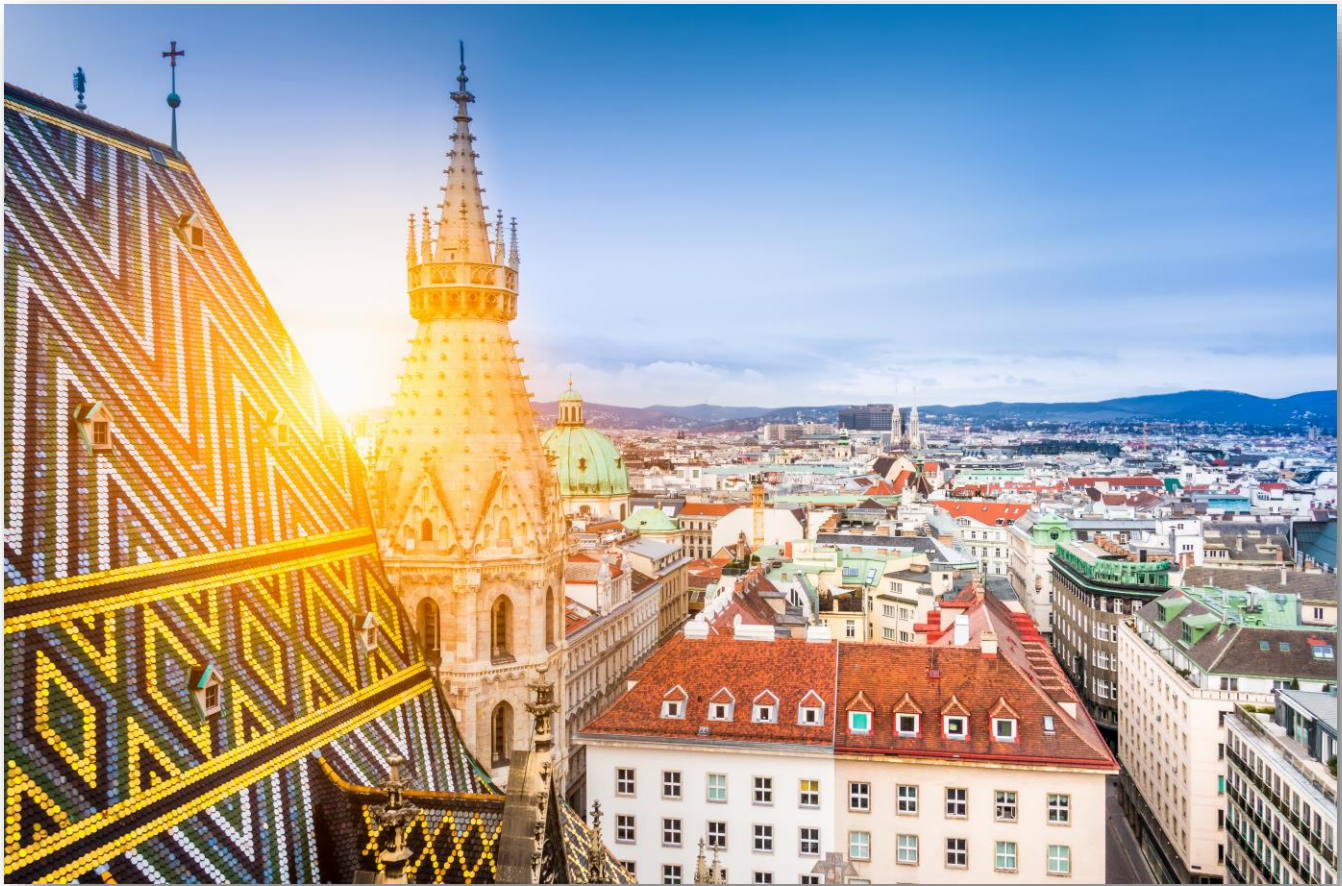




Fall | 21



INTERNATIONAL LAWYERS NETWORK



BRAUNEIS KLAUSER PRÄNDL
ESTABLISHING A BUSINESS ENTITY IN AUSTRIA

This guide offers an overview of legal aspects of establishing an entity and conducting business in the requisite jurisdictions. It is meant as an introduction to these market places and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.

