

DWF Germany

COVID-19 Legal Guidance

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Introduction

The COVID-19 challenge

On **12 March 2020**, the WHO declared the corona virus **COVID-19** a pandemic. Governments around the world are imposing unprecedented travel and movement restrictions and measures that are affecting the globalised economy.

In Germany, government authorities have taken restrictive measures, including closing public day care centres and schools, banning restaurant visits, cancelling events and closing businesses. Companies are facing business interruptions which are being implemented as a precautionary measure to slow down the spread of COVID-19.

“ It's serious. Since German unification, no, since the Second World War, there has not been a challenge to our country that depends so much on our joint solidarity.

Angela Merkel in her television address on 18 March 2020
Chancellor of the Federal Republic of Germany

What you find in this legal guidance

The COVID-19 pandemic raises numerous legal questions. With this handout, we would like to give enterprises some practical guidelines for dealing with these legal issues in the following key areas:

- Corporate Governance
- Employment Matters
- Public Law
- Real Estate
- Finance / Insolvency
- Customer and Supplier Relations

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Corporate Governance



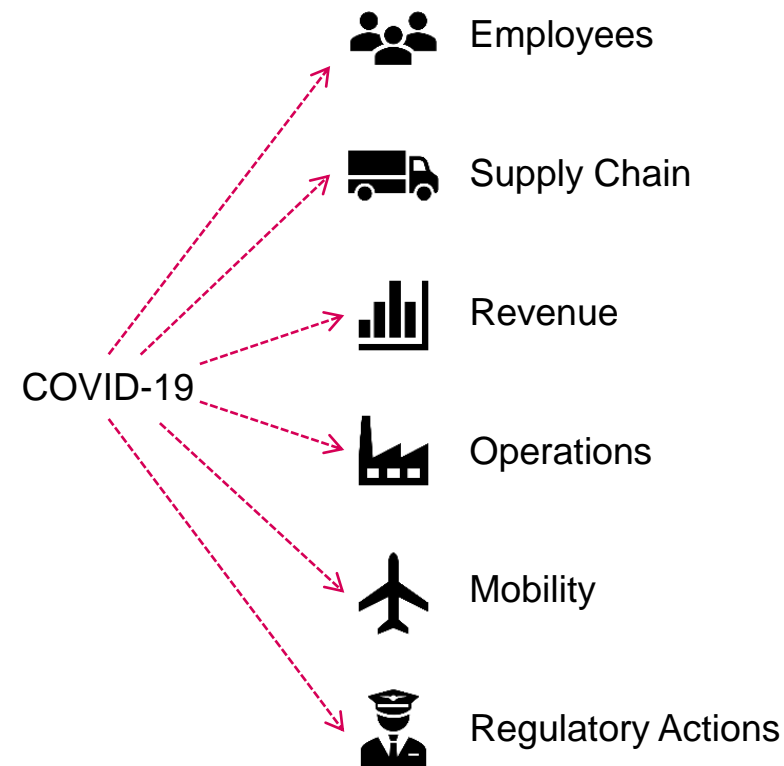
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1. Management Responsibility

It is currently difficult to estimate the long-term economic impact of the COVID-19 pandemic. What is certain, however, is that the pandemic will have a severe impact on enterprises already from a short-term perspective.

One of the central tasks of the management of every enterprise is to identify and assess the business and operational risks associated with the current situation, in this case the COVID-19 pandemic, and to take appropriate crisis management measures. This responsibility ensues in the first place from the obligation imposed on company boards and managing directors to manage companies with the due care of a prudent businessperson. In the second place, it results from numerous other provisions of employment law, public law, civil law and, last but not least, insolvency law.



2. Measures for Crisis Management

Setting up a crisis management team

The COVID-19 pandemic is creating a volatile environment that cannot be managed with day-to-day business resources.

Even medium-sized companies are hardly able to react to the massive restrictions on economic activity associated with the pandemic (especially due to curfews, travel bans, quarantines, people staying at home) in an effective manner with decentralized departments. Therefore, we recommend setting up a crisis management team.

Crisis management concept

The main task of the crisis unit should be to formulate a stringent concept for dealing with a corporate crisis triggered by the COVID-19 pandemic.

Such concept should include a description of the technical and organizational measures required to ensure business continuity as well as a management plan of key measures aimed at preventing or containing the crisis.

Quick-Check

Organising a crisis management team

- Determine team members and management structures
- Define competencies and tasks
- Channel information flows within the team
- Ensure fail-safe technical infrastructure and resources

Developing a crisis management concept

- Identify key resources for continued operation
- Identify key functions and know-how carriers
- Define fallback measures in case of failure of key resources
- Manage work and business processes
- Liquidity Management
- Set up communication plan
- Check and draw up contact lists
- Institute alarm management
- Establish a contingency plan in case of default of the company owner

3. Corporate Decisions



New legislation

Decisions of shareholders are made in shareholders' meetings, which generally require the presence of the shareholders at the meeting place. In order to avoid contagion in the COVID-19 pandemic, the new German Act to Mitigate the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedural Law that will soon come into force provides for new regulations on decision-making "at a distance".

