

# Investing in Austria

By Martin Brodey and Veit Öhlberger

**DORDA BRUGGER JORDIS Attorneys at Law**

**A**ustria is located in the heart of Europe. From Vienna, all other European capital cities can be reached within less than three hours by flight. As a member state of the EU, Austria provides full access to the European internal market, which has the world's largest gross domestic product.

Austria is recognised as the leading hub for doing business in Eastern and Southeast Europe. A disproportionately high number of foreign businesses have set up their Eastern European headquarters in Vienna, which is, although a western European capital, located further east than Prague.

Breadth of cultural activities, environmental quality and high living and security standards make Vienna regularly number one in international rankings on the best quality of life in the world.

However, foreign businesses invest in Austria not only for practical and geographical reasons, but because of the investor friendly legal environment. Among other relevant factors, the Austrian legal system provides legal certainty, an investor friendly tax system, a flexible company law and an ideal framework for holding companies.

## Framework for foreign investment

The Austrian legal system places hardly any restrictions on foreign investments. In particular, Austrian law does not require the participation of local partners for certain activities. A minor exception to this general rule applies to substantial acquisitions in the area of public security and public order.

Furthermore, Austrian company law does not differentiate between Austrian invested and foreign invested enterprises. Governmental permission is not required to incorporate a foreign invested company in Austria.

In addition, although there are certain restrictions on foreigners purchasing land (these are regulated on the provincial level and vary from region to region, whereby Vienna is among the most foreigner friendly) there are no such restrictions to foreigners entering into rental agreements.

## Investment vehicles

### Limited liability company – GmbH

In most cases, foreign investors set up their Austrian subsidiaries in the form of a limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*). This legal form essentially combines a limitation of liability for shareholders with tight control over the business activities of the subsidiary, in particular by way of binding instructions to the management. Furthermore, the GmbH provides considerable flexibility with regard to the rights of shareholders

(e.g., voting rights, profit distributions and consent requirements). The minimum registered capital is €35,000 (currently approximately US\$47,000), of which – in the case of cash contributions – at least €17,500 has to be paid in prior to registration; upon registration the GmbH is free to use these amounts. Rather than receiving a physical share certificate, each shareholder holds a quota share corresponding to a certain registered capital contribution and essentially consisting of a bundle of rights and obligations.

### Stock corporation – AG

The other main legal form available under Austrian law that allows for a limitation of liability is the stock corporation (*Aktiengesellschaft – AG*). Compared to the GmbH, however, the form of an AG is less flexible and the shareholders have less control over the business. Furthermore, a stock corporation is legally required to

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have a supervisory board whereas a GmbH must have a supervisory board only upon reaching a certain size (e.g., more than 300 employees or more than 50 shareholders with registered capital exceeding €70,000) or when conducting certain types of business (e.g., investment companies). Moreover, the procedure for forming an AG is more complicated and costly than that of a GmbH. The minimum registered capital is €70,000, of which at least 25% must be paid in prior to registration. Compared to the GmbH, where the transfer of shares requires the drawing up of an Austrian notarial deed, shares in an AG can be transferred comparably easy: Bearer shares (*Inhaberaktien*) are transferred by simple physical transfer, name shares (*Namensaktien*) by endorsement.

### Holding company

An Austrian holding company may be established either in the form of a GmbH or in the form of an AG. Most holding companies are established in the form of a GmbH.

Austria offers a number of substantial advantages for holding companies, including:

- a national participation exemption (for details see below);
- an international participation exemption (for details see below);

- a modern group relief system (for details see below);
- the tax deductibility of financing costs;
- an extensive network of double taxation treaties (especially with Eastern European countries) providing for low dividend withholding tax rates;
- no domestic withholding tax on interest payments to non-residents;
- no provisions regarding foreign controlled companies;
- the possibility of obtaining tax rulings, confirming the tax treatment of a specific situation in advance; and
- the flexibility of Austrian company law.

