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COVID-19

Relief Measures in Germany

Milbank

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1. Overview

1. Overview

On March 25, 2020, the German federal parliament (*Bundestag*) has approved unprecedented action to address the economic impact of the COVID-19 crisis on businesses.

The legislation is part of a 'protective shield' providing businesses with sufficient liquidity to master the crisis. Such 'protective shield' consists of four pillars, namely

- new and unlimited measures to provide liquidity to companies through special KfW programs
- tax-related liquidity assistance
- an expansion of the short-time work allowance (*Kurzarbeitergeld*) program and
- strengthened European cohesion.

As part of this shield, the *Bundestag* passed a law providing relief regarding specific civil, corporate and insolvency law related aspects of the COVID-19 crisis, including the possibility to hold virtual general meetings of stock corporations, a moratorium regarding rent and lease agreements and the suspension of the obligation to file for insolvency.

Further, the *Bundestag* has approved a law providing for the establishment of a so-called Economy Stabilization Fund (*Wirtschaftsstabilisierungsfonds*) which shall provide medium and large companies with guarantees of up to EUR 400 billion to facilitate a refinancing on the capital market. The fund shall further be entitled to sign up for equity participations of up to EUR 100 billion to avoid insolvencies and to provide loan facilities of up to EUR 100 billion to finance the special KfW programs.

The legislation is expected to pass the German federal council (*Bundesrat*) on March 27, 2020.

This overview highlights important aspects of the COVID-19 related governmental relief measures in Germany.

Several additional support programs and measures are taken on the level of individual German federal states (*Bundesländer*), which are not covered by this overview.



2. Corporate law aspects

2. Corporate law aspects – Directors’ duties in times of crisis

- In times of extraordinarily challenging economic circumstances, the management board of a company is obliged to closely monitor the performance and financial situation of the company. This includes
 - the monitoring of the development of revenues, profitability and liquidity
 - the assessment of options to make any short term adjustments to the business model within the limits of the statutory purpose of the company
 - the increase of the number and frequency of board meetings to closely monitor the performance and decide on required steps (the same applies to the supervisory board)
 - an assessment as to whether a loss has occurred at any company in the legal form of a stock corporation (AG) or limited liability company (GmbH) within the group which amounts to half of its share capital, in which case the respective general meeting has to be convened
 - an assessment as to whether an obligation to file for insolvency is triggered
 - for the supervisory board of a stock corporation: an assessment as to whether the compensation for the members of the management board has to be reduced as a result of a deterioration of the company’s profitability and/or whether the management board is properly composed in light of the new situation

- Further, the management board is obliged to assess existing and upcoming options to stabilize the company by reducing costs and accessing additional liquidity, including by way of
 - equity capital contributions, e.g. through the exercise of authorized capital
 - (re-)negotiations with banks and other lenders
 - application for public grants and other support (incl. the introduction of short-time work, the reduction of tax prepayments etc.)

- To avoid potential liability risks, board members should document all material decisions and considerations during the crisis

2. Corporate law aspects – General meetings, shareholder resolutions and transformation measures

- To allow for shareholder resolutions also during times of severe restrictions of free movement resulting from the COVID-19 pandemic, the relief measures facilitate general meetings, enable shareholder resolutions of stock corporations without the need for a physical presence of shareholders, and allow for advance dividend payments. This includes the following measures, all of which are limited to the period until December 31, 2020:
 - The management board of a stock corporation can decide that a general meeting is held with shareholders being able to participate and/or vote electronically, even without a respective authorization in the articles
 - The management board of a stock corporation can also decide that a general meeting is held as a mere virtual meeting without a right of shareholders to physically attend the meeting, provided that certain prerequisites are met which shall allow shareholders to follow the entire meeting, ask questions and cast their vote, in each case via electronic means
 - The convocation period of general meetings can be reduced by the management board to 21 days
 - The current requirement for German stock corporations to hold their annual general meeting within the first eight months of their financial year is lifted and such annual general meeting may instead be held at any time until December 31, 2020. It must be noted that this does not apply to European stock corporations (SE) which, pursuant to the applicable European regulation, must hold their annual general meeting within the first six months of their financial year
 - The management board may, subject to certain statutory limits, further decide to pay an advance dividend for the last financial year even without specific authorization in the articles
 - All of the above decisions require the consent of the supervisory board
- The foregoing provisions will also apply to partnerships limited by shares (KGaA) and – except for the extension of the time limit for holding the annual shareholders’ meeting – to European stock corporations (SE)
- Shareholders of a limited liability company (GmbH) may cast their vote in text form or in writing without the consent of all shareholders being required
- Transformations under the Transformation Act (*Umwandlungsgesetz*) can be registered in the commercial register on the basis of a balance sheet with a reference date which is within a 12 months’ period prior to filing (instead of eight months only); this applies to all applications for registration submitted in 2020