After the law comes into force, the new regulations are to apply to general meetings, shareholders' meetings, general meetings and representatives' meetings as well as members' meetings to be held in the year 2020.

The main changes for joint stock corporations and limited liability companies are shown opposite.

Important new provisions at a glance

Joint stock company

- The Board of Directors can decide that shareholders have to exercise their rights to participate and to vote in general meetings by means of electronic communication without need of authorization by the Articles of Association or Internal Rules of Procedure
- The Board of Directors can decide that general meetings will be held exclusively in a virtual meeting
- Shortening of the notice periods for convening the Annual General Meeting and for providing evidence of share ownership
- The Board of Directors may decide to hold the Annual General Meeting within the current fiscal year

Limited liability company

- Shareholders' resolutions may also be passed in text form or in writing without the consent of all shareholders (deviation from section 48 para. 2 of the German Act on Limited Liability Companies)

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Employment Matters



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1. Information Obligation towards Employees

Without any suspicion of an infection?

- Even without a suspicious case in the company, the employer is obliged to inform the employees about symptoms of COVID-19 on the basis of information from the Robert Koch Institute or the Federal Centre for Health Education.
- Data protection: Employer has no right to request employees to disclose their stays in the last 14 days or to demand information on symptoms of illness.
- However, the employee has a contractual secondary obligation to inform the employer about circumstances that lead to an increased risk of COVID-19 infection.

What in case of a suspicion of infection?

- In case of suspicion of contagion, the employer has a duty to inform in order to quickly identify and clarify contact persons.
- Data processing is justified according to Art. 6 para. 1 lit. b), d) and f) GDPR, since protection against further spread of contagion outweighs the employee's interest in secrecy (Art. 9 para. 1 GDPR in conjunction with Art. 26 para. 3 BDSG).
- **BUT:** No obligation of employer to notify the authorities.

2. Home Office

Can the employer ask employees to work in home office?

- Depends on whether there is a contractual agreement.
- Under certain circumstances, unilateral instructions are possible due to the right of direction according to § 106 GewO.
- Employer must ensure technical equipment and connection possibilities.
- Provision of IT infrastructure for many employees in a short time a great challenge for companies.

Can employees insist on working from the home office?

- No entitlement of the employee to home office.
- If the employer does not agree, the employee must come to the company - otherwise there is a risk of consequences under labour law.
- **Exception:** State authorities qualify infection risk with a certain danger level or employees prove that there is a concrete risk of infection at their workplace.
- **In practice:** In view of government measures (company closures, exit restrictions, closure of schools and kindergartens), there is hardly any other choice than to enable home office.

3. Business Travel and Private Travel

Can employers instruct employees to go on a business trip?

- Instructions for business trips by the employer are possible on the basis of an employment contract.
- Also applies with regard to internal meetings.
- However, exercise of right to issue instructions is limited to what appears reasonable (section 106 GewO), weighing of interests of the company versus interests of the employee.
- Also protection of the health of workers by virtue of their duty of care.
- Instruction to travel is unacceptable if to country for which a travel warning has been issued by the Foreign Office.
- Due to COVID-19 no instruction to business trips to risk area.
- **In practice:** given the current travel restrictions in most countries, the question does not arise at present.

How to deal with employees who return from a risk area?

- Release of employees with continued payment of remuneration due to duty of care towards other employees for the duration of the incubation period (current status: 2 weeks) or
- Instruction to work in the home office.
- Taking precautionary care measures (e.g. provision of disinfectants; reminding employees to wash their hands regularly, to avoid unnecessary hand-shaking and to observe the so-called coughing guidelines; regular cleaning and disinfection of surfaces and sanitary facilities).
- **BUT:** No right to ask about the last private trips abroad (although employees are obliged to inform themselves); no right to prohibit private trips (even to risk areas).

4. Short-Time Work

General information:

- Facilitated by amendment to the law as of 13 March 2020.
- Short-time work = partial or complete reduction of working hours with a corresponding reduction in remuneration.
- Compensation of the employees' missing earnings partially through the short-time work allowance paid by the Federal Employment Agency.
- Amount: 60-67 % of the lump sum net salary difference.
- Federal Employment Agency can pay social security contributions in full (NEW).
- **ATTENTION:** Introduction of short-time work requires a legal basis under labour law (collective agreement, works agreement, employment contract/individual agreement).

