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The "Act on the Temporary Suspension of the Duty to Apply for Insolvency and to Limit the Liability of Corporate Bodies in the Event of Insolvencies Caused by the COVID-19 Pandemic (COVID-19 Insolvency Suspension Act - COVInsAG)" - COMMENTARY

On 23 March 2020, the Federal Ministry of Justice and Consumer Protection (BMJV) issued a draft "Act on Mitigating the Effects of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedural Law"; the Federal Cabinet adopted this draft on the same day as a drafting aid for the coalition parties. The draft legislation, which will already have taken effect at the time of the publication of this article (based on knowledge to date), provides for the temporary suspension of the duty to apply for insolvency under insolvency law and concurrently provides for further legal consequences, in particular the limitation of the liability of corporate bodies for payments made during the COVID-19 pandemic. This article comments on the insolvency law regulations that came into force under the name "COVID-19 Insolvency Suspension Act" ("COVInsAG").

I. Background, legislative procedure and prior regulations

1. Introduction

There are already indications that, in addition to the medical and social consequences of the COVID-19 pandemic, the economic consequences in particular will take on unprecedented proportions. These will clearly overshadow even the consequences of the financial crisis of 2008/09. To the extent that this earlier crisis originated in the financial sector, its consequences could be borne on the shoulders of an essentially strong real economy; today, this real economy is affected. The existence of very healthy companies was acutely threatened even before the beginning of the Corona crisis and now infects the financial sector. The fear is not exaggerated that even the strongest economies worldwide are threatened with collapse. There is therefore no alternative other than rapid and courageous political action, not only in combatting the spread of the virus, but also in fighting the conflagration in the economy, especially among small and medium sized businesses which are the foundation of German prosperity.

The Federal Government has promised assistance to affected businesses in the form of a bundle of measures which, in addition to micro-invasive measures such as tax deferrals, primarily includes a "protective shield of billions".[1] This has already been launched and it is intended to provide unbureaucratic and rapid assistance to companies in difficulties, among other things, through facilitating access to development loans and bank guarantees by increasing the risk contributions assumed by the Federal Government. However, providing and opening access to aid, not to mention processing bottlenecks at the involved banks, costs time. That is time that is not given under § 15a of the German Insolvency Act (InsO) to companies in acute existential distress. If that provision is applied in the current situation, even the 3-week maximum application period is likely to be exhausted. Even if the likelihood of rapid assistance allowed for a delay, the payment prohibitions under corporate law, above all § 64 of the German Limited Liability Companies Act (GmbHG), make it difficult to continue

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[1] See the joint press release of the Federal Ministry of Finance (BMF) and the Federal Ministry of Economics and Energy (BMWi) dated 14 March 2020, "*Ein Schutzschild für Beschäftigte und Unternehmen*", p. 3 *et seq*. available at: https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schutzschild-fuer-beschaeftigte-und-unternehmen.pdf?__blob=publicationFile=14, last accessed on 24 March 2020.

businesses. In order to give affected businesses this necessary time, Federal Minister of Justice *Lambrecht* announced on 16 March 2020 that the aid programme adopted by the Federal Government would be accompanied by a suspension of the duty to apply for insolvency. According to the press release, the legislation passed in the wake of natural disasters in 2002, 2013 and 2016 is intended to serve as a model.[2]

2. Model: Reconstruction assistance legislation in 2002, 2013 and 2016

An obvious option was to draw upon the reconstruction assistance legislation passed in 2002, 2013 and 2016, which already suspended the duty to apply for insolvency under § 15a InsO in response to a temporary crisis. Although the suspension of the duty to apply for insolvency under this template legislation was necessary, the scope of application in that legislation clearly fell short of practical needs. In particular, the impact of grounds for insolvency, especially on payment prohibitions under corporate law, was not identified at the time and was accordingly not regulated.[3] The target aimed at by the legislator, namely to protect previously-healthy companies from insolvency as an existential threat through no fault on their part, was therefore missed. In addition, the interpretation of the causality requirement, namely that the occurrence of the grounds for insolvency had to be "based on" the effects of the respective natural disaster, was also subject to considerable legal uncertainty.[4]

