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1. Introduction

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

A substantial part of the Austrian economy is foreign owned. The Austrian government, which formerly controlled about one quarter of the Austrian economy, has pursued a liberalization program aimed at enlivening the domestic capital market and attracting foreign investors. Privatization of state-owned enterprises has already taken place to a great extent in traditional Austrian industries during the last years (parts of e.g. Telekom Austria, OMV, VA Stahl AG, Österreichische Post AG and the complete divestment of Austria Tabak AG, Postsparkasse, Austrian Airlines and others) and might continue to be pursued in the future (parts of e.g. ÖBB (national railways), national and regional power companies).

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

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

2. General Political and Economic Information

2.1. Facts and Politics

Austria is a **federal republic** with a total area of 83,858 square kilometers and consists of nine provinces (*Bundesländer*). Based on the latest population estimates, Austria has a population of more than eight million people (8,336,000 in 2009), about 1.6 million (1,680,000 in 2008) of whom live in the capital, Vienna. Other large cities are Graz, Linz, Salzburg, Innsbruck, Klagenfurt, Villach and Wels with populations between 50,000 and 250,000.

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

Head of government is Federal Chancellor (*Bundeskanzler*) Werner Faymann of the Social Democratic Party (*SPÖ*), who has headed a coalition with the Austrian People's Party (*ÖVP*) since December 2, 2008. Vice-Chancellor is Josef Pröll (*ÖVP*), who is also finance minister. In the last elections in September 2008 the Austrian Social Democratic Party (*SPÖ*) won a relative majority, taking 29.26 % of the votes. The Austrian People's party (*ÖVP*) received 25.98 %. The Austrian Freedom Party (*FPÖ*) – with 17.54 % of the votes -, the Greens – with 10.43 % of the votes – and the Alliance for the Future of Austria (*BZÖ*) – with 10.7 % of the votes – represent the opposition.

The head of state has been Federal President (*Bundespräsident*) Heinz Fischer (*SPÖ*) since 2004. He was re-elected in April, 2010 (next election to be held in 2016).

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

2.2. Economy

The Austrian **Gross Domestic Product (GDP)** was estimated to be EUR 32,800 per capita in 2009. In 2009 the estimated GDP shrunk by 3.6 % and is expected to grow by 1.3 % in 2010. In 2008 the service sector accounted for an estimated 67.2 %, industry for an estimated 30.9 % and agriculture for 1.9 % of the GDP. Imports of about EUR 119 billion were almost balanced by exports of about EUR 117.33 billion in 2008. Growing exports to Central and Eastern Europe may enable Austria to eliminate its trade deficit.

The **unemployment rate** of about 6.8 % in 2009 was among the lowest in Western Europe.

The **inflation rate** was about 3.2 % in 2008 and 0.5 % in 2009. 1.2 % is expected for 2010.

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

2.3. Austria and the European Union

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

Austria joined the European Union (EU) on January 1, 1995. At that time the member states of the EU increased to 15. 10 further countries (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) joined the EU on May 1, 2004. Bulgaria and Romania joined on January 1, 2007. The EU has therefore comprised 27 member states since 2007. Austria is also member of the Schengen Accord (normally there are no border controls when somebody enters or leaves a state party of that treaty).

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

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

As a member country of the EU, Austria has taken part in the Economic and Monetary Union (EMU) from the very beginning. Furthermore, Austria is not only a member of the EU but also of numerous international organizations, such as the World Trade Organization (WTO) and the Organization for Economic Cooperation and Development (OECD). For more detailed information, see 26.2.

3. Business Opportunities in Austria

3.1. General Information

3.1.1. Overview of Business Activities

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

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

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

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

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

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

3.1.2. Commercial Register (Firmenbuch)

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

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

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

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

3.1.3. Legal Representative; Prokurist

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

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

3.2. Employees of Foreign Companies

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

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

3.3. Commercial Agent

A commercial agent (*Handelsvertreter*) is permanently entrusted by his principal (e.g. a foreign company) with the solicitation of customers or the conclusion of business deals in the principal's name and for its account. The legal status of a commercial agent in Austria has been brought into line with EU directives. The commercial agent has a claim for a compensation payment (*Ausgleichsanspruch*) if his contract is terminated and the principal has

obtained, through the agent's activities, new customers who are likely to stay in a business relation with the principal.

3.4. Distribution Agreements

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

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

3.5.1. General

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

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

3.5.2. Establishment

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

The **articles of association** (*Gesellschaftsvertrag*) or, in case of a sole-shareholder company, the **declaration of establishment** (*Erklärung über die Errichtung der Gesellschaft*)

must be executed before a **notary public** (*Notar*) by means of a notarial deed (*Notariatsakt*).

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

3.5.3. Share Capital, Liability, Transfer of Shares

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

The **liability** of shareholders of a *GmbH* is limited to the (total) unpaid share capital unless they act malevolently. For up to 5 years after divestment former shareholders may therefore be liable for both the unpaid amount of their own shares and also that of their fellow shareholders! The articles of association can provide for **additional contributions** (*Nachschüsse*).

Shares of a *GmbH* can be **transferred** only by means of a notarial deed (*Notariatsakt*). A transfer (including an undertaking to transfer) which does not comply with this formal requirement is null and void! Consequently, such shares cannot be traded on the stock exchange (*Börse* - see 23.2.1). The articles of association may make the transfer dependent on further conditions, in particular upon the consent of the company.

3.5.4. Corporate Bodies

The *GmbH* must have one or more **managing directors** (*Geschäftsführer*). Unlike the board of directors (*Vorstand*) of an *AG*, the managing directors are appointed by the shareholders' assembly (see below). The managing directors represent the company and run its day-to-day business. They are under a statutory obligation not to compete with the *GmbH*. There is no legal requirement that one or all managing directors be domiciled in Austria. However, if no managing director resides in Austria and, as a consequence, the *GmbH* cannot act, any affected person may demand that the court appoint a temporary managing director (*Notgeschäftsführer*).

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

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

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

Provided the *GmbH* does not have a mandatory supervisory board, the **audit of the financial statements** (*Jahresabschluss und Lagebericht*) is not mandatory for *GmbHs* fulfilling at least two of the following three criteria: balance sheet total less than EUR 4.84 million, turnover less than EUR 9.68 million, employees less than 50. However, all *GmbHs* have to file their financial statements with the commercial register.

3.5.5. "Mini"-company with limited liability (Mini-GmbH)

In recent years a number of limited companies domiciled in the UK have established local branch offices (see 3.9.2 below) because this type of company provides for a minimum share capital of only GBP 1 (EUR 1.5). In Austrian there is an ongoing discussion about creating a "small" company with limited liability. It will have a share capital of only EUR 10,000. This reduced share capital must be paid up in full. In addition, the company will be obliged to allocate 10 to 25 % of its annual profit to the accruals. The formation of such a small company with limited liability will be possible on the basis of template articles of association or a template declaration of establishment to further reduce the costs of establishment. This new type of company might be implemented in late 2010/early 2011.

3.6. Stock Company (Aktiengesellschaft)

3.6.1. General

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

3.6.2. Establishment

A formation by just one founder has been permitted since 2004. In contrast to an establishment by two or more founders, the name of the sole founder has to be registered with the commercial register (*Firmenbuch*). The same is true if one person acquires all the stock of a company.

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

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

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

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

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

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

In 2001 conditions and possibilities to grant shares or share options to employees were amended and improved.

3.6.4. Corporate Bodies

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

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

A **stockholders' assembly** (*Hauptversammlung*) must be held annually within eight months after the end of each accounting year and may be held on other occasions as well. Since 2009 the law also provides for participation in the assembly by electronic means. The stockholders decide, *inter alia*, on the distribution of profits, formal approval (*Entlastung*) of the actions of the members of both the supervisory board and board of directors and on the appointment of auditors. For certain fundamental decisions, e.g. the increase or reduction of stock capital, other changes to the articles of association, mergers, liquidation, etc., a **qualified majority** of 75 % of the votes is required. The law also provides for certain **minority rights** for stockholders or groups of stockholders representing at least 5 % of the stock capital. All decisions of the stockholders' assembly must be certified by a notary public in order to become legally effective.

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

3.7. General Partnership (Offene Gesellschaft)

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

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

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

3.8. Limited Partnership (Kommanditgesellschaft)

A limited partnership (*KG*) consists of at least one **general partner** (*Komplementär*) with unlimited liability and of at least one **limited partner** (*Kommanditist*), whose liability is restricted to the amount of his contribution (*Einlage*) registered in the commercial register. The general partners manage the business. The *KG* has a legal personality.

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

3.9. Branch Offices of Foreign Corporations

3.9.1. General

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

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

3.9.2. Branch Offices of Foreign Companies with Limited Liability

If the seat of a company with limited liability is located outside Austria, the managing directors (*Geschäftsführer*) must file for registration of the branch office in the **commercial register** (*Firmenbuch*). Companies not domiciled within the EEA must name an authorized

representative of the branch office who resides in Austria; companies domiciled within the EEA may do so. The foreign company must file legalized copies of its registration documents and the articles of association currently in force. If the articles of association are not in German, a legalized translation must be provided. Each year the foreign company has to file (a translation of) its annual financial statements. Due to the minimum share capital of only GBP 1, a number of branch offices of UK limited companies have been established in Austria for small businesses that in fact only operate in Austria. Since many of these operations have not been very successful, their number is now decreasing.

3.9.3. Branch Offices of Foreign Stock Companies

If the seat of a foreign stock company is located outside Austria, the members of the board of directors (*Vorstand*) must file for registration of the branch office in the **commercial register** (*Firmenbuch*). Companies not domiciled within the EEA must name an authorized representative of the branch office who resides in Austria; companies domiciled within the EEA may do so. The foreign company must file legalized copies of its registration documents and the articles of association currently in force. If the articles of association are not in German, a legalized translation must be provided. Each year the company has to file and publish (a translation of) its annual financial statements.

3.10. Formation Cost

Setting up a ***GmbH* or an *AG*** attracts a **1 % capital tax** (*Gesellschaftssteuer*), based on the paid-in capital including a premium, and a **registration fee** (*Eintragungsgebühr*) of approximately EUR 390 for the commercial register, depending on the complexity of the registration. A capital increase is subject to a 1 % capital tax and a registration fee of approximately EUR 250.

Setting up a **partnership** attracts only a **registration fee** for the commercial register. However, since a *GmbH & Co KG* is viewed as a corporation for this purpose, its formation is subject to the above-mentioned 1 % capital tax.

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

4. Other Forms of Business Enterprises

4.1. European Economic Interest Grouping (EWIV)

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

4.2. Cooperative (Genossenschaft)

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

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

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

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

4.4. Sole Proprietorship (Einzelunternehmer)

An individual may operate a business as a sole proprietorship (*Einzelunternehmer*). He is **solely liable** for the enterprise's debts with all his personal and business assets. Sole proprietors have to register with the commercial register if the business exceeds a certain size (in general annual turnover of over EUR 400,000).

4.5. Association (Verein)

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

4.6. Silent Partnership (Stille Gesellschaft)

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

The silent partnership has no legal personality and cannot act under a common name. It is not obligatory to disclose it to the public.

4.7. Societas Europaea (SE)

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

The European Company Statute enables enterprises active in several EU member states to set up a public limited-liability company with the Latin name ***Societas Europaea*** (*SE*) and to operate throughout the European Union under a single legal and management system,

instead of being subject to the national legislation of the various member states. The *SE* must be entered in a register in the member state where its registered office is situated. In Austria this is the commercial register (*Firmenbuch*). Every registration must be published in the Official Journal of the European Community. The statute permits a choice between a one- or two-tier management system. Companies are able to merge, form a holding company, create joint subsidiaries or convert themselves into an *SE* without going into liquidation.

