

## LEGALINK

### INVESTMENT AND BUSINESS START UP IN AUSTRIA

#### (A) Legal system

1. What is the legal system (i.e. common law system, civil law system or both) in your country?

The Austrian law is based on Roman law and it therefore follows the civil law system.

However, case law and most importantly decisions of the Supreme Court may be of substantial importance in interpreting written law.

2. What are the major law courts in your country?

- In civil and criminal cases the Austrian Supreme Court takes the final decision.
- Main task of the High Constitutional Court is the judicial review. This involves the review of the constitutionality of federal laws as well as the review of the lawfulness of Austrian regulations.
- The High Administrative Court reviews the legality of decisions of administrative authorities and decides about complaints, if administrative authorities fail to render decisions in time (*Säumnisbeschwerde*).

3. What are the sources of laws (such as constitution, statute law and common law) in your country?

The underlying legal basis is Austria's federal constitution. Then federal law and federal state law apply. In accordance with all these laws Austrian regulations are issued.

4. What is/are the official language(s) in your country?

Official language in Austria is German. Additionally, the Croatian, Slovenian and Hungarian language can be used when dealing with authorities specifically named in Annex 2 of the Ethnic Groups Act 2011 (*Volksgruppengesetz 2011, VoGrG*) in the Federal States of Austria Styria, Carinthia and Burgenland.

#### (B) Foreign investment

5. Are there any restrictions faced by a foreign individual or company when they want to invest in your country? Is an approval or permit required if a foreign individual or company wants to enter a certain industry?

There are no restrictions on foreign ownership or investment in general; there are only a few restrictions on foreign investments (for example, special provisions on acquisition of landed property by foreign investors from non-EU countries). Also imports and exports, other than those within the EU Member States, can be restricted (Foreign Trade Act 2005, *Außenhandelsgesetz 2005 AußHG*).

However, authorisation is required for investment in certain regulated areas, such as for instance banking, defence, financial services, media, etc.

6. Are there any exchange control or currency regulations in your country?

The Austrian Central Bank (*Österreichische Nationalbank; "OeNB"*) administers the exchange control system under the Foreign Exchange Act 2004 (*Devisengesetz 2004, DevG*).

There are no restrictions on movement of capital and payments in Austria, except for those specified in Articles 57 to 60 of the EC Treaty. However, the OeNB regulates all foreign exchange transactions and is authorised to declare specific kinds of transactions subject to authorisation. There are no restrictions in Austria concerning the purchase and exchange of foreign currency into European currency.

7. What grants or incentives are available to a foreign individual or company to encourage investment in your country?

The grants or incentives available to foreign investors are as follows:

- Cash, subsidies or other kinds of contributions granted to foreign investors by the federal, provincial and municipal governments;
- National tax incentives, most of which are granted in the form of tax exemptions (for example, investment into research or education);
- Export incentives (export insurance and financing of exports).

**(C) Business vehicles**

8. What is the most common form of business vehicle used by foreign investors in your country?

The most common form of business vehicle used by foreign companies is the limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH*).

**(i) Registration formalities;**

A GmbH comes into legal existence on registration with the Commercial Register in Austria (*Firmenbuch*). The articles of association (*Gesellschaftsvertrag*, articles), which must be in the form of a notarial deed, must be filed with the Commercial Register. Specified forms detailing the managing directors must also be filed. The registration procedure takes about two to three days.

**(ii) Minimum (and maximum) share capital;**

The minimum share capital of a limited liability company is EUR 35,000. There is no maximum share capital.

**(iii) Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities);**

At least half of the minimum share capital must be paid up in cash before registration in the Commercial Register; the other half can be paid up either in cash or by contributions-in-kind.

**(iv) Any restrictions on foreign shareholders;**

There are generally no restrictions on foreign shareholders. Shares of a GmbH cannot be issued or quoted on a stock exchange. A notarial assignment deed is required for the assignment of shares. Restrictions on rights attached to shares can be imposed by the GmbH's articles, making the assignment of shares dependent on the company's approval.

**(v) Management structure and any restrictions on foreign managers;**

A GmbH is represented by one or more managing directors, who are appointed by the shareholders and can be removed by the shareholders at any time without cause. The election of a supervisory board of directors is voluntary (except in some circumstances). The supervisory board is elected by the shareholders and consists of at least three members.

**(vi) Directors' liability;**

Directors must act with the diligence of a careful businessperson. If they do not act with the necessary due care, they are personally liable for any damage caused as a result.

**(vii) Parent company liability;**

Parent companies (shareholders) may become liable to their company or the company's creditors for the:

- initial undercapitalisation of the company;
- commingling of shareholders' and company's assets; and
- artificial splitting up of a business into separate legal entities to shield assets from insolvency proceedings.

