KIRKLAND & ELLIS

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COVID-19

German Government Actions to Mitigate Economic Effects

- WORK IN PROGRESS -

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Please note that due to the active and preliminary nature of the governmental announcements and the ongoing implementations thereof this slide deck may not reflect the latest status.

Agenda

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5. Further Amendments to the Corporate, Civil and Insolvency Law
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1. Reduced Hours Compensation (*Kurzarbeitergeld*)

Reduction of Working Hours	Legal Framework ▶ Under German law, employers may reduce the working hours of their employees and, simultaneously, their salaries, in a crisis if such reduction is provided for in collective agreements (*Tarifverträgen*), company agreements (*Betriebsvereinbarungen*) or the individual employment agreements.
Compensation Benefits	Benefits ▶ Under certain conditions, the German Federal Labour Office (*Arbeitsagentur*) partly covers the reduced salaries so that employees only suffer relatively low losses, so-called "reduced hours compensation benefit" (*Kurzarbeitergeld*). Amount of Compensation ▶ Employees will receive 60% (67% if they have one or more children) of their net income for hours not worked and not paid for by the employer from the German Federal Labour Office (for each employee with a gross salary higher than €6,700 a month, the compensation is capped to the amount they would receive with a gross salary of €6,700).
Loosening of Eligibility Criteria	Lower Threshold ▶ By the beginning of April 2020, the strict eligibility rules concerning reduced hours compensation benefits will be loosened. In particular, it is only required that 10% of employees or more in the company are affected by the shorter working hours (before: 30%). Further Changes ▶ In addition, unlike before, (i) employees are no longer required to build up negative hours before benefitting from the reduced hours compensation, (ii) temporary/agency workers are eligible and (iii) the Federal Labour Office will provide complete reimbursement of social security contributions in relation to hours not worked.
Further Alleviations for Employees	Further Compensation for Reduced Salary ▶ On 18 March 2020, the German Ministry of Labour (*Arbeitsministerium*) announced that it is considering options to further bridge the gap between the employee's regular salary and the reduced salary, including reduced hours compensation, in particular for low-income families. ▶ Further, the Ministry signalised it will introduce a statute to decrease salary reductions for parents who are caring for a child.

Germany has introduced or announced plans to introduce various measures to keep loss of wages for employees at a minimum

2. Tax

Tax Deferrals	Alleviations in case of significant hardship ▸ The tax authorities' ability to grant tax deferrals (*Steuerstundungen*) will be eased in case the collection would place significant hardship on the respective company. Such hardship would materialise where sales of a respective company collapse due to COVID-19. The tax authorities are instructed to be less strict when applying these standards. Scope ▸ It is envisaged that companies will be able to defer taxes running into billions. The German Ministry of Finance has initiated the necessary process in cooperation with the federal states.	**A number of measures are expected to be introduced that would allow for various tax benefits, including deferrals and adjustments**
No Enforcement Measures and Penalties	▸ Furthermore, the competent tax authorities will release companies directly affected by COVID-19 from enforcement measures and late payment penalties until 31 December 2020.	
Adjustment of Tax Prepayments	Adjustments in case of lower taxable income ▸ In addition, the adjustment of tax pre-payments will be improved. It is intended that pre-payments will be adjusted immediately and with little hurdles as soon as it can be determined that the expected current year taxable income is going to be less than last year's income.	
Measures at State (*Bundesland*) Level	Additional Alleviations ▸ However, some federal states implemented additional measures to ensure the liquidity of companies, e.g. Bavaria is granting deferrals free of interest for income tax, corporate income tax and VAT purposes and, additionally, a reduction of trade tax pre-payments to zero.	

3. Liquidity - Overview

KFW LOAN PROGRAMS (DETAILS ON SLIDE 6-8)

What's New?

- Existing loan programs are extended to companies affected by COVID-19 that had no liquidity issues on 31 December 2019. KfW will offer to assume up to 90% of risk for working capital facilities up to €1bn.
- Syndicated financing program provides for participation of KfW in financing of other financing partners on their terms.
- The German Government plans the establishment of a fund for measures to stabilise the German economy (*Wirtschaftsstabilisierungs-fond*).