Austrian corporations are subject to a corporate income tax rate of 25%. There exists no special corporate status for a holding company.

#### National participation exemption

Under the national participation exemption, dividends resulting from qualifying participants are tax-exempt. The following conditions must be fulfilled:

- an Austrian entity subject to corporate income tax (parent), e.g., a stock corporation or a limited liability company,
- has a participation, whether direct or indirect,
- in an Austrian corporation or a company with a legal form listed in the Annex to the EU parent/subsidiary-directive, or in a corporation resident in a third country that allows for extensive mutual administrative assistance (subsidiary).

If these conditions are met, any dividends received by the parent through its participation in the subsidiary will be exempt from Austrian corporate income tax, regardless of the extent of the participation and regardless of any holding period.

#### International participation exemption

Under the Austrian international participation exemption, dividends and capital gains resulting from qualifying participations are tax exempt. The following conditions must be fulfilled for the international participation exemption to apply:

- an Austrian corporation (parent),
- has a direct or indirect participation of at least 10% in the share capital
- of a foreign company (subsidiary) which is comparable to an Austrian or EU corporation (as opposed to a partnership),
- with the participation having been held for an uninterrupted period of minimum one year.

If these conditions are met, the following will be exempt from Austrian corporate income tax: (i) any dividends received by the parent from its participation in the subsidiary; and (ii) any capital gains realised by the parent upon the sale of its participation in the subsidiary.

As a result, dividends and capital gains as well as losses or other changes in value of a subsidiary are in principle tax neutral. However, there is the option to declare a participation as tax effective. This option has to be exercised in the year of the acquisition and is

non-revocable. Upon exercising this option, capital gains resulting from that participation or other changes in value of the subsidiary become taxable and losses tax deductible.

Sec 10 (4) of the Austrian Corporate Income Tax Act (*Körperschaftsteuergesetz*) contains a special anti-abuse provision relating to the international participation exemption. This provision applies if both of the following conditions are clearly fulfilled or one of them is substantially exceeded and the other one is closely met:

- the subsidiary focuses on earning passive income (i.e., interest income, rental income, income from royalties and income from capital gains) as opposed to engaging in an active trade or business;
- the subsidiary's effective tax burden is less than 15%.

In this case, the international participation exemption is replaced by an indirect foreign tax credit system (switch-over). Thus, if the subsidiary is a company in a low tax jurisdiction earning only (mainly) passive income, the anti-abuse provision would apply and dividends received by the parent from the subsidiary would be taxable at a rate of 25%, with the possibility of receiving a tax credit for foreign withholding taxes and taxes on underlying income of the subsidiary.

#### Group taxation

Financially linked companies may form a group of companies for tax purposes (tax group – *steuerliche Unternehmensgruppe*) with the legal effect that the taxable profit/loss of any business year of each group member is assigned to and taxed at the level of the group leader.

One of the basic requirements is that the companies are financially linked in a way that one company owns directly or indirectly more than 50% of the shares and the voting rights in another company. The group of companies shall exist for a minimum period of three years. In case a group member leaves the group during this minimum term, any assignment of profits or losses to the group leader is cancelled retroactively.

One of the main advantages of the group taxation is that losses generated by any group member may be offset against the profits generated by other group member(s) at the level of the group leader. Also foreign subsidiaries may become group members. As a consequence, foreign losses become deductible for tax purposes in Austria (whereby a double use of losses is excluded).

Where there is the acquisition of an operative company by a group member, a depreciation of goodwill is also allowed in case of a share deal. The goodwill is calculated as the difference between the equity of the acquired company plus hidden reserves contained in the non-depreciable fixed assets on the one side, and the acquisition cost on the other side. Any such goodwill is capped at 50% of the acquisition cost. The calculated goodwill will be depreciable on a straight-line basis over 15 years.

