

COVID-19 NEWS OF INTEREST

Germany – Measures to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law (COVID-19 Mitigation Act)

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Please find below a summary of the most important aspects of the German Act relating to the Mitigation of the Impact of the COVID-19 Pandemic for Civil Law, Insolvency Law and Criminal Procedure Law (*Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht* (COVID-19 Mitigation Act)), which was passed on March 25, 2020 by the German Parliament and confirmed by the Upper House of the German Parliament. In addition, this alert also contains an initial summary of the German Economic Stabilization Fund (*Wirtschaftsstabilisierungsfonds*). The Frankfurt Willkie Team is available for any questions and further details regarding the subject matters discussed below.

We hope that you continue to stay healthy and safe.

+++ Suspension of the insolvency filing obligations under the COVID-19 Mitigation Act +++

- Provisions shall take retroactive effect as of March 1, 2020.
- The existing obligation to file for insolvency within 21 days of the occurrence of the reason for insolvency is suspended by the COVID-19 Mitigation Act until at least September 30, 2020 (Suspension Period).
- Suspension of the insolvency filings generally applies, filings are only required if:

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- the insolvency is not based on the COVID-19 pandemic; or
- there is no prospect of the existing indebtedness being resolved.
- If a debtor was solvent on December 31, 2019, it is assumed that any subsequent insolvency is the result of the COVID-19 pandemic and that there are prospects of resolving the existing indebtedness.
- Extension of the suspension is possible until March 31, 2021 by means of decree of the German Federal Ministry of Justice.
- Restrictions for insolvency filings by third parties:
 - Filings within three months of the COVID-19 Mitigation Act coming into force, reason for insolvency must have already existed on March 1, 2020.
- Mitigation of payment prohibitions for managing directors:
 - Payments made in the ordinary course of business – in particular those that serve to maintain or resume business operations or to implement a reorganization concept – are deemed to be compatible with the procedures of a prudent and diligent manager and do not trigger liability.
- Protection of lenders – Insolvency claw-back (*Insolvenzanfechtung*):
 - No lenders' disadvantage (*Gläubigerbenachteiligung*) and thus no clawback if a new loan granted during the Suspension Period is repaid by September 30, 2023 or if collateral is provided to secure such loans during the Suspension Period.
 - Privileges shall cover all types of financing measures, i.e., in addition to traditional loans, they cover trade credits and other forms of performance. Both repayment of principal and the payment of interest on loans are included.
 - Repayments of shareholder loans granted during the Suspension Period until September 30, 2023 are not considered as disadvantageous to creditors and can therefore not be clawed back.
 - Subordinated shareholder loan provisions are not applicable to newly granted shareholder loans during the Suspension Period nor to claims from economically comparable measures in insolvency proceedings applied for by September 30, 2023.

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+++ Corporate action relief measures under the COVID-19 Mitigation Act +++

- Stock Corporations (AGs), German Partnerships Limited by Shares (KGaA), European Companies (Societates Europaeae – SE) and Mutual Assurance Companies (*Versicherungsverein auf Gegenseitigkeit*):
 - Management board may broadcast a general meeting electronically, and allow shareholders to participate and vote by electronic form, even without a respective provision in the respective articles of association.
 - Management board may also decide to hold an online shareholders' meeting in which shareholders can only participate by means of electronic communication or vote via absentee ballot subject to the following conditions:
 - the entire shareholders' meeting has to be broadcast electronically (e.g., on the Internet);
 - shareholders can vote and ask questions electronically, which must also be answered accordingly; and
 - the option of filing an action to challenge resolutions even without the physical participation of the shareholders is guaranteed.
 - Members of the supervisory board may also participate virtually in the shareholders' meeting even without a corresponding provision in the articles of association.
 - Notice period for the invitation to the shareholders' meeting (and related deadlines) is reduced to 21 days.
 - The Period for holding a shareholders' meeting in the first eight months of a financial year is extended to 12 months. However, this does not apply to an SE, i.e. it remains at six months.
 - Management board may decide to pay an interim dividend even without a corresponding provision in the articles of association.
 - All measures mentioned above require the approval of the supervisory board. Irrespective of the provisions of the articles of association or the rules of procedure, the supervisory board may pass resolutions in writing, by telephone or in a comparable form without the physical presence of the members.
- Limited Liability Company (*GmbH*)

