



Introduction

As you adapt your business plans in the light of the current Covid-19 crisis, this brochure addresses more than 60 ideas for key tax areas in Germany.

Alongside improving the cash position of your business, [our] tax strategies can deliver earnings benefits, with VAT and Transfer Pricing (TP) directly increasing pre-tax profit.

This brochures also addresses the most urgent legal issues in the crisis.

Your Deloitte contact will be happy to discuss how these ideas can be applied in your organization.

Corporation Tax

1. Adjust prepayment amounts of current cash tax

If estimated statutory profits suggest that taxable income will decrease during the current year, provide this forecast and a draft tax calculation to the tax office along with an application to lower income tax prepayments. The tax authorities have indicated that an adjustment of corporate income tax prepayments will be granted more easily, while the Bavarian tax authorities have already published the necessary application form.

You can also try to retroactively apply for an adjustment of previous year prepayments to obtain cash tax prior to filing the annual return for that year. Your application should also include a provisional balance sheet and a tax calculation.

2. File your tax return early to obtain tax credits

Tax credits, e.g. domestic WHT from dividend distributions by a German subsidiary to domestic German shareholders, can usually only be claimed through a tax return. Therefore, such cash tax requires that you file the return early. In some case, you might even consider filing the return early based on provisional statutory figures. **Also, early filing of FY 2019 tax returns will help obtain tax refunds early in case prepayments made exceed the calculated tax and tax authorities deny a retroactive adjustment of prepayments (see above). FY 2019 tax return forms are expected to become available in April 2020.**

3. Tax prepayment deferral after restructuring

If a corporation is merged into another (new) corporation, the surviving corporation may apply for a reduction of its prepayments if the merged entity has current losses and total income for the surviving corporation in the current year is therefore expected to be lower than assessed previously.

The merged corporation may apply for a full reduction of its tax prepayments for the merger year.

4. Filing amended tax returns after closed tax audit

Filing amended returns for FY subsequent to a closed tax audit considering reversal effects of the tax audit findings might lead to positive cash tax effects.

5. Proactively obtain exemption certificates

Only where an exemption certificate exists do German authorities allow companies to directly benefit from treaty protection or from the EU Parent-Subsidiary-Directive through reduced WHT rate at source. Even if dividends are not anticipated, exemption certificates can allow German companies to immediately benefit from treaty protection or the EC Parent-Subsidiary Directive under certain circumstances: Under German tax law various issues could give rise to deemed dividend distributions which require the withholding of tax unless an exemption certificate exists. It should be taken into consideration that the process can consume considerable time (allow a minimum of three months).

Manage your
annual tax
payments

Avoid unnecessary
cash repatriation
cost (26.375%
domestic WHT)

6. German interest, even if non-deductible under limitation, may avoid WHT

Under German tax rules generally, a certain EBITDA-related amount of interest expense is deductible immediately. Any excess amount is deferred into future years. However, cash payments of interest which can effectively represent repatriations of profits are regularly not subject to withholding tax (WHT) under domestic German tax rules. Various strategies exist to increase a German company's leverage, which allow it to reach the desired interest expense levels.

These strategies might be extremely useful if the parent company does not pass the test of the German anti-treaty shopping rules and applies a withholding tax of 26.375%.

7. Return equity instead of profits

The return of equity may not be treated as dividends under German tax rules and does not require the paying company to withhold tax. The return of equity may require – amongst others – an assessment of (tax) equity amounts (“steuerliches Einlagekonto”) by the tax authorities which is a standard part of the tax return assessment. Obviously, there can also be additional legal requirements which could require timely planning.

8. Buy back own shares (treasury stock)

In certain scenarios, a German company could consider buying back its shares. The share price is paid in cash to the parent company and – if structured adequately – does not become subject to withholding tax.

9. Formation of German tax group

Distributions from a German subsidiary to a German parent company are also subject to German withholding tax. However, in case the German companies form a tax group (Organschaft), current profits of the subsidiary can be transferred to the parent without the obligation to withhold taxes.

10. Cross-border EU merger

If a German company is merged cross-border into its EU parent company, the German activities could give rise to a Permanent Establishment (PE) of the EU company. Any retained earnings of the transferred legal entity should not be subject to withholding tax. The merger could generally be effected on carry-over basis.

