Friday, March 20, 2020

Due to its constitutional and legal system, Germany is different from a number of other countries around the world. Measures fighting the spread of COVID-19 in Germany cannot be taken at the central government level in Berlin (Bundesregierung) but have to be taken by the governments of the 16 states (Landesregierungen), which constitute the Federal Republic of Germany.

However, in recent days the Prime Ministers of the 16 German states have coordinated their action closely with each other and with the central German government.

Alongside such preventive measures the central German government has adopted measures providing financial assistance and other assistance to enterprises on a number of levels, including in particular (i) unlimited liquidity assistance and state guarantees within the scope of the generally approved Federal Budget for such measures of EUR 460 bn plus an additional COVID-19 triggered amount of EUR 93 bn, (ii) tax related reliefs, (iii) short time working allowances (Kurzarbeitergeld), (iv) export credit finance, (v) suspension until at least 30 September 2020 of otherwise existing obligations to file for insolvency and (vi) plans to establish a EUR 40bn

Measures fighting the spreading of COVID-19

Measures adopted by the 16 state governments (Landesregierungen) fighting the spread of COVID-19 are in a number of ways different from measures in other countries because of strict German constitutional constraints on what governments and administrative authorities can order to be done. In particular, the principle of the rule of law (Rechtsstaatsprinzip) and the principle of proportionality (Verhältnismäßigkeitsgrundsatz) require a specific limit as to the time and scope of any adopted measures.

As of 18 March 2020 there is neither a general travel ban, nor the closing of cities or areas nor a general quarantine in Germany.

Measures adopted as at 18 March 2020 in the State of Hessen, (in which the city of Frankfurt am Main is situated and which will be used for the purposes of this blog post as reference state) include:

1. Requiring staff of critical industries and services like police forces, military staff, fire fighters, medical and pharmaceutical staff, and staff of water, energy and communication facilities, which have been in High Risk Countries in the last 14 days to self-isolate for 14 days. High Risk Countries currently include Italy, Iran, China (Province of Hubei), South-Korea (Province of Gyeongsangbuk-do (North-Gyeongsang)), France (Region Grand Est), Austria (State of Tirol), Spain (Madrid), USA (States of California, Washington, and New York).

2. Prohibiting anyone who has been in a High Risk Country in the last 14 days from accessing specifically protected locations like hospitals, doctor’s offices, nursing homes, retirement homes, schools, childcare centers and other listed institutions.

3. Shutting schools and childcare centers (Kindergarten).

4. Prohibiting any private and public events and meetings involving 100 or more people.

5. Closing down any leisure related events, stores and markets (e.g. sport events, concerts, cinemas, play grounds, bars, clubs, theaters), but expressly excluding critical infrastructure/services such as foods stores, pharmacies, and banks, amongst others. The traditional German Sunday closures (Sonntagsverkaufsverbote) relating to those critical providers are suspended. Restaurants and hotels remain open, subject to social distancing measures, and must close by 6pm. Hotels are not available to tourists and some of the 16 German states and regions have banned travelling for tourism in general.

In addition to the above, there had also been unilateral decisions of the German central government to (i) prohibit the export of certain medical devices and (ii) to increase controls (but not to lock down travel in general) at the borders with Austria, Denmark, France, Luxembourg and Switzerland. The unilateral German export control has now been replaced by the EU Commission Implementing Regulation
2020/402 of 14 March 2020 controlling, for a period of six weeks, the export of certain medical devices to non-Union countries. Whether exports to the United Kingdom are still allowed, is not entirely clear, but it is likely that such exports to the UK continue to be allowed until 31 December 2020 pursuant to the rules of the Withdrawal Agreement. The issue of increasing controls at internal borders within the EU is subject to guidelines issued by the European Commission in order to safeguard the functioning of the internal market. Insofar as the European Union’s external borders are concerned, strict border controls and entry bans have been adopted for non-EU nationals (with UK nationals currently being exempted from such measures).

**Steps Germany is taking to assist potentially stressed/distressed companies**

There is assistance for stressed and distressed companies both on the federal and state level.

On the federal level the German government has adopted, or is about to adopt the following measures:

1. There is liquidity assistance in an unlimited amount for enterprises.
2. There is much broader access to short time working allowances for employees, which will enable enterprises to cut working hours, with the shortfall in employees’ wages being compensated by the social security system.
3. There is tax relief, in particular through tax deferrals and suspending enforcement measures against companies for unpaid taxes until the end of 2020 (including any default interest).
4. There will be a suspension until 30 September 2020 of the general obligation under the German Insolvency Code for the directors of insolvent companies to file for insolvency within 3 weeks of the company becoming over indebted or unable to pay the outstanding debt when due. The Federal Ministry of Justice will be authorised to extend the time of such suspension until 31 March 2021. Read further about this in [this blog](#).
5. The German Federal Government plans to establish a EUR 40bn COVID-19 Federal Solidarity Fund (Solidaritätsfond) for sole traders, sole practitioners and very small enterprises with up to 10 employees. EUR 10bn of such Solidarity Fund will be available as non-refundable COVID-19 relief payments and EUR 30 bn will be available through loans to be disbursed directly by such Solidarity Fund.

Insofar as the unlimited liquidity assistance is concerned, it will be provided through:

1. The state owned bank, KfW, by way of opening the existing KfW credit programmes for existing enterprises and start-ups to new groups of borrowers and increasing the KfW risk portions from 50% to 70%. Any application for a credit facility needs to be done, as is usual, through the relevant commercial
banks (Hausbanken). In practice, this programme will be available as of 23 March 2020;

2. Increasing the maximum state guarantees to EUR 2.5 Million and enabling the banks to take express decisions on their own for amounts of up to EUR 250,000 within three days of the application (leichterer Zugang zu Bürgschaften).

3. Special programmes at KfW for enterprises in crisis status. This will be achieved by increasing the risk portions of KfW.

4. Special export credit risk guarantees along the lines of the German ECA (Hermes) crisis programmes in 2009.

Such federal level measures will require EU State Aid Clearance and we understand that the relevant applications have been made by the German central government at the EU level.

In addition to financial assistance on the German federal level, there can be additional assistance at state level.

For example, the State of Hessen has

- increased its programme for unsecured loans for small enterprises (Kapital für Kleinunternehmen), and

- provided guarantees of up to EUR 1.25 Million for small and medium sized enterprises with a guarantee portion of 80% of the guaranteed loans (or 60% in case of “express-guarantees”).

Specific aspects of state liability and compensation resulting from losses occurred as a consequence of measures taken to fight COVID-19 are regulated in the German Act on Protection against Infections (Infektionsschutzgesetz – “IfSG”). Those rules apply in particular in respect of loss of income of employees who are the subject of orders made under the IfSG, as well as other specified losses caused directly by certain measures taken.

However, the state liability and compensation rules under the IfSG do only cover specific cases and do not provide a general principle of state liability and compensation.

Insofar as losses are concerned which are not covered by the IfSG, recourse to general rules of German state liability and compensation needs to be taken.

What should Companies be doing now in response to COVID-19?

Companies must check with the German bank (Hausbanken) the particular loan and guarantee programmes (on KfW level and individual state level) that are available to them. They should consult with their lawyers in respect of the soon to be implemented Federal Solidarity Fund (Solidaritätsfond) and any other potential compensation claims.

© Copyright 2020 Squire Patton Boggs (US) LLP