Topics in our current issue:

(Act Reforming Civil Law Associations)

On 22 October 2014, the Austrian National Council adopted the Act Reforming Civil Law Associations. It will become effective on 1 January 2015.

"New things are created when old things are turned over, continued, developed."
(Bertolt Brecht)

The "civil law association" (GesbR) is still a popular model for many users, from family firms to consortia in the construction industry. It acts as a "catch-all" for business joint ventures requiring a lower degree of formality, publicity or durability than other types of companies. The GesbR is currently governed by provisions in the original Civil Code of 1811. Since then, practice has become far removed from the wording of the law. Accordingly, the National Council, on 22 October 2014, adopted a law to reform the relevant provisions of the Civil Code and the Business Enterprise Code. The provisions of the Act reforming the GesbR are based on those governing the OG (general partnership) and they apply unless members have agreed otherwise.

What is new about the "old" GesbR?

First of all, the new law expressly states that the GesbR has **no legal personality**. Claims are owned jointly by all members, tangibles are held in co-ownership.

Enforcement proceedings allow private creditors to seize a member's share in the GesbR: a member's creditor may terminate the GesbR at six months' notice at the end of any business year in order to realize the claims due to the member on winding up the GesbR.

The previous cumbersome practice of jointly conducting the business in line with the majority principle is now replaced by **individual members having the authority to transact ordinary business on their own**. Unless otherwise stated in the association agreement, each member is thus allowed to operate ordinary business on his/her own. In compensation, the other members are granted the **right to object**; if exercised, the opposed transaction may not

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be executed. Given the members' personal and unlimited liability for the company's obligations, **extraordinary transactions require unanimity**. If one or more members arbitrarily withhold their consent, the others can sue for approval. Even if no provision has been made in the association agreement, members may by a majority of votes decide on additional contributions if it is not otherwise possible to continue the GesbR. An overruled member is entitled to withdraw from the company within a reasonable period of time.

The authority to manage the GesbR internally is reflected in the members' **authority to represent** it externally. For an entrepreneurially active GesbR the law provides that, in order to protect third parties, even if one member has no or only limited authority to represent the GesbR, his/her transactions nevertheless entitle or commit all members, provided the third party did not know nor had to know of the member's lack of authority to represent the company.

The new provisions aim to simplify as much as possible dispositions made when a member is replaced. If a member joins, leaves or is replaced, his/her legal relationships with regard to the company, and in particular his/her co-ownership shares devolve upon the joining or remaining member(s). Dispositional transactions are no longer necessary, except with regard to registered rights.

Moreover, the amendment explicitly provides a framework for **converting a GesbR** into an OG (general partnership) or KG (limited partnership), in this way facilitating a change from GesbR to OG or KG, but not vice versa. It is now stipulated by the law that the GesbR's assets devolve upon the successor (OG or KG) by way of universal succession upon the latter's registration. Newly added are detailed regulations for **dissolving the GesbR** and provisions governing formal **liquidation proceedings**. In future, a GesbR formed for unlimited duration may be terminated only upon six months' notice at the end of a business year. Termination of a GesbR for good cause and the exclusion of a member require a court decision under the new rules.

The amendment was also used to **codify** a legal concept known as **"actio pro socio"** and recognised in corporate law: each member has the right to demand performance of obligations by other members with regard to the company for the benefit of all members.

GesbR and cartel law

The GesbR is of great practical importance when it comes to large-scale projects in the construction industry or technological projects. Where the members are competitors this can lead to complex issues involving **cartel and tendering law**. The Amendment to the Cartel Law of 2005 finally made it impossible for consortia to rely on being "immune" from cartel law. Ever since, members have had to examine whether or not a consortium violates cartel law – and consequently tendering law. As a guideline it can be said that the admissibility of a consortium made up of competitors increases with its being needed to open up a market. Setting up a consortium will thus be admissible when the entrepreneurs involved do not, at the time of their cooperation, have the requisite capacities to handle the contract or submit a potentially successful bid on their own.

Entrepreneurs will be well advised to examine the admissibility of a consortium under cartel law. When cartel law is violated, entrepreneurs are threatened not just with enormous fines but may have their contracts annulled and – economically just as damaging – be excluded from participating in the procurement procedure.

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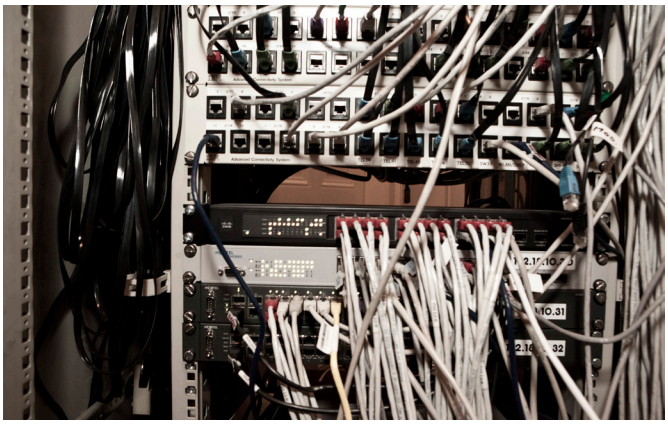
(European Court of Justice grants "Right to be forgotten")