3. The legislative procedure for COVInsAG

The first "Draft Act on the Temporary Suspension of the Duty to Apply for Insolvency [...] Due to the Coronavirus SARS-CoV-2"[5] relied closely upon this template legislation, but at the same time took into account the criticism of these templates. For example, the draft set out that insolvency grounds posed must be "based on" the effects of the COVID-19 pandemic and provided for the suspension of the duty to file an application only "as long as there is a reasonable prospect for restructuring due to serious financing or restructuring efforts on the part of an applicant". However, in comparison to the template legislation, relief was provided for in that the effects of the pandemic are deemed to cause the insolvency grounds if these arose on or after 13 March 2020. In addition, the draft also already closed the gaps for payment prohibitions that had been identified in the template legislation by providing that payments required for the continuation of business operations are compatible with the due care of a prudent and conscientious manager.

The call for much more far-reaching regulation was quickly heard in the discussion that immediately flared up.[6] In particular, it appeared urgent to address lender liability and claw-back risks in the bridging period. It is welcomed that the BMJV has reacted to this in its further drafts, made improvements, and finally, presented a comprehensive catalogue of regulations in the final draft of the COV-

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[2] Press release of the BMJV dated 16 March 2020, available at https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2020/031620_Insolvenzantragspflicht.html, last accessed on 24 March 2020.

[3] See *Schmidt*, ZInsO 2013 p. 1463 at 1466; *Müller/Rautmann*, DStR 2013 p. 1551 at 1553.

[4] Although it was predominantly argued that indirect reference to the respective disaster was sufficient, see *Müller/Rautmann*, DStR 2013 p. 1551 at 1552; *Schmidt*, ZInsO 2013 p. 1463 at 1465; doubts were, however, based on general principles at the expense of the applicants, which increased the risk of liability, see *Landry/Knapp*, jurisPR-HaGesR 7/2013 note 1.

[5] Draft Act on the Temporary Suspension of the Duty to Apply for Insolvency and on a Stay of the Interruption of Criminal Court Hearings Due to the Coronavirus SARS-CoV-2 in legislative process status as of 17 March 2020 (CorInsAG (processing status: 17 March 2020, 11:34 am)).

[6] See e.g. the announcement of TMA Deutschland, available at https://www.tma-deutschland.org/tl_files/presse/pressemitteilungen/TMA-Pressemitteilung-Covid-19_2020-03-13.pdf.

InsAG, which was adopted by the Federal Cabinet on 23 March 2020 as a drafting aid for the coalition parties. According to the announcements of the Ministry of Justice, the law will be passed in week 13 of 2020.

4. Overview of the COVID-19 Insolvency Suspension Act (COVInsAG)

The COVInsAG was initiated as § 1 of the "Draft(s) Act to Mitigate the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedural Law" (the Act) and will enter into force with (retroactive) effect as of 1 March 2020.[7]

The legislation consists of four provisions. § 1 regulates the fundamental suspension of the duty to apply for insolvency until 30 September of this year. § 2 provides for further legal consequences of this suspension, which, in addition to limiting the payment prohibitions, are intended in particular to create incentives to inject new liquidity into affected businesses and to maintain business relations with them.[8] § 3 COVInsAG limits the ability for creditors to file insolvency applications. Finally, § 4 COVInsAG contains an authorisation to issue regulations on the basis of which the validity of § 1 to § 3 (which are limited in time until 30 September 2020) can be extended until 31 March 2021 at the latest.