11. Avoid late filing penalties

If it seems possible that you will not file your tax return on time, you could consider filing a tax return based on provisional figures to avoid the assessment of late filing penalties.

12. Avoid interest charges

If 15 months have passed since the end of the fiscal year, but the final tax return cannot be submitted yet and additional tax payments are expected, a voluntary tax prepayment may reduce the amount of interest assessed on outstanding taxes (interest rate 6% p.a.), which is not deductible.

In this context, it might also be worth taking a conservative filing position for provisions that have been recognized in the statutory balance sheet. If the issues that gave rise to the provisions may require additional investigation, the corresponding expense might not be deducted in the tax return

Avoid penalties

in the first place but could help later if other adjustments could occur (even in a tax audit) to avoid the post deadline increase of cash tax liabilities which would give rise to interest penalties. If the result of the investigations allow you to take the tax deductions, these may offset other income adjustments and could therefore avoid additional interest charges.

13. Defer interest income

Under German tax laws, non interest-bearing payables with a term of more than one year must be discounted, giving rise to income at the level of the debtor in the year of discount. This can be avoided if a minimal interest rate is agreed for such payables. This planning is most likely to be used in domestic scenarios because in a cross-border context, transfer pricing rules would require an arm's length interest rate right away. Often one can find non-interest bearing domestic payables if an Organschaft is established and the subsidiary's profits were not paid in cash but converted into loans.

Defer income

14. Introduce a deviating fiscal year

If non-tax reasons exist to change the fiscal year from calendar year to a different year end (e.g. adopting group standards), the tax for the current calendar year is assessed for the stub period. The tax for the new fiscal year that ends in the subsequent year is assessed after the close of the new deviating fiscal year, i.e. in the next calendar year. This could generate a cash tax deferral. Tax authority consent is necessary.

15. Transfer of hidden reserves

In the event of the sale of certain assets (e.g. real estate), the gain from the sale will not immediately give rise to a taxable gain, but may be reinvested in assets of a similar nature. If the profit is not reinvested directly, it can be recognized as a reserve and lower the taxable income. The reserve must be reinvested within four years or six years, respectively depending on the nature of the reinvested asset.

Bear in mind that if the reserve is not reinvested, it must be resolved at the end of the four/six year period (increasing taxable income) and interest of 6% p.a must be applied for the whole period.

16. Carry back losses into previous years

Losses can be carried back one year for Corporate Income Tax (CIT) purposes (not for local trade tax). The use of losses carried back is limited to EUR 1m. Any remaining loss balance can be carried forward for an indefinite period but will only allow offsetting future income of EUR 1m plus 60% of the remaining positive income.

Monetize losses

If combined with the introduction of a short fiscal year (#13), the carry-back of losses and the resulting cash refund could be accelerated.

Carry-back must be filed in the tax return of the year in which the loss occurred (tax return amendment).

17. Use losses through tax consolidation (Organschaft)

German tax law allows you to offset losses of one group company against positive income of another group company. This requires a parent-subsiary structure where the parent company owns more than 50% of the subsidiary's shares (vote) at the beginning of the subsidiary's fiscal year and that certain legal steps are taken prior to year end (signing of pooling agreement, approval of the agreement by the shareholders, registration with the local court).

18. Use losses though receivables factoring

If the legal ownership of the loss company and the profitable company does not match the parent-subsiary scheme as required for Organschaft, a receivables factoring plan with built-in discounts creates an expense for the profitable group member (seller) and income for the loss company (factor) upon collection of the full amount of the receivable.

19. Prepayment of expenses/royalties

IP rights, inventory or stock could be sold to the subsidiary in advance in order to receive an immediate cash inflow (discount necessary, set up an accrual).

20. Increase interest deduction above 30% limit

The German interest expense limitation rules allow immediate deduction only for amounts under three million euros of the net interest expense (net of interest income). Net interest expense of EUR 1m or more can only be deducted in an amount of 30% of tax adjusted EBITDA. Amounts of net interest expense of 30% or more of tax-adjusted EBITDA can generally be carried forward. However, there is an exemption that allows you to immediately deduct net interest expense of 30% or more of tax-adjusted EBITDA if a special equity test is passed. This equity test can be very complex but also very beneficial for the German taxpayer. It basically compares the consolidated equity ratio of the parent company and the individual equity ratio of the German subsidiary. If the latter (equity ratio of the subsidiary) is higher, the taxpayer may deduct all its interest expense and reduce its cash tax liability. Whether the test can be passed should be checked each year before the end of the fiscal year. For corporations, the equity ratio test is supplemented by a further requirement to demonstrate that interest payments made by either German or foreign group members to group companies/affiliates or to third parties that may take recourse to group companies/affiliates exceed 10% of net interest expense at the level of the respective group entity/affiliate.

