



Special information:

Compensation for plant closures unlikely according to current legal situation in Germany

Summary

The plant closures ordered by the general decrees of 16 March 2020 and 17 March 2020 issued by the Bavarian State Government will have considerable economic consequences for the companies affected. These consequences are also only partially offset by the aid packages of the German state and federal governments, which are constantly being put together. The issue therefore arises as to whether there are any additional claims for compensation for affected companies on the basis of the previously applicable law.

Even if it is not yet possible to assess with certainty how German courts will deal with the legal regulations in the future, claims for compensation for affected companies are to be classified as rather unlikely. This is mainly due to the fact that the general rulings are likely to prove lawful after the first rush decisions by German courts and that, as a rule, the state has no obligation to pay compensation for lawful administrative actions. There is only an exception if compensation must be paid on the basis of special statutory regulations. The German Infection Protection Act, on the basis of which the general rulings were issued, does contain such regulations. However, they are unlikely to apply to general plant closures.

Therefore, at present, the only possibility for the undertakings concerned is to examine, on a case-by-case basis, applications for exemptions and the initiation of judicial measures against the general decrees issued. Due to the high requirements, however, such applications for exemptions are likely to be very difficult to enforce. Furthermore, the chances of success for the initiation of legal measures based on the most recent first decision on the legality of the general decrees are at best unsettled. It remains to be seen how the authorities and courts will decide on this matter.

This unfortunate situation for affected companies can only be defused by new legal regulations. We assume that, depending on the further course of the crisis, further aid programs will be set up to support the economy. It remains to be seen whether the legislator will take appropriate measures. We will of course keep you informed of further developments.

If you have any questions or need advice, please do not hesitate to contact us.

We are happy to advise you!



Detailed description

Initial situation

The novel coronavirus SARS-CoV-2 has spread worldwide in a short period of time. The disease is very infectious. There is a very dynamic and serious situation with a constant increase in case numbers within a few days. The Bavarian State Government has therefore issued a general decree on event and operating bans on the occasion of the corona pandemic of [16 March 2020, Ref.: 51-G8000-2020/122-67](#), and the general decree of [17 March 2020, Ref.Z6a-G8000-2020/122-83](#) amending the general rulings on bans on events and operations on the occasion of the corona pandemic of 16 March 2020, ref.: 51-G8000-2020/122-67, has ordered far-reaching bans on events and operations.

The plant closures pose major economic challenges for the companies concerned. This is especially true if the companies do not conduct the majority of their business via online trading, but are dependent on their branch business, which comes to a complete standstill due to the closures. In some cases, government agencies have taken some measures; further measures have been announced. However, government measures are far from having cushioned all the major economic consequences for these companies.

The issue therefore arises as to whether, under the current legal provisions, claims for compensation may be considered with regard to plant closures. The issue of compensation claims is first of all determined by whether the general decree of 16 March 2020 in the form of the amending decree of 17 March 2020 is lawful or unlawful.

Legality of the ordered closures still open

In the current discussion, several voices are being raised in the meantime which want to question the legality of the general rulings - also insofar as they are factually necessary in the matter to protect the population as a whole. There are some indications that the general decrees issued for the closure of plants may in fact be illegal for various reasons. For example, it is open to question whether the statutory basis of empowerment on which the state government primarily relies on the general ruling, namely § 28 para. 1 sentence 2 of the Infection Protection Act (hereinafter referred to as IfSG), was intended to make such far-reaching orders possible at all. Furthermore, one can justifiably raise the question whether the orders in this generality are actually proportionate. It is at least conceivable that less drastic measures would have been sufficient. However, due to the currently unclear situation and the protection of the outstandingly high legal interests "life and health of the entire population", the state government will certainly be granted a wide discretion.

First decision on the legality of plant closures

As an inquiry to the Bavarian administrative courts on 23 March 2020 revealed, two first decisions of the Administrative Court of Munich on the legality of general decrees have already been issued (decisions of 20 March 2020, M 26 E. 20.1209 and M 26 S 20.1222). In both proceedings, retail operators had appealed against the closure of their stores. However, the court rejected the applications and considered the orders to be lawful. The general order to close shops was a proportionate measure to fight the virus. The sensitive interference with the exercise of the profession and the massive loss of income for retailers resulting from the order would have to take second place



to the public interest. Health protection, in particular the slowing down of the spread of the virus to ensure sufficient capacity of the health system, would therefore justify the drastic measure. The court did not follow the objection raised in proceedings that it must be left primarily to the personal responsibility of the shopkeepers to take infection prevention measures (protective and hygienic measures, minimum distances, etc.) or that they must be given priority and, if necessary, be ordered to do so. This is not an equally effective means of combating the virus. An effective monitoring of infection protection measures taken or commissioned by the individual companies themselves is illusory. As the court further announced, further proceedings are currently also pending, in which, for example, it is argued that the wearing of mouthguards is a sufficient measure against the spread of the virus. The court will also decide on this in the near future.

