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Compensation claims for hotel operators

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The prohibition of the use of certain hotel facilities ordered by the countries responsible for the enforcement of the German Infection Protection Act ("IfSG") can have serious economic consequences. Already with the ordinances for protection against the corona virus SARS-CoV-2 of 16 and 17 March 2020 ("Corona Protection Ordinances"), which were issued on the basis of sec. 32 in conjunction with sec. 28 para. 1 IfSG, hotel operations have been severely restricted by the prohibition of tourist offers. Hotel operations incur high losses due to the discontinuation of tourist offers and thus a large number of overnight stays. The question therefore arises whether the hotel operators affected by the prohibitions of use in the above sense can assert claims for compensation against the federal states of Germany.

Internal memoranda from the Federal Ministry of Justice and Consumer Protection ("BMJV") and the NRW State Ministry of Health initially come to the unsurprising conclusion that there are no claims for compensation for the cancellation of events and company closures. Particularly interesting in this context are the statements in a "leaked" rough sketch by the BMJV from March 2020, according to which

> "[...] here, it is no longer individual persons who are affected in a particular way by a particular disadvantage of a material or immaterial nature, but rather comprehensive, sometimes considerable impairments for practically an entire country, the compensation of which appears to be only partially accessible to the classical management by individual case consideration both in the assertion of claims and their possible judicial enforcement. Here, general legal principles and economic policy measures which, taken as a whole, appear to be most suitable for creating appropriate solutions must be taken into account. [...] BMG [Federal Ministry of Health] is, however, currently preparing a comprehensive amendment of the IFSG, which should go far beyond additions in the area of liability. The legal situation presented here is therefore likely to become obsolete in the near future."

Even if these remarks suggest that the Federal Government will deal with the amendment of the compensation provisions of the IfSG in the future, it nevertheless seems appropriate to take a look at the current legal situation. Compensation claims may arise from the IfSG, but also from the police and regulatory law of the federal states and from general state liability law..

1. COMPENSATION CLAIMS UNDER THE INFECTION PROTECTION ACT ("IFSG")

If one assumes that the Corona Protection Ordinances issued so far are covered by the sec. 32 in connection with sec. 28 para. 1 IfSG and are therefore lawful, claims for compensation under the IfSG are fundamentally excluded.

For example, sec. 65 IfSG only provides a claim for compensation in the case of measures to prevent epidemics in accordance with sec. 16, 17 IfSG if objects are destroyed, damaged or otherwise reduced in value or if another not only inessential financial disadvantage is caused. According to the wording, the provision does not apply to measures based on sec. 32 in conjunction with sec. 28 para. 1 IfSG.

A claim for compensation under sec. 56 IfSG is also excluded. According to this provision, a person who is subject to prohibitions in the exercise of his or her previous gainful employment on the basis of the IfSG as a dropout, suspect of infection, suspect of illness or as any other carrier of pathogens and thereby suffers a loss of earnings, shall receive compensation in money. The right to compensation is thus only due to those persons who, as "troublemakers", themselves contribute to the spread of the coronavirus. Only companies indirectly affected by plant closures and other measures, which are claimed as "non-disturbers", can undoubtedly not invoke this right.

Hotel operators to whom, on the basis of sec. 32 in conjunction with sec. 28 para. 1 IfSG the provision of tourist offers for the protection of the general public is prohibited, do not have any claim for compensation according to the IfSG. However, an analogous application of the aforementioned compensation claims in sec. 56 and 65 IfSG to hotel businesses and other companies affected by (partial) closures or other measures is sometimes discussed. It seems doubtful, whether there is an unplanned regulatory gap which is necessary for such an analogous application of the compensation provisions. This is contradicted by the unambiguous wording of, for example, sec. 65 para. 1 sentence 1 IfSG, which expressly provides compensation only for measures under sec. 16, 17 IfSG. In addition, the compensation provisions contained in a separate section of the IfSG ("Compensation in special cases"), which comprise a total of 13 sections, are quite detailed. The legislator has apparently deliberately taken a differentiated approach here.

In contrast, the fact that - according to the system of the IfSG - protective measures pursuant to sec. 28 IfSG should only be taken against individual or several persons according to the legislative will, speaks in favour of a lack of planning. According to the explanatory memorandum, sec. 28 IfSG is not tailored to far-reaching measures against entire economic sectors. This could indicate that the legislator did not see any need for a corresponding compensation regulation. It simply did not have such far-reaching measures, those currently based on sec. 28 IfSG , in mind as

An analogous application of the compensation provisions of the IfSG could also be appropriate to avoid valuation inconsistencies. Otherwise, the carriers of the virus would be entitled to compensation, while hotels, which are largely closed for the protection of the general public, would not. The fact that, despite the wide scope for authorisation of the countries responsible for the enforcement of the IfSG and the low factual hurdles, there is no claim for compensation for such far-reaching economic consequences, supports the assumption of a corresponding application for affected traders.

