Impact of the Covid 19 pandemic: Further assistance from the German Government

25 March 2020

What is new?

Despite the substantial scope of the first package of measures from the German government, the establishment of a "protective shield for employees and companies", it had already become clear that further measures would be necessary to mitigate the effects of the Covid 19 pandemic on the German economy (for the first package, see our newsletter of 18 March 2020).

Only ten days later, the German government has now significantly expanded the previous package. While this package still concentrated on ensuring liquidity for companies, in particular through loans with a significant participation by the state-owned Kreditanstalt für Wiederaufbau (KfW, i.e. Reconstruction Loan Cooperation) and guarantees, further measures to protect the economy are now being added. The total volume of state measures now extends to EUR 1.2 trillion:

- **A fund to support the real economy** (Economic Stabilisation Fund, "Wirtschaftsstabilisierungsfonds- WSF") is being set up along the lines of the Financial Market Stabilisation Fund (also known as the Special Fund for Stabilisation of the Financial Market, "SoFFin"). The draft law to establish an Economic Stabilisation Fund (Economic Stabilisation Fund Act, "Wirtschaftsstabilisierungsfondsgesetz – WStFG") was adopted by the Federal Cabinet on 23 March 2020 and is to go through the legislative procedure in the Bundestag and Bundesrat this week. The Fund is supposed to issue state guarantees for the liabilities of large, strategically important companies. In addition, it can - similar to the SoFFin under the Financial Market Stabilisation Fund Act (Finanzmarktstabilisierungsfondsgesetz) - acquire stakes in distressed companies. The measures thus complement KfW's special programmes. The WSF has funds of up to EUR 500 billion at its disposal for stabilisation measures. All aid measures are subject to much stricter conditions vis-à-vis the enterprises than the KfW loans, for example, and also require approval by the European Commission.

- In addition, the Federal Cabinet has adopted a draft law to mitigate the consequences of the Covid 19 pandemic in civil, insolvency and
criminal procedural law, which provides, in particular, relief for tenants, leaseholders and citizens with regard to their obligations under continuing obligations. This includes restrictions on the termination of tenancy and lease agreements and regulations on deferral and contract adjustment in consumer loan law, as well as on rights to refuse to perform for other continuing obligations. In addition, the draft law provides for a suspension of the obligation to file for insolvency and for facilitation of the holding of meetings required under corporate law by using telecommunications. Additionally, the key points of Corona emergency aid for small businesses and the self-employed (Eckpunkte zu "Corona-Soforthilfen für kleine Unternehmen und Selbständige") are intended to enable further aid measures by way of direct grants for companies with up to 10 employees.

Finally, KfW's special programme has also been concretised and expanded in the last few days. These adjustments will benefit large enterprises in particular, as the turnover limits have been abolished and the maximum loan amounts have been raised. In addition, the level of risk assumption in syndicated financing has been increased to up to 80%. These enhanced loan programmes have already been approved by the European Commission with regard to state aid law.

Economic Stabilisation Fund: A safety net for the real economy

The Economic Stabilisation Fund (WSF) should, similar to the SoFFin during the financial and economic crisis, be able to provide guarantees to distressed companies and subscribe to their capital instruments. The responsible federal ministries - the Federal Ministry of Economics and Energy (BMWi) and the Federal Ministry of Finance (BMF) - have closely aligned these measures with the previous structures of the SoFFin. The existing Financial Market Stabilisation Fund Act of 2008 will accordingly be supplemented by provisions on the establishment of an Economic Stabilisation Fund - sections 15 et seq. - and rebranded as a general stabilisation fund act. Its instruments, guarantees and recapitalisation measures can, however, only be applied for by companies in the real economy. They are not open to financial institutions. The SoFFin has not yet been reactivated but could be revived by law at short notice if this should become necessary to avoid a systemic crisis.

As in 2008, the technical details will be regulated in a separate acceleration act, which will be renamed the Economic Stabilisation Acceleration Act (Wirtschaftsstabilisierungbeschleunigungsgesetz). As in 2008, this law will remove a wide range of hurdles under corporate law so that the measures can take effect quickly and effectively.

