



Law for the mitigation of the consequences of the COVID-19 pandemic

UPDATE as per 23 March 2020

(reflecting the amendments to the proposal made in the course of 22 and 23 March 2020 by the German Ministry of Justice based on feedback received in the accelerated legislative process)

Proposed German law for the mitigation of the consequences of the COVID-19 pandemic

The German Federal Government is currently working on a **Law for the mitigation of the consequences of the COVID-19 pandemic** in the areas of Insolvency, Corporate, Civil and Criminal Procedure Law. Ministry officials have been working through the weekend with the goal to get the legislation finalized by both chambers of parliament as early as possible in the course of this week.

This legislation is in addition to other government measures being worked on, most importantly emergency relief packages for businesses such as direct grants, subsidized lending, tax breaks and capital/equity injections. There will be further legislation as the situation develops to cater for the exceptional situation for economy and people.

The final version of the law may well deviate from the proposal discussed below and the further development in the course of this week will therefore need to be monitored closely.

OVERVIEW

The proposed legislation covers four areas:

- Suspension of the obligation to file for insolvency, corresponding limitation of the management's liability and incentives to continue to do business with the affected companies;
- Measures to simplify decisions in corporate law (most notably AGMs), the laws of associations and of cooperatives as well as of homeowner associations (*Wohnungseigentum*);

- Moratorium on contractual obligations of consumers and micro-enterprises under long term agreements and loan agreements and a ban on termination of property leases, to avoid hardships by introduction of amendments of the Introductory Code to the German Civil Code (*EGBGB*); and
- Trial suspension flexibility in criminal law procedural rules

INSOLVENCY LAW

The amendments to the existing regime aim at enabling companies that have become insolvent or are facing financial difficulty as a result of the COVID-19 pandemic to continue business operations. This shall be achieved by way of a comprehensive suspension of the obligation to file for insolvency until 30 September 2020 and by a number of additional measures which shall (i) ensure that management can continue to run the business in the ordinary course, (ii) eliminate legal risks in connection with the provision of new financing in a crisis and (iii) reduce claw-back risks for contractual counterparties generally.

CORPORATE LAW

The COVID-19 pandemic has led to extensive restrictions on the public and private gathering of people, which also curtailed the ability of companies to hold (shareholder) meetings and pass resolutions. Given the importance of several of these resolutions for the shareholders (e.g. on the distribution of dividends) and – especially in light of the current situation – the company itself (e.g. on capital measures or restructurings), the main objective of the proposal regarding corporate law is to enable companies to efficiently convene meetings and adopt resolutions without the physical presence of shareholders.



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CIVIL LAW

The proposed amendments to the Introductory Code to the German Civil Code aim to address the loss of income by a large number of people, primarily consumers, employees as well as self-employed entrepreneurs. With regard to rent payments, the government fears that tenants may not be able to pay rent in a timely fashion. In a similar manner consumers and entrepreneurs are expected to face difficulties in repaying loans and paying loan instalments and interest in time. Whilst the easements regarding long-term contracts are intended to apply for the benefit of consumers and micro-enterprises and the easements regarding loan agreement apply to consumers only, the easements with respect to property rental agreements are intended to aim at tenants of all kind.

CRIMINAL PROCEDURE LAW

The proposed law would change criminal procedure so that criminal trials that have to be interrupted because of the pandemic would not have to start all over again afterwards.

CORE POINTS OF THE PROPOSED LAW

The proposed law does, for the most part, not introduce new or amend the wording of existing provisions but contains six articles punctually changing and overlying regulations in the relevant codes.

INSOLVENCY LAW: SUSPENSION OF THE OBLIGATION TO FILE FOR INSOLVENCY

The proposed changes to the legal regime include (i) an amendment to the strict liability regime for management regarding payments effected after the occurrence of cash flow insolvency or balance sheet insolvency, (ii) liability, claw-back and other exemptions regarding new loans and security, including an exception from the general rule that shareholder loans are subordinated in a subsequent insolvency of the subsidiary, and (iii) claw-back exemptions to avoid contractual counterparties discontinue trading or terminate contractual relationships.

