Topics in our issue:

Reform of personal bankruptcy calls for action on the part of the creditors

The 2017 Act Amending Insolvency Law (IRÄG 2017) greatly helps individuals to gain debt relief. But the blessing it offers to individual debtors may well become a curse for creditors and the general public.

The IRÄG 2017 includes a revision of the personal bankruptcy proceedings which will become effective on 1 November 2017. **Substantial changes are made to the "Abschöpfungsverfahren" (skimming)**, which may be instituted only when the settlement plan proposed by the debtor fails to be approved by the requisite majority of creditors. Current insolvency law provides that, subject to the debtor's application, the skimming procedure (which usually runs for seven years) may be instituted when no obstacles are known and the debtor cedes any income above the poverty line to a trustee for distribution to the creditors. Provided that the creditors receive at least ten percent of their claims within seven years, the remaining debts will be discharged. Skimming is thus the only option for a debtor to achieve full settlement of his/her liabilities without the creditors' consent.

The amendment **cuts the skimming period to five years and abolishes the minimum dividend**. Consequently, future debtors will be able to relieve themselves of their liabilities through skimming even when they have little or no income or have amassed enormous debts. Previously they typically required third-party help, but the reform enables them to get rid of their debt even when creditors are left without a penny in debt payment.

A new precondition for instituting skimming will be that the debtor during insolvency proceedings (i.e. from instituting bankruptcy proceedings to the court approving skimming) must pursue an adequate gainful employment or at least have made an attempt to this end. This **duty to work** on the part of the debtor (known as "exertion") already now applies for the duration of the skimming procedure. If a debtor fails to meet his/her obligations, thereby impeding creditors' satisfaction, the court must, upon a creditor's application, stop skimming, so that the residual debt will not be discharged. A debtor who has no income or whose income is

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below the poverty line must, under the new law, inform the trustee at least once a year *"of his/her endeavours to get gainful employment"*.

The debtor's duty to work previously played no large part in the skimming procedure, especially since the debtor had to produce the 10 percent dividend in order to be released of his/her residual debt and thus was automatically called upon to obtain an adequate income. For those who failed to achieve the minimum dividend the court still had the option to cancel their debt in equitable circumstances.

It is doubtful whether the new rules are suitable to prevent the work-shy or those labouring in the black economy from abusing the skimming procedure. After all, even though the annual duty of information does not apply when the income exceeds the subsistence minimum, it does not follow that the debtor pursues a gainful employment that equals his/her capacities. And the law is silent on how creditors can prove, much less successfully assert at court, a debtor's lackadaisical efforts to get a proper job, even if he/she is bound to give information annually. Without knowing any specifics such as qualification, health status, actual efforts to find work, etc. such proof will be difficult or even impossible to furnish. Moreover, the debtor is considered to have refused giving information only after refusing to answer the court. The bankruptcy courts themselves have limited ways and means of checking, not least because the number of skimming procedures is expected to explode. **The new provisions are therefore likely to be abused** at a scale that cannot yet be assessed. Unsurprisingly the IRÄG 2017 has met with opposition from the very start, not just from business and creditor protection associations but also from judicial officers who are responsible for implementing the law in court.

A recent survey carried out by Österreichischer Verband Creditreform found that problems with handling money and irresponsible consumerism are the chief cause of over 85 percent of personal bankruptcies. Given that the new law will greatly facilitate debt relief, the deterrence potential of insolvency could further decrease. Consequent responses by businesses – from factoring in additional losses to limiting acceptable payment modalities – are likely to be felt by all consumers.

Entrepreneurs will need to ask themselves what conclusions they should draw from the reform of the skimming procedure. There are two replies that do not obviate each other:

1. **Prevention:** In future, entrepreneurs need to ensure that their **claims will be sufficiently securitised** (e.g. by reservation of title). Surety stood by natural persons will fade because guarantors will similarly find it easier to divest themselves of the debt. Entrepreneurs may well reduce the number of payment methods accepted by them as well as the work rendered by them on account in order to avoid chasing their money only to be faced with a non-productive skimming procedure.

2. **Reaction:** When a customer fails to pay, the entrepreneur will have to react even more promptly. **Installing an efficient claims management system is thus the order of the day.** Since the priority principle ("first come first serve") rules supreme before bankruptcy proceedings are actually instituted, it will be advisable to promptly go to court and apply for attachment rather than make protracted efforts to collect the money.

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Data privacy law: new media privilege

The new Data Protection Adjustment Act of 2018 was promulgated on 31 July 2017. It makes substantial changes to the Data Protection Act of 2000 (DSG 2000) effective as of 25 May 2018 and revises the privileges of data processing in connection with publishing.

