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Statement

for discussion regarding a

5th Contergan Foundation Amendment Act

OUTLINE

Dear Sir/Madam,

We comment below on the discussion regarding a 5th Contergan Foundation Amendment Act:

A. Summary of our suggestions

We are making the following proposals, which we will then explain in further detail below, for a 5th Contergan Foundation Amendment Act:

1.) On the one hand, dissolution of the entire foundation capital
   - according to § 4 Para. 1 number 4 ContStifG (contribution from Grünenthal),
   - of the remaining foundation capital according to Section 3 ContStifG (approx. € 6.5 million)

   and the corresponding distribution to the beneficiaries of the foundation in March 2022;

2.) Grandfathering for the damage points of thalidomide victims;

3.) Repeal of § 15 para. 2 ContStifG.

B. Introduction

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We are happy and grateful that politicians are clearly doing everything in their power to take legal measures during this legislative period to further improve the situation of thalidomide-affected people.

We see it as a priority that what is possible is decided and legally standardised during this legislative period.

If the dissolution of the foundation's assets and the corresponding payment to the affected persons represent a particularly important form of support, especially in this time when the injured persons are preparing for retirement, and if, furthermore, a grandfathering provision for the damage points from thalidomide would meet the important need of the affected persons for security, then it is absolutely necessary to prevent these corresponding legislative projects from falling into discontinuity. We are dealing here with important concerns of those affected by thalidomide. And the state has a special responsibility for caring for the victims.

This responsibility must also be emphasised with regard to the Foundation's foreign beneficiaries, especially since this group of people had to waive claims against Grünenthal as the damaging party, as required by the Contergan Foundation Act.

In the following, we comment on the individual regulatory complexes discussed, first referring to the dissolution of foundation assets (letter "C"), then to the grandfathering of damage points (letter "D"), then to the credits pursuant to § 15 para. 2 ContStifG (letter "E") before concluding:

C. Dissolution of foundation assets

We warmly welcome the proposal of the Board of Directors of the Contergan Foundation to pay out the foundation's assets to thalidomide victims. With regard to the foundation capital originating from Grünenthal, pursuant to § 4, para. 1 number 4 ContStifG, we see a uniform agreement among the Contergan victims in favour of a payout to the victims. With regard to the Foundation's capital stock from Section 3 of the Contergan Foundation Act (around

€6.5 million), which exceeds this amount, some argue that such a payout should not impair the Foundation's ability to work. However, this fails to recognise that, in the current legal situation, these amounts are never available for disposal within the foundation. The amounts are available, but cannot and must not be spent. In order to change this state of "dead" capital in excess of the amounts stated in § 4 para. 1 no. 4 ContStifG, a legal amendment is therefore imperative. On this side, however, it is not clear how it could make sense to create further expenditure profiles for the foundation through new legal norms regarding amounts that could be very helpful to the affected persons themselves, especially at the moment.

For these reasons we clearly advocate a complete dissolution of the capital stock with the legal instruction to pay out to the thalidomide victims.

In the course of this, we ask you to arrange for the payment amounts to fall due in March 2022, as the Foundation's last payment will be due on 8.3.2022.

D. Grandfathering for Damage Points

Grandfathering for the damage points from thalidomide damage would relieve many thalidomide victims of the fear of losing recognition of damage which they have already obtained. In revision proceedings initiated by injured parties to review their recognised extent of damage by the foundation (e.g. after affected parties have learned of further damage due to hospitalisation), it was and still is common practice that not only the newly reported damage is assessed. Rather, in these procedures, a check of the already recognised damage for the cause to be recognised, and the corresponding allocation of damage points is also carried out automatically. In this case, individual damage is often completely denied or the number of damage points is reduced.[1]

[1]See judgment of the Cologne Administrative Court of May 28, 2019 - 7 K 2132/17: https://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2019/7_K_2132_17_Urteil_20190528.html

However, that the thalidomide pensions cannot be reduced in their amount due to grandfathering, even if damage points are deducted and as a result the total number of damage points no longer corresponds to the pension amount. This questionable situation follows from the legal construction of the administrative situation whereby in the Contergan Foundation only the executive board, which issues a benefit decision, acts as an authority by determining the amount of the pension category, with the consequence that grandfathering can occur. According to this administrative jurisdiction, the damage points, on the other hand, are not determined by the board itself, but are merely auxiliary instruments provided by the medical commission, which thus do not become part of the sovereign decision and therefore do not enjoy any protection.[2]

These legal confusions are not clear to many injured parties, which often means that damage claims due are not asserted - for fear of losing the pension in whole or in part after decades of undersupply.

