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COVID-19 RESPONSE

Germany has introduced a raft of measures and programmes to help combat the economic impact of COVID-19 containment measures. Here we present what we consider to be the most significant and interesting. This section is not exhaustive.

Loans and grants – employees:

Three main tranches of wage subsidy have been introduced.

The most wide-reaching is “**Kurzarbeit**”. This programme existed before COVID-19. It is a social security programme whereby the government will subsidise employees’ wages up to 60% (more for those with children) in order to allow their employers to reduce their hours (and their expenditure on wages) instead of laying them off. Under COVID provisions, the subsidy has been increased. From the fourth month, the rate is increased to 70% of flat-net remuneration for those households without children and 77% for those households with children. From the seventh month, it is increased to 80% for those households without children and 87% for those households with children. In September, there was a decree to make this benefit more flexible (e.g., reducing the minimum number of employees effected by working hours reduction to 10% for the business the qualify) and to extend the period for receiving this benefit from 12 to 24 months until 31st December 2021.

Freelance artists in Germany can access funds if they work for cultural institutions funded by the Federal Government. They will be compensated for up to 60% of fees from cancelled events up to €1,000 and 40% up to €2,500.

Students can access interest-free loans of up to €650 per month for jobs lost due to the pandemic.

Loans and grants – businesses:

As well as the enhanced terms of “**Kurzarbeit**”, there are a variety of direct loans and grants available which businesses of different sizes can access.

A grant of up to €150,000 / 80% of fixed costs in the subsidy period is available for businesses showing decreased sales volumes compared to the same month of the previous year. This Federal Government grant has been supplemented by some Federal States’ own grant programmes.





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There is a separate start-up assistance programme. Venture capital companies can access funds to invest in innovative start-ups and there are also funds which can be directly accessed by start-ups (subject to maximum turnover limits).

Low interest loans are available at both State and Federal level. Companies with 5 employees or less can access up to €9,000, those with up to 10 employees can access up to €15,000, those with up to 50 employees can access up to €500,000, and companies with over 50 employees may access up to €800,000.

Freelancers and solo-self-employed people can apply for loans, usually up to €200,000, equalling up to 25% of revenues, x2 personnel expenses or, their finance requirements for 18 months.

Aimed at larger companies, the KfW special programme offers financing from €25m as part of syndicated financing in which KfW bank assume up to 80% of risk share and up to 50% of total company debt.

Finally, the Economic Stabilisation Fund (ESF) is for large companies and SMEs deemed to be strategically important to Germany. It offers a broad range of corporate finance instruments.

Legal and administrative burden:

The German government has eased burdens on businesses as regards their obligations to debt, insolvency and contracts.

The abiding principle however remains that directors/managers must be responsible in how they respond to difficult financial circumstances. They should check whether it is realistic for them to continue trading after COVID-19 without insolvency. If it is not, then insolvency now may be the best option, irrespective of COVID-19. They are not exempt from liability as a result of the measures which have been introduced.

Debt

Until 30th September 2020 (the suspension period), loans and guarantees received will not be regarded as improper contributions delaying filing for insolvency.

Any payments on loans (including new shareholder loans) or guarantees for such loans, which are taken out during the suspension period, will not be considered disadvantageous to creditors.

Challenge to any debtor transactions prior to insolvency, other than loan repayments, will be significantly curtailed. Unless the contracting party was aware



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that the debtor's financing activity was insufficient to address their financial problems, most legal acts will not be contestable in insolvency proceedings.

Insolvency

Until 30th September 2020, the requirement to file for insolvency is suspended and directors/board members have limited liability for insolvencies caused by COVID-19. Creditors may only apply for insolvency on the basis that there were grounds for insolvency before 1st March 2020.

It will be assumed for the duration of the insolvency period that payments made in the ordinary operation of the business, to re-start operations or to help finance the business are in keeping with liability requirements as concerns taking due care as a prudent and diligent businessperson.

Contractual obligations

Important provisions were implanted from the end of March until the end of June 2020.

Consumer loan agreements were suspended where the debtor could not pay and certain types of consumer contractual obligations were suspended, such as for utilities.

In addition, landlords were prevented from terminating tenants' leases where the tenant could show non-payment as a result of COVID-19.

Small businesses were also able to avail of these measures in certain circumstances.

Employment law:

Please see "**Kurzarbeit**" above, in addition to the below.

Failure to appear for work due to COVID-19 sickness or official quarantine orders is covered by the standard German Continued Remuneration Act for up to six weeks (employers can apply for reimbursement of these expenses). Failure to appear for work due to fear of infection / caution is not covered.

