

## IX. The Community Steps Up: Changing Responsibilities in Germany

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### 1. Introduction

After a short period of hesitation, German governments reacted quickly to the COVID-19 crisis in March 2020. Public life was shut down, public events were prohibited and curfews were imposed. These reactions also made some peculiarities of federalism visible: the Federal Infection Protection Act (*Infektionsschutzgesetz* – IfSG), which serves as their legal basis, is to be implemented by the federal states (*Länder*)<sup>1</sup>, which in turn employ various authorities at this end<sup>2</sup>. This background led to the fact that crisis management strategies were pursued with varying degrees of stringency. However, the initial federal competition for best practice was restricted by agreements between the Federal Government and the *Länder*<sup>3</sup>, and also by new federal responsibilities<sup>4</sup>. This led to a largely harmonised approach that was aimed not least at emphasising the seriousness of the crisis situation. Unfortunately, the crisis measures continue to be fragmented and

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- 1 Bavaria has, in the course of the crisis, passed a law of its own (Bavarian Infection Protection Act – [BayIfSG](#) of 25 March 2020, GVBl. p. 174). North Rhine-Westphalia, too, has passed an Infection Protection and Competence Act ([IfSBG-NRW](#) of 14 April 2020, GV. NRW. 2020. p. 218b). What remains to be clarified is the extent to which the Infection Protection Act within the meaning of Art. 72 Para. 1 GG (Basic Law) leaves scope for individual *Länder* regulations (sceptical, and yet cursory elaboration of the Scientific Service (*Wissenschaftlicher Dienst*) of the German Bundestag of 9 April 2020, [WD 3-3000-081/20](#) on the Bavarian Infection Protection Act – BayIfSG).
  - 2 Cf. only *Giesberts/Gayger/Weyand*, COVID-19 – Hoheitliche Befugnisse, Rechte Betroffener und staatliche Hilfen, NVwZ 2020, p. 419.
  - 3 By way of several agreements between the government and the *Länder*; cf. [guidelines for concerted action](#) regarding the further restriction of social contacts in public areas in view of the corona pandemic in Germany of 16 March 2020.
  - 4 In the event of an “epidemic situation of national import” in line with [Sec. 5 IfSG](#), introduced via Art. 1 of [the Law on the Protection of the Population in the Event of an Epidemic Situation of National Concern of 27 March 2020](#) (Federal Law Gazette = *Bundesgesetzblatt* – BGBl. I, p. 587).

diverse from one region to another due to a certain obstinacy of *Länder* governments.

Since the end of April 2020, gradual easing measures had been announced and implemented<sup>5</sup> – and taken back again in November 2020, in order to react to the second wave of the COVID-19 pandemic. From the beginning, the legal bases have had to be (re)adjusted,<sup>6</sup> and the question remained open as to the extent to which local differentiations were reasonable or even necessary. However, it has always been clear that this question had to be raised and answered. After all, lifting restrictions is legally and politically much more difficult than introducing them. While a quick and comprehensive elimination of interpersonal contacts will seem obvious at the first moment of crisis perception and without alternative in a collective state of shock of sorts, the situation changes with the realisation that a quick return to the previously practiced lifestyle will not be possible. Hygiene concepts have been introduced,<sup>7</sup> putting emphasis on social distancing, washing hands and protecting the nose and mouth, in which context also *Lüften* (airing out with ‘impact and cross ventilation’<sup>8</sup>) gained a rather dubious fame. From this point on, there was and still is a growing need to comprehensively balance legally protected interests and justifying restrictions of freedom in individual cases, always taking into account the principle of equal treatment – especially since the many implementation measures are now, as was to be expected in Germany, intensively discussed in legal terms<sup>9</sup> and brought before courts for review.<sup>10</sup> In November 2021, the Federal Constitutional Court took a landmark

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5 Cf. on the decisions of the Federal-Länder-Conference of 30 April 2020 the [information provided by the Federal Government](#). A good overview of the measures taken by the Government and the *Länder* is found on the websites of the Federal Bar Association – BRAK.

6 See for the most recent developments *Kießling*, Corona-Maßnahmen in Herbst und Winter 2021/22 nach Ende der “epidemischen Lage”. Update, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2022, pp. 15 et seq.

7 See *Bund-Länder-Beschluss* of 6 May 2020.

8 See [The Guardian](#) of 30 September 2020.

9 With an emphasis on the impact of fundamental rights on the one hand, and the rule of law as well as the principle of democratic legitimacy on the other; see on the latter point *Kingreen*, *Der demokratische Rechtsstaat in der Corona-Pandemie*, *Neue Juristische Wochenschrift (NJW)* 2021, p. 27 66 et seq. On the first point see *Kersten/Rixen*, *Der Verfassungsstaat in der Corona-Krise*, 2nd ed. 2021, pp. 95 et seq.; *Gärditz*, *Grundrechtsschutz in der Pandemie*, *Neue Juristische Wochenschrift (NJW)* 2021, pp. 2761 et seq.

10 See for an overview [information of the Federal Bar Association](#) (*Bundesrechtsanwaltskammer*).

decision on the constitutionality of contact restrictions, accepting a broad margin of appreciation of the legislature.<sup>11</sup>

A certain federal diversity was also noticeable in terms of economic and socio-political reactions.<sup>12</sup> As early as mid-March 2020, both the Federal Government<sup>13</sup> and the *Länder*<sup>14</sup> introduced supplementary budgets to provide additional funds for the fight against the virus and to compensate for the consequences thereof. This enabled the Federal Government alone to take out additional loans amounting to almost EUR 156 billion<sup>15</sup> that is intended to keep the economy running,<sup>16</sup> with federal funds being supplemented by state funds in varying amounts. A second supplementary budget is aimed at financing a recovery package with an amount of EUR 103 billion.<sup>17</sup> Although the long economic upswing in recent years has left considerable scope for support measures, the pandemic did lead to some insolvencies and may still change the economic landscape as it is uncertain how effective and how useful government rescue efforts will ultimately be. It is also possible that the corona crisis will lead to an increase in unemployment<sup>18</sup> – even though it will be difficult to draw a line as at the same time in which the COVID-19 crisis started to slow down, a new crisis formed with the illegal war of aggression in the Ukraine. In any case, right

11 *BVerfG* of 19 November 2021, 1 BvR 781/21.

12 We here leave out the important measures concerning health care; see in this context *Eichenhofer*, *Pandemiebekämpfung durch Sozialrecht*, *Sozialer Fortschritt* 2021, pp. 585, 587 et seq.

13 Cf. *Budget Supplement Law (Gesetz über die Feststellung eines Nachtrags zum Bundeshaushaltsplan für das Haushaltsjahr 2020 – Nachtragshaushaltsgesetz 2020)* of 27 March 2020, BGBl. I, p. 556. On the budget constitutional implications see *Schwarz*, *COVuR* 2020, p. 74.

14 Cf. for Bavaria the law amending the budget law 2019/2020 (Budget Supplement Law 2019/2020 – *NHG 2019/2020*) of 19 March 2020, GVBl. 2020, p. 153 and the second law amending the budget law 2019/2020 (2<sup>nd</sup> Budget Supplement Law 2020 – *2. NHG 2020*), GVBl. 2020, p. 238; for NRW see Budget Supplement Act 2020 (*Gesetz über die Feststellung eines Nachtrags zum Haushaltsplan des Landes Nordrhein-Westfalen für das Haushaltsjahr 2020 – Nachtragshaushaltsgesetz 2020 – NHHG 2020*) of 24 March 2020, GV. 2020, p. 189.

15 Sec. 2 Para. 1 Budget Supplement Act 2020 (fn. 13).

16 See for financial support in extension of digital infrastructure and child care infrastructure *Gesetz über begleitende Maßnahmen zur Umsetzung des Konjunktur- und Krisenbewältigungspakets* of 14 July 2020 (BGBl. I, p. 1683).

17 *Law of 14 July 2020* (BGBl. I, p. 1669); see *information of the Federal Treasury* (BMF).

18 For further details on this – and also the effects of prolonged unemployment and statistical recording – see Bundesagentur für Arbeit, *Auswirkungen der Corona-Krise* (fn. 37), p. 8 et seq.

at the start of the pandemic, steps were taken not only to preserve the liquidity of companies but also to safeguard jobs and, in this sense, direct labour market policy objectives were also pursued.

## 2. Job Retention

### a) Short-Time Work Benefit

It was possible to fall back on an instrument that had proved to be extremely successful in overcoming the last financial crisis around ten years ago: the short-time work benefit (*Kurzarbeitergeld* – *Kug*)<sup>19</sup>. It is granted within the framework of unemployment insurance, i.e. in accordance with the rules of social insurance. On the one hand, this means that it is embedded in a special form of self-administration and is basically financed by contributions. On the other hand, this basis precludes the *Länder* from following different routes, as *Kug* is paid uniformly throughout the country. As an instrument for crisis management, it had been expanded by the so-called *Economic Stimulus Package I* at the end of 2008<sup>20</sup> and been reduced again from 2012<sup>21</sup>. The fact that *Kug* is still intended to serve to preserve jobs in addition to providing compensation for employees affected by short-time work is fully in line with its traditional orientation, even if its purpose is no longer explicitly mentioned in the qualifying conditions of the Social Code Book (SGB) III<sup>22</sup>. Corresponding links between the labour

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19 The short-time working benefit (*Kurzarbeitergeld* – *Kug*) of Social Code Book (SGB) III is also referred to as “economic trend-dependent *Kug*” (“*konjunkturelles Kug*”), in order to distinguish it from its special forms, i.e. “seasonal *Kug*” (“*Saison-Kug*”) and “*Transfer-Kug*”, cf. [Sec. 101](#) and [111 SGB III](#)). On the benefits and the distribution of costs of *Kug*, see short reports (*Kurzberichte*) of the Institute for Employment Research (IAB) [14/2009](#) and [17/2009](#).

