GETTING THE DEAL THROUGH

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CONTENTS

Austria

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General

1 How can the government's attitude and approach to internet issues best be described?

The Austrian government has a very positive attitude towards the internet and its possibilities. This manifests itself not only in the fact that Austria is, and has been for years, the leader in e-government within the European Union, but also in its activities to further internet access and usage among the Austrian population, for example by pushing e-learning or granting tax deductions to consumers with new broadband connections.

The annual ICT (information and communication technologies) survey conducted by Statistics Austria shows a steady, albeit in comparison with former years slightly reduced, increase in internet access and internet use in the private sector as well as in broadband connections and mobile internet access in the business sector. In the private sector, the most important development, however, is the increase in the use of internet-ready mobile phones, which has almost doubled within one year, increasing from 11 per cent in 2009 to 21 per cent in 2010. It is also interesting to note that only 43 per cent of Austrians do online shopping while 51 per cent make use of e-government offerings for private purposes.

For the purposes of contracting, Austrian legislation rarely distinguishes between the online and offline worlds. While in general this allows for the same legal rules to apply for the same type of contracts regardless of whether they are concluded by analogue or digital means, some rules or formalities can be met more easily offline, thus creating barriers to internet use. Another aspect is that some rules create additional problems when applied to mobile devices, for example, due to the size of the devices or the quality and costs of the connection, and may therefore impede the growth of the mobile commerce market.

Legislation

2 What legislation governs business on the internet?

In general the same legal rules apply to businesses both on and off the internet. Therefore, the Civil Code or the Business Enterprise Code, as well as any specific regulations related to the business in question, must be observed online.

Most of the specific laws or provisions for internet businesses result from the implementation of the relevant EU directives. Further regulations, in particular regarding the provision of information prior to and after conclusion of a contract, may be found, for example, in the Media Act and in the Business Enterprise Code.

Regulatory bodies

3 Which regulatory bodies are responsible for the regulation of e-commerce and internet access tariffs and charges?

Austrian law does not provide for any specific regulatory body for e-commerce as such. Therefore, within their respective fields, bodies such as the Data Protection Commission are also responsible for e-commerce, but their roles are not exclusive.

In the same way, no specific provisions on internet access tariffs and charges exist; rather, the rules on charges for communication networks and services set forth in the Telecommunications Act apply. The regulatory bodies for issues pertaining to the Telecommunications Act are the Austrian Communications Authority, the Broadcasting and Telecommunications Regulation GmbH and the Telekom Control Commission.

Jurisdiction

4 What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions (or disputes) in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

Austrian courts follow the rules set forth in Regulation No. 44/2001 for determining the applicable jurisdiction. Regulation No. 593/2008 is used for determining the applicable law regarding contractual matters, while for non-contractual obligations Austrian courts apply the rules of Regulation No. 846/2007.

For non-contractual matters, therefore, generally both the applicable jurisdiction and the applicable law are those of the country in which the damage occurs.

However, in contractual matters, generally the jurisdiction and applicable law are those of the country in which the party providing the services or goods has his seat or habitual residence. This will usually be the place where the contractual obligation has or should have been performed. Both relevant regulations allow for the parties to agree upon any other law or jurisdiction without requiring any formalities, thus making it possible to easily conclude such agreements over the internet.

While the aforesaid applies to both business-to-business (B2B) and business-to-consumer (B2C) contracts, for the majority of B2C contracts special provisions apply which are designed to protect consumers. Such provisions may lead to the application of Austrian law or the application of only certain provisions if the otherwise applicable law provides less protection in the relevant areas.

In the case that none of the above-mentioned regulations are applicable, the relevant jurisdiction and law are determined following the provisions of the Private International Law Act, which generally gives the same result as the regulations.

Contracting on the internet

5 Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

As a basic principle, article 883 of the Civil Code stipulates that contracts may be concluded in any form unless otherwise provided by law. Therefore, the majority of contracts may be concluded orally or in writing, explicitly or implied, online or offline. A common exception is the requirement of written form: in Austria this does not only mean 'in writing' as opposed to 'orally', but furthermore requires a handwritten signature. However, due to article 4 of the Signature Act, a handwritten signature may be substituted by a qualified electronic signature (see question 7 for details). Therefore even such contracts (with the notable exception of contracts in inheritance law or family law) may be validly concluded online.

