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# Ways out of the crisis - On corporate recovery through the Restructuring Plan

## by lawyer Kristina Lindenfeld

The coronavirus crisis presents entrepreneurs with unprecedented challenges. Companies that were entirely financially sound at the beginning of 2020 are either already or at least in the medium-term seeing their existence at risk. This particularly affects the event and travel industry, but in many cases also affects other sectors, including because of a potential "domino-effect".

Even before the coronavirus crisis, there were particularly crisis-prone sectors. These especially include the automotive industry, which, in addition to the effects of the transition towards e-mobility, are now also suffering from the effects of the coronavirus crisis.

Companies affected by economic crisis will foreseeably be able to access completely new opportunities for corporate recovery, which are to be provided by the new instrument of a so-called **Restructuring Plan**, which, according to current legislative initiatives, is likely to take effect as of as of January 1, 2021.

### Implementation of the directive on restructuring and insolvency

Even before the coronavirus crisis, the European legislator passed a directive on restructuring and insolvency (EU) 2019/1023, according to which Europe-wide provisions were resolved with the purpose of enabling crisis-affected companies to carry out a restructuring outside of a "traditional" insolvency **at an early stage**. Until now, such out-of-court recovery plans most frequently failed, as these could only be realized with the consent of all creditors.

### German Act on the Further Development of Restructuring and Insolvency Law *(Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz)* / German Act on Company Stabilization and Restructuring *(Unternehmensstablisierungs- und -restrukturierungsgesetz)*

The German legislator intends to accelerate implementation of the directive in view of the coronavirus crisis. It is intended that through the draft **German Act on the Further Development of Restructuring and Insolvency Law** *(Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz – SanInsFoG)*, an effective tool for corporate recov-

ery is provided with the so-called Restructuring Plan. The legal basis for the Restructuring Plan is to be provided through the new **German Act on Company Stabilization and Restructuring** *(Unternehmensstabilisierungs- und -restrukturierungsgesetz – StaRUG)*. Alongside with the Restructuring Plan as the key element for corporate recoveries, the StaRUG foresees further procedural tools for restructurings (instruments of the stabilization and restructuring framework, Sec. 31 StaRUG). Especially the Restructuring Plan has the potential to become a real "game changer" for companies affected by imminent insolvency and, for example, to effect waivers of creditors based on majority decisions.

On November 18, 2020, consultations took place in the German Bundestag on the SanInsFoG and referred the proposed legislation to the Committee on Justice and Consumer Protection *(Ausschuss für Recht und Verbraucherschutz)* for further consultation. Insofar as the SanInsFOG takes effect as currently planned on January 1, 2021, there are many substantial changes which companies and their management should be aware of:

**Which opportunities does the Restructuring Plan offer?**

In the case of imminent insolvency, entities are provided with a possibility of corporate recovery through the Restructuring Plan. One of the most important opportunities the Restructuring Plan offers is a legal basis for **interventions in claims and rights of creditors and shareholders** based on a **majority decision**.

Through this, corporate recoveries and interventions in claims and rights are possible even against the will of a minority.

- **Intervenable Claims:**

  **Rights and claims, in which can be intervened against the will of the minority**, include:

  - Claims, which would have to be registered as an insolvency claim in ordinary insolvency proceedings (Sec. 4 Para. 1 No. 1 StaRUG)
  - Rights which would entitle to separate satisfaction in ordinary insolvency proceedings (Sec. 4 Para. 1 No. 2 StaRUG)
  - Shareholding and membership rights in the company concerned (Sec. 4 Para. 3 StaRUG)

- Intra-group third-party collateral provided by a subsidiary of the company concerned to the creditor of the company concerned (Sec. 4 Para. 4 StaRUG).

These insolvency claims are to be intervenable pursuant to the law, regardless of their maturity and whether or not these are subject to a condition (Sec. 5 Para. 1 StaRUG). In the case of mutual contracts, it is foreseen that it can only be intervened in the claim insofar as the contractual partner has already provided his services (Sec. 5 Para. 2 StaRUG). Contracts are therefore not to be fundamentally changed, only individual claims.

- **Non-intervenable Claims**

Claims in which **cannot** be **intervened** are the following claims, which are deemed particularly worthy of protection:

- Claims of employees against the company concerned, including claims to company pension commitments
- Claims for intentional damages
- Penalties and fines.

- **Intervention into creditor rights through the Restructuring Plan**

The changes to claims are implemented through the Restructuring Plan (Sec. 7 et seq StaRUG). It is divided into an explanatory (descriptive) part and an executive part, in which the legal effects are determined.