The Federal Government has also based the size of the WSF on the volume of the SoFFin; an amount of EUR 400 billion is envisaged for WSF guarantees, and of up to EUR 100 billion for recapitalisation measures. In addition, loans of up to EUR 100 billion are to be granted to KfW via the new fund to enable it to finance its special programmes.
The instruments of the WSF are reserved for **large systemically important companies** that are of central importance for the German economy and may not be able to receive the (large-volume) support they need for stabilisation from the other programmes. The assessment of whether a company is "systemically important" is the responsibility of the BMF and BMWi in particular. The ministries should take into account, among other things, the number of jobs and the company’s integration in the economy - e.g. via supply chains. The draft law also refers to the German Foreign Trade and Payments Regulation (Außenwirtschaftsverordnung - AWV) and critical infrastructure as defined therein. According to this, an indication of the systemic importance of a company can be its affiliation to a strategically relevant industrial sector - such as energy, transport or health care.

The WSF is established as a special fund with no legal capacity at the Finance Agency, which also managed the SoFFin. In managing the WSF, the Finance Agency is subject to the supervision of the BMF and the BMWi. The measures introduced by the WSF are limited until 31 December 2021.

The instruments of the WSF still have to be coordinated with the European Commission, so their details - such as remuneration, conditions of grant - have not yet been finalised. In the next few days, the responsible federal ministries will publish the accompanying legal regulations that will specify the stabilisation measures in more detail. There is experience gained from the financial market crisis in this area.

In detail, the following applies:

**Eligible companies**

**Large companies** according to the EU definition, which in any case meet two of the three following criteria are eligible to apply:

- a balance sheet total of more than EUR 43 million,
- more than EUR 50 million in sales,
- more than 249 employees on an annual average.

This is based on the financial years already closed on the balance sheet before 1 January 2020. Small and medium-sized enterprises (SMEs) as defined by the European Commission are generally not eligible to apply for funding. However, they can be included if they are active in one of the sectors the German Foreign Trade and Payments Regulation identifies as critical with regard to possible takeovers by foreign investors. These include companies from the energy, water, food, information technology and telecommunications, cloud computing, health, finance and insurance, transport and traffic as well as telematics and media sectors.

In their application, companies must provide evidence that no other source of funding is available to them. Accordingly, priority must be given to the stability programmes adopted in parallel, especially the extended measures for companies to use KfW loans. In addition, companies must have a clear independent perspective for continued operation after the corona pandemic.
has been overcome. Finally, according to the relevant EU definitions they must not have been an "undertaking in difficulty" as at 31 December 2019.

**Stabilisation Instruments**

**Guarantees**
The new fund will be able to provide guarantees of EUR 400 billion to secure corporate debt and liabilities and thereby to help companies refinance themselves on the financial markets. The WSF guarantee will allow banks to take the risks arising from such exposure to the corresponding companies in the real economy, using the ESF credit risk, which should significantly improve the refinancing of companies. The duration of the guarantees and the liabilities to be secured can be up to 60 months.

More detailed provisions on the exact modalities will be laid down in secondary regulations. According to the draft law, a market-conform premium should, in principle, be agreed. Similar to the financial crisis, they will nevertheless be relevant under state aid law. Therefore, guarantee measures may be notified by Germany to the Commission on the basis of the Temporary Framework and should be approved on this basis.

**Investments and recapitalisation measures**
The WSF also has EUR 100 billion at its disposal for investments in distressed companies.

According to the draft law, an investment can only be made if there is an important interest in stabilising the company. It must also be demonstrated that the purpose pursued by the investment cannot be achieved better and more economically in any other way. There is an express waiver of a time limit on recapitalisation.

In addition to the acquisition of shares, the investment measures may also include the acquisition of other equity instruments - subordinated debt instruments, hybrid bonds, profit participation rights, silent partnerships. Here, too, details, in particular provisions on the consideration for the recapitalization, upper limits for participation in elements of equity and conditions for the resale of the equity interests, are to be laid down in secondary regulations.

State participations in companies cannot be approved on the basis of the Temporary Framework. In the case of holdings in undertakings in difficulty, approval could qualify as restructuring aid under the Guidelines on State aid for rescuing and restructuring, which would have to be notified in each individual case. The Commission is likely to modify the guidelines in the light of the Corona crisis. Approval may be subject to commitments in order to limit resulting distortions of competition. The Commission’s decisions taken in the wake of the financial market crisis provide a great deal of experience in this respect.

**Conditions for stabilisation measures**
Similar to financial institutions using the SoFFin measures, companies in the real economy must also meet certain requirements and conditions depending on the type of stabilisation measure if they wish to receive the
benefit of those stabilisation measures. Section 25 (3) of the draft law already contains requirements in this regard. Details may also be provided for by secondary regulations.

