



**Baker
McKenzie.**

Coronavirus

Legal guide for Germany

Date: 26 June 2020



*We will provide you with **regular updates** on all relevant legal developments regarding the Coronavirus disease in Germany.*

*Our **team is ready to navigate** you through these challenging times. Please don't hesitate to get in contact with our experts.*

The contents of this guide do not replace legal advice in individual cases.

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Employees and
Businesses

Employment (I)

(Status: 26 June 2020)

[Update: 12 June 2020]

What is the current status regarding legal regulations for virtual negotiations?

As part of the Social Protection Package II, the "Gesetz zu sozialen Maßnahmen zur Bekämpfung der Corona-Pandemie" of 20 May 2020 adopted the following amendments to the Labour Courts Act:

- The court may allow volunteer judges to attend oral hearings by means of video and audio transmission from a place other than the court.
- The labour courts are to allow the virtual participation of the parties to the negotiations ex officio under certain conditions.

Link to the law (Federal Law Gazette Part I of 28.05.2020 p. 1055 ff.):

https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=%2F%2F%2A%5B%40attr_id=%27bgbl120s1075.pdf%27%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl120024.pdf%27%5D_1591188104536

[Update: 12 June 2020]

Is the works council also able to make effective decisions in virtual works council meetings?

Within the context of the "Gesetz zur Förderung der beruflichen Weiterbildung im Strukturwandel und zur Weiterentwicklung der Ausbildungsförderung" of 20 May 2020, the German Federal Parliament amended § 129 of the Works Constitution Act:

- Participation in works council meetings is possible by means of video or telephone conference if it is ensured that third parties cannot take note of the content of the meeting;
- The participants must confirm their presence in advance of the meeting to the works council chairperson in text form (e.g. by e-mail);
- A recording is not permitted.

In this context, the law on speaking committees and the European Works Councils Act were amended.

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Employment (II)

(Status: 26 June 2020)

[Update: 8 April 2020]

Under what conditions can the employer order short-time work?

Due to the economic situation caused by COVID-19, the employer can apply for short-time work compensation under simplified conditions at the employment agency. The application must be submitted to the responsible employment agency at the company's establishment. The following simplified requirements now apply:

- *at least 10% of employees have a loss of earnings of more than 10%.*
- *the absence from work is temporary and unavoidable*
- *overtime and working time accounts must first be reduced*
- *the build-up of negative working time balances and consumption of vacation of the current calendar is temporarily not required*
- *social security contributions must still be paid, but will be refunded retroactively from 1 March 2020 until the end of 2020.*
- *the employer must notify and apply for short-time work compensation in writing within the same month to the employment agency at the place of business, giving reasons for the request.*

Applications and guidelines can be found [here](#).

[Update: 12 June 2020]

What is the amount of short-time pay?

Up to now, short-time pay was granted to employees in the amount of 60% of the compounded net salary taking into consideration the social contribution assessment ceiling. For employees with at least one dependent child, the percentage benefit is 67%.

When the Social Protection Package II came into force, the short-time working allowance increased depending on the duration of short-time working:

- *For childless employees who work at least 50% less, the short-time working allowance will be increased to 70% from the 4th month of payment and to 80% from the 7th month.*
- *For employees with children who work at least 50% less, the short-time working allowance will be increased to 77% from the 4th month of payment and to 87% from the 7th month.*

These increases apply until 31 December 2020 at the latest.

[Update: 12 June 2020]

What does the social protection package on the Corona pandemic include?

On 14 May 2020, the German parliament passed the law to further reduce the social and economic impact of the coronavirus pandemic (Social Protection Package II). It contains:

- *Improved conditions for short-time work benefits gradual increase*
- *Possibilities of additional income (from 1 May 2020 in all professions up to their previous net income limit)*
- *Extension of the duration of entitlement to unemployment benefit (unemployment benefit is extended by three months for those whose entitlement would end between 1 May 2020 and 31 December 2020)*
- *For the labour and social courts, the possibility of using video conferencing in the oral proceedings will be extended.*

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Employment (III)

(Status: 26 June 2020)

[Update: 8 April 2020]

Has the employee the right to stay at home and take care of his children, if kindergartens and schools are being closed? How is the continued payment of wages during childcare going to be regulated?

If kindergartens and schools are being closed and alternative care options (such as the other parent or emergency care in the institutions) do not exist, the employee can refuse performing work for such time. To reduce the loss of earnings suffered by working custodians when they have to look after their children themselves due to the closure of schools and daycare centres by the authorities, Sec. 56 (1a) Infection Protection Act (Infektionsschutzgesetz) now includes a claim for compensation. Accordingly, those affected receive compensation of 67 percent of their monthly net income (maximum EUR 2,016) for up to six weeks. The employer, who can apply for reimbursement to the competent state authority, will be responsible for payment. The prerequisite for this is,

- *that working custodians have to look after children under 12 years of age or children with disabilities who are dependent on help, because care cannot be provided otherwise,*
- *that there is no other possibility of staying away from work on a temporary paid basis (for example by reducing time credits)*
- *the institution would not be closed anyway.*

Are employees obliged to disclose themselves as a "risk-factor" to the employer?

- *Employees with a confirmed infection need to disclose the same to their contractual employer.*
- *Employees with flu symptoms who*
 - i. *visited; or*
 - ii. *had contact with individuals from areas with presumed community transmission of COVID-19 (e.g., China, Italy, North or South Korea, Japan, Singapore, Hong Kong and Iran) within the past 3 weeks need to disclose this circumstance.*
- *Even without flu symptoms (i.e., fever, cough, difficulty breathing, pain in the muscles, tiredness), employees who*
 - i. *have an individual with a confirmed infection in their household; or*
 - ii. *visited an event, which later became known to be a venue from which the disease spread, need to disclose this circumstance to their employer.*

Can the employer demand employees to disclose themselves as being a "risk-factor"?

The employer's right to ask certain questions has as counterpart the employees' obligation to disclose the corresponding information (i.e., the employer has the right to ask for the circumstances specified as per question no. 1 and the employee has to provide the corresponding and truthful answer).

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Employment (IV)

(Status: 26 June 2020)

Can the employer issue an instruction (or a policy) requiring employees to report co-workers with flu symptoms (i.e., fever, cough, difficulty breathing, muscle pain, tiredness) to the employer?

Yes, but this is a significant intrusion on privacy in a sensitive area. For reasons of proportionality at least the following precautions should be taken:

- i. Limit geographic scope: The reporting possibility should only be offered for employees of
 - a) sites located in areas with presumed community transmission of COVID-19; or*
 - b) sites in which an employee was diagnosed positively with a Coronavirus infection; or*
 - c) sites in which an employee had allegedly come in contact with an individual with a confirmed infection.**
- ii. Offer, don't oblige to report: The reporting possibility should be phrased as an invitation to report, rather than as an obligation to report (under German law it is very questionable whether a reporting obligation can be created unilaterally by means of an instruction).*
- iii. Keep reports within the employer: The reporting channel should be limited to the employer (i.e., the contractual employer and not to anyone else in the group of companies and not to third parties) and within such employer to a narrowly defined group of recipients (e.g., the Coronavirus crisis team).*
- iv. Limit reportable content: It should be made clear that
 - a) the reporting channel must only be used with regard to the fact that symptoms exist and not for reporting an individual's specific symptoms; and*
 - b) the reportable symptoms are limited to the publicly known and acknowledged list of symptoms (i.e., fever, cough, difficulty breathing, pain in the muscles, tiredness).**
- v. Separate reports from other employee data: The information reported through the reporting channel should be recorded separately, not be included in the employee's personnel file and should be deleted 6 weeks after recording.*
- vi. Create transparency: A transparent (Art. 13 GDPR) notice, containing information according to Art. 14 GDPR, needs to be issued to all employees (including contingency workers) before the reporting line is opened, especially with regard to the points mentioned herein, but also with regard to the steps envisaged by the employer upon having received a report).*
- vii. Inform data subjects: The employee concerned by a report has to be notified as soon as possible.*

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Employment (V)

(Status: 26 June 2020)

[Cont.]

Can the employer issue an instruction (or a policy) requiring employees to report co-workers with flu symptoms (i.e., fever, cough, difficulty breathing, muscle pain, tiredness) to the employer?

viii. *Decide how to treat the reporters: There is an ongoing discussion in Germany whether the data subject (i.e., the reported subject) has the right to learn who reported him or her – we deem it possibly (even though not entirely risk free) to assure reporters to treat their reports in confidence when such reports were made in good faith. Even though not a privacy compliance issue, please note that the works council has a co-determination right with regard to the technical system used to implement the reporting line and the reporting requirements.*

Can employees refuse to come to work?

Employees can only refuse to come to work if

- i. *there is a confirmed Coronavirus infection in the work place; and*
- ii. *the employee's place of work is in close proximity to where the infected employee was located (i.e., same open space office); and*
- iii. *the employer cannot reassign the employee to a no-risk environment at the workplace.*

Can employees refuse to attend meetings or to travel?

- *Only if the meeting takes place in a region officially recognized by authorities as being a crisis-region or if attendees visiting from crisis-regions would attend (for information see <https://www.auswaertiges-amt.de>).*
- *Same rule applies for business travel.*

Can the employer send employees on suspension from work?

- *If an employee qualifies as a "risk factor" based on the criteria set out in the response to question no. 1, the employer is obliged to lock out the employee.*
- *The employee would need to continue to work if possible (e.g., from the home office) unless sick.*

When is the employer forced to shut down its operations?

- *Only if there is evidence that the place of work is an "out of control crisis venue".*
- *This decision should only be made in consultation with local health authorities (Gesundheitsamt).*

Does the employer have the obligation to report infections occurring in the business to the health authorities?

No, only medical staff and doctors who become aware of an infection are required to report to the health authorities (https://www.gesetze-im-internet.de/corona_v_melddev/).

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Employment (VI)

(Status: 26 June 2020)

Can the employer request an employee to see a doctor?

No, the employer can only recommend the employees to see a doctor. If the employee refuses, the employer can send the employee on paid garden leave under the preconditions stipulated in item 6.

If employees are sent on suspension from work, or refuse to come to work or if an operation is being shut down, do the employees still need to be paid?

- *In case of a legitimate lock out, suspension from work or shut down (based on the requirements stipulated in these FAQ), the employee would need to be paid.*
- *But the employee would also be required to take all reasonable steps to work from home. Further, the employee would need to accept being temporarily reassigned physically within the workplace to a no-risk environment (i.e., other office) or to be assigned with different duties even if these are inferior to the standard duties (unless entirely unacceptable).*

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Data Protection (I)

(Status: 26 June 2020)

Is a data controller permitted to process personal data in connection with the COVID-19 pandemic (e.g. by requiring employees/visitors to fill out a questionnaire including questions on travels to high risk areas and on whether they have been in close contact with someone who has been positively tested for COVID-19 or by conducting temperature checks of employees and visitors in its premises)?

Yes, data controllers are generally permitted to process personal data for the purpose of containing the pandemic or protecting their employees.
The legal bases for such measures vary. Depending on the specific data processing activity, the following legal bases may be available for data controllers:

- Employee Data: Sec. 26 (1) FDPA respectively Art. 6 (1) f) GDPR and – to the extent special categories of personal data are processed – Sec. 26 (3) FDPA, Sec. 22 (1) No. 1 (b), (d) FDPA and Art. 9 (2) (b) GDPR.
- Third Party Data: Art. 6 (1) f) GDPR and – to the extent special categories of personal data are processed – Art. 9 (2) (i) GDPR together with Sec. 22 (1) No. 1 (c) FDPA and Sec. 22 (1) No. 1 (d) FDPA.

In any event, the principle of proportionality must be taken into account. The personal data must be kept confidential and may only be used for the specific purpose.

Is it required to inform the data subjects on the respective processing?

Yes, the data subjects must be informed about the processing activities in line with Art. 13 GDPR (e.g. via a privacy notice). If the data controller has already provided certain information to the data subjects (e.g. via its general privacy notice), only limited additional information needs to be provided (e.g. the additional data categories and processing purposes).

How long can the respective personal data be stored?

The relevant personal data must be deleted as soon as they are no longer required for the respective purpose. This must be assessed on case-by-case basis. The latest point in time will be the end of the pandemic. However, certain personal data such as visitor lists should be deleted earlier (generally after 4-6 weeks).

[Update: 29 April 2020]

Yes, several guidance has been published:

Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying COVID-19 cases? (1/2)

- The Federal Commissioner for Data Protection and Freedom of Information has issued [information regarding the handling of data protection in connection with the Corona pandemic](#), including FAQs regarding data processing in the employment area.
- The German data protection authorities (“Datenschutzkonferenz”) published [“Information regarding the processing of personal data by employers in connection with the Corona pandemic”](#) and a resolution on [“data protection principles and the Corona pandemic”](#).
- The European Data Protection Board has issued a [statement](#) and [guidelines](#).

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Data Protection (II)

(Status: 26 June 2020)

[Cont.]

Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying COVID-19 cases? (2/2)

Furthermore, in particular the following guidance has been published:

- The data protection authority of Baden-Wuerttemberg published, inter alia, [FAQs regarding Corona](#) as well as information on “[data protection-friendly technical possibilities of communication](#)”.
- The data protection authority of Schleswig-Holstein issued particular [information](#) on data protection and Corona, including information on working from home.
- The data protection authority of Rhineland-Palatinate published [information on Corona & data protection](#), including information, inter alia, on carrying out temperature checks.
- The data protection authority of Hamburg published a [statement](#) on data protection in times of Corona, including information on the processing of personal Covid-19 data by retailers and companies open to the public and Covid-19 and employment relationships.
- The data protection authority of Saxony issued particular [information](#), inter alia, on working from home and the handling of customer and visitor data.
- The data protection authority of Brandenburg published a [statement](#) on data protection and working from home.
- The data protection authority of North Rhine-Westphalia published a [statement](#) on data protection in gastronomy and [FAQs](#) with questions and measures of the employer against Corona infections.
- The data protection authority of Bavaria published [advice regarding data protection and data security](#).
- The data protection authority of Sachsen-Anhalt [published information on data protection and the Corona pandemic](#).
- The data protection authority of Berlin published, inter alia, a [recommendation](#) and a [checklist](#) on the use of video conferencing systems.

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Curfews (I)

(Status: 26 June 2020)

[Update: 28 May 2020]

Further extension of curfews

Curfews are extended until 29 June 2020. However, this should not result in further or new restrictions for companies. In addition, the implementation of the contact restrictions will continue to vary greatly from one federal state to another, so that it remains crucial for companies to closely monitor the specific regulations in the federal states relevant to their business activities.

[Update: 7 May 2020]

Common basic rules of the federal states on further relaxation of curfews

All shops will be allowed to reopen, regardless of their size. Instead of the previous limitation of the sales area to a maximum of 800 square meters, a maximum number of customers per shop area is now to be set in order to comply with the distance rules. Restaurants, hotels, and cultural institutions are also to be allowed to reopen gradually in many federal states. There will continue to be conditions for the workplaces, according to which the companies are to develop hygiene concepts for their employees and, as far as feasible, continue to allow home office. The details of the respective rules will, however, be left to the federal states and will depend on the actual infection rates in the states. Throughout the next days and weeks, there are hence to be expected inconsistent rules, start dates and penalties throughout Germany which will make it necessary to closely monitor the rules in the federal state(s) relevant for the company's business operations.

[Update: 23 April 2020]

Face masks mandatory nationwide

From 27 April 2020, face masks and breathing masks will be mandatory throughout Germany in the retail trade and local traffic. In addition to bookstores, car and bicycle dealers, some federal states also allow shops with a shop area of more than 800 square meters to open if the shop area is reduced to a maximum of 800 square meters (Berlin, Bremen, Hamburg, Hesse, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saxony, Schleswig-Holstein and Thuringia from 24 April and North Rhine-Westphalia from 27 April).

[Update: 15 April 2020]

Further extension of curfews

The curfew will be extended nationwide until 3 May 2020. The current measures will not be tightened and in some cases will even be relaxed: from 20 April 2020, retail shops with a maximum of 800 square meters of shop space and, irrespective of shop space, bookstores, car and bicycle dealers may reopen under conditions relating to hygiene, access control and the avoidance of queues. There will be no general obligation to wear face masks or breathing masks. The borders to Austria, France, Luxembourg, Denmark and Switzerland will continue to be restricted, but will remain open for commuters and freight traffic as before. Major events are to remain prohibited nationwide until 31 August 2020. Concrete regulations, for example on the size of the events, are to be made by the federal states.

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Curfews (II)

(Status: 26 June 2020)

[Update: 3 April 2020]

Extension of curfews

The curfew will be extended until 20 April 2020 throughout Germany. The current measures will not be intensified, however. There will still be no nationwide obligations regarding home office or limitation of production.

[Update: 27 March 2020]

Guidelines of the government and the Regional Prime Ministers of 22 March 2020

According to the Guidelines, it inter alia remains possible to commute to work, participate in meetings, attend necessary appointments and carry out other necessary activities. More far-reaching regulations by the federal states remain possible. As far as the states Bavaria, Baden-Wuerttemberg, Saxony and Saarland have adopted more coercive measures, these measures mainly relate to the private domain. Commuters are still permitted to cross national borders to work in Germany as long as they can produce their work contract or a confirmation of their employer on request. Commuters from Poland and the Czech Republic may not be able to easily travel back, however.

