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ESSENTIAL BUSINESS GUIDE FOR FOREIGN INVESTORS IN AUSTRIA

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This guide represents the law of Austria as at 1st April 2013

However it is a guide only and does not replace professional legal and tax advice

TABLE OF CONTENTS:

- INTRODUCTION -

ESSENTIALS FOR FOREIGN INVESTORS

Any enterprise or investor making an investment or setting up business abroad is a target for many suitors. Foreign governmental agencies, chambers of commerce, non-governmental organisations, banks, accountancy and law firms try to persuade the foreign investor to choose their jurisdiction, provide long lists of persuasive incentives, advantages of corporate locations, market opportunities and sometimes even perks such as tax holidays, sunset clauses, government grants and so forth.

The first rule to remember is that success depends on a careful and informed choice. There is no such thing as a free lunch, but there can be a difference in the quality of the lunch. By making a careful and informed choice the lunch might be quite agreeable or even better and in some instances, excellent. As stated, it all depends on a careful and informed choice. To make such a choice the foreign investor has to take into account the following essential information:

1. <u>Foreign Environment</u>

In the host country there are some basic do's and don'ts to be taken on board by the foreign investor and these are not easy to identify, as the foreign investor is used to the environment, rules and practices of their own country and marketplace.

Therefore they might be misled by assuming that the business environment, rules and practices of another jurisdiction are similar to their own. This not only leads to serious mistakes but is a recipe for disaster and often ends in disputes and litigation. At this point the foreign investor and the local partner discover too late that their supposed firm agreement was an agreement on shaky grounds. Although it was based on good mutual personal understanding, there was a basic misunderstanding about the material terms.

The first step for a foreign investor is therefore to find out the specific do's and don'ts of the other jurisdiction. In respect to Austria, these are set out in the first chapter of this *Essential Business Guide* and are more or less applicable throughout the countries of the European Union and the European Economic Area.

2. <u>Unusual Corporate Structure</u>

The second essential point for the foreign investor is to understand the basic corporate structures in the target or host jurisdiction. At a first glance any company appears to be just a company as it is a legal entity different from its shareholders and directors.

However, a closer look at the details reveals huge differences. Such details relate to the capitalisation, the accounting and reporting, directors' and shareholders' liabilities, rights of representation, etc. A lack of understanding of these issues causes not only distress to the foreign investor who may be locked into a situation too difficult to exit from, but also financial losses.

For instance, in a dispute before the Austrian courts about the right to vote in a shareholders' meeting, a publicly listed US-based multinational as a 50% shareholder in an Austrian limited liability company was faced with the difficulty of proving to the Austrian court that its Vice President, International, had the legal right to represent the US corporation in that shareholders' meeting. The Austrian judge expected the Vice President's authority to be documented in an official certification from the Austrian Company Registry, a public record in Austria, and was completely puzzled that there is no such Company Registry in the United States. Various legal experts on US corporate law had to give evidence to establish the rights of representation of the Vice President, International, as a company officer.

A proper understanding of the basic corporate rules of the host jurisdiction is therefore essential for a foreign investor prior to finally committing to equity investments in a

partner's business. In respect to Austria, the basic corporate structures and rules are set out in chapter two of this Guide.

3. More than Taxes

Tax planning is the next essential step to be understood by a foreign investor and their advisors. Tax planning is complex, as not only the rules of the host jurisdiction have to be taken into account but also the rules of international taxation to be applied between the jurisdiction of the investor and the host jurisdiction. While these international rules are frequently reduced to writing in bilateral tax treaties on the avoidance of double taxation it is important to understand the actual application and practice of these rules.

Frequently, tax planning is understood only as how to minimize a tax burden for a proposed business activity. While this is certainly an aspect to be borne in mind, there are more important issues which may be overlooked in the enthusiasm for profits with lower tax expected by the foreign investor or from the foreign investment.

More important are those issues which are not expressed in terms of tax rates and brackets but other problems which might arise in a trans-border situation such as taxable permanent establishments, transfer pricing, cost plus taxation, deductibility of interest, rentals, licence fees and royalties, deductibility of commissions payable to third parties, etc. Above all, the exit strategy which is the tax burden in case of relocation of the enterprise out of the host jurisdiction, the sale of the business interest in the host jurisdiction, trans-border mergers and liquidation must be examined.

Foreign investments also have an upside aspect of taxation, in particular the availability of reducing tax exposure within a group, tax exemption of foreign dividends, in particular the participation exemption and the Parent-Subsidiary Directive of the European Union. These aspects are covered in chapter three - Tax Planning.

4. Cover Your Back

The main purpose of foreign investment is frequently the expectation of making profits in a foreign and promising market. The investor has interesting know-how or a profitable business model and expects to boost the success by taking their products, know-how and business models international, in particular to markets such as the European Union, Eastern Europe, Central Asia or Russia.

This can be done by going solo or cooperating with a local partner. The choice is frequently to do it with a local partner as the partner in the host jurisdiction has the local market knowledge, customer base or networks to turn the venture into a success. Before finalizing and making commitments, a foreign investor is strongly advised to protect their know-how, trademark, business name, patents and all industrial property.

Failure to obtain proper protection prior to making commitments may not only result in lengthy disputes and court procedures but actually in a loss of such rights. For instance the trademark "Land Rover" was lost in Brazil to a local company which registered "Land Rover" for itself. In Austria an electronics shop registered "Apple" as a trademark and for seven years Apple Macintosh had to fight in the courts before recapturing its own trademark.

The full and enforceable protection of know-how and industrial property rights is therefore absolutely essential for a foreign investor. This is therefore covered in chapter four of this Guide.

5. Lost in Labour

In the host jurisdiction, the foreign investor usually requires workers to carry out the business. Local labour is usually used for this purpose. Additionally, some people may also be seconded directly by the foreign investor to the host jurisdiction. Both groups come under the local labour law; the main aim of that law is very often to protect the employee and not the employer.

If this is so in the jurisdiction of the foreign investor as well, they will certainly be aware that this is an essential aspect of a foreign investment and will usually pay great attention to this point.

In respect to Austria, the protection of employees and the risks of an employer are set out in chapter five of this Guide. In contrast to all other European countries, Austria does not provide for any obligation on the part of the employer to pay hefty termination compensation to employees. This is certainly one of the advantages of using Austria as a base for operating throughout the internal market of the European Union.

6. For better or worse

A further point essential to foreign investors may be pensions and superannuation schemes. When seconding managerial staff from the investor's home jurisdiction to the host jurisdiction, or hiring and retaining managers in the host jurisdiction, the issue of a company pension and superannuation may arise. To avoid any surprises, and in particular to provide the foreign investor with sufficient information about the Austrian system, pension and superannuation are covered in chapter six of this Guide.

This chapter should in particular help the foreign investor to avoid making promises and commitments which may be common in the home jurisdiction of the investor but may be too generous in the host jurisdiction. Once an over generous promise has been made, it is virtually impossible to withdraw it without disappointing and demotivating the local manager to be hired or the manager to be seconded.

7. Information is Value

No doubt there are other aspects of great importance for a foreign investor before making final decisions and final commitments. Such final points like business licences, regulatory permits, banking rules, payroll procedures etc, require advice by the appropriate professional advisors to be engaged in the host jurisdiction. However, these are finer points which are important but are not essential knowledge for a foreign investor when making contacts overseas and investigating possibilities.

- CHAPTER ONE -

DO'S AND DON'TS FOR FOREIGN INVESTORS

I Introduction

Foreign investors from countries outside the European Union and the European Economic Area often face pitfalls or miss opportunities when committing themselves to investments and business activities in Europe. The foreign investor is well advised to learn from mistakes made by others, keep away from danger zones and leverage the success of their investment by using opportunities not available in their own jurisdiction.

The following contains recommendations to foreign investors for securing success; what to do and what to avoid. The recommendations focus on foreign investments in business and do not discuss the immigration of the foreign investor to Austria. In such instances, different considerations may apply and additional problems have to be dealt with.

II Representative Office

A representative office of a foreign business can be established in Austria without any formalities; in particular, there is no requirement of registration with the Company Registry, any business name registry or the tax office. A representative office also does not require any business licence or regulatory permit. However, in the area of financial services and insurance, notification of the establishment of the representative office may have to be filed with the supervising authority.

For purposes of establishing a representative office, the foreign enterprise rents office premises or commercial space and hires the required employees. Any employees have to be registered with the local tax office and the local social security office for payroll withholding purposes.

The activities of a representative office however have to be strictly limited to the purposes set out in the relevant tax treaty between Austria and the jurisdiction of the company setting up the representative office in Austria.

If a foreign company sets up a representative office in Austria, its activities have to be limited to:

- Storage, display or delivery of goods or merchandise belonging to the enterprise, for instance, consignment stock or goods for the purpose of processing by another enterprise.
- Purchasing office, i.e. the representative office buys goods and merchandise for the foreign company.
- Collecting information for the enterprise, e.g. market intelligence.
- Activities which have a preparatory or auxiliary character for the enterprise, e.g. advertising or scientific research.

Any activities in excess of those listed may result in the foreign enterprise being considered as having a permanent establishment and not just a representative office in Austria. The result will be that the foreign company becomes taxable in Austria to the extent that the activities of the Austrian establishment contribute to the profit of the Foreign company. As this is often difficult to determine, drawn out and costly procedures will follow involving an exchange of information and negotiations between the tax administrations of both Austria and the foreign jurisdiction.

It is important to note that each tax treaty may have a slightly different description of the permitted activities of a representative office. The relevant tax treaty has to be reviewed depending on the jurisdiction of the foreign enterprise. In a non-treaty situation, i.e. the foreign enterprise is situated in a jurisdiction which does not have a tax treaty with Austria, the representative office itself may already trigger a taxable permanent establishment in Austria. Prior to opening such a representative office it is recommended that an agreement or binding ruling is sought from the Austrian tax office.

III Branch of a foreign company

Once the activities of a foreign enterprise in Austria exceed the limits of the activities of a representative office, the presence in Austria will be considered as a taxable permanent establishment. The foreign enterprise will therefore be required to register a branch in Austria.

While it is possible to register the branch of a foreign company with the Austrian Company Registry, a foreign investor is strongly advised to use this route only in exceptional circumstances after having thoroughly discussed this option with their professional advisors. The drawbacks of a branch of a foreign company in Austria are the cumbersome and expensive registration and house-holding requirements. The registration in Austria has to reflect the full status of the foreign company which requires certified and apostilled translations of all foreign and non-German documents. Whatever the foreign company is required to file under its own corporate regulations has to be filed with the Austrian Company Registry as well.

The registration of the branch of a foreign company also requires all directors - including the non-executive directors - to sign the application for registration of the branch whereby the signatures have to be notarised and apostilled. In the case of companies with directors resident in various jurisdictions, this can be a cumbersome task.

As an alternative to registering the branch of a foreign company, it is easier, faster and less expensive to form and register a subsidiary in the form of an Austrian limited liability company (GmbH) or a joint stock corporation (AG).

IV Commercial Agents

The commercial agent in Europe enjoys a high degree of protection vis-à-vis the principal on the basis of a Directive of the European Commission signed into law throughout the member countries of the European Union. The courts are also highly protective of commercial agents and in some instances where the commercial agent has been fully dependent upon and subject to close supervision and control by the principal, the agency contract has sometimes been interpreted as an employment contract with all resulting tax and social security consequences including full labour law protection.

The commercial agent is entitled to statutory commission, interest on commissions due, override commissions for direct business of the principal, termination compensation of up to one year's gross commission, commissions for business after termination and has no liability for damages if the agent terminates.

There is no need for a signed agency agreement as the exchange of correspondence or an oral understanding may already establish a principal-agent relationship whereby the statutory provisions for the protection of the agent apply automatically.

Even a written agency agreement cannot exclude the major protections of the commercial agent, e.g. the termination compensation. Clauses in agency agreements excluding or limiting the agent's protection are ineffective and the statutory provisions apply. The statutory provisions can also not be avoided by agreeing to submit the agency agreement to a foreign law which does not provide such protection. The choice of law clause will be

considered ineffective to the extent that it negates the protection the agent would have otherwise enjoyed under statutory provisions.

Before appointing a commercial agent in Austria or in any other country of the European Union, it is vital to seek legal advice and to have the agreement drafted to avoid pitfalls. The additional protection afforded by law and in particular the mandatory termination compensation may serve the principal as leverage in negotiations with an agent for insisting on a lower commission percentage than the principal is otherwise paying to agents in the foreign or other overseas jurisdictions.

Depending on the circumstances, it might be possible to create a broker or factor contract rather than a commercial agency agreement to avoid the pitfalls set out above. However, the drafting of such agreements requires great care and legal advice.

V Distributorship

As an alternative to using a commercial agent, a foreign enterprise might consider the appointment of distributors. A distributor might require some exclusivity or at least some selective distribution systems. Again, there are a number of legal pitfalls.

An exclusive or selective distribution system may violate national or European competition law. The distributorship contract therefore requires scrutiny as to its legal compliance. For instance, there are clear rules as to the limits of any geographic area for exclusive distribution, parallel imports and retail price maintenance.

However, there is another danger when appointing distributors in Europe. A distributor who is economically dependent on the manufacturer to a high degree may, at the time of the dissolution of the distribution, claim contract protection similar to a commercial agent (see above). While there are no statutory provisions for the protection of distributors, courts in Austria and in other EU countries have extended the protection of the commercial agent to the distributor in a considerable number of instances. Also, although the beginning of a distributor relationship might be harmonious and not exposed to such dangers, any remarkable success achieved by the distributor might make the distributor economically dependent upon the manufacturer. If the manufacturer then wants to go directly into that market, e.g. by setting up a subsidiary, the distributor may object and require considerable payments in return for giving up any action to determine their rights in the courts and thereby create an unclear situation in this particular market for a number of years.

