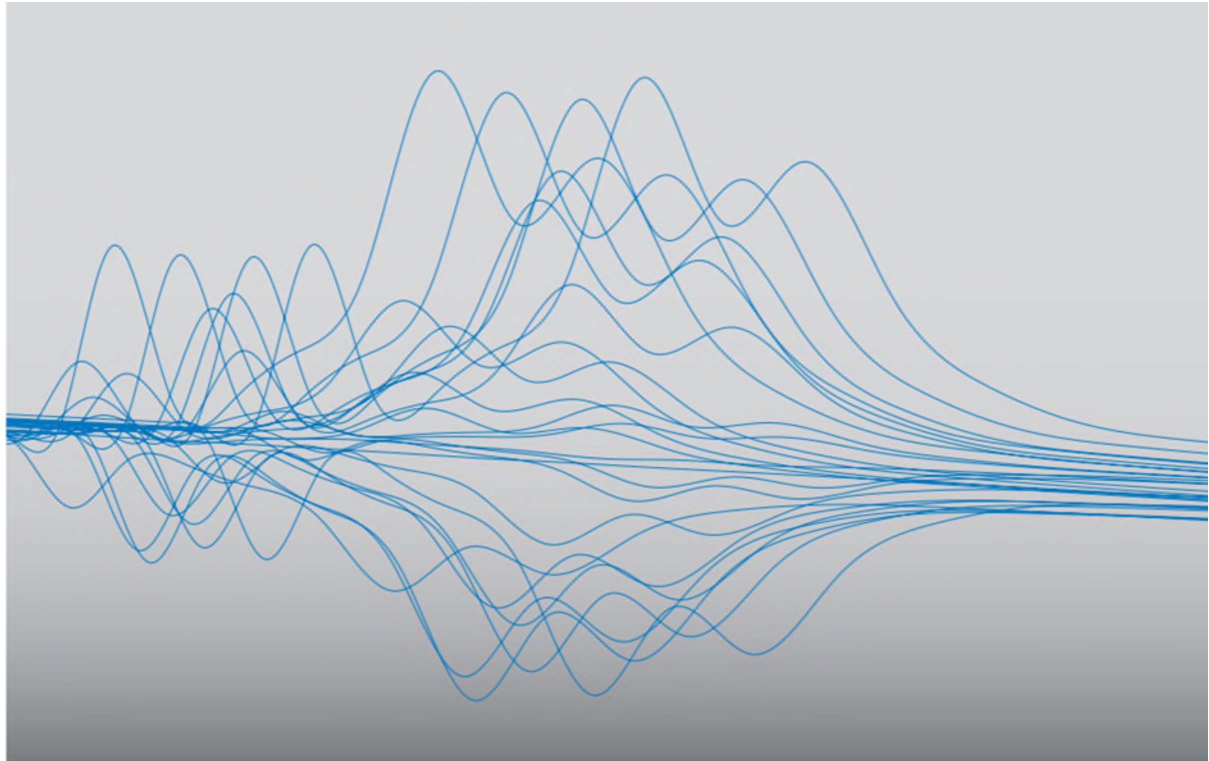

Current Challenges for Companies due to Coronavirus (COVID-19) under German Law – Issue 4

STATE: 2 April 2020

The legal issues for companies due to COVID-19 have expanded again since our last newsletters (Issue 1, Issue 2, Issue 3). As such we would like to draw attention to specific legal areas.

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I. What concrete changes in labour law have been made by the Corona Acts of 27.3.2020?

In the last week of March, the Bundestag and Bundesrat passed a package of measures in record time to deal with the crisis economically, which also has implications for labour law in particular.

Of particular importance here are the Facilitation of Access to Social Security Act and the Protection of the population in the event of an epidemic situation of national significance Act.

These acts regulate:

- Improvement to the possibility of earning additional income in another job during short-time work, limited until 31 October 2020; thus further increasing the attractiveness of short-time work
- Increase in additional income opportunities for pensioners up to EUR 44,590.00 until 31 December 2020
- Changes in the basic provision (in particular if the short-time working allowance is below the subsistence level)
- Authorisation for the Federal Ministry of Labour and Social Affairs (BMAS) to deviate from the provisions of the Working Hours Act by means of a statutory ordinance (scope of application in particular: opening of Sunday work in sensitive areas of supply)
- Substantiation of a claim for compensation for childcare in Sec. 56 of the German Infection Protection Act (IfSG), amounting to 67% of net income, if there is no alternative childcare option and the childcare is due to the closure of schools and daycare facilities. To be considered:
    - such a claim did not previously exist, so that the employer was obliged to pay the remuneration for a maximum period of one week despite the employee's absence, but no claim existed beyond this period.
    - the payment is made by the employer, but the employer receives a refund from the health authority responsible for the school closure

Are there already exceptions to the restrictions of the Working Time Act?

