

Guide

- Law to mitigate the consequences of the Covid 19 pandemic - What is to be considered from the entrepreneur's point of view?

Status: March 26, 2020

1. Insolvency law

1.1 Temporary suspension of the duty of management to file for insolvency (debtor application)

- The suspension concerns a company's own application for insolvency or over-indebtedness
- The suspension is limited to the period from 1 March (retroactive) to September 30, 2020 (to be extended to max. March 31, 2021) (suspension period)
- If the company was still solvent on December 31, 2019, it is assumed that insolvency was triggered due to the effects of the COVID 19 pandemic and that there are prospects of overcoming insolvency (reason for suspension)
- Otherwise, the party claiming the existence of an obligation to file an insolvency application must demonstrate and, where appropriate, prove that there are no grounds for suspension

1.2 Consequences of the suspension

In order to protect management from further liability risks, to motivate creditors to maintain the business relationship and to provide incentives for granting credit, accompanying regulations provide for a number of privileges limiting clawback and personal liability:

- Payments which are made during the suspension period in the ordinary course of business are deemed to be compatible with the diligence of a prudent and conscientious manager and are therefore not subject to the payment restrictions of sec. 64 German Limited Liability Companies Act and the parallel provisions for other forms of corporations. These include in particular those payments which serve to maintain or resume business operations or to implement a restructuring concept.
- The repayment of new loans granted during the suspension period until September 30, 2023 and the provision of collateral for such loans is not considered to be unfair to creditors (and therefore not to be considered as antecedent for this reason). The same shall apply to the repayment of new shareholder loans and payments on claims arising from transactions which are economically equivalent to such loans, e.g. from the staying of other shareholder claims. The provisions on the subordination of new shareholder loans under insolvency law are also not applicable to insolvency proceedings of the debtor which are applied for by September 30, 2023. However, these privileges do not apply to the granting of collateral for shareholder loans from the assets of the company.
- During the period of suspension, the granting of credit and collateral shall not be regarded as an action deepening insolvency.
- Furthermore, payments made to other contractual partners, e.g. lessors, landlords or suppliers during the suspension period or collateral extended, are not subject to clawback, provided that these payments were congruent. On the other



hand, a clawback is not excluded if the other party was not in good faith and well aware that the debtor's restructuring and financing efforts were not suitable to overcome an insolvency that had occurred.

- The easing of clawback and liability rules apply not only to companies qualifying for suspension of filing, but also to all other business, such as sole traders and limited partnerships with an individual as general partner, and also to enterprises facing serious difficulties as a result of the COVID-19 pandemic but are not yet insolvent.
- The time restrictions - granting of credit during the suspension period and repayment by September 30, 2023 - do not apply to financing under state aid programmes at federal or state level, nor do they apply to the share to be provided by third parties in this connection. As a result, loans granted under the government assistance programmes are protected even after the suspension period has expired, as are repayments without time limit.

1.3 Can creditors still file for insolvency?

- For a limited period of 3 months, a third-party application by a creditor additionally requires proof that the reason for commencing insolvency proceedings already existed on March 1, 2020.
- However, this does not apply to rights regulated apart from the Insolvency Act, e.g. the Federal Financial Supervisory Authority (BAFIN) as the competent supervisory authority.

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2. Moratorium on liabilities from continuing obligations

2.1. Scope and deadline

- This concerns consumer's right to refuse to make payments in order to satisfy a claim relating to a consumer contract which constitutes a substantial continuing obligation, i.e. which is essential to maintain basic living standards (e.g. electricity, gas, etc.).
- Contract concluded before March 8, 2020
- Does not apply to rental, lease and loan agreements, as well as employment contracts
- Beneficiaries: Consumers and micro enterprises (less than 10 employees and annual turnover up to EUR 2 million)

2.2 Right to refuse performance

- Prerequisite: Due to circumstances arising from the COVID 19 pandemic, payment is not possible without jeopardising the adequate livelihood of a beneficiary or his dependants.
- The right to refuse performance is limited in time until June 30, 2020 (extendable until max. September 30, 2020).
- On the other hand, the consequences of exercising the right to refuse performance must not be unreasonable for the creditor, which is the case if the failure to perform would jeopardise the economic basis of his business.



- Suppliers of services affected by the right to refuse performance should make an assessment of the extent to which they can accept this and at what point the right to refuse performance becomes unacceptable for the supplier. Appropriate guidelines should be issued to staff involved.