#### Branch office

Instead of establishing a (holding) subsidiary, some foreign businesses establish for minor investments a branch office (*Zweigniederlassung*). This is not limited to certain types of businesses but the branch office has to be registered with the Austrian

Companies Register. Foreign enterprises with their corporate seat outside of the EU and the European Economic Area (EEA) must designate a permanent representative residing in Austria. A branch office does not have a legal personality separate from its 'parent' company, so that contracts concluded with the branch office are concluded with the foreign legal entity itself. The decision to establish a subsidiary or only a branch office will depend mainly on tax and liability considerations.

### Investment via M&A

Previously, Chinese businesses mainly invested in Austria by establishing their own subsidiaries and simply selling their products and services in the Austrian and (Eastern) European market. More recently, Chinese investors have also entered the Austrian market through mergers and acquisitions.

The acquisition of an established business has the main advantage of providing immediate market penetration. The existing trade ties to – often Eastern – Europe can also be instantly used. In addition, most of the interesting Austrian targets are also active in China so that synergies can be achieved in the investor's home market too.

When mergers exceed certain thresholds, Austrian law requires clearance by the Austrian merger control authorities before the merger is put into effect. European merger control regulations can also apply, in addition to national legal provisions, when an even higher threshold has been crossed.

### Share deal or asset deal?

Generally speaking, straight forward M&A transactions are usually structured as share deals. However, as the legal identity of the target company remains unchanged by a share deal, the purchaser takes over the target with all its liabilities. This can be undesirable for an investor, in particular, when acquiring a distressed or insolvent business. In such a situation, an asset deal might be the better option, as in principle they allow the investor to exclude certain unwanted assets and liabilities from the purchase. However, this option is limited by Austrian law – in particular by the following provisions, which provide for an automatic transfer of liabilities with the transfer of underlying assets:

- Pursuant to sec 1409 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), the purchaser is liable for any pre-existing debts of the acquired business that he knew or should have known about. This provision is mandatory law but the

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Martin Brodey heads the firm's M&A and CEE desks. His practice focuses on corporate and M&A, international transactions, and CEE projects.

He has advised numerous international clients on a wide range of M&A transactions, including privatisations, in Austria and in Central Europe. On several occasions, he was retained as strategic lead counsel in sizeable M&A (and privatisation) projects in Eastern European jurisdictions (i.e. Hungary, Slovakia and Slovenia). Other M&A transactions in which he was retained include acquisitions linked with public tender offers (takeover law) and corporate restructurings (including the squeeze-out of minority shareholders).

Industries he covers include banking and financial services, energy, telecoms, construction, IT, wood and paper, food and beverages, chemical, pharmaceutical and health.

Martin graduated from the University of Vienna (Dr iur 1992) and the University of Virginia, School of Law in Charlottesville, Virginia (LL.M. 1989). He also studied law at the University Paris II 'Assas'. Prior to joining the firm in 1991, he worked as an associate at law firms in Washington, DC (Sidley & Austin), and New York (White & Case).

Martin is a member of the IBA, UIA, World Services Group and Biolegis. He has published numerous articles on corporate and competition law in Austrian and international professional journals, and gives presentations at specialised seminars and conferences in Austria and abroad. He is a board member and legal adviser of the American Chamber of Commerce in Austria.

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Veit Öhlberger is an attorney with DORDA BRUGGER JORDIS and specialises in corporate and commercial law, mergers and acquisitions, arbitration and doing business with China. He heads the firm's China desk.

Veit joined DORDA BRUGGER JORDIS in 2005. During 2008, he worked at the headquarters of the China International Economic and Trade Arbitration Commission (CIETAC) and at the Beijing office of a major German law firm. He regularly advises international clients, in particular Chinese clients, on investing in Austria as well as on Austria- and Eastern Europe-related M&A transactions and commercial contracts. His arbitration experience includes working under the ICC, UNCITRAL, CIETAC and the Vienna Rules in a wide range of commercial disputes relating to mergers and acquisitions, joint ventures as well as sale and distribution matters.

Veit graduated from the University of Vienna (Mag iur 2002, Dr iur 2004) and the University of Oxford (Lincoln College, M.Jur. 2004). He undertook additional legal studies at the London School of Economics and the Renmin University of China.

