

**AUSTRIA**





# Austria

## **PART I: CONTRACTUAL – NO OFFICE IN THE TARGET COUNTRY**

### **A. Direct sale**

#### **A.1. Without written agreement – general terms**

1. *What are the formalities a foreign seller must complete in your jurisdiction in order to make sure that its terms and conditions of sale are binding and enforceable towards local purchasers? Are these conditions enforceable towards non commercial parties?*

Under Austrian law agreements can be entered into in writing, orally or tacitly. Thus, there are no special formalities required, the contractual partner however must be aware of the terms and conditions of sale and must agree to them. In practise sellers refer to the applicability of their own general terms and conditions and clarify that they are only prepared to enter into a contractual relationship subject to their terms and conditions (concurrently excluding applicability of the counterparty's general terms and conditions). Strict consumer protection rules (generally implementing EU-law) apply in relation to consumers.

#### **A.2. With a written agreement**

2. *What are the clauses a foreign seller should integrate in a written sales agreement (or in his general terms and conditions) and the reasons why?*
  - (a) **Retention of title:** *Is this provided for in your jurisdiction? What are the conditions to make it enforceable towards local purchasers and third parties?*

Retention of title is permissible and always advisable. No special form requirements are to be observed. As to timing, the agreement on retention of title must be reached prior to delivery of the respective object of sale.

Generally, retention of title is valid also towards third parties, unless such third party has acquired the object of sale in good faith. In this respect it is advisable to agree on an extended retention of title (*verlängerter Eigentumsvorbehalt*) under which the purchaser assigns its future claims against potential third party acquirers of the object of sale to the (initial) seller.

Perfection requirements as to such assignments need to be observed.

- (b) ***Interest and penalty clause:*** *Are these clauses enforceable in your jurisdiction? Can they be reduced or annulled? What are the consequences if this clause is not integrated in the agreement? What is the legal rate in your jurisdiction?*

Interest and penalty clauses are useful. Penalty clauses are, however, subject to judicial discretion.

The legal interest rate applicable between entrepreneurs is 8% above the basic interest rate published by the Austrian National Bank and adjusted every 6 months. The legal interest rate in connection with consumers contracts amounts to 4% per annum. Restrictions to agreements on interest payable on default interest apply.

- (c) ***Applicable law and competent jurisdiction:*** *Are these clauses enforceable in your jurisdiction? What are the consequences if this clause is not integrated in the agreement?*

Under Austrian law generally parties have freedom to choose governing law and/or jurisdiction. As a default rule a contract for the sale of goods shall generally be governed by the law of the country where the seller has his habitual residence. The purchaser may not only be sued in the courts of the state of their domicile but also in the state where the goods were delivered or should have been delivered in case of a sale of goods.

## B. Commercial Intermediaries

3. *What types of commercial intermediaries do exist in your jurisdiction.*

Given the basic liberty to conclude any contract the parties agree upon (unless for unlawful purposes), the parties may create any type of commercial intermediary they wish. The most common are:

- franchisees;
- distributors;
- commercial agents.

4. *What legislation does apply in your jurisdiction with regard to the above mentioned types of distribution agreements?*

Austrian law transposed EU-law on commercial agents, including

special provisions on notice periods, post contractual non-compete clauses and compensation on termination of the agency contract. The provision is applied by way of analogy to certain distributors and also franchisees.

## **PART II: BRANCH – OFFICE IN THE TARGET COUNTRY BUT NO LEGAL PERSON:**

5. What are in your jurisdiction the differences between starting up a branch and starting up of a company (subsidiary)?

Creating a subsidiary is usually more time efficient since the establishment of branches requires translation of the constitutional documents of the company establishing the branch and filing of such documents with the companies register. Furthermore certain documents will have to be translated to be filed with the competent trade authority. On the other hand incorporation of a subsidiary is usually more costly since Austrian companies have a minimum registered capital in the amount of EUR 35,000 (LLC) or EUR 70,000 (stock corporation), respectively.