In this respect, the draft law specifies various conditions, including limits on distributions and the remuneration of members of corporate bodies; similar conditions were also formulated for SoFFin support measures and had to be accepted by banks seeking assistance. In general, the draft law states that beneficiary companies should ensure a sound and prudent business policy and should also contribute to stabilising production chains and jobs. In addition to reporting obligations to the WSF, it is conceivable there will be regulations on the use of the funds raised, rules on taking out further loans or measures to avoid any distortion of competition, as well as sector-specific restructuring requirements.

The responsible federal ministries are likely to base their more detailed secondary regulations on the conditions that they agreed with beneficiary banks during the financial crisis. The question arises, however, whether similarly far-reaching conditions would really be proportionate in the case of the Corona crisis, since - as the Federal Government also acknowledges in the explanatory memorandum to the law - the companies slid into this crisis through no fault of their own. The federal ministries are likely to take this into account when exercising their discretionary powers in favour of the companies applying. Corresponding commitments may also result from coordination with the European Commission.

**Decision on the measures**

Under Section 20(1) of the draft law, applications for funding are to be submitted by companies to the BMWi; the Ministry is also to act as a contact for companies in the run-up to the application. The **BMWi will decide on the measures in agreement with the BMF**; the review should take into account the importance of the company for the German economy, the urgency, the effects on the labour market and on competition. The decision on stabilisation measures is to be made in the properly and duly exercised discretion of the competent federal ministries; there is no legal entitlement to support. However, the federal ministries will have to observe the principle of equal treatment in their decisions.

An inter-ministerial committee will be established for fundamental issues and matters of particular importance, in which members of other federal ministries (Federal Chancellery, Federal Ministry of Labour and Social Affairs, Federal Ministry of Justice) will also participate. By means of secondary regulations the KfW may be entrusted with the performance of tasks under the Law - including decisions on stabilisation measures.

**Simplifications under corporate law for recapitalisation measures under the Economic Stabilisation Acceleration Act**

As was the case with recapitalisations under the Financial Market Stabilisation Fund 2008, the draft law establishing the WSF also eliminates to the benefit of the Fund and the speed of the process a large number of (corporate) law
obstacles to the effective recapitalisation of companies. In principle, third parties should not be able to delay or complicate the procedure. To this end, the interest in the preservation of the companies is given priority over the rights of other shareholders and formal justice.

In close alignment with the provisions of the Financial Market Stabilisation Fund Act, the new law therefore provides for significant simplifications under corporate law for the implementation of stabilisation measures. The simplifications directly apply to companies incorporated as stock corporations; however, by means of general references the rules are also applicable in a simplified form to other companies in which no natural person has unlimited liability.

> The act on measures in corporate, association, cooperative and residential property law already reduced the formal requirements for holding general meetings. In accordance with Section 7 of the Economic Stabilisation Acceleration Act, shorter invitation periods now apply to general meetings at which resolutions are to be passed on capital measures for stabilisation purposes, and restrictions in the articles of association on the granting of voting proxies are suspended.

> The required majority for the resolution of a capital measure is reduced to a simple majority; for the exclusion of the subscription right, which is permissible in any case of subscription by the WSF, a majority to two thirds or the simple majority if at least half of the share capital is represented at the general meeting applies. When utilizing authorized capital, the management board may, with the consent of the supervisory board, also issue shares with a profit or liquidation preference as well as non-voting preference shares where the preference is not paid up. The WSF is given the opportunity to subscribe for shares below the issue price if they have previously been offered to shareholders at the issue price. The creation of authorized or conditional capital is permitted beyond the previously applicable maximum limits.

A similar simplification will be introduced for a reduction of capital, for which a resolution with a simple majority will also sufficient and for which the claim of the company's creditors to security will be suspended. The issue of profit-sharing rights and subordinated bonds as well as entering into silent partnerships, is possible until 31 December 2021 without the involvement of the general meeting, provided that in all these cases no right to exchange them for shares is granted.

> The disruption potential of individual shareholders is limited by various provisions of the Economic Stabilisation Acceleration Act. Lawsuits or motions in the temporary injunction proceedings neither prevent registration nor implementation of stabilisation measures and in release proceedings pursuant to Section 246a of the German Stock Corporation Act (AktG) an overriding interest of the shareholders is presumed. Shareholders who attempt to obtain unjustified advantages by means of legal measures are additionally threatened with a liability for damages.
An additional acceleration of capital measures is to be achieved by the fact that the capital measure already takes effect upon publication on the company’s website, at the latest upon publication in the Federal Gazette.

