Investing in Austria

6th, completely revised edition

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INVESTING IN AUSTRIA

An outline
prepared by

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and Auditor Treuhand GmbH,
Vienna

6th, completely revised edition

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1. Introduction

Austria, since January 1, 1995, a member of the European Union, is well known for her stable and prosperous economy, her highly skilled labor force and her geographic location in the heart of Europe. She is a party to the Maastricht Treaty and a participant in the Economic and Monetary Union (EMU). The Tax Reform 2005 (*Steuerreform 2005*) has substantially reduced the corporation tax (*Körperschaftssteuer*) from 34 % to 25 % and has introduced group taxation (*Gruppenbesteuerung*). Austrian tax legislation is now even more attractive for investors than before.

A substantial part of the Austrian economy is foreign owned. The Austrian government, which formerly controlled about one quarter of the Austrian economy, is pursuing 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* and the complete divestment of *Austria Tabak AG*, *Postsparkasse* and others) and will continue to be pursued in the future.

This booklet - in its sixth, 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 cannot substitute 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** comprised of nine provinces (*Bundesländer*) and encompasses a geographic area of 83,871 square kilometers. The population numbers more than eight million people (8,106,000 in 2004), about 1.6 million (1,627,173 in 2004) 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.

Chancellor (*Bundeskanzler*) Wolfgang Schüssel of the conservative Austrian People's Party (*ÖVP*) heads a coalition government with the Austrian Freedom Party (*FPÖ*) for a second term. In the last elections in November 2002 the Austrian People's Party (*ÖVP*) won a relative majority, taking 42 % of the votes. The Austrian Freedom Party (*FPÖ*) received 10 % of the votes - a sharp drop from the 27 % it won in 1999. The Austrian Social Democratic Party (*SPÖ*) - with a share of 37 % of the votes - and the Greens - with a share of 9 % - represent the opposition.

The nine Austrian **provinces** (*Bundesländer*) are ruled by provincial governments presided over by a Governor (*Landeshauptmann*), who in most cases heads a government composed of all parties represented in the Provincial Parliament (*Landtag*).

2.2. Economy

The Austrian **Gross Domestic Product (GDP)** was about EUR 28,700 per capita in 2004. In 2003 the real GDP grew by 0.7 %. A real growth rate of 1.8 % was forecast for 2004, which should increase to 2.5 % in 2005. Exports of goods and services account for more than 52 % of the GDP. Foreign trade showed a surplus in 2002: imports worth about EUR 75.5 billion were offset by exports of about EUR 78.4 billion; in 2003 they were in near balance.

At 4.5 % the **unemployment rate** was among the lowest in Western Europe in 2004.

The **inflation rate** was about 1.3 % in 2003. 1.8 % is expected for 2004.

Based on the average of the **structural indicators** Austria has the third strongest economy in the EU.

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. European Union and European Economic Area

After becoming a part of the European Economic Area (EEA) on January 1, 1994, Austria joined, together with two other participants of the EEA - Sweden and Finland -, the European Union (EU) on January 1, 1995. While the EEA was maintained because of the wish of the three remaining countries - Norway, Iceland and Liechtenstein - to participate in the Single Market, the member countries of the EU increased to 15. At the summit conference in Copenhagen the EU negotiations with the candidate countries (Lithuania, Latvia, Estonia, Poland, Slovakia, the Czech Republic, Hungary, Slovenia, Malta and Cyprus) for their accession to the EU in 2004 were concluded. Those countries became members of the EU on May 1, 2004.

As a member country of the EU Austria has taken part in the European Economic and Monetary Union (EMU) from the very beginning. Furthermore, Austria is member 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 - *OHG* (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 four.

Several forms of companies enjoy **separate legal existence** (*Rechtspersönlichkeit*) and are herein referred to as **corporations.** These are the company with limited liability (*GmbH*) and the stock company (*AG*), but also include the cooperative (*Genossenschaft* - see 4.2) and the association (*Verein* - see 4.6). While the various types of **partnerships** (general partnership, limited partnership, registered partnership) do not enjoy separate legal existence, they may sue and be sued and hold rights under their name and are thus from a practical standpoint very similar to corporations. In contrast, the silent partnership (see 4.7) 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** (*Einzelkaufmann* - see 4.5).

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 his business partner prior to entering into an agreement with him to ensure that the right person is signing the agreement.

The commercial register is accessible on-line. An **excerpt from the commercial register** (*Firmenbuchauszug*) can be obtained from the courts as well as from notaries public and lawyers or, by registered users, on the Internet at 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 holds full commercial powers to represent a company or a sole proprietorship, but who, however, may not enter into 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 give rise to tax liability.

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 his 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 activities of the commercial agent, new customers who are likely to remain.

3.4. Distribution Agreements

The EU competition regulations are applicable to distribution agreements (*Vertriebsverträge*). In certain cases Austrian courts have applied, by analogy, provisions 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 complicated (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 nonresidents, 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 have 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. Former shareholders may therefore be liable for both the unpaid amount of their own shares for up to 5 years after divestment 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 appoint 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 former represent the company and run its day-to-day business. Managing directors 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. The shareholders' assembly 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 provide otherwise. In certain cases (e.g. increase of share capital) a majority of 75 % 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 voluntarily be established. 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 have to be appointed as members of the advisory board as long as it exercises no controlling influence on 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 3.125 million (3.65 million as of 2005), turnover less than EUR 6.25 million (7.3 million as of 2005), employees less than 50. The increase in threshold values is expected to come into force for accounting years beginning after December 31, 2004, thus

implementing the Council Directive 2003/38/EC. However, all companies have to file their financial statements with the commercial register.

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 important advantage of the *AG* is the flexibility of transfer of stock (*Aktien*), thereby creating the possibility to raise funds on capital markets. However, in contrast to the *GmbH*, an *AG* must have a supervisory board in all cases and shareholders' assemblies are subject to stricter formal requirements (see 3.6.4).

3.6.2. Establishment

A formation by just one founder has been permitted under the law since October 8, 2004. In contrast to a formation by two or more founders, the name of the sole founder has to be registered with the commercial register (*Firmenbuch*).

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 in the form of **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, merely the handing over of the stock certificate (*Aktie*) is required. 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 the day-to-day business. Its members are subject to statutory non-competition rules. Members of the board of directors can 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 can be held on other occasions as well. 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 in the case of 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 Handelsgesellschaft*)

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

Although an *OHG* is not considered to have a separate **legal personality**, it may acquire rights, titles to real estate, incur liabilities and be a party to a lawsuit. The *OHG* is represented by its partners.

The **purpose of the *OHG*** must be trade or other commercial enterprises as specified by the Commercial Code (*Handelsgesetzbuch*). To operate other businesses in the form of a partnership, the registered partnership (see 4.3) or the civil law association (see 4.4) is available.

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.

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 referred to as a ***GmbH & Co KG***.

3.9. Branch Offices of Foreign Corporations

3.9.1. General

Foreign corporations, i.e. companies seated outside of Austria, can also do business in Austria by establishing a **branch office** (*Zweigniederlassung*). Branch offices do not enjoy separate legal existence. 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 company.

3.9.2. Branch Offices of Foreign Companies with Limited Liability

In case the seat of a company with limited liability (*GmbH*) is 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 are required to name an authorized representative of the branch office whose ordinary residence is in Austria; companies domiciled within the EEA may do so. The foreign company must provide legalized copies of its registration documents and the articles of association currently in force. In case the articles of association are not in German, a legalized translation has to be provided.

3.9.3. Branch Offices of Foreign Stock Companies

In case the seat of a foreign stock company (*AG*) is outside Austria, the members of the board of directors (*Vorstand*) have to file for registration of the branch office in the **commercial register** (*Firmenbuch*). Companies not domiciled within the EEA have to name an authorized representative of the branch office whose ordinary residence is in Austria; companies domiciled within the EEA may do so. The foreign company must provide legalized copies of its registration documents and the articles of association currently in force. In case the articles of association are not in German, a legalized translation has to be provided.

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** of approximately EUR 360

for the commercial register, depending on the complexity of the registration (e.g. number of shareholders, members of the board of directors). A capital increase is subject to a 1 % capital tax and a registration fee of approximately EUR 230.

Setting up a **partnership** only attracts a **registration fee** (*Eintragungsgebühr*) for the commercial register. However, since a *GmbH & Co KG* is viewed as a corporation for this purpose, the formation of a *GmbH & Co KG* 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 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 improve 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* (e.g. liability) are similar to those of the *OHG.*

4.2. Cooperative (*Genossenschaft*)

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

4.3. Registered Partnership (*Eingetragene Erwerbsgesellschaft*)

If the purpose of a company does not qualify as a general partnership (*OHG* - see 3.7) or a limited partnership (*KG* - see 3.8), it may be formed as a registered partnership (*EEG*), which can be established in one of the following two forms:

- General Registered Partnership (*Offene Erwerbsgesellschaft [OEG]*)
- Limited Registered Partnership (*Kommanditerwerbsgesellschaft [KEG]*).

The ***EEG*** is therefore available to the so-called „professions" (lawyers, etc. - *Freie Berufe*), small businesses and to businesses in agriculture and forestry.

The provisions regarding the two types of *EEGs* (*OEG* and *KEG*) are similar to those of the *OHG* and *KG,* especially as far as liability is concerned.

4.4. 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]*).

4.5. Sole Proprietorship (*Einzelkaufmann*)

An individual may operate a business as a sole proprietorship (*Einzelkaufmann*). He remains **solely liable** for the business's debts with all of his personal and business assets. Sole proprietorships can be registered in the commercial register if the business reaches a certain size.

4.6. Association (*Verein*)

An association (*Verein*) is a corporation mainly established on a non-profit basis and is therefore usually not appropriate for operating a business.

4.7. 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 separate legal existence and cannot act under a common name. It is not necessary to disclose it to the public.

