Topics in our issue:

New deposit guarantee scheme

On 1 January 2019, Einlagensicherung AUSTRIA Ges.m.b.H. (ESA) was launched as an institutional deposit guarantee scheme (DGS) under Section 1 (1) 1 of the Federal Act on Deposit Guarantee Schemes and Investor Compensation in Credit Institutions (ESAEG). It now covers deposits of up to EUR 175bn, with guarantees typically at about EUR 100,000 per client and bank.

Legislators instructed the Austrian Economic Chamber (WKO) to set up a unified deposit guarantee scheme in good time, with the result that ESA was founded in late 2017. Originally it was restricted to credit institutions run by banks and bankers, cooperative banks and state mortgage banks, but in mid-2018, all Raiffeisen banks joined so that ESA meanwhile extends to almost all of the Austrian banking sector. In addition to the Raiffeisen banks, joint stock banks, cooperative banks, and mortgage banks, ESA shareholders include all building societies, employee provision funds and many special-purpose credit institutions. Previous protection schemes set up by the trade associations of Raiffeisen banks, banks and bankers, cooperative banks, and state mortgage banks are no longer responsible for depositor protection since 2019. The only exception to this full-scale guarantee scheme that ESA provides are the savings banks which had their institutional guarantee scheme recognised as a deposit guarantee and investor compensation scheme. Claims by clients of a savings bank (including Erste Group Bank AG) are thus the responsibility of Sparkassen-Haftungs GmbH rather than ESA, nevertheless, both are governed by the ESAEG.

Funding

ESA currently has almost 500 shareholders and covers deposits of EUR 175bn. One of its principal tasks is to set up a deposit guarantee fund which is targeted to collect at least 0.8% of the sum of covered member deposits by July 2024. By the end of this saving-up stage, ESA will have about EUR 1.4bn for immediate use in the event that a member should fail and its clients need to be compensated. The contributions are levied from the members holding covered deposits, annually based on a calculation model approved by the Financial Market Authority (FMA). These financial means need to be invested in accordance with criteria specified in the ESAEG and detailed in an investment

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guideline. The accounting report about the fund has to contain an earnings statement, a statement of assets as well as investment conditions, and shall report about alterations to the asset portfolio and the endowment of the fund at the start and end of the financial year. A major criterion is to ensure that these financial means must be invested in low-risk assets that can be utilised quickly in the event of a default.

If the assets of the deposit guarantee fund should be insufficient to compensate all clients in a default, ESA is authorised to levy special contributions of up to 0.5% p.a. of the sum of the covered member deposits, which increases its range by about EUR 875m per year. ESAEG furthermore provides for an increase in the special contributions under certain conditions, so that ESA may obtain more than 0.5% from its members. However, these increased contributions need to be approved by the FMA subject to an expert opinion obtained from the Austrian National Bank.

What to do in the event of a major default?

If a member should fail to an extent that the fund and special contributions do not suffice, then ESA is authorised to draw on Sparkassen-Haftungs GmbH in order to compensate clients. The two guarantee schemes are obliged, both under the law and through contracts, to cooperate and extend mutual support. This commitment obliges each scheme to make its fund available to the other scheme and, if necessary, to obtain from its members special contributions of up to 0.5% of the covered deposits, once its own financial means and special contributions are found to be insufficient. If the funds of the two schemes are still inadequate to compensate all clients of the failed bank, then the primarily affected scheme needs to take out a loan which is then repaid by both schemes *pro rata* to the sum of their members' covered deposits. Under the ESAEG the finance minister may extend a federal liability for this loan. This ensures that even major failures can be handled quickly and properly, and that adequate means are available.

Payback from insolvencies

In the insolvency proceedings of the credit institution, ESA enjoys preferential creditor standing and must therefore be satisfied before all other creditors to the extent it compensates its protected depositors. Proceeds from utilisation will thus primarily benefit ESA which will use such payments to either service the loan or top up its deposit guarantee fund.

Right of compensation

With ESA now undertaking the deposit guarantee, depositors continue to be protected same as before. Deposits are guaranteed for up to EUR 100,000 per bank and client. In special cases (such as proceeds from real estate transaction, insurance payment, severance pay), the limit per client and bank increases to EUR 500,000 at most ("temporary high balance protection"), on condition that the default occurs within twelve months after the amount is deposited or after the time when such deposits can be legally transferred.

As a rule, ESA must compensate each depositor of a member for the covered deposit within just seven working days after such member's default. If the client's claim is disputed, or if the deposit is the subject of a legal dispute, or a fiduciary account, or a deposit covered for a limited period, or if there is a suspicion of money laundering, payout may be deferred until the case is clarified but for at least for up to three months.

European basis

The ESAEG implements Directive 2014/49/EU on deposit guarantee schemes (DGSD) and Directive 97/9/EC on investor-compensation schemes. Under Article 19 DGSD, the European Commission will submit to the European Parliament and Council a report on the directive's implementation in the summer of 2019. To prepare the report, working groups have been set up to identify the need for possible changes in the DGSD. Whether and to what extent actual changes will be made and whether such changes, if any, will require adjustments to the ESAEG remains to be seen.

