

DWF Germany

COVID-19 Legal Guidance

Update 28 April 2020

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
- Public Law
- Real Estate
- Finance
- Insolvency
- Customer and Supplier Relations

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Corporate Governance



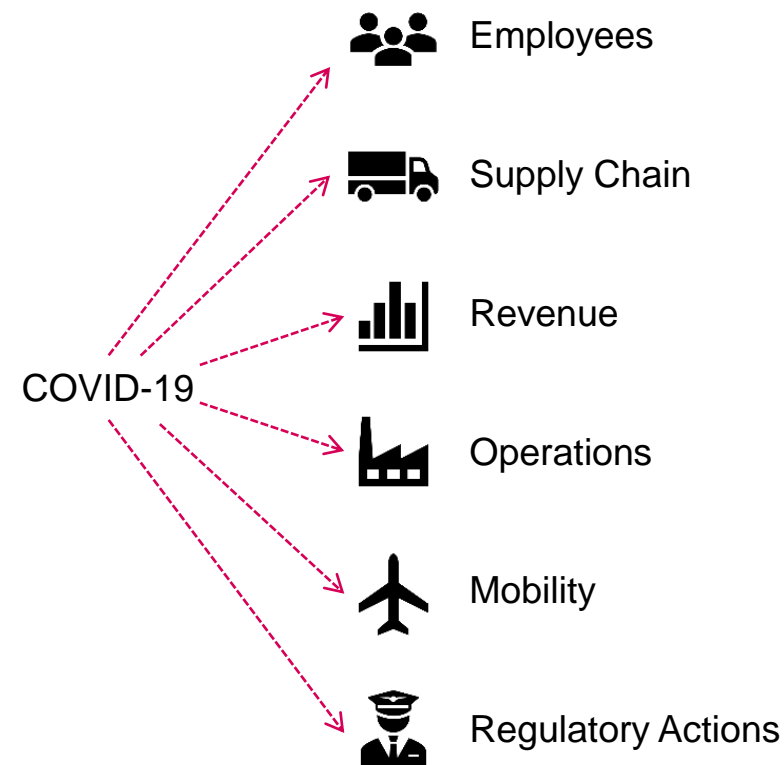
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1. Management Responsibility

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 came into force on March 28, 2020 provides for new regulations on decision-making "at a distance".

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.
- The prerequisite for this compensation is that care can only be provided by the parents and that the loss of earnings cannot be avoided - for example by reducing working time credits. Claims for short-time work compensation also take precedence over the compensation claim. Compensation amounting to 67 percent of net income is granted for up to six weeks and is limited to a maximum monthly amount of EUR 2,016.
- The German Federal Council approved the social protection bailout on 27 March 2020.

7. Health & Safety

To do's for employers after the end of the lockdown

- Ensure occupational health and safety through sufficient and appropriate measures.
- Orientation towards the SARS-CoV-2 occupational safety standard of the Federal Ministry of Labour and Social Affairs of 16 April 2020:
- Principles: Provision of mouth-and-nose covers if minimum distance cannot be safely maintained; no persons with respiratory symptoms or fever on company premises. Development of a procedure for clarifying suspected cases (e.g. in case of fever).
- Development of a concept for operational measures:
- Technical measures such as workplace design ensuring a distance (at least 1.5 m); regulations on cleaning and hygiene (e.g. provision of liquid soap and towel dispensers that are kind to the skin; adjustment of cleaning intervals, especially for sanitary facilities and common rooms); regular ventilation; office work in the home office if possible;

Reduction of business trips and face-to-face meetings to a minimum and provision of technical alternatives (telephone and video conferences)

- Organisational measures such as ensuring sufficient protective distances (e.g. floor markings); personalised use of tools and work equipment and regular cleaning); working time and break arrangements that reduce personal contact (staggered working and break times; shift work); restricting the access of external persons to a minimum and documentation (time of entry and exit); instructions for action in suspicious cases
- Personal measures such as mouth-and-nose covering and protective equipment in the event of unavoidable contact with other people; instruction of managers on preventive and occupational safety measures and active communication; occupational medical precautions and protection of particularly vulnerable persons (possibly advice from company doctor).