[Update: 27 March 2020]

Sanctions for violations throughout Germany

Adherence to curfews shall now be observed by the regulatory authorities and police throughout Germany and shall be sanctioned in case of violations. The legal basis for such sanctions remains the Infection Protection Act. North Rhine-Westfalia has been the first federal state to issue a catalogue of fines, with fines for prohibited business operations starting at EUR 4,000. Baden-Wuerttemberg and other states will follow shortly.

Whom does it concern?

A curfew may currently primarily be imposed on persons who are sick, may be sick or can or may infect other people (Sec. 28(1), 30 Infection Protection Act). In case of a large number of confirmed Corona cases within one town, at least the authorities in Bavaria and Baden-Wuerttemberg currently appear to take the stand that a curfew may indeed be imposed on all inhabitants of that town as a matter of precaution.

What is prohibited? (Example: Bavaria)

All persons are prohibited to leave their private premises without good reasons. In principle, it is hence prohibited to enter public spaces (for exceptions see below). This applies to streets, footpaths, squares, public transport but also to customer areas of business premises and service companies

What is permitted? (Example: Bavaria)

It is in particular permitted to enter public areas to transport goods, to get to or from work when holding a confirmation letter of the employer, to do grocery shopping, visit doctors and pharmacies, get gasoline and withdraw money.

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Curfews (III)

(Status: 26 June 2020)

Which penalties could be imposed?

In our view, it is already doubtful whether there is a sufficiently clear legal basis for the enforcement of longer-lasting curfews which may then lead to the imposition of penalties or fines in case of infringement.

However, at least the authorities in Bavaria currently take the standpoint that an infringement of curfews may be punished with a fine of up to EUR 25,000 (Sec. 73(1a) No. 6 and (2) Infection Protection Act). First-time infringers should likely face a rather low monetary fine, however. In addition, an intentional violation which causes the virus to spread may theoretically also lead to imprisonment of up to five years (Sec. 74 Infection Protection Act).

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Mandatory Business Closures and Gradual Reopening (I)

(Status: 26 June 2020)

[Update: 15 May 2020]

Who is affected?

- In implementation of the [agreement](#) between the Federal Government and the Federal States of 16 March 2020, all Federal States implemented regulations on far-reaching closures of establishments and facilities open to the public. By [agreement](#) dated 15 April 2020, it was agreed to extend these restrictions with certain easings. The latest [agreement](#) of 6 May 2020 provides for a further gradual relaxation of the restrictions.
- In implementation of the latest agreement, in principle all stores are now allowed to reopen, regardless of the size of the sales area.
- Under the agreement of 6 May 2020, the Federal States can decide independently on the reopening of other establishments and facilities which have been closed so far. This concerns in particular
 - hotels and other accommodation for tourist purposes
 - restaurants, bars, clubs, discos, pubs and similar establishments
 - theater, operas, concert halls, movie theaters and similar institutions.
- Major events will remain prohibited until at least 31 August 2020.
- Furthermore, under the agreement of 6 May 2020, the Federal States have committed to ensuring that, in the case of localized outbreaks (i.e. in districts or municipalities with cumulatively more than 50 new infections per 100.000 residents within the last 7 days), a restriction concept is immediately implemented at the local level. Therefore, further restrictions may be enacted locally.

[Update: 15 May 2020]

What is prohibited?

- Since the restrictions in place and the planned gradual reopening steps are implemented differently in each individual Federal State and further restrictions may be implemented at the local level, the current relevant laws of the respective Federal State, district and municipality should always be carefully reviewed.
- As far as service industries are prohibited, the provision of services outside of the business is generally also prohibited.

[Update: 7 May 2020]

What is permitted?

- To the extent that restaurants are still required to remain closed, take-away sales and deliveries remain permissible, as a rule, although special precautions must be taken with regard to hygiene.
- Apart from the prohibited services, service providers may continue to offer their services, subject to the special hygiene requirements.

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Mandatory Business Closures and Gradual Reopening (II)

(Status: 26 June 2020)

[Update: 7 May 2020]

What requirements apply when shops are (re-)opened?

- Insofar as shops may (re)open, strict requirements apply with regard to hygiene, access control and avoidance of queues.
- In Bavaria, for example, the following requirements apply:
 - The operator must take suitable measures to ensure that a minimum distance of 1.5 m between customers can be maintained,
 - the staff must wear a mouth and nose cover,
 - customers from the age of 6 must wear a mouth and nose cover,
 - the operator must draw up a protection and hygiene concept (e.g. admission, mouth and nose cover) and, if customer parking spaces are provided, a parking concept,
 - the operator shall ensure that the number of customers present in the store at the same time does not exceed one customer per 20 m² of sales area.
- The details of the requirements vary from State to State. Therefore, the currently valid State laws should always be checked.

[Update: 7 May 2020]

What are the risks of non-compliance?

- Compliance with mandatory business closure regulations and the requirements for the reopening of businesses is regularly monitored by the regulatory authorities and, if necessary, enforced by coercive measures.
- Fines of up to EUR 25,000 may be imposed for violations (in particular if repeated).
- Many Federal States have issued detailed catalogs of fines; however, even without such a specific catalog tailored for the current Coronavirus-related prohibitions in place, the imposition of fines in case of non-compliance is possible in every Federal State.
- Theoretically, a prison sentence of up to 5 years would also be conceivable in the case of an intentional violation that leads to a spread of the virus (Section 74 Infection Protection Act).

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Real Estate and Tenancy Law (I)

(Status: 26 June 2020)

[Update: 2 April 2020]

Could the parties claim that the COVID-19 pandemic is a *force majeure* event which excuses the parties from performing the lease obligations?

It is doubtful whether the COVID-19 pandemic qualifies as force majeure in a lease scenario. Force majeure clauses are not frequently used in German leases and need to be explicitly agreed between the parties. In case a force majeure clause is agreed between the parties, it usually only covers the destruction or damage of the leased premises, i.e. the direct physical impact on the leased premises.

If a force majeure clause is triggered by the COVID-19 pandemic (e.g. because the clause also explicitly covers events of epidemic or pandemic), it may entitle the tenant to reduce the rent if, and to the extent that, the leased premises themselves are partially unusable or inaccessible. The rent reduction would apply for the period of time that the leased premises are unusable or inaccessible.

On 27 March 2020, the German Parliament passed a law on mitigating the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law. It became effective on 1 April 2020. The new law shall inter alia protect the tenant from the termination of its lease by the landlord if the tenant falls in default with its rent payments for the period between 1 April 2020 and 30 June 2020 due to the COVID-19 pandemic.

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Real Estate and Tenancy Law (II)

(Status: 26 June 2020)

[Update: 12 June 2020]

Could the parties argue that the lease contract is frustrated by the impact of the COVID-19 pandemic?

It is uncertain whether the parties could successfully argue that the lease is frustrated by the impact of the COVID-19 pandemic. There is a very old case law from the German Imperial Court of Justice (Reichsgericht) dating back to 1915, according to which tenants were granted rent suspension rights due to official closure orders in light of World War I. However, the current legal literature often differentiates as follows: only if restrictions are directly linked to the location or the (structural) condition of the premises, the landlord shall bear the risk of the tenant being limited in its use of the leased premises. In all other cases only the tenant's profit expectation is affected, for which the landlord shall not be held liable.

However, in the meantime we see an increasing number of authors in recent legal literature taking the view that the economic impact of the COVID-19 pandemic and the related restrictions imposed by the German state governments cannot be only the tenants' risk. It is argued that in individual cases the rent may have to be adjusted on the basis of general legal principles (such as the frustration of contract). Alternatively, it is argued that the official closure orders may constitute a defect of the leased premises (so-called defects caused by external impacts (Umweltmangel)). As there has not been a comparable situation in Germany (or in the rest of the world) to date, it is currently hard to predict in which direction the entire argumentation and the distribution of risks will shift. We therefore recommend tenants that the current situation and a possible cost sharing are discussed with and requested from the landlords with the aim to seek an amicable solution (e.g. based on a joint understanding of the frustration of contract principles). The recommendations published by the Handelsverband Deutschland (HDE) and the Zentraler Immobilien Ausschuss (ZIA) on 3 June 2020 give a first idea of how an appropriate risk distribution between the landlords and the tenants might look like. In view of the current uncertainty, we also recommend to make rent payments subject to the reservation of the right to reclaim any overpayments in rent.

(For the definition and types of force majeure and frustration of contract please also see the explanations under the section [Commercial Contract: Force Majeure](#)).

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Real Estate and Tenancy Law (III)

(Status: 26 June 2020)

[Update: 27 March 2020]

If the lease contains a tenant's keep-open covenant, might a governmental quarantine or shutdown put the tenant in breach? How would a landlord enforce the covenant?

It is common for retail leases to provide for a keep-open covenant, in particular for leases for spaces located in shopping malls and outlet centers and for leases with turnover clauses.

The tenant's breach of its keep-open covenant may trigger a contractual penalty and entitle the landlord to terminate the lease agreement. The landlord can also seek to enforce the covenant by specific performance.

However, if an administrative order is issued to keep the leased premises closed, this would take precedence over any keep-open covenant in the lease.

[Update: 28 May 2020]

If the tenant cannot use its leased premises, does it have to continue paying rent?

In general, the tenant has to continue to pay rent. It is common for German leases to contain wording explicitly excluding the tenant's right to suspend or reduce the rent payments, respectively, unless the defect of the leased premises is acknowledged by the landlord or confirmed by binding court decision.

Exceptions may apply, if the lease includes wording for an event of force majeure or if the landlord cannot fulfil its contractual obligation to grant the tenant the use of the leased premises.

On 1 April 2020, the law on mitigating the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law became effective. The new law shall protect the tenant from the termination of its lease by the landlord, if the tenant falls in default with its rent payments for the period between 1 April 2020 and 30 June 2020 due to the COVID-19 pandemic. Any other reason for the payment default will not exclude the termination, such as any unwillingness to pay the rent or cash flow difficulties because of other (non-Corona-related) reasons. The tenant has to make the connection between the default of payment and the COVID-19 pandemic sufficiently plausible (Glaubhaftmachung) in case of dispute. This means that the tenant has to present evidence that supports an overwhelming probability that its default in payment is due to the COVID-19 pandemic. The plausibility requirement can be met by providing an affirmation in lieu of an oath (Versicherung an Eides statt) of the tenant or other suitable evidence. Appropriate means may include, in particular, proof of submission of an application or a certificate of entitlement to state aid or other proof of income. In addition, tenants of commercial space can regularly provide evidence by pointing out that the operation of their business has been prohibited or materially restricted by legal ordinance or official order in the context of combating the SARSCoV 2 virus.

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Real Estate and Tenancy Law (IV)

(Status: 26 June 2020)

[Cont.]

If the tenant cannot use its leased premises, does it have to continue paying rent?

The general obligation of the tenant to pay its rent shall neither cease nor be suspended by the law on mitigating the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law. The landlord shall remain entitled to claim the outstanding rent payment plus interest accrued. Only the threat for the tenant to face the termination of the lease due to its failure to pay the rent because of the pandemic shall be excluded for the aforementioned period. The law therefore protects the tenant from the termination of the lease without releasing it from its payment obligations under the lease.

Taking into account the recent developments in legal literature, the current situation should be discussed with and requested from the landlords by tenants with the aim to seek an amicable solution. In addition, any rent payments should be made subject to the reservation of the right to reclaim any overpayments in rent.

[Update: 2 April 2020]

Does the protection provided by the law on mitigating the consequences of the COVID-19 pandemic also exclude a termination due to non-payment of ancillary costs?

Pursuant to Section 2 para. 1 of the law on mitigation of the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law, the landlord is not entitled to terminate a lease only because the tenant fails to pay the rent in the period from 1 April 2020 to 30 June 2020 due to the pandemic. The law does not differentiate between net rent and gross rent. Thus, the general principles apply. The rent covers the basic rent plus the current operating and ancillary costs (in particular advance payments of operating costs or lump-sum operating costs). The rent also includes subletting surcharges, surcharges for commercial use or the specially agreed payment for the use of furniture. Besides the purpose of the regulation to protect the tenant from pandemic-related terminations this understanding is also supported by the fact that the term "rent" in the case of extraordinary termination due to default of payment according to Section 543 para. 1 no. 3 of the German Civil Code also includes the advance payments of service charges/operating costs in addition to the basic rent.

[Update: 2 April 2020]

Does the tenant have to pay interest if it does not pay its rent based on the law on mitigating the consequences of the COVID-19 pandemic?

The law on mitigating the consequences of the COVID 19 pandemic in civil, insolvency and criminal procedure law does not contain any special provision on the interest accrued during the tenant's default of rent payment due to the COVID-19 pandemic. This means that the customary default interest rate according to Section 288 para. 2 of the German Civil Code applies. For consumers this currently equals 4.12% p.a., for commercial businesses 8.12% p.a.

[Update: 28 May 2020]

Can the tenant argue that the leased property is defective due to the effects of the COVID-19 pandemic?

It is doubtful whether a tenant can successfully claim that its rent payment obligation ceases to apply due to a defect of the leased premises. Such a claim would require that the landlord is no longer able to make the leased premises available to the tenant for the agreed purpose due to official closure orders and that such inability qualifies as a defect of the leased premises.

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Real Estate and Tenancy Law (V)

(Status: 26 June 2020)

[Cont.]

Can the tenant argue that the leased property is defective due to the effects of the COVID-19 pandemic?

According to German case law and literature, a defect of the leased premises may also result from an external impact on the leased premises which are otherwise free of defects. However, the external impact that restricts the use of the leased premises (e.g. the governmental degrees that ban the opening of certain stores for customers) must directly relate to the specific condition, state or location of the leased premises.

The fact that these measures do not relate to a specific condition of the individual object, but to the general type of use and business purpose (e.g. grocery stores, petrol stations, pharmacies or others types of retail stores) carried out in the leased premises suggests that closure orders do not constitute a defect of the leased premises.

The law to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law also assumes that the obligation to pay rent remains.

As mentioned above, we see individual opinions in legal literature taking the view that the official closure orders may constitute a so-called defect caused by external impact. This said, the circumstances of each individual case need to be considered carefully.

[Update: 27 March 2020]

If the government imposes additional public health requirements, can the landlord compel the tenant to comply with these?

Leases often contain a tenant's covenant to comply with all legal obligations or statutory requirements that are related to its business within the leased premises. So, if the government imposes additional public health requirements in respect of the business activities that the tenant carries out in the leased premises (e.g. minimum distance and maximum numbers of persons in the leased premises), the landlord can request from the tenant to comply with these rules in order to fulfill its contractual obligations, e.g. as part of its duty to ensure the public safety in the leased premises (Verkehrssicherungspflicht).

[Update: 27 March 2020]

If compliance with public health requirements falls to the landlord, who pays for items such as an enhanced cleaning regime, additional cleaning of common areas and any deep cleaning?

Costs for additional cleaning measures may be recoverable from the tenant as part of the service charges. However, service charges can only be allocated to the tenant if this is expressly agreed in the lease. Commercial leases often provide for a widely-drafted list of services and explicitly enable the landlord to charge for additional services, insofar as these services are economically connected to the operation or maintenance of the property and provided in accordance with the principles of good estate management. Often, the allocation of costs for new additional services is capped at a certain percentage amount of the currently applicable costs for service charges (e.g. cap at 10% of the current costs for service charges).

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Real Estate and Tenancy Law (VI)

(Status: 26 June 2020)

[Update: 15 May 2020]

Relief measures

On 15 April 2020, the German Chancellor and the heads of government in the 16 German federal states (Länder) have passed a joint resolution with regard to the restrictions for public life in order to contain the COVID-19 pandemic. It provides that former resolutions and measures in order to contain the COVID-19 pandemic shall remain in force and that the related ordinances in the German federal states shall continue to apply until 3 May 2020. On 6 May 2020, the Chancellor and the heads of government in the 16 German federal states agreed on further gradual reliefs from the restrictions. In principle, all stores are now allowed to reopen, regardless of the size of the sales area, but subject to extensive hygiene and social distancing measures. Each Federal State can decide independently on the reopening of other establishments and facilities which have been closed so far. This concerns in particular hotels and other accommodation for tourist purposes, restaurants, bars, clubs, discos, pubs and similar establishments as well as theater, operas, concert halls, movie theaters and similar institutions.

The legal implementation of this joint resolution in each Federal State is the responsibility of the respective state. Furthermore, under the agreement of 6 May 2020, the Federal States have committed to ensuring that, in the case of localized outbreaks (i.e. in districts or municipalities with cumulatively more than 50 new infections per 100,000 residents within the last 7 days), a restriction concept is immediately implemented at the local level.

Therefore, further restrictions may be enacted locally and it will be necessary to review the specific regional regulations for each site individually in order to determine the requirements for the reopening of the retail spaces. (For further information on the relief measures, please also see the explanations above in the section "Mandatory Business Closures and Gradual Reopening".)

[Update: 30 April 2020]

Concluding new lease contracts

When entering into new leases, in particular when entering into leases for retail or restaurant spaces, the parties should consider including wording for events like the COVID-19 pandemic and other acts of force majeure.

