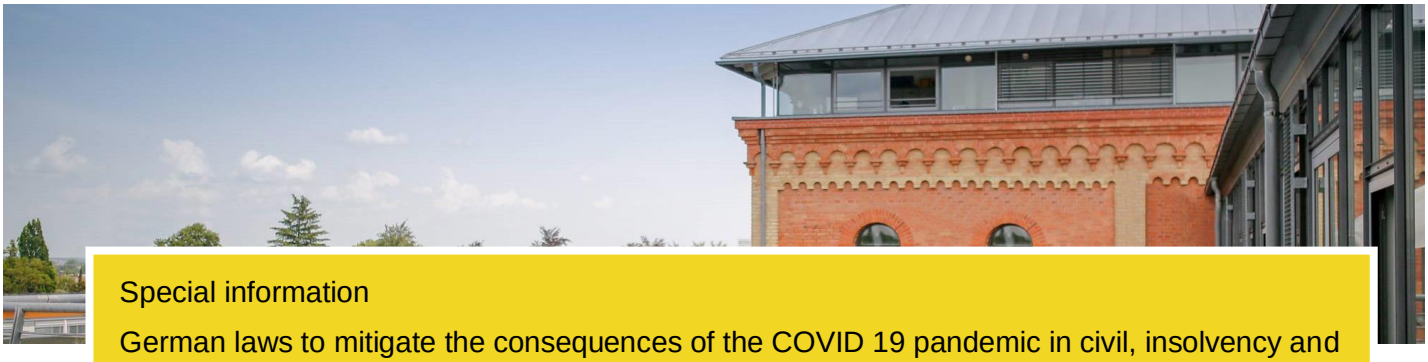

Special information

# German laws to mitigate the consequences of the COVID 19 pandemic in civil, insolvency and criminal proceedings (as of 30 March 2020)

The spread of the novel SARS-CoV-2 virus (Covid-19 pandemic) has led to very considerable restrictions in all areas of private and business life in Germany, which seemed unthinkable just a few weeks ago.

Therefore, on 23 March 2020, the German government published a draft law to help formulate a bill with the aim of mitigating the negative effects of the corona crisis on companies and private individuals, and plans various economic support measures for entrepreneurs, sole traders, other small, medium-sized and large companies and credit institutions. Therefor, the draft law provides for temporary adjustments to existing legal provisions in civil, insolvency and criminal procedure law. The Bundestag already unanimously adopted the draft law on 25 March 2020. Thereupon the Bundesrat approved the draft law on 27 March 2020. On the same day the law was executed and published in the Federal Law Gazette. As a result, the "Law on mitigation of the consequences of the COVID 19 pandemic in civil, insolvency and criminal proceedings" has been in force since Saturday, 28 March 2020. In the following we would like to summarize the contents of the law for information purposes.

## 1. Insolvency law

- **Suspension of the obligation to file for insolvency and payment prohibitions**
  Provided that insolvency maturity is based on the effects of the COVID 19 pandemic, the obligation to file for insolvency and possible payment prohibitions are expected to be suspended until 30 September 2020 (hereinafter "**suspension period**"), unless there is no prospect of the insolvency being resolved. If the debtor was not already insolvent on 31 December 2019, the legal presumption that the insolvency maturity is based on the effects of the COVID 19 pandemic and that there is no prospect of the insolvency being removed now applies in his favor.

- **Restriction of insolvency applications by creditors of a company**
  Insolvency applications by creditors of a company filed within a 3-month period after the promulgation of the law to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal proceedings should only lead to the actual opening of insolvency proceedings if the reason for the opening of insolvency proceedings (inability to pay or over-indebtedness) already existed on 1 March 2020. Otherwise, a creditor's application will be rejected.

- **Loan repayments not disadvantageous to creditors**

  The repayment by 30 September 2023 of a new loan granted during the suspension period and the provision of collateral to secure such loans during the suspension period is not considered to be detrimental to creditors. This also applies to the repayment of shareholder loans and payments on claims arising from legal acts which correspond economically to such loans (but not to their collateralization.) Such repayments cannot therefore be reclaimed under the provisions of the so-called insolvency challenge, should insolvency proceedings be opened despite restructuring efforts.

- **Suspension of the subordination of shareholder loans under insolvency law**

  The otherwise applicable subordination under insolvency law of shareholder loans and of claims from economically comparable legal acts is also suspended if these are loans granted during the suspension period.

- **No immorality of loans granted during the crisis**

  The draft law also provides that new loans and their collateral are not immoral during the suspension period. This takes account of the established case law of the German Federal Court of Justice, according to which a ("restructuring") loan granted during a crisis which merely prolongs a delay in filing for insolvency is generally immoral and thus void.