4.8. *Societas Europaea* (*SE*)

Following the political accord reached by the Council of Ministers on December 20, 2000, on the Regulation to establish a **European Company Statute** and on the related **Directive** concerning **Worker Involvement**, the appropriate legislation was formally adopted in 2001 and entered into force on October 8, 2004. On the same date additional national provisions went into effect to implement details of registration, transfer of seat, establishment etc.

The statute for a European company gives enterprises operating in several EU member states the opportunity to set up a public limited-liability company with the Latin name ***Societas Europaea*** (*SE*), and to develop as a single operator throughout the European Union on the basis of a single legislative and management system, instead of being subject to the national legislation of each member state in which they have subsidiaries. Companies are able to merge, create a holding company, create joint subsidiaries or convert themselves into an *SE* without going into liquidation as soon as a public limited-liability company has its registered office and head office within the EU. 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 registered *SE* must be published in the Official Journal of the European Communities. The statute permits a choice between a one- or two-tier management system.

4.9. 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 1435/2003 dated July 22, 2003 on a Common European Statute was passed. The statute will enter into force on August 18, 2006.

The *SCE* will provide for cross-national cooperation between cooperatives and remove 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 rules of commercial law are the **starting point for determining taxable income**; whatever valuation methods have been used for commercial law purposes may also be applied 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 entertaining expenses
- a portion of depreciation and expenses relating to a passenger car if the acquisition costs (including of VAT) exceed a certain amount
- 50 % of the supervisory board members' remuneration
- donations (with some exceptions)
- expenses where the 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 take precedence, resulting in a difference between taxable and financial statement income. Goodwill acquired in the course of a takeover 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 towards 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.

Tax losses 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 % (before 2005 the tax rate was 34 %). 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** 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*) (before 2005 the tax rate was 34 %). Even if no income is generated, a *GmbH* triggers a minimum corporation tax of EUR 1,750 whereas EUR 3,500 are due in case of an *AG*.

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

Under the Tax Reform 2005 (*Steuerreform 2005*) **interest** on the leveraged acquisition of investments that either qualify for the domestic participation privilege or the international affiliation privilege is **deductible**.

Furthermore, the Tax Reform 2005 implemented a new **group taxation concept** (*Gruppenbesteuerung*). This concept is a system of group relief, under which 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 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 also have to apply for group taxation with the tax authorities. The group has to 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 member of the group.

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). However, 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. 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 final tax (*Endbesteuerung*) for the individual shareholder.

A resident company's dividend income from Austrian sources is exempt from corporation tax under the **domestic participation exemption** (*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 a minimum interest of 25 % in the company. However, capital gains from the disposal of a shareholding do not fall under the scope of the domestic participation exemption.

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 activities exceed those of a mere holding company, that staff is being employed and office space is 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, use of this residence 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 the 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, can 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 at least 12 months. Under similar conditions capital gains from the disposal of a foreign subsidiary are also exempt from tax, unless the Austrian holding company opts for the taxability of capital gains. This option must be exercised in the year a participation is acquired. On the other hand capital losses as well as write-downs in a participation's book value reduce the company's taxable income. However, such capital losses and write-downs must be spread over a period of seven years.

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 does not require a minimum shareholding or 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 investments from or to foreign countries (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 EU Merger Directive was implemented by the Reorganization Tax Act.
- 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 does not have substance.

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

6.2. Foundation (*Privatstiftung*)

Since September 1, 1993, the **Act on Private Foundations** (*Privatstiftungsgesetz*) has been in force. A *Privatstiftung* is a legal entity, the internal organization and purpose of which are largely determined by the grantor (*Stifter*), who provides the assets necessary to achieve the aims of the *Privatstiftung.*

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 (in form of cash or contributions in kind). If capital is raised as a contribution in kind, an audit is required.

A private foundation may be made *inter vivos* or *mortis causa*. In order to form the private foundation the founder has to draw up a **declaration of establishment** (*Stiftungserklärung*). The foundation purpose (*Stiftungszweck*) defines the framework and legal intent for the use of the assets. The grantor can prescribe his wishes (*Primat des Stifterwillens*). Neither the foundation's establishment nor its practices are subject to supervision by public authorities. The law provides that the by-laws

(*Stiftungszusatzerklärung*), which include specific regulations such as the names of the beneficiaries, the assets etc, need not be known to the public. The statutes, which have to be presented to the commercial register, and the by-laws must be drawn up in form of 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 contributed the minimum amount.

The private foundation **shall not carry on a trade or business**. It shall 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 by averting the splitting up of family property. Every foundation is subject to an annual statutory audit and must prepare financial statements.

A private foundation must have a **board of directors** (*Stiftungsvorstand*) consisting of at least three members, two of whom maintain their permanent place of residence in Austria (but must not necessarily be Austrian nationals). Who or whose family members is / are a beneficiary of the private foundation shall not be a member of the board, even if he is the grantor. An advisory board is optional. A certified accountant (*Stiftungsprüfer*) is, in addition to the directors, a legally necessary body of the foundation.

The contribution of assets to an Austrian foundation is subject to an **entrance fee** of 5 % **gift tax** (*Schenkungssteuer*), and an additional 3.5 % tax on real estate. Gift tax 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 value of the property. If the private foundation's assets are donated to a beneficiary other than the grantor within 10 years of formation, taxation will normally be levied under inheritance and gift tax provisions at the regular rate. Supplementary contributions made by the grantor are also taxed with the flat rate of 5 %.

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). However, the international affiliation privilege for dividend income is only applicable in cases in which foreign withholding taxes have not been reduced under a tax treaty. It is sometimes advisable to combine a foundation with an Austrian holding company. 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. Such tax will be credited against withholding tax on distributions to

beneficiaries (see below). Other current income of a foundation is subject to a 25 % corporation tax (before 2005 the tax rate was 34 %).

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. If profits are not distributed for several years, the "yield" may be higher (almost the equivalent of tax-free accumulation of profits). 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.

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 and demergers of corporations** are also possible under Austrian law. Usually, one company is merged with 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, although in such case the surviving company must always be a stock company.

If the target company owns **real estate**, depending on the province where the real estate is located, special approval may be necessary for its acquisition (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 24.2.5).

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. In case of a share deal the legal entity 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). The acquisition of shares in a **company with limited liability** (*GmbH*) requires a notarial deed in order to be effective (see 3.5.3). Notarization is also required for the increase of 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 a going concern are acquired. Since the legal entity of the target is changed, all contracts previously concluded by the target will have to be transferred to the purchaser to remain effective. For such transfer the consent of the third party is required. **Labor relations** generally 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 liable for all business debts if he retains the company name (*Firma*) of the target. This unlimited liability can be reduced by a special entry in the commercial register. Even if the company name is not kept, there is a statutory liability for all debts of the transferred business which were 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 4.5) only attract transfer taxes on the transfer of real estate. 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 **real estate transfer tax** (*Grunderwerbsteuer*) of 3.5 % 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 an asset deal. Now, 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.

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-run railways (***ÖBB***) were transformed into a company with legal personality (*Bundesbahngesetz 1992*), but the government still holds 100 % of its shares. In May 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. In May 1996, another 14.9 % of *OMV* stock was sold so that *ÖIAG* now holds 35 %. In 1993 *Austrian Industries AG* was split up into ***VA Technologie AG***, ***Böhler-Uddeholm AG*** und ***Voest-Alpine Stahl AG***. After several reductions of its stake, *ÖIAG* now holds 15% of *VA Technologie AG* and *Voest-Alpine Stahl AG*. In contrast, *Böhler-Uddeholm AG* has been fully privatized. *ÖIAG* achieved 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 the summer of 2001 the last tranche of *Austria Tabak* was sold to the *Gallaher Group*.

The federal government's shares in ***Bank Austria*** were sold in the second half of 1997. In the same year, *Bank Austria* acquired the government's shares in *Creditanstalt*. Since then the group is called ***BA-CA***. Since 2000 *BA-CA* has been part of the mainly German *HypoVereinsbank Group*. 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*) (approximately 75 %) and *KSP Unternehmensbeteiligungsgesellschaft m.b.H*. (approximately 25 %). Since November 2003 *BAWAG* has held 100 % of *Postsparkasse*.

The biggest privatization in Austrian history, which was prescribed by the EU, occurred in the telecommunications sector. A close-run contest between *Telecom Italia* and *Ameritech* for the strategic partnership with ***Telekom Austria*** was decided in Italia's favor when it acquired a blocking minority holding of 25 % plus one share for the record price of ATS 27.226 billion (about EUR 1.98 billion). *Telecom Italia*'s decisive advantage was the

already existing share held by its subsidiary STET in *Mobilkom Austria*, a subsidiary of *Telekom Austria*, thus keeping Austria's mobile and terrestrial phone networks under one roof and facilitating the integration of the two. In November 2000 another tranche of 28 % of *Telekom Austria* shares were publicly 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. The participation of private investors constituted a further record with approximately 91,000 shareholders. In 2002 *Telecom Italia* began its exit from *Telekom Austria* and *Mobilkom Austria. Telekom Austria* acquired *Telecom Italia*'s shares and now owns 100 % of *Mobilkom Austria*. At present, *ÖIAG* holds 47.2 % of *Telekom Austria*, while 52.8 % are publicly held. In 2004 *Swisscom* planned to buy *ÖIAG's Telekom Austria* shares, but the project failed due to the opposition of the general public, some political parties and the trade unions. In the same year *Telekom Austria* started a program to repurchase share capital.

Besides the shares mentioned above, *ÖIAG* still holds 39.7 % of ***Austrian Airlines*** and 100 % of both the Austrian postal service, ***Österreichische Post*** and of a mining company of minor importance, *ÖIAG-Bergbauholding*.

8.2. Liberalized Markets: Telecommunications, Energy and Railways

Since the liberalization of the telecommunication market in 1997 many telecommunications companies have entered the Austrian market. **GSM licenses** were auctioned off by the Telecommunications Control Commission. At present, four companies hold GSM licenses: *Mobilkom Austria* (*Telekom Austria* subsidiary), *T-Mobile* (subsidiary of the German *T-Mobile*), *One GmbH* (owned by the German energy service provider *E.ON*), and *tele.ring* (owned by *Western Wireless*). Mobile number portability, as prescribed by the New Regulatory Telecommunication Framework of the EU, is expected to make the market even more competitive.