Prepay expenses/
royalties

Make interest
expense tax
effective

21. Create additional profits that can be repatriated

If sufficient cash for distributions is available but insufficient book reserves or profits exist, several corporate restructures (mergers, hive-downs, etc.) can be carried out at fair market values for statutory purposes. These may give rise to profits that can be distributed. At the same time, the transfer could be treated at carry-over basis for tax purposes, which avoids taxable gains from the transaction.

Boost distributable
profits for
repatriation

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Value Added Tax

22. Explore opportunities to claim foreign VAT earlier

A number of jurisdictions allow the filing of VAT refund claims earlier than at the end of the year for which the refund claim is filed, e.g. in quarterly or half-year claims. Where considerable refund amounts are involved, it might be worth considering filing such claims earlier even if this creates additional administration costs. Applications for the first quarter of 2020 can already be submitted in April 2020.

23. File compliant and complete VAT refund claims

VAT refund authorities are increasingly scrutinizing whether the formal requirements are met before accepting VAT refund applications. Incomplete applications result either in an immediate refusal or a significant processing delay. A complete application accelerates the reimbursement process.

24. Increase VAT recovery on employee and travel expenses

Explore the possibility and the formal requirements to be fulfilled with regard to documentation for the VAT recovery on employee and travel expenses; make use of current legislation in certain jurisdictions concerning the cap/statute of limitations periods for retrospective claims on under-recovered input VAT on these expenses.

25. Improve bad debt relief efficiencies

Collect sufficient back-up documentation to claim bad debt relief as early as possible. The tax already paid can be corrected if, due to demonstrable circumstances, payment by the debtor cannot be expected to be made as soon as it is due.

26. Check supply chains and ensure correct processing in tax compliance systems

In the case of cross-border supply transactions with different distribution structures, correct VAT treatment is sufficient. Special attention must be paid in B2B cross-border trade, to ensure that the business partner's valid and correct VAT ID number is used.

27. Ensure timely and proper VAT return filing

Timely and proper filing with early input VAT recovery and appropriate output VAT reporting avoids late filing and late payment penalties as well as interest charges.

28. Consider waiving the permanent extension

By making use of the permanent extension for filing preliminary tax returns, entrepreneurs gain time in exchange for making a special advance payment. By contrast, waiving the permanent extension leads to a cash flow advantage.

Maximize VAT recovery

VAT return management

29. VAT grouping or degrouping / branch-HQ planning

In countries where VAT grouping is not automatic (unlike Germany), consider electing group companies into a VAT group to maximize cash-flow savings on intra-group charges or degrouping a company in case it has a negative impact on the overall input VAT recovery ratio due to its VAT-exempt supplies. Combine VAT grouping with headquarter branch service structures for VAT cash flow savings on intra-group/intra-branch services.

30. Request timely invoicing from vendors

Consider requesting vendors submit their invoices on time and in proper and complete form to ensure input VAT recovery. Ensure timely processing of purchases. Often input taxes are not claimed in the tax period in which the legal requirements (receipt of supply, receipt of invoice) are met. The improvement of internal control and approval processes avoids a late VAT refund or even the loss of the input tax deduction.

31. Review self-billing arrangements

Self-billing has the advantage that the invoice necessary as proof of receipt of services/goods for the refund of input VAT is available as the recipient is the issuer of the invoice on behalf of the vendor.

32. Cash basis taxation

As a rule, tax liability takes effect in the month in which deliveries or services are provided (accruals taxation). Small businesses can opt for cash basis taxation in order to improve their cash flow.

