

AUSTRIA

Austrian Bar (ÖRAK)

New Features of the Law Governing the Profession – Berufsrechtsänderungsgesetz 2013 (BRÄG 2013)

As a result of *BRÄG 2013* the legal profession in Austria now has one further legal option to practice the profession, namely as a “*GmbH & Co KG*” (limited partnership made up of a limited liability company as a general partner and limited partners). This is the outcome of an ÖRAK initiative and a concept drawn jointly with the Federal Ministry of Justice. There are important changes in connection with the “special lump-sum remuneration” (*Sonderpauschalvergütung*) for legal-aid services by lawyers in proceedings of excessive length. Here, clarification was obtained for determining an adequate amount of remuneration. The group of persons covered by the professional secrecy obligations of lawyers was enlarged to include also the official representatives of an entity in a law firm. Moreover, the disciplinary regulations, the provisions on elections and the composition of disciplinary panels were adopted, and the rules on persons authorized to receive service of documents according to § 6 of the European Lawyers Act (EIRAG) were adapted. Moreover, following an ÖRAK initiative it is now possible for lawyers to apply for a reduction of their ÖRAK compulsory membership fee to the level of the amount paid by trainee lawyers for a maximum period of twelve months following the birth or adoption of a child.

Access to Justice

- **Court Fees**

ÖRAK has been criticizing for years that access to justice is seriously restricted by the high court fees. In the meantime, a study by the Council of Europe (CEPEJ – European Commission for the Efficiency of Justice) has confirmed that the number of court cases is on the decline. In view of the continuously rising fees, many people shy away from asserting their rights. However, access to justice must be affordable for citizens. This is an essential factor for preserving the standards applying to the rule of law and thus also for the attractiveness of Austria as a business location.

ÖRAK strives for a reduction of court fees as well as administrative improvements. The following demands have been successfully fulfilled to date:

- Major improvements were achieved in connection with the 2012 Amendment of the Land Register Fees Act, as compared to the first draft, which would have resulted in a massive increase of land register fees.
- When collecting court fees, the court must once again indicate precise information concerning the court acronym, the court case number, the party’s name and the third-party case number. This makes it possible for lawyers to link payments to specific cases.

- **Reform of the Court Structure / Closures and Mergers of Courts**

As a consequence of the 2012 Local Courts Ordinance, local courts in Upper Austria, Lower Austria and Styria were closed in a first step in 2013. Further courts followed on 1 January 2014. It is thus becoming increasingly difficult for individual persons to contact a court, which is a further obstacle to access to justice. The overall goal of a comprehensive reform of the court structure in Austria must be to improve access to

justice. This requires an overall plan which, though, does not seem to emerge. ÖRAK therefore demands that local courts will only be closed after an extensive evaluation as well as a dialogue with all stakeholders. It is regrettable that no such dialogue has been launched to date. In ÖRAK's view the significance of smaller local courts, which all function very efficiently as ÖRAK representatives could confirm during on-site visits, especially lies in their role of maintaining social peace in rural areas. Lawyers are open to any type of structural improvement; yet, the result must not be that access to justice in rural areas is undermined.

Tax on Revenues from Real Estate

With the 1st Stability Act in 2012, the government introduced a new tax, the so-called tax on revenues from real estate (*ImmoEST*), as a result of which a tax is due on property held in the form of land and buildings. ÖRAK reacted with vehement criticism, especially concerning the complex calculation and collection of this tax, as well as the higher liability of representatives of real-estate property owners when establishing the advance payment.

On the initiative of ÖRAK it was possible to obtain the following improvements and to take the following measures, in particular:

- To ease the liability burden on lawyers,
- To set up a central information office with the Federal Ministry of Finance for representatives of real-estate property owners for a limited period of time,
- To require the Federal Ministry of Finance to provide information material on the tax on revenues from real estate.

