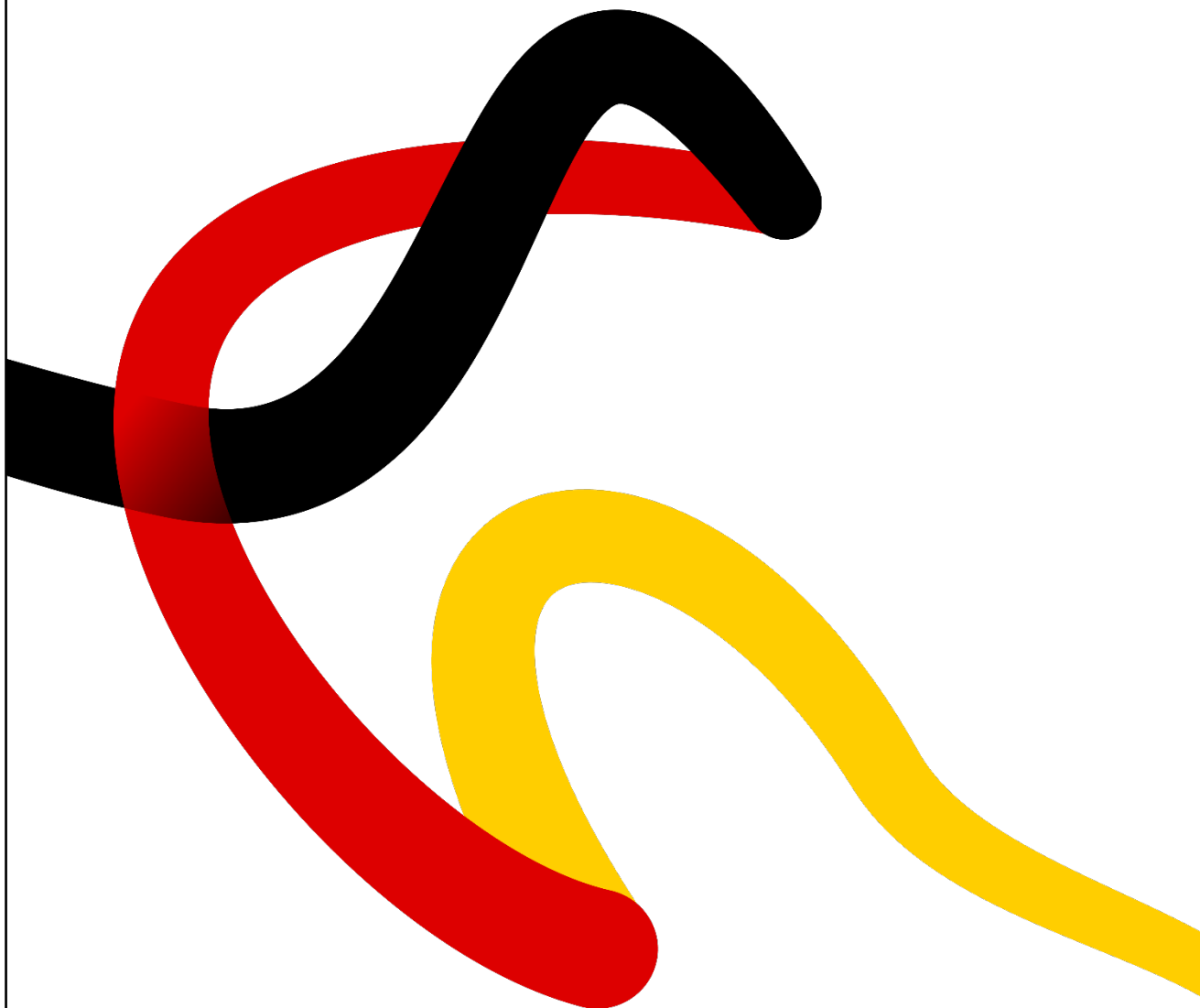


## Germany: Covid-19 Emergency Legislation and Measures

The economic impacts of the Covid-19 crisis have led to diverse offers of emergency assistance from the German Federal and State governments as well as emergency legislation on civil, corporate, insolvency and employment law to help ease the consequences of the crisis.

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## 1 Overview

After establishing a "protective shield for employees and companies" for employees and companies who are affected by the impact of the coronavirus to mitigate the effects of the Covid-19 pandemic, which consists of the four pillars:

- Short-time work compensation (*Kurzarbeitergeld*) for employees and a simpler and quicker access to it;
- Tax-related liquidity assistance for businesses;
- A protective shield worth billions for businesses; and
- Strengthening European cohesion.

The German Federal Government has introduced a number of laws intended to help mitigate the Covid-19 crisis. Whilst the help still concentrates on ensuring liquidity for companies, in particular through loans and guarantees, additional measures to protect the economy have been added concerning civil, corporate, insolvency and employment law.

The German State Governments have also introduced measures for emergency liquidity relief on the individual state level.

The current measures at Federal and State level are divers and further evolving.

## 2 Funding and Liquidity Measures

### 2.1 FEDERAL LEVEL

#### 2.1.1 ECONOMIC STABILISATION FUND (ESF)

An economic stabilisation fund (ESF) was established with a volume of up to €600 billion, establishing an economic stabilisation fund to recapitalise companies through

- public guarantees;
- mezzanine and equity instruments;
- refinancing through the Kreditanstalt für Wiederaufbau (KfW) Special Program is aimed at medium-sized and large companies.

