

In Germany, we have received an increasing number of enquiries about the coronavirus disease 2019 (COVID-19), commonly known as the "coronavirus," and what organisations should be doing to mitigate the impact of the virus on their business, staff, supply chains, etc.

Here is an overview of the key legal issues for businesses in Germany to consider, together with some practical steps for businesses to take.

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## Coronavirus and the "Corona Package" of the Federal Government

On 23 March 2020, the Federal Cabinet (*Bundeskaabinet*) approved the so-called "Corona Package" consisting of six laws with a broad range of application and wording assistance for the German parliament (Bundestag). The aim of the package is to mitigate the consequences of the coronavirus pandemic for citizens, companies, the economy and society. Due to the urgency, the Federal Council (*Bundesrat*) made its decision directly on the laws in abbreviated form on 27 March. The laws had been adopted by the German parliament on 25 March. The laws will enter into force in the first week of April, subject to the signature of the Federal President and publication in the Federal Law Gazette.

### What Changes Does the Legislative Package Contain and What Does It Mean For Enterprises?

Comprehensive measures have been adopted which have implications for potentially distressed enterprises.

- An unlimited amount of liquidity assistance is available to enterprises (see [page 2](#)).
- Enterprises can minimize personnel costs by registering for short-time work because the reduction of employees' wages will be compensated by the German social security system (see [page 3](#)).
- Tax relief will be granted, in particular, through tax deferrals and the suspension of enforcement measures against companies for unpaid taxes until the end of 2020. The statutory default interest (currently 6.0% per annum) for overdue tax payments will be waived upon request (see [page 5](#)).
- A law to mitigate the consequences of the COVID-19 pandemic in civil, bankruptcy and criminal procedure law has been adopted, which includes *inter alia* the following regulations:
  - The obligation to file for insolvency and the prohibition of making payments under insolvency law will be suspended until 30 September 2020, unless the insolvency was not caused by the COVID-19 pandemic or there are no prospects that the insolvency will be eliminated (see [page 4](#)).
  - Under Article 240 Section 1 of the Introductory Act to the German Civil Code (EGBGB), consumers and small companies who cannot fulfill their contractual obligations due to the COVID-19 pandemic, will be granted the right to refuse performance with respect to contracts and continuing obligations entered into before 8 March 2020.



This will ensure that consumers and small companies especially are not cut off from basic supply services (such as electricity, gas, telecommunications and water, if civil law applies) in the event that they cannot fulfill their contractual duties due to the crisis.

- For leases for property and premises, the landlord's right to terminate the lease will be restricted. This applies for both residential and commercial lease agreements. Landlords are not allowed to terminate the lease due to unpaid rent during the time period between 1 April 2020 and 30 June 2020, provided that the rent was not paid due to the COVID-19 pandemic. The tenant's obligation to pay the rent will continue to exist. This applies accordingly for usufructuary leases.
- With regard to consumer loan contracts, a statutory deferral period in relation to payment obligations and a contract adjustment after the end of the deferral period with the possibility for the contracting parties to negotiate a different contractual solution should be introduced under Article 240 Section 3 EGBGB. This will be flanked by statutory protection against termination. Specifically, this means that the lender's claims for repayment, interest or principal payments due between April and July 2020 will be deferred for a period of six months. This requires that the borrower has lost income due to the coronavirus pandemic and it is, therefore, unreasonable to demand payment. The Federal Ministry of Justice, acting together with the Federal Ministry of Finance and the Federal Ministry of Economy, will be authorized to extend such rules by way of a statutory instrument in favor of additional groups of borrowers other than consumers.
- Substantial relief will be created temporarily for carrying out the general meetings of stock corporations (AG), limited partnerships limited by shares (KGaA), insurance associations (VVaG), European companies (SE), shareholders' meetings of limited liability companies (GmbH), general and representative meetings of cooperative societies, and general meetings of associations so that the various legal entities are also still capable of making decisions and taking corporate action under the current restrictions on physical meetings of shareholders. Key aspects of the temporary relief for stock corporations, limited partnerships limited by shares, insurance associations and European companies include allowing the management board to enable

the online participation in the annual general meeting without authorization in the articles of association; the option of a presence-free general meeting with limited opportunities to contest resolutions made; the option to reduce the period of notice for convening meetings to 21 days; and the authorization of the management board to make installment payments to shareholders in respect of balance sheet profits even without a provision in the articles of association. In addition, it will be possible to hold a general meeting during the financial year.