Reform of the Administrative Court System

The National Council adopted a fundamental reform of the administrative court system in 2012 (2012 Amendment of the Administrative Courts Act) which established a two-tier administrative courts' structure consisting of eleven administrative courts (one regional administrative court for every federal province of Austria as well as one federal administrative court and one federal financial court). The Austrian bar association has always advocated the creation of a genuine administrative court system. ÖRAK therefore expressly welcomed this reform. The new administrative courts took up their work on 1 January 2014. However, the reform also led to the closing of a number of administrative units, including the Supreme Appeals and Disciplinary Commission (OBDK), responsible for matters concerning lawyers and trainee lawyers with respect to the law governing their profession and their disciplinary regulations. It is gratifying to note that it was possible in the course of the reform to introduce an additional level of jurisdiction in disciplinary cases, as well as in several other matters of special importance concerning lawyers and trainee lawyers, namely an appeal to the Supreme Court (Administrative Courts Adaptation Act for the Justice Sector). On this level, two or three senates deal with the matters referred to them. As previously, they will be composed of two Supreme Court judges and two judges selected from among the lawyers' ranks. The regional administrative courts have jurisdiction over all other matters, while the federal administrative court is responsible for specific issues.

New ÖRAK Working Groups

- **Legislation on Guardianship**

As a matter of principle, lawyers are required to accept guardianship obligations – also in those cases where no legal matters need to be handled. Moreover, if the persons under guardianship do not have any financial means, lawyers are required to provide their services without having any title to an adequate remuneration. Quite frequently, they do not even receive a refund for their cash expenses. ÖRAK set up a separate working group to discuss these problems. It advocates, amongst others that, in the future, lawyers cannot be forced to accept guardianship obligations. However, whenever lawyers wish to accept duties of this kind, they should specialize in this field and be able to organize their office operations accordingly. When accepting guardianship obligations it must be ensured that cash expenses are refunded, but also that adequate remuneration is seen as a matter of course.

- **Women as Lawyers**

ÖRAK set up a special working group “Women as Lawyers” in order to examine specifically why a proportionally small number of women practice as lawyers in Austria and what initiatives and measures can be taken in order to change this situation. On the occasion of International Women’s Day on 8 March 2013, the ÖRAK journal “*Anwaltsblatt*” dedicated an issue to the role of women as lawyers. Looking at the situation in Japan, the USA, Australia and other countries in Europe provided major incentives to the Austrian bar association. Here are a few examples: implementation of a system whereby lawyers volunteer to act as deputies for their female colleagues during a six-month period after childbirth, the possibility to obtain a refund of up to 50% of the old-age pension contributions for a period of two years as of the birth of a child, as well as several practical arrangements in connection with the exemption from the obligation to accept legal-aid cases during a certain period before and after childbirth. Another very significant change is the 2013 BRÄG amendment, enshrined in § 53 (2) item 5 of the Lawyers’ Regulations (RAO), stipulating that “upon application, lawyers only need to pay the amount established for trainee lawyers for a maximum period of 12 months after childbirth or adoption of a child.”

ÖRAK Turns 40

The Austrian Federal Bar Association (*Österreichischer Rechtsanwaltskammertag*) will be celebrating its 40-year anniversary at a formal event at *Kursalon Hübner* in Vienna on 23 May of this year. The ÖRAK journal “*Anwaltsblatt*” will publish a special issue on this occasion in summer. It will contain an overview of the ÖRAK history as well as of the European Presidents’ Conference, which is closely associated to it. One focus of this issue will also be covered in several contributions, namely the future challenges, expectations and perspectives of the professional association and the exercise of the profession.

ÖRAK Activity Report

In 2013 ÖRAK published a comprehensive activity report for the first time, which lists the results achieved by the Austrian bar association for the protection and further development of the rule of law in Austria, as well as the activities of this professional association for its members.