Short description:

- German state-owned economic stability fund (*Wirtschaftsstabilisierungsfonds, WSF*);
- Volume:
  - total volume of EUR 500 billion, which will offer guarantees for the financial indebtedness of large, strategically important companies and will have the ability to purchase equity in distressed companies;
  - EUR 400 billion is available for liquidity;
  - EUR 100 million for recapitalization; and
  - an additional EUR 100 billion available for refinancing through KfW Special Programs.

Applications to be filed and negotiated with the German ministry of economics (*BMWi*) and need to be approved by the German ministry of finance (*BMF*).

Measures under the ESF are available until 31 December 2021.

- Eligibility
  - restricted to companies that participate in the real economy (not financial institutions) (Realwirtschaft);
  - generally: large companies (as per the EU definition) are eligible and must fulfil two of the following three criteria based on financial statements in the last two financial years already closed on the balance sheet before 1 January 2020:
    - balance sheet of more than EUR 43 million;
    - more than EUR 50 million in total revenues per annum; and
    - a yearly average of 249 employees.
  - exception: SMEs with respect to guarantees and recapitalisation measures
    - critical to the German economy (within the meaning of the Foreign Trade Regulation);
    - sectors: healthcare, energy, food, transportation, telecommunications, IT, media, finance, insurance, and cloud computing;
    - companies that have been valued by private investors with an enterprise value of at least EUR 50 million in at least one completed financing round since 1 January 2017
  - prove that no other financing resources is available (i.e., liquidity is only available through KfW);
  - no financial distress before 31 December 2019 (according to the EU definition of “company in financial difficulty”) and clear going-concern prognosis.
- Available instruments under the ESF
  - guarantees with a total volume of EUR 400 billion for financial indebtedness of companies in order to support the refinancing of their respective instruments via senior debt instruments (i.e. bonds, loans, promissory notes) with a maturity of up to 60 months
    - volume of guarantees may range up to 100% of the credit risk;
    - anticipated to be granted on an arms’ length basis, nevertheless subject to state aid rules (*Beihilferecht*) and subject to approval of the European Commission;
  - direct investment / participation with a total volume of EUR 100 billion in equity or hybrid (e.g., bonds, convertible loans and silent participations).

## 2.1.2 LIQUIDITY ASSISTANCE VIA THE KREDITANSTALT FÜR WIEDERAUFBAU (KfW)

### 2.1.2.1 Background / Role of Kreditanstalt für Wiederaufbau (KfW)

The KfW is a German state-owned development bank, based in Frankfurt am Main, which serves as one of Germany's leading financiers of small and medium-sized enterprises (SMEs) and, in connection with the Covid-19 pandemic mitigation efforts, grants various loan schemes to companies to improve liquidity and to cover running costs.

### 2.1.2.2 Applications / Inquiries for Eligibility for KfW Support and Required Documents

- Application for KfW loans are submitted through the company` s regular commercial bank (*Hausbank*) or other finance partners, which may approach the KfW with inquiries regarding the eligibility.

### 2.1.2.3 KfW backed Loan Programs

General eligibility:

- registered seat of the company in Germany; and
- Covid-19 related criteria:
  - as of 31 December 2019: The company did not experience financial difficulties (i.e., it was able to obtain credit from financial institutions); and the company shows orderly financial conditions (i.e., the regular commercial bank had no knowledge of payment delays of the company for more than 30 days, any existing arrangements to defer payments (*Stundungsvereinbarungen*), or any covenant breaches);

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- as of the application date for the KfW backed loan based on current projections and with the assumption of a normalizing overall economic situation (as before the crisis), the company is reasonably expected to be fully financed by 31 December 2020; and under the assumption of a normalizing overall economic situation (as before the crisis), the company has a reasonable going concern.

KfW offers a broad range of relatively easily accessible and cost-attractive loan arrangements. In particular, these are:

- *ERP-Gründerkredit Universell* (ERP Universal Start-up Loan)
  - Eligibility:
    - young companies and freelancers (established less than five years ago);
    - arrangement that includes risk coverage of up to 80% of the input costs to a maximum amount of EUR 200 million;
    - new feature is the release from liability for large enterprises with an annual turnover of up to EUR 2 billion.
- KfW Unternehmerkredit (Entrepreneur Loan)
  - Eligibility:
    - existing enterprises (more than five years in the market) with no size limit;
    - available amounts:
      - maximum of EUR 1 billion per group
      - not more than 50% of the total group financing (if above EUR 25 million).
    - additional limits are
      - (i) 25% of net sales in 2019, or
      - (ii) 200% of personnel costs in 2019, or
      - (iii) liquidity need for the next 18 months for SME or 12 months for large companies.
    - guarantee coverage:
      - up to 90% for SME or
      - 80% for large companies.
    - Margins range of:
      - 1.0 - 1.46% p.a. for SME and
      - 2.0 - 2.21% p.a. for large companies.
- KfW Kredit für Wachstum (Loan for Growth)
  - Eligibility:
    - existing enterprises (more than five years in the market);
    - arrangement with an extended service scope: turnover ceiling for enterprises eligible to apply has been raised from EUR 2 billion to EUR 5 billion;
    - the programme previously limited to enterprises operating in the innovation and digital sectors has been expanded to availability to all companies by way of syndicated financing, without being restricted to a particular sector;
    - the risk coverage will be increased to 70% (previously 50%).