- Relief will also be created temporarily for cooperatives and associations, even without corresponding provisions in the articles of association, such as the option to hold meetings without being physically present and to make resolutions without corresponding meetings.

#### **What Does Unlimited Liquidity Support Under the Economic Stabilization Fund Mean and Which Companies Have Access?**

- On 27 March 2020, the *Bundesrat* approved the Economic Stabilization Fund, which was introduced by the federal government on 23 March. This is intended to implement the measures necessary to stabilize the German national economy and secure jobs. The instruments of the Economic Stabilization Fund include:
  - A guarantee framework totaling €400 billion in order to make it easier for companies to obtain refinancing on the capital market
  - Recapitalization measures amounting to €100 billion to strengthen the equity capital of enterprises in order to ensure their solvency
  - Loans of up to €100 billion to refinance KfW special programs
- Companies which meet at least two of the following criteria will have access to these instruments:
  - Balance sheet total of more than €43 million
  - Revenues of more than €50 million
  - More than 249 employees as an annual average

In order to give as many companies as possible access to the instruments, the group of beneficiaries has been expanded and goes beyond the scope of "small and medium-sized enterprises" defined by the EU Commission. In addition, even smaller enterprises, which are of particular importance for the infrastructure, can be given access in individual cases.

The establishment of the Economic Stabilization Fund is initially limited until the end of 2021.

Recapitalization measures can be linked to specific conditions, which can affect, in particular, the amount of remuneration of the board of directors, the distribution of dividends and the use of the funds made available by the government.

- The unlimited liquidity assistance will be provided as follows:
  - The state-owned bank KfW will open the existing traditional KfW credit programs for existing enterprises and start-ups to new groups of borrowers, improving eligibility and interest rates and increasing the KfW risk portions from 50% to 90% for small and medium-sized enterprises and up to 80% for larger enterprises. Any application for a credit facility needs to be done as usual through principal banks. The relevant programs are the *Unterprogramme KfW-Unternehmerkredit (037/047)* and *ERP-Gründerkredit – Universell (073/074/075/076)*. Interest rates are between 1% and 1.46% p.a. for SMEs and between 2% und 2.12% p.a. for larger enterprises. There will be no credit rating process of KfW for amounts of up to €3 million (any checks will be done only by the principal banks).
  - KfW participation in syndicated loans through the program *Direktbeteiligung für Konsortialfinanzierung (855)*. Accordingly, KfW will participate in individual financing transactions for medium-sized and large enterprises and will assume up to 80% of the risk.
  - Increasing the maximum amounts for state guarantees to €2.5 million and enabling the guaranteeing banks to make independent decisions on amounts of up to €250,000 within three days of the application.
  - There will be special export credit risk guarantees along the lines of the German ECA (Hermes) crisis programs in 2009.

## Labor and Employment Law

### How Can Enterprises Receive Short-time Compensation?

The requirements for so-called “short-time compensation” (*Kurzarbeitergeld*) have been considerably relaxed, with retroactive effect from 1 March 2020 for a fixed period until 31 December 2020. According to the new statutory regulations, the following now applies:

- Right to short-time compensation if a considerable lack of work exists, which affects at least 10% of the employees employed by the business or in a part of the business.
- The loss of wages or salary of the employees concerned must amount to at least 10% of the gross remuneration for the respective calendar month.
- It is still necessary to use up any working time credit or outstanding holiday entitlements prior to the start of short-time work (*Kurzarbeit*). However, it is no longer mandatory that a negative working time balance be eliminated.
- The German Federal Employment Agency (*Bundesagentur für Arbeit*) will reimburse the social security contributions for employees on short-time work. This means that the employer must still continue to pay the contributions with the employee’s wages or salary (i.e. the full amount of the employer and employee contributions to health, pension and nursing care insurance). With retroactive effect from 1 March 2020 until the end of 2020, the *Bundesagentur für Arbeit* will reimburse these social security contributions to the extent that they are attributable to the portion of short-time work.
- It is now also possible to apply for short-time compensation for temporary agency employees, who cannot currently be leased. This was not possible in the past because it is considered an operational risk of the leasing company not to be able to lease its employees on a permanent basis.
- The other requirements for introducing short-time work have remained the same. There must be a legal basis for the temporary reduction of the working hours. This can or may be agreed in the employment contract, a supplement





## Insolvency Law

### What Changes Result for Companies Under the New Law?

The law on the suspension of the obligation to file for insolvency as a result of the spread of coronavirus provides for the following important regulations.