Key prerequisites:

- Significant loss of work that is temporary and due to economic reasons or unavoidable event.
- Minimum level of loss of work: 10% of the employees of an operational unit affected (NEW; previously 1/3).
- Company: at least one person employed under social security legislation.
- Personal: employed, subject to social security contributions and not dismissed under social security law (not: marginal part-time employees and trainees).
- Subscription period: 12 months (can be extended by the Federal Ministry of Labour and Social Affairs to up to 24 months).

4. Short-Time Work

Key prerequisites

- Procedure: first of all, notification of the loss of working hours by the end of the calendar month to the employment agency in whose district the operational unit has its registered office, then written notification from the employment agency that the requirements have been met (to be issued without delay), then application for short-time work compensation to the employment agency in whose district the payroll accounting office is located
- **TIP:** Use forms from the Federal Employment Agency.

5. Termination of Employment

Termination for conduct reasons

- E.g., employee refuses to work for fear of contagion.
- The general rules apply:
 - If the Dismissal Protection Act is not applicable (usually less than 10 employees in the business unit), the employer only has to comply with the notice period and formal requirements (written form “wet ink”) and can terminate the contract.
 - If the Dismissal Protection Act is applicable, the employer needs a reason for the dismissal that justifies it socially. Persistent refusal to work for fear of infection could be a behavioural reason.
- **BUT:** It will most likely be necessary to issue one or more warnings to the employee before termination.

Termination for operational reasons

- Permissibility of dismissals for operational reasons depends on the individual case and the general rules apply.
- If the Dismissal Protection Act is applicable, a considerable loss of productivity is generally suitable to justify dismissal for urgent operational reasons.
- **BUT:** jobs must be lost permanently, which seems questionable in the case of a temporary COVID-19 crisis; short-time work may be a milder remedy
- In companies with more than 20 employees, prior notification of mass dismissal may be required before notice of termination is given.
- If works council exists, consultation before notice of dismissal is given and, if necessary, negotiations on reconciliation of interests and social plan (takes time!).

6. Social Protection Bailout from 25 March 2020

The German Parliament passes social protection bailout:

- No crediting of remuneration from secondary employment against short-time working compensation in system-relevant sectors and professions limited until 31 October 2020 (limit: target remuneration from main job)
- Authorisation to issue regulations in the Working Time Act for the Federal Ministry of Labour for nationwide special working time regulations.
- Increase in supplementary income limit for pensioners from EUR 6,300 to EUR 44,590 (limited until 31 October 2020).
- Compensation for loss of earnings under the Protection Against Infection Act for parents who have children under 12 years of age due to closure of schools and kindergartens and need to take care of them.

Approval of the German Federal Council required:

- The German Federal Council still has to approve the social protection bailout on 27 March 2020.

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Public law



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1. Reporting Obligations

Statutory reporting obligations

The Federal Ministry of Health and the individual federal states of Germany issued a so-called “Corona Notification Ordinance”. This ordinance provides for extended reporting obligations regarding an infection with COVID-19.

Events triggering the statutory reporting obligation

The obligation to notify exists in the following cases:

- in case of suspected illness,
- in the presence of direct or indirect indications of an acute infection,
- in the event of death of a person infected with the virus.

Persons and organisations subject to reporting obligations

The following persons and organizations are required to report throughout Germany:

- Doctors, members of the nursing and medical professions (especially nursing staff), veterinarians, alternative practitioners,
- Medical practices, hospitals, community facilities, nursing homes, refugee accommodation, homeless facilities, prisons, outpatient care services,
- Laboratories,
- Health authorities,
- Persons in the emergency and rescue service, if the patient was not immediately taken to a medically managed facility (e.g., hospital) and if a doctor was not consulted.

2. Quarantine Orders

In general

Governmental authorities, in particular the local health authorities, can take appropriate measures, in particular quarantine in accordance with section 28 of the Infection Protection Act, against persons who are suspected of being infected.

3. Orders for Shutdown of Business

General decrees of governmental authorities

- Due to the competence of the federal states, the respective orders differ in their concrete form, especially with regard to their scope and duration as well as with regard to the acting governmental authorities.
- In most cases, the orders were issued as general decrees (“Allgemeinverfügungen”) by local governmental authorities. These were mostly based on section 28 of the German Infection Protection Act (Infektionsschutzgesetz - IfSG) and in part on the basis of section 16 IfSG.

Which organizations and businesses are the most affected?