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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



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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.

The emergency aid packages have already been expanded several times since the beginning of the COVID-19 pandemic. 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:

- Tax payment deferrals: Businesses can apply (until 31 December 2020) for temporary, interest-free deferrals of income tax, corporate tax and VAT payments.
- Adjustments to tax prepayments: Companies, self-employed persons and freelancers can request adjustments to the amount of prepayments for income tax, corporation tax and trade tax.
- Suspension of enforcement measures: Enforcement of overdue taxes will be waived through the end of 2020. Late-payment penalties for income tax, corporation tax and VAT will be waived as well.
- The customs administration, which administers import VAT, energy duty and aviation tax, will grant the same relief. This relief also applies to insurance tax and to VAT administered by the Federal Central Tax Office.

Deferral of social security contributions

Relief for businesses is also provided in the area of social security contributions:

- Deferral of social security contributions may be granted if the enterprise faces serious financial difficulties as a result of the current crisis
- Application to the responsible health insurance institution, 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 to help companies overcome liquidity shortages
- EUR 100 billion for direct recapitalization measures in order to safeguard the solvency of companies (equity participation measures)
- Refinancing to borrow up to €100 billion to refinance the special programs assigned to state-owned development bank KfW
- Beneficiaries: Companies which meet at least two of the following three criteria in the last two financial years before 2020:
 - more than EUR 43 million balance sheet total
 - more than EUR 50 million turnover
 - more than 249 employees (annual average).

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
- Beneficiaries: Self-employed persons, freelancers and small enterprises with up to 10 FTEs and permanent establishment in Germany and German tax register number

4. State-owned Development Bank (KfW)

KfW Fast Credit

- Up to EUR 800 million loan amount
- Duration: Maximum 10 years with two grace years
- Beneficiaries: Small commercial enterprises and freelancers (with more than 10 employees) existing since 2019
- KfW backs 100 % of the bank risk
- Application: Via principal bank at KfW

NOTE: Additional credit program designated to cover a wider range of enterprises in comparison to status per March 2020

KfW Business Loan

- Up to EUR 1 billion for investments and working capital purposes
- Duration: Up to 6 years (loans above 800 KEUR) up to 10 years (loans below 800 KEUR) or 2 years firm (working capital financing loans)
- Beneficiaries: Domestic and foreign companies with a turnover of up to EUR 5 billion existing at least 5 years after foundation
- KfW backs up to 90 % of the bank risk
- Application: Via principal bank at KfW

NOTE: Loan amounts and financing conditions have been modified to cover a wider range of enterprises in comparison to status per March 2020

KfW Loan for Growth

- Participation in debt financing for credits issued by bank consortium in an amount of more than EUR 25 million for investments and costs of business operations
- Duration: Flexible
- Beneficiaries: Domestic and foreign companies with a turnover of up to EUR 5 billion for activities in Germany
- KfW backs up to 80 % of the bank risk
- Application: By invitation of the financing partner

NOTE: Financing conditions have been modified to cover a wider range of enterprises in comparison to status per March 2020

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.

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Insolvency



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1. Insolvency Law – Provisions of COVInsAG

Suspension of filing for insolvency

Criminal and liability-based obligation to file for insolvency (managing director, 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.
		(refutable) Assumption: If the debtor was not illiquid 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 (27 March 2020) 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

1. Insolvency Law – Provisions of COVInsAG

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 illiquid 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 <p>are not disadvantageous to creditors</p>
<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 illiquid 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 illiquid nor overindebted)</i></p>	<p>Art. 1, § 2 Abs. 1 Ziff. 2</p>	<p>Not privileged; no change to the existing arrangements</p>

1. Insolvency Law – Provisions of COVInsAG

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>

1. Insolvency Law – Provisions of COVInsAG

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	Not challengeable in subsequent insolvency proceedings, if <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	Not challengeable in subsequent insolvency proceedings, if <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

2. Advice for immediate Actions

- Analyse threatened or existing liquidity gaps.
- Check obligation to file for insolvency and suspension (review whether the company was already illiquid and/or overindebted on 31.12.2019. Further steps depend on the results.) **Attention** if the company was already overindebted on 31.12.2019!
- Prepare – as far as possible - a business plan for the current and future financial year and determine liquidity requirements/reducible costs/available grants.
- Obtain information about Available credit facilities, promotion and guarantee programs/Contact the principal bank.
- Examine further procedure/examine all alternative approaches to proceed (including protective shield procedures/insolvency proceedings in self-administration/insolvency proceedings).
- Gather complete documentation required for the application.
- Submit application with all necessary documents.