The obligation to file for insolvency pursuant to Section 15a of the German Insolvency Code (InsO) and Section 42(2) of the German Civil Code (BGB) is suspended retroactively from 1 March 2020 until 30 September 2020 (suspension period). The Federal Ministry of Justice and Consumer Protection (BMJV) may extend this suspension period by statutory order until 31 March 2021.

This means that the obligation of the managing directors of a limited liability company (GmbH, GmbH & Co. KG, AG, UG) to file for insolvency with criminal penalties and liability and the obligation of the executive boards of associations to file for insolvency with liability is suspended.

The draft law contains two exceptions. The obligation to file for insolvency remains in force if the insolvency reasons (inability to pay or over-indebtedness) are not a result of the COVID-19 pandemic. In addition, there is an obligation to file for insolvency if there are no prospects of eliminating an inability to pay.

However, the burden of proof that these two exceptions apply lies with the party claiming that there has been a breach of the obligation to file for insolvency (i.e. typically a subsequent insolvency administrator or a creditor).

In addition, a relaxation of the rules relating to the burden of proof is intended to help the debtor. If the debtor was not insolvent on 31 December 2019, it is legally presumed that the grounds for insolvency have arisen from the effects of the COVID-19 pandemic, and that there are prospects of eliminating any existing insolvency. The purpose of this presumption is to relieve the applicant of the difficulties related to the burden of proof and forecasting. According to the explanatory memorandum to the law, a rebuttal should only be considered in cases where there is "no doubt" that the COVID-19 pandemic was not the cause of the insolvency and that it was not possible to eliminate any existing insolvency. In this respect, "the strictest requirements must be fulfilled." In order to give affected companies the opportunity to continue their business and eliminate the insolvency situation, the suspension of the obligation to file for insolvency is flanked by further regulations.

- There is a relaxation of the payment prohibitions under company law when grounds for insolvency exist (Section 64 sentence 1 GmbHG, Section 92(2) sentence 1 AktG, Section 130a(1) sentence 1 HGB, also in conjunction with Section 177a sentence 1 HGB and Section 99 sentence 1 GenG). Insofar as the prerequisite for the suspension of the obligation to file for insolvency exists, payments made in the ordinary course of business, in particular those payments which serve to maintain or resume business operations or to implement a restructuring concept, are deemed compatible with the diligence of a prudent and conscientious manager and therefore do not trigger any liability on the part of the manager.

to the employment contract, a works agreement or a collective bargaining agreement. If a works council exists, its co-determination rights must also be observed when introducing short-time work.

- The amount of short-time compensation has also remained the same. It amounts to 67% (employees with a registered child allowance) or 60% (other employees) of the net difference between the net wages or salary resulting from the target wages/salary for the respective month and the net wages or salary resulting from the actual wages/salary for the month. The target salary (gross) is thereby capped by the income threshold (*Beitragsbemessungsgrenze*).
- The previous regulations should apply again as of 1 January 2021.

### Who Will Compensate the Loss of Earnings of Parents if They Have to Take Care of Their Children Themselves Due to the Closure of Childcare Facilities and Schools?

The new Section 56(1a) of the German Infection Protection Act (IfSG), which will apply until 31 December 2020, provides for parents to receive compensation if their children, up to the age of 12, must be looked after at home due to the closure of schools and childcare facilities and who suffer a loss of earnings as a result. This compensation amounts to 67% of the loss of earnings, for six weeks at the most in each case, and up to a maximum of €2,016 per month.