Self-employed people who are unable to work due to COVID-19 containment measures as per the German Protection Against Infection Act can claim compensation under the Act.



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Tax obligations:

September 2020:

- Draft Annual Tax Act 2020 ("**Jahressteuergesetz 2020**"). Prolongs the tax exemption for certain payments made as part of the reduced hours compensation benefit (so called **Kurzarbeitergeld**) until 31 December 2021.

July 2020:

- Increased tax-exempt trade tax add-backs from €100,000 to €200,000
- Reduced income tax in relation to trading income to four times the trade tax base.
- Increased the maximum tax research allowance under the Research Allowance Act from €500,000 to €1m per company until 1st July 2026.
- Enhanced depreciation rates for movable assets to a ratio of 2.5, with a maximum of 25% per annum on any acquired or made between 31st December 2019 and 1st January 2022.
- Increased the maximum loss carry back from €1m to €5m for losses accrued in 2020 and 2021
- Allowed a loss carry back from 2020 to be included within 2019 prepayments or tax assessment, based on 30% of the tax base for prepayments or assessment for 2019 or an estimate of the 2020 losses.
- Reduced standard VAT from 19% to 16% and from 7% to 5% on certain goods and services.
- Certain payments towards the reduced hours compensation benefit ("**Kurzarbeitergeld**") are made exempt from income tax from March to December 2020.
- If applied for or concluded in 2020, then the timeframe for concluding certain corporate restructuring mechanisms (e.g., merger of a partnership) for tax purposes is extended from 8 to 12 months.

May 2020:

- Extensions until 31st May 2020 granted for 2018 tax returns if COVID-19 prevented submission within the usual deadline.

March 2020:

- Applications accepted, without the need to prove damages on a value basis, for income tax and corporate tax prepayment adjustments if directly impacted by COVID-19 to considerable extent.
- Deferment of VAT granted until 31st December 2020, with no strict requirements.
- Also includes measures to possibly suspend enforcement and penalty actions until 31st December 2020.
- As a rule, interest on deferral is to be waived.





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Business structure. What types of business structures are there?

- **Einzelunternehmen** (sole trader/sole proprietorship): Unlimited liability of the owner with their business and private funds; In order to pursue such debtors, you will need the first name and surname of the debtor.
- **GbR (Gesellschaft bürgerlichen Rechts)** (Civil law partnership): No minimum capital; Unlimited liability of partners; Usually non-business or small-business activities.
- **OHG (offene Handelsgesellschaft)** (General partnership): No minimum capital; Unlimited liability of partners.
- **KG (Kommanditgesellschaft)** (Limited partnership): No minimum capital; At least one partner is liable, with business and private funds; Limited partners are only liable with company capital.
- **PartG (Partnergengesellschaft)** (Professional [service] partnership): No minimum capital; Partners must be independent professionals (e.g. lawyers, doctors, architects).
- **UG (Unternehmersgesellschaft)** (Entrepreneurial company with limited liability): No minimum capital, however 25% of yearly earnings must be accumulated until EUR 25,000 is reached; Liability is limited to company capital.
- **GmbH (Gesellschaft mit beschränkter Haftung)** (company with limited liability): A minimum capital of EUR 25,000.00 in the form of cash but also assets such as cars or company equipment; Partners are only liable with company capital.
- **AG (Aktiengesellschaft)** (company on shares): A minimum capital of EUR 50,000 divided into shares; Liability is limited to company capital.

Data sources. Where can I find information about a company?

- Corporate information is available at the German Commercial Register (Handelsregister): www.handelsregister.de

Credit Checks. Where can I find financial information about a business?

- You can obtain information on the financial state of affairs for companies and industry at the German Commercial Register. There are also numerous private reporting agencies offering credit checks.



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Judgment Search. Can I find out if a business already has a judgment against it?

- Normally you find this information in a credit report. Credit reports are offered as a service online.

Contracting. How do businesses contract with each other and which documents do you need if you have to go to court?

- As a minimum, it is advisable to have at least the following available:
 - Copies of the contract(s)
 - Copy invoices and a full statement of account (including payments and credit notes that have been allocated against the outstanding invoices.
- In the case of a regular lawsuit procedure, copies of the complete contractual documentation should be available starting with the contract, orders, confirmations, delivery notes and invoices.
- Every step of the trading relationship between the debtor and the creditor should be provable by documentation.
- In case of dispute, all notes of conversations between the creditor and the debtor should be kept and given to your lawyer.
- In the case of verbal negotiations, you will need the visit or negotiation reports and the names of any witnesses.