The **German Working Hours Act** (ArbZG) contains strict regulations on the maximum permissible working time: the **daily working time** may not exceed 8 hours on average. In addition, a **rest period** of at least 11 hours, and in some sectors such as hospitals and nursing homes, exceptionally 10 hours must be observed. Furthermore, there is a **general ban on employment on Sundays and public holidays**; for various sectors and companies such as hospitals, care facilities and emergency services there have of course always been exceptions. However there should still remain at least 15 Sundays free of work and a substitute day of rest must be granted during the week.

Deviations from these principles can only be made to a very limited extent by **collective agreements** (extension of the daily working time for on-call services and reduction of the rest period to 9 hours) or by the **federal government or subordinate to it, the state government by statutory order** (service on Sundays or public holidays to satisfy necessary needs of the population). The local regulatory authorities have limited powers to issue exceptions, specifically where this is urgently required in the public interest.

Due to the corona crisis, the following new Sec. 14 (4) ArbZG has been inserted: ***The Federal Ministry of Labour and Social Affairs may, by means of statutory order*** *[...], in exceptional emergencies with nationwide implications, in particular in epidemic situations of national significance [...], permit exceptions for a limited period of time for activities of employees which go beyond the exceptions provided for in this Act and in the legislative and in collective agreements decrees issued on the basis of this Act.. These activities must be necessary for the maintenance of public safety and order, health care and nursing, services of general interest or the supply of the population with essential goods.*

This framework – which allows authorities at various levels of the hierarchy a higher degree of flexibility – is still valid today and must be observed. As long as no use has been made of the authorisations facilitating statutory orders, the provisions regarding working hours, rest periods, etc. will continue to exist in the Corona crisis and also where there is a high demand for work.

Unfortunately, the exceptions currently resemble a patchwork quilt. As far as can be seen, the BMAS has not yet made use of the – central – exceptional provision under Sec. 14 (4) ArbZG. However, some implementation of regulations by local regulatory authorities can be found. In Bavaria, for example, the governments of Upper and Lower Bavaria, Lower-, Middle- and Upper Franconia, Swabia and Upper Palatinate have already issued regulations containing various exceptions on 17 March 2020. In this respect, it must always be examined in each individual case whether (local) exceptions exist and whether these cover the specific operation.

What measures are recommended with regard to an – anticipatory – ersonnel, and in particular recruitment policy?

The future course of the corona crisis and its potential impact on global economic developments simply cannot be predicted at present. As a result, it is also impossible to foresee any developments in the personnel area, particularly the impact on new hires. New hires may also have an influence on the situation with short-time working: **contracts already concluded** may also start directly in short-time working. With **new contracts** in the current situation, it should be confirmed in advance whether that employment and induction training can take place, otherwise new obligations are not advisable. The same should also apply in principle to the **extension of expiring fixed-term contracts**.

In the event of serious employment problems, it should be considered whether **contracts already concluded should be ordinarily terminated even before the start of work**, unless this has been contractually excluded, which is rather unlikely. In this case, the two-week period of notice during the probationary period, which can also begin before the commencement of work, applies - again subject to a deviating contractual provision. If the period of notice expires before the start of work, no remuneration need be paid. Alternatively, it is recommended to find an agreement with the employee on a later start date (after the end of the corona crisis). These agreements and terminations are permissible if they are not abusive and do not conflict with any protective rights (e.g.: pregnancy); the employer must be allowed to react to the crisis and to pursue an appropriate personnel policy.

The same applies to **employees during the probationary period**, if the need for employment is likely to disappear in the long term. Here too - provided there are no conflicting contractual provisions - a dismissal can be examined in compliance with the two-week period of notice, as the German Dismissal Protection Act does not (yet) apply here. However, it is also permissible to stick to the hiring and, if necessary, to order short-time work first. The employer can then terminate employment before the protection against unfair dismissal comes into effect, ultimately allowing the employer to terminate the contract during the probationary period if the crisis persists.

Does a tax exemption apply to bonus payments of up to EUR 1,500 and if so, for whom (instruction from the Ministry of Finance to the tax offices as a legal basis)?

On 29 March 2020, the Federal Minister of Finance announced via the media that he would issue an "*instruction on 30 March 2020 that such a bonus up to EUR 1,500 will be completely tax-free*". This announcement, which has been received extremely positively, has not yet been further confirmed. In the form of an instruction, the regulation appears to be problematic, as a legal regulation is probably required. Furthermore, it is not clear from the statement whether the plan is to cover all bonus payments or whether this only applies to individual sectors, especially in the medical or otherwise systemically relevant area. In this respect, it is currently not advisable to conclude corresponding agreements with employees. It is advisable to wait for the further procedure.

II. Official restrictions of patent law possible – what patent holders should consider now

The current outbreak of the COVID-19 disease, caused by the novel coronavirus SARSCoV-2, no longer stops at patent law either. In particular, pharmaceutical companies and manufacturers of medical devices, such as breathing apparatus or protective equipment, must expect the planned draft of a German Protection of the population in the event of an epidemic situation Act of national importance (Bundestag Document. 19/18111) to amend the German Infection Protection Act (IfSG) to limit their rights under German patents and European patents granted in Germany. Although such interventions are only likely in the case of further aggravation of the crisis, patent holders should be prepared.