> Various follow-up obligations are suspended for stabilisation measures.

- The provisions of the German Stock Corporation Act on controlling companies are not applicable to the Federal Government and the WSF until the end of 2021. The duty to inform the Economic Committee is not applicable. Notification obligations in accordance with the German Securities Trading Act (WpHG) due to the acquisition of a qualifying holding, as well as in accordance with the German Banking Act (KWG) due to the acquisition of a significant holding, are suspended.

- In the event of an acquisition of control due to a stabilisation measure or a subsequent increase in the shareholding, the BaFin grants exemption from making a takeover offer. The rules on acting in concert in conjunction with the WSF are also relaxed. If the Federal Government or the WSF nevertheless submits a takeover offer, special provisions regarding deadlines, publication obligations and minimum prices will apply.

- Furthermore, in the case of shares issued to the WSF, admission to the stock exchange is not mandatory until the new shares are transferred to a third party.

- Section 13 of the Economic Stabilisation Acceleration Act states that acquisitions of equity interests in banks should not trigger an ownership control procedure pursuant to Section 2c of the German Banking Act, which may seem surprising at first glance given the fact that the measures of the WSF are limited to companies in the real economy. What is meant here, however, are those ownership control procedures that are triggered by the indirect acquisition of a regulated subsidiary due to the acquisition of a shareholding in a parent company operating in the real economy.

**Tax law changes**

Finally, Section 27 of the draft Economic Stabilisation Fund Act contains accompanying tax regulations to support the stabilisation measures. To this end, the existing provisions of the previous Section 14 of the Financial Market Stabilisation Fund Act (FMStFG) are essentially declared to be applicable here. In addition to the provisions which relate to the tax situation of the WSF itself and result in it being subject neither to corporation tax nor to trade tax and not being an entrepreneur within the meaning of the Value Added Tax Act (Section 14 (1) FMStFG), it is also provided that investment income received by the WSF is not subject to tax deduction (eher withholding?) (Section 14 (2) FMStFG).
In addition, certain tax consequences resulting from the implementation of stabilisation measures for the companies concerned are also excluded or at least mitigated. For example, Section 8c of the German Corporation Tax Act (Körperschaftsteuergesetz) and Section 10a, last sentence of the German Trade Tax Act (Gewerbesteuergesetz), which lead to the loss of unused tax losses (including loss carryforwards) in the event of a harmful acquisition of equity interests, do not apply to the acquisition of stabilisation elements by the WSF and their retransfer (Section 14 (3) sentence 1 FMSiFG). According to the wording, this might also apply to indirect transfers of shares to the WSF, but for example the transfer by the WSF to a third party would probably not be a re-acquisition within the meaning of the provision and may therefore lead to the later loss of unused tax losses. In addition, pursuant to Section 27 (1) of the Economic Stabilisation Fund Act, the provisions of Section 15 (3) of the German Conversion Tax Act (Umwandlungssteuergesetz), which in the case of a spin-off leads to the pro rata elimination of losses, loss carryforwards and similar tax attributes, shall not apply to spin-offs if such spin-offs are necessary to prepare a stabilisation measure.

Furthermore, acquisitions by the WSF should be exempt from real estate transfer tax and should not constitute a relevant change of shareholders in the case of partnerships for the purposes of Section 1 (2a) of the Real Estate Transfer Tax Act (Grunderwerbsteuergesetz) (see Section 14 (4) FMSiFG). However, in contrast to the case of the elimination of unused tax losses, repurchase is not expressly exempted from real estate transfer tax, so that later (re)transfers by the WSF may trigger land real estate transfer tax. It should also be noted that only the acquisition by the WSF itself is exempt from real estate transfer tax. If the acquisition of shares by the WSF leads to an infringement of the holding periods for real estate transfer tax (e.g. under Section 6a of the German Land Transfer Tax Act), the real estate transfer tax will then be levied retroactively on the originally exempted transaction and not on the acquisition by the WSF itself.

