



Extraordinary Insolvency Filing Rules Resulting from COVID-19 in Germany

By Oliver Biernat

Legal representatives of corporations have an obligation to file for insolvency within three weeks after they have realised that the company is either insolvent, threatened by impending insolvency or is over-indebted. If they omit this, they can be sentenced to imprisonment for up to three years and may be made personally liable for damage that may arise from non- or late filing.

In order to avoid a wave of insolvencies as a result of the corona pandemic, a new legal act called "COVInsAG", came into force on 27 March 2020 but is applied retroactively since 01 March 2020. It suspended the obligation to file for insolvency for an insolvency



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caused by COVID-19 until September 2020. According to the following conditions, the obligation to file for insolvency pursuant to § 1 COVInsAG is suspended:

- The insolvency or over-indebtedness of the company is a consequence of the pandemic: It is assumed that the insolvency is due to the pandemic if the debtor was not yet insolvent on 31 December 2019.
- There must not be any circumstances that make a successful restructuring of the company appear hopeless.
- It is presumed that there is a prospect of the insolvency being resolved if the debtor was not yet insolvent on 31 December 2019.

In addition, the managing director's liability for payments despite insolvency maturity and the insolvency administrator's right of rescission have been significantly modified. This largely eliminates the risk of a future insolvency challenge.

In this case, congruent legal acts cannot be contested in subsequent

insolvency proceedings, unless the opponent of the contestation was aware that the debtor's restructuring and financing efforts were not suitable for eliminating an inability to pay that had occurred. This also includes performance in lieu of performance or on account of performance, payments by a third party on the instruction of the debtor, the provision of security other than that originally agreed if this is not more valuable, the shortening of payment periods and the granting of payment facilities.

Even the repayment of shareholder loans enjoys protection against later challenge. § Section 39 (1) no. 5 and Section 44a InsO (insolvency code) are not applicable in insolvency proceedings applied for up to 30 September 2023.

Please note that the payment prohibitions, according to which managing directors are personally liable for payments after the occurrence of insolvency maturity, are not suspended in principle by the COVInsAG. However, if the conditions for suspending the obligation to file for insolvency are met, the payment prohibitions are also relaxed.

Payments which are made in the ordinary course of business, in particular those payments which serve to maintain or resume business operations or to implement a reorganisation concept, are then considered to be compatible with the diligence of a prudent and conscientious manager and do not trigger liability.

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Many companies will still be struggling by the end of September 2020. The suspension is extendable by decree of the Ministry of Justice until 31 March 2021 at the most. This

may give some companies enough time to overcome the negative financial impact of the pandemic. Nevertheless, some companies will not survive and, for example, will

drag others down with them through bad debts and cease of orders. Therefore, one should be prudent when selecting business partners and remember that “cash is king”.

HUNGARY

New Rules in Hungarian Liquidation Proceedings During the Emergency Situation (COVID-19)

By **Dr Attila Kovacs**

Hungary introduced some temporary rules because of COVID-19 which are protecting debtors facing financial difficulties. According to the Government Regulation No. 40/2020 on the declaration of an emergency situation, a creditor may submit an application for the

commencement of liquidation proceedings during the emergency situation if, according to the payment demand sent to the debtor, the period allowed to the debtor to pay his debt and the following 75 days have elapsed without success. In other words, debtors receive an additional 75 days to repay their debts in order to escape from liquidation.



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Another temporary rule is that an application for liquidation of the debtor may be submitted only if the amount of the claim (calculated without interest and contributions) exceeds HUF 400,000 instead of HUF 200,000.

The Curia in Hungary stated in its new resolution Nr. Fpkf.VII.30.213/2019/2 dealing with jurisdiction issues that only the rules of the EU Regulation (2015/848 / EU) are applicable to insolvency proceedings against a limited liability company registered in another Member State of the European

Union, and therefore only a limited liability company can be a debtor, and in connection with its Hungarian branch only a territorial procedure may be carried out if the conditions are met.

The Curia prescribed that, in the further stage of the proceedings, the Hungarian Metropolitan Court must rule on the question of whether the Hungarian court has jurisdiction to adjudicate the application for territorial liquidation proceedings, taking into account the provisions of Article 3 (4) (a) of the EU Regulation, whether the conditions justifying the opening of territorial procedure exist.