1. Extension of sovereign powers to restrict patent law

Patent rights are property in the sense of the constitution (GG), and principally protect their owner according to Article 14 GG against unintentional use by private third parties, even if these are public authorities acting as sovereign bodies. However, the use of the invention of the patent right in the interest of the common good as a manifestation of the social bond of property (Article 14 para. 2 GG) is permitted, subject to strict barriers. For such an intervention, an explicit and sufficiently defined legal basis for authorisation is required.

Such a legal basis of authorisation has long been found in Sec. 13 para. 1 Patent Act (PatG), which allows restrictions of patent protection where this is necessary for social reasons, i.e. for reasons of welfare (Sec. 13 para. 1, sentence 1, PatG) or because of a threat to state security (Sec. 13 para. 1, sentence 2, PatG). The public welfare case which is primarily relevant in this context effectively applies to all cases in which state care appears necessary, and a case of emergency can be assumed due to a dynamically developing outbreak of a pandemic such as COVID-19.

With the planned amendment law, Sec. 5 No. 5 InfSG new version will in future authorize the Federal Ministry of Health to order, pursuant to Sec. 13 para. 1 PatG, that an invention relating to one of the products mentioned in Sec. 5 No. 4 InfSG new version before the enumeration, can be used for the security of the Federal Government or in the interest of public welfare. The products named in No. 4 are pharmaceuticals, including narcotics, medical devices, laboratory diagnostics, aiding tools, items of personal protective equipment and products for disinfection as well as for strengthening human resources in the health care system. A subordinate authority can also be instructed to issue the order, which has direct consequences for legal action (see 2.). The following is explained as a justification:

"In order to ensure a supply of products in the event of a crisis, the effect of a patent can also be restricted under Sec. 13 PatG, for example, in order to be able to produce vital substances or drugs". (Bundestag Document. 19/18111, p. 26).

In its effect, such an order for use has the consequence that in this respect the exclusive right (prohibition right) of the patent proprietor and the other potentially entitled persons (such as licensees in the case of an exclusive license) is cancelled. Once a legal order for use has been issued, the ordered use of the patent may then be exercised by the Federal Ministry or the issuing authority itself. However, it is also at the discretion of the ordering authority to transfer the use to a third party. Such a third party can also be a competitor who is able to produce the patented products required in a crisis, such as ventilators, more quickly or in larger quantities.

2. Appeals and time limits

The remedies against such an order are limited. Any order for use based on Sec. 13 PatG may be contested by means of an action for annulment before the administrative courts. In case the order for use is issued directly by the Federal Ministry of Health, this follows directly from Sec. 13 (2) Patent Law, which remains unaffected by the amendments. With regard to orders by subordinate authorities, however, Sections 40 and 42 VwGO are relevant. In both cases, a period of one month from receipt of the order applies. Whereas in the case of a challenge to orders of the Federal Ministry, an action for annulment may be brought directly before the Federal Administrative Court, in the case of an ordering subordinate authority, opposition proceedings must first be conducted (Sections 69, 70 VwGO), which, especially in the current situation, is likely to cause considerable delays. Only after notification of a negative decision on an objection can an action for annulment be brought before the Administrative Court (not the Federal Administrative Court), within one month.

Both the patent proprietor himself, insofar as his own right of use is affected, and the holder of an exclusive licence to a patent are entitled to file an action for annulment.

The action for annulment has suspensive effect (Sec. 80 German Code of Administrative Court Procedure (VwGO)) unless the immediate execution of the order for use is specifically ordered, which would not even have to be justified in writing in the case of an emergency measure (Sec. 80 para. 3 VwGO).

The administrative courts seised must examine the requirements of the order for use, in particular whether the interest of public welfare or the security of the Federation

requires the ordered use of the patent. Since these are undefined legal terms, there is no scope for discretion with regard to the question of whether or not they are given. However, if the public interest requires the order be granted, the competent authority has a discretionary power which, in turn, can only be reviewed by the administrative courts to a limited extent - for abuse or exceeding of discretion.

3. Entitlement to compensation for patent holders

The order for use according to Sec. 13 PatG functions as a legal authorisation to limit the rights of the patent proprietor in the public interest, which is equivalent to expropriation. Therefore, Sec. 13 para. 3 PatG provides for compensation in accordance with Article 14 para. 3 of the constitution. Debtor is the Federation, against which any action for compensation is to be brought, even if the use of the patent by third parties has been ordered.

However, such a compensation might – compared to proceedings against patent infringers in patent infringement proceedings before the ordinary courts – result in a considerable financial disadvantage for patent owners. In practice, the compensation to be granted under Sec. 13 para. 3 PatG will not, in general, reflect the actual economic loss suffered by the patentee. The fact that the administrative courts do not usually deal with patent matters could also have a negative effect in this respect. At best, the administrative court will consider the calculation basis of the license analogy to be appropriate. However, the otherwise usual claim for damages, which offers the patent proprietor the possibility to claim the entire infringer's profit according to the principles of the threefold calculation of damages, does not exist in case of an administrative order.

