

AUSTRIA

Austrian Bar (ÖRAK)

Professional Law

- **Amendments to the Lawyers' Act (RAO)**

In a ruling of 11 June 2013, the Austrian Constitutional Court repealed as unconstitutional the phrase "similar provisions apply to elections which are held during a plenary assembly" in section 23 paragraph 3, final sentence, of the Lawyers' Act (RAO). The repeal took effect as per 30 June 2014. The repealed provision had provided (in section 24 paragraph 3 RAO) that the different weighting of votes between lawyers and trainee lawyers, which was applicable in certain elections in the plenary assembly of a bar, should be applied to votes on all matters assigned to the plenary assembly.

On 12 June 2014 the Budget Accompanying Act 2014 (*Budgetbegleitgesetz*, Federal Law Gazette BGBl I 40/2014) was promulgated which contains, inter alia, the new provisions for section 24 paragraph 3, final sentence, RAO. The newly drafted rules now provide that two votes of a trainee lawyer correspond to one vote of a lawyer in votes conducted in the plenary assembly.

A new provision was introduced according to which trainee lawyers have a full right to vote in votes pursuant to section 27 paragraph 1 letter (d) RAO on the assessment of the annual dues paid by the bar members to cover the bar's administrative expenses and of the contributions paid by the bar members to cover expenditure under section 29 paragraph 1 letter (c) RAO, and in votes on the Schedule of Contributions (*Umlagenordnung*) pursuant to section 51 RAO.

Moreover, the Budget Accompanying Act 2014 amended section 53 paragraph 2, first sentence, RAO which - in addition to a ceiling amount - now also prescribes a minimum amount, i.e. at least one quarter of the amount actually due to be paid by a lawyer, for the contributions assessed in the Schedule of Contributions for the trainee lawyers' pension fund.

These amendments took effect on 1 July 2014. The Austrian Bar welcomes these amendments which comply with the Constitutional Court's ruling.

- **Amendment of the Guidelines on the Exercise of the Lawyer's Profession (RL-BA)**

At its meeting on 23 May 2014, the assembly of representatives of the Austrian Bar resolved to amend the "Guidelines on the Exercise of the Lawyer's Profession and the Monitoring of Duties of Lawyers and Trainee Lawyers (RL-BA 1977)". Accordingly, lawyers must not pay less than EUR 1,150 to their office staff. The amendment also included provisions governing apprentices, according to which apprentices must be paid a (gross) amount (14 times per year) of at least EUR 367 in the first year of training, of at least EUR 458 in the second year, and at least EUR 605 in the third year of training.

- **Adjustment of the General Fee Criteria**

The assembly of representatives of the Austrian Bar resolved to adjust the General Fee Criteria (*Allgemeine Honorar-Kriterien, AHK*). These changes include a valorisation of the assessment base for the general fee criteria and the fee categories pursuant to section 9 AHK as well as adjustments which were required in the wake of the Administrative Court Amendment.

New Supreme Appeals and Disciplinary Commission (OBDK)

In 2012, the Austrian National Council adopted a wide-ranging reform of the system of administrative jurisdiction (Administrative Jurisdiction Amendment 2012), which created a two-tier system of administrative jurisdiction consisting of 11 administrative courts (one regional administrative court in every Austrian province as well as a Federal Administrative Court and a Federal Fiscal Court). The new administrative courts started their work on 1 January 2014. In the wake of this reform, a number of administrative authorities such as the Supreme Appeals and Disciplinary Commission (OBDK), which is responsible for professional and disciplinary matters concerning lawyers and trainee lawyers, were dissolved. On a positive note, the reform has installed a stage of appeal to the Supreme Court for disciplinary matters and some other matters of major importance governing lawyers and trainee lawyers. (Administrative Jurisdiction Adjustment Act – Judiciary). Matters referred to that instance are dealt with in one or several senates which consist, as in the past, of two professional Supreme Court judges and two lawyer-judges who are elected from among the legal profession. The regional administrative courts and in some areas also the Federal Administrative Court now have competence for all other matters.