ESTABLISHING A BUSINESS ENTITY IN AUSTRIA



“Establishing a Business Entity in Austria”

Dr. Andreas Bauer
Partner
Brauneis Klauer Prändl – Vienna

1. Introduction

In principle any national citizen or foreign national is allowed to establish a business in Austria. A company is defined as a partnership of at least two persons (exceptions for limited liability companies and joint-stock companies), founded by a legal transaction, who want to achieve a certain purpose through organized cooperation. While one person is sufficient to establish a **limited company** (*Kapitalgesellschaft*), at least two persons are necessary to form a **partnership entity** (*Personengesellschaft*). A business operated by a single natural person with full personal liability (i.e. without any further partners or shareholders) is referred to as a **sole proprietorship** (*Einzelunternehmen*).

If foreign business owners choose to establish a subsidiary in form of a limited company in Austria it is important to mention that the establishment is legally independent from the parent company meaning that the foreign parent company does not bear direct and unlimited liability for the subsidiary's obligations. The corporate forms typically chosen for such subsidiaries are the **limited liability company (GmbH)** and the **joint-stock company (AG)**. Additionally, there is the **European Company (SE)**, which is seldom used.

With regard to partnership entities, the **general partnership (OG)** and the **limited partnership (KG)** may be used. Another option to choose is the so-called **GmbH & Co KG**, which is a hybrid form of a limited company and a partnership

entity that combines characteristics of each of those two.

2. Types of business entities

Austrian company law offers a limited number of possible corporate forms, which are conclusively regulated by law. No further company forms may be created (however, companies incorporated in a Member State of the EU or EEA must be recognized as such in Austria). The most important Austrian company forms are:

- Limited liability company or Gesellschaft mit beschränkter Haftung (**GmbH**)
- Joint-stock company or Aktiengesellschaft (**AG**)
- European Company or Societas Europaea (**SE**)
- General Partnership or Offene Gesellschaft (**OG**)
- Limited partnership or Kommanditgesellschaft (**KG**)
- Branch offices of foreign companies or Zweigniederlassung

2.1 Limited liability company (GmbH)

The limited liability company or *Gesellschaft mit beschränkter Haftung* (**GmbH**) is an incorporated entity and is among the most popular legal forms for business enterprises in Austria. Its legal identity is independent of that of its shareholders. As a general rule, the shareholders of a limited liability company do not bear any personal liability towards the company's creditors for the company's obligations (“principle of separation”). The shareholders of a **GmbH** are only personally liable for unpaid share capital, or in the case of malevolence of the shareholder.

A **GmbH** is set up by one or more shareholders, who may be individuals, corporations and partnerships, residents and non-residents, Austrian and foreign citizens, as well as foreign corporations.

The contract between two or more founders of a limited liability company is called Articles of Association (*Gesellschaftsvertrag*). In case of a sole-shareholder company, the articles are referred to as Declaration of Establishment (*Errichtungserklärung*). Both documents must be certified by a notary public by means of a notarial deed. The *Gesellschaft mit beschränkter Haftung* (**GmbH**) comes into legal existence upon its registration in the Commercial Register (*Firmenbuch*). The minimum share capital of a limited liability company is EUR 35,000. At least half of the share capital (EUR 17,500) must be paid in cash (exception: continuation of an enterprise and contributions in kind). If the founders make use of the so-called Formation Privilege (*Gründungsprivilegierung*), only EUR 5,000 must be paid in cash at the time of formation. Additionally, the shareholders are personally liable for another EUR 5,000 during the first ten years after the “privileged formation” of a **GmbH** has been registered in the Commercial Register (*Firmenbuch*). The Formation Privilege (*Gründungsprivilegierung*) ends after ten years at the latest but can also be discontinued voluntarily at an earlier point in time. The requirements for this step are that the Articles of Association are amended accordingly and that the statutory minimum deposit requirements (usually at least EUR 17,500 in cash) are met. Since the transfer of shares in a **GmbH** is more difficult (a notarial deed is required) than that of stock in a stock company (**AG**) the **GmbH** is less suitable if a widespread ownership or the

frequent transfer of shares is desired.