Finally, Section 27 (3) of the draft law stipulates that the above tax provisions also apply mutatis mutandis to institutions established by other domestic (German) local authorities comparable to the WSF and their stabilisation measures, i.e. in particular those of the federal states. However, this also means that measures by stabilisation funds of other EU Member States or third countries will not benefit from the tax advantages described above and that stabilisation measures in favour of foreign group parent companies may lead to the loss of unused tax losses or trigger real estate transfer tax at their domestic (German) subsidiaries. This restriction to domestic stabilisation measures has already been criticised in the literature for the FMSiFG as a violation of the right of establishment.

**Further development of KfW’s special programmes**

In the meantime, the first package of measures announced by the Federal Government on 13 March 2020 (see our newsletter of 18 March 2020) has also been enhanced. In particular, KfW’s special programmes are now also available to large companies without any sales restrictions. The European
Commission approved the adjusted credit programmes on 22 March 2020. The following should in particular be noted:

> The KfW Enterprise Loan ("KfW-Unternehmenskredit", for enterprises that have been in existence for at least five years) and ERP Start-up Loan - Universal ("ERP-Gründerkredit – universell", for young enterprises that have been active on the market for between three and five years) are now also available to large enterprises without restriction.

At the same time, the **maximum loan amount has been raised to EUR 1 billion per group of companies** (from the previous limit of EUR 200 million). The maximum loan amount is now limited to

- 25% of the annual turnover in 2019 or
- twice the wage costs of 2019, or
- the current financing requirements for the next 12 months for large enterprises (18 months for small and medium-sized enterprises)

of the company. However, for loans exceeding EUR 25 million, the amount of the loan may not exceed 50% of the company’s total debt.

The special regulations are no longer limited to working capital loans, but also extend to loans for investments, inventories and the acquisition of assets from other companies (including M&A/takeovers and active participations). KfW assumes up to 80% of the risk for large enterprises and up to 90% for small and medium-sized enterprises.

> The special rules for syndicated financing were also adapted and transferred to the **Special Programme "Direktbeteiligung für Konsortialfinanzierung"** (i.e. Direct Participation for Syndicated Financing). This applies to debt financing risk participations by KfW of at least EUR 25 million. The amount of the KfW risk share is limited by the following ratios:

- twice the amount of the annual payroll in 2019 or
- 25% of the total revenue for the year 2019 or
- the liquidity requirements for the next 12 months.

To ensure an adequate risk partnership between KfW and the financing partners, KfW's share of the company's total debt is limited to a maximum of 50%. KfW's assumption of risk has been increased to up to 80% of project financing.

The current terms and conditions of the programmes can be found in KfW's information sheets on the **Special Programme Direct Participation for Consortium Finance, KfW Enterprise Loan and ERP Start-up Loan - Universal**.

> The programmes are available to formerly healthy **companies** that slid **into difficulties** after 31 December 2019 due to the Covid 19 outbreak. The following conditions apply:
Only companies that were not in difficulty on 31 December 2019, i.e. that were in an orderly economic situation, are eligible. The relevant house bank or syndicate bank must not be aware of any unregulated payment arrears of the applicant of more than 30 days as of the cut-off date of 31 December 2019 and there must have been no deferral agreements or covenant breaches at that time.

In addition, at the time of application, the company must be expected to be fully financed until 31 December 2020 in accordance with current planning, i.e. the company must have a positive forecast for its continued existence. The plans and forecasts are to be based on the assumption that the overall economic situation will continue to normalize (as before the crisis).

Other important news in connection with the state protective shield

Commission guidelines on the approval of state aid: Temporary Framework published

On 19 March 2020, the European Commission published a Temporary Framework, by which it provided the member states with guidance for their support measures including state aid. If the programmes meet the requirements of the Temporary Framework, it should be possible to approve them at very short notice following notification by the member state concerned. This was done, for example, with regard to the KfW credit measures on 22 March 2020.

The Temporary Framework contains specific provisions for the following measures:

- Direct grants, repayable advances and tax advantages,
- State guarantees for bank loans to companies and
- Subsidised state loans.

In addition, the Commission sets out the conditions under which private banks may be involved in providing guarantees or subsidised interest rates without constituting state aid that would require the Commission’s approval.

More far-reaching measures, such as the acquisition of shareholdings in companies, as provided for under the new protective shield, fall outside the Temporary Framework and therefore require separate approval by the European Commission.

