

## FAQ Coronavirus: How companies secure their liquidity during the corona crisis – 6 April 2020

The corona crisis directly affects companies and is associated in particular with a substantial decline in revenues. In order to prevent the resulting, in some cases massive, liquidity shortages from pushing companies into insolvency, measures to secure liquidity must now be taken as quickly as possible. To maintain an overview of the situation and to be able to take short-term decisions, we have summarized the numerous existing options below.

### Part 1 – Economical measures

#### 1. Federal government: KfW coronavirus aid program

The KfW coronavirus aid program will be available from 23 March 2020 to all companies based in Germany that have temporary financing difficulties due to the corona crisis. This means that all companies that were not in financial difficulties on 31 December 2019 can apply for a loan.

**Funding type:** loans

**Sponsor:** Federal ministry of Economics and Energy (BMWi)

**Subsidies:** The funds for the KfW coronavirus aid program are unlimited

#### Funding:

##### Quick loan – Presented on 6 April 2020

On Friday, 3 April 2020, the European Commission approved a programme that allows member states to grant interest-free loans or assume 100 percent risk liability, for example. The maximum limit per company is EUR 800k.

Based on this permission, the BMWi and the Federal Ministry of Finance (BMF) developed the so-called "Quick Loan Programme", which is intended to give medium-sized enterprises faster access to KfW loans. The key data of the new programme are a loan term of 10 years and an interest rate of 3% p.a. Companies with more than ten employees are eligible to apply. The applications are also processed by the house banks under the Quick Loan Programme, but the house bank is released from 100% liability by the state-owned development bank KfW and thus by the Federal Government. The loan amount is based on a three months' turnover in 2019 - however, the maximum amount per company with 11 to 49 employees is EUR 500k and for companies with 50 to 249 EUR 800k.

Since, due to the 100 % indemnity of the house banks by KfW, no assessment of the further development of the applicant company is made by the house banks (e.g. by a credit/creditworthiness check), certain basic requirements have been laid down in order to keep the default risk within limits. In order to receive a quick loan, the applicant company must

- have been active on the market at least since the beginning of 2019,
- have sound financial circumstances and
- must have generated a profit in 2019.



Since the purpose of the Quick Loan is primarily to secure liquidity in the short term, a "conversion" of the Quick Loan into an ERP Start-up Loan or KfW Entrepreneur Loan can take place at any time, provided the conditions are met. This is possible without paying interest on early repayment.

### ERP-start-up loan and (ii) KfW-business loan

Due to the fact that the other promotional loans existing in addition to the fast loan (i) ERP start-up loan and (ii) KfW-business loan, only provide for a maximum indemnity of 80 % to 90 % from the house banks, the house banks always carry out their own credit assessment. This is entirely in the hands of the respective house bank. Only when the respective credit assessment has been successfully completed, the house bank forwards the corresponding application to KfW. **However, the positive assessment of the future development of the applicant company (positive forecast for its continuation), which has been additionally required, will be deleted from KfW's information sheets as of 6 April 2020.**

### ERP-Founders' Loan-Universal (073/074/075/076)

If a company has been active on the market for at least 3 years or can present two financial statements, a loan can be applied for investments, operating resources, warehouses or for the acquisition of assets from other companies. Under certain conditions KfW covers parts of the risk of the bank granting the loan.

For large enterprises (more than 249 employees, more than EUR 50 million revenue or more than EUR 43 million balance sheet total) KfW will cover up to 80% of the liability. The coverage of liability is an agreement on the distribution of risk between KfW and the house bank. The higher the exemption from liability, the lower the risk for the house bank in the event of a loan default.

For small and medium-sized enterprises (usually up to 249 employees and a turnover of up to EUR 50 million) KfW provides a release from liability of up to 90%.

If a company has been active on the market for less than 3 years or if two financial statements are not available yet, small and medium-sized and large companies can still apply for an ERP Founder's Loan-Universal for investments and working capital, however, in this case the KfW does not cover the risk, i.e. the house bank bears the full risk. The only alternative here is the "ERP Founder's Loan - start-up money" with which one can obtain up to EUR 30,000 for operating funds with a risk coverage of up to 80 % by KfW.

### KfW-Business Loan (037/047)

The so called KfW-Business Loan is equal to the ERP-Founder's Loan-Universal. However, the applying company must have started its business more than 5 years ago.

### Interest rate and loan period:

The interest rate is based on the development of the capital market and is between 1.00 % and 2.12 % p.a.

The loan period is up to 5 years, with a maximum of 1 grace year and a fixed interest rate for the entire period.

However, the BMWi and the BMF are currently in agreement with the European Commission that an extension of the term to 10 years and the repayment of the loans should be linked to the better fortune case, i.e. that the loans should not have to be repaid until the company is making profits again.



### Loan sum:

Maximum EUR 1 billion per business group (affiliated companies), limited to

- 25 % of annual revenue in 2019 or
- double the wage costs 2019 or
- the current liquidity requirements for the next 18 months for small and medium-sized enterprises and 12 months for large enterprises.

For loans exceeding EUR 25 million, the amount of the loan is limited to a maximum of 50 % of the company's total debt, whereas, according to KfW, shareholder loans etc. also have to be included in the calculation of total debt.

Companies particularly are considered as a business group

- in which the applying company itself has a direct or indirect investment of more than 50 % or
- which have a direct or indirect investment of more than 50 % in the applying company.

### Principle of the house bank:

The loans are mediated by the companies' house bank (commercial bank, savings bank, cooperative bank).

### Risk assessment:

For loan amounts up to and including EUR 3 million per enterprise KfW takes over the risk assessment of the house bank and waives its own assessment of the loan application. In this case, the applying company does not have to submit any documents for risk assessment to KfW when the application is submitted.

For loan amounts of **between EUR 3 million and EUR 10 million inclusive**, a simplified risk assessment is carried out under the following conditions ("**modified fast track**"):

- the ability to cover the debt service is determined on the basis of the calculations of the house bank, taking into account the new project of the applying company/group on the basis of actual figures, if applicable. For this credit assessment, a finance plan including liquidity planning must always be prepared,
- the 1-year probability of default (PD) for the applying company/group, if applicable, is max. 2.80 % based on their rating (cut-off date 31 December 2019),
- the applying company/group, if applicable, **had no liquidity problems prior to 31 December 2019, no significant decrease in revenues/profits (usually max. 10 %)** and its economic situation had not substantially deteriorated,
- the applying company/group, if applicable, shows **no significant changes in the shareholder structure** within the last 12 months before or with the application.



If these conditions are fulfilled it's only necessary to provide:

- the last two financial statements (if the financial statement for 2019 is not available yet, the financial statement for 2018 and an economic evaluation as of December 2019 is required for the assessment of the economic situation),
- internal credit agreement with the house bank, including a vote, but at least a risk-oriented statement on the applicant and any existing / planned covenant agreements

If the conditions for the modified fast-track are not fulfilled and for loan amounts of more than EUR 10 million up to and including EUR 300 million, the usual lending process for loans of more than EUR 1 million is at KfW's own risk.

