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Legal issues around the COVID-19 Pandemic

Status 20 April 2020

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"A little sacrifice saves lives."

German Chancellor Angela Merkel

Introduction

Background

"A little sacrifice saves lives." On 18 March 2020, German Chancellor Angela Merkel clearly emphasized the seriousness of the situation. The prohibition of the operation of commercial enterprises, educational institutions, restaurants and the possible expected curfew are necessary measures in the fight against the new COVID19 ARS-CoV-2.

#flattenthecurve
#wirbleibenzuhause
#westayathome

The Chancellor's clear statements are very welcome, as are the measures taken recently to contain the Pandemic. However, they make it clear that the COVID-19 Pandemic and the measures adopted to contain it (#flattenthecurve, #wirbleibenzuhause = #westayathome) also represent a major challenge for the entire population in terms of their economic consequences.

The Pandemic threatens - in addition to health as the greatest good of every human being - especially entrepreneurs and tradespeople as well as employers and employees, landlords and tenants. High losses and considerable damage have been recorded or are to be feared. In this respect, the Chancellor made one thing clear: "The coming weeks will be even more difficult".

In dealing with the Pandemic and its consequences, numerous legal questions arise, the answers to which are not always easy in view of the novelty of the facts and which also cause a certain amount of uncertainty among market participants. At the same time, much is in flux and the government and legislators are trying to mitigate the economic consequences for market participants with a variety of measures, including legislative measures.

The following article attempts to provide a brief overview of the current and possible future legal conditions and opportunities for market participants – with an attempt of taking into account recent developments in a dynamic environment.

We have compiled the following information with the greatest possible care - due to the urgency of the legislative process, things change continuously, which is why it cannot be guaranteed that the latest state of the discussion is always given.

Update April 2020: The present contribution was originally prepared on 26 March 2020. We have updated it in a number of relevant places to cover developments up to 15 April 2020. We have refrained from a complete update. For further details we refer to our more recent articles.

Key legislative measures

Numerous measures and laws have been adopted by the legislative and executive bodies to mitigate the economic impact of the Pandemic.

Central elements in this respect - in addition to making funding options more flexible and extending them - are the law on the establishment of a special fund with no legal capacity "Economic Stabilisation Fund - WSF" and the so-called COVID 19 Pandemic Act.

Act on the Establishment of a Non-Legally Capable Special Fund "Economic Stabilization Fund - WSF

- The Act on the **establishment of a non-legally capable special fund "*Wirtschaftsstabilisierungsfonds* - WSF"** has been published in the German Federal Law Gazette (*Bundesgesetzblatt*) and entered into effect at the end of March.

- In accordance with Section 16 of the Act, the **purpose** of the Economic Stabilization Fund is **to stabilize companies in the real economy by overcoming liquidity bottlenecks and by creating the framework conditions for strengthening the capital base** of companies whose existence would have a significant impact on the economy, technological sovereignty, security of supply, critical infrastructures or the labor market.

- **Companies in the financial sector** and credit institutions or bridge institutions are **not** considered to be companies in the real economy.

- Eligible companies must have **fulfilled at least 2 of the 3 following criteria** by 31 December 2019: (i) balance sheet total of more than EUR 43,000,000, (ii) turnover of more than EUR 50,000,000, (iii) more than 249 employees on an annual average.

- The **Federal Ministry of Finance** in agreement with the **Federal Ministry of Economics and Energy** will decide on the stabilization measures to be taken by the Economic Stabilization Fund upon application of the enterprise.

- **Stabilization measures** consist, among other things, of the **assumption of guarantees and participation in recapitalization measures**, which in turn comprise the acquisition of subordinated debt, hybrid bonds, profit participation rights, silent participations, convertible bonds, the acquisition of shares in companies and the assumption of other components of the equity of these companies.

- The **prerequisites and conditions** for stabilization measures essentially consist of the fact that **additional financing options are not available to the companies**.

- In addition, the stabilization measures must provide **clear and independent prospects for continued operations after the Pandemic** has been overcome. Companies applying for a stabilization measure may not have met the EU definition of "companies in difficulty" as of 31 December 2019; they must guarantee a sound and prudent business policy.

- The **further details** regarding the management of the special assets and the corresponding framework conditions are to be specified flexibly in an accompanying **statutory ordinance** issued by the Federal Ministry of Finance in agreement with the Federal Ministry of Economics and Energy.

COVID-19 Pandemic Act

- The central component in the area of civil, corporate and insolvency law is the "Act on Mitigation of the Consequences of the COVID 19 Pandemic in Civil, Insolvency and Criminal Procedure Law" (hereinafter also referred to as the "**COVID 19 Pandemic Act**").

- The COVID-19 Pandemic Act has been published in the German Federal Law Gazette (*Bundesgesetzblatt*) and **entered into effect at the end of March**. It is a so-called article law, by which various pieces of legislation were amended.

- Article 1 of the COVID 19 Pandemic Act contains the **law on the temporary suspension of the obligation to file for insolvency and to limit the liability of executive bodies in the event of insolvency caused by the COVID 19 Pandemic (COVInsAG)**. According to this law, the obligation to file for insolvency is suspended until 30 September 2020, unless the reasons for insolvency are not based on the COVID 19 Pandemic. If the company was not illiquid at the end of 2019, it is presumed that the insolvency is due to the COVID 19 Pandemic. This presumption means that in these cases no insolvency petition will have to be filed until the end of September 2020.

- Article 2 of the COVID 19 Pandemic Act contains the so-called **Law on Measures in Company, Association, Cooperative and Condominium Law to Combat the Effects of the Infection with the SARS CoV-2 Virus**. This law initially provides for regulations concerning general meetings of stock corporations, KGaA and SE and cooperatives in times of crisis. In addition, it extends the period provided for in Section 17 paragraph (2) sentence 4 of the German Reorganization Act from the current 8 months to 12 months. Further regulations concern general meetings of associations and regulations for condominium owners' associations.

- Art. 3 of the COVID-19 Pandemic Act contains amendments to the Introductory Law to the **Code of Criminal Procedure** - we have refrained from presenting them. The same applies to the further amendments to the Introductory Act to the Code of Criminal Procedure provided for in Article 4 of the COVID-19 Pandemic Act.

- Article 5 of the COVID-19 Pandemic Act **supplements Article 240 of the Introductory Act to the Civil Code with special provisions on the consequences of the Pandemic**. In particular, consumers, but also micro-enterprises, as well as tenants, are to be protected from the legal consequences of financial problems in connection with the COVID-19 Pandemic. Essential points can be roughly summarized as follows:

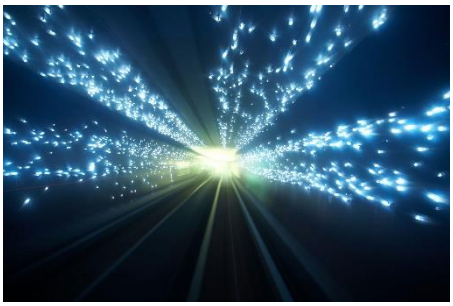
    - If a **consumer** is unable to meet his (payment) obligations from certain continuous obligations in the period April to June 2020 without endangering his livelihood, he is entitled to temporarily refuse to meet his (payment) obligations. A corresponding regulation is provided for micro-enterprises. Excluded are - among others - contracts of employment.

    - If a **tenant** is temporarily unable to meet his obligations to pay the rent in the period from April to June 2020, the tenancy cannot be terminated solely for this reason; however, he remains obliged to

pay the rent and must subsequently pay off accrued rent debts. This regulation applies to all tenants, regardless of whether the rent is residential or commercial.

- If a **consumer**, due to financial problems as a result of the COVID-19 Pandemic, is not in a position to meet due loan obligations under **consumer loan agreements** without limitation of his reasonable living costs, he is entitled to refuse the due payments without legal disadvantages. Unless the parties agree otherwise in individual cases, the loan will be virtually suspended as a result of such a deferral, all payments will be postponed by (up to) 3 months without any disadvantage to the consumer. The lender may not terminate the loan during the deferral period.