Veit is an active member of the Union Internationale des Avocats (UIA), the Austrian-Chinese Legal Association, the Young Austrian Arbitration Practitioners (YAAP) and the ICC Young Arbitrators Forum (ICC YAC). He regularly speaks and publishes on corporate and commercial law, arbitration and doing business with China.

extent of the liability is capped with the value of the acquired assets.

- Pursuant to sec 38 of the Austrian Business Code (*Unternehmensgesetzbuch*), the purchaser is liable for any pre-existing debts of the acquired business. The extent of this liability is not capped but the liability can be excluded by agreement. Such an exclusion of liability, however, becomes only valid towards third-party creditors if registered with the Companies Register or otherwise appropriately made public or if notified to the third-party creditor directly.

Other statutes provide for more specific liabilities for prior debts, for example, in respect of social insurance contributions and taxes.

### The need for due diligence

The above shows that a due diligence review of the target is essential. In some instances, liabilities can be contractually excluded. In other instances, respective representations and warranties should be agreed upon to reduce the risks arising out of an acquisition.

In this context it is important to note that, under Austrian law, a purchaser could be considered as having waived his claims with regard to a defect on which the seller offered specific information but the purchaser refused to conduct a due diligence review. This might even apply to instances where a purchaser failed to request certain information from the seller.

### Acquisition vehicle

A foreign investor may purchase an Austrian target directly or through an acquisition vehicle.

#### Austrian holding company

As explained above, an Austrian holding company provides many advantages, some of which make it a particularly useful acquisition vehicle.

#### Non-resident intermediate holding company

A non-resident intermediate holding company may be an option in cases of more favourable tax treaties between Austria and other jurisdictions, compared to the Austrian-Chinese tax treaty.

Dividends paid out by Austrian corporations to non-resident shareholders generally trigger a withholding tax of 25%. If a tax treaty provides for a lower withholding tax rate, the tax authorities will refund the excess amount (most double taxation treaties to which Austria is a party provide for a maximum rate of between 5% and 15%). Under some agreements, treaty relief may be granted at the source if certain conditions are met.

Under the Austrian provisions implementing the EU parent/subsidiary-directive, however, outbound dividends are totally exempt from any withholding tax under the following conditions:

- an EU company with a legal form listed in the annex to the EU parent/ subsidiary-directive
- has a direct participation of at least 10% in the share capital
- of an Austrian corporation
- with the participation having been held for an uninterrupted period of at least one year.

However, tax at source must be withheld temporarily if the dividends are distributed within the one-year holding period; a refund will be granted as soon as the one-year holding period has expired. According to a ruling issued by the Austrian Ministry of Finance, no temporary withholding is necessary if the taxpayer provides evidence that the shares will likely be held for a period exceeding one year and if sufficient security is provided.

Tax at source must also be withheld in the case of an abuse

of law and constructive dividends. Abuse of law does not exist if the EU parent company states in writing that it derives its income from active business, that it employs its own personnel and that it maintains its own business facilities.

### Acquisition funding

A purchaser has to decide on the debt/ equity portions of the funding of an acquisition. In this context, the main advantage under Austrian law is that interest on loans for the acquisition of a participation is tax deductible. The most common way to deduct interest expenses and to offset them against the target's taxable income is the acquisition of a business via an Austrian corporate acquisition vehicle, followed by the establishment of a tax group.

### Trade law

Depending on the type of business activity of a newly established company or branch office, a simple notification or an application for a trade licence with the competent trade authority may be required. Moreover, legal entities have to appoint a suitable trade representative. In case the business activity is a so called regulated trade (*reglementiertes Gewerbe*), the trade representative must fulfil certain requirements of professional training and/ or professional experience. The trade representative may either be an executive or an employee of the company, and has to reside in Austria or another EU or EEA member state (to the latter, certain exceptions apply in case of bilateral agreements between Austria and the third state or in case of reciprocity; these exceptions are, however, not relevant with regard to China).