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Real Estate and Tenancy Law (VII)

(Status: 26 June 2020)

[Update: 28 May 2020]

Recommended Actions

As the situation develops, we recommend taking in particular the following steps at this stage as a tenant:

- *Review your contracts to consider whether or not you can rely on a force majeure clause or any other provisions in the lease.*
 - *If any non-performance of a lease obligation has occurred (e.g. forced closure of the entire shopping mall or default), make a record of the event in as much detail as possible, including the timing of the occurrence and the reasons for the non-performance. Inform the other party of its non-performance in writing and request its performance within a reasonable period, if required under the lease or by statutory law.*
 - *Contact your landlord if you cannot or do not want to pay your rent during the COVID-19 pandemic with the aim to discuss with and request from the landlord possible solutions such as temporary rent suspensions and an adjustment of the lease.*
 - *Make the rental payments only under reservation of the right to reclaim any overpayments in rent.*
-

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2 Corporate Governance

Corporate

Implications for limited liability companies and for transformations under the Transformation Act (Status: 26 June 2020)

Is it still necessary to hold a shareholders' meeting to pass shareholders' resolutions of a German limited liability company?

Until the end of 2020, shareholders' resolutions of German limited liability companies may also be passed outside a shareholders' meeting in text form or by submitting written votes, even if not all shareholders agree to this.

This means that it is generally no longer necessary to convene or hold a physical shareholders' meeting. Instead, shareholders entitled to a sufficient number of votes to fulfill the applicable majority requirement for the relevant shareholders' resolution may simply pass the resolution in text form or by submitting written votes (unless a stricter form requirement applies).

However, this relaxation does presumably not apply if a physical shareholders' meeting needs to be held under mandatory law, e.g. in case a shareholders' resolutions on the approval of a merger, demerger or change of legal form under the German Transformation Act shall be passed or in case half of the registered share capital of the company is lost.

Are there any relaxations for mergers or other transformations under the German Transformation Act?

Yes, under the new rules, a merger, split up or de-merger may be implemented on the basis of a balance sheet the reference date of which precedes the date of the commercial register filing by 12 months (rather than 8 months).

This relaxation applies for all relevant commercial register applications filed until the end of 2020.

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New Rules for Stock Corporations (I)

(Status: 26 June 2020)

[Update: 27 March 2020]

Can shareholders' meetings be held by electronic means and how long can a shareholders' meeting be postponed?

Due to the most recent developments, which also include a ban on public assembly, it is practically and legally impossible (and probably not advisable) for German stock corporations to hold physical shareholders' meetings in the coming months. However, no purely electronic meeting is possible under the German Stock Corporation Act (AktG). A physical attendance option for the shareholders remains necessary with the simultaneous possibility for the shareholders to participate in the meeting and exercise some or all shareholder rights electronically. It is conceivable that the company representatives gather in one place and all shareholders attend electronically, but only on a purely voluntary basis, which is an unrealistic scenario for companies with large numbers of shareholders. However, even this requires corresponding provisions in the articles of association, which do not exist in many cases.

Against this backdrop, the German government and parliament have adopted two laws modifying the relevant rules for German stock corporations (i.e. AGs, KGaAs and SEs). With respect to shareholders' meetings and related measures, the relevant law is the law on remediating the consequences of the COVID-19 pandemic in civil law, insolvency law and criminal procedures.

Key features of the part on stock corporations are the possibility for the management board, with the approval of the supervisory board, to allow for a pure online participation in the shareholders' meeting even without corresponding provisions in the company's articles of association, limited possibilities for shareholders to challenge the resolutions taken, shortening the notice for convening a shareholders' meeting to 21 days and the authority to the management board, without corresponding rules in the articles of association, to provide for an advance (dividend) payment on the basis of the profit shown in the balance sheet. Furthermore, the shareholders' meeting can be held within the financial year, i.e. the notice is extended from the previously applicable 8 months period. Note that the advance dividend must not exceed half of the amount of profit remaining after making mandatory allocations to profit reserves and must not exceed half of the amount of the balance sheet profit of the preceding fiscal year.

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New Rules for Stock Corporations (II)

(Status: 26 June 2020)

[Update: 27 March 2020]

Which publications of related insider information should be made?

The German regulator, the BaFin, has published a Q&A on this topic, see

https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html?jsessionid=1C3B6A4D0509369267579E14696D9CE5.1_cid361

The following key takeaways from BaFin's Q&A may be mentioned:

- the fact that the (shareholders' meeting and consequently the) dividend decision is delayed does not as such require disclosure of insider information, but the (likely) reduction of the dividend may;
- if there are other important measures to be decided in the shareholders' meeting, e.g. the creation of an important and necessary capital, and the meeting is postponed, this may be a reason for a public disclosure;
- if the issuer considers it as likely that the financial guidance needs to be revised downwards, it needs to disclose this as insider information; note though that no new guidance is required if the expectations are unclear in the current scenario, it suffices to withdraw the old guidance.

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New Rules for Stock Corporations (III)

(Status: 26 June 2020)

[Update: 27 March 2020]

Which measures mandatorily require a shareholders' meeting?

*It needs to be taken into account that many – also urgently required – measures under corporate law must mandatorily be resolved by the shareholders' meeting. This applies in particular to **capital increases**, which may be of utmost importance in the current situation, unless authorizations have been granted in advance (authorized capital). Without a shareholders' meeting regular **dividend payments** cannot be effected for the time being, because they require a resolution of the shareholders' meeting. So even if, based on the new project of law, the management board (with the approval of the supervisory board) were to pay an advance of up to 50% of the annual dividend, shareholders have a keen interest that the full dividend be paid out soon on the basis of the necessary shareholders' resolution.*

[Update: 27 March 2020]

What changes are being introduced to the German Takeover Act?

The German government and parliament have also adopted a second law, the law on a fund stabilizing the economy.

*This law includes rules modifying the relevant rules for German stock corporations (i.e. AGs, KGaAs and SEs) in the Takeover Act. This includes that the new government stabilization fund (the "**Fund**") to be introduced is under no duty to make a mandatory offer if it were to exceed the relevant threshold of 30% which otherwise triggers such obligation. Concerting by one or more shareholders with the Fund or the German government does not lead to an attribution of voting rights (acting in concert) and, hence, does not lead to a potential requirement to make a mandatory offer based on such attribution. If, in connection with a stabilization measure, the Fund or the German government make a tender offer, special rules apply, in particular the minimum price is only the lower of (a) the two-week volume-weighted average price (normally: three-months VWAP) of the relevant shares or (b) the VWAP from March 1 to 27. Finally, the threshold for a squeeze-out of the Fund under the German Stock Corporation Act is lowered from 95% to 90%.*

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3 Liquidity / Financing

Financial Support Measures (I)

(Status: 26 June 2020)

[Update: 7 May 2020]

Which support measures are available?

- As part of the [package of measures to mitigate the effect of corona virus](#) the German Federal Government has set up a "billion-dollar protection shield" for affected companies. Affected companies receive facilitated access to government liquidity assistance in the form of loans and guarantees.
- To this end, the KfW Special Program 2020 expands amongst others the existing government programs for liquidity assistance (e.g. KfW loans) and makes these available to more companies.
- In addition, in cooperation with credit agencies the Federal Government puts up a "[protective umbrella](#)" of EUR 30 billion to secure supplier credits of German companies. Further, the Economic Stabilization Fund (ESF) may, apart from the recapitalization measures detailed in the following sections of this guide, issue guarantees to secure debt securities and loans, and grant loans to KfW.
- Furthermore, the federal government has decided on an emergency aid program with direct subsidies for small enterprises (up to ten employees) and self-employed persons.
- The Federal Ministry of Economics is also funding consultancy services for small and medium-sized enterprises affected by Corona, including freelancers, up to a consultancy value of EUR 4,000.
- On 1 April 2020, the German government also announced a new package of measures specifically tailored to the needs of start-ups.
- Most federal states have introduced supplementary liquidity assistance in the form of bridging loans and guarantees, and in some cases also emergency aid programs in the form of direct subsidies. Which companies can benefit thereof varies from state to state. However, large companies are mostly excluded from support.
- A recent addition is the [Directive](#) of 27 April 2020 for the federal funding of production facilities for personal protective equipment and medical devices for patient protection and their preliminary products.

[Update: 23 April 2020]

In particular, what does the KfW offer?

- The terms and conditions of the KfW programs "Corporate Loan" (for existing companies) and "ERP Start-up Loan" (for companies under 5 years old) were eased by increasing risk assumption for working capital loans (up to 80% for working capital loans up to EUR 200 million, up to 90% for small and medium-sized enterprises). In addition, the programs will be opened up for large companies with a turnover of up to EUR 2 billion.
- The KfW Special Program "Direct Participation for Consortium Finance" enables large syndicated financing with risk participation by KfW of up to 80%.
- The program "KfW Quick Loan" is available to enterprises with more than 10 employees that have been active on the market at least since 1 January 2019 and have recorded profits. The loan volume per enterprise is limited to 3 months' turnover in 2019 and a maximum of EUR 800,000 for enterprises with more than 50 employees and a maximum of EUR 500,000 for enterprises with up to 50 employees, respectively. The bank will receive a 100% indemnity from KfW. A risk assessment is not required.

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Financial Support Measures (II)

(Status: 26 June 2020)

[Update: 23 April 2020]

[Cont.]

In particular, what does the KfW offer?

- The programs are in particular available to companies that have temporarily experienced financing difficulties due to the Corona crisis.
- Companies that were in difficulties already on 31 December 2019 will generally not be permitted to apply for a loan under the aforementioned programs; in such cases, the possibility of exceptional rescue measures should be assessed.

[Update: 2 April 2020]

Which changes have been made to the established Government guarantee programs?

- For the government-owned guarantee banks, the maximum guarantee amount is increased to EUR 2.5 million. Guarantee banks shall be allowed to take decisions on the granting of guarantees up to an amount of EUR 250,000 independently within three days.
- The so-called large guarantee scheme, which has so far been limited to companies in structurally weak regions, will be extended to all regions. This program enables the coverage of working capital financing and investments from an amount of EUR 50 million with a guarantee rate of up to 80%.

[Update: 2 April 2020]

What are ESF guarantees and who is eligible?

- According to the new Act on the Establishment of an Economic Stabilization Fund (ESF), the ESF is authorized to assume guarantees of up to EUR 400 billion for bonds issued between 28 March 2020 and 31 December 2021 and for established liabilities of companies in order to eliminate liquidity bottlenecks and support refinancing on the capital market.
- The term of the guarantees and the liabilities to be hedged may not exceed 60 months and the guarantees may only be assumed for an adequate consideration: <http://www.gesetze-im-internet.de/fmstfg/index.html>
- The stabilization measures of the ESF are aimed at companies from the real economy (i.e. no companies from the financial sector and no banks) that have met two of the following three criteria in the last two completed financial years prior to 1 January 2020:
 - Balance sheet total more than EUR 43 million
 - Revenues more than EUR 50 million
 - More than 249 employees on an annual average
- However, the ESF Committee can also decide at its own discretion on applications from companies that do not meet these criteria, provided that the company is active in one of the sectors mentioned in Section 55 Foreign Trade and Payments Regulation or is of comparable importance for security or the economy.
- Assistance is also available to start-ups which had at least one financing round since 1 January 2017 with a post-money valuation of at least EUR 50 million.
- The details are to be set out in an ordinance.
- Information on the further planned activities of the ESF can be found on the following pages.

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Financial Support Measures (III)

(Status: 26 June 2020)

[Update: 12 June 2020]

What assistance measures are available to start-ups?

- The 2 billion Euro assistance package for start-ups announced by the Federal Government on 1 April 2020 has meanwhile been launched. It consists of two pillars:
 - **First pillar:** Venture capital funds will have access to additional public funding through a new Corona Matching Facility (CMF). Private VC fund managers targeting start-ups and young growth enterprises located in Germany can mirror financing rounds until 31 December 2020 through funds via [KfW Capital](#) and the [European Investment Fund](#) (EIF).
 - **Second pillar:** Further options for securing mezzanine or equity financing will be made available to young start-ups without access to the CMF and small businesses via the promotional institutions of the individual federal states of Germany (Landesförderinstitute). For this purpose, the KfW Group will provide to the state promotional institutions global loans with indemnity against liability for refinancing purposes (see KfW [press release](#) of 8 June 2020 (in German)). The specific promotional structure varies from state to state.

[Update: 12 June 2020]

Where can I apply for support?

- Contact with KfW for KfW loans is made through the house bank. Companies which do not have a house bank can contact KfW's financing partners (e.g. savings banks, Volks- and Raiffeisen banks and commercial banks). These check the application and then forward it to KfW.
- Applications to the guarantee banks can be submitted directly [online](#). Applications for higher amounts are accepted by the guarantee mandataries of the respective federal states or the respective state ministries of economics. For guarantees of EUR 20 million or more, inquiries and applications can be sent to PricewaterhouseCoopers GmbH (<http://www.pwc.de>).
- Details on the application procedure for the emergency aid programs set up by the Federal Government and the Federal States can be found in the respective program. The same applies to additional credit programs launched by the federal states.
- Details on the application procedure for ESF guarantees will be set out in the planned ordinance. Further information on the application requirements and procedure of application will be available shortly at www.wsf.bmw.de.
- Fund managers can apply for admission to the Corona Matching Facility by contacting KfW Capital (VC-matching@kfw.de) or the EIF (German-CMF@eif.org). Further information on the CMF can be found [here](#).
- Information on the promotion of start-ups in the individual federal states can be found on the websites of the respective state promotional institutions. An overview of the relevant institutions can be found on the KfW [website](#) (in German).

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Economic Stabilization Fund

Financial support measures for large enterprises (Status: 26 June 2020)

[Update: 27 March 2020]

What is the government approach generally?

Germany has created the Economic Stabilization Fund (Wirtschaftsstabilisierungsfonds; "ESF"), which has been blueprinted from a similar fund to save banks from failing in the wake of the global financial crisis and in fact, the pre-existing laws in that respect were revitalized and adapted for supporting the "real economy".

The fund shall stabilize the economy by overcoming liquidity shortages and strengthening the capital base of companies whose endangered existence would have a significant effect on the economy, technological sovereignty, security of supply, critical infrastructures and the labor market.

[Update: 9 April 2020]

Which companies are eligible?

Only companies from the "real" economy are eligible, which are not from the financial sector or credit institutions. In addition in the last fiscal years ended prior to January 1, 2020, the companies must have met two out of the three following criteria:

- **Total Assets** of more than EUR 43 million
- **Total Revenues** of more than EUR 50 million
- **More than 249 employees on average during the year.**

Assistance is also available to (i) systemically relevant smaller companies that are part of Germany's critical infrastructure (companies active in one of the sectors mentioned in sec. 55 Foreign Trade and Payments Regulation or of a comparable importance for the security or economy) and (ii) (solely for recapitalizations) start-ups which had at least one financing round since 1 January 2017 with a post-money valuation of at least EUR 50 million.

[Update: 27 March 2020]

What are the hard criteria?

The companies must have no other funding alternative. The stabilization measure must give companies a self-sufficient perspective of continuation of business after the end of the COVID-19 pandemic. As of 31 December 2019, the companies must not have been in financial trouble. Companies must demonstrate a solid and prudent business policy. They must contribute to the stabilization of chains of production and secure employment. These criteria can be safeguarded by imposing conditions before funding is granted.

[Update: 27 March 2020]

What other limitations apply when companies accept stabilization measures?

Besides limitations on use of funds, there will be rules on incurring additional debt, limitations on (variable) compensation of executive board members and dividend distributions. In addition, measures to avoid distortion of competition and sector specific restructuring conditions can be imposed. Compliance will be secured by a legally binding commitment to be signed by the executive board with the consent of the supervisory board, which will be published.

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Economic Stabilization Fund

Financial support measures for large enterprises (Status: 26 June 2020)

[Update: 27 March 2020]

The Federal Ministry for Economy and Energy is the competent authority.

Whom to contact to clarify if the company is eligible?

[Update: 27 March 2020]

The following decision making parameters apply: Significance for the German economy, urgency, effect on the labor market and the competition as well as the principle of using the funds economically and efficiently

What are the decision making criteria applied by the fund?

[Update: 9 April 2020]

The fund can issue guarantees for loans up to EUR 400 billion for debentures or bank loans. The term of the guarantees must not exceed 60 months.

What kind of financial support is available?

In addition the ESF can provide direct funding of up to EUR 100 billion in various forms of recapitalizations in the form of subordinated notes, hybrid debentures, profit participation rights, silent partnerships, convertible debentures, shares and other equity instruments as necessary to stabilize the company.

Moreover the ESF can grant loans to the Kreditanstalt für Wiederaufbau (KfW, a government owned bank) to refinance special loan programmes related to Corona.

[Update: 27 March 2020]

Recapitalizations are a means of last resort if the Federal Republic has a significant interest in the stabilization and this purpose cannot be fulfilled better and more economically through other means.

When would the fund use the recapitalization tools?

[Update: 15 May 2020]

Yes, there are plans to regulate more details in an ordinance. The ordinance will have to take into account the EU Commission's temporary framework for state aid in the version of 8 May 2020 (for more details see "[EU Legal Framework for State Aid](#)").

Will more details be decided?

[Update: 9 April 2020]

The Federal Ministry of Finance has been authorized to issue debt of up to EUR 200 billion (EUR 100 billion for recapitalizations and EUR 100 billion for loans to the KfW).

Where is the money coming from?