2.2 Joint-stock company (AG)

The joint-stock company or *Aktiengesellschaft* (**AG**) is similar to the *Gesellschaft mit beschränkter Haftung* (**GmbH**) and the second legal form of a limited company in Austria. The *Aktiengesellschaft* (**AG**) is an independent legal entity and possesses rights and obligations of its own. The shareholders of an **AG** are only personally liable for unpaid share capital, or in the case of malevolence of the shareholder.

In comparison to the **GmbH**, the establishment of a joint-stock company is more complicated and more expensive.

An **AG** may be set up by one or more natural persons or legal entities. In the case of a sole founder it is required to register the sole-shareholder’s name in the Commercial Register (*Firmenbuch*). The Articles of Association must be certified by a public notary by means of a notarial deed. The formation procedure is subject to stricter formal requirements compared to the **GmbH**. The minimum stock capital of an *Aktiengesellschaft* (**AG**) is EUR 70,000. At least one quarter of said amount must be paid in during the company’s formation. The **AG** comes into legal existence upon its registration in the Commercial Register (*Firmenbuch*).

In comparison to the **GmbH**, the **AG** is structured after a so-called dualistic model. This means that the General Meeting (*Hauptversammlung*) appoints a Supervisory Board (*Aufsichtsrat*) with at least 3 members and the Supervisory Board appoints the Board of Directors (*Vorstand*). The directors are appointed for a maximum term of 5 years but may be reappointed after their term has ended. Contrary to the

managing directors of a **GmbH**, members of the Board of Directors (*Vorstand*) of a joint-stock company (**AG**) are not subject to instructions by the General Meeting or the Supervisory Board in their normal course of business.

The most significant advantage of the *Aktiengesellschaft* (**AG**) compared to the **GmbH** is the easier transferability of company shares and their tradability on the stock market.

2.3 Entities under European Law (SE)

The European Company or *Societas Europaea* (**SE**), the *European Cooperative Society* (**SCE**) and the *European Economic Interest Grouping* (**EEIG**) are also business entities which may be incorporated under Austrian law but are seldom used.

2.4 General Partnership (OG)

The general partnership or *Offene Gesellschaft* (**OG**) is an association of at least two physical persons or legal entities. Each of the partners in a general partnership bears personal, unlimited, direct and joint liability for all the partnership's obligations. The liability towards creditors can't be limited. The general partnership may be established for any purpose permitted by law and may therefore undertake all commercial, industrial, professional and agricultural activities (exceptions: activities such as insurance businesses, pension funds and employee provision funds). Unlike limited companies, the *Offene Gesellschaft* (**OG**) may be set up without any initial capital. It comes into legal existence upon its registration in the Commercial Register (*Firmenbuch*).

2.5 Limited Partnership (KG)

2.5.1 General information

The limited partnership or *Kommanditgesellschaft* (**KG**) is a partnership entity consisting of at least two physical persons or legal entities, similar to the *Offene Gesellschaft* (**OG**). The major difference towards the **OG** is the liability of its members, because not all the partners bear full and unlimited liability for the partnership's obligations. At least one partner ("general partner") is required to bear unlimited liability for the partnership's obligations while the remaining partner/s ("limited partner") is/are only liable up to the amount of their capital contributions registered in the Commercial Register (*Firmenbuch*).

2.5.2 GmbH & Co KG

The **GmbH & Co KG** is a hybrid form of the limited liability company (**GmbH**) and the limited partnership (**KG**) in which the sole personally liable general partner is a limited liability company (**GmbH**). In a typical setup the shareholders of the **GmbH** are also limited partners of the **KG**.

Considering how the liability of the partners is modified in case of the **GmbH & Co KG** the Austrian legislation tends – due to the strict rules on creditor protection – to apply the same legal framework to the **GmbH & Co KG** as to the limited liability company (**GmbH**). Therefore, the **GmbH & Co KG** is sometimes referred to as "hidden limited company".

The reasons for establishing this special form of a limited partnership are motivated mainly by the advantages of an indirect limitation of liability and tax

benefits.

2.6 Branch offices of foreign companies

Foreign legal entities (i.e. sole proprietors, partnership entities and limited companies) may do business in Austria by establishing so-called branch offices (*Zweigniederlassungen*). This possibility is available to every foreign legal entity, also business entities from non-European countries.