### Employment of foreigners and residence permits

In cases where third country nationals are to be employed with the company or the branch office, they would have to obtain employment permits under the terms of the Austrian Aliens Employment Act (*Ausländerbeschäftigungsgesetz*) and a residence permit under the Austrian Act on Residence and Sojourn (*Niederlassungs- und Aufenthaltsgesetz*). Since July 1 2011, amendments to these statutes replaced the former general key employee concept by a set of four schemes for highly skilled third country nationals. They established an essentially merit-based points system in lieu of the former quota system. EU/ EEA citizens (except for Romanian and Bulgarian nationals) and Swiss nationals are free to live and work in Austria.

### Final remarks

Austria has a lot to offer to foreign investors – particularly from a legal perspective. However, to make use of the advantages of the Austrian legal system and to avoid potentially negative implications for investments requires sound legal advice on an individual basis. In response to a continually growing demand for legal advice on business between China and Europe, DORDA BRUGGER JORDIS established a 'China Desk'. Best acquainted with the characteristics of the local markets and culture, DORDA BRUGGER JORDIS also creates communicative and strategic conditions to successfully enter the Austrian market. We look forward to assisting you in investing in Austria.

# 在奥地利投资

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**奥**地利位于欧洲中心，由维也纳乘坐飞机，三小时内可以到达所有其他欧洲国家的首都城市。奥地利是欧盟成员国之一，能全面通往全球国内生产总值最高的欧洲内陆市场。

奥地利获公认为欧洲东部和东南部的具领先地位的业务枢纽，绝大部分外国企业在维也纳成立它们的东欧总部。虽然维也纳是西欧首都，但比布拉格位处较东。

文化气息、环境素质及高水平的生活和安全标准，使维也纳长期在全球最优质生活方面排名国际第一。

不过，外国企业到奥地利投资，不只是为了实际和地理原因，而是法律环境有利投资者。在各有关因素当中，奥地利的法律制度具确定性，税制有利投资者，公司法灵活具弹性，并且是控股公司的理想架构。

## 外商投资的架构

奥地利的法律制度对外商投资差不多没有任何限制，特别是奥地利法律没有规定当地合营者参与特定活动。这项通则的一个例外情况，是在公共安全和公共秩序方面的大额收购。

此外，奥地利公司法不区别奥地利投资企业与外商投资企业。在奥地利设立的外商投资企业不必政府批准。

此外，虽然对外国人买地实施一些限制（由省级管理，各地情况不同，而维也纳是当中最有利外国人的），但外国人签订租赁协议没有这些限制。

## 投资工具

### 有限责任公司 — GmbH

在大部分情况，境外投资者以有限责任公司的形式(Gesellschaft mit beschränkter Haftung – GmbH)在奥地利设立子公司。这种法律形式主要结合股东的有限责任和子公司业务的严密控制，尤其是通过管理层必须履行的指示。此外，GmbH为股东的权利（例如投票权、利润分配和同意的规定）提供较大灵活性。最低的注册资本为35,000欧元，当中最少17,500欧元为货币出资金额，

## 奥地利公司法不区别奥地利投资企业与外商投资企业。在奥地利设立的外商投资企业不必政府批准

必须在注册前出资；在注册后，GmbH可自由使用这些出资金额。每名股东持有相应注册出资金额的限量份额，而不是收到实际的股份证明书，此外还有基本的权利和义务。

### 股份公司 — AG

在奥地利法律下的另一种限制责任的主要法律形式是股份公司(Aktiengesellschaft – AG)。不过，与GmbH相比，AG形式的灵活性较低，股东对业务的控制较少。此外，法规要求股份公司必须设有监事会，GmbH在达到一定规模（例如超过300名员工或超过50名股东，注册资本多于70,000欧元），或经营某些业务种类（例如投资公司），才须设有监事会。另外，成立AG较GmbH的程序复杂和成本高。最低的注册资本为70,000欧元，当中最少