'Click wrap' contracts pose a special problem. This is not due to their being concluded by clicking a button since, as long as no special requirements are set forth by law, even a click, just like a nod, may validly conclude a contract under Austrian law; rather, the problem is that under Austrian law a party cannot accept terms which he was not given the opportunity to review before accepting. This issue can easily be avoided by providing a link to the relevant terms next to the button, for example. However if the terms are not accessible, are hard to find (even if this is only due to bad page design), or are not mentioned at all, the person or entity employing those terms risks the valid conclusion of the contract without such terms.

6 Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

The most relevant law for contracting on the internet is the E-Commerce Act, implementing Directive 2000/31/EC, which stipulates the information obligations which service providers are required to meet. While the rules set forth apply to B2B and B2C contracts alike, certain provisions are only mandatory in relation to consumers.

On websites, as well as in newsletters, certain information needs to be provided at all times, such as the name and contact details (both online and offline) of the service provider, as well as details of the services (eg, the authorisation scheme and supervisory body, if applicable) or the service provider's profession (eg, the relevant professional body and rules, in the case of a regulated profession). The Media Act stipulates further requirements for newsletters or other periodic electronic media which are disseminated at least four times a year.

Additional information obligations are set forth for online shops, requiring them to provide detailed information on the technical steps until conclusion of the contract, including detection and correction of input errors, storage of the text of the contract, contracting languages and any applicable voluntary code of conduct. This information must be provided in a clear, comprehensive and unambiguous way prior to the conclusion of the contract; or (as is usually the case), if the customer does not conclude the contract but rather sends a binding offer which the service provider may or may not accept, before placement of the offer. Customers need to be provided with effective technical means with which to identify and correct possible input errors before submitting a contractual declaration. This can prove to be problematic in a mobile environment. Upon placement of the order, the service provider has to immediately confirm receipt by electronic means. Furthermore, he has to provide to the customer all relevant contractual provisions, including general terms and conditions, in a storable and reproducible way. Allowing access to the terms on the service provider's website is not deemed sufficient, since the service provider may alter or delete them at any time; however, allowing the customer to save or print the page containing the terms suffices to comply with the legal requirements. Failure to provide the contractual provisions in a storable form does not affect the validity or applicability of the terms in itself, but the service provider risks a fine of up to €3,000 and litigation on the grounds of unfair competition.

Any electronic message containing a contractual or otherwise legally significant declaration, as well as any electronic confirmation of receipt, is considered duly received only if the addressee can retrieve it under normal circumstances.

For B2C contracts, additional provisions (eg, on information requirements or the right of withdrawal) can be found in the Consumer Protection Act. By an amendment which entered into force on 30 April 2011, B2C contracts on betting- and lottery-related services as well as any contract in connection with a promised prize is considered void if concluded during a call which is considered cold-calling under article 107 of the Telecommunications Act. Contracts concluded due to unsolicited e-mails or SMSs (which are also regulated in article 107 of the Telecommunications Act) are, however, not concerned. It should be noted that while the Consumer Protection Act (as its name implies) generally applies only to B2C contracts, articles 31(b) to 31(f), which contain the implementation into Austrian law of a large part of Directive 90/314/EEC on Package Travel and Holiday Tours, are also valid for B2B contracts. For the distance marketing of consumer financial services, specific rules are set forth in the Distance Financial Services Act, which contains the transposition of Directive 2002/65/EC into Austrian law.

General information requirements which do not require the conclusion of a contract are set forth in the Media Act. Originally created to govern the rights and obligations of media such as newspapers, radio or television, and therefore being rather formal and complicated, due to the technology-neutral definition of 'media' the act can also be applied to electronic media. Today, specific informational obligations exist for electronic periodic media such as websites and newsletters. While in general, provisions on, for example, defamation or forbidden publications apply to all types of media, whether digital or analogue, the Media Act distinguishes between websites containing only information which is not suitable to influence public opinion and related only to the presentation of personal life or the presentation of the website's owner ('small' websites) and websites which do not meet these criteria ('large' websites). The act contains special provisions regarding, for example, counterstatements, publication or fines, which are only applicable for 'large' websites.