- Newly granted loans from banks and other lenders (including commercial credit and other forms of performance on target) are also protected in order to motivate them to provide additional liquidity to companies in crisis. It is, therefore, not possible to contest any refund made by 30 September 2023 of a new loan granted during the suspension period or the provision of collateral to secure such loans during the suspension period, and the granting of loans and collateral cannot be regarded as an immoral contribution to delaying insolvency. However, this requires that the loan is truly a new loan; mere extensions, for example, are not sufficient.
- Shareholders will also be given an incentive to provide liquidity to companies in crisis. For this reason, repayments made by 30 September 2023 on new loans granted by shareholders during the suspension period will not be considered disadvantageous for creditors and, therefore, cannot be contested in any subsequent insolvency proceedings. Such loans are also no longer subject to subordination in insolvency proceedings pursuant to Section 39(1) no. 5 InsO.
- In order to relieve the fears of other contractual partners (such as suppliers, landlords, lessors, etc.) that they will have to repay payments received from companies in crisis in the event that restructuring efforts fail and insolvency proceedings are commenced, the possibilities for contesting transactions made during insolvency are also restricted. Any settlement of claims or provision of security which the creditor was entitled to receive, is not contestable in later insolvency proceedings. The same applies for any performance in lieu of or on account of performance, payments made by a third party on the debtor's instructions, the provision of security other than that which was originally agreed if this is not more valuable, the shortening of payment terms and the granting of payment facilities. Any exceptions are only valid if the opponent knew that the debtor's restructuring and financing efforts were not suitable for eliminating the existing insolvency. This restriction of insolvency avoidance also applies for contractual partners of companies that are not obligated to file an application (e.g. sole traders and limited partnerships with a natural person as the general partner) and contractual partners of debtors who are neither insolvent nor over-indebted.

Finally, for a three-month transitional period, the right of creditors to apply for the commencement of insolvency proceedings is also suspended. During the three months after the law has entered into force, creditors may only apply for insolvency if the reason for insolvency (inability to pay or over-indebtedness) already existed on 1 March 2020.

## Tax Law

### What Tax Relief Exists for Companies Facing Liquidity Problems?

Many companies will experience significant drops in sales and profits due to the coronavirus pandemic and will, therefore, be facing the associated liquidity problems. In this regard, the German Federal Ministry of Finance (*Bundesfinanzministerium* – BMF) issued a letter on tax relief measures for companies on 19 March 2020.

### Facilitation of Tax Deferrals

The tax authorities should be able to defer the payment of applicable taxes (without deferral interest) if the taxes cannot be paid due to a lack of liquidity as a result of the coronavirus pandemic and the payment would constitute a significant hardship for the company. In this respect, the tax administration has been instructed not to impose strict requirements in terms of providing evidence. The deferral measure applies, in particular, for corporate tax, income tax, trade tax and value-added tax. However, it does not apply, for example, for the payment of wage withholding tax or capital gains tax. The application for relief should not be negatively impacted if the company cannot quantify the damages resulting from the coronavirus pandemic. Individual state tax authorities have already made sample application forms for tax deferrals available on their websites. The deferral interest can be waived until 31 December 2020 subject, however, to the discretion of the competent tax office in each case. The Bavarian State Ministry has already announced that it intends to waive deferral interest. Other federal states are also considering doing this.

### Adjustment of Advance Tax Payments

The advance tax payments should be adjusted quickly and easily as soon as it becomes apparent that the company's income will decrease in comparison to the previous year. This applies, in particular, for corporate tax, income tax and trade tax. In this case, it is also not necessary to quantify the





specific damages incurred. If, however, the advance payments should be adjusted for the time period after 31 December 2020, these simplification rules do not apply. For trade tax, this has been regulated in a state decree on the adjustment of the base amount of trade tax, which was issued on 19 March 2020.

#### **Enforcement and Late Payment Fees**

In principle, late payment fees of 1% must be paid for each commenced month if a company cannot pay corporate tax or income tax on time. If companies cannot pay these taxes in a timely manner due to liquidity shortfalls caused by the coronavirus pandemic, tax offices should waive the late payment fees. Any enforcement measures of the tax administration (e.g. attachment of bank accounts) are also to be suspended from 19 March 2020 until 31 December 2020.

#### **Accommodations of the Customs Authority and the Federal Central Tax Office**

With regard to taxes levied by the customs authority (e.g. energy tax and air traffic tax), the Customs Directorate General has been instructed to accommodate the companies concerned. The same applies for the Federal Central Tax Office, for example, in view of value-added tax and insurance tax. This, therefore, also allows for the application of the aforementioned measures, i.e. tax deferrals, adjustment of advance payments, suspension of enforcement measures and the waiver of late payment fees.

Affected companies are advised to contact their individual tax office early on. It is expected that the tax authorities will take further steps to implement these measures. In addition, further tax relief measures are currently subject to discussion, such as the extension of filing deadlines (e.g. preliminary value-added tax returns) or the expansion of depreciation allowances. In this respect, taxpayers should keep an eye on the further measures taken by the legislator and the tax authorities.