Check your supply contracts and other contractual relationships



In the current market circumstances and, in particular, when confronted with force majeure notifications by suppliers, companies should review their supply contracts and other contractual relationships, with the aim of having a clear view on the risk allocation between the Parties.

Force majeure notifications by suppliers

In the context of the COVID-19-Pandemic, many clients are faced with the question of how to deal, from a legal standpoint, with notifications of force majeure received from suppliers, because of delivery bottlenecks, delays or other disruptions in the supply chain.

Where the underlying agreements are subject to the laws of Germany, one must look into the relevant regulations and principles of German law. Generally speaking, given the absence of a definition of the term in German statutory law, German courts define **force majeure** as extraneous, externally induced events outside the business, which are unforeseeable and unusual according to the human insight and experience of the people involved, and which cannot be prevented or rendered harmless by economically bearable means, not even by the utmost care that can reasonably be expected under the circumstances and which cannot be accepted by the entrepreneur. In short: The event in question must be **unforeseeable, unavoidable and exceptional**.

Whether or not the corona virus outbreak (and its consequences) can be qualified as a force majeure event will strongly depend on the **particularities of each individual case**. Where violations of state-imposed sanctions and embargoes would be required in order to perform contractual obligations, a force majeure event would typically be given. On the opposite, mere additional financial expenditures caused by alternative means of transport (e.g. air instead of sea transport), general price increases or difficulties in the procurement of raw materials can usually not be considered a force majeure event. Besides these considerations, the specific regulations in the **individual force majeure clauses** are crucial. If a clause already mentions epidemics, pandemics, or quarantines as well as various government measures (whether associated or unassociated therewith) as examples of force majeure, this should increase the likelihood that a contractual partner can successfully invoke force majeure.

In the current market circumstances and, in particular, when confronted with force majeure notifications by 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.

Problems within supply chains

Clients may also be confronted with situations where they believe they are entitled and need **to make force majeure notifications themselves**.

Under German law, failure to receive supplies from one's own suppliers, would, however, generally not suffice for a company to successfully invoke force majeure vis-à-vis its own customers. As a general rule, the organization and securing of **self-supply** is the responsibility of a company's business planning and risk management.

The situation can be different where the relevant scenarios are reflected in contractual clauses by means of a so-called **self-delivery reservation**. In such cases, the delivery is made subject to the reservation of timely and proper self-delivery. Reservations of self-delivery serve to protect the company as part of a supply and production chain from claims for damages from its customers. Whether and to what extent this is legally permissible, what clauses would be accepted by German courts and which rules should specifically be included in the contract must be examined on a **case-by-case basis**.

In the current situation, companies who rely on suppliers should **analyze existing contractual relationships** to assess whether their supply relationships with their customers provide for self-delivery reservations and/or other clauses shifting pre-supplier risk to the other party and assess whether given the circumstances these clauses can be invoked.

Specific regulations for consumers and micro-enterprises

Until the end of June 2020, **consumers and micro-enterprises** will benefit from the payment moratorium contained in Article 5 of the COVID-19 Act (Article 240, Section 1 Introductory Act to the Civil Code).

This brings along that micro-enterprises and consumers **do not have to fulfil their obligations arising from certain continuous obligations** entered into before the COVID-19 Pandemic in the period April to June 2020, **if fulfilment would result in the consumer being unable to earn a reasonable living or the micro-enterprise being unable to fulfil its obligations or only at the risk of its economic livelihood**.

This essentially includes payment claims, but other claims may also fall within the scope of application. The **right to refuse performance does not apply if this is unreasonable for the creditor**, as otherwise he is economically endangered, especially if the contractual partner is a natural person and is dependent on performance for his reasonable livelihood.

The above provisions do not apply to rental, lease and loan agreements, as special regulations apply in this respect.

Furthermore, the regulations do not apply to employment contracts. This means that the employee retains his claim to the wages owed, without the employer being entitled to refuse performance due to financial problems.

Originally, it was intended that all contractual relationships would be covered by the special regulations and that the scope of application would extend to September 2020. It remains to be seen whether the payment moratorium will be extended until the end of September 2020 or, with the approval of the Federal Parliament, beyond that date and whether other companies will also be included in the scope of application retroactively.

Specific regulations for tenants

Tenants benefit from the provisions of the COVID-19 Pandemic Act on the temporary suspension of the right to terminate the lease due to default. Please refer to the comments on risk allocation for rental agreements.

Insurance coverage in the COVID-19 environment

In the current market circumstances, the availability of insurance coverage for damages caused by shutdowns and comparable events can be paramount.

Whether insurance coverage is available, can only be **assessed on a case-by-case basis**, against the background of the terms and conditions of the corresponding policies.

The chances are rather poor if **business interruption policies** are designed according to the **model conditions** of the German Insurance Association (GDV) in the variants FBUB 2010 and AMBUB 2011. These policies are meant to cover business interruption due to property damage, whereas the insurance cover against infectious diseases is often missing.

The situation can look different where the insured has undertaken extended protection via **Extended Coverage modules** or where an **all-risk policy** has been concluded. In these constellations, depending on the exact wording of the policy and the further terms and conditions applicable to it, coverage can be given. Whether it is in fact given will depend on whether epidemics and/or infectious diseases are explicitly named as an insured risk or even an all-risk policy is in place. Depending on the contract, retroactive losses may also be covered under certain circumstances, i.e. if a supplier fails due to the virus and production has to be suspended.

The situation is also not quite so simple in the case of **business closure insurance**, for example where food-processing companies have to shut down as a result of the virus. The authorities can order this if a notifiable disease occurs in the business - and have made use of that possibility. Although these policies also cover the event that a company has to shut down as a result of an illness under the Infection Protection Act. Nevertheless, here the problem often consists in that is that that Act has already been in force for five years. The new corona virus SARS-CoV-2/COVID-19, however, was only included in the list of notifiable diseases by the Federal Ministry of Health in January 2020, mainly because it is what it is - new, to humankind, at least. Here, chances are poor for the insured if a policy make explicit reference to a catalogue of diseases according to the "old" Infection Protection Act as an insured event, but the new corona virus is missing. In this case, cover is very likely to be denied by the insurer, at least at the outset, because the reference to the catalogue of diseases will be interpreted as a (static) reference to the list applicable at the time the contract was concluded. That said, it must be noted that insurance con-

tracts are sometimes more open and general - and may also take into account further developments of the Infection Protection Law. Then, coverage may be available.

Update April 2020: For individual constellations, regions and/or federal states, solutions are emerging "at the political level". One example is the proposal drawn up by DEHOGA Bayern, the Bavarian Ministry of Economic Affairs, the vbw and individual insurance companies, on the basis of which certain insurers have declared their willingness to pay between 10 and 15 percent of the daily rates agreed in the event of company closures and to pay these to restaurants and hotels. The proposal applies to restaurants and hotels in Bavaria, which have business closure insurance, but the applicability of this insurance in the context of the Corona pandemic is highly controversial and has been rejected by the insurance industry. The agreement has no general binding force. It only represents a "ready-made solution" for negotiations and agreements in individual cases.

In the current situation, companies are well advised to scrutinize whether and to what extent what consequences of the COVID-19 outbreak may be covered by insurance and to 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 **an 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**.

Once the Pandemic has been dealt with, businesses should look into their insurance coverage and the market and policies as it will then be given, so as to reevaluate what type of insurance coverage would make sense and whether premiums remain economically viable.

Legal changes to consumer loan agreements

Article 5 of the COVID-19 Pandemic Act will add a new Article 240 (currently a blank space) to the Introductory Act to the Civil Code. This will entail, among other things**, temporary special provisions for consumer loan agreements in Section 3**.

If a consumer is unable to meet his obligations under a consumer loan agreement (payment of principal and/or interest) in the period April to June 2020 because he himself has suffered a loss of income due to the COVID-19 Pandemic, so that fulfilment is unreasonable for him, the interest and principal payments due are deemed to be deferred. The consumer can pay (so that no deferral takes place), but does not have to. The lender and the borrower should adjust the contractual conditions; if they do not do so, the loan relationship is extended by 3 months - in economic terms - and all payment obligations, whether interest or repayment obligations, are postponed accordingly.