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

As one of the last countries in Europe, Austria auctioned off six **UMTS mobile phone licenses** in November 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 on the Austrian market. Instead it sold its frequencies to *Mobilkom Austria* with consent of the regulatory authority at the end of 2003.

Under the new Telecommunications Act - in compliance with the New Regulatory Telecommunication Framework of the EU - the holding of a GSM license is no longer prerequisite for operating a mobile network. The Telecommunications Control Commission therefore granted *Tele 2* the right of interconnection with the incumbent *Telekom Austria* as a Mobile Virtual Network Operator (**MVNO**) in May 2004.

On April 1, 2001, the Act on the Austrian Communications Authority (*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. This Act furthermore 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 the *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-Kontroll Kommission)*, started work on March 1, 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*), which entered into force on January 1, 2000. There are various kinds of electronic signatures, depending on the degree of security. 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 March 2004, which regulates the electronic communication between citizen and government. Among other things, it introduced a new kind of electronic signature.

The Austrian **E-Commerce Act** (*E-Commerce-Gesetz*) was designed to implement the EC E-Commerce Directive 2000/31/EC and entered into force on January 1, 2002. It covers certain aspects of information society services and institutes the country of origin control, as well as exceptions thereto (e.g. the regulation of spamming). Furthermore, it contains the basic principles governing the online closing 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 on the websites linked to.

For information on EC directives on distance contracts and on financial services, see 17.

In August 2003, Austria adopted the new **Telecommunications Act** (*Telekommunikationsgesetz 2003*) in compliance 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 2002/58/EC concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications

Sector (eCommunication Data Protection Directive) amended the general Data Protection Directive (95/46/EC) and focuses on special privacy threats resulting from modern communication, such as spamming and protection of communications as well as traffic data content.

The general EC Data Protection Directive was implemented by the **Data Protection Act** (*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 incompatible 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 trans-border data flow must not only be notified to, but are also subject to prior approval by the Data Processing Register, e.g. when the subsidiary is based outside the EEA.

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 geographic location, the potential for creating new jobs or setting up new or expanding old facilities, the technology used 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. Here one can reduce his investment expense by up to 50 %, e.g. for manufacturing equipment or information technology.
- **Research & Development** activities: typical research and development projects can be subsidized up to 60 % depending on research focus, region, etc.

- **Recruitment and personnel development**: human resource subsidies of up to 45 % are normally granted in connection with personnel development. 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 environmental conditions** 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.

Even the range of incentives is broad: from regional to national, from cash grants and low-interest loans to export guarantees. Therefore individual consultations are required to determine the available incentives. Austria, however, 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 facilitate state supports and contain exemptions from the requirement to give prior notification. The Block Exemptions Regulations became effective on February 1, 2001, and will be valid until December 31, 2006. Various Austrian regions qualify for extensive state and EU aid, as approved by the European Commission to promote and facilitate economic development.

9.2. Tax Incentives

Since income tax 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's training allowance** (*Bildungsfreibetrag*) of up to 20 % of qualifying training costs, alternatively a tax credit equal to 6 % of such costs
- a particular **allowance** of up to EUR 4,380 (*Lehrlingsfreibetrag*) if **apprentices** are employed (only applicable if the employment contract was concluded before January 1, 2005), alternatively a tax credit of EUR 1,000

- for individuals a **roll-over relief** for capital gains from the disposal of fixed assets (except investments in subsidiaries) that have been held for a minimum of seven years (15 years in case of certain real estate) applies. However, capital gains from the disposal of an intangible may only be rolled over to the acquisition of an intangible asset. A similar rule applies to capital gains from the disposal of tangible assets.

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 gained previous practical experience. An exemption from the certificate of proficiency (*Nachsicht vom Befähigungsnachweis*) by the Trade Authority is possible under certain circumstances. Other activities (*freie Gewerbe*) do not require such 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. This person must either be a person authorized to represent the corporation (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 corporation and who contributes to the social security system. This person is responsible for the correct conduct of the business and is commonly referred to as the ***gewerberechtlicher Geschäftsführer***.

An **industrial license** (*Betriebsanlagengenehmigung*) has to 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 owner of the plant or factory 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 in connection 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 sue for cease and desist from the non-observance of trade law under the Law Against Unfair Competition (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, grants employees minimum standards of payment, termination protection, maximum working-time, benefits etc.

The **works council** (*Betriebsrat*) represents employees' interests and has significant statutory powers. 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, to supervise the compliance with regulations protecting the employees and to obtain information, including financial statements. In particular, the works council must be informed on certain intended changes of the business.

The sources of Austrian labor law are not limited to statutes, but also comprise so-called **collective bargaining** (*Kollektivverträge [KVs]*) and **company agreements** (*Betriebsvereinbarungen*), respectively. Collective bargaining agreements are agreements between trade unions and statutory employer organizations, regulating issues like payment 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 agreed on 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. Recent initiatives and statutes seem to confirm this trend, adopting same or similar rules for blue-collar and white-collar workers, for example, provisions concerning vacation entitlement (*Urlaubsgesetz*), redundancy payment (*Arbeiter-Abfertigungsgesetz*) and sick payment. But different rules still exist, regarding, for example, periods of employment termination (see below) and non-competition provisions.

11.2. Wages, Working-Time, Worker Protection

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

The *KVs* provide for extra payments of one monthly salary each for vacation and Christmas, respectively, thus granting employees **14 payments a year**. The so-called 13th and 14th salary (or Christmas and vacation pay) are currently 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-times apply 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, save 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 has to be paid at the normal hourly rate plus at least 50 %. Owing to Council Regulation 207/76 dated 9 February 1976 night employment of women has been permitted since August 1, 2002. Further deregulation of working-time provisions is expected in the future as a result of more EU flexible regulations.

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) are 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. For children born on or after January 1, 2002, 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 income. This amount will be paid until the child is 30 months old, or, if parents share the responsibility of childcare, 36 months.

Mothers and / or fathers of children born after June 30, 2004, or parents who have been on parental leave on that date, 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 three years and they live in the same household as the child. The parent must inform his employer in writing and three months in advance about the planned 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 can be terminated by ordinary termination or dismissal with immediate effect. A **dismissal with immediate effect** by the employer (*Entlassung*) or an **immediate resignation** by the employee (*Austritt*) has to be supported by important reasons. The **ordinary termination** (*Kündigung*) requires no reason, but compliance with certain periods and dates is necessary. There is the possibility to challenge ordinary termination of employment by the works council or the employee in labor court on the grounds that, *inter alia*, the termination was socially unjustified; however, the interest of the employer also has to be considered.

In enterprises where a **works council** is established, in general, termination is 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, the handicapped, and those employees drafted into military or non-military services from termination.

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 justified immediate resignation 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). All employment contracts beginning after December 31, 2002, fall under the new Act on Statutory Corporate Employee Retirement Scheme (*Betriebliches Mitarbeitervorsorgegesetz*). Under the new legislation the employer has to pay 1.53 % of the monthly remuneration (including benefits and before taxes) to a fund with the

exception of the first month. In case of ordinary termination by the employee, unjustified resignation by the employee, dismissal for cause or if there are not yet three years of continuous contributions, the employee cannot claim actual severance payment, but his accrued payments will remain in the fund. In all other cases the employee is entitled to payment from the fund. In general, employment contracts beginning on or before December 31, 2002, are governed by the old regime. However, employer and employee may agree that the employee transfer to the new system. It is also possible to transfer accrued entitlements of the old regime into the fund.

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

11.4. Transfer of a Business

If a business or parts of it are transferred to another owner (see 7.3), the employment relations are automatically transferred to the new owner, who is regarded as the new employer with all the relevant rights and obligations. If the position of the employee, however, deteriorates because of the transfer, the employee is entitled to terminate the employment, while enjoying the same claims as in the case of ordinary termination by the employer. Even after the transfer, the former employer (seller) remains jointly and severally **liable** with the new employer (purchaser) for claims of employees arising from the time before the takeover. The liability of the former employer for severance payment and company pension is restricted to five years after the takeover. Termination of the employment contract by 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 an **employment permit** (*Beschäftigungsbewilligung*), to be obtained prior to the start of employment. A **certificate of exemption** (*Befreiungsschein*) can be issued to employees who have, as a general rule, spent at least five of the last eight years in employment in Austria or to employees who have been married to an Austrian citizen for the last five years and have their residence in Austria, or to certain juvenile employees for whom less strict requirements apply than for

adults. Since January 1, 2003, it is possible to obtain a certain exemption for highly qualified workers (*Schlüsselarbeitskräfte*), if there is a lack 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, also enables the holder to work in Austria without the need of a further work permit.

11.5.2. Employment of EU / EEA Nationals

For nationals of EEA member states and of Switzerland the rules of **free movement of workers** apply substantially in the same way as for nationals of the member states of the EU.

However, for nationals of eight of the new EU member states, Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, the Czech Republic and Hungary the freedom of movement of workers under EU law does not yet apply. Although these countries have been full members since May 1, 2004, bilateral agreements restrict freedom of movement for the next two to seven years. However, if these countries' nationals have been legally employed in Austria for the last 12 months they will receive a **free movement certificate** (*Freizügigkeitsbestätigung*) and no work permit is required.

11.6. Taxation of Employment Income

Employment income for services 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*). It should be noted that under the pay-as-you-earn system approximately 1/7 of the 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*)
- 0.38 % to 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.

Not only is the employee covered by the social security scheme, but his **dependents** are as well.

