

## THE ORIGINS OF THESE PROBLEMS ARE THE DIFFERING LEGAL SYSTEMS

If an English company wants to register a branch in Austria with a memorandum of association containing such provisions as quoted above, such provisions are interpreted by the Austrian courts in the sense that the company wishes to do banking business. As a prerequisite the courts demand a licence according to the Austrian banking regulations. Since the English company actually is not involved in any banking business, does not intend to become so, and is thus not prepared for obtaining a banking licence, the registration of a branch often fails because of such misunderstanding.

During the registration procedure of the decision quoted above the English company successfully explained to the court the differences between the two legal systems and clarified the misunderstanding about the content of the English memorandum of association and the actual activities of the company.

It was outlined to the Commercial Court of Vienna that content and range of the memorandum of association is still influenced by the ultra vires doctrine. Furthermore it was explained to the court that the legal term of banking business is harmonised by the directive 2006/48/EU. Therefore, banking businesses that require a licence in England require a licence in Austria too and vice versa. Requiring a licence from an English company that does not need a licence in England would be a violation of Austrian banking regulations. This would constitute a violation of the harmonised legal term of banking business and at the same time a violation of the principle of freedom of establishment according to articles 49 and 54 of the EU-treaty in the Lisbon version.

Crucial for the understanding and the correct interpretation of such provisions of English memoranda of association as quoted above is the fact that the company only deals with its own money and not with

money from others. This is the essential difference to the banking business, where it is all about money from customers. Taking out credits or issuing bills of exchange is usual commerce and no banking activity. Finally it was explained to the court in this case that according to the Austrian banking regulations a banking business is only given if its activities exceed a certain quantitative threshold. Sporadic credit and loan accommodation – as it is usual in commerce – is not meant to be banking business.

Considering the legal characteristics during the registration process of a branch of an English company in Austria and explaining these characteristics to the court should make the registration of English branches trouble-free in the future. ◇

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*Dr Jürgen Brandstätter is Managing Partner at BMA Brandstätter Rechtsanwälte GmbH. For more information [www.bma-law.com](http://www.bma-law.com)*