At present, there are various nationwide orders for the closure of certain facilities and operations. These are particularly affected:

- Sports facilities such as gymnasiums, swimming pools, saunas, golf courses and fitness studios,
- Clubs, bars and discos,
- Cinemas, conference and event rooms,
- Pubs,
- Restaurants,
- Hotels,
- Shopping centres and furniture stores,
- Shopping malls and factory outlets

4. Claims for Compensation Government Liability

Compensation rights for employees and self-employed persons in case of prohibition of employment or quarantine

- Section 56 of the German Protection against Infection Act provides for compensation for employees and self-employed persons in respect of whom governmental authorities have ordered a ban on employment or quarantine on the grounds of protection against infection.
- Employees are entitled to the net salary for the first six weeks, followed by sickness benefit.
- The social security contributions (pension, health and nursing care insurance as well as unemployment insurance) are paid by the federal state, this refers to the employer's contribution as well as to the employee's contribution.
- The claim is usually made by the employer.
- For self-employed persons, the loss of earnings is determined on the basis of the tax assessment notice. In addition, self-employed persons may claim reasonable operating expenses.

Claims for compensation for losses due to shutdowns of businesses or operating restrictions

- In practice, it is still unclear whether companies and entrepreneurs affected by a shutdown of business can claim compensation for the losses incurred as a result of the prohibitions or restrictions.
- The wording of section 65 IfSG provides for a compensation for measures taken by governmental authorities which serve to protect the population and require the individual to make a special sacrifice. According to the general rules of the law of damages and compensation, the affected person or entity is to be placed in the position he or it would have been in if the damaging event or the official measure had not occurred. Essentially, this should lead to a claim for compensation in the amount of the lost income, from which only those costs would have to be deducted that were actually saved, such as the loss of cleaning costs or reduced energy costs.
- It is not settled yet, as to whether additional compensation claims can be forwarded on the basis of general administrative law or principles of governmental liability.

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Financial Matters / Insolvency



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1. Overview

The COVID-19 pandemic leads to massive liquidity shortfalls, which may lead to corporate insolvencies upon short notice.

To avert these financial risks, Germany's federal and state governments have put together a comprehensive emergency aid package to cushion or at least mitigate these dangers.

In addition, in the wake of the pandemic, legislators have adapted the previously applicable provisions of insolvency law.

It is to be expected that in the course of the COVID-19 pandemic further financial aid measures will be adopted.

Key COVID-19 financial support a glance

Tax offices	→ Deferral of tax liabilities
Health insurance	→ Deferral of social contributions
Federal Labour Office	→ Short-time pay
Protective shield of the Federal Government	→ Economic stabilisation fund and emergency financial assistance
State-owned Development Bank (Kreditanstalt für Wiederaufbau – KfW)	→ Reinsurance of bank loans
Guarantee banks	→ Reinsurance of bank loans
Specific measures of federal states	→ Emergency aid, loans and grants

2. Taxes and Social Contributions

Tax relief

The Federal Government wants to ease the burden on freelancers as well as entrepreneurs and companies with tax relief. To this end, the tax authorities are granting the following reliefs:

- Deferments will be made easier.
- Advance payments can be adjusted more easily.
- Enforcement measures (e.g. account seizures) or late payment surcharges will be waived until 31 December 2020 as long as the debtor of a tax payment due is directly affected by the effects of COVID-19.

Note: Unfortunately, all measures within the scope of the so-called protective shield do not compensate for the loss of revenue and are only suitable for bridging liquidity bottlenecks on temporary basis.

Deferral of social security contributions

- Deferral of social security contributions may be granted if the company faces serious financial difficulties as a result of the current crisis
- Application to the responsible health insurance company, financial difficulties must be documented.

3. Protective Shield of the Federal Government

Economic stabilization fund for large companies

- EUR 400 billion for debt instruments and liabilities
- EUR 100 billion for equity participation measures

Emergency aid for small enterprises, self-employed persons and freelancers

- EUR 50 billion volume
- 9k EUR for companies with up to 5 full-time employees
- 15k EUR for companies with up to 10 full-time employees

4. State-owned Development Bank (KfW)

KfW Start-Up Loan

- Up to EUR 200 million loan amount
- Duration: Maximum 10 years with two grace years
- Beneficiaries: small commercial enterprises and freelancers (with less than 50 employees)
- Annual turnover not to exceed EUR 10 million
- Company existence up to 5 years after foundation
- Application: via principal bank at KfW

KfW Entrepreneur Loan

- Up to EUR 200 million loan amount
- Duration: Either up to 2 years with a maximum of EUR 5 million or up to 5 years with a grace year
- Beneficiaries: SMEs and freelancers
- Annual turnover not to exceed EUR 2 billion
- Company existence at least 5 years after foundation
- Application: via principal bank at KfW

KfW Loan for Growth

- Participation in debt financing with a KfW risk share between EUR 7.5 million and EUR 100 million
- Duration: flexible
- Conditions: for investment and resources in innovation and digitisation
- Beneficiaries: domestic and foreign companies with a turnover of up to EUR 5 billion
- Application: by invitation of the financing partner, optional refinancing of participating banks.