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 2004), the employee's contributions amount to 17.95 % of gross salaries (*Gehälter*). The employee's contributions on the 13th and 14th salary amount to 16.95 %. In addition, the employer makes contributions amounting to 21.85 % on current salaries and 21.35 % on the 13th and 14th salary. Total social security contributions thus amount to 39.8 % on current salaries and 38.3 % on the 13th and 14th salary. However, there is a ceiling on the basis for contributions of EUR 48,300 per year (in 2004) so that the maximum employee's contribution amounts to EUR 8,600, the maximum employer's contribution to EUR 10,519 per year. The ceiling is linked to an index and is adjusted annually. Social security contributions on wages (*Löhne*) are slightly higher than those on salaries.

Freelancers are also included in 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 the scheme of their native country for a limited period of time.

11.8. Pensions

11.8.1. Retirement

The retirement age is 65 for men, 60 for women. However, early retirement is possible (currently 61.5 for men, 56.5 for women), but in future the possibilities for early retirement will be restricted. Upon retirement (*Pension*), employees are entitled to 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 Plan

Companies are free to establish pension plans granting their employees additional income after retirement. However, the provisions of the pension plan must be in accordance 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. These rights usually only come into existence upon registration.

The land title register is open to the public, thus everybody has the right of **access to the register** and to obtain excerpts thereof. Lawyers, notary publics and other registered users can obtain excerpts from the register online at www.rdb.at.

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 or mortgages) by foreigners (in some cases also by Austrians) is subject to approval by the **Land Transfer Authorities** (*Grundverkehrsbehörden*). The restrictions imposed vary from province to province and mainly depend on the zoning of the real estate.

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

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

and EU citizens under the Tyrol Act on the Acquisition and Sale of Land was held to breach the EC Treaty in a preliminary ruling by the **European Court of Justice** in June 1999. As a result, provisions discriminatory for EEA and EU citizens with regard to real estate not to be used as principal residence or to establish an undertaking have been abolished. Nevertheless, some provinces and communities still uphold regulations restricting the acquisition of real estate not to be used as principal residence but do not discriminate between Austrian citizens and foreigners.

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

12.3. Lease of Apartments, Houses 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) is applicable to the lease of apartments, houses, 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. Such rent control applies to most types of private premises and reduces the permissible rent to a maximum amount per square meter, depending on the location and condition of the premise. For certain types of premises (business premises, condominiums, luxury apartments), no rent control exists when they are newly rented. However, in such cases the rent must not exceed an adequate level.

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 important reasons (e.g. non-payment of the rent, lack of proper maintenance). Notice of termination (by lessee and lessor) must be filed in court. By concluding contracts of limited duration (careful wording of the written limitation clause is necessary) one can avoid the restrictions in terminating lease agreements. The minimum duration regarding the lease of apartments and houses is three years; however, the lessee of an apartment or house is entitled to terminate after one year despite an agreed duration.

In case of **transfer of a business** (including significant changes of ownership in a corporation), the lease contracts remain with the business; however, the lessor has the right to increase the rent to the 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. 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** (*Gebühr*), based on the total rental payments under the agreement. For rental agreements of an indefinite term, the rental payments of three years 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 in the hands of an investor from the disposal of such real estate are only subject to Austrian income or corporation tax when 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 (*Grunderwerbsteuer*) 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 donation or inheritance is exempt from the real estate transfer tax. In this case the transfer is subject to inheritance (*Erbschaftsteuer*) or gift tax (*Schenkungssteuer* - see 20.3).

A tax return must be filed by the 15th of the second month following the taxable event. The tax has to be paid one month after its assessment. Alternatively, real estate transfer tax may be paid to a lawyer 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 the registration with the land title register (*Grundbuch*) the purchaser has to pay a **registration fee** (*Eintragungsgebühr*) of 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 contract 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 a 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 that can be divided into two categories, security *in personam* and security *in rem*. Whereas **security *in personam*** (*obligatorische Sicherheiten*) only creates a relationship between the contracting parties, **security *in rem*** (*dingliche Sicherheiten*) extends its effectiveness beyond the contracting parties and can therefore 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

- can be rescinded (*anfechten*) under certain conditions (see 24.2.6)
- would not be enforceable for a loan recharacterized as equity capital (see 24.2.1)
- can 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 demand repayment of equity except under certain conditions (*Kapitalerhaltungsvorschriften*).

13.2. Security *in Personam*

13.2.1. Suretyship

A **suretyship** (*Bürgschaft*) is an agreement whereby one party, surety (*Bürge*), undertakes to pay another party's, the original debtor's debt in case the latter does not fulfill his obligation. The validity of the suretyship depends on the existence and the validity of the underlying obligation. The extent of the original debt determines the extent to which the surety is responsible. When a corporation 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.

Unless he is a **merchant** (*Kaufmann*), 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 very similar to the suretyship, but unlike the latter, the former can 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 (also except for a *Kaufmann*). 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** (*Patronats-erklärung*). 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*) encompasses tangible items, including rights. Like the suretyship, the validity of a pledge depends on the existence and the validity of the underlying obligation. The validity of a pledge also depends on the observation of very 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 appropriate marking of the customer accounts in the books of the pledgor, from which must be readily understandable when and in whose favor the pledge was made. Should, however, the pledgor not be obliged to keep accounting records (which show the receivables), a valid pledge on receivables can be created by notification to the debtor. 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). Due to the rule of confidence in Austria's land title register system, the mortgage is a highly effective security. The ranking of various mortgages on the same 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, very 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 for security are not fulfilled unless the available bookkeeping organization ensures that in customer accounts individual assignment notes appear as well as in each case in the list of the 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 limited by the Consumer Protection Act (*Konsumentenschutzgesetz*). Assignments trigger 0.8 % stamp duty. However an assignment given as security for a bank loan is exempted from stamp duty, if the credit 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

An agreement of retention of title (*Eigentumsvorbehalt*) is the most 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, and it is thereby agreed that the seller maintains ownership until the purchase price has been fully paid. A 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 should not only serve as security for the purchase price, but also for any other claims of the seller against the buyer. In Austria this kind of retention of title is not considered to be sufficiently specific and is therefore regarded as ineffective.

14. Foreign Exchange Control

Owing to its EU and EEA membership, Austria is obliged to allow the **free movement of capital**. In 2004 Austria enacted a new 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 the central bank. Under the Foreign Exchange Act transactions are not subject to any restrictions, save certain exceptions. Such exceptions include provisions under EU law and regulations of the Austrian National Bank in accordance with EU law. Hence, the Austrian National Bank can require prior approval for certain transactions. Notification is obligatory in various cases for statistical purposes under Austrian National Bank regulations. 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 National Cartel Law

15.1.1. General Procedure

The main sources of the Austrian cartel law are the **Cartel Act** (*Kartellgesetz*) and the **Act on the Establishment of a Federal Competition Authority (FCA)** (*Wettbewerbsgesetz*). Further amendments are expected to enter into force soon to implement changes in European cartel law.

The Cartel Act contains special antitrust regulations (on cartels, including special regulations on vertical distribution agreements, on merger control and abuse of a dominant market position). Proceedings in cartel (antitrust) matters take place before a special panel of judges of the Court of Appeal in Vienna, the **Cartel Court** (*Kartellgericht*). Proceedings may be initiated by

- the parties (e.g. notifications of mergers or cartels)
- any other undertaking (undertakings are natural or legal persons which actively and independently take part in business and are not, therefore, engaged in a purely private activity) whose legal or economic interests are affected
- the Austrian Economic Chamber (*Wirtschaftskammer Österreich*) the Federal Employees Organization (*Bundesarbeitskammer*) and the Standing Committee of the Presidents of the Austrian Chamber of Agriculture (*Präsidentenkonferenz der Landwirtschaftskammern Österreichs*)
- the so-called official parties (*Amtsparteien*), which are the FCA and the Federal Cartel Prosecutor.

The Federal Cartel Prosecutor represents the public interest in competition matters and is accountable to the Minister of Justice. Accordingly, the Cartel Court may no longer initiate proceedings *ex officio*.

The FCA is established at the Ministry of Economic Affairs and Labor 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 utilize the advice of the competition commission, which is established at the FCA office. Among other things, the FCA is empowered to examine potential restraints on competition

on a case-by-case basis and undertake general examinations of entire business sectors if it suspects that competition is being threatened. In the course of its investigations the FCA may also call upon and question companies or individuals and examine relevant business documentation. The Cartel Court has to allow the FCA to carry out house raids as in cases 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 implement EC competition rules.

Violations of cartel regulations can result in fines levied by the Cartel Court upon enterprises of up to EUR 1 million or 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*).

Illegal cartels or cartels prohibited by the Cartel Court 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 can also give rise to cease and desist orders or claims for damages.

15.1.2. Cartels

Cartels (*Kartelle*) based on agreements between independent undertakings, on recommendations or on decisions by associations of undertakings, which have as their objective or effect the **prevention, restriction or distortion of competition**, in particular with respect to production, demand or prices in the mutual interest of the agreed undertakings, are prohibited and void. However, such cartels can be permitted by the Cartel Court under certain conditions, *inter alia*, if the cartel is neither expressly prohibited by law nor contravenes good morals and is furthermore justified for reasons of national economy.

Cartels which are created by **concerted practices** (without agreement), by agreements without the intention to restrict competition and those remaining below certain thresholds with regard to market share are treated differently.

15.1.3. Vertical Restrictions on Distribution

Vertical restrictions on distribution (*Vertikale Vertriebsbindungen*) are agreements between a binding undertaking and one or more bound undertakings, whereby the bound

undertaking is restricted in purchasing or selling goods, or in receiving or rendering services. Such vertical restrictions of distribution must be notified to the Cartel Court prior to their implementation. Upon motion the Cartel Court may prohibit the implementation of such vertical restrictions of distribution if they are expressly prohibited by law or contravene good morals or are not justified for reasons of national economy. Vertical restrictions of distribution falling within the scope of Article 81 EC Treaty are not prohibited to the extent the relevant EC block exemption applies. Preliminary injunctions are possible. If price maintenance is also involved, the agreement is subject to the provisions concerning cartels.

15.1.4. 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.