Regarding informational requirements, the Media Act requires the publication of an imprint, once again distinguishing between 'small' and 'large' websites. The former are required to publish only the media owner's name and domicile or seat respectively and, if applicable, the object of the company; the latter must also provide information on the shares held by the media owner, information on the managing directors and board members, and information on certain direct and indirect shareholders and their respective shareholders. No discrimination is made between different types of newsletters, but only newsletters which are disseminated at least four times a year are governed by the Media Act. Such newsletters must contain the same information as a 'large' website, but this requirement can be fulfilled by providing a link to the imprint on the website.

Article 14 of the Business Enterprise Code and article 63 of the Trade Act contain additional disclosure requirements for websites, business letters including e-mails and order forms. Both provisions result from the transposition of Directive 2003/58/EC into Austrian law and are nearly identical. However, article 14 of the Business Enterprise Code applies only to businesses registered in the Austrian company register, while all other businessmen are covered by article 63 of the Trade Act. The provisions stipulate that businesses or businessmen need to provide their name and seat or place of business respectively and, if applicable, the commercial register number and the registering court. Registered businesses contravening these provisions may be fined up to €3,600 multiple times.

7 How does the law recognise or define digital or e-signatures?

In Austria, digital and e-signatures are both collectively referred to as 'electronic signatures' by law and are defined in the Signature Act. The act, a transposition of Directive 1999/93/EC, distinguishes between several types of signatures: electronic signatures (also referred to as 'simple electronic signatures'), advanced signatures (which are uniquely linked to a signatory, are capable of identifying him, are created using means that the signatory can maintain under his sole control and are linked to the data to which they relate in such a manner that any subsequent change of the data is detectable) and qualified electronic signatures (which are advanced digital signatures based on a qualified certificate and created by a secure signature-creation device). Only qualified electronic signatures may substitute a handwritten signature. This allows the conclusion by electronic means of most types of contracts for which Austrian law demands the written form.

8 Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

Businesses and, to a lesser extent, private persons are obliged by several Austrian laws to retain documents or records for a time period of seven years or fewer for tax, accounting or social security purposes. In general, records may be kept in analogue or digital form. The same applies to the retention of documents, where it usually suffices to retain only a digital copy of a former physical document. Yet in certain cases, for example for purposes of VAT recovery, retention of the document in its original is required. If records or documents are retained electronically, it must be certain that they can be accessed and processed at any time during the retention period provided by law.

Regarding data retention in general, the transposition of Directive 2006/24/EC on the retention of data, the controversial Data Retention Directive, by means of an amendment to the Telecommunications Act, has to be mentioned. The amendment was published in the *Bundesgesetzblatt* (the Federal Law Gazette) on 18 May 2011 and is planned to enter into force on 1 April 2012. While the transposition is generally regarded as for the most part fulfilling only the minimum requirements set forth by the directive, it is nevertheless controversial and criticised even from within the ranks of the governing parties. A transposition was, however, regarded as necessary after Austria has already been sanctioned by the European Court of Justice for non-implementation. Therefore a motion for a resolution was accepted by parliament by which the government is obliged to present a new amendment should any changes occur at EU level, so that such amendment could enter into force by 1 April 2012. In light of the current discussion regarding the Data Retention Directive, the much awaited questions of the Irish High Court in the case brought forward by Digital Rights Ireland to the European Court of Justice on whether the directive complies with the Charter of Fundamental Rights of the European Union as well as the announcement by the Austrian opposition parties to lodge a complaint of unconstitutionality with the Austrian Constitutional Court, it remains to be seen whether the transposition will ever enter into force in its current form.

Security

9 What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

The Data Protection Act stipulates that data controllers and data processors must take technical and organisational data security measures to ensure the security of personal data. The nature and intensity of the required measures depend not only on reasonableness, but also on the state of the art of technology and the nature and the extent of personal data. Additionally, providers of telecommunication networks or services, therefore including but not limited to internet service providers, are obliged by the Telecommunications Act to take the same measures and to inform the users of any risk to data privacy and possible remedies if such risk is beyond their control.

The Austrian Payment Services Act stipulates that in the case of electronic payments, banks and payment service providers need to provide for a means of authentication – that is, for a technical procedure which allows the bank or payment service provider to verify the use of a specific payment instrument, including its personalised security features.

10 As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

The use of encryption for the purpose of securing communications is generally allowed. No ban of specific encryption methods exists. The police and the criminal courts (empowered by the Security Police Act and the Code of Criminal Procedure, respectively) are the only authorities that can require private keys to be made available, either by questioning of witnesses or suspects or by confiscation of data carriers. In the case of witnesses who are not privileged to decline to answer questions, coercive measures may be applied. These must be proportional to the crime in question and can include a fine of up to €10,000 and imprisonment for up to six weeks.