6. *What formalities must be fulfilled for opening a branch?*

Formalities to open a branch office: Evidence has to be provided as to:

1. Existence of the parent company; and
2. Commencement of conduct of business by the branch.

The application must be signed by all representatives, certified by a notary. All documents to be submitted must generally be translated into German.

7. *Why would you rather advise a foreign seller to set up a branch and not a company in your country, or vice versa?*

The decision whether to open a branch or rather a subsidiary is mainly driven by the scope of business conducted in Austria and the risk associated therewith. Larger size business units and risky business is generally conducted by Austrian subsidiaries. Furthermore in certain business areas Austrian costumers prefer entering into agreements with Austrian counterparties, i.e. a subsidiary rather than a branch.

8. *Is a branch authorized to act before the court, to engage people, ...?*

From a mere legal perspective no agreements are entered

into by the branch as such but rather on behalf of the parent company. This however does not limit the possibility to act as an employer or before courts.

9. *What is the liability of the legal representative of the branch?*

Liability of representatives is generally determined by the laws of the jurisdiction of incorporation i.e. not Austrian law. Nevertheless certain Austrian provisions apply to representatives of a company irrespective of such company's place of incorporation if it conducts business in Austria. In particular legal representatives are liable for the accurate payment of certain taxes, social security contributions and fines under public law (in the latter case unless a special representative is appointed).

10. *Is there an automatic liability of the head office for the operations or acts of the branch?*

The head office is liable for all obligations of its branch since it qualifies as the legal entity assuming all rights and obligations.

11. *Which language will the documents be in?*

If the branch deals with courts or public authorities, then they are obliged to use the official language – German. Documents in other languages must generally be translated when used vis-à-vis Austrian authorities.

12. *What are the accounting requirements for a branch?*

Under Austrian law, the Austrian branch has to file accounting / financial information pertaining to the branch's foreign holding entity (to be drawn up in accordance with the laws of incorporation of such entity) with the Companies Register in German language.

### **PART III: SUBSIDIARY – LEGAL PERSON (SEPARATE LEGAL LOCAL ENTITY) IN THE TARGET COUNTRY**

13. *What are the advantages of establishing a subsidiary compared to establishing a branch?*

The subsidiary is an independent legal entity and therefore the parent company is generally not liable for its subsidiary's obligations (banks and other creditors might however require parent guarantees or other securities to be granted by the parent company).

The advantage of creating a subsidiary on a local market mainly

results from the fact that such subsidiaries are considered local firms thus creating more confidence by its customers and suppliers. It might also be useful to check tax advantages under the EU parent-subsidiary directive or the various double tax treaties.

Of course, authorities and tax advisors are more familiar with Austrian companies and the rules provided for them. Furthermore, Austrian subsidiaries do not require special translations, certification, etc.

14. *Can you present the main characteristics of the company forms existing under your jurisdiction in the following schedule:*

Company Form	Aktiengesellschaft (stock corporation)	GmbH (limited liability company)	OG (General partnership)
Limited liability	yes	yes	no
Free transferability of the shares	yes	yes (notarial deed required; the articles of incorporation may provide for restrictions)	no (generally consent of all other partners is required unless otherwise provided for in the AoA)
Fixed or variable capital	fixed	fixed	no registered share capital (AoA to usual provide for fixed capital accounts)
Minimum capital	70,000.00 EUR	35,000.00 EUR (minimum payment EUR 17,500)	no
Number of founders	1	1	2 (the partnership must have at least 2 partners during the entire term of its existence)
Notarial deed	yes	yes	no

15. *Which of the company forms is used most frequently in your jurisdiction?*

Most Austrian companies are GmbHs (> 100,000). Small enterprises (eg family businesses) are often operated in the form of OGs or KGs (limited partnerships). Most subsidiaries of

foreign parent companies are GmbHs (due to the fact that the management of GmbHs is obliged to obey instructions by its shareholders)

16. *Which company form is used most frequently in case of small or family business?*

see above

17. *What are the main formalities a foreign company has to comply with in order to establish a subsidiary (filial/filiale)?*

Depending on the legal form of the company, the establishment of a subsidiary basically requires:

- articles of incorporation (notarial deed with respect to AG and GmbH);
- payment of registered share capital to the extent required by law (only AG and GmbH);
- registration with the Companies Register;
- application for a VAT number with the tax authorities;
- payment of company tax (1% of the registered capital);
- appointment of managing directors (GmbH, AG) and supervisory report (AG).