3. Moratorium for property rent and lease agreements

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- Under the approved legislation, a landlord/lessor may not terminate an agreement for the rent (*Miete*) or lease (*Pacht*) of residential or commercial property (solely) as a result of the tenant's/lessee's failure to pay the rent/lease fees which become due during the period from April 1, 2020 through June 30, 2020, provided such default results from the effects of the COVID-19 pandemic

- The following details are worth noting:
 - The provision applies for the benefit of all tenants, including businesses and large companies
 - The tenant/lessee bears the burden of proof that the inability to pay is a result of the COVID-19 pandemic; *prima facie* evidence (i.e., in particular an affidavit (*eidesstattliche Versicherung*)) is sufficient
 - The provision does not prevent the tenant from default under the rent/lease agreement, but merely suspends the landlord's termination right which would otherwise exist as a result of the default
 - The exclusion of the termination right applies until June 30, 2022, thereby giving the tenant/lessor a period of two years to fulfil the outstanding payment obligations
 - The law provides the authority to the federal government to extend the exclusion of the termination right with the approval of parliament (*Bundestag*) to rent/lease fees which become due in the period until September 30, 2020, provided that it is to be expected that the COVID-19 pandemic continues to materially affect the living and economic circumstances of larger numbers of people



4. Special KfW programs

4. Special KfW programs

- KfW (*Kreditanstalt für Wiederaufbau* – the German state-owned development bank) has made available various COVID-19 loan programs as part of the German federal government’s efforts to support enterprises affected by the crisis
- Enterprises have to meet, among others, the following criteria to be eligible for the corona loan programs:
 - As of December 31, 2019, the enterprise was not an “undertaking in difficulties” (equity has not fallen below half of its registered capital)
 - As of December 31, 2019, the enterprise was in an orderly financial situation (no payment defaults continuing for more than 30 days; no deferral/standstill agreements or covenant breaches)
 - As of the date of application, based on its current budget, the enterprise is adequately financed until December 31, 2020 based on the assumption that the overall economic situation will return to normal
 - As of the date of application, there is a positive forecast for a going concern based on the assumption that the overall economic situation will return to normal
- KfW offers the following programs:
 - Special program “direct participation in syndicated / consortium based financing” (*Sonderprogramm Direktbeteiligung für Konsortialfinanzierung*)
 - Program for foreign or domestic medium-sized and large enterprises which are not majority state-owned
 - Purpose: financing investments and working capital projects in Germany (as for KfW entrepreneur loans, we assume this also includes acquisitions)
 - Participation by KfW of up to 80% of the financing by way of risk assumption, direct participation as lender or back-to-back refinancing for syndicate banks
 - Financing of at least EUR 25 million. The financing may not exceed (i) two times the annual salaries paid in 2019, or (ii) 25% of annual sales in 2019, or (iii) the estimated liquidity needs in the next 12 months. In addition, the financing may not exceed 50 % of the total enterprise debt. There is no absolute cap on the amount of financing
 - KfW Entrepreneur Loan (*KfW-Unternehmerkredit*)
 - Program for enterprises domiciled in Germany that have been active on the market for at least five years and are majority privately owned
 - Risk assumption (guarantee) for fronting financing partner (usually a relationship bank) of up to 80% for large companies (matching two of the following criteria: more than 250 employees, more than EUR 50 million turnover or more than EUR 43 million overall balance sheet) and up to 90% for small and medium-sized enterprises
 - The relationship bank fronts the loan to the borrower and KfW assumes the credit default risk vis-à-vis the relationship bank
 - Funding of up to EUR 1 billion per enterprise group for investments, working capital, warehouse stocking and the acquisition of other enterprises (assets and shares) for projects in Germany

4. Special KfW programs (cont'd)

- Funding may not exceed (i) two times the annual salaries paid in 2019, or (ii) 25% of annual sales in 2019, or (iii) the estimated liquidity needs in the next 18 months for small and medium sized enterprises and 12 months for large enterprises, or (iv) 50% of the total debt of the enterprise