§ 1 Suspension of the obligation to file for insolvency

The obligation to file for insolvency pursuant to sec. 15a InsO and sec. 42 para. 2 of the German Civil Code is suspended until 30 September 2020. The suspension shall not apply if the insolvency is not caused by the effects of the spread of the SARS-CoV-2 virus (COVID-19 pandemic) or if there exists no prospect of remedy of an existing cash flow insolvency (*Zahlungsunfähigkeit*). If the debtor was not cash flow insolvent as at 31 December 2019, it is presumed that the insolvency is caused by the effects of the COVID-19 pandemic and that there exist prospects of remedy of an existing cash flow insolvency.

§ 2 Consequences of the suspension

- i. Insofar as the obligation to file an insolvency application is suspended pursuant to § 1,
 - 1) payments that are made in the ordinary course of business, in particular payments that are made to maintain or resume business operations or to implement a restructuring concept, are deemed to be carried out with the due diligence of an ordinary and conscientious director within the meaning of sec. 64 sentence 2 of the German Limited Liability Companies Act (*GmbHG*), sec. 92 subsection 2 sentence 2 of the German Stock Corporation Act (*AktG*), sec. 130a subsection 1 sentence 2, also in connection with sec. 177a sentence 1 of the German Commercial Code (*HGB*) and sec. 99 sentence 2 of the German Cooperative Societies Act (*GenG*);
 - 2) the repayment until 30 September 2023 of a new loan granted during the suspension period, and the granting of security in respect of such loans during the suspension period are deemed not to disadvantage creditors; half-sentence 1 also applies to the repayment of shareholder loans and payments in respect of claims arising from legal acts that correspond economically to such a loan, but not to any security granted in respect of such loans or claims; sec. 39 subsection 1 no. 5 and sec. 44a of the Insolvency Code do not apply in respect of insolvency proceedings relating to the debtor's assets that were applied for by 30 September 2023;
 - 3) the granting of credit and the taking of security during the suspension period is not to be regarded as a contribution to a delay in filing for insolvency contrary to public policy (*sittenwidrig*);



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2. Consequences of the suspension (cont.)

- 4) legal acts which have granted or enabled the other party security or satisfaction, to which such other party was entitled in such form and at such time cannot be clawed back in subsequent insolvency proceedings and are not subject to claw-back rights; this does not apply if the other party was aware that the debtor's restructuring and financing efforts were not suitable to remedy an existing cash flow insolvency (*Zahlungsunfähigkeit*). Sentence 1 applies accordingly to
- a. performance instead of or on account of performance (*Leistung an Erfüllung statt oder erfüllungshalber*);
 - b. payments by a third party at the behest of the debtor;
 - c. the granting of a security other than the security originally agreed, if such security is not more valuable;
 - d. the shortening of payment terms and
 - e. the granting of accommodations for payment.
- ii. paragraph 1 no. 2 and 3 also apply to credits granted by Kreditanstalt für Wiederaufbau, the German state-owned development bank, or its financing partners or other institutions in the context of Covid-19 induced financial support programs, even if the credit is granted (or security taken in respect of such credit) after the suspension period and irrespective of the time of repayment of such credit.

§ 3 Opening of proceedings based on the application of a creditor

In the case of applications for the opening of insolvency proceedings filed by creditors between the effective date of the law and the date three months after the effective date, the opening of insolvency proceedings requires that the reason for the opening of insolvency proceedings already existed on 1 March 2020.

§ 4 Authorization to issue regulations (*Verordnungsermächtigung*)

The Federal Ministry of Justice and Consumer

Protection is empowered to extend the suspension of the obligation to file for insolvency pursuant to § 1 para. 1 and the provision on the reasons for opening insolvency proceedings in case of applications filed by creditors pursuant to § 3 until 31 March 2021 by way of a regulation (*Rechtsverordnung*) without the consent of the Federal Council (*Bundesrat*), if this is necessary (*geboten*) due to ongoing demand for available public aid, ongoing funding difficulties or other circumstances.