The pre-merger control (**approval** by the Cartel Court) will apply if

- the **combined** relevant turnover of the involved undertakings amounts to or exceeds EUR 300 million **worldwide** (for the purpose of calculating this threshold the turnover of a media undertaking or media service has to be multiplied by the factor 200; the turnover of a credit institution is replaced by the value of 5 % of earning figures; the turnover of insurance undertakings is replaced by the value of gross premiums) and
- the **combined** relevant turnover of the participating enterprises amounts to or exceeds EUR 15 million **in Austria** (turnover is generated **in Austria** if the recipient of deliveries or services is domiciled in Austria) and
- the turnover of **each of at least two** participating enterprises amounts to or exceeds EUR 2 million **worldwide**.

Although competitors still do not have the right to request an investigation (this is a privilege of the *Amtsparteien* - see 15.1.1), the Austrian Cartel Act provides for a right of competitors to **file comments** on a merger which has been notified and published within 14 days of publication. The Cartel Court has to prohibit the merger if it is to be expected that the merger creates or intensifies a dominant position. The non-prohibition of a merger can be made contingent upon restrictions and the imposition of certain duties. Company mergers may be reversed if prior approval was based on false information provided by the parties or the conditions for approval were infringed.

15.1.5. Dominant Market Position

The **abuse of a dominant market** position is prohibited. The Cartel Court must order the undertaking to cease abusing its position. If such an order is given to a **media undertaking** or **media service**, the Cartel Court also has to, under certain conditions (impairment of diversity of the media, further abuse expected), take measures to reduce that position. Consequently, such orders could 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 81 EC Treaty** prohibits agreements and concerted practices that have the object or effect of preventing, restricting or distorting competition; **Article 82 EC Treaty** 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 and do not fall below the *de-minimis* principle (minimum standard for a noticeable effect on competition) are **prohibited and void**. Intentional or negligent infringement may lead to fines of up to 10 % of the previous year's worldwide turnover being imposed by the European Commission. However, individual exemptions or such under the EC Block Exemption Regulations may apply. Effective May 1, 2004, the system of individual exemptions has been significantly modified. Undertakings relying on an exemption have to evaluate for themselves whether certain agreements or practices could be justified, although they may have a negative competitive effect. This places a considerable risk on undertakings. Furthermore, the **abuse of a dominant position** within the Common Market or in a substantial part of it is prohibited as incompatible therewith, insofar as it may affect trade between member states, and may result in fines as well.

Certain **concentrations** (mergers, acquisitions and joint ventures) between undertakings with a combined worldwide turnover of more than EUR 5 billion, in which at least each of two of the firms concerned have a combined Community-wide turnover of more than

EUR 250 million, must be approved 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 also need the approval of the European Commission, thereby avoiding the necessity of a merger procedure in several member states. In both cases, approval may be 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 it is also possible that a merger which does not exceed these thresholds but would have to be notified in at least three member states could be referred to the European Commission upon request of the applicant or *sua sponte*, if no member state objects. *Vice versa*, the Commission can 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 laws** is complex. In the EC Merger Control Regulation the European Commission has, following the "one-stop-shop" principle, sole competence for concentrative mergers having an EC dimension. With regard to Cartel Law, national competition authorities must apply both national and European competition law. In so doing, national competition law must not prohibit what is allowed under European law and, *vice versa*, national authorities must not allow what is prohibited under European law. However, member states are free to apply stricter provisions with regard to the abuse of a dominant national market position. The cooperation between European and national competition authorities has intensified and is organized in a European Competition Network (ECN).

Due to successful introduction of competition laws in most EC countries, competition policy regarding **vertical restraints** has changed. The EC has passed 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 81 EC Treaty. Various other block exemption regulations for specific industry sectors (e.g. car distribution) also exist.

15.3. Advertising Law

The **Law Against Unfair Competition** (*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)
- 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 acts for purpose of competition which are contrary to ethical practice, for example, the exertion of moral pressure to buy goods.

Prize competitions (*Preisausschreiben*) are not generally forbidden, but are unlawful 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) or if too much pressure is placed on the customer to purchase goods.

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 *UWG* to sell systematically below costs.

According to the Cartel Act (*Kartellgesetz*) a company not acting as a retailer is prohibited from announcing 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 of works contracts, supply contracts 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 the economic sectors 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 the national and on the international level. There is the Austrian **Federal Act on Procurement** (*Bundesvergabegesetz 2002*) and there are nine provincial acts (one for each Austrian province) on review of procurement proceedings. The Federal Act contains all substantial rules for procurement proceedings as well as procedural rules on legal remedies during pending procurement proceedings and review of completed procurement

proceedings which have been conducted by national public authorities or by certain entities which are publicly owned / controlled by national legal bodies.

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

Apart form that, Community 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 equal and fair treatment of tenderers in public and "semi-public" economic areas, depend in particular on the authority inviting the tender and on the amount and the object of tender. After a strict, and in most cases, public tendering procedure, the tenderee must award the contract to the tenderer with the best or cheapest offer.

During the tendering procedure every tenderer can call upon specialized procurement supervision authorities like the **Federal Procurement Authority** (*Bundesvergabeamt*) to protect his interests in being awarded the contract. The authorities may issue a decree either to stop the tendering procedure or to cancel decisions of the tenderee.

After closing the contract, a review of the procurement proceeding by the competent procurement authority may be requested, which, however, normally has no influence on the closed contract. In its decision the authority declares whether or not the contract was awarded in accordance with the procurement rules to the tenderee with the best or cheapest offer. If the award of contract is found illegal, the tenderee with the actual 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 on by national courts.

In order to ensure the transparency of tendering procedures, tenderees also have to discharge extensive notification duties towards the European and national procurement authorities.

16. Product Liability

Austria has implemented the EC Directive 85/374 on **Liability for Defective Products** by adopting the Product Liability Act (*Produkthaftungsgesetz*). Producers, importers, own-branders and, where the producer and importer of the product cannot be identified, each supplier who has put it in circulation, are required to compensate consumers for any damages caused to them or their property by a defective moveable product (including energy), without negligence having to be proven (strict, i.e. no-fault liability) and independent of any contracts with the injured persons (innocent-bystander liability). Suppliers are exempt from liability if they inform the injured party within a reasonable period of time of the identity of the producer (importer) or of any suppliers of the product preceding them. Producer is not only the manufacturer of the finished product but also of any raw material or component parts and any person who, by putting his name, trademark or other distinguishing feature on the product, presents himself as its producer. The Product Liability Act provides for a EUR 500 deductible, therefore, only damages exceeding EUR 500 can be claimed.

Defendants are provided with 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 such as to enable the existence of the defect to be discovered.

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

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

According to 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 commercial enterprises and consumers. Some of its provisions also apply to other contracts.

Under certain circumstances consumers **may cancel purchases** 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 in any case. These provisions distinguish between clauses which are not binding on the consumer per se and clauses which bind the consumer only if they have been individually negotiated. Clauses which are prohibited per se are, for example, clauses whereby the offer of a consumer may be accepted within an unreasonably long period by the business enterprise and clauses whereby the consumer waives his right to refuse payment if the business enterprise does not properly fulfill the contract. All clauses in general terms of contract or in standard contract forms must also be transparent, i.e. comprehensible to consumers.

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

Special rules apply to **package travel tours**. These are not consumer-specific rules, although they are part of the Consumer Protection Act.

Austria has implemented EC Directive 97/7/EC concerning the Protection of Consumers in Respect of **Distance Contracts** by amending the Consumer Protection Act. Distance contracts can be concluded by any means without the physical presence of the parties (e.g. teleshopping, electronic mail, Internet). The supplier must inform the consumer in detail about the goods and services (e.g. price, delivery costs, taxes), personal data (e.g. address of supplier) and certain rights (e.g. right of cancellation) and confirm that information in writing. Consumers are protected by a special right of cancellation and can therefore cancel the purchase within certain time periods. Special protection against abuse and fraud involving payment cards is provided. **Financial services** are explicitly excluded from the scope of the new provisions regarding distance contracts. They are subject to the Distance Financial Services Act (*Fern-Finanzdienstleistungs-Gesetz*).

For information on the EC directive on **e-commerce**, see 8.3.

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

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 1995*) imports and exports, excepting those of EU member states, can be restricted. The competent minister may issue regulations stipulating that imports or exports of certain goods require a license. Such restrictions may be imposed for legal or economic reasons. The breach of such a regulation may result in criminal prosecution. The transfer of modern technologies is regulated both by the Austrian Foreign Trade Act and the Dual-Use Regulation of the EU.

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 closed 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 within a reasonable time after having discovered the lack of conformity or after he ought to have discovered it, in any case within a period of two years from the time the goods were actually handed over to him. The buyer may then require performance. He may also require the seller to repair the goods. He 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 in case 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

The protection of the environment is a very important 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 are closed down. Such

clean-ups are also regulated by the **Act on the Improvement of Sanitary Conditions of Old Waste Sites** (*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 rules 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 and proven control technology. Like the Trade Act the Water Law Act also provides for strict clean-up provisions to prevent contamination. If the owner of a plant causing water contamination cannot undertake the necessary clean-up or cannot 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.

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 the disposal and recycling thereof.

Air pollution is dealt with by the **Air Pollution Act for Boiler Facilities** (*Luftreinhaltegesetz für Kesselanlagen*), which establishes uniform emission 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 of these acts impose administrative fines for the non-fulfillment of legal obligations set up by the law itself as well as regulations and administrative orders based thereon. In addition, the **Criminal Code** (*Strafgesetzbuch*) makes polluting the environment, under certain conditions, a criminal offense.

Austria still must implement the EC Directive 2004/35/EC on **Environmental Liability with regard to the Prevention and Remedying of Environmental Damage** dated April 21, 2004 by April 30, 2007. The relevant legislation is currently being drafted.

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. A new 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 goods and 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 besides 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 a resident undertaking, tax liability is generally shifted to the Austrian party (so-called reverse charge-system).