**(viii) Reporting requirements (including filing of accounts).**

The managing directors must annually:

- report to the supervisory board (if existing) on the company's policy; and
- present to the supervisory board information on the GmbH's future, financial situation and the profitability.

The company must publish the annual accounts in the commercial register, the cost of which is EUR75.

**(D) Employment**

9. What are the main laws regulating employment relationships in your country?

The main laws regulating employment relationships in Austria include:

- Labour Constitution Act 1973 (*Arbeitsverfassungsgesetz 1973, ArbVG*);
- Employees Act 1921 (*Angestelltengesetz 1921, AngG*);
- Austrian Civil Code 1812 (*Allgemeines Bürgerliches Gesetzbuch 1812, ABGB*);
- Liability of Workers Act 1965 (*Dienstnehmerhaftpflichtgesetz 1965, DHG*)
- Employment of Foreign Workers Act 1975 (*Ausländerbeschäftigungsgesetz 1975, AuslBG*)
- Employee Protection Act 2013 (*ArbeitnehmerInnenschutzgesetz, ASchG*);
- Equal Treatment Act 2013 (*Gleichbehandlungsgesetz 2013, B-GlBG*);
- Working Hours Act 2007 (*Arbeitszeitgesetz 2007, AZG*).

Further legislation covers areas such as:

- labour inspection;
- temporary employment;
- employment of foreigners;
- employment of people with disabilities;
- pregnancy, maternity and paternity.

10. Is a written contract of employment required in your country, and if so, must it contain any particular language? Are any agreements and/or implied terms likely to govern the employment relationship?

Under Austrian law, a written contract of employment is generally not mandatory. Employment contracts may also be concluded orally or by implication. However, in such cases the employer must provide the employee with a notice of employment when the contract is concluded. This notice must state the conditions of employment as well as essential rights and obligations of the employee (eg place and hours of work, salary, notice period etc).

Under certain circumstances a written contract of employment is mandatory. The purpose of this obligation is to warn and protect specific employees, most notably in the case of apprenticeship contracts.

Apart from statutory terms, employment relationships are typically governed by collective agreements and/or company-level agreements. Regarding implied terms, employment relationships are governed by the employee's duty of loyalty and the employer's duty of care.

The employee's duty of loyalty mainly comprises the obligation to confidentiality and the obligation to obey the employer's instructions as well as the obligation to refrain from any actions which harm the employer's economic interests.

The employer's duty of care most importantly aims at protecting the employee's health and property. There are various regulations which further specify the duty of

care, eg the Employee Protection Act and the Maternity Protection Act 1979 (*Mutterschutzgesetz 1979, MSchG*).

11. Do foreign employees require work permits and/or residency permits if they work in your country? If so, how long does it take to obtain them and how much do they cost?

Citizens of a member state of the European Economic Area (EEA) and citizens of Switzerland do not need work permits or residency permits in Austria. However, this does not apply to Bulgarian and Romanian nationals until 1 January 2014; Croatian nationals will be subject to interim regulations once Croatia is a Member of the EU.

Other foreigners – irrespective of whether they wish to commence employment in Austria or not – do require a residency permit if they want to stay in Austria. In the former case, they also need a work permit.

Generally, the work permit is limited to a specific place of work and valid for a maximum of one year with the possibility of extension. The future employer must apply for the work permit on behalf of the foreign employee.

There are special categories of work permits available if the employee has previously worked in Austria for a certain period. Such permits are not restricted to a specific workplace and may be valid for more than one year.

Foreign key workers are subject to special provisions and may be granted access to the entire Austrian employment market without restrictions. Whether a foreign employee qualifies as a key worker is assessed on a points-based system taking into account qualifications and skills, professional experience, language skills and age. In particular the following foreign employees may be considered key workers:

- highly skilled workers;
- specialists in shortage occupations; and
- university graduates.

The costs and duration of proceedings regarding work permits and residency permits vary depending on the type of permit; typically the costs range from EUR 25.00 to 150.00.

12. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals) in your country?

In businesses with at least five employees, the employees may elect a works council. The works council has a right to be informed and to participate regarding certain employment issues. The works council:

- monitors compliance with statutory law, collective agreements and company-level agreements within the company;
- intervenes with the employer where the employees' interests are at stake; and
- must be informed about all issues regarding the economic, social, health related or cultural interests of the employees.

Further, the works council must be consulted before the employer terminates the contract of an employee or dismisses the employee. Depending on whether the works council agrees or disagrees with the termination/dismissal or remains silent, the employer has different options to appeal the termination/dismissal.

The works council must also be informed of any changes of business, such as the relocation or closing of a company, the merger with other companies or a change of the company objective.

13. Are there any employment protection laws (such as minimum wage law and/or maximum working hours law) in your country?

