measures desired to circumvent this formation audit (Gründungsprüfung) i.e., concealed contributions in kind, are not permissible in Austria and could potentially give rise to liability on the part of the affected shareholder.

2.1.4. Notification of the newly formed GmbH; entry into the Commercial Register

The founding of a GmbH must be entered into the Commercial Register (Firmenbuch) to ensure its validity. The managing director(s) must register the GmbH in the Commercial Register of the responsible Commercial Court or regional court. The Austrian Firmenbuch corresponds to the German Handelsregister. Notification requires the notarised signatures of all of the GmbH's managing directors. In addition, the managing director(s) must also provide notarised specimen signatures to the court as well as a declaration confirming that both the cash contributions and any contributions in kind are available to them for disposition without restriction. Furthermore, they are required to submit a payment confirmation by the bank.

If authorised signatories (Prokuristen) are appointed, their notarised specimen signatures must also be filed with the Commercial Court.

If a supervisory board is appointed during the founding phase, which is usually not required, the su-pervisory board members and the identity of the chairman and the deputy chairman must be entered into the Commercial Register.

It is not necessary to provide evidence to the Commercial Court of having been granted a trade licence. However, if the GmbH is involved in the banking business, it must obtain prior approval from the Austrian Financial Market Authority (FMA) and submit this approval to the Commercial Court. The same applies in cases where the formation of the GmbH simultaneously entails a merger for reasons of competition law. In this case, antitrust approval by the Austrian Federal Competition Authority must be submitted.

2.1.5. What types of business transactions may a GmbH not conclude?

The legal form of the GmbH may be used for nearly all legal types of business, especially for commerce and trade, industry, retail and wholesale businesses and services.

However, a GmbH is not permitted to be established for pharmacies, pension funds, employee provident funds, the mortgage banking business, private equity funds, political activities, and the insurance business. By contrast, GmbHs may be used for engaging in the insurance brokerage business.

2.1.6. Who is permitted to be a shareholder of a GmbH?

Any natural person or legal person (especially incorporated companies), all registered partnerships (e.g., OG, KG) and comparable foreign companies are entitled to become shareholders of a GmbH. It is not required for a shareholder to be an Austrian citizen or to have his domicile or place of residence in Austria. A GmbH may be established by one shareholder (single person founding). The sole shareholder of the GmbH may also act as the GmbH's (sole) managing director.

If foreign entities participate in the founding of a GmbH in Austria, they must provide evidence of their legal existen-

ce based on a confirmation from the competent court or Chamber of Commerce. If such a confirmation is not issued in German, a certified translation must be provided.

2.1.7. Number of managing directors; who may serve as the GmbH's managing director?

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

Only natural persons may be appointed to serve as managing directors. Legal entities (e.g., AG or GmbH) or partnerships cannot be appointed as managing directors, because that would allow individuals to avoid responsibility (i.e., liability to creditors and public authorities for non-compliance with the law) by hiding behind the cloak of a legal person (legal entity).

The appointed managing director must also be of legal age and be fully legally competent.

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

Nevertheless, in urgent cases (where managing directors needed to represent the GmbH are not present or cannot be reached), the court may, upon application of an interested party (e.g., a business partner of the GmbH, a creditor, employee or a public authority), appoint an "emergency managing director" who may be reached within Austria. To avoid this, it is advisable either to appoint a managing director or at least an authorised signatory whose habitual residence is within Austria.

Shareholders of a GmbH may issue instructions to the managing director(s) by adopting an appropriate resolution. If the objective is to abolish or restrict the right of shareholders to issue instructions to the managing directors, this must be stipulated in the articles of association.

2.1.8. Formation expenses

In connection with the formation of a GmbH, there are costs associated with preparing the articles of association and further documentation (e.g., registration with the Commercial Register, specimen signatures, etc.) and engaging the notary to prepare the notarial deed. (The simplified founding of a single-person GmbH eliminates the requirement of a notarial deed.)

As a rule, court fees for entering the GmbH in the Commercial Register are between € 350 and € 500.

Under the Austrian New Companies Promotion Act (Neugründungs-Förderungsgesetz – NeuFöG), it may be possible to be exempted from court fees[8].

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

2.1.9. How long does it take to establish a GmbH?

As a rule, the time it takes to have a GmbH entered into the Commercial Register is usually one to two weeks, provided the following has been done: the notarial deed of formation of the GmbH has been implemented by the shareholders, the application for registration with the Commercial Register has been signed by the managing director(s) and notarised, the capital contributions have been paid up and all of the required documents are available.

It is possible to issue a notarised power of attorney to establish a GmbH.

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

2.1.10. Liability for transactions conducted before registration of the GmbH

Founders of a GmbH are personally liable according to the law if they conduct business transactions in the name of the GmbH prior to its entry into the Commercial Register (e.g., a lease, commercial transactions, employment contracts etc.). in other words, they bear liability for the GmbH which is in the process of being formed. As a rule, the GmbH may assume responsibility for these transactions conducted on its behalf. However, it is required to notify the business partner (landlord, contractual party, employee) of this within three months after the GmbH has been entered into the Commer-

8 Section V provides information on other forms of preferential treatment stipulated in the New Companies Promotion Act.

cial Register. If the formation of the GmbH is not successful, or the share capital has either been partly or completely lost prior to registering the GmbH in the Commercial Register, the persons who conducted the transactions on behalf of the GmbH - and under some circumstances the shareholders themselves - bear personal responsibility!

2.1.11. Die Organe der GmbH

a) General meeting of shareholders as the supreme governing body of the GmbH

The top decision-making body of the GmbH is the general meeting of shareholders, the most important one being the annual general meeting (AGM). The shareholders adopt resolutions at the general meeting either by being physically present there, or, if allowed by the articles of association, via virtual (electronic) participation of the shareholders. Hybrid meetings, in which shareholders can choose between the two forms of participation, can also be regulated in the articles of association. Resolutions can also be adopted by written consent enabled by means of a circular resolution, by verbal approval, or even tacitly.

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

As the supreme governing body of the GmbH, the general meeting of shareholders is entitled to take action on all matters impacting the company. In particular, it may prescribe rules of procedure for the managing directors, issue binding instructions and adopt resolutions on matters submitted to the annual general meeting for the approval of shareholders by the managing directors. Such an approval resolution has the effect of discharging the managing directors from liability for any potential claims with respect to the transaction in question. A general meeting of shareholders must be held at least once each fiscal year, in each case during the first eight months of the year. If held once per year, this "ordinary general meeting of shareholders" serves as the annual general meeting with the purpose of reviewing and adopting the annual financial statements, allocating the net profits as well as discharging the managing directors and supervisory board (if any).

Further general meetings of shareholders may be held as needed, in particular in the event of unfavourable business results on the part of the GmbH or in case transactions requiring approval are to be implemented. Pursuant to Austrian law, the managing director(s) and the supervisory board are responsible for convening general meetings of shareholders. The articles of association may also grant shareholders the direct right to convene a meeting. The notice period for convening a general meeting of shareholders is eight days. If all shareholders agree, they may hold the general meeting of shareholders immediately (i.e., on an ad hoc basis), waiving all of the convocation formalities, or may adopt resolutions by providing their written consent via a circular resolution. A copy of the resolutions adopted by the shareholders must be immediately forwarded to each shareholder by registered mail without delay.

As the supreme governing body of the GmbH, the general meeting of shareholders also adopts resolutions on amendments to the articles of association, capital increases, capital decreases, mergers, spin-offs, change in the legal form of business and liquidation of the GmbH.

b) Managing director

One or more managing directors must be appointed as the management and representative body of the GmbH.

Managing directors are generally appointed by means of a notarised shareholder resolution.

Shareholders may also be appointed as managing directors if stipulated in the articles of association.

As a rule, managing directors may be dismissed from office at any time without notice. Any claims they may have under employment agreements are unaffected by any such dismissal. The articles of association may place restrictions on the dismissal of managing directors. In such cases, every other shareholder can have a court dismiss the managing director where good cause exists by taking legal action.

Managing directors are permitted to resign from office. A managing director may resign at any time for important reasons. If no compelling reasons exists, he must provide prior notice of at least 14 days.

The authority of the managing director to represent the GmbH is governed primarily by the articles of association. According to existing regulations, managing directors represent the company jointly. However, the company may grant individual power of representation to one or more managing directors. In practice, it is customary to establish "dual control" (four eyes principle) by which the company may only be jointly represented by two or more managing directors or by a managing director together with an authorised signatory.

Duties and liability of the managing directors

The primary task of the managing directors is to manage the company. In doing so, they are required to proceed in a manner that is commercially viable and safeguards the company's interests. The managing directors must comply with all relevant legal regulations. By its nature, given the virtually innumerable number of regulations, this duty entails a significant liability risk for each managing director. Regulations include those pertaining to bookkeeping, financial statements, accounting, internal control systems, tax and trade laws, employee protection rules, environmental regulations, laws against unfair competition and competition law itself, etc. In the interest of the company's creditors, the managing directors must be kept up to date on the GmbH's financial condition at all times, report it to the shareholders and, where applicable, initiate restructuring measures (if such measures have a prospect of success). In the event of insolvency or over-indebtedness, they must initiate insolvency proceedings (bankruptcy, restructuring) with the court.

It is also important to mention that managing directors are obliged to comply with the stipulations contained in criminal law in connection with the management of the GmbH's business, for instance in the context of occupational accidents involving physical injury resulting from negligence or death, or damage to the environment. This applies even if the managing director is guilty of a breach of his duty to monitor events sufficiently or if he or bears organisational culpability. Other relevant criminal law provisions are those relating to embezzlement, fraud and bankruptcy crimes, criminal tax law and the like.

Every Austrian GmbH is required to maintain complete bookkeeping and accounting records and prepare financial statements. The managing directors are obliged to maintain a financial accounting system and internal system of controls in line with the requirements of the business. They must also ensure compliance with tax regulations. A cash register and receipt issuing obligation exists in Austria.

Moreover, managing directors are required to submit monthly, quarterly, and annual tax declarations and pay the required taxes. The managing directors must prepare annual financial statements and a man-agement report within five months after the end of each fiscal year. If the GmbH also serves as a "parent company" (Mutterunternehmen), the GmbH is generally required to prepare consolidated financial statements and a consolidated management report. If the GmbH exceeds a certain size and is classified as a "mid-sized" or "large" incorporated company, or is obliged to have a supervisory board, an annual audit of the financial statements must be carried out by a chartered certified accountant.

As with all other incorporated companies, a GmbH must file its annual financial statements and management report (together with the proposal of the managing directors on the appropriation of profits) with the Commercial Register no later than nine months following the end of the respective fiscal year. The relevant documents are available for public inspection. The filing must be done electronically. Simplified rules apply regarding the annual financial statements to be submitted to the Commercial Court in the case of micro, small and mid-sized limited liability companies. Small GmbHs are only generally required to submit a condensed balance sheet and condensed notes to the annual financial statements. In the case of micro companies, there may be no obligation to prepare notes to the annual financial statements.

The law imposes liability on managing directors when they fail to exercise the due care and diligence of a prudent businessperson (Sorgfalt eines ordentlichen Geschäftsmannes). In particular, this is relevant for unlawful or negligent commercial transactions. To the extent that such liability is required to satisfy the claims of the GmbH's creditors, neither a resolution by the shareholders approving the managing director's action nor any resolution discharging the managing director will absolve him of liability for failing to exercise due care and diligence.

c) Supervisory board

The Austrian Limited Liability Company Act does not generally require the legal form of a GmbH to set up a supervisory board. Such an obligation applies only in certain situations. A duty to establish a supervisory board will typically arise when the annual average number of employees of the GmbH exceeds 300. Other cases in which there is a statutory duty to establish a supervisory board are of lesser import-

ance in practice. A supervisory board or another governing body e.g., an advisory board may also be set up voluntarily.

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

Employee co-determination on the supervisory board
If a works council has been established at the GmbH or if the GmbH serves as a group parent company, the works council or the group works council may appoint employee representatives to serve as members of the supervisory board, subject to the so-called "one-third co-determination" rule. This means that for every two members of the supervisory board appointed by the shareholders, one employee representative may be delegated. If the number of supervisory board members elected by the shareholders is uneven, a further employee representative may be appointed.

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

The role of the supervisory board is to oversee management, review the annual financial statements and prepare reports to the shareholders. Furthermore, the supervisory board must be involved in certain transactions of material importance as defined by the company's statutes or the articles of association. These include the acquisition and sale of equity interests, businesses, real estate, and investments. In such cases, the managing directors must obtain the prior consent of the supervisory board.

In contrast to the supervisory board of an Austrian joint stock company (Aktiengesellschaft), the supervisory board of a GmbH is not authorised to appoint or dismiss the managing directors or to approve the annual financial statements.

The law requires the supervisory board to meet at least four times per fiscal year i.e., at quarterly intervals.

The members of the supervisory board of a GmbH are not required to have their domicile or habitual residence in Austria, nor are they required to be Austrian citizens. There is no statutory rule as to whether it is permitted to hold meetings of the supervisory board abroad. If employee representatives are also on the supervisory board, meetings outside of the country will presumably only be permitted if it is possible and reasonable for the employee representatives to travel there and if the GmbH reimburses them for the related expenses.

2.1.12. Dividends

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

2.1.13. Transactions between the GmbH and shareholders in the corporate group

A GmbH is permitted to enter into transactions with its shareholders or group companies, such as purchase and supply agreements, lease, and licence agreements, etc. However, any such transactions must be based on the "arm's length principle" (at normal market conditions). Violations of these rules may exist, for example, if the GmbH grants loans to its shareholder (group parent) or to an affiliate, or grants guarantees for the benefit of its shareholders or affiliates. From this perspective, even cash pooling within a corporate group may pose a problem.

2.1.14. Shareholder loans to the GmbH

It is entirely permissible for shareholders to grant loans or lines of credits to the GmbH or assume liabilities (e.g., guarantees) for loan or leasing liabilities of the GmbH. In return, the GmbH is also allowed to pay arm's length compensation to its shareholders in exchange for this.

There are no legally defined maximum limits on lending (loan-to-equity ratio), and neither do thin capitalisation rules exist in Austria as in some other countries. However, in extreme cases, the tax authorities may qualify loans as "hidden capital contributions." Accordingly, the interest payable on such loans is not considered to be tax deductible as an operating expense.