For loan amounts above EUR 300 million per enterprise, KfW will check the validity of the loan agreement documentation as part of the usual risk analysis processes

**Since the house banks still have a credit default risk of at least 10% or 20%, they will continue to expect the provision of appropriate collateral in addition to the further execution of an individual credit check. Since the collateral also does not only relate to the 10 % or 20 % remaining risk, it may also be necessary to provide collateral of up to 100 % of the loan amount.**

#### **Special Programme 'Direct participation for consortium financing' (855)**

In parallel, with the KfW's special programme for syndicated financing also a new instrument was created. The Special Programme is also aimed at companies that have experienced temporary financing difficulties due to the corona crisis from 1 January 2020. KfW participates in financing in line with market conditions on the same terms as other banks. KfW assumes part of the credit risks of the financed enterprise and offers the participating banks the option of refinancing. The financing structures are tailored to the individual needs of the borrower. The programme is limited until 31 December 2020.

The programme is aimed at German and foreign commercial enterprises, the majority of which are privately owned, for projects in Germany. Foreign projects of German companies or their subsidiaries based abroad cannot be financed. Financing is provided within a consortium, either directly as a consortium partner or indirectly as a risk sub-participation. Optionally, partner banks can also be refinanced by means of a pass-through loan at their own risk.

The programme is designed to support companies that meet the following requirements:

As at the reporting date of 31 December 2019:

- The company was not a company in difficulty. Examination and confirmation is carried out by the consortium bank.
- The company is in an orderly financial situation. The syndicate bank is not aware of any unregulated payment arrears of more than 30 days, existing deferral agreements or breaches of covenant by the applicant.

At the time of application:

- According to the current planning (assumption: on the basis of an overall economic situation returning to normal ("as before the crisis")), the company is expected to be fully financed until 31 December 2020.





- Assuming that the overall economic situation returns to normal ("as before the crisis"), there is a positive going concern forecast for the company.

The entire expenditure for investments and working capital will be financed.

Under the Risk Programme, KfW participates in debt financing with risk participations, whereby the KfW risk share usually may not exceed EUR 25 million or

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

KfW's assumption of risk can amount to a maximum of 80% of the project financing. In order to ensure an adequate risk partnership between KfW and the financing partners, KfW's share of the total debt of the enterprise is limited to a maximum of 50%. Optionally, all banks participating in the consortium can be bilaterally refinanced by KfW. KfW participates in financing with a term of up to 6 years pari passu at market conditions. This means that KfW assumes for its risk participation the terms and conditions agreed by the financing partners (including the term, repayment schedule, margins, commitment commission, fees, collateralisation structure) if these are deemed to be appropriate on the basis of a creditworthiness and risk assessment by KfW.

## 2. Federal government: Economic Stabilisation Fund Act – WStFG

The Economic Stabilization Fund Act passed by the German congress ("Bundestag") on 25 March 2019 and by the German Federal Council ("Bundesrat") on 27 March 2019 provides for further stabilization measures in addition to the KfW coronavirus aid program launched by the Federal Ministry of Economics and Technology ("BMWi") in the form of guarantees of EUR 400 billion, EUR 100 billion for government investments (recapitalization) and EUR 100 billion to refinance the development bank KfW.

The Economic Stabilization Fund aims to stabilize companies in the real economy by bridging liquidity shortages and by creating the framework conditions for strengthening the capital base of companies whose existence would have a significant impact on the economy, technological sovereignty, supply security, critical infrastructures or the labor market.

Companies in the real economy in this context are business enterprises that are neither financial sector companies nor credit institutions and that have fulfilled at least two of the following three criteria in the last two financial years already closed on the balance sheet before 1 January 2020:

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

The Federal Ministry of Finance (BMF) in consent with the BMWi decides on the stabilization measures to be taken by the Economic Stabilization Fund upon application of the enterprise after due consideration of:



- the importance of the company for the German economy,
- the urgency,
- the impact on the labor market and competition, and
- the principle of using the resources of the Economic Stabilization Fund as economically and sparingly as possible.

The BMF, in consent with the BMWi, may also, by an executive order law which does not requiring the approval of the Federal Council, set forth more detailed provisions on the requirements to be met by the recipient enterprises with regard to

- the use of the funds received,
- the raising of further loans,
- the salaries of the organs of the company,
- the pay-out of dividends,
- the period within these requirements must be fulfilled,
- measures to avoid any distortion of competition,
- sector-specific restructuring requirements,
- the method by which the company must give account,
- a commitment to comply with the requirements laid down, to be made and published by the authorized representative organ with the consent of the supervisory organ, and
- other conditions which are intended to provide security..

An inter-ministerial committee (Economic Stabilization Fund Committee) decides on these measures and conditions as well as on general questions and matters of particular importance by consensus.

#### **Warranties:**

The Economic Stabilization Fund is empowered to provide warranties of up to EUR 400 billion for debt instruments issued from the date of entry into force of the WStFG (probably 30 March 2020 until 31 December 2021) and liabilities established by companies in order to eliminate liquidity shortages and support refinancing on the capital market. The term of the warranties and the liabilities to be protected may not exceed 60 months. An appropriate compensation must be charged for the granting of warranties.

The BMF may, in consent with the BMWI, issue further provisions by executive order law on

- the type of warranties and the risks that can be covered by itself,
- the calculation and offsetting of warranty amounts,
- the compensation and other conditions of the warranty,



- limits on the provision of warranties for liabilities of individual companies and
- certain types of warranty and
- other conditions that are necessary to ensure the purpose

#### Recapitalization:

The Economic Stabilization Fund may also invest in the recapitalization of companies. The recapitalization measures include the acquisition of debt instruments, hybrid bonds, profit participation rights, silent participation, convertibles, the acquisition of shares in companies and the assumption of other components of the equity of these companies if this is necessary for the stabilization of the company. Appropriate compensation must be agreed for the recapitalization.

A shareholding by the Economic Stabilization Fund shall only apply, if there is an important interest of the Federal Government in stabilizing the enterprise and if the purpose intended by the Federal Government cannot be achieved better and in a more economical way. **The Economic Stabilization Fund Committee may also decide at its own discretion on applications of companies which have been valued by private investors with an enterprise value of at least 50 million Euro including the capital raised by this round in at least one completed financing round since 1 January 2017.**

The BMF may, in consent with the BMWi, issue provisions on

- the compensation and other conditions of the recapitalization,
- limits for participating in capital components of individual companies and for
- certain types of equity components,
- the conditions under which the Economic Stabilisation Fund may sell its participation in the equity components, and
- other conditions that are necessary to ensure the purpose

#### Loans:

The Economic Stabilisation Fund can grant KfW loans to refinance the special programmes allocated to it by the Federal Government in response to the so-called Corona crisis

### 3. Start-up support

For start-ups, the Federal Government has announced an additional package of measures with a volume of EUR 2 bn, which is specially tailored to their needs. The package of measures is to include the following elements in particular, which are to be implemented step by step:

- Public venture capital investors at fund of funds and at fund level (e.g. KfW Capital, European Investment Fund, High-Tech Gründerfonds, coparion) are to be provided with additional public funds in the short term, which can be used for financing rounds of start-ups in the framework of co-investment together with private investors.



- The investors in the fund of funds, KfW Capital and the European Investment Fund (EIF), are to be put in a position to take over shares from defaulting fund investors in the future with additional public funds.
- For young start-ups without venture capitalists among the shareholders and for small and medium-sized enterprises, financing with venture capital and forms of financing replacing equity capital should be made easier.

