

OVERVIEW - LAW TO MITIGATE THE CONSEQUENCES OF THE COVID 19 PANDEMIC IN CIVIL, INSOLVENCY AND CRIMINAL PROCEEDINGS

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The law to mitigate the consequences of the COVID 19 pandemic in civil, insolvency and criminal proceedings ([BT-Drs. 19/18110 ; Formulierungshilfe der Bundesregierung vom 23.03.2020](#)) was passed unanimously by the German Parliament on 25 March 2020 as well as by the German Federal Council on 27 March 2020. It contains regulations on insolvency law (with retroactive effect from 1 March 2020; regulations on measures in corporate, cooperative, association, foundation, residential property law and criminal procedure law which come into force on the day after promulgation as well as regulations on civil law (moratorium, loan law, tenancy law) which comes into force on 1 April 2020.

The most important regulations of the above-mentioned law are summarized below:

MORATORIUM ON PERFORMANCE AND PAYMENT OBLIGATIONS

Persons economically affected by the COVID-19 pandemic, who are *consumers or micro-enterprises* (up to 9 employees and up to EUR 2 million turnover p.a. or up to EUR 2 million balance sheet total, whereas individual companies of a group of companies are added together) will receive *Deferral for all performance*

and payment obligations (in the form of a right to refuse performance) until 30 June 2020 arising from contracts concluded before 8 March 2020 and which are so-called continuing obligations (i.e. an obligation which is directed towards recurring services and consideration which are repeated over a longer period of time). The term „continuing obligation“ is specified separately as „essential continuing obligation“ with two different meanings for consumer contracts on one hand and for micro enterprises on other hand. The term „performance“ is specified separately with two different meanings for consumer contracts and micro enterprises. However, the right to refuse performance can only be asserted under the condition and for as long as they would otherwise endanger their reasonable livelihood or economic basis.

The regulation also applies to services already due at the time of the coming into force of the law as well as services in default.

The moratorium therefore does not apply, for example, to purchase work contracts. Furthermore, this moratorium does not apply to obligations arising from employment and travel contracts. Likewise, the moratorium does not apply to rental agreements, leases and consumer loan agreements for which there are special priority regulations (see below). The right to refuse per-

formance is excluded if the creditor's economic basis would be endangered by non-performance; in this case, however, the debtor has the right to withdraw from or terminate the contract.

TENANT PROTECTION

The obligation to pay rent in the case of rental agreements for land or premises remains in principle. However, the landlord may not terminate the lease solely on the basis of rent debts for the period from 01 April 2020 to 30 June 2020 if the tenant (whether a private individual or a company) is unable to pay the rent due to the COVID-19 pandemic consequences (which is presumed in favor of the tenant if he can credibly prove it - i.e. the landlord would have to prove the contrary). The term "Credible Proof" is specified in the legal justification. The regulation applies to both residential and commercial leases. If the tenant makes compensates this rent arrears from the period 1. April 2020 to 30 June 2020 by 30 June 2022, the landlord cannot terminate the lease. However, this does not enable tenants to defer payments. Therefore, a tenant not paying its rent on time will still face late payment fees. The landlord is not prevented from demanding the arrears of rent for this period of three months from the tenant and, if necessary, from taking legal action.

LOAN COMMITMENTS

Termination of loan agreements concluded with consumers (where an entrepreneur is the lender) before 15 March 2020 due to default of payment or deterioration of financial circumstances is excluded until three months after the due date; this applies additionally in the event of

a deterioration in the collateral value.

In the case of loan agreements concluded with consumers (the term „consumer loan“ is specified) before 15 March 2020, the Bank's claims for interest, repayment or redemption of the loan due between 01 April 2020 and 30 June 2020 are deferred for three months if the COVID-19 pandemic has led to loss of income on the part of the borrower and the payment would jeopardize his or her reasonable livelihood. The connection between the COVID 19 pandemic and the loss of income is assumed. If no amicable solution is reached by then, the loan will be automatically extended for another six months.