20 [Measures package of the Federal Government](#) “Beschäftigung durch Wachstumsstärkung”, November 2008.

21 Through the Law on Improving the Chances of Integration in the Labour Market ([Gesetz zur Verbesserung der Eingliederungschancen am Arbeitsmarkt](#)) of 20 December 2011 (BGBl. I, p. 2854).

22 Unlike in [Sec. 63 Para. 1 Sent. 1](#) last phrase of the previous law (*Arbeitsförderungs-gesetz* - AFG): “...when it can be expected that through the granting of the short-term work benefit workplaces are retained for employees and trained employees are retained for the company”. Similarly, [Sec. 116 Para. 1 Sent. 4](#) of the Law on Employment Services and Unemployment Insurance ([Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung](#) – AVAVG (in the version of 3 April 1957, BGBl. I, p. 322), which provided, however, that “the Federal Government, after

market and socio-political objectives<sup>23</sup> have always been characteristic of the German unemployment insurance and do not per se lead to particular problems in the interpretation of the qualifying conditions<sup>24</sup>.

Building on the experience gained around ten years ago and spurred on by the fact that the budget of the Federal Employment Agency was well-stocked due to the economic growth that had soon followed<sup>25</sup>, the government introduced a draft law on 12 March 2020 to improve the regulations for short-time work benefits<sup>26</sup> for a limited period in response to the crisis. It was discussed and adopted one day later in three deliberations

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hearing the Administrative Council, decides in relation to the situation on the labour market and through a regulation in which economic areas and branches the granting of the short-time work benefit is admissible" (Sec. 116 Para. 1 Sent. 2 AVAVG). This purpose had not yet been mentioned in the regulation of "support for short-time workers" ("Kurzarbeiterunterstützung" in Sec. 130 AVAVG of 16 July 1927 (RGBl. I; p. 187), which, however, had to be authorised or mandated respectively.

- 23 Cf. *Drucksache* of the German Federal Parliament (BT Dr.) V/2291, p. 55 on the purposes of *Kug*: "Its socio-political value is that it reduces the employee's burdening uncertainty concerning his professional existence. From an economic policy point of view, the short-time working benefit, which is paid to allow companies to retain the workers they have trained, serves to balance out short-term economic fluctuations and to bridge structural changes in the company caused by economic development. The significance of the short-time working benefit for the labour market is that it stabilises employment relationships.
- 24 What could be questionable might be the depth of judicial control as the interpretation of individual conditions requires special expertise of the competent administrative authority with regard to the labour market policy background; on this in general *Schuler-Harms*, *Die gerichtliche Kontrolldichte sozialrechtlicher Entscheidungen*, SDSRV 62 (2012), p. 59, 77 et seq. See for a non convincing distinction between primary and secondary purposes *Hase*, *Legitimation des Funktionswandels*, in: *Funktionswandel der Sozialversicherung – von der Arbeitnehmer- zur Unternehmenshilfe und zum Marktakteur*, ZAAR Schriftenreihe 33 (2013), pp. 37, 39 et seq.; for more details and differentiation see *Bieback*, in: *Gagel*, SGB II/SGB III (as per 2020), before Sec. 95 SGB III, recital 4 et seq.
- 25 The projected reserve for 2019, according to the [Federal Employment Agency](#), was EUR 24.3 billion. The underlying problems cannot be discussed here. On the importance of budgetary autonomy and the past shifts between social security budgets, see *Becker*, *Verfassungsrechtliche Vorgaben für Sozialversicherungsreformen*, ZVersWiss. vol. 99 (2010), pp. 585, 599; on the fundamental (albeit in the specific case too limited) control under constitutional law of the connection between the obligation to pay contributions and the obligation of social security schemes see also Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) of 22 May 2018, 1 BvR 1728/12, recital 78.
- 26 BT Dr. 19/17893.

in the Bundestag<sup>27</sup>. The law was published in the Federal Law Gazette<sup>28</sup> on the same day and entered into force on 15 March 2020. The speed with which the procedure was conducted is remarkable<sup>29</sup>. However, it can also be explained by the fact that the statute of Parliament contains only two provisions empowering governmental authorities and thus places the regulation of instruments previously tested – as in addition to short-time work benefits, the remuneration of temporary agency workers is also affected<sup>30</sup> – in the hands of the executive, albeit for a limited time until the end of 2021<sup>31</sup>.

On this basis, the Federal Government Regulation on the Facilitation of Short-Time Work (*KugV*) was issued on 25 March 2020<sup>32</sup>. It initially changes two conditions: It is sufficient for *Kug* to be granted if at least ten per cent of the employees have a loss of earnings of more than ten per cent<sup>33</sup>; negative working time accounts (agreed upon by the company) will not be set up; yet, an existing positive balance first has to be worked off.<sup>34</sup> In addition, the employer is fully reimbursed for any social security contributions incurred<sup>35</sup>. A further improvement was brought about by the regulation on the Period of Entitlement to the Short-Time Work Benefit (*KugBeV*) of 16 April 2020<sup>36</sup>: through this statutory instrument, the granting of the benefit is extended retroactively from 1 January 2020 to a maximum period of 21 months and (in this respect including old cases)

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27 BT PlPr. 19/153 (Zusatzpunkt 19).

28 BGBl. I, p. 493.

29 Cf. on “acceleration phenomena”, their classification and evaluation see *Schwerdtfeger*, Krisengesetzgebung, 2018, p. 27 et seq., 156 et seq.

30 According to Sec. 3 *KugV* (fn. 32) the right stipulated in Sec. 11 Para. 4 Sent. 2 of the Law on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz* – AÜG) of temporary agency workers to remuneration is, in the event of an agreement entered into on short-term work, revoked for the loss of work and the period during which the temporary agency worker is paid the short-term work benefit. On the background see *Waltermann*, Kurzarbeit und Arbeitnehmerüberlassung, NZS 2020, p. 337.

31 Sec. 109 Para. 5 SGB III and Sec. 11a AÜG, Art. 1 and 2 of the law on temporary crisis-related improvement of regulations on the short-term work benefit of 13 March 2020.

32 *Kurzarbeitergeldverordnung* (BGBl. I, p. 595).

33 Sec. 1 No. 1 *KugV*, by derogation from Sec. 96 Para. 1 Sent. 1 No. 4 SGB III.

34 Sec. 1 No. 2 *KugV*, by derogation from Sec. 96 Para. 4 Sent. 2 No. 3 SGB III.

35 Sec. 2 Para. 1 *KugV*.

36 Regulation on the period of receipt of short-term work benefit (*Kurzarbeitergeld-bezugsdauerverordnung*), BGBl. I, p. 482.

to 31 December 2020 at the latest, as it is foreseeable that the economic recession will last for a longer period of time.

Shortly after the adoption of these measures, a debate broke out about the amount of the payments. This was due to several reasons. First, it was predictable that more people than ever before would have to resort to *Kug*<sup>37</sup>. In June 2020, about 13% of all employees in Germany received this benefit.<sup>38</sup> Second, the loss of working hours was very high at least in the sectors that have been hit particularly hard by the crisis<sup>39</sup>, and while *Kug* covers temporary minimum wage losses, it does not limit the amount of these losses in individual cases – in other words, it is also paid when short-time work is actually ‘zero’<sup>40</sup>. Third, economic recovery will take time, even if catch-up effects had been expected to occur relatively quickly once the consequences of the pandemic will have been overcome.<sup>41</sup> In some sectors the loss of wages is cushioned by collective agreements that provide for an increase in *Kug*, to some extent under differentiated condi-

