TIGGES
RECHTSANWÄLTE

The Act for the mitigation of the consequences of the COVID-19-pandemic has been passed.

What companies and entrepreneurs need to know now!

The current developments regarding the COVID-19 pandemic are creating big challenges for all companies. The legislator has therefore passed important, temporary changes in the area of

I. bankruptcy law,

II. commercial tenancy law,

III. corporate law,

IV. loan law, and

V. performance-refusal law.

In this briefing we summarise the most important regulations in these five areas for you, and inform you where you need to act now.

I. Bankruptcy law

Background

The grave impacts of the COVID-19 pandemic on the economic situation of many companies can give rise to bankruptcy-law questions. In a bankruptcy situation, the management is obliged to file for insolvency. Otherwise, criminal-law and liability-law risks threaten. Creditors can also file for insolvency. In addition, liability-law risks arise if a company is continued in a bankruptcy situation. This is the case not only for the company itself, but rather also for business partners of the company continued. The legal reforms which have been enacted are intended to make it easier to continue companies which are experiencing financial difficulties because of the COVID-19 pandemic.

The following has been enacted

- Until 30 September 2020 the Management of a bankrupt company is released from the obligation to file for insolvency. However, this applies only if the reason for bankruptcy (usually insolvency) is caused by the consequences of the COVID-19 pandemic. This is presumed if the company was not yet insolvent on 31 December 2019. Otherwise, the management must prove that insolvency would not have occurred without the COVID-19 pandemic. Equivalent regulations apply also for natural persons.
- If the bankrupt company is continued due to being released from the obligation to file for insolvency, the management is not liable at a later point in time for payments which are necessary for the business operations or the implementation of a restructuring plan.
- Repayments of subsidised loans which have been granted by the KfW or other state assistance programs due to the COVID-19 pandemic cannot be challenged in subsequent insolvency proceedings by the insolvency trustee, either.
- The following applies for all companies, i.e. solvent companies as well:
  - Repayments of loans which are made up to 30 September 2023 cannot be challenged in subsequent insolvency proceedings by the insolvency trustee. This also applies for the repayment of shareholder loans.
  - Payments towards congruent claims, which usually means claims which are due, cannot be challenged in subsequent insolvency proceedings by the insolvency trustee.
- Creditors can only file for insolvency in the first three months after the legal reform enters into force if the debtor company was already insolvent on 1 March 2020.
- The Federal Ministry of Justice and Consumer Protection (BMJV) can prolong some of the periods named up to 31 March 2021 at most.

This is important to know

The obligation to file for insolvency is only suspended if the company has fallen into bankruptcy due to the COVID-19 pandemic. In this context, while any company can invoke the presumption that there was no insolvency as of 31 December 2019, if the bankruptcy is not attributable to the COVID-19 pandemic, failure to file an insolvency application entails grave liability risks, regardless of the criminal prosecution aspect.

What you should do now

If your company is in crisis, the development in the business operations should be documented carefully. What is particularly relevant are the reasons for turnover losses and other disruptions of the business operations. In the event of a business partner or customer having financial difficulties, it is recommendable to ask to talk about the causes of the crisis.

II. Commercial tenancy law

Background

As part of the response against the COVID-19 pandemic, gastronomy businesses and retail stores have been ordered to close. As a further consequence of the quarantine orders, manufacturing companies have sharply limited or discontinued their business. These measures will result in substantial turnover losses. In the absence of sufficient financial reserves, companies affected will not be able to or will only be able to a limited extent to meet their ongoing financial commitments until the measures are lifted, for example to pay the rent. Under current provisions, the lessor is entitled to terminate the lease effective immediately if the lessee is in default in the amount of two months' rent. The legal reforms now enacted are intended to prevent business owners from losing their leases and thus the basis of their livelihood due to the negative economic impacts anticipated.

What has been enacted

- Lessors cannot terminate a commercial lease agreement on the ground that the lessee have not paid rent due and payable for the period from 1 April 2020 until 30 June 2020, provided that the non-payment is caused by the impacts of the COVID-19 pandemic. The connection between the COVID-19 pandemic and non-payment is to be proven by the lessee.
- The rent arrears from the period from 1 April 2020 until 30 June 2020 are to be settled by 30 June 2022. Therefore, the lessor may terminate the lease on the grounds of default, that have arisen in the period from 1 April 2020 until 30 June 2020, only from 1 July 2022 onwards.
- A prolongation of the abovementioned period up to 30 September 2020 can be unilaterally decided by the Federal Government. If the German Bundestag agrees, a further prolongation beyond 30 September 2020 is conceivable.