Certification authorities are permitted by the Signature Act, which also contains all legal provisions specific to certification authorities, including those on liability. Apart from that, general provisions still apply. Upon the start of business – for which no authorisation is required – certification authorities are obliged to notify the supervising authority (the Telekom Control Commission) and present a certification and security concept. The Telekom Control Commission may issue or revoke certificates for certification authorities and may take other supervisory measures to ensure compliance with the provisions of the Signature Act.

Domain names

11 What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

Nic.at, the Austrian registration authority, is responsible for registration of domains with the top-level domain '.at' and the sub-level domains '.co.at' and '.or.at'. Applications for domains may be performed through a registrar or directly at nic.at and are processed on a 'first come, first served' basis. Electronic applications are processed in the order of their receipt; applications made via fax or letter, however, are deemed to have been received at 00:00 hours of the working day following the day of their receipt. Residency in Austria is not required for registration of an '.at' domain, but the complete name of the domain holder must be specified, along with a valid postal address (PO box addresses are not deemed sufficient) and the e-mail address of the domain holder. Furthermore, the domain holder must indicate whether he or she is an individual person or an organisation. Since the Arbitration Office for '.at' domains was closed on 31 October 2008, Austrian civil courts have been able to deal with a multitude of legal disputes regarding '.at' domains. The WIPO uniform dispute resolution policy does not apply for want of voluntary adoption by nic.at; however, arbitration is possible on the basis of WIPO alternative dispute resolution.

12 Do domain names confer any additional rights (for instance in relation to trademarks or passing off) beyond the rights that naturally vest in the domain name?

In Austria, domains do not confer any additional rights beyond the rights that naturally vest in the domain name. However, the use of

a domain name for an extended period of time may create a non-registered trademark, which is protected, among others, by article 9 paragraph 3 of the Act Against Unfair Competition.

13 Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

Owning a trademark will assist in challenging an unlawful registration of a similar domain name. However, there are other rights which will also alleviate domain name challenges, such as the right to a name or rights pertaining to non-registered trademarks.

Advertising

14 What rules govern advertising on the internet?

Article 107 of the Telecommunications Act generally forbids unsolicited electronic messages (including SMS) that are sent for the purposes of direct marketing or addressed to more than 50 persons. They are, however, permissible if the sender has received the contact details in the context of providing goods or services to his customers and the message is used for direct marketing of similar goods or products. The sender must clearly offer the possibility to decline usage of contact details for marketing purposes. This offer must be made when the contact details are first acquired, as well as in any subsequent message. Unsolicited electronic messages are not permissible in any case if the address is included in the 'Robinson List', which is kept by the Broadcasting and Telecommunications Regulation GmbH.

For advertisements in periodic media, thus including websites and newsletters which are disseminated at least four times per year, article 26 of the Media Act contains additional information obligations (see question 6 for details of the other information requirements). Any paid-for announcement, recommendation or other contribution or report must be labelled as an advertisement, paid insertion or commercial unless the design or arrangement leaves no doubt that the publication has been made against payment.

It should be noted that advertising on the internet is not subject to taxation in Austria, since the Advertisement Levy Act only covers print media, radio, television and the use of physical advertising space.

15 Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

In general, advertisements for illegal goods (eg, drugs, certain weapons) or illegal activities (eg, criminal offences) are banned and in certain cases may even be punishable under the Penal Code. Total bans, partial bans (usually regarding certain media) or other restrictions for legal goods or services (eg, tobacco) exist in a multitude of laws as well as in voluntary regulations, for example in regard to certain professions. Any and all bans regarding the press or print media are also valid for internet advertising. Infringement of the relevant provisions may result in fines or claims on the grounds of the Act Against Unfair Competition, among other things.

Financial services

16 Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

Special provisions on the distance marketing of consumer financial services can be found in the Distance Financial Services Act. Covered financial services include banking services and services provided in connection with granting of credit, insurance, old-age benefits for individuals, financial investments or payments. The act only covers information obligations and the consumer's right of withdrawal. Electronic payment services are also regulated in the Payment Services Act, which applies to B2B and B2C contracts. Further rules for financial services in general can be found in the relevant Acts for the service providers, such as the Banking Act.