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- 37 In March and April there were 751,000 applications (cf. [Sec. 99 SGB III](#)) reported for 10.1 million persons, an unprecedented number, according to the Federal Employment Agency, showing the effects of the corona crisis on the labour market, [Arbeitsmarkt kompakt, April 2020](#), p. 6. It should be noted that this figure is always higher than the actual number of benefits granted; for example, in 2009 up to around 1.4 million people received *Kug*, which was reported to have been applied for by 3.3 million people, Federal Employment Agency, *Inanspruchnahme konjunkturelles Kurzarbeitergeld nach Sec. 96 SGB III*, [Arbeitsmarkt kompakt, April 2020](#), p. 8. The actual number reached its peak in April with 5.95 million recipients of KUG; since then, it has started to decrease (May: 5.92 million, June: 4.63 million, July: 4.24 million), see BA, [Arbeitsmarktbericht September 2020](#), p. 9.
- 38 Employees subject to mandatory social insurance, preliminary findings of the BA, see [Arbeitsmarktbericht September 2020](#), p. 9.
- 39 In April 2020, 93.4% of employees subject to social insurance contributions in the catering industry and 87.2% in the accommodation sector were notified of short-time working, cf. on this and other industry branches Federal Employment Agency, *Inanspruchnahme konjunkturelles Kurzarbeitergeld* (fn. 37), p. 7.
- 40 On loss of salary see [Sec. 96 Para. 1 Sent. 1 SGB III](#); it may, according to No. 4 “also amount to 100 percent of the monthly gross salary”. Hesitant on the possibility of “short-term work zero” (“Kurzarbeit Null”), i.e. being temporarily laid off while receiving short-term work benefits, see Federal Social Court (*Bundessozialgericht* – BSG) of 14 September 2010, B 7 AL 21/09 R, recital 12 et seq.; clarifying remarks in [BT Dr. 17/6277](#), p. 86.
- 41 In September, the BA already observed a decrease in unemployment for the first time since the outbreak of COVID-19. See for the mode of calculation of specific “Corona effects” on the unemployment rates [Arbeitsmarktbericht September 2020](#), p. 12 et seq.; on this basis, the BA follows that there have been no more observable effects of the pandemic since July 2020.



tions and at levels of between 70% and 97%<sup>42</sup>. Under the Second Social Protection Package<sup>43</sup> which was adopted on 20 May 2020<sup>44</sup>, *Kug* was raised (“topping-up”), in the event of a loss of income of at least 50%, from the previous 60% (or, respectively, 67% for persons who have at least one child)<sup>45</sup> to 70% (or 77%) after the fourth reference month, and to 80% (or 87%) after the seventh reference month<sup>46</sup>. Furthermore, the possibility of earning additional income up to the full amount of the usual monthly income in addition to *Kug* by means of a second job is to be prolonged until December and extended to all jobs<sup>47</sup>. It is remarkable that through the realisation of these measures, *Kug* is not only higher than ever before – with the argument that more often than in the past, many people will no longer be able to work at all<sup>48</sup>; but also that a longer period of absence leads to higher benefits, which reverses the approach otherwise adopted for compensation payments. This can be explained only in part by the fact that the extension of benefits is relatively limited in time. In fact, we can observe that the political community takes over specific responsibility as the intention is to provide “targeted support”<sup>49</sup> for employees who have been affected by the pandemic in an exceptional way, obviously with the aim of protecting those affected from having to claim so-called basic security benefits, i.e. social assistance<sup>50</sup>.

In 2020, both generous conditions for granting the short-time work benefit were prolonged. The Second Regulation on the Facilitation of

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42 Cf. overview provided by the German Trade Union Confederation, [DGB](#).

43 Information provided by the German Federal Ministry of Labour and Social Affairs, [BMAS](#).

44 [Law on Social Measures to Fight the Corona Pandemic](#) (Social Protection Package II) (BGBl. I, p. 1055); see corresponding draft of 27 April 2020, [BT Dr. 19/18966](#).

45 [Sec. 105 SGB III](#); on the requirements for the increase see [Sec. 149 No. 1 SGB III](#) in connection with [Sec. 105 No. 1 SGB III](#).

46 [Sec. 421c Para. 2 SGB III](#).

47 [Sec. 421c Para. 1 Sent. 1 SGB III](#); the relaxation of the supplementary income limit initially referred to “systemically important occupations and sectors”; for the interpretation of these terms, see Federal Employment Agency (BA), [Weisung 202003015 of 30 March 2020](#) item 2.1.8, and on its ambiguity [Löwisch](#), *Das Gesetzspaket zum Sozialschutz*, BB 2020, pp. 948, 950; cf. also below, fn. 71. Cf. on additional income [Zieglmeier](#), *Corona-Schutzschirm: Kurzarbeit und Kurzarbeitergeld*, DStR 2020, pp. 729, 733 et seq.

48 [BT Dr. 19/18966](#), p. 26.

49 [BT Dr. 19/18966](#), p. 27.

50 On this motive see blog entry by [Bispinck/Schulte](#) of the Institute of Economic and Social Research ([WSI](#)) of 14 April 2020.



Short-Time Work of 12 October 2020 (2nd *KugBeV*<sup>51</sup>) increased, until the end of 2021, the duration of the benefit for up to a maximum of 24 months in order to build ‘a bridge of job-security and to secure long-term planning’.<sup>52</sup> With its amendment of 15 September 2021, the further extension lasted until 31 March 2022. At the same time, the increase in the benefit was successively extended, most recently also until 31 March 2022.<sup>53</sup> The most recent prolongation goes back to a law of 23 March 2023 and allows for a maximum period of 28 months of short-time work benefit payment until 30 June 2022, and for the better condition including the possibility to extend the duration of benefits through the respective regulation until 30 September 2022.<sup>54</sup>

On annual average, 2.94 million persons received short-time work benefits in 2020.<sup>55</sup> According to the rules laid down in Social Code Book III (*SGB III*), short-time work benefits are financed through contributions from employers and employees (Sec. 340 *SGB III*). Yet, the intake from contributions was not sufficient in order to cover the expenses. The Federal Employment Agency spent a total of EUR 61 billion in 2020 to cushion the impact of the pandemic on the labour market. This expenditure was offset by income of around EUR 33.7 billion, so that the deficit of EUR 27.3 billion had to be made up. Around EUR 20 billion could be used from the Federal Employment Agency’s reserves in 2020. The remaining EUR 7 billion had to be covered from the federal budget, first as a sort of liquidity assistance which then had been transformed into a non-repayable subsidy at the end of 2021.<sup>56</sup> The reserve came from contributions paid in previous years that had not to be spent in the years of economic

51 BGBl. I, p. 2165.

52 [Information of the Federal Ministry of Labour and Social Affairs](#) (Bundesministerium für Arbeit und Soziales) on the 2nd Act regulating Short-Time Work Benefit Receipt Duration.

53 Last amended by Art. 12a of [Gesetz zur Stärkung der Impfprävention gegen COVID-19 und zur Änderung weiterer Vorschriften im Zusammenhang mit der COVID-19-Pandemie](#) of 10 December 2021 (BGBl. I, p. 5162).

54 Law to Extend Special Regulations in Connection with the COVID-19 Pandemic on Short-Time Work Benefits and Other Benefits ([Gesetz zur Verlängerung von Sonderregelungen im Zusammenhang mit der COVID-19-Pandemie beim Kurzarbeitergeld und anderen Leistungen](#)) of 23 March 2022 (BGBl. I, p. 482).

55 [Press Release of the Federal Employment Agency](#) (Bundesagentur für Arbeit) of 4 January 2022.

56 Based on Sec. 12 of the Budget Law 2021, granting exemption from the general rule laid down in Sec. 365 *SGB III* which only allows for deferred payment, see press release of *Bundesagentur für Arbeit* of 26 February 2021.

growth. Its overall amount was EUR 25.8 billion. The remaining sum of around EUR 6 billion was then spent in 2021.<sup>57</sup> In 2022, the Federal Employment Agency will remain without any reserve fund, and it started into the year with an estimated deficit of around EUR 1.3 billion.<sup>58</sup>

*b) Other Measures in a Divided Labour Market*

The job support measures also include the new regulation in Sec. 56 Para. 1a IfSG, according to which persons who have to look after children themselves due to the closure of childcare facilities or schools and who suffer a loss of earnings as a result, receive compensation of 67% of their average monthly income for a maximum of six weeks<sup>59</sup>. The time limit is reminiscent of the right to continued pay of wages<sup>60</sup>, without any explanations having been given by the legislator<sup>61</sup>.

The situation is somewhat different with regard to efforts to counteract pandemic-related changes in the demand for labour<sup>62</sup>. These include, on the one hand, the expansion of marginal employment through the Social

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57 State subsidies became necessary in 2020 as the *Bundesagentur für Arbeit* had not been able to spend the whole amount of its reserves immediately, due to a longer-term investment strategy, see press release of *Bundesagentur für Arbeit* of 26 February 2021.

58 See [WirtschaftsWoche of 22 January 2022](#). Also cf. [2022 budget plan of the Federal Employment Agency](#).

59 At a monthly maximum amount of EUR 2,016, [Sec. 56 Para. 2 Sent. 3 IfSG](#) and, upon receipt of insurance protection according to [Sec. 57 Para. 6 IfSG](#). On the background under labour law see *Hohenstatt/Krois*, Lohnrisiko und Entgeltfortzahlung während der Corona-Pandemie, NZA 2020, pp. 413, 414 et seq.

60 [Sec. 3 Para. 1 Law on Continued Pay of Wages \(Entgeltfortzahlungsgesetz – EntgFG\)](#). On the configuration and open questions see *Fuhrott/Fischer*, Arbeitsrecht und Corona 2.0 – Weitere gesetzliche Änderungen, NZA 2020, pp. 409, 411.

61 Rather, the draft ([BT Dr. 19/18111](#), p. 26) contains the apodictic sentence: “The amount of a compensation benefit provided by the state is to be limited.”