33. Accelerate VAT refund through VAT registration.

Even one-off transactions can result in VAT registration requirements in foreign VAT jurisdictions. While this results in additional VAT administration costs for VAT registration and related (limited) VAT reporting requirements, such registration can allow you to recover foreign input VAT incurred in relation to the one-off transaction much faster than through 9th or 13th EU VAT Directive refund claims (even a voluntary registration, where allowed, should be considered for this purpose).

Invoicing and tax
point planning

Review VAT position
in relation to one-
off transactions

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Energy Tax/Electricity Tax (ET)

34. Reducing ET payments by setting annual tax payments with amounts subject to ET refund

If ET must be declared and paid for the previous year, you should verify whether you can settle the outstanding ET with the amounts of ET subject to refund for volumes consumed in the previous years as well. A settlement of outstanding ET with refundable ET reduces the ET payments. Therefore, it is recommended that you file the refund applications for volumes consumed in the previous year together with the annual ET return(s) for the taxable volumes. Since refunds need to be accepted by the relevant customs office, it is recommended that you file an application for technical clearing deferral for the outstanding ET as well to put payments dormant until acceptance of the refund by the customs office.

Minimize
ET payments

35. Reducing ET prepayments by considering volumes subject to ET refund

If ET returns are filed annually, ET prepayments must be made on a monthly basis. Legally (if this does not jeopardize the tax situation for customs), there is an opportunity to file an application to reduce monthly ET prepayments by considering the potential ET refund based on the estimated volumes consumed in the current year. Therefore, you should contact the relevant customs office and apply for a reassessment of ET prepayments in view of potential ET refunds.

36. Review your energy and electricity flows

Explore your energy and electricity flows to optimize your refund position. Production entities defined in Section 2 No. 3 of the German Electricity Act, referring to the German Classification of Economic Activities, Edition 2003 (WZ 2003), can generally apply to a number of different refund opportunities for energy products consumed. The specific volumes consumed must be allocated to a partial or full energy tax refund. Energy costs can therefore be reduced by analyzing energy flows and the processes in which energy will be consumed and identifying the respective volumes. One of the results could be a full refund of energy and/or electricity taxes instead of a partial refund or a refund of volumes for which energy tax or electricity tax refund applications have not been filed in the past.

Maximize
ET refunds

37. Filing annual ET refund applications shortly after the end of the year of consumption

Most enterprises apply ET refunds on an annual basis for volumes consumed in the previous calendar year. It is common practice that refund applications for these volumes to be filed shortly before the end of the year following the year of consumption. This leads to a liquidity disadvantage, which can be avoided by filing for the annual refund shortly after the end of the calendar year in which the volumes were consumed.

Optimize
ET cash flow

38. Filing ET refund applications during the year

A more efficient cash impact can be achieved by filing periodical ET refund applications during the year of consumption of the energy products. Legally, applicants may choose the calendar quarter or half-year as the period of refund in most cases. In individual circumstances, the relevant customs office may upon application also allow the calendar month as the refund period. However, in case of a refund as per the rules about peak relief ("Spitzenausgleich"), an annual application summarizing the total amounts must be filed in addition. Otherwise, the customs office will claim the amounts already refunded for the respective periods.

Use ET exemptions

39. Applying for licenses for ET exempt consumption of electricity for small electricity producers

With effect from 1 July 2019, the German legislator implemented a special license procedure, e.g. for in-house consumption of electricity or for the supply of electricity to end-consumers that is generated in renewable energy power plants or in high-efficiency CHP plants with electrical output of up to two megawatts. The electricity producer in these plants can self-consume or supply the electricity with tax exemption only if he holds this license; otherwise, ET falls due and has a cash impact. Without the proper license, ET on self-consumption only is generally refundable, while ET on supplies to end-consumers remains in place.

40. Applying for licenses for ET-exempt consumption of electricity in the production of electricity

In the production of electricity, volumes of electricity are consumed as well. These volumes will generally be treated as tax-exempt. If no license is available, the ET due on these volumes is generally refundable. Applying for a license for consuming electricity in the production of electricity might improve your cash flow as well (depending on the volumes). However, in certain cases the volumes have to be evidenced by measuring instruments.

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Employer and Mobility Taxes

41. Cross-charge assignment-related costs

At the time of payment of costs related to the assignment of an employee to an affiliated foreign company (e.g. salary, benefit in kinds, taxes, etc.), a contemporary and complete cross-charge to the foreign company should be put into practice and immediate payment should be requested. Besides positive effects on cash flow, this ensures the avoidance of tax risks resulting from the denial of business expenses deductions for business tax purposes.