Defamation

17 Are ISPs liable for content displayed on their sites?

ISPs can be held liable for content under general Austrian civil and penal law, although chapter 5 of the E-Commerce Act contains special provisions limiting their liability.

Access providers are not liable for transmitted information if they do not initiate the transmission, do not select the receiver of the transmission and do not select or modify the information contained in the transmission. The same applies to search providers. Liability is also excluded for caching if the ISP does not modify the information, complies with rules regarding the updating of cached information and acts expeditiously to remove or to disable access to cached information upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network or access to it has been disabled or that a court or an administrative authority has ordered such removal or disablement. Hosting providers are exempt from liability for information stored at the request of a user, on the condition that they do not have actual knowledge of the illegal activity or information and are also not aware of any facts or circumstances which make the illegal activity or information apparent. Upon obtaining such knowledge or awareness, they can prevent liability by expeditiously removing or disabling access to the information. The same applies for ISPs which provide access to information or content by linking to it.

ISPs are generally not obliged to monitor their services or to actively seek indications of illegal activity. However, the Austrian Supreme Court holds that host providers are required to monitor sites on which an infringement has occurred and further infringements may be expected. The limitations of liability do not preclude injunctive relief.

18 Can an ISP shut down a web page containing defamatory material without court authorisation?

Not only does the E-Commerce Act empower ISPs to shut down a web page containing defamatory material without court authorisation but, as stated under question 17, it even requires hosting and caching providers to do so to avoid liability. The exemption from liability only applies if and as long as the ISP has no knowledge of illegal activity and is also not aware of facts or circumstances from which the illegal activity is apparent. Upon obtaining such knowledge or awareness, host and caching providers are required by law to act expeditiously to remove or disable access to the information, otherwise they themselves become liable for the illegal material or activity.

Intellectual property

19 Can a website owner link to third-party websites without permission?

In principle, linking is legally allowed without permission as long as the objects or pages linked to are not presented in such a manner that the user of the page providing the link would be led to the assumption that the linked content was provided by the linking website. Therefore, ordinary links – where the user clicks on images or on underlined words and is forwarded to an unaltered third-party website – are permissible, at least when leading to the main page of the third-party website. Framing, however, where the third-party website is presented within a frame of the linking website and thus

as part of that website, is only legal if there is prior permission by the third party. The same applies to inline links, where the content of a third-party website, such as an image, is automatically embedded into the linking website and does not require any interaction by the user. Adding a copyright notice to framed or inline-linked content will not suffice if the content may only be displayed on other websites upon prior permission.

Deep links pose special problems. While such links are usually ordinary links, leading to the unaltered third-party website, they point to a specific page or image, bypassing the main page. This may cause loss of revenue to the third party (eg, by means of fewer advertisements displayed per visit) and can result in a claim for damages against the owner of the linking website.

20 Can a website owner use third-party content on its website without permission from the third-party content provider?

Third-party content which is protected by intellectual property rights may generally not be used without prior permission. A notable semi-exception is material licensed in such a way as to allow use without prior individual permission; for instance, under the Creative Commons Share Alike licences. In such cases, however, the necessary permission has actually been granted by the act of choosing the licence, therefore only removing the requirement of obtaining individual permission.

21 Can a website owner exploit the software used for a website by licensing the software to third parties?

Website owners may exploit software used for their website only if and insofar as they do not by such action infringe the intellectually property rights of a third party. Therefore, if the website owner has all the rights or an appropriate licence relating to the software, exploiting it by licensing it to third parties is legally allowed. In any other case, the prior permission of the software's owner needs to be obtained.

22 Are any liabilities incurred by links to third-party websites?

In Austria, linking to third-party websites may incur liability if the links are made by framing, inline or as a deep link (see question 19). In other cases, generally no liability is incurred. Austrian law does not require a statement by the linking website expressing dissociation from the content provided on the third-party website.

For ISPs providing links, article 17 of the E-Commerce Act stipulates an exception from liability for the linked-to activity or information if the ISPs do not have actual knowledge of illegal activity and are also not aware of facts or circumstances which make the illegal activity or information apparent. Upon obtaining such knowledge or awareness, liability can be prevented by expeditiously removing the link.