This is important to know

The obligation to pay the rent does not cease; lessees cannot reduce the rent or refuse permanently to pay the rent by invoking the legal reform. The rent is not deferred, so lessees automatically are in default if they do not pay when the rent is due and can thus be exposed to secondary claims - e.g. default interest - as a result thereof. Only the lessor' right to effect extraordinary terminations in the event of default in payment in the time period named has ceased to apply.

Termination for other reasons is still permissible. If the lease period is indefinite, then each of the parties may give notice of termination. Further, a default in payment which occurred before 1 April 2020, as well as a default in payment which arises after 1 July 2020, presents still a valid ground for terminating the lease agreement.

Contrary to an earlier draft version of the legal reform, the connection between non-payment of the rent and the impacts of the COVID-19 pandemic is not presumed in tenants' favour. Rather, a lessee must prove to the lessor that such a connection exists.

What you should do now

If you are a lessee, you should act now. If it is foreseeable that you will be unable to pay the rent, then you should contact your lessor. By informing him about your lack of liquidity, you will reduce the risk of termination and a consequent legal dispute. As a result of the termination protection enacted, you have gained time to inform yourself about liquidity assistance programs from the Federal and state governments and file an assistance application if applicable.

At the same time you should collect evidence of a connection between the COVID-19 pandemic and your non-payment.

Lessors, on the other hand, should prepare for the possibility that their lessees shall fail to pay rent due. As a lessor, you too should inform yourself about potential assistance measures from the Federal and state governments.

In the event that your lessee shall fail to pay rent due, you should ask him to prove the connection of his lack of liquidity and the COVID-19 pandemic, and thoroughly check the evidence presented. Moreover, you can initially avert the financial consequences of rent losses by using the security deposit.

III. Corporate law

Background

The protection measures to prevent the spread of the COVID-19 pandemic, particularly the limitations on gatherings of people, have had some substantial impacts on companies of various legal forms being able to act, because they may be no longer able to obtain resolutions in meetings in the usual way. This is the case for general meetings which are usually held once a year as well as for extraordinary meetings which in light of extraordinary circumstances – such as those now – are potentially of existential importance for the companies affected. The legal reforms decided are intended to simplify the passing of resolutions during the COVID-19 pandemic and thus to secure companies' ability to act.

What has been enacted

All of the regulations initially apply exclusively for the year 2020. The Federal Ministry of Justice and Consumer Protection (BMJV) can extend them, insofar as necessary, up to 31 December 2021.

- For the Limited Liability Company (in German: GmbH) it previously was the case that shareholder resolutions were to be passed at shareholder meetings as a matter of principle. Shareholder meetings usually require the physical presence of the shareholders. An exception was only possible for unanimous shareholder resolutions or if all of the shareholders waived the holding of the shareholder meeting. Because of the legal reform, shareholder resolutions can now be passed temporarily in writing or in text form outside the shareholder meeting, even if not of all of the shareholders have agreed.

- For stock corporations it was already possible to hold general meetings via electronic communication and to allow for postal votes. However, a corresponding provision in the articles of association was necessary for this. The change in law now empowers the board of directors to hold such general meetings temporarily even without a provision in the articles of association. As a result thereof, it is no longer mandatory for the shareholders to be physically present.

- As a result of other legal reforms, it is ensured that the members of the board of an association or a foundation as well as administrators of an apartment-owner association remain in office even after the expiry of their respective term of office, until they are removed or a successor is appointed. This guarantees the association's ability to act.

This is important to know

As a result of the legal reform, certain minority rights have been limited temporarily in favour of practicability in crisis times.

The temporary simplifications regarding the holding of general meetings and shareholder meetings do not suspend the other legal requirements, however. This pertains *inter alia* to the obligation to pass resolutions which require to be passed at an ordinary shareholder meeting at all. Moreover, the applicable majority requirements, meeting-calling stipulations, and formal requirements for certain shareholder resolutions continue to apply. For example, notarisation of a change to the articles of association.