In cases where a loan or line of credit is granted during a crisis, i.e., at a point in time at which the GmbH is either overindebted or insolvent or where the parameters exist for a presumption of necessary reorganisation in accordance with the Austrian Reorganisation Act (Unternehmensreorganisationsgesetz - URG), the granting of a loan is generally considered to be a "substitution of equity" subject to the Austrian Equity Substitution Act (Eigenkapitalersatzgesetz – EKEG). This refers to loans granted by shareholders who have at least a 25% stake or exert a dominant or controlling influence (refer to § 5 EKEG for more details). The legal

consequence of an equity-replacing shareholder loan is that the incorporated company is not permitted to pay back the loan or interest to shareholders until the crisis is resolved. In case of insolvency, equity-replacing shareholder loans are not included in the pro rata payments to satisfy the claims of creditors.

The recipient and the managing director will be held personally liable if the repayment ban is violated.

2.2. Flexible company (FlexKapG)

The new type of company i.e., the flexible company (Flexible Kapitalgesellschaft – FlexKapG) was introduced as a new legal form of business in Austria effective 1 January 2024. The explanation of the features of the GmbH largely applies to the FlexKapG. The flexible company has a separate legal personality, just like the GmbH. Furthermore, FlexCapG shareholders are not personally liable to creditors for the liabilities of the company.

2.2.1. Founding of a flexible company

The legally stipulated minimum amount of share capital for a FlexKapG is € 10,000, of which at least € 5,000 must be paid up in cash. One or several natural or legal persons can be shareholders. If the prerequisites for a simplified start-up are not fulfilled, a notarial deed for the declaration of establishment (Errichtungserklärung) or the articles of association is required. The founding is considered to legally take effect when the FlexKapG is entered into the Commercial Register, in which case the managing director is responsible for registering the company.

The descriptions on founding a GmbH (2.1.2), duration of the company (2.1.9), founding expenses (2.1.8), share capital (2.1.3) and registration in the Commercial Register (2.1.4) also apply to the FlexKapG. Similarly, the statements applying to illegal transactions (2.1.5), eligibility to be a shareholder (2.1.6) and transactions concluded before registration in the Commercial Register (2.1.10) coincide with the features of a GmbH.

2.2.2. Organs of the flexible company

a) General meeting of shareholders

The top decision-making body of the FlexKapG is the general meeting of shareholders, which is authorised to appoint as well as to dismiss the managing director and to issue instructions to the management. The shareholders adopt resolutions at the general meeting either by being physically present there, or, if allowed by the articles of association, via virtual (electronic)or hybrid participation of the shareholders. Resolutions can also be adopted by written consent enabled by means of a circular resolution, by verbal approval, or even tacitly. In contrast to the GmbH in which all shareholders must agree to the written resolutions, the articles of association of the FlexKapG can waiver this requirement. If a shareholder has more than one vote, he can also exercise his right to vote in a non-uniform manner (split voting). The ordinary general meeting of shareholders takes place in the first eight months of the fiscal year. It is held for the purpose of reviewing and adopting the annual financial statements, allocating the net profits as well as discharging the managing director and the supervisory board (if there is one).

b) Managing director

The managing directors comprise the management and representative body of the FlexKapG and run the company. Only natural persons can be appointed to serve as the managing director. Generally speaking, all managing directors jointly share the power of representation and management authority. However, the articles of association can grant individual competencies to the managing directors.

c) Supervisory board

It is always possible to voluntarily set up a supervisory board. Similar to the GmbH, a supervisory board must be appointed under certain circumstances, which relate to the amount of share capital and the number of employees or shareholders. In contrast to the GmbH, a medium-sized FlexKapG is already obliged to establish a supervisory board. If a works council has been set up at the FlexKapG or in the corporate group, one-third of the supervisory board members are employee representatives (one third co-determination). The remaining supervisory board members are elected by the general meeting of shareholders.

Otherwise, the information provided about the managing director (2.1.7) and the organs of the GmbH apply to the FlexKapG as well.

2.2.3. Dividends and transactions between shareholders and the company

Dividends may only be distributed based on the net profits shown in the annual financial statements. Any other kind of distribution of assets to shareholders is not permissible. For this reason, business transactions between the FlexKapG and its shareholders are generally allowed, but only if they are conducted based on the arm's length principle.

The information provided about the GmbH with respect to dividends (2.1.12), transactions and loans between the company and shareholders (2.1.13 and 2.1.14) also apply to the FlexKapG.

2.2.4. Share transfers and enterprise value shares

At a GmbH, the transfer of share ownership formally requires a notarial deed, whereas a deed drawn up by a notary or lawyer is sufficient for the legally effective transfer of shares at a FlexKapG.

In addition, the articles of association of a FlexKapG can stipulate the issuing of enterprise value shares (Unternehmenswert-Anteile) to the amount of up to 25% of the share capital. The simple written form suffices for the acceptance and transfer of enterprise value shares. These enterprise value shares are particularly suited to enable employee participation in the company's success due to the related entitlement to share in the balance sheet profits. However, the holders of enterprise value shares are neither allowed to vote nor to voice objections to resolutions. Furthermore, the issuing of enterprise value shares does not have to be immediately and individually entered into the Commercial Register but can take place collectively (list of holdings), but no later than nine months after the balance sheet date. If the founding shareholders dispose of a majority shareholding, the articles of association must also grant tag-along rights to the enterprise value shares.

2.3. Joint stock company (AG)

The third legal form of corporation discussed here is the joint stock company (Aktiengesellschaft - AG). As a legal person, the AG has a separate legal personality, possesses rights and obligations of its own, and its shareholders generally assume no liability for the AG's liabilities.

2.3.1. Founding of an AG

The statutory minimum share capital of an AG is € 70,000 and at least one quarter of it must be paid in at the time the company is established. An AG may be formed by one or more natural persons or legal entities. Accordingly, the one-person formation of an AG is permitted. If the AG is owned by a single shareholder, the shareholder must be identified by name in the Commercial Register.

The supervisory board appointed by the founders of the AG are responsible, in turn, for appointing the AG's initial management board by adopting a resolution.

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

If the AG is not founded exclusively through paid-in cash contributions, but also by contributions in kind (which are permitted), a court-appointed formation auditor must conduct a formation audit. Just as with a GmbH, cash contributions must be paid into a bank account of the AG in the process of formation and a confirmation from the bank must be submitted to the Commercial Court.

Details on the GmbH provided above with reference to the notice of granting a license for banking transactions as well as the allocation of founding expenses and how this is regulated in the articles of association apply analogously to the AG.

The primary organs of the AG are its management board, supervisory board, and the general meeting of shareholders.

2.3.2. Management board

The management board is the representative and management body of the AG. Only natural persons (and not legal persons) may be appointed to serve as members of the management board. They must be of legal age and be fully

legally competent. Members of the management board are not required to hold any shares in the AG.

In managing the business operations of the AG, the management board is not subject to direction by the shareholders, in contrast to the managing directors of a GmbH or FlexKapG. The members of the management board are appointed by the supervisory board for a limited term of office, namely for a maximum period of five years or less. The premature removal of management board members by the supervisory board is one permissible for good cause. The contracts of management board members may be extended after their current terms of office have expired.

2.3.3. Supervisory board

As opposed to a GmbH, a supervisory board is compulsory for every AG. The members of the supervisory board (of whom there must be at least three) are elected by the general meeting of shareholders. The articles of association of the AG may assign shareholders the right to appoint supervisory board members to a certain extent. Elected supervisory board members are appointed for a maximum term of office of about five years. It is permissible to appoint members of the supervisory board for a shorter term, and members may also be reappointed.

Parity-based employee co-determination on the supervisory board applies to an AG as it does to a GmbH. Refer to the information on the GmbH supplied in subsection 2.1.11.c. As is the case with the GmbH, the supervisory board of the AG must meet at least four times annually. In certain cases, the supervisory board is legally obliged to establish an "audit committee" to review the company's annual financial statements. This committee subsequently undertakes a special review of the annual financial statements prepared by the management board. If the supervisory board approves the annual financial statements, they are deemed to have been adopted. If this happens, the general meeting of shareholders is bound by the adopted annual financial statements.

2.3.4. Audit of annual and consolidated financial statements by the auditor

The annual financial statements and management report (and, where applicable, the consolidated financial statements and consolidated management report) for every AG must be audited by an independent chartered accountant. The annual financial statements must be submitted to the Commercial Register no later than nine months after the end of the AG's fiscal year. In the case of a "large AG," the annual financial statements must also be published on the Federal Electronic Announcement and Information Platform (*elektronische Verlautbarungs- und Informationsplattform - EVI*).

2.3.5. General meeting of shareholders

The general meeting of shareholders is the meeting bringing together shareholders. It must be held at least once annually i.e., in the first eight months of the fiscal year for the purpose of presenting the annual financial statements, granting a discharge to the management board and the supervisory board, adopting resolutions on the appropriation of the net profits, and appointing a chartered accountant to audit the financial statements. This meeting is referred to as the "ordinary general meeting of shareholders." If needed, it is also possible to convene additional "extraordinary" general meetings of shareholders. The period of notice is at least 28 days to convene an ordinary general meeting and 21 days for extraordinary general meetings of shareholders. The general meeting of shareholders is chaired by the chairman of the supervisory board.

As is the case with all Austrian incorporated companies, all transactions between the AG and its shareholders must be based on the arm's length principle (at normal market conditions). The information provided above on the financing of a GmbH by shareholders, shareholder loans, interest on these loans and equity substitute loans applies analogously to the AG as well.

2.4. European Company (Societas Europaea – SE)

2.4.1. Founding of the SE[9]

Since 2004, Austrian law has permitted the formation of the legal form of business known as the "European Company" (Societas Europaea – SE). However, it is only possible to establish an SE in certain limited circumstances. This is because the SE may only be formed by "refounding" the company which involves a change of the legal form or when existing companies collaborate to form it. More specifically, this is implemented by means of a merger, conversion of a national AG, founding a holding company or incorporating a subsidiary SE.

9 Refer to J. Reich-Rohrwig, Societas Europaea-SE, Die Europäische Aktiengesellschaft (2006)

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

However, a foreign company which has a subsidiary itself in another EU member state may easily establish an SE in collaboration with its Austrian subsidiary. The same applies if a foreign SE aims to set up a subsidiary SE in Austria.

2.4.2. Legal foundations of the SE

An SE is based primarily on European law (SE Directive). In addition, it is governed by the Austrian SE Act (SE-Gesetz - SEG) and, subsidiarily, Austrian stock corporation law. In terms of its legal character, an SE is a joint stock company. However, in contrast to Austrian stock corporation law, an SE may set up a monistic system featuring an administrative board consisting of managing and non-executive directors. Alternatively, there is the option of resorting to the dual model of the Austrian joint stock company (Aktiengesellschaft- AG), under which the management board is set up as the management and representative body and the supervisory board serves as the controlling and monitoring body. If the SE chooses the "board system," the board members are elected by the general meeting of shareholders. If the SE opts for the dual system, the general meeting of shareholders elects the members of the supervisory board. In turn, the supervisory board is responsible for appointing and dismissing the members of the management board.

From the point of view of tax law, an SE is regarded as a corporate entity subject to the stipulations of the Austrian Corporate Income Tax Act (Körperschaftssteuergesetz).

2.5. General partnership (Offene Gesellschaft – OG)

The general partnership (Offene Gesellschaft – OG, previously offene Handelsgesellschaft), is a type of partnership consisting of at least two physical or legal persons. Each of the partners in an OG bears personal, unlimited, direct, and joint liability to the partnership's creditors for its liabilities. It is not possible to limit the partners' personal liability to the OG's creditors (unless an individual agreement to this effect has been concluded with the creditors).

An OG may undertake any and all commercial, industrial, free-lance, agricultural and silvicultural activities and may be used for any other purpose permitted by law. However, partnerships (OG, KG) are not permitted to engage in certain activities e.g., operating as banks, insurance companies, pension funds and employee provident funds.

In contrast to corporate entities, an OG may be set up without any initial capital. An OG comes into legal existence as soon as it is entered into the Commercial Register. Registration must be carried out by all of the partners, by way of notarised signatures.

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

Under Austrian law, an OG is classified as a form of partnership (and not a corporation). In terms of tax law, an OG is generally deemed a "commercial partnership or co-entrepreneurship" in which the income (profits/losses) is directly assigned to the partners in proportion to their stakes in the company.

The partners themselves have the authority to manage and represent the OG. Individual partners may be excluded from managing and representing the company, either by contract or by court order.

However, the partners of an OG are not required to participate in the partnership's day-to-day operations. It is entirely permissible for them to hire managers, appoint them to serve as authorised signatories or grant them the power of attorney to manage the affairs of the OG.

2.6. Limited partnership (Kommanditgesellschaft – KG)

2.6.1. General remarks

Another form of partnership is that of the Austrian limited partnership (Kommanditgesellschaft - KG). As opposed to an OG, not all of the partners in a KG bear full and unlimited liability for the partnership's liabilities. Instead, it is only required to have (at least) one partner who bears unlimited liability to the partnership's creditors ("general partner"), similar to the OG. The remaining partners have only limited liability to the creditors. They are referred to as limited partners (Kommanditisten).

The liability of each limited partner ends as soon as his limited partnership share (liability contribution) has been fully

paid in. His liability is revived once he has been reimbursed for his contribution.

2.6.2. GmbH & Co KG

The GmbH & Co KG is a hybrid form of a limited partnership. The main feature of this corporate form is that its sole personally liable general partner is a GmbH. The shareholders of the GmbH are simultaneously also limited partners of the KG.

In a typical GmbH & Co KG, the sole management and representative competencies of the KG are vested in the GmbH acting as the general partner. In turn, the GmbH is represented by its managing directors, so that their duty is to manage the affairs of the GmbH & Co KG and thus to fulfil all related obligations. For this reason, the managing directors of the general partner GmbH are liable to the creditors and the limited partners of the GmbH & Co KG for breaches of duty.