Risk Allocation in other contractual arrangements

The COVID-19-Pandemic has a major impact on all type of business relationships regulated by agreement, from energy supply to leasing of production machinery, from logistics and warehousing to lease of real estate, buildings, etc.

In these circumstances, parties should have a good feeling for the **risk allocation as provided for in the corresponding agreements and/or by statutory law for the various constellations** that may be given. And may also see a need to verify whether damages caused can be recovered from public authorities or insurers of either party. The results of such analyses and verifications can then be used to design, plan and implement a strategy, which strategy may often have to put an amicable solution as a 1st priority, but may sometimes also have to involve a more robust position, including the search for loopholes and agreements, etc.

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.

Risk Allocation in lease agreements

Similar considerations need to be made when it comes to **lease agreements**. Production Companies operating in leased facilities can have a considerable interest in terminating existing lease agreements or at least suspending payment obligations thereunder. Retail chains who operate in leased facilities and have entered into an obligation to operate can be interested in at least not having to operate. Landlords, on the other hand, are primarily interested in ensuring adequate return on investment and generating lease income.

In this context, particular attention will also have to be paid to the **temporary special regulations under Section 2 of Article 5 the COVID-19 Pandemic Act** and the associated **shift in conventional risk allocation**. In line with its declared objective of relieving tenants during the Pandemic, the Act provides that tenants may not be terminated solely for rent debts incurred during the period from 1 April to 30 June 2020. No distinction is made according to the type of tenancy - residential or commercial - nor according to the persons affected - consumers or entrepreneurs - nor according to the financial power relations - "poor landlord", "rich tenant". The regulations **apply in principle to every tenant and every type of tenancy**.

The obligation of the tenants to pay the rent, however, remain in place.

The relevant **period** may be extended until 30 September 2020 by a statutory order of the Federal Government, which requires neither the approval of the Bundestag (German Federal Parliament) nor that of the Bundesrat (German Federal Council – 2nd Legislative Chamber in which the German States are represented).

The regulations on the temporary prohibition of termination of rental relationships will **expire with effect from 30 September 2022**. According to our interpretation, this means that **rent arrears** must have been settled by this date.

Update April 2020: Also against the background of the fact that even larger companies, which are assumed to have sufficient financial strength, had announced that they wanted to stop or reduce rental payments, a **dispute has arisen about the scope and effectiveness of the moratorium on termination**.

In this context, **a clear distinction** is not always made between the individual legal constellations. A distinction must be made between

- the **new regulations introduced by the COVID-19 Pandemic Act** and the new regulations restricting the landlord's right of termination due to default;

- the regulations of the German Civil Code, which already existed before the COVID-19 Pandemic, in particular Section 313 of the German Civil Code, with the principles laid down therein regarding **frustration of contracts (*clausula rebus sic stantibus*)**; and

- contractual regulations concerning **force majeure**.

The new provisions of the COVID 19 Pandemic Law mean that under certain circumstances, **failure to pay the rent for certain months cannot in itself justify termination by the landlord**. However, the **obligation to pay the rent remains in full**. Rents that have not been paid are to be paid subsequently, in accordance with the legislator's interpretation, by 30 June 2022. In this respect, it is disputed under which conditions the moratorium on termination applies. Some would like to point out that only the objective characteristic "non-payment" is to be made credible and believe that a "right to non-payment" exists at least for commercial tenants who have to keep their shops etc. closed due to official orders. Others refer to the explanatory memorandum to the law, according to which Pandemic-related financial bottlenecks must exist - there is no clarity here so far.

The application of the **principles of frustration of contract (*clausula rebus sic stantibus*,** the legal doctrine allowing for a contract or a treaty to become inapplicable because of a fundamental change of circumstances) in German law originally originate in the case law of the German Reichsgericht, the Federal Supreme Court's predecessor. In view of the special circumstances surrounding the outbreak of the First World War, the doctrine has found its way into German legal tradition. In this respect, it is **not a matter of limiting the legal consequences of non-payment, but rather of allocating the risk between the parties and the question of whether rent is due and, if so, in what amount**.

Section 313 BGB provides that in the event of a serious change in the circumstances which have become the basis of the contract, an adjustment of the contract can be demanded. The prerequisite is that the **party under obligation cannot reasonably be expected to adhere to the contract**. If it is impossible or unreasonable to adjust the contract, the contract may be terminated. If the tenant and landlord did not foresee special circumstances at the time of conclusion of the contract which lead to a serious change in the business relationship, an amendment of the contract may be necessary in good faith. In special exceptional cases, there is therefore the possibility of a contract adjustment according to the principles of the frustration of contract doctrine (Section 313 para. 1 BGB).

Up to now, the **case law** in commercial tenancy law has been **opposed to recourse to the frustration of contract doctrine**. In any case, according to traditional opinion and previous case law, it is true in this respect that, even taking into account the frustration of contract doctrine, it would have to be assumed that the rental payment obligation would continue to exist, irrespective of the restrictions associated with the Pandemic. In view

of the unprecedented historical extent of the Corona crisis and the associated duration and intensity of the economic burden on tenants, it is unclear and remains to be seen whether case law will reflect on the corresponding principles and apply them to commercial tenancies.

However, even if the principles were to apply, the **distribution of risk** laid down in the relevant lease agreement would have to be taken into account - again, at least according to traditional opinion. According to the interpretation prevailing to date, **the economic risk in the event of an official order to close down a shop** - unlike in other legal systems, for example under Austrian law, compare the provisions on rent exemption under § 1104 ABGB (Austrian Civil Code) - **in principle lies with the tenant**. Although a reduction of rent or claims for damages by the tenant against the landlord are the exception according to the prevailing opinion, it is advisable to examine the distribution of risk agreed in the rental agreement as well as the relevant official order in each individual case.

It remains to be seen whether case law will apply the frustration of contract doctrine in order to make the landlord share in the ongoing economic burden on the tenant.

Against the background of the unclear legal situation and the unsatisfactory situation for which market participants have shown leniency, umbrella organisations and associations have issued a **joint appeal for a "breathing space for commercial rents in the Corona crisis"**, calling for landlords and tenants of commercial properties to sit down at the same table and discuss a temporary adjustment of rental agreements. In addition, the **ZIA Zentrale Immobilien Ausschuss e.V.,** the central association of the real estate industry, **has called for extensive improvements to the legal regulations** in a statement dated 30 March 2020, including the inclusion of a provision requiring large, solvent tenants to prove (and render proper evidence for) the connection between default and the Pandemic, and to **extend the moratorium** on claims from loan agreements, which has so far been limited to consumer loan agreements, **to all loan agreements**.

Further developments in legislation and case law remain to be seen. Until then, tenants and landlords should seek solutions acceptable to both sides by negotiation.

Reproduction of the wording of Art. 5 COVID-19 Pandemic Act

Section 1

Moratorium

(1) A consumer shall have the right to refuse until 30 June 2020 to provide services to satisfy a claim related to a consumer contract which is a continuing obligation and which was concluded before 8 March 2020, if, due to circumstances arising from the spread of the SARS CoV-2 virus (COVID-19 Pandemic) infection, the consumer would not be able to provide the service without jeopardising his or her reasonable subsistence or that of his or her dependents. The right of refusal exists in respect of all material long-term obligations. Material long-term obligations are those that pertain the purchase of services /goods of appropriate general interest.

(2) A micro enterprise as defined in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36). shall have the right to refuse performance until 30 June 2020 of any claim related to a contract which is a continuing obligation concluded before 8 March 2020 if the debtor due to the COVID-19 Pandemic),

1. the enterprise cannot provide the service or
2. the provision of the benefit would not be possible without jeopardizing the economic basis of the enterprise's business

The right of refusal exists in respect of all material long-term obligations. Material long-term obligations are those that pertain the purchase of services /goods necessary for the continuation of the business enterprise.