The main employment protection laws are the Employee Protection Act, the Working Hours Act 2007 (*Arbeitszeitgesetz 2007, AZG*) and the Rest Periods Act 1983 (*Arbeitsruhegesetz 1983, ARG*).

The Employee Protection Act ensures the safety and health of employees by imposing obligations regarding the work place, work equipment, work material, health surveillance etc.

The Working Hours Act and the Rest Periods Act contain detailed provisions – amongst others – on working hours, overtime, part-time work and rest periods.

Further, there are employment protection laws regarding specific employees, eg the Maternity Protection Act and the Children and Adolescents Employment Act 1986 (*Kinder- und Jugendlichen-Beschäftigungsgesetz 1986, KJBG*).

Even though there is no statutory minimum wage in Austria, most employment areas are covered by collective agreements which stipulate minimum wages within their employment areas.

14. Is there any pension system in your country? Is it on a mandatory or voluntary basis? If so, please give details.

The Austrian pension system is on a mandatory basis. It generally covers:

- old-age insurance;
- insurance in case of reduced ability to work; and
- insurance of surviving dependants.

The retirement age is governed by complex regulations, depending on when the insured person was born and for how long he or she has been insured. As a general rule, the retirement age for men is 65, for women 60.

In addition to the statutory pension system, the employer may voluntarily establish a company pension for the employees. Company pensions may be provided for in employment contracts, company-level agreements or collective agreements.

15. How is the termination of individual employment contracts regulated in your country?  
Under what circumstances is the dismissal of an employee unlawful?

Individual employment contracts may be terminated through:

- consensual termination;
- notice of termination;
- resignation of the employee;
- dismissal by the employer;
- termination during probationary period;
- expiration of term (fixed-term employment contracts); and
- death of the employee.

In businesses with at least five employees an employee may challenge the notice of termination where it is based on the employee's (i) union membership, (ii) enlistment for military service or (iii) application as a member of the works council. Under certain circumstances the employee may also challenge the notice of termination if it is socially unjustified.

Lawful dismissal requires that an employee has acted in such a way that it would constitute a ground for dismissal. The legitimate grounds for dismissal depend on whether the employee is (i) a salaried employee or (ii) a blue-collar worker.

In case of salaried employees the Salaried Employees Act 1921 states the grounds for dismissal by way of example only. These grounds encompass amongst others:

- disloyalty to the employer;
- acceptance of unjustified benefits from third parties without the employer's knowledge;
- incapacity of doing the work agreed upon; and
- breach of duty or disobedience to the employer.

The grounds for dismissal of blue-collar workers are listed exhaustively in the Trade, Commerce and Industry Regulation Act 1994 (*Gewerbeordnung 1994, GewO*), for example:

- the presentation of false or forged letters of reference;
- incapacity of doing the work agreed upon;
- theft, misappropriation or any other criminal offence making the employee untrustworthy; and
- disclosure of trade or business secrets.

The dismissal of an employee is unlawful if it is not based on a legal ground or if the grounds for dismissal are not asserted immediately. Depending on the specific situation of the employee, unlawful dismissal may be null and void or subject to appeal or it may entitle the employee to compensation.

16. Are redundancies and mass layoffs regulated in your country? If so, please give details.

Under the Labour Market Promotion Act 1994 (*Arbeitsmarktförderungsgesetz 1994, AMFG*), the employer must inform the Public Employment Service Austria (*Arbeitsmarktservice, AMS*) in writing if the employer intends to terminate within 30 days employment contracts of at least:

- five employees in businesses with more than 20 but less than 100 employees;
- 5% of the employees in businesses with 100 to 600 employees;
- 30 employees in businesses with more than 600 employees; or
- five employees who have reached the age of 50.

The employer must inform the AMS at least 30 days before the first termination. The notice to the AMS must contain the reasons for the termination of the employment contracts and the number of the concerned employees.

**(E) Tax**

17. In relation to employees, what is the basis of taxation (i.e. whether territorial source principle, tax residency principle or other principle is adopted) in your country?

A person is tax resident if:

- His/her permanent domicile is in Austria.
- His/her customary place of abode (that is, his stay is not a temporary one) is in Austria. If the person stays in Austria for more than six months a year he/she is considered as an unlimited income tax payer (Section 26 of the Federal Tax Code 2009 (*Bundesabgabenordnung 2009, BAO*)).

18. Under what circumstances are employees subject to taxation in your country?

Tax resident employees

Residents are subject to income tax on their worldwide income drawn from seven sources specified by law (for example, income from dependent work, independent work, business operations or leasing). Income which does not fall within one of the seven categories is not taxable.

Taxable income is taxed at graduated marginal rates ranging from 0% to 50% (progressive rates), using a calculation model according to Section 33 of the Act on Income Tax 1988 (*Einkommensteuergesetz 1988, EStG*).