The underlying liability concept (premised on the unlimited personal liability of at least one shareholder) is modified in the case of a GmbH & Co KG. For this reason, Austrian lawmakers have put the typical GmbH & Co KG[10] on the same footing as real corporations in many ways. In particular, this relates to the rules on creditor protection as well as those pertaining to annual and consolidated financial statements and audits, the Austrian Reorganisation Act, the duty to file for bankruptcy if applicable and the Austrian Equity Substitution Act. In this regard, see the information provided on the GmbH in subsections 2.1.11.b and 2.1.14.

In practice, the GmbH & Co KG as a legal form of business is usually selected for reasons relating to liability and tax laws.

2.7. Branch offices of foreign companies

2.7.1. General remarks

Foreign legal entities (**sole proprietors, partnerships,** and **incorporated companies**) may establish branch offices in Austria. This not only relate to the freedom of establishment under EU law (also refer to the EU directives on opening branch offices in EU member states). The option to open a branch office is available to every legal entity from third countries (§ 12 Austrian Business Code).

10in which there is no natural person in the role of general partner with the authority to represent the company

Regarding the aspects of the Austrian Act Governing the Employment of Foreign Nationals *(Ausländerbeschäftigungsgesetz - AuslBG)* and the necessity to obtain a residence permit, reference is made to Section III subsection 3 below. Moreover, there are special regulations for branch offices of foreign legal entities contained in the Austrian Stock Corporation Act *(Aktiengesetz)* and the Austrian Limited Liability Company Act *(GmbH-Gesetz)*.

2.7.2. Registration of the branch office in the Austrian Commercial Register

Austrian law requires Austrian branch offices of foreign legal entities to be reported to and registered with the Austrian Commercial Register. Evidence of the valid existence of the foreign legal entity must be proven by means of official documents (including a certified German translation).

2.7.3. Appointment of a permanent representative for the branch office

If the branch office in Austria is established by a foreign joint stock company or a limited liability company in which the law governing their legal status does reflect the laws of an EU or EEA member state, a "permanent representative" (ständigen Vertreter) must be appointed for the Austrian branch office. This person must have his habitual residence in Austria.

In cases of incorporated companies in which the laws governing a legal person do not concur with those of an EU/EEA member state, there is no obligation to appoint such a permanent representative for the branch office, although they do have the right to do so.

The permanent representative is authorised to represent the company both in and out of court. Limitations on the scope of the permanent representative's competencies are invalid vis-à-vis third parties. However, it is permissible to limit his authority to the operation of the branch office. Appointing two or more permanent representatives is possible. However, in this case, they are only authorised to represent the branch office jointly.

2.7.4. No separate legal personality, liability, capital

A branch office does not possess a separate legal personality. All obligations and liabilities are borne by the foreign legal entity (business owner).

In accordance with Austrian law, a branch office is not required to have its own share capital.

2.7.5. Bookkeeping, tax declarations

Branch offices are required to keep separate accounts and to file tax returns in Austria.

Branch offices of foreign incorporated companies are required to submit and disclose their annual financial statements in German to the Austrian Commercial Court. The accounts must be prepared, audited, and disclosed under the laws governing the foreign incorporated company (headquarters). However, this is not necessary if the accounting documents of the branch office can be downloaded in German or English via the Business Registers Interconnection System.

2.7.6. Details on registering the branch office and filing changes with the Commercial Register

If the branch office of a foreign incorporated company is registered with the Commercial Register, a publicly notarised copy of the foreign company's articles of association must be presented to the Austrian court along with a certified translation into German, if required. Similarly, all of the entries and deletions in the foreign Commercial Register must also be entered into the Austrian Commercial Register. In practice, this requirement is often complicated and costly. Accordingly, the perceived benefits of cost-effectiveness in establishing a company in Austria as a "branch office" without the need for any additional capital are strongly offset by the above-mentioned disadvantages.

2.7.7. Does it make sense to establish a limited company (Ltd.) abroad and then set up a branch office of this limited company in Austria?

In many cases, investors (including Austrians) decide to form incorporated companies (limited companies) in countries in which there is no prescribed share capital or much less is required than in Austria. These foreign "limiteds" (Ltd.) frequently establish a branch office in Austria to do business in the country without any minimum stipulated amount of capital. However, the subsequent costs are significantly higher considering that two sets of annual financial statements must be prepared (one for the branch office regulated by Austrian law for submission to the tax office, the other under the law of the country in which the company has its headquarters) as well as two sets of tax returns, etc.

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

2.8. Private foundation

A private foundation is a legal entity (legal person) endowed by one or more founders with assets of at least € 70,000. The purpose of the foundation, which is determined by the founder, must be achieved through the use, management, and investment of the assets. It is by no means required that the purpose of the foundation be non-profit or charitable. Instead, the purpose of the foundation may be self-serving i.e., to bestow financial benefits on one or more beneficiaries.

A private foundation has no owner, i.e., it is not possible to issue any shares in the private foundation. The economic beneficiaries of the private foundation are its designated beneficiaries. Beneficiaries of a private foundation may be natural persons as well as domestic and foreign foundations, partnerships, and corporations. The foundation deed is not required to stipulate who the beneficiaries are. However, a flexible approach to naming the beneficiaries can be taken in the foundation deed.

A private foundation itself is not permitted to operate businesses, but it may hold shares in other companies, especially limited partnerships, limited liability companies and joint stock companies. In this way, it can serve as a quasi-group holding company.

It is compulsory for a private foundation to have two governing bodies i.e., the management board (consisting of at least three persons) and the foundation auditor. A supervisory board must be established if the number of employees of a private foundation or its equity interest (group entities) exceeds 300.

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

An Austrian private foundation may not only be used as an (intermediate) holding company and as a tool to manage a business. It can also serve to settle questions of company succession between parents and their descendants.

Broadly speaking, the tax implications of a private foundation for Austrian founders and beneficiaries are roughly similar to corporations. However, foundations involving foreign connections should carefully analyse the tax implications.

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

1. General remarks

Companies (businesses, corporate divisions) may be acquired as a whole by acquiring all of its assets (so-called asset deals) or, in economic terms, by acquiring all of the shares in the business when this business belongs to a company or cooperative (so-called share deals).

The main advantage of an asset deal is that the buyer can more effectively protect himself from unknown or concealed liabilities or liability risks than acquiring the business by purchasing shares. In contrast, the main advantage of a share deal is the ability to more easily maintain the existing contractual relationships of the acquired company. This is because selling all of the company's shares does not usually entitle the contractual partners to prematurely terminate contracts unless there are a) so-called change-of-control clauses in place or b) unless, exceptionally, there is good cause making it unreasonable for the contractual partner to preserve the contractual relationships (continuing obligations).

2. Asset deals

In cases of asset deals[11], the buyer separately acquires the individual assets of a business. Under Austrian law, this is known as "singular succession." This can mainly cause problems in transferring contractual relationships to the buyer. As a rule, the approval of the contractual parties is required to validly transfer the contract in accordance with general principles of Austrian civil law.

With regard to tenancy law, both an asset deal and a share deal entitle the landlord, under certain circumstances, to raise the previous rates for the rented premises to current market levels (only for tenancies in "old buildings")[12].

Under Austrian law, buyers may assume liability for liabilities belonging to the business being sold. Liability regulations are found in various statutes (Austrian Business Code - UGB, Austrian Civil Code - ABGB, Austrian General Social Insurance Act - ASVG, Austrian Federal Tax Code - BAO, and the tax codes of the Austrian federal states). Some of these liabilities are mandatory, whereas in other cases they may be excluded based on an agreement between the buyer and seller and registration in the Commercial Register.

3. Share deals

In the case of an asset deal (purchase of shares in a general partnership (OG), limited partnership (KG), a limited liability company (GmbH) or cooperative, stock purchases) the buyer acquires shares in the "legal entity," i.e., in the firm that operates the business. If all or the majority of the shares are acquired, the buyer is able to manage or control the business in the future.

If a controlling interest is acquired in a publicly listed company (AG), the Austrian Takeover Act (Übernahmegesetz) provides specific rules governing the mandatory tender offer to all the company's shareholders (refer to subsection 4 below).

The buyer himself, with the support of advisors, usually conducts a due diligence review in light of the fact that he is usually interested in more closely scrutinising the object of sale. Within the context of this review, the legal, tax, commercial, business, technical and environmental aspects of the object of sale are examined. The legal situation in this respect is complex. The buyer has claims per se based on warranties, violations of disclosure obligations, right to avoidance on grounds of error and claims for damages if the

11 On issues relating to asset and share deals, see J. Reich-Rohrwig, Unternehmens- und Anteilsübertragung aus zivil- und gesellschaftsrechtlicher Sicht in Unternehmensnachfolge, published by Bank Austria (1999) 10 et seq.
J. Reich-Rohrwig, Rechtsfragen beim Unternehmenskauf und Beteiligungserwerb in Hanzel/Wunderbaldinger (eds), Mergers & Acquisitions in Austria (1993) 243 et seq.
J. Reich-Rohrwig, Gewährleistungsfragen beim Anteilskauf, ecolex 1991, 89 et seq., jointly with Dr. Thiery
J. Reich-Rohrwig, Haftung des Käufers einer Beteiligung in Bertl/ Mandl/ Mandl/Ruppe (eds), Kauf und Verkauf von Unternehmungen (1992) 91 et seq.
J. Reich-Rohrwig, Auslegung und Reichweite von Bilanzgarantien, in Althuber/Schopper (eds), Handbuch Unternehmenskauf (2015) 391 et seq.
J. Reich-Rohrwig, M&A: Auslegung von Kaufpreisanpassungs-, Earn-out- und Besserungsklauseln, Festschrift für F. Rödler (2010) 763 et seq.; Grossmayer/Hanslik, Big Deal? M&A Verträge richtig verhandeln! (2013)

12 On this point, see J. Reich-Rohrwig, Mietzinserhöhung bei Geschäftsraum-Hauptmiete (1994).

acquired company does not fulfil the stipulated or presumed properties or if the buyer was misled. However, buyer rights are usually modified, restricted, or excluded in the share purchase agreement. For this reason, it is advisable to consult an experienced, reputable law firm when conducting contract negotiations and any due diligence review.

4. Takeover law

Under the Austrian Takeover Act (Übernahmegesetz - ÜbG), a party aiming to acquire a direct or indirect "controlling interest" in a publicly listed, joint stock company (target company) is required to notify the Austrian Takeover Commission of its intention to do so without delay and to launch a public "mandatory tender offer". There are two statutory lower limits on such offers. It may not be lower than either the average share price over the previous six months nor the highest price paid by the bidder for shares in the target company within the previous twelve months.
With respect to the definition of "controlling interest," it is fundamentally considered to exist if a stake exceeding 30% of the voting capital in a company is acquired. In this case, the buyer is obliged to make a public mandatory offer. However, there are exceptions to this obligation, namely,

- If the more than 30% stake does not lead to a controlling interest because, for example, another shareholder has an even larger shareholding (e.g., 51%) of the voting shares,
- There is a formal change of control, but this is not of material significance because the transfer occurs within a corporate group, or
- The acquisition is made for restructuring purposes.

A "group of legal entities acting in concert with each other" (i.e., syndicate partners) acquiring a controlling interest is also obliged to make a mandatory tender offer under the Austrian Takeover Act. Major restructuring efforts within such groups can also trigger the obligation to make a public tender offer.

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

In line with the EU Takeover Bids Directive, the Austrian Takeover Act imposes detailed obligations on the bidder but also stipulates the duties of the management and supervisory boards of the target company during the takeover process.

The bidder usually hires a reputable law firm in takeover proceedings[13] in light of the complexity of the bidder's obligations and the rules to be complied with under the Austrian Takeover Act (especially confidentiality and disclosure obligations to prevent market distortions and the abuse of insider information). There is a statutory requirement for the bidder and the target company to consult an expert (chartered accountant or bank) on takeover procedures.

5. Merger control

5.1. Austria

As in most EU member states and the EU itself, the acquisition of businesses and equity interests in Austria is subject to merger control under competition law. The objective of merger control is to prevent a market-dominating position from arising or the further expansion of an existing dominance as a result of the merger. When it comes to "media mergers," another goal is to preserve media plurality.

Based on relevant laws, "merger control" applies inter alia to both the acquisition of businesses and of shares (stock) constituting a least 25% of the capital of the target company, if the acquired or target company and the buyer exceed specified revenue thresholds. If other shareholders retain at least a 25% stake in the target company, their revenue is also taken into consideration. The decisive factor in these cases is the revenue in the previous fiscal year. Revenue of affiliated companies is aggregated.

Under Austrian merger control law, the following **revenue thresholds** have to be cumulatively met for a merger to trigger "reporting obligations" pursuant to § 9 (1) Federal Competition Act (*Kartellgesetz - KartG*):

- Revenue of all companies involved worldwide surpassed € 300 million in the previous fiscal year,
- Revenue of all companies involved in Austria totalled more than € 30 million,

13 On this point, refer to Peter Huber (ed.), Kommentar zum Übernahmegesetz (2017).

- of which two affiliates had revenue of over € 1 million each, and
- The global revenue of at least two of the companies amounted to more than € 5 million

The exception is mergers where the companies involved achieved the following revenue in the last fiscal year prior to the merger:

1. Only one of the companies involved in Austria generated revenue of more than € 5 million and other companies did not achieve more than € 30 million in global revenue (§ 9 (2) of the Federal Competition Act).
2. Furthermore, mergers are subject to the reporting obligation if, in the last fiscal year, the companies involved:
   - generated total revenue of more than € 300 million,
   - achieved revenue exceeding € 15 million in Austria,
   - the value of the consideration (e.g., purchase price) for the merger is more than € 200 million and
   - the company being acquired carries out a substantial part of its business activities in Austria (§ 9 (4) Federal Competition Act.

Under § 9 (3) of the Federal Competition Act, lower revenue thresholds apply to **media companies** and **media services** (e.g., ancillary publishing companies, news agencies) and to **ancillary businesses in the media sector** (e.g., printing companies, advertising agencies, film distribution companies).

If the above-mentioned revenue thresholds under § 9 (1) of the Federal Competition Act are exceeded, the merger must be reported to the **Austrian Federal Competition Authority** (Bundeswettbewerbsbehörde). Within four weeks from the date of registration, the Federal Competition Authority and the Federal artel Prosecutor may apply to the Competition Court (Kartellgericht) for permission to review the merger.

The share or asset deal may not be formally concluded prior to the approval of the merger.