4.8. European Cooperative Society (SCE)

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

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

5. Taxation of Partnerships, Corporations and Individuals

5.1. Common Principles of Taxation

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

- 50 % of entertainment expenses
- a portion of depreciation and expenses relating to a passenger car if the acquisition costs (including value-added tax [VAT]) exceed a certain amount

- 50 % of supervisory board members' remuneration
- donations (with some exceptions)
- expenses whose recipient is not disclosed.

Depreciation for tax purposes is generally in line with depreciation in financial statements. If the depreciation charges required for financial statement purposes exceed the amounts acceptable under tax law, those allowed under tax law prevail, resulting in a difference between taxable and financial statement income. Goodwill acquired in the course of a take-over (asset deal) may be amortized over a period of 15 years. Buildings may be depreciated; the depreciation rate ranges between 3 % (e.g. factory) and 2 % (e.g. residential) on a straight-line basis. Land cannot be depreciated. Passenger cars must be depreciated over a minimum of eight years.

There are certain **restrictions** with regard to **accruals and provisions**, particularly to general provisions and lump-sum accruals as well as to accruals for severance and jubilee payments and for pension schemes. Only 80 % of long-term accruals and provisions are deductible.

There are no specific **transfer pricing rules**. However, the general arm's-length principle prevails and Austria has adopted the OECD Transfer Price Report. Related-parties' transactions that do not comply with the arm's-length principle may be recharacterized as hidden profit distribution or hidden equity contribution. A hidden dividend distribution is not deductible for the purposes of corporation tax and is subject to withholding tax in the same way as an actual dividend. The Ministry of Finance will issue Transfer Pricing Guidelines (*Verrechnungspreisrichtlinien*) based on the above-mentioned principles in the near future that will provide detailed guidance.

Tax losses (resulting from business income) may be carried forward indefinitely and may be offset against both trading income and capital gains. However, only 75 % of current income may be offset against tax losses brought forward, thus 25 % of current income is invariably subject to tax. Excess tax losses can still be carried forward. Loss carry-backs are not permitted.

5.2. Taxation of Partnerships

Profits of a partnership are taxed at partner rather than at partnership level. The partnership is a unit for the computation of income, which is then allocated to the partners and taxed in their hands. If the partner is an individual, his share in the partnership's profits is subject to **income tax** (*Einkommensteuer*). If the partner is a corporation, its share is liable to **corporation tax** (*Körperschaftsteuer*). A non-resident partner's income from the partnership is subject to Austrian income or corporation tax.

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

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

For tax purposes, a silent partnership is treated as a partnership (thus the partners' profit share is qualified as business income) if the silent partner is not only entitled to a share in the profits but also to a share in the goodwill and the assets of the enterprise. Otherwise, the silent partner's share in the profits is a deductible expense, but attracts a 25 % withholding tax when distributed. The silent partner whose profit share is qualified as income from investment of capital is subject to withholding tax, the amount of which is credited against mainstream income or corporation tax.

5.3. Taxation of Corporations

An Austrian corporation's profits are taxed at the company level at a flat rate of 25 % **corporation tax** (*Körperschaftsteuer*). Even if no income is generated, a *GmbH* triggers a minimum corporation tax of EUR 1,750, whereas an *AG* owes at least EUR 3,500.

The taxable income of a corporation is determined by applying the common principles outlined under 5.1.

Interest on the leveraged acquisition of investments, even if they qualify for the domestic participation privilege or the international affiliation privilege, is **deductible.**

In 2005 a new system of group taxation (*Gruppenbesteuerung*) was introduced. Under this system of group relief the profit or loss of a group member as computed for purposes of corporation tax is attributed to the controlling company. For losses, the group relief operates across borders and is also **applicable to non-resident first-tier subsidiaries**. Losses from non-resident subsidiaries can thus be offset against group income under the condition that they be recovered if offset abroad in a later tax year. The only condition for group membership is a **direct or indirect majority investment in a corporation**. The group members must also file for group taxation with the tax authorities. The group must exist **for at least three years**. If a member leaves the group for whatever reason before expiration of this period, tax will be assessed as if it had never been a group member. A kind of goodwill amortization is available for domestic share deals under certain conditions (see 7.4.2).

5.4. Dividend Withholding Tax

Dividends paid to an individual generally attract a 25 % **withholding tax** (*Kapitalertragsteuer*). This withholding tax rate is regularly reduced under Austria's double-tax treaties (see Annex 1). Although most tax treaties require the company to withhold the full rate and the recipient of the dividend to apply to the tax authorities for a refund, in general unilateral relief is available if the foreign recipient submits a certificate of residence. A resident individual's dividend income from Austrian sources is not subject to further income tax if 25 % has been withheld at source. Thus the withholding tax is the comprehensive tax (*Endbesteuerung*) for the individual shareholder.

A resident company's dividend income from Austrian sources is exempt from corporation tax under the **domestic participation privilege** (*Schachtelprivileg*). Any withholding tax suffered is refunded or credited against corporation tax on income from other sources. A dividend is exempt from withholding tax if a domestic corporate shareholder holds at least 25 % of the company. However, capital gains from the disposal of a shareholding do not fall under the scope of the domestic participation privilege, but are subject to 25 % corporation tax.

Dividend distributions to a foreign corporate shareholder also attract 25 % withholding tax. The above-mentioned unilateral relief to the double-tax treaty rate is only available if the foreign corporate recipient additionally confirms that its activities exceed those of a mere holding company, that staff is being employed and office space occupied.

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

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

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

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

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

5.5. Taxation of Individuals

An individual resident in Austria is subject to **income tax** (*Einkommensteuer*) on his worldwide income. An individual is treated as resident if he has either a permanent accommodation available in Austria or if he has his habitual abode there. If an individual has a secondary residence in Austria, its use for less than 70 days (which has to be proved by records) per calendar year does not trigger unlimited Austrian tax liability, unless the individual opts for it. A non-resident individual is subject to income tax only on his income from Austrian sources, e.g. his share in an Austrian partnership's profits or his rental income derived from real estate located in Austria.

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

- disposal of shares if the shareholding was 1 % or more at any point of time within the last five years
- disposal of shares or other moveable assets within 12 months after their acquisition
- disposal of real estate within 10 years (in case of subsidized buildings that are rented to tenants, 15 years) after its acquisition (two years when the property has been the main residence of the taxpayer)
- disposal of a going concern or a partnership interest.

If assets are privately held, capital losses can neither be set off against other sources of income nor be carried forward.

Progressive **income tax rates** of up to a maximum of 50 % apply to both resident and non-resident individuals.

Reduced rates apply to:

a) capital gains from the disposal of a going concern or the disposal of a partnership interest after a minimum holding period of seven years if the disposal is made upon retirement; otherwise, such capital gains are subject to the full income tax rate, but may be spread evenly over three years after a holding period of seven years
b) capital gains from the disposal of shares in a *GmbH* or in an *AG* if the shareholding was 1 % or more at any point of time within the last five years and the shares have been held for more than one year
c) capital gains from the disposal of shares in a foreign corporation which have been held for more than one year
d) dividends from both resident and non-resident corporations
e) interest from cash deposits in Austrian as well as foreign banks
f) interest on Austrian and non-Austrian bonds
g) distributions by an Austrian foundation (*Privatstiftung*) to its beneficiaries.

In cases a) and b) above the income **tax rate is reduced** to half the normal rate, in the cases of c) through f) either a flat rate of 25 % is withheld at source if the deposit is made with an Austrian bank or, if the deposit is with a foreign bank, the tax rate is reduced in the course of the tax assessment. The reduced rate of 25 % also applies if an individual earns interest or dividend income through a partnership. The reduced rates are equally available to non-resident individuals.

6. Holding Companies and Foundations

6.1. Holding Company

A **holding company** does not require a specific status. Any Austrian corporation, regardless of its other business activities, may function as a holding company. Foreign investors may obtain numerous tax benefits by establishing an Austrian holding company.

Dividends received from a foreign company are exempt from corporation tax (see 5.3) under the **international affiliation privilege** (*internationales Schachtelprivileg*). The international affiliation privilege is granted if an Austrian company has held at least 10 % of the foreign company's equity for a minimum of 12 months.

Under similar conditions capital gains from the disposal of a foreign subsidiary are tax neutral, unless the Austrian holding company opts for their taxability. This option must be exercised in the year a participation is acquired. In the same way capital losses as well as write-downs in a participation's book value are tax neutral, unless the Austrian holding company opts for taxability (same option as above). If taxability is opted for, the capital loss reduces the company's taxable income. However, such capital losses and write-downs must be spread over a period of seven years. These are one-time options and bind the holding company with regard to this specific investment.

The international affiliation privilege and the capital gains exemption (in case the taxability option is not exercised) may be replaced by a credit method whereby underlying foreign corporation taxes are credited against Austrian corporation tax if the following two tests are met:

- the foreign subsidiary earns mainly passive income (interest, royalties, rental and lease income, capital gains from the disposal of shareholdings)
- the effective tax rate of the foreign subsidiary does not exceed 15 %.

Further benefits of establishing an Austrian holding company are:

- dividends received from another Austrian company are exempt from Austrian corporation tax under the **domestic participation privilege** (*Schachtelprivileg* - see 5.4); the domestic participation privilege neither requires a minimum shareholding nor a minimum period of shareholding
- tax deductibility of interest on the leveraged acquisition of participations (see also 5.3)
- Austrian tax law provides for a system of group relief under the group taxation concept (see also 5.3)
- Austria possesses a broad **network of double-tax treaties,** which either eliminate withholding taxation or reduce the withholding tax rate for "inbound and outbound investments" (see Annex 1)
- a strict **debt-equity ratio** is not applicable under Austrian tax law, although the tax authorities may recharacterize shareholder loans as hidden equity under a substance-over-form approach
- in many cases the Austrian **Reorganisation Tax Act** (*Umgründungssteuergesetz*) facilitates a tax-free reorganization of corporations and partnerships and applies to both national and cross-border transactions; the Reorganization Tax Act implemented the EU Merger Directive
- only few specific **anti-avoidance rules** exist, but the Austrian tax authorities are empowered to prevent abuse; the main anti-avoidance rules are:
    - the international affiliation privilege is not available for the repatriation of passive income from a low-tax jurisdiction
    - the withholding tax exemption under the Parent-Subsidiary Directive is not available if the EU holding company has no substance.

The holding company can be formed as a company with limited liability (*GmbH* - see 3.5) or a stock company (*AG* - see 3.6).

6.2. Foundation (Privatstiftung)

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

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

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

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

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

The contribution of assets to an Austrian foundation is subject to an **entrance fee (Stiftungseingangssteuer)** of 2.5 % and a surcharge of 3.5 % on real estate. Both the entrance fee and the surcharge fee on real estate located in Austria is based on 300 % of the property's assessed value (*Einheitswert*), unless the fair market value is lower. In general the assessed value is far below the market price of the property. Supplementary contributions made by the grantor are also taxed at 2.5 %. However, all contributions are subject to an increased rate of 25 %, if the declaration of establishment, by-laws and similar arrangements are not disclosed to the tax authorities.

Some current revenues of an Austrian foundation are **tax exempt**, such as dividend income from investments in Austrian companies under the domestic participation privilege (see 5.4). The international affiliation privilege for dividend income is also applicable unless the dividend is paid out of passive income from a low-tax jurisdiction. Interest income from bank deposits, bonds or mutual funds as well as capital gains from the disposal of substantial shareholdings, i.e. 1 % or more, are subject to a 12.5 % tax rate. That tax will be credited against withholding tax on distributions to beneficiaries (see below). Furthermore, such capital gains tax can be deferred if the capital gain is rolled over into a new qualifying investment in shares in a domestic or foreign company within the next 12 months. Other current income of a foundation is subject to a 25 % corporation tax.