Undertakings have to make **monthly VAT payments** which are due on the fifteenth of the second month following the month the goods or services were supplied. Preliminary tax returns must be filed 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 **intra-EU supplying of goods and rendering of services**. Intra-EU supplies to entrepreneurs having a VAT identification number (UID) are zero-rated. In contrast, the receipt of intra-EU supplies is subject to VAT (intra-community acquisition). Particularly, for most purchases by private individuals 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 taken. Mail orders in excess of certain thresholds and motor vehicle sales remain subject to the country-of-destination principle. Information on intra-EU supplies

must be provided to the Austrian tax authorities on a quarterly basis, in a so-called European Sales Listing.

20.2. Stamp Duties

Stamp duties (*Gebühren*) are levied on numerous legal acts if they are manifested by a written document. Stamp duties are payable after an assessment is made 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 contains a number of **anti-avoidance rules**, the most stringent ones on loans and overdraft facilities. However, it is still possible to avoid stamp duties in some cases.

20.3. Inheritance and Gift Tax

Austrian **inheritance tax** (*Erbschaftssteuer*) is attracted where either the deceased or the heir was resident in Austria at the time of the deceased's death. Austria has concluded tax treaties with some countries to avoid double taxation on estates (see Annex 1).

Gifts are subject to **gift tax** (*Schenkungssteuer*) at the same rates as inheritances. In most cases, gifts do not fall under the scope of the above-mentioned tax treaties.

The **tax rate** ranges from 2 % to 60 %, depending both on the relationship between transferor and transferee and the value of the estate or gift. A surcharge of 2 % to 3.5 % is levied on the transfer of real estate. If cash, bonds or shareholdings of less than 1 % in domestic or foreign companies that are deposited or custodied with an Austrian bank are among the assets of an estate, they are exempt from inheritance tax. It should be noted that this exemption does not apply to gifts.

The transfer of assets to an Austrian **foundation** attracts inheritance tax at a flat rate of 5 % (if real estate is transferred, plus a 3.5 % surcharge, both based on 300 % of the property's assessed value).

It should be noted that inheritance and gift taxes were generally based on the assets' value determined under specific rules. In particular, the **assessed value** (*Einheitswert*) of real estate located in Austria is below market value (see 12.4). Since 2001 the basis of the inheritance and gift taxes is the **300 % assessed value**, unless it exceeds the fair market value.

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 %.

As of June 2000 a new federal 5 % **advertising tax** (*Werbeabgabe*) replaced the old system of taxation which was governed by provincial law. Some municipalities collect **parking fees** and **tourism contributions**.

It should be noted that 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 company that has a business license is required to pay mandatory contributions (*Kammerumlagen*) to the Austrian Economic Chamber (*Wirtschaftskammer Österreich*), which are collected by the federal tax authorities. The contributions are levied in two ways:

- 0.38 % to 0.44 % contribution based on gross wages and salaries (*Zuschlag zum Dienstgeberbeitrag [DB]*)
- a contribution of 0.3 % based on 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 (*OHG* and *KG*). The law requires that bookkeeping and financial statements must 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 year-end. They require the approval of the shareholders' assembly in the case of a *GmbH* and the supervisory board in the case of an *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 is treated as large or medium-sized if two of the following tests are met:

	medium-sized company	large company
total assets	> EUR 3.65 million	> EUR 14.6 million
net turnover	> EUR 7.3 million	> EUR 29.2 million
employees	> 50	> 250

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

- companies listed on the stock exchange
- banks, insurance companies and investment funds
- large *AGs.*

All other companies must only file their financial statements 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, sales and staff are exceeded. Consolidated financial statements must be audited before they are submitted to the supervisory board of the parent company. They must be published in the *Wiener Zeitung* if one of the group companies is a large Austrian stock company (*AG*). Otherwise, it is sufficient to file them with the commercial register.

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 agreement.

According to the principle of the **free movement of goods** no customs duties are levied on trade of goods - both industrial and agricultural - between 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 licences 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 concise outline of all provisions.

The EU as well as the 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 which lasted from 1986 until 1994. The WTO is the decision-making body and administrative institution based on the GATT 1994. The European Customs Tariff and the Harmonized Tariff System have been adapted to the requirements of GATT provisions.

22.2. Import Value-Added Tax (VAT)

For imports of goods from non-EU countries **import value-added tax** (*Einfuhrumsatzsteuer*) is levied and is either collected by the customs authorities 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 for financing a large part of their investments. Most Austrian banks offer the full range of banking and financial services. Only a few are highly specialized. Banks generally tend to have very close relations to the customer 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 in Europe, as the European Central Bank sets the guidelines for EU monetary policy. Some of the Austrian National Bank's former powers have been transferred to the respective governing bodies in the EU, for example the competence to set the discount rate and the Lombard rate or to determine the minimum reserve requirement placed on banks. Now the Austrian National Bank merely implements the decisions of the European Central Bank in Austria. However, it still plays a role in supervising Austrian banks.

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

To do business as a **bank (credit institution)** in Austria a license from the Austrian Financial Market Authority is required. However, if a license has already been obtained in any EEA or EU member country, no further approvals, only certain notifications to the Austrian Financial Market Authority, are necessary ("single passport principle"). The Austrian Banking Act contains provisions regarding minimum equity and solvency as well as limitations to minimize exposure to risks. 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 for 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 as well as real estate property funds, insurance as well as 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 major, well-publicized dispute between the Austrian government 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 securities deposits and carrying out securities transactions. Under this amendment to the **Banking Act** the anonymity of saving accounts was abolished.

A **deposit insurance scheme** (*Einlagensicherungssystem*) covers deposits of private individuals up to an amount of EUR 20,000, whereas deposits of legal entities are insured for up to 90 % of this amount. 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 loses its license to accept deposits. A similar scheme is established for certain investment services executed by credit institutions and securities firms.

23.2. Capital Markets

23.2.1. Stock Exchange

The only securities exchange in Austria, the **Vienna Stock Exchange** (*Wiener Börse*), trades in securities, options, futures and foreign currencies. It is regulated by the **Austrian Financial Market Authority** (*Finanzmarktaufsichtsbehörde*). In May 2004 the Vienna Stock Exchange bought, together with two Austrian banks, a major stake in the Hungarian Stock Exchange located in Budapest.

A further measure for the improvement of the Austrian capital market is the **Shares Buyback Act** (*Aktienrückerwerbsgesetz*). This law allows the reacquisition of own shares up to the amount of 10 % of the stated capital. The buyback depends on the following conditions: prior approval of the shareholders' meeting authorizing the board of directors to buy back shares (for a period not exceeding 18 months) in joint stock companies, substantial own funds (only none bound funds [*Eigenmittel*] which could be contributed as dividends shall be used), the shares 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 Stock Exchange, Frankfurt Stock Exchange, Swiss Stock Exchange or the American New York Stock Exchange. The **Austrian Takeover Act** (*Übernahmegesetz*) also applies to the buyback of shares listed on the Vienna Stock Exchange if the shares are acquired by public tender offer (see 23.2.5).

23.2.2. Insider Trading

Austria has implemented the EU Insider Trading Directive by including a relevant provision in 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, which information, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question, by

- acquiring or disposing of transferable securities for his own account or for the account of a third party,
- disclosing that inside information, unless such disclosure is made in the normal course of the exercise of his employment, profession or duties or
- recommending to or procuring a third party, on the basis of that inside information, to acquire or dispose of transferable securities,

is subject to punishment by criminal courts, if he acted with the intention to gain profit for himself or for a third party.

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 offers to the public 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.

Basically, the Capital Market Act is also applicable to transferable securities traded on the Vienna Stock Exchange. However, the **Stock Exchange Act** also contains regulations 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). All investment funds are mutual funds managed by a funds manager which has to be a bank with a specific license.

A complicated procedure applies to **foreign investment funds** which are to be offered publicly in Austria. However, an investment fund from an EEA country is not required to undergo that procedure, though an Austrian paying agent or representative is invariably required.

The implementation of the relevant EU regulations into 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.

Since 2003 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 equity securities which have been issued by a stock company incorporated in Austria and which are admitted by the Vienna Stock Exchange to the official list or to the regulated market.

The law provides that anybody who acquires a controlling interest must make a public bid for all equity securities of this company. Controlling interest means a shareholding which enables the bidder (the person making a purchase offer for shares) to exercise by himself or together with other entities a dominant influence over the target company. The purchase offer must be notified within 20 exchange business days to the **Takeover Commission**. The Takeover Commission - an administrative authority composed of 12 members - has described the characteristics of a controlling interest in more detail. Criteria to be considered are the percentage of the share and the voting capital, the distribution of the other voting capital, the voting capital which is usually represented in general meetings of the company and the provisions of the articles of association.

The acquisition of 20 % of the shareholding could lead to a bid for the remaining 80 %. The **mandatory purchase offer** must include a price. The purchase price must be the price paid for the relevant securities by the bidder reduced by a maximum of 15 %. However, it must at least correspond to the average price of the stock on the stock exchange during the last six months before the controlling interest was acquired. In view of the conflicting interests the Takeover Act contains an opting-out provision: companies may provide in their articles of association that no discount at all or a discount of less than 15 % applies. In this way a company may enhance its attractiveness on the capital market. Owners of equity securities in the amount of 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 **publish** his intentions and also inform the management of the target company.

The Takeover Commission may recommend, in an opinion or order by decree, that the bidder or the target company publish supplementary information or corrections. The decisions of the Takeover Commission, with the exception of penal rulings, are not subject to a 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 last acquisition triggering a mandatory offer but all shares of the owner acting illegally.

23.2.6. Securities Supervision Act

Under the **Securities Supervision Act** (*Wertpapieraufsichtsgesetz*), which is based upon the EU Directive for Investment Services in the Securities Field, investment services companies and credit institutions providing investment services to consumers have to comply with the applicable rules of conduct.

The **Austrian Financial Market Authority** (*Finanzmarktaufsichtsbehörde [FMA]*) takes appropriate measures to maintain orderly and fair trading in instruments admitted to the regulated market, safeguards the interests of investors, provides information to other supervisory authorities and competent authorities of other member states, prevents insider trading and conducts investigations in connection therewith and ensures the prosecution of administrative infringements.