(2) Paragraph (1) shall not apply, if the exercise of the right to refuse performance is unreasonable for the creditor for his part, since failure to perform would jeopardise the economic basis of his business. Paragraph (2) shall not apply if the exercise of the right to refuse performance is unreasonable for the creditor because failure to perform would jeopardise his reasonable subsistence or the reasonable subsistence of his dependents or the economic basis of his business. If the right to refuse performance under sentence 1 or 2 is excluded, the debtor may withdraw from the contract. The right of rescission is replaced by the right to terminate the contract in the case of continuing obligations.

(4) Paragraphs (1) and (2) shall further not apply

1. in connection with rental agreements and tenancy agreements pursuant to Section 2, loan agreements as well as
2. claims under employment contracts.

(5) Paragraphs (1) and (2) may not be derogated from to the detriment of the debtor.

Section 2

Restriction on the termination of rentals and tenancies

(1) The landlord may not terminate a lease of land or premises solely on the grounds of the tenant failing to pay the rent in the period from 1 April 2020 to 30 June 2020 despite being due, if the failure to pay is due to the effects of the COVID-19 Pandemic. The connection between COVID-19 Pandemic and non-payment must be made credible. Other termination rights remain unaffected.

(2) Paragraph (1) may not be derogated from to the detriment of the lessee [tenant].

(3) Paragraphs (1) and (2) shall apply to leases (*Pachtverhältnisse*) by analogy.

(2) Paragraph (1) to (3) shall only apply until 30 June 2022.

Section 3

Regulations on the right to loans

(1) For consumer loan agreements concluded before 15 March 2020, claims of the lender for repayment, interest or principal payments due between 1 April 2020 and 30 June 2020 shall be deferred for a period of three months from the due date if the consumer has lost income as a result of the exceptional circumstances caused by the spread of the COVID-19 Pandemic, which make it unreasonable to expect the borrower to provide the service owed. It is unreasonable to expect the borrower to perform the service, in particular if his or her reasonable standard of living or that of his or her dependents is at risk. In the period specified in sentence 1, the consumer is entitled to continue to make his contractual payments on the originally agreed performance dates. If he continues to make the payments in accordance with the contract, the deferral set out in sentence 1 is deemed not to have been made.

(2) The parties to the contract may reach agreements deviating from paragraph (1), in particular regarding possible partial payments, interest and repayment adjustments or debt rescheduling.

(3) Terminations by the Lender due to default of payment, significant deterioration of the financial circumstances of the consumer or of the value of the security provided to secure the loan are excluded in case of paragraph (1) until the end of the deferral period. This provision may not be deviated from to the detriment of the borrower.

(4) The lender shall offer the consumer a discussion on the possibility of an amicable arrangement and on possible support measures. Remote means of communication may also be used for this purpose.

(5) If no mutually agreed arrangement is reached for the period after 30 June 2020, the term of the contract shall be extended by three months. The respective due date of the contractual services shall be postponed by this period. The Lender shall provide the consumer with a copy of the Agreement which takes into account the agreed contractual amendments or the amendments resulting from sentence 1 and from paragraph (1) sentence 1.

(6) Paragraphs (1) to (5) shall not apply if deferral or exclusion of termination is unreasonable for the Lender taking into account all circumstances of the individual case including the changes in general living conditions caused by the COVID-19 Pandemic.

(7) The paragraphs (1) to (6) shall apply mutatis mutandis to the balancing and the recourse between joint and several debtors under Section 426 of the German Civil Code.

(8) The Federal Government shall be authorized to amend the personnel scope of application of paragraphs (1) to 6 by statutory order with the consent of the Federal Parliament but without the consent of the Federal Council (*Bundesrat*) and in particular to include micro-enterprises within the meaning of Article 2 paragraph (3) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises in the scope of application.

Section 4

Regulation authorization

(1) The Federal Government is authorized to issue a statutory order without the consent of the Federal Council (*Bundesrat*)

1. to extend the applicability of the right of refusal pursuant to Section 1 until 30 September 2020 at the latest
2. to extend the restriction on termination contained in Section 2 paragraphs (1) and (3) to arrears which have arisen in the period from 1 June 2020 to 30 September 2020 at the latest,
3. to extend the period referred to in Section 3 paragraph (1) to the expiry of 30 September 2020 and the extension of the term of the contract pursuant to Section 3 paragraph (5) at the latest,

provided the social life, the economic activity of a multitude of undertakings or employment of a large number of people can be expected to continue to be significantly affected by the COVID-19 Pandemic.

(2) The Federal Government is authorized, to extent by statutory order, requiring the consent of the Federal Parliament but not the consent of the Federal Council (*Bundesrat*), the deadlines set forth in paragraph (1) beyond 30 September 2020 if the impairments continue to exist after the statutory order referred to in paragraph (1) became effective.

Manage Your Work-force

In the current circumstances, businesses should carefully assess their requirements from 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.

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 sick and/or are unable to come to their workplace for various COVID-19-induced reasons, but are also facing closure or limited usability of offices, reduced or increased, etc. - and at the same time are held to ensure both business continuity as well as profitability.

As a result, employers needs to **find good solutions for an entire row of issues**, from proper communication with employees and other stakeholders to implementation and organization of remote work/home office with the associated impact on IT applications; from **employee satisfaction** to working hours, time recording and **control mechanisms**, etc.

In that context, employers will need to analyze what possibilities there are to reduce overtime credits and or build up working time debits and how to implement them as well as, potentially, possibilities to force employees to take vacation or to implement company vacations. Also, employers may want to assess whether there is a need – and possibility – to reduce the number of freelancers and/or reduce average working time with the aim of avoiding dismissals.

Such issues can and should be made part of an "**emergency plan**" which can be agreed upon with the works council, if any. Where there is no works council or similar organ, employers needs to find practicable solutions with the employees to safeguard that the business continues as smoothly as possible.

In the current circumstances, businesses should carefully assess their requirements from 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.

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

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 possibilities for minimizing cost of labor**.

Depending on the industry that employers active in, minimizing cost of labor can be essential in 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 work facilities** promulgated by the German Federal Government, as part of its so-called 4 pillar Protective Shield (or, to use the words of the Minister of Finance, the German Bazooka). By implementing short-time work, employers can reduce the 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 work requires a **legal basis** (i.e. an agreement with the competent union, the works council or the employees), such legal basis needs to be **created as soon as possible**, if not already in place. On such legal basis, the employer needs to report the loss of work to the competent employment agency and apply for short time work 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 work, employers also may assess possibilities to apply for compensation according to the **German Infection Protection Act**.

Making provisions for the future

On medium term, employers should take relevant precautions for the time after the corona Pandemic and play through and calculate possible restructuring measures (e.g. applying for state aid for the qualification of personnel, reduction of workforce, relocation of task or personnel, etc.), so as to achieve Day 1 After COVID-19-Readiness.

Ensure liquidity – avoid Insolvency

Businesses are well advised to take the current legal framework into consideration, so as to avoid any (personal) liability issues. Also, businesses should monitor or future developments in the legislative framework, as the new framework will provide more flexibility to deal with the consequences of the Pandemic.

Suspension of the duty to file for insolvency

Under German law, management bodies of German companies are generally subject to an obligation to file for insolvency, which kicks in if and as soon as a reason for opening insolvency proceedings arises (inability to pay or over-indebtedness in the absence of a positive prognosis of continued existence) and must then be fulfilled immediately, at the latest within 3 weeks. A breach of this obligation can lead to criminal prosecution of the responsible members of the managing bodies and to personal liability.

The legislator wants to avoid that the COVID-19 Pandemic, also against the background of a possibly delayed payment of state aid, lengthy credit check processes, etc., leads to a multitude of insolvency applications. Article 1 of the COVID-19 Pandemic Act contains the so-called Act on the Temporary Suspension of the Obligation to File for Insolvency and on the Limitation of Organ Liability in the Event of Insolvency Caused by the COVID-19 Pandemic (COVID-19 Insolvency Suspension Act - **COVInsAG**). Regulations that were adopted on the occasion of the flood catastrophes of 2002, 2013 and 2016 serve as a model. The main contents of the Act can be summarised as follows:

- **Suspension of the obligation to file for insolvency**: The obligation to file for insolvency is suspended until 30 September 2020. This does not apply if the ground for insolvency are not due to the consequences of the spread of the SARS-CoV-2 virus (COVID-19 Pandemic) or if there is no prospect of eliminating an existing insolvency. If the debtor was not insolvent on 31 December 2019, it is assumed that the ground for insolvency have been induced by the effects of the COVID-19 Pandemic and there are prospects of eliminating an existing insolvency.