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

5.2. Merger control in the European Union – EU Merger Regulation (MR)

If a **merger has "a community dimension"** within the **EU** or **EEA**, the merger is covered by merger control rules stipulated in the **EU Merger Regulation**[14] instead of Austrian merger control (and any applicable merger control of other EU member states). The authority with jurisdiction over such proceed-ings is the **European Commission** in Brussels.

In addition to other differences which will not be further explained here, the Merger Regulation (MR) mainly defines significantly higher revenue thresholds before it is assumed that the merger attains a "community dimension." There are two types of threshold values, and merger control under the MR apply if the thresholds of only one of the two alternatives is exceeded.

However, **no** jurisdiction is vested in the European Commission under the EU regulations in both types of threshold values if the companies involved in the merger each derive more than two-thirds of their total EU-wide revenue within one and the same member state.

The MR stipulates the following two thresholds:

Threshold 1:

a. Total global revenue of all entities involved in the merger equals more than € 5 billion, and
b. Total EU revenue of at least two entities involved in the merger equals more than € 250 million.

Threshold 2:

a. The combined global revenue of all entities involved in the merger equals more than € 2.5 billion,
b. Total revenue of all of the entities involved in the merger in at least three member states exceeds € 100 million,
c. In each of at least three of the member states covered by subsection b, the total revenue of each of at least two entities involved in the merger is more than € 25 million, and
d. Total EU-wide revenue of each of at least two entities involved in the merger exceeds € 100 million.

As noted, under the MR, the European Commission in Brussels has jurisdiction over European merger applications. However, under certain circumstances, the **European Commission** may delegate merger applications to the national competition authorities.

14 Council Regulation (EC) No. 139/2004 of 20 January 2004, OJ L 24 dated 29 January 2004.

6. Approval requirements for acquiring equity interests in banks, stock exchanges etc.

Special legislation imposes further requirements on obtaining approval if a party purchasing or selling shares in **banks** meets, exceeds or falls short of certain equity ratios (10%, 20%, 30% or 50% of the bank's capital) in accordance with § 20 of the Austrian Banking Act (*Bankwesengesetz - BWG*), or when Austrian banks acquire equity interests in banking institutions in non-EU member states (§ 21 of the Austrian Banking Act).

The thresholds applicable in the case of *stock exchange operating companies* are 10%, 20%, 33% or 50% of the voting rights or capital in the stock exchange company (§ 58 Austrian Stock Exchange Act – *Börsegesetz - BörseG*).

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

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

Additional approval and notification obligations exist with respect to private **radio and television companies** under § 15b and § 22 of the Austrian Private Radio Broadcasting (*Privatradiogesetz - PrR-G*) and pursuant to §§ 10, 25 and 25a of the Austrian Audiovisual Media Services Act (*Audivisuelle Mediendienste – Gesetz- AMD-G*).

7. Obligations of third-country nationals to obtain approval for acquisitions in sensitive sectors

7.1. Acquisition of companies if public security and public order could be put at risk

Following the example of Germany, the Austrian Investment Control Act (Investitionskontrollgesetz – InvKG) contains special rules regulating the acquisition of companies and stakes in companies by "foreign persons or entities" in any sector which is important to public security and public order. These persons (natural or legal) are neither nationals of the EU nor nationals of Switzerland, Liechtenstein, Norway, or Iceland nor do they have their headquarters or head office in these countries.

Accordingly, the direct or indirect acquisition of companies, significant stakes in companies or substantial proportion of voting shares or the acquisition of a controlling stake in companies may, under certain circumstances, be subject to approval by the Federal Ministry for Digital and Economic Affairs.

The approval requirement covers foreign direct investments in Austrian companies ("target companies") except for those with fewer than ten employees or whose annual revenue or balance sheet total is less than € 2 million. The acquisition process is subject to official approval if the target company operates in a business area in which public security and public order could be endangered, including crisis preparedness and public services. Furthermore, the requirement to obtain authorisation of the sale also encompasses the acquisition of a significant share of voting rights in target companies operating in "particularly sensitive areas" (e.g., defence goods and technologies, water, critical energy, or digital infrastructure, etc.).

The acquisition of an equity interest is subject to official approval if the buyer obtains or exceeds at least 25% or 50% of the voting rights. Moreover, in "particularly sensitive areas," acquiring 10% of the voting rights is already considered to be of material importance.

If the foreign person does not comply with the demand by the Federal Minister of Digital and Economic Affairs to submit an application for approval, the federal minister has the right to formally make a decision to initiate the approval procedure.

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

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

7.3. Application for approval

The application for approval to the Federal Ministry for Digital and Economic Affairs must describe, among other things, the business activities of the entity and the planned acquisition process. An application for approval must be submitted prior to the conclusion of the binding contractual agreement on the acquisition. In the case of a public tender offer, the application is to be submitted immediately after the announcement of the intention to submit such an offer. If the acquiring person believes the acquisition process does not require official approval, he can apply for the issuing of a no-objection certificate (Unbedenklichkeitsbescheinigung).

The Federal Minister for Digital and Economic Affairs must issue a decision within one month from the date of receiving the application. This states either that the minister has no objections to the acquisition or that a more detailed review procedure is to be carried out. In the latter case, the acquisition must either be approved within two months, or, if there is a concern that it poses serious risks to substantial interests of "public security and public order," must approve it subject to certain conditions being fulfilled, or c) reject the application if the conditions do not suffice to eliminate the threat.

7.4. Legal consequences

Acquisitions concluded despite the lack of official approval, violations of stipulated conditions or approval obtained through fraud i.e., making false or incomplete statements can be sanctioned by a court of law. The scope of penalties include imprisonment of up to three years. When the crime is committed to generate commercial gain, by means of forgeries of official documents and data or by another falsified piece of evidence, the punishment can be imprisonment of up to six months or fines of up to 360 daily rates. A breach of the obligation to obtain official approval also results in the acquisition in question being invalidated.

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

Section III: Employment law, work permits for foreign nationals

1. Foundations of employment law

Employment (labour) law is the special area of private law for employed wage or salary earners i.e., employees. Their personal dependence and economic inferiority vis-à-vis employers are relativised by many special employment regulations. Traditionally, employment law is broken down into individual and collective employment law. Individual employment law refers to the bilateral relationship of the parties to an employment agreement (employer and employee) i.e., the employment contract (contractual law). Collective employment law covers, in particular, the law pertaining to collective agreements and works constitutions.

2. The employment contract

As a general principle, employer and employee may negotiate the contents of the employment agreement on an individual contractual basis. However, the applicable regulations and collective agreements often prescribe minimum standards (e.g., in the case of minimum wage, overtime pay, maximum permitted working hours, annual leave) that may not be undermined to the detriment of the employee.

As a general principle, no prescribed legal form for concluding an employment contract exists. Such an agreement may be concluded orally, in writing or implicitly on the basis of conclusive actions. If a written contract has not been concluded, a notice of employment (Dienstzettel) must be issued. A notice of employment is a confirmation of the essential rights and obligations arising out of the employment contract. The notice of employment must comply with the minimum requirements contained in § 2 (2) Employment Contract Law Adaptation Act (Arbeitsvertragsrecht-Anpassungsgesetz – AVRAG).

3. Foreign employees

3.1. General remarks

For reasons of labour market policy, employing (non-EU) nationals in Austria is subject to various restrictions and controls under the Austrian Act Governing the Employment of Foreign Nationals (*Ausländerbeschäftigungsgesetz - AuslBG*). As a basic principle, all persons are deemed **foreign nationals** if they do not possess Austrian citizenship.

An entrepreneur in Austria may only employ a foreign national if a **work permit** (*Beschäftsigungsbewilligung*) or **Permission of Posting** (*Entsendebewillung*) has been issued for that employee or if a **confirmation of notification** (*Anzeigebestätigung*) or an **EU Confirmation of Posting** (for foreign nationals posted by a company; also refer to subsection 3.4) has been issued, or if the employment holds a valid **work permit** or **exemption certificate** (*Befreiungsschein*). The public authority in which jurisdiction is vested is the regional office of the Austrian Public Employment Service (*Arbeitsmarktservice – AMS*).

The exception to the Austrian Act Governing the Employment of Foreign Nationals is the employment of EU/EEA citizens.

In addition, the following types of individuals, in particular, are exempted from the Austrian Act Governing the Employment of Foreign Nationals: refugees, spouses and children of Austrians or EU/EEA citizens, of special senior executives or of employees in diplomatic/consular missions or foreign nationals to whom the status of a so-called **"beneficiary of subsidiary protection"** (*subsidiär Schutzberechtigten*) has been granted.

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

3.2. Key workers and regular seasonal workers

A special authorisation option for work permits has been created for **key workers** (*Schlüsselkräfte*; maximum of one year) who have a particular education which is in demand on the Austrian labour market or who possess special knowledge, skills, and experience. Work permits are also facilitated for skilled workers in shortage occupations (*Mangelberufe*) and graduates of Austrian universities as well as family members, not to mention regular seasonal workers (*Stammmitarbeiter*) with an elementary knowledge of German, who were employed as seasonal workers in Austria in previous years and who were given the prospect of obtaining a permanent employment contract.

3.3. Red-White-Red – Card

The introduction of the **Red-White-Red – Card (Rot-Weiß-Rot – Karte)** in the year 2011 created a new, flexible system of immigration in Austria. The aim of this measure is to enable qualified workers from outside the EU, as well as their family members, to migrate to Austria on a permanent basis, pursuant to criteria that apply both in individual respects and in line with labour market policy. The Red-White-Red – Card is issued for a period of 24 months and grants authorisation for temporary residence and employment with a specified employer. Very highly qualified workers, skilled workers in shortage occupations, other key workers, graduates of an Austrian university, self-employed key workers and regular seasonal workers can apply for the Red-White-Red – Card. The most important criteria governing the issuance of a Red-White-Red – Card are qualifications, professional experience, age, language skills, a firm job offer and a particular minimum level of compensation that depends on the qualifications of the worker.

For skilled workers in shortage occupations, the minimum salary under law, regulation or collective agreement must be paid. Other key workers must earn a minimum gross salary of 50% of the monthly maximum contribution basis for the Austrian social insurance system ASVG (€ 5,850 monthly since 1 January 2023) plus bonus payments. University graduates must earn a monthly gross salary that is customary in the local market for Austrian graduates with comparable employment and professional experience.

The authority issues two types of Red-White-Red – Cards. Firstly, there is the **normal Red-White-Red – Card**, which constitutes authorisation to reside in Austria and be employed with a particular employer.

Secondly, an additional option is to obtain a **Red-White-Red – Card Plus (Rot-Weiß-Rot – Karte Plus)** which conveys residence authorisation and unrestricted access to the labour market. The "Red-White-Red – Card Plus" is issued to the holder of a Red-White-Red – Card if that person was em-

ployed for at least 21 months during the previous 24-month period subject to the applicable conditions for issuing the card. It is also granted for a period of one year (for three additional years if certain prerequisites are met) to family members of holders of a Red-White-Red – Card, an EU Blue Card or family members of foreign nationals who are already permanent residents. This follows review conducted by the Austrian Public Employment Service (Arbeitsmarktservice - AMS) and the responsible Immigration Authority for foreign nationals (i.e., district administrative authority/municipal district office; in Vienna: Municipal Department 35).

3.4. Posting of third-country nationals to Austria

Foreign employees employed by a foreign employer in a third country which lacks an office within Austria generally require a **work permit** (*Beschäftigungsbewilligung*). If the work rendered does not last longer than six months, the third-country nationals require **permission of posting** (also known as secondment; *Entsendebewilligung*) which may be issued for a maximum period of four months. In the construction sector, employees always require a work permit.

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

4. Remuneration (salary, wages)

4.1. Minimum wage levels

The amount of remuneration paid to the employee by the employer is primarily regulated in the employment contract. There is no statutory minimum wage in Austria. However, there are collective wage agreements which provide for a "minimum wage level" in many sectors and which employers must meet or exceed due to the relatively compulsory effects of these collective agreements.

One special feature of working in Austria is the fact that, for tax optimisation reasons, salaries are generally paid out in fourteen instalments (monthly – i.e., twelve times per year, plus holiday pay (*Urlaubsgeld*) and the Christmas bonus (*Weihnachtsgeld*).

4.2. Prevention of wage dumping (underpayment)

The Austrian Anti-Wage and Social Dumping Act (*Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG*) applies to all employment relationships based on a private law contract as well as for the employment of employees in line with the Temporary Employment Act (*Arbeitskräfteüberlassungsgesetz – AÜG*) and employment relationships based on the Home Labour Act 1960 (*Heimarbeitsgesetz*). Paying less than the legally stipulated minimum wages or wages mandated by collective labour agreements is punishable by high administrative penalties.

The Austrian Anti-Wage and Social Dumping Act also ensures that valid legal minimum wage levels or wages stipulated in collective agreements apply to employees who are temporarily posted or seconded to Austria (no distinction is made here between EU and EEA member states or third countries).

The employment of workers regardless of their nationality, who are posted to Austria from a company whose operating headquarters are in an EU or EEA member state or Switzerland with the purpose of their working in Austria must notify the Central Coordination Office for the Monitoring of Illegal Employment (*Zentrale Koordinationsstelle für die Kontrolle illegaler Arbeitnehmerbeschäftigung – ZKO*) of the Federal Ministry of Finance before the employee is posted to Austria for temporary work. This notification must take place electronically via the electronic forms of the Ministry of Finance[15]. Different ZKO forms must be filled out depending on whether the person set to work in Austria involves a case of posting or cross-border hiring out of workers. The true economic content and not the outer appearance of the situation is the decisive factor on assessing whether a particular case involves posting or cross-border hiring out of workers.

The cross-border hiring out of workers from third countries must comply with the stipulations contained in § 16 Act on the Hiring Out of Workers (*Arbeitskräfteüberlassungsgesetz – AÜG*). In addition to the work permit required by the Austrian Act Governing the Employment of Foreign Nationals, the employer is obliged to obtain further approval. § 10 AÜG ensures that workers hired out across borders receive the same remuneration as regulated by the collective labour ag-

15 Form ZKO 3 can be currently downloaded at: https://www4.formularservice.gv.at/formularserver/user/formular.aspx?pid=fe66cedb506e495c94b3e826701443e5&pn=B461f73088ab946fe9bd1d1cce573d81a

reement and are subject to the same rules on working hours as stipulated in the collective agreement for this company.