In this respect, there is also an urgent need for legislative action.

E. Regarding making calculations according to § 15 para. 2 Contergan Foundation Act

I. Introduction

By the decision of the Federal Administrative Court of March 31.3.2021, with which the unconstitutionality of the charging regulations of § 15 para. 2 ContStifG is pronounced, however, there is also a massive, immediate need for action:

on the one hand, the need of those affected for urgent legal security is clear here. Since, in the opinion of the Federal Administrative Court, as explained below, European law is also involved, it is foreseeable that, should the Federal Constitutional Court

[2]See judgment of the Cologne Administrative Court of May 28, 2019 - 7 K 2132/17 : https://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2019/7_K_2132_17_Urteil_20190528.html - RN 101.

not share the opinion of the Federal Administrative Court, the question of the validity of credits may be taken all the way to the European courts and thus take further years until final clarification. This would be unbearable for everyone involved.

Due to the clear decision of the Federal Administrative Court that charging according to § 15 para. 2 ContStifG is unconstitutional, there is also an uncomfortable legal uncertainty facing the foundation.

In addition, it would be detrimental to the reputation of the Federal Republic of Germany if the Federal Constitutional Court found an unconstitutionality in the case of "Contergan", in particular, involving discrimination against foreign victims. The longer the proceedings and interim decisions become, the worse this circumstance would be.

For all of this, it is urgently recommended to install a legislative solution in advance of a decision by the Federal Constitutional Court, which can offer a definitive resolution to the legal problems raised.

II. The legal situation

1.) Effects of the decision of the Federal Administrative Court of 31.3. 2021

With its decision of 31.3.2021 regarding foreign beneficiaries of the Contergan Foundation, the Federal Administrative Court declared the charging regulation pursuant to § 15 para. 2 ContStifG as clearly unconstitutional and, according to Art. 100 para. 1 GG, § 13 No. 11 BVerfGG, applied to the Federal Constitutional Court for a corresponding ruling.[3]

What is particularly noteworthy in the decision is that the Federal Administrative Court no longer raises the question of whether the legal norm is unconstitutional or not, but clearly states that it is unconstitutional and passes the case on to the Federal Constitutional Court with this certain conviction, so that it can initiate the corresponding ruling

[3] https://www.bverwg.de/pm/2021/22 .

against the federal law. The Federal Administrative Court thus assumes that the Federal Constitutional Court will declare § 15 para. 2 ContStifG, according to § 95 para. 3 sentence 1 BVerfGG, to be null and void.

In the event of this provision's invalidity, the affected administrative acts would be unlawful from the start due to the lack of a legal basis and could be withdrawn under the conditions of § 48 VwVfG - within the framework of discretion[4], whereby § 79 para. BVerfGG or § 183 VwGO also do not conflict with this.[5]

2.) Interim result:

Valid notices of credit according to § 15 para. 2 ContStifG initially retained their validity despite an annulment decision by the Federal Constitutional Court, but could, in accordance with Section 48 VwVfG, be withdrawn by the foundation as a discretionary decision, both for the future (ex nunc) and for the past (ex tunc).

3.) Scope of the discretion / entitlement to withdraw the credit assessment

In principle, decisions according to Section 48 VwVfG are at the discretion of the authority. According to the case law of the Federal Administrative Court, however, there is then

exceptionally "a right to withdraw a final administrative act if its maintenance is 'absolutely unbearable'." [6] This is usually the case

> "if the authority violates the general principle of equality by exercising the right of withdrawal in the same or similar cases or if there are circumstances that make the authority's appeal to incontestability appear to be a violation of morality or good faith. The obvious illegality of the administrative act, the withdrawal

[4]BVerwGE 64.62; BSG 61,187 = NVwZ 1989, 998.
[5]BSG NVwZ 1989, 998; BverwGE 64.62.
[6] BVerwG 6 C 32.06 - judgment of January 17th, 2007 - https://www.bverwg.de/%C2%A0%3Csup%3E170107%3C/sup%3EU6C32.06.0 - RN 13.

of which is requested, can also justify the assumption that its maintenance is simply unbearable."[7]

A further reduction in discretion can be considered in the event of violations of EU law.[8]

From these points of view, the following results in particular:

First of all, it is more than questionable whether the annulment of a credit notice, which would be based on such an unconstitutional norm, could in and of itself be refused.

