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September 2020: Covid-19 Update – Extension of the suspension of the obligation to file for insolvency until December 31, 2020 only for enterprises overindebted as a consequence of the pandemic

The German Federal Government has resolved a [draft Law amending the Act to Temporarily Suspend the Obligation to File for Insolvency and to Limit Directors' Liability in the Case of Insolvency Caused by the COVID-19 Pandemic \(COVInsAG\)](#).

Pursuant to the planned amendment, the suspension of the obligation to file a request for insolvency for enterprises overindebted as a consequence of the pandemic will be extended beyond September 30, 2020 until December 31, 2020.

For enterprises, which are illiquid as a consequence of the pandemic, there shall not be any extension. Consequently, for such illiquid enterprises, the general obligation will then apply from October 1, 2020 to request the opening of insolvency proceedings without undue delay, i. e. at the latest within three weeks.

Background and Provisions since March

In March, **five measures** were implemented with the [COVInsAG](#):

- Temporary suspension of the obligation to request the opening of insolvency proceedings until September 30, 2020, insofar as
 - the illiquidity or overindebtedness is a consequence of the spread of the COVID-19 pandemic
 - or
 - there are prospects of a remedy of the illiquidity;
- limited liability of the management for payments made despite insolvency during the period of suspension of the obligation to file for insolvency;

- limited contestation of performance to the contractual partner during the period of the suspension of the obligation to file for insolvency;
- granting of new credit is not deemed to be contributing, *contra bonos mores*, to the delayed filing of a request for insolvency during the period of suspension of the obligation to file for insolvency;
- for three months, limited possibility for creditors to enforce insolvency proceedings by requests for insolvency proceedings.

With the law, enterprises affected by the pandemic were temporarily granted the opportunity to overcome an existing insolvency, in particular by utilizing government assistance, as well as through restructuring and financing arrangements.

Lifting of the protective measures in three steps

If the law becomes effective as resolved, there will be a **lifting of the protective measures in three steps**:

Creditor insolvency requests possible since June 29, 2020

Since June 29, 2020, creditors already have regained the possibility to force enterprises obliged to file for insolvency into insolvency proceedings by way of a creditor's request.

An extension of the period foreseen by the COVInsAG, in which creditors were denied the filing of a creditor's request, by the Federal Ministry of Justice and Consumer Protection did not take place. Enterprises which are insolvent as a result of the pandemic can now – even if they (presently) are not obliged to file for insolvency themselves – be forced by a creditor into insolvency proceedings. This applies irrespective of whether the enterprise is insolvent due to illiquidity (Section 17 of the German Insolvency Statute – *InsO*) or overindebtedness (Section 19 of the German Insolvency Statute – *InsO*).

Obligation to request opening of insolvency proceedings in the case of illiquidity as a consequence of the Corona-pandemic from October 1, 2020

With the resolved law, directors and management board members (or in the case of the absence of a legal representative its shareholders) are, also in the case of illiquidity as a consequence of the COVID-19-pandemic, obliged to request the opening of insolvency proceedings from October 1, 2020.

Illiquidity pursuant to Section 17 German Insolvency Statute – *InsO* is given if the enterprise is unable to meet its existing obligations to pay on the date of their maturity. This can generally be assumed if the enterprise has ceased to make payments, i. e. is unable to fulfill a substantial amount of its obligations. This is regularly the case if the enterprise cannot fulfill 10% or more of its mature total obligations longer than three weeks, insofar as not by way of exception it can almost certainly be expected that the liquidity gap will shortly completely or nearly completely be closed and due to the special circumstances of the individual case, the creditors can be expected to wait. Whether illiquidity is given must be carefully reviewed in each individual case, however, typical indications are the non-payment of salaries and social security contributions, the non-payment of suppliers, insolvency requests of creditors or (failed) enforcement measures.

The responsible executive bodies of the enterprises are obliged to conduct and document the review of the liquidity status.

Also from October 1, 2020, the criminal and civil law consequences shall once again apply to enterprises illiquid as a consequence of the pandemic in the case of a failure to request the opening of proceedings.

Obligation to request opening of insolvency proceedings in the case of over-indebtedness as a consequence of the Corona-pandemic from January 1, 2021

With the resolved law, an extension of the suspension of the obligation to file for insolvency until December 31, 2020 is only intended for overindebted enterprises.

An enterprise is overindebted pursuant to Section 19 Subsec. 2 German Insolvency Statute – *InsO* if the debtor's assets no longer cover the existing liabilities. This shall only not apply, if the going concern of the enterprise is predominantly likely.

In the context of the going concern forecast, a forecast period of up to two years has to be reviewed. With the extension of the suspension of the obligation to file for insolvency for enterprises overindebted as a consequence of the pandemic, the difficulty of “the preparation of reliable forecasts” under the current (corona) circumstances is recognized. Under these circumstances, the extension of the suspension of the obligation to file for insolvency has been deemed proportionate and reasonable.

Current Figures of Corporate Insolvencies and Perspectives

The current figures of the German Federal Statistical Office show a 6.2 % decline in corporate insolvencies reported in the first half of 2020 compared with the same period of the previous year (Destatis, press release No. 349 from September 10, 2020).

The protection of enterprises “in corona-insolvency” is now gradually being lifted. Due to the temporary suspension of the obligation to file for insolvency for enterprises affected by the pandemic, an increase in corporate insolvencies in the coming months is to be expected.

In view of the planned legislative changes, enterprises affected by the pandemic should carefully review whether and which insolvency filing obligations may apply. In the case that illiquidity is given, a timely insolvency filing needs to be prepared. If overindebtedness is given, the further postponement of the obligation to file for insolvency can be used to apply for (further) state aid or for financing or restructuring arrangements. Crisis-proof enterprises should also review whether their contractual partners are affected by the pandemic and may be potentially at risk of insolvency, and which consequences follow for the business relationship and their own liquidity situation.

About the author:

[Kristina R. Lindenfeld](#) is a Senior Associate at RITTERSHAUS Rechtsanwälte and advises on corporate law, general commercial law and insolvency law. If you have any questions or need advice, please contact lawyer Kristina R. Lindenfeld (mailto: kristina.lindenfeld@rittershaus.net)

RITTERSHAUS

Rechtsanwälte Partnerschaftsgesellschaft

Mannheim Office

Harrlachweg 4
68163 Mannheim
Tel.: +49 621 4256 0
Fax: +49 621 4256 250

Frankfurt Office

Bockenheimer Landstraße 77
60325 Frankfurt/Main
Tel.: +49 69 274040 0
Fax: +49 69 274040 250

Munich Office

Maximiliansplatz 10
80333 München
Tel.: +49 89 121405 0
Fax: +49 89 121405 250

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