In addition to the obligation to keep the notification of posting on file (also electronically), the employer is also obliged to keep the documents on the registration of the posted workers with the health insurance fund (social insurance documents A1 or E101) on file provided that there is no requirement to pay social insurance contributions for the workers in Austria. Furthermore, the employers are required to keep wage documentation on file (in German) at the place of work/deployment in Austria for the duration of their deployment in Austria. In turn, this serves as the basis for determining the wages due to the workers in accordance with Austrian law. The documents include the employment contract or notice of employment, pay slips, proof of the payment of wages and bank transfer slips, wage records, records of working hours, and documents on wage classification. For more information, refer to www.entsendeplatfform.at.

Violating the provisions of the Austrian Anti-Wage and Social Dumping Act, especially regulations on notification and keeping necessary records on file for inspection, is considered to be an administrative offence regardless of the number of employees involved and can lead to severe administrative penalties i.e., a fine of up to € 20,000.

4.3. Employees from the new EU member states

Employees from Poland, Czechia, Hungary, Slovakia, and Slovenia have enjoyed free access to the Austrian labour market since 1 May 2011, whereas employees from Bulgaria and Romania have been able to exercise this right since 1 January 2014 and Croatian employees since 1 July 2020.

5. Working time

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

A collective agreement may permit a daily normal working time of ten hours, but it is generally not possible to extend the normal weekly working hours. If normal working hours are exceeded, this will result in a claim for overtime pay, which is generally 50% of the base remuneration.

However, Austrian working time law provides a host of options for scheduling normal working time differently than envisaged by law. This enables employers to adapt working time to the real-life needs of day-to-day business operations, which deviate from the inflexible limits mentioned above. In turn, this approach avoids overtime which is subject to mandatory overtime pay (e.g., averaging or rolling calculation period). Collective agreements typically contain detailed rules on different ways to schedule working time. For example, the collective agreement for the retail sector, the collective agreement for industry, the collective agreement for commercial trades and the IT collective agreement allow for the option of aggregating normal weekly working hours and averaging it out over a longer reference period.

The absolute maximum limits on working time are:

- Daily working hours: 10 hours
- Weekly working hours: 50 hours

However, there are further restrictions that apply within these upper limits. Working time may (only) be extended by five overtime hours per week if there is an increased need for staff so that the limit of 48 weekly working hours is not exceeded in a 17-week reference period. However, not more than 20 overtime hours are permitted per week. Employees are allowed to reject overtime without giving any reason if the permissible weekly working time of 50 hours or daily working time of ten hours is exceeded.

If more than 48 hours of work are permitted within a single week, the average weekly working time within a reference period of 17 weeks is not allowed to exceed 48 hours in line with European law. The collective labour agreement can allow for an extension of the reference period to up to 52 weeks.

6. Annual leave

Employees are entitled to uninterrupted paid leave during the annual leave year. The period of annual leave is 30 business days (Monday to Saturday) and increases to 36 business days after 25 years of service. Entitlement to annual leave expires two years after the end of the annual leave year in which it accrued.

7. Termination of the employment contract (notice, dismissal)

7.1. Termination of employment by notice

The notice of termination is the unilateral, orderly dissolution of an employment relationship which provides due and proper notice and complies with notice periods and deadlines. As a rule, no particular reasons for terminating the employment contract have to be provided. Special rules apply to certain groups of employees, such as disabled persons afforded special recognition, staff representatives, pregnant women and employees who have taken part-time parental leave.

7.2. Challenging a notice of termination

However, it should not be overlooked that, within the context of the general protections against unfair termination of employment laid down in § 105 of the Austrian Labour Constitution Act (*Arbeitsverfassungsgesetz – ArbVG*), an employer bears the onerous duty of stating the precise justifications if the employment relationship with an employee is terminated and the employee contests the notice of termination on grounds of incompatibility with social policy, if in fact the works council has not expressly consented to the notice of termination. This applies to businesses with at least five employees on a permanent basis, even if no works council has been appointed.

The reasons used to justify the notice of termination by the employer include **grounds which relate specifically to the person being terminated**, when such aspects are disruptive to operating the business (e.g., conduct contrary to instructions given, incompatibility, lack of punctuality, etc.) or **organisational reasons** (e.g., changes in the economic environment; restructuring measures; shutdown of business units or entire departments, relocating headquarters, etc.) leading to a loss of jobs. All in all, it is important to note that Austrian employment law is significantly more liberal than many other European labour laws (e.g., Germany, France, Italy) with respect to employers terminating employment contracts.

7.3. Social plan for the benefit of employees

If a significant change in business (e.g., in connection with staff redundancies) arises entailing material disadvantages to all or significant parts of the staff, "measures to prevent, eliminate or attenuate such consequences may be governed by works council agreement" in companies employing at least 20 staff members on a permanent basis. This is stipulated by § 109 (3) of the Austrian Labour Constitution Act. If no agreement is reached between the owner of the business and the works council with respect to implementing, changing, or suspending a works agreement ("social plan"), the mediation office (Schlichtungsstelle) will issue a ruling upon application of one of the parties to the dispute. This means that if certain prerequisites are fulfilled, the works council can compel the implementation of a social plan.

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

Similar to any long-term contractual relationship, an employment agreement may be terminated not only by an ordinary notice of termination, expiry of its fixed term or amicably based on a termination by mutual agreement, but prematurely, with immediate effect, for good cause. If the employer terminates the employment for good cause, this is termed as a dismissal (without notice). If this is done by the employee, it is referred to as a (premature) resignation. A good reason leading to dismissal or resignation is always when one party to the employment contract cannot be reasonably expected to adhere to the stipulations of the contract up until expiration of the notice period.

8. Difference between salaried employees and wage earners

Austrian employment law continues to distinguish between salaried employees and wage earners. In accordance with the Federal Salaried Employees Act (*Angestelltengeset - AngG*), salaried employees are employees rendering commercial services, higher non-commercial services, or office work for a businessman or equally entrepreneur. Any person who does not fulfil these conditions is considered a wage earner.

This distinction between salaried employees and wage earners is particularly relevant in light of the important reasons for prematurely terminating a contract, industrial constitution law (separate works councils) and special payments.

9. Works constitution

In principle, the Austrian Labour Constitution Act (Arbeitsverassungsgesetz – ArvVG) prescribes the appointment or convening of two constitutive bodies of employee co-determination and representation of employee interests in every company (with five or more permanent employees) i.e., the works council and the general staff meeting. The works council as the main staff body has comprehensive responsibility for representing the commercial, social, health-related, and cultural interests of the company staff. The representative bodies of the staff are supposed to carry out their activities, whenever possible, without disrupting business operations. The works council can exercise numerous rights when dealing with the company owners e.g., the right to information, participation, and co-determination.

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

- Involvement in social matters, in particular by entering into company or works agreements.
- Involvement in human resources matters, in particular with respect to the termination of employment contracts (general protection against unfair dismissal)
- Involvement in commercial matters, in particular co-determination within the supervisory board of an AG or GmbH (refer to Section I, subsection 2.1.11.c – "one-third, parity-based co-determination").

10. Collective agreements

Collective agreements (referred to in Germany as "Tarifverträge" and in Switzerland as "Gesamtarbeitsverträge") are agreements made in writing between employer bodies with the competence to take part in collective bargaining (e.g., the Austrian Federal Economic Chamber - *Wirtschaftskammer Österreich – WKÖ*) and employee representative bodies (Austrian Trade Union Federation - *Österreichischer Gewerkschaftsbund – ÖGB*). Their mandatory effect is similar to that of a legal regulation. Minimum working conditions set out in collective agreements must be fulfilled. The stipulations contained in the normative, applicable collective agreement is of fundamental importance for structuring employment relationships and employment contracts in use.

The significance of collective agreements lies in the balancing of interests between employees and employers across companies and businesses by establishing minimum labour conditions which must be fulfilled. Wages and salaries of employees are increased at regular intervals (usually annually) by revisions to the collective agreements. On a case-by-case basis, additional terms are agreed upon, e.g. dirty-work or hardship bonuses. Generally, collective agreements also provide for annual leave bonuses and a "Christmas bonus" (so-called 13th and 14th month salaries). In addition to compensation, collective agreements regulate other essential working conditions such as working hours, entitlements to unpaid leave or termination dates/notice periods which deviate from the law and benefit the employees involved.

Section IV: Trade law and other approval requirements

1. Trade licence

1.1. General remarks

In order to carry on a trade, both sole proprietors as well as partnerships and corporations require a trade licence.

By contrast, an Austrian trade licence is not required when EEA nationals and companies with their registered office within the EEA (and this also applies to Switzerland to a limited extent), holding a relevant license in their country of origin, render services in Austria only on a temporary and occasional basis.

A "trade" is an independent, regular activity carried on with the intention of deriving an economic benefit. Agriculture and forestry, artists and certain other professions covered by special laws (e.g. free-lance work, banking) are exempt from the scope of the Austrian Trade Act of 1994 (Gewerbeordnung - GewO). Activities covered by special statutory rules are likewise subject to approval requirements (e.g., banks, insurance companies, pension funds etc.).

1.2. Prerequisites for issuing a trade licence

For sole proprietors, the prerequisite for obtaining a trade licence is being a citizen of Austria, an EEA member state or Switzerland.

An entrepreneur who is a third-country national may be granted a licence to carry on a trade in Austria if this is covered by an international treaty that provides for reciprocity, or if he provides proof of having a residence permit for Austria entitling him to carry on a trade.

As a prerequisite for carrying on a trade in Austria, foreign partnerships or corporations must furnish evidence of the establishment of a branch office registered with the Austrian Commercial Register (refer to Section I, subsection 2.7 above).

A further prerequisite for issuing a trade licence is that there are no grounds precluding the granting of the licence (e.g., tax offences, court convictions). In addition, the entrepreneur must be at least 18 years old. In the case of partnerships and corporations, the above-referenced grounds for exclusion from carrying on a trade must not apply to the corporate bodies of the entity (managing director, management board) or with regard to persons exercising a significant influence on the company.

2. Types of trades and the different licensing requirements

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

The Austrian Trade Act (GewO) of 1994 makes a distinction between "free" and "regulated" trades. All trades not expressly listed in the statute are free trades. For example, free trades include trading in retail goods (but not in weapons, pharmaceuticals etc.), IT services or advertising agencies. No "evidence of qualifications" (Befähigungsnachweis) as the basis for a certificate of competence is required in order to carry on free trades. On the other hand, regulated trades (e.g., the catering and hotel trade, mechatronics) require a certificate of competence.

The certificate of competence is furnished by providing proof of a relevant course of training or studies, professional qualifications and/or proof of work experience in an EEA member state.

The trade authority can issue an individual certificate of competence if proof is provided of the required knowledge, skills and experience.

2.2. Commencement of business

In the case of free trades in general and many regulated trades, business operations may commence immediately following the registration with the trade authority. The application itself suffices if all the prerequisites are fulfilled as explained in subsections 1 and 2.1 above. In this case, it is not necessary to wait for the trade authority to formally issue the trade licence.

By contrast, with respect to the designated regulated trades ("sensitive trades", e.g., master builders, electrical engineers, gas and sanitation technology), the trade may not be carried out until formal approval has been granted by the trade authority and legally takes effect. In the case of these "sensitive" trades, the trade authority examines the trustworthiness of the business owner.

3. Managing director under trade law

The holders of trade licences may be both natural persons (sole proprietors) and corporations and partnerships (GmbH, AG, OG, KG) as well as associations and branch offices of foreign companies. Corporations and partnershipa are required to designate a "managing director under trade law" to the trade authority, even when the trade is a free trade. The managing director under trade law is responsible for ensuring compliance with regulations under trade law.

The managing director under trade law is not required to be the managing director "under commercial law" registered with the Commercial Register with the authority to represent the entity under commercial law. Accordingly, even a simple employee may be appointed to serve as the managing director under trade law if that employee works at least half-time and has been granted authority to issue instructions within the company.

If the company engages in a regulated trade, the managing director under trade law must possess the required certificate of competence. If the sole proprietor himself does not have the mandatory evidence of qualifications, he is permitted or obliged to appoint a managing director under trade law with the necessary competencies.

As noted above, a "certificate of competence" is not required to carry on free trades.

As a rule, the managing director under trade law must be domiciled within Austria or, if he is an EEA national, in an EEA member state. However, it is obligatory for the managing director under trade law (who does not have his habitual residence in Austria) to be physically present in the business for which he is responsible for a certain amount of time.

4. Further approval requirements under public law

4.1. Trade facilities approval

Trade facilities are any geographically fixed locations regularly used for the purposes of commercial operations. Trade facilities include plants, buildings, rooms, open areas and operational facilities which constitute an operational unit for purposes of the business and are regularly used for purposes of carrying on a trade (e.g., a restaurant; a production site with machinery; warehouses for chemicals or flammable liquids), but, by contrast, not just office facilities.

If risks, nuisances, or adverse effects can arise in connection with the trade facilities which impact the business owners, customers, or neighbours, then "trade facilities approval" is required.

The administrative decision (authorisation notice) on the part of the trade authority normally imposes certain conditions. These are obligations the respective owner of the trade facilities must meet. Approved trade facilities must be regularly inspected (usually every 5 or 6 years) to confirm that they operate in accordance with the administrative decision and valid rules under trade law. Any changes (e.g., installation of new machines, structural changes) generally require approval.

An integrated trade facilities permit is required for certain facilities capable of causing adverse effects on the environment as a result of air, water, and soil emissions ("IPPC facilities"). These include facilities in the energy industry, chemical industry, metal industry, etc. Special requirements with regards to environmental protection, technology, accident prevention, etc. must be met in order to obtain such approvals. The authorisation notice stipulates emissions thresholds and other conditions. The owner of an **IPPC facility** must comply with special record-keeping and reporting obligations as well as the obligation to undergo regular inspections to ensure that the facility is state of the art.

For purposes of accident prevention, so-called **Seveso III** business facilities, which work with certain hazardous materials (chlorine, ammonium nitrate, etc.) must comply with additional obligations. For example, the owner is required to prepare a safety plan and a safety report, which are subject to regular audits. The owner must also develop emergency preparedness plans, create organisational structures to prevent serious accidents and document the measures taken. Furthermore, the owner has information obligations vis-à-vis public authorities and the general public.