VI Joint Venture

Joint ventures are an attractive business model for foreign investors using a local partner to implement a project. In Austria, such projects are typically building and construction projects, plant contracting, IT projects, pharmaceutical developments and life science projects.

However the foreign or overseas joint venture partner would rely completely on the local knowledge of the local partner and frequently does not have the proper controlling and management information systems in place. These joint ventures therefore sometimes prove to be high risk ventures and often end in drawn out litigation or arbitration.

Apart from any particular risk of the local joint venture partner itself, there is a high risk vis-à-vis creditors of the joint venture as, according to Austrian law, each partner of a joint venture is jointly and severally liable to the creditors of the joint venture. In the absence of specific contractual stipulation in the agreement each joint venture partner can bind the joint venture itself to third parties. The foreign partner might then find themselves at the mercy of the creditors, in particular in case of insolvency of the local partner. This risk can be managed by way of an incorporated joint venture in which the joint venture partners create a new company and, as a result, the liability of each joint venture partner is limited to their equity contribution.

Before entering into a joint venture agreement with an Austrian or other European partner, a foreign or overseas enterprise is advised to review other options such as sub-contracting with a profit share agreement in the project, alternatively taking the role of general contractor or, as suggested, creating a new company with the other joint venture partner, combined with a sophisticated corporate governance and control mechanism.

- CHAPTER TWO -

CORPORATE STRUCTURES

I Corporate Vehicles for Foreign Investors

Foreign investors favour the

- Limited Liability Company (GmbH: Gesellschaft mit beschränkter Haftung); and/or
- Joint Stock Corporation (AG: Aktiengesellschaft)

as vehicles for investment in Austria or as a platform for business in the European Union, Eastern Europe, Russia and Central Asia. In addition to operational and business activities, these corporate vehicles can be used for holding purposes and for acting as regional headquarters.

Other structures are available but are used by foreign investors only in unusual circumstances which require special solutions. Amongst the other structures are branches of foreign companies, private foundations, cooperatives, limited and unlimited partnerships, European stock corporations, European private companies and various other forms of business organisations and associations. Amongst those listed, the private foundation is sometimes used by foreign investors as an ultimate holding structure, in particular as an Austrian foundation can be set up for either profit purposes or for non-profit purposes.

II Basic principles of Austrian companies

The attractions of Austria as a corporate location for setting up companies by foreign investors are as follows:

- No discrimination against foreign shareholders. Neither the nationality or residence of foreign individuals, nor the place of incorporation or main place of management of corporate shareholders has any impact on their standing and rights as shareholders. They are treated equally with any Austrian shareholders. Restrictions are only applied in line with any UN Security Council resolutions.
- No corporate law restrictions on foreign directors or office bearers of Austrian companies. Their nationality and place of residence does not matter, and there are no restrictions on a foreign investor appointing himself director of an Austrian company. However, care must be taken that the appointment of a foreign director does not result in the Austrian company having its main place of management in another jurisdiction, thereby becoming tax resident in that jurisdiction in line with existing tax treaties. In the absence of a bilateral tax treaty, an Austrian company will always be considered tax resident in Austria, as internal Austrian tax law uses the statutory seat of a company as its place of residence. Where a tax treaty applies the test of the main place of management, a foreign investor acting as a director of an Austrian company is well-advised to have a second Austrian resident director documenting that the company is actually managed from Austria and not from abroad. In such a setting it is possible for the foreign shareholder/director to have the right of sole representation of the company while the Austrian resident director only represents the company together with another director.
- No official permission or accreditation required for setting up an Austrian company by a foreign investor, except for some specific businesses such as banks, financial services, insurance, pension funds.
- No foreign investment control. Irrespective of the size of the investment, the foreign investor does not have to obtain any administrative consent or government approval.

Exceptions apply for the acquisition of land, agricultural land particularly, as the Austrian provinces have each passed legislation which provides certain control and administrative approval prior to a foreign controlled company or foreign individuals acquiring real property. There may be other restrictions such as anti-trust clearances, securities laws and regulations etc. which may affect an investment but they affect both foreign and domestic investors.

- No restrictions on using nominee shareholders. They are registered in the Company Registry as shareholders, they are treated as shareholders and neither discriminated against nor denoted as nominee shareholders. There is also no requirement to disclose the beneficial shareholders to the Company Registrar. The trust agreement can be disclosed to the tax office at the time of distribution of dividends or realization of capital gains in order to shift the tax burden from nominee to beneficial owner, but the tax office must keep the trust agreement confidential.
- No Foreign Exchange Control in Austria other than certain reporting requirements to the Austrian National Bank for statistical purposes only. This also applies when an Austrian company establishes foreign subsidiaries.

The advantages set out above provide a foreign investor with a safe and reliable environment. Austrian rules and legislation are not as frequently changed as may be the case in other countries, in particular in the area of corporate and commercial law. The Act on the Limited Liability Company (GmbH) is still the 1906 Act and the Act on Joint Stock Corporations (AG) is from 1965. Over the years both Acts have been slightly amended to cope with the changing business environment and practices. A foreign investor can therefore expect a secure and reliable structure and legal environment which allows long term planning.

III The Limited Liability Company (GmbH)

A GmbH is created by one or more shareholders drawing up Articles of Association in the form of an Austrian notarial deed and the registration of that deed with the Company Registry kept at the Commercial Court or the High Court of the relevant district. Once entered into the Register, the GmbH becomes a legal entity of its own.

In order to get there, a number of steps are required as follows:

- The GmbH needs a name, followed by the designation "Gesellschaft mit beschränkter Haftung" or "GmbH". The name can be the name of a shareholder, a description of the business to be carried out by the company, a fantasy name or any combination thereof. The name must not conflict with the name of an existing company, must not interfere with existing IP rights and, above all, the name has to be true. This might cause problems in connection with geographic descriptions e.g. "Austria" or "Europe" as a geographic area as the description would only be permitted if the company is actually intending to carry out business throughout that region. The name must also not contain a description of a business for which a special licence is required, such as "bank".
- The company has to have a description of its business objectives. As businesses often require a business licence it is advisable to limit the business objectives to the actual business to be carried out by the company and not to use an all inclusive clause as commonly found in Anglo-American articles of association. In addition to the main business objectives, it is advisable to mention ancillary business activities such as holding activities, management of other companies doing the same business etc.
- The company requires a statutory seat stated in the Articles of Association, which must be a geographic location in Austria e.g. "Vienna". An actual business address or registered office does not have to be stated. The statutory seat determines the jurisdiction of the Commercial Court or High Court keeping the Company Registry.

- Other clauses of the Articles of Association can be stipulated to suit the requirements of the investor. In particular the financial year, rights of shareholders, procedures in AGMs, transfer of shareholdings etc. Austrian corporate law does not use model or standard articles of association, and most are drafted individually to suit the shareholders.
- A GmbH has to state its statutory capital to be subscribed by the shareholders. There is no concept of capital being authorised but not subscribed. At the time of formation, at least a quarter of the subscribed capital has to be contributed by the shareholders in cash or in kind. At present, the minimum amount of statutory capital is EUR 35,000 of which half, i.e. EUR 17,500 has to be contributed at the time of the formation. The shareholders remain personally liable for any unpaid part of the statutory capital. This personal liability even survives the transfer of the shareholding to a new shareholder.
- A GmbH does not and must not issue share certificates. The shareholding is a business and ownership interest evidenced in the corporate documentation and the entries in the public Company Registry.
- Foreign investors are always advised to contribute the initial capital contribution in cash and not in kind. In case contributions are made in kind, an application has to be made to the court for the appointment of an expert to evaluate the actual value of the contribution in kind with a view to protect creditors.
- The capital contribution is subject to a one per cent Capital Transfer Tax. It will only be levied at the time of the formation or capital increase of the company. The transfer of a shareholding to another shareholder does not trigger any tax.
- The initial cash contributions by the shareholders have to be paid into an Austrian bank account opened in the name of the company to be formed. The bank will block the funds until the actual registration of the company in the Company Registry. The bank will issue to that effect a certificate to be submitted to the Company Registrar together with the application for registration.
- No particular debt-equity ratios are required with the exception of companies carrying out special business such as banking, insurance and the like. The thin-capitalisation rules are reduced to the simple requirement of having to call a shareholders' meeting if a company has lost half or more of its equity. Also a company director may incur personal liability for debts of the company if she/he keeps on trading while the company has become insolvent.
- The GmbH requires at least one director. He/she is appointed by resolution of the shareholders signed in the presence of an Austrian notary public. The GmbH does not require any other company officers, though it is possible to appoint additional directors and procurists. The latter are appointed by the director.
- To avoid the necessity of actually coming to Austria to appear before a notary, foreign investors are advised to empower Austrian representatives with an authorization to sign the Articles of Association and any shareholder resolutions. This procedure avoids any language problems. If the notary is faced with a person who is not able to communicate in German, a court licenced interpreter is required to attend the signing to interpret, which adds to the time, cost and expense.
- The director of the company has to sign the application to the Company Registrar for the registration of the company in the presence of the notary public. Together with the application, the Company Registrar needs to have the Articles of Association, the bank certificate on the paid in capital, the director's specimen signature, the tax clearance of having paid the one per cent tax on the capital and, in the case of any unusual company name, such as geographic description, an opinion by the local Chamber of Commerce.

- The company may commence business operations prior to its registration, although anyone acting for the company incurs personal liability for any commitments made on behalf of the company. Once the company has been registered, it takes over all liabilities from the persons having acted for the company and they in turn are freed from their personal liability.
- The company must comply with the annual reporting requirements to the Company Registrar, in particular by way of filing a form with basic data on the financial statements. Only larger companies are required to file full financial statements with the Company Registrar.

The Company Registry is a public register open to inspection by the general public. It is kept electronically and can be accessed over the internet by registered users for a nominal fee.

A GmbH is a suitable vehicle for a foreign investor who either uses a nominee shareholder or has no problem with publication of name, date of birth and address. In view of the limited reporting requirements, a GmbH can keep its business activities to a great extent confidential and away from public attention. This might be of particular relevance where the Austrian company is to act as a international holding company, regional headquarter or group head.

IV Joint Stock Corporation (AG)

The Stock Corporation (AG) lends itself to both private investors and raising capital from the public. Foreign investors are able to use the Austrian AG for similar purposes as a GmbH. The use of an AG might in particular be suitable for more than one private investor as Austria does not restrict or control joint investment schemes as long as they do not qualify as investment funds.

The establishment of an AG is similar to the establishment of a GmbH in a number of ways. It starts with the drawing up of the Articles of Association and is completed with the registration of the AG in the Company Registry. The following matters have to be attended to:

- The determination and choice of a name followed by the description "AG". Any name, description or fantasy name may be used. The name must not be confusing or misleading.
- Business objectives and the seat of the corporation follow the same rules as the GmbH.
- The minimum issued, subscribed and paid in capital is EUR 70,000. The capital has to be paid into an account of the AG with an Austrian bank which in turn will issue a certificate for the Company Registrar.
- Instead of contributing the capital in cash, the founding shareholders may prefer to contribute in kind. This is however under the same restrictions as with a GmbH, as an expert valuation is required as to the actual value, and this will be carried out by one of the experts appointed to the Commercial Court.
- The founding shareholder or shareholders are furnished with a global share certificate representing the capital paid in to the AG. This global certificate can later be exchanged against shares according the Articles of Association.
- The founding shareholder or shareholders appoint the first Supervisory Board of the AG consisting of at least three members, who must be individuals. Corporate membership on a Supervisory Board is not possible.
- The Supervisory Board in turn appoints the first director or directors of the AG. The term of their appointment must not exceed five years. They can be removed at any time by the Supervisory Board.
- Austrian corporate law follows the two-tier board system of governance, whereby the Supervisory Board has the power to appoint and dismiss the directors but no power

to represent the AG. In turn, the director or directors have the sole power to represent the AG.

- The capital is subject to one per cent tax the first time the AG is capitalised. In case of a capital increase, the tax has to be paid on the amount by which the capital is increased. Subsequent transfers of shares are not subject to transfer tax.
- The Supervisory Board and director have to draw up formal reports about the formation of the company and sign them in the presence of a notary public.
- Once all documents have been signed the director has to sign an application to the Company Registrar for the registration of the company and has to submit along with it the Articles of Association, the bank certificate, the clearance certificate of the tax office, the report of the Supervisory Board and the director on the formation of the company, specimen signatures of the directors and specimen signatures of the Supervisory Board members.
- Once the AG is registered in the Company Registry it becomes a full legal entity and can start operation through its director. Any person acting for the AG prior to its incorporation incurs personal liability. This personal liability is automatically taken over by the AG upon registration in the Company Registry while at the same time the personal liability of the persons acting prior to incorporation ends.
- An AG has the duty to obtain an annual audit by a certified public accountant. The auditor's report, together with the financial statements, has to be filed with the Company Registry, which is open to inspection by the general public. At the same time a notice has to be published that the documents have been filed and are available for inspection.

In contrast to the GmbH, the financials of an AG are fully accessible by the public. However, the benefit is that the foreign investor or other shareholders can be kept confidential. Only where the AG is controlled by one single shareholder, holding 100% of all bearer shares, is there a duty to register the name of this sole shareholder with the Company Registry.

A transfer of shares can be done by physically handing over the endorsed share certificates together with the change of registration of the name of the shareholder in the share register kept by the company. Bearer shares are only available with listed companies.

In the case the AG is publicly listed, disclosure requirements have to be complied with by shareholders directly or indirectly acquiring, exceeding, or falling below shareholdings of 5%, 10%, 50%, 75% or 90% of the shares of an AG listed at the Vienna Stock Exchange.

- CHAPTER THREE -

TAX PLANNING

I Attitude of Fiscal Authorities - In General

As a general rule, Austria's tax laws do not discriminate against low-tax or no-tax jurisdictions. The rationale for this attitude is to allow Austrian business organisations to have access to low-tax and no-tax jurisdictions for purposes of international strategic business planning. Even the Austrian government, on some occasions, has used tax havens for issuing treasury bonds for the international markets.