In any case, according to the assessment of the Federal Administrative Court in the decision of 31.3.2021, there is a prohibition of discrimination according to Art. 18 TFEU (ex Art. 12 EGV). This violation of EU law alone should reduce the foundation's discretion "to zero"[9] ; and generate claims for revocation of the notices of credit. The resulting annulment of the Foundation's imputation decisions entails, in accordance with Article 3 of the Basic Law, the annulment claims of all foreign benefit recipients.

Since equal treatment in the revocation of crediting decisions of foreign affected persons is already unlikely anyway due to the different procedural pressures, if a crediting is revoked in one or more cases, all others could invoke it anyway, and demand equal treatment and the revocation of their credits.

Furthermore, numerous case constellations are conceivable in the area of the above-mentioned aspects of "good morals or good faith" which give rise to a claim for withdrawal.

4.) Results

If the foundation can revoke notices of credit, it will not be politically or legally acceptable not to do so in all comparable cases in general. The “dam break” could for example

[7]BVerwG 6 C 32.06 - judgment of January 17, 2007- https://www.bverwg.de/%C2%A0%3Csup%3E170107%3C/sup%3EU6C32.06.0 - RN 13
[8]ECJ NVwZ 2004,459, RN 26.
[9]EUGH, NVwZ 2004,359 RN 26.

be caused by the assertion of hardship cases or because of violations of EU law. If one or more people enforce the withdrawal of a notices of credit, then all those affected by similar notices of credit will regularly be entitled to cancellation.

The responsibility assumed by the state for the foreign beneficiaries of the Contergan Foundation must also result in the creation of clear, binding and legally tenable regulations as quickly as possible.

III. Scope of required legal changes

If the case law states that a credit according to § 15 para. 2 ContStifG for the thalidomide pension is a violation of the property guarantee and, moreover, considers such a general billing to be inadmissible because there are different economic circumstances and social systems in the individual countries and thus

the intention of the legislator for § 15 para. 2 ContStifG, namely to prevent foreign benefit recipients from being placed in a better position than domestic benefit recipients, as inappropriate, disproportionate and, to that extent, the pension reduction for foreigners violates the principle of equality under Article 3 para. 1 of the Basic Law, then a credit is also not achievable by replacing § 15 para. 2 ContStifG.

Accordingly, the deletion of the entire § 15 para. 2 ContStifG is indicated.

F. Conclusion

As already stated, a 5th law to amend the Contergan Foundation Law would be more than welcome during this legislative period. The topics considered in this respect are highly complex and have now been extensively discussed and it is important to prevent

these results which are highly important for those affected from being lost through discontinuity.

Not only would the distribution of the designated endowment capital - as complete as possible - be a massive help for those affected in organising their retirements, but at the same time a grandfathering of the damage points provides a greater sense of security.

The crediting method from § 15 para. 2 ContStifG cannot be replaced with legal certainty by other regulations due to the individual constitutional objections of the Federal Administrative Court.
It is important to realise that, given the legal opinion of the Federal Administrative Court, the reduction of thalidomide pensions by crediting foreigners must be considered a definite failure!
Waiting for a decision by the Federal Constitutional Court would, as explained, be damaging to Germany's reputation, but especially unreasonable for the foreign beneficiaries of the Contergan Foundation.

From all of this it follows that consistent action through the prompt deletion of § 15 para. 2 ContStifG is the best path.

The better position of foreign victims could be relativised in the case of German thalidomide by finding a constitutional way to create financial compensation.

Finally, we ask that the representatives of the affected persons be included in the detailed deliberations.

Thank you very much for your commitment and we wish you that you get through this difficult time in good health.

Yours

sincerely

Contergannetzwerk Deutschland e.V.
Christian Stürmer, chairman and elected representative of those affected

on the Board of Trustees of the Contergan Foundation for Disabled People