5. Guarantee Banks and State Aid

Guarantee banks

- Increase of the guarantee ceiling to EUR 2.5 million
- Higher risk assumption by the Federal Government due to increase in counter-guarantee
- Accelerated decision-making process
- Duration: Region-specific
- Requirements: Cross-industry for commercial small and medium-sized enterprises and freelance professions
- Application: Via principal bank

Specific measures of federal states

- In addition, the individual federal states of Germany have set up different packages of aid measures which are offered to companies located in the respective federal state.
- The financial assistance ranges from non-repayable grants, interest-free loans, liquidity and working capital loans and state guarantees to investment funds.
- The target groups are mainly small and medium-sized enterprises, but also include large companies in some cases.

6. New Insolvency Law

Suspension of filing for insolvency

Criminal and liability-based obligation to file for insolvency (managing director and executive committee of the association, 42 II BGB, 15a InsO)	Art. 1, § 1	Suspension of the obligation to file for insolvency until 30.09.2020 ("suspension period")
		No suspension if <ul style="list-style-type: none"> the insolvency is not caused by the effects of the SARS CoV-2 virus (COVID 19 pandemic), or there is no prospect of eliminating the occurred illiquidity.
		Burden of proof: The managing director has the burden of proof that his obligation to file for insolvency was suspended.
		Assumption: If the debtor was not insolvent on 31.12.2019, it is assumed <ul style="list-style-type: none"> that the insolvency is based on the effects of the COVID 19 pandemic, and that there are prospects of eliminating the occurred illiquidity
Creditor application for Insolvency	Art. 1, § 3 i.V.m. Art. 6 Abs. 3	The opening of insolvency proceedings on the basis of a creditor's application filed within 3 months from the day after the promulgation of the law requires that the reason for opening the proceedings has already existed on 01.03.2020.
		Extension of these provisions until 31.3.2021 is possible by statutory order

6. New Insolvency Law

Liability for payments/repayment of loans/collateralisation

<p>Liability of the Directors from 64 I GmbHG, 92 II 1 AktG, 130a HGB/177a S.1 HGB; 99 S. 1 GenG</p>	<p>Art. 1, § 2 Abs. 1 Ziff. 1</p>	<p>Payments in the ordinary course of business, in particular payments which serve to maintain or resume business operations or to realize a restructuring plan, are deemed to be compatible with the diligence of a prudent and conscientious manager within the meaning of §§ 64 II GmbHG, 92 II 2 AktG, 130a I 2 / 177a S.1 HGB, 99 S. 2 GenG.</p>
<p>Repayment of new loans granted during the suspension period together with their collateral <i>(also applies to companies that are not subject to an application obligation and debtors that are neither insolvent nor overindebted)</i></p>	<p>Art. 1, § 2 Abs. 1 Ziff. 2</p>	<ul style="list-style-type: none"> ▪ repayments until 30.09.2023 and ▪ security for such loans during the suspension period are not disadvantageous to creditors
<p>Repayment of shareholder loans and payment of claims arising from legal acts that are economically equivalent to such loans <i>(also applies to companies that are not subject to an application obligation and debtors that are neither insolvent nor overindebted)</i></p>	<p>Art. 1, § 2 Abs. 1 Ziff. 2</p>	<ul style="list-style-type: none"> ▪ repayments up to 30.09.2023 are not disadvantageous to creditors ▪ Sections 39 (5) no. 1 and 44 a InsO (subordinations) do not apply to insolvency applications filed by 30.09.2023
<p>Providing collaterals for shareholder loans <i>(also applies to companies that are not subject to an application obligation and debtors that are neither insolvent nor overindebted)</i></p>	<p>Art. 1, § 2 Abs. 1 Ziff. 2</p>	<p>Not privileged; no change to the existing arrangements</p>

6. New Insolvency Law

Granting, repayment and collateralisation of loans/state aid measures

<p>loans granted by KfW and its financing partners within the framework of government aid programmes in connection with the COVID 19 pandemic</p>	<p>Art. 1, § 2 Abs. 3 iVm § 2 Abs. 2</p>	<ul style="list-style-type: none"> ▪ repayments and ▪ collateralisation of such loans <p>are not considered to be disadvantageous to creditors.</p> <p>This also applies</p> <ul style="list-style-type: none"> ▪ if the loan is granted or secured after the end of the suspension period, and ▪ unlimited for the return.
	<p>Art. 1, § 2 Abs. 3 iVm § 2 Abs. 3</p>	<p>The granting of loan and collateral <u>within and outside</u> the suspension period does not constitute an illegal contribution to the delay in filing for insolvency.</p>
<p>Assistance for delaying insolvency by further granting of loans and collateral (not KfW)</p>	<p>Art. 1, § 2 Abs. 1 Ziff. 3</p>	<p>The granting of credit and collateralisation during the suspension do not constitute an illegal contribution to the delay in filing for insolvency.</p>