Improve cash flow

42. Income tax payments for employees on assignment

Encourage your employees who are currently on assignment to/from a foreign company to submit relevant information for the preparation of income tax returns to the tax provider as soon as possible in order to receive any income tax refunds from the German tax authorities that are related to the assignment.

You should examine closely if it is necessary and consistent with the assignment policy of your company that the employer bears the taxes related to the assignment of employees.

43. Review assignee compensation packages

International mobile employees regularly receive allowances as part of their compensation package while working abroad. These allowances compensate for costs or burdens caused by international assignment. Examples include cost of living allowance, mobility allowance, housing allowance, hardship allowance, travel allowance and home leave allowance.

Employers should review if certain allowances need to be addressed and potentially rearranged in the current situation, e.g. because assignments are interrupted or travel activities are stopped. In this context, it should also be borne in mind that the actual costs of these allowances may exceed the agreed net payments.

While the German government has announced that it will generally grant a deferral on collecting taxes, wage taxes as amounts withheld from salaries are exempt from this beneficial regulation. Therefore, overpayments of wage taxes should be avoided when ensuring stable cash flow.

Reduce wage taxes where possible

44. Apply for tax exemption

You should apply for wage tax exemption certificates for employees who are currently assigned from Germany to a company in a country that has agreed a double taxation treaty with Germany which provides for tax exemption of employment income in Germany. This could be beneficial in case a net salary agreement has been arranged.

45. Adjust estimates of employment income taxable in Germany

The German Ministry of Finance requires employers to estimate the employment income of mobile employees that is taxable in Germany and withhold the applicable wage taxes on a monthly basis. Where the number of workdays taxable in Germany is reduced due to adjusted work arrangements during the Covid-19 pandemic, estimates should be adjusted in order to reduce the wage taxes due. This adjustment will particularly help those employers who have concluded net salary arrangements with their employees.

46. Adjustment of taxable benefit for private use of company car

Many employers cover the wage taxes arising on the benefit in kind resulting from the private use of a company car that is provided to employees assigned to Germany. As well as private use, the benefit from commuting between home and workplace is taxable. If the benefit in kind is computed on the basis of the so-called 1% rule, a reduction of the benefit in kind and therefore the wage taxes can be applied for months with less than 15 days of commuting.

Additionally, that reduction would automatically apply to Value Added Tax arising on this benefit in kind.

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Customs and Excise

47. Can you benefit from preferential origin?

Companies with cross-border movements of goods often have to pay significant amounts of import duties. However, the EU has agreed many preferential agreements with countries benefiting the imports of goods originating in these countries. Therefore, it is worth considering whether you have the possibility option of benefiting from these agreements, meaning that import duties are either reduced or set to zero. Are you importing from such countries and not using the preferential treatment yet? And if not, could you switch your sourcing to a supplier located in one of these countries?

Review your supply chain

48. Do you benefit from customs procedures?

Many companies have complex supply chains involving goods crossing borders, sometimes more than once. If the goods are cleared through customs every time, a lot of customs duties and import VAT fall due. This is often not necessary. You could consider whether your supply chain can be streamlined towards more direct shipments. Further, it is beneficial to use customs warehouses for goods entering and subsequently leaving the EU again in order to avoid import duties. In case of contract processing, either abroad for EU products or in the EU for foreign products, these could be conducted via inward/outward processing. This saves import duties as well. In case goods are imported for temporary usage only, the temporary usage procedure must be considered.

49. Is your tariff classification correct?

Import duties and import VAT are calculated on the basis of customs value and customs tariff. The customs tariff depends on the customs tariff classification of the imported product. Since the tariff classification leads to different customs duty tariffs, companies should check whether they are using the right tariff classification to avoid overpayments. If it turns out that the company has paid too much due to incorrect tariff classification, it can apply for a refund of the overpayment for imports over the last three years.

Optimize your import

50. Is your declared customs value correct?

The customs value calculation is often difficult and bears opportunities as well as risks. Therefore, companies should review the calculation of its customs value carefully, e.g. is the basis for the calculation correct (transfer prices to consider?) or are components such as transportation costs calculated correctly or included twice due to incorrect Incoterms?