- ERP Start-up Loan (*ERP-Gründerkredit – Universell*)
 - Program for individual entrepreneurs and commercial enterprises domiciled in Germany which are majority privately owned and have not been on the market for more than five years
 - Entrepreneurs and commercial enterprises should ideally be active on the market for at least three years. As a minimum, entrepreneurs and commercial enterprises must be commercially active with financial statements for two years
 - Funding of up to EUR 1 billion per enterprise group for investments, working capital, warehouse stocking and the acquisition of other enterprises (assets and shares)
 - Funding may not exceed (i) two times the annual salaries paid in 2019, or (ii) 25% of annual sales in 2019, or (iii) the estimated liquidity needs in the next 18 months for small and medium sized enterprises and 12 months for large enterprises, or (iv) 50% of the total debt of the enterprise
 - Risk assumption (guarantee) for fronting financing partner (usually a relationship bank). For large companies that have been active on the market for at least 3 years, up to 80% of the risk can be assumed. For small and medium-sized companies that have been active on the market for at least 3 years, risk assumption of up to 90% is possible. For companies that have been active on the market for less than 3 years, KfW may assume credit risk in the same manner
 - The relationship bank fronts the loan to the borrower and KfW assumes the credit default risk vis-à-vis the relationship bank

- All applications have to be made through the applicant's relationship bank; a direct application at KfW is not envisaged

- Both the relationship bank / syndicate banks and KfW will have to run a full credit approval process (safe for smaller loans of up to EUR 3 million); the documentation to be provided in this respect is currently evolving

4. Special KfW programs (overview)

Program	Special program direct participation (<i>Sonderprogramm Direktbeteiligung</i>)	KfW Entrepreneur Loan (<i>KfW-Unternehmerkredit</i>)	ERP Start-up Loan (<i>ERP-Gründerkredit-Universell</i>)
Eligibility criteria¹	<ul style="list-style-type: none"> • Syndicated financing • Applicant may be foreign entity 	<ul style="list-style-type: none"> • Active > 5 years • No annual turnover limit (was EUR 500M pre crisis) • Applicant is domiciled in Germany 	<ul style="list-style-type: none"> • Active < 5 years² • No annual turnover limit (was EUR 500 million pre crisis) • Applicant is domiciled in Germany
Maximum credit volume³	<ul style="list-style-type: none"> • No volume cap • < 50% of total debt • Minimum EUR 25 million 	<ul style="list-style-type: none"> • EUR 1 billion⁴ 	<ul style="list-style-type: none"> • EUR 1 billion⁴
Purpose	<ul style="list-style-type: none"> • Investments and working capital including acquisitions • Project is in Germany 	<ul style="list-style-type: none"> • Investments and working capital including acquisitions • Project is in Germany 	<ul style="list-style-type: none"> • Investments and working capital including acquisitions • Project is in Germany
KfW risk assumption	<ul style="list-style-type: none"> • <80% 	<ul style="list-style-type: none"> • <80% for large enterprises⁵ • 90% for SME⁶ 	<ul style="list-style-type: none"> • <80% for large enterprises⁵ • 90% for SME⁶

1 In case of a group of companies, criteria to be applied to whole group

2 Should be active ideally more than three years

3 Limit per group of companies

4 Volume capped at one of the following: (i) two times the annual salaries paid in 2019, or (ii) 25% of annual sales in 2019, or (iii) the estimated liquidity needs in the next 18 months for small and medium sized enterprises and 12 months for large enterprises

5 Matching two of the following: more than 250 employees, more than EUR 50 million turnover or more than EUR 43 million overall balance sheet

6 Other than large enterprises



5. Tax related liquidity relief

5. Tax related liquidity relief

- The Federal Ministry of Finance (*Bundesfinanzministerium*) and the highest tax authorities of the Federal States (*Oberste Finanzbehörden der Länder*) have addressed liquidity constraints of businesses directly affected by the COVID-19 crisis in two decrees published on March 19, 2020 (“**Decrees**”). While the Decrees explicitly relate to income tax (*Einkommensteuer*), corporate income tax (*Körperschaftsteuer*), trade tax (*Gewerbesteuer*) and VAT (*Umsatzsteuer*) only, further measures (in particular with regards to wage tax (*Lohnsteuer*) and the submission of tax declarations) are expected to be published shortly.
- The Decrees are for the benefit of taxpayers which are “*directly and not insignificantly affected*” by the COVID-19 crisis and provide for
 - a deferral of tax payments falling due until December 31, 2020 without deferral interest, and
 - a reduction of prepayments for income taxes, corporate income taxes and trade taxes,

