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Insolvency proceedings and liquidation of companies

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Ansprechpartner	Nein
Fachlich freigegeben am	12.12.2022
Fachlich freigegeben durch	Federal Ministry for Economic Affairs and Climate Action
Handlungsgrundlage	• Insolvency Code (Insolvenzordnung - InsO) • Act on Limited Liability Companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung - GmbHG) • German Criminal Code (Strafgesetzbuch - StGB) • Social Security Code (Sozialgesetzbuch - SGB), Book III • German Civil Code (BGB) • Act to shorten residual debt discharge proceedings and on the adjustment of pandemic-related provisions in company, cooperative, association and foundation law and in tenancy and lease law (Gesetz zur weiteren Verkürzung des Restschuldbefreiungsverfahrens und zur Anpassung pandemiebedingter Vorschriften im Gesellschafts-, Genossenschafts-, Vereins- und Stiftungsrecht sowie im Miet- und Pachtrecht)
Teaser	If you want to set up a business in Germany, you must comply with certain rules and requirements. This section provides information on your rights and obligations, in particular with regard to insolvency proceedings and the liquidation of companies.
Volltext	Insolvency or over-indebtedness Over-indebtedness under insolvency law is a situation where a debtors assets no longer cover their existing liabilities. Insolvency or over-indebtedness is often caused by insufficient crisis management, or a total lack thereof. It usually leads to insolvency as a result of payment difficulties. What must be done in the event of existing or imminent insolvency or over-indebtedness depends on the companys legal form and its specific situation: • Share-capital companies (Kapitalgesellschaften), such as limited liability companies (GmbHs) and companies in which no natural person has unlimited liability as a general partner, such as a GmbH & Co. KG, must file an

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insolvency petition. In the event of insolvency or over-indebtedness under insolvency law, you have only 3 weeks in which to resolve the reason for opening insolvency proceedings. If this is unsuccessful, the management is legally required to file for insolvency.

- Self-employed persons who, as (former) sole traders or (former) partners in a partnership (Personengesellschaft), are personally liable for any debts incurred, may file for insolvency on the grounds of (imminent) insolvency. The question is whether and/or when it is reasonable in each particular case to file for insolvency in order to settle debts.

Types of insolvency proceedings

Standard insolvency proceedings - commercial businesses: the purpose of insolvency proceedings in respect of a business is to satisfy the creditors collectively. This does not necessarily require the business to be broken up. Instead, the Insolvency Code also offers opportunities to preserve it.

Standard insolvency proceedings - natural persons: the purpose of standard insolvency proceedings is debt relief for natural persons, i.e. people who:

- are self-employed; or
- were previously self-employed and still have debts outstanding from self-employment resulting from employing workers; or
- were previously self-employed and have unmanageable assets. Assets are unmanageable if there are more than 20 creditors.

Probate insolvency proceedings: probate insolvency proceedings are concerned with the assets of the estate of a deceased person, where the purpose of the proceedings - unless filed by a creditor - generally lies in limiting the liability of heirs to the estate.

Filing for insolvency proceedings

Insolvency proceedings are opened only when a petition is filed. Certain types of companies, such as a GmbH or a GmbH & Co. KG, are required to file an

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insolvency petition. The petition must be filed in writing with the competent insolvency court or dictated for the court record. The petition may be filed by creditors or by the debtor themselves.

The petition may be withdrawn if the insolvency proceedings have not yet been opened. If the petition is withdrawn, the petitioner will be ordered to pay the costs of the proceedings. The courts usually give a decision on insolvency petitions within approximately 4 to 12 weeks.

In the event of insolvency or over-indebtedness, the managing directors and/or board members or the liquidators must, pursuant to Section 15a of the Insolvency Code (InsO), file for the opening of insolvency proceedings without delay, and in any case no later than 3 weeks after the insolvency or over-indebtedness has occurred. The 3-week period is meant as a maximum timeframe; you should not go up to this deadline if you are able to file earlier. If the petition is delayed due to the fault of the parties required to file it, or if it is not filed correctly or at all, the parties required to file a petition will be liable to prosecution. There is also the risk of liability having to be covered by personal assets. The liability of managing directors for insolvency-related obligations is governed by the Act on Limited Liability Companies (GmbHG).

A creditors petition is only admissible if the creditor meets certain requirements. Creditors must:

- designate their address for service of official documents, their legal form, if any, and the representative of the debtor
- demonstrate a legal interest in opening insolvency proceedings
- substantiate a claim that is due

NB: the claim must also:

- not be entirely insignificant. For example, if the principal claim has been settled in the meantime, outstanding interest and reminder costs are not

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sufficient grounds to justify a claim.