GUARANTEES (DETAILS ON SLIDE 9)

What's New?

- Individual guarantee limit was increased to €2.5m (from €1.25m).
- Federal state will assume 10% more coverage (and up to a maximum of 50% for working capital facilities) under the back-to-back guarantees, and guarantee banks will be able to make independent decisions for guarantees up to €250k within 3 days. Note, however, that the coverage limit may depend on the individual guarantee bank.

LARGE GUARANTEE PROGRAM (DETAILS ON SLIDE 10)

What's New?

- Large guarantee program will be open to applicants of all regions (not just structurally weak regions).

EXPORT GUARANTEES (DETAILS ON SLIDE 11)

What's New?

- Government announced the authorised amount for export guarantees can be increased quickly, should additional export cover become necessary.

3. Liquidity –KfW Loan Programs (1/2)

General	Legal Framework ▶ The German Government expanded existing and initiated a new liquidity assistance program. The loans are backed by Kreditanstalt für Wiederaufbau (“KfW”), a German state owned development bank. KfW loans are not issued by KfW directly, but fronted through a local bank or other credit institution.
Loan Terms	Normal ▶ KfW loans are “normal loans” in the sense that they need to be repaid on the maturity date. Loan Terms ▶ Subject to the relevant loan program.
Risk Assumption	Speciality ▶ What makes a KfW loan “special” is that KfW offers to assume a certain portion of the risk towards the bank that issues the loan. This means that if the applicant defaults on any payments due, KfW will cover that risk towards the issuing bank (although the applicant retains 100% of the repayment obligation). This is often the condition upon which the issuing bank will agree to provide the loan in the first place.
Application & Timing	Application process ▶ Applicant applies with local bank or other finance partner of choice. Application documents ▶ Subject to the individual program, an application usually requires: The last 2 annual financial statements, other supporting material (budget, management reports), a qualified capital service calculation, the bank’s credit committee approval, including a “risk opinion” vis-à-vis the applicant and any planned or existing covenant agreements. Local banks might lack the capacity to produce a sophisticated “risk opinion” (which may be as fulsome as an ordinary IDW S6 opinion), and will therefore be required to be produced externally (e.g. by a “Big 4” accountancy firm). Timing ▶ Several weeks or months. Note that the “fast track procedure” is only available to applicants without any current liquidity issues.

KfW-backed credits will be open to a wider range of companies and the issuing credit risks will be further reduced

3. Liquidity –KfW Loan Programs (2/2)

KfW Special Program

(Implemented by existing, extended loan programs)

ERP Start-Up Loan (Companies established within the last five years)

KfW Entrepreneur Loan (Companies established for five years or more)

Eligibility
- Companies affected by COVID-19 that had no liquidity issues on 31 December 2019:
  - Undertaking must not have been “in difficulty” (within the meaning of the General Blocking Exemption Regulation) and no known payment delays over 30 days, standstill agreements or covenant breaches.

Risk participation
- KfW will assume up to 90% for SMEs and 80% for large enterprises.

Volume
- Max. €1,000m per group limited to (i) 25% of sales in FY 2019, or (ii) double of labour costs 2019, or (iii) current liquidity need for upcoming 18 months (for SMEs) or 12 months (for large companies).

New Temporary Syndicated Loan Program

Term
- Max. 6 years.

Risk participation
- KfW will assume up to 80% risk (min. €25m but not exceeding 25% of sales in FY 2019 or liquidity need of upcoming 12 months) either by way of sub-participation or as syndicate partner (each on pari passu basis)
- Alternatively, KfW can refinance a syndicate partner directly.

Loan Conditions
- Funding purpose: investments and equipment.
- Interest repayment terms, costs and credit support: As per existing syndicated loan.