18. *What are the costs of establishing a subsidiary in your jurisdiction?*

The establishment of a GmbH – which is the most common company form – requires the payment of the minimum capital (at least EUR 17,500– see above) plus court fees, legal advisors' fees and certification costs (notary fees).

19. *How long does it take to establish a subsidiary in Austria?*

The incorporation of a GmbH can be managed within a few days. In case of urgency transfer of shelf companies is offered.

20. *Is there specific legislation with regard to the liabilities of the founders and the directors of the most used company form?*

The founders are liable for the company (GmbH) only in rather extreme cases (eg fraud). They remain liable for unpaid parts of the minimum capital (jointly and severally at least for EUR 17,500 – see above). The director, however, may be liable vis-à-vis the company if he damages the company in negligence. Tax authorities and social security bodies sometimes hold the director liable in insolvency of the company – if the director has acted negligently.

In recent years it has become more common for creditors to hold directors of a GmbH liable in case of insolvency of the company (in particular based on delayed filing for insolvency)

## **PART IV – MISCELLANEOUS**

### **A. Real estate**

#### **A.1. Purchase of a real estate**

**21. Who do you turn to in order to close a valid purchase agreement?**

The parties may draft the contract themselves. In most cases, however, they have the contract drafted by an attorney or by a notary. In order to be registered with the land register the respective transfer agreement needs to be certified.

To be enforceable against third parties transfer of ownership has to be registered in the land register.

**22. What are the costs related to the purchase agreement?**

The overall costs of a real estate purchase amounts to roughly 10% of the purchase price (including court fees, notary fees, attorney's fees, real estate transfer tax).

**23. Is there in your jurisdiction legislation that can slow down the purchase process (e.g. environmental legislation requiring preliminary soil examinations)**

In some provinces, foreigners need to prove that they are residents of EU member countries in order to purchase real estate. Furthermore, the acquisition of agricultural real estate is restricted. This may slow down the purchase process.

General rules on the land owner's liability for contaminations (in case of lacking knowledge of the identity of the polluter or the polluter's ability to remedy) may result in extended investigations (including with respect to contaminations and bombs).

#### **A.2. Rent a real estate:**

**24. Is there imperative law in your jurisdiction with regard to the rent of offices, industrial real estate or commercial real estate? Can you give a summary of the major stipulations of these regulations?**

Austrian tenancy law basically does not differentiate between rent of real estate for private or for business reasons.

Strict tenant protection laws may in certain cases apply. In such case, the tenancy contract may only be dissolved for cause (eg non-payment of rent).

It is possible to conclude the contract for a limited or for an unlimited term. In case the Austrian Tenancy Act (MRG), applies the landlord is entitled to raise the rent upon a change in (beneficial) ownership in the tenant (change of control).

25. *Are there any formalities to be fulfilled in order to enforce the lease agreement towards third parties?*

Following handover of the property no specific formalities apply. In particular it is not necessary – and therefore almost never done – to have the tenancy contract registered in the Property Register.

### A.3. *Environmental issues:*

26. *For what types of activities is an environmental permit required?*

Austria has rather strict environmental laws. If a subsidiary plans to set up a business having potential impact on the environment or on the neighbours, then – depending on the expected emissions – a public law permit must be obtained. If the neighbours decide to appeal against the respective administrative decision, the procedure may take some time (6 months up to one year). The opening of mere office space requires no special permits, as long as the place is dedicated to such use.

27. *Can you describe briefly this procedure? How much time will this procedure normally take*

see above

### A.4. *Employment:*

28. *Are there any specific regulations with regard to outsourcing of employees?*

Outsourcing of employees is possible under Austrian law. In fact, many companies tend to hire their employees from companies specialized in the supply of workforce. It is not uncommon that companies later conclude employment contracts with employees initially supplied by a supply firm directly.