## **Data Protection**

The German Federal Commissioner for Data Protection and Freedom of Information (BFDI) has recently – and apparently for the first time – taken a [position](#) on the protection of employees' data due to the coronavirus pandemic.

In the foreground, there is a focus on the handling of health data of employees and third parties, such as visitors. In practice, these initial guidelines are extremely valuable because many enterprises are currently questioning whether measures that are urgently needed to control the spread of the virus are compatible with data protection law. Fortunately, the BFDI has also taken the view expressed in our first coronavirus update that, even in times of crisis, the processing of health data is principally only possible to a restrictive extent. The BFDI makes it clear that enterprises should not be guided by the principle, "necessity knows no law." At the same time, however, the BFDI identifies ways, compliant with data protection law, to implement essential measures to control the spread of the coronavirus pandemic and/or protect employees in day-to-day operations. As already explained in our last update, the principle of proportionality and, above all, the principle of purpose limitation in accordance with the legal basis must thereby be observed.

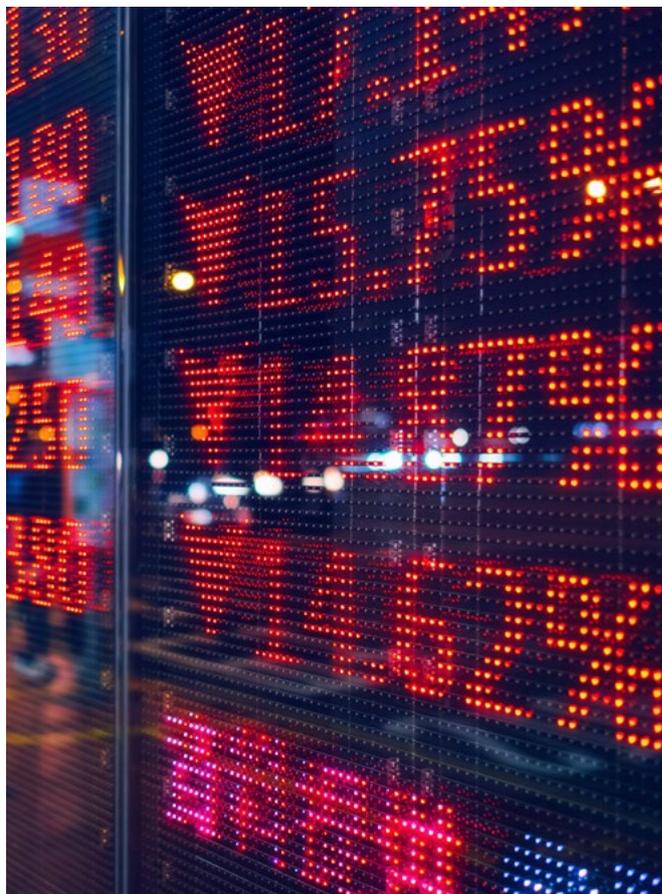
Enterprises need security in times of uncertainty. The BFDI also apparently agrees with this point in principle. In the opinion of the BFDI, the following measures, which are now the focus of controlling and combating the coronavirus pandemic, may be considered compliant with data protection law if the statutory requirements are met:

- Measures intended to combat the spread of the virus within the operation and among other employees. This includes, in particular, the collection and processing of personal (health) data by the employer which concerns the confirmation of an infection of an employee, the employee's stay/return from a risk area identified by the Robert Koch Institute (RKI) and other information about contact with persons proven to

be infected in order to prevent or control the spread of the virus among employees as best as possible.

- Measures related to access control. This includes the collection and processing of personal (health) data of guests and visitors when entering the business premises. This also concerns the collection of data which relates to the infection of the visitor, the visitor's potential contact with persons proven to be infected or any stay or return from an RKI risk area.
- Any measures to inform potential contact persons which lead to the disclosure of (health) data already collected from employees proven to be infected or suspected of being infected to their potential contacts are still considered critical. Such disclosure is usually only considered lawful if knowledge of the individual's identity is required in exceptional cases for precautionary measures, e.g. in urgent cases, such as imminent business trips, etc. Moreover, in our opinion, the information management should generally be left up to the competent health authorities or public regulatory or law enforcement authorities in the area of emergency response.
- From a business perspective, it should be considered positive that the BFDI also considers that the employee has an obligation under the employment relationship to disclose any circumstances or events relevant to the coronavirus pandemic. In particular, the employee must disclose to the employer any circumstances relating to his or her own confirmed infection, contact with persons proven to be infected and any stay/return from a risk area. The data transfer resulting from this disclosure obligation therefore takes place in principle for contractual purposes in compliance with data protection law.
- The BFDI confirms the assessment that consent should be used as a legal basis for measures only in exceptional cases in light of employee data protection due to the associated problems (see our first coronavirus update in this regard).
- Checking the temperature of employees and visitors is not expressly addressed in the statement of the BFDI. However, strict alignment with the statutory provisions granting authorization is emphasized. From a data protection standpoint, temperature checks are, therefore, still inadvisable because there is no apparent reliable legal basis under the General Data Protection Regulation (GDPR) or the German Federal Data Protection Act (BDSG), in our opinion.