[Update: 27 March 2020]

The ESF is exempt from trade tax and corporate income tax and is not subject to turnover tax. No tax is to be withheld on capital gains of the ESF; the ESF is also not obliged to withhold capital gains tax. In the event of the acquisition of stabilization elements by the ESF or their subsequent retransfer, existing loss carryforwards will remain intact: section 8c KStG (German Corporation Tax Act) and the last sentence of section 10a GewStG (German Trade Tax Act) do not apply. The legal acts undertaken in order to perform the tasks assigned to the ESF as acquirer are exempt from real estate transfer tax. Notwithstanding section 15 UmwStG (German Transformation Tax Act), in the case of spin-offs which represent a necessary preparation for a stabilization measure, offset-able losses, remaining loss carryforwards, negative income not offset and interest and EBITDA carryforwards (section 4h EStG (German Income Tax Act) remain with the transferring corporation.

Which tax regulations are applicable to the ESF?

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Economic Stabilization Fund

Overview on corporate law relaxations (Overview) (Status: 26 June 2020)

[Update: 2 April 2020]

Is there any relaxation of the corporate law rules in connection with recapitalization measures?

Yes. There are numerous relaxations in the new Economic Stabilization Acceleration Act (*Wirtschaftsstabilisierungsbeschleunigungsgesetz*) to allow for the speedy and simplified adoption of the necessary resolutions. In particular, the ability of minority shareholders to block the necessary corporate measures is severely curtailed.

<http://www.gesetze-im-internet.de/fmstbg/FMStBG.pdf>

[Update: 9 April 2020]

Do the relaxations only apply in case of a participation of the ESF or also in case of a participation of other parties in a recapitalization or in other circumstances?

Where a German AG (stock corporation), KGaA (limited partnership by shares), SE (societas europeae) or GmbH (limited liability company) issues shares to repay a silent partnership with the ESF or where the grant of funds by third parties is a condition for guarantees or funding from the ESF the relaxations apply by way of analogy.

In addition, the relaxations apply with respect to the legal forms mentioned above for restructuring of investments made by the ESF and also for capital increases against issuance of shares at financial institutions which need funds to meet regulatory capital requirements and at airlines where needed to maintain their status as a national carrier under EU law.

[New: 9 April 2020]

Which relaxations apply to recapitalisation measures in the case of an AG, KGaA or SE?

Numerous relaxations apply to recapitalizations of an AG by way of capital increase against issuance of shares, conditional capital increase or creation of authorized capital (see [here](#)). These rules take into account that such companies are typically listed on a stock exchange and have minority shareholders.

For KGaA's and SE's these special provisions apply accordingly.

[New: 9 April 2020]

Which relaxations apply to recapitalisation measures in the case of a GmbH?

Relaxations also apply to recapitalizations of a GmbH by way of capital increase against issuance of shares or creation of authorized capital. Furthermore, special provisions apply to the exclusion of shareholders from the GmbH (see [here](#)).

[New: 9 April 2020]

Which relaxations apply to recapitalisation measures in the case of a KG?

For the KG, special provisions apply in connection with the entry of the ESF as limited partner (see [here](#)).

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Economic Stabilization Fund

Recapitalizations of stock corporations (Status: 26 June 2020)

[Update: 27 March 2020]

Does the company need to call a shareholders meeting to adopt capital measures connected to a recapitalization?

Companies might be able to use existing authorized capital (*genehmigtes Kapital*) to issue **shares**. However, the conditions are unlikely to be suitable for a recapitalization, particularly as regards the exclusion of pre-emptive rights of the shareholders. It would therefore be necessary to have the shareholders' meeting resolve a capital increase or to create the necessary authorized capital.

Companies might also be able to use contingent capital to issue **convertible debentures**, but the issuing conditions must also be resolved by the shareholders and existing authorizations might not match the terms asked for by the ESF.

The issue of **profit participation rights** (*Genussrechte*) no longer requires a shareholder resolution and the companies are deemed authorized to issue such instruments unless the instrument can be converted into shares. The pre-emptive rights of the shareholders do not apply, again with the exception for convertible instruments. This also includes the issue of instruments guaranteed by the ESF.

Subordinated debt or hybrid debt can be also issued without shareholder approval unless convertible into shares.

A silent partnership would normally qualify as an enterprise agreement subject to shareholder approval, but this rule is abandoned for silent partnerships with the ESF as a silent partner.

[Update: 27 March 2020]

Isn't it difficult and time consuming to call and hold a shareholders meeting?

Companies are fully able to use the relaxations, which allow for the holding of a virtual shareholders' meeting as described elsewhere in the guide. Moreover, for capital measures, the period for calling the meeting is shortened to two weeks and can be called at any place (even contrary to the place fixed in the company's articles of association).

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Economic Stabilization Fund

Recapitalizations of stock corporations (Status: 26 June 2020)

[Update: 27 March 2020]

How can the company secure the necessary majority vote?

*Only a **simple majority** of the votes cast is sufficient to pass the capital measure regardless of what the articles of association say. This also applies where the new shares are subscribed by parties other than the ESF and even if the ESF does not participate at all in the capital increase!. The supermajority for a resolution, which **excludes the pre-emptive rights** of the shareholders has been **lowered from 75% to two thirds or a simple majority of at least half of all shares are represented in the meeting**. If the ESF has been admitted as subscriber, the exclusion of pre-emptive rights cannot be challenged in court.
Capital reductions can also be resolved with a simple majority.*

[Update: 27 March 2020]

What pricing is permitted in capital measures?

For listed stock corporations, the current stock price is deemed acceptable if this is at least the (notional) par value of (typically) EUR 1.00. This is not doable, a capital reduction with a reverse stock split would have to be resolved. The ESF can be granted a discount on the issue price after they were offered to the shareholders at the undiscounted offer price.

[Update: 27 March 2020]

What kind of shares can be issued?

The shares can have a dividend preference and a liquidation preference. Contrary to the existing rules, the non-voting preference shares can stay non-voting, even if the preference is not paid.

[Update: 27 March 2020]

Does the company need to wait for the shareholder resolution to be passed?

No, funds can be granted by the ESF beforehand and be allocated to the newly issued shares after their issuance (in deviation from existing rules).

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Economic Stabilization Fund

Recapitalizations of publicly listed companies (Status: 26 June 2020)

[Update: 27 March 2020]

Does the shareholder resolution need to be registered in the commercial register before the capital increase is effective?

No. Given that the commercial registers might not work due to Corona-related measures or registration is significantly delayed, a recapitalization measure is valid as soon as the company has published it on its website or, at the latest, when the measure has been published in the (electronic) Federal Gazette. Registration in the commercial register is no longer required for the effectiveness of the capital measure.

[Update: 27 March 2020]

What happens if the shareholder resolution is attacked in court by a minority shareholder?

Any such court challenges, including preliminary injunctions, do not block the registration in the commercial register.

[Update: 27 March 2020]

What other steps have been taken to prevent minority shareholders from resisting necessary capitalization measures?

Shareholders who block a recapitalization measure, e.g. by voting against it or by filing unfounded legal remedies face the risk of unlimited claims for damages if their intent is to obtain "unjustified benefits" (in other words if they try to withhold consent to blackmail the company). Shareholders cannot raise the defence that their vote was not causative due to other shareholders voting with them.

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Economic Stabilization Fund

Stabilization and recapitalization of limited liability companies (Status: 26 June 2020)

[Update: 27 March 2020]

Does the company need to call a shareholders meeting to adopt capital measures as part of a stabilization measure?

Under the new rules, the Economic Stabilization Fund may participate in recapitalization measures related to limited liability companies, e.g. capital measures, silent participations, subordinated debt, etc.

It is not required to hold a physical meeting for the implementation of the measures. In line with the general relaxations applying for shareholders' resolutions in 2020, capital measures may also be passed by submitting notarized votes, even if not all shareholders agree to submitting their votes outside a physical meeting.

[Update: 27 March 2020]

What are the majority requirements for capital measures involving the Economic Stabilization Fund?

Irrespective of the provisions of the articles of association of the German limited liability company on the majority requirements for capital measures, the passing of a shareholders' resolution on a relevant capital measure only requires the simple majority of the votes cast. This also applies to the exclusion of subscription rights in connection with the relevant capital measures, irrespective of the number of shares participating in the vote.

[Update: 27 March 2020]

Does the shareholder resolution need to be registered in the commercial register for the capital increase to become legally effective?

No, the shareholders' resolution on a relevant capital measure becomes legally effective upon (i) the filing of the resolution with the commercial register and the publication of the resolution on the website of the company, or (ii) the publication of the resolution in the German Federal Gazette at the latest.

In any event, the commercial register application regarding the capital measure needs to be filed with the competent commercial register without undue delay after the shareholders' resolution has been passed.

[Update: 27 March 2020]

What are the conditions for an exclusion of a shareholder in connection with a stabilization measure?

If this is required for the success of the stabilization measure, shareholders may be excluded from the company against compensation on the basis of a shareholders' resolution passed with a majority of three quarters of the votes cast.

The exclusion of the relevant shareholder becomes legally effective upon the passing of the shareholders' resolution outlined above.

The minimum amount to be offered as compensation needs to be calculated on the basis of the enterprise value determined by a neutral expert.

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Economic Stabilization Fund

Stabilization and recapitalization of limited partnerships (Status: 26 June 2020)

[Update: 27 March 2020]

Is it possible for the Economic Stabilization Fund to become a partner in a limited partnership?

The general stabilization measures also apply to limited partnerships. In case of a recapitalization based on a direct participation in the limited partnership, the Economic Stabilization Fund will become a limited partner of the limited partnership.

[Update: 27 March 2020]

Does a participation of the Economic Stabilization Fund in a limited partnership require the consent of all partners?

No, under the new rules, the unanimity principle applying as a default rule for partner decisions at the level of a limited partnership has been suspended for decisions on the acceptance of the Economic Stabilization Fund as a new limited partner.

The relevant partners' resolution may be passed with the simple majority of the partners participating in the voting. This relaxation is meant to prevent minority partners from blocking necessary recapitalization measures.

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Tax Reliefs (I)

(Status: 25 June 2020)

[Update: 25 June 2020]

Which tax reliefs are available in Germany?

Taxpayers directly and seriously affected by the Corona crisis may apply for the following tax reliefs:

1. Tax payment deferrals

The payment of taxes that are due in 2020 can be deferred interest-free. The duration of the deferral should generally be three months, but may be longer in individual cases. The deferral applies to income tax, corporate income tax, trade tax and VAT.

2. Adjustments to tax prepayments

Tax prepayments can be reduced in 2020. This applies to prepayments of income tax, corporate income tax and trade tax. The advance VAT payment due in case of permanent deadline extensions can be refunded. No special adjustment for taxation based on agreed fees.

3. Suspension of enforcement measures

Measures to enforce the payment of overdue taxes and taxes becoming due can be waived through the end of 2020. The same applies to late-payment penalties.

Conditions

In order to determine when a taxpayer is directly and seriously affected by the Corona crisis, the tax authorities have announced that the measures shall not be subject to strict conditions. Therefore, they are satisfied with plausible information from the taxpayer that the Corona crisis has caused serious negative impact on his/her economic situation.

Grants and subsidies to employees

Employers may provide their employees with grants and subsidies up to EUR 1,500 between 1 March and 31 December 2020. Such grants and subsidies need to be provided in addition to the salary owed in any case and need to be recorded in the payroll account. Since the Corona crisis affects the entire society, it is assumed that there is a reason justifying the grant or subsidy within the meaning of the wage tax guidelines. Contributions by the employer to short time working allowances are not covered by this tax exemption.

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Tax Reliefs (II)

(Status: 25 June 2020)

[Update: 25 June 2020]

Which tax reliefs are available in Germany?

(cont'd)

Subsidies for short-time working compensation

Employer contributions to short-time work compensation and seasonal short-time work compensation for wage payment periods beginning after February 29, 2020 and ending before January 1, 2021 are tax-exempt up to 80 % of gross salary in accordance with the social security treatment. They must be included in the progression proviso.

Investment tax law

Passive breaches of limits for investment funds or special investment funds between 1 March and 30 April 2020 do not in principle constitute a breach of the investment regulations.

Extension of the tax loss carryback

The tax loss carryback for the year 2020 is to be extended to a maximum of EUR 5 million or EUR 10 million (in the case of joint assessment). In addition, a mechanism is to be introduced so that the loss carryback can be used in the 2019 tax return.

Degressive depreciation

A degressive depreciation of 25%, but no more than 2.5 times the linear depreciation, is to be introduced for movable fixed assets in 2020 and 2021.

Trade tax

In the case of trade tax, the exemption for the addition according to section 8 no. 1 Trade Tax Act is to be increased to EUR 200,000.

Extension of deadlines in connection with investments

The reinvestment periods of § 6b German Income Tax Act are to be extended by one year. The deadlines for the use of investment deductions in accordance with § 7g German Income Tax Act are to be extended by one year.

How can I apply for the reliefs?

The tax reliefs must generally be applied for. The tax offices will not act automatically.

The German Federal States have provided various application forms for download on their homepages. Applications need to be filed with the competent tax office or the municipality (with respect to trade tax).

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Tax Reliefs (III)

(Status: 25 June 2020)

Other Taxes

Generally, the measures described above are only applicable for income tax, corporate income tax, trade tax and VAT.

However, some German Federal States have already announced to offer **further tax reliefs**, e.g. with respect to **real estate transfer tax**, inheritance or gift tax. Whether a certain tax relief is available needs to be checked with respect to the relevant German Federal State.

In addition the Federal Customs Authority (Bundeszollverwaltung) and the German Federal Tax Office (Bundeszentralamt für Steuern) has been instructed to apply the above tax reliefs accordingly (details of application are currently still open).

In the German Reorganization and Transformation Act, deadlines were temporarily extended. These extensions of deadlines are now reflected in the Reorganisation Tax Act for the tax retroactive periods regulated in § 9 and § 20 of the Reorganisation Tax Act in order to ensure that the deadlines run in parallel. These periods are now twelve months instead of eight.

[Update: 25 June 2020]

VAT

Beside the general tax reliefs, which also apply for VAT, there are the following special tax reliefs for VAT:

1. The VAT rate for gastronomy will be reduced to 7% for one year from 1 July 2020. Beverages are excluded from this.
2. The VAT rates are to be reduced from 19% to 16% and from 7% to 5% from 1.7.2020 to 31.12.2020.
3. The due date for import VAT is to be postponed to the 26th of the following month.

Promotion of aid for people affected by the Corona crisis

The German Ministry of Finance favors support measures that are intended to benefit those affected by the Corona crisis. These include:

- Simplified verification of donations
- No change in the articles of association necessary for fundraising campaigns
- Deduction of operating expenses possible for sponsoring and contributions to business partners
- Tax exemption for waiver of salary and supervisory board remuneration
- If a tax privileged corporation makes personnel, premises, material resources or other services available to, for example, hospitals against payment, such payment can be allocated to the special-purpose operation (Zweckbetrieb) for income and VAT purposes.

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Tax Reliefs (IV)

(Status: 25 June 2020)

Filing of tax returns

The German Federal States provide for **extensions** regarding the filing of certain tax returns. Whether such an extension is available needs to be checked with respect to the relevant German Federal State

Sources

[Formulation aid for the draft of a Second Corona Tax Assistance Act](#)

[Resolution of the Coalition Committee of 3.6.2020](#)

Corona Tax Assistance Act in form of recommendation by finance committee dated May 27, 2020

Decree of BMF dated March 19, 2020 with respect to income taxes and VAT

Decree of BMF dated March 19, 2020 with respect to trade tax

Decree of BMF dated April 9, 2020 with respect to grants and subsidies

Decree of BMF dated April 9, 2020 with respect to investment tax law

Decree of BMF dated April 9, 2020 with respect to promotion of aid for people affected by the Corona crisis

Decree of BMF dated April 23, 2020 regarding the extension of the declaration period for wage tax filing

Decree of BMF dated April 24, 2020 regarding the flat-rate reduction of tax prepayments already made for 2019

Decree of BMF dated April 9, 2020 with respect to promotion of aid for people affected by the Corona crisis- supplement

FAQ by BMF dated June 5, 2020 (permanently updated)

FAQ by Federal Chamber of Tax Consultants dated June 5, 2020

https://www.zoll.de/DE/Fachthemen/Zoelle/Coronakrise/Steuern/steuern_node.html#doc370404bodyText1

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Financial Arrangements (I)

(Status: 26 June 2020)

You are a borrower?

The spread of the Virus per se does not impact any finance documents. Only if the revenues and prospects are adversely affected, an event of default might be triggered. But even then the finance documents are not automatically terminated.

Next steps?

In case of a bilateral or syndicated loan, start conversations with your contact person at the bank. Prepare a finance and liquidity plan, taking into account the possible impact of the Virus on your business.

In a worst case?

Try to secure liquidity by e.g. terminating cash pools and utilizing credit lines.

KfW Programs

The set of measures presented by the German Government include a guarantee for the banks extending loans to corporates, covering 80% or 90%. That way, companies facing an illiquidity due to the Virus are being provided with the liquidity needed. These programs are being provided through KfW, the German state owned support bank. The respective loans are being applied for through the relevant "house banks". Loans must not exceed EUR 1 billion in total for a group and are limited at 25% of total revenues in 2019, double the amount of salaries, liquidity needs for next 12 or 18 months (depending on the size of the company) or 50% of the total debt in case of loans in excess of EUR 25 million.

[Update: 27 March 2020]

The ECB announced on 18 March 2020 the launch of a new temporary asset purchase programme of private and public sector securities.