- **Caution** when making payments to creditors or third parties and/or when entering into new liabilities!
- **Attention:** civil and criminal liability for various offences is not suspended!

Tax office

- Application to tax office deferral of tax liabilities and tax prepayments, Waiver of late payment penalties and enforcement measures and 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.

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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 private and commercial 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.

3. Recommendations and Options for Action

Tenant and Landlord:

- Preparation of a liquidity calculation for the next six months
- Application for state aid (e.g. KfW fast loan with 100% risk assumption of state owned KfW bank; for further state aid see also slides "Financing")
- Application for tax relief and deferral of social security contributions (see slides "Financing")
- Examination of existing financing agreements for information obligations, compliance with agreed financial ratios, triggering of covenant breaches or material adverse change clauses

Tenant:

- Determination of turnover before/after the lockdown decision and recording of the available evidence
- Examination of insurance cover and obligations (in particular in the event of complete or partial closure of the business)
- Safeguarding of legal positions through legal remedies against unlawful governmental requirements / business shutdown and assertion of claims for compensation
- Addressing the landlord with the aim of reaching an amicable (deferral/ relief settlement (if applicable subject to state aid))
- Reduction/retention of rent under substantiation of the COVID-19 pandemic-related non-performance /partial performance, if still necessary

Landlord:

- Addressing tenants on COVID-19 affliction, clarification of possible rent reductions in consideration of state aid
- Preparation of overview of payment obligations for the next six months
- Checking whether tenant deposits can be made use of
- Addressing banks and other creditors regarding possible reductions/ extensions of payment obligations.

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Supplier and Customer Relationships



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1. Disruptions in 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) or of unreasonableness (e.g. a preliminary product can only be procured on the world market with disproportionately great difficulties – however, possibly difficult to determine in individual cases), the supplier is released from his obligation to perform.
- **Voucher solution:** On April 8, 2020, the German Federal Government resolved a formulation for a law to mitigate the consequences of the COVID-19 pandemic in contract law regarding events, according to which the organiser resp. operator must issue a voucher to the ticket holder resp. member if an event cannot take place resp. a facility was or is to be closed. This does not apply if the issuing is unreasonable due to personal circumstances or if the voucher has not been redeemed by 31 December 2021 (statutory deferment). **But:** The conformity with European law is still unclear, so that it is currently unclear whether a corresponding law will be passed.

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.
- **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, since, for example, oral hearings in court are currently only possible to a very limited extent and the participation of foreign witnesses is in any case not easily possible due to the 14-day domestic quarantine ordered by the federal states for persons entering from abroad. It remains to be seen whether the competent authority will grant exemptions upon request. For the time being it is unclear when these measures will expire.

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.
- According to the Law to Mitigate the Consequences of the COVID-19 Pandemic in Civil Law, Insolvency Law and the Law on Criminal Proceedings as of 27 March 2020, 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 €) do not, until 30 June 2020, have to pay debts arising from essential continuing obligations entered into before 8 March 2020 (moratorium) if
- in the case of the consumer: the consumer would not be able to pay without at the same time jeopardising his reasonable subsistence or that of his dependants, or
- in the case of a micro-entrepreneur, the entrepreneur is unable to pay or would be unable to pay without at the same time jeopardising the economic basis of its business.

What action should be taken?

