Topics in our issue:

Where does the milk come from?

Recently the European Court of Justice (ECJ) held that national obligations regarding the country of origin labelling of food products are acceptable only subject to strict prerequisites. At the same time, existing regulations at the EU level appear not to satisfy consumers' wishes to obtain more information on food products.

In 2011, the European Union collated food labelling requirements in a harmonised Regulation on the provision of food information to consumers (Regulation (EU) 1169/2011). The Regulation requires that the origin of a given food must be stated whenever consumers might be misled about its actual country of origin or place of provenance without such information. This applies, in particular, when the information or label provided with the food in its totality implies that the food has a different country of origin or place of provenance. The Regulation does not affect existing special rules for various foodstuffs such as vegetables, beef, or olive oil, nor rules for the protection of guaranteed traditional specialities, protected designation of origin, protected geographical indications, or geographical indications. Moreover, the Regulation allows member states to pass additional rules that mandate further obligations regarding the designation of origin or provenance of specified foodstuffs.

However, the ECJ recently stipulated major restrictions, holding that member states may not pass stricter national measures except subject to narrow prerequisites. The cause of the ruling was a French decree which required designating the origin for milk and dairy products. Lactalis, a French dairy giant, sued

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to have this decree annulled. The French Conseil d'État asked the ECJ to clarify whether the Regulation allows member states to enact nationally binding regulations on the origin or provenance of milk or milk used as an ingredient.

The ECJ made it clear that a mandatory designation of origin is permissible only when a link can be established between certain qualities of a food and its origin and the member state can demonstrate that such information is important for a majority of consumers. Otherwise, such information is mandatory only if its lack would make it possible to deceive consumers on the true origin of the food. In other words: The milk from France would need to be demonstrably better because it originates from France and the consumers would accord this circumstance adequate consideration.

In an Austrian context, this would mean that a designation of origin is necessary when a carton of milk is labelled "Milk from Salzburg" but actually contains milk of another provenance. This information may also be required when there is a link between the quality of a food and its origin. This may well be assumed to be the case with protected designations of origin, protected geographical indications, or geographical indications. Any general obligation of a country of origin labelling for milk or dairy products, however, does not apply (same as for most other agricultural products) because their mandatory labelling is not permissible under Regulation (EU) 1169/2011.

It is arguable whether the EU Regulation actually does justice to its aim of ensuring that consumers are "appropriately informed as regards the food they consume". A Commission report of 2015 found that almost 43% of consumers use the designation of origin in order to give preference to national or local products. National measures could certainly impede the free movement of goods, but nothing prevents the Commission from submitting proposals that take into account consumers' wishes for more information on the origin of foods. It can be assumed that the origin in a given country does not necessarily state anything regarding the quality of a product. Yet for agricultural products, the designation of origin at least says something about the distance they have travelled between their place of provenance and the persons consuming them.

Rainer Herzig *is a lawyer and partner with Preslmayr Rechtsanwälte, specialising, i.a., on company law, competition law, intangible property rights and life science.*

E herzig@preslmayr.at

State support and rental reductions due to covid-19

A wide range of state policies, from payments to compensate for losses in revenues to subsidies for fixed costs, aims to mitigate the losses suffered from measures related to covid-19. Landlords who miss out on rental payments due to closed operations want to get a share of their tenants' support payments from the state.

Rentals for the premises make up a substantial part of a business's costs. When the use of the property is impossible or extremely limited, the question of whether any rental needs to be paid becomes an issue.

Which party bears the risk of unusability?

Landlords argue that the pandemic and government-ordered closures are part and parcel of the **entrepreneur's risk** and that for this reason the rental must be paid. Tenants, on the other hand, invoke Section 1104 of the Civil Code, according to which no rental is due when the property cannot be used due to extraordinary accidents such as war or pestilence. According to this argument, there is no obligation to pay the rental when the property cannot be used due

to extraordinary accidents such as war or pestilence. According to this argument, there is no obligation to pay the rental when the property cannot be used due to government restrictions linked to covid-19. The *"risk of reality"* is thus borne by the landlord.

In this connection, arguments reach back to age-old supreme court decisions: already in the context of World War I, the Supreme Court made it clear that a governmental order to flee from the enemy constitutes an extraordinary accident, the effect of which is **borne by the landlord**. Based on this, the first (first-instance) court decisions since the outbreak of the covid-19 pandemic find that the burden of government closures is to be borne by the landlord. When a property becomes unusable due to an extraordinary accident, the landlord therefore loses its entitlement to rental. If the property can be used only to a limited extent, the rental needs to be reduced *pro rata*.