## 2.1.2.4 Direct Participation by KfW in Syndicated Loans

KfW also participates directly or as a member in syndicated financings. KfW's participation aims at increasing the company's chances of obtaining individually structured and tailor-made syndicated financing.

- Direct participation in syndicated loan financing based on market terms and financing available to the other banks or financing partners.
- No maximum loan amount applies.
- Risk sub-participation up to 80 percent of the risk, but not more than 50 percent of the total indebtedness of the company or refinancing options for participating banks through funding sub-participations.
- Companies with registered seats in Germany or foreign companies which seek financing for projects in Germany are eligible.
- Investments of German companies or their foreign subsidiaries outside Germany are not eligible.

- KfW's commitment is for working capital or investments with a maturity of up to six years, with a minimum commitment of EUR 25 million, but limited to 25 percent of the annual turnover for 2019, twice the labor costs for 2019, or current financing requirements for the next 12 months.

## 2.1.2.5 KfW Fast Loan for SMEs (*KfW-Schnellkredit 2020*)

After criticism for the practicability of the implementation of the KfW backed loans, where the regular commercial bank should assume at least 10 % of the risk, the German Federal Government wants to create a solution for healthy small and medium-sized enterprises that do not receive interim financing although their loss of sales and losses are caused by the Covid-19 pandemic. The programme is intended to protect economically sound medium-sized enterprises from corona insolvency.

- Application requirements:
  - enterprises with 10 to 250 employees;
  - active on the market at least since 1 January 2019;
  - profitable in 2019 or on average over the last three (3) years;
  - written assurance that the company was in good financial order and not in difficulty as at 31 December 2019;
  - before granting a loan, the house bank checks the number of employees, turnover and the profit actually generated. The loan is to be approved without further credit risk assessment by the house bank or the KfW. The loan is to be granted without a forecast of the future. It is a lending decision based solely on past data;
  - applications can only be submitted until 31. December 2020.
- Terms:
  - KfW exempts the regular commercial bank (*Hausbank*) from 100% of the liability, therefore no collateral is necessary. The regular commercial bank will only obtain a current Schufa information;
  - loan volume limited to three (3) months' turnover. For enterprises with up to 50 employees also EUR 500,000, for enterprises with more than 50 employees also EUR 800,000;
  - the loan can be drawn within one month of the commitment, draw down in tranches is possible;
  - the interest rate is currently fixed at 3% p.a. and may change in line with capital market developments;
  - credit term 10 years, repayment in equal instalments. A grace period of up to two (2) years should be possible. No early repayment penalty in the event of unscheduled or early repayment.
- Exclusions:
  - micro-enterprises with up to 10 employees and sole self-employed persons are not covered by the KfW Fast Loan. However, if the conditions are met, these enterprises can draw on the one-off payment under KfW emergency aid;
  - weaker-performing enterprises that were unable to generate a profit in 2019 and on average over the last three (3) years are excluded. However, it is precisely such enterprises that will have poor chances of receiving the remaining KfW loans, as the main bank is not released from 100% of the credit risks;
  - debt rescheduling or repayment of credit line drawdowns is not permitted;
  - profit distributions during the term of the loan are not permitted. This does not include the customary market remuneration of business owners;
  - the KfW Fast Loan may not be combined with other KfW loans or with instruments of the Economic Stabilization Fund;
  - the *KfW Schnellkredit 2020* is subject to approval by the EU Commission.

## 2.1.3 GUARANTEES TO SUPPORT LIQUIDITY

Additionally, guarantee programs are available in Germany.

- Guarantees for operating resources  
Exclusion of eligibility:
  - applicant company is in a restructuring case or
  - difficult financial situation emerged before the Covid-19 crisis.
  
- Scope:
  - guarantees up to EUR 2.5 million are processed directly by the responsible guarantor banks, and
  - guarantees over this ceiling will be processed by the federal states or their own public development institutions (in Baden-Württemberg, that is *Landesbank, Bürgschaftsbank BW* and in Bayern the *LfA Förderbank Bayern, Bürgschaftsbank Bayern*).
  
- In particular, the current guarantee terms and conditions have been changed against the background of the Covid-19 crisis as follows:
  - The maximum guarantee amount has doubled to EUR 2.5 million.
  - The ceiling on the share of operating resources in the total exposure of the guarantor bank has been increased to 50-80 percent.
  - Guarantor banks are allowed to make independent decisions regarding amounts up to EUR 250,000 within three days.
  - The large guarantee programme will also be opened for companies outside structurally less developed regions.
  
- Documents that are typically requested for the decision:
  - annual financial statements for 2018, preliminary figures for 2019/Management Analysis including a trial balance, and an informative calculation of capital requirements;
  - liquidity plan and profitability forecast (usually for guarantees > EUR 250 thousand);
  - voluntary self-disclosures.

## 2.1.4 SMALL FIRMS / SELF-EMPLOYED

The Federal Government is making available up to EUR 50 billion to provide emergency aid by way of (foremost) non-refundable grants for small businesses and self-employed individuals (Federal Emergency Aid Programme).