In summary, it must be noted that the BFDI is, inter alia, primarily responsible for the federal administration and the supervision of data protection in the private sector is the responsibility of the supervisory authorities of each individual federal state. In this respect, the position of the BFDI can only be seen as an initial orientation. The directions given in the individual federal states must still be monitored closely. The authorities, amongst others, in Baden-Württemberg und Schleswig-Holstein, have already issued initial statements. It can be expected that further positions and initial determinations/guidance for practical use will follow. We will stay on the ball and take a consolidated look at the opinions of the individual state authorities in one of our next updates.



## Banking and Capital Market Law

### What Measures Are Being Taken on the National and EU Levels in the Area of Banking and Capital Market Law?

The coronavirus crisis has also struck the banking and capital market environment with full force. Banks and other market participants have to overcome the considerable regulatory challenges which coronavirus is posing to their business operations. The German Federal Financial Supervisory Authority (BaFin) is taking the current risk situation caused by coronavirus very seriously. It is in close contact with banks and other financial market players regarding possible reactions and emergency plans. According to BaFin, it is continuously analyzing further developments and possible effects on the financial industry.

The European Banking Authority (EBA) announced two important actions in its [statement](#) concerning the coronavirus crisis on 12 March 2020:

- EU-wide stress tests at banks will be postponed to 2021 to allow banks to focus on the current situation.
- Competent authorities should make full use, where appropriate, of flexibility embedded in the existing regulatory framework.

These measures are intended to prevent a negative impact on the markets due to financial shortfalls caused by, among other things, a too strict application of capital and liquidity requirements. On the other hand, the EBA does consider it important that any deterioration of asset quality be accurately reflected. However, this should take place in a close dialogue between the respective supervisors and banks.

In addition, the crisis may also have an impact on banks' balance sheets. For instance, loan defaults among borrowers experiencing difficulties due to the crisis or losses in trading positions due to the development of stock markets could influence the capital ratios of banks, which could fall below the minimum requirements in the worst-case scenario.

The European Central Bank (ECB), which also supervises systemically relevant German banks, also announced corresponding relief for banks in this connection in its [press release](#) on 12 March 2020:

- Banks can fully use capital and liquidity buffers, including Pillar 2 Guidance
- Banks will benefit from relief in the composition of capital for Pillar 2 Requirements
- ECB will consider operational flexibility in the implementation of bank-specific supervisory measures (see [here](#))

On 20 March 2020, the ECB put its announced capital relief measures amounting to €120 billion into effect. This relief is available for banks to finance up to €1.8 trillion of lending.

The additional measures, which should ensure that significant institutions (SIs) under the supervision of the ECB, can continue to fund households and corporations during the coronavirus crisis, include further flexibility in the prudential treatment of loans backed by public support measures. In light of the current market conditions, supervisors will deploy flexibility when discussing with banks the reduction of non-performing loans. Furthermore, banks are encouraged to take steps to avoid excessive pro-cyclical effects when applying the IFRS 9 international accounting standard.

In addition, the ECB will discuss individual measures with banks, such as adjusting timetables, processes and deadlines. For example, the ECB is considering rescheduling on-site inspections and extending deadlines for the implementation of remediation actions stemming from recent on-site inspections and internal model investigations, while ensuring the overall prudential soundness of the supervised banks. In this context, the ECB Guidance to banks on non-performing loans also provides supervisors with sufficient flexibility to adjust to bank-specific circumstances. Extending deadlines for certain non-critical supervisory measures and data requests will also be considered. In light of the operational pressure on banks, the ECB supports the decision by the EBA to postpone the 2020 EU-wide stress test and will extend the postponement to all banks subject to the 2020 EBA stress test.