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- In deviation from section 48 para. 2 GmbHG (*Limited Liability Company Act – GmbHG*), resolutions of the shareholders in the calendar year 2020 may be passed in text form or by written submission of the votes even without consent of all shareholders.
- Law of Transformation (*Umwandlungsrecht*)
 - Extension of the eight-month cutoff date for closing balance sheets to be submitted in accordance with section 17 para. 2 sentence 2 UmwG (*Transformation Act – Umwandlungsgesetz*) to 12 months in order to ensure that transformation measures do not fail due to a lack of meeting opportunities.

+++ Extensive refusal rights of consumers and small business owners for certain important contractual relationships under the COVID-19 Mitigation Act +++

- Consumers and small business owners (*Kleinstunternehmen*) (up to and including nine employees and annual turnover or annual balance sheet total of less than €2 million each) may refuse to perform important contractual obligations (coverage with services for the adequate provision of basic necessities for consumers or for the adequate continuation of the operation of small business owners) until June 30, 2020 if they are unable to meet their performance obligations due to the effects of the COVID-19 pandemic:
 - This applies, in particular, to basic services (e.g. electricity, gas, water (where regulated under civil law), compulsory insurance and telecommunications). Corresponding obligations must have been concluded before March 8, 2020.
 - Right to refuse performance does not apply to lease, tenancy or loan agreements, nor does it apply to employment contracts. However, for rental and loan agreements special provisions described in this client alert apply.
 - Consumers have a right to refuse their contractual obligation if they cannot provide their contractual obligation due to the COVID-19 pandemic without endangering their (or their dependent relatives') livelihood.
 - Small business owners may refuse to provide the performance if, due to the COVID-19 pandemic, they are either unable to provide performance or they can provide it, but it could not be carried out without endangering the economic basis of their business.
 - Accordingly, consumers or business owners must state and prove these circumstances.

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- Exceptions to this right to refuse performance exist in favor of creditors who would be placed in a situation comparable to that of debtors as a result of the refusal to perform. In these cases, however, the debtor has a right of termination.
- Payment obligations under consumer loan agreements (*Verbraucherdarlehensverträge*) due between April 1, 2020 and June 30, 2020 and concluded before March 15, 2020 shall be suspended for three months if the consumer cannot reasonably be expected to pay due to the COVID-19 pandemic.
 - Payments are not reasonable if they endanger the adequate livelihood or the adequate livelihood of dependents.
 - Suspension applies to claims for repayment of the loan as well as interest and amortization payments.
 - The corresponding contract is extended by three months so that the debtor has to pay only one installment per month. However, payments can also be made on the originally scheduled payment dates, in which case the suspension does not apply initially, but the debtor can also rely on the suspension provision at a later date within the framework of the deadlines described above.
 - Termination of the loan due to late payment, due to significant deterioration of the financial situation or due to the value of collateral provided for the loan is excluded until June 30, 2020.
 - Lenders should offer consumers support measures and adapt loans accordingly by mutual agreement. In the event that no amicable solution can be found between the lender and the consumer for the period after June 30, 2020, the due date will be suspended for an additional three months with a further extension of the contract by three months.
 - The above provisions initially apply until June 30, 2020, but may be extended and expanded if certain conditions are met. It is possible to extend the regulations to other groups of borrowers (especially small business owners) by means of a decree.

+++ Temporary Moratorium for lease obligations under the COVID-19 Mitigation Act +++

- Landlords are not allowed to terminate lease agreements due to lease liabilities arising in the period from April 1, 2020 to June 30, 2020, if the rent liabilities are caused by the effects of the COVID-19 pandemic. Such "causality" has to be made plausible ("*glaubhaft gemacht werden*").
- This applies to both housing and lease agreements for other premises or real estate and is not limited to consumers and small business owners.