- One-off cash payments for small companies to bridge immediate liquidity gaps caused by the discrepancy of ongoing costs and loss of revenues;
- Range from EUR 9,000 for enterprises with up to five employees (FTEs) to EUR 15,000 Euro for enterprises with up to ten employees and will be paid over three months.

Update: Applications under the Federal Emergency Aid Programme were possible until latest 31 May 2020.

## 2.1.5 UPDATE: START-UP SUPPORT

Due to the de facto lack of access to traditional loan instruments provided by bank financing for start-ups, a support package of altogether EUR 2 billion in measures for young tech companies and small *Mittelstand* companies, was introduced. The package of measures is based on two pillars:



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## Pillar 1 - Corona Matching Facility (CMF)

- Designed to provide liquidity to portfolio companies or new investments of professional private venture capital funds (VC funds) in cooperation with KfW Capital or the European Investment Fund (EIF);
  - financing rounds are carried out by accredited private VC fund managers matched by public funds;
  - VC fund opts for a matching of either (i) existing portfolio companies or (ii) of portfolio companies and new investments (special purpose vehicle (SPV)).
- Prerequisites of eligible VC fund manager:
  - European VC fund manager;
  - independent VC fund manager (no CVC);
  - successful Due Diligence by KfW Capital / EIF. The aim is to ensure selective access to the programme based on quality features.
- Prerequisites of portfolio company:
  - is a highly innovative and forward-looking start-ups or young growth company;
  - has financing need during the Covid-19 crisis;
  - has a strong connection to Germany;
  - documentation of the financing round including shareholder resolution;
  - no majority shareholding by individual financial or strategic investors;
  - was not yet in financial difficulties as of 31 December 2019 (according to EU definition).
- Matching:
  - the funds invested by an accredited VC fund are generally matched *pari passu* with 50 % CMF funds (the matching quota);
  - the VC fund can choose a separate lower or higher matching ratio per investing scheme for existing and new investments;
  - the maximum selectable matching quota is 70 % and the matching quota for new investments may not exceed that for existing investments;
  - the CMF's percentage in each financing round may not exceed 50 %. However, if additional non-matching investors participate in the financing round, the matching quota of the VC fund can be increased until a maximum of 50 % CMF funds are invested.
  - State aid (*Beihilfe*) rules must be observed.
- Application by VC fund manager possible since 14 May 2020 to either KfW Capital or EIF.
- Instruments
  - convertible loans or equity contribution;
  - VC fund determines form and time of the exit (exit, conversion, repayment).
- Terms:
  - standardized CITAs (Co-investment and Trust Agreement between VC fund and KfW Capital or EIF, in which the accredited VC fund (General Partner) acts as trustee of the federal funds), no fees, no carry;
  - processing of the application and signing of the financing documents until 31 December 2020;
  - retroactive inclusion of CMF funds from 2 February 2020 (if documented accordingly in the documentation).

## Pillar 2 - for Start-Ups and small enterprises (with no access to pillar 1)

- In close cooperation with the German States, in particular with the state development banks (*Landesförderbanken*) to open up access to well established networks of state

funding agencies and regional investment companies; further details were not yet available at the time of this Update.

- Risk sharing model expected where the German Federal Government shares the risk with the state development banks and private investors; details unclear at the time of this Update;
- The public sector can provide up to EUR 800,000 per funding in public funds in accordance with state aid law as approved by the EU Commission.

In addition, public financiers are to be put in a position to use public funds to take over shares from defaulting fund investors.

## 2.1.6 UPDATE: CONSULTANCY SERVICES

- Eligibility: small and medium-sized enterprises (SMEs) and freelancers;  
Scope: funding for professional consultancy services, i.e.
  - general advice on damage limitation (such as purchasing alternative upstream products; modifying the work flow to facilitate remote work); or
  - advice on how to generate new income (e.g. online sales channels).
- Amount: maximum EUR 4,000 without having to contribute financially.

## 2.2 STATE LEVEL

Each German State has introduced mitigation programs consisting of emergency ad hoc liquidity help in the form of grants (*Sofortprogramm*), loan programs and guarantees. Which State program is accessible depends on where the company has its registered seat and whether it then meets the particular requirements of the individual State programs. An overview of the emergency programs in German can be obtained here: <https://www.roedl.de/themen/covid-19/uebersicht-zu-hilfsprogrammen-im-zusammenhang-mit-der-corona-krise>.

Update: Current application dead-lines should be checked, i.e. applications under the Bavarian Emergency Aid Programme ("Corona Emergency Aid") were possible until latest 31 May 2020.

## 3 Tax

The German Federal Government has decided to take a number of tax relief measures in order to improve the liquidity situation of companies facing financial difficulties as a result of the Covid-19 crisis and through no fault of their own. The relief measures apply specifically to personal income tax, corporate income tax and value-added tax. In addition, there is also responsiveness on the part of customs authorities. Anyone who defers taxes does not have to pay interest or to fear enforcement. Late payment fines have also been waived. Applications for deferral of trade tax are processed at the respective municipality level.

In general, a simplified form for the applications is available on the website of the competent tax offices.

### 3.1 DEFERRAL (STUNDUNG)

- Deferrals can be granted for payment of taxes on income (personal income tax, corporate income tax, solidarity surcharge, trade tax) and value-added tax. No deferrals will be granted for withholding taxes (payroll tax and capital gains tax).