- not be misused as an unfair means of applying pressure, for example in order to harm the opponent as a competitor
- set out grounds for opening the insolvency proceedings i.e. insolvency or over-indebtedness

Pursuant to Section 54 InsO, the proceedings are not subject to advance payment; the costs will be claimed back from the insolvency assets when the proceedings have been concluded, or charged to the party liable for payment of the costs. In addition to the debtor, the petitioning creditor is always liable for the costs incurred up until the opening of the proceedings. The amount of the administrators remuneration is laid down in the Insolvency Law Remuneration Ordinance (Insolvenzrechtliche Vergütungsverordnung - InsVV). The experts compensation is calculated primarily on the basis of the time expended on their work. The possibility of deferring the costs of the proceedings pursuant to the first sentence of Section 4a(1) InsO only applies to natural persons who request the discharge of residual debt and whose assets are insufficient to cover the costs of insolvency proceedings.

Appointing the insolvency administrator

When insolvency proceedings are opened, the insolvency court appoints an insolvency administrator. The insolvency administrator is a natural person who is suited to the case in hand, particularly experienced in business affairs and independent of the creditors and debtors. The person must be selected from among all the individuals willing to assume the administration of the insolvency. The administrator is given a deed confirming their appointment. Once the administrators work is complete, the deed must be returned to the insolvency court.

At the first creditors meeting following the appointment of the insolvency administrator, the creditors may choose a different person to replace the administrator.

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The insolvency administrator is subject to the supervision of the insolvency court. The court may, at any time, require the administrator to provide specific information or a report on the progress of the proceedings and on the management. The insolvency court may dismiss the insolvency administrator from their role if there is a good reason for doing so. With regard to the appointment of the insolvency administrator, please contact the insolvency court, which is the competent local court.

Grounds for insolvency

When opening insolvency proceedings, the reason for doing so must be provided. There are three grounds on which insolvency proceedings may be opened:

- insolvency
- imminent insolvency
- over-indebtedness (for legal entities only)

Insolvency pursuant to Section 17 InsO

The debtor is insolvent if they are unable to fulfil the payment obligations that are due. As a rule, this is to be assumed if the debtor has ceased making payments. The determining factor regarding the question of insolvency is the maturity of the liabilities. Deferred liabilities are not classed as mature. However, an earnest demand is not necessary to assume maturity, i.e. there is no need for a reminder.

Typical indications of insolvency are:

- non-payment of suppliers
- non-payment of wages, salaries and social security contributions
- issuing of bad cheques
- protests of bills of exchange
- payment enforcements or the existence of applications for enforcement
- applications for a statutory declaration to be made

Imminent insolvency pursuant to Section 18 InsO

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Insolvency is imminent when the debtor is likely to be unable to fulfil existing payment obligations on the due date. The option that a debtor has to file a petition for insolvency proceedings in respect of its own assets on the grounds of imminent insolvency should be used in particular where there are restructuring prospects for the ailing company, since the earlier an insolvency petition is filed, the greater the chance of restructuring.

Over-indebtedness pursuant to Section 19 InsO

In the case of legal entities - and partnerships with no natural person behind them as a general partner or partner - over-indebtedness may also constitute grounds for opening insolvency proceedings. Pursuant to Section 19(2) InsO, there is over-indebtedness when the debtors assets no longer cover existing liabilities, unless it is highly likely, considering the circumstances, that the undertaking will continue to exist.

In addition to the question of arithmetical over-indebtedness - i.e. if the assets shown on the assets side of the balance sheet are smaller than the liabilities shown on the liability side - the going-concern prognosis is the determining factor when assessing over-indebtedness as grounds for insolvency. Companies with arithmetical over-indebtedness may escape the obligation to file for insolvency if they can establish and substantiate a positive going-concern prognosis.

Employees claims, such as entitlement to salary, holiday pay and pension contributions

The opening of insolvency proceedings in respect of the assets of employees does not affect the obligation to pay contributions for health, pension, long-term-care and unemployment insurance. Particular attention must be paid to the timely payment of employees contributions. If they are not paid to the institutions in due time, there is a risk of criminal liability pursuant to Section 266a(1) of the German Criminal Code (StGB). There is also a requirement to accurately and fully disclose information in connection with employers social

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security contributions, pursuant to Section 266a(2) and (3) StGB. Only accident insurance contributions may be waived if, after the opening of insolvency proceedings, the employees were granted leave until a specified time at which the employment relationship ends.