Complaints against laws

Since 1 January 2015, the Austrian Constitutional Court decides on the unlawfulness of ordinances and/or the unconstitutionality of laws upon application by persons who are a party in a case decided by an ordinary first-instance court and who claim that their rights have been infringed because of the application of an unlawful ordinance or unconstitutional law, on the occasion of an appeal filed against such a decision (Federal Law Gazette BGBl I 114/2013). This means that a complaint to this effect is filed together with an appeal against the first-instance decision. The Constitutional Court may refuse dealing with any such complaint if it is unlikely that it will be successful.

In June 2014, a draft of the simple-law provisions to implement the complaint procedure was sent out for consultation. As expected, it contained a large number of exemptions, some of which were justified merely by the desire to bring the proceedings to a quick end. Any such extensive catalogue of exemptions raises concerns as to equal treatment, given the fact that an application for judicial review of a legal norm which is filed by a court is not subject to any similar restriction. In its comments on the draft bill, the Austrian Bar (ÖRAK) warned of the immunization of entire proceedings which are being withheld from a review. This would essentially erode the purpose of the new legal remedy.

Access to Justice

- **Court Fees**

For years, the Austrian Bar has been criticising that access to justice is being severely restricted because of high fees. According to a recent study conducted by the Council of Europe (CEPEJ - The European Commission for the Efficiency of Justice) in 2014, Austria's judiciary is financing 108.3% of its expenditures from fees that are levied. The European average is 20.5%. In view of the ever increasing fees, many citizens are reluctant to enforce their rights. The Austrian Bar (ÖRAK) has long been demanding affordable access to justice; in particular it has been asking for a cap on lump-sum fees in civil proceedings.

With the 2014 Court Fee Amendment, the legislator has already taken up a number of demands voiced by the legal profession: Major changes include the abolition of fees for minors in family law proceedings, reduced fees in other custodial and family law proceedings, the elimination of questions of doubt in collection proceedings, and the creation of requirements for the joint payment of registration fees and land transfer tax.

- **Land Transfer Tax**

A ruling by the Constitutional Court of 27 November 2012 required a reform and amendment of the land transfer tax which was promulgated on 30 May 2014 in Federal Law Gazette BGBl I 36/2014 and has been in force since 1 June 2014. During the legislative process, the Austrian Bar had pressed for the creation of a system that is consistent with the rules governing the assessment of the court registration fee. The new provisions largely correspond to the proposals made by the Austrian Bar. Sadly, the parliamentary process brought about a limitation of the circle of family members who are beneficiaries, which now differs from the Court Fees Act.

Amendment of the Code of Criminal Procedure

In May 2014, a draft amendment of the Code of Criminal Procedure was sent out for consultation. It entered into force on 1 January 2015. The Austrian Bar welcomes this legislative initiative, since it implemented – at least partially – a number of major demands of the legal profession.

On a positive note, the reform has provided for new possibilities for appointing and reviewing the work of court experts and for calling in private experts. These changes are at least a step in the right direction. The Austrian Bar explicitly welcomes the re-introduction of a second professional judge in proceedings with lay jurors, even though the list of offences is still too restricted. The Bar also welcomes that the ceiling amounts for determining the lump-sum contribution to be made to the reimbursement of defence costs, pursuant to section 293a Code of Criminal Procedure after acquittal or stay of the proceedings in given cases, have been raised. This now satisfies – at least partially – a long-time demand of the legal profession (the ceiling amounts are still too low to constitute adequate reimbursement of defence costs in such cases).

The Austrian Bar has heavily criticised the (re)introduction of summary proceedings for small claims. While some improvements were made during the legislative process, which partly defused the problem, the Austrian Bar continues to be adamantly opposed to summary proceedings for small claims because of massive concerns under the rule of law.

This reform package does not include the following demands which have also been made by the legal profession: strengthening the rights of defendants, ensuring effective defence by expanding the stand-by duty of lawyers, and prescribing in law the requirement of a legal defence in adversarial witness examinations.

