

Client Memorandum

Corporate Law | The selection of a company structure in Austria

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1. Statement of facts and related questions

Our clients are planning to start a pharmaceutical business, with each of the co-founders offering different means of contribution, varying levels of expertise as well as divergent degrees of intended involvement in the day-to-day operations. Which company structure best accommodates their respective interests and objectives?

2. Brief answer

In view of their disparate circumstances and possibilities for contribution, a so-called "AG & Co. KG" – a business partnership with a stock corporation as the only fully liable partner – appears to be the most suitable legal structure.

Since Marc possesses considerable knowledge and is the only one to have gained any working experience in the pharmaceutical sector, it stands to reason that he would not want to be restricted to merely receiving a share in (possible) future profits, but instead prefer equity participation in the company. However, he currently has no funds at his disposal and is therefore unable to make a capital contribution, which (assuming he does not possess any assets eligible for contribution in kind either) precludes him from attaining equity ownership in a corporation (AG or GmbH). Partnerships, by contrast, do allow for equity participation of a so-called working partner ("Arbeitsgesellschafter").

A conventional business partnership, however, engenders considerable risk, since establishing a traditional OG or KG would be contingent on (at least one of) the partners agreeing to assume unlimited personal liability, which – especially against the backdrop of an industry which entails taking risks – seems like an imperfect solution.

The AG & Co. KG not only accomplishes a limitation of liability, but also enables Marc to obtain equity in exchange for his working contribution as a limited partner¹. In addition, the establishment of a so-called consolidated unit company ("Einheitsgesellschaft")² simplifies the voting process and eliminates the need for stipulations regarding the departure of one of the three founders, since departure from the KG will consequently entail an exit from the AG as well. Moreover, should the founders at some point in the future decide to go public, the appropriate company structure (AG) will already be in place.

3. Detailed commentary and further information

In order to establish the AG & Co. KG, the stock corporation ("Aktiengesellschaft", henceforth referred to as "AG"), functioning as the fully liable partner, will have to be incorporated first. The establishment of an AG requires a nominal capital of at least € 70.000³. Since Marc doesn't possess any financial resources, only Ann and Tom will provide the requisite capital endowment, with both contributing € 35.000 and in turn receiving a 50% share in the AG. They will then settle on the allocation of supervisory board mandates, which should be awarded to people closely associated with them. Marc – on account of his professional knowledge and expertise – will subsequently be appointed CEO by the supervisory board; he will be the sole member of the company's executive board for now.

After having completed the formation of the AG, the founders will proceed with the establishment of the limited partnership ("Kommanditgesellschaft", henceforth "KG"). Marc, Ann and Tom will be limited partners ("Kommanditisten"), with all three partners holding equal stakes. This will be stipulated in the partnership agreement.

Marc will be working partner and obtain equity participation in exchange for providing his services, which – for the purpose of matching his stake with those of Ann and Tom – will be valued at € 35.000. According to a ruling by the Austrian Supreme Court (OGH)⁴, the fact that Marc will fulfil his working contribution as CEO of the AG (the KG ceding their claim to Marc's contribution to the AG⁵) does not constitute a prohibited capital repayment (despite the AG being a partner in the KG) because the provisions of §§ 82 f GmbHG are – albeit extended in scope by way of analogy to the company structure of GmbH (AG) & Co. KG – applicable exclusively to the relation between the company and its limited partners, not between the KG and the fully liable partners.

Contrary to Ann and Tom, Marc's contribution will not be fulfilled immediately, due to its character as a future service. This will bear a significant risk for Marc, as he will remain personally liable to the KG's creditors in the amount of € 35.000 until his services provided to the business – appraised at objective value. To avoid this, the partners can⁶, presumably meaning the amount a third party could command for the same kind of services⁷ – match the valuation of his contribution (€ 35.000)⁸; this applies irrespective of Marc's registered amount of liability ("Haftsumme"), for which there exists no legal minimum⁹. To avoid this, the partners can agree to value his contribution lower than what they consider it to be worth¹⁰ – while at the same time maintaining his stake of one third – in the business agreement¹¹.

