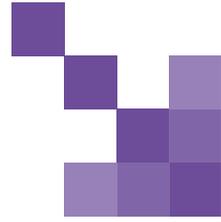


Doing business in Austria



Albert Birkner and Stefan Gurmam
Cerha Hempel Spiegelfeld Hlawati (Lex Mundi Member Firm)

www.practicallaw.com/3-369-8103

LEGAL SYSTEM

1. What is the legal system (civil law, common law or a mixture of both)?

The Republic of Austria has a civil law system; therefore, legislation is the primary source of law. However, case law also has its significance.

FOREIGN INVESTMENT

2. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

The investment climate in Austria is generally quite favourable; there are only a few restrictions on foreign investments (for example, special provisions on land acquisition by foreign investors from non-EU countries). Imports and exports, other than those within the EU member states, can be restricted (*Foreign Trade Act 2005 (Außenhandelsgesetz 2005)*).

3. Are there any exchange control or currency regulations?

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

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

ject to authorisation. There are no restrictions in Austria concerning the purchase and exchange of foreign currency into European currency.

4. What grants or incentives are available to investors? Are any of these aimed specifically at foreign investors?

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

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

BUSINESS VEHICLES

5. What is the most common form of business vehicle used by foreign companies to conduct business in your jurisdiction? In relation to this vehicle, please provide details on:

- Registration formalities (including timing).
- Minimum (and maximum) share capital.
- Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities).
- Any restrictions on the rights that can attach to shares.
- Any restrictions on foreign shareholders.

- **Management structure and any restrictions on foreign managers.**
- **Directors' liability.**
- **Parent company liability.**
- **Reporting requirements (including filing of accounts) and cost of compliance.**

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

- **Registration formalities.** A GmbH comes into legal existence on registration with the Commercial Register in Austria (*Firmenbuch*). The articles of association (*Gesellschaftsvertrag*) (articles), which must be in the form of a notarial deed, must be filed with the Commercial Register. Specified forms detailing the managing directors must also be filed. The registration procedure takes about two to three days.
- **Share capital.** The minimum share capital of a limited liability company is EUR35,000 (about US\$47,967). There is no maximum share capital.
- **Non-cash consideration.** Half of the minimum share capital must be paid up in cash before registration in the Commercial Register; the other half can be paid up either in cash or by contributions-in-kind.
- **Rights attaching to shares.** Shares of a GmbH cannot be issued or quoted on a stock exchange. A notarial assignment deed is required for the assignment of shares. Restrictions on rights attaching to shares can be imposed by the GmbH's articles, making the assignment of shares dependent on the company's approval.
- **Foreign shareholders.** There are no restrictions on foreign shareholders.
- **Management structure.** A GmbH is represented by one or more managing directors, who are appointed by the shareholders and can be removed by the shareholders at any time without cause. The election of a supervisory board of directors is voluntary (except in some circumstances). The supervisory board is elected by the shareholders and consists of at least three members.

- **Directors' liability.** Directors must act with the diligence of a careful businessman. If they do not act with the necessary due care, they are personally liable for any damage caused as a result.
- **Parent company liability.** Parent companies (shareholders) may become liable to their company or the company's creditors for the:
 - initial undercapitalisation of the company;
 - commingling of shareholders' and company's assets; and
 - artificial splitting up of a business into separate legal entities to shield assets from insolvency proceedings.
- **Reporting requirements.** The managing directors must annually:
 - report to the supervisory board (if existing) on the company's policy; and
 - present to the supervisory board information on the GmbH's future financial situation and the profitability.

The company must publish the annual accounts in the commercial register, the cost of which is EUR75 (about US\$103).

EMPLOYEES

6. What are the main laws regulating employment relationships?

The main laws regulating employment relationships are the:

- **Act on Employees (*Angestelltengesetz*) (AngG).** This regulates the working conditions and contractual provisions of white collar employees.
- **Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) (ABGB).** This regulates the general provisions of the civil law.
- **Act on the Employment of Foreign Workers (*Ausländerbeschäftigungsgesetz*) (AuslBG).** This regulates the employment of foreign employees in Austria.
- **Act on the Liability of Workers (*Dienstnehmerhaftpflichtgesetz*) (DNHG).** This regulates the employees' liability towards the employer.