Eligibility
- Majority privately owned, with corporate seat in Germany or abroad, undertaking must be located in Germany.
- Companies affected by COVID-19 that had no liquidity issues on 31 December 2019.
  - Undertaking must not have been “in difficulty” (within the meaning of the General Blocking Exemption Regulation) and no known payment delays over 30 days, standstill agreements or covenant breaches.
- At time of application: Reasonable prospect of company’s liquidity status returning to “normal” status prior to COVID-19 crisis by 31 December 2019.

KfW offers additional liquidity boosts for companies affected by COVID-19

3. Liquidity –Economic Stability Fund

Purpose	Draft German Act on the Fund for Economic Stability (*Wirtschaftsstabilisierungsfondsgesetz – WStFG*) ► The purpose of the "Economic Stability Fund" (*Wirtschaftsstabilisierungsfonds - "WSF"*) is to stabilise businesses of the real economy with systemic importance for the German economy, technological sovereignty, critical infra-structure and labour market.

Eligibility	Personal Scope
	► Companies are eligible:
	    ► if they meet two of the following criteria: (i) balance sheet over €43m, (ii) revenue of over €50m, (iii) more than 249 employees (only two of three criteria have to be met), or
	    ► if they are companies within the meaning of Sec. 55 of the German Foreign Trade and Payments Ordinance or companies of comparable importance for the German economy or security.
	
	Further prerequisites:
	► Company has no other means for financing available.
	► Clear and autonomous perspective for going concern following end of crisis (through the use of WSF measures).
	► No "undertaking in difficulty" as at 31 December 2019 (within the meaning of the General Blocking Exemption Regulation).
	► Company to warrant a sound and prudent business policy, contributing to, inter alia, the stabilisation of supply chains and preservation of jobs.

Application Process	► The WSF will be administered by the German Finance Agency (*Finanzagentur*). ► Applications shall be filed with the German Ministry of Economics (*Wirtschaftsministerium*).

Instruments	The following financing instruments will be made available through the fund:
	► Guarantees:
	    ► Guarantees in an amount of up to €400bn with a term of up to 60 months.
	► Equity Participations – by way of:
	    ► subordinated debt instruments;
	    ► hybrid bonds;
	    ► participation rights;
	    ► silent partnership;
	    ► convertible bonds;
	    ► company shares; and
	    ► acquisition of other equity components.
	
	► Instruments will be available until 31 December 2021.

The German Government plans on the establishment of a fund to stabilise the German economy

3. Liquidity – Guarantees

General	Guarantee Banks ► Guarantee banks (*Bürgschaftsbanken*) are private development banks supported by the state. They provide guarantees for both loans and other investments, e.g. silent partnerships. Counter Guarantees ► The Federation and the regional states provide counter guarantees to mitigate the guarantee banks' exposure.	**Guarantee program will be expanded and state will assume higher coverage**
Application	Channeled through Local Banks ► The application process will usually be channeled via the credit institution where the applicant applies for the loan. Application Documents ► The application will need to include detailed liquidity forecasts (at least when seeking credit support for working capital facilities), and several parties (including the federal – and regional state, the credit institution and the guarantee bank) have a right to scrutinise the applicant's financial condition prior to granting the guarantee (cf. Clause 8 of the general guarantee provisions (*Allgemeine Bürgschaftsbestimmungen Kredit)*).	

3. Liquidity – Large Guarantee Program

General	General Coverage ▸ The "large guarantee program" (*Großbürgschaftsprogramm*) (provides for parallel guarantees by both the Federal Government and the individual states, and was originally limited to companies in structurally weak regions) covers guarantees in excess of €2.5m without a limit regarding the maximum guarantee amount.	**Availability of large guarantees is not limited to certain regions**
Prerequisites	Requirement: No other Option ▸ Any guarantee is only available if the borrower has no other options to receive financing. Mandator ▸ This requirement is assessed by a mandator (*Mandatar*), who also assists the guarantor with the administration of the guarantee issuance. For the Federation and for some regional states, PricewaterhouseCoopers acts as mandator. Limitation ▸ Any guarantee will only cover up to 80% of the loan, i.e. the lenders need to bear the risk for 20% of the loan themselves.	
Application	Application Process ▸ The lenders apply for the guarantees at the regional or Federal ministry of economy or certain state banks (e.g. the LfA Förderbank in Bavaria). ▸ The available guarantee programs depend on the regional state in which the borrower is located.	