#### 4. Immediate aid

With an emergency programme, the BMF also provides one-off emergency aid to micro-enterprises from all sectors of the economy as well as to self-employed persons and members of the liberal professions. The emergency aid is granted as an equity benefit to help overcome an economic situation that is threatening the existence of the company and that has arisen as a result of the corona crisis. An economic situation threatening the existence of the enterprise is assumed if the continuous income from the applicant's business operations is not expected to be sufficient to cover the liabilities arising from the employment in kind and to be paid (liquidity bottleneck) in the three months following the application. The programme is therefore intended to help in particular with rental and lease costs and leasing instalments as well as with other operating costs, e.g. loans for business premises or leasing instalments. If the landlord reduces the rent, any unused subsidy can be used for a further two months. This programme is carried out by the federal states. For this reason, solo self-employed persons and small enterprises with up to 10 employees (full-time equivalent) are supported within the framework of this emergency programme by a grant which does not have to be repaid. Self-employed persons and companies with up to 5 employees (full-time equivalent) receive a one-off payment of up to EUR 9,000 for 3 months. Self-employed persons and companies with up to 10 employees (full-time equivalent) receive a one-off payment of up to EUR 15,000 for 3 months. As a rule, the federal states distribute the federal emergency aid in combined application procedures. In addition, many Länder top up the federal emergency aid with their own funds, as non-repayable grants or in some cases as loans. In some cases, larger companies with more than 10 employees are also eligible (see Part 4).

#### 5. Measures of the states

In addition to the federal government, the states have also set up their own aid programmes. The following is an overview of the measures implemented to date.

##### **Baden-Württemberg:**

The Baden-Württemberg Ministry of Economics, Labor and Housing has launched an emergency aid program. Commercial enterprises, social enterprises and members of the liberal professions who find themselves in an economic situation that threatens their existence and suffer massive liquidity shortages as a direct result of the corona pandemic will be supported with a one-time, non-repayable grant.

Baden-Württemberg has also supplemented immediate aid from federal funds with a sum for larger companies with up to 50 employees (EE). Up to 5 EE = EUR 9k, up to 10 EE = EUR 15k and up to 50 ET = EUR 30k. The conversion of part-time employees and so-called EUR 450 jobs into ET is carried out as follows: Employees up to 20 hours: factor 0.5; employees up to 30 hours: Factor 0.75; employees over 30 hours Factor 1; employees on ERU 450 jobs: factor 0.3.





In addition, companies in Baden-Württemberg can use the "liquidity loan" of the L-Bank to bridge short-term liquidity bottlenecks. It is aimed at freelancers and companies with up to 500 employees. The liquidity loans from L-Bank can amount to between EUR 10,000 and EUR 5 million. The terms are between four and ten years and there are zero to two grace years or a final payment after four years. The loans are granted through the house bank procedure, the house bank must approve the loan after a risk assessment. The companies must have a basically functioning business model and must have been creditworthy before the outbreak of the Corona crisis. The L-Bank assumes up to 80 percent of the risk from the bank. It is also possible for the guarantor bank to provide a guarantee of up to EUR 2.5 million.

#### **Bavaria:**

The Bavarian state government will set up a special fund of EUR 20 bn - BayernFonds. Through this fund, the Free State will be able to acquire temporary stakes in companies in order to preserve know-how and jobs in Bavaria. The BayernFonds will be targeted in particular at companies with a turnover or balance sheet total of more than EUR 10 million and at least 50 employees, thus closing the gap left by the WSF in Bavaria. The selection of the companies eligible for the fund is to be made by the Bavarian Ministry of Economic Affairs. A law for the Bayern-Fonds is to be passed in the state parliament on April 23, 2020. The investments will be managed either by Bayerische Beteiligungsgesellschaft or LfA Förderbank. In addition, the Free State can also invest in companies itself.

In addition, the Bavaria supports companies in providing liquidity through fast loans. To this end, the guarantee framework of the Free State has been increased tenfold from currently around EUR 4 billion to EUR 40 billion. The loans are granted by LfA Förderbank Bayern. This bank can now, for example, provide more risk assumption (guarantees and indemnities) under a global counter-guarantee of the Free State in the amount of EUR 2 billion, such as the simplified application procedure for indemnified loans up to EUR 500k (otherwise EUR 250k). In addition, the Universal Loan was expanded by opening up the indemnities for larger companies and loan amounts of up to EUR 4 million and raising the indemnity rate to 80%. The Universalkredit is intended for freelancers and commercial enterprises with a consolidated turnover of up to EUR 500 million. A lower limit of EUR 25k and a maximum loan amount of EUR 10 million apply. The loans can have a term of three to 20 years and up to two grace years.

The simplified application procedure (waiver of consolidation concept) was also introduced for acute loans. The maximum loan amount for an acute loan is EUR 2 million. Maturities of four, eight or twelve years and up to two grace years are possible. LfA loans and guarantees must be applied for through the main bank and approved by it. Currently in preparation is a "Corona-Schutzschirm-Kredit" with obligatory 90% release from liability for companies with a group turnover of up to EUR 500 million.

An emergency programme of non-repayable grants, graduated according to the number of people in employment (EE), was also set up. Up to 5 EE = EUR 9 thousand, up to 10 EE = EUR 15 thousand, up to 50 EE = EUR 30 thousand and up to 250 EE = EUR 50 thousand. For conversion into EE, see Baden-Württemberg. Under certain conditions, companies with up to 10 employees that have already received funds from the emergency aid program of the Free State of Bavaria can also apply for a top-up from the federal program. If the applicant fulfills the application requirements for both the Bavarian emergency aid program and the federal program for emergency aid, the Bavarian program generally takes second place to the federal program.

#### **Berlin:**

The Land of Berlin has launched the so-called 'rescue aid Corona'. Supporting measures of this emergency aid include interest-free rescue aid with a term of 2 years up to EUR 0.5 million and loans up to EUR 0.5 million, in duly warranted exceptional cases up to EUR 2.5 million, whereby directly enforceable guarantees in the amount of the loan are mandatory. This also applies to start-ups founded less than 3 years ago. The EUR 5k increase in federal funding granted by Berlin for small companies with up to five employees was discontinued as of 5 April 2020.



### **Brandenburg:**

Brandenburg has set up an emergency aid program in the form of non-repayable grants, staggered according to the number of employees (EE). Up to 5 EE = EUR 9k, up to 15 EE = EUR 15k, up to 50 EE = EUR 30k and up to 100 EE = EUR 60k. This does not apply to companies that were in difficulties before the corona crisis. For conversion into EE, see Baden-Württemberg.

### **Bremen:**

The State of Bremen provides immediate aid for micro-enterprises with fewer than 10 employees and less than EUR 2 millions annual turnover as well as for self-employed persons and freelancers up to EUR 5k, depending on the extent of the liquidity bottleneck described above. For conversion into ET, see Baden-Württemberg + seasonal work for three months of the year full-time: factor 0.25.

In addition, there is the liquidity aid provided by Bremer Aufbaubank. The loans are aimed at self-employed persons, freelancers and small companies. Term for loans up to EUR 50k up to 6 years, 1 year interest and repayment free. Loans of EUR 50,000 thousand with a term of 5 years and repayment-free in the first year or a term of 2 years with final repayment can be cumulated with KfW promotion.