- **Labour constitutional law (*Arbeitsverfassungsgesetz*) (ArbVG).** This regulates working conditions, works council and collective bargaining.
- **Working Time Act (*Arbeitszeitgesetz*) (AZG).** This regulates the working time of the employees.

The most relevant law for foreign employees is the AuslBG. Austrian laws apply to employees from Austria working abroad on a temporary assignment. However, they do not apply to employees working abroad on a long-term basis (unless a choice of law has been agreed on, in which case, the more favourable provisions of the foreign law apply to the work relationship).

The Labour Protection Act (*ArbeitnehmerInnenschutzgesetz*), the Maternity Protection Act 1979 (*Mutterschutzgesetz 1979*) and the Act on Employment of Children and Juveniles 1987 (*Bundesgesetz über die Beschäftigung von Kindern und Jugendlichen 1987*) are mandatory in relation to the provisions on:

- The security and protection of the employees' health in the employment/working environment.
- Pregnant, juvenile or disabled employees.

Compliance with these provisions (as well as with working time provisions) is monitored by the Works Inspection Authority (*Arbeitsinspektorat*).

7. Is a written contract of employment required? Are any agreements and/or implied terms likely to govern the employment relationship?

A written contract of employment is not required. However, a written statement setting out the employment terms containing the most important rights and duties must be given to each employee immediately after the start of work (*Dienstzettel*).

Other terms, which are likely to govern the employment relationship, are:

- Collective bargaining agreements (*Kollektivvertrag*).
- Plant agreements (*Betriebsvereinbarung*).

Implied terms may govern the employment relationship based on a long-standing practice of a company (for example, a bonus system).

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

Employees working in a company with at least five employees may set up bodies to represent their interests before the employer. The most important body in this context is the works council. The works council has, among other things, the right to:

- Negotiate with the employer.
- Supervise compliance with regulations protecting the employees.
- Request information, including financial statements.
- Immediate notification in case of a dismissal.
- Be informed of certain intended changes of the business (for example, mass layoffs or restructuring measures).
- Be represented at the supervisory board.

9. How is the termination of individual employment contracts regulated?

Generally, an employment contract can be terminated by:

- Mutual agreement.
- Giving notice of termination.
- Dismissal with good cause.

Employees in companies employing at least five people can contest the notice of termination if it is (*Article 105, ArbVG*):

- Due to the employee's:
 - membership of a union;
 - enlistment for military service;
 - application as a member of the works council.
- Socially unjustified.

The relevant labour laws set out minimum notice periods to be given by each party, the length of which depends on how long the employee has been employed in the company. Where a works council is established, in general, a termination notice 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 works council explicitly approved the dismissal, the employee can still make a claim against the dismissal for one of the above reasons. However, in this case the employee cannot contest the dismissal for being socially unjustified.

If the term of employment has lasted for at least three years without interruption, the employee is entitled to severance payment (*Abfertigung*). Due to a change of law there are two existing systems in Austria for severance payments.

The old system (*Abfertigung Alt*) applies to employment relationships started before 1 January 2003. The employee acquires the right of severance payment if the employment relation is terminated after three years by:

- Ordinary termination by the employer.
- Mutual consent.
- Justified immediate resignation by the employee.

In principle, the new system (*Abfertigung Neu*) applies to employment relationships started after 1 January 2003. During the employment relationship, the employer must pay 1.53% of the employee's gross monthly salary to a special fund for severance payments. The employee acquires the right to severance pay if the employment relationship is terminated after three years and is not:

- Ordinary termination by the employee.
- Justified dismissal without notice.
- Unjustified termination by the employee without complying with the period of notice (*unberechtigter vorzeitiger Austritt*).

If one of the above listed termination causes applies, instead of losing the claim to severance pay, the employees can carry over the balance of the special fund to the new employment relationship.

10. Are redundancies/mass layoffs regulated? If so, please give details.

The employer must notify the Labour Market Service

(*Arbeitsmarktservice*) for collective dismissals if a certain number of employees is affected.