CORPORATE LAW: MEASURES TO SIMPLIFY DECISIONS IN CORPORATE LAW, THE LAWS OF ASSOCIATES AND OF COOPERATIVES AS WELL AS CONDOMINIUMS

§ 1 Stock companies (*Aktiengesellschaften*); partnerships limited by shares; European Companies (SE); mutual insurance associations (*Versicherungsvereine auf Gegenseitigkeit*)

Pursuant to the proposed law, the management board can decide that the (annual or extraordinary) general meeting (*AGM*) is transmitted electronically and shareholders participate and vote electronically, and that members of the supervisory board may participate by means of audio- or video-conferencing, even if this not provided for in the articles of association (see sec. 118 para. 1 sent. 2 German Stock Corporations Act). Furthermore, the management board is also free to decide that the AGM can be entirely conducted in virtual format, i.e. without physical presence of any shareholder, provided that the following prerequisites are met:

- the entire AGM is transmitted electronically (i.e. via the internet);
- shareholders can vote electronically (i.e. via electronic communication sent in advance of the meeting or online);
- shareholders can ask questions electronically;

the voting shareholders are given the necessary means to contest resolutions of the AGM without being physically present (which is currently a requirement, see sec. 245 para. 1 German Stock Corporations Act).



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As regards questions from shareholders in relation to the topics of the AGM, the management board is given “due, free” discretion (“*nach pflichtgemäßem, freiem Ermessen*”) as to whether and how such questions are admitted and answered, and it can further request that any questions be submitted electronically until two days prior to the AGM at the latest, thus introducing a much more lenient standard compared to sec. 131 German Stock Corporations Act.

The convocation period of AGMs is reduced to 21 days (and other related periods are shortened accordingly) and the current requirement for companies to convene their AGM within eight months of their business year (see sec. 175 para. 1 sentence 2 German Stock Corporations Act) – ending for most companies on 31 August 2020 – is extended to twelve months (i.e. 31 December 2020). The latter does not apply, however, to European Companies (SE) – see below.

The management board can further decide to pay an advance dividend for the last fiscal year even if this is not provided for in its articles.

All of the above decisions require consent of the supervisory board, for which the underlying resolution can also be taken in writing, by telephone, or by similar means of communication.

Shareholders’ rights to contest AGM resolutions based on certain formalities, including the convocation in electronic/virtual format (referred to above), are limited; they can only be based on intentional violations.

§ 1 of the proposed law also applies to partnerships limited by shares and – except for the extension of the convocation period to 12 months – European Companies (SE). AGMs of European Companies still have to be convened within 6 months of their fiscal year pursuant to the requirements of European law (Art. 54 para. 1 SE-VO). Finally, most of the aforementioned regulations on German stock corporations also apply (*mutatis mutandis*) to mutual insurance associations (*Versicherungsvereine auf Gegenseitigkeit*).

§ 2 Limited liability companies (*Gesellschaften mit beschränkter Haftung*)

Regarding German limited liability companies (*Gesellschaften mit beschränkter Haftung*), the law provides that resolutions of the shareholders’ meeting

can also be taken in text form without a physical meeting or by casting votes in writing even if not all shareholders agree to such procedure.

§ 3 Cooperatives (*Genossenschaften*)

The law further includes various mitigation measures with respect to cooperatives. In particular, similar to the rules applying to stock corporations, partnerships limited by shares and European Companies (SE), the law also provides that members of cooperatives can take their resolutions in writing or electronically, irrespective of whether this is permitted under the articles of association. The law also provides that the annual financial statements can be approved by the supervisory board instead of the members’ assembly. The members of the cooperative board can remain in office even beyond the original term of their nomination until dismissal or election of a successor. The law further allows for an underrun of the prescribed overall number of members for the relevant boards.

§ 4 Transformation Law (*Umwandlungsrecht*)

For mergers and demergers under the German Transformation Act (*Umwandlungsgesetz*) the law provides that transformations may be registered and thereby become effective, if the balance sheet, which the transformation measure is based upon, relates to a date within the last twelve months (instead of currently eight months).

§ 5 Associations (*Vereine*) and foundations (*Stiftungen*)

Regarding associations (*Vereine*) under German civil law and foundations (*Stiftungen*), the law provides that members of the executive board can remain in office even beyond the original term of their nomination until dismissal or election of a successor. Even without an express authorization under the articles of association, the board can allow members to participate and use their rights in a general meeting non-physically, as well as to cast any votes for a general meeting in advance in writing. Finally, the requirements for resolutions outside of a general meeting are loosened (while all members have to be involved, only half of the members need to cast their votes and the relevant majority has to be reached).