62 In this context, mere reference should be made to the provisions of the act on the use of facilities and social services to combat the coronavirus SARS-CoV-2 crisis (“Gesetz über den Einsatz der Einrichtungen und sozialen Dienste zur Bekämpfung der Coronavirus SARS-CoV-2 Krise”, which is part of the Social Protection Package) in connection with a mandate to guarantee sufficient medical services (Social Services Provision Act = [Sozialdienstleister-Einsatzgesetz – SodEG](#)) of 27 March 2020 (BGBl. I, pp. 575, 578) and stipulated in the law on the compensation of COVID-19-related financial burdens of hospitals and other health care facilities (COVID-19 Hospital Relief Act = [COVID-19-Krankenhausentlastungsgesetz](#)) of 27 March 2020 (BGBl. I, p. 580).

Protection Package<sup>63</sup>, which is primarily intended to benefit the agricultural sector<sup>64</sup>, the expansion of additional income opportunities for pensioners<sup>65</sup>, the change in the crediting of income for recipients of student funds under the Federal Education Assistance Act (*Bafög*)<sup>66</sup> and flexibilisation of parental leave<sup>67</sup>. Another aspect is the increased flexibility of working hours<sup>68</sup>. On the basis of the COVID-19 Working Time Regulation<sup>69</sup>, the working day can be extended, rest periods shortened and work on Sundays and public holidays can be arranged for<sup>70</sup>. All this applies to certain activities which, in this context, are not labelled as “system-relevant”<sup>71</sup> but are listed in detail as being in the special general interest<sup>72</sup>.

The amendment is a response to the fact that, although the pandemic has resulted in the loss of a lot of work, other activities are in greater demand than before, and that meeting this demand may be in the public interest, especially for the supply of essential goods and services to the population. Employers have been given the option of granting tax-free subsidies; these were, in principle, subject to social security contributions

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63 *Sec. 115 SGB IV* in the version amended by Art. 3 of the Law for Facilitated Access to Social Security and the Use and Protection of Social Service Providers Due to the Coronavirus SARS-CoV-2 of 27 March 2020 (*Gesetz für den erleichterten Zugang zu sozialer Sicherung und zum Einsatz und zur Absicherung sozialer Dienstleister aufgrund des Coronavirus SARS-CoV-2*) of 27 March 2020 (BGBl. I, p. 575).

64 *BT Dr. 19/18107*, p. 27.

65 *Sec. 302 Para. 8 SGB VI* in the version amended by the Social Protection Package (fn. 63). On this see *Schlegel*, *Ausweitung der Hinzuverdienstmöglichkeiten für Rentner*, NZS 2020, p. 336 et seq.

66 *Sec. 53 Para. 2 Bafög* in the versions amended by the law on the compensation of COVID-19-related financial burdens of hospitals and other health care facilities (COVID-19 Hospital Relief Act – *COVID-19-Krankenhausentlastungsgesetz*) of 27 March 2020 (BGBl. I, p. 580).

67 *Sec. 27 Law on Parental Pay and Parental Leave (Bundeselterngeld- und Elternzeitgesetz – BEEG)* as amended by Law of 20 May 2020 (BGBl. I, p. 1061).

68 By way of introducing the power to issue statutory instruments in *Sec. 14 Para. 4 Law on Working Time (Arbeitszeitgesetz – ArbZG)*.

69 Regulation on derogations from the Working Time Act as a result of the COVID-19 pandemic (*COVID-19-ArbZV*) of 7 April 2020 (BANz. AT of 9 April 2020 V2).

70 *Sec. 1 Para. 1 Sent. 1, 2 Sent. 1 and 3 Para. 1 Sent. 1 COVID-19-ArbZV*.

71 Cf. on this fn. 47 above; generally also *Hildebrandt/Schneider*, „Systemrelevanz“ und „Kritische Infrastruktur“ in den Corona-Verordnungen der Länder und ihre Konkretisierung durch die BSI-KritisV, COVur 2020, p. 78 et seq.

72 *Sec. 1 Para. 1 Sent. 2 and Para. 2 COVID-19-ArbZV*.

but later on exempted.<sup>73</sup> A special bonus for care workers was introduced in May.<sup>74</sup> The possibilities under labour law for ordering overtime remain unchanged<sup>75</sup> – just as, conversely, with regard to other activities no new possibilities have been created for partially bridging the loss of work by ordering leave.

### 3. Supporting the Economy

#### a) Putting up a “Protective Umbrella”

The Federal Government has, within the framework of the aid declared compatible with the internal market by the European Commission<sup>76</sup>, used the consultations on the supplementary budget, among other things, to set up an emergency aid programme for micro-enterprises from all sectors of the economy, self-employed persons, and members of the liberal professions with up to ten employees, as well as farmers. The first package (which introduced so-called “emergency aid”, now also referred to as “bridging aid I”) amounts to a volume of EUR 50 billion and provided for a one-off payment for three months of EUR 9,000 for companies with up

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73 On the basis of a communication by the Federal Treasury (BMF). Critical with regard to the content and the initially missing legal basis *Haupt, Zusätzlicher steuerfreier Zuschuss für Arbeitnehmer wegen Corona per Verwaltungsanweisung – ein populistischer Schnellschuss*, DStR 2020, pp. 967, 968 et seq. See now Law on the Implementation of Tax Law Support Measures in the Corona Crisis (*Gesetz zur Umsetzung steuerlicher Hilfsmaßnahmen zur Bewältigung der Corona-Krise – Corona-Steuerhilfegesetz*) of 19 June 2020 (BGBl. I, p. 1385).

74 *Sec. 150a SGB XI* introduced by Art. 5 of the second law on the protection of the population in the event of an epidemic situation of national import (*Zweites Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*) of 19 May 2020 (BGBl. I, p. 1018).

75 *Greiner*, Änderung des Arbeitszeitgesetzes, Erlass einer COVID-19-Arbeitszeitverordnung, NZS 2020, pp. 338, 339; cf. also on the possibilities *Sagan/Brockfeld*, Arbeitsrecht in Zeiten der Corona-Pandemie, NJW 2020, pp. 1112, 1115. A more open approach on the possibilities of imposing “company holidays” *Dehmel/Hartmann*, Das Coronavirus (COVID-19) auf dem Vormarsch, BB 2020, pp. 885, 888.

76 Cf. above, I.3.a). On this see official statements of the Federal Ministry for Economic Affairs and Energy (BMWi) on the Federal Framework “small amounts of compatible aid” (“Bundesregelung Kleinbeihilfen 2020”) of 26 March 2020 and “guarantees 2020” (“Bundesregelung Bürgschaften 2020”) of 20 March 2020, BAnz. of 31 March 2020 B 1 and B 2.

to five employees (full-time equivalents), and of up to EUR 15,000 for those with up to ten employees (full-time equivalents). In accordance with the EU legal framework, the prerequisite is that companies had not been in economic difficulties prior to March 2020<sup>77</sup>. On the basis of an administrative agreement between the Federal Government and the *Länder*, the aid was paid out via the *Länder* authorities (in some cases including local authorities); applications have to be handed in until end of May 2020.<sup>78</sup> They are supplemented by state-owned programmes, some of which also include larger companies.<sup>79</sup> As a result of this, but also due to different regulations regarding accumulation or crediting, implementation problems arose not only in the first few days. The bottom line is that the exact amount of the subsidy depends on the location of the affected companies.<sup>80</sup> What the subsidies have in common, however, is that they serve to compensate for a shortfall in current material costs, but not in personnel costs.<sup>81</sup>

In July 2020, the first package was supplemented by a bridging aid programme for small and medium-sized enterprises (*Corona-Überbrückungshilfe für kleine und mittelständische Unternehmen – “bridging aid II”*)<sup>82</sup> providing a further volume of EUR 24.6 billion. Enterprises meeting the conditions as well as self-employed individuals can claim for compensation of accrued costs (rents, incidental expenses, but *not* wages) for up to three months and up to EUR 150,000. The maximum amount for enterprises with up to five employees (full-time equivalents) is EUR 3,000 per month, and up to EUR 5,000 for those with up to ten employees (full-time equivalents). Eligibility condition is a loss of sales of at least 60% in June, July and / or August, compared to the respective months of the previous year; with the exclusion of enterprises with sales of more than EUR 750 billion

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77 Cf. the [key points](#) decision by the cabinet of 23 March 2020.

78 Overview on this in a [joint press release](#) by the the Federal Ministry for Economic Affairs and Energy (BMWi), the Federal Treasury (BMF) and the Bavarian Ministry of Economic Affairs, Regional Development and Energy (BayStMWi) of 29 March 2020. On the modalities see information of the [Federal Government](#).

79 In [Baden-Württemberg](#) up to 50 employees; in [Bavaria](#) up to 250.

80 The maximum amount in [Bavaria](#) is EUR 50,000 (for up to 250 employees), in [North Rhine-Westphalia](#) it is EUR 25,000 (for up to 50 employees) and in [Baden-Württemberg](#) it is EUR 30,000 (for up to 50 employees).