Examples can be given as follows:

Up to EUR 10,000: 0%.

EUR 25,000: 23%.

EUR 51,000: 33.5%.

Above EUR 51,000: 50%.

The taxable income can be reduced by:

- Special expenses not related to income of a particular source (*Sonderausgaben*).
- Extraordinary expenses (*außergewöhnliche Belastungen*).

#### Non-tax resident employees

Non-residents are subject to income tax at the same rate as resident employees but only on their Austrian-sourced income (see above, Tax resident employees). In general, foreign withholding tax on passive income from other countries is credited against the Austrian income tax.

19. What income tax or social security contributions must be paid by:

**i. Employees?**

See question 19 ii.

**ii. Employers, in relation to their employees?**

An employer must pay part of its employees' social insurance contributions and channel both the employer's and the employee's contribution directly to the social insurance authority. Income tax is withheld by the employer under a pay-as-you-earn system (*Lohnsteuer*).

20. In relation to corporations, what is the basis of taxation (i.e. whether territorial source principle, tax residency principle or other principle is adopted) in your country?

Corporations are considered tax resident in Austria if either:

- They have their legal place of business in Austria.
- Their effective management is carried out in Austria.

The part of a non-resident corporation's income subject to Austrian corporation tax is determined either by way of annual assessment or by way of deduction at the source.

21. Under what circumstances are incorporations subject to taxation in your country?

The amounts made available to the company (including the premium) are subject to capital transfer tax at the rate of 1%. In addition to the capital transfer tax, a registration fee between EUR 400 and 750 must be paid upon incorporation. Start-ups may under certain conditions be exempt from capital transfer tax and registration fee. Total incorporation cost (including taxes, attorney's and notary's fees) normally amount to EUR 3,500 for a GmbH and to EUR 5,000 for an AG. Incorporation costs may be borne by the company in the amount indicated in the articles.

22. What are the main taxes that potentially applicable to a corporation and what are their tax rates?

The total taxable income of a resident corporation is taxed at the flat rate of 25%. However, there is a minimum corporation tax based on the nominal capital of the corporation, Section 24, Paragraph 4 of the Corporation Tax Act 1988, (*Körperschaftsteuergesetz 1988, KStG*):

- 5% of the nominal capital (quarterly prepayment); for a GmbH this is EUR 1,750 each year and for an AG this is EUR 3,500 each year);
- EUR 5,452 each year for credit institutions and insurance companies;
- EUR 1,092 for start-up companies.

The main taxes that potentially apply are:

- Corporate income tax, at the rate of 25%.
- Personal income tax (in the case of partnerships), at progressive rates from between 23% and 50%.
- Value added tax (VAT), generally at the rate of 20%.
- Capital transfer tax, at the rate of 1%.

23. Please explain how each of the following is taxed in your country:

**i. Dividends paid to foreign corporate shareholders?**

In general, dividends paid by Austrian companies are subject to a withholding tax at a rate of 25%. Under certain specific conditions, this withholding tax does not apply to dividends paid to a company resident in another EU country. The rate of withholding tax can be reduced for dividends paid to non-EU shareholders in accordance with tax treaties. Depending on the tax treaty, this reduction may be in the form of an up-front reduction at source or a refund of withholding tax.

**ii. Dividends received from foreign companies?**

Based on the international participation privilege (that is, profit distributions of any kind resulting from an international participation are tax free if the underlying participation has been held for a minimum retention period) (*Schachtelprivileg*), special rules apply to the corporate tax exemption of dividends paid by foreign (non-

resident) companies to resident companies. Dividends paid to an individual generally attract a 25% income tax.

**iii. Interest paid to foreign corporate shareholders?**

If a security is not issued at the grant of a loan, interest paid on the loan is not subject to withholding tax in Austria. A 25% withholding tax is imposed on interest income from bank deposits and securities held in Austrian banks. Interest paid to non-resident companies and individuals on bank accounts, savings accounts and similar accounts is exempt if the recipient confirms in writing that he/she is a non-resident. Interest on bonds received by non-resident companies is exempt from tax if the securities are deposited with an Austrian bank and if the owner of the bond confirms in writing that it is a non-resident.

**iv. Intellectual property (IP) royalties paid to foreign corporate shareholders?**

IP royalties paid are subject to a 20% withholding tax, subject to any double tax treaties. Exemptions from the payment of withholding tax are provided for in Section 99 lit a of the Act on Income Tax.

24. Are there any thin capitalization rules (i.e. restrictions on loans from foreign affiliates) in your country? If so, please give details.