ECB EUR 750 billion Pandemic Emergency Purchase Programme (PEPP)

*The new PEPP purchases will be conducted until the end of 2020 and will include all the asset categories eligible under the ECB's existing asset purchase programme (APP).
The range of eligible assets under the corporate sector purchase programme (CSPP) will be expanded to include non-financial commercial paper, making all commercial paper of sufficient credit quality eligible for purchase under the CSPP.*

We expect that the ECB will publish detailed guidance shortly.

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Financial Arrangements (II)

(Status: 26 June 2020)

[Update: 2 April 2020]

Are Lease Agreements affected by the law mitigating the consequences of the COVID 19 Pandemic?

We refer to our update on the payment moratorium in the [Commercial Contracts / Force Majeure](#) section. The right to refuse fulfillment of obligations (Leistungsverweigerungsrecht) only applies to essential contracts with continuing obligations (wesentliches Dauerschuldverhältnis). It is currently not clear whether a lease agreement could be regarded as an essential contract with continuing obligations if the relevant leased object is required to provide for adequate basic needs of the relevant enterprise.

[Update: 2 April 2020]

Does the law mitigating the consequences of the COVID-19 Pandemic affect only consumer loans?

Yes, the new law is only applicable to consumer loan agreements.

For consumer loan agreements entered into before 15 March 2020, claims for repayment, amortisation and interest which become due between 1 April and 30 June 2020 are postponed by 3 months from their respective due date if and to the extent the consumer suffers a decline of income due to the extraordinary circumstances caused by the COVID-19 pandemic, making fulfilment of the relevant obligation unbearable for the debtor, specifically in cases where the debtor's means for living are jeopardised.

Lenders' termination rights on the basis of nonpayment or deterioration of credit or a deterioration of the realisable value of any collateral granted for such loan are excluded until 30 June 2020.

Lenders' termination rights on the basis of nonpayment or deterioration of credit or a deterioration of the realisable value of any collateral granted for such loan are excluded until 30 June 2020.

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Financial Arrangements (III)

(Status: 26 June 2020)

[Update: 30 April 2020]

KfW "quick loan" for medium-sized enterprise (with more than ten employees and at least active since January 2019)

For investments and working capital needs, mid-sized companies can soon apply for the so-called KfW "quick loan". The loan will be 100% guaranteed by the Federal Government.

- 100 % risk assumption of KfW
- No risk assessment of the loan extending bank
- Maximum loan amount: up to 3 months turnover in the year 2019
- Enterprises with up to 50 employees can apply for a maximum loan of EUR 500,000
- Enterprises with more than 50 employees can apply for a maximum loan of EUR 800,000
- Term 10 years
- Showed profits in 2019 or on average over the last three years

The new KfW "quick loan" program is not limited to SMEs as defined by the EU Commission. However, according to the information provided by KfW, the KfW "quick loan" is available only to

- enterprises engaged in trade and industry seated in Germany that are majority-owned by private individuals
- sole proprietors / freelancers in Germany

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Compensation Claims (I)

(Status: 26 June 2020)

Overview of possible compensation claims

- Companies directly affected by the measures currently ordered by the state may be eligible for compensation based on statutory compensation provisions set out in special laws (in particular the Infection Protection Act; "IFSG"). However, these statutory compensation regulations are unlikely to cover the measures currently taken, or only in exceptional cases.
- Additional claims for compensation based on general legal principles are unlikely.
- Companies only indirectly affected by the current government restrictions are not entitled to compensation. They will therefore need to rely on the planned general financial support measures.

[Update: 3 April 2020]

Which cases are covered by compensation claims under the Infection Protection Act?

- The Infection Protection Act provides for compensation claims primarily in the case of measures taken against individuals. For example, persons who (i) are subject to a prohibition in the exercise of employment as suspects of infection or illness; or (ii) are separated as suspects of infection and thereby suffer loss of earnings, are entitled to compensation (Section 56 (1) IFSG). However, a claim for compensation by the business owner in the case of ordered general closures of businesses as currently put into effect is unlikely to be justified under this provision.
- The new right to compensation for loss of earnings due to the care of children following the closure of schools and similar establishments, introduced by the amendment to the law of 27 March 2020, also applies only to the individuals with custody.
- The Infection Protection Act furthermore provides for a claim for compensation if objects are destroyed or damaged due to official measures for the prevention of infectious diseases or if another "not only insignificant pecuniary disadvantage" is caused by such measures (Section 65 (1) IFSG). However, since the current measures are based on statutory provisions for the control of infectious diseases and, in addition, are usually in the form of general statutory orders, the compensation provision for individual prevention measures is not directly applicable. It remains to be seen to what extent a corresponding application to the current measures will be recognized in view of the apparent statutory gap.

[Update: 3 April 2020]

Are compensation claims available under other special laws and regulations?

- Compensation provisions can also be found in other special laws, such as the civil protection laws of the individual Federal States. However, claims only exist insofar as measures have been taken on the basis of these laws. This has not been the case so far.
- The ordinances issued to date by the individual Federal States on the basis of the Infection Protection Act also contain no compensation regulations as far as can be seen.

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Compensation Claims (II)

(Status: 26 June 2020)

[Update: 30 April 2020]

Are claims for compensation available under general principles of law?

- According to general legal principles, claims for compensation are conceivable in particular in the form of a claim arising from expropriating encroachment (on the case of interventions in ownership positions) or a claim for sacrifice (in the case of encroachments on other protected legal positions).
- Both legal institutions serve to compensate for unreasonable, atypical and unforeseen secondary consequences of intrinsically legitimate encroachments on property or other protected legal positions.
- The governmental orders and regulations currently enacted or planned, such as business closures, may qualify as such encroachments on constitutional ownership positions. However, although the financial consequences for the companies affected may be serious and even threaten the existence of the individual company, they are neither atypical nor unforeseen. Rather, the negative effects were accepted in view of the risks to the health of the entire population that would result from a further spread of the coronavirus.
- With the exception of the described specific legal principles, negative effects of lawful measures and regulations must be accepted by those affected without compensation. Therefore, affected companies will probably not be able to assert claims for compensation under general legal principles, provided that the underlying measures are legal.
- To the extent that measures should prove to be illegal, claims arising from an expropriation-equivalent intervention should be considered.

[Update: 7 May 2020]

Outlook

- It remains to be seen how courts will decide upon the legitimacy of the Coronavirus-related interventions on fundamental rights, especially in relation to mandatory business closures. While applications for preliminary relief have so far been largely unsuccessful, a number of courts have meanwhile ruled that the distinction introduced temporarily between shops with a sales area of up to 800 m² and larger shops lacked justification and was therefore unlawful (see e.g. Bavarian Administrative Court, [decision](#) dated 27 April 2020). The Federal States concerned have meanwhile reacted to this by correcting the regulations.
- It further remains to be seen whether the legislators at federal or state level will decide on supplementary compensation regulations or extend the existing compensation regulations under the Infection Protection Act in view of the serious effects of the current statutory regulations and orders on affected businesses.
- However, even such supplementary regulations would in principle only cover the companies directly affected by state regulations and orders. Companies that are similarly hard hit by the general effects of the corona crisis will therefore remain dependent on the financial support programs planned at federal and state level.

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EU Legal Framework for State Aid (I)

(Status: 26 June 2020)

[Update: 3 April 2020]

Do the planned State support measures qualify as State aid?

- To the extent that companies receive payments or other advantages such as tax breaks, loans and state guarantees on favorable terms to cushion the effects of the corona virus, these measures may constitute aid within the meaning of Article 107 TFEU.
- In its [Communication](#) on the current corona crisis of 13 March 2020, the European Commission has already made it clear that measures granted equally to all companies (e.g. suspension of tax payments) do not constitute State aid and may therefore be implemented immediately by the Member States.

[Update: 15 May 2020]

Are the planned measures justified under EU State aid rules?

- State aid is compatible with the internal market and therefore justified, inter alia, when it is granted to make good the damage caused by natural disasters or exceptional occurrences (Article 107(2)(b) TFEU).
- Furthermore, State aid may be declared compatible with the internal market by the Commission if it is intended to remedy a serious disturbance in the economy of a Member State (Article 107(3)(b) TFEU).
- In both cases, new aid measures must first be notified to and approved by the European Commission. Exceptions from the approval requirement apply only to measures based on existing, approved support schemes and measures covered by the General Block Exemption Regulation for State aid or the so-called de minimis Regulation.
- On 19 March 2020, the European Commission adopted a [temporary framework](#) for State aid measures to support the economy in the light of the COVID-19 outbreak, based on Article 107(3)(b) TFEU, which has subsequently been amended by communications from the European Commission of [3 April 2020](#) and - most recently - [8 May 2020](#). The latest amendment has introduced criteria for the provision of public support in the form of recapitalization measures (see below for further details).

[Update: 7 May 2020]

Which measures have been approved?

- On 22 March 2020, the Commission [approved](#) the KfW Special Program 2020, which expands the existing KfW loan programs (“KfW Corporate Loan”, “ERP Start-up Loan” and special program “Direct Participation for Consortium Finance”) on the basis of the Temporary Framework.
- On 24 March 2020, the Commission also [approved](#) the so-called Federal Small Grants Scheme 2020, which is the basis for the emergency aid programs of the Federal Government and the Federal States, and [approved](#) the Federal Loan Guarantee Scheme 2020.
- On 2 April 2020, the Commission [approved](#) an aid scheme extending the loan measures adopted on 22 March 2020 to state development institutions.
- On 7 April 2020, the Commission [approved](#) changes to the Federal Small Grants Scheme 2020, the Federal Loan Guarantee Scheme 2020 and for low-interest loans 2020.

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EU Legal Framework for State Aid (II)

(Status: 26 June 2020)

[Update: 7 May 2020]

Which measures have been approved?

(cont'd)

- On 13 April 2020, the Commission [approved](#) the [federal guarantee program](#) to stabilize the domestic commercial credit insurance market in the Coronavirus pandemic.
- By [decision](#) of 26 April 2020, the Commission approved planned aid to the charter airline Condor as ad hoc aid (i.e. outside an approved aid scheme) directly on the basis of Article 107(2)(b) TFEU.
- By [decision](#) of 28 April 2020, the Commission approved the Federal Research, Development and Investment Aid Scheme which, as an umbrella scheme, allows aid for COVID-19 related research and development, investment aid for the construction and upgrade of respective testing and upscaling infrastructures, and investment aid for production facilities for COVID-19 related products and services.

[Update: 3 April 2020]

Is government support available also to companies in financial difficulty?

- As a rule, companies in financial difficulty may receive State aid only once within 10 years in accordance with the [EU rescue and restructuring guidelines](#) and are excluded from general support programs.
- However, the measures currently approved also apply to companies in difficulty, provided that they were not already in difficulty before the coronavirus crisis began.

[Update: 15 May 2020]

What changes does the latest amendment of the State aid Temporary Framework bring?

- The amendment sets out criteria under State aid rules which the Commission will apply when reviewing public support measures taken by Member States in the form of equity and/or hybrid capital instruments for undertakings facing financial difficulties due to the COVID-19 outbreak.
- Member States can provide recapitalization measures in the form of equity instruments and/or instruments with an equity component ("hybrid capital instruments"), e.g. profit participation rights, silent participations and convertible secured or unsecured bonds.
- The specific measure chosen must be appropriate to address the beneficiary's needs while being the least distortive to competition.
- Under the Temporary Framework, recapitalization measures may only be taken if:
 - the beneficiary would go out of business or face serious difficulties to maintain its operations without the state intervention,
 - it is in the common interest to intervene (e.g. to avoid social hardship and market failure),
 - the beneficiary is not able to find financing on the markets at affordable terms and existing horizontal measures in the Member State to cover liquidity needs are insufficient, and
 - the beneficiary was not in difficulty on 31 December 2019.
- Even in the case of approved recapitalization schemes, all individual aid under the scheme above the threshold of EUR 250 million must be notified to the Commission.

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EU Legal Framework for State Aid (III)

(Status: 26 June 2020)

[Update: 15 May 2020]

What changes does the latest amendment of the State aid Temporary Framework bring? (cont'd)

- *Recapitalization measures are subject to strict conditions, including the following:*
 - *The recapitalization amount must not exceed the minimum needed to ensure the viability of the beneficiary.*
 - *The Member State shall receive appropriate remuneration for the investment. This remuneration should be increased in order to converge with market prices so as to provide an incentive for redemption. The capitalization should be redeemed when the economy stabilizes. The Temporary Framework sets out detailed methodologies to determine this remuneration.*
 - *Restrictions for future business activities apply. For example, beneficiaries must not engage in aggressive commercial expansion or take excessive risks. Limitations are imposed on the purchase of stakes in competitors. In the case of undertakings with significant market power, additional measures to preserve competition may be required (e.g. structural or behavioral commitments).*
 - *Beneficiaries cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares other than in relation to the Member State.*
 - *As long as at least 75 % of the recapitalization measures have not been redeemed, the remuneration of each member of the beneficiary's management is limited to the fixed part of his/her remuneration on 31 December 2019.*
- *The described criteria and limitations will need to be taken into account in the Ordinance to be enacted which will set out detailed rules for recapitalization measures to be carried out by the Economic Stabilization Fund.*

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4 Restructuring / Insolvency

Insolvency Law (I)

(Status: 26 June 2020)

[Update: 27 March 2020]

What kind of assistance is planned for companies affected by the COVID-19 pandemic?

The German parliament passed the "Act to Mitigate the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedural Law", on 25 March 2020, which was approved by the Bundesrat on 27 March 2020. The bill provides for the following measures:

- The obligations to file for the opening of insolvency proceedings (pursuant to Section 15a of the German Insolvency Code, "**Inso**" and Section 42 para. 2 of the German Civil Code, "**BGB**") are suspended for companies that have become illiquid (i.e. cash-flow insolvent) or over-indebted as a result of the COVID-19 pandemic.
- As long as the obligation to file for insolvency proceedings is suspended, managing directors are not liable for failure to file for insolvency or a delayed filing. Furthermore, the liability for violations of statutory payment prohibitions (pursuant to Section 64 sentence 1 of the German Limited Liability Companies Act, "**GmbHG**" or Section 92 para. 2 of the German Stock Corporations Act "**AktG**") is mitigated. In particular, payments which serve maintaining or resuming business operations or to implement a restructuring concept are generally permitted.
- Financing is facilitated by introducing measures to reduce the risks for potential lenders.

[Update: 27 March 2020]

What are the requirements for these measures to apply?

The obligation to file for insolvency is not suspended if the insolvency was not caused by the consequences of the COVID-19 pandemic or if there is no prospect of resolving an existing insolvency. However, if the debtor was not (yet) illiquid by 31 December 2019, it is legally presumed that the insolvency was caused by the COVID-19 pandemic and that there is a prospect of resolving it. We recommend documenting the liquidity as of 31 December 2019 and to obtain a corresponding confirmation from an expert if need be.

[Update: 27 March 2020]

How long are the obligations to file for insolvency suspended?

The obligations are currently suspended until 30 September 2020. However, the suspension can be extended by ordinance until 31 March 2021.

[Update: 30 April 2020]

Can creditors still apply for the opening of insolvency proceedings?

Creditors can still file petitions to open insolvency proceedings. However, insolvency proceedings are only to be opened upon application filed by a creditor between 28 March 2020 and 28 June 2020 if the insolvency reason was already present on 1 March 2020.

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Insolvency Law (II)

(Status: 26 June 2020)

[Update: 30 April 2020]

What liability risks remain?

The managing directors are not comprehensively exempted from liability. The general liability rules under criminal or tort law continue to apply, unless the liability is limited by further regulations enacted in connection with the COVID-19 pandemic. For example, a managing director of a distressed enterprise may be at risk of becoming liable for fraud when entering into new contracts.

[Update: 30 April 2020]

What measures are taken to protect lenders and business partners?

In order to facilitate the financing of businesses, the granting of new loans is exempted from liability for prohibited (creditor-harming) crisis financing while the obligation to file for insolvency is suspended. In addition, for new loans granted during the suspension period any redemption occurring by 30 March 2023 as well as the taking of security for such loans are exempted from claw-back and avoidance in subsequent insolvency proceedings. This also applies to the granting and repayment of new shareholder loans, but not their collateralization. Legal acts performed during the suspension period by which a creditor was granted a security or satisfaction in a kind or at a date the creditor was entitled to (congruent coverage pursuant to Section 130 InsO) as well as performance rendered in lieu or on account of the contractually owed performance, payments by a third party on the instruction of the debtor, the provision of other collateral than originally agreed upon (if the provided collateral is not more valuable), the shortening of payment terms and the granting of payment facilities are also exempted from claw-back and avoidance.

The protective measures for lenders and other creditors also apply to debtors that are under no insolvency filing obligation and to debtors that are not insolvent.

[Update: 3 April 2020]

When does the new law come into force?

The new law was enacted and published in the Federal Law Gazette on 27 March 2020. However, the above-mentioned regulations come into force retroactively as of 1 March 2020.

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5

Supply Chain

Trade Controls

(Status: 26 June 2020)

[Update: 28.05.2020]

Are there any trade restrictions adopted by the EU in response to the COVID-19 crisis?

There are currently no trade restrictions implemented by the EU in response to the COVID-19 crisis. The EU had adopted extensive controls for personal protective equipment with the enactment of Commission Implementing Regulation (EU) 2020/402 as well as the subsequent Commission Implementing Regulation (EU) 2020/568.