Any transaction taking place abroad will result in a higher duty of co-operation by the Austrian tax payer with the Austrian tax authorities, in particular, when low-tax or no-tax jurisdictions are involved.

Dividends and capital gains received by an Austrian company from its offshore subsidiaries are tax exempt, provided the anti-avoidance test is not met. This test provides that this type of income to an Austrian company may lose its exempt status and become subject to Austrian corporate tax if:

1. the overall local direct and indirect tax burden of the offshore subsidiary does not exceed 15 per cent in respect of its profits, and
2. the subsidiary's main resources are dedicated to passive business.

Careful corporate and operational planning should ensure that the anti-avoidance test is met, so that there is complete legal enjoyment of offshore benefits.

Even if the test is not met, a credit for taxes paid abroad is still available.

Austria has not enacted any CFC legislation and is unlikely to enact it in the future.

II Subsidiaries in Foreign Jurisdictions

i Zero Tax Jurisdictions

In transactions involving jurisdictions which have exemption from taxation, the participation exemption for dividends and capital gains may be lost if the anti-avoidance test is met. In addition, the tax payer will be under a higher duty of cooperation whenever the Austrian tax authorities investigate transactions taking place in the tax-exempt jurisdiction.

ii Low-Tax Jurisdictions

In transactions involving low-tax jurisdictions, foreign dividends or capital gains may become taxable if the overall local tax burden does not exceed 15 per cent of the profits and the main resources of the subsidiary are dedicated to passive business, in particular, earning income from interest, leasing and capital gains (anti-avoidance test above). Foreign tax credits are still available. Furthermore, there is a higher duty of co-operation with the Austrian tax authorities.

iii Jurisdictions That Exempt Foreign-Source Income

In regard to jurisdictions that exempt foreign-sourced income from taxation, the Austrian tax authorities would require a higher duty of cooperation and disclosure when scrutinising the transactions. Otherwise there are no repercussions.

iv Jurisdictions That Grant Tax Incentives to Offshore and Qualified Holding Companies

In respect to jurisdictions that grant tax incentives to offshore and qualified holding companies, dividends and capital gains from these jurisdictions may not be tax exempt under the participation exemption if the anti-avoidance test is met, i.e., the overall tax burden does not exceed 15 per cent of the profits and the main resources of the subsidiary are dedicated to passive business (see above). There is a higher duty of co-operation with the Austrian tax authorities.

v Jurisdictions That Provide Tax Exemptions for Manufacturing and Processing Exports

In regard to jurisdictions that provide tax exemptions for manufacturing and processing exports, if these exemptions result in an overall tax burden not exceeding 15 per cent of the profits, the participation exemption for dividends and capital gains may be lost. There is a higher duty of cooperation with the Austrian tax authorities who will examine the activities of the foreign subsidiary, in particular whether the subsidiary's main resources are actually applied to manufacturing. If so, the anti-avoidance test will be met and the participation exemption will apply.

vi Jurisdictions That Provide Tax Reductions for International Companies with Privileged Offshore Financial Status

In respect to jurisdictions that provide tax reductions for international companies with privileged offshore financial status, if these exemptions result in an overall tax burden not exceeding 15 per cent of the profits and the main resources of the subsidiary are dedicated to passive business, the anti-avoidance test will not be met and the participation exemption for dividends and capital gains may be lost. There is a higher duty of co-operation with the Austrian tax authorities.

III Tax Treaty Regime

In General

Austria has income tax treaties with 90 countries, additional tax information exchange treaties with four offshore centres and treaties on interest with 15 offshore centres. Most of these follow the Organisation for Economic Co-operation and Development (OECD) Model Treaty.

i Characteristic Provisions and Treatment

a. Persons covered

Both individuals and companies are covered by double-taxation treaties, as a standard feature of the Austrian tax treaty regime.

b. Citizenship

As a general rule, citizenship or "domicile" has no relevance. However, in a residency test under a double-taxation treaty, citizenship may be eventually decisive in case of dual-residency.

c. Dual-Resident Individuals

In respect to dual-resident individuals, citizenship may provide the final test of residency, as provided for in various tax treaties.

Under a regulation issued by the Austrian Federal Ministry of Finance, individuals do not establish a tax residence in Austria for the purpose of income tax, irrespective of a home being available in Austria, if the following conditions are met:

- the home is used for not more than 70 days per year;
- proper records on the use of the home are kept; and
- no ordinary tax residence is established in Austria within five years.

d. Dual-Resident Companies

The place of management will determine where the company is resident for tax purposes, while, in Austrian domestic tax law, the place of incorporation is decisive. In the case of European Union (EU) Companies, the Parent Subsidiary Directive may override treaty provisions between Austria and other European Union Member States.

e. Resident Foreigners

Residency for Tax Purposes: If a foreigner meets the residency test under the applicable double-taxation treaty, he/she will be considered resident in Austria for tax purposes, irrespective of nationality or any valid residency permit.

Third-Country Persons Seeking Eligibility for Treaty Purposes: If a third-country person actually establishes a residency for tax purposes in Austria, he/she will be treated as tax-resident in Austria and will be subject to taxation in Austria of all income worldwide.

Permanent travellers will be treated as resident in Austria if they meet the lowest form of residency under the Federal Tax Code (availability of a place to stay in Austria), unless they are able to prove that they are taxed on their worldwide income by another country.

ii Taxes covered

Typically, all income and corporate profit taxes are covered under Austria's double-taxation treaties and, where relevant, wealth taxes. Austria does not levy wealth, gift or inheritance taxes.

iii Exchange of Information

Most double-taxation treaties contain the exchange-of-information clause of the OECD Model Treaty.

As a result of Austria's bank secrecy, in the past the actual exchange of information was frequently not possible because Austrian banks refused to disclose details of bank accounts of foreign customers unless criminal proceedings had already been commenced by a court. Austria has now fully implemented the OECD standards and relaxed its bank secrecy rules in respect to foreign account holders, allowing Austrian banks to reveal account information where there is a specified request for information as a bank customer.

In addition, other bilateral and multilateral treaties of mutual assistance in both administrative and criminal matters and EU Directives require an exchange of information.

Group requests for information are currently not possible in Austria.

iv Assistance in Collections

As a general rule, foreign revenue debts are not enforceable in Austria, either against resident individuals or corporations with assets in Austria. A foreign revenue debt is only enforceable if so provided in a bilateral agreement. At present, the following double-taxation treaties provide for assistance in collections:

- France;
- Germany;
- Norway; and
- USA.

Assistance in collections is also provided to other EU member states in compliance with the European Community (EC) Directive 2001/44/EC amending Directive 76/308/EEC. These Directives have been implemented in Austria and are applicable in addition to any existing bilateral agreements fully subject to taxation.

IV Treaty Shopping

i Treaty Shopping Defined

Austrian tax legislation does not provide any definition of treaty shopping. The anti-avoidance rules (see text, below) are designed to prevent treaty shopping. The tests applied by the tax authorities indicate the approach taken by the Austrian administrative practice. In addition, the tax authorities are able to apply the substance-over-form rule. If the treaty shopping has no commercial background at all, the tax authorities could challenge the economic value of the transaction and deny the relief sought by means of treaty shopping.

ii Impact of Treaty Shopping on Tax Relief

If the tax authorities establish that the transaction carried out in the course of the treaty shopping has no substance, but only form, the tax authorities may disregard the formal aspects and treat the transaction as a domestic transaction.

iii Administrative and Judicial Response to Treaty Shopping

The administration attempts to avoid Austria being used for establishing holding companies for mere treaty-shopping purposes. However, the Tax Office has failed in the Administrative Court when challenging alleged treaty-shopping structures. In any case, it is advisable to document the business reasons underlying the establishment of holding companies in Austria. In respect to outbound treaty shopping, the administrative response is to challenge the transaction whenever it violates the substance-over-form rule.

iv Treaty Limitations on Treaty Shopping

Some double-taxation treaties contain specific limitations on treaty shopping, such as the treaties with Ireland, Liechtenstein, the Netherlands and the United States. One must also be aware of specific domestic tax provisions limiting benefits in particular circumstances.

v Treatment of Inbound Treaty Shopping

In a case of inbound treaty shopping, the Tax Office, depending on the circumstances, might refuse the privileges sought by treaty shopping, such as tax exemption of foreign dividends and capital gains, as well as refusal of VAT credits.

vi Treatment of Outbound Treaty Shopping

In respect to outbound treaty shopping, the Tax Office might apply the substance-over-form rule and treat the transaction as a domestic transaction fully subject to taxation.

V Treatment of Offshore Transactions

i Tax-Haven Legislation

In General

Austrian tax law and/or fiscal administrative practice does not either classify or list zero-tax and low-tax jurisdictions. Only in the context of the exemption of foreign dividends and capital gains on the basis of participation may an overall threshold of 15 per cent of taxation with respect to profits be relevant, provided the subsidiary's main resources are dedicated to passive business.

a. Offshore Investment Funds

Under Austrian tax law, there is no discriminatory treatment of offshore investment funds simply because they have been established offshore.

b. Foreign Trusts

Trusts established by Austrian residents or with Austrian-resident beneficiaries are treated as separate legal entities under Austrian tax law, provided they are truly opaque discretionary trusts. As a result, foreign discretionary trusts will not be subject to Austrian taxation.

If foreign trusts are non-discretionary (bare trusts or interest-in-possession trusts), they will be considered to be part of the assets of the Austrian resident settlor and/or income of the Austrian resident beneficiaries and taxed accordingly.

c. Foreign Personal Holding Companies

Under Austrian tax law, foreign personal holding companies will be considered to be part of the assets of the Austrian resident, unless he or she can demonstrate a valid business purpose for the foreign personal holding company.

d. Foreign Corporations

Foreign corporations established as subsidiaries in offshore or low-tax jurisdictions will be considered to be independent taxable entities of that jurisdiction, provided they are either comparable to an Austrian company or are a recognized EU company. The receipt by the Austrian parent company of dividends and capital gains will be tax exempt, provided the following conditions are met:

- equity participation of 10 per cent or more;
- holding of that equity participation for more than one financial year; and
- the foreign corporation is not caught by the anti-avoidance test, as follows:

  - the overall direct and indirect tax burden suffered by the foreign subsidiary does not exceed 15 per cent of its profits; and

  - the main resources of the foreign corporation are dedicated to passive business such as earning income from interest, capital gains, licence fees or leasing rates.

  In case both elements of the anti-avoidance test are met, the participation exemption will be denied and, as a result, the dividends and/or capital gains will be fully taxed in Austria at the corporate tax rate of 25 per cent. However, any taxes imposed abroad will be credited.

  An example of where both elements are met is a foreign subsidiary with an overall tax burden of less than 15 per cent on its profits, and in the business of converting interest into dividends. In this situation the Austrian holding company would not be able to claim the tax exemption.

e. Other Vehicles Facilitating Offshore Transactions

Other vehicles facilitating offshore transactions may be scrutinized to determine whether they meet the substance-over-form rule. If a transaction fails to meet this test, it will be taxed as a domestic transaction.

VI Strategic Corporate Tax Planning

i Holding Structures

Austrian companies can establish their subsidiaries offshore, either in no-tax or in low-tax jurisdictions. This is an accepted practice for corporate tax planning and is particularly attractive for structures owned by ultimate non-Austrian resident beneficiaries. Austrian

holding companies will enjoy tax exemption both for foreign dividends and capital gains derived from the disposal of shareholdings in foreign subsidiaries.

ii Commissionaire Structures

Commissionaire structures are accepted as such by Austrian law and administrative practice. They enjoy the same tax status as any other commercial activity. For value-added tax purposes, commissionaires are treated as distributors. To manage high-risk investments, in particular investments in Russia, emerging economies and other high-risk jurisdictions, a base company in a tax haven or a low tax jurisdiction will facilitate the managing of risks.

This may be achieved by an Austrian company acting as a commissionaire for a foreign company, which takes the full commercial risk on its books.

iii International Holdings

Companies in no-tax or low-tax jurisdictions can be legitimately established for ultimate holding companies of international groups.

This will be considered by the Austrian tax authorities as a legitimate use and not as treaty shopping.

To have the legitimate use accepted, the purpose of the offshore holding must be fully disclosed to the tax inspector.

iv Rulings in Advance

The tax-planning effects of an international holding structure can be submitted to the International Tax Department of the Austrian Federal Ministry of Finance on a no-name basis for a preliminary ruling. Such rulings can be obtained in two to four weeks. In addition, a binding ruling can be obtained from the local Corporate Tax Office, prior to implementation of the structure. Binding rulings are subject to an administrative fee.

v EU Parent Subsidiary Directive

Dividends paid by an Austrian company to its corporate shareholders resident in other member countries of the European Union remain untaxed both at the sending and receiving ends by virtue of the EU Parent Subsidiary Directive guaranteeing freedom of movement of capital inside the Internal Market. By carefully choosing the parent shareholding company of the Austrian company, the overall tax burden on both business profits and on the dividends of the ultimate shareholders may be reduced.

VII Group Taxation

If a profitable Austrian company is holding Austrian or foreign subsidiaries their losses can be consolidated with the profits of the holding company. The following conditions have to be met:

- Application for forming a tax group to be filed with the Tax Office and signed by all members of the group.
- The holding company as the head of the group has to have a controlling participation in the subsidiaries of 50% or more of the equity.
- The group has to be established for a minimum of three years and in the case that the group is terminated earlier, all tax advantages are reversed.
- The losses of the subsidiaries to be utilised by the group head have to be the subsidiary's own losses.

The group taxation regulation is aimed at encouraging and supporting the internationalisation of Austria's industry and business. There is no residence, nationality or other qualifying test for shareholders of the Austrian holding company or the group head. The Austrian holding company might well be held by non-resident shareholders. As a result, group taxation is an attractive feature for foreign investors.