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

There are no work restrictions in Austria for citizens of the EU, Switzerland, Iceland, Norway and Liechtenstein, however, temporary restrictions apply for citizens of the new Eastern European EU member states. A non-EU or non-European Economic Area national (or national of the new Eastern European EU member states) must obtain one of three different types of work permit, with varying permissions (*Ausländerbeschäftigungsgesetz*):

- **Work permit.** The employer must apply for the work permit at the competent Labour Market Service. The permit allows the employer to employ a person for a particular position for one year.
- **Work authorisation.** When a foreign employee has been legally employed in Austria for a period of 52 weeks within the previous 14 months, he can apply for a work authorisation. A work authorisation gives the foreign employee the right to work in any position within a particular federal province for two years (an extension is possible).
- **Certificate of exemption (*Befreiungsschein*).** A foreign employee can apply before the start of employment for a certificate of permit to work for five years (an extension is possible) if:
 - he has been legally employed in Austria for a period of five years within the previous eight years;
 - he has been married to an Austrian citizen for at least five years.

The costs of the respective applications vary and are not a significant amount (minimal costs are about EUR30 (about US\$41) for each application).

TAX

12. In relation to employees, what constitutes tax residency in your jurisdiction?

A person is tax resident if:

- His permanent domicile is in Austria.

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

13. What income tax or social security contributions must the following pay:

- Tax resident employees?
 - Non-tax resident employees?
 - Employers, in relation to their employees?
-

Tax resident employees

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

Taxable income is taxed at graduated marginal rates ranging from 0% to 50% (progressive rates), using a calculation model (*Article 33 of the Act on Income Tax (Einkommensteuergesetz)*). Examples can be given as follows:

- Up to EUR10,000 (about US\$13,705): 0%.
- EUR25,000 (about US\$34,262): 23%.
- EUR51,000 (about US\$69,895): 33.5%.
- Above EUR51,000: 50%.

The taxable income can be reduced by:

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

Non-tax resident employees

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

Employers

An employer must pay part of its employees' social insurance contributions and channel both the employer's

and the employee's contribution directly to the social insurance authority. Income tax is withheld by the employer under a pay-as-you-earn system (*Lohnsteuer*).

14. In relation to business vehicles, what constitutes tax residency in your jurisdiction?

Corporations are considered tax resident in Austria if either:

- They have their legal seats in Austria.
 - Their effective management is carried out in Austria.
-

15. Please give details of the main taxes that potentially apply to a tax resident business vehicle (including rates).

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

- 5% of the nominal capital (quarterly prepayment) (for a GmbH this is EUR1,750 (about US\$2,398) each year and for an AG this is EUR3,500 (about US\$4,797) each year).
- EUR5,452 (about US\$7,472) each year for credit institutions and insurance companies.
- EUR1,092 (about US\$1,497) for start-up companies.

The main taxes that potentially apply are:

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

16. How are the activities of non-tax resident business vehicles taxed?

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

17. Please explain how each of the following is taxed:

- **Dividends paid to foreign corporate shareholders.**
 - **Dividends received from foreign companies.**
 - **Interest paid to foreign corporate shareholders.**
 - **Intellectual property (IP) royalties paid to foreign corporate shareholders.**
-
- **Dividends paid.** In general, dividends paid by Austrian companies are subject to a withholding tax at the rate 25%. Under certain specific conditions, this withholding tax does not apply to dividends paid to a company resident in another EU country. The rate of withholding tax can be reduced for dividends paid to non-EU shareholders in accordance with tax treaties. Depending on the tax treaty, this reduction may be in the form of an up-front reduction at source or a refund of withholding tax.
 - **Dividends received.** Based on the international participation privilege (that is, profit distributions of any kind resulting from an international participation are tax free if the underlying participation has been held for a minimum retention period) (*Schachtelprivileg*), special rules apply to the corporate tax exemption of dividends paid by foreign (non-resident) companies to resident companies. Dividends paid to an individual generally attract a 25% income tax.
 - **Interest paid.** If a security is not issued at the grant of a loan, interest paid on the loan is not subject to withholding tax in Austria. A 25% withholding tax is imposed on interest income from bank deposits and securities held in Austrian banks. Interest paid to non-resident companies and individuals on bank accounts, savings accounts and similar accounts is exempt if the recipient confirms in writing that he is a non-resident. Interest on bonds received by non-resident companies is exempt from tax if the securities are deposited with an Austrian bank and if the owner of the bond confirms in writing that it is a non-resident.