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- Only a termination under the aforementioned conditions is excluded; all other termination rights (of a landlord and tenant) continue to apply.
- The obligation of the tenants to pay the rent also remains in force. As a result, tenants and lessees are still required to pay their debts on time, i.e. interest on late payment will be charged on rent not paid on time, and tenants may also owe further damages for delay.
- Deviating contractual provisions are invalid.
- The provisions outlined above also apply to tenancy agreements (*Pachtverträge*).
- The aforementioned restriction on termination is supposed to expire at the end of September 30, 2022, i.e. from this date, termination for non-payment (also from the period April to June 2020) is possible again.

+++ Potential extensions of the measures under the COVID-19 Mitigation Act +++

- If the impact of the COVID-19 pandemic does not sufficiently subside in the period from April to June 2020, the German government may extend measures under the COVID-19 Mitigation Act by means of decrees.

+++ Establishment of an economic stabilization fund +++

- Like the COVID-19 Mitigation Act, the Act Establishing the Economic Stabilization Fund (*Gesetz zur Errichtung des Wirtschaftsstabilisierungsfonds*) ("**WSF**") was also passed by the German Parliament on March 25, 2020 and approved by the Upper House of the German Parliament. Additional details will be subject to a decree to be issued by the German Ministry of Finance.
- In addition, such decree must then also be briefly coordinated with the EU Commission. Accordingly it can be assumed that guarantees/ sureties will only be possible up to a maximum from 80 to 90 percent.
 - Applications are to be made with the German Ministry of Economics.
 - Thresholds for enterprises in certain sectors and of certain sizes apply:
 - Companies whose existence would have a significant impact on the economy, technological sovereignty, security of supply, critical infrastructures or the labor market and which satisfy at least two of the following three criteria in the last two financial years before January 1, 2020:
 - A balance sheet total of more than €43 million.

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- Revenues of more than €50 million.
- More than 249 employees on an annual average.
- Two types of measures: (i) guarantees (maximum of 60 months) and (ii) recapitalization (unlimited in time, WSF determines exit).
 - Acquisition of subordinated debt instruments, hybrid bonds, profit participation rights, silent partnerships, convertible bonds, acquisition of shares in companies, and the assumption of other components of equity, if this is necessary for the stabilization of the company.
 - There is no time limit.
- General requirements for stabilization measures / for decree:
 - No other financing possibilities are available.
 - The stabilization measures must show a clear going-concern after the COVID-19 pandemic.
 - Applicants must not have been companies in distress within the meaning of the EU rules on December 31, 2019.
 - Companies must guarantee a sound and prudent business policy.
 - Companies should make a contribution to stabilizing production chains and securing jobs.
 - The Federal Ministry of Finance may stipulate further requirements by a decree:
 - Use of funds
 - Taking up further loans
 - Management remuneration
 - Distribution of dividends
 - Timeframe in which the requirements must be satisfied
 - Measures to avoid distortion of competition

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- Industry-specific restructuring requirements
 - Accounting type and methodology
 - Declaration of commitment by a body authorized to represent the company with the consent of the supervisory body
 - Other appropriate conditions
- Additional provisions will be introduced, in particular tax rules, and certain adjustments will be made with regard to the implementation of the measures in different types of companies. Competition law does not apply to the WSF.

Prior versions of this client alert (in the German language) will be published shortly in the Willkie COVID-19 Resource Center which you can find under <https://www.willkie.com/content/covid-19-resource-center>. We are also happy to distribute any prior versions by e-mail. You can find additional resources in the Willkie COVID-19 Resource Center.

Legal Notice:

This Coronavirus/COVID-19 client alert is provided to clients and friends of Willkie as a short overview of the most important current developments and impacts of the COVID-19 pandemic in Germany. It does not constitute legal advice and may not address all aspects of such developments and impacts.

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Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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