- **Consequences**: The provisions on the suspension of the obligation to file for insolvency correspond to corresponding consequential changes. The regulations on the (in)-permissibility of payments in Section 64 German Limited Liability Companies Act, Section 92 paragraph (2) German Stock Corporation Act and comparable provisions of the German Commercial Code and German Cooperatives Act are modified, the same applies to the return of loans granted and collateral provided during the suspension period - these are no longer per se subordinate and are not

to be considered immoral - and legal acts which have granted or enabled the other party to grant security or satisfaction - these are privileged and are withdrawn from avoidance (actio pauliana).

- **Creditors' motions**: In the case of creditors' insolvency petitions filed within 3 months of the date of the Law's entry into force, the opening of insolvency proceedings requires that the reason for opening the proceedings already existed on 1 March 2020. As things stand at present, this applies regardless of whether the reason for opening the insolvency proceedings is due to the COVID-19 Pandemic.

- **Temporal scope of application**: The suspension of the obligation to file for insolvency is initially limited until 30 September 2020. However, the Federal Ministry of Justice is authorised to extend the period of applicability until 31 March 2021. The privileged treatment of the repayment of loans and collateral - including privileges under insolvency avoidance law - covers measures taken up to 30 September 2023; special privileges are granted for financing and collateralization within the framework of government aid programs.

- Companies and their management bodies are well advised to **consider the applicable legal framework** in order to avoid questions of personal liability - and to **seek qualified advice** in case of doubt. Furthermore, companies should make provisions for the obligation to file for insolvency in order to prove the **causality of the Pandemic** for the occurrence of the reason for insolvency. Furthermore, companies that have become or are threatened by a reason for insolvency should immediately take all other precautions necessary to **prove their ability to restructure**, such as applying for public assistance.

Management liability

In a crisis situation, there are liability risks for members of the executive board in case of payments, which have been made by the company after the company became technically insolvent. According to the current regulation, this liability is not linked to the obligation to file an application under section 15a Insolvency Code and the period regulated therein, but to the state of material insolvency maturity. This means: the decisive factor is whether the company concerned is technically insolvent (Section 17 Insolvency Code) or over-indebted (Section 19 Insolvency Code).

The legislator has recognized this problem and **has extended the consequences of suspension to the corresponding provisions**.

Payments during the suspension period which are made in the ordinary course of business, in particular those payments which serve to maintain or resume business operations or to implement a restructuring concept, **will in future be deemed to be compatible with the diligence of a prudent and conscientious business man** within the meaning of the relevant statutory provisions of the respective laws. This will significantly reduce personal liability risks - nevertheless, it is recommended to seek legal advice in case of doubt.

Reproduction of the wording of the COVInsAG

Section 1

Suspension of the obligation to file for insolvency

The obligation to file an insolvency petition pursuant to Section 15a of the Insolvency Code and Section 42 paragraph (2) of the German Civil Code is suspended until 30 September 2020. This does not apply if the insolvency grounds are not based on the consequences of the spread of the SARS-CoV-2 virus (COVID-19 Pandemic) or if there is no prospect of eliminating an existing insolvency. If the debtor was not insolvent on 31 December 2019, it is assumed that the insolvency grounds are due to the effects of the COVID-19 Pandemic and there are prospects of eliminating an existing insolvency. If the debtor is a natural person, section 290 paragraph (1) No. 4 of the Insolvency Code shall apply with the proviso that no refusal of discharge of residual debt may be based on the delay in opening the insolvency proceedings in the period between 1 March 2020 and 30 September 2020. Sentences 2 and 3 shall apply accordingly.

Section 2

Consequences of the suspension

(1) If the obligation to file a request for insolvency proceedings is suspended under Section 1

1. payments which are made in the ordinary course of business, in particular those payments which serve to maintain or resume business operations or to implement a reorganisation concept, shall be deemed to be compatible with the due care of a prudent and conscientious manager within the meaning of section 64 sentence 2 of the German Limited Liability Companies Act, Section 92 paragraph (2) sentence 2 of the German Stock Corporation Act, Section 130a paragraph (1) sentence 2, also in conjunction with Section 177a sentence 1, of the German Commercial Code and Section 99 sentence 2 of the German Cooperatives Act;

2. the repayment of a new loan granted during the suspension period up to 30 September 2023 and the provision of collateral to secure such loans during the suspension period shall not be deemed to be disadvantageous to creditors; the foregoing shall also apply to the repayment of shareholder loans and payments on claims arising from legal acts which correspond economically to such a loan, but not to their collateral; insofar, Section 39 paragraph (1) no. 5 and Section 44a of the Insolvency Code shall not apply to insolvency proceedings concerning the debtor's assets which were filed until 30 September 2023;

3. the granting of credit and the provision of security during the suspension period shall not be regarded as immoral contribution to fraudulent conveyance of insolvency;

4. legal acts which have granted or enabled the other party to grant security or satisfaction which the other party was entitled to claim in the nature and at the time cannot be contested [*by way of actio pauliana*] in subsequent insolvency proceedings; this shall not apply if the other party was aware that the debtor's restructuring and financing efforts were not suitable to eliminate an insolvency which had occurred. The forgoing shall apply mutatis mutandis to

   (a) services in lieu of or on account of performance;

   (b) payments by a third party on the instructions of the debtor;

   (c) the provision of security other than that originally agreed, unless such security is more valuable;

   (d) the shortening of payment terms and

   (e) the granting of payment facilities.

(2) Paragraph (1) nos. 2, 3 and 4 shall also apply to undertakings which are not subject to an application obligation and to debtors who are neither insolvent nor over-indebted.

(3) Paragraph (1) nos. 2 and 3 shall also apply to loans granted by *Kreditanstalt für Wiederaufbau* and its financing partners or by other institutions as part of governmental aid programs in connection with the Covid-19-Pandemic, even if the loan is granted or security was provided, after the expiry of the suspension period and for an indefinite period of time with respect to the repayment.

Section 3

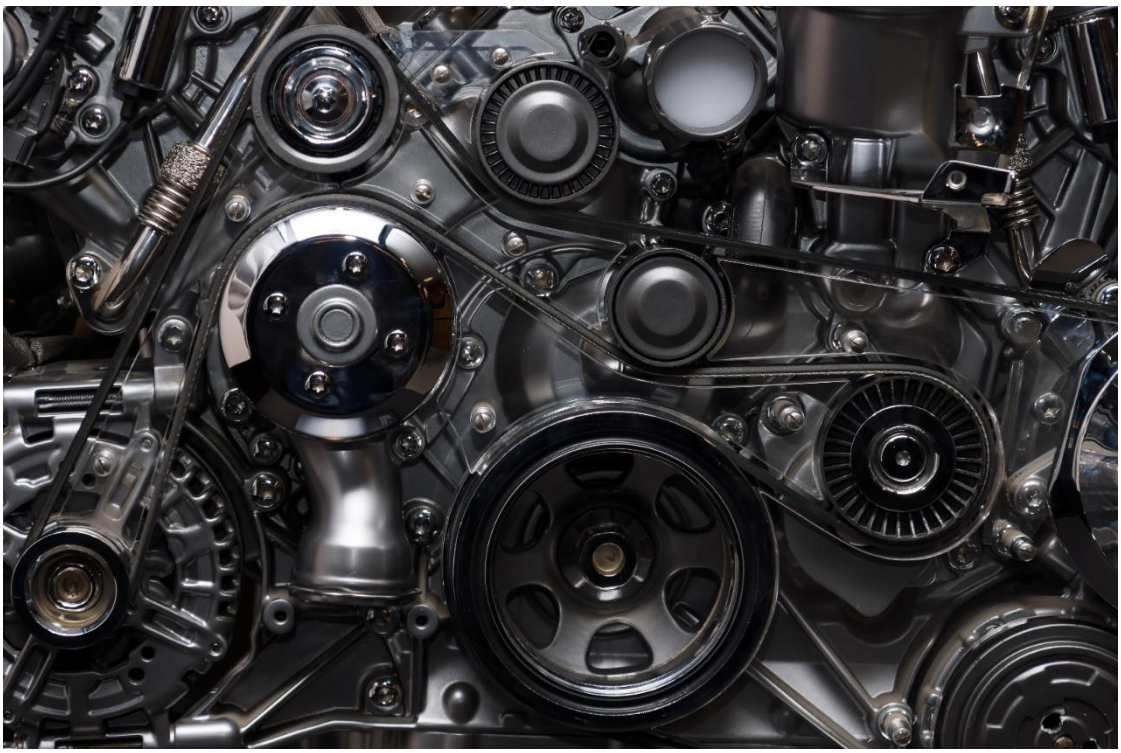
Reason for opening insolvency proceedings for creditors