An analogous application of the compensation provisions of the IfSG is not necessary from the outset if the measures ordered for the enforcement of the IfSG were wrongly based on sec. 28 para. 1 IfSG. It is therefore being discussed whether sec. 16 IfSG, which is in an exclusivity relationship with sec. 28 IfSG, is not the correct basis for the authorisation of the prohibition of use for certain offers of hotel companies. Sec. 28 para. 1 IfSG authorises for measures to be taken against non-infected persons in the event of infection or suspected infection. However, the companies concerned are not regularly suspected of having infected employees or guests. If, on the other hand, there are facts which could lead to the occurrence of a transmissible disease, sec. 16 para. 1 IfSG authorises the respective competent authority to take the necessary measures to avert the dangers threatening the individual or the general public. According to this provision, the

respective competent authority may thus take measures to protect the general public from the dangers resulting from the occurrence of a transmissible disease such as the coronavirus. For these measures, state claims for compensation under sec. 65 IfSG could be granted to compensate not only insignificant financial disadvantages. In this respect, it does not matter which authorization basis the federal states use for their corona protection ordinances. Otherwise, by choosing the basis of authorisation, the federal states would to a certain extent be able to exclude compensation claims. What is more decisive is which authorisation basis should have been used correctly. This determination, and thus in particular the delimitation of sec.16 IfSG from sec. 28 IfSG, is the responsibility of the courts, which are currently frequently concerned with the legality of the Corona Protection Regulations.

2. COMPENSATION CLAIMS CONCEIVABLE IN ADDITION TO IFSG

In addition to the aforementioned claims, compensation claims in the event of a claim as a non-disturber according to the regulatory law of the federal states - for example according to sec. 39 para. 1 lit. a) OBG NRW - are conceivable, provided that the respective state laws apply in addition to the IfSG. It is true that the regulatory law only applies to measures of the regulatory authorities. However, it can be argued very well that the federal states act as special regulatory authorities when issuing the Corona Protection Regulations. The IfSG constitutes special danger prevention law, according to which the responsible authorities are assigned the tasks of danger prevention in certain areas - including the danger of spreading infectious diseases. For special regulatory authorities, the regulations of the regulatory law of the federal states - for example, according to sec. 12 OBG NRW - apply in addition.

The claims for compensation by the regulatory authorities generally assume that the companies affected by plant closures and other measures are neither conduct nor condition disturbers, i.e. that they are not the cause of the risk of infection. As long as no infections have occurred in the hotel business itself, one can hardly assume that hotel operators have directly caused the danger of the corona virus spreading. Rather, in a regular hotel operation, the guests only meet sporadically, so that it is not typically to be expected that a risk of infection arises. Hotel operators are therefore not to be qualified as "troublemakers". A claim for compensation for the claim as a non-disturber is then possible.

Official liability claims according to sec. 839 para. 1 sentence 1 of the German Civil Code (BGB) in connection with Article 34 of the German constitution, on the other hand, may be excluded in principle. Regardless of the question of the legality of the measures taken, which has not yet been conclusively clarified, there is regularly a lack of accusable conduct. One can hardly assume that the Corona Protection Ordinances were issued without the necessary care, because the measures taken with the Corona Protection Ordinance are constantly evaluated and regularly adapted to the current situation. In particular, the persons affected and their interests are also taken into account. Nevertheless, official liability claims due to incorrect implementation of individual measures are possible.

Last but not least, subsidiary claims arising from expropriation and expropriation-equivalent intervention complement the system of state compensation. These are recognised under customary law and are derived by case law from the general idea of sacrifice in sec. 74, 75 General Prussian Land Law (PrALR). According to these, there is a claim for de facto impairment of property by lawful or unlawful sovereign intervention, provided that the encroachment on property, the scope of protection of which also includes the established and practiced commercial business, constitutes a special sacrifice. Such a special sacrifice exists in individual cases if the effects of the encroachment on property are so significant in terms of duration, type and intensity that it would be unreasonable to accept it without compensation. A special sacrifice is not

excluded solely by the fact that a large number of companies have been claimed. On the contrary, hotels are particularly hard hit by the extensive prohibition of use, since over a period of several weeks almost no turnover can be generated, while other businesses can continue to operate on the market. Under these aspects, it does not seem reasonable to accept the ban without compensation. However, it must be taken into account that the federal court of justice (BGH, ruling of 19 January 2006 - III ZR 121/05) considers an exclusion of liability due to force majeure to be possible if the damaging event cannot be prevented or rendered harmless by economically bearable means even by extreme care that can be reasonably expected in the circumstances.

3. SECURING COMPENSATION CLAIMS THROUGH THE ASSERTION OF PRIMARY LEGAL PROTECTION

The question of the existence of claims for compensation cannot be answered conclusively, as the above explanations show. As far as can be seen, no court decisions on this question have yet been made. It is therefore more important for the companies affected by partial or complete plant closures or other failures to secure any existing claims for compensation now by seeking primary legal protection against the state measures. According to the established case law of the Federal Court of Justice, claims for compensation can be wholly or partially excluded under the legal concept of contributory negligence within the meaning of sec. 254 BGB if the person affected has not taken all reasonable legal remedies against the damaging measure (inter alia BGH, judgment of 26 January 1984 - III ZR 216/82). In this respect, there is a so-called priority of primary legal protection: The person affected must take all reasonable steps to avoid the disadvantage as far as possible.

In order to prevent claims for compensation to be made at a later date from being reduced, the legality of the measures ordered should be subject to judicial review. For this purpose, it is advisable to initially submit only interim applications for legal protection in accordance with sec. 47 Para. 6 German Rules of the Administrative Courts (VwGO) (within a period of one year) in order to have the legality of the arrangements made reviewed in court in advance. Experience has shown that the Higher Administrative Courts responsible for deciding on interim legal protection applications pursuant to sec. 47 para. 6 VwGO decide on interim legal protection applications in connection with corona measures within a few days. Depending on the outcome of the interim legal protection proceedings, it should then be decided on a case-by-case basis whether a review of the substance of the case in accordance with sec. 47 para. 1 VwGO is appropriate.

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