UPDATE Insolvency law – Extension for suspension of the obligation to file for insolvency until 31.01.2021

On 21st March 2020, the 2nd COVID-19-legislative-package ("2. COVID-19-Gesetzespaket") was announced in Austria, amending 39 laws and creating 5 new laws. Most of the provisions came into force on 22nd March 2020. Three further extensive legislative packages, the 3rd COVID-19 Act ("3. COVID-19-Gesetz"), the 4th COVID-19 Act ("4. COVID-19-Gesetz") and the 5th COVID-19 Act ("5. COVID-19-Gesetz") were announced on 4th April 2020 and came into force on 5th April, also with an effect on the area of insolvency law.

Frequent questions on insolvency law:

Obligation to file for insolvency in the COVID 19 crisis

- What are the reasons for opening insolvency proceedings in Austria?
- When is it necessary to file an application to open insolvency proceedings in general?
- What liability risks can arise in connection with a breach of the obligation to file for insolvency?
- What is valid in times of the COVID 19 crisis?
- To whom does the deadline extension apply?
- Suspension of the obligation to file an application in the case of over-indebtedness?

Mandatory over-indebtedness assessment in the COVID 19 crisis?

- Who must carry out an over-indebtedness audit?
- According to which criteria is the over-indebtedness check to be carried out?

Further topics of insolvency-law:

- What effects does the 4th COVID-19-Act have on the right of appeal?
- What are the innovations concerning time limits in insolvency proceedings?
- What simplifications exist in fulfilling a reorganisation plan?
- Who can apply for a deferral of payment-plan-instalments?
- What are the effects of the 4th COVID-19-Act on the equity-replacement-law?

Obligation to file for insolvency in the COVID 19 crisis

What are the reasons for opening insolvency proceedings in Austria?

Illiquidity (§ 66 IO) is a general reason for opening insolvency proceedings for all types of debtors, irrespective of whether they are natural or legal persons. In the case of legal persons and partnerships with no natural person with unlimited liability is a partner ("hidden corporations" or GmbH & Co KG), over-indebtedness under insolvency law (§ 67 IO) is enough as a special reason to open insolvency proceedings. As a significant proportion of companies in Austria are managed in the legal form of corporations, the reason for opening insolvency proceedings especially got practical importance.

Insolvency exists, if the debtor is no longer able to pay his liabilities caused by a lack of cash and is not expected to be able to obtain the necessary cash immediately. This must be distinguished from a payment hold-up, caused by a temporary lack of payment, which does not lead to the opening of insolvency proceedings. It is presumed in the event of a shortfall in cover of not more than 5% of all due liabilities.

Over-indebtedness under insolvency law must be strictly distinguished from both, a purely accounting over-indebtedness resulting from the balance sheet under company law (negative equity) and an arithmetical over-indebtedness determined based on a liquidation status. In the case of corporate debtors, arithmetical over-indebtedness only constitutes over-indebtedness under insolvency law in connection with a negative forecast of continued existence (see point III).

In the case that the COVID-19 crisis causes a drop in sales or earnings and defaults on customer receivables, with the result that not all due liabilities can be paid, it must be checked immediately for all types of debtors whether there is just a delay in payment or whether they are already insolvent. In the case of a debtor to whom the special reason for opening the insolvency proceedings applies, it must also be checked whether these circumstances prevent a positive prognosis of continued existence of the company, unless arithmetical over-indebtedness can be excluded. The current absence of illiquidity does not lead to a positive prognosis of continued existence automatically. The inability to pay is determined purely based on the reporting date and therefore only represents a snapshot. For a positive survival prognosis, it is necessary that the ability to pay can be affirmed for a longer period.

When is it necessary to file an application to open insolvency proceedings in general?

In the case of a reason for opening insolvency proceedings (material insolvency), the debtor is obliged to apply for the opening of insolvency proceedings without culpable delay, at the latest 60 days after the material insolvency has occurred (§ 69 (1) IO).

In any case, the obligation to apply for the opening of insolvency proceedings starts at the time when the existence of a reason for the opening of insolvency proceedings is objectively recognisable. This is met if there are insolvency indicators which suggest a reason for insolvency for a diligent debtor (benchmark-figure), especially after manifestation of insolvency in the sense of clear insolvency indications.