In the case of a period between … [insert: date referred to in Article 6, paragraph (3) of this Act] and … [insert: date referred to in Article 6, paragraph (3) of this Act], the opening of insolvency proceedings shall require that the reasons for opening the insolvency proceedings already existed on 1 March 2020.

Section 4

Regulation authorization

The Federal Ministry of Justice and Consumer Protection shall be authorized to extend by statutory order, without the consent of the Federal Council (*Bundesrat*), the suspension of the obligation to file for insolvency pursuant to Section 1 paragraph (1) and the regulation on the reason for opening insolvency proceedings in the case of creditors' insolvency applications pursuant to Section 3 until 31 March 2021 at the latest if this appears to be necessary due to continued demand for available public assistance, ongoing financing difficulties or other circumstances.



Review of existing financing arrangements

"Businesses should review existing financing agreements with the aim of establishing the most relevant clauses and effects that may be triggered by any occurrences or developments "

Financing/loan agreements often provide for **regulations dealing with changes in the market environment, a deterioration of the Borrower's financial situation and/or creditworthiness, material adverse effects**, etc. Also, the corresponding arrangements can provide for regulations pursuant to which not only the aforementioned circumstances, but also an **insolvency of any subsidiary** of the borrower, group company or guarantor or the initiation of **restructuring** measures without proper notification of the lender can trigger adverse consequences, such as for example, but not limited to, an extraordinary termination and premature repayment obligation. Also, in the event that the Borrower can no longer meet its obligations, is in breach of **financial covenants**, is in arrears with payments, this can lead to a premature termination and/or an enforcement of collateral granted and - also in view of cross default clauses - can have a severe effect on entire groups. Also, fulfillment of obligations under existing financing arrangements can have considerable impact on possibilities available for granting financial means made available under the German Bazooka.

To the extent that this has not happened yet, companies should, on the basis and against the background of their financial planning, adjusted to COVID-19- induced effects, review existing financing agreements with the aim of establishing the most relevant clauses and effects that may be triggered by any occurrences or developments. More in particular, businesses should establish what circumstances or occurrences might justify an **extraordinary termination**, what **notification obligations** 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.

The COVID-19 Pandemic Act provides for **special rules only for consumer loan contracts**. If a consumer is unable to meet his or her obligations under a consumer loan contract, he or she can temporarily refuse to pay principal and interest. From an economic point of view, the consumer loan is "postponed" by three months. Contrary to what was suggested in the preliminary drafts, comparable regulations for companies as borrowers are not part of the Act at least not at present.

The German Protective Shield

The protective shield set up by the Federal Government for employees and companies affected by the effects of the COVID-19 Pandemic cannot be described in detail here.

The program consists of four pillars, namely (i) relief for short-time work, (ii) tax-related liquidity support for companies, (iii) a so-called "billion-Euro protective shield" for companies, and (iv) attempts to strengthen European cohesion.

The subsidies available in the meantime - including the special programs meanwhile approved by the European Commission - cannot be described in

the context of this document - companies are well advised to analyze all available measures to ensure business continuity and liquidity. Please contact us for further information.

Make use of special company law provisions

Companies should make use of alleviated company law provisions.

Law on measures in company, association, cooperative and residential property law to combat the effects of infection with the SARS-CoV-2 virus

Article 2 of the COVID-19 Pandemic Act contains the law with the rather bulky title as reproduced in the headline. Among other things, it provides for **significant facilitations for the holding of general meetings** using electronic remote communication media.

Annual General Meetings are held from April to June each year. Listed public limited companies hold their general meetings where hundreds, if not thousands of shareholders gather in a confined space during "normal times". In the current **"less normal" times** of the COVID-19 Pandemic, where meetings of more than two people are generally not allowed and where a distance of more than 1.5 metres is to be kept between people, this is impossible.

The COVID-19 Pandemic Act provides for solutions to this problem. In particular, the **Annual General Meeting can be held as a virtual general meeting** - i.e. without the presence of shareholders. Annual general meetings can also be postponed. The deadline by which the annual general meeting must take place has been postponed, and general meetings can now be held throughout the entire fiscal year.

Other company bodies can also take their decisions outside of physical meetings. This will apply regardless of whether the respective articles of association contain appropriate opening clauses.

Further regulations can be summarised as follows:

- **Shortening of convocation periods**: Annual General Meetings can be convened with a shortened notice period of 21 days; the notification regulations will be adjusted accordingly.
- **Limitation of the right to ask questions**: The Management Board is given the option of limiting the shareholders' right to ask questions to those questions that have been submitted electronically two days before the Annual General Meeting.
- **Advance dividends**: Companies are enabled to pay a discount on the balance sheet profit to the shareholders even without an authorization

in the Articles of Association in accordance with Section 59 paragraph (1) German Stock Corporation Act, while maintaining the other requirements of Section 59 German Stock Corporation Act.

- **GmbHs**: Shareholders' resolutions may also be passed in writing or in text form if not all shareholders agree to this procedure.

- **Other legal form**: Comparable facilitations will also be introduced for cooperatives, associations and foundations - these differentiate according to the particularities of the relevant legal form.

- **Continued appointment**: In addition, members of the board of directors of an association or foundation as well as administrators within the meaning of the German Condominium Act (*Wohnungseigentumsgesetz*) will remain in office until they are dismissed or a successor is appointed.

- **Reorganization Act**: In the conversion right, the period up to which a merger or demerger can be carried out on the basis of the annual financial statements of the previous year is extended. In the future, the closing date of the closing balance sheet to be filed may be up to twelve (instead of the previous eight) months back - calculated back from the date of filing.

- **Temporal scope of application**: The provisions of company law initially only apply in 2020. The Federal Ministry of Justice and Consumer Protection may extend the validity until the end of 2021 by means of a statutory order.

Reproduction of the text of the law on measures in the law on companies, associations, cooperatives and condominiums to combat the effects of infections with the SARS-CoV-2 virus

Section 1

Public limited liability companies; partnerships limited by shares; European companies (SE), mutual insurance companies

(1) Decisions regarding the participation of shareholders in the Annual General Meeting by means of electronic communication in accordance with Section 118 paragraph (1) sentence 2 of the German Stock Corporation Act (electronic participation), the casting of votes by means of electronic communication in accordance with Section 118 paragraph (2) of the German Stock Corporation Act (postal vote), the participation of members of the Supervisory Board by means of video and audio transmission in accordance with Section 118 paragraph (3) sentence 2 of the German Stock Corporation Act and the admission of image and sound transmission in accordance with Section 118 paragraph (4) of the German Stock Corporation Act may be made by the Executive Board of the Company even without authorization by the Statutes or rules of procedure.

(2) The Executive Board may decide that the meeting is to be held as a virtual general meeting without the physical presence of the shareholders or their proxies, provided that

1. a video and audio transmission of the entire meeting takes place,
2. the exercising of voting rights by shareholders is possible via electronic communication (postal voting or electronic participation) as well as the granting of a power of attorney,
3. the shareholders are given the opportunity to ask questions by way of electronic communication,
4. the shareholders who have exercised their voting rights in accordance with No. 2 are given the opportunity to object to a resolution of the Annual General Meeting, in deviation from Section 245 no. 1 of the German Stock Corporation Act, waiving the requirement to appear at the Annual General Meeting.