II. § 1 COVInsAG: Suspension of the duty to apply for insolvency

§ 1 (1) COVInsAG fundamentally suspends the duty to file an insolvency application (with attaching civil and criminal liability) under § 15a InsO and § 42 (2) of the German Civil Code (BGB) for a period from 1 March 2020 to 30 September 2020.

1. Systematic attribution

1.1 Duty to apply for insolvency *de lege lata*

The purpose of the duty to apply for insolvency pursuant to § 15a InsO and § 42 (2) BGB is to remove non-viable businesses from the commercial market at an early stage, i.e. usually before illiquidity occurs, for their own protection and in the interest of creditors, and to transfer them to collective enforcement proceedings.[9]

This purpose is called into question if external circumstances make it impossible to reliably forecast the economic development of a business. Since over-indebtedness (§ 19 InsO) often occurs before illiquidity (§ 17 InsO) and the relaxed, so-called "modified two-stage concept of over-indebtedness"[10] introduced in the course of the Financial Market Stabilisation Act[11] requires an examination of whether the continuation of the business is still predominantly likely under the circumstances (lack

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[7] See Art. 6 of the Draft Act on Mitigating the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedural Law.

[8] Press release of the BMJV dated 23 March 2020, available at: https://www.bmjv.de/SharedDocs/Artikel/DE/2020/032320_Corona_FH.html, last accessed on 24 March 2020.

[9] Heidelberg Commentary/Rüntz/Laroche, InsO, 9th ed. 2018, § 19 note 2.

[10] Refers back to *K. Schmidt*, AG 1978 p. 334 *et seq*. Temporarily introduced with the Financial Market Stabilisation Act (FN 11). In force for an unlimited period of time since the Act on the Introduction of Remedies in Civil Procedure and on the Amendment of other Provisions of 5 December 2012, Federal Law Gazette I, 2012 p. 2418.

[11] Act on the Implementation of a Package of Measures to Stabilise the Financial Market of 17 October 2008, Federal Law Gazette I p. 1982.

of a continuation forecast[12]), the determination of a positive continuation forecast is always decisive for the assessment of a filing duty.[13] The purpose of this forecast is to determine the medium-term[14] viability of the business.[15] Prevailing opinion holds that this must be assessed on the basis of an examination of sustainable liquidity in the forecast period.[16]

However, such a test is simply not feasible during the on-going Corona pandemic. It is currently not possible to update the earnings and finance plan and it is also not possible to predict when market conditions and supply and sales relationships will return to normal. On this factual basis, an expert restructuring opinion cannot be prepared with any seriousness. However, in this case, a positive continuation forecast cannot be supported; if there is also mathematical over-indebtedness based on liquidity values of assets, the duty pursuant to § 19 InsO to obtain a restructuring opinion will apply. Although aid programmes are underway to deal with the exogenous consequences for fundamentally viable businesses, numerous businesses with a right to exist[17] would be taken out of the market, which is not the purpose of the duty to apply for insolvency.

1.2 Purpose of the COVInsAG

The purpose of the COVInsAG is to obtain the time needed to implement the aid programmes and normalise the economic situation: Businesses should not have to go through insolvency proceedings because they are unsuccessful in obtaining available financial aid within the three-week period, whether in the form of state aid or other financing and restructuring arrangements with creditors and capital providers.[18] In the special situation of the crisis caused by the effects of the Corona pandemic, the duty to apply for insolvency and associated liability is detrimental to the economy as a whole, since it threatens to force a large number of economically sound businesses into insolvency proceedings even though financial aid is available. The statute therefore provides for the suspension of the duty to apply for insolvency for the duration of the effects of the COVID-19 pandemic.

2. Basic suspension of the duty to apply for insolvency

The general suspension of the duty to apply for insolvency is set out in § 1 sentence 1 COVInsAG. In contrast to the preliminary draft and the template legislation, the COVInsAG provides for an explicit suspension not only of § 15a InsO, but also of § 42 (2) BGB, and therefore also covers the associations, foundations, and institutions which are currently in the focus of public reporting.