Reform Project Criminal Code 2015

In early January 2013 the Federal Ministry of Justice set up a project group which has since been dealing with a comprehensive reform of the Austrian Criminal Code. The Austrian Bar involved itself heavily in the reform debates in a number of meetings. One task of the project groups is to review the different penalty ranges for crimes against the person and for property offences. The Austrian Bar has warned against implementing a more balanced penalty regime by increasing the penalty ranges for crimes against the person and criticised the planned, partly substantive increases in a comment submitted to the Federal Ministry of Justice. The final report of the project group was presented recently.

Right to Issue Instructions

In early 2014, a consultative board for reforming the reporting duties and the right to issue instructions was set up. A management, steering and control model for public prosecutor's offices that is in conformity with the Constitution is to be developed. Austria's lawyers were represented in this expert group by Dr. Rupert Wolff, President of the Austrian Bar. The much-discussed delegation of the power to issue instructions to a body other than the Federal Minister of Justice was rejected by a majority, since this would require an extensive amendment of the Constitution. At its final meeting, the consultative board reached the conclusion that a "Committee of Wise Men" consisting of the Procurator General as chair and two external jurists should be set up. This would eliminate the risk of possible political interference by public prosecutor's offices.

Data Retention

One encouraging development can be reported from the area of fundamental rights protection: In April 2014, the Court of Justice of the European Union (CJEU) declared the European Data Retention Directive (Directive 2006/24/EC) as invalid following two requests for a preliminary ruling by the Irish High Court and the Austrian Constitutional Court (C-293/12 and C-594/12).

Specifically, the CJEU was clear in its finding that the directive constitutes an interference with the fundamental right to the protection of private life and of communication (Article 7 of the Charter of Fundamental Rights of the European

Union) and with the fundamental right to the protection of personal data (Article 8 of the Charter of Fundamental Rights of the European Union), which is wide-ranging and particularly serious. Provisions are lacking to ensure that the interference is limited to what is absolutely necessary.

The Constitutional Court then resumed the proceedings, which had been stayed, and ruled in late June 2014 that the Austrian provisions to implement the Data Retention Directive were disproportionate and therefore unconstitutional (G 47/2012 and others). Statutory limitations of the fundamental right to data privacy, the Constitutional Court argues, must be the least intrusive of all means to attain the given objective, and proportionate when weighing the seriousness of the interference and the importance of the objectives pursued. The Court took the view that the Austrian provisions, in an overall assessment, would not satisfy these requirements. Notably, the Constitutional Court did not grant the legislature a deadline for rectification and repealed the provisions with immediate effect.

The Austrian Bar (ÖRAK), which had been vehemently opposed from the very beginning to an all-encompassing retention of communication data of all citizens without suspicion, welcomes this clear decision which has been issued by the Constitutional Court. Nevertheless, the Austrian Bar still maintains that all restrictions implemented in Austria since 11 September 2001 in the area of surveillance and the fight against terrorism are evaluated by an independent expert commission and that its recommendations are implemented.

Guardianship Law

Guardianship law continues to be a highly-debated issue. The Austrian Bar has long been demanding improvements and submitted a list of demands in April 2014 which had been drafted by a working group on guardianship law it had set up. The demands listed include the abolition of the mandatory involvement of a lawyer to take over a guardianship case, often without payment, the deletion of the refutable assumption pursuant to section 279 paragraph 5 Civil Code, the possible splitting of legal representation and individual care, adequate compensation, and – at any rate – a refund of cash outlays from state funds. Moreover, the Austrian Bar has been demanding a solution for the VAT problem (lawyers are liable to pay VAT on their compensation when acting as guardians, as against natural persons, and must not be in a less favourable position than other natural persons acting as guardians), a reduction of the lump-sum rate according to tariff rate TP 7(c) subparagraph 2 GGG (*Gerichtsgebührengesetz*, Act on Court Fees) and modification of the mandatory contact rules.

The Federal Ministry of Justice is currently working on a comprehensive reform of Austrian guardianship law. The Austrian Bar (ÖRAK) is strongly involved in these activities, which are expected to be finalised by 2016.