Those investment services companies that want only to carry out investment services and no other banking activities are expressly exempted from the Banking Act. The Act on the Supervision of Investment Services defines investment services companies as anybody who provides one or more of the investment services according to the Banking Act, and is not a credit institution and is neither a EU member state credit institution nor a EU member state financial institution that derives its right to offer investment services in Austria from the Banking Act. Investment services companies generally have to apply for a license with the *FMA*, which also supervises compliance with the relevant laws by investment services companies towards their customers.

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 necessary to consult and to cooperate with it prior to closing. Conciliation proceedings are provided for the resolution of disputes. Furthermore, prior notification to 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 severity.

A formal winding-up procedure is provided for corporations. 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 without any assets can be deleted from the commercial register without any 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 the management of the company, each managing director is obliged to file for insolvency proceedings (bankruptcy [see 24.2.2] or composition proceedings [see 24.2.4]) without delay. But within a period of 60 days at the maximum, the management may try to reorganize the company. If the management does not apply for insolvency proceedings in time, it can be held personally liable for resulting damages (including newly created liabilities or shortfalls of *pro rata* payments [*Quote*] in bankruptcy). Furthermore, the management may face criminal responsibility. Shareholders are liable only in cases of misuse of their position and of great actual influence of the shareholders on the management.

Security *in rem* (see 13.3) is not affected by insolvency proceedings. However, enforcement can be postponed for a 90-day period.

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

24.2.2. Bankruptcy Proceedings

Bankruptcy proceedings (*Konkurs*) are instituted by the courts upon being filed for by the bankrupt (*Gemeinschuldner*) or a creditor. The court appoints an administrator

(*Masseverwalter*), usually an attorney-at-law, who then assumes control over the business of the bankrupt. Without doubt the administrator is the key player in the insolvency proceedings. The success of the insolvency proceedings depends mainly on his qualifications. In spite of this, the necessary qualifications were insufficiently defined by the Austrian Insolvency Act (*Konkursordnung*). The Insolvency Act has now been amended to require every prospective administrator to be registered in a list at the Vienna Court of Appeal (*Oberlandesgericht Wien*). The list contains a description of his qualifications. The bankruptcy court is obliged to appoint the most qualified person in each case. The administrator is responsible for managing and converting into money any remaining assets. The management is no longer entitled to represent the company. The primary goal of the proceedings is to save the business. The administrator can only liquidate the business if authorized to do so by the court and if 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 secured by a public insurance fund (*Insolvenzentgeltsicherungsfond*s).

All creditors who wish to obtain a *pro rata* payment have to file their claims in court. During bankruptcy proceedings, legal action and enforcement measures are not possible. However, legal action and enforcement measures related to security *in rem* and legal action against the bankruptcy estate resulting from business transacted after commencement of bankruptcy proceedings as well as legal action by the bankruptcy estate remain possible.

If the administrator intends to sell a company or its main assets, he has to make this intention public for at least 14 days in a special online database (*Ediktsdatei*) so that all prospective buyers are informed of the intended sale. In addition, sales contracts, with which either all assets or at least the main assets of the bankrupt are sold, have to be approved by both the court and the main creditors.

24.2.3. Compulsory Composition

During the bankruptcy proceedings the bankrupt may apply for **compulsory composition** (*Zwangsausgleich*) if he offers his creditors the payment of at least 20 % of their claims within a maximum of two years. Compulsory composition will be granted if agreed to by the majority of the creditors present at the hearing and 75 % of the total value of claims of the creditors present at the hearing. In case of proper fulfillment of the compulsory composition, the bankrupt will be discharged from all liabilities, something which cannot be achieved in bankruptcy proceedings (except in private [non-business] bankruptcy proceedings [*Privatkonkurs*]).

24.2.4. Composition with Creditors

Instead of bankruptcy proceedings an insolvent debtor may apply for **judicial composition proceedings** (*Ausgleichsverfahren*), in which he must offer to satisfy at least 40 % of the creditors' claims within a maximum of two years. Subject to the court's confirmation, the composition becomes valid (and binding for all creditors) if agreed to by the majority of the creditors present at the hearing and by 75 % of the total value of claims of the creditors present at the hearing. Security *in rem* (see 13.3) remains unaffected. During the proceedings the management is supervised by a composition administrator (*Ausgleichsverwalter*). Measures of enforcement, except those related to security *in rem*, are not possible.

24.2.5. 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 bankruptcy estate. The buyer is not liable for old debts. This also applies to tax debts and to social contributions. Lease contracts relating to real estate remain with the business, although the lessor has the right to raise the rent to market value. In bankruptcy proceedings, in contrast to composition proceedings, the buyer is not obliged to take over the previous employees of a business (see 11.4). The buyer therefore has the chance to negotiate new employment contracts with the old or to run the business with new employees. On the other hand, buying a business or assets of an insolvent undertaking has the disadvantage of lacking the representations and warranties usual in normal acquisitions. Acquisitions have to be approved by the court and by the creditors' committee (*Gläubigerausschuss*).

24.2.6. Fraudulent Conveyance

The administrator in bankruptcy proceedings (*Konkurs*) is **entitled to rescind** (*anfechten*) acts (especially payments and contracts) of the bankrupt company if the

- bankrupt intended to defraud his creditors and the contracting party of the bankrupt 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 business was insolvent.

Outside of bankruptcy proceedings any creditor can rescind acts by a debtor under similar circumstances, provided that enforcement against the debtor has been attempted without success.

24.3. European Insolvency Proceedings

Council Regulation 1346/2000 dated May 29, 2000, on Insolvency Proceedings went into effect on May 31, 2002. It is applicable to cross-border European insolvency procedures with universal scope, encompassing all the debtor's assets in the entire Community and provides for immediate recognition of judgments concerning the opening, conduct and closing of insolvency proceedings. In general, the main insolvency procedure has to be opened in that member state in which the debtor has his main business interests.

24.4. Taxation in the Course of Liquidation

Capital gains from the disposal of assets in the course of liquidation proceedings are basically subject to tax at the company level. Additionally, 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 enters into composition proceedings and settles only a certain portion of its liabilities, the profit created by the creditors' waiver is a taxable one. However, only that part of such tax liability equivalent to the composition quota has to be paid. Furthermore, there is a recapture of input VAT with regard to trade payables which need not fully be settled.

24.5. Changes in Legislation

Insolvency law is constantly changing in order to better fulfill business needs. The main goal of the most recent reform of the Austrian Insolvency Act (*Konkursordnung*) was to prevent the abuse of bankruptcy proceedings. It had turned out that some insolvency proceedings were planned by owners in order to transfer the company's assets at a very low price to close relatives or to free a company of its debts.

The introduction of the Equity Capital Substitution Act (*Eigenkapitalersatzgesetz*) in 2003 affects companies' attempts to recover financially: Loans by shareholders given or not withdrawn in a financial crisis of the company are recharacterized as equity capital and therefore subordinated to claims of other debtors (*eigenkapitalersetzende Gesellschafterdarlehen*). Consequently, security given by the company for such loans is not enforceable. This treatment of recharacterizing loans of shareholders as equity capital is not new to Austrian law. However, the Equity Capital Substitution Act now precisely defines the term financial crisis. A company is considered to be in a 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 % together with an anticipated debt repayment period of more than 15 years. The new regulations apply only to shareholders with a majority of votes within the company, or a minimum total share of 25 %.

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, unless it infringes Community law, public policy (i.e. general principles of law) or defeats mandatory provisions stated to protect consumers and employees which would otherwise be applicable if no choice-of-law clause had been stipulated. 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 where the party who is to effect the performance which is characteristic of the contract 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. In the scope of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the Council Regulation No. 44/2001, respectively, parties may agree (if no exclusive jurisdiction exists) that a court or the courts of a contracting 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 shall 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 cases involving consumers.

According to the Austrian Jurisdiction Act (*Jurisdiktionsnorm*) the choice-of-forum clause may refer to **Austrian jurisdiction** in general as well as to a specific court. It is only enforceable if it is made in writing and if the dispute for which it shall apply is designated. Restrictions exist in connection with labor cases and cases that involve consumers. In certain cases no agreement is permissible. The Austrian Jurisdiction Act does not exclude clauses which choose a foreign forum even when the Council Regulation No. 44/2001 or the Lugano Convention are not applicable.

Before the contractual parties agree upon a forum, they should check whether the judgments of the courts of the country to be stipulated as forum 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 insert 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 Austrian Constitution and the International Position of Austria

26.1. Austrian 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 principles of the separation of powers and the rule of law. According to the democratic principle, Austrian laws at least indirectly reflect the will of the people as expressed through parliamentary elections. 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 divided among the Federation (*Bund*) and the Provinces (*Bundesländer*). The rule of law dictates that public authorities (executive branch and judiciary) can only act based upon the law. The liberal principle provides for the protection of certain fundamental rights and freedoms. These basic rights and freedoms are guaranteed by the Austrian Constitution and the **European Convention on Human Rights**, which enjoys the status of constitutional law. The principle of the separation of powers consists of a system of checks and balances. This basically means that legislative, executive and judicial powers are strictly separated, so that no branch can monopolize power, and that each branch has certain control rights over the other, e.g. the right of appointment of a public judge or disclosure of information.

The provisions of the **European Union Charter of Fundamental Rights**, as signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission, respectively, at the European Council meeting in Nice on December 7, 2000, have only a limited effect on the rights and freedoms granted by the Austrian Constitution, as the Charter is mainly addressed to the institutions / bodies of the EU and to the members states only when implementing EU law. Nevertheless, the **European Union Charter of Fundamental Rights** 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.

In May 2003, the Austria Constitutional Convention (*Verfassungskonvent*) was established to radically reform the Federal Constitution. The Convention is composed of the main parties involved in the debate on the future of the Austrian Constitution, e.g. members of the government, experts, Supreme Court judges, members of the Court of Auditors (*Rechnungshof*). The future Constitution should provide the government with a framework to fulfill the needs of its citizens in the most efficient and transparent manner possible.