25% 必须在注册前出资。与GmbH不同，如转让股份必须有奥地利公证书，AG的股份转让较容易；无记名股份(Inhaberaktien)通过简单的实物转让，记名股份(Namensaktien)以背书方式转让。

## 控股公司

奥地利的控股公司可以有限责任公司或股份公司的形式成立。控股公司大多以有限责任公司的形式成立。

奥地利的控股公司的优点很多，包括：

- 国内股东免税(详见下文)；
- 国际股东免税(详见下文)；
- 现代化集团宽减制度(详见下文)；
- 融资成本可扣除税费；
- 双重征税协议的庞大网络(特别是东欧国家)规定的低股息预提税率；
- 向非居民支付利息不设国内预提税；
- 不限制外国控股公司；
- 税款核定，预先确定特定情况下的税款；
- 奥地利公司法可灵活实施。

奥地利企业的所得税率是25%。控股公司没有特别的企业身分。

## 国内股东免税

根据国内股东免税，合资格股东的股息免税，要符合以下条件：

- 缴纳企业所得税的奥地利企业(母公司)，例如股份公司或有限责任公司；
- 直接或间接持股；
- 在奥地利公司或欧盟母公司/子公司指令附件列出的法律形式的公司；或在允许广泛互相行政支持的第三国家的居民企业(子公司)。

如符合这些条件，母公司通过参与子公司收到的股息免收奥地利企业所得税，不论参与程度和控股时间。

## 国际股东免税

根据奥地利国际股东免税，合资格参与所得股息和财产收益免税，要符合以下条件才适用国际股东免税：

- 奥地利企业(母公司)；
- 直接或间接持股的股本有最少10%；
- 外国公司(子公司)，相当于奥地利或欧盟企业(相对于合伙企业)；
- 参与时间维持连续最少一年。

如符合这些条件：(i) 母公司从持股子公司所得的股息和(ii) 母公司出售子公司股份所得财产收益，免收奥地利企业所得税。

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Martin Brodey领导律行的并购和中东欧办事处，主要从事企业、并购、国际交易和中东欧项目。

他向很多国际客户提供在奥地利和中欧进行并购交易(包括民营化的法律意见。他在东欧国家(即匈牙利、斯洛伐克和斯洛文尼亚)的大型并购(和民营化)项目中获委任为策略性领导律师。他负责的其他并购交易包括公开邀约收购(收购法)和企业重组(包括挤出小股东)。

他涉足的行业包括银行与金融业、能源、电信、建筑、信息科技、木、纸、食品、饮品、化学品、药物和卫生业。

Martin在维也纳大学(Dr iur 1992)和弗吉利亚大学法学院(LL.M. 1989)毕业。他还在巴黎Paris II 'Assas'大学修读法律专业。在1991年加入律所前，他在华盛顿(Sidley & Austin)和纽约(White & Case)担任律师。

Martin是IBA、UIA、World Services Group和Bioglegis会员。他在奥地利和国际专家期刊发表很多企业和竞争法文章，又在奥地利和外国的专题研讨会和会议发表演讲。他是奥地利的美国商会委员会成员和法律顾问。

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Veit在2005年加入DORDA BRUGGER JORDIS。2008年，他在中国国际经济贸易仲裁委员会(CIETAC)的总部和一家主要的德国律所的北京办事处工作。他经常向国际客户，特别是中国客户提出在奥地利投资与奥地利和东欧有关的并购交易和商业合同的法律意见。他的仲裁经验包括根据国际商会(ICC)、联合国国际贸易法委员会(UNCITRAL)、中国国际经济贸易仲裁委员会(CIETAC)和维也纳法规，处理有关并购、合营企业和分销业务的商业纠纷。

Veit在维也纳大学(Mag iur 2002, Dr iur 2004)和英国牛津大学(Lincoln College, M.Jur. 2004)毕业。他在伦敦经济学院和中国人民大学修读其他法律课程。