in each case only upon application of the taxpayer. Whilst it is advisable to include in such application a (brief) substantiation as to how the relevant business is affected by the COVID-19 crisis, the Decrees do not require the taxpayer to quantify the (expected) impact on the business caused by the COVID-19 crisis and provide for an instruction to the competent tax authorities to exercise their respective discretion generously. The Decrees do not explicitly address prepayments that have been made for past periods, and it should be considered to extend the application to such periods.

- The Decrees further provide that the tax authorities will not enforce due tax payments until December 31, 2020 if the taxpayer is directly and not insignificantly affected by the impacts of the COVID-19 crisis. Late payment fines (*Säumniszuschläge*) arising between March 19, 2020 and December 31, 2020 shall be waived.
- In addition to the Decrees, several federal states have announced to reduce and refund prepayments made on VAT upon application if the taxpayer is affected by the COVID-19 crisis. It is not clear whether the reduction and refund, which can include the total sum of special VAT prepayments made for 2020, is only granted to taxpayers “*directly and not insignificantly affected*” by the COVID-19 crisis or if, e.g., indirectly affected businesses are also eligible to these measures. Taxpayers can also apply for an extension of time for advance VAT returns.



6. Employment related liquidity relief

6. Employment related liquidity relief – Short-time work allowance

- Short-time work is a temporary reduction of the ordinary working times for certain or all employees of a business in the event of unforeseen material declines in order volume and/or interruptions of business operations; it includes a reduction to zero hours (*Kurzarbeit Null*)
- Short-time work can be implemented by the employer only on the basis of a specific authority. Such authority may be provided in the individual employment agreement or, where an operation is subject to co-determination, in a works agreement or a collective bargaining agreement. Where a works council exists, short-time will thus require a specific works agreement. Where no works council exists and an employee does not consent to a reduction of hours, the employer can pursue short-time work by way of an amendment termination as last resort
- If working hours are reduced based on the implementation of short-time work, the salaries of the affected employees are reduced accordingly; the salary shortfall can be compensated in the form of a short-time work allowance paid by the Federal Employment Agency (*Bundesagentur für Arbeit*). Short-time work allowance is paid upon application by the employer for a period of up to 12 months
- In light of the COVID-19 crisis, the German parliament passed on March 13, 2020 a law enabling broader access to short-time work and short-time work allowance, including by (i) lowering the threshold requirement regarding the work force affected by the loss of workload (from 30% to 10%), (ii) a waiver of the need to build up a negative balance in working hours, (iii) expanding the eligibility to short-time work benefits to temporary and agency workers, and (iv) compensating employers for certain social security contributions
- Short-time work allowance requires a temporary considerable loss of working hours based on economic circumstances or an inevitable event. An inevitable event exists, in particular, if as a result of the COVID-19 situation there is a shortage of supplies or where orders by competent authorities result in a reduction or even halt of certain operations. Short-time allowance will, however, not be available where an employer reduces or closes its operations to protect its employees from infections
- Short-time work allowance amounts to 67% of the net pay loss for employees with at least one dependent and 60% of the net pay loss for all other employees, subject to a monthly cap; if and to the extent the employer makes additional payments (either voluntarily or based on a corresponding obligation), such additional payments do not reduce the amount of the short-time allowance



7. Economy Stabilization Fund

7. Economy Stabilization Fund - Overview

- As part of the COVID-19 related relief package, on March 25, 2020, the federal parliament (*Bundestag*) passed the “Act regarding the Establishment of an Economy Stabilization Fund” (*Gesetz zur Errichtung eines Wirtschaftsstabilisierungsfonds – WStFG*; the “**Economy Stabilization Fund Act**”).