What you should do now

Managing directors and shareholders who have to pass shareholder resolutions which are urgently necessary due to the impacts of the COVID-19 pandemic on their companies' financial situation should know that they can do this in the year 2020 at short notice and non-bureaucratically subject to simplified conditions, particularly in the case of a GmbH.

Shareholder resolutions can become necessary at present in connection with extraordinary (crisis) measures which go far beyond the usual course of business, and also if the articles of association prescribe a shareholder resolution for a particular measure. Managing directors should thus always keep an eye on any provisions in their companies' articles of association too.

IV. Loan law

Background

The legal reforms enacted are intended to prevent grave disadvantages arising for borrowers who are unable to meet their loan-repayment obligations due to the COVID-19 pandemic.

What has been enacted

The new provisions initially apply only for consumer-loan contracts which were entered into before 15 March 2020. The Federal Government can, however, expand the regulation at a later point in time to micro-companies as well as small and medium-sized companies.

- If the reasonable means of subsistence of a borrower or its dependents is jeopardised due to the COVID-19 pandemic, the lender's payment claims

which become due between 1 April 2020 and 30 June 2020 are deferred for three months.

- The lender is not entitled to terminate the loan contract during the abovementioned deferral due to the borrower's financial situation.
- The borrower and the lender can make deviating and supplementary agreements. This particularly relates also to the period after the expiry of the deferral. If no agreement is achieved, the duration of the loan is prolonged by three months.
- A deferral does not come into consideration if this is unreasonable for the lender. Here too, in particular the consequences of the COVID-19 pandemic for the lender are to be taken into account.

This is important to know

The deferral of a lender's payment claim merely means that the payment will become due at a later point in time. No interest and redemption payments are waived.

A borrower who invokes the deferral regulation must prove that it cannot be reasonably expected to make payment, due to the COVID-19 pandemic. The law does not contain any presumption regulation in this respect – like with tenancy law.

What you should do now

If you have granted loans to consumers or small companies, you are threatened with additional liquidity holes through possible deferrals. In such case, you should examine whether an unreasonable situation arises for you as well as a result of the temporary loss.

In addition, this regulation (so far) essentially pertains to credit institutions and consumers.

V. Extraordinary performance-refusal right

Background

Micro-companies, which due to the COVID-19 pandemic are unable to fulfil their contractual obligations, are allowed to refuse or suspend their performance for the time being, without this being associated with legal consequences which are detrimental to them. The legal reforms enacted are intended to guarantee that micro-entrepreneurs are not cut off, particularly from basic supply services – e.g. electricity, gas, water and the Internet.

What has been enacted

- Micro-companies, i.e. those with up to 9 employees and an annual balance sheet or annual turnover of less than EUR 2 million, can declare refusal of performance to their contract partner under a long-term contract relationship until 30 June 2020 if
  - the contract was entered into before 8 March 2020, and
  - the company is unable to render the performance or it would not be possible for the company to render the performance without jeopardising the financial bases of its income-earning business.
- This performance-refusal right does not apply if its exercise would be unreasonable for the contract partner because non-performance would result in jeopardising its reasonable livelihood or the financial bases of its business enterprise.
- If the performance-refusal right does not apply due to exercise being unreasonable for the contract partner, then the micro-company may terminate the contract.

This is important to know

The introduction of this temporally-limited performance-refusal right will impede the enforceability of the main claim. The contract partner's fulfilment demand can be countered by the performance-refusal right. At the same time, the contract partner's ancillary claims - such as for default interest - cannot arise. The performance-refusal right does not apply only for payments, but rather also for other claims which the contract partner has, for services for example.

The performance obligation does not cease permanently. The obligation to perform remains in existence and is to be fulfilled after the expiry of the moratorium – currently after 30 June 2020.

Finally, a micro-company may not invoke the performance-refusal right if performance was already due before the legislation came into force.

What you should do now

Because the performance-refusal right is a defence, you have to actively raise it, i.e. declare it to your contract partner. The defence does not come into effect on its own. At the same time, you must be able to prove that specifically because of the COVID-19 pandemic you are unable to perform.

Definitely do not forget that suspended performance is to be rendered no later than from 1 July 2020. Plan ahead in order to prevent problems arising later on.

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