AUSTRIA'S DOUBLE TAXATION TREATIES

AS OF 1ST APRIL 2013

	Treaty Limits on Withholding Taxes		
COUNTRY	**Dividends**	**Limits in % of Royalties**	**Interest %**
Albania	5/15	10	10
Algeria	5/15	10	10
Argentina	15/0	15	12.5
Armenia	5/15	5	10
Australia	15	10	10
Azerbaijan	1/15	10	10
Bahrain	0	0	0
Barbados	5/15	0	0
Belarus	5/15	5	5
Belgium	15	10/0	15
Belize	5/15	0	0
Bosnia-Herzegovina	10/5	5	5
Brazil	15	10/15	15
Bulgaria	0	0	0
Canada	5/15	0/10	10
China	7/10	10	10
Croatia	15	0	5
Cuba	5/15	5	10
Cyprus	10	0	0
Czech Republic	10	15	0
Denmark	10	0/10	0
Egypt	10/15	0	15
Estonia	5/15	10	10
Finland	10	5	0
France	0/15	0	0
Georgia	0	0	0
Germany	5/15	0	0
Great Britain	5/15	0/10	0
Greece	0/No limit	0/10	0/10
Hong Kong	10/0	3	0

	Treaty Limits on Withholding Taxes		
COUNTRY	**Dividends**	**Limits in % of Royalties**	**Interest %**
Hungary	10	0	0
India	10	10	10
Indonesia	10/15	10	10
Iran	5/10	5	0/5
Ireland	0/15	0/10	0
Israel	25	10	15
Italy	15	0/10	10
Japan	10/20	10	10
Katar	0	5	0
Kazakhstan Republic	5/15	10	10
Kuwait	0	0/10	0
Kyrgyz Republic	5/15	10	10
Latvia	5/10	5/10	10
Liechtenstein	15	10	10
Lithuania	5/15	5/10	10
Luxemburg	5/15	10/0	0
Macedonia (FYROM)	0/15	0	0
Malaysia	0/5/10	10/15	15
Malta	15/32.5	10	5
Morocco	10/5	10	10
Mexico	5/10	10	0/10
Moldavia	5/15	5	5
Mongolia	5/10	5/10	0/10
Morocco	5/10	10	10
Nepal	5/10/15	15	10/15
Netherlands	5/15	0/10	0
New Zealand	15	10	10
Norway	5/15	0	0
Pakistan	0/10/20	20/25	0
Philippines	10/25	15	15
Poland	5/15	5	5
Portugal	15	5/10	10
Romania	15	10	10

	Treaty Limits on Withholding Taxes		
COUNTRY	**Dividends**	**Limits in % of Royalties**	**Interest %**
Russian Federation	5/15	0	0
San Marino	0/15	0	0
Saudi Arabia	5	10	5
Serbia	15/5	5/10	10
Singapore	10	5	5
Slovakia	10	15	0
Slovenia	5/15	0/10	5
South Africa	5/15	0	0
South Korea	10/15	2/10	10
Spain	10/15	5	5
Sweden	5/10	0/10	0
Switzerland	5	5	5
Tajikistan	0	0	0
Thailand	10/20	15	0
Tunisia	10/20	10/15	10
Turkey	5/15	10	5/10/15
Turkmenistan	0	0	0
Ukraine	5/10	0/5	5
United Arab Emirates	0	0	0
USA	5/15	0/10	0
Uzbekistan	5/15	5	10
Venezuela	5/15	5	4.95/10
Vietnam	15/10/5	10/7.5	10

Austria has treaties with the following offshore centres as a result of which tax on interest accrued in non-resident accounts is withheld at source:

Andorra
Anguilla
Aruba
British Virgin Islands
Cayman Islands
Guernsey
Isle of Man
Jersey
Liechtenstein
Monaco
Montserrat
Netherlands Antilles
San Marino
Switzerland
Turks and Caicos Islands

- CHAPTER FOUR -

PROTECT YOUR KNOW-HOW AND IP

I Introduction

Industrial property protection in Austria deals with subjective rights to intellectual property. The proprietor of an intellectual property right is entitled to exclude third parties from the regulated use of this right, or claim an appropriate equitable remuneration.

In Austria, the principle of territoriality, codified in article 34 of the Act on International Private Law, is relevant to the protection of intellectual property rights. According to paragraph 1 of article 34, the coming into existence, content and expiry of immaterial goods are to be determined by the jurisdiction in which their use and/or infringement takes place. Holders of intellectual property rights acquired in Austria are protected only within Austria.

Intellectual property covers the fruits of commercially exploitable and entrepreneurial activities, as well as the protection of marks. The rights exist in various forms and are regulated in a number of legal acts. These acts are the subject matter of the following commentary and will be discussed in turn.

II Competition Law

Competition law is extensively regulated by the Unfair Competition Act. Competition law ensures that anyone who takes part in trade and commerce with the aim of promoting his or her own self-interest to the disadvantage of other competitors, does so without the use of illegal, unethical or unfair means.

A breach of intellectual property rights entitles the holder of these rights to claim damages and such claims, as well as applications to cease use and injunctions can be brought in the Austrian Commercial Courts. Where no enterprise exists or the enterprise is not domiciled in Austria, an action must be started at the place of the defendant's permanent residence. Failing this, local jurisdiction is passed onto the defendant's temporary domicile and in any other case, it is with the place of the original infringement.

III Trademark Act

The aim of the Trademark Act is to distinguish the goods or services of one enterprise from similar goods or services of another. A trademark makes known the origin of goods or services, or may serve to individualise a particular product.

It is a distinguishing mark that enjoys formal protection once registered in the Trademark Register. Contrary to other marks such as a company's name, a trademark is transferable and it can be separated from its founder. It is the individualising function of the trademark, rather than its outer appearance, that is protected by this legal area.

Trademarks fulfil the individualising function when they can be distinguished from other marks. The 'distinctiveness' required for a trademark may be of itself or acquired through commercial acceptance. Distinctiveness is exhibited when the mark can demonstrate a relatively high level of individuality, such as that found with few names and 'fantasy' pictures.

Some terms that lack this high level of individuality and have been accepted into everyday language, may, nevertheless, be recognised as distinguishing marks. However, ciphers, numbers, unpronounceable combinations of letters as well as generic names and descriptive statements lack distinctiveness.

Distinctiveness gained as a result of commercial acceptance occurs when a trademark is seen to represent a particular company, merchandise or certain service in the market place. The term 'commercial acceptance' may be locally or nationally defined. Where the registration of a trademark requires commercial acceptance, however, nationwide acceptance has to be proved.

When various trademarks collide, with the effect that one falls within the protective sphere of another, assuming all other necessary requirements for the protection of marks have been met, the mark with the later priority must give way to the mark with the earlier priority. The right of priority starts on the day an orderly application has been lodged. A danger of confusion arises when the use of a trademark allows it to be wrongly classified.

Whether such a mistake has arisen is a question of law and is judged objectively. A danger of confusion in its narrowest form takes place when both trademarks are connected to one enterprise. Such a situation means there is the danger that the trademarks may be confused with one another. This is termed 'direct' danger of confusion.

A different situation arises where, although the trademarks remain distinct, they may be assigned to the same firm due to their close similarities. This is termed 'indirect' danger of confusion. A danger of confusion in its widest form occurs when the trademarks involved are owned by different enterprises. Due to their similarities, however, a strong connection between the enterprises is assumed.

Trademark protection is established by registration with the Trademark Register. Registration is preceded by a written application to the Patent Office. The Patent Office undertakes a double test of legality, checking first the legality and then proceeding to test for similarities.

If the trademark is granted by the Patent Office, it is protected for a term of 10 years, which can be repeatedly renewed by re-registration. In accordance with article 29 of the Trademark Act, a trademark may expire for a number of reasons, first and foremost on the request of the trademark owner.

Expiration is also possible through lack of re-registration, as well as a decision of the Patent Office Revocation Division in answer to a request for cancellation. Cancellation grounds exist where:

1. Certain trademarks collide;
2. There are registration obstacles, such as the liquidation of the company involved; or
3. There is a failure to use a trademark appropriately within 5 years of its first registration.

IV Registered Design Protection

The Registered Design Act protects the external appearance (the aesthetically perceptible colour and form) of a product. The protection afforded by the presently applicable Registered Design Act should be clearly distinguished from the Industrial Design Act discussed below.

Only new designs are protected by the Registered Design Act. Article 2 provides a negative test to determine what is a new design. A design is not to be regarded as new, when it looks exactly like, or confusingly similar to, the appearance of an object that existed prior to the design's date of priority, and that was accessible by the public, and, obviously, when the object's appearance may be transferred to the object listed on the design's commodity classification.

All sensually perceivable objects that are absolutely and objectively new to the public are *per se* not new. Note, however, that the term "public" is not statutorily defined. A broad construction of the term is preferred, as to do otherwise would be to expand the realm of the Act to incomprehensible limits. The date of priority is defined as the date an orderly application has been lodged.

The principle of novelty, regulated in article 2, is subject to various exceptions. A disclosure that may injure the claim to novelty is inapplicable when it is not expressed 6 months prior to

the date of priority, and is concerned with either an obvious misuse to the disadvantage of the applicant, or the displaying of the design by the applicant (or his rightful successors) at an official or officially recognised trade fair.

Article 3 prohibits the possibility of dual protection. As a result of the principle of priority, older rights enjoy advantages in their protection over newer rights that are exactly the same as, or confusingly similar to their older counterparts. The Patent Office does not undertake a test of novelty during the registration process. Theoretically therefore, a new patent cannot impute protection until the first design has been declared void.

The principle of creator is valid in the protection of registered designs. Only the creators of a design, and their rightful successors, have a claim to the protection of the design. Thus, design protection is a transferable right under Austrian law. Note, however, that a design created by an employee for his employer during the term of employment belongs not to the employee but the employer. The exclusive intellectual property rights granted to the possessor of a design are codified in article 4.

Design protection is achieved by application. According to articles 11 and 12, a written application that includes a reproduction or a copy of the design takes place either at the Patent Office or at a Commercial Chamber. Each registration process checks that a design, as defined by the Registered Design Act, is present.

What is not checked, however, is the novelty of the design, whether there has been an infringement of the dual protection prohibition and whether the applicant has, in fact, a claim to the protection of the design. Once the copyright in the design has been awarded, the design is entered into the Design Register and the holder is awarded a certificate. Copyright in the design begins with the publication of the design and ends 5 years to the end of the month in which registration took place. Provided the renewal fees are paid on time, copyright protection can be twice renewed for further 5-year periods.

Copyright of a design ends by expiry of the protection, or by a Patent Office revocation of the design on the grounds that it is either obviously not new, or that it falls foul of the dual protection prohibition. It is also possible for an application of revocation to be made by an individual who believes a design to be contrary to the Registered Design Act. Copyright of a design may also be deprived of an individual when another alleges his entitlement to the protection.

V Patent Law

Products that demonstrate high levels of inventive thought come within the jurisdiction of the Patent Act, and are protected by letters of patent.

Inventions with significant ethical relevance for society at large, such as unethical inventions and inventions within the biological and medical realms are not patentable. However, Austria has implemented the directive 98/44/EC of the European Parliament and of the Council of 6th July 1998 on the Protection of Biotechnological Inventions.

As a result of the implementation, inventions involving biological material are capable of being patented, however with the exception that the human body in all its phases of formation and development is not patentable.

Inventions relating to plants and materials are only patentable provided they are not restricted to a particular plant or animal variety. This scope of protection of a patent on biological material also extends to the next generation derived from the protected material either by way of propagation or by way of multiplication.

Only the inventor and his rightful successors can claim for the issuing of a patent. A claim is established through the registration of a patent. Until otherwise proved, the first applicant will be deemed to be the inventor. A test as to whether or not the applicant is in fact entitled to patent the invention is not undertaken.

Where two inventions have been simultaneously invented, only the first applicant's invention is patented. If it can be shown, however, that at the time of registration the individual of the simultaneously achieved invention had *bona fide* use of his invention in Austria, or had made serious preparations for the commercial exploitation of the product, he will qualify as a prior user.

The effects of the first applicant's patent do not affect the prior user's rights. The latter is empowered to continue using the invention in the method and to the same extent adopted prior to the priority date. Usage of the product is firmly restricted to its prior operation. The prior user's opportunity to obtain a patent grant re-occurs when the first applicant's registration fails to patent the product.

An employee invention occurs when an invention is attributed to an employee and is invented within the working sphere. It must either be undertaken as an obligatory service at the suggestion of the enterprise, or is one that has been made substantially easier by the support or the experience of the enterprise.

In principle, the employee may claim for a patent grant under article 6 clause 1 of the Patent Act. This entitlement is not subject to a contrary agreement by the parties. The employer may claim the inventions of employees, however, where the contract of service is of a public law nature or where the parties of a private contract reach an agreement to this effect.

The registration of an invention as a patent requires a written application to the Patent Office in Vienna. The applicant gains a right of priority as a result of successful application. The Patent Office undertakes a preliminary investigation for formal and material defects.

If no defects arise, the patent is published in the *Austrian Patent Gazette* and is left open for four months from this date to general examination. Third parties are given the opportunity to make claims against the granting of the patent. If no such third party claim is made, the patent will be deemed as granted with the expiry for the four-month time limit. At this point, the patent is entered into the patent register and published for the attention of customers in the *Patent Gazette*. A certificate is awarded to the holder and the printed patent specification is published.

The maximum term given to patents is 20 years from the date of registration. The owner of a patent is entitled to licence the invention to third parties at his own free will. Austrian patent law also provides for compulsory licences.

An administrative authority may demand such licences, where the proprietor of an independent invention of immense commercial significance requires the use of an older patent to fully exploit the new invention. The same is true for the owner of the older patent, who is entitled to demand a licence for the independent patent. A compulsory licence may also be appropriate where the patentee does not appropriately exploit the patented product and where exploitation is within the public interest.

