BCLP. Client Intelligent

Insights

NEITHER COMPENSATION NOR DAMAGE CLAIMS FOR CORONA-RELATED NATIONWIDE BUSINESS CLOSURES IN SPRING 2020

Mar 21, 2022

Another landmark decision by the German Federal Court of Justice ("**BGH**") in connection with the COVID 19 pandemic was eagerly awaited. In its ruling of 17 March 2022 - III ZR 79/21, the BGH decided whether the state is liable for revenue losses caused by nationwide temporary closures or restrictions of operations due to government measures taken to combat the coronavirus and the resulting COVID-19 disease. The BGH has now clearly rejected this question and denied both compensation and damage claims against the state following a corona-related closure of operations.

The BGH ruling was based on the case of a restaurateur from Brandenburg whose hotel and catering business was closed due to the state closure order in the period from 23 March 2020 to 7 April 2020. Although the restaurateur received Corona emergency aid, in his opinion, this emergency aid was not sufficient to compensate for his loss of sales and profits and he demanded compensation from the State of Brandenburg for the loss of revenue he had suffered.

The BGH had to deal with claims based on the Infection Protection Act ("**IfSG**") as well as on general state liability law.

According to the decision of the BGH, the tradesmen are not entitled to compensation from the compensation provisions of the IfSG, either in direct or in corresponding application.

Compensation under Section 56 (1) IfSG, which according to its wording presupposes that the person concerned is the addressee of a state infection control measure (i) in a targeted manner, (ii) in relation to a person and (iii) as a disruptor under infection control law (= suspected of being infected), was ruled out from the outset, as a tradesman is a non-disruptor under infection control law. Section 65 (1) IfSG does not apply either, since the provision is relevant only to measures for the prevention of communicable diseases according to the unambiguous wording. However, the Corona Containment Ordinance of March 22, 2020 and the follow-up ordinances of 17 April 2020 and 24 April 2020 ("**Corona Containment Ordinances**"), which were issued only after the spread of

the corona virus and on the basis of which the operational closures were ordered, serve solely to control the COVID-19 disease.

The BGH also ruled out an analogous application of the compensation regulations of the IfSG by way of an interpretation in conformity with the constitution - despite the decision of the Federal Constitutional Court (decision of 10 February 2022 - Ref. 1 BvR 1073/21), which would also permit a different interpretation - because the wording of Sections 56, 65 IfSG is unambiguous and does not permit such an expansive interpretation. The wording of the provisions indicates the intention of the legislator to provide compensation for disruptors under infection law only in exceptional cases and thus selectively for reasons of equity.

For this reason, the BGH also rejected the application of the liability principle of expropriation developed under judicial law. Article 14 (1) sentence 2 of the German Constitution ("**GG**") does not serve to award mass and large-scale compensation.

The BGH ultimately also clarified that assistance for economic sectors severely affected by a pandemic is not a task of state liability. The principle of the welfare state requires the state community to share burdens that have arisen from circumstances which must be borne by the population as a whole and which only affect a certain group of people by chance. This task had already been fulfilled by the enactment of the Corona emergency aid.

A claim for compensation on the basis of official liability pursuant to Sec. 839 (1) Sentence 1 of the German Civil Code in conjunction with Art. 34 GG and on the basis of an expropriation-equivalent intervention is also out of the question, since the Corona containment ordinances and thus also the operational closures were lawful and also otherwise proportionate.

The proceedings have now been legally concluded. The only remaining option is to appeal to the Federal Constitutional Court. Due to the fundamental nature of this decision, it can be assumed that similar proceedings at the regional and higher regional courts will also be dismissed.

RELATED CAPABILITIES

- Real Estate

MEET THE TEAM

Kathinka Kamrau

Berlin

kathinka.kamrau@bclplaw.com
+49 (0) 30 684 096 122