III. Special challenges for insurance companies

Last week, on 24 March 2020 the President of the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, **BaFin**) in Germany stated in a press release that "the existing regulatory framework allows a high degree of **supervisory flexibility**", which BaFin makes full use of.
Within the existing regulatory framework, insurance companies as well as banks, fund management companies and other financial service providers are facing not only general economic, financial and legal challenges but also **specific challenges with regard to regulatory requirements**, in particular the **proper organisation of business** (Section 23 German Insurance Supervisory Act, **VAG**), specified by BaFin in a Circular providing guidelines on Minimum Requirements for the System of Governance of Insurance Undertakings (*Mindestanforderungen an die Geschäftsorganisation von Versicherungsunternehmen*, **MaGo**).
Most obviously, particular regulatory issues arise with regard to the processes and precautions required to allow working in **homeoffice**, e.g. with regard to

- IT security (IT adaptation, ensuring the integrity, availability, authenticity and confidentiality of data);
- Recording/documentation (recording of business conversations on audio carriers, topicality and completeness of record keeping, electronic recording of all transactions);
- Internal audits (ensuring that the internal audit department has complete and unrestricted information rights at all times, if necessary carrying out special audits on new processes / IT security in the home office);
- Performance of inspections / inspections at insurance companies as well as outsourcing provider and other cooperation partner;
- Availability for/proper handling of client contacts and client-related processes (policies, claims) (including data protection).

In addition to this, however, the Corona crisis also affects the **general requirements for proper business operations** set out in MaGo and the EIOPA Guidelines on the System of Governance and may require a number of additional measures, such as

- Adjusting the internal guidelines (No. 47 et seq. MaGo, Guideline 7): Internal guidelines have to provide for required actions and work procedures for all relevant staff (including home office);
- Own funds/solvency requirements (No. 203 et seq. MaGo, Guideline 31): continuous monitoring of the coverage and all movements in the Solvency Capital Requirement (SCR) and Minimum Capital Requirement (MCR) is required; losses/fluctuations in the value of investments may have an impact on own funds and SCR requirements;
- Adjusting the internal audit system (No. 134 et seq. MaGo): may be required in case internal and external processes are restructured/adapted (e.g. home office);
- Adjusting the internal control system including the compliance function (No. 86 et seq. MaGo; Guideline 38 et seq.);
- Outsourcing (No. 247 et seq. MaGo): Ensuring the availability of external service providers, new risk analysis required in the event of significant changes to the process/risk profile (e.g. home office);
- Additional operational risks (No 161 et seq. MaGo, Guideline 21): Identification, analysis, reporting, monitoring and minimisation of additional operational risks and documentation of the measures taken, e.g. with regard to legal change risks (German COVID-19 Act) or IT risks (home office);
- Adjusting the risk management system (No 151 et seq. MaGo, Guideline 17 et seq).

Moreover, with regard to the **asset management of insurance companies**, the following aspects need to be dealt with:

- Violation of investment limits and investment requirements (No. 178 et seq. MaGo): Monitoring and adoption of measures against violations (escalation process) required ; based on the experience made in the 2010 debt crisis, we assume that BaFin will temporarily tolerate crisis-related violations;
- Asset-liability management (ALM) (No. 169 et seq. MaGo): Ongoing monitoring and control of asset and liability items required, validation and adjustment of ALM to the effects of the Corona crisis on the asset side (e.g. reduction of cash flows from real estate investments).

BaFin and the EU supervisory authorities are acutely aware that **navigating through challenging market conditions** and **ensuring business continuity** in **compliance with regulatory law** in times of the Corona crisis imposes severe **challenges** on insurance companies as well as banks, fund management companies and other financial service providers.
A good overview of all the supervisory measures, regulations and facilitations by BaFin, the European Insurance and Occupational Pensions Authority (EIOPA), the European Securities and Markets Authority (ESMA) and the European Central Bank (ECB) is available on [BaFin's dedicated website for the Corona crisis](#).
Accordingly, with a specific focus on the insurance sector, the following has been issued so far:

