



FROM MERCHANT TO ENTREPRENEUR REFORM OF THE COMMERCIAL CODE

A new law amending the Commercial Code, the *Handelsrechts-Änderungsgesetz* (HaRÄG), entered into force on 1 January 2007. The Code known as “*Handelsgesetzbuch*” (HGB) in German has now been renamed “*Unternehmensgesetzbuch*” (UGB), the conversion from “trade” to “entrepreneurship” incorporating a number of key changes, especially with regard to company law, regulations governing the name of undertakings, accounting rules and enterprise-related transactions.

Clearly the most striking change is the fact that the UGB no longer uses the obsolete concept of “*Kaufmann*” (literally “merchant”) but has introduced the “*Unternehmer*” (**entrepreneur**). An “entrepreneur” is any individual who runs an enterprise, i.e. an organisation of economic activity on a self-employed basis and intended to be of long-term scope. The definition was copied from the Consumer Protection Act, and it applies to all operations, regardless of their size, i.e. the differentiation between “small traders” (whose business does not require a commercial organisation) and “merchants” (who are entered in the trade register) has also become obsolete. Application of the new UGB is no longer limited to organisations that aim to produce a profit, but extends the definition of enterprise to all activities that achieve at least a break-even result. Accordingly, non-profit organisations, some of which manage a substantial turnover, are well organised and employ a large number of staff, should now be expected to be treated as entrepreneurs. A leftover from the HGB is the rule that some business associations are deemed to be

entrepreneurs simply on the strength of their legal form (e.g. limited liability companies or joint stock companies). The special treatment traditionally accorded to the **self-employed** (tax consultants, physicians, lawyers) and **farmers** is continued, at least in part, in the new UGB, which has only limited application for these groups.

The change also affects **partnerships**. With enterprises now defined without regard to their size, it became necessary to abandon the division between types of partnership (OEG and KEG on **the** one hand and OHG and KG on the other) and combining them into an “*Offene Gesellschaft*” (OG) and “*Kommanditgesellschaft*” (KG). In future, either legal form may be chosen to exercise any kind of lawful activity, including the pursuit of intangible purposes. The “transformation” was automatic, effective as of the entry into force of the new UGB. Registered partnerships are allowed until 1 January 2010 to change their suffix, although existing OHGs may retain theirs. Entrepreneurs who carry on an enterprise in their



capacity of natural persons must add "eingetragene(r) Unternehmer(in)" (registered entrepreneur) or a comprehensible abbreviation ("e.U.") to their entry in the Company Register when they achieve a turnover of more than € 400,000 per business year; smaller sole proprietors may do so voluntarily. All entrepreneurs entered in the Company Register are now obliged to publish specified information (name of the undertaking, in the case of a sole proprietorship the individual's name if different from the company name, legal form, domicile, Company Register number and competent court, etc.) on their letterheads (including e-mails!), order forms and website, failing which they pay a coercive penalty. The rule applies to corporations as of 1 January 2007, to other entrepreneurs as of 1 January 2010 (except for e-mails, where the rule became effective on 1 January 2007). In the case of a GmbH & Co KG, a special rule stipulates that the data of both companies must be listed.

The rigid and complicated law governing the **name** of enterprises is being liberalised by the UGB. As of now, **any** imaginary name may be used, provided that it is not misleading and is sufficiently distinct from the names of other enterprises.

As the new UGB was extended to fields that had not been covered by the old HGB, it became necessary to **declaw** some of the provisions taken over from the HGB as well as exempt some entrepreneurs from its application. The notice of defect (Mängelrüge) has been extended to contracts for works/services and barter contracts involving tangible movable property; in the future, a defect must be notified "within a reasonable period" (not more than

two weeks according to initial comments) rather than "promptly". The requirement of writing for **sureties and guarantees** has been extended to all entrepreneurs (according to court rulings, a fax or e-mail message is not sufficient!). In contrast to the HGB regulation, entrepreneurs can now challenge contracts on the grounds of **laesio enormis**, unless it has been expressly excluded in the contract. Under the new UGB, the court's right to reduce a **contractual penalty** has been extended to entrepreneurs. The special HGB provision regarding the merchant's **bona fide acquisition of title or lien** has been cancelled; an entrepreneur's bona fide acquisition is now governed by the general rules (Sections 367 and 456) of the Civil Code.

Enterprise-related transactions within the scope of a **company acquisition** structured as an asset deal have been facilitated. Previously these required, as a rule, the consent of all contracting parties on the side of the seller. Now unless otherwise agreed or opposed by **the** contracting party, the buyer automatically becomes party to all enterprise-related transactions when the enterprise continues to stay in business, even under another name.



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inside

A BABY BOOM AT PRESLMAYR'S



The year 2006 will be noted in the annals of our law offices for a whole clutch of newly arrived little bundles of joy: fully six of our members (Edith Leisser, Christian Lovrinovic, Rainer Knyrim, Barbara Luef, Raimund Madl, Birgit Reinthaler) have entered the state of parenthood. We take pleasure in announcing the birth of Tanja (1 February), Christina (5 June), Lilian (24 July), Caroline (9 September), Franziska (16 September) and Younes (23 October). Another two of our staff members are expecting to give birth in the next weeks/months.