Retention of title

- In Germany regulations on retention of title (ROT) are extremely comprehensive and supplier-focused and must be explicitly agreed to prior to delivery.
- Most importantly, the debtor must acknowledge the retention of title before receiving the first invoice.
- Most companies include retention of title provisions in their general trading conditions. In this case, the debtor must either sign these conditions in advance or the creditor must advise the debtor explicitly that the general trading conditions apply before sending the first invoice.
- It is vital to get proof that the trading conditions have been agreed to; otherwise, the benefits of the more complex version of the German retention of title cannot be used for reducing the outstanding amount.
- There are three types of retention of title in Germany: Basic ROT; Increased ROT and Extended ROT.
- **Basic ROT**; the goods supplied remain the legal property of the supplier until full payment. The supplier can or must get the goods back.
- **Increased ROT**; Open account retention. In the course of on-going business relations, the supplied goods remain the legal property of the supplier until all outstanding amounts from the open account or business relations have been fully paid.

- **Extended ROT;** Assigned to the supplier in advance. In accordance with §354a of the Commercial Code, an advance assignment is effective despite a non-assignment agreement between the purchaser and any third parties.



PRE-LITIGATION

Letter before action. Do you have to send a demand letter to a debtor before going to court?

- Before going to court, and even before filing the claim to the enforcement authority, a warning notice to the debtor's registered address is mandatory.
- The warning notice should contain:
 - The name of the creditor and the basis of the claim
 - The total amount of the claim, including any penalty interests
 - Prescription on how to transfer the payment, i.e. bank account etc.
 - A warning that the claim will be enforced through the enforcement authority in case the claim is not settled within from the date of the notice
 - Information on how the object to the claim if not acknowledged by the debtor.
- If this measure has been taken and the payment still has not been made after the two-week notice period (according to the law), the creditor may file for enforcement.
- It is worth noting that, in Germany, you may be ordered to all pay court fees if you did not send a warning letter to the debtor prior to issuing proceedings.



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Can you claim interest and collection costs from customers if their payment is late?

- If the contracting parties have not agreed this in the contract, then statutory default interest and collection costs are applicable.
- The creditor may in addition to the claim demand to recover from the debtor:
 - Penalty interest of the claim: 8,12%
- Extrajudicial interest and costs can be claimed as part of the outstanding monies during the legal proceedings.

LITIGATION

Limitation period. How much time do you have before you must start legal proceedings?

- The general limitation period for bringing a claim is three years. However, limitation and other preclusion periods (such as the obligation to notify the other party about defects) vary depending on the subject matter of the dispute, ranging between only few days and 30 years.
- The statute of limitations is suspended if:
 - Negotiations take place between the relevant parties.
 - A statement of claim is filed.
 - Proceedings are initiated at one of the registered conciliation institutions (**Gütestellen**).
- With respect to payment claims, the statute of limitations is also suspended by the initiation of collection proceedings (**Mahnverfahren**).

ADR. What forms of Alternative Dispute Resolution are available and are they compulsory?

- Mediation is the most common form of ADR in Germany. Mediation can take place out of court based on an ADR agreement of the parties or in court. Courts can refer a court dispute to a division of a court specialising in ADR (court mediation) or suggest conducting ADR proceedings, namely mediation, out of court.
- A mediation conducted out of court is governed by the German Mediation Act. However, it does not contain comprehensive provisions on the mediation procedure so parties must agree on how the mediation proceedings are to be conducted.
- Courts have discretion to refer a dispute they deem to be suitable for ADR to a division of the court specialising in ADR that is not authorised to render



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a binding decision. In this case, the ADR mechanism chosen by this division is mandatory for the parties and forms an integral part of the court proceedings. If an amicable settlement cannot be reached, the case will be referred to the division of the court that is competent to render a binding decision, and the formal court proceedings must continue.

Court Proceedings. What forms of court proceedings are available, and do you need legal representation?

- Only applicable for monetary debts where the debtor is traceable, the legal dunning procedure can be applied.
- The Berlin-Wedding court is responsible for non-German clients, while various local courts are responsible for German cases.
- In order to obtain an enforceable judgment in this procedure, first the court order (**'Mahnbescheid'**) and secondly the enforcement order (**'Vollstreckungsbescheid'**) need to be applied one after another and served to the debtor within time frames stipulated in the German Civil Process Law. The debtor can appeal during both stages, which would transfer the dunning procedure into a regular lawsuit procedure.
- The regular lawsuit procedure is initiated either directly after the amicable collection has failed due to a dispute by the debtor or directly after the legal dunning procedure if the debtor has appealed.
- A written pre-procedure is usually issued. Both the creditor and the debtor must exchange opinions and proofs by letter until the judge believes all relevant information has been received. A hearing is then scheduled, during which both parties must be present. After the hearing, the judge sets a date to publish the final judgment, and both parties will be informed about the outcome in writing by the court.