In the area of biological material, a compulsory license can be obtained if a breeder cannot achieve the development of a further plant variety without infringing a prior patent. The breeder is able to obtain a non-exclusive license for the patent provided the plant variety constitutes a significant technical progress of considerable economic value compared to the patent and provided the license is necessary to exploit the plant variety.

A patentee's exclusive right to prohibit third parties from the use of the patented product is codified in article 22 of the Patent Act and is, following the principle of territoriality, restricted to Austria.

Article 46 holds that a patent is extinguished by:

- Expiration of the 20 year term; or

- Failure to pay the annual fee, by surrendering the patent or, in accordance with article 33 clause 1, as a result of the intestate death of a patent holder.

According to article 47, a patent may be totally or partially reversed to ensure that the invention is utilised to an appropriate extent within the country.

It is also possible to declare a patent void. The requirements are that:

- The object was in fact not patentable;

- The patent does not fully and clearly disclose the invention thus allowing it to be executed by an expert; or

- The micro-organisms deposited were not permanently accessible to the public.

Moreover, an application to deprive a patentee of a patented product can be made successfully where the patentee does not have a claim to the grant of the patent or is guilty of taking a substantial part of the invention from the documents of another without the latter's approval.

The cancellation of a patent takes place in an action for cancellation, and is regulated by the corresponding civil law procedures.

VI Industrial Designs Protection

The Industrial Design Act seeks to protect new industrially expedient technical designs that do not fulfil the level of novelty required under the aforementioned Patent Act. Protection afforded by the Act is especially useful for economic goods that often enjoy only short lived and temporary legal protection.

The Act's jurisdiction corresponds to that of the Patent Act, but is extended to take into account the programming logic that forms the basis of data processing programs. The Act does not apply to plants, animals and biological material or methods of their breeding. As applications for industrial design protection are not examined at all, their protection would seriously impair biotechnological innovations.

Pursuant to article 18 of the Industrial Design Act, registration occurs at the Patent Office. The Office merely establishes the formal requirements in a test of legality. It does not, however, look into the novelty of the invention or the validity of the applicant's claim to the protection of the industrial design. The Patent Office checks the technical stand of the invention, and compiles a report which is then conferred upon the applicant seeking registration. The latter has the opportunity to speed up the process by requesting the immediate drawing up of the report.

Once the requirements for registration have been met, the invention is filed in the Registered Design Register and published in the *Registered Design Gazette*.

A registered design application may be transformed into a patent application, so long as this occurs within two months of the research report. This is advantageous to an applicant from whose research report it emerges that a registration of a patent is promising.

A right of priority is awarded to the applicant on the day an orderly application has been lodged. The term of protection is shorter than that obtainable under Patent law. It commences with the official publication of the industrial design, and ends, at the very latest, 10 years to the end of the month in which the registration took place. Legal actions brought under the Registered Design Act are heard at the Commercial Court of Vienna, which has exclusive jurisdiction in this area.

According to article 28 of the Industrial Design Act, anyone can contend the nullity of a registered design, basing their contention on either one of the following grounds:

1. The design does not fall under the protection of the Industrial Design Act,
2. The design cannot be executed without an expert; or
3. The content of an earlier application to obtain design protection for an object is not consistent with the application that is presented at registration.

An individual claiming to be the rightful possessor of a registered design is entitled to petition that the right be deprived from the alleged possessor, and be transferred to him.

VII Semiconductor Chip Design Protection

Developers of microelectronic semiconductor chip products (topographies) are protected under the Semiconductor Chip Act from the reproduction and/or exploitation of the topography by third parties.

The registration process under this Act also takes place at the Patent Office. Once again, the registration process is focused on the ascertaining of formal requirements. Material requirements for the protection of a semiconductor chip are not tested. Once all requirements for registration have been met, the semiconductor chip protection right is registered in the Semiconductor Chip Register without further examination and published in the Patent Register.

According to article 8 clause 1 of the Semiconductor Chip Act, protection does not simply begin with the confidential commercial exploitation of the topography, (provided this is registered within two years). Neither does it arise on the date of registration at the Patent Office, given that the topography has not been previously exploited, or has only been exploited within confidential commercial circles.

Protection commences only once the semiconductor chip has been entered into the Semiconductor Chip Register. Article 8, clause 2 of the Semiconductor Chip Act makes it clear that this protection expires at the close of 10 calendar years starting from the year in which protection was first awarded.

In accordance with article 12 of the Semiconductor Chip Act, the protection afforded by the Act is transferable and inheritable.

The Commercial Court of Vienna has exclusive jurisdiction for actions based on the Semiconductor Chip Act. According to article 13 of the Act, anyone can attack the validity of this protected privilege. Grounds of nullity arise where the topography was not capable of being protected or when the claim to protection of a semiconductor chip has expired.

According to article 4 of the Act, the latter occurs where the topography has not been used outside the confidential commercial sphere of activity for 15 years after the first recording, or where the topography was not registered at the Patent Office. It is also possible for nullity to be declared where authorisation, as established by article 5 of the Act, was lacking or had subsequently been abolished. Authorisation is restricted exclusively to natural persons who are citizens of, or residents in, the European Union (EU) or European Economic Area (EEA) countries, as well as those legal persons with actual establishments in these countries.

Semiconductor chip protection may be declared void by application, when supporting documents to the report do not in fact correspond with the report. The person (or party) who is, in fact, the actual possessor of the topography, is also entitled to claim that the rights be deprived of the alleged owner and transferred to him.

VIII Copyright Law

The Copyright Act protects intellectual property creations in the literary, musical, artistic, and cinematography fields. Moreover, the Act guarantees the protection of activities, such as artistic performances, photography, the carrying of sounds or images, broadcasting, and the news.

The term "author" is attributed to the creator of the work. There is a presumption that the individual that is indicated as the author of a work is in fact the author of the work. Austrian copyright law is based on individual exclusive rights to exploit copyrighted work, so long as no legal restrictions exist.

Pursuant to article 24 of the Act, an author can authorise third parties to exploit the creation in a regulated manner. The provision also makes it possible for the author to transfer exclusive exploitation rights to a third party.

In the latter case, the author maintains his right to legally contend any breaches to the copyright, but he must refrain from using the work. The exclusive rights of exploitation are heritable, as well as alienable.

Copyright durations awarded to works of literature, music, and fine art are determined by whether the author of a work will be so characterised on the basis of the presumption of authorship, and whether or not the copyright was registered with the Copyright Register maintained by the Federal Ministry of Justice.

The Federal Ministry of Justice does not test the authority of the applicant seeking registration or the correctness of the facts made. If the author's rights are registered within 70 years of the work's creation, his copyright protection is given a 70-year time limit that commences on death, irrespective of whether or not the author can be classified in a manner that grounds his presumption of authorship. If, however, the author fails to register his copyright and the latter does not fall into one of the classified categories that establish a presumption of authorship, the copyright expires 70 years after the creation of the work.

Copyright protection for cinematography works expires 70 years after the death of the last living director, screenplay author, dialogue author, or creator of musical works specially requested for the film.

The scope of protection of the Copyright Act encompasses authors of Austrian citizenship, irrespective of where their work is first produced. At the same time, all work that is produced within Austria is protected by the Act in accordance with article 95. In principle, foreign authors whose works are not produced in Austria or based on Austrian-owned property may benefit from the Act's protection, so far as protection from their own countries, equivalent to the Act's protection, reaches them.

IX Domain Names

The protection of domain names, the alphanumerical chain of symbols formed to construct an Internet address, is a relatively new legal area still under development. Each domain can be represented only once on the Internet and, thus, it is important to guarantee that only the chosen addressee is reached through the given address. This legal area has yet to be codified in Austria.

At present, the intellectual property rights resulting from the use of domain names are protected by the Austrian competition law regime. "Domain-grabbing" occurs when a person engaging in trade deliberately acquires a domain name, with the intention of sabotaging the costly prior efforts of a competitor by using the name for his own business purposes or by exploiting his gained position at the expense of his competitor. This is considered unethical under article 1 of the Unfair Competition Act.

A claim in deception can be made when another label is used as the domain name, thereby misrepresenting the origin and, thus, the qualities of the economic performance. A domain user is acting in bad faith in the sense of article 9, clause 1, and is liable to pay damages when he uses the domain name in a manner that arouses confusion. An enterprise that registers a domain name as its website address uses this as an enterprise sign in the business market. A danger of confusion occurs when the use of the domain name brings about the danger that it may be wrongly associated with a particular enterprise.

There is presently, however, no trademark or distinguishing mark protection for domain names. Thus far, they have not been ascribed any distinguishing mark-like effects. It remains to be seen whether domain names, which currently merely specify a machine rather than a person, addressee, or sender of a message, may be treated as distinguishing marks in the future, thereby allowing users to freely choose the expressive force of distinguishing marks for themselves. As a consequence of the present value attributed to domain names, no analogy is drawn to marks that cannot prove distinctiveness and are thus prevented from

trademark registration, in accordance with article 4, clause 1, sentence 3, of the Trademark Act.

The holder of a domain name is only entitled to the exclusive worldwide use of the domain name. There is no established right, however, to prevent third parties from using the domain names for purposes other than the registered use of the domain name. Registration of a domain name occurs at the head office of the NIC.AT Internet Verwaltungs- und Betriebsgesellschaft mbH, based in Salzburg, Austria. Private law contracts are signed for the purposes of registration. It is not possible to merely reserve a domain name. Note that the registration of a domain name does not require any proof of Austrian citizenship; nor does the domain user have to be resident or headquartered in Austria.

- CHAPTER FIVE -

LABOUR AND EMPLOYMENT

I Introduction

Austria has comprehensive legislation covering all aspects of labour law. The main sources are:

1. *General Civil Code (ABGB).* The Code, in particular Articles 1151 to 1164, sets out basic provisions on the employment relationship.
2. *Labour Constitution Act (Arbeitsverfassungsgesetz).* This Act provides basic provisions on collective employment law. Of particular importance is the legislative authority contained in the Act to enter into collective agreements and enterprise agreements.
3. *Statutes on aspects of labour law*. There are a considerable number of statutes regulating various aspects of labour law such as holidays, employment of foreigners and employee liability.
4. *Statutes on types of employees*. There are separate statutes regulating different types of employees e.g. manual workers, agricultural workers, salaried employees, domestic workers, public servants and apprentices. Covering the most important and central aspects of the employment law relationship for non-manual workers is the Salaried Employees Act (Angestelltengesetz). Unless otherwise stated, the provisions of the Salaried Employees Act shall be referred to.

II Contract of Employment

i Form

There are no specific statutory requirements as to the form of a contract of employment. It may therefore be either in writing or oral. However, according to a 1993 Act (Arbeitsvertragsrechts-Anpassungsgesetz), where there is no written contract of employment, an employer is required to give the employee a written statement (called 'Dienstzettel') of the most important terms of the employment agreement, i.e. the starting date, the period of employment (if there is one), salary, holidays, termination terms etc.

ii Hiring

a Preferential Hiring

According to the Employment of Invalids Act (Behinderteneinstellungsgesetz) a certain number of disabled persons must be employed, at present at least one disabled person for each 25 employees. Failure to comply with this results in a payment obligation in lieu to the Federal Ministry for Labour, Health and Social Affairs.

Other than that, there are no other requirements to give preference to any particular person or group of persons when hiring.

b Foreign Nationals

The Employment of Foreigners Act (Ausländerbeschäftigungsgesetz) applies to the hiring of foreign nationals and contains restrictions on their employment. Except for a stated number of exceptions, e.g. refugees who have been granted asylum, diplomatic and consular workers, guest lecturers at Austrian universities or art academies and schools, European Commission workers, citizens from the European Union or EEA

countries, foreign nationals may not be employed in Austria without first obtaining a work permit.

A work permit will only be granted to a foreign national if certain conditions apply. In particular, the labour office and authorities dealing with residency permits will check the terms of the proposed employment provisions, the accommodation proposed for the employee, whether the current position and development of the employment market would permit the employment, to ensure that the employment does not conflict with any public or national economic interests.

c Discrimination

There is also an Equal Treatment Act (Gleichbehandlungsgesetz) which forbids discrimination of the basis of sex, age, religion and otherwise with regard to all terms of employment, including hiring.

iii Contents

a Terms Required or Imposed by Law

Minimum Notice Period

The minimum notice periods fixed by the law depend on the provisions governing the employment relationship and on the length of time the employee has been in the current employment.

For salaried employees, the periods which must be observed by the employer are as follows:

0–2 years	6 weeks' notice to the end of the quarter of the year	
2–5 years	2 months' notice	"
up to 15 years	3 months' notice	"
up to 25 years	4 months' notice	"
more than 25 years	5 months' notice	"

These notice periods may be varied, but not reduced, by collective bargaining agreements or by agreement between the employer and employee. For example, it can be agreed that notice can be given to the 15th or to the end of every month instead of only to any quarter of a year.

Salaried employees must observe a notice period of one month to the end of each month. However this period can be shortened or extended up to a period of six months as long as the period to be observed by the employer is not shorter than the period to be observed by the employee.

According to the Business Licence Act and the General civil Code, employment relationships with manual labourers can be terminated under observance of a 14-day notice period. However most collective bargaining agreements provide for longer notice periods which depend on the length of time the employee has been employed. In any case, the notice periods for the employer and the manual labourer must be the same.

Maximum Working Hours

According to the Working Hours Act (Arbeitszeitgesetz), in general, an employee may not work more than eight hours a day or 40 hours per week. Any hours worked in excess of these hours will be deemed overtime and subject to additional compensation at a marked-up rate.