81 Cf. below, fn. 121.

82 See [cornerstones of the Federal Treasury](#) (*Bundesfinanzministerium*); see also *Jahn*, *Corona-Erleichterungen beim Bezug von Kurzarbeitergeld werden verlängert*, NWB 2020, p. 2174.

and those that had already been in difficulties<sup>83</sup> before 31 December 2019. Payments from the first and the second package could be cumulated but had to cover different damages (accrued costs). Applications had to be filed with federal agencies, the *Länder* are still competent for the payment.<sup>84</sup> At the beginning of October 2020, about more than 124,000 applications had been filed with a volume of EUR 1.5 billion; the actual payments of bridging aids amounted to EUR 982 million, and those out of the emergency aid programme to about EUR 13.8 billion.<sup>85</sup>

With the upcoming new wave of the pandemic in autumn 2020, the Federal Government decided to prolong the measures and to introduce follow-up allowances (*Corona-Überbrückungshilfe für kleine und mittelständische Unternehmen* – “bridging aid III and III plus”). They were based on the rules described above; in the case of Bridging Aid III, the group of eligible persons was enlarged and a capital grant was provided. In addition, and as a reaction to lockdown measures, the Federal Government introduced so-called extraordinary economic aids for the months of November and December 2020 (*November- und Dezemberhilfe*) which was intended to provide further support to companies and the self-employed particularly affected by the Corona restrictions. These aids amounted to 75% of average weekly sales in the respective month of the previous year, up to a maximum of EUR 1 million.<sup>86</sup> These aids were not linked to actual operating costs incurred, but to sales losses. Finally, an allowance in order to support the restart of economic activities (*Neustarthilfe* and *Neustarthilfe Plus*) was intended help those self-employed who were not eligible for bridging assistance as they did not have to cover actual costs.

The bridging aids were extended on an ongoing basis, so that at the beginning of 2022, Bridging Aid IV continued to support companies and the self-employed in all sectors with annual sales of up to EUR 750 million in 2020.<sup>87</sup> The above-mentioned programmes have been supplemented by state programmes for cases of specific hardships (*Härtefallprogramme* of the

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83 For the term ‘undertaking in difficulty’ see Art. 2 No. 18 of Commission Regulation (EU) No. 651/2014 of 17 July 2014 ([ABL L 187/1 of 26 June 2014](#)).

84 See [implementation notes](#) as annex to the administrative agreement (*Verwaltungsvereinbarung*) between the Federation and the *Länder*.

85 BMWi (IC3) – BMF (IA5), *Corona-Pandemie Dashboard Wirtschaft Deutschland*, 6 October, 6 p.m., pp. 1, 2.

86 Cf. information of the [Federal Government](#).

87 Cf. joint press release of the Federal Ministry for the Economy and Climate Protection and of the Federal Treasury of [7 January 2022](#). Special conditions will be in place for the pyrotechnic industry as a result of the ban on the sale of New Year’s Eve fireworks.

*Länder*).<sup>88</sup> Until the end of 2021, the aids paid out of the federal budget summed up to an amount of about EUR 55 billion.<sup>89</sup> According to information provided by the Federal Government, the following specific payments have been made (as of 31 December 2021 for Corona Soforthilfe and as of 19 January 2022 for all others)<sup>90</sup>:

Programme	Eligibility period	Volume spent €
<i>Corona-Soforthilfe</i>	2020 March to May	13.43 bn.
<i>Überbrückungshilfe I</i>	2020 June to August	1.24 bn.
<i>Überbrückungshilfe II</i>	2020 September to December	2.41 bn.
<i>Überbrückungshilfe III</i>	2020 November to June 2021	27.23 bn.
<i>Überbrückungshilfe III Plus</i>	2021 July to December	1.73 bn.
<i>Novemberhilfe</i>	2020 November	6.66 bn.
<i>Dezemberhilfe</i>	2020 December	7.17 bn.
<i>Neustarthilfe</i>	2021 January to June	1.60 bn.
<i>Neustarthilfe Plus 3. Quartal</i>	2021 July to September	0.29 bn.
<i>Neustarthilfe Plus 4. Quartal</i>	2021 October to December	0.20 bn.
<i>Härtefallhilfen der Länder</i>	2020 March to March 2022	0.07 bn.

Without going into details, it should be noted that two groups of particularly vulnerable persons do not, or at least only partially, qualify for the above-mentioned programmes and have to rely on specific measures. The first consists of artists and professionals in the cultural sector; they are addressed by support programmes of the *Länder*,<sup>91</sup> although their support remained rather modest,<sup>92</sup> and many practical problems with the implementation of such programmes have been reported. As far as benefits based on federal laws are concerned, they could only claim the above-mentioned *Neustarthilfen* and social assistance (see 4.). At least, Federal Government introduced a special fund for cultural events with a budget of EUR 2.5 billion, covering both support for those events that had to take place with a limited number of spectators and losses for events that had to be cancelled

88 For an overview see: [Härtefallhilfen. Förderprogramm der Länder](#).

89 Communication from the Federal Government of 4 January 2022 on “*Corona-Wirtschaftshilfen der Bundesregierung*”.

90 See answer of State Secretary *Sven Giegold* in a Q&A session of the German Parliament, on the question by MP *Uwe Schulz*, [BT-Drs. 20/534](#), p. 13.

91 Cf. for Bavaria, Guidelines for Granting Financial Aid for Artists Hit by COVID-19 (Richtlinien für die Gewährung von finanziellen Hilfen für die von der Corona-Virus-Pandemie [SARS-CoV-2] betroffenen freischaffenden Künstlerinnen und Künstler – “Künstlerhilfsprogramm”) of 27 May 2020 (BayMBL. 2020 No. 301).

92 E.g. in [Bavaria](#) up to EUR 1,000 per month for up to three months, overall volume EUR 140 million.



altogether.<sup>93</sup> However, a major part of this fund was not utilised.<sup>94</sup> The second group are students who received support from a bridging aid set up by the Federal Ministry for Education and Research<sup>95</sup>; it had a volume of EUR 182 million and consisted of two elements: a non-repayable grant of EUR 100 to EUR 500 per month for June, July, August and September 2020; and a study loan (*KfW-Studienkredit*)<sup>96</sup> covering up to EUR 650 per month which is interest-free, but only until the end of 2021. Up until August 2021, more than 403,000 applications from 108,000 students had been accepted, which amounts to about 3 percent of all students.<sup>97</sup> The bridging aid expired as scheduled on 30 September 2020.<sup>98</sup> The student loan remains interest-free until the end of September 2022.<sup>99</sup>

For larger companies, the Federal Government set up an economic stabilisation fund at the same time as the emergency aid<sup>100</sup>. It is thus building on the measures it took to support financial market companies in the course of the last financial crisis<sup>101</sup>. The new fund is intended to support companies in the real economy, provided they were not in economic difficulties by the end of 2019<sup>102</sup>. It aims to preserve jobs and supplier structures under the assumption that companies “increasingly face liquidity

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93 Cf. No. 3 of the Execution Instructions for the Granting of Aid to Organisers of Cultural Events – “Special Fund of the Federation for Cultural Events” (Ziffer 3 der [Vollzugshinweise für die Gewährung von Hilfen für Veranstalter von Kulturveranstaltungen](#) (“Sonderfonds des Bundes für Kulturveranstaltungen”).

94 See [www.spiegel.de](http://www.spiegel.de) of 12 January 2022, [Coronamilliarden für die Kultur werden bislang kaum genutzt](#).

95 See [additional implementation guidelines](#) (*Zusätzliche Nebenbestimmungen zur Durchführung der Überbrückungshilfe für Studierende in pandemiebedingten Notlagen*) of 20 August 2020.

96 See [information](#) of the *Kreditanstalt für Wiederaufbau* – KfW.

97 See press release of Federal Ministry of Education and Research of 25 August 2021.

98 Ibid.

99 See information of of Federal Ministry of Education and Research of [1 December 2021](#).

100 Law on the establishment of an economic stabilisation fund (Economic Stabilisation Fund Act – *Wirtschaftsstabilisierungsfondsgesetz* – [WStFG](#)) of 27 March 2020 (BGBl. I, p. 543).

101 Through the Financial Market Stabilisation Acceleration Act (*Finanzmarktstabilisierungsbeschleunigungsgesetz* – [FMSStG](#)) of 17 October 2008 (BGBl. I, pp. 1982, 1986).

102 [Sec. 25 Para. 1 Sent. 3 StFG](#). The definition under Union law applies, cf. Guidelines on State Aid for Rescuing and Restructuring Non-Financial Undertakings in Difficulty (*Leitlinien für staatliche Beihilfen zur Rettung und Umstrukturierung nichtfinanzieller Unternehmen in Schwierigkeiten*) of July 2014 ([OJ C 249/1](#)).

shortages through no fault of their own as a result of measures to reduce the speed at which the coronavirus is spreading” and are “exposed to a risk of insolvency that threatens their very existence”<sup>103</sup>. A prerequisite for stabilisation measures<sup>104</sup> is that other financing options are not available and that these “provide clear independent prospects of continuing operations after the pandemic is over”<sup>105</sup>. The federal states have followed this example. With the Law on the Bavaria Fund and the Bavarian Finance Agency (*BayernFonds- und Finanzagentur-Gesetz – BayFoG*)<sup>106</sup>, Bavaria has set up a so-called *BayernFonds* (Bavaria Fund), which serves to “stabilise companies in the real economy in Bavaria by overcoming liquidity bottlenecks and creating the framework conditions for strengthening the capital base of companies” (Art. 2 Para. 1 BayFoG). The state of North Rhine-Westphalia has also provided a special fund<sup>107</sup>.