- The aim of the Economy Stabilization Fund Act is to stabilize and protect companies operating in the real economy (i.e., excluding the financial sector) from the economic damage resulting from the COVID-19 pandemic; the act mirrors the legal framework for the Special Financial Markets Stabilization Fund (SoFFin) established in connection with the financial crisis in 2008/09
 - **Eligible companies**
 - The Economy Stabilization Fund Act applies to companies in the real economy (i.e., excluding the financial sector) whose existence is material for the economy, the technological sovereignty, the security of supply, critical infrastructure or the labor market and that have exceeded two of the following three criteria in two consecutive financial years before January 1, 2020:
 - Balance sheet total in excess of EUR 43 million
 - Sales revenue in excess of EUR 50 million
 - More than 249 employees in the annual average
 - As a prerequisite for any stabilization measures, companies must ensure a sound and prudent business policy. In particular, they should contribute to the stabilization of production chains and to securing jobs
 - The companies must not have access to other forms of financing and must not already have been in financial difficulty on December 31, 2019
 - Stabilization measures are available to companies in any legal form

 - **Potential stabilization measures**
 - The stabilization measures under the Economy Stabilization Fund Act shall be carried out by a so-called Economic Stabilization Fund (*Wirtschaftsstabilisierungsfonds*; the “**Fund**”)
 - Under the Economy Stabilization Fund Act, the following stabilization measures are possible:
 - Guarantees: The Fund may provide guarantees for newly issued debt instruments and newly incurred liabilities in a total amount of up to EUR 400 billion; the term of the guarantees and the secured liabilities must not exceed a period of 60 months
 - Recapitalization: The Fund may acquire/subscribe for subordinated debt, hybrid bonds, profit participation rights, silent partnerships, convertible bonds, shares or other equity instruments in a total amount of up to EUR 100 billion

7. Economy Stabilization Fund – Overview (cont'd)

➤ Legal framework for stabilization measures

- The stabilization measures are at the discretion of the Federal Ministry of Finance (*BMF*) and the Federal Ministry of Economics and Energy (*BMWi*). Companies do not have a right / entitlement regarding a stabilization measure
- Companies receiving stabilization measures must comply with certain obligations and conditions which are stipulated on a case-by-case basis. These relate to, *inter alia*, the use of the funds received from the Fund, the remuneration of the respective companies' executive bodies, the distribution of dividends, the drawing of other credit lines and measures to avoid distortions of competition. Further details will be provided in a separate legal regulation
- Stabilization measures may be carried out until December 31, 2021
- To secure an efficient implementation of the envisaged stabilization measures, the Economy Stabilization Fund Act provides for comprehensive amendments to German corporate law, in particular, regarding capital measures (see following slides for details)

7. Economy Stabilization Fund – Corporate aspects

- The Stabilization Fund Act provides for a number of material amendments (mostly exemptions and facilitations) to German corporate law, in particular to the German Stock Corporation Act (*AktG*), applicable in connection with a recapitalization under the Stabilization Fund Act
- Some of the most relevant amendments can be summarized as follows:
 - **Capital measures in a stock corporation (AG/SE/KGaA)**
 - Shares may be issued to the Fund with profit distribution or liquidation preference; the issue amount of the shares may be below the stock exchange price
 - Contributions already made by the Fund may be set off against contribution obligations of the Fund in connection with a capital measure
 - Shares with profit distribution or liquidation preference issued to the Fund lose such preference in case of a transfer to third parties; the Fund may request a conversion of such preference shares into ordinary shares with voting rights in connection with such transfer
 - The adoption and implementation of resolutions of the general meeting on capital measures in connection with a recapitalization are significantly facilitated. In particular:
 - General meetings resolving on capital measures for the purpose of a recapitalization may be convened with only 14 days' notice
 - The majority requirements for the relevant resolutions of the general meeting are reduced to simple majority of the votes cast; this also applies in case of an exclusion of the shareholders' subscription rights and in case of capital reductions if at least half of the share capital is represented
 - The exclusion of the shareholders' subscription rights for purposes of the issuance of shares to the Fund is permissible in any case
 - Authorized capital (*genehmigtes Kapital*) and contingent capital (*bedingtes Kapital*) created for purposes of a recapitalization are not limited to 50% of the existing share capital and do not count against existing authorized and/or contingent capital
 - Until December 31, 2021, the management board may issue (with the consent of the supervisory board, but without the requirement of an approval by the general meeting) profit participation rights and bonds, in each case with a qualified subordination, provided that such profit participation rights or bonds do not contain a conversion right; the subscription right of the shareholders is excluded

7. Economy Stabilization Fund – Corporate aspects (cont'd)

➤ Capital measures in a stock corporation (AG/SE/KGaA) (cont'd)