Distributions to beneficiaries attract a 25 % withholding tax, which may be reduced by tax treaties. There is no further Austrian income tax on the distribution, but non-resident beneficiaries may be subject to income or gift tax in their country of residence. Taxation of beneficiaries resident in other countries depends on their national tax laws and the applicable double-tax treaty.

The generous tax exemptions and privileges for income from both domestic and foreign capital and direct investments as well as limited set-up expenses make the Austrian *Privatstiftung* highly attractive, in particular where the annual income of the foundation exceeds the amount of distributions to beneficiaries so that the foundation facilitates a significant tax deferral.

7. Mergers and Acquisitions

7.1. General Information

An existing business is usually either acquired by purchasing its shares (share deal) or its assets (asset deal). Also, acquisition by means of a lease agreement (*Unternehmenspacht*) is possible. Legislation makes it possible for corporations to demerge and thus enables the acquisition of only a part of a business. **Mergers** (*Verschmelzungen* or *Fusionen*) **and demergers** (*Spaltungen*) **of corporations** are also possible under Austrian law. Usually, one corporation is merged into another, however, it is also possible to merge two corporations in such a way that a new (third) corporation comes into existence. It is not only possible to merge two or more stock companies (or two or more limited-liability companies). A

stock company may also merge with a limited-liability company. In such case the surviving company can either be a stock company or a limited-liability company.

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

For acquisitions in connection with **insolvency**, special regulations exist which usually reduce the liability of the purchaser for debts of the acquired business (see 24.3).

Mergers exceeding certain thresholds require approval by Austrian cartel authorities. If even higher thresholds are exceeded, EU merger control regulations may apply (see 15).

7.2. Share Deal

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

The **Takeover Act** (*Übernahmegesetz*) regulates publicly made bids for the takeover of shares in companies listed on the stock exchange (see 23.2.5).

7.3. Asset Deal

In an **asset deal** all or part of the assets of an enterprise are acquired. Since the legal identity of the target is changed, all contracts previously concluded by the target must be

transferred to the purchaser to remain effective. Such transfers have been facilitated as of January 1, 2007. Unless agreed otherwise or opposed by the contracting party, the purchaser of an enterprise automatically becomes party to all enterprise-related contracts if the acquired business continues operating, even under a different name. Under certain conditions, the seller remains liable for obligations resulting from such transferred contracts. The same applies to **labor contracts**. They follow the business and employees are thus transferred automatically to the purchaser. However, the seller may remain liable for certain claims of transferred employees (see 11.4).

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

7.4. Taxation of Asset or Share Transfers

7.4.1. Transfer Taxes

The purchase of assets of a business (asset deal) and the purchase of a business from a sole proprietorship (see 4.4) only attract real estate transfer taxes. However, significant stamp duties may be incurred by the transfer of certain agreements (e.g. with banks) and receivables to the new owner. The purchase of a going concern is also subject to value-added tax (VAT [*Umsatzsteuer*]), which can be recovered by the purchaser.

The transfer of a partnership interest and of shares in an *AG* or *GmbH* is exempt from VAT.

When all shares in a company that owns Austrian real estate are acquired by a single shareholder, he incurs 3.5 % **real estate transfer tax** (*Grunderwerbsteuer*) based on

300 % of the property's assessed value (*Einheitswert*) or its fair market value, whichever is lower. The assessed value is usually far below market price.

7.4.2. Income Tax and Corporation Tax

The assets' book value may be stepped up if a business is acquired in the course of an **asset deal**. The same applies to the acquisition of a partnership interest. Assets are depreciated over their estimated useful lives, and goodwill is amortized over a period of 15 years. Interest on acquisition debt is deductible.

Prior to 2005, no step-up of assets or amortization of goodwill was available in a share deal. Under the Tax Reform Act 2005 the acquisition cost of shares in a corporation eligible for group membership is considered to be goodwill in an amount equal to the difference between acquisition costs and the capital of the acquired company according to accounting rules plus hidden reserves in non-depreciable assets. If this amount is negative, it is taxable. Goodwill as well as negative goodwill have to be spread over a period of 15 years. However, this basic rule is subject to some limitations: the amount of goodwill is limited to 50 % of the acquisition costs as a maximum basis for amortization. Furthermore, acquisitions of shares in non-resident corporations as well as related corporations are excluded. Also the acquired corporation has to operate a business. Hence, financial investments are excluded from the benefits of the amortization. Further goodwill amortization is only possible if and as long as both the purchaser and the acquired corporation apply for group taxation (see 5.3)

Tax losses of a company can be transferred in the course of an acquisition, provided the business that generated the losses is continued.

8. Privatization and Liberalization, New Technologies

8.1. Privatization

ÖIAG (*Österreichische Industrieverwaltungs Aktiengesellschaft*) is a 100 % state-owned company, which holds shares in a number of important Austrian industrial enterprises and is responsible for the privatization of state assets.

In 1992 the state-owned railways (***ÖBB***) were transformed into a company with legal personality, but the government still holds 100 % of its shares. In 1994 Abu Dhabi's *International Petroleum Investment Company* (*IPIC*) was found as a partner for ***OMV***, the, at the time, partially privatized (28 %) integrated oil and chemicals group. Currently, *ÖIAG* holds 31.5 %, IPIC 19.2 % and 49.3 % are publicly held. In 1993 *Austrian Industries AG* was split up into ***VA Technologie AG***, ***Böhler-Uddeholm AG*** und ***Voest-Alpine Stahl AG***. All three of these companies have been fully privatized. *ÖIAG* earned record profits of ATS 6.33 billion (about EUR 460 million) in 1997 by the sale of **salt mines** and the partial flotation of ***Austria Tabak***. In 2001 the last tranche of *Austria Tabak* was sold to the *Gallaher Group*.

The federal government's shares in ***Bank Austria*** were sold 1997. In the same year, *Bank Austria* acquired the government's shares in *Creditanstalt*. Since then the bank has been called ***BA-CA***. Since 2000 *BA-CA* has been part of the German *HypoVereinsbank Group,* which was bought in 2005 by UniCredit (originally an Italian and now a European bank). 100 % of the shares of ***Postsparkasse*** (postal savings bank) were sold by the state-owned postal holding company, *PTBG*, to *BAWAG* (*Bank für Arbeit und Wirtschaft*). In 2005 *BAWAG* and *Postsparkasse* were merged into a single company. In 2006 all of *BAWAG P.S.K.'s* shares were sold to a consortium dominated by the US investment trust *Cerberus*.

Since 1998 *ÖIAG* has steadily reduced its share in ***Telekom Austria***. In 2000 a tranche of 28 % of *Telekom Austria* shares were sold both on the Vienna bourse and New York Stock Exchange (NYSE), making *Telekom Austria* the first Austrian company to list its shares on the NYSE. At present, *ÖIAG* holds 28.42 % of *Telekom Austria*, while 71.58 % are publicly held.

In 2005 *ÖIAG* sold 49 % of the Austrian postal service, ***Österreichische Post AG***, on the Vienna stock market. ÖIAG currently holds 52.85%.

In late 2008 *ÖIAG* sold its shares (around 42%) in ***Austrian Airlines*** to *Deutsche Lufthansa AG*. After having acquired the majority of the publicly held other shares and having squeezed out the few remaining minority shareholders, *Lufthansa* delisted the *Austrian Airlines* shares from the Vienna stock market in February 2010. All shares in Austrian Airlines are now held by *ÖLH Österreichische Luftverkehrs-Holding-GmbH*. 49.8% in that holding company are held (indirectly via another holding company) by *Deutsche Lufthansa AG*; the remaining 50.2% are held by an Austrian trust (in order to secure that the majority of the *Austrian Airlines* shares continue to be held by an Austrian entity).

Besides the shares mentioned above, *ÖIAG* still holds 100 % of ***GKB-Bergbau GmbH***, whose task is to enable *ÖIAG* to withdraw from the mining sector by closing and securing several former mines.

8.2. Liberalized Markets: Telecommunications, Energy and Railways

Since the liberalization of the telecommunications market in 1997, many telecommunications companies have entered the Austrian market. **GSM licenses** were auctioned off by the Telecommunications Control Commission. At present three companies hold GSM licenses: *Mobilkom Austria* (*Telekom Austria* subsidiary), *T-Mobile* (subsidiary of the German *T-Mobile*) and *Orange Austria Telecommunication GmbH* (owned by the private equity investment firm *Mid-Europa Partners* and *Orange* (which is a part of *France Telecom*)). Mobile number portability, as prescribed by the New Regulatory Telecommunication Framework of the EU, has made the market even more competitive.

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

As one of the last countries in Europe, Austria auctioned off six **UMTS mobile-phone licenses** in 2000. The auction ended after two days with a total bid of ATS 11.443 billion (EUR 832 million). Each of the six bidders - *Telekom Austria*, *T-Mobile*, *One*, *tele.ring, Telefonica* and *Hutchison Whampoa* - acquired at least one paired-frequency package. The first company to operate the UMTS network was *Hutchison Whampoa* with its brand "3". While it has no GSM license, it offers full domestic roaming services. *Telefonica* never started its UMTS service in the Austrian market. Instead it sold its frequencies to *Mobilkom Austria* with consent of the regulatory authority in 2003.

Under the Telecommunications Act - in compliance with the New Regulatory Telecommunication Framework of the EU - a GSM license is no longer a prerequisite for operating a mobile network. However, currently there is only one active Mobile Virtual Network Operator (**MVNO**), namely *Mundio Mobile (Austria) Ltd.* It operates under the trademark VECTONE but is of minor importance.

In 2001 the Austrian Communications Authority Act (*KommAustria-Gesetz*) established a new regulatory authority for the control and regulation of the broadcasting and telecommunications sector, the **Austrian Communications Authority** (*Kommunikationsbehörde Austria [KommAustria]*), whose operating arm and agent is the **Telecommunications and Broadcasting Regulation GmbH** (*Rundfunk und Telekom Regulierungs-GmbH*). The main responsibilities of the Telecommunications and Broadcasting Regulation GmbH are the administrative support of the **Telecommunications Control Commission** (*Telekom-Kontroll-Kommission*) and the **Austrian Communications Authority** as well as number assignment. The Act also provides for the establishment of the **Federal Communications Panel** (*Bundeskommunikationssenat*), an independent authority to which appeals against decisions of the Austrian Communications Authority can be brought and which is responsible for supervising *ORF,* the public broadcasting service (see also 26.1.3).

The liberalization of the energy sector began with the enactment of the **Energy Liberalization Act**. The regulatory authority, the **Energy Control GmbH** (*E-Control GmbH)* and the **Energy Control Commission** (*E-Control Kommission)*, started work in 2001. Its structure and functions are analogous to those of the telecommunications sector.

Although the **railway market** was liberalized in 2000, *ÖBB* is still the sole market player.

8.3. New Technologies

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

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

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

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

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

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

The **Data Protection Commission** (*Datenschutzkommission*) is responsible for safeguarding data protection in Austria.

Certain data applications are subject to notification to the **Data Processing Register** (*Datenverarbeitungsregister*), unless an exception applies. Transnational groups are particularly affected since some data applications with cross-border data flow not only must be notified, but may also be subject to prior approval by the Data Protection Commission, e.g. when the subsidiary is based outside the EEA.

On January 1, 2010, an amendment to the Data Protection Act 2000 introduced a Data Breach Notification Duty for companies which forces them to inform data subjects if they find out that data from one of their data applications has been used in a systematic, grave

and unlawful manner and the data subjects may suffer damage. Austria was the second country in the European Union to introduce such a duty.

