# RESTRUCTURING, RECAPITALISATION & INSOLVENCY

## Corporate reorganisation in times of Corona or "the flavour of the hour"

For many companies, the corona crisis means an emergency braking from 100 to zero and poses huge challenges for the economy. The legislator reacted quickly and, with the Covid-19 Insolvency Suspension Act ("COVInsAG"), first and foremost largely suspended the obligation to file for insolvency.

In addition, managing directors and board members are no longer personally liable if they still pay invoices despite being unable to pay, in order to ensure the continuation of the business.

However, these reliefs are only to apply until 30 September 2020. If necessary, this suspension period can be extended to 31 March 2021 by statutory order.

### RESTRUCTURING TO OVERCOME THE CORONA CRISIS

Neither the suspension of the obligation to file for insolvency nor the privileged liability of the management will in itself solve the immense problems of the corona crisis. They merely give the companies a tight window of opportunity to take the measures necessary for reorganisation.

In any case, a reorganisation always requires a conclusive restructuring plan based on the actual circumstances.

To this end, the actual liquidity requirement must be identified and a corresponding cash flow plan drawn up, which must be continuously reviewed and adjusted if necessary. Of course, it is very difficult to plan reliably in view of the effects of the corona crisis: the longer the time horizon, the more uncertain the planned results will be. At the moment, many companies can only "operate on sight".

However, since the legislator clearly assumes that economy will return to normal from mid-2020, this planning approach may also be applied in the context of a restructuring concept.

When drawing up and monitoring the restructuring concept, it must always be borne in mind that by 30 September 2020 (unless this period is extended) all current reasons for filing for insolvency (inability to pay or over-indebtedness) must be removed. If the company is still insolvent on 1 October 2020, an insolvency application must be filed immediately.

However, this does not mean that the management of a company in reorganisation may in any case wait until the end of the suspension period before filing for insolvency. If it already becomes apparent during the implementation of the restructuring plan that the restructuring measures are not suitable for removing the inability to pay, there is an obligation to file for insolvency despite the COVInsAG and the liability privileges cease to apply.

Therefore, if the management wishes to make use of the facilitations of the COVInsAG for a reorganisation, it must document all internal considerations and implementation measures in a detailed and comprehensible manner. Only then, in the event of failure, can it successfully ward off subsequent personal liability claims.

### PROTECTIVE SHIELD *(SCHUTZSCHIRM)* AND DEBTOR-IN-POSSESSION MANAGEMENT *(EIGENVERWALTUNG)* AS RESTRUCTURING INSTRUMENTS

If it already becomes evident in the planning phase that insolvency is unavoidable, reorganisation measures should also be considered at an early stage in the context of insolvency proceedings.

In this case, a reorganisation under debtor-in-possession management combined with the so-called protective shield procedure should be considered first and foremost. The advantage of this procedure is that the current management remains in office and thus has the restructuring instruments of insolvency law at its disposal.

- For the duration of the protective shield procedure (maximum three months) protection against execution is provided!
- Wages and salaries are paid by the Federal Employment Agency during the protective shield procedure.

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- In addition, no value added tax is to be paid or will be refunded by the tax authorities during this period.

- Most importantly, once the protective shield procedure is completed, an effective debt settlement is possible through a tailor-made insolvency plan.

Since the current "lock down" has driven many companies into insolvency, insolvency proceedings unfortunately are often unavoidable. If, in such cases, the management seeks to rescue the company as independently as possible, the protective shield procedure is the ideal type of procedure. In the general perception, such an administrative procedure is hardly tainted with the stigma of insolvency. For this reason, numerous large companies have already recognised the "favour of the hour" and have initiated appropriate restructuring measures. A large number of other companies will soon follow.

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