

Measures to Overcome the Corona Crisis

Most companies, regardless of their industry, are currently feeling the drastic consequences of the corona crisis. The measures taken in many places due to the pandemic (entry restrictions, quarantine, etc.) are having a massive impact on the economy. In particular, these measures lead to a blockage of trade routes, causing supply chains to collapse and thus a marked decline in both exports and imports. In addition, many companies have limited or, in the worst case, no access to important employees; this also has a negative impact on productivity. After all, the restrictions on cultural life have already led to a collapse in business for many companies in the service sector as well as the catering trade. All of these problems are mutually fueling each other, thus further worsening the crisis.

1. Temporary suspension of the obligation to file for insolvency

Anyone being a corporation (GmbH, AG, SE, KGaA) or capitalistic partnership, in particular GmbH & Co. KG, who is insolvent or overindebted must file for insolvency within three weeks at the latest. Delayed filing for insolvency can result in personal liability for managing directors or board members and, if necessary, even criminal liability for delaying insolvency.

At the press conference of the Federal Government on 13 March 2020, the Federal Minister of Finance and the Federal Minister of Economic Affairs announced extensive liquidity aid, the so-called "Corona Rescue Package". However, the package is only just being put together and its details have not yet been fully worked out. In view of this, the three-week period for filing for insolvency is too short to allow the rescue package to take effect.

According to its press release of 16 March 2020, the Federal Ministry of Justice and Consumer Protection (BMJV) is therefore preparing a statutory regulation to suspend the obligation to file for insolvency until 30 September 2020 in order to protect companies that get into financial difficulties as a result of the corona epidemic. This legal regulation is intended to prevent companies from having to file for insolvency only because the aid decided on by the German government fails to reach them in time. Similar regulations had already been adopted for the flood disasters in 2002, 2013 and 2016.

However, the suspension of the obligation to file for insolvency will only be granted under the following conditions:

(1) The insolvency or over-indebtedness must be based on the effects of the corona epidemic. It will thus be necessary to prove that the corona epidemic has caused the insolvency or over-indebtedness in order to relieve the managing directors and board members of their liability. It remains to be seen whether the Act on the Suspension of the Obligation to File for Insolvency will provide for a presumption in favour of the management bodies obliged to file for insolvency in this respect.

(2) Furthermore, according to the BMJV, the suspension of the obligation to file for insolvency will only be granted to those companies where "there are reasonable prospects of recovery due to an application for public assistance or serious financing or reorganisation negotiations by a party obliged to file an application". This requirement could mean that the suspension of the obligation to file an application is only considered if the state aid is actually applied for and used. This is because the temporary suspension of the obligation to submit an application is intended to give the parties concerned the time needed process the assistance.

If the state aid is not applied for in the first place, and if there are no other promising attempts at reorganisation, the reason for invoking the exemption will probably no longer apply.

For the management bodies, this means that despite all adversities they remain obliged to verify the existence of grounds for insolvency at all times. The stronger the crisis, the greater the duty of monitoring! After all, the immediate use of rescue aid or at least its application - as far as possible - is urgently recommended.

2. Measures to avert the liquidity crisis

If a liquidity crisis becomes apparent in a company, we urgently recommend in a first step that the liquidity situation be assessed on the basis of suitable planning and monitored continuously. Should this planning indicate that the company will (probably) no longer be able to meet its liabilities when they fall due, advice under insolvency law should be obtained without hesitation in order to take suitable measures to avert possible insolvency.

In addition to the established proven restructuring instruments, other restructuring instruments are currently being developed or broadened by politicians as a result of the corona crisis in order to support the affected companies in overcoming the crisis.

2.1 Discussions with banks

In this context, early and well-prepared financing discussions with banks have proven to be successful in practice. A prerequisite for successful discussions with banks is regularly the submission of a restructuring report (IDW S6) prepared by an auditor or other expert advisor, on the basis of which the company's ability to survive is substantiated. We know from our advisory services that the earlier the company responds to the crisis, the greater the chances of obtaining a positive restructuring report.

