Topics in our issue:

GDPR: are you sufficiently transparent in your data processing?

Two years after the EU's General Data Protection Regulation (GDPR) entered into force, Europe as of 25 May 2018 is faced with a new legal situation. It remains to be seen which obligations will be at the focus of the supervisory authorities and data subjects. Nevertheless, the provisions on transparency in the processing of personal data are expected to be a priority concern.

The GDPR specifies several principles that need to be complied with when processing personal data: lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity, confidentiality and the obligation to provide evidence for compliance with these principles. Whether some of these are considered of a higher order than others cannot be deduced from the Regulation.

Nevertheless the principle of transparency, i.e. the processing of personal data in a comprehensible manner for the data subject, clearly stands out inasmuch as compliance with such obligations can be checked easily and quickly, same as compliance with the provision of legal ownership information and disclosure obligations under the Media Act: of particular relevance in this respect are Articles 13 and 14 of the Regulation, which specify which information regarding the processing of their personal data must be provided to the data subject when and how.

The scope of the information to be provided is by itself remarkable: in addition to the controller's identity and contact details (as well as that of the data protection officer, if any) it includes specifically the purposes of the data processing, its legal basis, a description of recipients or categories of recipients and intended third-country transfers, the period of storage, instructions on the data subject's rights and whether automated decision-making is used.

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PRESLMAYR RECHTSANWÄLTE

Many businesses are not so much worried about the information to be provided, but rather about the date and type of providing it: when personal data are collected directly from the data subject such information needs to be provided already at the time of its collection. In an online context, it will in many cases be possible to use a straightforward and constantly retrievable data protection statement on one's own web site.

However, the situation is different when personal data are processed by way of physical, telephone or other offline interaction with the data subject: in the opinion of the Article 29 Data Protection Working Party, suitable formats to provide data protection information may be written statements, flyers or information in contract documents for contracts made by mail; as may be oral statements or automatic prerecorded texts in the case of telephone conversations or oral or written statements given in the case of direct personal contacting.

Data controllers are thus faced with the task of considering which channels to use to collect personal data in order to be able to provide data subjects with data protection information in good time and transparently. We will need to wait for the GDPR's implementation to see which formats will turn out to be best practices for a suitable and reasonable compliance with the information obligations in terms of content, form and timing.

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New types of trade marks and representation formats – how to protect non-conventional marks

As one of the key changes in the new EU Trade Mark Regulation (EUTMR) and Trade Marks Directive, graphical representation is no longer necessary for filing EU trade marks or national marks. New types of trade marks are now permissible which may be filed in formats not previously allowed, provided that, using generally available technology, representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective. In short it is no longer necessary for a trade mark to be "graphically represented" but just to be "represented".

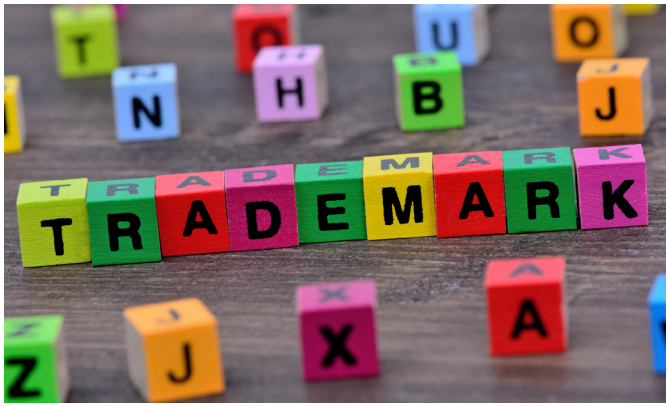
Liberalisation of the definition of a trade mark paved the way for new ways to protect non-conventional trade marks. Specifically, protection was simplified and extended for trade marks involving scent, taste and sound, holograms and moving pictures. The filing procedure in particular is expected to be facilitated.

Such improvements are highly welcome, although we are now faced with problems of practical implementation because neither detailed definitions for the forms of trade marks nor specific requirements for their representation have been furnished. Accordingly there is the risk that national trade mark offices accept trade marks (trade mark forms) on the basis of different national definitions and different requirements for their representation, which would hamper efforts to harmonise trade mark law in the EU member states.