- **IP royalties paid.** IP royalties paid are subject to a 20% withholding tax, subject to any double tax treaties. Exemptions from the payment of withholding tax are provided for in Article 99a of the Act on Income Tax (*Einkommensteuergesetz*).

18. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)? If so, please give details.

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

19. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

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

20. Are there any transfer pricing rules? If so, please give details.

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

21. How are imports and exports taxed?

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

- The supply of goods and services for consideration by a commercial enterprise within Austria.

- The import of goods by an entrepreneur located in Austria from an entrepreneur of a non-EU member state.

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

22. Is there a wide network of double tax treaties? If so, please give details.

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

COMPETITION

23. Are restrictive agreements and practices regulated by competition law in your jurisdiction? If so, please give brief details.

Cartels 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.

Vertical restrictions on distribution, which 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, can be prohibited by the Cartel Court.

The abuse of a dominant market position is prohibited.

In addition, the Cartel Court must prohibit a merger if it creates or intensifies a dominant position.

INTELLECTUAL PROPERTY

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

- **Nature of right.**
- **How protected.**

- **How enforced.**
 - **Length of protection.**
-

Patents

- **Nature of right.** The invention must:
 - be new;
 - not be obvious to an expert;
 - be applicable in the industrial field; and
 - not be contrary to good morals.

The holder is entitled to, for example, use the invention, prevent others from using the invention or put the invention into circulation.

- **How protected.** The application for a patent must be filed with the Austrian Patent Office. A full disclosure of the invention must be made so that a review by the examiner is possible. The application is refused if formal defects are not removed and objections as to the patentability are not dispelled.
- **How enforced.** In case of an infringement, the patent owner can make a claim for the following:
 - a cease and desist order;
 - abolition of the patent;
 - appropriate consideration;
 - damages and the surrender of profits;
 - the publication of the judgment; and
 - the rendering of accounts.
- **Length of protection.** The maximum protection period of a patent is 20 years from the filing date.

Trade marks

- **Nature of right.** To be registered as a trade mark, a sign must be used in the course of business and be capable of distinguishing goods and services of one company from those of another company. The owner can exclude others from:
 - using an identical sign for goods and services identical with those the trade mark is registered for; or

- using an identical or similar sign for identical or similar goods and services if there is a likelihood of confusion.
- **How protected.** Protection is ensured by registration at the Austrian Patent Office. The owner of an “older” trade mark can apply to cancel entries at the Austrian Patent Office.
- **How enforced.** Trade marks are enforced in the same way as patents (*see above, Patents*).
- **Length of protection.** Trade marks are protected for a renewable period of ten years from the day of registration.

Registered designs

- **Nature of right.** To be registered, a design must:
 - be new;
 - have individual character; and
 - not be against morality.

The holder is entitled to, for example, use the registered design, prevent others from using it or to put it into circulation.

- **How protected.** To be protected, an application must be filed with the Austrian Patent Office.
- **How enforced.** Registered designs are enforced in the same way as patents (*see above, Patents*).
- **Length of protection.** The applicant acquires the right of priority from the day of the registration.

Unregistered designs

- **Nature of right.** To be protected an unregistered design must (*Regulation (EC) No. 6/2002 on Community designs*):
 - be new;
 - have individual character;
 - be visible during typical use;
 - be disclosed.

- **How protected.** A design that meets these requirements is protected as an unregistered Community design for three years from the date on which the design was first made available to the public within the Community.
- **How enforced.** Unregistered designs are enforced in the same way as patents (*see above, Patents*).
- **Length of protection.** Protection lasts for three years.

