



GERMAN INSOLVENCY LAW ADJUSTED TO UNCERTAIN TIMES

Temporary shortening of the forecast period relating to the over-indebtedness check and other changes until 31 December 2023

21 October 2022

In response to the current upheavals in the energy and raw materials markets, the **restructuring and insolvency law** will be **temporarily** adjusted until and including **31 December 2023**. The legislator reduces:

- the forecast period for the over-indebtedness check and
- the planning periods for self-administration and restructuring planning,

and increases the maximum period for the obligation to file for insolvency for reason of over-indebtedness.

The regulations will form part of a new Law Crisis Mitigation Act (**SanInsKG**, previously named COVInsAG) adjusting certain elements of the German restructuring and insolvency law. This new legislation may be seen as a step towards a genuine "**bad weather insolvency law**". In detail, the SanInsKG provides for the following regulations that will temporarily be effective **up to and including 31 December 2023**:

Shortening of the forecast period relating to the over-indebtedness check

As before, a positive going concern prognosis rules out over-indebtedness. It is now required and at the same time sufficient that the debtor company can **meet its payment obligations** for at least a **period of four months** (section 4 (2) sentence 1 number 1 SanInsKG). Previously, a period

of twelve months was relevant for this solvency test (section 19 (2) sentence 1 of the German Insolvency Code (InsO). This adjustment should also apply to companies that were already over-indebted before the SanInsKG came into force, but the period relevant for filing an insolvency application in good time has not yet elapsed (section 4 (2) sentence 2 SanInsKG). According to the explanatory memorandum to the new law, companies should also be able to withdraw a self-filed application for insolvency only for the reason of an over-indebtedness, which would not be constituted due to the now shortened forecast period. Correspondingly, the return from a distressed management (*Notgeschäftsführung*) to a standard management should be permissible.

By shortening the forecast period, the new law addresses increasing difficulties of business planning and thus also releases managing directors from significant liability risks which in particular arise from the obligation to file for insolvency due to over-indebtedness (section 15a (1) sentence 1 alternative 2 InsO) and the then applicable payment bans (section 15b (1) InsO). However, according to the explanatory memorandum to the new law, the original forecast period of 12 months shall apply again already from 1 September 2023, if it is foreseeable that a forecast related to a 12-month period commencing on or after 1 January 2024 will indicate over-indebtedness.

Shortening of the planning periods relevant for self-administration and restructuring plans

Further, planning periods for any restructuring as part of a **StaRUG and insolvency by way of self-administration** are being adjusted to the new, shortened forecasting period for over-indebtedness.

In case of **self-administration** (section 270a (1) number 1 InsO) or a stabilization order under the **StARUG** (section 50 (2) number 2 of the German Act on the Stabilisation and Restructuring Framework for Business – StaRUG), financial plans dependent on forecast decisions must be presented. Such plans must demonstrate the solvency of the company for a fixed period in the future and also take into account all restructuring and procedural costs. If such evidence is missing, on the one hand

self-administration may be made much more difficult and therefore eventually fail (section 270b (2) InsO) and on the other hand a stabilisation order may not be issued (section 51 StaRUG).

Because of the uncertainties (in particular an unforeseeable price volatility) impeding any financial plans, the relevant planning periods are also **reduced from six to four months** (section 4 (2) sentence 1 number 2 and 3 SanInsKG).

Maximum deadline for filing for bankruptcy in the event of over-indebtedness

In case of over-indebtedness, the debtor now is given a deadline of **eight weeks** (until 31 December 2023) **instead of six weeks** to file for insolvency (Section 4a SanInsKG). This extended deadline should enable the debtor to continue ongoing restructuring efforts and complete the restructuring successfully out of court or, as applicable, to properly prepare a restructuring on by using the pre-insolvency instruments under the StaRUG or the insolvency by way of self-administration. The maximum period for filing for insolvency for the reason of illiquidity (three weeks) remains unaffected.

No special causality required and not limited to "affected" companies

In contrast to the COVInsAG, neither the scope of applicability is limited to companies that were "in good shape" and/or exposed to special raw material or energy risks (so-called energy-intensive companies) on a specific date, nor the obligations to file for insolvency are suspended in its entirety.