## 3.2 ADJUSTMENT ADVANCE PAYMENTS (ANPASSUNGEN VORAUSZAHLUNGEN)

- Tax authorities were instructed to simplify the procedure for adjustment of the advance tax payments by the taxpayer where it is foreseeable that sales or income of the taxpayer company for this year will be lower than assumed previously because of the Covid-19 crisis. Here too, the aim is to enable the companies to maintain better liquidity by reducing their tax advance payments quickly and easily.

## 3.3 ENFORCEMENT MEASURE (VOLLSTRECKUNGSMABNAHMEN)

- If a company has been directly affected by Covid-19, tax authorities waive their enforcement measures (such as account seizure or late payment fine) until 31 December 2020. Moreover, no interest will be accrued on tax arrears until further notice. This is intended to prevent companies from additional loss of their liquidity, which is necessary for the survival of their operations during the crisis, as result of collecting the tax amounts they cannot afford to pay in the short term.

## 3.4 UPDATE: PERMANENT EXTENSION OF THE VALUE ADDED TAX (VAT) PAYMENT DEADLINE (DAUERFRISTVERLÄNGERUNG)

- Companies benefitting from a permanent extension of the VAT payment deadline (*Dauerfristverlängerung*) which can prove that they are directly and not insubstantially affected by the current Covid-19 crisis can submit an application to the competent Tax Office (*Finanzamt*), which can then reduce the VAT special advance payment amounts payable in 2020 in part or in full, and therefore effectively refund payments that have already been made. The permanent extension of the VAT payment deadline will remain unaffected by this. Entrepreneurs who are directly and not insubstantially affected by the coronavirus crisis and have not yet applied for a permanent extension of the VAT payment deadline (*Dauerfristverlängerung*) may apply for this extension with the competent Tax Office.

## 3.5 UPDATE: CORONA TAX AID

- The Act on the Implementation of Fiscal Assistance Measures to cope with the Corona Crisis (Corona Tax Aid Act) (*Gesetz zur Umsetzung steuerlicher Hilfsmaßnahmen zur Bewältigung der Corona-Krise (Corona-Steuerhilfegesetz)*) provides that:
  - from 1 July 2020 to 30 June 2021 the VAT tax rate on meals in the restaurant and catering trade (including food retailers, butchers and bakeries, insofar as they would have previously generated turnover at the normal VAT rate by supplying ready-to-eat meals) is only 7 instead of 19 %. Drinks are excluded from such tax reduction;
  - tax-free allowances for short-time work compensation;
  - tax-free Corona Bonus (*Corona Prämie*) of up to EUR 1,500.00;
  - extension of parents' entitlement to compensation for loss of earnings resulting from the care of their children and the associated loss of working hours during the Covid-19 pandemic. The entitlement will be valid for 10 weeks instead of 6 weeks, and 20 weeks for single parents. The stipulations on loss of earnings apply retroactively to 20 March 2020.
- The Corona Tax Aid Act becomes effective upon publication in the Federal Gazette (*Bundesanzeiger*), which is expected to happen shortly.

## 3.6 OTHER

- In addition to the above measures, the General Directorate of Customs has been instructed to be more flexible in meeting the needs of taxpayer companies in the case of taxes for which the customs administration is directly responsible (for example energy tax or air transport tax) in order to enable these companies to maintain their liquidity. The same applies to taxes which are the responsibility of the German Federal Tax Office (*Bundeszentralamt*), such as insurance tax or value-added tax.

- Update: Aid deliveries/donations of medical supplies are exempted from import levies as a way to support efforts to combat the Covid-19 pandemic. The Central Customs Authority (*Bundeszollverwaltung*) has been instructed to start applying these measures immediately after the measure was approved by the European Commission.

## 4 Corporate and Insolvency Law

### 4.1 CORPORATE LAW

#### 4.1.1 STOCK CORPORATION LAW (*AKTIENRECHT*)

##### 4.1.1.1 Annual General Meetings (*Hauptversammlungen*) of German Stock Corporations (*Aktiengesellschaften, KGaA, SE*)

Short description:

- Simplification of Annual General Meetings (*Hauptversammlungen*), possibility of a "virtual" annual general meeting
- Minimum period of notice for convening meetings is reduced from 30 to 21 days;
- The Management Board may, without authorization from the Articles of Association, resolve to pay out to the shareholders a discount on the net profit
- Possibility of convening the Annual General Meeting throughout the year to receive the annual financial statement;
- Restriction of the shareholders' right of contestation (*Anfechtung*);
- Approval by the Supervisory Board of decisions associated with the law by resolution without physical presence.

##### 4.1.1.2 Capital Measures (*Kapitalmaßnahmen*) in Connection with Stabilisation Measures of the ESF

Short Description:

- Simplification for various types of capital measures in companies in the real economy (*Realwirtschaft*).

#### 4.1.2 LIMITED LIABILITY COMPANIES (*GMBH*)

##### 4.1.2.1 Shareholder Resolutions (*Gesellschafterversammlungen*)

Short description:

- Despite the lack of a basis in the Articles of Association, shareholder resolutions can now be passed in text form or by written vote without the consent of all shareholders. Existing quorum and/or majority regulations remain unchanged.
- As a result, circulation procedures (*Umlaufverfahren*) - even without the usual provision in the Articles of Association - are currently permissible with the approval of a majority of the shareholders' votes.