3. Liquidity – Export Guarantees

General	General Coverage ▶ Export credit guarantees (also known as “Hermes covers” as Euler Hermes AG (alongside PricewaterhouseCoopers) is mandated to manage the program) are offered to all German exporters and provide coverage in case of default by the relevant counterparty.	**Availability of large guarantees is not limited to certain regions**
Budget	Sufficient Budget Available ▶ While not expanded as part of COVID-19, the German government has announced that the 2020 budget provides sufficient means to fund the existing export credit guarantee program (although it has also said that the authorised amount can be increased quickly, should additional export cover become necessary).	
Eligibility	Criteria ▶ Creditworthiness of the foreign buyer, country risk, German added value, customary conditions of contract (terms of payment and contract period) and compliance with environmental, social and human rights standards.	

4. Extension of Time Limits on Duty to file for Insolvency

Previous - temporally suspended - legal framework for insolvency filing under German law

Insolvency events: Cash-flow insolvency: Inability to pay at least 90% of its debt when due for three weeks following the test date. Balance-sheet insolvency: occurs if (i) indebtedness exceeds assets on the balance sheet (based on liquidation values) and (ii) the going concern test fails. However, the going concern test is passed in case it is "more likely than not" that the company is capable to continue trading as a going concern and meet its financial obligation when due within the next 18-24 months based on a implementable restructuring concept.

Management's duty to file for insolvency: After the occurrence of an insolvency event without undue delay, but after 21 days the latest.

The Act on Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Proceedings ("German COVID-19 Rescue Act") has become effective as per 28 March 2020:

- **Suspension of the duty to file for insolvency until 30 September 2020 ("Suspension Period") (potentially extended to 31 March 2021)**

The duty to file for insolvency is suspended unless: (i) insolvency is not caused by effects of COVID-19; or (ii) no prospects of recovering from cash flow insolvency.

Burden of proof: rebuttable presumption that (i) and (ii) are satisfied if debtor wasn't cash flow insolvent on 31 December 2019. Burden of proof is on the person claiming that there was a breach of insolvency filing duty.

Expected Interpretation

With respect to the expected interpretation, one may refer to comparable legislation in 2002 and 2013 (flood crisis). However, the aforementioned presumptions broaden the scope of the suspensions regime compared to 2013

- "Insolvency is not caused by effects of COVID-19" may arguably be interpreted broadly to cover all direct or indirect effects of COVID-19 on the Company's operational business causing the occurrence of an insolvency event. In this context, it may be held irrelevant whether the respective company has been in a stressed situation before COVID-19, provided such situation alone would not have caused the occurrence of an insolvency event. However, as set out above, in case of cash flow solvency as at 31 December 2019, its presumed that the occurrence of insolvency is caused by COVID-19.
- "Prospect of recovering from cash flow insolvency" will require that, based on the assessment of a prudent business man, the company is capable to restructure its liquidity coverage against the background of either a filing for state aid or promising restructuring negotiations with its creditors and / or other stakeholders. Arguably, such negotiations should be prudently expected to be completed by the end of the suspension period.

Partial suspension of directors' duties

- No management liability for payments made (during Suspension Period) in the ordinary course of business (in particular, payments made to maintain or revive the business, or in connection with the implementation of a restructuring plan).
- This suspension significantly decreases the risk of managing directors incurring personal liability.