- **No liability of management bodies for payments despite insolvency**

  Management bodies should not be personally liable to pay compensation for payments from the company's assets despite insolvency (insolvency or over-indebtedness) if these payments are currently made in the ordinary course of business. This applies in particular to payments for the maintenance or resumption of business operations or for the implementation of a restructuring concept.

- **No contestability of legal acts**

  Legal acts performed during the suspension period and performed in accordance with the contract cannot be contested in subsequent insolvency proceedings under the planned new arrangement. Without this regulation, these legal acts would later be contestable by the insolvency administrator if the beneficiary knew of the insolvency of the debtor or in any case knew of circumstances which necessarily indicated the insolvency of the debtor. For the exchange of services in accordance with the contract, the risk of contesting is thus in principle considerably limited during the suspension period and no longer represents an obstacle to further deliveries in accordance with the contract.

## 2. Tenancies/Leases

- **No termination in case of arrears of payment**

  The landlord/landlady's right to terminate the contract in the event of default of payment is limited both in the case of land and residential and commercial leases. According to the current draft law, the landlord/lessor cannot effectively give notice of termination if the tenant/leaseholder fails to pay the rent/lease in the period from 1 April 2020 to 30 June 2020

despite being in arrears due to payment difficulties and the failure to pay is due to the effects of the COVID 19 pandemic. This regulation is valid until 30 June 2022.

This means that tenants/leaseholders have more than two years from 30 June 2020 to make good any rent or lease arrears that entitle them to terminate the lease. It follows that, due to payment arrears that occurred between 1 April 2020 and 30 June 2020 as a result of the effects of the COVID 19 pandemic and have not been settled by 30 June 2022, notice of termination can only be validly given after this date (1 July 2022).

According to the draft law, it is the responsibility of the tenant/leaseholder to establish a credible link between the pandemic and non-performance in the event of a dispute. According to the draft law, the lessee/tenant must present facts that show an overriding probability that his non-performance is due to the COVID 19 pandemic. According to the explanatory memorandum to the current draft law, suitable means of substantiation are, in particular, proof of submission of the application or the certificate on the granting of state benefits, certificates from the employer or other proof of income or loss of earnings.

Tenants/leaseholders of commercial property are likely to be able to provide credible evidence regularly by pointing out that the operation of their company has been banned or considerably restricted by legal ordinance or official order in the context of combating the SARS-CoV-2 virus. Examples of this include restaurants and hotels, the operation of which is prohibited in many German states, at least for tourism purposes.

It should be clarified that the temporary limitation of the right of termination does not extend to other grounds for termination. The landlord/landlady is at liberty to terminate the tenancy/leasing relationship during the period of validity of the Act on the grounds of rent arrears which have accrued in an earlier period or which will result from a later period. The tenant may also give notice of termination for other reasons, such as breaches of contract of another kind, for example unauthorized transfer of the leased property to third parties (§ 543 Paragraph 2 S. 1 No. 2 BGB (German Civil Code)) or for personal use (§ 573 Paragraph 2 No. 3 BGB).

Irrespective of this, in the case of tenancy/leasing relationships concluded for an indefinite period of time for land or for rooms which are not residential premises, ordinary termination without reason for termination is still possible. Even in the case of such tenancies with a fixed term of more than one year, both parties may have the right to give notice of termination without cause, irrespective of the COVID 19 pandemic, in the event of a breach of the special statutory written form requirement for long-term tenancies.

### Payment obligation remains in force

However, the general civil law provisions of the Civil Code in relation to the due date of the rent/lease and default shall remain unaffected and shall continue to apply to the claims for rent and lease during the period of validity of the law. As a result, tenants and lessees must continue to make their payments on time and may be in default if payment is not made on time.

- **Observe written form requirements**

  In the case of any other waiver, deferment or reduction agreements, however, it is imperative to ensure that the strict requirements of the written form requirement are taken into account in the case of contract amendments.

### 3. Consumer loan agreements

- **Deferral of repayment, interest or redemption payments over three months**

  Claims for repayment, interest or principal payments arising from consumer loan agreements concluded before 15 March 2020 and due between 1 April 2020 and 30 June 2020 shall in principle be deferred for a period of three months if the performance of the owed service is unreasonable for the borrower due to the COVID 19 pandemic. In particular, the Borrower cannot reasonably be expected to provide the service if his or her reasonable livelihood or the reasonable livelihood of his or her dependants is at risk.

- **Terminations due to default of payment or significant deterioration of financial circumstances excluded**

  In addition, loan agreements may not be terminated due to late payment or a significant deterioration in the consumer's financial situation during this period. The lender should offer the consumer a discussion about the possibility of an amicable settlement and about possible support measures. If an amicable settlement cannot be reached for the period after 30 June 2020, the term of the agreement shall nevertheless be automatically extended by three months. The respective due date of the contractual services will be postponed by this period.

