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The new Good Friday – your "personal holiday"

The recent ruling of the European Court of Justice (ECJ) on the Good Friday regulation in the Austrian Labour Rest Act (Arbeitsruhegesetz, ARG) has triggered vehement discussions. In response, the parliamentary session of 27 February 2019 introduced a "personal holiday" for all with a view to achieving a legal situation in conformity with EU law.

The previous provision of Article 7 (3) ARG granted a paid holiday on Good Friday to members of the Protestant Church of Augsburg (Lutheran) and Helvetic (Reformed) Confessions, of the Old Catholic Church and of the United Methodist Church. If a member of any of these churches worked on a Good Friday, they were entitled to double pay, whereas employees of other (or no) religious confessions had to work normal hours rather than enjoying a paid holiday.

An employee who was not a member of any of the above churches felt discriminated against by this rule, referring to the Employment Equality Directive (2000/78/EC) and demanding double payment for working on Good Friday. The court of first instance rejected the claim, while the appellate court awarded the plaintiff double pay. The Supreme Court was concerned that the special entitlement for members of certain churches might be discriminatory and submitted the case to the ECJ for a preliminary ruling.

The ECJ found that Article 7 (3) AG constituted an act of direct discrimination on the grounds of religion. The court denied any justification for such discrimination because the ARG regulation at issue was not necessary to protect religious freedom. After all, the regulation grants employees who are members of any of the said churches a 24-hour leave from work on Good Friday while employees of other religions whose holidays do not concur with the ARG holidays may not leave their work in order to practise the religious rights pertaining to such holidays except with their employer's consent within the scope of the employer's duty of care. The relevant ARG provisions thus exceed what is necessary

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to compensate for an assumed discrimination and treat employees with comparable religious duties differently.

As regards the consequences, the ECJ noted that, for as long as legislators fail to ensure conformity with EU law, employers need to grant employees the right to a paid holiday on Good Friday provided that the latter have informed their employer of their desire not to work on Good Friday. Such employees thus are also entitled to double pay if the employer rejects their application not to work on Good Friday.

Legislators' response:
Good Friday holiday is cancelled

In response to the ECJ judgment, a discussion ensued on several alternatives for achieving a non-discriminatory regulation. Proposals ranged from a "half" holiday to a public holiday for all on Good Friday.

The – highly disputed – decision arrived at completely cancels the previous Good Friday regulation. As of now, Good Friday is no longer a holiday, for anybody. Instead, the new Section 7a ARG allows all employees to take a day of their own choice off from their quota of paid holidays once every holiday year ("personal holiday"), provided that they inform the employer in writing at least three months in advance of the desired date. For 2019, a special regulation applies that employees can choose their personal holiday within three months of the new regulation entering into force and without regard to the deadline, on condition that they inform their employer not later than two weeks in advance.

The "personal holiday" may be consumed at any day of the year; no religious background is necessary. Nevertheless, it does not grant an additional holiday, but employees need to take one day of their own holiday quota.

If so asked by the employer, employees are free not to consume their personal holiday and work instead. In this case, employees still have a day off and can claim extra holiday pay in addition to the pay for their work. However, they cannot choose another personal holiday in the same holiday year.

Interference with the general collective bargaining agreement

By interfering with the general collective bargaining agreement applicable since 1952 (and several other collective bargaining agreements), legislators triggered irritated discussions: Section 33a (28) ARG now explicitly states that provisions in standards of collective rules which provide special Good Friday regulations only for employees who are members of one of the four churches are ineffective and no longer permissible. Whether this interference with the constitutional right to establish trade unions is permissible and will withstand the rulings of the ECJ and ECHR remains to be seen.

Open issues

The regulation providing for employees themselves to choose a paid day off (strangely enough written into the ARG) leaves several issues unsettled. Other than provided in the Austrian Paid Holiday Act, employers have little say regarding the choice of date. The question thus is how employers can ward off the abusive use of a "unilateral" right to take a day off, as would be the (extreme) case when all or a majority of employees take their personal holiday simultaneously so that operations would come to a standstill. It is also unclear whether employees can interrupt existing shift or employment schedules by their unilateral choice and how employers should fill up gaps in shifts. Moreover, the new regulation does not touch upon the Yom Kippur provision in the general collective bargaining agreement, so that this issue, which is identical with the Good Friday problem, can sooner or later be expected to find its way to the ECJ.