- BaFin on trading **transactions outside the business premises** (12 March 2020): Trading activities in home office do not constitute a violation of the minimum requirements for the risk management of banks, fund management companies and other financial service providers. However, the respective company must establish written specifications/work instructions with regard to these processes (cancellation of any prohibitions, conditions, limited period of time).
- **Communication with BaFin**: Given that BaFin is following the existing recommendations of the Federal Government to reduce personal contacts as far as possible until further notice, applications and all other correspondence to BaFin should therefore only be sent electronically. Confidential information should be sent via encrypted e-mail.
- **Electronic inspections** instead of on-site inspections by BaFin (17 March 2020): Currently no on-site inspections; establishment of an electronic access to documents by the companies (if possible), audits will be postponed and violations of the deadline will not pursued, in exceptional cases supervisory discussions on site are still possible.
- EIOPA Key Messages (17 March 2020): **2020 Solvency II Review** postponed, reference to measures to strengthen solvency (transitionals, volatility adjustment.
- EIOPA and BaFin on supervisory **flexibility regarding the deadline of supervisory reporting and public disclosure** re SCFR, QRT, RSR (20/21 March 2020): The "Recommendations on supervisory flexibility regarding the deadline of supervisory reporting and public disclosure – Coronavirus/COVID-19" aim to offer operational relief and support business continuity of insurance and reinsurance undertakings.
- Requests for **applying transitional measures or volatility adjustments**: BaFin will give priority to new requests for applying transitional measures for the valuation of technical provisions (provision transitional, interest transitional) or volatility adjustment and will examine them benevolently. If necessary, retroactive approval as of 31 March 2020 is possible.
- **Temporary underfunding of the guarantee assets for pension funds**: The previous administrative practice of BaFin stipulates that for underfunding of up to 10 percent in the guarantee assets of pension funds, a plan to restore the cover of the guarantee assets (cover plan) must be submitted no later than three months after the occurrence of underfunding. In view of the current situation, however, it is acceptable from BaFin's point of view if this deadline is extended to 1 October 2020 at the latest and if the first payments by employers to restore the cover of the guarantee assets no longer have to be made in 2020, but only in 2021.
- **Guarantee asset registers**: The submission deadline of 31 March 2020 is initially suspended. Guarantee asset registers may also be submitted in advance and additionally by electronic means (by encrypted e-mail/SecureMail). However, electronic submission does not exempt from paper submission, since for legal reasons it is not yet possible to dispense with this at present. Paper submissions must be made by 30 June 2020.
- **Temporary passive excess of the real estate quota**: In order to avoid emergency sales required by supervisory law to maintain the real estate quota and to preserve financial market stability, BaFin will not object to a temporary passive excess of the real estate quota of insurance companies not being subject to the Solvency II framework. However, as long as the real estate quota is exceeded, no corresponding new investments may be made (https://www.bafin.de/DE/Aufsicht/CoronaVirus/CoronaVirus_node.html).
- BaFin on **short selling bans** (19 March 2020): Short selling bans in other European countries do not apply to certain Euro indices with few exceptions.
- EIOPA on **RFR and EDA** (27 March 2020): Weekly information on the development of risk-free interest rate term structures (RFR) and symmetric adjustment of equity risk (EDA).
- **ESMA Facilitations** (19/20/23/26 March 2020): including extension of consultation and reporting deadlines.

IV. Draft of a new NRW (regional) Epidemic Act

The state government in North Rhine-Westphalia (NRW) wants to provide itself with far-reaching rights of intervention for dealing with epidemics with a new Act. The legislative draft contains a set of rules that will apply in the event of an "epidemic situation of national or state significance". Such an epidemic situation would first have to be formally identified by the Federal or North Rhine-Westphalian state parliament (Landtag). However, the draft of the "Act on the Consistent and Solidarity-based Management of the COVID 19 Pandemic in North Rhine-Westphalia and on the Adaptation of State Legislation with Regard to the Effects of a Pandemic" (Landtag Document 17/8920) has already attracted much criticism in advance.

I. Planned regulations

The current legislative draft provides for extensive powers to act in the event of an epidemic being identified. The following are of particular relevance:

- Doctors, nurses and rescue workers are to be able to be compulsorily conscripted in the event of an epidemic if a significant shortage of medical or nursing staff is identified. The competent authorities should be able to require them to provide services, goods and works.
- Furthermore, the state authorities could be authorized to secure medical supplies. They are to be able to issue bans on the sale of certain medical materials. In addition, the authorities could order that they be allowed to purchase medical material at the prices applicable prior to the beginning of the infection.
- The NRW Health Ministry could order hospitals to create additional treatment capacities and postpone pending operations in case of emergency.
- Rights of intervention are also envisaged for other ministers, e.g. the NRW Education Minister could order the cancellation of final examinations and change examination rules on her own authority.

The legislative draft is highly controversial and criticism does not only come from the opposition. Law scholars and physicians' representatives have also expressed constitutional concerns, as the regulations would lead to far-reaching interventions in fundamental rights and would considerably weaken the NRW state parliament.

II. Timeframe

The state government had originally planned to pass the Epidemic Act on 1 April 2020 in a fast-track procedure in the state parliament. However, the opposition have not only blocked this plan, but have now managed to stretch the timetable. Accordingly, the responsible committees will first deal with the Act after the first reading on Wednesday. The law could nevertheless be passed before Easter. The state government has also shown itself willing to negotiate with regard to changes in content.

V. COVID-19 and the enforcement of civil law claims

The COVID-19 crisis has now also reached civil court practice. The conduct of proceedings has been impacted even without explicit changes in the law.