The Act on Proprietary Capital Replacing Loans 2003 (*Eigenkapitalersatz-Gesetz 2003, EKEG*) has been in force since 1st January 2004. If a company is in a crisis because of thin capitalisation (less than 8% of proprietary capital), insolvency or over-indebtedness, loans of shareholders are considered as replacing the proprietary capital.

25. Are there any controlled foreign company rules (i.e. the profits of a foreign subsidiary must be imputed to a local parent company) in your country? If so, please give details.

There are no controlled foreign company rules in Austria. Generally, only a loss of a foreign subsidiary can be imputed to an Austrian parent company that is tax resident in Austria, if the two companies are financially connected (Section 9, Paragraph 6 of the Corporation Tax Act). Profits can only be imputed to an Austrian parent company by way of general income allocation principles.

26. Are there any transfer pricing rules (i.e. restrictions on the pricing of transaction between a local entity and a foreign entity) in your country? If so, please give details.

There are no specific transfer pricing rules. However, the general arm's-length principle prevails and Austria applies OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2001 to assess transactions between an Austrian resident company and its non-resident affiliated companies.

27. How are imports and exports taxed in your country?

The common VAT is currently 20%. A reduced rate of 10% is valid for certain goods. VAT is payable on:

- The supply of goods and services for consideration by a commercial enterprise within Austria.
- The import of goods by an entrepreneur located in Austria from an entrepreneur of a non-EU member state.

Specific rules apply to the intra-EU supplying of goods and rendering of services. Intra-EU supplies to entrepreneurs with a VAT identification number are zero rated. However, the receipt of intra-EU supplies is subject to VAT. The country-of-destination principle (that VAT is chargeable in the country where the goods or services are consumed) applies to entrepreneurs.

28. Is there a wide network of double tax treaties in your country? If so, please give details.

Austria has double tax treaties with more than 60 countries, including the US and nearly all of Western Europe.

**(F) Competition**

29. Is there any competition law in your country? If so, please give details.

Main sources of Austrian Competition Law:

- The Competition Act 2002 (*Wettbewerbsgesetz 2002, WettbG*), which governs the enforcement powers of the Federal Competition Authority (*Bundeswettbewerbsbehörde, FCA*);
- The Cartel Act 2005 (*Kartellgesetz 2005, KartG*), which contains the substantive competition rules;
- The Unfair Competition Act 1984 (*Bundesgesetz gegen den unlauteren Wettbewerb, 1984, UWG*), which protects competitors, consumers and other market participants against unfair commercial practices.

On 1st March 2013 important amendments to the above mentioned competition rules came into force. The amendment brought significant changes to Austrian competition law enforcement, with the FCA's powers having been strengthened considerably. In addition it contains a number of small, but practically important changes to substantive competition rules of the Cartel Act.

Competition Authorities:

- The FCA (<http://www.bwb.gv.at>) is the main competition authority in Austria. The FCA was established as a monocratic authority with the Competition Act 2002. The Director General is independent from orders of the Ministry although the FCA

administratively belongs to the Ministry of Economics. The FCA has to take responsibility for a well functioning competition in Austria. It is investigating body and legal party in cartel cases.

- However, final decisions are brought by the Cartel Court, the court in charge of competition law issues.
- Filings have to be made with the FCA which are then forwarded to the Federal Cartel Prosecutor (*Bundeskartellanwalt*, FCP). The FCA and the FCP, also referred to as the “official parties” (*Amtsparteien*), may bring applications to the Cartel Court, especially by applying for in-depth investigations in second phase proceedings in merger cases.

30. Are restrictive agreements and practices regulated by competition law in your country?

According to Section 1 of the Corporation Tax Act agreements between undertakings, decisions by associations of undertakings or concerted practices which may restrict or distort competition are prohibited. The prohibition of anticompetitive agreements in Section 1 of the Corporation Tax Act is almost identical to the prohibition provided for in Article 101 of the Lisbon Treaty.

Especially the following types of agreements will be caught by Section 1 of the Corporation Tax Act:

- Direct or indirect fixing of selling or purchase prices or any other trading conditions;
- Limitation or control of production, markets, technical development or investment;
- Sharing of markets or sources of supply;
- Application of dissimilar conditions to equivalent transactions with other trading parties, placing them at a competitive disadvantage;
- Making the conclusion of contracts subject to supplementary obligations having no connection to the subject of the contract.

In line with the European Commission’s De Minimis Notice, agreements between competitors will be exempt if the combined market share held by the parties does not exceed 10%, while vertical agreements are subject to a 15% market share threshold. In addition the exception does not apply to hardcore restrictions, such as price or quantity fixing and market sharing. In line with the respective jurisdiction of the European Court of Justice, it is arguable that even hardcore restrictions may however escape the provision of Section 1 of the Corporation Tax Act if they do not give rise to appreciable effects on the market.