29. *Applicable legislation according to the type of employment (differences between employment by local company or by head office for the local branch)*

It makes no difference whether the employee is hired by a branch office or by a subsidiary. In both cases, Austrian labour law and collective bargaining agreements as well as Austrian social security laws apply.

### 30. *Legal engagement and dismissal requirements and formalities*

Employment contracts can be concluded without observing formalities. Following commencement of the employment relationship a written document (Dienstzettel) setting out the key terms of the employment contract must, however, be issued by the employer if no written employment agreement is concluded.

As a general rule Austrian employers are entitled to terminate at will, subject to compliance with notice periods (6 weeks to 5 months depending on the employee's tenure) and effective dates (quarter's end unless otherwise provided for). Employees may contest their respective termination in case of

1. Unlawful motif (e.g. Employee's membership to a union, sex, or religion) or
2. Unfair termination (i.e. the employee is particularly affected by the termination due age, expected duration of unemployment or private situation) in which case the employer is obliged to justify termination.

### 31. *Social security regulations*

The legal provisions are quite complex and grant a high level of social protection in case of illness, unemployment and pension. Both employer and employee contribute to the social security institution. Employer's contributions amount to approximately 31 % of the employee's gross wage (up to an amount of such wage of approximately EUR 4,130 per month).

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# **EUROJURIS INTERNATIONAL BUSINESS GROUP:**

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who we are



# Eurojuris International

*Eurojuris was formed in the late 1980s with the objective of providing clients with access to legal advice and representation from local lawyers throughout Europe and worldwide.*

Eurojuris is now the leading network of law firms in Europe and worldwide with over 600 member firms and approximately 5000 lawyers. In addition Eurojuris can, through its correspondent firms, provide access to local firms in many other countries throughout the world. Members and correspondents are always well established medium sized independent law firms satisfying the Eurojuris criteria.

Eurojuris aims to provide more than just a reliable directory of legal firms. A permanent headquarters with full time staff to manage the organisation was created in 1993 and its responsibilities include co-ordinating numerous national activities, publishing brochures, newsletters and guides, organizing meetings and congresses, promoting specialist groups and setting up an organisation to provide cohesion among different legal systems and business cultures.

The Eurojuris commitment to quality is paramount and is maintained by ensuring that management procedures and work methods are tailored to match the client needs and are dynamic and open to constant improvement. It is also essential that all Eurojuris International members understand and implement approved work methods and that regular internal and external control procedures are reviewed on a systematic basis.

## **Eurojuris International Business Group**

*The Eurojuris International Business Group (Eurojuris IBG) is one of a number of the Eurojuris practice groups. Eurojuris IBG is a proactive, business generating group that was formed to enable a small group of Eurojuris members to focus on the needs of business clients. Members of the Eurojuris IBG are experienced in their practice areas and leaders in the international legal and business community.*

Eurojuris IBG members aim to provide a Partner level service to clients and, through close co-operation with European colleagues, to provide a consistent and seamless service.

Eurojuris IBG aims to offer a uniform presentation and mutual legal education schemes with common practices and to develop common services for the clients of member firms.

As more and more businesses find that improved communication and access opens the way to more international trade, the need for legal representation throughout a number of jurisdictions becomes essential. Eurojuris IBG provides access to expert local knowledge through a lawyer in the jurisdiction of the client's head office.

The members of Eurojuris IBG maintain close levels of co-operation and knowledge of each other's firms. This is achieved not only via the usual media of email, fax and telephone, but also through regular meetings, some of which take place in the offices of the member firms to enable members to understand the way in which they can better serve their client's needs.

The members of Eurojuris IBG fulfill very strict criteria: they are business minded, they work with business clients across Europe and overseas, they all work in the English language and have some knowledge of other European languages. Importantly they are equipped with the most up to date information technology systems and maintain substantial Professional Indemnity Insurance.

# How to expand **your business** across borders



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