- *The Implementing Regulations restricted the export of personal protective equipment listed in their respective Annexes I to destinations outside the EU. The export was subject to a license requirement in these cases.*
- *Annex I of the respective Regulation encompassed a range of items including mouth-nose-protection equipment, face shields, protective spectacles and visors, gloves and other protective garments.*
- *The Implementing Regulation (EU) 2020/402 entered into force on 15 March 2020 and was subsequently replaced by Implementing Regulation (EU) 2020/568 on 26 April 2020. The latter only imposed export restrictions for protective spectacles and visors, mouth-nose-protection and protective garment and no longer for face shields and gloves. Implementing Regulation 2020/568 expired on 25 May 2020. Ever since no export restrictions for personal protective equipment are in force.*

[Update: 28.05.2020]

Are there any national restrictions on international trade in addition?

Yes, some countries have adopted restrictive measures, even before the EU Commission enacted the Implementing Regulation:

- *Germany had restricted export and transfer of protective medical equipment in order to secure sufficient stocks in Germany by Decree of 4 March 2020 (amended on 12 March 2020.) The decree has been repealed on 19 March 2020, but may be reinstated anytime according to the German government.*
- *Other EU Member States such as the Czech Republic, France and Hungary have adopted national measures in relation to medical equipment. The export restrictions of some EU Member States continue to be in force.*

Do the other export control regulations continue to apply as usual?

Yes, the common export control restrictions continue to apply:

- *The EU's existing dual-use export control regime (Regulation (EU) 428/2009) will continue to apply. It restricts the export of goods that can be used for both civil and military (including WMD) purposes.*
- *Listing number 1A004 encompasses, inter alia, full face masks, filter canisters, protective suits, gloves, shoes and decontamination equipment, designed or modified for defense against... "biological agents".*

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Commercial Contracts / Force Majeure (I)

(Status: 26 June 2020)

General considerations

In order to assess the possible consequences of COVID-19 for contractual obligations, the parties first have to analyze their specific commercial contracts and the law applicable to them. Commercial contracts often include a choice of law clause. The following analysis focuses on contracts governed by German law.

Under German law, in the absence of mandatory legal provisions, the parties are free to determine their contractual rights and obligations. Therefore, commercial contracts may include specific provisions that deal with the non-performance or delay of performance due to events like the current spread of COVID-19 (e.g., force majeure clauses).

What is “force majeure”

The term “force majeure” is taken from the French language, its German translation is “höhere Gewalt”. Force majeure is not a defined legal term in German statutory law. It is however recognized in the German legal doctrine and case law and is frequently used in international commercial contracts. What constitutes as force majeure in the first place depends on the details of the respective force majeure clause agreed by the parties, if any. Where the parties’ agreement lacks on details in this regard, German case law defines force majeure as an external event without any operational context that cannot be averted even with the utmost diligence that can reasonably be expected.

Contracts including a force majeure clause

Force majeure clauses typically (i) define which events shall qualify as force majeure and (ii) the legal consequences in case an event of force majeure occurs.

In order to determine whether a certain event qualifies as an event of force majeure under the agreed force majeure clause, the wording of the respective clause and the hypothetical will of the parties will be relevant. Typically, force majeure clauses are “open” or non-exhaustive in the sense that the event does not need to be specifically listed as a force majeure event. Force majeure clauses often include a definition of what shall constitute as force majeure along with a list of examples of force majeure events.

As regards the legal consequences of a force majeure event, the parties usually in particular agree in their force majeure clause that (i) the party affected by the force majeure is exempted from its obligation to (timely) perform for the duration of such event and (ii) either party may rescind/terminate the respective contract where such event continues for a certain period of time.

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Commercial Contracts / Force Majeure (II)

(Status: 26 June 2020)

Contracts without a force majeure clause

In the absence of a force majeure clause, the effects of the hurdles resulting from COVID-19 on the parties' contractual rights and obligations need to be assessed – on a case-by-case basis – in the light of the agreed terms and the law governing the respective commercial contract. The following legal concepts will however in general become relevant:

(i) Permanent/temporary impossibility (dauernde/vorübergehende Unmöglichkeit)

The question of whether the performance of the contract is permanently or temporarily impossible must be analyzed on a case-by-case basis. In most cases, the performance of the contract will only be temporarily impossible due to COVID-19. The spread of COVID-19, particularly in supply contracts, will normally only result in a delay of the performance. However, if the parties agreed to a fixed date for performance, there is a likelihood that performance is permanently impossible. Please note that the performance of monetary obligations is, according to German law, never "impossible" in the meaning of this legal concept.

If and to the extent performance is permanently impossible (e.g. the delivery of goods/services), the debtor is exempted from having to perform its respective obligation(s). The other party is in turn not owing to the party that is not able to perform the consideration it would have owed to that party in case of proper performance of the contract (e.g. the agreed price for the goods/services).

If and to the performance is temporary impossible, the debtor is exempted from having to perform its respective obligation(s) as long as the performance remains impossible. For the same period, the other party is exempted from having to pay the agreed consideration to the party that is temporary not able to perform.

Only where the party who is (temporary) not able to perform its obligation is responsible for the impossibility to perform (which is unlikely in case of impossibility due to effects of COVID-19), it will owe to the other party damages that the latter suffers as a result of the (temporary) non-performance.

In addition, the other party will be entitled to rescind/terminate the respective contract in accordance with the statutory provisions.

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Commercial Contracts / Force Majeure (III)

(Status: 26 June 2020)

[Update: 27 March 2020]

Contracts without a force majeure clause

(ii) Frustration of contract (Störung der Geschäftsgrundlage)

Even though to be assessed in the individual case, the chances of the party affected in performing its obligations under a commercial contract due to COVID-19 implications to successfully rely on the legal concept of frustration of contract are rather low. In order to be able to do so, the respective disturbing event (here the hurdles resulting from COVID-19) must not fall within the sphere of risk of either party. Generally speaking, the party having to deliver goods / render services bears the risk of impediments to performance. Thus, where COVID-19 implications make the delivery of goods / performance of services more burdensome, the affected party will rather unlikely be able to rely on frustration of contract. In a few exceptional cases, however, a supplier affected in its performance may be entitled to rely on frustration of contract. This might be the case if COVID-19 implications result in a massive imbalance between the parties' obligations, which make it unreasonable for the supplier to adhere the contract. Pursuant to German case law, this might be the case if the costs for the supplier's performance are many times higher than before. Where, in the individual case, reliance on the concept of frustration of contract is possible, the parties may request amendments to the contract or, where this is not possible or reasonable, rescind/terminate the contract. In the absence of any applicable case law and the absolute new situation, it is hard to predict in which direction the courts would decide.

Concluding new commercial contracts

When entering into new contracts, (i) provisions should be drafted clearly and comprehensively to cover eventualities such as the present outbreak, already existing as well as foreseeable/unforeseeable future measures to combat the present outbreak and (ii) implications of the law governing the contract should be understood.

In particular, it should be noted that a party affected either by measures of authorities that already existed at the time of concluding the new contract or that were foreseeable at that time will likely not be entitled to rely on a "standard" force majeure clause as a result of such already existing/foreseeable measures. In this regard, it should be reviewed in light of the law governing the respective contract whether special provisions should be drafted.

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Commercial Contracts / Force Majeure (IV)

(Status: 26 June 2020)

[Update: 27 March 2020]

New law to protect consumers and microenterprises

Consumers shall be entitled to refuse performance under a consumer contract with continuing obligations (Dauerschuldvertrag) for the provision of services of general interest (allgemeine Daseinsvorsorge) until 30 June 2020, provided that the respective contract was concluded prior to 8 March 2020 and performance would put the consumer at risk of not being able to pay the cost of living for himself or his dependants as a result of COVID-19 implications.

Microenterprises shall be entitled to refuse performance under a contract with continuing obligations, which was concluded prior to 8 March 2020, until 30 June 2020, if - due to COVID-19 implications - they are not able to render performance or their performance would put the economic basis of their business at risk. This right shall however not exist in connection with rental, lease, loan and employment contracts.

These rights to withhold performance shall not exist, where their execution would be unreasonable to the other party. Consumers/microenterprises shall in such cases be entitled to terminate the contract.

Recommended Actions

As the situation develops, we recommend taking in particular the following steps at this stage:

- Review your contracts to consider whether you can rely on a force majeure clause or some other provisions.
- Check whether the force majeure clause stipulates the prescribed form and time limitations for giving notice of a force majeure event after it occurs, and if so, ensure that timely notice is given in the prescribed form.
- Where non-performance of a contract has occurred, make a record of the event in as much detail as possible, including the timing of the occurrence, the reasons for the non-performance, the parties involved and any facilities impacted by the event.
- Consider whether there are alternative ways of performing the contractual obligations (e.g. sourcing from another supplier).
- Consider whether there are ways to mitigate the effects of the present situation.
- Review potential insurance coverage and check whether your policies provide the right types and levels of coverage for crisis situations and are responsive to any changes in the business.
- Monitor the announcement of any new governmental or regulatory measures/policies in response to the outbreak of COVID-19, which may change your options for relief and the assessment of compensation.
- Special care should be taken when entering into new contracts (see row above).

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Governmental Contracts (I)

(Status: 25 June 2020)

Are direct awards now permissible?

- The effects of the corona virus do not per se allow for a deviation from public procurement law. However, a more lenient approach may apply an interim period.
- Regarding procedures to meet an **extremely urgent demand to contain the corona pandemic**, for which it can be proven that even the accelerated procedures take too long, **direct awards** pursuant the negotiated procedure without a call for tenders are justified, Sec. 14 (4) no. 3 VgV / Sec. 8 (4) no. 9 UVgO / Sec. 3a (3) no. 2, Sec. 3a EU (3) no. 4 VOB/A. New implementing provisions on the application of public procurement law in the above as well as sub-threshold area, which have just been issued (AZ 20601/000#003, AZ BW I 7 – 70406/21 #1, OJ C 108 I/1) on the occasion of the corona virus on national, federal states and European level explicitly allow for this option.
- The risk of the contract being declared invalid should be reduced by appropriate **notices**.

How to accelerate procedures?

- Regarding procurements which cover an **urgent need to contain the corona pandemic** (e.g. procurement of respiratory masks, servers or buildings/conversion work to create new hospital beds, etc.), urgency justifies the implementation of **accelerated procedures**. Accelerated procedures allow the following (shortened) time limits:
 - Tender submission deadline (open procedure): 10 days in the construction sector (Sec. 10 (1) sentence 1 VOB/A); 15 days in the field of supplies and services (Sec. 15 (3) VgV);
 - Tender submission period (restricted procedure/negotiated procedure): 10 days (Sec. 16 (7), 17 (8) VgV)
 - Time limit for participation (restricted procedure/negotiation procedure): 15 days (Sec. 16 (3), 17 (3) VgV).

Can existing framework agreements and/or contracts be used instead of new tenders to meet demand?

- Yes, regarding procurements which cover an **urgent need to contain the corona pandemic, additional orders** based on existing framework agreements and/or contracts may be justified due to a lack of predictability. However, this approach is limited to orders which do not change the overall character of the framework agreement/contract (Sec. 132 (2) no. 3 GWB / Sec. 21 (2) sentence 3 VgV). Therefore, for example, it is possible to **exceed the originally intended quantity** of the service/supplies covered by the framework agreement/contract.

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Governmental Contracts (II)

(Status: 25 June 2020)

Can ongoing procurement procedures be suspended?

- Yes, there are various possibilities for contracting authorities to suspend ongoing award procedures, depending on the stage of the procedure.
- It is permissible to **unilaterally extend certain deadlines** (e.g. deadline for submission of tenders, deadline for submission of applications for participation). In fact, the procedure is thus suspended for a certain period of time.
- Some time limits, however, can only be **extended with the consent of bidders/participants**. This applies in particular to the binding period.
- With regard to the **award of construction contracts**, the federal decree issued on the occasion of the corona virus stipulates that projects that are ready for tender must continue to be awarded, planning must be continued and new construction projects must be put out to tender.

Can negotiations be conducted online/virtually?

- Yes, provided that the requirements of public procurement law are observed. This means in particular that:
 - a certain level of security must be guaranteed for the electronic means used in order to preserve the **confidentiality** of negotiations;
 - it is necessary to ensure that all parties have **equal and transparent access** to the negotiations;
 - complete **documentation** of the negotiations must be provided for the purpose of traceability and possible verification of the outcome of the negotiations;
 - an **exchange** between the contracting authority and the tenderer on the subject of negotiation must be ensured.

PUBLIC CONSTRUCTION CONTRACTS – VOB/B

Can self-declarations be accepted instead of certificates?

- Yes, provided that the certificate was applied for in time and the timely issue is delayed solely due to the corona pandemic.
- The self-declaration must confirm that the conditions for issuing the required certificate are met.
- In addition to the self-declaration a (recently expired) previous certificate must be submitted.
- There must be no reasonable doubt that the requirements for issuing the certificate have been met even after its expiry.

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Governmental Contracts (III)

(Status: 25 June 2020)

PUBLIC CONSTRUCTION CONTRACTS

Does Corona justify an extension of execution deadlines?

- Yes, as a general rule the corona pandemic qualifies as force majeure in the sense of Sec. 6 Para. 2 No. 1 lit. c VOB/B (German Construction Contract Procedures) and thus justifies an extension of execution deadlines (see BMI decree of 23.03.2020 on corona pandemic, consequences of construction contracts):
 - If a contractor is unable to perform (on time) due to the corona pandemic and therefore requires an extension of the execution deadlines, he must explain in detail the connection between the non-performance and the corona pandemic. However, in this regard it is sufficient that the explanations make it **appear likely** that the corona pandemic is the reason for the disruption of the construction process. It is not necessary to dispel all doubts about this connection.
 - If it appears likely that the corona pandemic is the reason for the delay in performance, the execution **deadlines are automatically extended** for the time period of the disruption plus a reasonable period for resuming operations.
 - In this case, **no claims for damages or compensation** can be asserted against the contractor for the (temporary) non-performance.

PUBLIC CONSTRUCTION CONTRACTS

Can the submission date be carried out virtually?

- Yes, if technically possible, the entire procedure must be conducted electronically via an e-tendering platform.
- Otherwise, the minutes of the submission date with the information pursuant to Sec. 14 (3)(a) to (c) VOB/A must be made available to the tenderers without delay.

Can procedure disruptions caused by the corona pandemic still be regarded as unforeseeable even when new contracts are awarded?

- According to the decree of the Federal Ministry of the Interior, Building and Community (BMI) of 23 March 2020, this should be conceivable in individual cases. However, on closer examination, the strict requirements of force majeure in German law are probably no longer met here, as a current pandemic is no longer unforeseeable. Bidders should press for clarification before the conclusion of the contract.

How to deal with contractual penalties?

- In view of the uncertainties caused by the COVID-19 pandemic, contracting authorities at federal level should provide for **contractual penalties only in exceptional cases**.

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Governmental Contracts (IV)

(Status: 25 June 2020)

PUBLIC CONSTRUCTION CONTRACTS

Are contractors entitled to payments during the disruption of the construction process?

- As far as works continue to be provided, these are to be remunerated in accordance with the contractual provisions.
- As far as works are not provided due to the Corona pandemic, the contractor cannot claim payment.
- However, the Federal Ministry of the Interior, Building and Community (BMI) suggests that the parties should consider **interest-free advance payments** in exchange for a guarantee from the contractor in the event of non-performance (cf. Sec. 16 (2) VOB/B (German Construction Contract Procedures)) in order to mitigate the financial consequences of the disruption to the construction process for the contractor.

[Update: 24 April 2020]

Are there facilitations at federal level for the award of contracts below the EU thresholds?

- Yes, for supply and service contracts, the threshold applicable to the **Federal Ministry of the Interior, Building and Community (BMI)** and the **business area** for the execution of a **negotiated procedure** with or without a call for competition was increased to EUR 100,000 by 15 October 2020 (AZ DGI6-11033/94#3).

Do other countries also apply specific procurement instruments to meet the needs created to contain the corona pandemic?

- Yes, the application of public procurement law has been adapted in many jurisdictions around the world to meet the urgent needs created by the Corona pandemic. The most common instruments are - as in Germany - the acceleration of standard procedures and the use of direct awards. In some cases, however, contracting authorities have even been authorized to use more radical instruments such as the right to adjust prices unilaterally.
- The "**Global COVID-19 Guide on Public Contracting**" provides a worldwide overview of procurement instruments available to contracting authorities in light of the Corona pandemic, which can be viewed here: <https://publicprocurement.bakermckenzie.com/pages/covid19-guide>

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Governmental Contracts (V)

(Status: 25 June 2020)

[Update: 25 June 2020]

What changes or facilitations exist at state level?