### **Hamburg:**

In Hamburg, the measures consist of rescue loans granted directly by "IFB Hamburg" for working capital of up to EUR 250,000 for SMEs from Hamburg that have got into liquidity difficulties as a result of the corona crises and of emergency aid from the Hamburg Corona as non-repayable grants, staggered according to the number of employees (EE). Hamburg is increasing the federal funding by the following amounts: Up to 9 EE by EUR 5k = EUR 14k, up to 50 EE by EUR 5k = EUR 20k, up to 50 EE = EUR 25k and up to 250 EE = EUR 30k. In addition, commercial SMEs in Hamburg and freelancers and other service providers who have been active on the market for a maximum of 5 years can receive loans of up to EUR 750k per project. This support is a cooperation product with the "Bürgschaftsgemeinschaft Hamburg". For conversion into EE, see Baden-Württemberg.

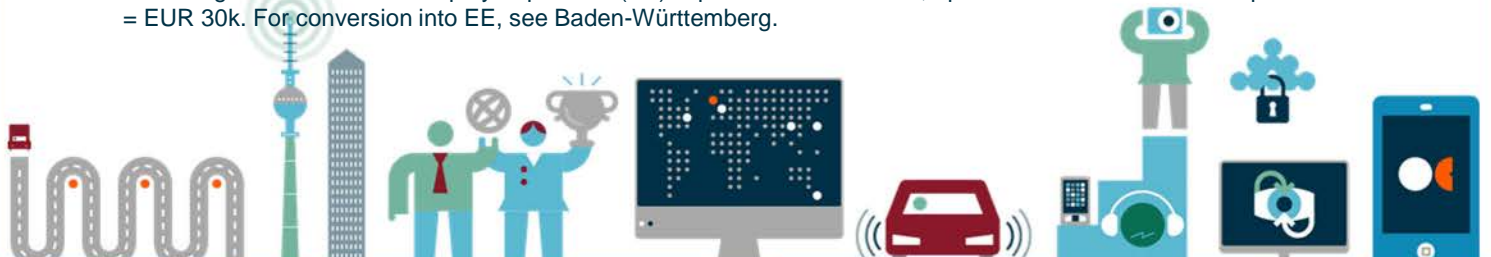
In addition, the Hamburg Investment and Development Bank (IFB) grants under the name Hamburg-Kredit liquidity and loans to small and medium-sized commercial enterprises in Hamburg and freelancers and other service providers who have been active on the market for a maximum of 5 years. This includes direct rescue loans for working capital of up to EUR 250k with a term of 3 years and annual special repayment options.

### **Hessen:**

The Wirtschafts- und Infrastrukturbank Hessen (WIBank) offers various support loans on behalf of the state. In addition to loans for small enterprises (KfK), SMEs with up to 250 employees and a turnover of EUR 50 million can obtain working capital loans of up to EUR 1 million from the "Gründungs- und Wachstumsfinanzierung Hessen" (GuW) development program via their house bank. The loan amount is between EUR 5k and EUR 200k, with a two-year grace period.

In addition, "Bürgschaftsbank Hessen" offers guarantees of up to EUR 2.5 million with a guarantee ratio of up to 80 % in cooperation with the State. This also includes express guarantees for loans of up to EUR 312,500, which are secured with a guarantee rate of 80 % and are issued particularly quickly if all criteria are met. In certain cases, the State also provides state guarantees, usually for EUR 2.5 million, to secure both the financing of investments and the financial bridging of liquidity shortages in cooperation with the house bank.

In addition, Hessen has launched an immediate aid programme in the form of non-repayable grants, graduated according to the number of employed persons (EE). Up to 5 EE = EUR 10k, up to 10 EE = EUR 20k and up to 50 EE = EUR 30k. For conversion into EE, see Baden-Württemberg.



### **Mecklenburg-Vorpommern:**

The state government of Mecklenburg-Vorpommern is planning an aid fund with cash resources of 700 million euros and the provision of an additional guarantee framework of 400 million euros - "MV-Schutzfonds". In addition to measures for micro-enterprises and small businesses, this fund will provide 200 million euros for largely interest-free bridging loans for all companies, an increase in the state's guarantee framework from EUR 400 million to EUR 1.6 billion and EUR 100 million for a participation program under which the state can temporarily invest in companies.

In addition, Mecklenburg-Vorpommern has launched an immediate aid programme in the form of non-repayable grants, graduated according to the number of employed persons (EE). Up to 5 EE = EUR 9k, up to 10 EE = EUR 15k, up to 24 EE = EUR 25k, up to 49 EE = EUR 40k and up to 100 EE = EUR 60k. For conversion into EE, see Baden-Württemberg

### **Niedersachsen:**

Under the "Niedersachsen Liquidity Loan" programme, the NBank grants direct loans to freelancers and companies with fewer than 250 employees and an annual turnover of up to EUR 50 million and an annual balance sheet total of up to EUR 43 million without involving a principal bank. The grants are staggered. This aid is also available to start-ups if they are younger than 5 years. This also applies if they were not in the black before the corona crisis broke out. In essence, the prerequisites are a viable business model and a positive assessment of the company's future development. EUR 5 million are reserved for the special needs of start-ups. Loans of EUR 5k up to a maximum of EUR 50k will be issued. Each company can only submit one application. The loan term is ten years, and in the first two years the loan is free of interest and repayment.

In addition, Niedersachsen has launched an immediate aid programme in the form of non-repayable grants, graduated according to the number of employed persons (EE). Up to 9 EE = EUR 3k, up to 15 EE = EUR 5k, up to 30 EE = EUR 20k and up to 49 EE = EUR 25k. For conversion into EE, see Baden-Württemberg.

### **Nordrhein-Westfalen:**

On 24 March 2020, the state parliament of Nordrhein-Westfalen passed the law on the establishment of a special fund - "NRW Rescue mechanism". This includes in particular immediate measures to facilitate loans and assistance for micro-enterprises and sole proprietors. Loans are granted under the "NRW.BANK Universal Loan", with "NRW.Bank" providing an indemnity against liability for up to 80% of a working capital loan granted by the house bank = loans with bullet maturities of 2 and 4 years or instalment loans with 3, 4 and 5 years maturity and an option of 1 or 2 grace years.

In addition, Nordrhein-Westfalen has launched an immediate aid programme in the form of non-repayable grants, graduated according to the number of employed persons (EE). Up to 5 EE = EUR 9k, up to 10 EE = EUR 15k and up to 50 EE = EUR 25k. For conversion into EE, see Baden-Württemberg.

Small companies (less than 50 employees) may also apply directly for equity capital of up to EUR 75k from the micromezzanine fund of the Kapitalbeteiligungsgesellschaft NRW. At this, the company receives economic equity capital, whereby the Kapitalbeteiligungsgesellschaft NRW as investor neither receives voting rights nor is allowed to interfere in the daily business. Term: 10 years; Repayment: from the 8th year in 3 equal annual instalments; Conditions: fixed fee 8% p.a. plus profit participation 1.5% of the contribution + variable profit participation 1.5% p.a. of the participation + one-time processing fee of 3.5% + personal (partial) guarantee of the major shareholder/s.



### Rheinland Pfalz:

The state of Rheinland-Pfalz is expanding the federal government's programs with the "Zukunftsfonds Starke Wirtschaft Rheinland-Pfalz" (Future Fund Strong Economy): This fund supplements the federal government's grants with low-cost immediate loans for companies with up to 10 employees and extends the immediate aid to companies with up to 30 employees. In addition, those who are affected can take advantage of the loans and guarantees of "Infrastrukturbank" and "Bürgschaftsbank Rheinland-Pfalz". This is handled by the house banks, which take over the application to the "ISB" and "Bürgschaftsbank". Rheinland-Pfalz supports companies with guarantees with 80% guarantees.