Suspension of Insolvency Filing Obligation	Arguably be interpreted broadly to cover all direct or indirect effects of COVID-19 on the Company's operational business causing the occurrence of an insolvency event	Suspension of directors' obligations regarding trading in the zone of insolvency under sec 64 GmbHG or sec 92 para. 2 AktG

5. Further Amendments – Insolvency Law

Restriction of Claw-back claims	Repayment of "new loans" and collateral
	► Repayments of "new loans" and collateral granted until 30 September 2020 ("Suspension Period") that are repaid by 30 September 2023 are not considered detrimental to creditors and cannot be clawed-back by an administrator.
	► For KfW loans and other state aid loans no time limits apply (i.e. also applies to loans granted outside Suspension Period and regardless of when they are repaid).
	► "New loans" means fresh money only (i.e. not A&E / extension of maturity of existing loans, or round payments).
	Shareholder loans
	► Repayment of shareholder loan cannot be clawed-back by an administrator; granting security is not covered by the exemption and therefore still subject to claw-back.
	Congruent actions
	► No claw-back risk for certain congruent actions unless counter-party has positive knowledge that restructuring efforts are not suitable for resolving cash flow insolvency (burden of proof on person clawing back/ administrator).
	► Congruent actions:
	    ► Repaying loans
	    ► Granting of credit support (including subsequent collateralisation)
	    ► Payment relief, unless counter-party has positive knowledge that restructuring efforts are not suitable for resolving cash flow insolvency (burden of proof on person clawing back/ administrator).

Equitable Subordination	► Shareholder loans granted within the Suspension Period and repaid by 30 September 2023 will not be equitably subordinated. ► Any granted securities for shareholder loans will remain subordinated and subject to claw back risk.
Lender Liability	Mitigation of risk for creditors being held liable to other creditors if a granted loan to a distressed company results in a delay or in a "deepening" of insolvency ► Granting of loans and securities, including extending or novating an existing loan, not considered to be a contribution to any delayed insolvency filing that violates bonos mores. ► This also applies to loan extensions / novations. ► For KfW loans and other state aid loans no time limits apply (i.e. also applies to loans granted outside Suspension Period and regardless of when they are repaid).
Involuntary Filings	Restrictions on involuntary filings ► Requests to open insolvency proceedings filed by a creditor within 3 months of the effective date of the legislation (extendable until 31 March 2021) are only permitted if reasons for insolvency existed prior to 1 March 2020.

Other temporary reliefs: also applies to companies that have no filing duties and/or are neither cash flow insolvent nor balance sheet insolvent

5.2 Further Amendments – Civil and Corporate Law

Moratorium	For micro companies ► Withholding right for certain long-term contracts (entered into prior to 8 March 2020) until 30 June 2020 (extendable until 30 September 2020), if company's inability to perform is caused by COVID-19 crisis. ► Definition of micro company: <9 employees / <€2m annual turnover / <€2m balance sheet total. ► Withholding right does not apply to lease agreements, employment contracts and loan agreements.	**Withholding rights, restrictions on termination rights to support existing contracts**
Lease Agreements	Restriction on landlord's extraordinary termination right ► Restriction on landlords' extraordinary termination rights based on delayed lease payments that are due in the period from 1 April 2020 to 30 June 2020 provided that outstanding rent payables are owed to the effects of the COVID-19 pandemic. ► The restriction of the extraordinary termination right shall expire on 30 June 2022. ► Extendable to rent arrears between 1 July 2020 - 30 September 2020. ► Burden of proof on tenant. ► The rent payment obligation and other termination rights remain in place.	
Corporate Law	Shareholder meetings ► Temporary relief for shareholder meetings, including ability to hold virtual meetings and vote electronically without any pre-existing permissions in the articles of association or shareholder consent.	

6. Measures at the Level of German States (*Bundesländer*) (1/2)

All German states (*Bundesländer*) have taken certain measures to support national companies. Initiated projects address liquidity needs and provide support on tax level. Most states offer following aids: state guarantees, bridge loans, suspension of repayments of loans and simplified tax deferrals.