In addition, in the current situation, the state-owned KfW Bank intends to further secure banks for corporate loans and guarantees to companies in the future, following the announcement of the responsible ministries, in order to contain the consequences of the corona virus on the German economy. To this end KfW will relax the conditions for access to the existing programmes and increase the risk coverage to up to 90 percent. Special programmes, including restructuring finance, are to be set up for companies not covered by the existing programmes. Affected companies should therefore ascertain in good time how much additional liquidity will probably be needed and whether and to what extent this can be covered by KfW programmes. It is advisable to prepare the applications with the support of their auditors and tax advisors.

2.2 Payment agreements with creditors

Furthermore, it has become apparent that early discussions with creditors about extending payment terms or even partial waivers are a proven means of overcoming the liquidity crisis. A crucial factor for the success of such discussions is the involvement of creditors in (reorganisation) planning in order to create the necessary transparency and thus credibility. For this purpose, too, it is advisable to obtain an appropriate restructuring report.

2.3 Short-time allowance

A tool that has already been tried and tested in previous crises is the application for short-time allowance at the employment agency. This can help to ease the liquidity situation considerably. In connection with the corona virus, the Federal Government has now created two further groups of cases in which short-time allowance can be applied for.

This is the case if the workload falls considerably due to epidemics, for instance because supply chains or sales opportunities collapse or if employees are not allowed to work because of official orders. In addition, the minimum threshold for employees affected by reduced working hours has been lowered to only 10 percent of a company or a company division. Further incentives for the introduction of short-time work are provided by the elimination of the obligation to give priority to negative working time balances. Moreover, in addition to 60 percent or 67 percent of the net wage, the social security contributions previously borne solely by the employer will be replaced by the employment agency.

3. Factual insolvency and monitoring duties of the management

Most German companies are currently preparing their annual financial statements for 2019, although the risks of the corona crisis as of the reporting date of 31 December 2019 will most likely only have an impact on the balance sheet in exceptional cases. Nevertheless, even if there was no threat of insolvency or overindebtedness reflected in the balance sheet on the reporting date, companies must always keep an eye on the effects the corona crisis may have on current business development. If significant negative consequences are to be anticipated, the management, together with its advisors, must examine whether and how the corporate plans need to be adapted and which measures may be necessary to avert imminent insolvency or, conversely, to ensure a positive going concern forecast. If the threat to the business activity is so serious that no positive going concern forecast can be derived from the - realistic - plans for the current and coming financial year, it is mandatory to establish an overindebtedness status under insolvency law in order to be able to verify an obligation to file for insolvency.

4. Debtor's personal management (*Eigenverwaltung*)

One way of overcoming the crisis may be to restructure the company in terms of personal management. This procedure offers considerable advantages compared to conventional insolvency proceedings:

- The management remains in office and the company retains thus essential know-how,
- Creation of liquidity and scope for restructuring and simultaneous debt relief for the company;
- Restructuring of the company through the option of terminating unprofitable business relationships under simplified conditions and implementing measures under labour law;
- High level of acceptance of personal management as a reorganisation procedure by creditors, banks, etc.

Just as with the measures outside insolvency described above, the success of personal management also depends to a large extent on early action and the involvement of business partners in the restructuring process. To create the necessary transparency and the related credibility, it is advisable to obtain an appropriate restructuring report. On the basis of this expert restructuring report, the way out of the crisis can then be plausibly presented to business partners and banks.

5. Dealing with crisis-stricken business partners

The corona crisis does not even stop at companies that have always been successful. On the contrary, it is rather to be expected that numerous companies of all sizes and regardless of their previous success will come into considerable distress. For this reason - even if your own company is healthy - it is advisable to focus more closely on possible crisis indicators among business partners, indicators such as

- official suspension of business operations due to the coronavirus;
- slow payment / delivery;
- request for liquidity assistance;
- sudden decline in quality;
- termination of trade credit insurance;
- deterioration of the credit rating;
- rumours in the market;
- etc.

in order to effectively counteract the spread of this crisis to your own company.

Insofar as business partners, be they suppliers or customers, are in crisis, we recommend subjecting the business relationship to closer monitoring and taking preventive measures to ensure that it is not affected by a possible insolvency of the business partner. This includes, in particular, adapting the payment modalities in such a way that in the event of the business partner becoming insolvent, the (future) insolvency administrator cannot reclaim the payments made by the business partner by way of an insolvency contestation.

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