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由此可见，子公司的股息、财产收益和损失和其他价值上的改变原则上不征税。不过，企业可以选择申报持股为应纳税项目。这选择必须在并购的年度作出，不能撤消。在作出这选择后，持股所得的财产收益或其他子公司价值的改变均应纳税，而损失则可扣税。

若以下两种情况同时清楚符合或其中一种情况远超出规定和另一种情况大致符合，适用奥地利企业所得税法(Körperschaftsteuergesetz)第10(4)条有关国际股东免税的特别反滥用规定：

- 子公司重点赚取被动收入(即利息收入、租金收入、特许权使用费收入和财产收益)，不从事主动贸易或业务；
- 子公司的实际税负少于15%。

在这种情况下，国际股东免税由间接外国税收抵免制度取代(制度转换)。因此，子公司在低税收区只有(主要是)被动收入，反滥用规定便会适用，母公司从子公司所收股息须缴纳25%税款，外国预提税和子公司所得税可能会有税收抵免。

## 集团缴税

财政上有连系的公司可为税务目的组成集团公司(税务集团 - steuerliche Unternehmensgruppe)，具有的法律效力是每个集团成员在任何营业年度的应纳税利润/损失，会集中在集团领导以征收税款。

对财政上有连系的公司，一个基本要求是一家公司须直接或间接持有另一公司多于50%的股份和投票权。集团公司成立最少三年。如集团成员在此最短期限内离开集团，分配到集团领导的利润或损失会追溯取消。

集团缴税的一个主要好处，是任何集团成员的损失可由其他集团成员的利润抵销，而且外国子公司也可以成为集团成员。因此，外国损失可以在奥地利扣减税款(不包括双重扣减损失)。

如集体成员收购一家运作中的公司，股份交易也可以摊销商誉。商誉是计算被收购公司的股权加上未折旧固定资产与收购价的差额。这种商誉最高是收购价的50%。已计算的商誉以直线法分15年折旧。

## 分公司

一些外国公司成立分公司(Zweigniederlassung)进行小型投资，而不成立控股子公司。分公司不受业务种类的限制，但必须在奥地利公司注册处注册。外国企业本身设于欧盟和欧洲经济区以外的，要在奥地利设立常驻代表机构。分公司并不是独立于母公司之外的法人，和分公司签订的合同，相等于和外国法人单位签订的合同。成立子公司或只成立分公司的决定，主要视乎税务和法律责任的考虑因素。

## 并购投资

中国企业过去在奥地利主要设立子公司，在奥地利和(东)欧市场出售产品和服务。近日中国投资者也通过并购进入奥地利市场。

收购已有公司的主要好处是能即时渗透市场。已有的贸易连系(一般是东欧)可即时利用。另外，大部分具吸引力的奥地利目标公司在中国也很活跃，可以在投资者的本地市场达到协同作用。

当合并超出一定标准，奥地利法律规定由奥地利合并管理部门在合并生效前处理。如超出更高标准，除国家法规外，欧洲合并管理法规也适用。

## 股份交易还是资产交易？

一般来说，简单的并购交易一般是股份交易的形式。不过，目标公司的法律身分不因股份交易而改变，收购人收购目标公司的所有债务。这种做法对收购困境或资不抵债企业的投资者来说是不智的。如属这种情况，资产交易可能是更好的方法，因为资产交易原则上准许投资者不收购不需要的资产和负债。不过，奥地利法规限制这种做法，特别是以下规定，要求转让资产时自动转让债务：

- 奥地利民法(Allgemeines Bürgerliches Gesetzbuch)第1409条规定，收购人对他所知或应该知道的被收购公司的已有债务负责。这条法规是强制执行的，但债务的水平最高为被收购资产的价值。
- 奥地利商业法(Unternehmensgesetzbuch)第38条规定，收购人对被收购公司的已有债务负责。债务水平没有上限，但可通过协议不包括债务。不过，不包括债务的做法，只限于此豁免已在公司注册处登记，或适当地公开或直接通知第三方债权人，才对第三方债权人有效。