Resolution of the ÖRAK Delegates' Conference

On 28 September 2013 the representatives of the nine Austrian regional bar associations unanimously adopted a resolution on the occasion of their annual meeting in Klagenfurt, requesting the newly elected National Council and Federal Government to attach adequate priority to its justice policy during the new legislative period, as is commensurate to a democratic country under the rule of law. Urgent and pending reform projects should be implemented expeditiously, involving all stakeholders, especially the bar associations. Austrian lawyers call for the following measures, in particular:

- To broaden the protection of professional secrecy to cover all correspondence by lawyers, irrespective of where it is located, and to enshrine lawyers' confidentiality in the Austrian constitution.
- To secure access to justice. Court fees have become a genuine obstacle. The justice sector should stop regarding itself as a big business operation. Court fees should be lowered, and a ceiling should be fixed for large amounts in dispute.
- To promote legal certainty through an evaluation of the statutory regulations on charges and fees. It is not acceptable that written agreements are not executed, merely because high fees need to be expected for such legal transactions. Unreasonably high charges are due on marriage contracts, out-of-court settlements, adoption contracts, agreements on contractual obligations, and many other legal transactions.
- To adapt the statutory provisions on compulsory portions to the changes in society, especially in order to secure the potential of companies to operate as going concerns.
- To protect and further develop fundamental rights by evaluating the stricter rules put in place in Austria since 11 September 2001 in the field of surveillance and anti-terrorism, to be conducted by an independent expert commission, as well as implementing its recommendations.
- Reform of the criminal procedural law applied in investigative proceedings.
 - In line with the decision taken by the National Council on 5 July 2013 (333E/XXIV.GP), effective legal protection must be ensured by further developing appeal instruments against rights violations and applications to suspend proceedings, as well as effective Supreme Court control concerning fundamental rights.
 - Securing the effective legal defence of accused persons as of the moment of their arrest, by expanding the stand-by service by lawyers, as well as by enhancing the attractiveness and actual use of this service, as part of the

- implementation of the Directive on the right to legal advice in criminal proceedings and the right to contact a lawyer upon arrest.
- Obligation to call in a lawyer in case of an adversarial examination.
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- Reform of criminal trial and appeals proceedings
 - Strengthening the rights of accused persons and victims by creating the option of retaining private experts, by admitting the presentation of these private expert opinions in court as well as the examination of such experts. Experts retained during investigative proceedings should be excluded from trial proceedings.
 - Establishing a well-functioning mechanism to review the evaluation of evidence by lay-judges and jury panels.
 - Re-introducing a second professional judge in proceedings before lay judges.
 - Simplifying the statutory provisions on legal remedies by abolishing formalities that are inconsistent with the seriousness of an offence.
 - Launching completely electronic criminal files, including the option of an electronic review of court files.
 - Introducing appropriate regulations on the refund of defence costs in case of acquittals in criminal proceedings.
 - Adopting appropriate new land-purchase tax regulations, with the involvement of legal practitioners.
 - Reversing the reduction of the court-practice training period for law graduates from 9 to 5 months.
 - Re-introducing a court recess period in keeping with previous arrangements, as laid down in the 2002 Amendment on Value Categories (WGN 2002), as well as including non-contested proceedings lodged by adversarial parties, especially in cases falling under the law of succession.
 - A comprehensive reform of legislation on guardianship.
 - Setting aside the obligation of lawyers and notaries public to accept a minimum of 5 guardianship cases.
 - Distinguishing between providing legal advice and providing personal care, except in those cases, where the necessary infrastructure is available.
 - Refunding cash expenses whenever persons under guardianship do not have financial means, as well as fixing adequate remuneration throughout the guardianship period.
 - Introducing the right of relatives of persons under guardianship to express an opinion on guardianship issues
 - Expanding the options for relatives to represent persons under guardianship
 - Improving current legislative practices by introducing a more transparent legislative process and by establishing binding Good Governance rules.

These are only a few examples of the demands raised by the Austrian bar association. The topics mentioned here are of particular importance.

Lawyers in Austria are willing to cooperate in the implementation of these issues and ready at any time to comment on the various issues. Lawyers in Austria will monitor carefully whether sufficient attention is paid to the rule of law during the current legislative period.