4.2. Water permits

Permits issued under the Austrian Water Act are a prerequisite for any use of public waters that exceeds the scope of public use as well as any construction or modification of facilities for the purposes of using public waters. These include, for example, the operation of power plants, water extraction (e.g., for purposes of irrigation or for plant water supply facilities), usage of ground water, impacts on public waters (e.g. discharge of wastewater), construction along riverbanks, drainage systems and hydraulic structures designed to protect or regulate water flows. Water permits are only issued for a limited period of time.

Although the party considered to be the cause of water pollution i.e., the business owner is the one mainly bearing liability under prevailing water laws, the managing director and board members of an incorporated company bearing responsibility for damages (even if only due to oversight or organisational culpability) may also be held accountable. The owner of a property and even the buyer of such a property may bear subsidiary liability if the owner or buyer had or should have had knowledge of the facilities or of measures from which the risks emanate.

4.3. Waste management

Businesses that generate waste in their production processes ("waste owners") are subject to special obligations with respect to handling waste (collection and treatment, mixing of waste, etc.). In particular, the owners of waste are responsible for ensuring that the waste is delivered to a licenced waste collector or handler and that such waste is processed or disposed of in an environmentally compatible manner. Moreover, owners of waste are required to keep ongoing records on the type, quantity, origins, and whereabouts of waste.

Additional requirements apply to businesses with more than 100 employees. They are required to appoint a professionally qualified waste management officer, who is responsible for compliance with the waste management statutes and regulations pertaining to that business.

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

4.4. Environmental impact assessment

Certain large projects expected to cause potentially significant impacts on the environment include waste treatment facilities, amusement parks, shopping centres, power plants, ground water extraction facilities, large-scale animal husbandry, land clearing projects or industrial facilities (paper and cellulose factories, foundries, cement plants, etc.). Therefore, an environmental impact assessment (*Umweltverträglichkeitsprüfung – UVP*) is required before a permit can be issued. The possible obligation to submit an environmental impact assessment is generally oriented to a threshold value or particular criteria (e.g., production capacity, usage of larger land areas), and sometimes by the physical location of the facility.

The general public is also involved in the environmental impact assessment.

Section V: Tax law

1. Current taxation and liquidation taxation of companies in Austria

Current taxation of business entities in Austria is based on the legal form of the business. This means the type of taxation depends on whether the entity is a corporation (refer to subsection 1.1), a sole proprietorship or a partnership (see subsection 1.2).

1.1. Corporations

1.1.1. Corporate income tax

Profits of incorporated companies (GmbH, AG, SE) are subject to a **23% corporate tax rate** (flat tax) in Austria.

A minimum corporate income tax (*Körperschaftssteuer*) is levied in fiscal years in which the entity generates a loss. This equals € 500 for a GmbH and € 3,500 for an AG. The minimum tax is credited against the corporate income tax in subsequent years.

Tax loss carry-forwards
Losses may be carried forward for an unlimited time and be offset by later profits. However, tax loss carry-forwards (Verlustvorträge) are limited to 75%. This means 25% of annual profits will be taxable, irrespective of the amount of tax loss carry-forwards available in the relevant year.

Exemptions (*Steuerbefreiungen*) **on dividends**
As a rule, the distribution of profits received by an Austrian incorporated company from equity interests held in domestic or foreign "corporations" (incorporated companies and cooperatives) are exempt from the corporate income tax at the level of the recipient. If an equity interest is held in corporations located in a third country or in a country with which Austria has not concluded a bilateral assistance agreement (*Amtshilfeabkommen*), this exemption from the corporate income tax for dividends will only apply on the condition that the equity holding equals at least 10% of the foreign corporation's total share capital and has been held for at least one year.

Capital gains (*Veräußerungsgewinne*) and liquidation gains (*Liquidationsgewinne*) received by an Austrian incorporated

company from a foreign corporation are also exempt from the corporate income tax if they fulfil the above-mentioned conditions.

Group taxation (*Gruppenbesteuerung*)
A parent company may form a tax group for tax purposes together with all or any of its subsidiaries or affiliates. The prerequisite is that the parent company's equity stake amounts to more than 50% of the nominal capital of the affiliate. The minimum duration of a tax group is three years. There are various tax benefits available to tax groups, for example losses by individual members of the group may be immediately offset by profits from other group members. The Austrian group taxation rules are amongst the most modern in Europe. In particular, even foreign subsidiaries which have their registered office in the EU or a country in which Austria has a comprehensive bilateral assistance agreement may be included within the tax group. In turn, this allows for the particularly quick offsetting of foreign losses[16].

1.1.2. Capital gains tax on the distribution of profits by an Austrian GmbH, AG, SE

As a rule, distributions of profits by an Austrian corporation to its shareholders are subject to a **27.5% capital gains tax** or withholding tax (*Kapitalertragssteuer*). This is charged at the source, i.e., the incorporated company must withhold the tax and remit it to the Austrian tax office.

If the shareholders of the incorporated company are natural persons who have their habitual residence (permanent centre of interest) in Austria, their Austrian income tax for these capital gains is deemed to have been settled by the deducted 27.5% capital gains tax (discharge of the tax liability).

If the recipient of distributed profits from an Austrian corporation is another Austrian incorporated company, an exemption from the capital gains tax applies if the equity holding equals at least 10% of its capital and is held for a minimum period of one year.

Distributions of profits to shareholders outside of the EU are generally subject to the 27.5% capital gains tax as mentioned above. If the recipient's country has concluded a double taxation convention (*Doppelbesteuerungsabkommen*) with Austria, the capital gains tax (withholding tax) is reduced in accordance with the applicable double taxation convention. Austria has concluded double taxation conventions with more than 90 countries across the globe, most of which correspond to the OECD Model Tax Convention.

16 Refer to J. Reich-Rohrwig in Wiesner/Kirchmayr/Mayr (eds), Gruppenbesteuerung, 2nd edition, 507ff.

1.1.3. Taxation on the liquidation of incorporated companies in Austria

If an incorporated company is liquidated, the liquidation profits are subject to the 23% corporate income tax.

The distribution of the liquidation proceeds to shareholders is not subject to the capital gains tax (withholding tax). The liquidation proceeds are not required to be allocated to retained profits and pure liquidation proceeds[17]. As a rule, any liquidation surplus in the hands of an Austrian recipient is taxable.

1.2. Sole proprietorships, partnerships

1.2.1. Sole proprietorships

Sole proprietors (natural persons) are subject to income tax on their income, in particular on the income they derive in Austria from commercial operations or from self-employment. The Austrian Income Tax Act (*Einkommensteuergesetz - EStG*) imposes a progressive tax rate on income of more than € 11,693; the top **income tax rate** in Austria is **50%**, which applies only to portions of income exceeding € 93,120. In the years 2016 to 2025, the maximum personal income tax rate is 55% if income is above € 1 million. Under certain circumstances, a reduced tax rate will be applied on liquidation profits when a business is terminated or disposed of.

1.2.2. Partnerships

The profits of a partnership are not taxed at the level of the entity itself. Rather, the share of each partner's profit (depending on whether the partner is a natural person or legal entity) is subject to either the income tax or corporate income tax. Accordingly, to assess the income tax or corporate income tax of the partner in the case of partnerships (in contrast with incorporated companies), it is generally irrelevant whether the profits are withdrawn from the partnership by its partners or not.

With respect to the income tax on profit shares of natural persons arising out of partnerships, the information found in subsection 1.2.1 applies.

17 EAS 3279 dated 15 May 2012

If the partner of the Austrian partnership is an incorporated company, its share of the profits is subject to the 25% corporate income tax.

In contrast to incorporated companies, no capital gains tax is withheld when it comes to profit shares from partnerships.

1.3. Taxation of foreign businesses or companies with/without double taxation conventions

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

In principle, foreign entities are subject to taxation in the country in which they have their registered office or their headquarters ("country of residence").

Furthermore, under certain circumstances, foreign incorporated companies are subject to a limited tax liability in Austria on the income they generate in Austria. Income from business operations is subject to taxation in Austria when a **permanent establishment** (*Betriebsstätte*) is operated in Austria. Income from self-employment and regular employment is subject to taxation in Austria when the work is carried out in Austria.

If no double taxation convention has been concluded between Austria and the country of domicile, a double tax liability may arise with respect to the foreign incorporated company. If a double taxation convention is in effect, profits of the foreign incorporated company may only be taxed in one of the two countries. Generally speaking, this is considered to be the country of residence (*Ansässigkeitsstaat*). Austria only has the right to taxation on foreigners if there is a permanent establishment in Austria.

Even if the profits from the permanent establishment are subject to taxation in Austria, the country of residence may apply the higher tax rate to the foreign incorporated company's other income when setting its tax rate. This is calculated by taking the profits of the permanent establishment into account (progression clause).

1.3.2. Foreign national with a stake in an Austrian partnership

The profits of a partnership are not taxed at the level of the partnership itself, but rather at the level of its individual partners (refer to subsection 1.2.2 above).

Under certain circumstances, the income from profit shares in an Austrian partnership derived by a foreign partner is subject to limited tax liability in Austria. In particular, Austria has the right to taxation if the partnership operates a permanent establishment in Austria. The information provided in subsection 1.3.1 apply analogously.

1.3.3. Foreign national with a stake in an Austrian corporation

As a rule, the profits distributed by an Austrian corporation to foreign nationals are subject to a 27.5% capital gains tax. Under certain circumstances, profits distributed to EU parent companies may be exempt from paying the capital gains tax. If a double taxation convention applies, there may be a reduced withholding tax (refer to subsection 1.1.2 above). For example, due to the respective valid double taxation convention, the maximum withholding tax for foreign nationals residing in Germany, Switzerland, Russia, France, Great Britain, or the United States is 15%.

2. Taxes on employment – Ancillary wage costs

The following ancillary wage costs (non-wage labour costs; *Lohnnebenkosten*) apply if the company employs staff in Austria:

- 3% municipal tax on gross salaries
- 4.5% employer contribution to the Family Burden Equalisation Fund (*Familienlastenausgleichfonds*)
- 0.34% - 0.42% supplementary employer contribution, depending on the Austrian federal state
- Approx. 22% employer social security contribution

These ancillary wage costs are deductible business expenses. They reduce the profits of the business and thus the assessment base for the corporate income tax or income tax.

Pursuant to the Austrian New Companies Promotion Act (*NeuFöG*), tax relief may be applicable for the first 12 or 36 months.

3. Value-added tax

The Austrian value-added tax (VAT; *Umsatzsteuer*) applies to sales revenue generated by profit-oriented business entities within Austria. In this regard, it does not matter whether the

entrepreneur resides in Austria or not. The VAT rate is generally 20%. In some situations, a reduced rate of 10% or 13% applies. There are also cases of complete VAT exemption (genuine and non-genuine tax exemptions, for example for banks and insurance companies).

Input tax deduction (*Vorsteuerabzug*)
As a rule, entrepreneurs are permitted to deduct the VAT invoiced to them by other companies for their goods or services as the input tax. However, businesses are not generally entitled to deduct the input tax if the good and services received are used for purposes of generating tax-exempt revenue.

Cross-border supplies of goods and other services
Deliveries of goods within the EU and in third countries are exempt from the value added tax under certain circumstances. As a rule, other services are subject to VAT in the country in which the recipient of the service has his registered office. In contrast, for B2B transactions, the tax liability applies to the country in which the company supplying the goods has its headquarters.

4. Land acquisition tax

4.1. Purchase of property

The acquisition of Austrian real estate is subject to a land transfer tax equalling 3.5% of the consideration (e.g., purchase price, assumption of debt). In addition, a 1.1% registration fee on the same assessment base applies to the registration of the new owner in the Land Register.

In certain cases, exemptions from the land acquisition tax exist (e.g., pursuant to the Austrian New Companies Promotion Act.

4.2. Acquisition of all company shares; unification of all shares by a single owner

If a buyer acquires at least 95% of the shares in a company owning real estate, or a shareholder acquires this amount of the remaining shares in a company ("unification of all shares by a single owner"), this will also trigger the land acquisition tax of 0.5% of the property's value.

Since 1 November 2017, rental agreements for flats have been exempt from the land acquisition tax.

5. Leasing fees

With respect to written lease and commercial lease agreements, a fee is due to be paid in Austria amounting to 1% of the assessment base.

In principle, the assessment base for the 1% fee is three times the annual gross remuneration (i.e., rent, operating costs and VAT). For fixed-term contracts, the assessment base is the gross fee arising over the term of the agreement.

Section VI: Industrial property rights and protection of intellectual property

1. Trademarks

Similar to most countries throughout the world, trademarks (brands), corporate names and other corporate symbols are also protected in Austria[18].

A **trademark** (*Marke*) is a means of designating or characterizing goods and services and, at the same time, constitutes intellectual property. The use of a trademark is governed in Austria by the Austrian Trademark Protection Act (*Markenschutzgesetz - MSchG*). The trademark law of the EU member states was largely harmonized based on the Trademarks Directive (EU) 2015/2436.

A trademark performs four main functions: **protection, indication of origin, warranty,** and **advertising**. For some time now, registered trademarks have not only been limited to **word marks**, **figurative marks**, or the combined **word and design marks**. In reality, **sound marks**, **colour marks** and **olfactory marks** may be registered provided they can be **graphically depicted** in some way.

However, there are obstacles to the registration of certain trademarks. In this respect, it is important to distinguish between absolute and relative grounds of refusal (*Eintragungshindernisse*). For example, *absolute grounds* of refusing registration apply to the flags or official coats of arms of countries. Descriptive terms or figures which are of low distinctive quality and generic terms may, per se, not be registered (*relative grounds* of refusal). However, if a trademark has acquired a distinctiveness, it may still be registered. Whether or not a trademark has actually acquired a distinctiveness is assessed in advance by the trademark authority.

The Austrian Patent Office (ÖPA) has jurisdiction over registrations of national Austrian trademarks. In the case of the **European Union Trademark**, which is being increasingly applied for, authority is vested in the **European Union Intellectual Property Office (EUIPO)** located in Alicante, Spain. The goods and services for which trademarks are registered and for which they provide protection, are assigned to certain classes, which can be found in the Nice Classification.