2.1 Regulatory system of § 1 COVInsAG

2.1.1 Principle: Suspension of the duty to apply for insolvency (sentence 1) as a general rule

§ 1 sentence 1 COVInsAG provides for the regular and general suspension of the application duty pursuant to § 15a (1) InsO and § 42 (2) BGB until 30 September 2020. In contrast to the preliminary

[12] See for example MüKoInsO/Drukarczyk/Schüler, § 19 note 55 *et seq*.
[13] Scholz/Bitter, GmbHG, 12th ed. 2018, before § 64 note 30.
[14] See BGHZ 129 p. 136 at 155; BGHZ 119 p. 201 at 214 *et seq*.
[15] Bork/Schäfer/Bork, GmbHG, 4th ed. 2019, § 64 note 12.
[16] See BGHZ 119, p. 201; IDW S 11 (IDW Standard: Assessment of the existence of grounds for opening insolvency proceedings, IDW Fachnachrichten 2015 p. 202) notes 93 and 57 *et seq*.; see also *Bork*, ZIP 2000 p. 1709 at 1710; *Fischer*, NZI 2016 p. 665; *K. Schmidt*, ZIP 2013 p. 485 note 49; *Thole*, ZInsO 2019 p. 1622 at 1623; A.A. *Frind*, NZI 2018 p. 431 at 434.
[17] See in this respect the list on p. 6 of the Begr. CorInsAG (processing status: 17 March 2020, 11:34 am); see now also p. 18, 20 and 28 of the Begr.
[18] Begr. COVInsAG p. 19.

drafts or the template legislation from 2002, 2013 and 2016, the provision does not require a positive examination of whether the insolvency grounds are "based on" the pandemic or the initiation of financing / restructuring efforts. Sentence 1 does not directly formulate requirements as to their seriousness or prospect of success. On the contrary, § 1 sentence 1 COVInsAG does not contain any constituent tests. The provision therefore reverses the rule-exception relationship known from its predecessor provisions: As a rule, all duties to apply for insolvency are suspended until 30 September 2020. This decision by the legislator is more than just symbolic in character; by reversing the rule-exception relationship, the allocation of the burden of proof and the burden of substantiation is - reversed. The person who invokes the exception to the suspension must substantiate and prove the existence of the conditions for the exception to the rule.[19]

2.1.2 (Reverse) exception: Exceptional continuation of the duty to apply (sentence 2)

Under the conditions set out in sentence 2, the general suspension of the duty to apply for insolvency proceedings will not apply under exceptional circumstances. According to this, the duty to apply for insolvency is not suspended if the insolvency is either not due to the consequences of the spread of the COVID-19 pandemic (alternative 1) or if there is no prospect to remedy existing illiquidity (alternative 2).

Considered in the overall context of the duty to file an application, at first glance, sentence 2 does not amount to an exception, but instead is a "(reverse) exception", since the provision sets out conditions under which the basic statutory case of the duty to apply for insolvency is revived. If one of the two alternative constituent tests in sentence 2 is met, the "normal" duty to apply for insolvency pursuant to § 15a InsO or § 42 (2) BGB applies. It is clear from the formulation of the suspension principle in sentence 1 and, in particular, also from the negative formulation of sentence 2 (*"This does not apply"),* which contrasts with it, that sentence 2 amounts to a true "genuine" statutory exception in terms of legal doctrine. In addition to qualifying as a (reverse) exception, this also requires the party invoking the existence of these exceptions (no suspension and no probability of remedying existing illiquidity) to argue these. At the same time, it further heightens the requirements for the burden of proof and substantiation which are already incumbent on that party.[20] In this respect, the wording "*This does not apply*" or "*unless*"[21] at the beginning of an exception has a very similar effect to a rebuttable presumption rule.[22] Sentence 2 thus presupposes that, for any exception to the general suspension, a strict standard of substantiation and proof must be applied to show the existence of grounds for the exception.