Although branch offices (*Zweigniederlassungen*) of foreign legal entities are required to be registered in the Commercial Register (*Firmenbuch*), they do not enjoy a separate legal personality. All obligations and liabilities of the branch office (*Zweigniederlassung*) constitute obligations of the respective foreign legal entity (business owner).

If a branch office (*Zweigniederlassung*) is established for a foreign limited liability company or joint-stock company with its registered seat outside the EU/EEA, it is required to appoint a “permanent representative” for the Austrian branch. The “permanent representative” is obliged to have his ordinary/main residence in Austria.

3. Steps and Timing to Establish

The necessary steps to establish any company form in Austria are similar in many ways, but there are a few differences for each type of business entity.

The principal step of any formation proceeding is the conclusion of the so-called Articles of Association (*Gesellschaftsvertrag*) which determine inter alia the name, the seat of the company, its purpose as well as the rules governing the interaction of its shareholders. The company’s name must be suitable for its identification and must have a distinctive character. As already mentioned, for the

foundation of a limited liability company and a joint-stock company a notarial deed is required. All applications to the Commercial Register (*Firmenbuch*) must be notarized.

The limited liability company demands a minimal amount of stock capital of EUR 35,000 (in the case of a Privileged Formation, EUR 10,000) and the joint-stock company EUR 70,000. Furthermore, there are certain criteria as to how the stock capital must be composed.

Generally, a company comes into legal existence upon its registration in the Commercial Register (*Firmenbuch*). Sole proprietorships do not have to be registered unless they exceed a certain business turnover of more than EUR 700,000 in two consecutive years or more than EUR 1.000,000 in one year.

Insurance Requirements:

Within the first month the managing directors (*Geschäftsführer*) (**GmbH**) or partners (**OG, KG**) must be registered with the Commercial Social Insurance Fund. Before employing anyone, a notification must be sent to the Regional Medical Insurance Company (*Gebietskrankenkasse*). Also, within the first month the commercial activity must be reported to the local fiscal authorities to receive a taxpayer identification number.

Required documents for a limited liability company:

The following documents must be presented to the Commercial Register (*Firmenbuch*) for the incorporation of a limited liability company (**GmbH**):

- Application for registration in the Commercial Register (*Firmenbuch*)
- Articles of Association (*Gesellschaftsvertrag*)
- Shareholder resolution on the appointment of at least one managing

director (*Geschäftsführer*)

- Notarized signature specimen of the managing directors (*Geschäftsführer*) and other authorised representatives (*Prokuristen*)
- Bank confirmation that the initial contributions have been paid into the agreed amount in cash and that they are at the free disposal of the managing directors (*Geschäftsführer*) and are especially not limited by any claims
- Resolution of the shareholders in notarized form regarding the election of the Supervisory Board (*Aufsichtsrat*) (if applicable)
- Resolution of the Supervisory Board (*Aufsichtsrat*) regarding the election of a chairman and the deputy chairman (if applicable)

4. Governance, regulation and on-going maintenance

4.1. Corporate governance

Corporate governance of course varies by the type of the company. For limited companies the supreme body is the General Meeting: the so-called *Generalversammlung* for the **GmbH** and the so-called *Hauptversammlung* for the **AG**.

A limited liability company (**GmbH**) is obliged to have a General Meeting (*Generalversammlung*) and one or more managing directors (and in some cases a Supervisory Board (*Aufsichtsrat*), which may also be established voluntarily). Managing directors (*Geschäftsführer*) must act with due diligence and follow the principle resolutions passed by the company's general meeting in compliance with the Articles of Association of the company and the applicable laws. They must not disclose

sensitive and confidential information to third parties, and they may be held personally liable for all damages caused by breaches of these obligations. Moreover, they usually must abide to a non-competition clause, which is normally part of their employment contract.

As already mentioned, for joint-stock companies (**AG**) a dualistic model is compulsory. This means that the General Meeting (*Hauptversammlung*) appoints a Supervisory Board (*Aufsichtsrat*) with at least 3 members and the Supervisory Board appoints the Board of Directors (*Vorstand*). The directors are appointed for a maximum term of 5 years but may be reappointed after their term has ended. Contrary to the managing directors of a **GmbH**, members of the Board of Directors (*Vorstand*) of a joint-stock company (**AG**) are not subject to instructions by the General Meeting or the Supervisory Board in their normal course of business. The Board of Directors (*Vorstand*) must also prepare the financial statements, which must be approved by the Supervisory Board (*Aufsichtsrat*) and then presented to the General Meeting (*Hauptversammlung*).