51. Increase your liquidity by paying later

There are several options for paying your excise taxes at a later stage in order to increase liquidity. Companies can apply for approvals that enable them to pay excise taxes monthly in one sum rather than for each single transaction. The German customs administration furthermore allows companies up until 31 December 2020 to apply for a deferment of excise taxes due to the corona pandemic.

Excise taxes

52. Apply for tax exemptions

Excise duties are usually significantly high. Certain deliveries (e.g. to beneficiaries) and production steps (e.g. denaturing of alcohol) are exempt from excise duties. Meeting the requirements for these tax exemptions can be challenging, but if the company does so, it can save a lot of taxes for those that regularly handle excise goods (e.g. alcohol, oil, electricity, tobacco, etc.)

53. Regular applications for Energy and Electricity Tax relief

Companies tend to apply for Energy and Electricity Tax reliefs once a year, even though it is possible to file applications more often, e.g. quarterly. In doing so, companies will have more frequent cash flows rather than having to tie up their money for a full year.

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Transfer Pricing

54. Adjust transfer prices proactively

Companies facing challenges brought by the economic slowdown should examine underlying commercial relationships between related parties, and consider what room there is for related parties to adjust or renegotiate transfer prices to reflect economic realities (e.g. overall decrease in operating margins, effect of forex rates; energy or commodity prices, etc.). Furthermore, companies should carefully scrutinize and apply comparable data while determining appropriate margins for routine entities (e.g. using appropriate periods; including loss makers; considering comparability adjustments; etc.).

Proactively adjust your transfer prices

55. Review intercompany contractual basis

Companies should assess whether existing contracts have price adjustment clauses and extraordinary termination clauses (e.g. for reevaluating intercompany charges and target margins). When drafting new contracts, companies may consider including automatic adjustment clauses for crisis situations to be able to react quickly and ensure flexibility.

56. Examine underlying financial relationships between related parties

Adjustment of intercompany financing conditions may be necessary during periods of economic downturn to ensure and manage liquidity. Companies may wish to consider renegotiating loan terms as third parties would do as well as reviewing thin capitalization provisions and covenants.

57. Consider price setting approach to determine transfer prices

Companies may wish to apply a proactive price setting approach to reflect current economic realities to determine future transfer prices. Such an approach should be supported by comprehensive calculations, contractual basis and documentation.

Proactively set your transfer prices

58. Economic slowdowns may lead to business restructuring

Ceasing of certain operations may be inevitable during a slowdown. Companies should consider proper treatment and allocation of the costs of ceasing operations. Furthermore, business restructuring (e.g. transfer of IP) may be required to improve liquidity and the efficiency and effectiveness of the supply chain. In such an event, companies would need to align costs with anticipated benefits and be mindful of potential exit taxation issues.

Consider changes to business model and value chains

59. As supply chains change, consider changes to functional and risk profiles

Companies should consider that changes in the supply chain may also be accompanied by changes in existing functional and risk profiles of various group entities that would warrant a realignment of the value chain and underlying transfer pricing.

60. Consider proactively engaging with tax authorities to manage uncertainties

Companies should consider engaging in open dialogue with tax authorities to discuss the potential implications of the economic climate on profitability and taxable income. Furthermore, existing agreements with tax authorities (such as APAs etc.) may need to be re-evaluated, e.g. with regard to critical assumptions.

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Proactively manage
disputes

Legal

61. National level

The German authorities and legislators are trying to help mitigate the effects of the COVID-19 pandemic with a series of measures aimed at helping enterprises sustain themselves. The corresponding actions may have numerous effects on businesses liquidity planning, obligations under law, relationship with third parties, etc. Businesses should carefully **monitor all relevant legislative and other developments** and build any results thereof into their planning, strategy and implementation.

Monitor ongoing legislative and other developments

62. European and international level

At the European level as well, important legislative and other measures are being taken, both in terms of measures to mitigate the consequences of the pandemic as well as, by way of example, in terms of state grants and European state aid laws, for example, and travel or trade bans, etc. Other national legislators are also taking action which can have an impact on German businesses – be it in terms of import or export restrictions or in terms of moratoria and comparable measures.

