

Out of the attic

Germany's crisis resilience put to test: emergency laws

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In view of the increasingly acute threat situation, driven in particular by growing doubts about the US' loyalty to NATO and the resulting restriction of the conventional and nuclear deterrence, the question arises: How well prepared is Germany for a further escalation of conflicts, especially that with Russia? Should asymmetric warfare – including against Germany – have even more far-reaching consequences, what legal instruments are available to the state in order to remain capable of acting in an external or internal emergency (*innerer oder äußerer Notstand*)? This briefing sheds light on the security and precautionary laws (*Sicherstellungs- und Vorsorgegesetze*), which have been rather neglected to date, and which (should) provide the necessary instruments for such situations.

Overview: Emergency laws

Security and precautionary laws are also known as emergency laws (*Notstandsgesetze*), as their application is – in general – excluded and subject to the determination of certain crisis situations.

Although the majority of federal security laws were passed in the 1950s and 1960s in the context of the post-war period, their purpose could not be more topical against the backdrop of the geopolitical "*Zeitenwende*": security laws primarily serve defence and the protection of the civilian population – thus, to increase Germany's resilience. They authorise state intervention in a large number of economic sectors, such as recourse to businesses in the commercial sector to cover the needs of the civilian population and the armed forces (*Wirtschaftssicherstellungsgesetz*) or the obligation to provide essential air traffic services (*Verordnung zur Sicherstellung des Luftverkehrs*).

The threshold for activating the security laws is high. Their "unblocking" requires the prior declaration of an external emergency: a state of tension (*Spannungsfall*, Art. 80a para. 1 s. 1 alt. 1 German Basic Law, *Grundgesetz (GG)*), a case of specific approval (*Zustimmungsfall*, Art. 80a para. 1 s. 1 alt. 2 GG), a case of alliance (*Bündnisfall*, Art. 80 para. 3 GG) or a state of defence (*Verteidigungsfall*, Art. 115a para. 1 GG).

In addition to the cases mentioned above, precautionary laws can also be applied in the event of an internal emergency, i.e. in the event of particular dangers of a federal state or social nature. These include, for example, natural disasters, a serious accident (including a terrorist attack) or a threat to the existence of the democratic order of Germany or one of its federal states. The catalogue of precautionary laws is very limited, not least

because disaster prevention is primarily the responsibility of the federal states. The federal government only has legislative powers in the areas of energy, food security, transport services, postal services and communications. Accordingly, the federal government has made its federal regulations on emergency preparedness in the *Energiesicherungsgesetz*, *Ernährungssicherstellungs- und vorsorgegesetz*, - and the *Postgesetz*.

Turning old into new

In recent years, the Federal Ministry of the Interior and Community (*Bundesministerium des Innern und für Heimat*, **BMI**) has initiated a cross-departmental revision process. The aim of this process is to comprehensively revise, modernise, improve and standardise the security and prevention laws. Although some changes and adjustments have already been made in this context and the process is not yet complete, a look at the security laws shows that there is still a need for reform - in some cases a considerable one. Two examples of this are given here:

There is a lack of clear material requirements for the declaration of the respective external states of emergency. Article 80a GG only regulates the formal requirements, for example the declaration of a state of tension by a two-thirds majority in the German government (*Bundestag*). However, the substantive requirements for the various states of emergency are not defined either in the Basic Law or in other (legal) provisions. The purpose of this opaque regulation is to grant the executive as flexible an instrument as possible. The downside of this high degree of flexibility is the considerable legal uncertainty. As the threshold for declaring a state of emergency is unclear, it is unpredictable for companies when it will be declared (and can be declared), particularly in the case of slowly escalating threats. For the private sector, this has a considerable - sometimes security-critical - impact on development, production and sales, as the security laws not only authorise the demand for certain goods and services, but also, for example, the termination of employment relationships for the purpose of securing work in the armed forces or civil defence. In many companies, a suddenly declared state of emergency and the resulting significant increase in demand from the public sector will therefore inevitably have an impact on regular operations, internal processes, the allocation of labour and the procurement of resources. This can lead to - avoidable - delays that make rapid procurement more difficult. Furthermore, under the current legal situation, the various executive bodies themselves can hardly prepare themselves to utilise the security laws efficiently. This problem did not arise during the Cold War because detailed plans were in the drawers of the relevant authorities at the time. This is no longer the case.

Even more serious, however, is the fact that the security laws do not reflect the realities of the 21st century, in particular access to artificial intelligence (AI), data, software or unmanned aerial vehicles. The *Bundesleistungsgesetz* (**BLG**), for example, is a security law that authorises the demand for services, such as the transfer of goods or services.

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The BLG only refers to things (*bewegliche Sachen*) without defining it. In any case, taking into account the provisions of the German Civil Code (*BGB*), corporeal objects are things as defined by law, i.e. not digital goods or data. Accordingly, it would not be possible to request data or AI for the purposes of civil defence. In the case of software, a distinction would have to be made as to whether it is embodied (CD-ROM, USB stick) or not (cloud solution). This would not only lead to legal uncertainty for users and those affected but would also significantly weaken Germany's (civilian) defence capability.

Outlook

It is evident that the reform of security and precautionary laws must be expedited under the new federal government. This applies not only to maximise the benefits of the regulations for civil defence, but also to ensure legal certainty for those affected.

BLOMSTEIN provides comprehensive advice on defence and security issues. We follow current national and international developments and support you with questions about the impact on your company. Contact Christopher Wolters and Hanna Kurtz at any time.