18 See *Engin-Deniz*, Kommentar zum Markenschutzgesetz, 3rd edition (2017)

After the **application is filed**, the authority reviews it to see whether there are grounds for refusal. Proof of acquired distinctiveness must be submitted at this stage. If the authority regards its review as complete, the trademark is **published**. Starting at the date of publication, a three-month period begins during which other trademark or copyright owners may file an **objection** against this new trademark. To avoid such opposition, it is recommended to conduct comprehensive research before registering the new trademark to determine whether prior rights exist. The trademark is **registered** in the trademark register if no objections are filed, if an amicable solution is found to disputes or they are resolved in favour of the trademark applicant. Protection exists for a period of ten years and may be extended by paying the applicable fees.

By registering a trademark, the owner is granted **exclusive rights**, enforceable against any person. Upon infringements of trademark rights, the trademark owner may request that such party cease the infringement, amongst other steps, and that any goods designated with the trademark be destroyed. In addition, it may claim compensatory damages and, within a reasonable time, deletion of any improperly registered new trademarks. Intentional trademark violations are punishable under criminal law.

Trademark protection extending beyond Austria's borders is provided, first and foremost, by the above-mentioned EU Trademark (community mark), governed by the European Union Trade Marks Regulation (EU) 1001/2017. Protection is also regulated by the IR Trademark (international trademark registration). Registration of a previously registered trademark with the World Intellectual Property Organisation (WIPO) confers protection in all WIPO member states for which registration is requested. If the IR registration is applied for within six months from the date of registration of the original trademark, the protection applies retroactively from the date of registration of the basic trademark (so-called priority right).

2. Internet domain law

The address of a website on the Internet is referred to as a "domain." Domains can be divided into top-level domains (such as .at, .com or .org) and into sub-level domains, also referred to as second-level or third-level domains. The latter refer to the portion of the address appearing prior to the top-level domain. The domain does **not** have any labelling or **designating function** per se. Instead, this must first be derived

from other rights such as trademark law or laws governing company symbols and names.

A domain (just like a trademark) performs a role in indicating the presumed origin and as a strong advertising vehicle. For this reason, there are frequent conflicts between various trademark rights in connection with registering domains. More specifically, a previously registered trademark does not always provide sufficient protection against a registered domain when the domain in question, for example, originates with the name of a company that might have already existed longer than the registered trademark and which was even registered prior to the trademark registration.

Since 2012, top-level domains (which were previously limited to country codes and 22 generic codes) may be registered using any designation (e.g.: .auto, .music or .wien). This opens up the possibility of registering designations of registered trademarks at the top level.

3. Protection of company name and logo

Company names and **company logos** are protected in Austria even without the registration of a word mark. However, protection may be regionally limited. Similar to trademarks, company names have an identification purpose as well as the function to indicate origin. For this reason, competitors are not permitted to use another business's older company name or logo in a manner which could potentially cause confusion.

If a sufficient level of distinctiveness has been determined, protection extends to company symbols (e.g., logos) and the presentation and packaging of goods or services of a company in a manner which is typical for its business.

The protection of company names may also be applied to meta tags (search engine advertising, key word advertising) and domains.

4. Patent law

The underlying purpose of patents is to provide protection for **technical inventions**, which protects them in a manner similar to a monopoly for a limited period of time. Four prerequisites must be fulfilled for an invention to be patentable. The first prerequisite is its **technical nature**, and a further prerequisite is the **industrial applicability** of the invention. In addition, requirements also exist with respect to **novelty** and **level of inventiveness** of the invention.

A patent application in Austria is filed with the Austrian Patent Office (ÖPA; *Österreichische Patentamt*). In particular, the patent applicant must formulate one or more patent claims, i.e., he must indicate for what reason he is requesting patent protection and how the four conditions of patentability are fulfilled. Initially, the Austrian Patent Office conducts a preliminary review of the application in formal and substantive terms. Following the subsequent publication of the application, it is possible to file a notice of opposition within a period of four months to issuing the patent. If no such objection is filed, the patent is registered, and an official announcement is made.

The patent holder is entitled to the **sole and exclusive use**, manufacture, sale, marketing, and licencing of the patented invention. In the event of an infringement against his patent, the patent holder has the right to obtain an injunction against the violator as well as termination of the infringement, publication of the judgement, financial accounting, and payment. The intentional violation of patent rights is also subject to criminal prosecution.

The European Patent Convention (EPC), whose membership includes the EU member states and twelve other countries, comprises the foundation for the European patent and harmonises a large number of national regulations. The basic model underling the European patent does not offer the option of registering a single patent which is valid throughout the entire EU, but only a bundle of individual national patents. A centralized assessment of patent applications is carried out, but these patents must be validated, upheld, and implemented in each member state. An application for a European patent can be submitted both to the European Patent Office (EPO) in Munich and the Austrian Patent Office (ÖPA).

After the issuing of a European patent, it is possible to file "a request for unitary effect" (*Antrag auf einheitliche Wirkung*). This serves as the basis for a Unitary Patent (*Einheitspatent*). The Unitary Patent was implemented by the Agreement on a Unified Patent Court and has been in effect since 1 June 2023. In contrast to the basic model underlying the European patent, the Unitary Patent offers unified patent protection for up to 25 EU member states, of which only 17 are participating at the present time. The Unified Patent Court (EPC), which has also been operating since 1 June 2023, has exclusive jurisdiction over disputes related to Unitary Patents and European patents. The UPC comprises a court of first

instance with a central division located in Paris alongside several local and regional divisions (also in Austria), a Court of Appeal based in Luxembourg and a Registry.

Similar to trademark protection, it is also possible to obtain international protection for inventions via the **Patent Cooperation Treaty** (PCT; *Patentzusammenarbeitsvertrag*). So far, over 150 countries have ratified the PCT. If a patent is applied for under the PCT, it is possible, by paying additional fees, to undergo simplified procedures to obtain patent protection in other countries that have also ratified the treaty. The application may also be filed with the Austrian Patent Office (ÖPA) in Austria.

5. Protection of seed and biological material

The protection of plant varieties is generally exempted from patentability under the stipulations contained in the Austrian Patent Law (*Patentgesetz – PatG*). The only resort in protecting plant varieties is under the **Federal Law on the Protection of Plant Varieties** (*Sortenschutzgesetz - SortSchG*). Accordingly, protection is not provided for an entire plant or certain genetic sequences, but only rather certain varieties which are distinctive, homogenous, stable, and new.

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

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

After the **Biotechnology Directive** was enacted in 1998, businesses have the option of also **having biological material patented**. This particularly applies to genetically modified material. In the past, patents on life forms such as yeast cultures were only granted occasionally. In the meantime, the number of patent applications in the biotechnology sector is so vast i.e., tens of thousands. The Biotechnology Directive was transposed into national law in Austria in 2005. Pursuant to § 1 (2) of the Austrian Patent Act, it is now also possible to obtain patents on products consisting of biological material. These even include biological material which has been isolated from its natural environment by means of a technological process, even if this material already existed in nature.

6. Design protection

Industrial designs or utility models are known in Austria as *Geschmacksmuster*. Internationally, the term has become popular simply as "**design**." Protection may be obtained for both two-dimensional and three-dimensional designs. The subject matter of the protection, which is of great significance to the economy, is the appearance of an entire product or portion of it. In this regard, the product features are the decisive factor i.e., its lines, contours, colours, shape, or surface structure.

Similar to trademarks and patents, design applications are filed and registered with the Austrian Patent Office (ÖPA). An industrial design is only reviewed to determine whether the formal prerequisites are met. For this reason, this is termed an "unexamined intellectual property right" (*ungeprüftes Schutzrecht*). Publication of a new design is undertaken at the same time as registration. The initial period of protection is five years. It is only possible to obtain four extensions, so that the maximum period of protection is 25 years.

Just like the intellectual property rights described above, the registered design grants exclusive rights to the owner. In a similarity comparison of two opposing designs, the **overall impression** is what ultimately matters.

An industrial design registered in Austria is only protected within Austrian territory. Similar to the community or EU trademark, a **registered Community design** (*Gemeinschaftsgeschmacksmuster*) with the European Union Intellectual Property Office (EUIPO) is also available. As is the case with the IR trademark application, the international registration of industrial designs can be carried out with the WIPO in Geneva for all member states.

7. Copyright

Copyright is one of the intellectual property rights. Copyright protects works of literature, music, the fine arts, and cinematic art. Software also benefits from copyright protection as linguistic work.

The subject matter of copyright protection is the individual design of the work in the fields of literature, music, the fine

arts, and cinematic art. The purpose of copyright is to protect the creator of a creative work and ultimately, to secure income for him. Protection not only extends to original works, but also for adaptations (e.g., translations), provided they constitute unique intellectual creations.

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

Creators may only be natural persons. Legal entities may only obtain rights to the exploitation and use of the works. In cases of creation by employees, copyright resides with the employee or the contractor. Rights of exploitation to the created work are transferred to the employer if the work was created by the employee in the course of his professional duties and acquisition rights were agreed upon in writing.

The creator has both economic rights and moral rights. These include exploitation rights i.e., the creator's right to commercially use his work and to grant third parties rights to the work. The right of exploitation is conceived as the right of exclusion and encompasses the right to perform, the right to rent and lend, the right to make the work available (e.g., online), the right to broadcast, the right of reproduction, the right of dissemination and the right of adaptation. If the right is transferred on an exclusive basis, this is termed the "right of use." If this right is non-exclusive, this is termed "permission to use" (licence to use).

Austrian lawmakers have acknowledged that certain other persons may perform work meriting protection, and it grants this protection in the form of related protection rights (ancillary copyrights).

The object of protection here is not the work itself, but rather the actions of the performing artists (interpreters), recording companies, event promoters, broadcasters, manufacturers of photographs, publishers of posthumous works and database creators.

The Austrian Copyright Act (*Urheberrechtsgesetz -UrhG*) grants claims under civil law, especially for identification as the author (copyright owner), for injunctions against unauthorised reproduction, dissemination, or publication, for damages, for restitution of unjust enrichment, for publication of a judgement, and for elimination of works created in violation of copyright. The Intentional infringement of copyrights is criminally punishable as offences subject to private law claims.

Works may be exploited either by the author or his publisher directly. In certain cases, this is done by a collecting society (e.g. AKM, Austromechana).

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

VII. Appendix

1. Checklist – Founding of a limited liability company (GmbH) and a flexible company (FlexKapG)

- ☐ Articles of association contractually agreed by shareholders as a notarial deed before an Austrian notary. It is permitted for shareholders to provide a signed and notarised power of attorney for this purpose.
- ☐ The requirement of a notarial deed does not apply to the simplified founding of a single-person limited company (*Ein-Personen-GmbH; GmbH = Gesellschaft mit beschränter Haftung*) or a flexible company (*Flexible Kapitalgesellschaft - FlexKapG*) by a natural person who is simultaneously appointed to serve as the managing director, in electronic form with a secure proof of identity.

  Minimum contents of the articles of association:
  - > Name and registered office of GmbH or FlexKapG
  - > Amount of the portion of share capital to be paid in by the shareholder
  - > Subject matter of the company
  - > Amount of share
  - > Reimbursement for costs of formation
- ☐ The minimum capital amounts to € 10,000. In principle, contributions in cash or in kind are permitted. Contributions in kind must be provided in full without delay. At least one quarter of the cash contributions must be paid in at the time of the company's formation, but in any case, a minimum amount of € 5,000.
- ☐ As a rule, if it is agreed upon that contributions in kind shall comprise more than half of the share capital, an audit of the company's formation by a court-appointed auditor is required.
- ☐ Bank confirmation or notarial confirmation on payment of minimum contributions to the share capital
- ☐ Resolution on appointing at least one managing director
- ☐ Specimen corporate signature of managing director (with notarial certification of the signature)
- ☐ If foreign companies are shareholders, evidence of their identity must be provided (e.g. by means of an extract from the foreign Commercial Register or confirmation by the foreign Commercial Register or Chamber of Commerce)
- ☐ Application for registration in the Commercial Register by all managing directors (with notarial certification of signatures)

Further notes:

- Under certain circumstances, there may be an obligation to appoint a supervisory board, particularly where, on an annual average, the GmbH or FlexKapG employs more than 300 staff members. In contrast to the GmbH, a medium-sized FlexKapG is already obliged to appoint a supervisory board.
- Audit of annual financial statements prescribed by law in the case of "mid-sized" and "large" GmbHs and FlexKapGs; a "small" GmbH or FlexKapG is also legally obliged to conduct an audit if there is a legal obligation to have a supervisory board.
- Annual financial statements of every GmbH and FlexKapG must be submitted to the Commercial Court each year.
- Exemption to payment of the registration fee for the Commercial Register is possible according to the Austrian New Companies Promotion Act (Neugründungs-Förderungsgesetz – NeuFöG).
- The minimum corporate income tax per year is € 500.

2. Checklist – Founding of a joint stock company (AG)

☐ Articles of association (as a notarial deed before an Austrian notary)

Minimum contents of the articles of association:

> Corporate name and registered office of company

> Whether shares to be issued are par-value or no-par value shares - In the case of par-value shares, the par value and in the case of no-par value, the number of shares and the issue price

> Subject matter of the company

> Amount of registered share capital

> Composition of management board, number of members on the management board

> Form of official publications by the company

> Reimbursement for costs of formation

☐ Minimum capital of € 70,000. Contributions in cash or in kind are permitted. At least one quarter of the cash contributions must be paid in at the time of the company's formation. Contributions in kind must be fully paid in.