Businesses should monitor whether and to what extent measures implemented at the European and international level or in other jurisdictions may affect their businesses – for good as well as for bad.

63. Force majeure notifications from suppliers

In the current market circumstances and, in particular, when confronted with force majeure notifications from suppliers, companies should **review their supply contracts and other contractual relationships** with a focus on the exact content and wording of force majeure clauses, if any, with the aim of having a clear view on the **risk allocation between the parties** and designing, planning and implementing a strategy for managing the legal facets of the relationship. This can help in recovering damages from suppliers and thereby bring liquidity effects.

Check supply contracts and other contractual relationships

64. Manage legal situation with pre-suppliers

Companies who rely on suppliers should analyze existing contractual relationships to assess whether their supply relationships with customers provide for **self-delivery reservations and/or other clauses that shift pre-supplier risks to the other party** and assess whether these clauses can be invoked in the circumstances, with the aim of a clear view on the risk allocation between the parties and designing, planning and implementing a strategy for managing the legal facets of the relationship.

65. Insurance coverage in the COVID-19 environment

In the current situation, companies are well advised to scrutinize **whether and to what extent consequences of the COVID-19 outbreak may be covered by insurances**. A corresponding review should extend to all relevant insurance policies, in particular business interruption policies, extended coverage modules, all risk policies and business closure insurance. In many scenarios, businesses should also make an attempt to convince their contractual partners to do the same, so as to ensure recovery of damages incurred to the greatest extent possible. This will require analyses on a case-by-case basis, looking at the individual damages and insurance policies, including the applicable terms and conditions as well as temporal elements. The results of such analyses should then be used in financial planning and/or to design, plan and implement a strategy for dealing with the insurer and/or third parties.

66. Risk allocation in other contractual arrangements

In order to design, plan and implement a thoughtful and sustainable strategy, parties should **review existing contractual arrangements with a focus on risk allocation mechanisms** provided for in these arrangements and/or under statutory law. This can help to considerably reduce the financial burden under existing arrangements and thereby bring about the desired liquidity effects. In that context, new acts of legislation and/or measures taken by authorities should be taken into consideration, as depending on the industry that a business is active in, a **shift in risk allocation by virtue of the law can have a significant impact on liquidity and cash planning**. By way of example, a moratorium with respect to individual types of contracts and/or regulations dealing with payment deferrals promulgated by the law as already under debate or implemented in some European countries can play a role here.

67. Organization of personnel and tasks

The COVID-19 pandemic has a massive impact on the organization of the workforce. Employers are not only confronted with an increased number of employees who report in sick and/or are unable to come to their workplace for various COVID-19-related reasons, but are also facing closure or limited usability of offices, reduced or increased tasks, etc. – and at the same time are held to ensure both business continuity as well as profitability. In the current circumstances, businesses should carefully **assess their requirements from an employment law perspective** based on the various scenarios and should look into and **implement possibilities available under German employment law, preferably in mutual agreement with the works council and/or the employees**.

68. Reduction of personnel costs by applying for state aid, e.g. short-time working

Against the background of the consequences of the COVID-19 pandemic that can already be felt in the German market, employers may have to **make use of all existing options for minimizing personnel costs**. Depending on the industry that employers are active in, minimizing personnel costs can be essential to ensuring liquidity and, thereby, avoiding even fiercer consequences for the business and its employees. One very relevant component in that context can be the **renewed and extended short-time working facilities** already promulgated by the German Federal Government, as part of its financial aid package (colloquially called "4-pillar Bazooka") (see #73). By implementing short-time working, employers can reduce employees' working hours and remuneration and have parts of the remuneration and social security contributions compensated by public authorities. Given that the implementation of short-time working requires a legal basis (i.e. an agreement with the respective union, the works council or the employees), the **legal basis needs to be implemented as soon as possible**, if not already in place. On such legal basis, the employer must report the loss of work to the relevant employment agency and apply for short-time working compensation. Such compensation can in general cover up to 100% of the employers' personnel costs. In case employees are under official quarantine, apart from applying for short-time working compensation, employers also may assess options for applying for compensation according to the German Infection Protection Act.