Court proceedings will continue to drag on in the future. In view of the independence of the judiciary, there are as yet no generally valid guidelines, such as suspending all trial dates until a certain date. Nevertheless, a large number of courts are already tending to **postpone** oral hearings ex officio in order to minimise travel and social contacts. In its press release of 17 March 2020, the Federal Bar Association expressly asked all judges "*to cancel and postpone to a later date, in agreement with the party representatives, any appointments that have already been scheduled and are not urgent, and to extend deadlines as generously as possible, taking into account the current situation*". The parties may also request postponements. Increasingly, disputes about the necessary protection of litigants from COVID-19 infections are being observed in negotiations; in some districts of the regional courts, persons who were in risk areas in the previous weeks are no longer allowed to enter court buildings at all. It remains to be seen whether such circumstances will be abused for delaying purposes in the course of proceedings.

Although rarely used so far, the possibility of **hearing by means of sound and vision transmissio**n (Sec. 128a German Code for Civil Procedure (ZPO)) could be a potential remedy. This can be ordered ex officio. However, many courts would first have to upgrade the technical equipment for this.

In any case, even in times of the COVID-19 crisis, companies must take care not to let their own claims become time-barred. An inhibition of **time-barring** must still be ensured in time. This also applies if the company entitled to claim is hit particularly hard by the crisis. Even if the company had to cease operations completely, relying on "force majeure" within the meaning of Sec. 206 German Civil Code (BGB) would in any case entail considerable risk and should be avoided by identifying potential claims that are about to become time-barred at an early stage and by taking measures to suspend the limitation period.

A cessation of **state court operations** ("standstill in the administration of justice") in such a way that, for example, a lawsuit can no longer be filed, is not yet in sight. However, the German Institution of **Arbitration** (DIS), for example, has closed its Berlin office indefinitely and the deadline mailbox there is out of order; their office in Bonn is still open. Electronic communication is requested. Similar tendencies are being pursued by other arbitration organisations such as the London Court of International Arbitration (LCIA), the Vienna International Arbitration Centre (VIAC) and the Hong Kong International Arbitration Centre (HKIAC). The International Chamber of Commerce (ICC) also urgently requests that communication be made by e-mail only.

VI. Data protection aspects

In the context of current statements by the German data protection supervisory authorities, it becomes evident, that data protection requirements do not stand in the way of the necessary measures to contain the COVID-19 pandemic, such as questions from authorities regarding a stay in a risk area or about contacts with COVID-19 patients**. Even the restricted disclosure of a suspected infection, can be justified under data protection law** if this is the only way to take effective precautionary measures for the contact persons. The collection of private availability data of employees for the purpose of company emergency planning may also be permissible under certain conditions. Irrespective of the specific data processing measures taken, it must be ensured that the requirements of the General Data Protection Regulation and the German Federal Data Protection Act are complied with.

The threat to IT security poses a **particular risk potential for the violation of the protection of personal data**. Many companies have switched completely to home office solutions, some of which also use private communication devices. Adequate IT security, such as encryption techniques, two-factor authentication and secure connection channels, must also be established for home office solutions. In particular, employees should be informed about how the internal processes are designed in the event of a cyber attack or other breaches of protection and which specialist bodies employees can turn to in such cases. Even in times of crisis, the obligation under data protection law to report breaches of protection without delay, at the latest within 72 hours, remains an important instrument for taking follow-up action and thereby protecting the rights and freedoms of data subjects.

The data protection supervisory authorities are not spared the effects of COVID-19 either. For example, the Bavarian State Office for Supervision of Data Protection has already announced that deadlines in ongoing data protection proceedings that end before will be automatically extended until 20 April 2020. In individual cases, it is also being examined whether a further extension of the deadline is required due to infection protection measures.

VII. Capital Market Compliance – Ad hoc Publicity

In connection with the Coronavirus, issuers may be exposed to insider information, which they are required to publish ad hoc without delay in accordance with Art. 17 of Regulation (EU) No. 596/2014 (Market Abuse Regulation - MAR). In view of the associated uncertainties, BaFin has published an FAQ on 20 March 2020.

Even if the spread of the Coronavirus is generally known, it must be examined whether the concrete consequences for the individual issuer are price-sensitive insider information subject to disclosure.

On the one hand, this applies with regard to the company's business development, which is positively or negatively influenced by Corona and which is reflected in particular in the (intra-year) business figures. If a significant deviation from a published forecast of the issuer, a quantitatively comprehensible market expectation or the previous year's figures becomes apparent (e.g. with regard to sales or earnings), it can generally be assumed that this is relevant to the share price.

If the issuer must assume with sufficient probability that existing forecasts will be significantly missed and this is not already verifiably reflected in the market expectation, such expectancy must be assumed to be insider information, even if a new forecast is not yet possible. In this case, the BaFin considers it permissible to take the old forecast "off the market" by means of an ad hoc announcement without already indicating a concrete new forecast. A concrete forecast that becomes possible at a later date must also be published immediately by means of an ad hoc announcement.