2.1.3 Presumption rule in sentence 3

Having regard to this background, the presumption rule in sentence 3 appears redundant, at least in view of the exceptional grounds that the insolvency grounds are not based on the pandemic. According to sentence 3, in the absence of illiquidity on 31 December 2019, it is assumed that insolvency grounds are based on the effects of the COVID-19 pandemic and that there is a prospect to remedy existing illiquidity. According to the legislative reasoning, this is a rebuttable presumption; in view of the purpose of the presumption, however, the rebuttal is only possible if there is "no doubt" about

[19] See Begr. COVInsAG p. 22 and p. 26.
[20] See in this respect for (the probably most tangible case of) § 280 (1) sentence 2 BGB Staudinger/Schwarze (2019) BGB § 280 note F 2.
[21] See the formulation at p. 4 COVInsAG
[22] For example, BGH ZIP 2013 p. 315 note 18; BGH GWR 2013 p. 69 note 19, each on § 280 (1), sentence 2 BGB.

the lack of causality of the pandemic or the lack of a prospect to remedy existing illiquidity.[23] In this respect, "the highest requirements must be set".[24] Sentence 3 is intended in this way to provide further relief for the party obliged to file an application.[25]

However, with regard to the exception that insolvency grounds are not in fact based on the effects of the COVID-19 pandemic, this presumption does not in fact justify any further relief in favour of the applicant. The regulation system of sentences 1 and 2 already leads to a reversal of the burden of proof subject to the highest requirements. The presumption rule would therefore have added value only if it were irrefutable. A rebuttable presumption cannot achieve more than the reversal of the burden of proof, which has already been imposed in any case.

As the legislative reasoning to the legislation explicitly states, sentence 3 also has no weight in terms of being a reverse conclusion, namely that less strict requirements apply to cases that are not covered by the presumption rule (having regard to the burden of proof and substantiation). The legislative reasoning for the legislation expressly clarifies here that the non-application of the presumption under sentence 3 has no effect on the burden of substantiation and proof under sentence 2.[26] Moreover, since a presumption rule cannot dogmatically influence the interpretation of a constituent test contained in a statute, but always has legal consequences only at the level of the burden of substantiation and proof,[27] any interpretation to the effect that stricter requirements must be imposed on the definition of the requirement of reliance within the scope of application of the presumption rule is also ruled out. Sentence 3 therefore only has a scope of application when examining the second exception ground, namely the lack of prospect to remedy existing illiquidity.[28]

2.2 Application of the (reverse) exceptions in sentence 2

2.2.1 Lack of connection to cause in terms of § 1 sentence 2 alternative 1 COVInsAG

The first exception to the suspension rule applies when it is substantiated and proven that the insolvency grounds are not based on the effects of the Corona pandemic. The legislative reasoning does not explicitly address how the term "based on" should be interpreted.

The purpose of the legislation must be interpreted broadly. Having regard to the legislative reasoning for previous norms and the earlier drafts of the COVInsAG, it can be assumed that insolvency grounds are not based on the effects of the pandemic only where the debtor has become insolvent due to the virus-induced interruption of supply chains or declining sales. The same also and already applies where there is only an indirect causal connection, e.g. if the debtor has become insolvent based on a pandemic because, for instance, customers no longer can or want to use services (to the same extent) due to fear of infection or due to official orders, or if employees of the business are prevented from working due to official orders, on the instructions of the employer, due to their own illness or the necessary care of their own children due to school closure.[29] "Based on" in terms of § 1 sentence 2 alternative 1 already exists if the occurrence of the insolvency or the lapse of the continuation

[23] Begr. COVInsAG, p. 26.
[24] Begr. COVInsAG, p. 26.
[25] Begr. COVInsAG, p. 26.
[26] Begr. COVInsAG, p. 22.
[27] Instead of all MüKoZPO/Prütting, 5th ed. 2016, ZPO § 292 note 1.
[28] See below § 1 section 2.2.2.
[29] See Begr. CorInsAG (processing status: 17 March 2020, 11:34 am), p. 5.

forecast in terms of § 19 (2) sentence 1 half-sentence 2 InsO is due to the pandemic in terms of a *conditio sine qua non*, namely directly or indirectly.