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§ 6 Homeowners Associations (Wohnungseigentümergeinschaften)

Regarding German homeowners associations (*Wohnungseigentümergeinschaften*), the law provides that the last appointed administrator can remain in office until dismissal or election of a new administrator, and that the last budget plan (*Wirtschaftsplan*) will also remain valid and in place until a new plan is resolved upon.

§ 7 Transitional provisions / § 8 Ordinance authorization

§§ 1 to 5 only apply to actions and events (i.e. AGMs or other meeting, payments of interim dividends paid, commercial register filings) taking place in 2020. The Ministry of Justice and Consumer Protection may – with consent of the German Federal Council – extend this period until 31 December 2021 if this seems necessary in light of the COVID-19 pandemic.

CIVIL LAW: MORATORIUM ON CONTRACTUAL OBLIGATION AND RENT PAYMENTS

A number of provisions shall be added to the Introductory Code to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*) in a new Article 240:

§ 1. Moratorium

Consumers and micro-enterprises (pursuant to 2003/361/EG, *Kleinstunternehmer*) as debtor of an obligation arising in connection with a long term contract (*Dauerschuldverhältnis*) entered into before 8 March 2020 may refuse fulfilment of the obligation until 30 June 2020, if - due to circumstances that are caused by the COVID-19 pandemic - in the case of a consumer if it is a consumer contract and the fulfilment of the obligation would endanger the debtor's adequate means for living or, those of its dependents. In the case of a micro-enterprise the right to refuse fulfilment is granted if the entrepreneur cannot discharge the obligation or the fulfilment of the obligation would endanger the economic basis of the debtor's business (moratorium). The respective obligation then, however, needs to be fulfilled after 30 June 2020, and does not fall away. In both instances the moratorium only applies to such long-term contracts that are essential to provide for adequate basic needs of the relevant individuals or enterprises,

such as e.g. mandatory insurance coverage, utilities and telecommunication.

This applies irrespective of whether or not the obligation of the debtor is to pay the contractual remuneration (i.e. money) or to render any other contractual performance (e.g. to deliver goods or services).

Debtors bear the burden of proof that discharging the liability is impossible or would endanger their adequate living or the existence of their business. While there should be clarity on whether or not the debtor is actually able to pay (this is an objective test), unclarity remains on what constitutes *endangering* the debtor's business or *adequate* living.

An exception applies where the moratorium/refusal to fulfil the debtor's obligation would be (i) unbearable for the creditor, applying essentially the same type of test as for the debtor's right to refuse fulfilment, or (ii) contrary to applicable rules of international laws for the transport of goods.

If the debtor's refusal right is excluded because it would result in an unbearable burden for the creditor, the debtor may terminate the agreement in order to avoid its obligation to perform. This does apparently not trigger any termination fee or other compensation for the debtor.

This moratorium provision does not apply in connection with rental agreements and loan agreements (for which a special protection scheme applies, see §§ 2 and 3 of the proposed provisions). A microenterprise is defined as an enterprise with less than 10 employees and a turnover and/or balance sheet not exceeding EUR 2 million.

§ 2. Restriction for the termination of rental agreements

The moratorium does not apply to property leases (residential and commercial). Landlords may, however, not terminate lease agreements for residential or commercial property if the tenant fails to pay rent during the period of 1 April through 30 June 2020 where such non-payment is caused by the effects of the COVID-19 pandemic. The tenant will have to provide prima facie evidence for the causal link between the COVID-19 pandemic and the tenant's failure to pay.



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§ 3 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 endangered. Creditors' termination rights on the basis of non-payment or deterioration of credit or a deterioration of the realisable value of any collateral granted for such loan are excluded until 30 June 2020. The creditor shall offer the consumer to discuss a potential agreement and conceivable measures of support. If the creditor and debtor cannot agree on an arrangement for the time period after 30 June the term of the agreement will be extended by 3 months.

The relief for the debtor shall not apply if the postponement of the payment or the exclusion of the termination right are unbearable for the creditor, taking into account all circumstances.

Extension possibility

The Ministry of Justice and Consumer Protection may extend the protective provisions with respect to loan agreements (§ 3) to other persons (in particular small and medium enterprises), if and to the extent that the German Parliament (*Bundestag*) does not object. The German Federal Government may extend the moratorium until 30 September 2020, the ban on termination for rental agreements for unpaid rent in the period from 1 July until 30 September 2020 at the latest, and the extension of the 3- months postponement for debt service for up to 12 months and the extension of the loan term for up to 12 months.

