

Corporate Aspects of Trading and Investing

Austria

I. INTRODUCTION

Austria, with a population of 8.4 million people, is one of the world's wealthiest nations with excellent business opportunities and an attractive investment market for companies of every size. Located in Central Europe, Austria offers foreign companies access to a still growing market with direct access to the European Union as well as to Central and Eastern Europe.

A company willing to do business in Austria usually starts by sending its employees to Austria and may then appoint a commercial agent or conclude a distribution agreement. If the first business steps are successful, a branch office or a company can be founded in order to be able to operate independently and to react efficiently to the existing market conditions.

Most companies in Austria are organized under the legal form of a Company with Limited Liability (*Gesellschaft mit beschränkter Haftung – GmbH*), a Stock Company (*Aktiengesellschaft – AG*), a General Partnership (*Offene Gesellschaft – OG*) or a Limited Commercial Partnership (*Kommanditgesellschaft – KG*).

All commercial activities in Austria underly the laws of the rather new “Code of Enterprises” (*Unternehmensgesetzbuch – UGB*) that replaced the former “Code of Commercial Law” at the beginning of the year 2007. Its main purpose is to provide a modernized, simplified and deregulated Austrian commercial law.

2. METHODS OF MARKET ENTRY IN AUSTRIA**2.1 DISTRIBUTION AND AGENCY**

A commercial agent (*Handelsvertreter*) is a person who is permanently entrusted with acquiring new customers and concluding business on behalf and for the account of a contracting businessman (the so-called Principal) and who carries out this activity independently and on a professional basis. The legal status of commercial agents in Austria was adjusted to the corresponding EU Directives and is now governed by the “Act on Commercial Agents” (*Handelsvertretergesetz – HVertrG*). The most discussed provision of this law regards the compensatory payment (*Ausgleichsanspruch*) the commercial agent can claim if the contract is terminated and the Principal has obtained new customers – who are likely to remain - through the activities of the agent.

In certain cases Austrian courts do also apply this compensatory payment - by analogy - to distributors and distribution agreements, although their legal position differs from the one of commercial agents as the distributor sells in his own name and for his own account. The EU Regulations on Competition, e.g. the so-called Block Exemption Regulations (*Gruppenfreistellungsverordnungen*), are applicable to distribution agreements as well.

2.2 BRANCH

Foreign companies that are equivalent to companies with limited liability or stock corporations may open a branch in Austria. Such a company-branch will be incorporated into the Austrian commercial register. Companies that do not have their company headquarters in a EU Member State have to appoint a permanent representative with residence in Austria for all business activities of the branch.

A branch is not a separate legal entity. It does not have its own share capital. However, it must keep separate books.

3. PARTNERSHIPS

The General Partnership (*Offene Gesellschaft – OG*) is a company existing of two or more individuals or corporations. Each partner is fully liable for all debts of the partnership. The liability to creditors cannot be limited by any means. Although the General Partnership is not considered to have a legal personality of its own, it may conclude transactions, it may sue and be sued and it is registered with the commercial register.

A Limited Commercial Partnership (*Kommanditgesellschaft - KG*) consists of at least one general partner (*Komplementär*) with unlimited liability and at least one partner (*Kommanditist*), whose liability is restricted to the amount of his contribution that is registered with the commercial register. In order to limit the liability of the general partner, the *Komplementär* of a Limited Commercial Partnership often is a Company with Limited Liability.

Since January 1, 2007 - namely when the the “Code of Enterprises” (*Unternehmensgesetzbuch – UGB*) came into force - general or limited partnerships may be founded for nearly every imaginable purpose. The former restrictions that limited the foundation of a company to certain permitted purposes were eliminated – now partnerships are treated equally to corporations. Under the new “Code of Enterprises” for all partnerships the incorporation into the Austrian commercial register has constitutive effect.

4. AUSTRIAN CORPORATIONS

4.1 THE STOCK COMPANY (AKTIENGESELLSCHAFT – AG)

The Stock Company (*Aktiengesellschaft – AG*) is legally organized under the provisions of the “Austrian Stock Corporation Act”(Aktiengesetz – AktG). The minimum stock capital of an Austrian Stock Company is € 70.000,--. In contrast to the Company with Limited Liability, the company shares of an AG may be transferred without notarization, which is its most important advantage. For an Austrian Stock Company a supervisory board is mandatory, whereas for Companies with Limited Liability a supervisory board is required only under certain circumstances.