4.2 Audit requirements

In the first five months of the financial year, limited companies (**GmbH, AG**) and hidden limited companies (**GmbH & Co KG**) must prepare and submit the annual financial statements, together with the accompanying notes, a management report and, if applicable, a corporate governance report (e.g. large joint-stock companies) and a report on payments to government agencies for the preceding financial year, to the members of the Supervisory Board (*Aufsichtsrat*) (if there is one).

In the following cases a statutory audit is mandatory:

- Joint-stock companies (**AG**)
- Banks, insurance companies and investment funds
- Large and medium sized limited liability companies (**GmbH**)

In comparison, small and very small companies are only obliged to submit limited financial information to the Commercial Register (*Firmenbuch*).

A company is considered small if at least two of the following criteria are met:

- Total assets are lower than EUR 5 million
- Turnover is below EUR 10 million
- Average number of employees is less than 50

A company is considered medium-sized if at least two of the following criteria are met:

- Total assets are between EUR 5 million and 10 million
- Turnover is between EUR 10 million and 40 million
- Average number of employees is between 50 and 250

A company is considered large if two of the above-mentioned criteria are exceeded (total assets exceed EUR 10 million, turnover exceeds EUR 40 million and average number of employees exceeds 250).

4.3 Minority shareholder rights and protection

The rights of minority shareholders shall be explained in this chapter on the basis of the legal framework regarding the limited liability company (**GmbH**).

Shareholders are entitled to the following minority rights, depending on the percentage of equity held:

- Shareholders who hold at least one third of the share capital alone or jointly may appoint a minority representative to the Supervisory Board (*Aufsichtsrat*).
- Shareholders whose capital contributions amount to (i) 10% of the share capital or (ii) the nominal amount of EUR 700,000 or (iii) a lower amount stipulated in the Articles of Association (*Gesellschaftsvertrag*) alone or jointly are entitled to the following minority rights:
 - Appointment of an expert for a special audit of the annual financial statements;
 - Assertion of claims to which the company is entitled against shareholders, managing directors (*Geschäftsführer*) and members of the Supervisory Board (*Aufsichtsrat*);
 - Appointment and dismissal of liquidators for cause.
- Shareholders who hold at least 5% of the share capital or the proportionate amount of EUR 350,000 alone or jointly have the following minority rights:
 - Appointment of auditors;
 - Audit of the annual financial statements during liquidation.

Further minority rights result from the majority requirements for shareholder resolutions. Resolutions which require a majority of three quarters of the cast votes, e.g. amendments to the Articles of Association (*Gesellschaftsvertrag*), can be prevented by more than 25% of the cast votes (blocking minority).

It may be noted that the rights of minority shareholders in joint-stock companies (**AG**) are like the aforementioned rights in the limited liability company (**GmbH**).

5. Employment Law

5.1. Employment of foreign citizens

The employment of foreign citizens is subject to various restrictions and controls under the Employment of Foreign Citizens Act (*Ausländerbeschäftigungsgesetz*, **AuslBG**), which forms the basis for the access of foreign workers to the Austrian labour market.

The **AuslBG** aims to regulate the ordered access of foreign workers to the Austrian labour market and ensures that they are employed under proper working conditions and wages.

Employment of EU/EEA Nationals: For nationals of EEA member states and Switzerland (with exceptions currently still in place for Croatia until 30/06/2020), the rules of free movement of workers apply substantially in the same way as for citizens of EU member states. EU/EEA nationals have free access to the Austrian labour market according to EU law and require no employment or working permit. EU/EEA citizens who wish to stay longer than three months in Austria only need a registration certificate. This is issued by the competent residence authority.