- **Protection of the creditors through comparative calculation and equal treatment**

In order that, if need be, an intervention into a claim against the will of a minority of creditors is possible, the so-called **comparative calculation** is an important element of the Restructuring Plan. With this comparative calculation, the company affected must under the general assumption that the business of the company shall be continued, show that the measure pursuant to the Restructuring Plan does not disadvantage the creditor concerned than in the case of the continuation of the business of the company.

In the Restructuring Plan, the different creditors are categorized into different groups pursuant to the types of their rights. The company creditors are also called **plan affected creditors**. Through the Restructuring Plan, existing rights and claims

of the company creditors are restricted, as may be the case also against the will of a minority. In order to provide a respective protection against misuse, the principal of **equal treatment** of company creditors shall apply pursuant to the draft law. Pursuant thereto, all company creditors within the same group are to be offered the same rights. A difference in treatment may not take place without the consent of those persons negatively affected by a difference in treatment.

Example: The A-Bank, B-Bank and C-Bank each have loan receivables against the Z-GmbH affected by imminent insolvency of EUR 1 million. If, pursuant to the Restructuring Plan, the A-Bank and B-Bank would each receive EUR 500,000.00 of their loan receivables, the C-Bank only however EUR 250,000.00, then this – discriminating – treatment generally requires the explicit consent of the C-Bank. However for the C-Bank, the consent may nevertheless may be in its interest, if e. g. C-Bank may realize further claims as a plan affected creditor within a different group and in the case of insolvency would have to expect far further default.

**How does the Restructuring Plan take effect?**

Pursuant to the planned law, there are different possibilities how the Restructuring Plan can be realized, i. e. the plan acceptance can take place.

- **Extra-judicial plan vote**

  The Restructuring Plan can be effected **by the respective company itself** in connection with a plan offer directed at the company creditors, if the respective creditors of the company consent (plan acceptance). The extra-judicial plan vote can, insofar as no plan affected creditor requests the holding of a meeting of plan affected creditors for discussion of the plan (Sec. 23 StaRUG), also be generally concluded in writing (or in text form, insofar as respective plan affected creditors agree) without a meeting taking place. But also a vote in the context of an extra-judicial plan affected creditors' meeting is possible (Sec. 22 StaRUG).

  The possibility of an extra-judicial vote on the plan allows the parties to define and organize the process and its modalities independently and without formalities. Only the knowledge of all parties of the content of the plan is necessary so that these can make an informed decision on their approval or rejection of the plan.

- **Judical plan vote**

  In addition to the extra-judicial plan vote, there is the possibility to vote on the Restructuring Plan in the context of a judicial plan vote. This path can, for example, be advisable in the case of a particularly controversial dispute with minority creditors of the company or simply to generally avoid a potential conflict regarding the proper conduct of the vote.

- **In all cases: 75% majority of the respective group required**

  The planned law allows for a plan vote by majority resolution, however without allowing for small creditors to be disadvantaged over large creditors.

This is to be ensured in that generally **each group** of plan affected creditors must consent to the Restructuring Plan with a **75% majority of the claims amounts**.

Pursuant to the following conditions, which ensure the protection of affected minorities, an overruling of an objection by a group of company creditors is possible:

- the plan affected creditors are foreseeably not negatively affected by the Restructuring Plan in comparison to without, and
- the plan affected creditors adequately participate in the economic value of the Restructuring Plan (plan value), and
- the majority of the plan groups have consented to the Restructuring Plan (if there are only two groups, the consent of the other group suffices).

**Does the Restructuring Plan apply to me or my company respectively? How can I make use of the stabilization and restructuring framework?**

- Personal (capacity to restructure)

  Pursuant to the planned law, the following persons have the capacity to restructure:

  - all legal persons
  - unincorporated associations
  - companies without legal personality
  - natural persons only insofar as they exercise an entrepreneurial activity.

- Formal (application)

- From a formal point of view, pursuant to the draft StaRUG, a notification to the **competent restructuring court** is required. This is the local court of the higher regional court district in which the company has its place of general jurisdiction.

- The notification to the restructuring court must contain the following:

  - a draft of the Restructuring Plan or at least a restructuring concept, and

  - a description of the status of negotiations with creditors, and

  - a description of measures which the company affected has undertaken in order to fulfill its obligations pursuant to the StaRUG.

**When is there an obligation to request the opening of insolvency proceedings? When is a Restructuring Plan feasible?**

- **Obligations to request the opening of insolvency proceedings**

  Companies are obliged to request the opening of insolvency proceedings in the case of (i) insolvency (Sec. 17 German Insolvency Act) or (ii) overindebtedness, insofar as its highly likely that the company, considering the circumstances, will continue to exist (Sec. 19 German Insolvency Act). The third reason for an insolvency is (iii) imminent insolvency (Sec. 18 German Insolvency Act), which entitles an affected company to apply for the opening of insolvency proceedings but does not oblige it to do so.