9. Investment Incentives

9.1. Government Investment Incentives

Austria offers a comprehensive system of both national and local **incentive programs**. The incentives available for a specific project vary, depending on the location, the potential for creating new jobs or setting up new or expanding old facilities, the technology used, the size of enterprise and various other factors.

Business activities which may attract public subsidies are:

- **investments** in plants and equipment are typically encouraged by investment grants in the context of regional subsidy programs; investment expenses can be reduced by up to 50 %, e.g. for manufacturing equipment or information technology
- **research and development**: typical research and development projects can be subsidized up to 50 % depending on research focus, region, etc; costs of fundamental research activities may be subsidized up to 100 %
- **recruitment and personnel development**: human-resource subsidies of up to 45 % are normally granted in connection with personnel development and training; furthermore, job creation grants are often available, as well as subsidies to meet initial salary costs or reduce social security costs of employees
- any activity that leads to an **improvement of the environment** may be entitled to environmental subsidies of up to 30 %
- **commodity exports** are supported by numerous export promotion programs
- **transnational cooperation**: costs related to transnational projects may also be eligible for subsidies.

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

Three block exemption regulations concerning state aid to small and medium-sized enterprises (SME) as well as *de minimis* aid (EUR 200,000 within three years) facilitate state supports and contain exemptions from the prior-notification requirement. The new Block Exemptions Regulations became effective on January 1, 2007, and are valid until December 31, 2013. In Austria, various Austrian regions qualify for extensive state and EU aid, as approved by the European Commission to promote and facilitate economic development. Burgenland, Austria's eastern-most province, is, for example, a "phasing out" region until 2013; the possible maximum rate of incentives for enterprises is, therefore, especially high.

9.2. Tax Incentives

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

Tax incentives available under the Austrian tax law include:

- additional allowance of up to 25 %, in particular cases up to 35 %, of **research and development expenses** (*Forschungsfreibetrag*), alternatively a tax credit equal to 8 % of certain research and development expenses
- **employee training allowance** (*Bildungsfreibetrag*) of up to 20 % of qualifying training costs, alternatively a tax credit equal to 6 % of such costs
- a particular **tax credit** of EUR 1,000 (*Lehrlingsausbildungsprämie*) per **apprentice** employed (only applicable if the employment contract was concluded before June 28, 2008). For apprentices hired after that date subsidies (up to three times monthly remuneration) are available from the Austrian Economic Chamber.

10. Trade and Industry Law

Most business activities in Austria require a **trade license** (*Gewerbeberechtigung*) under the **Trade Act** (*Gewerbeordnung*). The requirements for obtaining a trade license depend on the type of business. For regulated professions (*reglementierte Gewerbe*) a **certificate of proficiency** (*Befähigungsnachweis*) is required to prove that the person planning to engage in such trade fulfills certain educational criteria and has previous practical experience. The trade authority may grant an exemption from the certificate of proficiency (*Nach-*

sicht vom Befähigungsnachweis) under certain circumstances. Other activities (*freie Gewerbe*) do not require a certificate of proficiency.

Provided that the above-mentioned requirements are met, the **filing of a notification** is sufficient to start a business. However, a limited number of regulated professions require prior authorization (*Bewilligung*).

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

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

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

11. Labor Law and Social Security

11.1. General Information

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

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

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

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

11.2. Wages, Working-Time, Worker Protection

Minimum wages are provided for by *KVs*. Wages (i.e. minimum and actual wages) are normally raised annually as a result of negotiations between employer organizations and the trade unions.

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

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

Regular **working-time** is eight hours a day and 40 hours a week. Shorter working-time applies to employees under many *KVs* (the current standard is about 38 hours a week). Working-time can be allocated differently to the respective working days, but, for a few exceptions, working-time may never exceed 10 hours a day or 50 hours a week. Employees are entitled to a break of 36 consecutive hours at least once a week. Overtime work either has to be paid at the normal hourly rate plus at least 50 % or the employee has to be given equal time off.

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

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

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

Employees are entitled to full **sick payment** from their employer for at least six to 12 weeks and additional **half sick payment** for another four weeks. Thereafter social insurance benefits are received.

11.3. Termination of Employment and Dismissal Restrictions

Employment may be terminated by mutual agreement, ordinary termination or dismissal/resignation for cause with immediate effect. A **dismissal with immediate effect** by the employer (*Entlassung*) or an **immediate resignation** by the employee (*Austritt*) has to be for material cause. An **ordinary termination** (*Kündigung*) requires no cause, but both compliance with certain notice periods (*Kündigungsfristen*) as well as notice dates (*Kündigungstermine*) and – if a works council exists – prior notification of the works council are necessary. For blue-collar workers notice periods and dates are mainly prescribed by the *KVs*. The general rule for ordinary termination of a contract with a white-collar worker is that the longer the employee has been employed by the employer, the longer the notice period for a termination by the employer becomes. Unless a notice date on the 15th and/or the last day of each month has been expressly agreed and nothing else is said in the *KV*, the employer may only terminate the employment relationship at the end of each quarter (March 31, June 30, September 30 and December 31). A white-collar worker is entitled to terminate his employment contract on the last day of each month by giving one month's notice. The works council or the employee may **challenge ordinary termination** of employment in labor court on the grounds that, *inter alia*, the termination was socially unjustified or prompted by unfair motives. However, the interests of the employer must also be considered.

In enterprises where a **works council** is established, termination is, in general, void if the works council was not **informed** by the employer more than five business days before giving notice to the employee. If the business is closed on e.g. Saturday, this day is not counted as a business day.

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

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

If the term of employment has lasted for at least three years without interruption, the employee is entitled to **severance payment** (*Abfertigung*) in case of ordinary termination by the employer, termination by mutual consent or immediate resignation for cause by the employee. Severance payment ranges between 2/12 and one annual salary depending on the duration of employment. A severance payment must also be made upon retirement (see 11.8.1). However, all employment contracts beginning after December 31, 2002 (and older employment contracts, if so agreed in writing), fall under the Employee Retirement Scheme Act (*Betriebliches Mitarbeitervorsorgegesetz*). Under the act the employer has to pay 1.53 % of the monthly remuneration (including benefits and before taxes) into a fund. In case of ordinary termination by the employee, resignation by the employee without cause, dismissal for cause or if there have not yet been three years of continuous contributions, the employee may not demand immediate severance payment, but the accrued payments remain in the fund. In all other cases the employee is entitled to immediate payment from the fund.

11.4. Transfer of a Business

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

11.5. Employment of Foreigners

11.5.1. Employment of Non-EEA Nationals

The employment of a non-EEA national requires a **work permit** (*Beschäftigungsbewilligung*), to be obtained prior to the start of employment. A **certificate of exemption** (*Be-*

freiungsschein) can be issued to employees who have, as a general rule, spent at least five of the last eight years in employment in Austria or to employees who have been married to an Austrian citizen for the last five years and have their residence in Austria, or to certain juvenile employees for whom less strict requirements apply. Since January 1, 2003, it is possible to obtain an exemption for highly qualified workers (*Schlüsselarbeitskräfte*) if there is a shortage of such personnel in Austria.

A **residence permit** (*Niederlassungsbewilligung*) may also be required. A **residence certificate** (*Niederlassungsnachweis*), i.e. a residence permit of unlimited duration, entitles the holder to work in Austria without a work permit.

11.5.2. Employment of EU / EEA Nationals

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

However, for nationals of ten EU member states (Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, Czech Republic, Hungary, Romania, Bulgaria), the free movement of workers under EU law does not yet apply. Although these countries have been full members since May 1, 2004 (Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, Czech Republic, Hungary) and January 1, 2007 (Romania, Bulgaria), bilateral agreements restrict freedom of movement for the 2004 accession states until April 30, 2011, and regarding Romania and Bulgaria until the end of 2013, at the latest. However, if these countries' nationals have been legally employed in Austria for the last 12 months, they are entitled to a **free movement certificate** (*Freizügigkeitsbestätigung*) and no work permit is required.

11.6. Taxation of Employment Income

Employment income for work performed in Austria is subject to Austrian income tax at a progressive rate of up to 50 %. Income tax is withheld by the employer under a **pay-as-you-earn system** (*Lohnsteuer*). Under the pay-as-you-earn system approximately 1/7 of annual income is taxed at only 6 % provided that this portion is paid on top of the current remuneration. This is the main reason why wages and salaries are paid 14 times

per annum in Austria. Furthermore, severance payments are subject to a reduced rate of 6 % within certain limits that depend on the length of service.

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

- 4.5 % contribution to the Family Allowance Fund (*Dienstgeberbeitrag - DB*)
- 0.36 % - 0.44 % contribution to the Austrian Economic Chamber (*Zuschlag zum DB*)
- 3 % community tax (*Kommunalsteuer*)
- 1.53% contribution to the severance payment fund (see 11.3).

11.7. Social Security

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

- health
- accident
- pension
- unemployment insurance.

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

Social-security contributions are partly withheld from the employee's remuneration and partly paid by the employer in addition to the gross remuneration. Currently (in 2010), the employee's contributions amount to 18 % of gross salaries (*Gehälter*). The employee's contributions on the 13th and 14th salary amount to 17 %. In addition, the employer contributes 21.9 % on current and 21.4 % on the 13th and 14th salaries. Total social-security contributions thus amount to 39.9 % on current and 38.4 % on the 13th and 14th salaries. However, there is a ceiling for calculating the basis of contributions of EUR 57,540 per year (in 2010) so that the monthly maximum employee's contribution amounts to EUR 742.69, the maximum employer's to EUR 897.23. The ceiling is indexed and is adjusted annually. Social-security contributions on (blue-collar) wages (*Löhne*) are slightly higher than those on (white-collar) salaries.

Freelancers must also pay into the social-security scheme.

Basically, expatriates also fall under the scope of the compulsory social security scheme. However, Austria has concluded a number of **social-security treaties** with other countries which allow expatriates to remain under their native country's scheme for a limited period.

11.8. Old-Age Pensions

11.8.1. Retirement

The retirement age is 65 for men, 60 for women. In 2003 the provisions for early retirement were abolished. However, during a transitional period lasting until 2017, early retirement is still possible. For example, in 2007 men may retire early at 62.5 and women at 57.5 years of age. Additionally, until 2013 men can retire after 540 months of contribution and women after 480. Upon retirement (*Pension*), employees are entitled to a severance payment (see 11.3) and those who have contributed to social security for at least 15 years receive a social-security pension.

11.8.2. Pension Plans

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

12. Real Estate Law

12.1. Land Title Register

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

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

12.2. Acquisition of Real Estate by Foreigners

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

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

Following a preliminary ruling by the **European Court of Justice** in 1999, provisions discriminatory to EEA and EU citizens regarding real estate not to be used as a principal residence or to establish an undertaking were abolished. Acquisition of real estate **not to be used as a principal residence or to establish an undertaking** is now, therefore, in some provinces with substantial tourist industries, e.g. Tyrol and Salzburg, restricted for both foreigners and Austrians.

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

12.3. Lease of Apartments, Homes and Business Premises

The **Rent Act** (*Mietrechtsgesetz*) places considerable limits on the free contracting of lease (rent) agreements, mostly in favor of the lessee. The Rent Act (or at least parts thereof) applies to the lease of apartments, business premises and premises in business parks. To

the extent the Rent Act is not applicable, the provisions of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch [ABGB]*) apply.

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

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

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

12.4. Taxes and Duties on Real Estate

An annual **real estate tax** (*Grundsteuer*), payable in quarterly installments, is collected by the municipalities (*Städte*) and communities (*Gemeinden*). The tax rate ranges from 0.4 % to 0.84 %. A further tax is collected by the federal tax authorities for undeveloped building lots. This tax is also payable in quarterly installments. Both taxes are based on the **assessed value** (*Einheitswert*) of the real estate, which is far below the property's market price.

