Topics in our issue:

The KuKuSpoSiG: quaint in name and extensive in content

On 6 May 2020, another law linked to the COVID-19 pandemic has entered into force: the KuKuSpoSiG, an abbreviation that translates as Federal Act to guard art, culture, and sports against further impacts of the COVID-19 pandemic. It provides regulations regarding entrance and participation fees for art-, cultural-, and sports events which were or will be cancelled between 14 March 2020 and the end of 2020 due to the COVID-19 pandemic.

Specifically, instead of returning the entrance or participation fees, organisers may temporarily issue vouchers, which may be redeemed for other events set up by the same organiser. The same applies to the obligation of operators of art- or culture facilities to return ticket fees when they are closed due to the COVID-19 pandemic in 2020. The obligation holds regardless of whether the ticket was obtained directly from the organiser or operator or through an agent. This measure is designed to guard organisers/ operators against insolvency when they are asked to suddenly make large-scale paybacks because the event was cancelled, or the facility was closed as a result of the COVID-19 pandemic.

According to the preparatory details of the Act, an art or cultural event includes concerts, opera- and theatre performances, movie screenings and other acts. Sports events encompass athletic gigs and performances attended by a paying audience. The inclusion of art- and culture facilities in the scope of the law means that the Act also extends to museums and cultural monuments.

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Where the organiser/operator is a territorial authority or a legal entity which is at least majority-owned by a territorial authority or covered by a territorial authority's liability, the provisions of the KuKuSpoSiG do not apply. In such a case, the buyer is still entitled to claim (full) repayment of the fee.

Permissible amount of voucher

As a rule, vouchers may be issued only to a maximum amount of EUR 70 per event. If the ticket costs more, the buyer is entitled to a (cash) refund for the excess amount. Thus, if a ticket costs EUR 90, the organiser can issue a voucher for EUR 70 and must return the remaining EUR 20 at once.

The limit pertains to a single event. Accordingly, if a visitor booked three art-, culture- or sports events on the same contract, the organiser may issue a voucher of up to EUR 70 for each of the three events.

For tickets described as "luxury segment" in the preparatory details, where the payback may be over EUR 250 for a single event, the law considers it reasonable that buyers must accept a higher amount as a voucher: the organiser only needs to refund EUR 180, with the remainder covered by a voucher.

Payout of voucher

The voucher's holder is not obliged to redeem the voucher, however, he is not entitled to request a refund for the value of the voucher before 1 January 2023. The organiser/operator must not charge any costs for issuing, mailing, or redeeming the voucher. Vouchers may be assigned to other natural persons.

Deviating arrangements derogatory to consumers

If the visitor, participant, or holder of a voucher is a consumer, derogatory arrangements are null and void. Interestingly enough, the KuKuSpoSiG provides that *"voluntary acceptance"* of vouchers of a larger scope than provided by law shall be *"not excluded"*. The preparatory details specify that an organiser/operator may initially issue to the consumer a voucher for the entire amount (i.e. beyond the legally permissible amount) which the consumer may refuse; next, the consumer must accept a voucher only for the legally stipulated amount, with the remainder to be paid back to the consumer. This suggestion is problematic in its nature, not least because it entices organisers to ignore the statutory refunding rules and attempt to get around them.

Indeed, some event organisers have already taken up the suggestion and are issuing vouchers of a higher value than the price of the original ticket in order to induce their customers to accept a voucher for the amount which should actually be paid back. Thus, organisers of cancelled events of a ticket price of EUR 90 are issuing vouchers of much higher value, using the overpay to get customers to waive the (obligatory) payback of EUR 20.

Without any doubt, this will in actual practice raise the willingness to *"voluntarily"* accept the obligatory refund (in our case EUR 20) by way of a voucher. After all, Section 3 (2) of the KuKuSpoSiG expressly does not exclude this *"voluntary acceptance"*. This "voluntariness rule" is, however, highly problematic under consumer laws and does not change the fact that consumers might still insist on a refund. Moreover, it should be considered that the higher voucher values will further increase the debt burden of the business.

Obviously, consumer protection associations are not happy with this solution because it forces consumers to grant a loan to event organisers/operators while they have no security in the case that the issuer (in spite of the statutory provision) becomes insolvent. It remains to be seen whether the Act will save many organisers/operators or will simply delay their bankruptcy.

Mag. Clemens Irrgeher *is a lawyer and partner with Preslmayr Rechtsanwälte, specialising, i.a., on class-action lawsuits, investment law and capital market law.*

E irrgeher@preslmayr.at

Maintaining employment levels during short-time work

Incidental to the COVID-19 pandemic, the Austrian social partners developed a new type of short-time work jointly with the Federal Government and the Public Employment Service Austria (AMS). The most recent revision of the "corona short-time work regime" has eased some of the strictures imposed on employers.