The two measures highlighted here are supplemented by further loan programmes with an 80 or 90 percent risk assumption by the German Reconstruction Loan Corporation (*Kreditanstalt für Wiederaufbau – KfW*)<sup>108</sup>, various tax breaks<sup>109</sup> and a guarantee programme for farmers<sup>110</sup>. All in all, the Federal Government refers to a “protective shield”<sup>111</sup> or, respectively, a “protective umbrella for the economy with grants, guarantees, tax relief

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103 [BT Dr. 19/18109](#), p. 22. Cf. also Sec. 25 Para. 2 Sent. 1 and 2 StFG, whereby companies “which benefit from stabilisation measures of the Economic Stabilisation Fund ... must guarantee a sound and prudent business policy” and “in particular intend to contribute to stabilising production chains and securing jobs”.

104 These are guarantees of up to EUR 400 billion for debt instruments and justified obligations of companies to remedy liquidity bottlenecks and support refinancing on the capital market ([Sec. 21 Para. 1 StFG](#)) and for the recapitalisation of enterprises ([Sec. 22 Para. 1 StFG](#)).

105 [Sec. 25 Para. 1 Sent. 1 and 2 StFG](#).

106 [GVBl. 2020](#), p. 230.

107 Through Act on the Establishment of a Special Fund for the Financing of all Direct and Indirect Consequences of Coping with the Corona Crisis (NRW Rescue Scheme Act, [GV 2020](#), p. 189).

108 With differentiation according to the company’s amount of years in business, cf. information provided by [KfW](#).

109 Such as adjustments of advance payments, deferrals and tax exemptions of premiums for employees, cf. information provided by [BMF](#).

110 Combined with loans of up to EUR 3 million; cf. information provided by [Rentenbank](#).

111 Joint [press release](#) of BMWi and BMF of 13 March 2020.

and unlimited liquidity assistance”, which it has put up to help those who “are facing economic difficulties”<sup>112</sup>.

Outside this protective umbrella and in addition to the improvements to the granting of the short-time work benefit discussed above – which also include the assumption of social security contributions by the Federal Employment Agency (above, 2.a)) – the umbrella organisation *Spitzenverband Bund der gesetzlichen Krankenkassen* (GKV-Spitzenverband – Federal Association of Health Insurance Funds) has granted the possibility of deferring the payment of social security contributions already owed under simplified conditions. However, this is subject to the proviso that other support measures are not sufficient and that without the deferral, the collection of contributions “would be associated with considerable hardship for the employer”<sup>113</sup>.

#### b) Legal Character

Neither the above-mentioned grants from the emergency aid programmes of the Federal Government and the *Länder* nor the stabilisation measures of the Economic Stabilisation Fund differ according to the direct cause of the economic difficulties associated with the pandemic. They accompanied the measures to combat the epidemic. In mid-March 2020, the Federal Government and the *Länder* had already agreed on joint guidelines according to which many facilities (bars, discotheques, theatres, trade fairs, public sports facilities, etc.) were to be closed to the public; following an extension decided on 22 March, this was also to apply to catering and personal hygiene service companies<sup>114</sup>. The restrictions were put into legally binding form vis-à-vis those affected by the *Länder*, for example in Bavaria first by a general ruling<sup>115</sup> and then by a regulation<sup>116</sup>. These

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112 With a general overview provided in the [information for companies and self-employed persons](#) published on the homepage. Cf. also charts provided by BMF.

113 Newsletter ([Rundschreiben 2020/197](#)) of GKV-Spitzenverband of 24 March 2020, p. 3.

114 Cf. information provided by the [Federal Government](#).

115 [General ruling \(Allgemeinverfügung\)](#) of BayStMGP of 16 March 2020, Az. 51-G8000-2020/122-67, amended by [official statement](#) of 17 March 2020, Az. Z6a-G8000-2020/122-83, concerning the prohibition of public events and operating bans due to the corona pandemic; on their lifting see [official statement](#) of 3 April 2020 (BayMBl. No. 174).

116 Operating bans in line with Sec. 2 of the Bavarian Infection Prevention Measures Regulation (*Bayerische Infektionsschutzmaßnahmenverordnung* – [BayIfSMV](#)) of 27

acts had their legal basis in Sec. 32 IfSG<sup>117</sup> – which was in principle (still) accepted in the first time<sup>118</sup> although this statutory provision conferring powers to the executive was quite general and rather vaguely formulated which raised some concern with regard to the rule of law and the necessary democratic legitimisation. The legislator therefore amended the existing law by introducing a new legal basis for statutory instruments with Sec. 28a IfSG.<sup>119</sup> The Federal *Länder* Conference agreed in November 2020 on a so-called “lockdown light” to counter the ever-increasing infection figures in the fall of 2020 and to allow Christmas to be celebrated under “normal conditions”. When the accompanying contact restrictions failed to achieve the desired success, the states, by mutual agreement, moved to a hard, second lockdown shortly before Christmas 2020, which lasted until May 2021. With the start of the vaccination campaign, protective measures started to change their nature and were, first of all, intended to restrict access to shops, restaurants and other public places, requiring proof of vaccination, recovery or negative testing in order to obtain permission to enter (2G, 3G, 3Gplus). Since the spreading of the Omicron variant, the infection rate has been increasing at the beginning of 2022 whilst the number of those in need of intensive care beds stayed relatively low. As a result, the Federal Government decided to reform the Federal Infection

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March 2020 (BayMBL. No. 158) and in line with Sec. 2 of [2nd BayIfSMV](#) of 16 April 2020 (BayMBL. No. 205). Cf. now also Sec. 4 of [3rd BayIfSMV](#) of 1 May 2020 (BayMBL. No. 239). The (for the present) latest one is the [16th Regulation](#) of 1 April 2022 (BayMBL. No. 210).

- 117 Which was “adjusted” via the law of 27 March 2020 (fn. 4), and came into force on 28 March 2020, if only for reasons of “clarity of legal rules”, cf. BT Dr. 19/18111, p. 25.
- 118 Cf. for more details on this, the amendments and the forms of action *Rixen*, Gesundheitsschutz in der Coronavirus-Krise – (Neu-)Regelungen des Infektionsschutzgesetzes, NJW 2020, p. 1097, 1098 et seq. However, the Bavarian Administrative Court of Justice (BayVGH) had already pointed out quite early that it appeared “doubtful whether the reservation of the law as an essential principle of a parliamentary form of government can be maintained without the enactment of a law on measures by the parliamentary federal legislature as a legal basis for measures with medium and long-term effects”, Decision of [27 April 2020](#), [20 NE 20.793](#), recital 45. See for the landmark decision of the Federal Constitutional Court in this context fn. 11.
- 119 Introduced by the Third Law on the Protection of the Population in the Event of an Epidemic Situation of National Concern ([Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite](#)) of 18 November 2020 (BGBl. I, p. 2397).

Protection Act once more<sup>120</sup>, to end the restriction measures to a large extent and to place the competence to decide on new measures in the hands of the state parliaments under narrow conditions (Sec. 28a Para. 8 IfSG new).

However, the payment of the afore-mentioned benefits in the framework of emergency and bridging programmes was not directly linked to such restrictions and lockdown measures. To receive them, it was sufficient to evidence a threat to the economic existence due to “liquidity bottlenecks as a result of the corona crisis”<sup>121</sup>. It was not necessary to establish, and to prove, a causal link between a specific act of any *Länder* authority restricting personal and economic freedoms on the one hand, and a loss of income or any other damage on the other. This broad definition of the qualification conditions for benefits was, and still is, certainly due to the fact that in an exceptional situation like the outbreak of an epidemic, financial support has to be provided to a broad group of people as quickly and as unbureaucratically as possible.

It might also be an expression of the assumption that this form of financial support is not about the fulfilment of a legal obligation. Payments in the context of the mentioned emergency and bridging programmes are described as voluntary and as being “equitable benefit”<sup>122</sup>. This category of benefits has its legal roots in budgetary law, as a provision of the German Federal Budget Law (*Bundeshaushaltsordnung*) states that benefits for rea-

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120 Act of 18 March 2022 (Federal Law Gazette = *Bundesgesetzblatt* – BGBl. I, p. 466).

121 Cf. No. 1 of the [guidelines](#) for the granting of bridging aid by the Federal Government for companies and solo self-employed persons in Bavaria who have incurred losses due to the corona virus pandemic (SARS-CoV-2), official statement of 3 April 2020 (BayMBL. No. 175); according to No. 2.2, an applicant must “affirm that he has got into economic difficulties as a result of the corona pandemic which threaten his existence as the continuous income from business operations is expected to be insufficient to pay the liabilities in the three months following the application from the continuous commercial material and financial expenses (e.g. commercial rents, leases, leasing instalments) (liquidity bottleneck)”. More generally, the [key points of the BMWi and the BMF](#) state that federal subsidies should be used “to secure the economic existence of the applicants and to bridge acute liquidity bottlenecks such as, among other things, ongoing operating costs such as rents, loans for business premises, leasing instalments, etc. (also complementary to the *Länder* programmes)”.