Rental income from residential property is subject to **value-added tax** (VAT) at a rate of 10 %. Rental income from other real estate is exempt from VAT or optionally subject to VAT at a rate of 20 %.

Rental agreements are subject to a 1 % **stamp duty** (Rechtsgeschäftsg*ebühr*), based on the total rental payments under the agreement, with a cap for residential property of 1 % on three years' rental payments. For rental agreements of an unlimited duration, three years' rental payments form the basis of the stamp duty.

Rental income derived from real estate located in Austria is invariably subject to Austrian **income** or **corporation tax**. Capital gains of an investor from the disposal of such real estate are only subject to Austrian income or corporation tax if the property is sold within 10 years (in case of subsidized housing 15 years) after its acquisition. However, capital gains are invariably subject to Austrian tax if they form part of a business or the assets of an Austrian permanent establishment.

12.5. Taxes upon Transfer of Real Estate

Real estate transfer tax (*Grunderwerbssteuer*) is levied on all real estate transactions, including the transfer of real estate in connection with the formation of a company. The tax amounts to 3.5 % of the purchase price. If the transfer is between husband and wife or between close relatives, the tax is 2 %. Real estate transfer tax also accrues if all shares of a company owning real estate are united or taken over by a single shareholder. The transfer of real property by gift or inheritance is also subject to real estate transfer tax. In this case the tax is based on 300 % of the assessed value (see below).

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

Upon registration with the land title register (*Grundbuch*) the purchaser has to pay a **registration fee** (*Eintragungsgebühr*), which is 1 % of the purchase price. The registration of a mortgage attracts a 1.2 % registration fee (on top of a stamp duty for the loan agreement between 0.8 % and 1.5 %).

In certain cases the assessed value (*Einheitswert*) forms the basis for the real estate transfer tax and registration fee. If real estate is transferred in the course of the reorganization

of a going concern (e.g. merger), taxes and fees are generally based on 200 % of the assessed value.

13. Protection of Creditors

13.1. General Information

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

- may be rescinded (*anfechten*) under certain conditions (see 24.4)
- is not enforceable for a loan recharacterized as equity capital (see 24.5)
- may be void if the security is given by the company in favor of a shareholder in contravention of the statutory principle that shareholders must not be repaid equity unless certain conditions are met (*Kapitalerhaltungsvorschriften*).

13.2. Security in Personam

13.2.1. Suretyship

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

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

13.2.2. Guarantee

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

13.2.3. Letter of Responsibility

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

13.3. Security in Rem

13.3.1. Pledge

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

13.3.2. Mortgage

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

The registration of a mortgage in the land title register attracts a 1.2 % registration fee (see 12.5).

13.3.3. Assignment

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

13.3.4. Transfer of Title

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

13.3.5. Retention of Title

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

14. Foreign Exchange Control

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

15. Competition Law

15.1. Austrian Cartel Law

15.1.1. General Procedure

The main sources of the Austrian cartel law are the **Cartel Act** (*Kartellgesetz*) and the **Competition Act** (*Wettbewerbsgesetz*). In 2006 a new Cartel Act and an amendment to the Competition Act entered into force. This reform was intended to harmonize the Austrian substantive law on cartels with the competition rules of the European Union.

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

- the so-called official parties (*Amtsparteien*), which are the FCA and the Federal Cartel Prosecutor (*Bundeskartellanwalt*),

- every enterprise and every association of undertakings that have a legal or economic interest in the decision and
- the Austrian Economic Chamber (*Wirtschaftskammer Österreich*), the Federal Employees Chamber (*Bundesarbeitskammer*) and the Standing Committee of the Presidents of the Austrian Chambers of Agriculture (*Präsidentenkonferenz der Landwirtschaftskammern Österreichs*).

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

The FCA is established at the economic affairs ministry and is headed by a director general, who is independent and therefore may not be given instructions by the minister. One of the FCA's tasks is to prepare cartel proceedings. In this process it can consult the competition commission, which is established at the FCA. Among other things, the FCA is empowered to examine potential restraints on competition on a case-by-case basis and entire business sectors if it suspects that competition is being threatened. In the course of its investigations, the FCA may also call on and question companies or individuals and examine relevant business documents. The Cartel Court has to allow the FCA to carry out house raids in case of a substantiated suspicion of an abuse of a dominant position or the implementation of a prohibited cartel or merger. The FCA is, furthermore, empowered to apply EC competition rules.

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

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

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

15.1.2. Cartels

Agreements between enterprises, decisions by associations of undertakings and concerted practices which have as their object or effect the **prevention, restriction or distortion of competition** (i.e. **cartels** - *Kartelle*) are prohibited unless expressly exempted under law. Previously, companies could (and had to) obtain an approval from the Cartel Court for arrangements that might fall under the cartel ban, and thus gained legal certainty. Since 2006, however, the legal exception principle has applied in Austria. Enterprises must assess whether any competition restraints they envisage are exempted from the cartel ban. Exemptions are essentially designed to ensure that consumers adequately benefit from improvements in product manufacturing and the promotion of technological and economic progress. It is only when such economic justification can be furnished that competition restraints are permitted. The enterprises' self-assessment is facilitated by a legal tool available to the justice minister in conjunction with the economic minister, who can issue (and have done so in the past) a regulation exempting certain groups of cartels from the ban (block exemption regulation). These regulations specify the general criteria set out in the Cartel Act. Now that Austrian antitrust legislation has been harmonized with European cartel law, it is possible to apply the numerous decisions rendered by the European Commission and the European courts assessing competition restraints. Nevertheless, compared to the past, legal uncertainty has grown since undertakings or their lawyers must now assess the legal situation without the aid of the Cartel Court. Further, the Cartel Act contains a *deminimis* exemption for cartels with no noticeable effect on competition.

15.1.3. Merger Control

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

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

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

Although competitors do not have the right to request an investigation by the Cartel Court (this is a privilege of the *Amtsparteien* - see 15.1.1), the Cartel Act gives competitors affected by the merger the right to **file comments** with the FCA or the Federal Cartel Prosecutor within 14 days of publication of the merger on the FCA's website. If the FCA or the Federal Cartel Prosecutor demands an investigation of the merger, they have to file a request for examination. That initiates a second phase in which the notification of the merger is submitted to the Cartel Court. The Cartel Court must prohibit the merger if it expects the merger to create or intensify a dominant position. The non-prohibition of a merger can be made contingent upon restrictions and the imposition of certain duties. Mergers may be reversed if approval was based on false information provided by the parties or the conditions for approval were infringed.

15.1.4. Dominant Market Position

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

15.2. European Competition Law

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

dominant market position. Additionally, the **EC Merger Control Regulation** is directly applicable in Austria.

According to these provisions all **agreements between undertakings**, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market are **prohibited and void**, unless the *de-minimis* principle (minimum standard for a noticeable effect on competition) applies. Intentional or negligent infringement may lead to the European Commission imposing fines of up to 10 % of the previous year's worldwide turnover. However, individual exemptions or EC Block Exemption Regulations may apply. In 2004 the system of individual exemptions was significantly modified. Undertakings relying on an exemption must now evaluate whether certain agreements or practices are justified, although they may have a negative competitive effect. This places a considerable burden on undertakings. Furthermore, the **abuse of a dominant position** within the Common Market or a substantial part of it is prohibited insofar as it may affect trade between member states, and may also result in fines.

Certain **concentrations** (mergers, acquisitions and joint ventures) between undertakings with a combined worldwide turnover of more than EUR 5 billion, in which at least two of the firms concerned have a combined Community-wide turnover of more than EUR 250 million each, require approval by the European Commission. Additionally, if turnover thresholds in at least three member states are exceeded (combined EUR 100 million), a merger concerning a combined worldwide turnover of more than EUR 2.5 billion may be approved by the European Commission, thereby avoiding the necessity of a merger procedure in several member states. In both cases, approval is necessary only if each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state. Under a 2004 amendment a merger which does not exceed these thresholds but would have to be notified in at least three member states may be referred to the European Commission upon request of the applicant or *sua sponte*, if no member state objects. *Vice versa*, the Commission may refer a merger to the authorities of a member state under certain conditions.

The EC competition rules are not only enforced by the **European Commission** and the **European courts** (European Court of Justice, European Court of First Instance), but also by national authorities. Furthermore, EC law is applicable before national courts, e.g. with regard to invalidity of illegal cartel agreements under civil law. The relationship between EC competition law and **national cartel law** is complex. However, the harmonization of Aus-

trian and EC competition law has lessened the practical relevance of this problem. The cooperation between European and national competition authorities has intensified and is organized in a European Competition Network (ECN).

Due to successful implementation of competition laws in most EC countries, competition policy regarding **vertical restraints** has changed. The EC has enacted a **Block Exemption Regulation** on Categories of Vertical Agreements and Concerted Practices, exempting certain exclusive distribution, exclusive purchasing and other potentially restrictive agreements from the applicability of Article 101 TFEU. Various other block exemption regulations for specific industry sectors (e.g. car distribution) also exist.

15.3. Advertising Law

The **Unfair Competition Act** (*Gesetz gegen den unlauteren Wettbewerb - UWG*) explicitly prohibits a number of advertising practices, for example

- misleading advertising (handled very strictly by courts)
- promotional gifts (*Zugaben*) coupled with the purchase of principal products (with some exceptions) – however, the European Court of Justice is likely to hold such prohibitions to be incompatible with EU law in decisions to be issued soon
- abuse of trade names and other well-known signs of another enterprise (trademarks are protected by the Trademark Act against identical, misleading or unfair usage)
- unfair passing-off.

In addition, the *UWG* generally prohibits unfair commercial practices which are used in the course of business, for example, the exertion of moral pressure to buy goods.

Prize competitions (*Preisausschreiben*) are not generally prohibited, but are unlawful if too much pressure is placed on the customer to purchase goods or if they are coupled with the purchase of goods (with an important exception depending on the total value of available prizes and on the relation of their total value to the number of distributed tickets). The latter rule is part of the prohibitions on promotional gifts which – as mentioned above – are likely to become inapplicable soon. Promotional gifts and prize competitions may, nevertheless, not infringe any of the remaining prohibitions of the UWG, meaning that they e.g. may not be misleading.

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

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

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

15.4. Public Procurement / Tender Provisions

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

The complexity of this area results from the multitude of sources of law to be observed on national and international levels. There is the Austrian **Federal Procurement Act** (*Bundesvergabegesetz 2006*) and there are nine provincial acts (one for each Austrian province). The Federal Act contains **all substantial rules** for procurement proceedings as well as procedural rules for legal remedies during pending procurement and review of completed procurement proceedings which have been conducted by federal public authorities or by certain entities which are publicly owned or controlled by federal legal bodies.

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

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

Tender provisions, which generally pursue the objective of ensuring fair and equal treatment of tenderers in public and semi-public economic areas, depend in particular on the authority inviting and on the amount and the object of the tender. After a strict, and in most cases, public tender procedure, the tenderee must award the contract to the tenderer with the best or cheapest offer.

During the tender procedure every tenderer has recourse to specialized procurement supervision authorities like the **Federal Procurement Authority** (*Bundesvergabeamt*) to protect his interests in being awarded the contract. The authorities may issue an order either to stop the tendering procedure or to cancel decisions of the tenderee.

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

To ensure the transparency of tender procedures, tenderees must also discharge extensive notification duties to the European and national procurement authorities.