Data protection and privacy

23 How does the law in your jurisdiction define 'personal data'?

Article 4 clause 1 of the Data Protection Act defines personal data (also referred to as simply 'data') as information on data subjects – that is, any natural or legal person or entity whose data are used – if their identity is or can be determined. Data are considered only indirectly personal if they are meant for a controller, processor or other recipient of a transmission who cannot determine the data subject's identity by legally permissible means.

24 Does a website owner have to register with any controlling body to process personal data? May a website provider sell personal data about website users to third parties?

In Austria, the controlling body for data protection issues is the Data Protection Commission. The Data Protection Act also mentions the Data Protection Council, but its role is restricted to consultation of the Austrian federal government and the Austrian state governments.

Every controller is obliged to notify the Data Protection Commission of any data utilisation – that is, the sum of all logically related uses such as collection, organisation, storage, comparison, adaptation, consultation, transmission or destruction. However, certain data utilisations which are deemed to be common and pose no risk to data privacy – the so-called standard utilisations (eg, processing of client or personnel data for certain purposes) – are exempt from the notification obligation. Model utilisations, which are frequently used but not eligible to be declared standard utilisation, benefit from simplified notification requirements. The Standards and Model Regulation contains an exhaustive list of these utilisations.

The Trade Act restricts brokering of personal data to address publishers and direct marketing companies which require a special trade licence, allowing them to, among other things, collect and sell certain personal data without the data subject's consent. However, article 151 paragraph 3 of the Trade Act explicitly allows for the collection of the name, gender, title, academic degree, address, date of birth and profession of data subjects from third-party customer databases. Therefore, a website owner may legally sell customer data to address publishers and direct marketing companies, but only to them.

25 If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction?

Utilisation of one's own customer data for the purpose of marketing one's own products is considered (within limits) a standard utilisation (see question 24). However, profiling such data for generalised advertising purposes (in contrast to personalised advertising) is not explicitly regulated. Yet since profiling of personal data is considered data usage and does not fall under any standard utilisation, it would be mandatory to notify the Data Protection Commission.

26 If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

Commitment and transmission of personal data within the European Economic Area or to third countries with an adequate level of data protection does not generally require authorisation by the Data Protection Commission. Further exemptions from authorisation include commitment and transmission for private or public purposes or to US-based companies which have signed the Safe Harbor Agreement. Any non-exempt commitment and transmission requires prior authorisation. An application for such authorisation must detail among other things the type of data used, the purpose and duration of use and any special legal provisions and professional rules. In general, the existence of an adequate level of data protection within the third country must be outlined. If a sufficient level of protection does not exist, the applicant may demonstrate that the necessary level of protection is granted by other means, such as by contract. These rules need to be taken into consideration especially where cloud computing services are concerned, since those do not only involve the transfer and processing of data themselves but furthermore usually the transfer to and processing by a third party.

27 Does your jurisdiction have data breach notification laws?

While the very first general data breach provision was introduced in article 24 paragraph 2a of the Data Protection Act, which entered into force on 1 January 2010, the very first data breach provision in Austria was (and still is) found in article 95 paragraph 2 of the Telecommunications Act, which entered into force as an original and yet unchanged part of the revised Telecommunications Act on 20 August 2003.

According to article 95 paragraph 1 of the Telecommunications Act, providers of telecommunication networks or services, therefore including but not limited to internet service providers, must take technical and organisational data security measures to ensure the security of personal data, as required by article 14 of the Data Protection Act. Additionally, article 95 paragraph 2 of the Telecommunications Act obliges them to inform the users of any risk to data privacy and possible remedies if such risk is beyond their control.

In contrast to the provision of the Data Protection Act, article 24 paragraph 2a of the Data Protection Act applies to all data controllers, not only providers of telecommunication networks, yet is at the same time more limited in scope. According to this provision, a data controller is required to notify the persons concerned of a data breach only if data from his applications have been used systematically and severely in an unlawful way and there is a danger of damage occurring to the persons concerned. Even if all this applies, the data controller is not required to issue a data breach notification if the notification would require an effort disproportionate to the pending damage or the costs of notifying all persons concerned. In the original version presented to parliament, the exception should only apply if the effort was disproportionate to both the damage and the costs; however, this 'and' was changes to an 'or' within the course of the parliamentary discussions. Considering that the costs of data breach notifications are usually high (eg, a large enough newspaper advertisement in Austria may cost tens of thousands of euros), it remains to be seen how effective this provision turns out in practice.