6. New Insolvency Law

Effects of suspension on insolvency challenges *(also applies to companies that are not subject to an application obligation and those that are neither illiquid or overindebted)*

legal acts which provided or allowed the other party to provide security or satisfaction which the other party could claim in the manner and at the time	Art. 1, § 2 Abs. 1 Ziff. 4	<p>Not challengeable in subsequent insolvency proceedings, if</p> <ul style="list-style-type: none"> the other part was not aware that the debtor's restructuring and financing efforts were not suitable for eliminating the occurred illiquidity
Services in lieu of or on account of performance	Art. 1, § 2 Abs. 1 Ziff. 4a	
Payments by a third party on the instruction of the debtor	Art. 1, § 2 Abs. 1 Ziff. 4b	
Shortening of payment terms	Art. 1, § 2 Abs. 1 Ziff. 4d	
grant of facilities for payment	Art. 1, § 2 Abs. 1 Ziff. 4e	
Provision of security other than that originally agreed	Art. 1, § 2 Abs. 1 Ziff. 4c	<p>Not challengeable in subsequent insolvency proceedings, if</p> <ul style="list-style-type: none"> the other party was not aware that the debtor's restructuring and financing efforts were not suitable for eliminating the occurred illiquidity and unless the security is more valuable

7. Advice for immediate Implementation

- Analyse threatened or existing liquidity gaps.
- Check obligation to file for insolvency (if yes: review whether the company was already illiquid on 31.12.2019. Further steps depend on the results.)
- Prepare a business plan for the current and future financial year and determine liquidity requirements.
- Contact the principal bank and obtain information about available credit facilities, promotion and guarantee programs.
- Gather documentation required for the application.
- Submit application with all necessary documents (avoid refusal of aid due to incomplete applications; explain reasons for not submitting specific documents in a comprehensible manner).
- Caution when making payments to third parties and entering into new liabilities

Applications to the tax office

- Deferral of tax liabilities
- Waiver of late payment penalties
- Waiver of enforcement measures until the end of the year
- Adjustment of tax prepayments
- Extension of the deadlines for the advance return for turnover tax
- **Note:** The reasons based on the special situation must be explained to the tax office in a comprehensible manner.

Information about further support measures

- Obtain information on further support measures by the federal, state and local authorities on a continuous basis.

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Real Estate Matters



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1. Rent Claims under Commercial Leases

Currently, tenants in the Federal Republic of Germany are negotiating rent reductions and/or rent suspensions with their landlords almost on a daily basis. The reasons are manifold, official orders for closure or independent entrepreneurial decisions the request to reduce financial losses by deferments, rent reductions and temporary contract adjustments is always the core.

What is the legal situation? Basically the following applies:

- The rental contract remains unchanged and rent must be paid.
- For a rent reduction, the rented property must be defective (section 536 of the German Civil Code). Restrictions imposed by authorities in the context of the COVID-19 crisis mostly relate to certain types of use of the property (e.g. as a restaurant), but do not change the basic suitability of the rented property for the contractually stipulated use. As a rule, restrictions of use that are not caused by the characteristics of the leased property are not considered a defect of the leased object. However, it should be checked in each individual case whether the respective rental agreement contains a special risk distribution clause that allows the assertion of claims for defects.

- If the landlord takes measures restricting the use of the leased property on his own (without corresponding orders issued by governmental authorities), this may result in claims by the tenant.
- An adjustment of the contract can generally not be demanded. Due to the enormous extent of the crisis, however, it cannot be ruled out that the principles of "disturbance of the basis of the transaction" (section 313 of the German Civil Code) may be applied by the courts in the tenancy law by way of exception. In individual cases, the tenancy agreement must be analysed in detail here.
- Ultimately, as always, claims based on fault of the landlord remain. In the current COVID-19 crisis, violations of duties of care must be considered in particular, if these would have made a measure dispensable or delayed if they had been properly and properly observed.
- The tenant should, however, always keep an eye on business interruption insurance or other claims for compensation against the state.

2. Protection against Termination

Legislation project

Protective measures for tenants of both commercial and residential leases have now been decided.

- A new law passed on March 25, 2020 (BT Drucksache 19/18110) provides that tenants cannot be terminated with respect to default in payment of rent arising in the period between 01 April to 30 June 2020, if the tenant can demonstrate credibly that the default was caused by the COVID-19 pandemic. This moratorium may possibly be extended by regulation.
- If the default in payment of the rent (arising in the period between 01 April to 30 June 2020) persists beyond 30 June 2022, the landlord may terminate the lease with immediate effect (i.e. after 30 June 2020) in accordance with general provisions of law. Interest for rent arrears can be charged.

