

Act to Mitigate the Consequences of the Covid-19 Pandemic

Date: 22 April 2020

On 27 March 2020 the German Bundestag has adopted the Act to Mitigate the Consequences of the Covid-19 Pandemic under Civil, Insolvency and Criminal Procedure Law (*Gesetz zur Abmilderung der Folgen der Covid-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht*). The act provides for extensive measures that will have profound consequences. **Companies** must take action:

Insolvency law

- **suspension** of the **obligation to file for insolvency** for Covid-19-related insolvency and/or over-indebtedness until the end of September 2020 and of the right of creditors to file for insolvency until presumably the end of June 2020;
- **limitations** of the insolvency administrator's right to **avoid** certain pre-insolvency transactions, i.e. repayments of (restructuring) loans, shareholder loans (if repaid within three years), a contractual performance actions until the end of September 2020 (e.g. payment on due invoice);
- **cancellation** of **subordination** of shareholder loans in insolvency proceedings that have been filed for by the end of September 2023 at the latest.

Civil law

- **rights to refuse performance** for **micro-enterprises** (fewer than 10 persons employed and annual turnover or annual balance sheet in total less than EUR 2 million) in respect of continuing obligations necessary for the operation of the economic foundations of their business undertaking because of Covid 19 related impediments to performance;
- 2-year **preclusion of termination** of **all leases and usufructuary leases** (residential and commercial) due to Covid 19-related payment defaults in the period from April to the end of June 2020;
- **deferral** of payment claims under **consumer loan agreements** in the period from April to the end of June 2020 due to Covid-19-related unacceptability, unless it is to be expected unreasonable for the lender to accept this. Temporary **preclusion of termination**. The provisions can be extended by statutory instrument to include in their scope of application **micro-enterprises**.

Corporate Law

- facilitate **online meetings** without physical presence in company and cooperative law;
- further regulations to ensure the **ability** of German companies **to act and make decisions**.

Most of the measures are limited in time until the **end of June 2020**, but may be extended. The act also provides that the changes in civil law only apply to contracts concluded before **8 March 2020** (loan agreements: 15 March 2020).

When concluding contracts, each company is therefore already taking a risk of not being able to invoke the consequences of the Covid-19 pandemic in future performance. When concluding contracts, it is important to ensure that all possible effects of the Covid-19 pandemic are contractually covered. This applies not only to contracts subject to the act, but to all contracts in general.

In detail, the act provides for the following measures to mitigate the impact of the Covid-19 pandemic:

I. Insolvency law

The obligation to file for insolvency

- is suspended until 30 September 2020, unless insolvency is not caused by Covid-19 or where there are no prospects of remedying the insolvency.
- if the obligor was not insolvent by 31 December 2019, it is assumed that insolvency was caused by Covid-19.
- however, if there is no longer any prospect of overcoming the insolvency, insolvency must be filed for!

Furthermore, **creditors of the insolvent party** are not entitled to **file for insolvency proceedings** for a period of three months if inability to pay debts or balance-sheet insolvency was not already given on 01.03.2020. However, **the insolvent party** may still file for insolvency proceedings and - under certain circumstances - may be obliged to do so.

In addition, the following measures are provided for:

- **payments** made in the ordinary course of business are permitted during the suspension of the obligation to file for insolvency.
- **new credit and/or new shareholder loans** granted during the suspension period may be repaid by September 30, 2023 at the latest without the lender having to fear avoidance of the repayment. The same applies to collateral that has been provided during the suspension period if the collateral is returned within the following three years.
- in the event of insolvency, **shareholder loans** are **not subordinated**, provided that insolvency is filed for no later than three years after the end of the suspension period.
- granting loans and providing collateral during the suspension period is not considered a wrongful contribution to a criminal failure to file for insolvency in due time;
- during the suspension period, legal acts which granted or enabled the other party to obtain collateral or satisfaction to which such party was entitled in that manner and at that time, may not be avoided in subsequent insolvency proceedings , e.g. payments of

due invoices, **cannot be avoided** in subsequent insolvency proceedings, unless the recipient was aware that the insolvency of the performing party could no longer be avoided. The same applies to the **the shortening of the time allowed for payment** and the **relaxation of payment terms**.

