

Österreichischer Rechtsanwaltskammertag

# Country Report Austria

48th European Presidents' Conference 2020

## Legislation in Austria

One important task of the Austrian Bar (ÖRAK) is to express an opinion on the many bills and drafts for other legal regulations. These position papers are prepared by experts from among the ranks of the Bar.

During the period between October 2018 and September 2019, ÖRAK had to deal with 164 bills and draft regulations. The position papers submitted by ÖRAK on the various bills are an important contribution to law-making, which is highly appreciated by the parties involved in the legislative process as well as the general public.

It is regrettable and difficult to understand from a factual perspective that sound position papers prepared by recognized experts often remain completely outside of consideration in the further legislative process. In addition, it still happens that ÖRAK is omitted in the reviewing procedure. Whenever a bill has considerable impact on citizens, it should undergo thorough scrutiny before being adopted.

## 2020 Act Amending Professional Regulations

The 2020 Act Amending Professional Regulations (BRÄG 2020), which was sent out for reviewing at the end of October 2019 and is planned to become effective on 1 April 2020, is intended to transpose provisions of the 5<sup>th</sup> Money-Laundering Directive as well as to implement several ÖRAK proposals concerning professional regulations.

In addition to modifying a number of provisions in the professional regulations for lawyers, the amendment primarily leads to a modernization of the rules in the Lawyers' Act (RAO) governing the exercise of the legal profession. In full compliance with the principles that lawyers shall exercise their profession independently and at their personal responsibility, the amendment opens up and expands the scope of admissible formats for setting up office, at the same time taking into account and integrating the formats available in other EU member states for establishing a partnership or corporation. The goal is also to liberalize the incorporation of law firms and to admit proxy powers (exclusively for lawyers) as well as to restrict the group of persons eligible for becoming a shareholder or partner, as defined in § 21 c of the Lawyers' Act (RAO).

In connection with disciplinary sanctions, it will henceforth become possible to convert parts of a fine (maximum three fourths) pursuant to § 16 (1) Number 2 of the Disciplinary Statute (DSt) into a punishment on probation. This option is intended to further accentuate punishments, taking also account of considerations relating to their special preventive effect.

With regard to the bar examination, the consequences of using inadmissible tools and/or otherwise feigning performance will be put into clear terms (no grading and/or invalidating a grade obtained at an examination, as well as including this performance in the number of entries for the bar examination).

The assessment basis, which is contained in the Lawyers' Rates Act (RATG) and applies to objects that do not constitute a cash or cash equivalent value, has remained unchanged for decades. The same applies to the minimum and maximum amounts for certain matters laid down in the Lawyers' Rates Act (RATG). A moderate increase is intended to gradually adapt these amounts to current standards.

## Professional Secrecy

Next to independence and absolute loyalty to the client, professional secrecy is an indispensable prerequisite when exercising the legal profession. Every citizen must be able to rely on the fact that

the retained lawyer will observe his/her professional secrecy and will not use any disclosed evidence against a client. Professional secrecy is an indispensable guarantee for effectively ensuring the right to a fair trial. Independent lawyers committed to professional secrecy make sure that our democratic state under the rule of law functions properly. It is only by granting and respecting the professional secrecy of lawyers that legal peace can be maintained and legal certainty can only be obtained.

However, an increasing number of attempts have been observed for some time, which aim at diluting the professional secrecy of lawyers, as a pillar in the exercise of the legal profession. ÖRAK had to state with great concern that the fundamental right of citizens to confidential communication with their lawyers is not completely protected in Austria.

The delegates to the ÖRAK Representatives' Meeting therefore adopted a resolution in September 2018 for the protection of the fundamental right of citizens to an independent lawyer committed to professional secrecy, and the fundamental right of lawyers to confidential communication with their clients, as well as to ensure fair trials. In this resolution ÖRAK calls for constitutional guarantees which will ensure the absolute protection of confidential information and fully ban any exploitation of confidential information contained in any correspondence or communication with lawyers as well as records and documents relating to clients – irrespective of whether such data and/or documents are available in digital or physical form. It also calls for sanctions in case of violation.

## Security Package

From the very beginning, ÖRAK objected to the measures contained in the so-called “security package”, as these comprised far-reaching and unjustifiable interferences with the fundamental rights of citizens in Austria. The surveillance of car drivers was expanded, for example. In addition to the license-plate number of a vehicle, it was also intended to automatically record the brand, type and color of a vehicle as well as information about the driver. Moreover, the law called for the installation of surveillance software in the mobile phones and computers of suspicious persons. This measure was meant to facilitate access to encoded messenger services such as, for example, WhatsApp. The so-called “federal Trojan horse” was planned to go live in early 2020, in connection with suspected offences that carry a prison term of more than ten years.

One third of the members of parliament filed an application against this bill with the Constitutional Court (VfGH). We are pleased to report that the arguments raised by critics, including ÖRAK, were taken up. Last year the Constitutional Court lifted several provisions of the law and declared them to be unconstitutional.

## Services for Citizens

In 2018 Austrian lawyers provided gratuitous services to about 40,000 citizens, either by counselling or representing them. The services include, amongst others, the “stand-by legal counselling service for arrested suspects” (*Rechtsanwaltlicher Bereitschaftsdienst für festgenommene Beschuldigte*) as well as the gratuitous “initial legal advice” (*Erste Anwaltliche Auskunft*). By providing these services, Austrian lawyers live up to their self-imposed claim of making an essential contribution to law and order in Austria.