其他法规规定已有负债的具体债务，例如有关社保缴费和税款。

### 尽职调查的需要

以上所述显示对目标公司进行尽职调查是必要的。有些情况债务可以合同规定豁免。其他情况有关说明和保证必须约定，以减低收购引起的风险。

在此情况下，我们要注意奥地利法律规定若果卖方提供的具体材料有缺陷，收购人拒绝进行尽职调查，视为放弃追诉权利。若果有些情况下收购人没有要求卖方提供某些材料，此规定或许也适用。

### 收购工具

外国投资者可直接或通过奥地利公司收购奥地利目标公司。

#### 奥地利控股公司

正如以上说明，奥地利控股公司好处很多，一些好处令奥地利控股公司成为特别有用的收购工具。

#### 非居民中间控股公司

奥地利和其他司法管辖区的税务协议比奥地利与中国的更优惠，可考虑成立非居民中间控股公司。

奥地利企业支付的股息一般要缴付25%预提税。税务协议规定的预提税率较低的，税务部门会退回过多的税款(奥地利签订的大部分双重税务协议规定最高税率为5%至15%之间)。有一些协议规定达到一些条件会提供税务优惠。

但是，奥地利实行有关欧盟母/子公司的指令，规定在以下情况的境外股息免收预提税：

- 欧盟公司的法律形式属于欧盟母/子公司的指令附件列出的形式；
- 直接持股最少达股本的10%；
- 奥地利公司；
- 持股的时间最少连续一年。

不过，股息在一年持有期内分配的，须暂时源泉扣缴税款，一年持有期过去后，会尽快退回。奥地利财务部发出的裁决指出，纳税人若能提供股权很可能会持有多年于一年的证明，同时提供足够担保金的，不需要暂时扣缴税款。

滥用法律和建设性股息的，也要源泉扣缴税款。欧盟母公司书面说明收入来自活跃业务，有聘用员工和自设公司设施的，不属滥用法律的情况。

### 收购资金

买方要决定收购资金的债务/股权分配。奥地利的法律在这方面的主要好处，是收购股权的贷款利息可抵扣税款。利息费用抵扣目标公司的应纳税所得额最常用的方法是使用奥地利企业收购其他业务，然后成立税务集团。

### 贸易法

按照新成立公司或分公司的业务类别，申请贸易许可须向主管贸易部门作简单通知或作出申请。此外，法人公司要委任合适的贸易代表。当业务是所称的被监管行业(reglementiertes Gewerbe)，贸易代表要具备有关专业培训或专业经验。贸易代表可以是公司的行政人员或员工，必须在奥地利或其他欧盟或欧洲经济区成员国居住(对后者来说，奥地利和第三方国家签订双边协议或互惠协议会有一些例外情况，但这些例外情况与中国没有关系)。

### 外国人就业和居住证

公司或分公司招聘的第三国家的国民必须根据《奥地利外国人就业法》(Ausländerbeschäftigungsgesetz)取得外国人就业证，和根据《奥地利居住和旅居法》(Niederlassungs- und Aufenthaltsgesetz)取得居住证。由2011年7月1日起，修订后的上述法规以第三国家人才的四个计划，取代原一般主要员工的概念，设立主要根据优点的制度，代替以前的配额制度。欧盟/欧洲经济区人(不包括罗马尼亚和保加利亚人)及瑞士人可自由在奥地利生活和工作。

### 结语

奥地利可向外国投资者提供多项选择，特别是从法制方面来看。不过，为了善用奥地利法律制度的优点，避免可能对投资的负面影响，必须按个别情况有资深的法律意见。因应中国和欧洲对法律服务的需求持续增长，DORDA BRUGGER JORDIS设立了“中国办事处”。DORDA BRUGGER JORDIS对本地市场和文化了如指掌，同时为投资者提供沟通和策略性条件，助其成功进入奥地利市场。我们期待为您在奥地利的投资效力。