



Temporary relief for companies in crisis by German legislators

– Shortening of the forecast period for over-indebtedness –

According to the German Insolvency Code, companies are obliged to file for insolvency within certain statutory maximum periods if they are illiquid and/or over-indebted. Illiquidity can often be determined very quickly, as the liabilities due (in terms of insolvency laws) are compared with the company's available liquidity on a given date. Over-indebtedness, on the other hand, is not so easy to determine. The first step is usually to check whether the company has a positive going concern prognosis, an essential part of which is a liquidity plan for the next 12 months. Over-indebtedness occurs if the going concern prognosis is negative and then in a second step an over-indebtedness status shows that the (liquidation) value of the liabilities to be taken into account is less than the existing assets.

In practice, the preparation of a reliable liquidity planning for 12 months has become almost impossible for companies in recent years, especially with regard to the current global economic situation (especially the Covid crisis and energy price crisis). To counteract this, the legislator has temporarily shortened the forecast period for liquidity planning to 4 months with effect from 9 November 2022. In the following, we would like to provide an insight into the German over-indebtedness test to file for insolvency, its current legal changes and the resulting possibilities for crisis management.

In Germany – unlike in a lot of countries – there is not only an obligation to file for insolvency for illiquidity, but also for over-indebtedness. The obligation to file for insolvency due to over-indebtedness is of great importance in practice; it often leads to civil and criminal liability of the management due to a lack of compliance and, in particular, the fact that over-indebtedness is quite often not stated in time. With effect from 9 November 2022 and limited until end of 2023, the legislator has now modified the requirements for over-indebtedness in favour of the

Problem in practice:

determining over-indebtedness in particular on the basis of a liquidity plan for 12 months

Legislative action:

reduction of the forecast period

affected companies in order to give them even more time until the obligation to file for insolvency, which is subject to criminal penalties, comes into effect. In particular, the requirements for current financial planning have been simplified, as the relevant planning horizon has been considerably shortened, which should be a relevant relief, especially in the current global economic developments, some of which are difficult to predict.

In principle, the over-indebtedness test is carried out in two independent steps. Only if the examination in both steps is negative, over-indebtedness needs to be stated and the management is thus obliged to file an application for the opening of insolvency proceedings without delay, at the latest, however, after the expiry of (so far) 6 weeks:

1) Existence of a positive going concern prognosis?

In order for the going concern prognosis to be positive, the will to continue the company must be present, as well as a realistic concept for the continuation of the company. The business plan must include a liquidity forecast showing that the company will not become insolvent in the forecast period, which is 12 months (for the period before 9 November 2022).

2) Preparation of an over-indebtedness status

Companies can use an over-indebtedness balance sheet, also known as over-indebtedness status, to determine whether they are actually over-indebted. If their liabilities exceed their existing assets using liquidation values, the over-indebtedness status is negative.

3) Examination of the obligation to file for insolvency

If both the over-indebtedness status and the going concern prognosis are negative, there is a duty to file for insolvency. This gives the management a maximum period of 6 weeks to avert the obligation to file for insolvency through restructuring measures, whereby this period may only be exhausted as long as there are still predominant prospects for a successful restructuring.

With effect from 9 November 2022, the legislator (BGBl. 2022, 1966) has decided to shorten the planning period for the going concern prognosis from previously twelve months to temporarily only four months (cf. going concern forecast previously under No. 1). The amendment

Over-indebtedness test in two steps

Legal consequence

Temporary reduction of the forecast period to 4 months

to the law only applies until the end of 2023 though. In this way, companies only have to prepare their financial planning for a significantly shorter period. Especially in times of strongly fluctuating energy and raw material prices as well as great uncertainties in the global supply chains, this is a noticeable relief for the already heavily burdened companies.

In addition, the legislator has made further changes, including an extension of the maximum period for filing for insolvency in the case of over-indebtedness from six to eight weeks (cf. previously section 3.). If the company is not (or no longer) financed through the next four months, the management must nevertheless file for the opening of insolvency proceedings without undue delay, at the latest within a maximum of eight weeks after over-indebtedness occurred. If the company will currently not become illiquid within the next four months, there is currently no obligation to file for insolvency due to over-indebtedness.

Furthermore, the forecast period for self-administration and restructuring plans has been shortened from 6 to 4 months.

First of all, the shortening of the forecast period considerably reduces the management's liability risk under civil and criminal law. In addition, the legislator's measures can also be used in many cases by debtors and creditors. From the debtor's perspective, there is thus more time and at the same time easier conditions when initiating insolvency proceedings in self-administration (debtor-in-possession). Self-administration is particularly suitable for restructuring a company relatively quickly and profoundly by means of insolvency plan proceedings without the risks associated with the debtor's loss of control over his company in regular insolvency proceedings.

From the creditor's point of view, this also creates time periods to also work towards controlled insolvency proceedings in self-administration or to use one of the new pre-insolvency restructuring instruments in Germany, which were created by the StaRUG and the SanInsFoG (BGBl. 2020, 3256). The shortening of the forecast period for self-administration and restructuring plans therefore facilitates access to these restructuring instruments, which can enable a relatively quick and favourable restructuring.

Nevertheless, the shortening of the forecast period for the examination of over-indebtedness should not obscure the fact that the company in crisis must plan beyond the forecast period. Thus, even if the company is fully financed for the next 4 months – and thus over-

**Further changes:
extension of application deadline**

**Consequences for practice:
temporary relief for companies**

**Nevertheless, companies are not
exempt from the obligation to plan
for the longer term in a crisis**

indebtedness cannot be stated – there may still be imminent illiquidity if the company is not fully financed in the current and following year. If there is only imminent illiquidity, the company is not obliged to file for insolvency. Nevertheless, its room for manoeuvre is limited, since e.g. when concluding longer-term contracts despite imminent illiquidity, there are sometimes considerable criminal law risks for the managing director (e.g. due to bankruptcy offences). In this respect, shortening the forecast period only helps the company in crisis to a limited extent.

The aforementioned temporary changes in the law significantly extend the period for initiating out-of-court or pre-insolvency restructuring measures. In this way, both the debtor and the creditors are given greater room for manoeuvre to explore existing restructuring options.

Conclusion

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