"Based on" in terms of § 1 sentence 2 alternative 1 is therefore lacking if there was a duty to file an application even before the Corona crisis. Accordingly, the suspension of the duty to file an application does not benefit so-called "zombie companies",[30] namely those which have not had a reliable continuation forecast for quite some time and from which the fig leaf is only now removed due to the effects of the pandemic. If an *ex-post* evaluation shows that there was no continuation forecast even before the crisis-related slumps began, the duty to apply for insolvency continues to be posed. This is also correct: Anyone who has interpreted the continuation forecast very - not to say too - generously to date should not now be legitimised by the legislation retroactively, since the crisis merely revealed the cessation of the continuation forecast, but did not itself trigger it.

In order to apply the exception set out in sentence 2 alternative 1, however, specific substantiation and proof is needed that insolvency grounds already existed before the effects of the crisis. The reversal of the burden of proof under § 19 (2) sentence 1 half-sentence 2 InsO does not apply. Accordingly, the risk of a false assessment of the continuation forecast lies in principle with the party obliged to file an application, since § 19 (2) sentence 1 half-sentence 2 InsO (with its negative wording "unless") assumes as its footing the absence of a positive continuation forecast and accordingly, that over-indebtedness at law exists.[31] However, within the scope of application of the COVInsAG, this presumption is superseded by the rule imposed by § 1 sentence 1 and the reversed rule-exception arrangement. If, as a result, it cannot be proven that illiquidity or over-indebtedness existed prior to the occurrence of the effects of the crisis, the exception in sentence 2 does not apply and the suspension remains in force.

The equivalent causality requirement under the *conditio sine qua non* formula, however, does not mean that alternative courses of causation may be disregarded having regard to the purpose of the statutory provision. If a business would have become insolvent in a foreseeable manner even without the effects of the pandemic, the suspension of the duty to file an application does not apply either. The same strict standards apply to the burden of proof and substantiation.

The situation is different if the affected business was already in difficulties before the pandemic, but this by itself did not found a duty to file an application.[32] In terms of the Act, singular causality or even primary causality is not required for "based on" under the evaluative framework. At the same time, however, according to the purpose of the COVInsAG, any merely completely secondary causality of the effects of the pandemic cannot be sufficient. This is also supported by the legislative reasoning. The legislative reasoning considers the simplification of evidence in sentences 2 and 3 to be necessary because "it may be unclear whether the insolvency is due to the effects of the COVID-19 pandemic or not".[33] If the legislator were to assume that even a completely minor cause would suffice, such uncertainties would hardly exist. According to the will of the legislator and the purpose of the Act, which is to prevent only those insolvencies caused by the Corona pandemic, a completely minor

[30] On the concept of the "zombie business" see the OECD study "The walking dead? - Zombie Firms and Productivity Performance in OECD Countries" dated 10 January 2017.
[31] See Federal Court of Justice NZG 2010 p. 1393, note 11; Federal Court of Justice NZI 2007 p. 44 note 3.
[32] This was already the case in the legislative reasoning of the much more cautious CorInsAG (processing status: 17 March 2020, 11:34 am), p. 9.
[33] Begr. COVInsAG, p. 26.

cause of the effects of the pandemic is therefore not sufficient to "cause" the situation. In any case, the consequences triggered by the pandemic must have provided the final impetus that triggered the insolvency. The above applies to the burden of proof and substantiation; it is incumbent on the party claiming that the insolvency was not "based on" this to prove that.