16. Products Liability

Austria has implemented the EC Directive on **Liability for Defective Products** by enacting the Products Liability Act (*Produkthaftungsgesetz*). Producers, importers, own-branders and, where the producer and importer cannot be identified, any supplier that has put the product into circulation, are required to compensate for damages caused by a defective moveable product (including energy) as follows: Damages caused by death or by personal injury are to be compensated in any case. Furthermore, consumers have to be compensated for damages to any item of property. Business persons, however, need only be compensated for damages caused to such items of property dedicated mainly to personal use. Negligence does not need to be proven (strict, i.e. no-fault liability). The liability is inde-

pendent of any contractual relationship with the injured persons (innocent-bystander liability). Suppliers are exempt from liability if they inform the damaged party within a reasonable period of the identity of the producer (importer) or of any preceding supplier. Producer is not only the manufacturer of the finished product but also of any raw material or component parts as well as any person who, by putting his name, trademark or other distinguishing feature on the product, presents himself as its producer. The Products Liability Act provides for a EUR 500 deductible with regard to property damages, therefore, only property damages exceeding EUR 500 can be claimed.

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

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

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

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

17. Consumer Protection

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

Under certain conditions consumers **may cancel transactions** if the contract was negotiated off business premises (e.g. mail orders, promotional trips).

Under the Consumer Protection Act certain **clauses in contracts concluded with consumers** are void. The act distinguishes between clauses which are not binding on the consumer *per se* and others which bind the consumer only if they have been individually nego-

tiated. Clauses which are prohibited *per se* include an unreasonably long period during which a consumer is bound to his offer or the waiver of the consumer's right to refuse payment if the enterprise does not properly fulfill the contract. All clauses in standardized contract terms must also be transparent, i.e. comprehensible to consumers.

Special organizations such as the **Consumer Information Association** (*Verein für Konsumenteninformation*) may take **legal action** to prevent the contractor from using such clauses (*Verbandsklage*).

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

Austria has implemented the EC Directive concerning the Protection of Consumers in respect of **Distance Contracts** by amending the Consumer Protection Act. Distance contracts are concluded without the physical presence of the parties (e.g. teleshopping, email, Internet). The supplier must inform the consumer in detail about the goods and services (e.g. price, delivery costs, taxes), his personal data (e.g. address) and certain rights (e.g. right of cancellation) and confirm that information in writing or in another durable medium available and accessible to the consumer. Consumers are protected by a special right of cancellation which they must exercise within certain time frames. In 2004 provisions concerning **retirement homes** were added to the Consumer Protection Act by the Retirement Home Contract Act (*Heimvertragsgesetz*). **Financial services** are explicitly excluded from the scope of the provisions regarding distance contracts. They are subject to the Distance Financial Services Act (*Fern-Finanzdienstleistungs-Gesetz*).

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

To implement the Consumer Credit Directive (2008/45/EC) a new Consumer Credit Act (*Verbraucherkreditgesetz*) will enter into force on June 11, 2010. The lender has to provide standardized information as well as adequate explanations of the credit conditions and costs to make credit offers easier to compare. Lenders are also obliged to thoroughly check the debtors' creditworthiness before offering credit and, if necessary, to warn the consumer. Consumers are entitled to cancel a credit agreement within 14 days (except mortgage loans and leasing contracts) and to make partial early repayments. The new regulations also contain requirements concerning credit reference databases and impose new disclosure obligations on credit intermediaries.

18. Foreign Trade Law

18.1. Export and Import Control

Since Austria's accession to the European Union (EU), the EU's foreign trade regime has been applicable. However, under the **Foreign Trade Act** (*Außenhandelsgesetz 2005*) imports and exports, excepting those of EU member states, may be restricted. The competent minister has issued a regulation (*Außenhandelsverordnung 2005*) stipulating which imports or exports require a license (e.g. weapons, high-tech goods). A block exemption regime exists. Breach of the restrictions may result in criminal prosecution.

18.2. UNCITRAL Sales Law

The **United Nations Convention on Contracts for the International Sale of Goods** (**CISG** - *UN-Kaufrecht*) is usually applicable to sales agreements on goods concluded between Austrians and foreigners and prevails over Austrian civil law. However, the applicability can be excluded by agreement. CISG does not differentiate between impossibility, warranty, default etc. If a party fails to perform its contractual obligations, this constitutes a breach of contract. The buyer has to give notice to the seller within a reasonable time after discovering the breach or after he ought to have discovered it, in any case within two years from the time the goods were actually handed over to him. The buyer may then demand performance. He may also demand that the seller repairs the goods. The buyer may only insist on the delivery of substitute goods if the lack of conformity constitutes a fundamental breach of contract. Furthermore, the law provides for a reduction in price if the goods do not conform with the contract. The seller may require the buyer to pay the price and to take delivery. Damages for breach of contract include the loss of profit; liability is not based on fault.

19. Environment / Waste

Environmental protection is a vital issue in Austrian politics. Austria spends approximately 3.4 % of its GDP on environmental measures.

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

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

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

The **Waste Management Act** (*Abfallwirtschaftsgesetz*), governing the trade and disposal of waste, contains similar provisions. In addition, the Waste Management Act gives the competent minister the power to issue regulations imposing restrictions on the use of certain packaging materials and setting up rules for their disposal and recycling.

Air pollution is dealt with by the **Boiler Facilities Clean Air Act** (*Luftreinhaltegesetz für Kesselanlagen*), which establishes uniform standards for boiler facility emissions and obligations to comply with air emission limits to avoid harm or nuisance to neighbors. Protection against harmful air emissions is furthermore offered by the **Forest Act** (*Forstgesetz*), which also regulates forest zoning and forest use.

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

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

20.1. Value-Added Tax (VAT)

Since 1973 Austria's **VAT** (*Umsatzsteuer, Mehrwertsteuer [USt, MWSt]*) system has been similar to that of the EU. The VAT Act 1994 (*Umsatzsteuergesetz 1994*) came into force on January 1, 1995, when Austria joined the EU. It brought the Austrian VAT regime in line with EU directives.

The **standard rate** on the delivery of goods and the provision of services is 20 %. A reduced rate of 10 % is valid for food, agricultural products, rental of residential property and the transportation of passengers. Among other things, exports and certain services related to exports and imports are zero-rated, whereas the banking and insurance industries are exempt from VAT, as is the rental of immovable property except for residential property, though the lessor may elect otherwise (see 12.4). Hospitals, doctors and dentists are exempt from VAT.

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

When a non-resident undertaking provides services to an undertaking resident in Austria, tax liability is generally shifted to the Austrian party (reverse-charge system).

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

Specific rules apply to the **deliveries of goods and rendering of services within the EU**. Intra-EU deliveries to enterprises having a VAT identification number (UID) are zero-rated. In contrast, the receipt of intra-EU deliveries is subject to VAT (intra-community acquisition). In contrast, for most purchases by consumers the country-of-destination principle has been replaced by the country-of-origin principle, i.e. VAT accrues in the country in which the goods are bought and not in the country to which the

goods are delivered. Mail orders in excess of certain thresholds and motor vehicle sales remain subject to the country-of-destination principle. Information on intra-EU deliveries and services must be provided to the Austrian tax authorities on a quarterly/monthly basis, in a so-called European Sales Listing (*Zusammenfassende Meldung*).

20.2. Stamp Duties

Stamp duties (*Rechtsgeschäftsgebühren*) are levied on numerous legal acts if they are manifested by a written document. Stamp duties are payable after being assessed by the tax authorities, in certain cases after a self-assessment. The following written agreements - *inter alia* - attract stamp duty:

- lease and rental agreements (1 %)
- loans, overdraft facilities (0.8 % or 1.5 %)
- assignments of rights, e.g. receivables (0.8 %)
- suretyships (1 %).

The Stamp Duty Act (*Gebührengesetz*) contains a number of **anti**-**avoidance rules**, the most stringent being on loans and overdraft facilities. However, it is still possible to avoid stamp duties in some cases.

20.3. Inheritance and Gift Tax

Following a Constitutional Court (*Verfassungsgerichtshof* [*VfGH*]) decision, the inheritance and gift tax (*Erbschafts- und Schenkungssteuer*) expired on July 31, 2008. On August 1, 2008 a notification requirement was introduced for gifts exceeding certain thresholds (EUR 50.000 within 1 year among close relatives, EUR 15.000 within 5 years in other cases). Non-compliance with this requirement constitutes a criminal offense.

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

20.4. Other Taxes

The first registration of a **car** in Austria attracts a duty (*Normverbrauchsabgabe*) based on the purchase price. The rate depends on the standard fuel consumption of the car and can be as high as 16 %.

Insurance premiums are subject to **insurance tax** (*Versicherungssteuer*) at rates ranging between 1 % and 11 %.

Advertising tax (*Werbeabgabe*) amounts to 5 %. Some municipalities and communities collect **parking fees** and **tourism contributions**.

It is impossible to enumerate all of Austria's taxes in this brochure, instead the main taxes of interest to the foreign investor are treated here.

20.5. Contributions to the Austrian Economic Chamber

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

- 0.36 % - 0.44 % of gross wages and salaries (*Zuschlag zum Dienstgeberbeitrag [DB]*)
- 0.3 % of total input VAT from both purchases and imports.

21. Accounting, Auditing and Publication Requirements

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

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

A statutory **audit** is required for

- banks, insurance companies and investment funds
- every *AG* (stock corporation)
- large or medium-sized *GmbHs* (companies with limited liability) or *GmbH & Co KGs* or a *GmbH* with a mandatory supervisory board.

A company with limited liability is treated as large or medium-sized if at least two of the three following tests are met:

	Medium-sized *GmbH*	large *GmbH*
total assets	> EUR 4,84 million	> EUR 19,25 million
net turnover	> EUR 9,68 million	> EUR 38,5 million
employees	> 50	> 250

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

- public interest companies: companies listed on the stock exchange, banks and insurance companies
- *AGs* that are large (same tests as above for GmbHs).

Most other companies must only file their financial statements electronically with the commercial register. In this case a notice is published in the *Wiener Zeitung* stating that the financial statements have been filed.

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

A group of companies is required to prepare **consolidated financial statements** (*Konzernabschluss*) if certain thresholds for total assets, turnover and staff are exceeded. Consolidated financial statements must be audited before they are submitted to the super-

visory board of the parent company. They must be published in the *Wiener Zeitung* if one of the group companies is either a public interest company or a large Austrian stock company (*AG*). Otherwise, it is sufficient to file them with the commercial register.

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

22. Customs Duties and Other Fees on Imports

22.1. Customs Duties

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

According to the principle of the **free movement of goods**, no customs duties are levied on trade of goods - both industrial and agricultural - between EU member states. For statistical purposes, however, trade movements are registered (INTRASTAT).

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

Both the EU and its member states are members of the **World Trade Organization** (**WTO**), which was established on January 1, 1995, after completion of the Uruguay Round of negotiations lasting from 1986 to 1994. The WTO is the decision-making body and administrative institution based on the General Agreement on Tariffs and Trade (GATT) 1994.

The European Customs Tariff and the Harmonized Tariff System have been adapted to comply with GATT provisions.

22.2. Import Value-Added Tax

On imports of goods from non-EU countries **import value-added tax** (*Einfuhrumsatzsteuer*) is levied and is either collected by customs or may alternatively be paid to the tax authorities if an Austrian undertaking is liable for the tax. Import VAT is levied at the normal VAT rate (currently 10 or 20 % - see 20.1).

23. Banking and Capital Markets

23.1. Banking System

Austria's well-organized and highly developed banking system plays a major role in the economy because the small capital market requires companies to use bank loans to finance a large part of their investments. Most Austrian banks offer the full range of banking and financial services. In recent years the major Austrian banks have successfully penetrated Central and Eastern European and now play an important role there. Banks generally tend to have very close relations with their customers through an extensive network of local branches.