The maximum working hours may be varied, but not increased, by way of collective agreements. The usual working hours fixed according to most collective agreements are

at present 38.5 hours per week. As a result of the liberalization of the markets, the Working Hours Act has been amended to include complex provisions on flexible working hours which fix maximum average working hours over longer periods of time. Various collective bargaining agreements in specific industries allow longer working hours if required by the nature of the business, as long as the average maximum hours over a certain fixed period are not exceeded.

Minimum Wages

There is no fixed statutory minimum wage. Minimum wages are fixed in the collective agreements.

If no minimum wage is fixed in the applicable collective agreement and no fixed salary is contained in the employment contract, the salary paid to the employee must be reasonable (Art. 1152 ABGB).

Minimum Holidays

According to the Vacation Act (Urlaubsgesetz) and National Holidays Act (Feiertagsruhegesetz), employees are entitled to the following minimum vacation and holidays per year:

(i) 25 working days for employees working Monday-Friday and who have worked continuously for the same employer for up to 25 years;

(ii) 30 working days for employees working Monday-Friday and who have worked more than 25 years continuously for the same employer;

(iii) All national holidays which are fixed by law. If such holidays fall on a Saturday, if that is not a working day for the employee, or a Sunday, then no day may be taken in lieu. Any person who is required to work on such a day will be remunerated additionally for that time. An increased payment will be made only if agreed between employer and employee or if provided for in the applicable collective agreement.

Maternity/Paternity Rights

The Mothers Protection Act (Mutterschutzgesetz) and the Fathers Leave Act (Väter-Karenzgesetz) contain rights of both mother and father: The Mothers Protection Act provides specific protection during pregnancy:

(i) Expectant mothers may not carry out any hard physical work, work that involves particular burdensome odours, physical burdens or work that implies a risk to the health of the mother or the child.

(ii) Expectant mothers may not work with dangerous substances, dangerous rays or work with the damaging effect of heat, cold or wet.

(iii) Work in which the salary earned by a person is dependent on the level of her performance is not permitted for pregnant women after the 20th week of pregnancy.

(iv) Expectant mothers may not carry out work which requires continuous sitting or standing unless they can take short breaks.

(v) Expectant mothers may not work at places where there is smoking unless the employee is a smoker herself, always provided this is possible at all in respect to the type of business.

(vi) Expectant or nursing mothers may not work overtime, total weekly hours must not exceed 40 hours and total daily hours must not exceed nine hours.

(vii) Night work and work on Sundays and public holidays is permitted only in certain circumstances set out in the Act.

(viii) Pregnant employees may not work at all for the eight weeks prior to the expected date of birth and eight weeks after confinement, referred to as 'the protection period' (Schutzfrist). If the protection period before the birth is reduced, the period after the birth can be increased to 16 weeks.

Parental leave is permitted as follows:

(i) One parent or both parents in turns lasting at least two months may take parental leave up to the second birthday of the child. The total term of the leave may be split between the parents twice.

(ii) If a parent takes full time parental leave for a year after the birth, one parent or both parents, in turns lasting at least two months, may take further part-time leave for two years up to the child's third birthday.

(iii) If one parent takes full time parental leave for a year after the birth, both parents may work part-time for a further year.

(iv) If no parental leave is taken, then both parents may work part-time in turns of at least two months up to the seventh birthday of the child.

An employer may not give notice of termination during the employee's pregnancy and until four months after confinement. If an employee takes paternal leave, he is protected from notice of termination until the end of four weeks following that leave unless the prior consent of the Labour Court has been obtained.

Night Work

According to the EU Night Work Adjustment Act ("EU-Nachtarbeits-Anpassungsgesetz"), persons who regularly or during 48 weeks per calendar year work at least 3 hours between 10 p.m. and 5 a.m. are entitled to additional rest periods, free health examinations and, under certain conditions, transferral to a day job.

Leave of Absence for Military or Other Public Service Duties

According to the Security of Job Positions Act (Arbeitsplatzsicherungsgesetz), an employer must release an employee from his duties if the employee has received an order that he attend military service.

An employee who has been drafted to do military service may not in principle be given notice from the time of the announcement or service of the drafting order until the expiry of one month after the end of the military service. An employee must inform the employer of the announcement or service of the drafting order without delay. Otherwise, military servicemen may only be given notice on limited grounds and with the prior consent of the Labour Court (Article 12 (3) Security of Job Positions Act).

Confidentiality of Employer's Secrets

The duty of an employee to keep confidential his or her employer's operational and business secrets is contained in the following statutory provisions:

(i) The Business Code (Gewerbeordnung) contains provisions on the duty of confidentiality imposed on manual labourers, factory workers and apprentices.

(ii) Art. 115 (4), Labour Constitution Act contains the duty of confidentiality owed by members and representatives of members of the Workers' Council.

(iii) Art. 11, Unfair Competition Act (Unlauteres Wettbewerbsgesetz) provides that any employee who breaches his or her duty of confidentiality with regard to the employer's operational or business secrets may be convicted and sentenced to up to three months' imprisonment or a fine of up to 180 days' income.

(iv) The breach of an obligation to secrecy by a salaried employee can constitute grounds for immediate dismissal (Article 27 fig. 1, Salaried Employees Act).

Non-compete Clause

Post contractual non-compete clauses are permissible under Austrian law and can be entered into with both salaried employees and manual workers. The requirements are as follows:

- The employee must be at least 18 years of age.
- The restriction must be in the field of the employer and must not last longer than one year. Non-compete clauses can include restrictions with regard to employed as well as self-employed activities of the employee.
- The non-compete clause must be reasonable. Essentially, the employee may not be restricted to such an extent that he/she is forced to give up a trained profession and change his/her field altogether. If the employee has the possibility of performing his/her job in another field, or another geographic area, the non-compete clause will usually be deemed valid.

An employer can only rely on a post-contractual non-compete clause if the employment is terminated by the employee by no fault of the employer, or if the employee behaves in such a manner that would give grounds for immediate termination. In all other cases the non-compete clause is enforceable only if the employer continues to pay the salary of the former employee during the non-compete period.

The parties can agree that an employee must pay a penalty if he/she breaches the non-compete clause. If the employer insists on payment and the employee pays the agreed amount, he/she is then free to work for a new employer. The court can reduce the amount under certain conditions, the main case being that the amount is unreasonable.

The non-complete clause is only enforceable provided the employee was earning EUR 2,400 during the last month of employment.

b Fixed Term Contracts

An employment contract for a fixed term is valid under Austrian law. However, it is not generally possible to enter into a series of employment contracts for limited periods. Unless special economic or social reasons are present, such a series of contracts will be deemed to be a chain employment contract and thus ineffective as fixed period contracts. The employment relationship will be deemed to be employment for an indefinite period. As a result, notice periods have to be observed.

c Employment for a Probationary Period

Employment for a probationary period for up to one month is permitted under Austrian law. During this time, the employment contract may be terminated by either party at any time (Art. 19 (2), Salaried Employees Act and Art. 1158 (2), ABGB) without giving any reason.

It is not possible to add one probationary period to another, thereby extending the probationary period beyond one month. Any probationary period of more than one month will be deemed to be a valid one month probation, which may be terminated at any time, followed by a fixed term contract for the remaining period.

Unless specifically provided for in the applicable bargaining agreement, a probationary period must be expressly agreed upon.

d Contracting Out of any Right to Compensation or Indemnity on Termination

Any contracting out of a right to compensation or indemnity upon termination will be deemed invalid.

e Freedom to Agree Provisions

The employer and employee are free to agree on contractual provisions which are not otherwise regulated or compulsory by statute or by collective agreements. For example, the parties may agree on extended periods of notice, longer vacation, additional travel allowances, enhanced redundancy rights, stricter confidentiality provisions, anti-competition covenants, etc.

iv Foreign Employees

The legal requirements relating to the form and content of employment contracts apply to all employment contracts in Austria. No distinction is made in this regard between contracts with foreign national employees and with Austrian employees.

Also non-resident employers, e.g. representative offices of foreign companies which employ staff in Austria or relocate staff to Austria are subject to Austrian labour law.

III Termination of Employment

i General

a Form of Termination

Unless otherwise provided for in the employment contract or in the applicable collective agreement, a notification of termination of employment need not be in writing. However, the notification of termination must be clearly given and the words 'notification of termination' ('Kündigung') or 'giving notice of termination' ('kündigen') must be used.

b Length of Notice

The length of notice to be given by the employer and the employee will depend on various factors:

a) Minimum notice periods as fixed by law (see II.iii.a above).

b) The minimum notice periods may be provided for in the applicable collective bargaining agreement and/or the terms of the employment contract.

c) The maximum notice period available to be given by an employee is six months.

d) The length of notice to be given by the employer may not be less than that given by the employee. There is no cap on a maximum period.

e) In contracts for a definite period the contract may provide that it may not be terminated at all during its period of validity unless grounds for immediate termination arise.

c Salary in Lieu of Notice

Except in the case of immediate dismissal, both the employer and the employee must always give the applicable notice of termination and the employee has the right to be paid his or her salary until the end of the notice period. However, it is possible for the employer to release the employee from his or her duties during this period. This may only be done at the discretion of the employer and not the employee.

d Informing the Workers' Council

In enterprises where a workers' council has been established, the employer must inform the workers' council about any proposed termination of an employee at least five working days before giving notice of termination. The workers' council has the right to give its opinion or request consultation. Notice which is given prior to the workers'

council having been given five days to give its opinion is invalid. When the workers' council has raised objections against the termination but the employer has nevertheless terminated the employee, the termination can be appealed at the Labour Courts within one week by the workers' council. If the workers' council has not objected to the termination or has refrained from making an appeal, the employee can appeal to the court. Possible grounds for appeal are illicit reasons for the termination or its violation of social justice.

e Protected Employees

There is a certain number of protected employees. Employees who are on sick leave for any reason are not protected from having their employment terminated. However, the following types of employees are to a certain extent protected from having their employment terminated.

Members of Workers' Councils and Youth Welfare Councils established for Larger Business Concerns

The prior consent of the Labour Court must be obtained before notice can be given. Consent will only be given if:

(i) the business operations have been stopped or limited either wholly or in part and the relevant member cannot be employed further; or

(ii) the member is not able to carry out the work he or she was contracted for and it is not expected that he or she will ever be able to do this; or

(iii) the member has persistently breached his or her employment duties.

Workers within the Scope of the Protection of Mothers and Fathers Leave Act

As a general rule, effective notice may not be given to female workers from the commencement of their pregnancy to the expiry of four months after the birth. If either the mother or the father makes use of the right to take parental leave they may not be given notice during the leave and up to the expiry of four weeks after the end of such leave.

Exceptions are:

(i) if the female employee does not notify the employer of her pregnancy within five working days after notice of termination of her employment has been given, or if

(ii) the prior consent of the Labour Court has been obtained.

Military Servicemen

Those employees who have been drafted for military service may not be given notice from the time of the announcement or service of the draft order until the expiry of one month after the end of the military service. This protection will not apply if the employee fails to inform the employer of having been drafted without delay after receipt of the order. Otherwise, military servicemen may only be given notice for limited reasons (Article 12 (3), Security of Job Position Act (Arbeitsplatzsicherungsgesetz) and with the prior consent of the Labour Court.

An employment contract for a definite period will expire on the last date irrespective of whether the employee is carrying out his military service at that date.

Apprentices

An apprentice is given a fixed term contract. It can be terminated only on limited grounds i.e. expiry of term, the apprentice passing all examinations or death or incapacity of the master or apprentice.

An apprenticeship may be terminated by consent which must be in writing. If the apprentice is under age, i.e. younger than 18, mutual termination is subject to the consent of his or her guardian.

Unilateral termination by either party must be in writing and only for the reasons stated in the Act.

Invalids and Victims of Political Persecution

Such employees may only be given notice upon receiving the consent of the Invalids Committee, an administrative department of the provincial Disabled Persons' Office, after a hearing has taken place.

A notification of termination to any of the above in breach of the rules concerning termination will be deemed ineffective and the employment contract will continue to apply.

f Older Employees

Older employees who have been employed by the same employer for at least six months can appeal against their termination at the Labour Courts within one week of termination – even if no workers' council has been established – based on violation of social justice. In cases where the employer first hired the employee when the employee was above 50 years of age, two years of service are required.

g Factors Relating to Termination

Factors such as salary, seniority and age, except for those factors listed above, do not have any effect on termination.

h Mandatory Laws

The laws on termination of employment may be varied to a certain extent by collective agreements and the employment agreement itself. The limitations are as follows:

(i) The period of notice given must not be less than the minimum statutory periods.

(ii) The period as given by the employer may never be shorter than the period to be given by the employee.

(iii) An employee in general cannot effectively contract out of his statutory entitlements upon termination.

ii Termination Without Notice

a Where Permitted

An employment contract may be terminated without notice only for an important reason.

Termination by Employer

An important reason sufficient to justify instant dismissal of an employee is if that employee has caused serious detriment to the employer's interests.

What amounts to behaviour considered a good reason for termination will depend on whether the employee is a manual worker ('Arbeiter') or a salaried or non-manual employee ('Angestellter').

- **Manual worker**:

  According to the Business Code (Gewerbeordnung) a manual worker can be dismissed immediately if he/she

(i) presents false papers or gives false information about his/her other employment;

(ii) has proved to be incapable of carrying out the work contracted for;

(iii) becomes habitually drunk and is warned about this on several occasions without effect;

(iv) steals, misappropriates funds or commits any other punishable offence which makes him/her unworthy of the employer's trust;

(v) betrays a business or operational secret or carries out other business which is detrimental to his/her employment without the permission of the employer;

(vi) leaves his/her work without authorisation or neglects his/her duties persistently or attempts to incite the other employees to

1. disobedience or insubordination against the employer; or
2. misconduct; or
3. act in an immoral or illegal manner;

(vii) 1. commits a serious defamation, physical injury or dangerous threat against the employer, his or her dependants or the other employees of the same business;

2. goes about carelessly with fire and light although he/she has been previously warned about this;

(viii) 1. suffers from repulsive illness; or

2. is unable to carry out his/her work through his own fault; or

(ix) is imprisoned for more than fourteen days.