Since 2004 the foundation of an Austrian Stock Company by only one founder is permitted by Austrian law. In contrast to an Austrian Stock Company which is participated by two or more shareholders, the name of a sole founder has to be registered with the Austrian commercial register. The by-laws (*Satzung*) must be established by notarial deed in front of a notary public.

The stock capital is divided into either shares with a par value of at least € 1,-- or into shares representing a percentage of the stock capital without a par value. Shares can be issued by means of registered share (*Namensaktie*) or bearer share (*Inhaberaktie*).

In case a stock company is founded with contributions in kind (*Sacheinlagen*), an initial audit by an independent and certified public accountant is mandatory.

The representative corporate body of an *Austrian Stock Company* is the board of directors (*Vorstand*). It may consist of one or more members. The members of the board of directors are nominated by the supervisory board. The board of directors does not only represent the AG, but also runs its daily business. The board members are subject to statutory non-competition rules and can only be appointed for a maximum term of five years. Nevertheless re-appointments are permitted.

A general meeting of shareholders must be held annually within eight months after the previous business year. Additionally it may be held on other occasions as well. The shareholders decide - inter alia - on the distribution of profits, on formal approval of the actions of the members of both supervisory board and board of directors and on the appointment of auditors. For certain primary decisions, e.g. the increase or reduction of stock capital, another change of the by-laws, mergers, liquidation, etc. a qualified majority of 75% of the votes is required.

4.2 THE COMPANY WITH LIMITED LIABILITY (GESELLSCHAFT MIT BESCHRÄNKTER HAFTUNG – GMBH)

The Company with Limited Liability under Austrian law is mainly governed by the “Limited Liability Companies Act” (*Gesetz über die Gesellschaften mit beschränkter Haftung – GmbHG*). The liability of shareholders is limited to the share capital of the company. Unless it is intended to raise funds on the Austrian Stock Market or to change ownership frequently, the *GmbH* is the most convenient form of organization due to its flexibility. Most foreign companies doing business in Austria are organized under the legal structure of an Austrian Company with Limited Liability.

4.3 FORMATION OF A COMPANY WITH LIMITED LIABILITY

As a legal entity, the company starts to exist from the moment of its registration with the Austrian commercial register. Before that incorporation of the new company, any person acting in the name of the company is personally liable for obligations arising from those actions.

The application for registration has to be presented in German language and must also bear the notarized signatures of all managing directors. Among others, the presentation of the following documents is mandatory: the by-laws, the certified minutes of the shareholders' resolution appointing the managers, a list of shareholders, a list of managing directors indicating their power of representation (single or joint signing power), a declaration of the managing directors that the capital contributions have already been paid, the clearance certificate and - if one of the shareholders is a foreign legal entity - a legalized (and if necessary: super-legalized) extract from the foreign commercial register of that shareholder.

The *GmbH* may be founded by one or more persons - any of them being an individual or a legal entity, resident or non-resident, Austrian or foreign citizen. However, the company must be based in Austria. The by-laws have to be signed in front of an Austrian notary public and state at

a minimum: the company's name, location of company headquarters, the line of business the company is in, the amount of share capital and the capital contributions to be made by each shareholder.

The minimum share capital is € 35.000,--. Each shareholder has to pay at least € 70,-- and must pay in cash at least one quarter of his/her share. The sum of all cash contributions has to be at least € 17.500,--. Substitution of those cash deposits by contributions kind in are possible, but require a rather complicated procedure.

A supervisory board for a Company with Limited Liability has to be established amongst others if:

- the share capital exceeds € 70.000,-- and there are more than 50 shareholders; or
- the annual average number of employees exceeds 300; or
- a centralized management control (holdings of more than 50%) of stock companies or limited liability companies have a mandatory supervisory board, and the total number of employees of these companies together exceeds 300 on an annual average.

Furthermore it is necessary to apply for an appropriate trade licence. For legal reasons a person with residence in Austria, who fulfills the relevant criteria that is required for the specific trade licence (e.g. education), needs to be appointed. The legal representative of the company is responsible vis-à-vis the governmental authorities that the Company with Limited Liability observes all provisions of the Austrian trade law.

4.4 MANAGEMENT OF A COMPANY WITH LIMITED LIABILITY

There may be one or more managing directors - neither of them needs to be an Austrian citizen or resident in Austria. All Managing directors are appointed by shareholders' resolution. Shareholders may also be appointed as managing directors. Unless the by-laws or a shareholders' resolution provides for other clauses, the company has to be jointly represented by the managing directors. Managing directors are under a statutory obligation not to compete with the company.