CRIMINAL PROCEDURE: EXTENSION OF TIME BETWEEN TWO TRIAL DATES

Currently, German criminal procedure dictates that a criminal trial, once set in motion, cannot be interrupted for a prolonged period (maximum between three weeks and one month, with some extensions in special circumstances). If the deadline is missed, the trial must start all over, with all the heard evidence becoming null and void.

The new law will extend the maximum time between consecutive court hearings in criminal cases to a total of three months and 10 days. The statute may be revoked after one year.

The prerequisite for the extension under the proposed law is that the next main hearing cannot be held sooner due to the pandemic. This is the case, for example, if the trial involves individuals at heightened risk or if the court's normal business is restricted due to the measures to contain the virus. The latter should be the case for practically every German criminal court already as of today – and therefore allow every case on trial today in Germany to be interrupted for three months and ten days.



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INITIAL OBSERVATIONS

INSOLVENCY LAW

The amendments aim to enable companies that have become insolvent or are facing financial difficulty as a result of the COVID-19 pandemic to continue their business operations and to access financing.

By way of the comprehensive suspension of the statutory filing obligation after the occurrence of balance-sheet insolvency (*Überschuldung*) and cash-flow insolvency (*Zahlungsunfähigkeit*), companies shall be afforded with breathing space in order to be able to access any form of the state-backed funding programmes or to avert insolvency by any other means. The suspension does not apply if insolvency is not caused by the COVID-19 pandemic or if there exist no prospects that cash-flow insolvency can be remedied. The statutory presumption that insolvency is caused by the effects of the COVID-19 pandemic and that there exist prospects of remedy of an existing cash flow insolvency if the debtor was not cash flow insolvent as at 31 December 2019 seeks to compensate for the obvious uncertainties and takes significant burden off the directors in assessing whether or not the filing obligation is suspended.

§ 2 no. 1 shall enable directors to continue to run the company in the ordinary course. As a matter of German law, after the occurrence of balance-sheet insolvency (*Überschuldung*) and cash-flow insolvency (*Zahlungsunfähigkeit*), management is under an obligation to apply a so-called emergency management with the effect that it may only make such payments which are absolutely necessary to avoid an immediate break-down of the business. The new law allows management to make any payments in the ordinary course of business. This shall not only include payments to maintain or resume business operations but also payments required to implement a restructuring.

§ 2 no. 2 and 3 aim to encourage and facilitate to provision of new financing to companies affected by the COVID-19 pandemic.

Pursuant to § 2 no. 2 any repayments until 30 September 2023 of new loans (including trade credit) granted during the suspension period and the granting of security in respect of such new loans shall be exempted from insolvency claw-back in a subsequent insolvency proceedings over the debtor. The law also provides for incentives for shareholders to provide funding to struggling subsidiaries. Contrary to currently applicable German insolvency law, new shareholder loans granted within the suspension period are not subordinated in a subsequent insolvency of the subsidiary applied for until 30 September 2023 and any repayments on such shareholder loans are also exempted from clawback. However, contrary to third party loans, any security granted in favour of shareholder loans is not privileged so that they remain subject to claw-back with a look-back period of ten years from the date of the filing for the opening of insolvency proceedings.

§ 2 no. 3 significantly increases the legal certainty for loans extended to a company in a financial crisis. As a matter of German law, a lender that extends a loan or other form of credit to a distressed company would be exposed to liability risks if such loan or credit is insufficient to achieve a turnaround, only delays an inevitable insolvency and therefore inflicts harm on other creditors. Any security granted in respect of such loan or credit can be regarded contrary to public policy (*sittenwidrig*) and therefore void. The provision affords comfort in respect of any new loans or credit granted during the suspension period.

Any loans granted by Kreditanstalt für Wiederaufbau, its financing partners or other institutions in the context of COVID-19 receive the same protection, and even extends that protection to loans granted (or secured) beyond the suspension period, in an effort to ringfence the state financings granted to avert COVID-19 induced financial difficulties.