- **Temporary increase of the thresholds for direct awards in the case of procurements caused by the corona crisis:**
 - **Bavaria** (until 30 June 2020): Supplies and services up to EUR 25,000 without sales tax
 - **Lower Saxony** (until 30 September 2020): Supplies and services below the EU thresholds (below EUR 214,000) that are particularly urgent due to circumstances related to the COVID 19 pandemic
 - **Rhineland-Palatinate** (until 30 June 2020): Supplies and services below the EU thresholds (below EUR 214,000) and construction works below the EU thresholds (below EUR 5,350,000) that directly or indirectly contribute to the containment of the corona pandemic
 - **Mecklenburg-Western Pomerania** (until 30 June 2020): Supplies and services below the EU thresholds (below EUR 214,000) and construction works below the EU thresholds (below EUR 5,350,000) that directly or indirectly contribute to the containment of the corona pandemic or its consequences
 - **Saarland** (until 31 December 2020): Supplies and services below the EU thresholds (below EUR 214,000) that directly or indirectly contribute to the containment of the corona pandemic
 - **North Rhine-Westphalia** (until 30 June 2020): Supplies and services below the EU thresholds (below EUR 214,000) that serve the containment and short-term management of the corona pandemic and/or the maintenance of service operations; (until 31 December 2020) all construction works up to EUR 10,000 without sales tax
- **Temporary increase of the thresholds for the negotiated procedure or restricted tender**
 - **Bavaria** (until 30 June 2020): Supply and service contracts below the relevant threshold for negotiated procedure with or without a call for competition or for restricted tendering without a call for competition
 - **Lower Saxony** (until 30 September 2020): Supply and service contracts below the relevant threshold for negotiated procedure with or without a call for competition or for restricted tendering with or without a call for competition; construction works up to EUR 1,000,000 without sales tax for negotiated procedure and up to EUR 3,000,000 without sales tax for restricted tendering without a call for competition
 - **Thuringia** (until 31 December 2020): Supply and service contracts below the threshold for negotiated procedure or for restricted tendering without a call for competition; construction works up to EUR 3,000,000 without sales tax for negotiated procedure or for restricted tendering without a call for competition

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Governmental Contracts (VI)

(Status: 25 June 2020)

[Update: 25 June 2020]

What changes or facilitations exist at state level?

(cont'd)

- **Hamburg** (until 31 December 2020): Supply and service contracts relating to the provision of supplies to the population and to combating the spread of coronavirus below the threshold for negotiated procedure
- **Saarland** (until 31 December 2020): Supply and service contracts up to EUR 150,000 for negotiated procedure or for restricted tendering without a call for competition; construction works up to EUR 150,000 for negotiated procedure and up to EUR 1,000,000 for restricted tendering without a call for competition
- **North Rhine-Westphalia** (until 31 December 2020): Construction works up to EUR 100,000 without sales tax for negotiated procedure and up to EUR 1,000,000 without sales tax for restricted tendering without a call for competition
- **Saxony-Anhalt** (until 31 December 2020): Supply and service contracts below the threshold for negotiated procedure or for restricted tendering with or without a call for competition; construction works up to EUR 2,500,000 without sales tax for negotiated procedure and below the threshold for restricted tendering with or without a call for competition
- **North Rhine-Westphalia** (until 30 June 2020): **the application of the UVgO is suspended** for the purchase of goods and services intended for the containment and short-term management of the Corona pandemic and/or the maintenance of service operations.
- **Berlin** (until 30 June 2020): An **electronic tendering procedure may be waived** for the award of supplies and services below the threshold.
- **Hamburg** (until 31 December 2020): In the case of negotiated contracts for supplies and services below the threshold in connection with procurements to ensure the supply of the population and to combat the spread of the coronavirus, an **electronic tendering procedure may be waived**.
- **Hesse**: The **submission date** for construction contracts below the thresholds according to Sec. 14a VOB/A is **dispensable**. Sec. 14 VOB/A is to be applied accordingly.

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6 Further Areas

Antitrust & Competition (I)

(Status: 26 June 2020)

[Update: 12 June 2020]

What are the general implications of COVID-19 for the application of competition law?

- Competition law remains applicable also in times of crisis. The European Competition Network (ECN), a network of European Competition authorities, has just confirmed that the objective of competition rules ensuring a level playing field between companies remains relevant also in a period where the economy suffers from crisis conditions.
- All European competition authorities now try to maintain business as usual with most of their staff working from home. However, uncertainties and delays regarding merger control proceedings should be expected, and at least temporary changes with respect to the competition authorities' enforcement priorities (see below).
- As this crisis is evolving on a day-to-day basis, the competition authorities' statements should be monitored closely.
- EU Commissioner Breton stated that the EU competition rules need reviewing in light of the lessons learned from the Covid-19 pandemic, confirming the importance of the EU's clean energy policy, the focus on boosting digital industries and building defenses against economic challenges from China and the US.

What are the specific implications for merger control procedures?

- **Planning a transaction:** With many competition authorities' staff across the globe working from home, companies planning a transactions should expect delays in merger control procedures:
 - Competition authorities such as the European Commission and the German Federal Cartel Office (Bundeskartellamt) have encouraged companies to postpone any planned transactions. Other competition authorities have announced that the review process will be delayed and/or temporarily suspended (e.g. Argentina, Botswana, Columbia, Egypt, Malaysia, Philippines, India, Peru and South Africa).
 - The Austrian competition authority (Bundeswettbewerbshbehörde) decided that for any merger notifications received on or after 22 March 2020 and before 30 April 2020 (i.e. by 29 April 2020), the period of time for the review will start on 1 May 2020 and end on 29 May 2020.
 - Germany has adopted a law according to which the review period for notifications filed between 1 March 2020 and 31 May 2020 is extended (Phase I: 2 months instead of 1; Phase II: 6 months instead of 4). The Head of the Federal Cartel Office mentioned on 29 April that the Federal Cartel Office will be "transparent" with notifying parties. It is uncertain though whether the Federal Cartel Office will indeed inform the parties early in the process if they expect to exhaust the extended review period. To date, we have seen all cases cleared within the normal timeframe.
 - The French competition authority announced that their merger reviews which were suspended since March will start to run again from June 24 2020.
 - Possible delays until clearance by competition authority and the potential consequences for a transaction should be taken into account when planning the timeline of the transaction (long stop date) and when drafting the agreements.

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Antitrust & Competition (II)

(Status: 26 June 2020)

[Cont.]

What are the specific implications for merger control procedures?

- **Transaction is currently under review:** If a transaction cannot be postponed, it should be considered to discuss it with the competition authorities beforehand:
 - Regarding the notification procedure, the European Commission now accepts submissions in digital format (i.e. via email or the Commission's platform eTrustEx). The German Federal Cartel Office as usual accepts submissions via fax.
 - For the review process, a number of challenges should be expected: It can be difficult for the competition authority to execute a market test and to collect information from third parties also working from home. Similarly, it may be difficult for the notifying companies to produce requested information at short notice, as it may not be accessible from home.
 - Looking back on the past weeks, the Head of the German Federal Cartel Office stated that they were able to do business as usual. A major challenge have been market tests, as it was obviously not a priority for companies to respond to the competition authorities requests for information.

What will be in the focus of competition authorities?

- The competition authorities will closely scrutinize behavior that may amount to a crisis-related abuse of dominance.
- Due the current crisis, several competition authorities across Europe and the globe are already actively monitoring companies to detect any abusive behavior regarding products with a crisis-related increase in demand (e.g. disinfectants, respiratory masks or certain food or household goods).
- Companies with market power on such markets, even only if based on the narrowest possible market definition, should be aware of the increased scrutiny by authorities. But also competitors and/or customers will be monitoring crisis-related changes to prices and other conditions closely and report immediately to the authorities if they believe that a companies' behavior could be considered abusive.
- Authorities in the UK, China, Ecuador and Colombia have already sent targeted industry-specific letters, warning against conduct that harms competition and consumer rights.
- For example, the UK urged pharmaceutical and food companies to self-report instances where a price hike is caused by an equivalent increased applied upstream by wholesalers or suppliers, to assist the CMA in investigation any issues further up the supply chain. Other competition authorities may follow suit and send out similar warnings. The CMA is also engaging with Amazon and eBay to find out what they are doing to curb profiteering from the coronavirus crisis.
- France has already set maximum prices for hand sanitizers and announced that it would do the same for face masks. The CMA also announced that it would assess the possibility of direct legislative pricing.

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Antitrust & Competition (III)

(Status: 26 June 2020)

[Update: 12 June 2020]

Are there areas where competition authorities will take a more lenient approach?

- A cooperation between competitors that have a clear crisis related justification will be met with a lenient approach by competition authorities.
- The ECN expressly mentioned that it will not actively intervene against “necessary and temporary” measures from cooperating companies that are put in place to avoid a shortage of supply, as they most likely would either not amount to a restriction of competition or generate efficiencies that would outweigh any such restriction.
- If companies are uncertain about their plans being compatible with competition law, they can reach out to the European Commission or the national competition authority. The competition authorities have encouraged such contact and offered to provide informal guidance in that regard. It has launched a dedicated email address in that regard: COMP-COVID-ANTITRUST@ec.europa.eu. According to EU officials, however, the e-mail address has not been used as much as expected.
- The European Commission is currently considering several requests for comfort letters. One comfort letter regarding a coordination of behavior in the pharmaceutical sector has been issued in the beginning of April. To face the shortage of supply of medicine, the cooperation in question envisages, inter alia, to identify production capacity and existing stocks, to adapt or to reallocate, based on projected or actual demand, production and stocks, and to potentially also address the distribution of COVID-19 medicines. Such a cooperation would have been unlikely to be accepted by the Commission without the impacts of the crisis. A central condition for the cooperation is that it is limited in time until the risk of a shortage, incl. a second wave of COVID-19, is overcome.
- The crisis also impacts the decision-making of competition authorities regarding the competitive assessment before the background of the changed economic situation. For example, the German Federal Cartel Office has closed its investigations in the Sky/DAZN case regarding Champions League broadcasting rights. The Federal Cartel Office had initiated the proceedings against Sky and DAZN due to the suspicion that the companies may have agreed to split the broadcasting rights for Germany for the seasons 2018/2019 to 2020/2021 between them. One of the various points for closing the investigation was the change of the economic situation brought about by the crisis. The authority found that the effects of the crisis on the current football season in Europe make near-term market developments hardly predictable. For this reason, the assessment of the effects of an intervention under competition law was particularly difficult.

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Antitrust & Competition (IV)

(Status: 26 June 2020)

[Cont.]

Are there areas where competition authorities will take a more lenient approach?

- On 5 May 2020, special EU regulations for potato, dairy, and flower producers came into force. For a period of six months, farmers, farmers' associations, producer organizations and other participants are authorized to conclude agreements and to make common decisions, such as on free distributions, production planning, market withdrawals or joint promotion. The regulations are aimed to alleviate the consequences of a significant drop in demand as a result of the crisis.
- The German Association of the Automotive Industry (VDA) has presented crisis-management measures to the German Federal Cartel Office, to ease the economic consequences of the crisis. The measures contain framework conditions for restarting automotive production and a model for restructuring suppliers. Key elements would be the exchange of information within stakeholder groups over a limited period of time, including information on the solvency, credits, aid measures or operational problems of a company. The German Federal Cartel Office discussed the measures with VDA and decided to refrain from examination under competition law in more detail, but has provided for some accompanying measures to ensure compliance with competition law requirements. For example, the scope of information exchanged must be limited to data that is indispensable for the restructuring process, and the data has to be exchanged in aggregate form.

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Compliance (I)

(Status: 26 June 2020)

Are compliance obligations suspended due to the Corona Pandemic?

No! Compliance also applies in times of crisis and the duty of legality - i.e. the obligation of Management to ensure that the company and its employees act in accordance with the law - still applies despite the Corona pandemic.

Are there any additional compliance obligations due to the Corona-related measures?

Yes! In particular, measures according to the Infectious Diseases Protection Act (Infektionsschutzgesetz, "IfSG") or the statutory ordinances issued in accordance with § 32 IfSG must be observed within the scope of the duty of legality. In addition to sanctions against the persons acting in each case, violations of measures pursuant to the IfSG may under certain circumstances also have serious consequences for companies. For example, the risk of company fines and seizure of assets under Section 30 of the Act on Regulatory Offenses (Ordnungswidrigkeitengesetz, "OWiG"), also exists in the event of violations of measures under the IfSG. The same naturally also applies to possible further regulations that could be introduced in the future.

[Update: 24 April 2020]

What about compliance obligations in economically difficult times?

In addition to the Corona-specific compliance risks described above, an economic crisis poses compliance risks for companies. In times of crisis, employees are under great economic pressure. Orders are cancelled or postponed. Routine procedures and standard processes can no longer be implemented as usual. There is a growing temptation to be less strict about complying with internal rules and legal regulations or to enter into business transactions that would normally be avoided.

Non-compliant behavior typically increases when companies and/or their employees seek to:

- *Speed up processes that may be stalled and/or delayed due to the current crisis, e.g. customs clearance*
- *Shift to alternative business partners (e.g. suppliers) that are less affected by the current crisis but that have higher risk profiles, or without sufficient time to conduct due diligence to evaluate their risk profiles*
- *Make false accounting entries in order to meet various stakeholder' expectations*
- *Make false representations when applying for government grants and subsidies.*

However, external factors such as an economic crisis are generally not considered by regulators and law enforcement agencies as effective justification for non-compliant behavior. In addition to the areas of antitrust law and trade restrictions already described in this guide, corruption risks also arise in particular.

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Compliance (II)

(Status: 26 June 2020)

[Update: 30 April 2020]

What measures should companies take at the moment from a compliance perspective?

To steer the company as safely as possible through the Corona crisis with regard to the associated compliance risks, we recommend the following measures:

- *Renew Tone from the Top and ensure awareness of employees, in particular the upper management levels to the described Corona- and crisis-specific compliance risks. We have prepared a draft compliance email for our clients in legal and compliance departments for forwarding to their business and sales teams. This email is designed to ensure that key compliance issues continue to be communicated effectively during this time of business upheaval. The email will remind recipients of their compliance responsibilities and provide them with guidance on how to manage key legal risks. [The template can be downloaded here.](#)*
- *Compliance with the relevant compliance guidelines, standards and controls should continue to be monitored and documented accordingly.*
- *Legislative and administrative developments, in particular those at local level, should be closely monitored to ensure timely and appropriate responses to new requirements. The responsibility for this should be clearly defined and supported by adequate communication and reporting channels.*
- *If a Corona crisis team exists, compliance should be represented accordingly.*

Ultimately, a well-run corporate compliance program must not be sidelined by the Corona pandemic. While business and health risks rightfully remain at the center of concerns, companies should ensure that any compliance risks that may arise are pre-empted and addressed in an appropriate and timely manner. This will not only give support to your employees and confidence to your customers in the short term, it will also enhance the long term reputation of the business once this crisis has passed.

Furthermore, in light of the recently published draft for a German corporate liability act (more information regarding the draft can be found in our [Client Alert](#) and on our [New Corporate Liability Act Online Platform](#)), companies must expect increasing pressure of prosecution, higher sanctions and incentives for compliance programs and internal investigations once the draft becomes law and should therefore ensure that compliance is adequately taken into account.

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Intellectual Property

(Status: 26 June 2020)

[Update: 27 March 2020]

What does this mean to my health-related patents?

The federal government can in the public's interest or in the interest of protecting the state request a compulsory license on inventions relevant to overcome a national epidemic. On 27 March 2020, Germany has passed a law by which the federal government increases its competencies in order to overcome an epidemic situation of national scope which would cover the current COVID-19 pandemic. Under the new law, the federal government can request from a company to tolerate the use of any of its inventions that cover relevant drugs, medical devices or technology in the public's interest or the interest of protecting the state. The patent owner can claim an adequate compensation from the state.

[Update: 20 May 2020]

Are there any implications on pending patent, trademark and design registry proceedings in front of the European Patent Office (EPO) or the European Union Intellectual Property Office (EUIPO)?

Yes.

On 1 May 2020, the EPO announced that all time limits in proceedings regarding EP and PCT patent applications will be ex officio further extended until 2 June 2020.

On 15 May 2020, the EUIPO announced that it will not further ex officio extend pending deadlines in application and other registry proceedings regarding EU trademarks and EU designs. This means, time limits that previously expired between 9 March 2020 and 17 May 2020 and were extended ex officio to 17 May 2020, will have expired on 18 May 2020 if not individually extended. The Office emphasizes that additional extensions are still possible, however, in case of second extensions require an individual case-by-case reasoned request.

Is there any specific impact in the area of product piracy?

Some companies in the healthcare industry notice an increase in counterfeiting and fraudulent activities as a result of the COVID-19 pandemic. Due to the current lack of urgently needed products such as respiratory masks or disinfectants, there is an increasing risk that fraudsters and counterfeiters use brands of renowned manufacturers of such products to fraudulently offer such products. Also in the press, there are already first reports of seizures of counterfeit COVID-19 test kits (see following [article](#)).

Trademark owners from potentially affected industries should monitor the market more closely and, for example, set up a domain monitoring since fraudsters often register domains using the trademarks or corporate logos of the original manufacturers to make their offer appear legitimate.

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Investment Protection

(Status: 26 June 2020)

What does cross-sectoral foreign investment review in accordance with Sec. 55 German Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung – AWV) mean?

The **cross-sectoral review**, in accordance with Section 55 AWV, applies to all acquisitions of companies by which investors domiciled outside the EU and EFTA acquire at least 25% of the voting rights of a German target company. The threshold is 10%, if the target operates critical infrastructure or operates in other essential and particularly sensitive sectors. Acquisitions by EU or EFTA entities cannot be reviewed unless there are indications of an abusive construction of the investment or a circumvention of the law. The cross-sectoral review allows to enact orders or to prohibit the acquisition in extreme cases in order to guarantee the public order and security of Germany.

What does sector-specific foreign investment review in accordance with Sec. 60-62 AWV mean?

The **sector-specific review**, Sections 60-62 AWV applies to the acquisition of target companies in the defense and IT security sector by foreign investors including investors from other EU Member or EFTA States. It suffices that an investor acquires 10% of the voting rights in the case of a sector-specific review. The sector-specific review allows to enact orders or prohibit the acquisition in extreme cases in order to guarantee fundamental security interests of Germany.