The 60-day period is meant to give the debtor a last serious attempt at restructuring.

What liability risks can arise in connection with a breach of the obligation to file for insolvency?

69 IO constitutes a protective law in favour of the creditors. A violation of the obligation to file for insolvency in a timely manner (delay in filing for insolvency) can therefore for legal persons as debtors, justify claims for damages by creditors against the respective responsible bodies (external liability). In addition, a delay in filing for insolvency by the responsible bodies regularly leads to a violation of company law regulations and thus to an obligation to pay damages to the company itself (internal liability).

What is valid in times of the COVID 19 crisis?
The maximum period of 60 days available to the debtor for filing the application is extended to 120 days in the case of natural disasters and comparable situations (Section 69 (2a) IO). The 2nd COVID-19 Act amended § 69 para. 2a IO to the effect that the extension of the period to 120 days now also applies in the event of a pandemic or epidemic.

The background to the extension of the application period is that many entrepreneurs are directly affected by massive liquidity problems as a result of the current crisis situation, but due to expected compensation payments, among other things, they can currently expect to be able to meet their payment obligations again soon.

The Federal-Government created measures to generate liquidity/secure the solvency of companies and has set up a hardship fund, standardized relief for short-time work, granted payment relief or deferrals with regard to income tax and social security contributions, and made guarantees for bridging loans possible.

Although a payment from the "hardship fund" was assured "quickly and unbureaucratically", the regular 60-day period seemed to be too short to restore the necessary liquidity. For this reason, the deadline for pandemics and epidemics was explicitly extended to 120 days.

To whom does the deadline extension apply?
The extension of the deadline only applies to those debtors who have fallen into economic crisis as a result of the COVID-19 crisis.

Debtors who were already materially insolvent when COVID-19 occurred are not entitled to the 120-day extension. The fact that their restructuring efforts may include the planned measures of the Federal-Government does not change the previous 60-day period for filing an application, as the corporate crisis was not triggered by COVID-19.

In the corona-crisis it should also be pointed out, that the extension of the deadline can only be used for serious and promising attempts to restructure. That means, that there must be a realistic chance of removing the reason for opening insolvency within the (extended) deadline. This requires a corresponding forecast, which must be continuously evaluated.

Suspension of the obligation to file an application in the case of over-indebtedness?

The 4th Covid-19-Act also stipulated the exception, that the obligation of the debtor to file for insolvency in the case of over-indebtedness does not apply, when occurring in the period from 1st March 2020 to 30th June 2020. By the amendment of the 2nd COVID-19-Justiz-Begleitgesetz (announced on 2.7.2020) this **period was extended until 1st January 2020**. If there is over-indebtedness at the end of this period, the debtor must file for insolvency within 60 days of 1st January 2020 or within 120 days of the occurrence of the over-indebtedness, whichever period ends later.

The obligation to file for insolvency when illiquidity occurs does not change.

Mandatory over-indebtedness assessment in the COVID 19 crisis?

Who must carry out an over-indebtedness audit?
An obligation to check over-indebtedness can only arise for those business entties or debtors, to whom the special reason for opening insolvency proceedings applies, mainly for:

- Companies with limited liability (GmbH),
- Stock corporations (AG),
- Cooperatives with limited liability,
- Covert corporations,
- Associations which are economically active (e.g. sports clubs).

According to which criteria is the over-indebtedness check to be carried out?

According to the consistent jurisdiction, a two-stage examination procedure must be determined to verify over-indebtedness under insolvency law:

Arithmetical over-indebtedness: This exists if, in the event of liquidation, the assets of the debtor (assets) are not enough to satisfy the creditors. This must be checked, based on a liquidation status.

Survival prognosis: In this context, a realistic estimate of future income and expenses must be made to determine whether the company will remain solvent and thus viable in the future. This may also include restructuring and financing measures, whether these are specifically planned, there is a firm intention to implement them and their implementation appears realistic.

The state measures already in force, to procure liquidity/secure the solvency of companies can be included in the forecast for the continued existence, even if the standardised conditions for this are not met in the specific case, so that in any case, an examination in the individual case appears necessary.