2.2.2 Lack of a prospect to remedy illiquidity in terms of § 1 sentence 2 alternative 2 COVInsAG

The second exception provided for in the second alternative of sentence 2 is the lack of a prospect to remedy existing illiquidity. The suspension of the duty to file an application does not apply if there is no (further) prospect that the business will be able to overcome existing illiquidity.

It is noticeable that, according to the wording of the Act, this exception refers solely to the lack of a prospect to remedy existing illiquidity. A lack of a prospect to eliminate over-indebtedness does not, however, at first glance, conflict with the suspension of the duty to apply for insolvency. Neither the legislation itself nor the legislative reasoning for the legislation refers to an assessment of over-indebtedness. This is equivalent to a temporary abolition of § 19 InsO until the end of September. However, this is appropriate having regard to the current incalculability of the duration and extent of the effects of the pandemic and the associated inability to prepare serious planning. There is no prospect to eliminate a negative continuation forecast (and thus over-indebtedness) as long as the development of the consequences of the pandemic is not foreseeable.

However, this does not lead to the *prima facie* conclusion that the applicant would be completely suspended from the basic obligation of forward-looking financial planning. If the party obliged to file an application does not have forward-looking financial planning appropriate to the circumstances, there is also no prospect to remedy illiquidity in terms of the Act. This mandatory result follows from the recognised requirements for the remedying of illiquidity within the scope of application of § 17 (2) InsO. According to the Federal Court of Justice,[34] the restoration of liquidity presupposes that it is ensured that the debtor is able to meet not only its current liabilities but also its liabilities that will shortly become due. Once illiquidity has occurred, it can only be remedied if the debtor again has sufficient liquid funds to meet all liabilities that are due. It is[35] therefore properly necessary to restore liquidity on a sustainable basis.

This interpretation must also apply to the constituent test for the prospect to remedy illiquidity in terms of § 1 sentence 2 COVInsAG. This already follows from the fact that the COVInsAG does not intervene in the grounds for filing for insolvency. In addition, according to the legislative reasoning, the COVInsAG also pursues the purpose of giving businesses the opportunity to continue their business and to eliminate the liquidity situation.[36] The legislation therefore expressly aims to remedy insolvency grounds in the long term; in other words, it is not intended to support businesses which, after overcoming Corona-related restrictions, will not be able to survive on their own. The financial aid measures within the package of measures are also only intended to compensate for direct Corona losses; the business must be in a position to close any gaps beyond this under its own business planning after the end of the Corona-related exceptional circumstances. Although this does not

[34] Federal Court of Justice dated 25 October 2012 - IX ZR 117/11, ZIP 2012 p. 2355; see also Federal Court of Justice dated 12 October 2006 - IX ZR 228/03.

[35] See Praxis des Handels- und Gesellschaftsrechts/Bauer, 4th ed. 2018, § 28 Insolvency and Criminal Law, Insolvency Company Law, note 98.

[36] Begr. COVINSAG p. 26.

mean that a continuation forecast in terms of § 19 InsO would be needed prior to the re-entry into force of the application duty, it does mean that a sustainable restoration of liquidity is required for the review of the exceptions. This in turn means that a plan must be drawn up beyond the suspension period and must render it plausible that the measures will not only take effect in the short term, but will serve to restore a viability that existed prior to the corona-related limitations by way of the business' own efforts. If this cannot be shown, there is no prospect to remedy illiquidity in terms of the norm. The criterion of the sustainability of financial planning or the restoration of liquidity is therefore also already a direct constituent test for the concept of illiquidity in terms of § 1 sentence 2 a 2 COVInsAG.

This also imposes a duty upon the applicant to prepare forward-looking financial planning. Similar to the constituent tests for payment prohibitions,[37] the fundamental duty of self-monitoring on the part of the corporate body remains in force and is expressed in the duty to undertake forecasting planning. The COVInsAG does not seek to release corporate bodies from their duties to properly manage the business and monitor it, but only from the (specific) consequences of the pandemic. According to the purpose of these measures, due care must accompany the suspension of the duty to apply for insolvency and the associated risks for the economy as a whole, as well as the use of public assistance.