Short-time work is a temporary reduction in normal working hours and pay due to temporary economic difficulties. Its object is to avoid unemployment and maintain employment levels as much as possible. Concomitantly, Section 37b (2) of the Public Employment Service Act (AMSG) specifies an agreement required between the social partners – necessary to obtain the allowance for working short hours – to ensure that the employment level will be maintained during short-time work and beyond (if agreed), unless the regional AMS office grants an exception in special cases. Accordingly, current specimen agreements between the social partners include provisions to maintain the employment level during the short-time work regime and to retain affected workers for a period after their return to normal working hours.

Which employment level?

During short-time work, employers must maintain the total level of employees in the enterprise, in the works or in the department (depending on the agreement made with the social partners) as it applied before the start of the short-time work regime, unless previously agreed changes have been accounted for. After the end of the short-time work regime, only such employees as had been affected by short-time work must be retained for at least one month. The new regulation applicable since 1 June 2020 provides that if the situation deteriorates substantially after conclusion of the agreement between social partners, the retention period may be shortened or even waived entirely, subject to trade union approval. If no trade union approval is forthcoming, it may be replaced by a decision of the regional AMS advisory board.

Termination of employment during corona short-time work?

The provisions that foresee maintaining employment levels mean restrictions on dismissing employees, and employers may under certain circumstances be obliged to top up their employment figures. As a rule, employers may dismiss employees only after the retention period has expired.

Since 1 June 2020, there has been clarity as to which terminations during short-time work do not trigger an obligation to top up employment during the retention period: (i) employment relationships terminated prior to the start of short-time work; (ii) expiry of a limited employment relationship that had begun before the start of the short-time work; (iii) notice given by the employee; (iv) justified firing and unjustified leaving; (v) termination by mutual consent provided that the employee has been advised of the consequences by the workers' council or the trade union or the Chamber of Labour; (vi) termination due to the employee's demise; (vii) termination due to the employee's entitlement to a pension (regardless of the type of termination); and (viii) termination during a trial period. Furthermore, it should be noted that (ix) dismissals by the employer with a view to reducing the employment level do not trigger an obligation to top up employment if the survival of the enterprise or works is seriously endangered, always on condition that the works council (or the trade union, in operations without a works council) consents within seven days or an exception has been granted by the regional AMS advisory board in cases where the works council or trade union do not give their consent.

Notice given by the employer on personal grounds, unjustified firing or justified early resignation and termination by mutual consent without previous consultation, however, require topping-up.

An accidental failure to maintain the employment level due to normal fluctuations within an enterprise is irrelevant. If an employment relationship is terminated in a way that triggers topping-up, the employer is granted a reasonable period to search for suitable staff. It suffices to plausibly demonstrate search activities (e.g. publishing job offers, confirmed notification of vacancies to the AMS).

It is still not clear whether an employer's violation of the retention obligation is sufficient grounds for an individual's protection against termination; with regard to employees affected by short-time work, this cannot be excluded at least during the retention period after short-time work. Nevertheless, the failure to comply with the provisions on preserving employment levels may result in a reduction or complete loss of the short-time working allowance, depending on how serious the deviation is; amounts already paid out need to be paid back accordingly.

Mag. Eszter Tóth *is a trainee lawyer with Preslmayr Rechtsanwälte, focusing mainly on labour law.*

E toth@preslmayr.at

Fixed-cost grant from the Corona Assistance Fund: applications accepted as of now

Enterprises that suffer from turnover losses of at least 40% between 16 March 2020 and the end of the COVID-19 measures or 15 September 2020 at the latest, may apply for a fixed-cost grant from the Corona Assistance Fund. Depending on their actual losses, up to 75% of their fixed costs will be reimbursed:

- loss of 40-60%: 25% reimbursed
- loss of 60-80%: 50% reimbursed
- loss of 80-100%: 75% reimbursed

Originally, the Federal Government had planned to accept applications for the grant only after the annual accounts for the current business year have been furnished. As this would be too late for many enterprises, the grant will be paid out in three instalments, with applications for the first instalment accepted as of now and payout to be handled quickly. The second instalment may be applied for from 19 August 2020, and the third instalment from 19 November 2020. The application for a reimbursement from the first instalment of up to EUR 12,000 may be submitted by the enterprise directly. All further applications need to come from a tax consultant, certified public accountant, or balance sheet accountant.

Mag. Günther Billes *is a lawyer and partner with Preslmayr Rechtsanwälte. He is focussed on company law and bankruptcy law.*

E billes@preslmayr.at

Preslmayr Rechtsanwälte OG
Universitätsring 12, 1010 Vienna, Austria
Tel: (+431) 533 16 95
office@preslmayr.at www.preslmayr.at
FN 9795f, HG Wien
UID: ATU10504104

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