26.1.2. Laws

In Austria, there are various categories of laws which work within a **hierarchical system**. With regard to validity, each category is based on and limited by a higher category. The main source of constitutional law is the **Federal Constitution** (*Bundes-Verfassungsgesetz*), which dates back to 1920. In addition, numerous statutes also enjoy the status of constitutional law. These laws are regarded to be at the top of this system. However, even Austrian constitutional law is subordinate to the law of the **European Union** (EU). Austrian law which conflicts with EU law is, though still in force, inapplicable. Subordinate to constitutional law are ordinary **statutes** (*Gesetze*). This category covers any statute that is not explicitly enacted as constitutional law. Based on and limited by statutes, administrative authorities may issue **regulations** (*Verordnungen*) referring to matters within their area of competence. As a consequence of the rule of law, regulations may merely execute a statute and cannot - with certain exceptions - substitute, abrogate or amend it. **Decrees** (*Erlässe*) issued by administrative authorities, if addressing only the officials of the authority, do not create general laws. **Orders** (*Bescheide*) are administrative decisions that address an individual. **Judgments** (*Urteile*) by Austrian courts of law as well as orders do not have legal effect beyond the parties of the disputes. However, judgments are commonly used in legal argument.

As far as **sources of international law** are concerned, such as international treaties or customary international law, the Federal Constitution provides for the adoption of those

kinds of law on the various levels of the hierarchical system described above. 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 Federal Constitution and are held by the **Federation** and exercised by Parliament. However, certain important legislative powers are vested in the **Provinces**, such as laws on the acquisition of certain types of real estate (in particular by foreigners), on building, environmental protection and land zoning.

26.1.3. Executive Branch

According to the Federal Constitution, the **executive** (*Verwaltung*) and the **judicial** (*Gerichtsbarkeit*) branches must be separated at all levels of procedure. However, the Federal Constitution provides for mechanisms to control the executive branches, thus 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 **Independent Panel on Asylum** (*Unabhängiger Bundesasylsenat*) and the **Independent Tax Panel** (*Unabhängiger Finanzsenat*) and other independent panels, are admissible.

The **Federal President** (*Bundespräsident*) is elected directly by the people and holds office for six years. In the daily course of politics, the Federal President is only marginally involved in government affairs. Apart from his responsibilities in appointing and dismissing the government and dissolving parliament, he may take action only at the request of the federal government and pending approval of the members of government concerned. Important presidential duties include the appointment of government officials and the representation of the Republic of Austria abroad. However, the president's powers are limited to vetoing and to rejecting proposals.

The Federal President appoints the **Federal Chancellor** (*Bundeskanzler*) and, at the latter's behest, the remaining members of the cabinet. Under constitutional practice the Federal President plays a subordinate role in the formation of the government. He limits himself de facto (with two exceptions in 2000 concerning prospective appointees from the Austrian Freedom Party) to appointing the government agreed on by the parliamentary majority. The cabinet as a whole performs only those tasks which have explicitly been assigned to it by law or delegated to it by the Federal President. All other duties are carried out by the competent minister. Under law the Federal Chancellor is only *primus inter pares*. He has no authority to give ministers instructions. Nevertheless, he is in a strong position

since the Constitution gives him the right to propose to the Federal President the appointment or dismissal of the other cabinet members.

The Federal Constitution also permits the establishment of independent agencies, so-called **Article 133 sec 4 Authorities** (*Artikel 133 Z 4 Behörden*) since the legal basis of these agencies can be found in said article of the Constitution. They consist of panels whose members are independent, and at least one of whom must be a judge. In addition, their rulings are not subject to appeal, in particular, appeals to the Administrative Court are inadmissible, unless expressly provided for by Austrian or EU law. The rulings of such agencies can, however, be appealed to the Constitutional Court on the grounds that an administrative authority infringed fundamental constitutional rights. 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). Both the independent panels and the Article 133 sec 4 Authorities theoretically fulfill the requirements of a tribunal as prescribed by Article 6 European Convention on Human Rights and Article 234 EC Treaty.

26.1.4. Judicial Branch

The judiciary comprises **courts of law** (*Gerichte*), which are presided over by independent judges. The Federal Constitution provides only for federal courts; there are no provincial ones. The **Constitutional Court** has jurisdiction to decide whether international treaties, statutes, administrative regulations and orders comply with the Federal Constitution and has the authority to declare statutes, administrative regulations and orders unconstitutional. For further details on the judiciary, see chapter 27.

26.1.5. Legislative Branch

Austrian Parliament consists of the *Nationalrat,* whose 183 members are directly elected by the people every four years, and the *Bundesrat*, whose 62 members are appointed by the provincial legislatures (*Landtage*).

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 and 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. The European courts and institutions are accessible to Austrians. As a full member of the EU, Austria has a direct say in the creation of EU law and in European politics.

With the enlargement of the EU, the European institutions had to be adapted. Austria now has 18 of 732 seats in the European Parliament. Accordingly, Austria's political influence in Parliament is limited. On the other hand, Austria has 10 of 321 votes in the Council. The fact that, for example, Germany, whose population is about 10 times that of Austria's, has 29 votes is evidence of the latter's relative overrepresentation in the Council. In the second half of 1998 Austria presided over the Council and will do so again in the first half of 2006. The former Austrian Minister of Foreign Affairs, Dr. Benita Ferrero-Waldner, is designated to become Commissioner of External Relations and European Neighborhood Policy in a new Commission bound to take office in 2004.

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**) and the **World Bank.**

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

27. Court System and Arbitration

27.1. Civil Law Courts

The Austrian 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 in 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, located in Vienna, Graz, Linz and Innsbruck. The Courts of Appeal decide in panels of three judges. In important cases a further appeal to the Supreme Court, located in Vienna, is possible. The question whether or not a case is important depends on the amount in litigation, but also on the nature of the case. An appeal to the Supreme Court is, for example, permissible 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 is at odds with prior Supreme Court decisions. The Supreme Court generally decides in panels of five, with respect to certain procedural questions in 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, special **Commercial Courts** (*Handelsgericht und Bezirksgericht für Handelssachen*) only exist in Vienna. Apart from that, the above-mentioned ordinary courts decide as Commercial Courts. Commercial matters are, for example, actions against businessmen or companies in connection with commercial

transactions, unfair competition matters, etc. Other special courts are the **Labor Courts** (*Arbeits- und Sozialgericht*), 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 in panels) and labor matters, lay judges 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 his action (*Klage*) with the competent court. In general, the defendant (*Beklagter*) has the possibility to answer the claim within a period of four weeks. It is in the parties' disposition to 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 Austrian Code of Civil Procedure (*Zivilprozessordnung [ZPO]*) requires in cases where the amount in litigation exceeds EUR 4,000 that the parties be represented by attorneys (exception: labor cases in the first instance). The amount in litigation also serves as basis for the calculation of attorney's and court fees. Attorney's fees are regulated by a special tariff. Contingency fees are not permitted in Austria. Court costs are incurred by filing an action or an appeal. In general the winning party is compensated for the court and attorney's fees by the losing party.

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. **Council Regulation No. 44/2001** dated December 22, 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters entered into force on March 1, 2002 and has replaced the **Brussels Convention.**

27.3. Other Courts

The **Constitutional Court** (*Verfassungsgerichtshof*) scrutinizes laws as to their constitutionality and protects the fundamental rights and freedoms of the population. It also settles conflicts of competence.

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

Criminal cases 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

The Austrian Code of Civil Procedure (*ZPO*) contains regulations applicable to national and international arbitration proceedings. The parties may agree on arbitral proceedings

- before an **ad hoc arbitral tribunal** (whereby in the absence of an agreement of the parties the Austrian Code of Civil Procedure regulates the establishment of the tribunal);

- before the **International Arbitral Centre of the Austrian Economic Chamber** in Vienna (in this case 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 that the parties have entered into; 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.,

- before 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.,

- before another Austrian or non-Austrian institutional arbitration tribunal.

The **arbitration agreement or clause** must contain a clear designation of 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 must be in writing. In general all matters which may also be settled by a compromise can be the subject of arbitration (exceptions: status, matrimonial, labor and public law matters, as well as adoption, criminal cases and questions of the validity and justification of intangible property rights etc.).

The **arbitral award** is final. There are no legal remedies unless the parties have agreed to them. However, there is the possibility of nullifying the award by filing an action in an ordinary court in cases of the non-existence of a valid arbitration agreement, or if one of the parties has not been heard in the proceedings, or if the arbitrators have exceeded their authority, or if the award is contrary to Austrian public policy or for other similar important reasons enumerated in the Code of Civil Procedure. 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 above-mentioned reasons has become known.

Foreign arbitral awards may be enforced in Austria under the condition of reciprocity, as foreseen 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 of June 10, 1958, 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 trade and industry of certain countries (e.g. Hungary).

Annex 1: Tax Treaty Network

Austria has concluded tax treaties with the following countries:

Algeria
Argentina
Armenia
Australia
Azerbaijan
Belarus
Belize
Belgium
Brazil
Bulgaria
Canada
China
Croatia
Cuba
Cyprus
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Germany
Greece
Hungary
India
Indonesia
Iran
Republic of Ireland
Israel
Italy
Japan
Kuwait
Kyrgysztan
Liechtenstein
Luxembourg
Malaysia
Malta
Marocco
Mongolia
Mexico
Nepal
The Netherlands
Norway
Pakistan
The Philippines
Poland
Portugal
Romania
Russia
Singapore
Slovakia
Slovenia
South Africa
South Korea
Spain
Sweden
Switzerland
Thailand
Tunisia
Turkey
UK
Ukraine
United Arab Emirates
USA
USSR - The tax treaty with the USSR is now being applied to some countries that formerly belonged to the Soviet Union, e.g. Georgia, Tajikistan, Turkmenistan
Uzbekistan

The purpose of the above 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
Hungary
Liechtenstein
The Netherlands
Sweden
Switzerland
USA

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