The AG will become unlimited partner ("Komplementär") of the KG. It will not make a capital contribution, due to the operational business remaining entirely within the AG, thus obviating the need for greater financial resources in the KG. Instead, the AG will become a working partner as well, albeit – unlike Marc – a "pure" working partner with no equity participation, which is possible under Austrian law¹². The contribution of the AG will consist in taking on the unlimited liability and management of the KG. It will neither be entitled to profits, nor to the proceeds of liquidation or the return of credit balance upon withdrawal. In order to pre-emptively avoid any problems relating to formation of will, the AG will not partake in the decision-making process of the KG¹³; the votes of Marc, Ann and Tom will each count for one third. The partnership agreement will also contain a clause assigning the representation of the KG in relation to its shareholder rights from its stake in the AG exclusively to the limited partners, prohibiting the AG from exercising the KG's shareholder rights in its own general assembly. Marc – due to his position as CEO of the AG – will abstain from voting in all matters pertaining to his mandate, so as to avoid any conflict of interests.

Ann and Tom will make a contribution in kind and bring in their shares in the AG, valued at their nominal worth of € 35.000.

Consequently, the KG will become the sole stakeholder in its unlimited partner, the AG. Such a structure – until recently – had been considered inadmissible by some. However, in 2014 the Austrian Supreme Court (OGH), when confronted with the question regarding the legal admissibility of a consolidated unit company (“Einheitsgesellschaft”), ruled¹⁴ that the provision of § 81 GmbHG (purchase of own shares) is not applicable if the unlimited partner’s stake in the KG does not have any economic value, meaning he does not participate in profits and losses, proceeds of liquidation and is not entitled to a return of credit balance. That is the case with a pure working partner. A consolidated unit company is therefore – according to the OGH – permissible with regard to this provision. Other requirements in relation to the payment of the purchase price by the partnership and the corresponding liability of the unlimited partner do not require further examination here, on account of the stakes in the AG representing a contribution in kind for which the KG will not have to pay. The structure outlined here, with the AG serving as a pure working partner and not gaining equity participation is therefore admissible under Austrian law.

¹ *Bergmann*, RdW 2008/341, 382; *Krejci in Krejci*, RK UGB § 167 Rz 11;

Koppensteiner/Auer in Straube (Hrsg), UGB I₄ § 171 Rz 13

² meaning that the KG is the lone shareholder in its unlimited partner (the AG)

³ see § 7 AktG

⁴ 2 Ob 225/07p

⁵ which does not interfere with § 124 UGB, see 3 Ob 29/81

⁶ 2 Ob 517/88; *Koppensteiner/Auer in Straube* (Hrsg), UGB I₄ § 161 Rz 14, § 171 Rz 11

⁷ *Wünsch*, GesRZ 1978, 52

⁸ 2 Ob 517/88; 4 Ob 540/89; 7 Ob 1658/95

⁹ OLG Wien 31. 3. 2005, 28 R 53/05b, GeS 2005, 378; *Koppensteiner/Auer in Straube*, UGB I₄ § 161 Rz 13

¹⁰ 9 Ob 128/98h HS 29.017; *U. Torggler/H. Torggler in Straube* (Hrsg), UGB I₄ § 109 Rz 26; *Koppensteiner/Auer in Straube* (Hrsg), UGB I₄ § 161 Rz 14; any valuation would still, however, be subject to the general/universal limitations contained in §§ 879, 934f ABGB

¹¹ § 109 UGB is non-mandatory

¹² 6 Ob 8/00w SZ 73/71; OGH SZ 49/163; *Koppensteiner/Auer in Straube* (Hrsg), UGB I₄ § 161 Rz 18

¹³ § 119 Abs 2 UGB will be waived in the partnership agreement

¹⁴ 6 Ob 185/13v