Copyright

- **Nature of right.** The Austrian Copyright Act (*Urheberrechtsgesetz*) provides protection for works which are original intellectual creations in the field of:

- literature;
- music;
- fine arts; and
- cinematography.

The holder is entitled to realise, reproduce, distribute or lease his work. He has the right to a commission if he sells his work.

- **How protected.** The copyright protection is granted as soon as the work is created. There is no registration requirement.
- **How enforced.** Copyrights are enforced in the same way as patents (*see above, Patents*).
- **Length of protection.** Generally, the term of copyright for literature, musical and artistic works is 70 years after the end of the year of the author’s (or last co-author’s) death.

Confidential information

- **Nature of right.** Employees must not disclose business secrets.
- **How protected.** The obligation of secrecy for employees is regulated by law (*Article 27(1), AngG*). However, the specific regulation of the obligation of secrecy should be stipulated in the employment contract. Business partners can also agree on confidentiality of information by signing a contract.

- **How enforced.** An employee that breaches the secrecy obligation can be dismissed and ordered to compensate the employer. The breach of a confidentiality agreement will result in the business partner paying compensation.
- **Length of protection.** The secrecy obligation for employees is not limited. The parties to the agreement stipulate the length of protection of confidentiality agreements.

MARKETING AGREEMENTS

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

- **Agency.**
- **Distribution.**
- **Franchising.**

- **Agency.** The law on commercial agents (*Handelsvertretergesetz*) (*HVertrG*) applies to persons who are put in charge of arranging and concluding transactions, wholesalers and distributors. An agent is entitled to compensation if he acquired new customers or improved the company's business relationship with its customers.
- **Distribution.** See above, *Agency*.
- **Franchising.** There are no specific franchise laws in Austria, however, *HVertrG* applies in analogy.

E-COMMERCE

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

The laws regulating e-commerce in Austria are the:

- **E-Commerce Act 2002 (*E-Commerce Gesetz*).** This regulates the admission of service providers and their information obligations, liability, contractual duties and co-operation with other states.
- **Act on Distance Selling (*Fernabsatzgesetz*, §§ 5a ff *KSchG*).** This regulates the protection of consumers in distance selling.

- **Act on Electronic Signatures (*Signaturgesetz*).** This regulates the use of the electronic signature certification and the companies using and offering the electronic signature.
- **Act on Access Control (*Zugangskontrollgesetz*).** This regulates the protection of service providers who provide, among other things, television or radio broadcasts.
- **Act on Distance Financial Service (*Fern-Finanzdienstleistungs-Gesetz*).** This defines distance financial service and stipulates the obligations for distance selling.

DATA PROTECTION

27. Are there any data protection laws? If so, please give brief details.

Data protection rights are mainly governed by the Data Protection Act 2000 (*Datenschutzgesetz 2000*). The right to data protection, especially in relation to personal and family life, is a fundamental right, which is also ensured by the Austrian Federal Constitutional Law (*Bundes-Verfassungsgesetz*) (*B-VG*). The Act regulates the general protection, storage and use of personal data, and sets out the obligations of companies using this data.

PRODUCT LIABILITY

28. Are there any laws regulating product liability and product safety? If so, please give brief details.

Austria has implemented Directive 99/34/EC amending Directive 85/374/EEC 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 the product in circulation, must compensate consumers for any damages caused to them or their property by a defective movable product, without negligence having to be proven and independent of any contracts with the injured persons (innocent-bystander liability).

CHSH

Cerha Hempel Spiegelfeld Hlawati

Commercial

Banking & finance and capital markets

Tax

Administrative business law

Real estate and
project development

Commercial litigation and arbitration

Cerha Hempel Spiegelfeld Hlawati
Partnerschaft von Rechtsanwälten
Parkring 2, A-1010 Vienna
Tel.: +43/1/514 35-0
Fax: +43/1/514 35-35
office@chsh.at

MEMBER

LEX  MUNDI

THE WORLD'S LEADING ASSOCIATION OF INDEPENDENT LAW FIRMS

www.chsh.at

CHSH Bratislava Brussels Bucharest Budapest Vienna
in alliance with BSJP Gdansk Katowice Poznan Warsaw Wroclaw