122 Cf. e.g. I.1 of the relevant guideline in Schleswig-Holstein (Richtlinie zur Gewährung von Überbrückungshilfen als Billigkeitsleistung für von der Corona-Krise 03/2020 in ihrer Existenz besonders geschädigte kleine Unternehmen, Angehörige der Freien Berufe und Soloselbstständige mit finanzieller Unterstützung des Bundes, ABl. SH 2020, p. 812): “in Form einer Billigkeitsleistung”.

sons of equity may only be granted if special funds are made available for this purpose.<sup>123</sup> In this sense, payments out of the COVID-19 programmes are not intended to suggest state liability. At the same time, there have always been specific legal provisions for ‘social compensation’ in the context of epidemic crises, namely in Art. 56 IfSG,<sup>124</sup> which promises “compensation in money” to a person who, on the basis of this law, “is subject to prohibition in the exercise of his or her previous occupation and thereby suffers a loss of earnings”<sup>125</sup>. Sec. 56 IfSG is only applicable to administrative measures based on specific other provisions of the statute, and not to general security measures such as the above-mentioned lock-down orders and operating bans.<sup>126</sup> In the meantime, this result was confirmed by the German Federal Court of Justice in its ruling of 17 March 2022.<sup>127</sup>

The origins of the corona programmes and of the compensation under Sec. 56 IfSG are otherwise the same: the compensation provision was also designed as an “equity regulation”<sup>128</sup>, which was intended to replace certain claims founded on state liability (general and unwritten *Aufopferungsanspruch*).<sup>129</sup> And it is remarkable that the origins of this provision date back to the second last turn of the century and the time when the Law on Combating Dangerous Diseases (*Reichsgesetz betreffend die Bekämpfung gemeingefährlicher Krankheiten*, in short: *Reichsseuchengesetz*) of 30 June

123 [Sec. 53 Bundeshaushaltsordnung](#) (Federal Budget Code).

124 The rule was first established with the *Reichsseuchengesetz* of 1900 (Sec. 28) and was taken over into the *Bundesseuchengesetz* of 1961 (Sec. 49), the predecessor of the IfSG; see for the history and the contents *Becker*, Öffentliches Entschädigungsrecht, in: Huster/Kingreen (eds.), *Handbuch des Infektionsschutzrechts*, 2<sup>nd</sup> ed. 2022, Sec. 9 Para. 45 et seq., 109 et seq. with further references. Clearly not relevant here is the compensation regulation in Sec. 65 IfSG concerning the destruction of contaminated objects; for more detail see *Cornils*, Corona, entschädigungsrechtlich betrachtet, [On Matters Constitutional \(Verfassungsblog\)](#) of 13 March 2020.

125 The exact amount is regulated in [Sec. 56 Paras. 2-4 IfSG](#).

126 Different and for direct applicability some voices raised in the early literature in 2020; see now comprehensively with complete references *Becker*, in: Huster/Kingreen, *HfSR* (fn. 124), Sec. 9 Para. 109 et seq.

127 *Bundesgerichtshof* (BGH), [III ZR 79/21](#).

128 Explicitly [BT Dr. III/1888](#), p. 27, with reference to the fact that the purpose of the provision is “not to compensate fully for the damage, but to provide a certain degree of protection from material hardship to those affected by a prohibition of occupation”.

129 [BT Dr. 14/2530](#), p. 88 on the revised version as amended by IfSG.

1900<sup>130</sup> had been discussed.<sup>131</sup> Already then, a special commission set up by the Parliament in order to take care of the matter argued in favour of the predecessor provision of Sec. 56 IfSG (Sec. 28 RSeuchG) that, even if it was not possible to provide comprehensive compensation, it nonetheless did not consider it appropriate to waive compensation altogether, stating that “it would be just and equitable to award compensation to such persons as are prevented by direct police interference with their personal freedom of movement and the power to dispose of their labour from performing their regular day’s work and earning the wages they would have been certain to earn if they had been free to move about unimpeded”.<sup>132</sup>

#### 4. Social Protection

To accompany the economic and social policy measures summarised above, and to improve the situation of people who nevertheless lose their job or employment, access to various social benefits is being simplified or temporarily extended. The first group includes changes brought about by the First Social Protection Package<sup>133</sup> to child benefits<sup>134</sup>, and the second group includes the prolongation of the receipt of unemployment benefits<sup>135</sup> as provided for in the Social Protection Package II<sup>136</sup>. This is intended to prevent the unemployed from “being directly referred to the basic security for job-seekers [...] at a time when the possibilities and

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130 RGBl. 1900, p. 306.

131 See for the procedure Hess Seuchengesetzgebung, 2009, pp. 292 et seq.

132 Minutes of the *Reichstag* (RT Prot.) B. 170, 1898/1900, 179th Meeting on 24 April 1900, p. 5085: “[es] entspreche der Gerechtigkeit und Billigkeit, wenn solchen Personen eine Entschädigung zugesprochen werde, die durch direkte polizeiliche Eingriffe in ihre persönliche Verkehrsfreiheit und in die Verfügungsgewalt über ihre Arbeitskräfte daran gehindert würden, ihrer regelmäßigen Tagesarbeit nachzugehen und den im Falle unbehinderter Verkehrsfreiheit ihnen sicher in Aussicht stehenden Lohn zu verdienen”.

133 Gesetz für den erleichterten Zugang zu sozialer Sicherung und zum Einsatz und zur Absicherung sozialer Dienstleister aufgrund des Coronavirus SARS-CoV-2 (Sozialschutz-Paket) of 27 March 2020 (BGBl. I, p. 575).

134 By linking it to the previous month’s income and expanding the range of authorisations, Sec. 20 Law on Child Benefit (*Bundeskindergeldgesetz* – BKGG) as amended by Art. 6 of the Social Protection Package I.

135 By three months via a new Sec. 421d SGB III.

136 See fn. 44.



opportunities for finding and taking up new employment are seriously restricted”<sup>137</sup>.

Already with the Social Protection Package I, access to this scheme of social assistance (basic security or basic provision for job-seekers as regulated in Social Code Book II) has been facilitated in a particularly comprehensive and early manner<sup>138</sup>. In addition to a series of procedural simplifications, the assessment of whether a rent is appropriate has been suspended<sup>139</sup> for an initial period of six months<sup>140</sup>. Assets are not taken into consideration if the applicant declares that s/he does not have substantial assets<sup>141</sup>. What is to be regarded as “substantial” remained completely open both in the legislative procedure<sup>142</sup> and in initial reports<sup>143</sup>. The legislator’s main aim was to provide for benefits as quickly and unbureaucratically as possible so that “no one has to face existential hardship due to the economic effects of this crisis”<sup>144</sup>. The Federal Employment Agency decided to apply the new provision in accordance with the guidelines on housing benefit<sup>145</sup>. The reason for this is that the term “substantial” is also

137 BT Dr. 19/18966, p. 27.

138 Via Art. 1 and 5 of the [Social Protection Package I](#). See for more details *Amborst*, Die leistungsrechtlichen Regelungen der Coronagesetze im SGB II und ihre Auswirkungen, Informationen zum Arbeitslosenrecht und Sozialhilferecht (info also) 2021, pp. 195 et seq.; *Ekardt/Rath*, Anpassungen im SGB II, V und XII in der Corona-Krise: Rechtsfragen und Wirksamkeit, Neue Zeitschrift für Sozialrecht (NZS) 2021, pp. 417 et seq.

139 [Sec. 67 Para. 3 SGB II](#), [Sec. 141 Para. 3 SGB XII](#).

140 If the approval period starts between 1 March and 30 June 2020. The period can be extended until 31 December 2020 by decree, [Sec. 67 Para. 6 SGB II](#) and [Sec. 141 Para. 6 SGB XII](#). On the problem of compatibility with the principle of taking an approval decision for a scope of 12 ([Sec. 41 Para. 3 Sent. 1 SGB II](#)) *Burkiczak*, “Hartz IV“ in Zeiten von Corona, NJW 2020, pp. 1180, 1181.

141 [Sec. 67 Para. 2 SGB II](#), [Sec. 141 Para. 2 SGB XII](#).

142 BT Dr. 19/18107, p. 25.

143 Without attempting to define the term, but pointing out that it cannot be a question of substantiality for the existence of a benefit entitlement, *Burkiczak*, NJW 2020 (fn. 140), pp. 1180, 1181; with reference to the fact that the administrative bodies must “find directing guidelines”, *Bittner*, Befristete Regelungen für den erleichterten Zugang zu Leistungen der Gewährung des Existenzminimums [...], NZS 2020, pp. 332, 333. See now *Meßling*, in: Schlegel/Meßling/Bockholdt, COVID-19, Corona Gesetzgebung Gesundheit und Soziales, 2020, Sec. 2 Para. 15 et seq.