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

The **Austrian Control Bank** (*Oesterreichische Kontrollbank*) has a centralized clearing function for the transfer of securities, which are generally deposited there. Furthermore, it

issues guarantees to foster exports and foreign investments. It also operates as the notification office under the Capital Market Act (*Kapitalmarktgesetz*).

The **Financial Market Authority** (*Finanzmarktaufsichtsbehörde [FMA]*) is the supervisory authority for banks. It's major tasks include, in particular, licensing, authorization, notification, supervision, analysis of results of official measures and the involvement in legislation related to banking supervision. To do business as a bank (credit institution) in Austria a license from the **Financial Market Authority** is required. Compared to other relevant legislation in Europe, the Austrian Banking Act (*Bankwesengesetz*) contains a comprehensive list of banking activities which require a banking license. Besides the core banking activities like deposit and lending business, banking transactions in Austria include a wide range of additional activities like the current account, factoring and guarantee business as well as trading with financial instruments etc. Each kind of banking transaction under the Austrian Banking Act requires a separate banking license. There are several minimum requirements stipulated which have to be fulfilled in order to receive a banking license. The minimum requirements concern e.g. a minimum initial capital amounting to at least EUR 5 million, professional experience and personal integrity and soundness of the managing directors, the (beneficial) owner(s) have to pass a "fit and proper" test.

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

However, if a license has already been obtained in another EEA or EU member state, no further approvals, only certain notifications to the Financial Market Authority, are necessary (Single Passport Principle). The **Banking Act** and the Solvency Regulation (*Solvabilitätsverordnung*) have implemented the Basel II principles for banks in Austria. A revision of the legal framework is expected under Basel III. The regulatory standards contain provisions regarding minimum equity and solvency requirements for credit, market and operational risk as well as liquidity requirements and restrictions to minimize exposure to risks (e.g. large exposure rules and risk management). The Banking Act also deals with accounting, auditing and the publication of financial statements. Credit institutions usually are all-purpose banks and offer a full range of banking services: they grant all sorts of credit and loan facilities, accept securities and other valuables in safe custody, underwrite share and bond issues and trade in securities for customers and on their own account. Savings banks (*Sparkassen*) and credit cooperatives for trade (*Volksbanken*) as well as agriculture

(*Raiffeisenkassen*) are organized mainly on a local level with central institutions serving as clearing houses. The large credit institutions often offer additional services through their subsidiaries, such as leasing, factoring, investment funds, real estate property funds, insurance, travel facilities, credit cards and building society activities.

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

A **deposit insurance scheme** (*Einlagensicherungssystem*) covers deposits up to EUR 100,000 (for legal entities up to EUR 50,000 or starting on January 1, 2011, up to EUR 100,000). Any credit institution which receives deposits from the general public must join the insurance scheme of the sector or the banking system to which it belongs. If the credit institution is not a member of a deposit insurance scheme, it may not accept deposits. A similar scheme was established for certain investment services rendered by credit institutions and securities firms.

In accordance with the Single European Payment Area ("SEPA") and the relevant EC Directive, a new legal framework for **payment services** was implemented at the end of 2009. The Payment Services Act (Zahlungsdienstegesetz) contains provisions on prudential requirements, the access of new payment service providers to the market, information requirements and the respective rights and obligations of payment services users and providers.

23.2. Capital Markets

23.2.1. Stock Exchange

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

The **Stock Buyback Act** (*Aktienrückerwerbsgesetz*) allows the reacquisition of own shares of up to 10 % of the nominal capital. The following conditions must be met: prior authorization of the board of directors by the stockholders' assembly to buy back shares (for a period not exceeding 18 months) in stock companies, substantial own funds (only non-bound funds [*Eigenmittel*] which could be contributed as dividends may be used), the stock must be listed on the Vienna Stock Exchange or on the Stock Exchange of any other OECD member state or on any other recognized public securities market. Therefore the buyback of shares is possible not only for Austrian companies listed on the Vienna Stock Exchange but also for those listed, for example, on the London, Frankfurt, Swiss or the New York Stock Exchange. Furthermore, the **Takeover Act** (*Übernahmegesetz*) applies to the buyback of shares listed on the Vienna Stock Exchange if the shares are to be acquired by public offer (see 23.2.5).

23.2.2. Insider Trading

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

- acquiring or disposing of transferable securities for his own account or for the account of a third party
- disclosing inside information, unless such disclosure is made in the normal exercise of his employment, profession or duties or

- recommending to a third party, on the basis of inside information, to acquire or dispose of transferable securities

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

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

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

23.2.3. Capital Market Act

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

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

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

23.2.4. Investment Fund Act

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

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

undergo that procedure, though an Austrian paying agent or representative is invariably required.

Following the implementation of the relevant EU provisions, Austrian law permits the establishment of fund of funds, profit-retention funds, as well as pension investment funds (*PIF*). Pension investment funds have been equipped not only with a state subsidy but also with certain tax privileges. A revision of the present Investment Fund Act is expected due to the current developments of EU law (UCITS IV (Undertakings for Collective Investment in Transferable Securities Directive), AIFM (Alternative Investment Fund Manager) Directive).

Real estate funds are regulated in a separate act, the **Real Estate Investment Fund Act** (*Immobilien-Investmentfondsgesetz*).

23.2.5. Takeover Act

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

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

The **mandatory purchase offer** must include a price. The purchase price must be the highest price paid for the relevant stock by the bidder during the last 12 months. However, it must be no less than the stock's average price on the stock exchange during the six months prior to the notification of the purchase offer. Owners holding stock worth at least 1 % of the nominal capital or at least EUR 70,000 may apply for a **review** of the legality of the purchase price offered within three months of publication of the results of the takeover bid.

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

The Takeover Commission may either recommend or order that the bidder or the target company make supplementary information or corrections public. The decisions of the Takeover Commission, with the exception of penal rulings, are not subject to regular administrative appeal.

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

23.2.6. Securities Supervision Act

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

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

The **Securities Supervision Act 2007** defines investment firms (*Wertpapierfirma*) and investment services undertakings (*Wertpapierdienstleistungsunternehmen*) as providers of one or more of the investment services under the Securities Supervision Act 2007. The commercial provision of investment advice, portfolio management, or the reception and transmission of orders in relation to one or more financial instruments requires an authorization by the FMA. Due to higher standards, portfolio management may only be carried out by investment firms. Compared to investment services undertakings, the minimum requirements for investment firms demand on even higher level of minimum capital and set a higher standard for senior managers and the organisational structure. Under the freedom to provide services (EU Passport), investment firms are furthermore allowed to provide investment services in any EU member state if they have been authorized to do so in an-

other. In Austria, investment firms and investment services undertakings are not credit institutions and are, therefore not allowed to engage in banking transactions (e.g. trading in financial instruments), that require a license under to the Austrian Banking Act.

24. Liquidation, Insolvency and Fraudulent Conveyance

24.1. Liquidation

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

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

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

24.2. Insolvency

24.2.1. Insolvency Proceedings

If a company is insolvent or its liabilities exceed its assets and this is known or must be known to management, each managing director is obliged to file for insolvency proceedings without delay. However, the management may try to reorganize the company within a maximum of 60 days. If management does not file for insolvency in time, it can be held

personally liable for resulting damages (including newly created liabilities or shortfalls of *pro-rata* payments [*Quote*] in insolvency). Furthermore, management may face criminal prosecution. Shareholders are liable only if they misuse their position or they exercise a dominant influence on the management.

On **July 1, 2010**, a new Austrian Insolvency Act (*Insolvenzordnung*) enters into force. Until June 30, 2010, insolvency law comprised the Bancruptcy Act (*Konkursordnung*) and the Composition Act (*Ausgleichsordnung*). The Insolvency Act provides for a consolidated **insolvency proceeding** to enhance opportunities for successful restructuring. The primary goal is to save the business.

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

If he already presents such plan together with the filing for insolvency and offers a minimum 30 % pro-rata payment to the creditors within a maximum of two years, he maintains administration of his property (*Sanierungsverfahren mit Eigenverwaltung*). The court then appoints an administrator (*Sanierungsverwalter*) who only supervises management. The *Sanierungsverfahren mit Eigenverwaltung* corresponds to the former judicial composition proceedings (*Ausgleichsverfahren)*, however, the minimum pro-rata payment has decreased from 40 % to 30 %.

In case the restructuring plan provides less than 30 % (however, minimum is 20 % within two years), the court appoints an administrator called *Masseverwalter*, who assumes control over the insolvent debtor's business and property *(Sanierungsverfahren mit Masseverwalter)*.

It is also possible to present a restructuring plan later during insolvency proceedings. This is similar to the former compulsory composition (Zwangsausgleich).

In any case, restructuring is only possible if agreed to both by the majority of the creditors and 50 % of the total value of claims of the creditors present at the hearing. If the restructuring plan is fulfilled, the debtor is discharged from all liabilities.

If restructuring is not possible, the remaining assets are sold by the administrator. The proceedings are then called bankruptcy proceedings (*Konkursverfahren*).

Security *in rem* (see 13.3) is not affected by insolvency proceedings. However, enforcement can be postponed for 6 months.

Creditors should note that clauses aimed at dissolving contracts solely for the reason that insolvency proceedings have been opened are without effect and, therefore, unenforcable. In addition, creditors are not allowed to dissolve agreements with the debtor for the period of 6 months after opening of insolvency proceedings, if such termination would endanger the continuation of the debtor's business.

The new law is applicable for all proceedings opened after June 30, 2010. However, if a debtor in a pending proceeding files a restructuring plan after June 30, 2010, the new regulations also apply.

Loans given to a company by shareholders in financial crisis are recharacterized as equity capital (*eigenkapitalersetzende Gesellschafterdarlehen*) and therefore subordinated to claims of other creditors. Consequently, security given by the company for such loans is not enforceable (see also 24.5).

24.2.2. Administrator

The court-appointed administrator (*Insolvenz-, Sanierungs- and/or Masseverwalter – see 24.2.1 above*) usually is an attorney-at-law. Without doubt, the administrator is the key player in the insolvency proceedings. The success of the proceedings depends mainly on his qualifications. In spite of this, the necessary qualifications have been insufficiently defined by the Austrian Insolvency Act. Every prospective administrator now has to be listed with the Linz Court of Appeal (*Oberlandesgericht Linz*). The list contains a description of his qualifications. The insolvency court is obliged to appoint the most qualified person in each case. The administrator can only liquidate the business if authorized to do so by the court and it is the only way to prevent further damage to creditors. The administrator is entitled to cancel long-term contracts (especially contracts of employment) in a privileged manner. He thereby has the chance to shrink or close the business on favorable terms. Claims of most employees in insolvency cases are covered by a public insurance fund (*Insolvenzentgeltsicherungsfond*s).

All creditors wishing to obtain a *pro-rata* payment must file their claims in court. During insolvency proceedings, legal action and enforcement measures are inadmissible. However, legal action and enforcement measures related to security *in rem* and legal action against

the insolvency estate resulting from business transacted after commencement of insolvency proceedings as well as legal action taken by the insolvency estate remain possible.

If the administrator intends to sell a company or its main assets, he must inform all prospective buyers for at least 14 days on a special online database (*Ediktsdatei*). In addition, the sale either of all assets or at least the insolvency estate's main assets must be approved by both the court and by the creditors' committee (*Gläubigerausschuss*), whose members are normally the main creditors.