## Legal Aid

In 2018 **legal-aid lawyers were assigned to a total of 20,420 cases** in Austria (14,315 criminal cases / 5,589 civil cases / 152 cases before the Constitutional Court / 323 cases before the Supreme Administrative Court / 41 before administrative courts). The **value of these legal-aid services** amounted to almost **40 million euros** in 2018.

## **Stand-by Legal Counselling Service for Arrested Suspects – Arrest Hotline**

A person becomes an “arrested suspect” in criminal proceedings when suspected of having committed a punishable offence, on account of certain specific facts, and when investigations are conducted concerning that person, or constraint is exercised against him/her. In keeping with § 49 Number 2 of the Code of Criminal Procedure (StPO) that person has to right to retain a lawyer. As early as 2008, ÖRAK established a stand-by service for arrested suspects, the so-called “Arrest Hotline”, together with the Federal Ministry of Justice (BMJ), in order to facilitate the use of this right. Depending on the case, it comprises a telephone call or a personal counselling interview as well legal assistance during the examination, if applicable. The telephone number **0800 376 386** is available free of charge 24 hours/7 days so that a lawyer can be contacted without delay.

In 2020 the Stand-by Legal Counselling Service for Arrested Suspects will also play an important role in the course of transposing the Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings as well as the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings. ÖRAK is engaged in ongoing discussions with the Federal Ministry of Justice (BMJ) concerning a possible further expansion of this service.

## **Initial Legal Advice**

The “initial legal advice” service has been in operation for a considerable period of time. In 2018 more than 18,500 persons seeking legal advice received gratuitous counselling services from about 1,300 lawyers.

## **Monitoring Report 2017/18**

On 17 December 2019, ÖRAK presented the 45<sup>th</sup> Monitoring Report of Austrian Lawyers for the year 2018/19.

ÖRAK publishes this annual report in compliance with ÖRAK’s statutory obligation to monitor the administration of justice in Austria. The purpose is to correct any misconduct by authorities by presenting various observations and recommending improvements. As in the past, the current Monitoring Report is an essential contribution towards illustrating and remedying any misconduct by judicial authorities, administrative entities or the legislator. It therefore deals both with law-making issues as well as the practical implementation of a large number of different procedures.

The ÖRAK Monitoring Report can be found at [www.rechtsanwaelte.at](http://www.rechtsanwaelte.at) (at: Kammer/Stellungnahmen/Wahrnehmungsbericht).

## **Temperature Curve of the Rule of Law**

The “Temperature Curve of the Rule of Law” is an ÖRAK project which serves the objective of measuring the level of rule of law in Austria and to illustrate its development. For the purpose of this study, the term “rule of law” describes the level of functionality and justice of a country and must therefore be understood in the broadest meaning of the term.

The first edition of the study “Temperature Curve of the Rule of Law” was published in 2016 and compared Austria, Germany and Slovenia. The purpose was to identify in a first step the strong and the weak points of Austria in a comparison to two countries that have a similar legal regime. On this basis, the focus was exclusively put on Austria’s regime for the rule of law for the study made in 2018, and the current indicators were compared to those established in 2016.

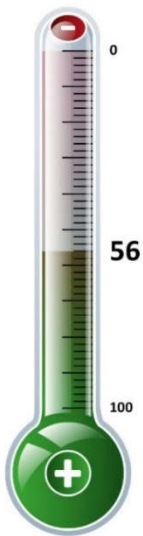
In order to be able to elaborate on the weak and strong points, ÖRAK addressed the questions – involving a scientific advisory board and the University of Vienna in the discussions – on what basis which factors and indicators can be “measured” and compared. As a result, the following eleven clusters were obtained:

- Quality and stability of governmental structures
- Quality in law-making
- Fighting corruption
- Basic and fundamental rights
- Public order and safety/security
- Industrial location – legal certainty for legal entities
- Living environment – legal certainty for physical persons
- Civil jurisdiction
- Criminal jurisdiction
- Administrative procedures and administrative jurisdiction
- Citizen-oriented government

Three indicators were developed for each of these eleven clusters. In addition, ÖRAK conducted a survey among Austria’s lawyers to determine those clusters which – in the view of lawyers – are of particular significance for the rule of law. You will find detailed information on the results obtained for the various clusters either in the study or, in summary form, in the ÖRAK Monitoring Report 2017/18.

The Temperature Curve of the Rule of Law ultimately obtained a value of 56 for the year 2018, which is basically a positive trend. The value for the year 2018 is slowly moving towards the mark 100 (maximum improvement). So, the “temperature” is going down.

Veränderung 2016–2018



With the Temperature Curve of the Rule of Law, ÖRAK pursues the objective of disclosing the development of the rule of law in Austria in a transparent manner as well as providing the initial impetus whenever there is need for improvement.

**ÖRAK will present the next edition of the study in 2020, which will be a comparison of the years 2016, 2018 and 2020.**

You can download the complete study at [www.rechtsanwaelte.at](http://www.rechtsanwaelte.at) (at: Kammer/Stellungnahmen/Fieberkurve des Rechtsstaates).

You will find detailed information about ÖRAK activities in the ÖRAK Activity Report 2019, which can be viewed at [www.rechtsanwalte.at](http://www.rechtsanwalte.at) (at: Kammer/Stellungnahmen/tätigkeitsbericht).