- **Currently not applicable to companies**

  In addition, the Federal Government will be given the option of extending the schemes to other groups of borrowers - in particular micro, small and medium-sized enterprises - by means of a regulation. The special regulations do not yet apply to these groups.

### 4. Further right to refuse performance

- **Right of consumers to refuse performance:**

  A consumer shall be granted the right to refuse the performance of his or her contractual obligations until 30 June 2020 if, as a result of circumstances arising from the COVID 19 pandemic, the consumer would be unable to provide the performance without jeopardizing his or her reasonable subsistence or that of his or her dependants. However, the right to refuse performance shall only apply in connection with a consumer contract which is qualified as a material continuing obligation and which was concluded before 8 March 2020. Material continuing obligations are those which are necessary to be covered by services of general economic interest (e.g. contracts with electricity, gas or telecommunications providers).

- **Right of refusal of services by micro-enterprises:**
  A micro-enterprise (enterprises with up to nine employees and an annual turnover of up to EUR 2 million) has the right to refuse to provide services to satisfy a claim until 30 June 2020 if, due to circumstances arising from the COVID 19 pandemic, the micro-enterprise is unable to provide the service or the entrepreneur would not be able to provide the service without jeopardizing the economic basis of his business. However, the right to refuse performance only exists in connection with a contract that is qualified as a material continuing obligation and was concluded before 8 March 2020. Material continuing obligations are those that are necessary to cover the obligations with services for the appropriate continuation of the business (e.g. compulsory insurance, contracts with electricity, gas or telecommunications providers).

- **No right to refuse performance if unreasonable for the creditor**
  However, the right of the consumer/small business to refuse performance is excluded if the refusal is unreasonable for the creditor. In this case, the consumer/micro enterprise may withdraw from or terminate the contract.

- **No extinction of the contractual obligation**
  However, the right to refuse performance does not lead to the lapse of contractual obligations, but only to a temporary deferment. In addition, the legal consequence only occurs if the debtor expressly invokes the right to refuse performance vis-à-vis the creditor.

**5. Company law**

In order to enable companies to pass necessary resolutions and thus remain capable of acting even if restrictions on the freedom of assembly continue to exist, substantial facilitations for the holding of general meetings of the stock corporation (AG), the partnership limited by shares (KGaA), the mutual insurance company. (VVaG) and the European Company (SE), as well as for shareholder meetings of the limited liability company (GmbH), general meetings and representative meetings of the cooperative, and general meetings of associations.

- **GmbH:**
  Shareholders' resolutions may be passed in text form or by submitting votes in writing without the consent of all shareholders.

- **AG / KGaA:**
  A general meeting may be held **without the physical presence of shareholders.** The prerequisites for this are that a video and audio transmission of the entire Annual General Meeting takes place, that it is possible to exercise voting rights via electronic communication (postal vote or electronic participation) as well as to grant power of attorney, that shareholders are given the opportunity to ask questions via electronic communication, and that shareholders who have exercised their voting rights electronically can submit objections electronically until the end of the meeting.

The Management Board (with the approval of the Supervisory Board) can decide whether to make use of this option even without the corresponding authorization in the Articles of Association. In addition, the scope for contesting such decisions is considerably limited.

The **shareholders' right to ask questions can** also be **limited in the way that** questions must be submitted electronically at the latest two days before the Annual General Meeting. In addition, if the Annual General Meeting is only conducted by electronic absentee voting and proxy voting, the option of submitting motions during the Annual General Meeting is not applicable.

In addition, the 8-month period of Section 175 of the German Stock Corporation Act (AktG) for **holding the Annual General Meeting is extended to twelve months** for stock corporations and partnerships limited by shares. For the SE, however, the 6-month period will continue to apply. Furthermore, the period for convening a general meeting may be substantially shortened.

An **advance payment on the balance sheet profit** can also be made without the corresponding authorization in the Articles of Association.

However, it remains to be seen whether these measures are practicable for public limited liability companies, particularly in view of the new electronic components and necessary technical solutions.

The above statements are only a non-binding compilation according to the current status. No liability is assumed for the correctness and completeness. We would be pleased to support you in checking and, if necessary, implementing the above measures in your company.

Your familiar contact persons remain at your disposal regarding this matter.
In addition, you will find the contact persons who have been particularly involved in the above-mentioned topics.

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**Sonntag & Partner**

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The respective project-related team composition as well as the interdisciplinary and integrated consulting approach aim at a precise solution development and solution implementation - according to the individual needs of the clients.

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**Concluding remarks**

You can find further information about our law firm and our consulting services at https://www.sonntag-partner.de/