The special situation created by Corona may also require a change in the previous dividend policy or practice in individual cases. This too is potentially relevant to the share price and must therefore be published on an ad hoc basis.

Finally, it should be noted that personal details within the company, insofar as they concern persons in key positions, may constitute insider information. It is therefore conceivable that an illness, for example of the CEO due to Corona, combined with a possibly prolonged absence, could also be grounds for ad hoc publicity.

Holding of shareholder and general meetings

The contact restrictions and assembly bans to combat the COVID 19 pandemic currently do not allow for the holding of face-to-face meetings. The Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Proceedings Act, which was promulgated in the Federal Law Gazette on 27 March 2020 (Federal Law Gazette I No. 14 p. 569), provides for regulations that enable and facilitate the holding of shareholder and general meetings. The relevant provisions entered into force on 28 March 2020.

The Act, which is initially limited to 31 December 2020, provides for the holding of the Annual General Meeting as a virtual Annual General Meeting without the physical presence of shareholders or their proxies, provided that (i) the entire Annual General Meeting (including the debate or answering of questions and the voting) is transmitted in sound and vision, (ii) shareholders are enabled to exercise their voting rights via electronic communication (postal vote or electronic participation), (iii) shareholders are given a (limited) opportunity to ask questions via electronic communication and (iv) shareholders have the opportunity to object to resolutions of the Annual General Meeting.

Online offers for shareholders may be provided for, even if there is no authorization for this in the Regulations of the Company. Actions for annulment due to violations of the legal requirements for a virtual general meeting, including the possibility to ask questions and violations of selected provisions of Sec. 118 German Stock Corporation Act (AktG) are limited. The invitation period as well as other periods may be shortened.

In addition, the period for holding an Annual General Meeting in accordance with Sec. 175 para. 1 sentence 2 AktG is extended, so that the Annual General Meeting does not have to take place in the first eight months of the financial year, but by the end of the fiscal year.

Finally, for the year 2020, the Management Board shall also be able, with the approval of the Supervisory Board, to pay a discount on the net profit for the year to the shareholders without an authorisation in the Articles of Association pursuant to Sec. 59 para. 1 AktG, i.e. also without a resolution of the Annual General Meeting (this shall also apply within the framework of an inter-company agreement).

For companies in the legal form of an SE and a KGaA (special kind of limited partnership), the simplifications generally apply accordingly. However, the German legislator cannot extend the period for holding the ordinary general meeting of the SE within six months due to the mandatory requirements under Union law. Initiatives are underway to adapt European law to the emergency situation.

The provisions for the GmbH (parallel to limited liability company) shareholders' meetings also provide for facilitations so that a physical presence can be avoided. According to the draft law, shareholders' resolutions may be passed in text or written form even without the consent of all shareholders.

VIII. COVID-19 Insolvency Suspension Act

In the **COVID-19 Insolvency Suspension Act (COVInsAG)**, the legislator has made the following far-reaching, temporary changes to the law in order to mitigate the consequences of the COVID-19 pandemic in insolvency law, which came into force retroactively as of 1 March 2020:

1. Suspension of the obligation to file for insolvency

The Act **suspends** the **obligation to file for insolvency** for a period **until 30 September 2020**. However, the suspension does not apply **if** the **insolvency** is not **due to** the effects of the spread of the **COVID-19 pandemic** and there is no prospect of eliminating an insolvency that has occurred.

If the debtor was solvent on 31 December 2019, it is assumed that the later factual insolvency is due to the COVID-19 pandemic and there are prospects of eliminating any inability to pay that has occurred.

2. Restriction for creditor insolvency applications

Insolvency applications by creditors are also only possible to a **limited extent**. For creditor applications filed within three months of the Act coming into force, the precondition for opening insolvency proceedings is that insolvency or over indebtedness already existed on 1 March 2020.

3. Limitation of liability for managers

In the event of suspension of the obligation to file for insolvency, the liability of managers for payments after insolvency maturity is also excluded if the payments are **made in the orderly course of business**, in particular payments which serve to **maintain or resume business operations** or to **implement a reorganisation concept**.

In this respect, the liability privilege is applicable under the same conditions described above that apply to the suspension of the obligation to file for insolvency.

4. Facilitation of lending: Limitation of liability and contestability

Finally, the new law allows for **easier lending**. In this respect, the law provides that **loans** granted by non-shareholders during the suspension period and to be repaid by 30 September 2023, **including** any **collateral provided for this purpose**, are privileged in terms of contestability and liability.

It is intended that **loans granted and collateral provided** during the suspension period are **not to be regarded as an immoral contribution to insolvency protraction**. The liability privilege also applies to prolongations and novations.

In addition, for such loans granted during the suspension period, it is provided that

(i) the return by 30 September 2023, and

(ii) the provision of collateral

are not considered to be disadvantageous to creditors, with the consequence that they are not subject to an insolvency challenge in any subsequent insolvency proceedings. This privilege does not apply to novations or prolongations and economically comparable circumstances that amount perhaps to a back and forth payment.

