COVID-19: THE GOVERNMENT'S RESPONSE (GERMANY)

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Legal Briefings

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The German legislature has enacted a package of measures to enable businesses to face the impact of COVID-19.

FINANCE

The German government will protect businesses with new measures to provide liquidity, the volume of which is unlimited. Due to the high degree of uncertainty in the current situation, the government has very deliberately decided to not set any limits on the volume of these measures. This is a very significant decision which is supported by the entire federal government.

KfW liquidity assistance programmes

The existing liquidity assistance programmes have been expanded to make it easier for companies to access cheap funding, e.g. via various programmes provided by the German state-owned development bank KfW. Also, KfW has established a new special programme for business who have temporarily come into financial difficulties due to the current crisis. More detailed information on the different measures available with KfW can be accessed here.

These measures are subject to existing state aid rules and were approved by the European Commission. For more information on the EU Commission's Temporary State Aid Framework, click here.

German Start-Up Liquidity Programme 2020

The German Federal Government has also announced a special liquidity assistance programme tailored to the needs of the German Start-Up community. For details, please click here.

Economic Stabilisation Fund Act

In addition to the KfW liquidity assistance programmes the Federal Ministry of Finance has prepared a legislative initiative that has been adopted by the German parliament and enacted on 28 March 2020, the Economic Stabilisation Fund Act (Wirtschaftsstabilisierungsfondsgesetz, “WStFG”).

The German government is making use of measures that were successfully applied in the financial crisis in Germany. Those measures are now being made available to companies meeting at least two of the following criteria (for at least two consecutive financial years prior to 1 January 2020):

- total balance sheet of exceeding 43 million;
- sales revenue exceeding 50 million; and
- more than 249 employees on a yearly average.

Provided that the companies can demonstrate to meet further requirements, they may apply for the following support measures:

- debt instruments guaranteed by the newly established economic stabilisation fund (the “Economic Stabilsiation Fund”) for up to 60 months; and
- equity investments by the Economic Stabilisation Fund, inter alia, by share capital, subordinated debt and equivalent hybrid equity instruments.
- Members of our German team have extensive experience advising the German government in stabilisation measures in the financial crisis. We will provide a more detailed overview in due course.

FOR MORE INFORMATION REGARDING FINANCIAL SUPPORT FOR BUSINESS ON STATE LEVEL PLEASE CLICK HERE.

REAL ESTATE

Protection of tenants against termination of contract

On 27 March 2020 the German legislature adopted unanimously a law aimed at mitigating the consequences of the COVID-19 pandemic in civil, insolvency and criminal proceedings (*Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht*) ("**COVID-19 Relief Act**"). Some provisions of this measure also include amendments to German lease law, which came into effect on 01 April 2020

According to the COVID-19 Relief Act, landlords may not terminate lease agreements solely on the grounds that a tenant failed to pay the rent during the period from 1 April 2020 to 30 June 2020 (the period may be prolonged until 30 September 2020 by way of an ordinance (*Rechtsverordnung*)), provided that such rent arrears are based on the effects of the COVID-19 pandemic, whereas the burden of proof is on the tenant. This suspense of the termination right shall apply to both residential and commercial leases and shall apply until 30 June 2022, i.e. the landlord will only be entitled to terminate the lease due to rent arrears of the tenant between 1 April 2020 to 30 June 2020 as of 1 July 2022. The COVID-19 Act does not stipulate a remission of the obligation to pay rent.

Economically the suspense of the landlord´s right to terminate the lease does not constitute an interest-free loan from landlord to tenant. As the rent remains due and payable, but only the right of the landlord to terminate the lease due to non-payment as a result of the pandemic is suspended, interest is accruing on the outstanding rent payments at a rate of 5 or 9 % p.a. of the interest base rate, i.e. in general approx. 4% p.a. in the event of residential leases and approx. 8 % p.a. in the event of commercial leases.

The COVID-19 Relief Act is silent on whether the landlord can call on the rent security (if any) provided by the tenant, which in German commercial lease is oftentimes three months net rent, i.e. would exactly cover the initial time period (1 April to 30 June) stipulated by the provisions of COVID-19 Relief Act. Calling on the rent security could indeed be an option for the landlord, whereas the feasibility depends on the particularities of the individual case.

Furthermore, it may be worth scrutinizing whether any insurances covering business interruption/loss of rent are in place which may cover a loss of rent incurred by the landlord. There is no general answer as to whether or not this is the case. Rather, the wording of each insurance policy will need to be reviewed individually.

Finally, the COVID-19 Relief Act does facilitate amicable agreements between landlord and tenant e.g. regarding a moratorium of the obligation of the tenant to pay rent by introducing limitations regarding the risk of the landlord to be subject to claw back rights (*Insolvenzanfechtungsrechte*) of an insolvency administrator in the event of the occurrence of an insolvency of the tenant.