Conclusion

- The limitation of privileges to companies that were, on specific dates, "in good shape" raised difficult questions in practice and did not always lead to fair solutions. Thus, the comprehensive approach of the SanInsKG seems to be justified.
- The shortening of the forecast and planning periods addresses the uncertainties faced by many market participants. However, a further reduction to three months would have been preferable in view of the already required 13-week liquidity test.

- The extension of the application period in case of over-indebtedness to eight weeks is also favourable in order to make available more time to give efforts to either finalizing an out court restructuring or preparing stabilisation proceedings in accordance with the StaRUG or insolvency proceedings.
- Unsolved demarcation issues remain in connection with the new forecast and planning periods as well as the new application period, e.g. if these periods started before the SanInsKG came into force or would expire after 31 December 2023.
- Not subject to changes are the forecast periods in relation to imminent illiquidity (*drohende Zahlungsunfähigkeit*, section 18 (2) sentence 1 InsO) and the annual going-concern assessment in connection with the annual financial statements (section 252 (1) no. (1) German Commercial Code (HGB)). Presumably, this will also apply to the general principles regarding the prerequisites for eligible restructuring opinions established by the German courts.

Recap:

- The COVInsAG is modified and renamed to **SanInsKG**.
- Between the date after publication of the new law (probably taking place end of October or beginning of November 2022) until and including 31 December 2023, a **shortened forecast period of four months for over-indebtedness** applies to companies.
- The **time periods for the financial plans** to be presented in connection with instruments under the StaRUG and insolvency by way of self-administration were also **shortened from six to four months**.
- The maximum period for filing for insolvency due to over-indebtedness is extended **from six to eight weeks**.
- The adjustments are generally applicable, i.e. there is neither a **requirement of forecast uncertainties** (e.g. due to the development of energy prices) nor a restriction of applicability to companies that were "in good shape" on a specified date.

Our restructuring and insolvency law team



Dr Franz Bernhard Herding

Partner – Frankfurt
Tel +49 69 2648 5712
franz-bernhard.herding@allenoverly.com



Dr Sven Prüfer

Partner – Frankfurt
Tel +49 69 2648 5381
sven.pruefer@allenoverly.com



Dr Walter Uebelhoer

Partner – Munich
Tel +49 89 71043 3113
walter.uebelhoer@allenoverly.com



Peter Hoegen

Senior Counsel – Frankfurt
Tel +49 69 2648 5905
peter.hoegen@allenoverly.com



Moritz Probst

Senior Associate – Frankfurt
Tel +49 69 2648 5522
moritz.probst@allenoverly.com



Wencke Rusbüldt

Senior Associate – Frankfurt
Tel +49 69 2648 5484
wencke.rusbuedt@allenoverly.com



Dr Jörg Weber

Senior Associate – Munich
Tel +49 89 71043 3957
joerg.weber@allenoverly.com



Dr Adrian Lingens

Associate – Frankfurt
Tel +49 69 2648 5695
adrian.lingens@allenoverly.com



Sebastian Hanke

Associate – Munich
Tel +49 89 71043 3137
sebastian.hanke@allenoverly.com



Simon Mattiat

Associate – Frankfurt
Tel +49 69 2648 5616
simon.mattiat@allenoverly.com



Tobias Schröter

Associate – Frankfurt
Tel +49 69 2648 5616
tobias.schroeter@allenoverly.com



Philipp Zehlicke

Associate – Frankfurt
Tel +49 69 2648 5645
philipp.zehlicke@allenoverly.com

Allen & Overy LLP

Dreischeibenhaus 1, 40211 Düsseldorf, Germany | Tel +49 211 2806 7000 | Fax +49 211 2806 7800

Bockenheimer Landstraße 2, 60306 Frankfurt am Main, Germany | Tel +49 69 2648 5000 | Fax +49 69 2648 5800

Ballindamm 17, 20095 Hamburg, Germany | Tel +49 40 82 221 20 | Fax +49 40 82 221 2200

Maximilianstraße 35, 80539 Munich, Germany | Tel +49 89 71043 3000 | Fax +49 89 71043 3800

Allen & Overy is an international legal practice with approximately 5,600 people, including some 580 partners, working in more than 40 offices worldwide. A current list of Allen & Overy offices is available at allenoverly.com/global/global_coverage.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy LLP is authorised and regulated by the Solicitors Regulation Authority of England and Wales (SRA number 401323).

The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2022. This document is for general information purposes only and is not intended to provide legal or other professional advice. | EUO1-#2007281213

allenoverly.com