By decree, the above-mentioned regulations might be extended to micro enterprises (see above). Whether such a regulation will come or not is not yet known. If it does not come, this would mean that several micro-enterprises would no longer be able to meet their loan obligations, should their tenants exercise the above-mentioned right to refuse performance.

EXTENSION OF THE ABOVE RULES

Should the consequences of the COVID-19-pandemic persist, the above-mentioned periods (regarding moratorium, tenant cancellation exclusion, loan deferrals) can be extended until 30 September 2020 and beyond. This time regulation also applies to the de facto rent-free months and loan deferrals, loan extensions and loan termination exclusions.

SUSPENSION OF THE OBLIGATION TO FILE FOR INSOLVENCY AND SPECIAL RULES UNDER INSOLVENCY LAW

The *obligation to file for insolvency* in the event of illiquidity or over-indebtedness *is suspended with retroactive effect from 1 March 2020 until 30 September 2020* if illiquidity or over-indebtedness is due to the consequences of the spread of the COVID-19-pandemic and if there are prospects of eliminating an existing illiquidity. If the debtor was not illiquid on 31 December 2019, it is presumed that illiquidity or over-indebtedness is due to the pandemic *and* that there are prospects of eliminating an existing illiquidity. In addition, creditors will not be allowed to file an effective third-party insolvency petition against debtors within three months of the promulgation of the law, unless the reason for insolvency of the debtor was already present on 1 March 2020.

As far as there is no obligation to file for insolvency until 30 September 2020, *managing directors of companies with limited liability can make payments in the ordinary course of business* even after the event of illiquidity or over-indebtedness without being personally liable. This specifically also includes a payment for the maintenance or resumption of business operations or the implementation of a restructuring concept.

The *liability risk for lenders who grant a loan to be repaid by 30 September 2023 (also e.g. trade credit) or collateral for it during the period up to 30 September 2020 does not apply*, i.e. such granting of a loan or collateral or its return does not constitute a discriminatory or even immoral

act or a punishable participation in a „delay in filing for insolvency“. Loans granted on the occasion of the pandemic, which are *part of government aid programs*, are not disadvantageous to creditors or relevant to liability for the parties involved even if they are granted or secured after 30 September 2020 or if they are not due to be paid back until after 30 September 2023. Newly granted *shareholder loans* (but not their collateral) - granted until 30 September 2020 - are ranked higher in any subsequent insolvency proceedings against the debtor, when they are applied for until 30 September 2023.

The *current contesting in insolvency proceedings* will be considerably *mitigated*: Any congruent legal acts (those that correspond to what has been agreed) in the period up to 30 September 2020 are not contestable under insolvency law, unless the other party knew that the debtor's restructuring and financing efforts could not eliminate the illiquidity that had occurred. Even some *incongruous* legal acts (e.g. granting of payment facilities, assignment of claims instead of agreed cash payment; payments by third parties on the instruction of the debtor) are privileged.

A possible extension of the suspension period until 30 September 2020 by decree until 31 March 2021 is already embedded in the law.

CORPORATE AND RESIDENTIAL PROPERTY LAW

General meetings, shareholder and member meetings are simplified. At the AG, there will be an unattended general meeting with limited possibilities of contestation, with a shortened

invitation period to 21 days, as well as the authorization for the executive board to make advance payments on the net profit even without a provision in the articles of association. The Annual General Meeting can also be held within the year (extension of the 8-month period). The same applies to GmbHs, cooperatives and associations (resolutions by circulation without the consent of all shareholders). In the case of cooperatives, associations, foundations and condominium owners' associations, the committees remain in office until new ones are appointed. In the case of WEG, this also applies to the business plan. In addition, in the Conversion Law the period pursuant to § 17 (2) sentence 4 UmwG (Conversion Act) according to which the balance sheet date of the balance sheet the measure is based on must not be more than eight months in the past at the date the application for registration of the measure is filed with the commercial register is extended to twelve months.



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