The Executive Board decides at its own discretion which questions it answers and how; it can also stipulate that questions must be submitted by electronic communication no later than two days before the meeting.

(3) Notwithstanding Section 123 paragraph (1) sentence 1 and paragraph (2) sentence 5 of the German Stock Corporation Act, the Management Board may decide to convene the General Meeting no later than the 21st day before the day of the meeting. Notwithstanding Section 123 paragraph (4) sentence 2 of the German Stock Corporation Act, in the case of listed companies, the evidence of share ownership must refer to the beginning of the twelfth day prior to the meeting and, in the case of bearer shares of the Company, must be received at the address specified for this purpose in the notice of convocation by no later than the fourth day prior to the Annual General Meeting, unless the Management Board specifies a shorter period for the receipt of the evidence by the Company in the notice of convocation of the Annual General Meeting; any provisions of the Articles of Association that deviate from this are irrelevant. In the case of convening a meeting with a shorter period of notice pursuant to sentence 1, the notification pursuant to Section 125 paragraph (1) sentence 1 of the German Stock Corporation Act must be made at the latest twelve days before the meeting and the notification pursuant to Section 125 paragraph (2) of the German Stock Corporation Act must be made to those entered in the share register at the beginning of the twelfth day before the Annual General Meeting. In deviation from Section 122 paragraph (2) of the German Stock Corporation Act (*Aktiengesetz*), in the aforementioned case, requests for supplements must be received by the Company at least 14 days before the meeting.

(4) Notwithstanding Section 59 paragraph (1) of the German Stock Corporation Act, the Executive Board may decide, even without authorization by the Statutes, to pay an advance on the net profit for the year to the shareholders in accordance with Section 59 paragraph (2) of the German Stock Corporation Act.

(5) The Executive Board may decide that, in deviation from Section 175 paragraph (1) sentence 2 of the German Stock Corporation Act, the Annual General Meeting shall take place within the fiscal year. Sentence 1 applies accordingly to a down payment on the compensation payment (Section 304 of the German Stock Corporation Act) to outside shareholders within the framework of a company contract.

(6) The decisions of the Management Board under paragraphs (1) to (5) require the approval of the Supervisory Board. In deviation from Section 108 paragraph (4) of the German Stock Corporation Act, the Supervisory Board may, irrespective of the provisions in the Statutes or Rules of Procedure, carry out the resolution on approval in writing, by telephone or in a comparable manner without the physical presence of the members.

(7) Irrespective of the provision in Section 243 paragraph (3) no. 1 of the German Stock Corporation Act, the challenging of a resolution of the Annual General Meeting may also not be based on breaches of Section 118 paragraph (1) sentences 3 to 5, paragraph (2) sentence 2 or paragraph (4) of the German Stock Corporation Act, the violation of the form requirements set forth in Section 125 paragraph (4) German Stock Corporation Act or on a breach of paragraph (2) by the Executive Management pursuant to paragraph (2), unless the Company can be accused of intent.

(8) The above paragraphs shall apply mutatis mutandis to companies which have the legal form of a partnership limited by shares (*Kommanditgesellschaft auf Aktien, KGaA*). In the case of a European company as defined in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ L 294, 10.11.2001, p. 1), as last amended by Regulation (EU) No 517/2013 (OJ L 158, 10.6.2013, p. 1), paragraphs (1) to (7), with the exception of paragraph (5), shall apply mutatis mutandis. In a company in accordance with Section 20 of the SE Implementation Act of 22 December 2004 (BGBl. I p. 3675), which was last amended by Article 9 of the Act of 12 December 2019 (BGBl. I p. 2637) (company with a one-tier system), the decisions in accordance with paragraphs (1) to (4) shall be taken by the Administrative Board (*Verwaltungsrat*); paragraph (6) shall not apply to such a company.

(9) Paragraphs (1) and (2), paragraph (3) sentences 1 and 3 as well as paragraphs (4) to (7) shall apply mutatis mutandis to mutual insurance associations within the meaning of Section 171 of the Insurance Supervision Act.

Section 2

Limited Liability Companies

Notwithstanding Section 48 paragraph (2) of the Act on Limited Liability Companies, resolutions of the shareholders may be adopted in text form or by written vote without the consent of all shareholders.

Section 3

Cooperatives

(1) Notwithstanding Section 43 paragraph (7) sentence 1 of the Cooperatives Act, resolutions of the members may also be passed in writing or in electronic form if this is not expressly permitted in the statutes. In this case, the Executive Board shall ensure that the minutes are accompanied by a list of the members who participated in the adoption of the resolution in accordance with Section 47 of the Cooperatives Act. The type of voting must be noted for each member who participated in the adoption of the resolution. Without prejudice to the provisions contained in Section 51 paragraphs (1) and (2) of the Cooperatives Act and unless the cooperative can be accused of intent or gross negligence, the contesting of a resolution of the General Assembly cannot be based on violations of the law or the membership rights that are due to technical problems in connection with the decision-making according to sentence 1.

(2) Notwithstanding Section 46 paragraph (1) sentence 1 of the Cooperatives Act, the convening of the meeting may be effected on the Internet on the website of the cooperative or by direct notification in text form.

(3) Notwithstanding Section 48 paragraph (1) sentence 1 of the Cooperatives Act, the adoption of the annual financial statements may also be effected by the Supervisory Board.

(4) With the consent of the Supervisory Board, the Executive Board of a cooperative may, at its due discretion, make an advance payment on an expected payment of a disputed credit balance of a retired member or an expected dividend payment to a member; Section 59 paragraph (2) of the German Stock Corporation Act shall apply accordingly.

(5) A member of the Executive Board or of the Supervisory Board of a cooperative shall remain in office even after expiry of his term of office until his successor is appointed. The number of members of the Executive Board or the Supervisory Board of a cooperative may be less than the minimum number stipulated by law or the articles of association.

(6) Meetings of the Executive Board or the Supervisory Board of a cooperative as well as joint meetings of the Executive Board and the Supervisory Board may also be held without a basis in the articles of association or in the rules of procedure by way of circulation in text form or by means of a telephone or video conference.

Section 4

Reorganization Act

Notwithstanding Section 17 paragraph (2) sentence 4 of the Reorganization Act (*Umwandlungsgesetz*), it is sufficient for the admissibility of the registration if the balance sheet has been prepared as of a date which is not more than twelve months prior to the filing date.

Section 5

Associations and Trusts (*Stiftungen*)

(1) A member of the executive committee of an association or a trust remains in office even after expiry of his or her term of office until his or her revocation from office or until a successor is appointed.

(2) Notwithstanding Section 32 paragraph (1) sentence 1 of the German Civil Code, the board of directors may allow members of the association to join the association even without authorisation in the articles of association,

1. to participate in the general meeting without being present at the place of assembly and to exercise membership rights by means of electronic communication or
2. without participating in the general meeting, to cast their votes in writing before the general meeting is held.

(3) Notwithstanding Section 32 paragraph (2) of the German Civil Code, a resolution is valid without a meeting of the members if all members have participated, at least half of the members have cast their votes in text form by the deadline set by the association and the resolution has been passed with the required majority.

Section 6

Condominium owners' associations

(1) The last appointed administrator within the meaning of the German Condominium Act (*Wohnungseigentumsgesetz*) shall remain in office until his or her dismissal or until a new administrator is appointed.

(2) The business plan last adopted by the condominium owners continues to apply until a new business plan is adopted.

Section 7

Transitional arrangements

(1) Section 1 shall only apply to General Meetings and advance payments on the balance sheet profit which take place in 2020.

(2) Section 2 shall only apply to shareholders' meetings and resolutions that take place in 2020.