CORPORATE

Publicly listed companies: virtual shareholder's meetings

In order to ensure that shareholders’ meetings of publicly listed companies can take place despite social distancing in response to the COVID-19 pandemic, the COVID-19 Relief Act also simplifies the existing legal framework for the convention and holding of annual shareholders' meetings, mainly in order to allow virtual annual shareholders’ meetings. In more detail, the COVID-19 Relief Act contains the following points:

- Management boards may opt to hold shareholders' meetings as (purely) virtual meetings if certain technical requirements are met to safeguard shareholders' voting and information rights.
- In order to hold such a virtual meeting, management boards may opt to use certain means of electronic communication even if the articles of association do not provide a management board with the authority to do so. For instance, a management board may require the company's supervisory board to attend the virtual meeting through audio and video transmission.
- The minimum invitation period to convene shareholders' meetings is shortened from 36 days to 21 days. Accordingly, the record date and the timing for shareholders to exercise certain rights (e.g. request for the extension of the agenda) have been changed.
- Annual shareholders' meeting may be held throughout 2020.
- Management boards may decide in favor of an advance payment of distributable profit even if a company's articles of association do not authorize the management to do so.
- Shareholders will not be able to contest shareholders' resolutions because a company has (allegedly) not complied with requirements for the usage of electronic communication, unless a company willfully violated applicable rules.

For any of the above measures management boards need the approval by the respective supervisory board.

German Transformation Act: Extension of Filing Deadlines up to Twelve Months

The corporate law related measures also include changes to the German Transformation Act (Umwandlungsgesetz). In case of a merger (Verschmelzung) the applicable deadlines relating to the reference date (Stichtag) of the final financial statements (Schlussbilanz) of the respective transferring entity (übertragender Rechtsträger) have been extended. The reference date for the final financial statements may now lie up to twelve months before the filing of the merger with the competent commercial register. The reason for the extension of the relevant deadline from eight months to twelve months is to avoid that transformation measures fail because current restrictions for holding conferences or meetings in person in response to the COVID-19 pandemic prevent to hold shareholder’s meetings regarding the approval of the merger agreement of the entities involved. This corresponds to the reasoning for the implementation of virtual shareholder’s meetings described above. The extension of the deadlines relating to the reference date of the final financial statements also apply for all filings of split off measures (Spaltungen) in the course of 2020. The German Federal Ministry of Justice and Consumer Protection has been empowered to extend the aforementioned measures through to 2021.

In each individual case it should be assessed carefully whether the extension of the relevant deadlines also applies for tax purposes. In this respect, the legal developments should be monitored and it remains to be seen whether the German legislators or the German Federal Ministry of Finance will clarify the implications of the deadline extension for tax purposes.

Ad-hoc notification requirements and the Corona pandemic – BaFin provides guidance in FAQs

The German Financial Supervisory Authority (*Bundesanstalt für Dienstleistungsaufsicht – BaFin*) has provided answers to the most frequently asked questions about potential Ad-hoc notification requirements pursuant to Art. 17 of the Market Abuse Regulation (MAR) that relate to circumstances potentially caused by the Corona pandemic. BaFin's FAQs includes the following guidance:

- To postpone a shareholders' resolution on the distribution of dividends due to the postponement of an annual shareholders' meeting does generally not trigger an Ad-hoc notification. However, if the amount of dividend that is planned to be distributed is reduced compared to what an issuer has originally announced this may be regarded inside information.

- If an annual shareholders' meeting is postponed time-critical shareholders' resolutions – e.g. a resolution on an urgently needed capital measure – will be delayed. Further, if the delay of such a shareholders' resolution has a severe impact on an issuer's assets, liabilities, financial position or performance, the issuer may be required to publish an Ad-hoc notification.

- In relation to changes of forecasts due to effects of the Corona pandemic the general rules remain valid: Forecast changes generally need to be published as inside information without undue delay if the issuer assumes, with a sufficient degree of probability, that the actual results will significantly fall short of the existing forecasts (and not at the moment the exact impact of the Corona pandemic on the financial position and financial performance can be determined in full). This applies irrespective of whether the issuer can provide the market with a new detailed forecast.

- When determining whether financial figures (and their considerable deviation from their relevant benchmarks) form information that has the potential to have a significant effect on share prices BaFin takes the view that stricter criteria need to be applied with a view to current sharp price fluctuations on stock exchanges due to the Corona pandemic.

- BaFin determines market expectations based on the mean value (arithmetical mean) of current analyst estimates ("consensus estimates") at the time the inside information emerges. As a rule, adjustments for any outliers are not permissible. However, given the current impact of the coronavirus crisis, it may be permissible to adjust an existing consensus estimate, e.g. on the basis of current press reports. An issuer may choose to do so if the existing consensus estimate refers to estimates that are clearly no longer up-to-date and that do not take into account the current situation.