It therefore remains to be seen how the courts will decide further in this matter. However, it is already becoming apparent that the administrative courts are likely to grant the state government a wide discretionary power to take measures to fight the epidemic, due to the protection of the overriding legal interest of the health of the entire population, and that they will probably keep the general rulings on shop closing times.

Far-reaching changes to the IfSG planned

Independent of this, the German Federal Government is currently also planning far-reaching changes to the IfSG. In addition to a new distribution of powers of intervention, an expansion of the powers themselves is also to be expected. It is possible that this will further defuse the concerns about the legality of general rulings.

Compensation is rather unlikely according to the current legal situation

To the extent that the courts follow the first trend in future decisions on the legality of general rulings and consider them to be lawful, claims for compensation are rather unlikely.

This is mainly due to the fact that in Germany, as a rule, the state is not obliged to pay compensation for lawful administrative actions. The only exception is when compensation must be paid on the basis of special legal regulations.

The Infection Protection Act, on the basis of which the general decrees were issued, does contain such regulations. Thus the Protection Against Infection Act with § 56 para. 4 in conjunction with para. 1 IfSG and § 65 para. 1 IfSG basically provides for claims for compensation. However, their prerequisites are unlikely to be fulfilled. Thus § 56 para. 4 in conjunction with para. 1 IfSG grants compensation claims for individual measures against persons affected. If, for example, the competent authority were to order quarantine measures against an individual, the individual would then be entitled to compensation under the conditions stated there. However, § 56 para. 4 in conjunction with para. 1 IfSG does not provide for compensation for general closures. Furthermore, it is unlikely that compensation can be obtained under § 65 para. 1 IfSG. § 65, para. 1 IfSG focuses on measures for the prevention of communicable diseases according to §§ 16, 17 IfSG. However, the current measures of the State Government are no longer (only) aimed at the prevention of communicable diseases, but already at the control of communicable diseases.

If - as in the IfSG - there are special statutory provisions on compensation, further claims under the so-



called claim to sacrifice ("expropriatory intervention") are generally excluded. In addition, such a claim to sacrifice would - in addition to numerous other requirements - above all require a so-called "special sacrifice", i.e. a special individual case, which in the present case, however, is not likely to be the case.

Accordingly, claims for compensation could be considered at most if the orders were to prove illegal in future court decisions. In this case, official liability claims pursuant to § 839 BGB (German Civil Code) in conjunction with Art. 34 para. 1 GG (German Constitution) as well as claims from the so-called "expropriation-equivalent" intervention could be considered as bases for compensation in favor of the companies concerned. Unfortunately, however, these claims are also not quickly and easily enforceable. Instead, the claims are linked to numerous conditions. Thus, for example, in the present case all reasonable (if necessary also judicial) measures would first have to be taken to avert the orders and to avert the damage. Furthermore, the question arises as to whether the state government or the acting officials can really be successfully legally accused of the plant closures (illegality, fault, causality of the damage, etc.). Due to the currently unclear situation and the protection of the extremely important legal goods "life and health of the entire population", the state authorities will also be granted a wide discretion under civil law.

Possible measures by affected companies

Therefore, at present, the only possibility for the companies concerned is to examine, on a case-by-case basis, applications for exemptions and the initiation of judicial measures against the general injunctions issued. Due to the high requirements, however, such applications for exemptions are likely to be very difficult to enforce. Furthermore, the chances of success for the initiation of legal measures based on the most recent, initial decision on the legality of the general rulings are at best open. It remains to be seen how the authorities and courts will decide on this matter.

Legislative measures are urgently needed

This unfortunate situation for affected companies can only be defused by new legal regulations. We assume that, depending on the further course of the crisis, further aid programs will be set up to support the economy. It remains to be seen whether the legislator will take appropriate measures here. We will of course keep you informed of further developments.



The above statements are only a non-binding compilation according to the current status. No liability is assumed for the correctness and completeness. We would be pleased to support you in checking and, if necessary, implementing the above measures in your company.

The contact persons of our law firm who are known to you are also available here. In addition, you will find the contact persons who have been particularly involved in the above-mentioned topics.

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Concluding remarks

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