- Resolutions of the general meeting regarding the measures set forth above become effective upon their publication on the company's webpage or, if earlier, upon publication in the Federal Gazette (*Bundesanzeiger*) (i.e., irrespective of their registration in the commercial register (*Handelsregister*))
- Shareholders do not have subscription rights in case of a silent participation of the Fund, including where such silent participation provides for conversion rights
- The facilitations for recapitalizations apply accordingly if the new shares are also or exclusively subscribed by third parties
- Except for purposes of co-determination law, neither the Fund nor the federal state (*Bund*) will be considered as 'dominating entity' (*herrschendes Unternehmen*) for purposes of German corporate law

➤ Squeeze-out; exemptions from public takeover law, competition law and listing requirements

- The Fund may pursue a squeeze-out of minority shareholders if it holds 90% of the shares, and the squeeze-out becomes effective upon the publication of the resolution of the general meeting on the company's webpage or, if earlier, upon publication in the Federal Gazette
- Far-reaching exceptions from German public takeover law provisions apply to the acquisition of equity interests by the Fund:
 - The Fund has no obligation to make a mandatory takeover offer
 - If the Fund makes a voluntary takeover offer, it is exempted from several provisions of German takeover law (e.g., regarding acting in concert and the requirement to provide a financing confirmation)
- The Fund is also exempted from the provisions of parts 1 through 3 of the Act regarding Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*)
- Compliance with the provisions for a stock exchange listing is only required when shares subscribed by the Fund are transferred to third parties



8. Insolvency related aspects

8. Insolvency related aspects

- As part of the COVID-19 related relief legislation, the German parliament has passed a law aiming to prevent insolvencies of companies which encounter financial difficulties as a result of the COVID-19 pandemic
- The legislation comprehensively modifies the German insolvency regime and addresses nearly all insolvency-related obligations and restrictions which insolvent debtors typically encounter and which would frustrate the affected companies' going concern status and their ability to continue trading
- The amendments become effective with retroactive effect as from March 1, 2020
- The key aspects are as follows:
 - **Suspension of the directors' obligation to file for insolvency**
 - The obligation of managing directors of German companies to file for insolvency is suspended until September 30, 2020, unless (i) the insolvency is not caused by the COVID-19 pandemic or (ii) there are no prospects of overcoming an existing illiquidity
 - It is presumed that the company has become insolvent as a consequence of the COVID-19 pandemic and that the company has prospects of overcoming its illiquidity if the debtor was not illiquid as at December 31, 2019
 - The Federal Ministry of Justice and Consumer Protection is authorized to extend the suspension period until March 31, 2021
 - **Restrictions on creditor filings**
 - Within three months after the bill has come into force, creditor filings are only permitted if the insolvency reason has already existed on March 1, 2020
 - **Legality of discharge of pre-existing liabilities**
 - Following the occurrence of illiquidity or over-indebtedness (*Insolvenzreife*), directors are no longer entitled to permit any discharge of liabilities which already existed prior to the occurrence of such illiquidity or over-indebtedness, unless such discharge is, from a creditors' perspective, compatible with the diligence of an orderly and conscientious director
 - The amendment explicitly provides that payments made in the ordinary course of business are compatible with the diligence of an orderly and conscientious director

8. Insolvency related aspects (cont'd)

➤ Exclusion of equitable subordination

- The equitable subordination regime will not apply to any new shareholder loans which were extended during the period of time in which the directors' insolvency filing obligations were suspended

➤ Exclusion of claw-back rights

- Any repayment on or before September 30, 2023 of loans that were granted during the period of time in which the directors' filing obligations were suspended will not be subject to claw-back rights (*nicht anfechtbar*); this also applies to the collateralization of such loans
- The same applies to the repayment of shareholder loans, but not to the granting of any security for such shareholder loans

➤ Elimination of lender liability for new financings

- New loans extended (as well as security) during the period in which the filing obligation was suspended are not contrary to public policy (*contra bonos mores, sittenwidrig*)
- Thus, there is no risk of lender liability in relation to any such new financings irrespective of the existence of a restructuring opinion confirming that a successful turnaround of the debtor is more likely than not (usually according to the IDW S6 standard)

➤ Relief also for solvent debtors

- The exclusion of equitable subordination, the exclusion of claw-back rights and the elimination of lender liability for new financings set out above also apply to debtors which are not illiquid or over-indebted (*insolvenzreif*)
- The purpose of this further relief is to motivate lenders and other counterparties to provide additional financing and continue trading with the relevant debtor