At a time when Austrian businesses are busy preparing for the EU's General Data Protection Regulation (GDPR) effective as of 25 May 2018, not least due to the threat of serious punitive measures, the new legal situation does ease life in some fields, such as data processing for journalistic purposes.

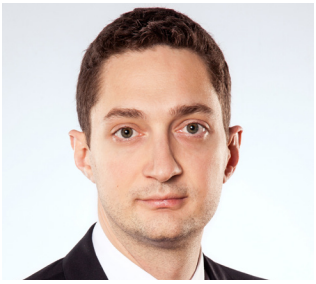
The current DSG 2000 in its Section 48 provides that most of the data privacy provisions do not apply for media businesses, media services or their staff which/who use personal data directly for their publishing activities within the meaning of the Media Act. The situation prevailing in Austria was widely criticised in the past years since the EU Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Directive 95/46/EC), which the DSG 2000 underlies, takes a much broader view, privileging all processing of personal data carried out solely for journalistic, artistic or literary purposes – regardless of who processes such data.

The media privilege transposed in Austria on this basis, however, does not apply to individuals who while journalistically active are not media businesses or media services nor their employees. This would apply to the PR departments of public corporations, NGOs or associations, as well as individuals who publish on a private website.

Similarly, given the (at least in this respect) unequivocal wording of Section 48 DSG 2000, it appears impossible to extend the media privilege analogously to journalistically active persons who are not simultaneously media businesses or media services (or their employees). Consequently, while classical mass media businesses profit from the media privilege in connection with data privacy, self-employed bloggers are currently not just responsible under media law but need to comply with data privacy rules as well.

Such unequal treatment will be eliminated in the Data Protection Adjustment Act of 2018 based on the GDPR which calls for member states to provide for exemptions or derogations from the future data protection law for any processing carried out for journalistic, academic, artistic or literary purposes: contrary to Section 48 DSG 2000, Section 9 of the new DSG grants the privilege not just to businesses but to any processing for academic, artistic or literary purposes.

While the GDPR generally applies data privacy "thumbscrews" to the controllers, individuals who work as journalists but are not currently covered by the definition of a media business or media service (or their employees) may now breathe more easily: they too will be exempt from many of the provisions of the GDPR in order to reconcile the right to protect personal data with the freedom of expression and information.



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Register of beneficial ownership starts in January 2018

Transposing the 4th EU Anti-Money Laundering Directive, the Act Establishing a Register of Beneficial Ownership (WiEReG) enters into force on 15 January 2018. By 1 June 2018 at the latest, stock corporations, limited liability companies, limited commercial partnerships, general partnerships, savings banks, private foundations, associations and, possibly, trusts need to report their beneficial owners to this register. The reporting duty does not apply to legal entities which have already supplied data on their beneficial owners to the Company Register or Register of Associations (such as general partnerships, limited commercial partnerships and limited liability companies whose shareholders or partners are solely natural persons).

Beneficial owners are natural persons who ultimately own or control the legal entity; this is the case when the owner holds a stake of more than 25 percent or has the direct or indirect control (a stake of over 50 percent) of a legal entity that holds a stake of more than 25 percent. The reporting duty includes name, residence, nationality, type and scope of the beneficial interest and the share of the stake or voting rights.

The report is filed electronically through the business service portal USP. The Register can be accessed by the legal entity itself with regard to data reported by it, and by all entities invested with obligations to check under the Financial Market Money Laundering Act, such as banks, professional representatives (lawyers, notaries public, auditors, tax consultants, etc.), as well as real estate agents and insurance agents. If a legitimate interest can be shown in connection with preventing money laundering and terrorist financing, other natural persons and organisations are allowed to access the Register as well.

Delayed reports are punishable (on pain of penalties) by repeated coercive fines of up to EUR 5,000; a wilful violation of the reporting obligation is punished by a fine of up to EUR 200,000, and a grossly negligent violation calls for a fine of up to EUR 100,000.

For further information on the subject please contact irrgeher@preslmayr.at and kern@preslmayr.at

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Preslmayr events you should have marked on your schedule:

Information events, courses and workshops – Preslmayr Rechtsanwälte are once again organising numerous events during the autumn. The series was launched by our information event at Zwettl on 21 September 2017 which dealt with the EU's General Data Protection Regulation (GDPR) and was organised jointly with IT experts from MP2 IT-Solutions GmbH. The next events are:

- 5 October 2017: "The new Data Protection Act"
- 19 October 2017: "Stay silent and lose"
- 23 November 2017: "Practical problems of managerial liability"

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