(3) Section 3 paragraphs (1) and (2) shall be applied to General Meetings and Representatives' Meetings which take place in 2020, Section 3 paragraph (3) shall be applied to the adoption of annual financial statements which take place in 2020, Section 3 paragraph (4) shall be applied to advance payments which take place in 2020, Section 3 paragraph (5) shall be applied to appointments of members of the Management Board or Supervisory Board which expire in 2020 and Section 3 paragraph (6) shall be applied to meetings of the Management Board or Supervisory Board of a cooperative or their joint meetings, which take place in 2020.

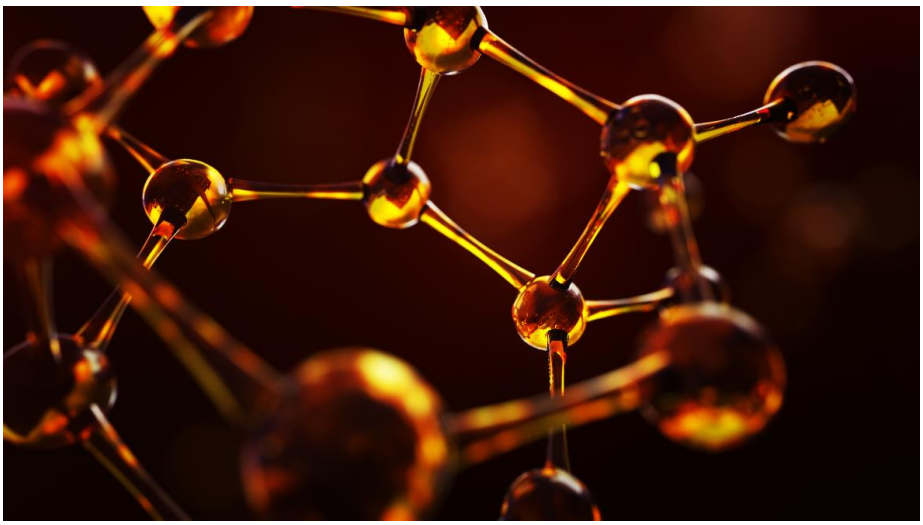
(3) Section 4 shall only be applied to registrations that are made in 2020.

(4) Section 5 shall only apply to appointments of board members of association or trusts expiring in 2020 and to general meetings of associations taking place in 2020.

Section 8

Regulation authorization

The Federal Ministry of Justice and Consumer Protection shall be authorized to extend the validity of Section 1 to 5 pursuant to Section 7 by statutory order without the consent of the Federal Council (*Bundesrat*) until 31 December 2021 at the latest if this appears necessary due to the continuing effects of the COVID-19-Pendemic in the Federal Republic of Germany.



Avoid liability risks

Companies and their management bodies should ensure that they avoid liability risks when taking action.

Criminal law risks in the event of untruthful statements in the context of applications for subsidies, etc.

Various legal parameters must be taken into account when applying for and claiming subsidies.

In particular, it must be taken into account that the various financial benefits are in each case tied to **preconditions** which must in some cases only be alleged and in others **made credible**, but in the interest of rapid processing must currently **only to a limited extent be proven**. **False statements** can have considerable consequences, including those consisting in **criminal sanctions**.

In connection with the Länder's subsidy programmes for the self-employed and small entrepreneurs, which provide for genuine subsidisation, the development banks involved have raised concerns about the truthfulness of the parties involved and pointed out that, irrespective of the speedy allocation of funds, a **more detailed examination will be carried out** at a later date.

In this respect, the charge of **subsidy fraud**, Section 264 of the German Criminal Code (StGB), could be particularly relevant. For this, a prison sentence of up to 5 years or a fine, in particularly serious cases up to 10 years, is provided for. The same also applies to the application for **short-time working allowance** - according to the predominant opinion, short-time working allowance is a subsidy in the sense of Section 264 StGB. Compliance with the application requirements for the granting of short-time work compensation can therefore be qualified as a fact relevant to subsidies, as has also been shown by proceedings in connection with or in the wake of the financial market crisis in 2008/2009. There, cases had become known in which there was actually no loss of working hours or at least no loss of working hours to the extent reported, but employers nevertheless had their advance short-time working allowance refunded.

The charge of subsidy fraud provides for significantly lower requirements than the "general" fraud under Section 263 of the German Criminal Code. It already allows **frivolous action** to suffice, i.e. a **special form of negligence in the direction of a gross and avoidable breach of duty of care**. In the case of subsidy fraud, for example, the incorrect or incomplete application for short-time working allowance made by the employer to the Federal Employment Agency can therefore be considered a criminal offence at the latest, without further proof of damage (i.e. actual damage as "success in crime") being required.

If false information is given in the course of credit applications, a charge under Section 265b StGB - **credit fraud** - may be incurred. In addition, fraud relevant under criminal law may also be involved - for example, if

there is deception about the conditions for deferral of taxes or social security contributions. Forgery of documents can also be relevant.

Finally, there is also a risk of criminal liability in the event of unauthorised use of tax deferral options. This is expressly pointed out in the forms: "Note: Incorrect information can have criminal consequences, cf. sanction regulations **§§ 370 and 378 of the German Fiscal Code**".

As a result, there is always a risk of criminal liability if the applicant violates the duties of examination, investigation, information or supervision incumbent upon him, whether out of indifference or gross carelessness, intentionally or, if necessary, recklessly.

Even if the authorities are not (able to) examine every last detail at present, the subsequent control will be carried out by special audit groups of the authorities, as was already the case after the financial crisis in 2008/2009.

Even if it has to be done quickly, the prudence and duties of a diligent management body require that the application work be done carefully despite all the hurry. Also in view of the substantial orders, **substance should take precedence over speed**.

The applications to be filed often involve substantial sums of money - not only to avoid personal liability does it seem advisable to seek expert assistance for the application.

Interactions between managerial action and funding

Update April 2020: Unlike the situation at the beginning of April, the conditions of the **KfW Special Programmes 2020 now provide for a ban on profit and dividend distributions**. The corresponding leaflets and other information have been adjusted accordingly in the meantime. They now provide for the following wording:

> Profit and dividend distributions (the latter only to the extent not required by law) are not permitted during the term of the loan, with the exception of customary market remuneration to business owners (natural persons). This also applies to profit and dividend distribution resolutions already adopted by general meetings.

For this reason, the Executive Board must now also consider whether and to what extent a **distribution policy correlates (or conflicts with) with the use of KfW programmes**.

Is it still permissible to make distributions today if an application for KfW funds is to be submitted promptly? May a resolution on the appropriation of profits still be implemented if massive deterioration has occurred? What information on legal transactions and/or disbursements made must be provided in the KfW applications without the risk of the loan agreement being terminated at a later date due to insufficient information - or even criminal sanctions? How can management bodies ensure that the necessary procurement of liquidity under the KfW programmes is not undermined by the general meeting or the general meeting of shareholders approving profit distributions? If a contract is signed, how can it be ensured that distributions contrary to the contract are not made? How are the statements in the KfW information leaflets to be interpreted, according to which the prohibition of profit and dividend distributions should also extend to profit and dividend

distribution resolutions already adopted by general meetings? Do they impose on executive bodies an obligation to not make use of KfW funds/loans? Or do they allow them to draw on KfW funds and then refuse to implement the profit distribution resolutions with reference to the clauses contained in the loan agreements?

Here - as with dividend and distribution resolutions and their execution as a whole - **a careful examination of the circumstances of the individual case is** just as **essential** as the involvement of advisors.

Take into account transitional provisions

Companies should reckon with transitional provisions.

Article 6 of the COVID-19 Pandemic Act provides for the entry into force and expiry of the provisions.

Reproduction of the wording of the provisions of Article 6 of the COVID-19 Pandemic Act

Article 6

Entry into force, expiry

(1) Article 1 shall enter into force on 1 March 2020.

(2) Article 2 shall enter into force on the day following its promulgation and shall expire at the end of 31 December 2021.

(3) Article 3 shall enter into force on the day following its promulgation.

(4) Article 4 shall enter into force on ... [insert date: the day and month of promulgation of this Act and the year of the first year following promulgation].

(5) Article 5 shall enter into force on 1 April 2020. Article 240 of the Introductory Act to the Civil Code shall expire on 30 September 2022.

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