Contact person for questions regarding contractual regulations (excluding labour and real estate law): Dr. Hermann Knott, hermann.knott@AndersenTaxLegal.de

3. Protection of tenants of land or premises

- Applies to private and commercial leases of land and buildings
 - Tenant fails to pay rent due, namely for the period April 1 to June 30, 2020
 - The non-payment of rent must be a result of the effects of the Covid 19 pandemic and must be substantiated
 - The landlord can not terminate the tenancy because of the tenants failure to pay. Other termination rights remain unaffected.
- As a regulation for the protection of tenants in the private sector, the rule is understandable. However, the landlord can pursue the claim for payment of the rent without restriction. The purpose of the regulation is to protect both the private and the commercial tenant, probably combined with the assumption that the landlord is protected by the comprehensive auxiliary measures generally available to the economy. Not in all commercial rental agreements is the tenant the party in need of stronger protection.

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4. Maintaining the ability of companies of various legal forms to act in view of the requirements to maintain social distance

4.1 Stock Corporations, KGaA, SE, Mutual Insurance Companies

In each case with the approval of the Supervisory Board and also without the authorisation by the Articles of Association or rules of procedure, the Management Board is authorised to decide on the following matters:

- Virtual Annual General Meeting with abbreviated invitation period (21 days)
- Payment of an advance on the net profit for the year in accordance with section 59 (2) German Stock Corporation Act
- The Annual General Meeting can take place within a year, i.e. not only within the first eight months
- Challenging resolutions of the Annual General Meeting is restricted

4.2 Limited Liability Companies (GmbH)

- Resolutions of the shareholders may also be passed in writing or by written submission of votes without the consent of all shareholders to this form of resolution.

4.3 Cooperatives

- Resolutions of the members may be passed in writing or electronically even if this is not expressly provided for in the statutes.



- The General Meeting can be convened on the Internet on the Cooperative's website or by direct notification in text form.
- The annual financial statements may also be adopted by the Supervisory Board.
- With the approval of the Supervisory Board, the Management Board may make an advance payment on a balance due to a retired member or an expected dividend payment to a member.
- A member of the Management Board or the Supervisory Board remains in office after the expiry of his or her term of office until a successor is appointed.
- Meetings of the Management Board or the Supervisory Board or joint meetings of both bodies may also be held without a legal basis in the articles of association or the rules of procedure by way of circulation in writing or by telephone or video conference.

4.4 Associations and trusts

- A member of the Management Board remains in office even after expiry of his or her term of office until he or she is removed or a successor is appointed.
- The executive can also permit for members of the association to participate in the general meeting without being present and to exercise membership rights via electronic communication without authorisation in the statutes.
- Resolutions may be passed without a meeting of the members if all members are involved, half of the members have cast their votes in writing by a fixed date and the resolution was passed with the required majority.

4.5 German Transformation Act

- It is sufficient for the registration of a conversion of a company under the German Transformation Act if the balance sheet has been prepared at maximum twelve months (previously eight months) prior to the filing date.

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5. Deferrals or contract adjustments in respect of consumer loans

5.1. Requirements

- Consumer loan agreements are affected. This also includes instalment payments for purchases.
- The loan agreement was concluded before March 15, 2020.
- Consumers are suffering loss of income due to the spread of the COVID-19 pandemic.
- As a result of the loss in income the consumer cannot reasonably be expected to make the payment owed. This applies in particular if the consumer's own livelihood or that of his dependants is at risk.

5.2. Legal consequences

- Any claims of the Lender for repayment, interest or principal payments due between 1 April and June 30, 2020 (the "Benefits") shall be deferred for a period of three months from the due date.



- The parties may make deviating agreements, in particular by agreeing partial payments or adjustments of interest or principal payments.
- The loan may not be terminated for reasons relating to the non-payment or deferral.
- If the parties cannot agree on a mutually acceptable arrangement for the period after June 30, 2020, the term of the contract shall be extended by three months. The respective due date of the payments shall be postponed by this period.
- Deferment and exclusion of termination shall not apply if this is not reasonable for the lender taking into account all circumstances.
- The rule can be extended to micro-enterprises (see above, Section 2.1) by means of a legal ordinance. In addition, the Federal Government may, by statutory order, extend the period for deferral until September 30, 2020 and the duration of the non-alterable period for extending the loan after expiry of the deferral period up to twelve months.

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