31. Is unilateral (or single-firm) conduct regulated by competition law in your country?

According to Paragraph 5 of the Corporation Tax Act the abuse of a dominant position on a market in Austria is prohibited. Such abuse in particular will consist of:

- Imposing unfair purchase or selling prices or other unfair trading conditions, which defer from those having arisen under competitive circumstances in comparable markets with effective competition;
- Limiting production, markets or technical development to the detriment of consumers;
- Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- Factually not justified selling of products below the acquisition price.

32. Are mergers and acquisitions subject to merger control in your country?

Under the definition of Paragraph 7 of the Corporation Tax Act the following mergers or measures constitute a concentration:

- The acquisition of the whole or a substantial part of an undertaking, especially by merger or transformation;
- The acquisition of rights concerning the business of another undertaking by means of a management agreement or the lease of such business;
- The direct or indirect acquisition of shares in an undertaking if the participation held after the acquisition is or exceeds 25% or 50%;
- At least half of the management or members of the supervisory boards of two or more undertakings are identical (interlocking boards);
- Any other connection of undertakings which confers on one undertaking a direct or indirect controlling influence over another undertaking;
- The establishment of a joint venture that fulfills all functions of an independent economic entity on a lasting basis.

A pre-merger notification must be made if in the last fiscal year before the transaction, the combined aggregate turnover of the undertakings concerned (e.g. buyer and target company, merging companies) was

- On the worldwide market: at least EUR 300 million;
- On the Austrian market: at least EUR 30 million; and if
- At least two of the entrepreneurs or undertakings concerned each had an annual turnover of EUR 5 million on the worldwide market.

Even where these thresholds are met, notification is not required if:

- Only one of the undertakings concerned achieved, on the Austrian market, a turnover exceeding EUR 5 million; and
- The combined aggregate worldwide turnover of the other undertakings concerned does not exceed EUR 30 million.

In applying the first two turnover thresholds (but not the third threshold) the turnovers of media undertakings must be multiplied by a factor of 200, for media support undertakings by a factor of 20.

All other mergers not fulfilling the pre-merger thresholds set forth above do not require a filing. Mergers falling within the jurisdiction of the European Commission are not subject to Austrian merger control either (one-stop-shop principle).

The undertakings concerned for threshold purposes are, in any event, the acquirer and the target as well as all entities that are affiliated; the seller only qualifies as "undertaking concerned" if he continues to hold an interest in the target of more than 25%.

## **(G) Intellectual property**

33. Please outline the main intellectual property rights that are capable of protection in your country. In each case, please state:

### **(i) Trademarks**

What is the nature of the right?

To be qualified as a trademark according to the Trademark Protection Act 1970, (*Markenschutzgesetz 1970, MSchG*) a sign has to be

- capable of being represented graphically (e.g. melodies can be represented graphically by writing in tunes) AND
- capable of distinguishing goods or services from those of another company; AND
- no obstacle to registration (Section 4 of the Trademark Protection Act) may apply.

How is it protected?

The trademark holder has the exclusive right to use the trademark and can prevent others from using an identical sign for goods and services identical with those the trademark is registered for (with some exceptions, e.g. exhaustion) and from using a sign identical or similar to the trademark for goods and services of the registered trademark or goods and services similar to them. The trademark can be transferred, licensed or pledged.

How is it enforced?

The application of a trademark has to be filed with the Austrian Patent Office.

Trademark infringement is generally enforced through the courts. The holder can claim for omission, removal, adequate compensation, damages, surrender of profits, publication of judgment and rendering of accounts. One important instrument is the injunction to immediately stop the infringement.

Disputes about the nullity of a trademark are decided by the Cancellation Division (*Nichtigkeitsabteilung*) of the Austrian Patent Office.

#### How long is it protected?

The protection is valid from application onwards and lasts until the end of a 10-year-term from registration onwards. With paying the official fee the trademark can be renewed for ten years time and time again.

### **(ii) Patents**

#### What is the nature of the right?

To be patentable, an invention:

- has to be new; AND
- must pertain to the field of technology; AND
- must have an inventive step (not be obvious to an expert, must not be state of art); AND
- has to be industrially applicable (and therefore reproducible); AND
- no obstacle to registration (Section 2 of the Patent Act 1970 (*Patentgesetz 1970*, *PatG*) may apply.

There is also a pared-down version of the patent, the registered design or utility patent (*Gebrauchsmuster*). The requirements for registration are not so strict but in contrast to a patent (see below) the maximum term is 10 years.

#### How is it protected?

The patent holder has the exclusive right to use the patent for industrial purposes. He/she may exclude third parties from producing industrially items using the patent, to place such item on the market, to offer, to import and to use it (with some exceptions, e.g. compulsory licenses) or also to possess for such purposes. The patent can be transferred, licensed or pledged. However, it is allowed to do all these actions for private purposes.