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1. Disruptions to Performance

Do suppliers have to be paid even if the receipt of the service has become de facto useless?

- A vast number of supplier relationships are disrupted by the pandemic (e.g. the leased hotel has to close due to an official ban).
- In principle, German law does not recognise any exemption from the obligation to pay in the event of "force majeure" - this term is not even defined by law.
- However, it is conceivable and should be checked whether the supplier contract contains a clause on force majeure.
- If, however, the supplier is also unable to deliver (e.g. due to an official prohibition), the customer will in principle not have to pay in case of a pandemic.
- In all other cases: If there was an explicit or implied agreement on the basis of the contract (e.g. functioning markets), the supplier can be required to adapt the contract (section 313 para. 1 BGB) in view of a material adverse change of circumstances assumed as basis of the transaction.

Is the supplier also obliged to deliver if his performance is impossible or unbearable for him?

- In cases of objective impossibility (e.g. official prohibition of delivery) the supplier is released from his obligation to perform.
- In the case of unreasonableness (e.g. a preliminary product can only be procured on the world market with disproportionately great difficulties), the supplier is also released from his obligation to perform (however, the limits of unreasonableness are very difficult to determine in individual cases).
- **Practical note:** Even if a claim against the supplier appears to be actionable in an individual case, asserting it in court encounters considerable difficulties in times of the COVID-19 pandemic (e.g.: oral hearings in court are only possible to a very limited extent)

2. Liability Issues

Is the supplier liable for damages if he does not provide his service because of the COVID-19 pandemic?

- If the supplier is exempted from his obligation to perform due to objective impossibility of his performance or due to personal unreasonableness, he shall in principle also not be liable for damages in the event of a pandemic.
- Caution is required, however, in cases where personal unreasonableness seems worthy of discussion. Here, misconceptions on the part of the supplier may well lead to liability scenarios.
- Liability scenarios are also conceivable if main customers are given preference in terms of supply without objective reasons.

What should be considered in the context of customer information?

- For reasons of contractual consideration, customers should be informed as soon as possible about essential supply issues so that they can take appropriate measures on their part.
- Liability scenarios due to insufficient customer information are conceivable.

3. Recent Developments

What recent developments need to be taken into account?

- Supply and travel restrictions that can severely disrupt supply chains must be monitored very closely.
- On 25 March 2020, the German legislator adopted a legislative package under which consumers and micro-entrepreneurs (according to EU Recommendation 2003/361: companies employing less than 10 employees and generating an annual turnover below 2m € or having a balance sheet total of less than 2m €) will not have to pay debts arising from continuing obligations entered into before 8 March 2020 until 30 June 2020 if they are unable to pay because of the COVID-19 crisis. It currently seems unclear whether this is a deferral of payment or a final right to refuse performance.
- Furthermore, private and commercial tenants cannot be terminated in the period from 1 April 2020 to 30 June 2020 if they are unable to pay the rent due because of the Corona crisis.

What action should be taken?

- Clear responsibilities should be assigned within the company to track current restrictions on supply and travel.
- In the case of material supply relationships that are considered to be at risk against the background of the COVID-19 pandemic, advisors should be called in early on in case of doubt in order to avoid supply bottlenecks or liability risks or at least to mitigate the consequences.

4. Insurance Protection

Is insurance cover available in case of damages and liability issues?

- It is already clear today that the COVID-19 pandemic will cause enormous damage on the corporate side.
- Of particular relevance is business interruption insurance in the form of business closure insurance; the insured risk is that the company's profitability will be significantly reduced as a result of the closure of the site. In relevant cases, the existence of such insurance should be examined immediately.
- For liability cases within supply chains, business liability insurance is also of great practical relevance. However, the regularly agreed exclusion of intent must be observed here. Liability cases resulting from the fact that a supplier has deliberately treated his customers unequally are generally not covered.

How should practical action be taken in the event of damage?