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The (tentative) return of innocence in administrative criminal law

On 1 January 2019, the administrative criminal law underwent major changes. In addition to adapting the law to several EU directives governing the rights of accused parties and simplifying provisions on the rights of public security bodies, the 2018 Amendment governing administrative criminal law (Federal Law Gazette I 2018/57) incorporated the principle of "advise rather than punish" in administrative criminal proceedings and strengthened the presumption of innocence principle.

The former legal position in administrative criminal law was that negligence was to be *ipso jure* assumed when the occurrence of a damage or risk was not an element of the administrative offence. Although this assumption of guilt could be refuted by the accused this was extremely difficult in actual practice. The implementation of Section 5 (1a) of the Administrative Penal Act (VStG) eliminates the assumption of guilt for administrative offences punishable by a fine in excess of EUR 50,000.00. According to the new legal situation, it is the government agency which needs to prove guilt rather than the accused party to prove their innocence.

Closely linked to this new regulation is Section 9 VStG which regulates the responsibility of legal entities regarding compliance with administrative rules and the establishment of an effective monitoring system, the criteria for which are extremely stringent under the rulings of the Supreme Administrative Court. The legislative records on Section 5 (1a) VStG stipulate that – contrary to previous rulings – no fault is to be assumed when the responsible party proves that it has set up and run a *"quality-assured"* structure which is periodically checked by external investigations or internal (automated) monitoring. Such a quality-assured structure would be ensured when a reliable staff member is trained and charged with monitoring tasks. Suitable measures that preclude a criminal offence and punishment of the responsible body would be the four-eyes principle and ongoing spot checks. However, since the wording of Section 9 VStG was not changed it remains to be seen whether court rulings will follow this path.

Advise rather than punish

The 2018 Amendment moreover implemented the "advise rather than punish" principle to administrative criminal proceedings. Analogously to Section 371c of the Industrial Code, the new Section 33a VStG stipulates that the government agency first needs to advise the accused party "with a view to ending the criminal conduct as effectively as possible" and request in writing that the accused achieves a state of compliance with administrative provisions and orders within a reasonable period. If the accused complies with the written request in due time there will be no further prosecution for offences which have been thus repaired, and criminal proceedings are to be discontinued. Alternatively, the accused may be admonished on special preventive grounds.

Advising is given priority on condition that the importance of the legal interest protected under criminal law, the intensity of the impairment caused by the offence and the accused's guilt are of relatively little importance. Moreover, under Section 33a (5) VStG, the "advise rather than punish" principle must not be applied to:

- violations of administrative regulations which require intent in order to be punishable;
- violations which were already subject of advice and written admonishment by the government authority in the past three years or where relevant administrative fines were imposed and have not yet been erased from the criminal record;
- violations which cause the imposition of temporary coercive and protective measures;
- violations which entail the revocation of authorizations.

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Hiring-out of GmbH managing directors within a group

When an employee is hired out it is as a rule the hirer-out rather than the hirer who acts as the employer in terms of labour and social insurance law. In a ruling of 2017, the Supreme Administrative Court found that when an employee is hired out in order to act as managing director with the hirer this establishes an employment relationship (also) with the hiring company which latter becomes the employee's employer under social insurance law (Ro 2014/08/0046). The court reasoned chiefly that the employing GmbH has acquired a direct right to the work of the managing director (due to its own legal relationship from the act of appointing him/her managing director).

This legal opinion does not just contrast the fact that the social insurance category is determined solely by the *in personam* contract and not by the position, but it also lacks practical relevance because the third-party employment of managing directors within a group is recognised under labour law as well as under the tax code. The ruling thus caused considerable confusion. Considering that managers are frequently hired out to other companies within a group where they are appointed managing directors, the application of this court ruling would have led to substantial trouble for companies.

Legislators have responded to the problem and clarified in Section 35 (2) of the General Social Insurance Act (ASVG) that the hirer is not the employer when employees are hired out within a group of legally independent companies under a common management, especially when they take on an executive post. This provision, highly welcome from a practical point of view, entered into force on 10 January 2019.

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P) Inside

Growth from within: Christian Kern becomes a partner of Preslmayr Rechtsanwälte

Mag. Christian Kern has been reinforcing the team of Preslmayr Rechtsanwälte as an attorney-at-law and partner in his own right since December 2018. He studied law at the University of Vienna and entered the office as an associate in 2014.

His main areas of expertise are data protection law, contract law, and civil law. When the situation became critical just before the General Data Protection Regulation entered into force, he proved his mettle and demonstrated his considerable experience in this field. In his new position he will further extend the data protection focus jointly with Dr. Franz Lippe, LL.M., our expert in data protection and media law.

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