The temporary restrictions on avoidance also apply to companies which are not obliged to file a request for insolvency proceedings (e.g. commercial partnerships).

However, despite these facilitations, caution is still recommended in crisis situations. The conclusion of contracts despite **serious doubts** about the company's ability to perform can still be prosecuted as **fraudulent conduct or credit fraud** and can result in personal civil liability of the persons involved.

II. Civil law

In the case of **continuous obligations necessary for business operations** under contracts which were concluded before 8 March 2020, microenterprises (employing fewer than 10 persons and annual turnover or annual balance sheet in total not exceeding EUR 2 million) are covered until no later than 30 June 2020:

- **right to refuse performance** if performance cannot be rendered due to the Covid-19 pandemic at all or without endangering the economic foundations of its business undertaking,
- unless this would be unreasonable to accept from the creditor's point of view, e.g. because it would threaten the economic foundations of his or her business undertaking, the debtor (microenterprise) has the right to **terminate** the contract.
- the right to refuse performance **does** (among others) **not apply** to leases, usufructuary leases, loan agreements and entitlements under labour law.

Special regulations will apply to **all leases and usufructuary leases** (residential and commercial):

- **rent** and also **ancillary costs** are to continue to be paid, therefore no right to refuse performance;
- Until the end of June 2022 landlords are not permitted to terminate leases on the ground of non-payments from the period April 2020 to June 2020 inclusive, insofar as the non-payment is due to the effects of the Covid-19 pandemic

Special rules will apply to **consumer loan agreements** (which **can be extended** by **statutory instrument** to also include loan agreements with **micro-enterprises**):

- **deferral** of payments which are to be considered unreasonable for the customer to make due to Covid-19-related loss of revenue in the period from April 2020 to June 2020 for a period of 3 months – does not apply if it is unreasonable to expect the lender to accept the deferral. Extension of the contract term by 3 months if no agreement can be reached for the period after 30 June 2020.

- **preclusion of termination** on the part of the lender on account of default in payment or significant worsening of the financial circumstances is excluded until the end of the end of the period of deferral of payment- does not apply if it is unreasonable to expect the lender to accept the deferral.

III. Company Law

For **stock corporations (AG)**, public partly limited partnerships (**KGaA**) and European companies **SE**, a temporal option is created for the year 2020,

- to enable electronic/**online participation** in the **general meeting** without authority granted herefor under the by-laws or rules of procedure;
- to hold an **unattended (online) general meeting** with **limited rights of appeal for shareholders**. In this context, the management board may decide at its duty-bound, free discretion which questions to respond to and in what manner and may stipulate that questions must be submitted by means of electronic communication no later than two days prior to the meeting;
- to reduce the **notice period** of calling a general meetings to **21 days**;
- to make **interim payments** towards the **net income to shareholders** before the general meeting is held;
- to hold the **general meeting** within the course of the **financial year** (instead of within the first 8 months). However, this **does not apply to the SE** since the applicable 6-month period is European law which cannot be ruled out by the German legislative body.

With regard to the limited liability companies (**GmbH**), the shareholders resolution in 2020 will be facilitated by the fact that resolutions can also be made in text form or by submission of the votes in written form (i.e. without a presence meeting) even without the consent of all the shareholders and if there is no corresponding provision in the by-laws of the company.

In 2020, **cooperative societies, associations and foundations**

- will also be temporarily facilitated by the possibility of holding **meetings without physical presence**,
- **resolutions** will be made **possible outside of meetings**, even without corresponding provisions in the by-laws of the association, and
- provisions will be made for members of a cooperative society's board of directors or supervisory board to remain in office even after the end of their term of office until such time as their successor has been appointed;
- in the case of cooperative societies, the annual financial statements can also be adopted by the supervisory board.

For **commonhold property** in 2020

- the last appointed administrator shall remain in office until he is withdrawn or a new administrator is appointed,

- the most recently adopted **business plan** continues to be valid until a new business plan is adopted.

In the **law of transformations**, the 8-month period is extended to 12 months in accordance with section 17 (2) sentence 4 of the Transformation Act (*Umwandlungsgesetz*) in order to prevent transformation measures from failing due to a lack of meeting opportunities. For **mergers** until 31 December 2020, balance sheets as of 31 December 2019 may therefore be used as closing balance sheets.