Right of appeal

In accordance with the 4th COVID-19-Act, the granting of a bridging-loan in the amount of a COVID-19-short-time-work-support applied by the borrower in the period from 1st March 2020 to 30th June 2020 and its immediate repayment after receiving the short-time work support to the lender in a subsequent insolvency of the company is exempt from a challenge according to § 31 IO ruled out. However, only for the extent that neither, (i) a pledge nor a comparable security from the assets of the borrower was provided for the corresponding loan and (ii) the insolvency of the borrower was not known to the lender when the loan was granted.

Background to this regulation is that employers who implement short-time work for their employees to avoid unemployment, require those bridging loans to maintain the liquidity until the short-time work support is pay-out under § 37b AMSG. In the circumstances described above, neither the granting of the loan itself, nor the immediate repayment after receiving short-time-work support payment is contestable in the event of the subsequent opening of insolvency proceedings.

Innovations concerning time limits in insolvency proceedings:

Interruption of the deadline
The 2nd COVID-19-Act stipulates for judicial proceedings, therefore also including insolvency proceedings, all procedural deadlines (both, statutory and judicial deadlines) which were not yet expired on 22nd March 2020 or whose period of validity has started between 22nd March and 30th April 2020 are interrupted until the end of 30th April 2020. These periods start to run again on 1st May 2020.

The 4th COVID-19-Act has now removed insolvency proceedings from the interruption of time limits, especially in order to be able to process reorganisation proceedings quickly. Periods that have already been interrupted start running again immediately after the 2nd COVID-19-Act on Justice comes into force (22nd March 2020); the day of announcement (4th April 2020) is not counted in the calculation of the period.

The time limits in insolvency-proceedings can be extended on request or ex officio up to 90 days, but for some time limits only under specific further conditions. Furthermore, it was stipulated that the debtor's self-administration is only to be withdrawn if the restructuring plan has not been accepted by the creditors within 120 days (instead of 90 days) after the opening of the insolvency-proceedings.

Facilitations the fulfilment of a reorganisation plan

If a debtor is in delay with the fulfilment of the reorganisation plan quota, a quota-based resurgence of claims could occur (§ 156a IO).

Such a resurgence should be prevented, when the debtor's payment difficulties result from the COVID 19 crisis. Only debtors will benefit from this facilitation, when their liabilities got due after the 2nd COVID-19-Act came into force. A written reminder, which is sent between 22nd March 2020 and 30th April 2020 does not lead to default according to § 156a (1) IO and therefore not to a quota-wise revival of the claim. The reminder is invalid. The creditor must send a reminder after 30th April 2020 (again).

Deferrals of payment-plan-instalments?

If a debtor is unable to meet due liabilities of a payment plan because of changes in its income and financial situation referring to COVID-19 measures, the debtor can apply for a deferral of liabilities. The application must be submitted not later than 14 days after receipt of a reminder; deferment is only possible for a maximum period of nine months.

Equity-replacement-law?

A further exception for short-term shareholder loans from the legal consequences of the equity replacement law got created within the 4th COVID-19-Act. A loan within the meaning of §1 EKEG does not exist when it is granted and added to the company by a shareholder for no longer than 120 days during the period of 5th April 2020 to 30th June 2020 and the company has not provided a pledge or comparable security from its assets for this purpose.

Background is the Equity-Replacement-Act (EKEG), which stipulates a repayment block for loans granted by a controlling shareholder to a (hidden) corporation in crisis until the company is restructured. Following § 3 (1) no 1 EKEG only cash loans for no more than 60 days are excluded, now cash loans granted for no more than 120 days until the end of 30th June 2020 are excluded. Shareholders covered by the EKEG can therefore grant their company cash loans for up to 120 days until the end of 30th June 2020 even in the case of a crisis, which are not covered by the repayment ban. The borrowing company may not provide security from its assets in favour of the shareholder for the granted loan.

Updated: 28th October 2020

We point out that the legal situation can change constantly, but we are on effort to keep the contents up to date.

Dr Ernst Chalupsky
Attorney at Law
Wels
T +43 7242 65290-303
F +43 7242 65290-333
e.chalupsky@saxinger.com

Mag. Dr. Nina Pichler
Attorney at Law
Vienna
Graz
T +43 1 9050100
F +43 1 9050100-200
n.pichler@saxinger.com

Mag Elisabeth Forstner

Attorney at Law
Wels
T +43 7242 65290
F +43 7242 65290-333
e.forstner@saxinger.com