On 13 May 2014, the European Court of Justice (ECJ) decided, within the scope of a so-called preliminary ruling procedure on the interpretation of the EU Data Protection Directive (95/46/EC), that search engine operators are restricted in what they can show as search results found regarding a given individual. Search results where an **individual has an interest in the privacy of their information content** must be removed when this interest in keeping the information secret overrides public interest in having access to it. The ECJ ruling involved a newspaper article from 1998 regarding the seizure of a property which was available online and, on entering the debtor's name, could be found by the Google search functions many years after the event. As the matter had been settled years ago, the debtor applied to the Spanish data protection authority to request that Google Spain and Google USA remove the relevant internet search result. The application was granted; Google appealed and the court asked the ECJ to clarify some provisions of the EU Data Protection Directive.

According to the ECJ ruling, the provisions of the EU Data Protection Directive apply to the processing of data (within the scope of the search) carried out by Google USA as the search engine operator because Google USA set up a branch in Spain with a view to promoting the sale of advertising space for the search engine in Spain. For this reason, individuals have the right to **demand removal of search results**, as defined in the EU Data Protection Directive, when such results **interfere with their privacy**. Only in exceptional cases, when the public interest in such information overrides the individual's fundamental right to privacy, does the individual have no right to request its removal.

It should be noted that the ECJ allows this claim **regardless of whether or not it was permissible in the first place to publish the data** on the web site found by the search engine. The ECJ reasons that the search engine operator adds further processing of personal data in addition to that of the web site operator; but it is only the search engine which allows internet users to find such information and set up a comprehensive profile. For this reason, an individual violated in his/her privacy may turn **directly to the search engine operator** and its EU branch in order to have a search result deleted. It is not necessary to first or simultaneously proceed against the operator of the linked web site.

The ECJ's findings also apply to Austria: In Austria, too, individuals should be able to request search engine operators to delete search results that violate their privacy. Moreover, since data and information regarding **legal entities** are also protected by the Austrian privacy laws, it will in future be possible for undertakings to require search engine operators to delete search results that produce obsolete or wrong information on the undertaking and, if necessary, have their claims enforced by the courts.



Although Google promptly responded to the ruling by providing a request form for the deletion of search results it remains to be seen whether the search engine operator is willing to reduce its offer of search results – and thus one of its most valuable assets – in response to such requests.

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(In brief)

Consumer Rights: End of "Moratorium"

As the Act Implementing the Consumer Rights Directive (VRUG) entered into force at extremely short notice, associations of consumers and entrepreneurs agreed on an unofficial "moratorium" which will expire at the end of this year. It is thus to be expected that consumer associations will now request that entrepreneurs comply with the statutory obligations and will file class actions against those that (still) fail to act in compliance with the law. Rapid action will therefore be the order of the day!

(Allergy Sufferers and Snack Stands)

Starting on 13 December 2014, an ordinance designed to help allergy sufferers avoid risks when consuming food challenges those who sell unwrapped food to consumers. As of this day, an ordinance will become effective, forcing entrepreneurs dealing with food, such as retailers, restaurants, caterers and snack stands, to inform consumers of allergens which are used in making or cooking such food. Information on altogether 14 allergens needs to be provided.

Such information may be supplied in writing or by word of mouth. The latter, however, is admissible only when a clearly readable sign placed at a conspicuous location specifies that information on allergens is dispensed orally if so requested. Moreover, such information may be given only by persons who can show proof of a suitable training.

In view of the fact that such written information may be quite "bulky" (just consider menus overloaded with information on allergens), it is recommended to use letter codes or abbreviations, although the consumer still needs to be able to (quickly) allocate such codes to the respective allergens (e.g. by an explanation enclosed with the menu, on a bulletin or on a data sheet).

("Light" Version of Limited Liability

Previously reduced by law to € 10,000.00, the minimum share capital for a ("light") limited liability company was increased to € 35,000.00 in the 2014 Act Amending Taxes and Charges. Newly established limited liability companies continue to enjoy privileges. For the Austrian Supreme Court (OGH), these new provisions may constitute a possible violation of the constitutionally granted equality principle as the Act Governing Limited Liability Companies (GmbHG) currently provides for three regimes which differ in their taxation and minimum share capital. The OGH filed an application with the Constitutional Court to revoke as unconstitutional various provisions of the GmbHG as amended in the 2014 Act Amending Taxes and Charges. The ruling from the Constitutional Court remains to be seen.

"Datenschutzrecht konkret" – Magazine with Focus on Data Privacy

Our Partner Rainer Knyrim is the editor-in-chief of the first Austrian magazine that deals with the practical sides of data privacy. On 6 October 2014, more than a hundred guests were invited to the Albert Hall in Vienna for the presentation of Datenschutz konkret. Top representatives specializing in Austrian data privacy law at government authorities, ministries, scientific institutions and interest groups celebrated the launch of the new magazine together with privacy officers from major companies. The inaugural addresses were held by Andrea Jelinek, head of the new Data Protection Authority, and Rainer Knyrim.

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