[Update: 30 April 2020]

What are the implications of the COVID-19 crisis on the German law on foreign investment review?

The Federal Government has decided in favor of a draft regulation amending the AWV, which extends the scope of the cross-sectoral foreign investment review to companies in the healthcare sector. The draft provides for the possibility of reviewing and prohibiting acquisitions of certain companies in the healthcare sector by non-EU or EFTA companies (see also our [Client Alert](#)).

Other than in other EU member states, the German government could currently in principle not prohibit the acquisition of such company by an investor from the EU or EFTA. Initiated already before the COVID-19 crisis, Germany is currently reforming its foreign investment review laws. In implementing the EU Screening Regulation (Regulation (EU) 2019/452), foreign investments will be subject to review and potential restrictions not only if there is an "actual risk" but already if there is a "probable impairment" of the public order and security of Germany or another EU member state. Transactions regarding particularly sensitive companies, such as operators of critical infrastructure, will be provisionally ineffective until the review is concluded. The catalogue of particularly sensitive companies will be extended by further industries such as artificial intelligence, robotics, semiconductors, biotechnology, quantum technology as well as the production of pharmaceuticals and medicinal products.

The EU Commission has furthermore issued guidelines for the conduct of foreign investment reviews by the EU Member States via a communication of 25 March 2020. In these, the EU Commission calls on Member States to conduct foreign investment reviews diligently, especially with regard to acquisitions of companies in the health sector, and to take the implications on other EU Member States into account.

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Work of State Courts and Arbitration Tribunals

(Status: 26 June 2020)

[Update: 20 May 2020]

To what extent is the German jurisdiction affected by the COVID-19 pandemic?

There is **no uniform nationwide regulation** on how the German courts should operate during the COVID-19 pandemic. However, the general principle applies that priority should be given to those proceedings that are core or urgent. Due to the independence of the judiciary, judges will decide independently on the timing and content of their proceedings. Therefore, decisions will be taken on a **case-by-case basis**.

This also applies to the wearing of a **mouth-nose cover**: The question of whether masks must be worn when entering the court buildings will be decided by the local authorities. In courtrooms, however, the judges decide independently whether a mouth-nose cover is to be worn for health protection reasons.

Instead of courtroom hearings, courts sometimes hold **oral hearing via video conference**. While this method is in principle open to the courts (§ 128a ZPO), the different technical equipment standards of the courts mean that these measures will also remain decisions on a case-by-case basis.

[Update: 20 May 2020]

To what extent are arbitration proceedings affected by the COVID-19 pandemic?

Arbitration is also affected by the COVID-19 pandemic.

However, **the arbitral institutions** continue their work under separate arrangements: End of March 2020, the German Institution of Arbitration (**DIS**) published procedural particularities. Among other things, postal and courier deliveries are to be avoided and replaced by e-mail or fax deliveries as far as possible. The DIS also declared that the effects of the COVID-19 pandemic will be taken into account when deciding on applications for extensions of deadlines.

On 16 April 2020, a number of well-known arbitration institutions such as **DIS, ICC, AAA, LCIA, SIAC and HKIAC** published a joint declaration in the wake of the COVID-19 pandemic. The institutions call upon the parties and arbitrators to discuss the impact of the pandemic and possible ways to combat it in an open and constructive manner. Arbitration tribunals and parties are invited to minimise the impact of any obstacles that may arise, in particular by making full use of the relevant institutional rules that allow arbitration proceedings to proceed without undue delay.

The work of **arbitration tribunals** is affected where public and non-public events are prohibited or restricted on federal state level. Here, the state-specific regulations on contact prohibitions, distance regulations and the wearing of a mouth-nose cover must be taken into account. Furthermore, the arbitral tribunals decide on the progress of the respective proceedings within the scope of their **discretionary powers**. In individual cases, it may be possible to conduct oral hearings by video conference.

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7 Industry Focus: Pharma and Medical Products

Industry Focus: Pharma & Medical Products (I)

(Status: 26 June 2020)

[Update: 9 April 2020]

Supply of medicines (incl. APIs, intermediaries), medical devices, biocidal products, diagnostics, personal protective equipment - Health Ministry authorized to take drastic measures

A new law entitled "Act on the Protection of the Population against Epidemic Emergencies on a National Scale" (amending Sec. 5 of the Fed. Protection against Infections Act) has been enacted, effective immediately (Fed. Gaz. 2020 I 14, 587), providing inter alia: If the lower house of congress proclaims an epidemic emergency of a nationwide dimension, the Health Ministry shall be empowered to take immediate actions through executive orders (not yet delivered) which allow for

- establishing large scale exemptions from the requirements of holding marketing authorizations, CE marks, compulsory labelling, import/export, holding manufacturing or distribution licenses, dispensing of drugs bound to pharmacies and other regulatory governance rules;
- ordering prohibitions on sales, or freezing of prices;
- compel companies to report (inventory) to regulators;
- intervening in manufacturing or supply chain processes;
- partly take over the management of hospitals, clinics, pharmacies and other healthcare institutions;
- limit patent protection (of vaccines etc.), Sec. 13 of the Patent Act.

The German Health Ministry published drafts of two Implementing Regulations:

(1) SARS-CoV-2 Medicinal Product Supplies Regulations (Apr 6), providing for the following key terms:

- *Restrictions on sale and commerce: The Ministry may order that so-called products for medical needs (drugs incl. APIs, excipients; medical devices; lab diagnostics; medical aids; PPE; specific sanitizers) may become subject*
 - to governmental oversight;
 - disclosure and reporting obligations imposed on companies including inventory levels; manufacturing capabilities; prices; distribution channels;
 - restrictions affecting commerce, prices, distribution, sales, especially orders to sell and supply product for prices fixed by the government to public procurement bodies or for-profit medical care providers;
- *Expansion of competences exercised by pharmacies, e.g. substituting dispensed drugs; referral of prescriptions; charging markups on drug deliveries by courier (€ 5 per delivery, € 250 flat); repetitive prescriptions;*
- *Broader latitude of hospital pharmacies to supply drugs when releasing patients transferred to outpatient care.*

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Industry Focus: Pharma & Medical Products (II)

(Status: 26 June 2020)

[Update: 9 April 2020]

[Cont.]

Supply of medicines (incl. APIs, intermediaries), medical devices, biocidal products, diagnostics, personal protective equipment - Health Ministry authorized to take drastic measures

(2) Regulation on Securing Access to Medical Supplies (MedBvSV) (Apr 7), providing for the following key terms:

- The Health Ministry and designated organizations may take over centralized procurement, storage, manufacturing and marketing of products for medical needs (see above). This comes close to a partly nationalization of a sector of the economy. For products subject to this governmental regime, regulatory restrictions otherwise applicable are to be waived (compulsory marketing authorization; licenses for manufacturing, importing, trading; labelling etc.).
- The Ministry may grant waivers also covering medicinal products freely distributed by pharma companies, such waivers e.g. relieving companies from mandatory marketing authorizations, any of the aforementioned licenses, or clinical trial requirements.
- Moreover, exemptions may be made from limitations related to blood transfusions; GCP compliance; marketing of PPE.

[Update: 9 April 2020]

Are any exemptions available from the marketing authorization requirement for medicinal products, or from any other compulsory licenses?

In principle, yes, foremost by virtue of the draft Regulation on Securing Access to Medical Supplies (MedBvSV) (see above).

In addition, individual case by case exemptions on the level specific MAs or other specific permits may be granted by competent state authorities through special administrative orders. The government opened the door for such measures by making a pronouncement on 02/26/2020 that there is a shortage of COVID-19 indicated medicines. So far local authorities have only occasionally taken advantage of the conferred exemption authority (State of Saxony, order of Apr. 1: MA and label waiver for a pneumococcal vaccine). Pharma companies are free to file for requests for exemptions, however.

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Industry Focus: Pharma & Medical Products (III)

(Status: 26 June 2020)

[Update: 3 April 2020]

Are exemptions from the CE-marking obligation for medical devices feasible which are relevant for COVID-19, including in-vitro-diagnostic devices?

In pure legal terms, yes. Pursuant to Sec. 11(1) of the German Medical Devices Act (and correspondingly Art. 13 MDD, Art. 59 MDR) the German federal regulator BfArM may temporarily waive the requirement that MDD/MDD conformity was demonstrated. Per its recommendation 2020/403 of 03/16/2020, the EU Commission encourages national governments to consider such derogations from conformity assessment procedures, also when the intervention of a Notified Body (NB) is not required. No such NB involvement would be necessary for pure class I medical devices (e.g. non-sterile gloves) or non A/B listed in-vitro-diagnostic devices (e.g. PCR- or IgG/IgM-based COVID-19 testing kits!).

Per a proposal for an MDR amendment by the EU Commission of April 3, 2020 (2020/0060(COD)), the way is supposed to be pathed for national regulators (in Germany BfArM [German FDA], perhaps also state-level authorities) to grant emergency exemptions from CE-marking for COVID-19-critical devices (such w/o being exhaustive) medical gloves, surgical masks, ICU equipment: Upon duly justified request, competent national authorities may allow the placing on the market and putting into services of specific devices without prior conformity assessment and CE marking (pursuant to Dir. 93/42/EEC or 90/385/EEC) if such is in the interest of public health or patient safety of health. Domestic manufacturers, but also importers of non-CE-marked devices (e.g. from China) may try to use this exemption mechanism once enacted.

[Update: 9 April 2020]

... Exemptions from the CE-marking of specific protective equipment (FFP masks, medical masks, protective gowns)

In response to EU COM Recommendation 2020/403 on conformity assessment and market surveillance procedures within the context of the COVID-19 threat, it became known that the German Health Ministry, by letter of March 13, instructed the head state-level surgeon generals to proceed in the following way regards the products at issue: Even without a CE mark products shall be deemed to have clearance for being placed on the market provided those products had obtained marketing approval (may be lawfully marketed) in the U.S., Canada, Australia or Japan (China is not mentioned). Otherwise (in the absence of CE marking or recognition of the aforementioned third-country approvals), "suitable bodies", which may be Notified Bodies, are to inspect conformity with EU safety/protection standards.

Implementation of the Ministry's guidance, a federal regulator (ZLS) acknowledged a condensed checklist (prepared by NBS Dekra and IFA) for inspecting basic technical EU compliance of COVID-19 pandemic face masks. This checklist apparently applies to FFP (face filtering pieces) which are PPE otherwise subject to EN 149. Following from the draft Regulation on Securing Access to Medical Supplies (MedBvSV), affected FFP (PPE) masks, if lacking appropriate CE marking and not having obtained market clearance in the U.S., Canada etc., have to be certified by a NB based of the condensed checklist. The draft Regulation does not establish a CE-mark-substituting fast-track inspection and validation of other non-CE-marked masks based on e.g. EN 14683:2019+AC:2019 by NBs or local authorities. In this respect importers should seek alignment with local regulators.

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Industry Focus: Pharma & Medical Products (IV)

(Status: 26 June 2020)

... Exemptions from the marketing authorization obligation applicable to biocidal products?

The German federal workplace safety agency (baua) issued a general exemption order of 03/04/2020 allowing pharmacies to market hand-sanitizers (disinfectants) containing 2-propanol which they manufactured in their pharmacy, under the umbrella of a standard authorization.

[Update: 3 April 2020]

MDR moratorium (suspending MDR applicability so far scheduled for May 26, 2020)

According to a proposal for an MDR amendment from the EU Commission of April 3, 2020 (2020/0060(COD)), the key date of May 26, 2020 is to be pushed back by one year to May 26, 2021 throughout the MDR. This would in the first place change the date of MDR application to May 26, 2021, but also the timelines for CTS and (anyway in doubt) Eudamed. The deadline for making available and putting into service of certain legacy devices taking advantage of the transition period until May 25, 2025 (Art. 120(4)) will also be deferred by one year.

[Update: 3 April 2020]

How about the impending departure of Switzerland from a mechanism established by the Mutual Recognition Agreement (EU/Swiss MRA) applicable to medical devices, progressing towards the date of MDR applicability of May 26, 2020?

The upcoming MDR moratorium would cause a continuation of the EU/Swiss MRA. Thus, the May 2020 deadline for Swiss manufacturers to be MDR ready would be suspended.

[Update: 3 April 2020]

May medical devices be supplied for free, or on a free loan basis, to medical institution – any change of perceptions in the compliance environment?

In ordinary times such practices would be in violation of the anti-inducement law of Sec. 7 HWG, and only be allowed within narrow limits. One of the acknowledged exceptions has so far been derived from Chapter 9.3 of the MedTech Europe HCP Code providing that free devices or free loans of up to 3 months are acceptable for bona fide purposes of HCP self-familiarization with new products. Industry stakeholders on EU level now settled on a guidance suggesting that in light of the pandemic wider exemptions, beyond Chapter 9.3, should be available. In our view, in the current legal environment it should be fair to surmise that reasonable donations or free loans to hospitals responding to genuine needs are not exposed to legal challenges. Telemedicine-platforms have already started some time ago to offer free distant doctor consultations for free to patients seeking remote medical advice on suspected Covid-19 symptoms, without any legal complaints under Sec. 7 HWG experienced.

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Industry Focus: Pharma & Medical Products (V)

(Status: 26 June 2020)

Are there any export bans applicable to medical or healthcare products?

Effective for Germany, at the moment (<until today>) only on the level of the EU (implemented through EU Reg 2020/402 of 03/14/2020) that imposes the requirement of an export authorization on specific personal protective equipment (e.g. certain filtering face pieces, FFP mouth nose masks) and medical gloves. The affected products are defined by reference to customs CN codes. A similar domestic export ban (even restricting shipments leaving Germany) imposed on 04/04/2020 by the German regulators based on the Export Control Act has consequently been rescinded. It may not be excluded that beyond the PSA currently captured, in the future the EU export authorization obligation will be extended to other devices (e.g. IVD test kits, ventilators) and/or Germany re-introduces bans on outbound shipments.

Could inventory of medicines, medical devices, PPE, biocidal products etc. (also if warehoused by manufacturers) be seized, sequestered or confiscated by the government?

According statutory instruments would be available and could be used as measures of last resort by regulators on the level of the federal states, as recently invoked by the state of Bavaria which on 03/16/2020 declared a state-wide state of emergency. State Disaster Relief Acts (e.g. in Bavaria Art. 9 BayKSG) empower local enforcement authorities to seize citizens' property. Further measures can be taken authorized through the Federal Infectious Diseases Protection Act (IfSG). Already now, medical clinics in Bavaria have to report their inventory of ventilators to authorities (order issued by the Bavarian secretary of health on 03/17/2020).

Are employees working with pharma or med tech companies regarded as "essential" (relevant to the system) in terms of their specific professions and may therefore be eligible for waivers of a general curfew if such was imposed?

The answer may depend on the specific impact of the job description and of the concerned products on containing the pandemic. According to the present day version of the Regulations on Combatting the COVID-19 Virus speedily enacted on state level, the category of employees stated in this question does not yet appear to be included. Companies which are concerned about the effect of curfews may consider to timely contact local authorities managing public order, trying to leverage specific pieces of legislation already in force in connection with critical IT infrastructure (e.g. Sec. 6 and Schedule 5 of the BSI-Kritis Reg.) and pertaining guidelines. According to this legislation, amongst others, the following service sectors have been categorized as of critical importance: supply of life-sustaining medical devices, and even in general supply of Rx drugs as well as blood and plasma products.

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Industry Focus: Pharma & Medical Products (VI)

(Status: 26 June 2020)

[Update: 27 March 2020]

Have any measures been imposed related to an inventory management and fixing of quotas for medicinal products?

Based on yet another new law (Sec. 52b(3d) of the Drug Act), BfArM mandated that:

- the supply volumes delivered to pharmacies directly by drug manufacturers or by pharmaceutical wholesalers shall not exceed the quantities of last year;
- equally, wholesalers shall only be supplied on last year's levels;
- in hospital-run pharmacies or free pharmacies supplying hospitals, the inventory of drugs considered COVID-19-relevant shall not exceed an 8 weeks supply;
- the minimum inventory level within the supply chain shall be kept on the level of a 2 weeks' demand.

The quota-fixing affects a large number of drugs identified by active substance which are regarded as significant for public health, as itemized in lists maintained by BfArM which are freely accessible. The measures aim to counteract excessive stockpiling.

The German Ministry of Health urged pharmacists, in a non-legally binding manner, to restrict the sale of non-prescription but pharmacy bound products (OTC) to quantities sufficient to satisfy regular household demand.

[Update: 3 April 2020]

Is there any conceivable way to ensure a continuous administering of investigational products to trial subjects (patients) enrolled in clinical studies, in light the additional burdens and workloads clinical (trial) centers are struggling with?

Sponsors may probe options for re-organizing studies in a way that investigational products are administered to study patients in the patients' homes (possibly assisted by study nurses) rather than at the study centers. According arrangements with regulators and IRBs might be legally supported by the EU guidance on Clinical Trial Management 27/03/2020 v2 jointly issued by EMA, CTFG, CTEG, GCP Inspectors Working Group, supplemented by an according BfArM (German FDA) guidance. A number of measures may be considered: # Remote Monitoring / Visits / Auditing, # Shipment of study medication ex trial center or ex sponsor site, or through licensed pharmacies, directly to subjects for at-home application, # facilitated Informed Consent (orally obtained), # transfer of patients, # leniency of Protocol Deviations.

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