Taxation

28 Is the sale of online products subject to taxation?

In Austria the same tax rules apply for the sale of online products as for the sale of offline products. Tax law distinguishes between the type of goods and services (eg, software and food), but not between channels of distribution or whether a product is supplied in physical form.

29 What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

Businesses in Austria are taxed if they are they are either established or generate profit within the country. Since the same rules also apply for most third countries, internationally orientated businesses would risk double taxation. For the purpose of avoiding such double taxation, Austria has concluded a multitude of double taxation treaties. For a business to benefit from such a treaty, it must set up a permanent establishment in the sense of the OECD Model Convention within its non-residential country.

The Austrian Federal Ministry of Finance and the OECD hold the view that a server can constitute a permanent establishment if it is used exclusively by the foreign company and does not provide mere auxiliary functions. However, Austrian tax authorities point out that each case has to be assessed individually and therefore no general rules – especially on auxiliary functions – can be established. It remains to be seen how this reasoning will apply to cloud computing services, where servers are usually not used exclusively but may, depending on the data involved, provide important functions.

30 When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

Every company undertaking entrepreneurial activities in Austria must notify the competent tax authority within one month. The competent financial authority is usually the one at the company's registered seat in Austria. As part of the notification, expected turnover in the business's first two years in Austria must be indicated. If the expected turnover for any one year exceeds €30,000, the company is allocated a tax number. A value-added tax identification number (VATIN or UID in Austria) is automatically allocated to any business liable to tax on sales.

Domestic internet sales are taxed in the same way as domestic physical sales (see question 28).

31 If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

This is not applicable in Austria.

Gambling

32 Is it permissible to operate an online betting or gaming business from the jurisdiction?

In Austria the state has a monopoly on gambling and betting. Gambling is regulated by the Law on Games of Chance, which also determines which games are considered games of chance. Poker has been added to the lists of games of chance in 2010. While this on the one hand restricts who can legally offer poker tournaments, it adds to the attractiveness of Austria as a country to hold poker tournaments in, since winnings from a game of chance are exempt from tax in Austria. Private companies desiring to offer gambling services must obtain an appropriate licence. While previously only Austria-based companies were eligible, after a judgment rendered against Austria by the European Court of Justice in the *Engelmann* case, eligibility has been extended to all capital companies with a supervisory board and their seat within the European Union. Internationally offered online gambling activities are also subject to the Austrian gambling monopoly and may not be advertised or executed within Austria. The Federal Ministry of Finance is the responsible authority for the supervision of licensed companies.

For online gaming, no dedicated licence exists. Rather the former state lottery is allowed to operate an online casino as part of its lottery licence. Currently the case of *Dickinger und Ömer* is pending, in which the question is raised whether it is compliant with the laws of the European Union to restrict the legal provision of online gaming to a single entity. In his opinion, advocate-general Yves Bot argued that such a restriction was permissible. The decision of the European Court of Justice is therefore eagerly awaited.

Few exceptions from the state monopoly exist, such as for sport betting activities or games of skill, and these are in part regulated by the laws of the federal states of Austria. In all Austrian states, sport betting services, whether offered online or offline, are subject to a permit.

33 Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

Austrian residents are permitted to use licensed online casinos, of which there is currently only one, as well as any betting website which has an appropriate permit (see question 32). Use of any other online gambling or betting service is forbidden. Participation in unlicensed online lotteries may result in a fine of up to €7,500.

Age requirements are governed by state law. Generally, participants in gambling and betting must be at least 18 years old.

Update and trends

Due to current discussions regarding the Data Retention Directive and announced complaints to the Austrian Constitutional Court, it remains to be seen whether and in what form the current Austrian transposition of this directive will enter into force on 1 April 2012.

The Law on Games of Chance, even though amended in 2010 taking into consideration the advocate-general's opinion in the *Engelmann* case, has been found non-compliant by the European Court of Justice with the laws of the European Union regarding the requirements for obtaining a gambling licence. Now another case is pending before the European Court of Justice, in which Austria's restriction of the legal provision of online gaming to a single licence is challenged. While the opinion of the advocate-general may not look as favourable for the defendant as it did in the *Engelmann* case, the outcome is still open.