24.3. Acquisitions in Connection with Insolvency

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

24.4. Fraudulent Conveyance

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

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

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

24.5. Shareholder Loans and Insolvency

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

24.6. European Insolvency Proceedings

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

24.7. Taxation in the Course of Liquidation

Capital gains from the disposal of assets in the course of liquidation proceedings are subject to tax at the company level. A shareholder is also subject to tax on capital gains, calculated as the difference between the liquidation proceeds and cost of the shareholding (in case of an individual, the tax rate is generally reduced to half the normal rate). However, there is no withholding tax on the distribution of liquidation proceeds.

When a company presents a restructuring plan and pays only a certain portion of its liabilities, the profit created by the creditors' waiver is a taxable one. However, only the tax liability equivalent to the pro-rata payment must be paid. Furthermore, there is a recapture of input VAT with regard to trade payables which need not fully be settled.

25. Choice of Law and Choice of Forum

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

The **choice-of-law clause** determines the substantive law. In contrast, the **choice-of-forum clause** (*Gerichtsstandvereinbarung*) selects the venue for litigation. Under the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the EC Council Regulation No. 44/2001, parties may agree (if no exclusive jurisdiction exists) that a court or the courts of a contracting/member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship. Such an agreement must be in writing, or evidenced in writing or in a form which accords with practices which the parties have established between themselves or in international trade or commerce. Special rules (concerning the validity of the agreement) apply to labor cases and those involving consumers.

Under the Austrian Jurisdiction Act (*Jurisdiktionsnorm*) the choice-of-forum clause may refer to **Austrian jurisdiction** in general as well as to a specific court. The clause is only enforceable if it is in writing and if the dispute for which it applies is specified. Restrictions exist in connection with labor cases and those involving consumers. Certain choice-of-forum clauses are not enforceable. The Jurisdiction Act does not render clauses unenforceable which choose a foreign forum even if the Council Regulation No. 44/2001 or the Lugano Convention is not applicable.

Before the contractual parties agree upon a forum, they should determine whether the judgments of the courts of the country to be stipulated are **enforceable** in their home countries. If no bi- or multilateral treaties on the mutual recognition and enforcement of judgments exist, it is advisable to include an arbitration clause in the contract since arbitral awards are, in general, easier to enforce than foreign judgments (see also 27.4).

26. Basic Aspects of the Constitution and International Relations

26.1. Constitution

26.1.1. Principles of the Constitution

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

Under the Treaty of Lisbon (see 26.2.1), the **Charter of Fundamental Rights of the European Union** dated December 7, 2000, as adapted at Strasbourg on December 12, 2007, is legally binding on the European Union and the member states in the execution of European law (except for those member states – not including Austria – that have opted out). It sets out in a single text, for the first time in EU history, civil, political, economic and social rights of European citizens and all persons resident in the EU.

26.1.2. Law

In Austria, there are various categories of law which are organized into a **hierarchical system**. Each category derives its validity from and is limited by a higher one. The main source of constitutional law is the **Constitution** (*Bundes-Verfassungsgesetz*), enacted in

1920. Numerous statutes also enjoy the status of constitutional law. Constitutional law is at the top of the hierarchy of norms. However, even Austrian constitutional law is subordinate to **European law**. Austrian law that conflicts with EU law is inapplicable, though still in force. Subordinate to constitutional law are ordinary **statutes** (*einfache Gesetze*). This category comprises any statute not explicitly enacted as constitutional law. Based on and limited by statutes, administrative authorities may issue **regulations** (*Verordnungen*) on matters within their competence. Under the rule of law, regulations may merely implement a statute and may - with certain exceptions – not replace, abrogate or amend it. **Decrees** (*Erlässe*), issued by administrative authorities and addressed only to the officials of the authority, do not create law binding on the public. **Orders** (*Bescheide*) are administrative decisions that address an individual. **Court judgments** (*Urteile*) and administrative orders only legally bind the parties to a dispute. However, judgments are commonly used in legal argument.

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

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

26.1.3. Executive Branch

Under the Constitution, the **executive** (*Verwaltung*) and the **judicial** (*Gerichtsbarkeit*) branches must be separated at all levels of procedure. However, the Constitution provides for mechanisms to control the executive branches, such as appeals to the **Administrative Court** (*Verwaltungsgerichtshof*) and the **Constitutional Court** (*Verfassungsgerichtshof*) against orders and acts of administrative authorities, including decisions of the **Independent Panels of Administrative Review** (*Unabhängige Verwaltungssenate*), the **Asylum Court** (*Asylgerichtshof*) and the **Independent Tax Panel** (*Unabhängiger Finanzsenat*) and other independent panels.

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

The president appoints the federal chancellor (*Bundeskanzler*) and, upon the latter's recommendation, the remaining cabinet members, including the vice-chancellor. The president may also dismiss the chancellor or the entire cabinet at any time. Despite these powers, the president normally appoints the cabinet agreed by the parliamentary majority.

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

So-called **Article 133 sec 4 Authorities** (*Artikel 133 Z 4 Behörden*) also exist, named after the empowering article of the Constitution. They consist of panels whose members may not receive instructions from government officials and are therefore independent. At least one panel member must be a judge. The Authorities' rulings are not subject to appeal; in particular, appeals to the Administrative Court (*Verwaltungsgerichtshof*) are inadmissible unless expressly provided for by law. Their decisions can, however, be appealed to the Constitutional Court on the grounds that they have infringed human rights and fundamental freedoms. Examples of Article 133 sec 4 Authorities are the **Telecommunications Control Commission** (*Telekom-Kontroll-Kommission* – see 8.2), the **Federal Communications Panel** (*Bundeskommunikationssenat* – see 8.2) and the **Data Protection Commission** (*Datenschutzkommission* – see 8.3). The independent panels mentioned at the beginning of this section and the Article 133 sec 4 Authorities are considered to be tribunals under Article 6 European Convention on Human Rights and Article 267 TFEU.

26.1.4. Judicial Branch

The judiciary comprises **courts of law** (*Gerichte*) with independent judges. The Constitution provides only for federal courts; there are no provincial ones. The **Constitutional Court** (*Verfassungsgerichtshof*) has jurisdiction to decide whether international treaties,

statutes, administrative regulations and orders comply with constitutional law. For further details on the judiciary, see chapter 27.

26.1.5. Legislative Branch

Parliament consists of the **National Council** (*Nationalrat),* whose 183 members are directly elected by the people every five years, and the **Federal Council** (*Bundesrat)*, whose 62 members are chosen by the provincial parliaments (*Landtage*). Each province has between three and twelve members, depending on its population. The Federal Council is of little importance, since the National Council can overrule a veto of the Federal Council (*Beharrungsbeschluss*).

26.2. International Relations

26.2.1. European Union

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

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

The European Parliament currently has 736 members from all 27 EU countries. Under the Treaty of Lisbon it shall be increased to 751 members. Austria now has 17 seats. Austria has 10 of 345 votes in the Council of the EU. Germany, on the other hand, whose population is about 10 times that of Austria's, has only 29 votes. That is evidence of the small member states' relative overrepresentation on the Council. Austria presided over the Coun-

cil in the second half of 1998 and in the first half of 2006. José Barroso has been president of the European Commission since 2004 (in 2009 he was re-elected to another five-year term). Under the Treaty of Lisbon a permanent president of the European Council is elected by the Council to two-and-a-half-year term. The first current president is Herman Van Rompuy. The position of the High Representative of the Union for Foreign Affairs and Security Policy and vice-president of the European Commission is currently held by Catherine Ashton. The former Austrian minister for science and research, Johannes Hahn, has been Regional Policy Commissioner since 2010.

26.2.2. Membership in International Organizations

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

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

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

27. Court System and Arbitration

27.1. Civil Law Courts

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

- District Courts (*Bezirksgerichte*)
- Superior Courts (*Landesgerichte*)
- Courts of Appeal (*Oberlandesgerichte*)
- the Supreme Court (*Oberster Gerichtshof*).

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

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

The Court of Appeal in Vienna decides as the **Cartel Court** (*Kartellgericht*) on the trial level. This is the only Cartel Court in Austria. Appeals are decided by the Supreme Court as the Appellate Cartel Court (*Kartellobergericht*). In cartel matters, as well, lay judges sit on the bench with professional judges.

27.2. Civil Procedure

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

Austria is a party to the **Lugano Convention** on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which regulates the judicial relations among EU and EFTA member states. The **EC Council Regulation No. 44/2001**, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters entered into force in 2002 and replaced the **Brussels Convention.**

27.3. Other Courts

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

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

Criminal matters are decided by District or Superior Courts in the first instance. Appeals are decided either by Superior Courts, Courts of Appeal or the Supreme Court.

27.4. Arbitration

A 2006 amendment to the Civil Procedure Code (*ZPO*) modernized Austria's arbitraton system. Austria is now an even more suitable venue for international arbitration proceedings.

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

Constitutional arbitral tribunals include:

- the **International Arbitral Centre of the Austrian Economic Chamber** (*Internationales Schiedsgericht der Wirtschaftskammer Österreich*) in Vienna (the *Vienna Rules* apply and the proceedings take place in Vienna, unless the parties decide otherwise; all written statements must be filed in German or in the language of the arbitration agreement; at least one party must be non-Austrian); the recommended arbitration clause reads as follows:

  > *"All disputes arising out of this contract or related to its violation, termination or nullity shall be finally settled under the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Economic Chamber in Vienna (Vienna Rules) by one or more arbitrators appointed in accordance with these rules."*

- the **Permanent Court of Arbitration of the Vienna Economic Chamber** (for disputes between Austrian enterprises)
- the **Court of Arbitration of the International Chamber of Commerce** in accordance with the ICC rules; the recommended arbitration clause reads as follows:

  > *"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."*

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

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

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

Foreign arbitral awards may be enforced in Austria under the condition of reciprocity, as provided by bi- or multilateral agreements. Austria has ratified nearly all important enforcement conventions, such as the Geneva Protocol and the Geneva Convention, the New York Convention on the Enforcement of Foreign Judgments and Foreign Arbitral Awards and the EU Convention. Additionally, various bilateral treaties on the **recognition of foreign arbitral awards** exist, e.g. with Belgium, Germany, Switzerland, France, Great Britain etc. The Austrian Economic Chamber has also entered into cooperation agreements with respect to commercial arbitration with the chambers of commerce of certain countries (e.g. Hungary).

Annex 1: Tax-Treaty Network

Austria has concluded tax treaties with the following countries:

Albania
Algeria
Argentina (terminated)
Armenia
Australia
Azerbaijan
Bahrain
Barbados
Belarus
Belgium
Belize
Bosnia-Herzegovina
Brazil
Bulgaria
Canada
China
Croatia
Cuba
Cyprus
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Georgia
Germany
Greece
Hungary
India
Indonesia
Iran
Republic of Ireland
Israel
Italy
Japan
Kazakhstan
Kuwait
Kyrgyzstan
Latvia
Liechtenstein
Lithuania
Luxembourg
Macedonia
Malaysia
Malta
Moldova
Mongolia
Mexico
Morocco
Nepal
Netherlands
New Zealand
Norway
Pakistan
Philippines
Poland
Portugal
Romania
Russia
San Marino
Saudi Arabia
Singapore
Slovakia
Slovenia
South Africa
South Korea
Spain
Sweden
Switzerland
Syria
Tajikistan
Thailand
Tunisia
Turkey
Turkmenistan
UK
Ukraine
United Arab Emirates
USA
Uzbekistan
Venezuela
Vietnam

The purpose of the treaties is to avoid double taxation. For royalties, interest and dividends the credit method, in which the country of residence grants a tax credit for tax paid at source, is generally used. With regard to other income, under some treaties the exemption method is used, in which the country of residence exempts other income from taxation. In a few cases the credit method applies to all types of income. Tax treaties regularly reduce the rate of withholding taxes on royalties, interest and dividends. Austria has entered into tax treaties with regard to **inheritance tax** with

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

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