- **Restructuring Plan in the case of "only" imminent insolvency**

  Through the SanInsFoG and the StaRUG respectively, the three reasons to open insolvency proceedings generally remain unchanged. Entirely new, however, is the additional possibility that in the case of **imminent insolvency of the company, there is the possibility for a corporate restructuring without insolvency through the Restructuring Plan through utilization of the measures of the preventive framework**.

- **Better differentiation between overindebtedness and imminent insolvency**

  Aim of the planned law is also to better differentiate between an "obligatory insolvency" in the case of overindebtedness on the one hand and a "voluntary insolvency" as well as the newly created possibility of a restructuring through the Restructuring Plan in the case of imminent insolvency on the other.

Pursuant to the law for the evaluation of whether imminent insolvency is given, a forecast period of **24 months** shall generally be applicable. By contrast, in the case of overindebtedness, it shall be decisive of whether a continuation of the company **in the next twelve months** is highly likely.

By these means, in the second year of the forecast period of the imminent insolvency, an overlap with the insolvency reason of overindebtedness is to be avoided and affected companies are afforded with the possibility of restructuring without insolvency.

- **Prolonged request period for insolvency request in the case of overindebtedness**

  In addition, a different request period for the opening of insolvency proceedings in the case of overindebtedness is to apply. Until now, the period for the reason for opening of insolvency proceedings in the case of insolvency and for overindebtedness was a maximum of three weeks (Sec. 15a Para. 1 German Insolvency Act). The three week period shall continue to apply for the opening of insolvency proceedings in the case of insolvency. In the case of overindebtedness, however, a prolonged maximum period of **six weeks** is to be relevant in a order that affected companies can duly and diligently prepare a restructuring in the preventive restructuring framework or in self-administration procedure.

- **Temporary transitional provisions in the case of pandemic-induced overindebtedness**

  In connection with the coronavirus crisis, it is intended that for companies overindebted due to the pandemic, in addition to the measures already resolved, there shall be a temporary transitional provision. Pursuant thereto, for the question of whether the continuation of an overindebted company is highly likely, in the time period **between January 1, 2021 and December 31, 2021**, only a forecast period of **4 months** shall be relevant. By this, it is intended to accommodate the difficultly of a number of overindebted companies in the COVID-19 pandemic to achieve a reliable prognosis of whether the continuation of the company for a period of otherwise 12 months is highly probable.

  **However**, the exception with a prognosis period of only 4 months for the question of whether continuation of the company is highly likely, shall only apply to companies in the calendar year 2021, if the affected company

  - was not insolvent as of December 31, 2019

- achieved a **positive annual result** from ordinary activities for the **financial year** concluded before January 1, 2020

and

- the turnover from ordinary activities in the year 2020 **broke in by more than 40% in comparison to the preceding year**.

**Who will accompany me respectively my company in the restructuring?**

In a restructuring pursuant to the planned StaRUG, there is no insolvency administrator, as the process is to be carried out outside of and long before a potential insolvency.

Instead, the restructuring court can – and will as a rule in such cases in which interests which require particular protection are affected or in which an independent monitoring is indicated – **ex officio** appoint a **restructuring officer** (*Restrukturierungsbeauftragten*).

Such cases are given, if:

- rights of creditors as consumers or as medium, small or micro-enterprises are affected
- the affected company requests a so-called **stabilizing order**, by which measures of compulsory enforcement in its assets are prohibited (freezing of compulsory enforcement) or the company is enabled to utilize certain assets to which third parties hold rights (freezing of utilization)
- a plan monitoring has been agreed.

Furthermore, a restructuring officer can be appointed upon request of the company in order to further the negotiations between the parties.

The appointed **restructuring officer** is **independent** from the creditors and the affected company and is a tax advisor, auditor, lawyer or other natural person with comparable qualification which is for the individual case qualified and experienced in restructuring and insolvency matters.

The affected company of course is free to appoint its own advisors in preparation of the Restructuring Plan and the application.

**Beginning when can I or my company complete a restructuring pursuant to the new law?**

The decisive provisions pursuant to the German Act on the Further Development of Restructuring and Insolvency Law – SanInsFoG – and therefore also the possibility of a restructuring pursuant to the German Act on Company Stabilization and Restructuring – StaRUG – are pursuant to the current draft already scheduled to take effect as of **January 1, 2021**.

**Summary:**

The planned law enables companies, which are imminently insolvent and are therefore not obliged to apply for insolvency proceedings, to choose the possibility of an extra-judicial Restructuring Plan. Affected companies are therefore provided entirely new opportunities to avoid an insolvency – regardless of state coronavirus aid. For many companies, a well-prepared Restructuring Plan can therefore become a lifeline in the corona crisis and provide the opportunity for a new start.

**On the author:**

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