- The consumer or micro-entrepreneur shall not be entitled to the moratorium if it would be unreasonable for the creditor that the consumer or micro-entrepreneur exercise its right to withhold. In this case, the consumer or micro-entrepreneur has the right to terminate the contract.
- The lender of a consumer loan concluded prior to 15 March 2020 is not entitled to terminate the loan until the end of the moratorium on 30 June 2020 due to late payment resp. due to a significant deterioration in the consumer's financial situation or the value of a provided security (cf. resolution of the local court of Frankfurt/Main as of 8 April 2020, ref. 32 C 1631/20 (89)).
- 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?

- 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.
- Several insurers have already announced that they will provide cover, others are currently still refusing to do so.
- For Bavaria, an agreement was reached between the Bavarian State Government, Allianz and DeHoGa, according to which Allianz will provide 10-15% coverage on the basis of missing turnover, the Bavarian State will provide immediate aid and it is assumed that 70% of the operating costs can be saved.
- 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.

5. Antitrust Law Implications

Is antitrust law suspended during the crisis?

- EU and national competition law generally prohibit agreements, and concerted business practices which restrict competition.
 - For this reason, actual or potential competitors may not (among other things) agree or exchange on commercially sensitive topics e.g., on prices, customers, markets, projects.
 - Moreover, suppliers may not unduly restrict their buyers' freedom of distribution e.g, by exercising resale price maintenance, entirely excluding supply to certain customers or territories etc.
 - During the COVID-19 crisis, these rules remain in place and are not temporarily suspended.
 - However, the EU Commission and the national competition authorities have declared that they may – under certain conditions – exempt certain types of behaviour from the antitrust prohibition.
- The exemption particularly applies to cooperation projects among competitors addressing the **shortage of essential products**.
 - While the authorities' focus clearly is on medicinal products, some statements suggest a broader application also involving essential consumer goods.
- The EU Commission has set up a website dedicated specifically to „*Antitrust rules and the corona virus*“. Please refer to this link: <https://ec.europa.eu/competition/antitrust/coronavirus.html>
 - In the early days of the crisis, the ECN (= European Network of Competition authorities, to which the EU Commission and the German Bundeskartellamt belong) have published a joint statement. Please refer to this link: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

5. Antitrust Law Implications

How to avoid undue profiteering?

- Pursuant to EU and national competition laws, companies which are in a dominant position, may not *abuse* that market power.
- Competition authorities throughout the EU emphasized in the last couple of days that they will closely monitor alleged “profiteering” to the detriment of consumers.
- At the beginning of April, for example, the UK Competition and Markets Authority (**CMA**) told businesses exploiting the coronavirus by raising prices for items such as hand sanitizer, baby milk and face masks that they will soon be brought to reckoning. Amazon and ebay are also involved in talks with the CMA to tackle profiteering by third-party retailers on their platforms amid the corona virus pandemic.
- The authorities stress that suppliers may set **maximum resale prices**. In their view the latter could prove useful to limit unjustified price increase at the distribution level.
- If suppliers of essential products are unsure whether they could be viewed as „dominant“, we recommend introducing maximum resale prices (at least on a temporary basis) to avoid unnecessary competition law risks and damages to reputation.