##### 4.1.2.2 Capital Measures (*Kapitalmaßnahmen*) in connection with Stabilisation Measures of the ESF

Short description:

- Relief for various types of capital measures in connection with stabilisation measures of the Economic Stabilisation Fund in companies in the real economy (*Realwirtschaft*).

#### 4.1.3 MERGERS, DEMERGERS & OTHER TRANSFORMATIONS (*UMWANDLUNGSVORGÄNGE*)

Short description:

- The deadline for submitting a balance sheet to the Commercial Register for mergers (*Verschmelzungen*) and demergers (*Spaltungen*) is extended from eight to twelve months.

- The final balance sheet (*Schlussbilanz*) required for such transformation measures may be up to 12 months old when the transformation documentation is filed with the Commercial Register, instead of 8 months.

The following time limits apply:

- Annual general meetings (*Hauptversammlungen*) and advance payments on the balance sheet profit which take place in 2020.
- Shareholders' meetings (*Gesellschafterversammlungen*) and resolutions which take place in the year 2020.
- registrations for transformation measures (*Umwandlungsvorgänge*) made in 2020.

The Federal Ministry of Justice and Consumer Protection is authorised to extend the validity by statutory order without the consent of the Bundesrat until 31 December 2021 at the latest, if this appears necessary due to the continuing effects of the Covid-19 pandemic in the Federal Republic of Germany.

## 4.2 INSOLVENCY LAW

### 4.2.1 CHANGES TO THE GERMAN INSOLVENCY ACT

Short description:

- Suspension of obligation to file for insolvency: Under German law, managing directors are required to file for insolvency within three weeks after the occurrence of an insolvency event, e.g. becoming over-indebted (*überschuldet*) or illiquid (*zahlungsunfähig*).
  - From 1 March 2020 onwards, the obligation to file for insolvency (*Insolvenzantragspflicht*) in case of illiquidity (*Zahlungsunfähigkeit*) based on the provisions of the German Insolvency Act (*InsO*) is suspended for the period up until 30 September 2020, unless (i) the cause for insolvency has not been caused by the Covid-19 pandemic or (ii) there is no prospect of improvement of the current financial situation.
  - For businesses that have been solvent as of December 31, 2019, it is assumed by statutory law that the later insolvency situation was caused by the Covid-19 pandemic and the removal of the illiquidity situation is promised by the improvement measures taken.
- Limitation of liability of managing directors:
  - Payments made by managing directors in order to ensure the continuation of the business during the suspension period are deemed to be made with the prudence of a diligent businessperson, which excludes potential personal liability.
- Liquidity by loans granted after 1 March 2020:
  - In order to facilitate new financings, liability risks of lending shareholders or third-party lenders and clawback risks for repayments in a later insolvency scenario have been reduced.
  - Repayments and granting of collateral for new loans granted during the Suspension Period shall not be deemed to be detrimental acts vis-à-vis other creditors if the repayment is effected until 30 September 2023.
  - New shareholder loans granted until 30 September 2020 are not deemed subordinated if the repayment will be effected as of 30 September 2023. The repayment will not be regarded as detrimental to creditors.
  - The granting of new collateral for shareholder loans however is excluded therefrom and may still be deemed as detrimental to creditors, even if granted until 30 September 2020.
- The right of creditors to file for insolvency is limited until 28 June 2020 unless the cause for insolvency occurred on or before 1 March 2020.

The intention is to help companies bridge the time period until they can actually receive funding from the available support programmes. The Federal Ministry of Justice (BMJ) is authorized to prolong this suspension until latest 31 March 2021.

## 4.2.2 CHANGES REGARDING THE GERMAN INSOLVENCY LAW IN CONNECTION TO THE ESF

Short description:

- Legal acts in connection with stabilisation measures cannot be challenged under insolvency law at the expense of the fund, the federal government, etc..
- The insolvency law provisions on shareholder loans do not apply with regard to the stabilisation measures.
- The legal principles of hidden contributions in kind (*verdeckte Sacheinlage*) do not apply.

## 5 Civil and Commercial Law

### 5.1 COMMERCIAL RENTAL AND LEASE AGREEMENTS

- Restriction on commercial landlords to terminate commercial rental agreements due to rental debts from the period 1 April 2020 until 30 September 2020, if the non-performance is due to the effects of the Covid-19 pandemic. The tenant must substantiate the causal connection between the pandemic and the non-performance.
- Both immediate and ordinary termination are excluded.
- However, the tenant is still obliged to pay rent and interest (in case of default), as well as damages which the landlord suffers as a result of delays in payment.
- Arrears must be settled by 30 June 2022.
- The contract may be cancelled after 30 June 2020 in case arrears occurred between 1 April 2020 and 30 June 2020 and have not been settled by 30 June 2022.
- In case of a closure by official order, a statutory provision relating to frustration of contract (Sec. 313 of German Civil Code [*Bürgerliches Gesetzbuch, BGB*] (*Wegfall der Geschäftsgrundlage*)) may be an instrument to suspend or adjust lease payments.

### 5.2 UPDATE: EXPORT CREDIT GUARANTEES

The aim of the scheme is to ensure that trade credit insurance continues to be available to all businesses so that buyers of goods and service customers do not have to pay in advance and, thus, reduce their immediate liquidity needs.