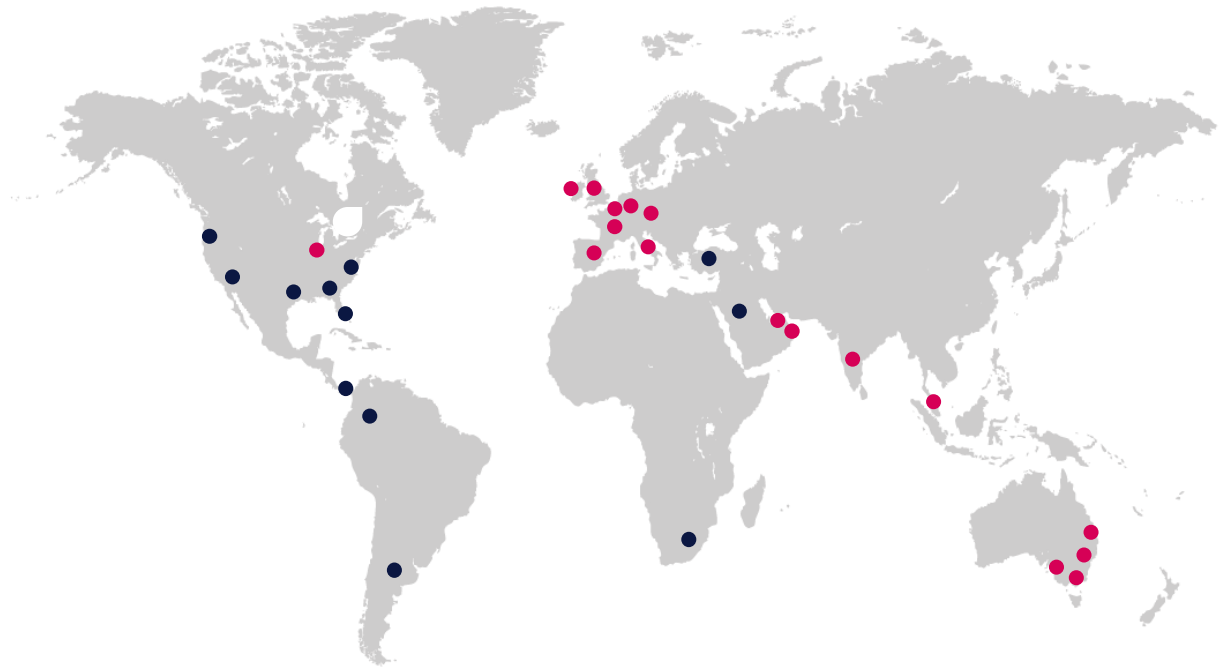
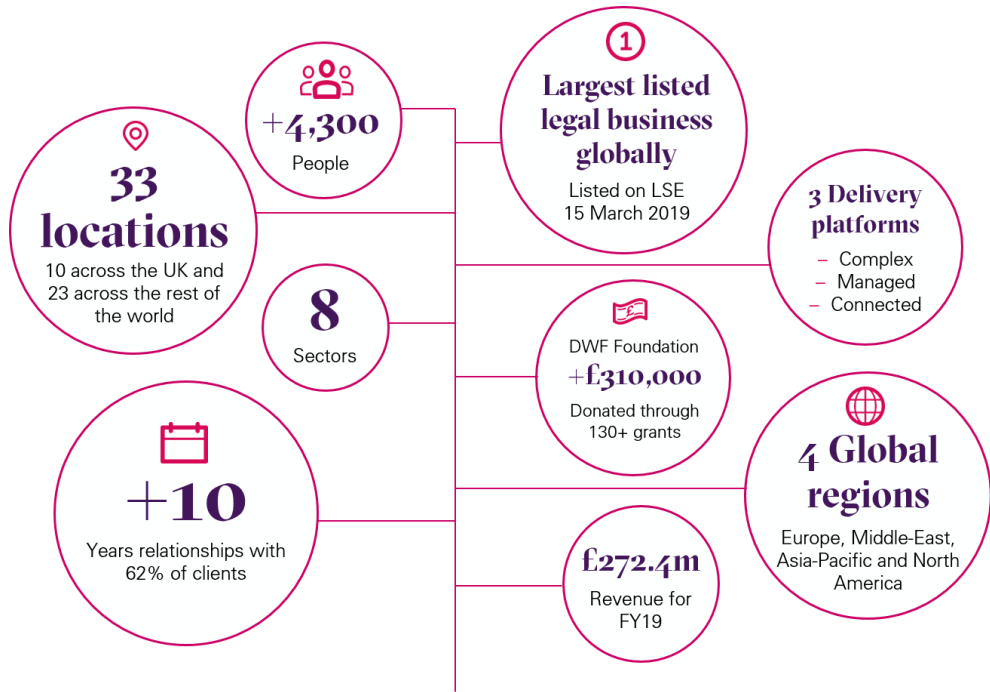
- The first step is to check which insurance contracts have been concluded by the company.
- If a suitable insurance policy has been identified for a loss or liability claim, a loss notification should be sent to the insurer (if required, supported by external advisers). Note that the insurance coverage can be endangered solely by a delayed notification of loss.
- Furthermore, it is important to ensure that the documentation is as accurate as possible. This applies both to the cause of the damage and to the exact amount of the damage. In practice, it is often not possible to prove the amount of damage because the documentation is inadequate.



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