A particular form of an authorized representative is the so-called proxy (*Prokurist*), who holds full commercial powers to represent a company or a sole proprietorship - but who, however, is not allowed not run real estate transactions without special authorization.

The powers of a managing director acting on behalf of a Company with Limited Liability as its legal representative are - in most cases - unlimited. In particular, powers are generally not limited to actions within the scope of business of a company. Furthermore, representative powers can normally not be limited by the articles of association. Enforceable limitation of the powers of a managing directors can only be achieved when he/she necessarily has to act jointly with at least one other person (managing director or proxy) when representing the company.

4.5 MANAGING DIRECTOR'S LIABILITY OF A COMPANY WITH LIMITED LIABILITY

The managing director is obliged towards the company to act with the care of a diligent business man when carrying out the management of the company.

If the managing director acts contrarily to his obligations he is liable vis-à-vis the company (internal liability).

Within the rules of internal procedure, the shareholder(s) may assign the duties to the managing directors. Each managing director is responsible vis-à-vis the company for the diligent performance of his specific duties, nevertheless each director remains liable for all core decisions of the company, which have to be jointly taken by the board.

According to Austrian company law only the company as a legal entity is liable for any violation of a duty to inform, disclose or safeguard a contracting party's interest prior to concluding an agreement. However, if the managing director has in a particular way inspired the confidence of a party, e.g. by warranting the contract's due fulfillment or if he has a personal financial interest related to the relevant transaction, he may also become liable towards third parties (external liability). Furthermore a managing director may become liable towards third parties for incorrect statements in relation to capital decrease or requests for payment of outstanding joint capital of a company.

A managing director must also take into consideration the provisions of the "Austrian Product Liability Act" (*Produkthaftungsgesetz – PHG*). He is responsible for duly organising and controlling the company's development and production. Any failure in doing so, which results in a defective product may trigger the managing director's liability.

Sect 9 and 80 of the "General Austrian Tax Code" (*Bundesabgabenordnung – BAO*) establish that legal representatives are personally liable for any tax shortfall of the company. Then, a managing director's specific liability to the company's creditors arises if he fails to plead for opening insolvency proceedings in due time.

Moreover, there do exist penal provisions within the "Limited Liability Companies Act", according to which managing directors, members of the supervisory board, other authorized representatives and liquidators that are providing misleading financial information regarding the company either within the annual financial statement or in the shareholders' meeting may be prosecuted by a monetary fine or even by imprisonment up to one year.

5. TAXATION OF PROFITS

In Austria a profound tax reform of the year 2005 (in force since January 1, 2005) increased attraction to international holding companies starting business in Austria. The core of the reform certainly was the reduction of the corporate income tax from 34% down to 25%. Within the tax reform 2005, also a new group taxation was implemented.

Under the former system, qualifying as a tax unit required not only a majority participation of 75% in another company, but also economic and operational control of this company by the parent company, and a profit and loss transfer agreement between the parent company and its subsidiary. The latter is no longer required by the new group taxation.

The only condition in order to fall within the new group taxation regime now is a direct or indirect majority investment in a target corporation. The current group taxation enables a resident corporation to use the tax losses of foreign subsidiaries directly held by Austrian group companies.

Dividends received from a foreign company are exempted from corporate income tax under the international affiliation privilege (*Internationales Schachtelprivileg*). The application of this privilege is granted if an Austrian company has held at least 10% of the foreign company's equity for at least 12 months. Under similar conditions capital gains from the disposal of a foreign subsidiary are also exempt from taxation, unless the Austrian holding company opts for the taxability of capital gains.

Dividends paid to an individual person are subject to a 25% capital gains tax (*Kapitalertragsteuer*) in Austria. This tax is regularly reduced under Austria's double-tax treaties.

Author

Veronika Mochar

Petsch Frosch Klein Arturo
Vienna, Austria

E-mail veronika.mochar@pfka.eu

Tel. +43 1 586 21 80

To contact PLG

Julienne Laveaux
PLG Secretariat
PANNONE LAW GROUP E.E.I.G.
avenue de Sumatra 41
1180 Brussels
Belgium

Tel. +32 2 374 88 46

Fax: +32 2 374 90 61

E-mail plg@plg.be

www.plg.eu.com

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