Manage your
workforce

69. Ensuring readiness for Day 1 after COVID-19

In the medium term, employers should take relevant precautions for the time after the COVID-19 pandemic and play through and calculate possible restructuring measures (e.g. applying for state aid for the qualification of personnel, reduction in workforce and its connection with short-time working, relocation of tasks or personnel, etc.), so as to **achieve readiness for Day 1 after COVID-19**.

70. Suspension of the duty to file for insolvency

Under German law, there is a general **obligation** on the Managing Directors or management board members of German corporations **to apply for insolvency proceedings**, in case certain prerequisites as set forth by law, are met. Currently, the German legislator is preparing amendments to the corresponding provisions of German insolvency laws with the aim of protecting companies that have run into financial difficulties as a consequence of the COVID-19 pandemic. It is paramount in the current circumstances, to **continuously monitor ongoing legislative developments in order to have a good view on the elbow room and flexibility available** as well as **to avoid any non-compliant behavior and/or associated consequences**, such as **personal liability** issues for the management. As there seems to be a general tendency that alleviation granted to businesses will at least to a certain extent depend on whether negative developments have been induced by the pandemic, businesses should intend to collect evidence which enables them to prove that the financial situation they are facing is the product of the COVID-19 pandemic. Finally, businesses should immediately take all other precautions that are required to be able to resort to **financial aid available under federal, state and European schemes**.

Ensure liquidity –
avoid insolvency

71. Management liability

In a crisis situation, there are **liability risks** for members of the executive board in case of payments that have been made by the company after it became technically insolvent. While legislation dealing with the situation is likely to be introduced, for the time being, managing directors and/or management board members of German companies should **continue to monitor** whether their company could be qualified as technically insolvent and, where this is the case, seek professional advice in order to have a proper view on what their obligations are and how they can comply with their duty of care without incurring any risk of personal liability. Apart from that, **ongoing legislative developments need to be monitored**.

72. Review of existing financing arrangements

Financing/loan agreements often provide regulations dealing with changes in the market environment, a deterioration of the borrower's financial situation and/or creditworthiness, material adverse effects, etc. All of these circumstances – and many more – can lead to extraordinary termination rights and premature repayment obligations being triggered. Moreover, certain developments with respect to individual group companies can have an impact on the entire loan agreement. Also, the fulfillment of obligations under existing financing arrangements can have considerable impact on options available for granting financial means made available under federal, state and European financial aid schemes. To the extent that this has not happened yet, companies should, on the basis and against the background of their financial planning, adjusted for COVID-19-induced effects, **review existing financing agreements with the aim of establishing the most relevant clauses and effects that may be triggered by the ongoing events and developments**. In particular, businesses should establish what circumstances or occurrences might justify an

extraordinary termination, what notification obligations they have access to, whether there are ways of avoiding a breach of financial covenants and/or, finally, whether there are any clauses in the agreements or regulations under statutory law which would allow them to suspend payments without running into adverse consequences. Depending on the result of these analyses and other considerations, borrowers may then want to **discuss the way forward with their lenders** with the aim of finding an amicable solution. In that context, ongoing legislative initiatives need to be monitored, as they can have a significant impact on financials, for example where moratoria are enacted by virtue of the law.

73. Schemes for financial aid

Both the European Commission and German Federal Government and states have indicated that they will contribute to mitigating the effects of the pandemic by making financial aid available. In particular, the German government has indicated that it will make available a **protective shield for employees and companies who are affected by the impact of the COVID-19 pandemic**. This protective shield is often also referred to as the German Bazooka, as this was the term used by the German Minister of Finance to describe the program. The program consists of 4 pillars, namely (i) short-time working/reduced hours compensation benefit (*Kurzarbeitergeld*) referred to above, (ii) tax-related liquidity assistance for businesses measures, (iii) a so-called “protective shield worth billions” for businesses and (iv) attempts to strengthen European cohesion. In the meantime, **additional elements have been added and pieces of legislation are underway**.

Businesses are well advised to continuously **monitor ongoing developments and new schemes and to analyze what grants may be available** so as to ensure business continuity and liquidity, and to **apply for financial aid**. In particular, companies in dire straits and companies who expect to be facing a liquidity shortfall or even a technical insolvency, based on their mid-case financial planning, should take action now by seeking advice on financial aid that may be available to them, monitoring further developments, discussing the further requirements for a successful application yet to be defined with their banks and/or KfW as well as making the relevant applications as soon as possible.

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