Measures that do not selectively favour individual companies but apply generally (e.g. short-time work compensation, tax deferrals) do not fall within the scope of the ban on state aid and can be implemented without prior approval by the Commission.
Law to mitigate the consequences of the Covid 19 pandemic

On 23 March 2020, the Cabinet also adopted a draft law to mitigate the consequences of the Covid 19 pandemic in civil, insolvency and criminal procedural law. This is intended as a contribution to mitigating the consequences of the pandemic for the affected citizens, the real economy as well as courts and public prosecutors offices. Of particular note are the temporary reliefs in insolvency law and with regard to existing contracts. The mechanism for this is a new Article 240 of the Introductory Act to the Civil Code. This applies to certain continuing obligations subject to German law. The following is envisaged:

Right to refuse performance

Article 240 Section 1 provides for a temporary right for consumers (within the meaning of Section 13 of the German Civil Code (Bürgerliches Gesetzbuch - BGB) and micro-entrepreneurs, i.e. for companies with up to nine employees and an annual turnover of up to EUR 2 million, to refuse to fulfil a contract if the following conditions are met

- It must be a consumer contract (within the meaning of Section 310 (3) of the German Civil Code) or a contract with a micro-enterprise in the form of a material continuing obligation:
  - A continuing obligation requires recurring services (such as energy contracts, rental contracts, telephone contracts) that are provided repeatedly over a longer period of time.
  - The contract must be material, i.e.
    - be required by a consumer to ensure coverage of services of an adequate basic level, or
    - be required by a micro-entrepreneur to ensure coverage of services for an adequate continuation of its business (e.g. compulsory insurance, electricity, gas or water supply, telephone contracts, etc.).
  - Only those continuing obligations concluded before 8 March 2020 are affected, i.e. at a point in time when the consequences of the crisis were not yet foreseeable.

- There must be a factual connection (causality) between the Covid 19 pandemic and the non-performance of the service,
  - in the case of consumers, so far as the service would entail an adequate subsistence for the consumer or its dependants, or
  - in the case of micro-entrepreneurs, in so far as the provision of the service would jeopardise the economic basis of the business.

- The right to refuse performance must be expressly asserted by the debtor/obligor.
The right to refuse performance can only be exercised until 30 June 2020, although an extension of this period by secondary regulation is possible.

The right to refuse performance is excluded if:
- this is unacceptable for the creditor/beneficiary. The debtor/obligor may then be able to terminate the contract; or
- it concerns rental, lease or loan agreements or employment contracts. There are special rules in the catalogue of measures (see below) or special rules already exist (see, for example, the regulations on reduced working hours).

Restriction on termination of rental and lease agreements
In addition, Article 240 Section 2 (1) provides for a limitation of the landlord’s/lessor’s right to terminate. A tenancy or lease of land and premises cannot be terminated solely on the ground that the tenant or lessee fails to pay the rent or lease in the period from 1 April 2020 to 30 June 2020 despite it having been due, if the failure to pay is due to the effects of the Covid 19 pandemic. The connection between the Covid 19 pandemic and non-payment must be demonstrated by the tenant/leaseholder. This regulation also only applies until 30 June 2022.

Special rules applying to loans
Special provisions relating to loans are also provided for in Section 3 of the draft law. According to this provision, the relevant loan agreements continue in force, but the lender's claims are temporarily deferred for the benefit of the consumer. This is supplemented by a provision on protection against termination and a possibility of future contract amendments:

These regulations only apply to consumer loans as defined in Section 491 of the German Civil Code, that is, general consumer loan contracts and real estate consumer loan contracts between a consumer (as defined in Section 13 the German Civil Code) and an entrepreneur as lender. They do not apply to deposits made by the consumer itself, for example, savings plans of the consumer. These regulations also do not apply to inter-bank business.

The loan agreement must have been concluded before 15 March 2020.

This applies to claims of the lender for repayment, interest or redemption payments that are due between 1 April 2020 and 30 June 2020.

Again, there must be a factual connection (causality) between the loss of income of the consumer caused by the Covid 19 pandemic and the non-performance of the service, in so far as the service would entail an adequate subsistence for the consumer or its dependants. This connection is initially presumed.

If the prerequisites are met, the following legal consequences apply:
The lender's claims are defered for a period of three months (from the due date of the claims). The consumer is nevertheless entitled to continue to make payments.

- The lender's right to terminate due to a payment default, a significant deterioration of the consumer's financial circumstances or the value of security is excluded during the deferment.