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Finally, in addition to the claw-back protection for loans and security under § 2 no. 2, § 2 no. 4 affords protection against insolvency claw-back for other counterparties such as, e.g., suppliers, customers and lessors. Without such protection, based on the currently applicable claw-back provisions counterparties would run a significant risks that payments, deliveries, etc. are clawed back in a subsequent insolvency and they would therefore most likely discontinue trading or terminate the contractual relationship. The first sentence of number 4 contains a privilege for congruent coverage (*kongruente Deckung*), i.e. where the counterparty was specifically entitled to performance or security in the form and at the time. Sentence 2 contains a privilege for selected forms of incongruent coverage (*inkongruente Deckung*), i.e. where performance or the granting of security deviates from what is owed contractually or otherwise. The claw-back exemptions do not apply if the counterparty had knowledge that the restructuring or financing efforts of the debtor were not suitable to remedy an existing cash flow insolvency (*Zahlungsunfähigkeit*) which may, depending on the circumstances, give rise to some uncertainty.

The provisions shall come into force with retroactive effect as of 1 March 2020.

MEASURES TO SIMPLIFY DECISIONS IN CORPORATE LAW

The new law offers a viable path for corporations to convene their respective meetings and pass all relevant resolutions in the face of curfews and bans on assembly.

While the current provisions of the German Stock Companies Act already allowed the broadcasting of AGMs and electronic shareholder participation (if this was provided for in the articles of association), companies hardly made use of this possibility due to the technical difficulties and related uncertainties – especially regarding shareholder’s action for annulment. The partial exclusion of actions for annulment will most likely provide some comfort in this regard.

The introduction of an entirely virtual AGM is a novelty that has already been discussed in previous years but ultimately rejected by the legislator as the shareholders right to be physically present during the AGM seems too important to be abolished.

Given the current circumstances this abolition is reasonable, however, it remains to be seen if and how fast companies are able to establish the electronic prerequisites (especially the rights to ask questions electronically) in order to comply with new provisions. In addition, the voting guidelines of some proxy advisers have been reluctant to support fully virtual AGMs in the past – however, given the current situation it is fair to assume that these guidelines will be amended accordingly in the weeks to come.

Regarding the right of shareholders to ask questions during an AGM, experience with digital media may suggest that both the absolute number of questions and the number of unjustified or inadmissible questions may increase “from a safe distance”. In this respect, the clear statement of the legislator in the legislative reasoning, whereby the management does not need to answer all questions but can summarize multiple replies and select meaningful questions in the interest of all shareholders, deserves support. The right to implement a “cut-off date” for questions two days in advance of an AGM further serves to structure and channel the anticipated increase in questions.

Unfortunately, the option to hold the AGM until 31 December 2020 does not apply to companies in the legal form of an SE due to mandatory law contained in the SE Regulation requiring the AGM to be held by no later than 30 June 2020. However, if it is not possible to hold a (virtual) AGM by that date due to Corona, boards might still be able to argue force majeure relieving board members from potential liability (but this is still untested in courts).

Note that the possibility to pay advance dividends is limited to the payment of 50 per cent of the company’s annual surplus and may not exceed 50 per cent of the balance sheet profit of the previous fiscal year 2018.

Prior to publication of the draft law, the German organization “Deutsches Aktieninstitut” (DAI) had also issued a number of recommendations in relation to German stock corporation law, not all of which have been adopted by the German lawmaker (e.g. more far-reaching privileges from executive liability and voidability/invalidity of shareholders’ resolutions; option to pay (full) dividends on the basis of executive/supervisory board resolutions; option to nominate the auditor solely on the basis of a supervisory board resolution; etc.).



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MORATORIUM AND TEMPORARY RELIEF ON CONTRACTUAL OBLIGATIONS AND RENT PAYMENTS

The proposed law will interfere with contractual relationships in an unprecedented manner in times of peace. The law clearly aims – and is reasoned to aim – at the protection of tenants (whether they are consumers or not), debtors under long term contracts (if they are consumers or micro-enterprises), and consumers as borrowers. While the postponement of payment obligations will bring immediate relief to obligors it will at the same time cause an immediate impact on creditors, in particular banking institutions, and private and commercial landlords.