- The German Federal Government continues to grant export credit guarantees (*Hermes Cover (Hermesbürgschaften)*) for exports to China or corona virus risk areas after the approval of the European Commission on 14 April 2020.
- The approved guarantee mechanism, which is open to all credit insurers in Germany, provides for risk sharing between the insurers and the State up to a volume of EUR 5 billion and, if necessary, offers an additional safety net that can cover up to EUR 30 billion.
- It also covers trade credits for buyers of goods and services in third countries.
- Previous cover commitments are not affected.
- In return, the trade credit insurers have made a commitment to Germany that they will maintain the current level of protection despite the difficulties faced by companies in the Corona crisis. The guarantee granted by Germany is limited to trade credits granted until the end of this year.
- In addition, the "List of Marketable Risks" was deleted until 31 December 2020 to make up for potential bottlenecks in the private market for export-credit insurance:
  - export credit guarantees can now also be granted for export transactions on short payment terms (up to 24 months);
  - for EU countries and some OECD countries (Australia, Iceland, Japan, Canada, New Zealand, Norway, Switzerland, USA and the United Kingdom).

## 6 Employment Law

### 6.1 SHORT TIME WORK (KURZARBEIT)

- Option for employers to cut personnel costs in the short term in order to avoid redundancies. The weekly working hours are reduced (up to zero) for a certain period which of course leads to the employees' salary being reduced.
- To compensate the employee for the (partial or total) salary loss, the Federal Labor Agency (*Bundesagentur für Arbeit*) will pay a certain percentage (60% or 67%) of the employees' net salary loss during the entire short time work period, the so-called short-time work compensation (*Kurzarbeitergeld*) and is reimbursed by the relevant labor agency to the employer who in turn pays it to the employees via the usual payroll.

#### 6.1.1 NEW REGULATIONS FOR SHORT-TIME WORK (KURZARBEIT)

- Effective 1 March 2020, it was made easier for employers to apply for short-time work compensation and by providing additional financial support.
- A company can apply for short-time work if 10 % of its employees are affected by a loss of working hours. Previously, at least one-third of the employees had to be affected.
- Employees do not have to build up minus hours before short-time work benefits can be paid.
- Normally, the payment of short-time work compensation is limited to 12 months – now it can be extended up to 21 months, if a company has introduced short-time working until December 31, 2019, and has notified the employment agency (measure ends latest 31 December 2020).
- Update: temporarily since 25 May 2020 and until 31 December 2020, if employees work 50 % or less due to the current situation the short-time work compensation is increased. From the 4th month of reference, the short-time work compensation is increased up to 70 % (or 77 % for households with children) and from the 7th month to 80 % (or 87 %). Up to the level of the original income, additional income can be earned in all occupations in the future.

#### 6.1.2 APPLICATION FOR REDUCED WORKING HOURS (KURZARBEIT)

- The employer must file a formal written request with the local labor agency. The general short-time work conditions are:
  - a considerable loss of work leading to the loss of salary due to either an economical reason or an inevitable event (e.g. the Covid-19 crisis), which occurs temporarily and is unavoidable;
  - at least 10% of the employees employed at the local business site are affected by a loss of salary of more than 10% of their monthly gross salary in the respective calendar month; and
  - at least one employee must be employed at the operation or operational unit affected by short-time work.
- The employer will typically advance the short-time allowance, which is then reimbursed by the relevant employment agency.
- Social security contributions will in the case of reduced working hours be covered by the Federal Employment Agency.
- Cut-off period for this application: three months after the end of the month that includes the days that the short-time allowance applies to. In the case of longer periods of short-time work, the benefit application must therefore be submitted monthly.

## 6.2 COMPENSATION OF SALARY IN CASE OF CHILDCARE

- If parents are not available to work because they have to look after their children under twelve (12) years of age due to closed schools/daycare, they may stay at home, and will receive 67% (max. EUR 2,016) of their monthly net income for up to six weeks.
- The employer may apply for reimbursement to the competent state authority.
- Overtime credits and vacation time need to be exhausted.

## 7 Update: Foreign Direct Investment Control

Due to the Covid-19 pandemic, the Fifteenth Amendment to the German Foreign Trade and Payments Ordinance (15<sup>th</sup> Amendment AWW) [*Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, 15. AWW-Novelle*], which focuses on the health sector, was fast-tracked and entered into force 3 June 2020.

Key elements of the amendment are:

- Extension of the notification obligation (Meldepflicht) to investments in the fields of pharmaceuticals, medical devices, protective equipment and in vitro diagnostics
  - catalogue of companies with particular security relevance includes i.e.
    - vaccine and antibiotics manufacturers;
    - manufacturers of medical protective equipment (PPE);
    - manufacturers of medical goods for the treatment of highly infectious diseases.
  - the acquisition of such companies, as well as share acquisitions above a threshold of 10 %, must in the future be notified immediately (upon the signing of a contract) to the Federal Ministry of Economics (BMW);
  - the BMWi may then open an investigation and can prohibit the acquisition or make a clearance decision subject to conditions.
- In addition to the above, the 10 % notification threshold will in the future also apply to companies providing services necessary to ensure the functioning of government communication infrastructures of the Federal Agency for Public Safety Digital Radio (*Bundesanstalt für den Digitalfunk der Behörden und Organisationen mit Sicherheitsaufgaben (BDBOS)*).
- Precision of the prohibition criterion (“threat to public order or public security”);
  - the amendment clarifies that the German Government may take investor-related factors into account when assessing transactions;
    - the acquirer is directly or indirectly controlled by the government (including other governmental bodies or armed forces of a third country), in particular by virtue of its ownership structure or in the form of more than non-significant financial resources;
    - the purchaser has already been involved in activities which have had an adverse effect on the public order or security of the Federal Republic of Germany or another Member State of the European Union; or
    - there is a considerable risk that the acquirer or persons acting on his behalf were or are involved in activities which would constitute certain criminal offences or administrative offences in Germany (including money laundering, fraud, bribery or corruption, breach of foreign trade regulations, etc.).
  - this specification is to apply to both cross-sector and sector-specific investment control.
- Clarification of investment control for asset deals
  - a separable business unit of a domestic company; or
  - all essential operating resources of a domestic enterprise or a delimitable part of an enterprise of domestic origin which are (i) necessary for the maintenance of the operation of the enterprise or (ii) a delimitable part of an enterprise.



Further changes to the German FDI regime are expected later in 2020 in connection with the implementation of the EU Screening Regulation.

## 8 Update: Further Announced Measures

On 3 June 2020 the coalition partners in the German Federal Government announced a key issues paper on a comprehensive economic and crisis management package. The planned measures include the following (not exhaustive):

- Tax Law:
  - reduction of the VAT rate from 19% to 16% and from 7% to 5% (from 1 July 2020 until 31 December 2020);
  - postponement of the of dead-line of the import turnover tax to the 26th of the following month;
  - introduction of a model to opt for corporate income tax (*Körperschaftsteuer*) for partnerships.
- Company Law:
  - employee participation: improvement of opportunities for employees to participate, with the explicit aim to address the special situation of Start-Ups.
- Insolvency Law:
  - introduction of a pre-insolvency restructuring process for corporate insolvencies.
- Employment Law:
  - extension of short-time work compensation scheme starting 1 January 2021.
- Cross-industry liquidity measures for small and medium-sized enterprises (*Überbrückungshilfen*) up to maximum EUR 25 bn in volume for the period of June to August 2020, taking appropriately into account the particularly affected sectors, i.e. hotel and catering industry, caterers, pubs, clubs and bars, facilities for the disabled, travel agencies, showmen, event logistics companies and companies in the area surrounding trade fairs.

## 9 List of New Laws

Law establishing an economic stabilisation fund (ESF) (Economic Stabilisation Fund Law (ESFL)) (*Gesetz zur Errichtung eines Wirtschaftsstabilisierungsfonds (Wirtschaftsstabilisierungsfondsgesetz – WStFG)*)

Law on Measures in Corporate, Cooperative, Association, Foundation and Residential Property Law to Combat the Effects of the Covid-19 Pandemic (*“Gesetz über Maßnahmen im Gesellschafts-, Genossenschafts-, Vereins-, Stiftungs- und Wohnungseigentumsrecht zur Bekämpfung der Auswirkungen der Covid-19-Pandemie”*)

Act to Accelerate and Simplify the Acquisition of Shares in and Risk Positions of Companies in the Financial Sector by the "Financial Market Stabilisation Fund - FMS" Fund (FMSF) (*Gesetz zur Beschleunigung und Vereinfachung des Erwerbs von Anteilen an sowie Risikopositionen von Unternehmen des Finanzsektors durch den Fonds "Finanzmarktstabilisierungsfonds - FMS" (Wirtschaftsstabilisierungsbeschleunigungsgesetz - FMStBG)*)

Covid-19 Insolvency Suspension Act (COVInsAG) (*Covid-19-Insolvenzaussetzungsgesetz - COVInsAG*)

Law to mitigate the consequences of the Covid-19 pandemic in civil, insolvency and criminal procedure (*Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht*)

Act on the temporary crisis-related improvement of the regulations for short-time work compensation (*Gesetz zur befristeten krisenbedingten Verbesserung der Regelungen für das Kurzarbeitergeld*)

Federal Government Regulation on the facilitation of short-time work (*Verordnung über Erleichterungen der Kurzarbeit*)

Update:

Act on the Implementation of Fiscal Assistance Measures to cope with the Corona Crisis (*Gesetz zur Umsetzung steuerlicher Hilfsmaßnahmen zur Bewältigung der Corona-Krise*) (draft as of 5 June 2020)

Ordinance on the duration of short-time working allowance (Kurzarbeitergeldbezugsdauerverordnung - KugBeV (*Verordnung über die Bezugsdauer für das Kurzarbeitergeld (Kurzarbeitergeldbezugsdauerverordnung - KugBeV)*)

Law on social measures to combat the corona pandemic (Social Protection Package II) (*Gesetz zu sozialen Maßnahmen zur Bekämpfung der Corona Pandemie (Sozialschutz Paket II)*)

Law on mitigating the consequences of the Covid 19 pandemic in competition law and for the area of the self-governing organisations of the commercial sector of the German Federal Government (*Gesetz zur Abmilderung der Folgen der Covis-19-Pandemie im Wettbewerbsrecht und für den Bereich der Selbstverwaltungsorganisationen der gewerblichen Wirtschaft der deutschen Bundesregierung*)

Fifteenth Amendment to the German Foreign Trade and Payments Ordinance (*Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, 15. AWV-Novelle*)

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