- Finally, the parties should seek to agree regulations for the period after 30 June 2020 (e.g. contract adjustments). If no solution is found, the contract term will be extended by three months and the due dates will be postponed by this period.

> The regulations do not apply if a deferral or the exclusion of termination is unacceptable for the lender. This depends on the specific individual case.

**Changes to insolvency law**

The draft law also contains a large number of insolvency law-related provisions. As already announced, the obligation to file for insolvency will be suspended under certain circumstances and special regulations will be introduced for the management, the provision of (new) financing and restricting the rules relating to avoidance by reason of insolvency. The draft law does, however, go further than the original announcement:

> The obligation to file for insolvency (in particular Section 15a of the German Insolvency Code (InsO)) will be suspended altogether with retroactive effect from 1 March 2020 until 30 September 2020. However, this does not apply if the insolvency trigger is either not due to the Covid 19 pandemic or if there is no prospect of eliminating an existing illiquidity insolvency (inability to pay debts). A rebuttable presumption is established that the Covid 19 pandemic is the cause of the insolvency and that an existing illiquidity insolvency can be remedied if the company concerned was still solvent (able to pay its debts) on 31 December 2019. Despite this presumption, the burden of proof that the obligation to file for insolvency has been suspended remains with the persons who are in principle obliged to file for insolvency.

Creditors' petitions will also be restricted for a period of three months after the law is promulgated. Creditor applications filed during this period additionally require that the reason for insolvency already existed on 1 March 2020.

> The draft law comprehensively addresses the liability risks for managers in the event of insolvency. To this end, the payment prohibitions that would otherwise apply are modified so far as the conditions for suspending the obligation to file for insolvency are met. In this case, payments in the ordinary course of business remain permissible. This expressly includes payments which serve to maintain or resume business operations or to implement a reorganisation plan.
The aim is to ensure that all necessary measures can be taken to continue the company in an orderly manner.

In order to facilitate access to liquid funds for the affected companies for the duration of the suspension, the draft provides for certain **privileges under insolvency law for new financing**. In addition, it contains restrictions on the right to challenge matters by reason of insolvency in order to enable the low-risk continuation of business relationships with suppliers and customers. These provisions also apply in favour of companies that are not "insolvency-ripe" or for which there is no obligation to file for insolvency.

If a company takes up new financing (including trade credits; does not apply to extensions or novations) during the period of suspension and provides collateral for this, the provision of the collateral and any repayment on the new financing made by 30 September 2023 is protected against challenge by reason of insolvency. In addition, the invalidity and liability risk arising from Section 138 of the German Civil Code and Section 826 of the German Civil Code (lenders' liability) is excluded for new financing (this also applies to extensions and novations).

Shareholder financing will receive special relief. The avoidance protection for repayments of shareholder loans made because of the Covid 19 crisis until 30 September 2020 also applies to these. By way of exception, shareholder loans are, to the same extent, not subordinated in the event of insolvency. However, the collateralisation of shareholder loans is not privileged.

In addition, the contestability of congruent payments as a whole, as well as for a catalogue of incongruent payments, is excluded, unless the relevant party was aware that the debtor's financing and restructuring efforts were not suitable to eliminate an insolvency that had occurred.

**Further Provisions**

In addition to an extension of the interruption period for criminal proceedings, the law provides for simplifications in the areas of cooperative, corporate, association, foundation and residential property law as well as the law applying to changes of corporate form. The new provisions are intended to enable the legal entities concerned to pass the necessary resolutions and remain capable of acting despite the restrictions on the ability to hold meetings. In particular, stock corporations (AGs) are to be temporarily enabled to hold virtual general meetings without the (physical) presence of shareholders; for limited liability companies (GmbHs), the facilitation of the adoption of resolutions by written procedure is proposed. The regulations relevant to companies will be addressed in a separate newsletter.

**Developments in the compensation for short-time work**

The compensation for short-time work will be made more flexible and subject to easier access requirements. The corresponding law for the temporary crisis-related improvement of the regulations for compensation for short-time work
was promulgated in the Federal Law Gazette on 14 March 2020 and entered into force on the day after its promulgation.