☐ Bank confirmation on payment of minimum contributions to the share capital

☐ Appointment of initial supervisory board (at least three persons)

☐ Resolution on appointment of management board by supervisory board

☐ Report of the founders (shareholders) on formation of an AG

☐ Formation audit report of management board and supervisory board

☐ Additional formation audit by court-appointed formation auditor if contributions in kind or acquisitions of assets have been agreed upon or if a member of the management board or supervisory board has a special advantage or an agreement on compensation (reward) for founding or preparation of the AG has been reached

☐ If foreign companies as shareholders, evidence of their identity must be provided (e.g. by means of an extract from the foreign Commercial Register or confirmation by the foreign Commercial Register or Chamber of Commerce)

☐ Specimen corporate signatures of members of the management board (with notarial certification of signatures)

☐ Application for registration on Commercial Register by all founders (shareholders), members of the management board and supervisory board (with notarial certification of signatures)

Notes:

- Supervisory board is mandatory in the case of an AG
- Audit of annual financial statements is mandatory for an AG
- Annual financial statements must be submitted to the Commercial Register and also published in the case of large AGs
- Minimum corporate income tax per year: € 3,500

3. Checklist – Founding of a general partnership (OG)

☐ Partnership agreement (no form prescribed)

Minimum contents of the articles of association:

> Name and date of birth of partners

> Name and registered office of partnership

> Legal form

> Terms governing the power of representation of the partners

> Date partnership agreement was concluded

> Subject matter of the company

☐ Application for registration into the Commercial Register by all of the partners (with notarial certification of signatures)

☐ Specimen signatures of partners with the power of representation (with notarial certification of signatures)

☐ If foreign companies are partners, evidence of their identity must be provided (e.g. by submitting extracts from a foreign Commercial Register or confirmation by a foreign Commercial Register or Chamber of Commerce)

4. Checklist – Founding of a limited partnership (KG)

☐ Partnership agreement (no form prescribed)

Minimum contents:

> Name and date of birth of the partners
> Name and registered office of partnership
> Legal form
> Terms governing the power of representation of the general partners
> Date partnership agreement was concluded
> Contributions of general partners, limited contributions of limited partners
> Subject matter of the company

☐ Application for registration with Commercial Register by all of the partners, including all of the limited partners (with notarial certification of signatures)

☐ Specimen signatures of partners (in notarised form)

☐ Specimen signatures of general partners with the power of representation (with notarial certification of signatures)

☐ If foreign companies are partners, evidence of their identity must be provided (e.g. by submitting extracts from a foreign Commercial Register or confirmation by a foreign Commercial Register or Chamber of Commerce)

5. Checklist – Founding of a GmbH & Co KG

☐ Founding of the GmbH as a general partner

Articles of association of general partner GmbH and further steps: see the checklist for the founding of a GmbH

☐ Founding of a limited partnership (KG), together with a GmbH as general partner (GmbH & Co KG)

Partnership agreement of KG (no form prescribed)

Minimum contents of partnership agreement

> Name and Commercial Register number of general partner GmbH and name and date of birth of limited partners
> Name and registered office of partnership
> Legal form
> Date partnership agreement was concluded
> Subject matter of the company

☐ Application for registration with the Commercial Register by all of the partners, both by general partner GmbH and all of the limited partners (with notarial certification of signatures)

☐ Specimen signatures of managing directors of general partner GmbH (with notarial certification of signatures)

☐ If foreign companies as partners, evidence of their identity must be provided (e.g. by submitting extracts from a foreign Commercial Register or confirmation by a foreign Commercial Register or Chamber of Commerce)

Notes:

- Under certain circumstances, an obligation exists to appoint a supervisory board for the general partner GmbH, of more than 300 members of staff are employed on an annual average
- Audited annual financial statements prescribed by law in the case of "mid-sized" and "large" GmbH & Co KGs and if a legal obligation exists to establish a supervisory board
- Legal requirement to submit annual financial statements to the Commercial Register

6. Checklist – Founding of a private foundation

☐ Deed of the foundation

Minimum contents

> Name and date of birth/Commercial Register number of founder(s)
> Designation of assets contributed to the private foundation
> Purpose of the private foundation
> Provisions on beneficiaries
> Name and registered office of the private foundation
> Duration of the private foundation and rules on the power of representation of the management board
> Appointment of first foundation board by the founders
> The founders may reserve the right in the deed of foundation to modify and even revoke the private foundation (if the founders are natural persons)

☐ Supplemental deed of foundation may be prepared

☐ Minimum capital of € 70,000

☐ Bank confirmation on deposit of minimum capital

☐ Specimen signatures and declaration of impartiality of all members of the foundation board (with notarial certification of signatures)

☐ Application for registration with the Commercial Register by all members of the foundation board (with notarial certification of signatures)

Notes:

- Supplemental deed of foundation not available for public inspection
- Minimum number of members of foundation board: three
- Foundation auditor required by law
- As a rule, no supervisory board required
- Advisory board may be set up
- Detailed rules on beneficiaries may be incorporated into supplemental deed of foundation or the right to designate the beneficiary/beneficiaries may be delegated to the foundation board, the founders, the advisory board or some other "official person or body" (individual)
- Basic rule on duration of private foundation: 100 years
- Tax on initiating a foundation (Stiftungsseingangssteuer) for Austrian private foundations: generally 2.5% on donated assets, 6% of the value of donated properties

6. Checklist – Founding of a branch office by a foreign legal entity (sole proprietorship, partnership, or corporation)

- ☐ Proof of legal existence of the foreign company (legal entity) for which an Austrian branch office is to be entered into the Austrian Commercial Register, by submission of a confirmation from the foreign authority (e.g., local court, Commercial Register, Chamber of Commerce) – foreign-language documents must be accompanied by a certified German translation.
- ☐ For the branch offices of foreign partnerships, all of the details required of an Austrian partnership must be reported to the Austrian Commercial Register – refer to the checklists for the OG and KG above.
    - Specimen signatures (notarised and accompanied by a certified translation) must be filed for general partners with the power of representation and for the "representative(s)" appointed for the Austrian branch office (who must also be registered as such).
- ☐ For the branch office of a foreign incorporated company (GmbH, AG, SE), all of the details required for Austrian incorporated companies (GmbH, AG, SE), must be reported to the Austrian Commercial Register – refer to the checklists above on the GmbH and AG.
    - A certified German translation of the articles of association must likewise be submitted.
    - Evidence showing in whom power of representation of the foreign incorporated company is vested (managing director, members of the management board) must be furnished in the form of a confirmation from the relevant foreign authorities (e.g., local court, Commercial Register, Chamber of Commerce) – foreign-language documents must be accompanied by a certified German translation.
    - Legal entities as to which the law governing their legal status is not the law of an EU or EEA member state must appoint at least one person for the entire business operations of the branch office to represent the company permanently in extrajudicial and judicial proceedings, and whose habitual residence is located within Austria ("representative"); legal entities from EU or EEA member states are not obliged to but are allowed to appoint such a person as well. The company is permitted to appoint two or more domestic representatives with the authority of collective representation.
    - Notarised specimen signatures accompanied by a certified translation must be furnished with respect to the corporate bodies of the company with the authority to represent the foreign incorporated company (managing director, members of the management board) and with respect to the "representatives" appointed and registered for the Austrian branch office (who must be registered in the Commercial Register).
- ☐ In all cases, the activities of the branch office (business purpose) and the law governing the legal status of the foreign legal entity must be reported in the Austrian Commercial Register filing for the branch office.

8. Comparison of legal forms

	GmbH/FlexKapG	AG	GmbH & Co KG
Minimum capital	€ 10,000	€ 70,000	for general partner GmbH € 10,000
Minimum paid-in capital	€ 5,000	€ 17,500	€ 5,000
Minimum number of managing directors/management board members as a rule	1	1	1
Obligation to set up a supervisory board	As a rule, NO (only if 300+ employees)	Generally YES	As a rule, NO (only if 300+ employees)
Minimum number of supervisory board members	If supervisory board is appointed: 3	3	If supervisory board is appointed: 3
Gesellschafter können Weisung an Geschäftsführungsorgan erteilen	YES	NO, shareholders have no authority to issue instructions	YES i.e., shareholders of the general partner GmbH
Financial accounting obligation	YES	YES	As a rule, YES
Requirement to audit annual and consolidated financial statements	YES, except in the case of the "small" and "micro" GmBH and the FlexKapG if there is an obligation to set up a supervisory board	YES	YES, except for "small" and "micro" GmbH & Co KG if there is no obligation to set up a supervisory board
Duty to disclose and publish annual and consolidated financial statements	YES, submitted to the Commercial Register, in condensed form for "small" and "micro" GmbH and FlexKapG	YES, for "large" GmbH additional obligation to publish in the Federal Electronic Announcement and Information Platform	YES. Submitted to the Commercial Register, in condensed form for "small" and "micro" GmbH & Co KG
General meeting of shareholders/ Annual general meeting	Generally no prescribed form	Always recorded as a notarial deed	Generally no prescribed form
Amendments to the articles of association require notarial certification	YES	YES	YES in the case of the general partner GmbH
Strict (no fault) liability of shareholders **a) for payment of capital contributions**	YES	YES	YES
b) for outstanding or overvalued contributions of shareholders/limited partners	YES, except enterprise value shareholders of a FlexKapG pursuant to § 9/2 of the Flexible Company Act regarding the contingent liability pursuant to § 70/2 Limited Liability Company Act	As a rule, NO.	YES (for the GmbH) NO (for the KG)
c) for prohibited return of capital contributions to the respective partners/ shareholders/limited partner	YES	YES	YES
d) for prohibited return of capital contributions to the other partners (shareholders/limited partners)	YES, limited to the amount of the share capital except for the enterprise value shareholders of a FlexKapG pursuant to § 9/2 of the Flexible Company Act	NO	For general partner GmbH: see GmbH; limited partners: NO
e) for company tax debts	As a rule, NO (except pursuant to § 16 BAO)	As a rule, NO (except pursuant to § 16 BAO)	As a rule, NO, but liability for the municipal tax
Fault-based liability of partners/ shareholders	YES; conceivable; see also § 42/7), 47/5 HmbHG and § 25 URG	YES; conceivable; see also §§ 100, 133/4 and 198/2 AktG	YES; conceivable; see also § 25 URG
Liability of managing directors and management board members towards the company and creditors*	YES Fault-based liability as a rule; strict liability pursuant to § 22 URG; liability for advance payment of insolvency costs	YES Fault-based liability as a rule; strict liability pursuant to § 22 URG; liability for advance payment of insolvency costs	YES Fault-based liability as a rule; strict liability pursuant to § 22 URG; liability for advance payment of insolvency
Liability of majority partner or shareholder towards creditors	YES Liability for insolvency application and advance payment for insolvency costs if there is no managing director	YES Liability for insolvency application and advance payment for insolvency costs if there is no management board	YES Liability for insolvency application and advance payment for insolvency costs if there is no managing directorn

*For further details, refer to J. Reich-Rohrwig in Straube/Ratka/Rauter, Wiener Kommentar zum GmbHG with respect to § 25 thereof.

	GmbH/FlexKapG	AG	GmbH & Co KG
Do instructions by shareholder resolution discharge the managing directors from liability? Does an approval resolution of the annual general meeting relieve the management board of the management board of liability?	As a rule, legally valid instructions relieve the recipients of liability provided that claims for compensatory damages are not required to satisfy the claims of creditors	As a rule, legally valid approval resolutions of the annual general meeting discharge the management board of liability provided that claims for compensatory damages are not required to satisfy the claims of creditors	See GmbH
Does the approval of the supervisory board relieve the managing director/management board member of liability?	NO	NO	NO
Minimum corporate income tax	€ 500 p.a.	€ 3,500 p.a.	€ 500 p.a. for the general partner GmbH
Tax losses of company can be offset against the profits of the offset against the profits of the shareholder/ partner	In general, NO, due to the separation principle, except in cases of "tax groups" between corporations	In general, NO, due to the separation principle, exceptin cases of "tax groups" between corporations	As a rule, YES
Corporate income tax rate	23% (flat rate)	23% (flat rate)	Profits are taxed at the level of the limited partner (23% corporate income tax for legal entities, up to 50% income tax for natural persons, 55% as of € 1 million, regardless of whether profits are disbursed to the limited partner or not
Dividend payment to partner/shareholder	As a general rule, subject to 27.5% capital gains tax on the amount disbursed if shareholder is not an incorporated company with an equity holding of at least 10%; in cross-border cases, see EU Parent-Subsidiary Directive and double taxation conventions (withholding tax)	As a general rule, subject to 27.5% capital gains tax on the amount disbursed if shareholder is not an incorporated company with an equity holding of at least 10%; in cross-border cases, see EU Parent-Subsidiary Directive and double taxation conventions (withholding tax)	Distribution of profits to limited partners not subject to any further taxation in Austria; in cross-border cases, see double taxation conventions
Main disadvantages of the legal form	• Compared to the AG, greater risk of shareholder liability in a GmbH or FlexKapG • Personal liability of main shareholders for certain tax debts of the GmbH and FlexKapG, if these shareholders permit the GmbH and FlexKapG to use their economic assets (§ 16 BAO)	• High degree of formalities at the annual general meeting • Management board members appointed for a defined period i.e., limited to five years and may be dismissed earlier for good cause • Mandatory audit of annual financial statements • Mandatory supervisory board • Personal liability of major shareholders for certain tax debts of the AG, if such shareholders allow the AG to use their economic assets (§ 16 BAO)	• Greater risk of liability of the partners of the general partner GmbH compared to the AG • Costly preparation of two annual financial statements – one for the GmbH and one for the KG

9. Advantages and disadvantages of sole proprietorships, branch offices

	Sole proprietorships (SP)	Branch offices (BO)
Personal liability for all debts from business operations	Sole proprietorship has unlimited personal liability	Company (headquarters) liable for all debts of the branch office without limitation
Legal obligation to set up a supervisory board	NO	NO in Austria
Obligation for audit of annual and consolidated financial statements	NO	NO in Austria But the branch office must determine profits and file tax returns for taxation purposes for taxation in Austria
Obligation to submit annual and consolidated financial statements to the Commercial Register in Austria	NO	For branch offices of foreign corporations, representatives of the branch office must disclose accounting documents (prepared, audited and disclosed in line with laws applicable to the company's headquarters) in German to the Austrian Commercial
Minimum capital requirements	NO	NO
Formalities	As a rule, NO. If annual revenue exceeds € 700,000 twice or € 1,000,000 once, the sole proprietorship must be entered into the Commercial Register	YES. In the case of an Austrian branch office, all amendments on the Commercial Register of the (foreign) headquarters must also be registered into the Austrian Commercial Register, if necessary including certified translations and proof
Taxation of profits	On profits of the Austrian branch offices – up to 55% income tax	Limited tax liability on profits from Austrian permanent establishments (23% corporate income tax, up to 55% personal income tax)

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