Up to 5 EE = up to EUR 9k from the Federal Government and up to EUR 10k immediate loans from the State if required, up to 10 EE = up to EUR 15k from the Federal Government and up to EUR 10k immediate loans from the State if required, up to 30 EE = up to EUR 30k immediate loans from the State plus a State subsidy of 30 percent of the loan amount = in total up to EUR 39k. For conversion into EE, see Baden-Württemberg.

### Saarland:

The Saarland has set up an emergency aid programme in the form of non-repayable grants, graduated according to the number of people in employment (ET). Up to 1 ET = EUR 3k, up to 5 ET = EUR 6k and up to 10 ET = EUR 10k. For conversion into ET, see Baden-Württemberg.

There is also the "Sofort-Kredit-Saarland". This is aimed at small and medium-sized enterprises (SMEs) in the commercial sector and freelancers and should have the following conditions (i) variant loan without subordination agreement with a term of 6 years and repayment-free in the first year, (ii) variant loan with subordination agreement (subordination to the claims of all other lenders) with a term of 10 years and repayment-free in the first 5 years, (iii) up to EUR 500k depending on the annual turnover in 2019, liquidity requirements and wage costs and (iv) no real collateral, but personal liability (sureties or guarantees) of the relevant shareholders/managing directors.

Guarantees have also been simplified and extended. The guarantee banks are currently doubling the maximum guarantee amount to EUR 2.5 million.

### Sachsen:

So far Saxony has not issued any special emergency aid for companies affected by Corona, but there is the programme "Saxony helps immediately". According to this programme, direct liquidity aid loans are issued for companies with a maximum annual turnover of EUR 1 million, solo self-employed and freelancers in direct proceedings up to EUR 50k (in exceptional cases up to EUR 100k) at zero interest, up to 3 years without repayment, with the possibility of an increase by a further EUR 50k after 4 months.

### Sachsen-Anhalt:

Sachsen-Anhalt has set up an immediate aid programme in the form of non-repayable grants, graduated according to the number of employed persons (EE). Up to 5 EE = EUR 9k, up to 10 EE = EUR 15k, up to 25 EE = EUR 20k and up to 50 EE = EUR 25k. For conversion into ET, see Baden-Württemberg.





### Schleswig-Holstein:

Emergency financial aid (grants) for small enterprises in all sectors of the economy and for self-employed persons. In detail it is planned: up to EUR 9 thousand one-time payment for 3 months with up to 5 employees (full-time equivalents) up to EUR 15 thousand one-time payment for 3 months with up to 10 employees. For conversion into ET, see Baden-Württemberg.

In addition, Schleswig-Holstein has set up a so-called Mittelstandssicherungsfonds with an initial volume of EUR 300 million, which is aimed at companies in the hotel, accommodation and catering sector that have been directly affected by government regulations in the course of the Corona crisis and have found themselves in an economic situation that threatens their existence or have a liquidity bottleneck.

### Thüringen:

Emergency aid programs in the form of non-repayable loans, staggered according to the number of full-time employees (ET). Up to 5 ET = EUR 5 thousand, up to 10 ET = EUR 10 thousand, up to 25 ET = EUR 20 thousand and up to 50 ET = EUR 30 thousand. This does not apply to companies that were in difficulties before the corona crisis started. For conversion into ET, see Baden-Württemberg.

In addition, companies can apply for up to 80 % collateralisation of loans and guarantees by the Thüringer Aufbaubank to finance investments and working capital of up to EUR 2 million. This is particularly aimed at small and medium-sized commercial enterprises, including the hotel and restaurant industry, trade fair services and representatives of business-related freelance professions. The interest rate for loans of up to EUR 50k is 0%.

## Part 2 – Tax measures

### 1. What measures have been taken or are planned?

With regard to fiscal aid, the government is initially focusing on short-term measures within the scope of the tax levy, which can be implemented without complex legal provisions. The relief therefore concerns taxes and tax prepayments that have already been determined. In its letter dated 19 March 2020, the BMF provided that

- affected tax payers can apply for an interest-free deferment of taxes due and
- request for a reduction of tax prepayments and
- the collection of late payment surcharges and the enforcement of tax debts are suspended.

With this letter, the BMF has set the basis for a unified approach in implementing tax measures. The federal states - that are competent for tax collection - have thus been given the necessary tools to implement the above-mentioned measures effectively and without a major bureaucratic burden.

Taxpayers which are particularly and directly affected by the corona crisis can apply for deferment of income tax and corporation tax already levied and not yet paid or to be levied by 31 December 2020. The normally required special substantiation of considerable hardship is not required. It is only necessary to present the actual circumstances. It is not required that the taxpayer has already suffered financial losses.



The same requirements were imposed on the claim for reduction of prepayments of income tax or corporation tax for companies affected. In some states, the requests for deferral and reduction of advance payments are already summarized in one form.

In addition, the tax authorities will refrain from enforcement measures and the levying of late payment surcharges until 31 December 2020 for companies directly affected. Enforcement is also suspended for taxes that arose and were due before 19 March 2020. However, the collection of interest on arrears will only be waived from 19 March 2020.

The customs administration (e.g. in the area of energy tax and air transport tax) and the Federal Central Tax Office (VAT and insurance tax) are also instructed to meet taxpayers' needs accordingly. For this reason, the customs administration has also implemented the measures described above from the BMF letter. The Federal Central Tax Office has not yet issued a statement. In addition to the tax measures of the BMF, the federal states have adopted their own regulations to reduce the burden on taxpayers.

In all states, it is possible to submit an application to the tax offices for an adjustment of the trade tax base (cf. the identical decrees issued by the supreme tax authorities on 19 March 2020). The same requirements apply to this application as for the adjustment of advance payments on income or corporation tax. The trade tax offices of the municipalities responsible for trade tax are bound by the adjustment of the trade tax base.

In addition, some states (e.g. Bavaria, Baden-Württemberg or NRW) reimburse special VAT payments already made for a permanent extension of the VAT return. It is expected that the other federal states will also implement this measure.

## 2. How do I obtain a deferral or a reduction of tax prepayments?

The finance ministries of most states have published a separate form for deferring and reducing tax prepayments in case of financial difficulties due to the effects of coronavirus. The forms of the respective federal states can be found on:

### **Baden-Württemberg:**

[https://finanzamt-bw.fv-bwl.de/\\_Lde/Steuererleichterungen+aufgrund+der+Auswirkungen+des+Coronavirus](https://finanzamt-bw.fv-bwl.de/_Lde/Steuererleichterungen+aufgrund+der+Auswirkungen+des+Coronavirus)

### **Bayern:**

<https://www.finanzamt.bayern.de/Informationen/Formulare/Steuerzahlung/?f=LfSt>

### **Berlin:**

<https://www.berlin.de/sen/finanzen/steuern/informationen-fuer-steuerzahler/-/artikel.910208.php>

### **Brandenburg:**

<https://mdfe.brandenburg.de/sixcms/detail.php/947663>

### **Bremen:**

<https://www.finanzen.bremen.de/detail.php?gsid=bremen53.c.78075.de>



**Hamburg:**

<https://www.hamburg.de/fb/finanzaemter/>

**Hessen:**

an informal application to the responsible tax office is sufficient

**Mecklenburg-Vorpommern:**

<https://www.regierung-mv.de/Landesregierung/fm/Aktuell/?id=158620&processor=processor.sa.pressemitteilung>