The law provides that the Federal Government may issue secondary regulations, limited in time until the end of 2021, which do not require the approval of the Bundesrat, to facilitate access to compensation for short-time work, to relieve companies and also to enable temporary agency workers to receive compensation for short-time work. Specifically, the amendments relate to Social Security Law (SGB III) and the Law on Temporary Employment (Arbeitsnehmerüberlassungsgesetz). In future, the Federal Government will be able to issue a secondary regulation stipulating that only 10 per cent of a company's employees need to be affected by the loss of working hours (currently at least one third of employees must be affected). In addition, a secondary regulation may in future allow the use of negative working time balances to avoid short-time work to be dispensed with, in whole or in part, and introduce full or partial reimbursement of the employers' social security for employees who receive short-time work benefits. By amending the Law on Temporary Work, the Federal Government can also make it possible in future by means of a secondary regulation for compensation for short-time work to be paid to temporary agency workers. It is to be expected that the corresponding secondary regulation on improved compensation for short-time work will be issued by the Federal Government in the near future. There is already a draft to this effect, which provides for the relief initially until 31 December 2020. It is also planned that the regulation will enter into force retroactively as of 1 March 2020.

Further Measures relating to Labour Law

On 23 March 2020, the Federal Cabinet also adopted a draft law on easier access to social security and the deployment and protection of social service providers on the basis of the corona virus SARS-CoV-2 (social protection package), which lays the foundations for cushioning the social and economic consequences of the corona pandemic for citizens. Among many other provisions, the draft includes the insertion in the Working Hours Act (Arbeitszeitgesetz) of the ability to issue secondary regulation to allow nationwide exceptions to the working hours regulations in systemically important areas, a relaxation of the additional income limit in pension insurance and in farmers' old-age provision, and a temporary waiver of the full crediting of remuneration from employment in systemically important areas taken up during short-time work.

In addition, the Protection Against Infection Act (Infektionsschutzgesetz) includes a claim for compensation for loss of earnings in the event of official closure of schools and day-care facilities in order to contain the current pandemic. The aim of the compensation scheme is to mitigate the loss of earnings suffered by working custodians of children up to the age of 12 if they have to look after their children themselves as a result of the closure and are therefore unable to pursue their professional activities. This planned amendment is not included in the social protection package (see above), but in the drafting aid for the draft law on the protection of the population in the event of an epidemic situation of national importance, which was drawn up by the

In order to ensure the ability of works councils to work in light of Covid 19, the Federal Ministry of Labour and Social Affairs also published a ministerial declaration of 20 March 2020 by Federal Labour Minister Hubertus Heil on 23 March 2020. In his declaration, Heil argues that in the current situation, if, for example, participation in a meeting in person leads to risks to the life or health of works council members or is not possible due to official orders, participation in a works council meeting via video or telephone conference including online applications such as WebEx or Skype is also permissible. This applies both to the involvement of individual works council members and to a virtual works council meeting. In his opinion, the resolutions passed in such a meeting are valid. As there can be no handwritten attendance list in such a case, participation should be confirmed to the works council chairperson in text form, for example by e-mail. The principle of non-publicity must also be upheld in the case of a video or telephone conference.

Support for small businesses and the self-employed

On 23 March 2020, the Federal Cabinet also adopted key points for corona emergency aid for micro-enterprises and solo self-employed persons to the tune of up to EUR 50 billion. Direct grants to self-employed persons and companies with up to 10 employees in the amount of up to EUR 15,000 for ongoing operating costs are intended to secure their economic existence and bridge liquidity bottlenecks. This emergency aid is also to be passed by the Bundestag and Bundesrat this week.

What happens next?

Within a short period of time, the German government has established a huge protective shield to limit the economic impact of the Covid 19 pandemic on the German economy as much as possible. The coming days will certainly be marked by these measures now being passed in the Bundestag and Bundesrat and supplemented by the announced secondary regulations. Other stakeholders, such as the European Commission or the banking supervisory authorities, will be called upon to define clearly the applicable framework conditions and to underpin the effectiveness of the instruments.

In our view, we will then, as was the case in the financial market crisis in 2008 and 2009, soon enter a phase in which the packages of measures will be rolled out and tailored to the needs of individual companies. Naturally, there will be many questions and issues to be clarified, and we will be happy to use all our experience and contacts to help answer and overcome them. Whether the programmes of the Federal Government need to be expanded and supplemented again will certainly depend primarily on the future course of the pandemic. In economic terms, the current government measures are aimed at supporting companies in the real economy, also in the hope that this will avert a further spill-over to banks and the financial markets. Not only for the economy, but for all of us, it is to be hoped that we can soon overcome the effects of the corona virus and put them behind us.