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Covid-19 – expected urgent measures in insolvency law–

The COVID 19 pandemic has led to extensive restrictions on private and business life in Germany. As a result, many companies are threatened with considerable economic difficulties and also with the risk of insolvency.

The legislator is countering the economic crisis with a wide range of measures through the COVID-19 Insolvency Suspension Act (COVInsAG). The aim is to enable companies to continue as a going concern despite the risk of insolvency so that they can subsequently be restructured by means of state stabilisation or private financing measures.

In this article the effects of COVInsAG on the obligation to file for insolvency and the liability risks for managers are explained.

- **Suspension of the obligation to file for insolvency**

According to the previous legal situation, managing directors of limited liability companies, stock corporations and other legal forms with limited liability as well as executive board members of associations were obliged to file for insolvency in case of insolvency or if the entity is overindebted.

This obligation is suspended by Section 1 COVInsAG until September 30, 2020, unless the insolvency is not due to the effects of the Covid 19 pandemic or there are no prospects of the entity becoming solvent again.

In order to further relieve the burden on the person obliged to file an insolvency application, the burden of proof of one of the aforementioned exceptions shall not be borne by the person obliged to file an application but by the party claiming the violation of the obligation to file for insolvency. This proof is made even more difficult if the entity in question was not insolvent on December 31, 2019. This is because in this case it is also presumed that the insolvency is due to the effects of the Covid 19 pandemic and that there is a prospect of the entity becoming solvent again.

These measures can be extended until March 31, 2021 (Section 4 COVInsAG).

- **Restriction of the creditor insolvency petition**

Pursuant to § 14 InsO, creditors may also file for insolvency. In the three months after the COVInsAG comes into force, Section 3 COVInsAG states that for a creditors application to commence insolvency proceedings, the reason (illiquidity or overindebtedness) must have already existed on March 1, 2020.

This effectively suspends the right of creditors to initiate insolvency proceedings for a period of three months.

These measures can also be extended until March 31, 2021 (Section 4 COVInsAG).

- **Liability risks after insolvency maturity**

For payments made after insolvency proceedings have been initiated, there are generally considerable liability risks for managing directors. In order to prevent liability, Section 2 COVInsAG provides that payments made in the ordinary course of business are deemed to be compatible with the diligence of a prudent and conscientious manager to the extent that the obligation to file for insolvency is suspended under Section 1 COVInsAG. This includes, in particular, payments which serve to maintain or resume business operations or to implement a restructuring concept.

- **Conclusion**

In our opinion, the legislative measures are well chosen and should enable many companies to survive the next difficult months. However, it should be noted that in

cases where it is foreseeable that it will not be possible to restructure the company even with state aid, an application for insolvency must still be filed. As a practical tip, we therefore recommend that managers who refrain from filing for insolvency under the new legal regulations, document clearly by means of a short business plan or a comparable planning calculation, why a restructuring of the company (possibly with state aid) appears possible from the current perspective.

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