In order to protect employees against loss of wages, in certain conditions insolvency allowance is paid by the Federal Employment Agency (Bundesagentur für Arbeit). The period covered by the insolvency allowance generally includes the last 3 months prior to the court ruling on the opening of insolvency proceedings or to dismissal through lack of assets, known as the insolvency event. Pursuant to Sections 165 et seqq. of Book III of the Social Security Code (SGB III), the amount of insolvency allowance paid is generally equivalent to the amount of net pay. Employees may apply to the relevant employment office for insolvency allowance within a limitation period of 2 months after the insolvency event, pursuant to the first sentence of Section 324(3) SGB III.

Protective shield procedure

Under certain circumstances, a debtor may apply for the protective shield procedure ahead of insolvency proceedings, at the same time as filing for insolvency. The umbrella procedure under Section 270b InsO is a special case of self-administration before insolvency proceedings are opened. It is intended to make it easier for the debtor to rescue the business by taking early action. This is a procedure for the preparing for restructuring using an insolvency plan in combination with self-administration. Self-administration means that the debtor themselves continues running the business, but under the supervision of an administrator.

The protective shield procedure requires that the application be submitted together with a certificate of reasons issued by a tax consultant, auditor, lawyer or person with equivalent qualifications who has experience in insolvency matters. The content of this certificate must include the statements that:

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- there is imminent insolvency or over-indebtedness, but there is no insolvency; and
- restructuring is not manifestly hopeless.

The court may not appoint a provisional insolvency administrator during the protective shield procedure, and may not deprive the debtor of the power to dispose of their assets. The debtor is given a maximum period of 3 months to draw up an insolvency plan. Upon the expiry of this deadline, or after the court has lifted the order for the protective shield procedure, the insolvency court will decide whether to open insolvency proceedings. In the protective shield phase, it is usually crucial whether or not the debtor gains the confidence of the contracting parties and creditors with regard to the possibility of restructuring.

Restructuring measures

Restructuring measures may be considered in insolvency proceedings in addition to breaking up the undertaking. The ability to restructure is a prerequisite in this respect. Possible restructuring measures are rescue through transfer of assets (übertragende Sanierung) or the insolvency plan procedure. Preparations for this should be initiated as early as possible. In particular, the protective shield procedure may be appropriate for this before insolvency proceedings are opened.

Rescue through transfer of assets refers to the acquisition of a company, or parts of a company, by a new person or company. The new company is unencumbered by previous liabilities of the insolvent company, with the exception, if applicable, of employment relationships, pursuant to Section 613a of the German Civil Code (BGB). The existing legal entity may itself be restructured by way of an insolvency plan procedure. A plan is drawn up according to certain specifications, defining how continuation and satisfaction of creditors is to take place - see Sections 217 et seqq. InsO.

Discharge of residual debt

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Debtors who are not refused the ability to discharge their residual debt may be free from debt after 3 years. This is made possible by the Act to Shorten Residual Debt Discharge Proceedings, which applies retroactively to all applications made on or after 1 October 2020.

Discharge of residual debt is open to all natural persons. Self-employed persons, freelancers and private individuals may therefore apply. However, in the event of the insolvency of a GmbH, discharge of debt is not possible, as a GmbH is a legal entity.

A debtor who applies for the discharge of residual debt must endeavour to find gainful employment as soon as insolvency proceedings are opened. The resultant attachable earnings or equivalent emoluments must be transferred to a trustee for the next 3 years. Execution and enforcement measures by individual creditors are not permitted during this good behaviour period. Discharge of residual debt may be refused if the debtor does not pursue any gainful employment or does not make sufficient effort to do so, or if they are convicted of insolvency offences. Delaying in filing a petition in insolvency is in itself an insolvency offence.

Erforderliche Unterlagen

Voraussetzungen

Kosten

Verfahrensablauf

Bearbeitungsdauer

Frist

weiterführende Informationen

Business start-up portal (Existensgründerportal) of the Federal Ministry of Economic Affairs and Climate Action (Bundesministeriums für Wirtschaft und Klimaschutz - BMWK)

- Ablauf des Regelinsolvenzverfahrens (Course of standard insolvency proceedings), available for download

Modul	Sachverhalt
	• Checkliste: Signale für eine Liquiditätskrise (Signs of a liquidity crisis), available for download
Hinweise	
Rechtsbehelf	
Kurztext	
Ansprechpunkt	
Zuständige Stelle	
Formulare	
Ursprungsportal	Insolvency proceedings and liquidation of companies, Insolvenzverfahren und Liquidation von Unternehmen