Employment of Non-EU/EEA Nationals: According to the **AuslBG** workers from third countries (non-EU/EEA countries) require – as mentioned above – a combined work and residence permit to be granted long-term access to the labour market in Austria. Such a permit enables them to work for a specific employer (e.g. with a so-called *Rot-Weiß-Rot-Karte*) or grants free access to the labour market (e.g. with a so-called *Rot-Weiß-Rot-Karte Plus*). It can be noted here that issuing such a work visa is made easier if a highly qualified and well-paid worker is to be recruited.

6. Taxation

The tax burden on corporate profits in Austria depends on the legal form of the company, the amount of profit generated and lastly on whether the profit is distributed or withdrawn by the shareholders or not.

6.1 Income tax and corporate income tax

Austrian tax law knows two different income taxes: income tax (*Einkommenssteuer*, **Est**) and corporate income tax (*Körperschaftsteuer*, **KÖSt**). While the income tax (**Est**) for individuals is designed as a progressive tax-system depending on the actual amount of income, the corporate income tax (**KÖSt**) is set uniformly at 25% of the taxable income or, in the case of limited liability, at 25% of the taxable income earned within Austria. A current tax reform will gradually reduce the corporate income tax (**KÖSt**) to 23% over to course of two years beginning in 2023 (1% from January 1, 2023, 1% from January 1, 2024). Legal entities that fall under the corporate income tax are limited companies (most notably **GmbH** and **AG**), institutions and foundations, but also regional authorities and professional bodies (e.g., Chamber of Commerce). In contrast to other EU countries, there are no other taxes on the profit (e.g. a trade tax).

Losses may be carried forward indefinitely. In each subsequent profit year, only 75% of the profit may be compensated. This means that 25% of the profit is taxable even with existing loss carry-forwards.

Branches of foreign companies are also subject to Austrian corporate income tax (**KÖSt**) with their income earned in Austria.

6.2 Group taxation

Austria has a modern group taxation system, which allows compensation of

profit and loss within a group. Even foreign entities may be part of this system.

Austrian group taxation has the effect of balancing the profits and losses of the parent company and its subsidiaries by forming a group of companies. The group parent then combines the results of the group members and subjects them to taxation.

The requirements for the eligibility of the group taxation are:

- Capital participation (share capital, share capital or cooperative capital) of more than 50% and majority of voting rights of the group parent in the group members (financial link);
- Submission of a group application to the tax authority;
- Conclusion of a group agreement for the purpose of tax equalization within the group;
- Financial link during the entire financial year and/or retention in the group for at

In the case of an international box participation, profit distributions of the foreign subsidiary to the Austrian parent company are tax-free.

6.4 Capital gains tax

Capital gains tax (*Kapitalertragsteuer*, **KES**t) is a special form of income tax. In the case of domestic income from capital assets, this income tax is levied by withholding tax. This means that the capital gains tax is withheld by the bank or the paying agent and paid directly to the tax office.

Capital gains tax of 25% is imposed on investment income from cash deposits (e.g. for interest on savings books and current accounts). For all other income from capital

least 3 years.

6.3 Tax relief and international box participation

In general, taxation of foreign income is based on the provisions for avoiding double taxation. The so-called international box participation (*Schachtelbegünstigung*) is an objective tax exemption within the framework of the corporate income tax (**KÖSt**) for distribution and capital gains from certain participations in foreign corporations. The goal of the regulation is to ensure that profits earned by corporations are taxed only once, as long as they do not flow to natural persons.

The rules for an international box participation apply if

- an Austrian parent company
- has a share of at least 10%
- in a foreign subsidiary (that is like an Austrian company)
- for an uninterrupted period of at least one year.

assets, the tax rate is 27.5% (e.g. for dividends from shares in limited companies).

Capital gains of a company are fully included in the taxable income and are taxed at the corporate income tax rate of 25%. Capital gains on sales of shares in foreign companies are exempt from Austrian income tax under certain circumstances.

This Memorandum is for information purposes only and reflects Austrian law in December 2021.

This Memorandum does not constitute legal advice and cannot replace personal consultation on a case-by-case basis. If you have any further questions about establishing a business in Austria or need general legal advice, please contact Mr Andreas Bauer, a.bauer@bkp.at, +43 1 532 12 10.

bkp Rechtsanwälte is one of the leading business law firms in Austria. We are specialized in consulting in all areas of business law with a distinctly international orientation. We assist our

clients in the long term and find sustainable ways to achieve their desired objective.