**Niedersachsen:**

<https://www.mf.niedersachsen.de/startseite/themen/steuern/antworten-auf-haufig-gestellte-steuerliche-fragen-faqs-im-zusammenhang-mit-dem-corona-virus-186548.html>

**Nordrhein-Westfalen:**

<https://www.finanze.nrw.de/de/steuererleichterungen-aufgrund-der-auswirkungen-des-coronavirus>

**Rheinland-Pfalz:**

<https://www.lfst-rlp.de/service/presse/aktuelles/detail/steuerliche-hilfen-in-der-corona-krise>

**Saarland:**

an informal application via email to the responsible tax office is sufficient

**Sachsen:**

[https://www.coronavirus.sachsen.de/download/Formular\\_zur\\_Beantragung\\_von\\_Steuererleichterungen\\_aufgrund\\_der\\_Auswirkungen\\_des\\_Corona-Virus.pdf](https://www.coronavirus.sachsen.de/download/Formular_zur_Beantragung_von_Steuererleichterungen_aufgrund_der_Auswirkungen_des_Corona-Virus.pdf)

**Sachsen-Anhalt:**

an informal application to the responsible tax office is sufficient

**Schleswig-Holstein:**

an informal application to the responsible tax office is sufficient

**Thüringen:**

[https://finanzen.thueringen.de/fileadmin/user\\_upload/Finanzaemter/Vordrucke/Steuererleichterungen\\_aufgrund\\_der\\_Auswirkungen\\_des\\_Coronav.pdf](https://finanzen.thueringen.de/fileadmin/user_upload/Finanzaemter/Vordrucke/Steuererleichterungen_aufgrund_der_Auswirkungen_des_Coronav.pdf)

The Ministries of Finance in Hessen, Saarland, Sachsen-Anhalt, Schleswig-Holstein have not yet provided special application forms. In these federal states the standard forms can be used for the corresponding application. In addition, the Finance Ministries of Schleswig-Holstein and Hessen point out that applications can also be made informally.



### 3. Do I have to pay interest for the deferral?

The BMF does not prescribe a general dispensation from deferral interest. However, it is to be welcomed that all the federal states have decided not to charge interest on deferral payments.

### 4. May anyone file such a request?

In general, these aids can of course only be claimed if there is a corresponding case of hardship. This means that the taxpayer must have got into financial difficulties due to the effects of the coronavirus and a regular tax payment would be a considerable hardship for him because, for example, he does not have sufficient reserves. The relevant information must be provided in the application. In order to be able to process the applications quickly and non-bureaucratically, the tax offices are instructed not to carry out a special individual case examination.

Important note: As always, no false statements shall be made. It is explicitly pointed out in the application form that incorrect information can have criminal consequences (tax evasion according to sec. 370 Fiscal Code (AO) and negligent tax reduction according to sec. 378 Fiscal Code (AO)).

It is also important to observe sec. 264 Criminal Code (StGB), especially when applying for subsidies. Based on the information provided in the 2020 tax return, tax offices can in principle easily see whether there was a slump in turnover and a liquidity bottleneck in 2020. Especially since the state subsidies must also be taxed as income.

### 5. Do I have to file my tax return?

There is not yet a unified approach to this. But the Bavarian Ministry of Finance, as well as, among others, the Ministries of Finance in Rheinland-Pfalz and Sachsen-Anhalt, have instructed the tax offices to proceed generously and as non-bureaucratically as possible when applying for an extension of the deadline for filing tax returns because of corona.

### 6. Practical information

#### Profit reductions in connection with the utilisation of collateral:

Under sec. 8b (3) sentence 4 Corporate Income Tax Act (KStG), profit reductions from certain financing services of a qualified participating shareholder are not tax-deductible. The prerequisite for this is that a company which has or has had an interest of at least 25% in the share capital or nominal capital of a company, grants the subsidiary a loan or a security (surety, guarantee, letter of comfort, pledge, transfer of ownership by way of security) for a loan taken up by the subsidiary, and the granting company suffers a reduction in profits in connection with the loan claim or from the utilisation of the loan security.

#### Tax residence of companies:

Corporations which have their management or registered office in Germany are subject to unlimited corporation tax in Germany. For the determination of the place of the management as the place of the business management (day-to-day business), it depends on where the will, which is decisive for the management, is formed and where the necessary measures of some importance for the management are ordered. In the case of corporations, this is usually the place where the persons authorised to represent or otherwise appointed to manage the company perform the day-to-day management duties incumbent upon them. This is the place where they carry out the actual,





organisational and legal acts that are part of the normal operation of the company.

A reduction in profit from the utilisation of the collateral may occur if the granting company is called upon to make use of the collateral and it has no adequate right of recourse against the subsidiary, whereby it may be sufficient for a reduction in profit that the shareholder must form a provision for an imminent call. Since, as described above, both the KfW and the house banks require the provision of collateral in principle for the granting of loans, these provisions may be of considerable relevance, especially for parent companies. It must be taken into account when deciding on the provision of collateral.

#### **Discounting requirement pursuant to sec. 6 (1) no. 3 Income Tax Act (EStG):**

Especially in case of the crisis-related granting of interest-free shareholder loans and/or the non-interest-bearing nature of liabilities (e.g. rental payments), the tax law requirement for the discounting of liabilities must also be taken into account in order to avoid a resulting discounting gain. However, this positive effect on earnings could also be consciously accepted if the debtor has tax loss carryforwards, for example.

Background: According to sec. 6 (1) no. 3 Income Tax Act (EStG), non-interest-bearing liabilities must be stated in the tax balance sheet at their lower going-concern value. For this purpose, the settlement amount is to be discounted to the balance sheet date during its term. This initially results in a discounting gain and the increase in the going-concern value subsequently results in a corresponding compounding expense.

Excluded from discounting are liabilities with a term of less than twelve months at the balance sheet date and liabilities that are interest-bearing or based on a down payment or advance payment. For this reason, a discounting gain can be avoided by agreeing a (minimum) interest rate for a term of more than 12 months, or can be achieved in a targeted manner by waiving interest. The obligation to discount applies in principle to all operating liabilities and to both cash and non-cash liabilities. In addition, discounting must also be carried out if a liability is permanently set interest-free during the year. This liability is discounted on the following balance sheet date and a corresponding discounting income is reported.

#### **Retroactive effect of conversions:**

As a result of the Act on Mitigation of the Consequences of the COVID 19 Pandemic in Civil, Insolvency and Criminal Proceedings Law, sec. 17 (2) sentence 4 Transformation Act (UmwG) was amended to the effect that in future it will be sufficient for the admissibility of registration if the balance sheet relevant to the respective conversion process has been prepared for a maximum of twelve months prior to the filing date. Pursuant to sec. 2 Transformation Tax Act (UmwStG), this retroactive effect also applies in the transformation tax law, whereby the tax consequences for the transferring and the receiving legal entity are (fictitiously) referred back to a retroactive date.

However, sec. 2 Transformation Tax Act (UmwStG), and thus also the new regulation, only applies to mergers, splits and spin-offs of corporations. For demergers and changes of form of corporations, transformations of partnerships and other contributions to corporations or partnerships, the separate provisions in sec. 9 sentence 3 and sec. 20 (6) sentence 1 Transformation Tax Act (UmwStG) apply. Therefore, in the latter cases, the eight-month retrospective effect remains valid, unless the legislator makes appropriate adjustments in the future.