Time frame. How long does it take before you can get a judgment against a debtor?

- The average duration of a legal dunning process is between eight and 12 weeks, whereas a court procedure can take 12 months or longer, depending on the complexity of the case and the availability of the judge and lawyers on both sides.

How much does it cost to go to Court?

- The costs arising from the lawsuit are allocated between the parties on a pro-rata basis according to the outcome of the case. Generally, the unsuccessful party must bear the court costs, his own costs and reimburse the successful party's costs. The same applies in case the action is withdrawn by the claimant.



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- These costs mainly consist of the successful party's legal fees, which are reimbursed at the rates set out in the Federal Attorney Remuneration Fees Act, regardless of any negotiated agreements between the attorney and his client.
- The court fees can be reduced if, for example, the proceedings are terminated early by a withdrawal of the action or a settlement. Further, the creditor may be ordered to pay court fees if he has not sent a warning letter to the other party before initiating court proceedings, and the debtor acknowledges the claim instead of submitting a defence (**sofortiges Anerkenntnis**).
- Courts have no direct power to limit or control costs during the proceedings. In rare circumstances, however, the court can, for example, deny a party's request to hear further experts if they consider this process to be too costly.

Enforcement of a court judgment. How do you enforce domestic/overseas judgments?

- On motion by the successful party, the judgment is enforced against the unsuccessful party.
- In relation to the enforcement of judgments on monetary claims, the successful party can file an application for garnishment measures with the local court that has jurisdiction over enforcing the judgment (**Vollstreckungsgericht**).
- The application must identify the claims or rights of the debtor to be garnished, such as deposits in bank accounts, or claims against third parties.
- In addition, or alternatively, the judgment creditor can file an application with the bailiff (**Gerichtsvollzieher**) to enforce against the debtor's tangible personal property.
- The enforcement of judgments other than monetary judgments follows different rules. Judgments for delivery or recovery of goods, as well as for surrendering possession of property are enforced by the bailiff.
- The enforcement in debt generally takes only four to eight weeks.
- The enforcement in movable property, however, often needs six to nine months in the western parts of Germany and nine to 12 months in the eastern parts of Germany, due to a lack of bailiffs and large backlogs.

Insolvency

- Insolvency proceedings – whether regular insolvency, insolvency plan or individual insolvency – are a collective enforcement by all the creditors to one debtor.
- With the start of the preliminary proceedings, all individual enforcement is suspended, and only when the insolvency proceedings do not start will individual enforcement continue. The aim of the insolvency proceedings is to pay out all creditors with the same quota by liquidating the assets of the debtor company or by collecting the enforceable income of the individual who is declared bankrupt.



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- After the debtor or a creditor files for the insolvency of the debtor, a preliminary liquidator is appointed to check if enough assets are available to cover the costs of the proceedings (court costs and costs of the liquidator). If these costs are deemed to be covered, then insolvency proceedings start, and a liquidator will be appointed; usually this is the preliminary liquidator.
- If any other route is followed, the court will reject the declaration of bankruptcy due to insufficient assets. The creditors can then lodge their claims and take back any goods delivered under retention of title. For goods in stock, the liquidator can choose whether to pay the original price to the creditors or to return the goods. For the extended retention of title, the insolvency practitioner liquidates the goods or claims and pays out these creditors the retaining VAT and a commission of 9,0% of the revenues.
- At the end of the proceedings, all the creditors with confirmed debts will receive a dividend, on average between 5,0% and 8,0% of the original claim.

The information in this document is accurate to our knowledge as of October 2020

The know-how in this fact sheet is not intended to constitute a definitive or complete statement of the law, nor is it intended to constitute legal advice for any specific situation. We do not accept any responsibility for action taken as a result of information provided by us. It is your responsibility to take specific advice when dealing with specific situations. The fact sheet is intended as educational in nature and may not reflect all recent legal developments and may not apply to the facts and circumstances of individual transactions and cases.

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Baker Ing

REGISTERED OFFICE

Office 7, 35 Ludgate Hill, London, EC4M 7JN

TELEPHONE

+44 (0)20 1234 5678

EMAIL: admin@bakering.global

WEBSITE: bakering.global

Chartered Institute of Credit Management

The Water Mill, Station Road

South Luffenham

OAKHAM, LE15 8NB

T: 01780 722900

E: info@cicm.com



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