- **Salaried employee:**

According to the Salaried Employees Act (Angestelltengesetz), a salaried employee may be dismissed if he/she

(i) is disloyal in his or her employment, enables or allows unauthorised advantages to third persons while carrying out his work without the knowledge or consent of the employer or commits an act which makes him or her unworthy of the trust of the employer;

(ii) is incapable of performing the promised services or those services considered reasonable in the circumstances,

(iii) without the consent of the employer

1. carries out an independent commercial business; or
2. makes transactions for his/her or another's benefit in the premises of the employer, or
3. for employees of a trader, breaches a prohibition against competition;

(iv) 1. fails to carry out his work duties for a lengthy period without a legal reason, or

2. persistently refuses to carry out his/her duties; or
3. does not carry out the authorised instructions of the employer; or
4. tries to induce other employees to disobedience against the employer;

(v) 1. serves a lengthy term of imprisonment; or

2. is absent from work for a considerable period unless for an illness or injury;

(vi) commits an act of violence, breach of morality or serious defamation against the employer, his or her representatives or family members or other employees of the same business.

These grounds for dismissal are not exhaustive if other serious reasons exist.

Termination by Employee

- **Manual worker:**

  According to Article 376(47) of the present Business Code and Article 82a of the previous Business Code, a manual worker may leave the employment without notice if:

  (i) he/she is not able to continue working without seriously damaging his/her health;

  (ii) the employer commits an insult or a serious defamation against him/her or the members of his/her family;

  (iii) the employer or members of his family attempt to incite the employees or the members of their families to act in or carry out immoral or illegal activities;

  (iv) the employer improperly withholds the agreed salary or breaches other essential provisions of the contract;

  (v) the employer is not able to or refuses to give the employee his earnings.

- **Salaried employee:**

  According to Article 26, Salaried Employees Act an important reason entitling an employee to leave his or her employment without notice is present if:

  (i) the employee becomes incapable of carrying out his/her duties or cannot do this without damaging his/her health or morals;

  (ii) the employer reduces or withholds improperly the salary owing to the employee, disadvantages him/her with regard to his/her perquisites by imposing unhealthy or insufficient food and unhealthy accommodation or breaches other essential terms of the contract;

  (iii) the employer refuses to carry out obligations he/she is obliged to carry out according to law to protect the employee's life, his/her health or his/her morals;

  (iv) the employer commits insults, damage to the morals of or serious defamations against the employee or his/her family members or refuses to protect the employee or his family members against such actions.

b Where not Permitted

The termination of employment without notice is not permitted without important reasons. In the case of improper termination, the following rights arise:

For the Employer:

A claim for damages arises. Assessment may, of course, be rather difficult.

For the Employee:

As a general rule, even if the termination is found to be improper there is no right of reinstatement. Rather, the employee is entitled to claim as follows:

(i) Damages. This is calculated as salary for the period to the end of the employment contract by way of ordinary notice which would have to have been given by the employer. For the first three months it is calculated without regard to any new employment but for the rest of the time, salary received in the new employment will be taken into account (Article 29 (1), Salaried Employees Act, Article 1162(b), General Civil Code).

(ii) Pro-rata vacation compensation. This is calculated on the basis of the vacation allowance for a year which has not been used, and the point during that year when employment ends.

(iii) Proportionate share of the Christmas remuneration, additional holiday payment (the 13th and 14th salaries) and other remunerations allowed under Austrian law.

(iv) Any applicable severance pay or as agreed, (see D.1.a.iv) below).

iii Termination With Notice

a Where Permitted

Provided that termination with notice is permitted, there is no requirement to show cause or good reason in order to give notice. The only requirement for such termination is that the proper period of notice is adhered to and the notice itself is properly given. See III.i.b.

b Where not Permitted

Termination with notice will not be permitted unless certain conditions are met in the following cases:

Multiple Terminations

Every employer must notify the relevant government employment office (Arbeitsmarktservice) in writing not less than 30 calendar days before, if within a 30-day period

(i) in businesses with 21–100 employees, the employer intends to terminate five or more employees,

(ii) in businesses with 100–600 employees, the employer intends to reduce the number of employees by at least 5 per cent,

(iii) in businesses with more than 600 employees, the employer intends to reduce the number of employees by at least 30, and

(iv) in any businesses, the employer intends to terminate five or more employees above the age of 50 years.

The notification of termination procedure may then only take place upon obtaining the approval of the employment office.

Please refer to III.i.e above with regard to the following:

Members of Workers' Council.

Workers within the Scope of the Protection of Mothers Act and Fathers Leave Act.

Military Servicemen.

Apprentices.

Invalids and Victims of Political Persecution.

iv Legal Consequences for Employer and Employee on Termination

a Rights of Employee on Termination by Employer

Termination on Notice

When the employee's contract has been terminated by the employer, he or she has certain minimum entitlements:

(i) A certain amount of free time each week to seek new employment. This time is often fixed by collective agreements and in any event the Salaried Employees Act states that an employee is allowed at least eight hours per week to seek new employment, unless the employee is the party who terminated the contract.

(ii) Wages to the end of the applicable notice period. If the employer does not comply with the notice period, the employee is in any event entitled to those wages.

(iii) Pro-rata vacation leave not yet taken. This is calculated on the basis of the vacation allowance for a year which has not been used and the point in time during that year at which employment ends. Proportional share of the Christmas remuneration holiday payment and other remunerations due under Austrian law, including any variable compensation.

(iv) Severance payment scheme. In general, severance payments have been abolished for all employees who commenced their current employment on or after 1 January 2003.

Employees who began work before that date and whose employment contract is terminated either by the employer giving notice, by mutual agreement between the parties or by the employee for a valid reason and who have worked with the same employer for at least three years are still entitled to a statutory severance payment ('Abfertigung'). The amount will depend on the period the employee has worked and is calculated as follows:

Employment	*Severance*			*pay*
after 3 years	2	monthly	remuneration	payments
after 5 years	3	monthly	remuneration	payments
after 10 years	4	monthly	remuneration	payments
after 15 years	6	monthly	remuneration	payments
after 20 years	9	monthly	remuneration	payments
after more than 25 years	12 monthly remuneration payments			

The 'monthly remuneration payment' is the average amount an employee received per month, including pro-rata 13th and 14th salaries, bonus payments, payments for regular overtime, commissions etc.

In case of dismissal by the employer for a valid reason or in case of ordinary termination by the employee no severance payment is due.

An employee is also entitled to severance payment if the employment is terminated by his retirement. The family of a deceased employee is entitled to half of the severance pay the employee would have been entitled to at the time of his death if the employment had been terminated. Similarly, pregnant women are entitled to terminate their employment and nonetheless receive half of their severance pay.

(v) Employee Benefit Funds. In order to promote the mobility of employees and to allocate available human resources more efficiently, the system of severance payments has been abolished for all employees who started work on or after 1 January 2003 and has been replaced by a different system set out in the Employee Benefit Act ("Mitarbeitervorsorgegesetz") as follows:

1. The employer must enter into an agreement with an Austrian Employee Benefit Fund which are mainly institutions affiliated with banks and/or insurance companies.
2. For each employee, the employer must pay monthly instalments of 1.53 per cent of the employees' gross monthly salary (incl. 13th/14th salaries). The amounts are paid together with the regular social security payments and the social security authorities then transfer the respective amounts to the Employee Benefit Fund.
3. The employer must pay the contributions to the Fund from the start of the employment (with the exception of the first month); no minimum duration of the employment relationship is required.
4. Once the employment relationship comes to an end, the employee does not have a claim against the employer, but instead against the Fund directly. Entitlement is not dependent on the way in which the employment was terminated and therefore even employees who are terminated for cause retain their entitlement.
5. After three years of employment, an employee can request that the Fund pays out the accumulated amounts in the event that the employer terminates the employment, the employment is terminated mutually or the employee terminates the employment for good cause. In the event of the employee's death, his/her heirs can claim the amounts.
6. Alternatively, the employee can choose to leave the accumulated amounts in the same Employee Benefit Fund for further investment, transfer the amounts to the Employee Benefit Fund of a new employer, transfer the amounts to an insurance company of their choice as a one-off payment for an insurance policy to be used as an additional pension, transfer the amounts to a pension fund at which the employee already has an entitlement or transfer the amounts to a financial institution of their choice for the purchase of shares in a pension investment fund under stipulation of an irrevocable pay-out plan.
7. From an Austrian taxation point of view, all contributions made to the Employee Benefit Fund are expenses that can be written off on the part of the employer.
8. Persons who were employed prior to 1 January 2003 may remain under the old severance pay system (see above), or may at their discretion wholly or partly transfer to the new severance pay system. This requires a written agreement between the employee and the employer.

Dismissal Without Notice

In general, the employee does not have a right to reinstatement. However, he does have the right to damages and the entitlements referred to in a).

b Rights of Employer on Termination by Employee

The improper termination of the employment contract by an employee, i.e. if without notice there is no important reason or, if with notice the period of notice prescribed is not complied with, terminates the employment relationship with immediate effect. The employer will generally only have a claim for damages. The decision on the quantum of damages must be assessed by the court and will be calculated on what is fair and reasonable in the circumstances.

v Special Provisions relating to Plant Closures, Cutbacks etc

There is no legally defined concept of plant closure or cutback. However, there is some statutory regulation relating to closures and cutbacks of larger business concerns as follows:

a Statutory Requirements

Prior Approval of Government Employment Office

An employer must notify the relevant government employment office (Arbeitsmarktservice) in writing by completion of a specific form not less than 30 calendar days before if, within a 30-day period

(i) in businesses with 21–100 employees, the employer intends to terminate five or more employees;

(ii) in businesses with 100–600 employees, the employer intends to reduce the number of employees by at least 5 per cent;

(iii) in businesses with more than 600 employees, the employer intends to reduce the number of employees by at least 30; and

(iv) in any businesses, the employer intends to terminate five or more employees above 50 years of age.

If notice of the intended reduction is not given at least 30 days before giving notice to the employees then any such notice to employees is ineffective.

Consultation with Workers' Council

An employer must inform the workers' council of any limitation or shutdown of the whole or a part of the business operations (as well as other significant changes to the business operations). The notification must be given with sufficient time to allow the workers' council to give their opinion on the measures contemplated. The workers' council may make suggestions to prevent, add or reduce any consequences of the measures undertaken which are disadvantageous to the employees.

If there are considerable disadvantages for all or most of the employees in businesses where there is an average of at least 20 employees, then measures may be fixed in order to prevent, avoid or reduce these consequences. In case of dispute concerning such measures between the employer and the workers' council, an application may be made to a statutory arbitration board for resolution of the dispute. (Article 109, Workers Constitution Act).

b Special Payments

There are no special payments to be made to employees made redundant as a result of plant closure or cutback. The payments due are those accorded to all employees upon termination of the employment relationship, including severance payments, where applicable, in accordance with the statutory provisions, collective agreements and the employment contract.

c Other Rights of a Redundant Employee

With the exception mentioned above, there is generally no right for an employee to object to his or her dismissal provided the employer has otherwise complied with his obligations upon termination and the employer is not breaching the terms of the contract by terminating, e.g. by giving notice on a fixed term contract which does not have provision for early termination.

The employee's only right to complain is if he or she is in any way not treated equally with regard to the termination or if an employee is terminated for an implicit reason. An

example would be if some employees were given arbitrarily longer periods of notice than others. The remedy will not be reinstatement but rather financial compensation.

vi Provisions upon Takeover of a Business

In the event a business is taken over, the buyer of the business is obligated to also 'take over' the employees of the business. The obligations to all employees become the mandatory obligations of the buyer. The buyer has no choice as to the employees who should or should not be retained in the business. This protection to employees is given under the law relating to employment contracts (Arbeitsvertragsrechts-Anpassungsgesetz – AVRAG), which came into effect partly on 1st July 1993 and finally on 1st January 1994. Also an asset deal may come under these rules if for instance a particular business line is sold or closed and outsourced.

vii Foreign Employees

The legal requirements governing the termination of employment contracts apply both to Austrians and to foreign nationals equally. There is no distinction made between the employees in this regard.

IV Equal Pay

The Equal Treatment Act 2004 requires in the private sector that there be equal pay and conditions for equal work. There are also provisions for employees in the public sector and many collective agreements provide for such equality.

If an employer breaches the terms of equal pay for equal work provided for under a collective agreement, the employee's remedy is to take the matter to the Labour Court to have the appropriate remedy determined. The court has power to require the employer to pay the difference between the actual salary paid and that salary which the court determines should be paid.

V Discrimination

There is an Equal Treatment Act (Gleichbehandlungsgesetz, mainly for private employment and areas outside the field of employment) and the Federal Equal Treatment Act (mainly for federal public service) which both outlaw discrimination on the grounds of sex, marital status, ethnic background, religion or philosophy of life, age or sexual orientation in employment, in particular with regard to:

- entering into employment;
- salary;
- offering social services to employees;
- measures related to educational and vocational training with an employer;
- promotion;
- other employment conditions;
- termination of employment, as well as other areas of the employment world.

Discrimination on the grounds of disability is not permissible either.

The Acts provide for various remedies which range from damage payments for not having been interviewed for discriminatory reasons, to being entitled to the difference between what one received as salary, and what one should have received. Penalties can also be imposed on employers for breaching the Acts.

The provisions are mainly enforced through the Equal Treatment Commission which is responsible for hearing claims by employees of discrimination and for fixing all related regulations. The Commission may award damages and impose fines in accordance with the Acts.

VI The Right to Strike

In Austria there is no special legislation relating to strikes and lock-outs. Therefore, the general provisions of public and private law apply. Therefore, civil law and penal provisions will determine the limits of permissible behaviour and activities in strikes.