The new Consumer Rights Directive, which was approved by the European Parliament on 23 June 2011, will among other things grant consumers the right to cancel a contract regarding an online purchase within two weeks of receiving the goods, and require online traders to give buyers precise information on the total price, the goods ordered and the trader's contact details. In Austria, however, consumer protection organisations have voiced their opinion that the transposition of this directive might in fact diminish the rights of Austrian consumers by harmonising the relevant provisions within member states, thus overruling the existing stricter provisions of Austrian law. The question of whether these concerns are well founded will only be answered by the Austrian transposition of the directive.

Outsourcing

34 What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

Austrian law does not provide special regulations regarding outsourcing. Thus the general legal rules, especially those of the Civil Code and the Enterprise Business Code, apply. Data protection can be a significant issue if services are outsourced outside Austria. While authorisation by the Data Protection Commission is not required for commitment and transmission of personal data within the European Economic Area, to third countries with an adequate level of data protection, or in the case of some other exceptions, any other commitment and transmission may only be legally performed after prior authorisation (see question 26).

This generally applies also to cloud computing services, which not only provide an alternative to outsourcing but also offer possibilities to cut costs where outsourcing is not an option due to possible changes in personnel.

35 What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, do the rules apply to all employees within the jurisdiction?

The rights of employees who previously carried out services that have been outsourced depend greatly on the question of whether the outsourcing constitutes a transfer of business. Only if this is the case will employees receive special rights while being automatically transferred to the company which now performs the outsourced services with all rights and obligations. If the new employer does not take over certain contractual provisions determined by law, the employee is entitled to object to the transfer within a period of one month after being informed of this fact and remain with the outsourcing company (ie, the transfer is regarded as never having taken place). Should the conditions of employment significantly worsen due to the transfer, the employee is entitled to cancel his employment contract within a period of one month after such deterioration is identifiable. While such cancellation is regarded as dismissal, entitling the employee to receive severance pay, it does not lead to an automatic continuation or renewal of the employment contract with the outsourcing company, leaving the employee unemployed.

Should the employee remain with his or her employer, either by choice or if the outsourcing does not constitute a transfer of business, he or she is entitled to be posted to a new workplace. However, if no jobs are available, no new jobs can be created within reasonable limits or the employee does not qualify for the available jobs, the employee risks the successful cancellation of his employment contract. The general rules of Austrian employment law apply for such cancellations.

Online publishing

36 When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability?

Liability for mistakes in information primarily depends on the nature of the information provided and the person or entity providing them. Persons publicly announcing to be experts are liable for any mistakes they provide in their area of expertise, while other persons may escape liability in such cases. In the case of incorrect information regarding a person, content providers may be held liable pursuant to the Media Act, regardless of fault. Liable content providers may be obliged to publish a counterstatement. Liability may be limited contractually; however, no limitation is possible by means of disclaimers placed on a website, since a visit to a website does not create a contractual relationship between the user and the content provider.

37 If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

Directive 96/9/EC on the legal protection of databases has been transposed into Austrian law by an amendment to the Copyright Act. Databases are protected by copyright if, by virtue of the choice or arrangement of the material, they constitute an intellectual creation particular to their creator. In such cases, the creator has all rights linked to copyright, such as reproduction, arrangement, alteration and distribution to the public. In addition, databases are protected by a sui generis right regardless of whether they have an intrinsically innovative nature if there has been a substantial qualitative or quantitative investment in the obtaining, verification or presentation of the content. Creators of such protected databases may prevent the extraction or reutilisation of the whole or a substantial part of the database. Insubstantial parts, however, may be extracted and reutilised for any purpose. Substantial parts of non-electronic databases may be legally extracted for private purposes.

Protection of databases does not extend to their content and is without prejudice to any rights subsisting in the content itself. Software which is used for the creation or operation of an electronic database is not considered part of that database and is therefore protected separately if applicable.

38 Are there marketing and advertising regulations affecting website providers?

Website providers are affected by the same rules regarding marketing and advertising as any other business in Austria. They may not send out unsolicited electronic messages (including SMS) for the purposes of direct marketing or to more than 50 persons, unless they have received the contact details in the context of providing their services to their customers, the message is used for direct marketing of similar

services and the possibility to decline usage of contact details for marketing purposes is clearly offered. The counter exception is when the relevant address is included in the 'Robinson List', in which case no unsolicited messages are permissible.

Since websites are considered periodic media in the sense of the Media Act, the display of certain information is required. In the context of advertising the most important one is the identification of paid-for content (see questions 6 and 14).

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