The foregoing shall apply **accordingly** to the **granting of unsecured shareholder loans** and payments on claims arising from legal acts which are economically equivalent to such loans. However, no privileges are provided for the collateralization of shareholder loans.

5. Suspension of statutory subordination for shareholder loans

In addition, the statutory subordination does not apply to the repayment of shareholder loans granted during the suspension period in insolvency proceedings applied for by 30 September 2023.

6. Further limitation of the insolvency challenge

Finally, the **contestability** of transactions of ongoing business relations in a subsequent insolvency, to the extent that it should not be avoidable, is **limited**. The aim here is to **facilitate** the **continuation** of **business relations**, especially with suppliers and customers.

Satisfaction and security which a third party could claim in the manner and at the time are not contestable in subsequent insolvency proceedings, unless the beneficiary was aware that the debtor's restructuring and financing efforts were not suitable to eliminate an insolvency which had occurred.

This applies accordingly to:

(i) performance in lieu of or on account of performance;

(ii) payments by a third party on the instruction of the debtor;

(iii) the provision of security other than that originally agreed, if this is not more valuable;

(iv) the shortening of payment terms and

(v) the granting of payment facilities

IX. Subsidies for companies during the Corona crisis

In order to protect companies and jobs, subsidies are made available and support measures are adopted in the current crisis. Currently, the following subsidies are among those that can be claimed:

The promotional bank KfW provides **working capital financing**. Working capital includes all running costs, such as rent and deposits for office and commercial premises, advertising costs, personnel costs, research and development costs, consultancy costs as well as costs for registrations and permits. Working capital financing can also be used to grant payment terms, to pre-finance orders and for training and further education of employees.

The Federal Government has granted guarantee banks the possibility to make decisions up to an amount of EUR 250,000 independently and within three days so that liquidity shortages are covered as quickly as possible. Companies can submit a free **preliminary inquiry for a financing project** via the financing portal of the guarantee banks. A response should be received within 48 hours after receipt of the preliminary enquiry.

Companies that have been active on the market for more than five years can apply for the so-called **entrepreneurial loan**. Eligible for application are companies with a maximum of 249 employees (based on full-time equivalents) and a maximum balance sheet total of EUR 43 million. Small and medium-sized enterprises make particular use of the loan for working capital. This loan has a final maturity of two years and can be fixed for the entire term of the loan with a fixed interest rate. Another option is a loan with a term of five years with a maximum of one grace year, whereby a fixed interest rate can also be selected for the entire term of the loan.

Small and medium-sized enterprises, young companies, freelancers, start-ups and company successors who have been active on the market for less than five years can take advantage of the **ERP start-up loan in the working capital variant**. Within the framework of a liquidity aid programme of the Federal Government, this subsidy contains a flat-rate 80% guarantee or indemnity against liability towards the lending bank. The loan granted can be used for the same purposes as for companies that have been active on the market for at least five years.

In addition, a so-called **ERP start-up loan- StartGeld** of up to EUR 100,000 can be taken up. Of this amount, up to 30,000 EUR can be used for working capital to avoid liquidity shortages. Here too, 80% of the credit default risk can be taken over by the KfW within the framework of a release from liability towards the bank. This does not only reduce the borrower's liability risk, but also reduces the default risk of the bank.

In addition, individual federal states have implemented so-called **emergency aid**. For example, companies and freelancers in need can receive unbureaucratic emergency aid of EUR 5,000 to 30,000 in Bavaria whereby subsidies do not have to be repaid. Furthermore, micro, small and medium-sized enterprises are supported with grants depending on the number of employees. Similar emergency aid programmes are also offered in Hamburg, Schleswig-Holstein and Thuringia. Saxony grants a so-called **emergency aid loan**, which can be taken up by sole proprietorships, freelancers and micro-enterprises that have an annual turnover of less than EUR 1 million, had an economically healthy fiscal year 2019 and are now suffering a decline in turnover of at least 20% in the fiscal year. The emergency loan is an interest-free, subordinated loan of up to EUR 50,000 (in justified individual cases even up to EUR 100,000). It is amortization-free in the first three years and interest-free for ten years. Approval from the house bank is not necessary.

Finally, a so-called **Economic Stabilization Fund (WSF)** is to be introduced to support the real economy; in legal terms this will be done by expanding the already existing Financial Market Stabilization Act. This is intended to strengthen the capital base of companies that were healthy and competitive before the Corona pandemic and whose current existence would have a significant impact on the economy, security of supply and the labour market, as well as start-ups of a certain minimum size. At this point we refer to our detailed article on the WSF in **Issue 3 - "Current challenges for companies due to COVID-19"**.

Affected companies should consider whether they would like to take advantage of one of the aid measures described above under the currently favourable conditions. In order to make the application as efficient and fast as possible, it is advisable to use the support of professional advisors. We would be happy to support you in this.

For more information

For more information please visit www.dlapiper.com or contact your key contact at DLA Piper directly.

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