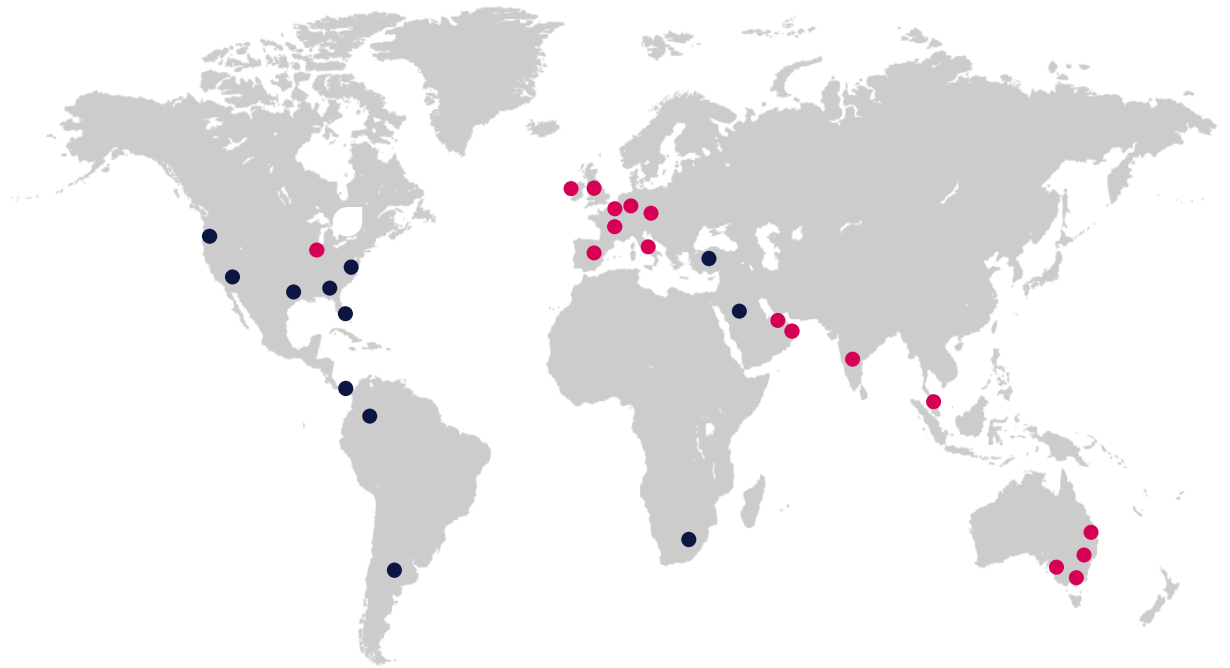
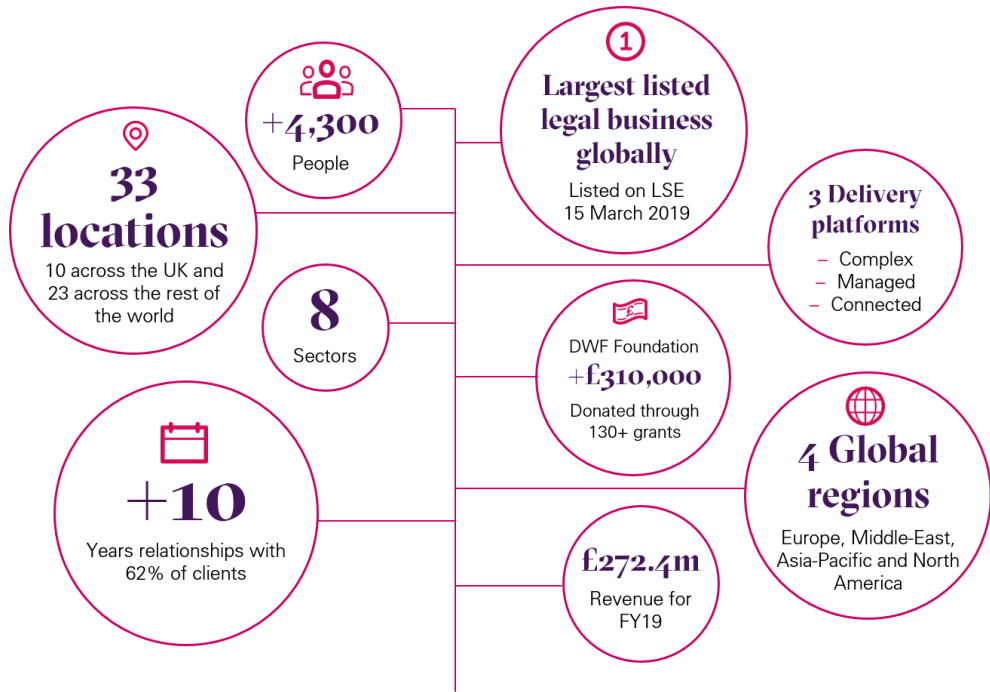
Example: A supplier of hand sanitizers requires its distributors to not sell a single bottle (500 ml) at a price higher than EUR 2.99. Distributors not abiding by this rule, are no longer supplied and/or will be sanctioned otherwise.



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DWF at a Glance



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