

Act on Non-smoker Protection in the hospitality industry

Ban on smoking in the hospitality industry since 1 January 2009

As a result of the deletion of the previous exemption clause in the Austrian Tobacco Act (TabakG), a ban on smoking in hospitality industry business enterprises has also been in effect since 1 January 2009. But there are three exceptions, which will be explained in the following:

Exception 1 - Business enterprises with two or more rooms - extra room

The following prerequisites must be given for this possibility of exception:

- At least two rooms suitable for or dedicated to hosting guests.
- The non-smoking area has to encompass at least 50% of the serving areas.
- The main room has to be smoke-free.
- It has to be guaranteed that no tobacco smoke penetrates the remaining seating areas occupied under the ban on smoking.

What does main room mean?

The assessment as to which room applies as the main room is basically incumbent upon the proprietor. However, factual criteria such as the area size, location, furnishings of rooms or their accessibility are to be taken into consideration in this assessment. The main room has to be able to be classified as “of overriding importance” in its overall consideration with regard to the other rooms. At any rate, the main focus of the gastronomic activity of the business enterprise is also to be taken into consideration in this connection.

Example: For instance, as a result of its merely temporary utilisation, a ballroom only used in the ball season, which otherwise remains for the most part unused, therefore does not apply as the main room, even if it is the largest room in the business enterprise.

How is the “protection against penetration of tobacco smoke” in the non-smoking areas to be ensured?

According to the health ministry, a smoking room has to be a structurally enclosed room. A prerequisite in this connection is a continuous, floor-to-ceiling solid wall comprised of masonry, lightweight building board, glass or similar construction. In

addition, a door which basically shall be closed (except when walking through) has to be available. However, a mere ventilating separation between smoking and non-smoking area without solid wall with door is insufficient.

Exception 2 - Small single room operations under 50 m²

Single room operations are considered to be such business operations which simply do not have any separation between smoking and non-smoking area in accordance with the law, i.e. separations in the form of room-dividers, niches, non-walk-through walls without doors, etc. change nothing in the character of a single room operation.

In such single room operations, whose only seating area has a floor area of less than 50 m², the proprietor can freely decide whether the venue is operated as a non-smoking or smoking establishment, but has to designate it appropriately.

The floor area of the seating area is important. Therefore, all adjoining rooms outside the seating area, such as kitchen, toilet, storage room, stairs and anteroom are left out of consideration. On the other hand, all areas within the seating area, even if these do not serve the administration of food or selling of beverages (such as the room behind the bar, dance floor or vestibule in the entrance area, which is not spatially separated from the seating area) cannot be deducted.

Exception 3 - Single room operations between 50 and 80 m² (“Corridor Regulation”)

The following prerequisites must be given for this possibility of exception:

- The floor area of the entire (single) seating area amounts to between 50 and 80 m² (the floor area of the seating area is also decisive here, and no areas within the seating area may be deducted).
- Constructional measures for creation of a separate smoking room are not permissible according to building law, police and fire regulations or legal preservation order provisions.

This regulation raises the most questions in the practical implementation. To be heeded in this connection is the fact that the proprietor has to prove that building law, police and fire regulations or legal preservation order provisions stand in the way of a partitioning. That is to say, smoking may only be theoretically allowed if it has been determined that a separation is not possible.

But for the most part, experts as well as the responsible authorities are of the opinion that this proof of impermissibility can hardly be produced, since only in very rare cases is there no possibility at all to erect a partition wall for reasons pertaining to building law or police and fire regulations. Furthermore, there is no competency regulation which states that the responsible authority issues a notification in advance concerning the inadmissibility of the construction project. As a rule, the municipality

is the authority responsible for the assessment of building law as well as police and fire regulations (insofar as no transfer of agendas to the district commission has been made; please enquire with your municipality in case of doubt).

The fact that according to the wording of the law, the rather likely reasons for denying approval (in accordance with the provisions covering business enterprises or occupational health and safety) are not to be taken into consideration shows that the legislature apparently endeavoured to absolutely rule out or keep the number of possible exceptions according to this matter of fact as low as possible in the first place.

The Federal Monuments Office (BDA) is responsible for the preservation order assessment of a construction project:

| | | |
|---------------------------------------|----------|--------------|
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Mandatory identification

Starting 1 January 2009, the proprietor has to identify whether or not the smoking ban applies in the rooms which are suitable for the administration of food or beverages to guests.

- In addition to the warning notice “Smoking endangers your health and the health of your fellow human beings”, rooms where smoking is allowed have to be designated.
- The markings are to be put up so that they are easily visible everywhere in the entrance area as well as in the room itself or the warning notice is easily legible.

Signs can be ordered from the *Gastronomie* (catering trade) professional group:
Tel.: +43(0)316/601-425; fax: +43(0)316/601-1760, gastronomie@wkstmk.at.