#### How is it enforced?

Patents are enforced in the same way as trademarks (see above).

#### How long is it protected?

The maximum duration of a patent is 20 years. To maintain the protection the annual fee has to be paid.

### **(iii) (Registered) Designs**

#### What is the nature of the right?

According to the Design Protection Act 1990 (*Musterschutzesetz 1990, MuSchG*) a design is the appearance of a product (Section 1, Paragraph 3) or part thereof and results in particular from of the characteristics of lines, contours, colours, frame, texture and / or materials of the product itself and / or its ornamentation. It has to be new (it has not been made available to the public before the date of the application) and must have an individual character (*Eigenart*; general impression of the design differs from the general impression of another design). No obstacle to registration (e.g. that there are moral issues) may apply.

#### How is it protected?

The design holder has the exclusive right to use the design and can prevent others from using it (with some exceptions, e.g. exhaustion (Section 5 lit a of the Design Protection Act)). The design can be transferred, licensed or pledged.

#### How is it enforced?

Designs are enforced in the same way as trademarks (see above).

#### How long is it protected?

The maximum duration of a design is 25 years. The first period lasts 5 years and can be extended four times by another period of 5 years.

### **(iv) Copyright**

#### What is the nature of the right?

The Austrian Copyright Act 1996 (*Urheberrechtsgesetz 1996, UrhG*) protects “creations” as defined by the Copyright Act. They have to pertain to one of the following fields:

- Literature (including computer programs and stage work)
- Music;
- fine arts (including photographic works and architecture);
- cinematic art.

Protection exists as soon as the work is created.

#### How is it protected?

The creator has the following exclusive rights:

- exploitation right (Section 14);
- the right to reproduce (Section 15);
- the right to distribute (Section 16);
- the right of rental and lending (Section 16 lit a);
- broadcasting rights (Section 17);
- the right of recital, performance and presentation (Section 18);
- the right to make the work available (Section 19).

These rights can be transferred, licensed or pledged. There are exceptions, particularly for private individuals, disabled people or for school purposes.

Additionally, no one is allowed to change the creation without the consent of the creator. This right is dispensable.

Furthermore, the creator has the right to decide about the designation. This right is indispensable but inheritable.

#### How is it enforced?

Copyright infringement is generally enforced through the courts. The holder can claim for omission, removal, adequate compensation, damages, surrender of profits, publication of judgment and rendering of accounts. One important instrument is the injunction to immediately stop the infringement. The courts also decide whether a work is a creation as defined in the Copyright Act.

The creator / the holder of the exploitation rights and rights of use can sue for omission, removal, publication of judgment, adequate compensation, damages, recovery of profits and financial reporting.

#### How long is it protected?

The protection lasts until 70 years after the death of the last co-creator (from the end of the calendar year on). In case of anonymous and pseudonymous works the term is 70 years after creation, or – if the work is published – 70 years after publishing.

### **(v) Ancillary copyright**

#### What is the nature of the right?

It is a neighbour right to the copyright and subsists with performance of a creation.

#### How is it protected?

The performer has explicitly stated rights (Sections 66 to 76 lit e Copyright Act). They are generally connected to the exploitation of the transfer of a work to the public (e.g. actors in a stage play) but also include the right of designation of the performed work.

#### How is it enforced?

Infringements of one of these rights are enforced in the same way as copyright infringements (see above, copyright).

#### How long is it protected?

The protection lasts until 50 years after the performance, or – if the performance is recorded and published – 50 years after publishing.

**(vi) Miscellaneous**

- Confidential information is not an intellectual property in Austria. Business secrets (as know-how) are subject to the Unfair Competition Act and the Employees Act (Section 27, Paragraph 1).
- As Austria is a member of the European Union, European trademarks, Patents and (registered and unregistered) designs are valid in Austria.

**(H) Marketing agreements**

34. Are marketing agreements regulated in your country? If so, please give brief details in respect of the following arrangements:

**(i) Agency;**

According to Section 1 of the Commercial Agent Act 1993 (*Handelsvertretergesetz 1993, HVertrG*) a commercial agent is entrusted by another party with the agency or closure of agreements in the name and for the account of the other party. However, the agent is self-employed.

**(ii) Distribution**

There are no specific laws or clauses about distribution agreements.

**(iii) Franchising**

There are no specific laws or clauses about franchising in Austria, not even a legal definition of the word "Franchising". The jurisprudence treats franchising agreements similar to license agreements and also the Commercial Agent Act is used in analogy.

**(I) E-commerce**

35. Are there any laws regulating e-commerce (such as electronic signatures and distance selling) in your country? If so, please give brief details.