144 BT Dr. 19/18107, p. 24.

145 Federal Employment Agency, directives on the law for easier access to social security and on the use and protection of social service providers due to the coronavirus SARS-CoV-2 (Social Protection Package) and supplementing regulations

used in the Law on Housing Benefit (*Wohngeldgesetz* – WoGG), even if there the claiming of housing benefit in the case of one’s own “substantial assets” is classified as “abusive”<sup>146</sup>. Nevertheless, the ‘borrowing’ from the Law on Housing Benefits is understandable if one follows the case law of the Federal Administrative Court (*Bundesverwaltungsgericht* – BVerwG) in whose view the question of whether a person can rely on substantial assets has to be answered solely on the facts and not on any personal fault.<sup>147</sup> However, it enhances at the same time the ambiguities in the relationship between housing benefit and social assistance in the form of basic security for job-seekers.<sup>148</sup> In any case, the changes introduced by the Social Protection Package mean that social assistance is paid for six to nine months without a means test, with a retroactive review being provided for under certain conditions only.<sup>149</sup> Although one reason named for this is the administrative burden associated with such a test, as has repeatedly been pointed out, the regulations go beyond mere administrative simplification. They are, in fact, introducing a new temporary unconditional minimum income benefit. In this respect, social assistance changes its nature and becomes a social compensation benefit. It fits into this context that payments from the emerging and bridging programmes mentioned (above, 3.a)) are not considered a functionally equivalent benefit and are, therefore, in principle not considered as income when applying for social assistance.<sup>150</sup> And it is quite remarkable that the Federal Minister of Social Affairs based his planning to extend the granting of an unconditional

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(*Weisungen zum Gesetz für den erleichterten Zugang zu sozialer Sicherung und zum Einsatz und zur Absicherung sozialer Dienstleister aufgrund des Coronavirus SARS-CoV-2 [Sozialschutz-Paket] sowie ergänzende Regelungen*), as per 22 April 2020, 1.2 Para. 4 and 5. Reference is made to 21.37 of the administrative regulation of housing benefit (*WoGVwV*) of 28 June 2017 (BAnz AT 10.07.2017 B5).

146 *Sec. 21 No. 3* housing benefit law (WoGG).

147 It should rather be based on actual circumstances, BVerwG of 18 April 2013, 5 C 21/12, according to which it is the lack of need for support that counts (recital 13) and approximate values are not to be understood as fixed limits (recital 14); on the last point see also BeckOK *SozR/Winkler*, WoGG (as per 1 March 2020), Sec. 21 recital 9. For a different interpretation and on the requirement of a “subjective element” see *Zimmermann*, WoGG, 2014, Sec. 21 recital 5.

148 Which are by no means clarified by the exclusion in *Sec. 7 WoGG*; cf. on this *J. Becker*, in: *Ruland/Becker/Axer* (eds.), *Sozialrechtshandbuch*, 6<sup>th</sup> ed. 2018, Sec. 29 recital 13 et seq.

149 Directive of the Federal Employment Agency (BA) (fn. 144), 1.2 Para. 10 with reference to *Sec. 45, 48 SGB X*.

150 Directive of the Federal Employment Agency (BA) (fn. 144), 2.4 with further references.

minimum protection benefit until the end of 2021 on the argument that he does not want “to bother” those concerned with “a means test or with the question whether their dwelling is possibly too large”<sup>151</sup>. Yet, it is remarkable that at least until spring 2021, the number of benefit recipients did not rise as feared, and in any case did not reach the predicted level, in particular also with regard to the self-employed.<sup>152</sup>

The last extension via Social Protection Package III came into force on 1 April 2021.<sup>153</sup> Simplified access to the social assistance schemes was thus extended until 31 December 2021. At the same time, beneficiaries of these schemes received a one-time payment of EUR 150 per person for the first half of 2021, accompanied by a ‘child bonus’ in the same amount on the basis of the Third Corona Tax Assistance Act.<sup>154</sup> The Act Amending the Infection Protection Act and Other Acts on the Occasion of the Repeal of the Determination of the ‘Epidemic Situation of National Significance’ of 22 November 2021<sup>155</sup>, extended the aforementioned period to 31 March 2022, and by decree of the Federal Government (see Section 67 (5) of the Second Book of the Social Code) to 31 December 2022.

## 5. Outlook

a) When the pandemic hit Germany, a favourable budgetary situation allowed for rapid and, compared with other countries, relatively generous support measures to be taken to secure jobs and businesses. The measures which are based on three pillars, are marked by the emergence of a “community responsibility”: the payment of emerging and bridging aids, the increase in short-time work benefits and the waiver of means-testing for the granting of social assistance serve to compensate for damages.

This approach is probably based on the assumption that such compensation might successfully balance out losses at least for a foreseeable and rather short period of time. It leads to a dominance of social policy objectives over other economic policy objectives which is certainly related

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151 Minister Heil as cited by the ZDF on 30 October 2020: “Wir wollen diese Menschen nicht ab 1. Januar mit einer Vermögensprüfung behelligen oder mit der Frage, ob ihr Wohnraum womöglich zu groß ist.”

152 See *Voelzke/König*, Sozialstaat und Pandemie – ein Überblick, Sozialgerichtsbarkeit (SGb) 2022, pp. 69, 73 et seq.

153 BGBl. I 2021, p. 335.

154 BGBl. I 2021, p. 330.

155 BGBl. I 2021, p. 4906.

to the fact that the direct trigger of the recession is the fight against a disease. In a society based on freedoms and a market economy, everyone has a responsibility for the result of her and his actions. Everyone has to take precautions, and companies also have a responsibility for sound economic management. However, the consequences of a pandemic can hardly be attributed to individual fault. Therefore, it is an obvious solution that the welfare state evokes its own responsibilities. And there is another argument for a quick and strong reaction of governments: It is generally difficult to pursue economic structural policies in times of crisis. Before all other things, what is broken must be mended, and only then can the cleaning-up resume – which will have to take into account other pressing issues and ongoing developments, in particular digitalisation, climate change and now also the consequences of the war of aggression in the Ukraine. This means at the same time that general lessons cannot be learned before experience has been gained. However, debates of this kind will soon follow in connection with economic policy programmes,<sup>156</sup> as the disputes over subsidies for the car and aviation industries indicate. And there are two points that merit to be highlighted as preliminary conclusions. One concerns the crisis-driven social policy measures as such, the other the overall social protection architecture on which the crisis with all its hardships sheds a spot light.

b) Besides its undeniable strengths, the establishment of a special “crisis compensation law” following the tradition of other ad hoc aid such as support for flood victims<sup>157</sup> also has its shortcomings. It is rooted in a lack of consideration for the fundamental questions involved as well as a lack of putting the new benefits into a systematic order. Against the often repeated hints to equity, the granting of compensation benefits is an obligation of a welfare state – even if this obligation does not follow from the rules of state liability but from the social state principle as such,<sup>158</sup> and even if there are no corresponding subjective rights of persons hit by the crisis.<sup>159</sup> It is not by chance that the extraordinary economic aid currently being provided can be regarded as recognising this obligation for

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156 See for the recovery package with different measures and an overall volume of EUR 130 billion information of the [Federal Government](#).

157 Cf. Becker, [Soziales Entschädigungsrecht](#), 2018, p. 133 et seq.

158 See Becker, in: Huster/Kingreen, HfSR (fn. 124), Para. 130 et seq.

159 See to the false consideration that the assumption of responsibility based on the welfare state is in contrast to the requirements of the rule of law when implementing such compensation Becker, [Soziales Entschädigungsrecht](#), 2018, p. 90 et seq.

a first time. In relation to the contents, there is a lack of proven standards and models: it remains an open question which level of compensation for damages is both affordable and appropriate. Their overall volume reflects the expectation of a not too distant economic recovery. Yet, while more people are affected than in the case of a natural disaster, and certainly in a very existential way, many others are not, or hardly at all, at least not directly. As a consequence, it is difficult to find a quick and effective solution that comes without too much bureaucracy when it has, at the same time, to take equality issues into account. With a view to the systemic aspects, the relationship between “corona compensation benefits” and other social protection benefits remains unclear. This holds particularly true with regard to the compensation provisions of the Federal Infection Protection Act (*Infektionsschutzgesetz* – IfSG). Even more problematic is that the differences between specific types of benefit systems are being blurred. Social assistance is largely decoupled from its characteristic condition of means testing – and yet the government does not consider it appropriate for short-term workers to have to (additionally) claim it.<sup>160</sup> This means that, as a result, a non-conditional cash benefit has been introduced in practice which comes very close to the concept of a “citizens’ income” – without any discussions on the fundamental differences in the conceptual bases of social assistance on the one hand and unconditional income on the other, and also without reflecting on what social protection individuals actually should enjoy, or to put it differently, how the social risk of poverty should be divided between the individual and the community.

c) Corona compensation benefits keep being linked to special causes of damage. This might explain why governments hazard the afore-mentioned difficulties: Measures leading to legal uncertainty and a certain disorder may be accepted as far as they are expected to be overcome within a short period of time. Still, the question remains at what time, and how quickly, the responsibilities should be shifted back in order to be able to return to a well-balanced societal and economic life. For how long should social assistance be uncoupled from means-testing, or when should we return to the principle of self-responsibility? For how long and to what extent should short-time work benefit be granted, or when should we return to a market economy allowing for structural changes?

Fading out crisis measures is a task on its own in order to overcome the crisis. Learning from the crisis is another. The German social state has, generally speaking, proven strong and stable. Nevertheless, the pandemic

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160 On the background see above, I.2.

also unveils shortcomings of, and gaps in, the existing German social protection systems. Access to social protection for the self-employed has to be improved. What also becomes visible, is the necessity to put much more effort than before into the support of children and of families. To open up equal opportunities, particularly as participation in education is concerned, becomes more important than ever.