If, due to the existing travel restrictions, managing directors resident abroad can no longer enter Germany to carry out the ongoing managing director activity, but have to do so from abroad because decisions cannot be postponed, this can lead to a dual residence of the corporation. As a consequence of the dual residence, the taxation rights have



to be divided between the two residential states, which can lead to a double taxation or at least to lengthy discussions with the competent tax authorities. In such a situation, consideration should therefore be given to appointing another managing director based in Germany at short notice. If the company is a controlled company, it should also be considered whether a fiscal unity for income tax purposes can be continued if there is actually a foreign management.

### **Managing Director's permanent establishment**

In its decision of 23 October 2018, the Federal Court of Finance (BFH) ruled that a managing director of a corporation is to be regarded as a permanent representative within the meaning of sec. 13 Fiscal Code, irrespective of the fact that the managing director is also an organ of the corporation. This can lead to a limited tax liability of a foreign corporation in Germany. Conversely, the ruling can also have an impact on a managing director of a German corporation who is now compulsorily active abroad due to travel restrictions, e.g. within the scope of the tax credit granted under sec. 34c Income Tax Act (EStG) or sec. 26 Corporate Income Tax Act (KStG).

### **Fiscal unity for income tax purposes**

An fiscal unity for income tax purposes means that the results of the subsidiary (Controlled Company) and the parent company (Controlling company) are taxable as a whole by the parent company. The prerequisite for this is that the Controlling Company has held a majority of the voting rights in the controlled company without interruption since the beginning of the fiscal year and has concluded a profit and loss transfer agreement (PLTA) with it for a term of at least five years. Pursuant to sec. 14 (1) sentence 1 no. 3 sentence 1 Corporate Income Tax Act (KStG), a PLTA must actually be implemented during its entire period of validity. In particular, the actual implementation requires that the Controlled Company transfers its entire profit to the Controlling Company and that the Controlling Company assumes any losses incurred by the Controlled Company.

In this context, sec. 14 (1) sentence 1 no. 3 sentence 1 Corporate Income Tax Act (KStG) expressly does not refer to the fulfilment of the claim/liability from the PLTA, so that a cash flow is basically not necessary. The PLTA can therefore also be fulfilled by offsetting or by converting the transfer obligation of the Controlled Company or the loss compensation obligation of the Controlling Company into a loan - even a long-term loan (novation) or by offsetting via current accounts or a cash pool account. However, this requires the solvency of the Controlling Company. In order to ensure that the PLTA is actually implemented, the Controlling Company must therefore, especially in the current crisis situation, fulfil its loss compensation obligation resulting from the PLTA by providing funds or corresponding valuable contributions in kind. In any case, a waiver of the claim under the PLTA is detrimental and leads to non-recognition of the fiscal unity due to lack of implementation.

### **Taxation of restructuring profits**

In the case of a debt waiver, a creditor waives all or part of his claim, which leads to a reduction in the liabilities side of the company's balance sheet. In addition, any interest payments are omitted. From a tax point of view, however, it should be noted that the extinguishment of a balance sheet liability is accompanied by a taxable extraordinary income for income tax purposes (restructuring profit). This also applies to the waiver of a shareholder loan granted to the company, insofar as this loan can no longer be considered to be of value. After the Federal Court of Finance (BFH) rejected the so-called reorganization decree in 2016, according to which reorganization profits were basically tax-exempt, the legislator created the new legal basis for the tax exemption of reorganization profits in sec. 3a, 3c (4) Income Tax Act (EStG) and sec. 7b Trade Tax Act (GewStG). However, as the ultima ratio, these provisions make the tax exemption of the restructuring profits subject to the following conditions in particular: proof of (i) the need and ability to reorganise the company, (ii) the suitability of the debt relief for reorganising the company and



(iii) the creditors' intention to reorganise. Only if these conditions are met the reorganisation proceeds are tax-exempt by law without the taxpayer's application. Therefore, in the current crisis, shareholders should definitely consider whether granting equity capital instead of a loan is preferable.

#### **Interest barrier:**

According to the basic rule of the interest barrier in sec. 4h Income Tax Act (EStG) in conjunction with sec. 8a Corporate Income Tax Act (KStG), interest expenses of a business are only immediately deductible up to the amount of the interest income of the same business and the same financial year. However, interest expenses in excess of interest income are only deductible up to 30% of the relevant profit ("offsettable EBITDA") increased by the interest expenses and the amounts deducted in accordance with sec. 6 (2) sentence 1, sec. 6 (2a) sentence 2 and sec. 7 Income Tax Act (EStG) and reduced by the interest income. If companies should be forced to raise new interest-bearing loans in the current crisis situation, it is essential to keep an eye on the interest barrier so that the interest expenses exceeding the interest income do not exceed the offsettable EBITDA or the exemption limit of EUR 3 million.

#### **Right to refuse payment for "material continuous obligations":**

The law on mitigating the consequences of the COVID 19 pandemic in civil, insolvency and criminal procedure law, which was issued by the Federal President on 27 March 2020, also ordered a moratorium on the fulfilment of claims arising from continuous obligations against consumers and so-called micro-enterprises until 30 June 2020 by amending the Introductory Act to the German Civil Code (EGBGB).

According to this amendment, a consumer has the right to refuse until 30 June 2020 payments for the fulfilment of a claim which is related to a consumer contract which is a continuing obligation and which was concluded before 8 March 2020, if, due to circumstances which are attributable to the corona crisis, the consumer would not be able to provide payments without jeopardising his reasonable livelihood or the reasonable livelihood of his dependants. The right to refuse payments shall apply to all material continuing obligations. Material continuing obligations are those that are necessary to cover them with services of reasonable general interest (e.g. electricity, gas, telecommunications, compulsory insurance, etc.).

Micro-enterprises (= less than 10 employees and annual turnover or annual balance sheet up to a maximum of EUR 2 million) have the right to refuse until 30 June 2020 to provide payments to satisfy a claim in connection with a contract which is a continuing obligation and which was concluded before 8 March 2020 if, as a result of circumstances attributable to the corona crisis, (i) the enterprise cannot provide the payments or (ii) the enterprise would not be able to provide the payments without jeopardising the economic basis of its business operations. The right to refuse payments exists in respect of all material continuing obligations. Material continuing obligations are those that are necessary to cover the obligations in order to adequately continue the company's business operations.

### **Part 3 – Effects on Accounting and the Balance sheet**

#### **1. Securing your liquidity – see part 1**

Take advantage of all aid payments from the federal government and the states that are granted as subsidies. If the company's liquidity requires it, take advantage of a low-interest loan from the KfW. The application must be made through your house bank. Details can be found under Part 1 of this FAQ



## 2. Securing your equity capital – actions measures also for the 2019 annual audit under commercial law

Revenue shortfalls in the coming weeks and months will lead to a reduction in equity for many companies. In order to reduce the risk of excessive debts on the balance sheet, you should take all the permitted accounting measures. Below you will find some suggestions. The commercial balance sheet is decisive. In the tax balance sheet, different accounting measures can be taken to avoid unnecessary tax burdens. It always depends on the individual case. Therefore, you should also check with your finance department and your tax advisor what can be put into practice. If you have any questions, please feel free to contact us at any time.