INSOLVENCY LAW

The COVID-19 Relief Act also contains provisions which order changes for the obligation to apply for insolvency. For our legal briefing on suspension of the insolvency application obligation please click here.

STATE AID

The EU Commission published on 19 March 2020 a Temporary Framework to support the economy in the context of the COVID-19-outbreak. This Framework gives guidance to Member States on state-aid-measures, which are considered admissible with the EU State Aid regime. The EU Commission emphasizes that the general rules remain applicable. It furthermore does not provide a block exemption from the requirement for Member States to notify and obtain Commission approval. It does, however, set out certain types of liquidity support measures that the Commission will consider as compatible with the internal market and would be able to approve very rapidly upon notification.

For more information on the EU Comission's Temporary Framework please click here.

On 2 April 2020 the Commission has further announced to mobilise all of its resources to protect lives and livelihoods (please click here).

TAX

Under guidelines issued by the German Federal Ministry of Finance and the German Federal States (*Länder*), for taxpayers that have been directly and not only immaterially (*direkt und nicht unerheblich*) affected by COVID-19 it will become easier to defer certain tax payments, as well as reduce prepayments, for 2020; and enforcement measures and late payment penalties will be waived until 31 December 2020. This will apply to federal taxes such as corporate income tax, value added tax and insurance tax, to trade tax as well as to taxes that are administered by the customs administration such as energy and aviation tax. It does not directly apply to payroll taxes and withholding taxes as well as local taxes such as property taxes, however. The German government estimates that overall businesses will be able to defer billions of euros in tax payments.

The plans in more detail:

- **Make it easier to be granted tax deferrals**. Tax offices can generally defer taxes for 2020 if their collection would lead to significant hardship of the taxpayer. The German Federal Ministry of Finance has instructed the tax offices to lower threshold for this condition to be met by taxpayers. In particular taxpayer will only have to demonstrate that they are directly and not immaterially affected by COVID-19 but do not have to provide (exact) amounts of their potential losses.

- **Make it easier to reduce tax prepayments**. Tax prepayments for 2020 can be reduced in a swift and straightforward manner as soon as it becomes apparent that a taxpayer's income in the current year is expected to be lower than in the previous year.

- **Waive enforcement measures** and late-payment penalties until 31 December 2020 if the taxpayer is directly and not immaterially (*direkt und nicht unerheblich*) affected by COVID-19.

In order to qualify for all of these three measure, taxpayers need to be directly and not only immaterially (*direkt und nicht unerheblich*) affected by COVID-19.

Many local and municipal administrations offer similar relief measures in respect of local and municipal taxes, for instance property tax.

A number of state tax administrations have meanwhile published answers to frequently asked question in relation to these measures, for the FAQs of the Hessian Ministry of Finance please click here.

On 3 April 2020, the Federal Ministry of Finance has publicly announced additional measures aimed at providing tax relief in the following specific situations:

- **Tax exemption of bonus payments and benefits in kind**. Bonus payments and benefits in kind up to an amount of EUR 1,500 paid to employees between 1 March 2020 and 31 December 2020 specifically for extra efforts during the COVID-19 pandemic will be exempt from both wage withholding taxes and social security contributions.

- **Special rules for cross-border workers**. Taxation rights in respect of the income of employees who usually cross an international border in order to commute to their workplace are usually allocated on the basis of days spent in the relevant countries. If cross-border workers now work from home during the COVID-19 pandemic, the taxation rights in respect of ther income may switch to a different country. In order to avoid this, Germany is currently working on special bilateral arrangements under which cross-worker would be treated as if they had travelled to their workplace if the work from home during the COVID-19 pandemic.

- **VAT exemption for certain donations in kind to hospitals and care facilities**. In principle, donations in kind are subject to VAT. In order to encourage donations of respiratory protective masks and disinfectants to, for instance, hospitals, medical practices, retirement and nursing homes as well as public institutions such as the police and fire departments, the VAT liability on such donations shall be temporarily suspended until 31 December 2020.

For more information on Tax Relieve measures please click here.

EMPLOYMENT

The employment law related measures to ease the burden on companies in the crisis are as of now limited to a relaxation of the regulations on short-time work compensation. However, during the last financial crisis, the instrument of short-time work had already proven to be a suitable means of avoiding high unemployment rates in times of drastic reduction in the workload. The previous conditions for the granting of short-time work compensation will be relaxed as follows:

- The threshold of employees affected by the loss of work has been lowered to 10%.
- No negative time account balances must be built up

- It is now clear that temporary workers are also entitled to short-time pay
- The social security contributions are now fully covered by the Federal Labour Office

For more information regarding data protection implications in the face of COVID-19 please click here.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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LEGAL NOTICE

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