As a result of this situation, it is certainly possible that the participation by an employee in a long-term strike could represent a ground for dismissal. This may however be a questionable ground because it is unlikely that his situation in relation to a breach of the employment contract would not have been fully explained to him by the unions.

VII Trade Unions

i The Role of Trade Unions

In Austria there are two types of trade associations representing employees' interests.

a Voluntary Trade Associations

The most important voluntary trade association in Austria is the Austrian Trade Unions Association (Österreichisches Gewerkschaftsbund – ÖGB). The ÖGB is a non-governmental organisation and consists of sixteen branches according to different industries. Its duties are determined in its statutes. Its activities focus on protecting the employees' interests in the areas of employment, social welfare and service law, social politics, other economic policies and workers' education. In addition, membership also offers special benefits such as legal protection and solidarity insurance cover.

b Compulsory Associations

In addition, there are trade association bodies in Austria which represent employees' and employers' interests with compulsory membership. The trade association for employees are the workers' chambers (Arbeiterkammern).

In comparison to the ÖGB, which is established as a private law association and is a legal entity in its own right, the workers' chambers are organisations of public law established by special statutes. They are established as the statutory representatives of the members of certain areas of employment. Membership of the different chambers is determined by law and is compulsory. The chambers are self-governing bodies.

The roles of the workers' chambers include the following:

a) to prepare reports, suggestions and opinions concerning matters relating to employees' interests for statutory bodies and authorities;

b) to prepare opinions on drafts of legislation, regulations and other legal provisions relating to these matters;

c) to have representatives in organisations and offices or to make suggestions on suitable representatives if and to the extent provided for by law;

d) to be involved in all measures and arrangements concerning the employment relationship or the economic and social position of employees;

e) to be involved in the supervision of maintenance of employment protection provisions as well as to establish apprentice and youth protection offices and through them to

look after the apprentice and occupational education rights as well as youth protection;

f) to act for employees in negotiating collective agreements.

ii Special Treatment of Trade Unions

Delegates to the workers' chambers and Trade Union representatives must be given time off work by their employers to be able to attend to their union duties.

VIII Arbitration/Conciliation

There are two authorities acting as arbitration or conciliation panels in employment disputes in Austria:

1. *Arbitration boards*. An arbitration board (Schlichtungsstelle) has authority to decide disputes concerning the entry into and amendment or termination of enterprise agreements in matters provided for in the Act upon application by one of the parties to the dispute. The arbitration board, which consists of a chairman and four co-arbitrators, will sit at the district where the relevant business operation is situated. An arbitration board has jurisdiction to conciliate between the parties, make suggestions to resolve the issues and to be involved in reaching an agreement between the parties. If necessary, it must also give a decision. It is not possible to appeal against any such decision.
2. *Labour Court*. This court (Arbeits-und Sozialgericht) is the main authority supervising the relationship between employers and employees. The court has power to resolve disputes, give rulings on disputed issues and act as conciliator. The court is situated with every district court throughout Austria.

IX Workers' Participation in Management

Workers' participation in management is limited to companies which have both a workers' council and a supervisory board. In these instances at least one third of the members of the supervisory board must be employees and are delegated by the workers' council to sit on the supervisory board.

Supervisory boards are mandatory in joint stock corporations and in certain limited liability companies as a second tier of governance which has the task to appoint, dismiss and control the board of directors.

- CHAPTER SIX -

PENSIONS AND SUPERANNUATION

I State Pension

Austria with its traditionally very strong social welfare policies has a very comprehensive state pension system. As a result, every employee is a participant as a beneficiary of the pension system. As has been the case in most European countries over the past few years, Austria underwent a major pension reform in 2003 which has brought and will bring major cuts in comparison to the previous system. The following are some specific features of the pension system:

i Pension Authorities

There are several large state authorities responsible for the maintenance of records, collection of contributions and distribution of pensions. The authority which is relevant will depend on the residence and occupation of the employee. For example, the relevant authority for an office worker resident in Austria is the Pensionsversicherungsanstalt für Angestellte and for blue collar workers it is the Pensionsversicherungsanstalt für Arbeiter. Other pension authorities are in charge of public servants, agricultural workers, farmers, entrepreneurs etc.

ii Contributions

Contributions to the state pension fund are compulsory and are paid in approximately equal portions by the employer and employee. The employer has the duty to pay the contributions by:

a) paying his contribution directly to the fund, and

b) withholding the employee's contribution from his or her salary and paying it to the fund on behalf of the employee.

iii Amount of Pension

The amount of a pension received by a former employee will depend on the years of employment and the amount of his or her salary. As a result, a highly paid employee who has worked for 40 years will receive a higher pension than an employee who has earned a lower salary and/or worked for a shorter period.

iv Right to Pension

The right to a pension will arise when the employee has:

a) Retired at the age set down by the law provided the employee has had contributions paid in for at least 15 years. At present the compulsory retirement age for men is 65 years and for women 60 years.

b) Retired due to ill health or other recognised incapacity to work, provided generally the employee has worked for at least a minimum amount of time which depends on his/her age and other criteria, unless the incapacity is due to a work accident or employment related illness.

c) Died, provided the employee has worked for at least a minimum amount of years depending on his/her age and the length of the marriage. In this case, spouse and dependant children are the recipients.

It is no longer possible to go into early retirement due to long employment although exceptions exist for manual workers. Before 1st January 2004, pensions were calculated on the basis of the last 180 months of employment however the basis will increase to the last 480 months by 2028. Income earned in past years will be revalued at a far lower rate than previously. It is also no longer possible to retire due to long unemployment.

v Treaties

Austria has signed an extensive number of bilateral treaties with other countries with regard to the transfer of pension rights from one country to the other. At present Austria has signed treaties with the following countries: Australia, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Chile, Croatia, Czech Republic, Cyprus, Denmark, Hungary, Finland, France, Germany, Great Britain, Greece, Ireland, Island, Israel, Italy, Korea, Kosovo, Liechtenstein, Luxembourg, Macedonia, Moldavia, Montenegro, Netherlands, Norway, Philippines, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, Uruguay and USA.

II Private Pension Arrangements/Superannuation

In 1990, the Austrian Parliament passed two statutes on non-state pension arrangements called the Pensionskassengesetz (Pension Funds Act) and the Betriebspensionsgesetz (Company Pensions Act). The purpose of these statutes is to overhaul the laws on private pensions which had been scattered throughout various statutes and thus to provide for the most relevant regulations to be contained in these two statutes. Additional regulations are contained in the tax laws and regulations. The Acts contain a system of strict control over and supervision of the entities running pension funds.

i Restrictions on who may set up a Non-state Pension

A pension fund may only be operated by a stock corporation (Aktiengesellschaft) which is registered in Austria. The various legislative requirements for such a company include that the paid up capital of a pension fund entity must be at least EUR 5 million (approximately GBP 3.5 million).

The control over who may set up a non-state pension is given to the Austrian Financial Market Authority. An enterprise wishing to set up a pension fund must apply to the Austrian Financial Market Authority for a special business licence. According to Article 9 of the Pension Funds Act, the application for a licence will be rejected if:

- The Articles of Association or the business plan (which must also be submitted with the application) do not contain provisions which ensure the fulfilment of the pension fund's obligations or the proper administration of the pension fund;
- The shareholders who own at least 10 per cent of the paid up capital of the fund do not have the prerequisites required to properly manage the pension fund;
- The structure of a group of companies with shareholders owning at least 10 per cent of the pension fund's paid up capital would prevent effective supervision of the fund;
- The pension fund is not intended for at least 1,000 beneficiaries;
- The capital is not available in an unlimited and unencumbered manner to the board of directors as required in Article 7 of the Act;
- The seat of the pension fund is outside of Austria;
- It is not intended that the pension fund should be in the form of a stock corporation;
- A member of the board of directors has been found guilty of committing a punishable offence contained in Article 13 of the Business Licence Act 1994;

- A criminal investigation is under way against a member of the board for a crime punishable with a sentence of more than one year of imprisonment, until the investigation has ended;
- A member of the board of directors does not have the appropriate training or the necessary characteristics and experience;
- Not at least one member of the board is a resident of Austria;
- Not at least one member of the board speaks German;
- The pension fund does not have at least two members of the board of directors and if the articles of association do not exclude a right of sole representation or a commercial power of attorney for the entire business operation;
- A member of the board of directors of the pension fund entity has another main occupation besides acting for the pension fund;
- With regard to corporate pension funds, the intra-business agreement and/or other contracts with regard to the formation of the corporate pension fund do not comply with the provisions of the Company Pensions Act.

The Financial Market Authority also has the power to withdraw licences.

ii Forms of Pension Arrangements

The pension arrangements between the employer and employee will be contained in either the contract of employment or an applicable enterprise agreement and they must be in accordance with the provisions of the Company Pensions Act. The employer is then required to enter into a contract with the pension fund and this contract must correspond with the agreement between the employer and the employee.

iii Legal Structure

As stated above, a non-state pension must be by way of an undertaking by the employer whereby the contract regulates the duties to be performed by the pension fund in relation to the beneficiaries. The undertaking does not have to be in writing to be enforceable.

iv Registration Requirements

There is no requirement as such to register a non-state pension arrangement with any official registration body. However, as a pension fund is not permitted to operate without a business licence granted by the Austrian Financial Market Authority, details of all operating pension funds in Austria will be maintained by the Authority.

v Types of Investments

The Pension Funds Act contains the following provisions on investments by pension funds:

Article 1(3) – Pension funds may not carry out any business which is not related to the administration of pension funds. By implication this excludes speculative activities.

Article 14 – Hedging transactions are only permitted when they serve as auxiliary transactions in connection with securing investments according to Article 25.

Article 25(1) – A pension fund must invest its assets in either:

1. - Investment stock in which the payment of a fixed amount is promised,
   - loans to the Republic of Austria, its provinces or another EU member country, or loans in relation to which the Republic of Austria, its provinces, an EU country or a bank are liable for repayment and interest,
   - mortgage loans,
   - loans to employers contributing to the pension fund.

2. shares, securities for participation capital and supplementary capital, rights of options, and
3. income yielding land and buildings in an OECD country.

Article 25(2) - The above investments are subject to conditions and restrictions, the most important of which are as follows:

1. Securities under fig. 1. and 2. above, with some exceptions, must in general be quoted at a national stock exchange or a stock exchange of an OECD country,
2. Investments in assets in Euro under fig. 1. must have a value of at least 35 per cent of the total assets,
3. A maximum of 50 per cent of the total assets may be invested in assets under fig. 2. above.
4. A maximum of 20 per cent of the total assets may be invested in assets under fig. 3. above.
5. A maximum of 50 per cent of the total assets may be invested in assets in foreign currencies according to (1) fig. 1. and 2. as well as assets according to (1) fig. 3 in foreign countries,
6. A maximum of 10 per cent of the total assets according to (1) fig. 1. above may be invested in assets from the same issuer,
7. A maximum of 5 per cent of the total assets may be invested in commercial papers,
8. Investments in index certificates are only permissible if they are from a financial institution with its seat in a "Zone A" country.

Article 25(3) - Investments in share certificates of capital funds are permissible as long as

1. the allocated assets, when added to the pro-rata assets held in the capital investment fund do not breach (1) and (2) above,
2. the share certificates are from a capital investment company with its seat in an OECD country, and
3. there are no cost disadvantages to the beneficiaries.

Note: The above is a summary of detailed provisions on investments which include definitions and explanations on various provisions. The above should thus be seen only as a general summary of the requirements and restrictions.

vi Minimum or Maximum Funding Requirements

As stated above, pension funds are required to maintain a minimum capital of EUR 5 million. Furthermore, there are detailed provisions in the Pension Funds Act concerning calculation of assets and funding.

vii Favourable Tax Treatment

The Income Tax Act (Einkommensteuergesetz) provides that pension contributions paid under the Pension Funds Act in most circumstances will be recognized as tax deductable.

viii Insurance Requirements

According to the Pension Funds Act, an application to the Austrian Financial Market Authority for a business licence to operate as a pension fund must be accompanied by a business plan. This business plan must contain details of the services which will be offered, an explanation of the circumstances which will protect the interests of the beneficiaries and will enable the continuing fulfilment of the pension fund's obligations and detailed accounting of the contributions and performances. Further, insurable risks which, from the business plan the pension fund is not able to pay itself, must be covered by an insurance company.

ix Surplus of Assets

The Pension Funds Act contemplates both a surplus and a deficit of assets. There are detailed provisions of the accounting in both circumstances. Article 24a(6) states that if there is a surplus of assets above the assets provided for in the business plan or by way of directors resolution, there must be an annual cancellation of 10 per cent of the difference. Although it is not specifically stated, this will presumably be by way of debiting the pension accounts.

x Pension Aspects of purchasing or selling Businesses

Any pension arrangements established with employees must be transferred to the purchaser who must take over the obligations of the previous employer with regard to the pension.

The Income Tax Act lays down strict rules with regard to taxable accounting of pension contributions and benefits. These are contained in Article 124 of the Act and, for example, contain provisions of what will be considered a liability and what an asset. Contingent liabilities must also be considered.

xi Additional Advisers

According to the system of controls built into the Pension Funds Act to protect beneficiaries of the funds, pension funds are required to obtain additional advice from the following:

a) An actuary who is responsible for preparing, or directing the preparation of, the business plan and to supervise compliance with the plan. The actuary must be appointed by the pension fund's supervisory board.

b) A supervisory actuary who must be an independent adviser and who must in particular supervise the following:

    a) Whether the operations of the business correspond to the business plan;

    b) Whether changes to the contributions or services provided are necessary;

    c) Whether and to what extent the employer must provide any cover; and

    d) Whether the requirements for insurance have been satisfactorily taken into account.

Furthermore, the supervisory actuary must give his approval to the business plan as well as any amendment to it before the authorisation of the Austrian Financial Market Authority is given.

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