

## New amendments to the COVInsAG as of 1 January 2021 Suspension of obligation to file for insolvency extended until 31 January 2021 for companies entitled to apply for funds under government support programmes to mitigate the effects of the Covid-19 pandemic

### **Developments of the COVInsAG since late March 2020 – in particular amendment of suspension time limit in September 2020**

On 17 December 2020, the German Bundestag passed the Act on the Further Development of Restructuring and Insolvency Law (*Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts*; **SanInsFoG**) (BT-Drs. 762/20). With the Business Stabilisation and Restructuring Act (*Unternehmensstabilisierungs- und -restrukturierungsgesetz*; **StaRUG**), the SanInsFoG in particular includes the generally expected legal framework for pre-insolvency restructuring measures in Germany (→ [summary and wording of the StaRUG in German and English](#)); however, it also provides for **amendments to the COVID-19 Insolvency Suspension Act (COVID-19-Insolvenzaussetzungsgesetz; COVInsAG)**, which entered into force with effect as of 1 March 2020 and has been amended several times since then to reflect the severe economic impact of the pandemic (→ [see](#)). Upon the COVInsAG taking effect, the obligation to file for insolvency on the grounds of illiquidity (section 17 (2) of the Insolvency Code (*Insolvenzordnung*; **InsO**)) and

over-indebtedness (section 19 (2) InsO) pursuant to section 15a InsO and section 42 (2) InsO was **suspended** until 30 September 2020 (section 1 COVInsAG). However, this time limit was only maintained for illiquidity. The suspension of the obligation to file for insolvency on the grounds of over-indebtedness was **extended from 1 October to 31 December 2020** (cf. section 1 (2) COVInsAG). In connection with the suspension, **specific facilitations have been and are still available for companies under section 2 COVInsAG**: for example, section 2 (1) no. 1 COVInsAG provides that the liability of directors and managers (which is – still – characterised by company law) following factual insolvency upon illiquidity and over-indebtedness (see, for instance, section 64 of the Limited Liability Companies Act (*GmbH-Gesetz*; **GmbHG**) and, from 1 January 2021, section 15b InsO) is restricted, and section 2 (1) nos 2-4 COVInsAG provides for the exemption of new **loan financing** from avoidance and liability rules (→ [detailed comments on the further amendments made in September 2020](#)).

### ***New amendments to the SanInsFoG – obligation to file for insolvency suspended until the end of January 2021***

The provisions of the COVInsAG have been further amended by the SanInsFoG in the version dated 17 December 2020. The focus is on the new section 1 (3) COVInsAG, new version, which provides for the **suspension of the obligation to file for insolvency** according to section 1 (1) (which, however, does not distinguish between illiquidity and over-indebtedness) **to be extended once more from 1 January to 31 January 2021**, provided that an application for financial support under government support programmes to mitigate the effects of the Covid-19 pandemic has been filed or could have been filed (but was not filed simply for legal and factual reasons), i.e. there existed at least an entitlement to file an application in the latter case (section 1 (3) sentence 3 COVInsAG, new version, see BT-Drs. 19/25353 dated 16 December 2020, p. 15). In accordance with the purpose of the provision, the application must not be obviously futile and the funds being granted must not be insufficient to remedy the situation resulting from the fact that insolvency has been triggered.

### ***Consequences of suspension unchanged – continued application of section 2 (2) COVInsAG***

If the conditions for suspending the obligation to file for insolvency under section 1 (3) COVInsAG, new version, are met, the "consequences of suspension" provided for in section 2 (1) to (3) COVInsAG will also apply pursuant to section 2 (5) COVInsAG, new version, in order to protect the affected directors and managers, companies, creditors and business partners against the liability and avoidance risks linked to the insolvency being triggered (BT-Drs. 19/25353 dated 16 December 2020, p. 15). By extending the obligation to file for insolvency until the end of January 2021, the advantages under section 2 (1) nos 2-4 COVInsAG will continue to be available. This also applies, in conjunction with section 2 (2) COVInsAG, for companies which are not subject to an obligation to file for insolvency as well as for companies which are neither illiquid nor over-indebted. In this regard, measures such as new loans (including in the

form of shareholder loans, cf. section 2 (1) nos 2 and 3 COVInsAG) as well as collateral serving as security for such loans need to be identified in a timely manner and implemented if required.

### ***Modifications relating to the period of the going-concern prognosis***

Pursuant to section 4 COVInsAG, new version, the **going-concern prognosis** in the context of the over-indebtedness test must in addition be prepared in the period between 1 January and 31 December 2021 on the basis of a **prognosis period of four months** instead of twelve months "if the over-indebtedness of the debtor has been caused by the Covid-19 pandemic." The latter is presumed under the conditions of section 4 sentence 2 COVInsAG, new version, if the debtor was not illiquid on 31 December 2019 and generated a positive result from ordinary activities in the last financial year ending before 1 January 2020 and the turnover from ordinary activities dropped by more than 30 percent in the calendar year 2020 compared to the previous year. In this context, the requirements of the presumption rule were also modified compared to the original version in the draft bill and the subsequent draft bill submitted by the government (→ [Client Bulletin on the draft bill submitted by the government](#)) and in response to the sector-specific financing structures, to the effect that a drop in turnover of **30 percent** and not, as originally intended, 40 percent is required ("pandemic-related financial shortages may result even from slight drops in turnover", BT-Drs. 19/25353 dated 16 December 2020, p. 15).

### ***Provisions on debtor-in possession schemes and protective shield proceedings***

Finally, sections 5 to 7 COVInsAG contain provisions **on debtor-in possession schemes and protective shield proceedings**, which became necessary as a result of the extensive modifications of sections 270 *et seqq.* InsO for the implementation of Directive (EU) 2019/1023 of the European Parliament and the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132

(Directive on restructuring and insolvency) and the so-called ESUG evaluation. These provisions in particular relate to the **temporal scope of application of the COVInsAG** by way of contrast to sections 270 *et seq.* InsO and **(facilitated) access to debtor-in possession schemes** (BT-Drs. 19/25353 dated 16 December 2020, pp. 15 *et seq.*).

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