State support payments

The question is whether support payments made by the government during the lockdown periods will change this assessment.

Fixed-cost grants are paid only for specified fixed costs. If such a grant is paid specifically to cover the rental of the business premises, this points at a corresponding obligation to pay the rental. However, the beneficiary's obligation to reduce the damage needs to be considered: when there is an entitlement for reduction of the rental, the beneficiary expecting the fixed-cost grant must not simply pay the entire rental but needs to come to a reasonable arrangement with the landlord.

The compensation paid by the government for lost revenues is differently structured: the entrepreneur is not compensated for any specific costs but gets a lump sum for revenues lost. Landlords argue that, under the principle of the "substitute commodum", the compensation for lost revenues establishes an obligation to pay the rental. The possibility to use the business premises is substituted by the compensation so that the tenant needs to hand over the compensation to the landlord. This argument has since been rejected by a majority of legal academia who argue that the compensation covers only part of the revenues (before covid-19) and does not affect the unusability of the premises.

At present, many landlords and tenants are arriving at mutual agreements on the rentals. Each case requires its individual analysis because the specific contract, the properties of the premises, and the sector involved all impinge on the legal situation. The first judgments made known are – to the extent they are reviewable – mostly **in favour of the tenant**. It remains to be seen which way the courts will move in the coming months.

Matthias Stipanitz *is a trainee lawyer with Preslmayr Rechtsanwälte, focusing mainly on the law on damages and insolvency law.*

E stipanitz@preslmayr.at

General collective bargaining agreement on corona testing

The "general collective bargaining agreement on corona testing", which covers measures under employment law and at workplace level to implement covid-19 tests, entered into force on 25 January 2021.

Based on the Act governing covid-19 measures, ordinances may be used to order that certain workplaces may be entered by employees only when they furnish evidence of a low epidemiological risk – such as a negative result of a SARS-CoV-2 test. If no such confirmation can be furnished, the wearing of an FFP2 mask becomes mandatory.

Accordingly, the most recent covid-19 emergency ordinances stipulate that certain groups of employees may enter workplaces only when they submit to an antigen test or molecular-biological test for SARS-CoV-2 at least every seven days; a proof of a negative test result must be provided to the employer. If no proof is forthcoming, the employee needs to

wear an FFP2 mask whenever s/he is in contact with customers, children, or pupils, or with the general public during public hours in a government office, or in storage logistics when a minimum distance of two metres cannot be maintained.

As an accompanying measure, the "general collective bargaining agreement on corona testing" entered into force on 25 January 2021, which applies to all businesses in Austria for which the Austrian Economic Chamber is authorised to conclude collective bargaining agreements.

The regulations of the "general collective bargaining agreement on corona testing"

To the extent that employees are obliged to provide proof of a negative test result in order to enter their workplace as outlined above, employers are obliged to grant employees a paid leave for the time required for testing. This extends to the travel time required. However, unless the test is performed at the workplace, it should be carried out on the way to or from the workplace, if possible. The entitlement to leave does not apply to employees on short time.

If employees are not legally obliged to furnish such evidence, corona tests must, to the extent possible, be done outside their working hours; if this is not possible, employers are obliged to grant leave for testing, at most once a week. The time for testing must be mutually agreed on with regard to operations. To the extent that self-testing is permitted, such tests may be used as well.

Ban on discrimination and "mask break"

Employees must not be fired, given notice, or otherwise discriminated for taking a SARS-CoV-2 test including the entitlements specified in the general collective bargaining agreement, nor for being tested positively.

Employees who are obliged to wear a mask when doing their job based on laws or ordinances in connection with SARS-CoV-2 (e.g., when working in enclosed spaces, in old age homes, nursing homes or homes for the handicapped, in hospitals or when in direct contact with customers) must be enabled to remove the mask for at least ten minutes after every three hours of working. It is not necessary to grant a break, it may suffice to change the area of activity. If this is not possible, work needs to be either discontinued or a break under Section 11 of the Act regulating working hours (e.g., lunch break) needs to be agreed on. There is no obligation to document the periods during which the mask is not worn.

Until further notice, the "general collective bargaining agreement for corona testing" will apply until 31 August 2021. According to current information, it is intended to elevate the "general collective bargaining agreement for corona testing" to the status of an ordinance which would give it a legally binding effect even outside its current scope of application.

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

E toth@preslmayr.at

Oliver Walther *is an attorney-at-law and partner of Preslmayr Rechtsanwälte who focuses on labour law and procurement law.*

E walther@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