BaFin is adapting its supervisory practice and measures in the coronavirus crisis. In doing so, BaFin is following the recommendations of the EU regulatory and supervisory bodies and international standard setters (see [here](#)). On its homepage, BaFin has published FAQs on various topics related to the coronavirus and is updating and extending them on an ongoing basis.



### Capital Market

The European Securities and Markets Authority (ESMA) expects national supervisory authorities (e.g. BaFin) not to prioritize their supervisory actions in relation to new regulations for systematic internalisers (SI) from 26 March, the application date, until 26 June 2020. Specifically, this concerns the new tick-size regime for SIs under the Markets in Financial Instruments Regulation (MiFIR) and the Investment Firms Regulation (IFR).

The tick-size regime regulates the minimum tick sizes for trading shares, certificates representing shares and exchange-traded funds (ETFs). The ESMA stated that compliance with the new requirements as of 26 March 2020, could create unintended operational risks for SIs in the context of the coronavirus pandemic and that the national competent authorities should generally apply their risk-based supervisory powers in a proportionate manner.

On 4 March 2020, the US Securities and Exchange Commission (SEC) published [guidelines](#) for US issuers on the management of the crisis. No such guidelines are available for listed German companies yet. Such companies may be obligated to disclose publicly one or more ad-hoc announcements in accordance with Art. 17(1) of Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014, on market abuse (Market Abuse Regulation – MAR) due to the effects of coronavirus as a “significant circumstances,” which gives rise to the existence of inside information. This is the case, for example, in the event of significant adverse effects on production with a negative business development outlook or in the event of a significant decline in sales. Information on the illness or (permanent) absence of managers due to coronavirus may also be considered inside information in some cases.

## German Infection Protection Act

Along with the other packages of measures, a number of amendments to the German Infection Protection Act (IfSG) have been adopted.

In the event of a national epidemic, the Federal Ministry of Health is authorized in the future, under the new Section 5(3) IfSG, to order that measures be taken for individuals entering Germany, such as medical examinations, verification of vaccinations or prophylaxis, and to establish their identity, travel route and contact data. In addition, the Federal Ministry may take measures with respect to railway, bus, ship and airline companies to identify and prevent the introduction of serious infectious diseases as far as travel from abroad to Germany is concerned. Finally, the Federal Ministry may take measures in the future to secure the supply of medicine and medical products and may also limit the patent protection of medicine and medical products.

## State Liability

### Does State Liability Exist for Measures of the Federal and State Governments?

Specific aspects of state liability and compensation resulting from losses incurred as a consequence of measures taken to fight COVID-19 are regulated in the IfSG. These rules apply, in particular, with respect to the loss of income of employees who are the subject of orders made under the IfSG and other specified losses caused directly by certain measures taken.

However, the state liability and compensation rules under the IfSG only cover specific cases and do not provide a general principle of state liability and compensation.

Insofar as losses are concerned, which are not covered by the IfSG, recourse under the general rules of German state liability and compensation needs to be taken.

The German legal system provides for state liability for unlawful measures taken by governments and administrative bodies, provided that the enterprise or person concerned has pursued the legal remedies available against the unlawful state action and the person concerned has suffered an infringement of property rights or other rights and resulting damage, despite having pursued the available legal remedies in due time. In order to prevent the loss of such rights and potential insurance claims, affected persons and enterprises should examine whether legal remedies are available against a certain measure and pursue the available legal remedies within the applicable time periods after weighing the other relevant aspects.

Furthermore, under certain conditions, the German legal system also provides for compensation claims of persons and enterprises for lawful measures taken by the government, provided that the person or enterprise concerned has not caused the measure to be taken. This is provided as compensation for the fact that the person concerned has been expected to suffer the consequences of the government intervention (*Sonderopfer*) and has, therefore, been unfairly burdened. This follows from the general legal concept of sacrifice.



## Further Updates

We will continue to monitor the situation carefully and keep this advice note under review. We have also set up a dedicated resource centre for businesses on the legal, regulatory and commercial implications of coronavirus COVID-19 on our [website](#).

This is to provide you with the very latest guidance on the practical steps to take, given that the situation is an evolving one and the government and health authorities' guidance and advice may well change.

If you would like to discuss any of the issues raised in this advice note, please contact any of our team listed below.



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