State	Description	Link to Source
Baden Württemberg	► Programs of L-Bank and Bürgschaftsbank Baden-Württemberg: liquidity credit up to €5m with a 4 to 10 year term	wm.baden-wuerttemberg.de wm.baden.wuerttemberg.de
Bavaria	► "Protective shield" of up to a total of €10bn for companies affected by the restrictions imposed by the coronavirus	bayern.de
Berlin	► Liquidity fund with a volume of €100m for bridge loans set up via Investitionsbank Berlin, amount may be doubled	rbb24.de berlin.de
Brandenburg	► Advance payments of VAT can be suspended, and interest on deferral and enforcement can be waived	mdfe.brandenburg.de
Bremen	► Task force has been set up, no specific measures announced so far	bab-bremen.de
Hamburg	► Support offers including support programs for business financing and state guarantees (*Landesbürgschaften*)	hamburg.de
Hesse	► Wide range of subsidised financing products via Wirtschafts- und Infrastrukturbank Hessen and Bürgschaftsbank Hessen to support small and medium-sized enterprises in particular with investments and working capital	wibank.de wirtschaft.hessen.de

6. Measures at the Level of German States (*Bundesländer*) (2/2)

State	Description	Link to Source
Mecklenburg-Vorpommern	► €100m "package of measures", including ► state guarantees for particularly affected companies ► doubling the amount per case of state guarantees up to €2.5m ► small-cap liquidity aid for small companies and freelancers	regierung-mv.de ndr.de
Lower Saxony	► State guarantees	nbank.de
North Rhine-Westphalia	► Uncomplicated provision of short-time work compensation ► Guarantees: up to €2.5m per company. Bürgschaftsbank enables a 72-hour express guarantee	wirtschaft.nrw.de
Rhineland-Palatinate	► Working capital loans and guarantees (ISB and Bürgschaftsbank Rheinland-Pfalz) ► Suspension of repayments of program loans	isb.rlp.de
Saarland	► €10m credit program	saarland.de
Saxony	► Tax breaks: Advance payments of VAT can be suspended, and interest on deferral and enforcement may be waived	smwa.sachsen.de mdr.de
Saxony-Anhalt	► No particular financial measures; government refers to existing liquidity aid institutions, i.e. KfW and state development banks	mw.sachsen-anhalt.de
Schleswig-Holstein	► Simplified tax deferrals ► Fast loan offer which primarily aims at small and medium-sized enterprises that have an established business model and sufficient prospects	schleswig-holstein.de
Thuringia	► Thueringen Aufbaubank: "Extension" of existing liquidity aid (in particular guarantees) ► Tax breaks: Advance payments of VAT can be suspended, and interest on deferral and enforcement may be waived	finanzen.thueringen.de

7. Measures at the Level of the European Union

European Investment Bank	► On 16 March 2020, the European Investment Bank proposed to mobilise up to €40bn to fight the COVID-19 crisis. The proposed financing package consists of: ► Guarantee schemes to banks based on existing programs for immediate deployment, (up to €20bn); ► Liquidity lines to banks to ensure additional working capital support for SMEs and mid-caps (€10bn); ► Asset-backed securities (ABS) purchasing programs to allow banks to transfer risk on portfolios of SME loans (€10bn).	**Flexibility regarding state subsidies; currently no utilisation of ESM**
Subsidies	► On 17 March 2020 the European Commission announced that the member states would take all necessary measures to mitigate the economic effects of the COVID-19 crisis, and that required approvals for state subsidies would be handled with more flexibility than usual. ► In particular, the European Commission said that allowances and tax benefits up to €500,000, loans with reduced interest and state guarantees that allow banks to issue interest reduced loans would be permitted.	
ESM	► The European Stability Mechanism (ESM – introduced in 2012) was not mentioned in the first statement made by the European Commission. ► However, since then, several officials have requested the ESM to be used to alleviate the impact of the COVID-19 crisis; discussions are ongoing.	
Bond Purchase Program	► The European Central Bank increased the volume of its bond purchase program and indicated to buy bonds up to an amount of €750m in 2020.	
“Corona-Bonds”	► European Commission is considering issuing bonds to finance state aid programs.	

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