### Why is it important?

- If the company's equity capital is reduced, banks and other lenders may demand further collateral or extraordinarily terminate existing loan agreements, depending on the structure of the loan agreements.
- If the equity capital becomes negative, there is an calculated over-indebtedness. It must be checked whether insolvency exists. Although the obligation to file for insolvency has been suspended until September 30, 2020 by the law to mitigate the consequences of the COVID 19 pandemic in civil, insolvency and criminal proceedings, the obligation to file for insolvency is still in force. However, there are two exceptions to this rule, in which an insolvency application must still be filed without delay:
  - The company's insolvency is based on reasons other than the corona pandemic.
  - There is no perspective of eliminating the inability to pay that has occurred.
- The suspension of the obligation to file for insolvency can be extended by the government until 31 March 2021.
- At the end of the suspension of the obligation to file for insolvency, presumably after 30 September 2020, the previous rules will apply again and an insolvency application must be filed immediately, at the latest within 30 days, in the event of over-indebtedness or insolvency. If this does not happen, the management is personally liable in the event of a delay in filing for insolvency.
- In addition to securing liquidity to avoid insolvency, it is also necessary to avoid over-indebtedness, i.e. the depletion of the company's equity capital.
- If the annual audit as of 31 December 2019 have not yet been finalised, the following measures should already be implemented there if the prerequisites are met in the individual case.

### What can be done?

- a. Capitalization of previously unaccounted assets in the commercial balance sheet
- Many companies develop their own technologies such as manufacturing methods, patents, software, know-how and copyrights. All these technologies are summarized under the term intangible assets. It is not necessary for these technologies to be recognized by an authority, such as the patent office. Intangible assets therefore include, for example:
    - unprotected inventions,
    - recipes,
    - know-how,





- software,
  - archives,
  - film and sound recordings,
  - customer and supplier lists,
  - patents,
  - registered design,
  - Copyrights
- owner of these intangible assets is the person who can exclude third parties from using the right
  - If such intangible assets are acquired, they must be capitalised and amortised at cost in the company's commercial and tax balance sheet
  - However, if the intangible assets were developed in-house, many companies have so far refrained from capitalizing them in the balance sheet. The consequence is that the development expenses were treated in full as operating expenses, which reduced the company's profit and thus its equity.
  - In the **commercial balance sheet**, self-created intangible assets may also be capitalized at their production cost. Development costs therefore do not result in operating expenses that reduce the result and thus equity.
  - For **tax purposes**, self-created intangible assets may not be capitalized (§ 5 (2) EStG). The development costs thus remain immediately deductible operating expenses, so that there is no higher tax burden when a self-created intangible asset is capitalized in the commercial balance sheet.

The following requirements must be met for capitalization in the commercial balance sheet:

- The internally produced intangible asset must represent a realizable asset on the balance sheet date (e.g. 31. December 2019); the development of the asset must therefore be completed to the extent that it can in principle be sold to a third party. Legal restrictions, such as those arising from copyright law, play no role in this context.
- The intangible asset must be considered as part of the business assets of the company. This occurs if the development took place within the company itself. If the intangible asset was created by a third party, e.g. within the scope of a contractual relationship, it must be examined to whom the asset belongs. If the principal has the exclusive and unlimited right of use, he is in any case entitled to economic ownership and the intangible asset is to be allocated to his company.
- The intangible asset is not assigned to the company within the scope of a so-called pending transaction. In the case of standard software, the software is not acquired by the company. Only a time-limited right of use is purchased, which is offset by regular (e.g. annual) payments. This is a pending transaction and the intangible asset may not be capitalized by the user.

If the above criteria are fulfilled, the development costs may be capitalized in the commercial balance sheet in accordance with § 248 (2) HGB. However, research costs may not be capitalized. The term "research" refers to the search for new scientific or technological knowledge. In contrast, "development" is the process of converting research findings or other knowledge into a marketable product or applicable process that can be determined in each individual case.



Furthermore, a **prohibition of capitalization** exists for self-created

- trademarks
- print titles,
- publishing rights,
- customer files,
- or any comparable intangible fixed assets

Which development costs may be capitalized?

- According to § 255 (2) and (3) HGB, capitalization must be based on the cost of production. This includes direct costs as well as variable overhead costs. The following can thus be capitalized
    - the production and direct material costs,
    - the direct costs of production,
    - production overheads,
    - material overheads and
    - the depreciation of fixed assets to the extent that it is caused by production.
  - The intangible assets shown in the balance sheet are to be depreciated in the following years. Depreciation is based on the asset depreciation range.
- b. Valuation of fixed and current assets in the commercial balance sheet 2019
- For many companies, the corona pandemic will have severely depressed the value of fixed assets and also current assets. However, it is an event which, according to the unanimous opinion of experts, should be treated as a value-determining factor in accounting. Since the main effects did not become evident until January 2020 or later, they are not to be taken into account when preparing the annual audit for 2019.
  - The following scope for action under commercial law exists in the preparation of the 2019 financial audit in order to strengthen equity. In principle, they only affect the commercial balance sheet. The tax balance sheet can or must contain different values, so that a lower value is generally applied for tax purposes. The higher valuations in the commercial balance sheet therefore do not lead to a higher tax burden for the company.

Fixed assets – avoiding of extraordinary depreciation and executions of appreciations

- In the case of fixed assets, there is an obligation to make extraordinary depreciation only in the event of a probable permanent impairment in the value of the assets. In this case, it must be examined on a case-by-case basis whether an impairment is actually permanent or whether a recovery in value appears feasible. The assessment is made on the balance sheet date. Only if a recovery in value is eliminated does the extraordinary depreciation have to be carried out to the lower value in accordance with § 253 (3) sentence 5 HGB. The basis for this is usually the current replacement value.
- If there has been extraordinary depreciation of fixed assets in the past and the reasons for the lower valuation no longer exist (from the point of view of a prudent businessman on the balance sheet date), there is an obligation to reinstate the value. This means that a appreciation must be made for fixed assets that were subject to extraordinary depreciation in the past, limited to the pursued acquisition or production costs. The appreciation in value is thus limited to the value that would have been achieved if no extraordinary depreciation had ever been made.



#### Current assets – extent of necessary value adjustment

- The strict lowest-value principle applies to current assets in the commercial balance sheet. Therefore, inventories and other current assets must be stated at the stock exchange or market price on the balance sheet date (§ 253 (4) sentence 1 HGB).
- Again, the question arises whether the corona crisis must already be taken into account in the valuation of current assets on the balance sheet date. A large number of goods will no longer be able to be sold or processed further, or only to a limited extent, due to the shutdown ordered by the authorities. As the Institute of "German Certified Public Accountants" (Institut der Wirtschaftsprüfer) also considers the corona crisis to be a value-relevant event that has shown its effects only after 31 December 2019, the valuation of inventories as of the balance sheet date 31 December 2019 must be carried out without taking the effects of the corona crises into account.

#### Your Contacts



**Joachim Breithaupt**  
Lawyer / Certified Tax Advisor  
Partner  
T +49 221 5108 4020  
M +49 160 2847158  
E [joachim.breithaupt@osborneclarke.com](mailto:joachim.breithaupt@osborneclarke.com)



**Florian Merkle**  
Lawyer / Certified Tax Advisor  
T +49 221 5108 4320  
M +49 162 4364422  
E [florian.merkle@osborneclarke.com](mailto:florian.merkle@osborneclarke.com)