Appendix - Moratorium for certain contracts of consumers and micro-enterprises

Appendix – Moratorium for material contracts with continuing obligations

- The relief package provides for a moratorium aiming to ensure that consumers and micro-enterprises (i.e., enterprises with less than 10 employees and an annual turnover and/or annual balance sheet total not exceeding EUR 2 million) do not lose access to essential supplies (such as electricity, gas, telecommunication):
 - Until June 30, 2020, consumers and micro-enterprises may refuse the fulfillment of payment or other performance obligations resulting from contracts providing for continuing obligations (*Dauerschuldverhältnisse*), excluding however lease agreements, credit agreements and service/employment agreements, which were entered into prior to March 8, 2020, if as a result of circumstances caused by the COVID-19 pandemic the consumer/micro-enterprise is unable to fulfil such obligations without endangering, in case of a consumer, its or its dependents' adequate means of subsistence or, in case of a micro-enterprise, the economic basis of its business operations; the burden of proof lies with the consumer/micro-enterprise without *prima facie* evidence being sufficient
 - The moratorium shall apply to agreements regarding adequate services of general interest or, in case of micro-enterprises, for the adequate continuation of their business operations. It is not entirely clear from the wording of the bill whether the moratorium shall apply exclusively to these agreements or more generally to all agreements for continuing services entered into by consumers and/or micro-enterprises prior to March 8, 2020
 - The moratorium does not apply in case it would lead to unbearable (*unzumutbar*) consequences for the creditor (i.e., the non-fulfilment would endanger its adequate means of subsistence/the economic basis of its business operation). In these cases, however, the consumer/micro-enterprise may terminate the contract
 - Where the moratorium applies, the consumer/micro-enterprise is technically not in default and, accordingly, no default interest or other default damages become payable during the term of the moratorium
 - The bill provides the authority to the federal government to extend the moratorium with the approval of parliament to September 30, 2020, provided that it is to be expected that the COVID-19 pandemic continues to materially affect the living and economic circumstances of larger numbers of people
 - Upon expiry of the moratorium, the consumer/micro-enterprise has to fulfil the suspended obligations. Accordingly, the moratorium does not entitle the consumer/micro-enterprise to further delay fulfilment of any of the outstanding obligations following the expiry of its term

Appendix – Moratorium for loans of consumers and micro-businesses

- The relief package further provides for a moratorium for consumer loans entered into prior to March 15, 2020
- Whilst the moratorium does not apply to other loans, in particular not to commercial loans, the bill provides for an authority of the federal government to extend the provisions with the approval of parliament also to other loan agreements, including loans granted to micro-enterprises, but also to loans granted to large companies; it remains to be seen whether such authority will be exercised
- The moratorium can be summarized as follows:
 - Obligations of repayment, amortization and interest payments of consumers under consumer loan agreements entered into prior to March 15, 2020 are deferred (*gestundet*) for a period of three months following their respective due date, provided that as a result of circumstances caused by the COVID-19 pandemic the consumer has suffered a loss of income which would make it unbearable (*unzumutbar*) for the consumer to fulfil such obligations without endangering his/her or his/her dependents' adequate means of subsistence
 - The burden of proof lies with the consumer (without *prima facie* evidence being sufficient)
 - Where the moratorium applies, the consumer is technically not in default and, accordingly, no default interest or other default damages become payable during the term of the moratorium
 - During the term of the moratorium, the lender may not accelerate and terminate the consumer loan agreement due to any payment default, any material adverse change in the financial situation of the consumer or any material adverse change in the recoverability (*Werthaltigkeit*) of any security granted for the loan
 - The bill further requires the lender to engage in good faith negotiations with the consumer regarding an amendment of the loan agreement for the time period after expiry of the moratorium; in case no agreement can be reached, the term of the existing agreement is extended by three months and the due date for all payments under the agreement is deferred by three months
 - The bill provides for the authority of the federal government to extend the moratorium with the approval of parliament to payments becoming due on or before September 30, 2020 and to expand the extended term in case an agreement regarding an amendment of the loan agreement cannot be reached to up to twelve months, provided that it is to be expected that the COVID-19 pandemic continues to materially affect the living and economic circumstances of larger numbers of people
 - It is unclear whether these provisions also apply to consumer loan agreements which are not governed by German law

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