Family Court Assistance

The 2013 Adoption and Name Change Amendment Act established the so-called family court assistance (*"Familiengerichtshilfe"*). This new institution is to improve the quality and sustainability of litigation and court proceedings in custody matters and personal interaction. Since July 2014, family court assistance units are available all over Austria at the first-instance district courts. In parallel, a steering group set up at

the Federal Ministry of Justice a year ago, has been working on the further development of family court assistance standards.

Transposition of the Consumer Rights Directive

On 13 June 2014 major amendments to the Consumer Protection Act (*Konsumentenschutzgesetz*) and a new Distance and Off-Premises Contracts Act (*Fern- und Auswärtsgeschäfte-Gesetz, FAGG*) entered into force (Act implementing the Consumer Rights Directive, Federal Law Gazette BGBl I 33/2014), which provide for extensive information duties and severe legal consequences for failure to meet these duties. These also apply to lawyers. This reform was prompted by the need to transpose Directive 2011/83/EU on consumer rights. The directive should have been transposed by the end of 2013, the ministerial bill was sent out for consultation only in 2014.

In its comment, the Austrian Bar (ÖRAK) identified a number of grave shortcomings in the draft bill and adverse consequences for businesspeople in Austria. In particular, the Austrian Bar (ÖRAK) does not consider it to be objectively justified to exempt service providers such as financial services providers or public officials from the duties of providing information, not, however, lawyers who are also subject to strict professional rules which by law require them to be independent and to furnish comprehensive legal information to consumers (their clients) on the legal consequences of concluding a contract. Although, on a positive note, some clarifications have been achieved, major points of criticism remain.

TrustNetz

For years, lawyers, physicians, journalists and several other professions which are subject to professional secrecy obligations in the interest of their clients, patients or informants have been exposed to a gradual erosion of professional secrecy. The Austrian Bar (ÖRAK) has responded to these challenges by developing, together with partners, a secure, encrypted and confidential electronic communications network called *TrustNetz*. As participants in the electronic legal transactions (ERV) system, lawyers are automatically connected to *TrustNetz*. With their citizen cards or digital mobile signatures, clients can subscribe to *TrustNetz*. Both communication partners can communicate confidentially, securely and verifiably via *TrustNetz* without media discontinuity. The costs per message are borne by the sender and amount to EUR 0.95 or EUR 1 (adding VAT), regardless of the file size.

HELP Programme

In March 2014, the Austrian Bar (ÖRAK) acceded to the Human Rights Education for Legal Professionals (HELP) programme. The HELP programme provides for fundamental right training of judges, public prosecutors and lawyers. Information on the HELP programme is accessible at www.coe.int/help.

Relaunch of the Internet Site of the Austrian Bar

The new concept and design of the website of the Austrian Bar (ÖRAK) was finalised and presented in early 2014 (www.rechtsanwaelte.at). The aim is to convey a modern, open and service-oriented image of Austrian lawyers also via the internet, which has meanwhile become the major information platform for the citizens at large. A smartphone-optimised version of the website is also available. Based on the new website, the internet sites of the Austrian Lawyers' Day (www.anwaltstag.at) and of the Conference of European Presidents (www.e-p-k.at) have also been revamped.

40th Anniversary of the Austrian Bar (ÖRAK)

On 23 May 2014, the Austrian Bar (ÖRAK) celebrated its 40th anniversary in a festive ceremony at *Kursalon Hüber* in Vienna. To mark this occasion, the Austrian Lawyers' Journal published an anniversary edition in the summer of 2014 dedicated to a chronological retrospective of the Austrian Lawyers' Day and the closely related history of the Conference of European Presidents. A more recent edition features several contributions on the future challenges, expectations and perspectives as regards professional representation and practice.

Annual Report by the Austrian Bar (ÖRAK)

For the second time, a comprehensive activity report was published highlighting the contributions by the legal profession to protect and strengthen the rule of law and also describes the activities undertaken by the professional association on behalf of its members.