Norms about e-commerce became part of Austrian Law through implementation of Directive 2000/31/EG of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on Electronic Commerce"). They were integrated in the E-Commerce Act 2001 (*E-Commerce Gesetz 2001, ECG*) which came into force on 1<sup>st</sup> January, 2002. The law deals among others with the web presence of service providers and the obligations to provide certain information to the visitors on the websites as well as with the process of contracting online. It is also in accordance with the Telecommunication Act 2011 (*Telekommunikationsgesetz 2011, TKG*) which forbids sending e-mails with advertising content without prior consent of the recipient.

Prior to that (since 2000) and into force until today the Consumer Protection Act 1979 (*Konsumentenschutzgesetz 1979, KSchG*) provides norms for distance selling transactions with consumers. These provisions also oblige suppliers to provide certain information to consumers and provide consumers with the right to cancel the contract for different reasons.

Additionally, the Digital Signature Act 1999 (*Signaturgesetz 1999, SigG*) and the Signature Regulation 2008 (*Signatur-Verordnung 2008, SigV*) deal with the use of electronic signature certification and with the requirements a certification body (*Zertifizierungsstelle*) has to fulfill. The Act on Access Control 2000 (*Zugangskontrollgesetz 2000, ZuKG*) deals with the protection of service providers who provide radio and television broadcasts. The Act on Distance Financial Services 2004 (*Fern-Finanzdienstleistungs-Gesetz 2004, FernFinG*) regulates the distance selling of financial services.

## **(J) Data protection**

36. Are there any data protection laws in your country? If so, please give brief details.

The main data protection law in Austria is the Federal Data Protection Act 2000 (*Datenschutzgesetz 2000, DSG*) and the corresponding data protection acts on state level. These acts are further specified through various administrative regulations.

The Data Protection Act generally applies to the processing of personal data, ie data about individuals who can be identified from the data. It stipulates the conditions under which personal data may be processed, the safety measures which must be taken by the processor of personal data and the obligation to register certain processing of personal data at the Austrian Data Protection Commission.

The Data Protection Act also establishes rights of the data subject, ie the individual to whom the data relates; for example a right of access to personal data, a right of rectification of inaccurate data and a right of erasure of unlawfully processed data.

Violations of the Data Protection Act may entail administrative fines of up to EUR 25,000; in case of grave violations a prison sentence (maximum one year) may be imposed.

## **(K) Product liability**

37. Are there any laws regulating product liability and product safety in your country? If so, please give brief details.

In 1988 the Product Liability Act 1988 (*Produkthaftungsgesetz 1988, PHG*) came into force. Therein is implemented the Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. The Act has not (yet) achieved any great importance as the general norm about indemnification (Section 933 lit a Austrian Civil Code) also covers most cases of damages (material damages as well as personal

injuries) caused by a defective product according to Section 5 of the Product Liability Act.

**(i) Product liability:**

According to the Product Liability Act indemnification can be claimed from the producer/ the importer/ own-brander (alternatively)/ the supplier who put the product on the market (subsidiary) when

- the product is defective at the time it is placed on the market AND
- damage has occurred AND
- there is a causal relationship between the defect and the damage.

If these requirements are fulfilled the injured party can claim for indemnification based on the Product Liability Act as well as based on Section 933 lit a of the Austrian Civil Code;. Damages concerning the product itself are not dealt with in the Product Liability Act as these cases covered by warranty (and guarantees granted voluntarily).

The main difference (and advantage for the injured party) is that according to the Product Liability Act it is not necessary to have a contractual relationship to the defendant. Also a third party can sue the producer/ importer/ the supplier of the product.

**(ii) Product safety:**

Firstly, the Product Liability Act provides a general clause (Section 5) about product safety. It does not define the product safety but states that a product is defective when it does not provide the safety which can be expected in a given case.

Secondly, according to the Austrian Civil Code, a fault is given in case of absence of characteristics which commonly can be expected and absence of expressly stipulated characteristics (Section 922).

Both clauses are highly flexible and adapt the requirements for product safety to the actual circumstances. Consequently, there is no strict legal definition for “product safety” but it is clear from the context (e.g.: a car has to have a break).

Furthermore, there are many additional clauses giving standards for certain products, especially technical, chemical and medical products as well as food products.

### INFORMATION ABOUT THE AUTHORS

Peter Polak ([p.polak@fplp.at](mailto:p.polak@fplp.at)) is a partner with Fiebinger Polak Leon Attorneys-at-Law and head of the firm's Corporate/M&A department.

Sabine-Katharina Andreasch ([s.andreasch@fplp.at](mailto:s.andreasch@fplp.at)), Gergely Tibor Sarlós ([g.sarlos@fplpat](mailto:g.sarlos@fplpat)) and Christian Eder ([c.eder@fplp.at](mailto:c.eder@fplp.at)) are associates with Fiebinger Polak Leon Attorneys-at-Law.