Apart from such issues, the integration of sectoral deposit guarantee schemes and the bundling of competences and responsibilities within ESA has certainly helped further enhance the already considerable protection of depositors in Austria.

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Data as a business model: the latest news on cookie consent

Given the background of the GDPR and its tie-in ban, the Austrian Data Protection Authority presumed as voluntary and therefore valid an individual's consent to accepting advertising cookies in order to use an online news platform for free.

In order to be valid, consent to the processing of personal data must be given voluntarily for the specific case, in an informed manner and unambiguously by way of a statement or other clear affirmative action. In judging the voluntariness, the GDPR insists that maximum consideration be given to whether, i.a., performance of a contract, including the processing of a service, depends on consenting to the processing of such personal data as are not required for performing the contract. This limitation to the use of consenting under data protection law is known as a tie-in ban.

A complaint to the Data Protection Authority was based on the following situation: the appellee runs an online community on her website on which she publishes daily, among other things, various journalistic articles. When first opened, the website displays a window that offers the choice to consent to the use of cookies for web analysis and advertising purposes or, alternatively, to use the website without cookies and adverts by entering into a paying online subscription. The appellant argued that the consent cannot be given voluntarily in line with the GDPR principles. On 30 November 2018 (DSB-D122.931/0003-DSB/2018), the Data Protection Authority rejected the complaint (which decision has since become final and binding).

The Authority found that there was first of all the need to examine the legal grounds for setting cookies under Section 96 of the Telecommunications Act (TKG) of 2003: since this law refers to consent-giving, the concept of consent needs to be judged in line with the GDPR when systematically interpreted, since the TKG 2003 does not have an appropriate definition.

As to the voluntariness criterion, the Data Protection Authority, in addition to the tie-in ban, noted that the risk of considerable negative consequences precludes voluntary action; the individual must not suffer any substantial disadvantage when he or she does not consent. In the specific case, the refusal to consent opens the choice to enter a paying online subscription free of advertising, data tracking, and cookies, at a not disproportionate (in the view of the Authority) cost. Moreover, the user can avail him or herself of alternative sources of information. Moreover, in connection with the unlimited access to the website opened up by the consent it needs to be considered that an action may be voluntary when a certain processing step clearly benefits the individual taking such step. This was the case here and the consent therefore needs to be judged to have been voluntarily given.

The ruling of the Data Protection Authority is highly welcome given the discussion of whether the business model of (supposedly) free online services can be continued after the GDPR has become effective: in the Authority's view, the tie-in ban does not *per se* contradict an obligatory consent to the setting of cookies or the processing of personal data for advertising or analytical purposes without which a service cannot be economically offered. This appears to confirm the widespread opinion that a tie-in is permissible when the provider of the (supposedly) free service itself offers equivalent alternatives (even against payment) without the need to consent.

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Procurement law: new arbitration procedure in Lower Austria

On 23 May 2019, the Lower Austrian State Parliament adopted an amendment to the Lower Austrian Procurement Review Act (NÖ VNG) whose main point was a fundamental change in the procedure before the Lower Austrian Public Procurement Arbitration Board.

The Amendment was passed in response to an infringement procedure initiated by the European Commission against Austria because it considered the provisions of the NÖ VNG regarding the obligation to have recourse to the Arbitration Board before applying to the State Administrative Court and the blocking effect of the application for arbitration to be incompatible with Directive 89/665/EEC.

With the newly adopted amendments, which are expected to enter into effect in late July 2019, arbitration proceedings are no longer mandatory before review proceedings are instituted before the State Administrative Court. Contractors may still apply, albeit voluntarily, to the Arbitration Board, but the contracting authority is no longer obliged to accept arbitration proceedings.

Even more important for contractors is the fact that the time limit for filing an application for review will no longer be suspended or interrupted, but will continue to run. Considering the already short time limit of 10 and 15 days to challenge a decision, the application for review will therefore have to be prepared in parallel with the application for arbitration.

The new regulation of the arbitration procedure will therefore doubtlessly cause it to massively lose its relevance. Legislators themselves have apparently come to the same conclusion, as the present amendment provides for the arbitration procedure to be totally abolished by the end of April 2020.

For more information on the topic, please contact: blecha@preslmayr.at

P) Inside

More than 70 guests were welcomed to our information event on "Happy Birthday GDPR" on 23 May 2019

Christian Kern, a partner of Preslmayr Rechtsanwälte, presented an overview of relevant decisions by government bodies made since May 2018. **Franz Lippe**, another partner, then reviewed statements of consent under data protection law. Jointly with attorney candidate **Tamara Freudemann**, **Oliver Walther** elucidated labour law aspects of employing internal data protection officers. In his capacity of external expert, **Thiemo Sammern**, co-founder of data.mill GmbH and certified data protection officer, gave a hands-on discourse on the rights of data subjects.

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