In order to alleviate the implementation process, the European Union Intellectual Property Office (EUIPO) and the trade mark offices in the member states strive to ensure that the new provisions of the EUTMR and Trade Marks Directive will be uniformly implemented throughout the Europe-wide intellectual property

network. The desired accord between trade mark offices, while it has no legally binding impact, aims to ensure some degree of harmonised implementation in the national legal systems, although it does not preclude some offices from permitting different electronic formats.

Thus, sound trade marks which previously required a musical notation for their representation can now be electronically filed by way of an MP3 sound file. Nevertheless other types of representation, such as sonagrams, a description of the sound in words, or onomatopoeia words are not to be accepted. Contrary to the EUIPO's practice, the Austrian Patent Office accepts WAV in addition to JPEG and MP3 files.



The trade mark reform has roused the interest of perfume producers, as, at least in theory, it should make it possible to register scent marks. However, the effect of abolishing the need for graphic representation so far is nil when it comes to filing scent marks, given that the application form has no "categories" and given the lack of a "generally available technology" for representing scent marks.

Videos or video sequences may now be protected through a motion mark. This needs to be represented by a video file (MP4) or a series of stills which show the movement or change in the position of the elements. Where stills are used they should be numbered or supplemented by a description explaining their sequence. Similarly, the new multimedia mark, a combination of images and sound, is represented by an audiovisual file (MP4). The new hologram mark can be represented by a video file or a graphical depiction of the views needed to show the full scope of the hologram effect.

A change has also been made with regard to colours: an application for a community trade mark no longer requires information on colours for image marks, in order to facilitate finding mark entries in the register. However, since some countries require written information on the colouring in order to grant priority, EUIPO offers an optional field in the application form in which to enter colours. They are not included in the EUIPO register, but their purpose is for the user to use them in the relevant country.

A trade mark that consists of a single colour or colour combination requires representation by a generally accepted colour code (such as RAL, Pantone, etc.). Yet, representing a trade mark by a colour code does not make it easier to register a so-called colour mark because a colour mark on its own usually lacks distinctiveness. Colour marks will thus continue to be granted in exceptional cases only – and typically only in a list of products that has been particularly specified. In the case of a colour mark, the representation by colour code does not preclude a stricter examination that considers not just its customary use in the course of business but also a general public interest in the further unrestricted use of such colour.

Generally it must be noted that the implementation process is still in its early stages. While some novelties have not yet caused an appreciable improvement for the user in actual practice, there are indeed new aspects which will facilitate filing non-conventional trade marks. We need to await developments.

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Better gender balance on supervisory boards

On 1 January 2018, the Act banning discrimination of women and men on supervisory boards (GFMA-G) entered into force. It is the first act to stipulate a legally binding minimum number of women and of men on supervisory boards in the private sector. The new provisions apply to elections and appointments after 31 December 2017 to the supervisory boards of listed companies and companies (including limited liability companies) of more than 1,000 employees.

Supervisory boards in such enterprises need to be made up of at least 30 % female and 30 % male members, provided that the board consists of at least six members (shareholders' representatives) and the female/male employees make up at least 20 % of the workforce. Any contravention of the new minimum numbers makes such election or appointment null and void.

The minimum numbers need to be observed with regard to the shareholders' representatives as much as the workers' representatives when at least three workers' representatives must be appointed to the supervisory board. As a rule, the minimum numbers need to be filled by both sides jointly, but if the majority of the shareholders' or workers' representatives objects to this overall view, the two groups need to comply with their respective minimum numbers separately.

The minimum numbers' rule also applies when a substitute replaces a member elected before 1 January 2018. As a consequence, substitute members who were effectually elected prior to 1 January 2018 cannot afterwards join the supervisory board if this results in contravening the minimum numbers. Supervisory board mandates existing prior to 1 January 2018, however, are not affected and remain effective until the end of their respective terms.

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P) Inside

Additions to our team and new vigour for our public procurement law line

T. Blecha

Starting in May 2018, **Mag. Thomas Blecha** is augmenting our legal team at Preslmayr Rechtsanwälte, where he will add new momentum to our traditional focus on public procurement law. His long years of experience in this field, acquired in several renowned corporate law firms, have made him an acknowledged expert in public procurement. Our team will be pleased to help you in all matters of public procurement, especially with regard to the recently adopted public procurement reform package.

T. Freudemann

Other newcomers to our team are **Mag. Tamara Freudemann**, whose priority is on administrative law, and **Mag. Christina Krč**, who concentrates on company law. We warmly welcome our new colleagues to our team and look forward to our future cooperation.

C. Krč

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