When referencing long term contracts (*Dauerschuldverhältnisse*) the proposal expressly aims at the essential support for the individual consumer or micro-enterprise with adequate basics such as mandatory insurance cover, electricity supply and other utilities (to the extent not sourced by the municipalities) and telecommunication. With respect to the easements on loan agreement the legislator expresses that the payment holiday only applies to the extent that a debtor actually lacks the sufficient funds and that a debtor may and must have to make partial payments. Still, if the loss in income suffered because of the crisis cannot be recovered, the debtor will face its aggregated debt (plus default interest in the case of unpaid rent) after the period of relief potentially without the funds required for payment.

The proposal is embedded into the Introductory Code to the German Civil Code and should therefore extend to German substantive civil law only, but not to contractual relationships governed by foreign laws.

Within the scope of a moratorium invoked by the debtor, the deferral of the debtor's obligation might at the same time block a right of the creditor to set-off own obligations against the deferred obligation. The same may apply for the ordinary right of retention (sec. 273, 320 para. 1 German Civil Code), that would otherwise allow the creditor to hold back its own (counter-)consideration until the other party's consideration is likewise fulfilled. This should be different for the special right of retention of the creditor (pursuant to sec. 321 para. 1 German Civil Code) which applies if the fulfilment of the debtor's obligation seems to be endangered. As the draft currently stands, the debtor, benefitting from the

deferral appears not to be required to pay default interest on the amounts due, as the respective obligations of the debtor are not payable. This effect will not occur with respect to rent payment obligations, as the rent payment obligation will not be subject to a moratorium, but a payment default will – under the specific circumstances – not trigger a termination right of the landlord. Consequently and opposite to the moratorium, the easements with respect to rental agreements are not designed to ease the pressure on liquidity, but to avoid terminations and the negative consequences for tenants associated therewith.

The law is necessarily addressing the debtor-creditor relationship in a brief and general manner. When relying on the law during the times of the crisis and when interpreting it in the aftermath, this may prove to cause uncertainty in many situations, e.g. if the creditor may reasonably claim that the delay of payment is (or was) unbearable for the creditor, that payment should have been made in time, or that a notice of termination given was valid and effective at the time. In addition, compliance with the freedoms guaranteed by the German Constitution will be discussed and eventually tested. However, it is generally acknowledged that the German Constitution permits within certain boundaries, the interference with the individual's property and economic interests.

The most recent draft of the law has restricted the vast rights for the competent ministries and the German government to extend the substantive and timely application of the easements. This was presumably driven by concerns on the basis of the constitutional restriction on the allocation of legislative powers to the executive branch raised during the legislative process. But the proposal continues to avail to the German Federal Government the possibility to extend the time period in which the described easement apply without a genuine decision of the legislative branch.

The law will work as a mitigation of the COVID-19 economic crisis only as a part of a larger scheme that will have to protect and support institutional lenders, industries that supply means of basic living on the basis of long-term contracts and – presumably to a lesser extent – housing companies, or even private landlords that are directly depending on timely payment by its debtors.



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CRIMINAL PROCEDURE

Long periods of time between hearings are generally of concern to individual and corporate defendants. However, the past days saw several large white-collar proceedings, which were set to go on for weeks, massively accelerated and rushed to judgement in an effort to clear out the often crammed courtrooms.

Against this alternative, the proposed change to the law appears to be the lesser of two evils. It would be preferable, however, to apply the new rule only to trials that must be continued (*e.g.* cases involving pre-trial detention) and to suspend all other trials and restart them after the end of the pandemic.

NEXT STEPS

The ministries push the initiative to become law within a this week, similar to the swift response taken during the financial crisis. To accelerate the process, the legislation is run through an extraordinary process, whereby the proposed law has been presented by the ministries to the parliamentary groups as a drafting basis on Friday, 20 March 2020 night for their scrutiny and feed-back over the week-end, the federal cabinet resolved on Monday, 23 March 2020, the parliamentary groups on Tuesday, with a planned accelerated adoption of the proposal in the German parliament (*Bundestag*) on Wednesday. There are plans to lower the requirement for a quorum (*i.e.* physical presence in parliament) to 25 per cent to cater for many parliamentary members being quarantined and restricted from travelling and observing enough space for social distancing in parliament. The Federal Council (*Bundesrat*) is to adopt the law on Friday, so that the German Federal President can execute the law immediately and it could come into force as quickly as possible thereafter.

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