For the burden of proof, this results in a graded burden of proof system based on the principles recognised for payment prohibitions:[38] Strict requirements must indeed be imposed on the substantiation and proof of the lack of any prospect to remedy illiquidity having regard to the "rule-exception premise". If, however, it can be demonstrated and proven that the party required to file an application violated the duty of self-monitoring, in particular that no forecasted liquidity planning was undertaken, the constituent tests for sentence 2 are met: If restoration of liquidity requires planning, such planning must be verifiably available. This means that, despite the complete suspension of § 19 InsO, businesses subject to the filing duty must draw up a liquidity plan taking into account the current framework conditions from which the need for any assistance can be determined and which can be expected to ensure liquidity even after the pandemic has been overcome.

In this respect, however, the business obliged to apply for insolvency benefits from the presumption rule of § 1 sentence 3 COVInsAG – and this is the only direct[39] scope of application of this provision. In this context, it follows from the presumption rule that the business required to apply for insolvency, and whose insolvency grounds did not occur until 2020, may assume in the context of its liquidity planning that it will also receive financial assistance to cover Corona-related payment defaults in the necessary amount. This result of interpretation is also supported by the fact that the state aid measures, in particular for the "protective shield of billions", also use 31 December 2019 as the relevant cut-off date.[40]

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[37] See below § 2 section 4.1.

[38] In addition, instead of all Baumbach/Hueck/Haas, 22nd ed. 2019, GmbHG § 64 note 115.

[39] See with regard to further evaluations that can be derived from the presumption rule in this context, see § 2 sections 4.1 and 4.2.5 below.

[40] See the joint press release of the BMWi and the BMF (FN 1); see also the information on the use of the "KfW Corona Aid" on the homepage of the Kreditanstalt für Wiederaufbau, available at https://www.kfw.de/KfW-Konzern/Newsroom/Aktuelles/KfW-Corona-Hilfe-Unternehmen.html, last accessed on 24 March 2020.

However, if there is a lack of overall planning or if this planning undoubtedly indicates that illiquidity will persist after 30 September 2020 or will reoccur in the short term, this will lead to the exception and the obligation to apply for insolvency despite the high requirements set out in the legislative reasoning for the Act.

2.3 Legal consequences of the suspension under § 1 sentence 1 COVInsAG

2.3.1 Suspension of the duty to apply for insolvency until 30 September 2020 (or 31 March 2021)

The duty to apply for insolvency is suspended for the duration of the restructuring and financing measures and until 30 September 2020 at the latest. The duty to apply will be revived as time passes. In accordance with § 249 (1) of the German Civil Code of Procedure (ZPO), the three-week maximum period under § 15a (1) sentence 1 InsO then begins to run anew.[41]

If, on the other hand, the prospect of liquidity restoration ceases to exist during the period in which § 1 sentence 1 applies, it follows from the purpose of the COVInsAG that – from this moment on – the exception under § 1 sentence 2 applies and the party obliged to apply for insolvency is obliged to do so immediately in terms of § 15a InsO or § 42 (2) BGB. Once the conditions for it no longer apply, an initial suspension can therefore be cancelled *ex nunc.*[42]

2.3.2 Legal consequences as of October 2020 and April 2021

The limitation of the suspension to a specific period of time is accompanied by the resumption of the general provisions as of the cut-off date. Accordingly, any existing over-indebtedness as of 1 October 2020, or, in case the regulation authorisation is asserted, as of 1 April 2021, will again trigger the obligation to apply for insolvency. If, however, the economy continues to suffer from the after-effects of the pandemic – which is quite likely – there will be difficulties in forecasting liquidity and earnings planning at this time as well. Having regard to the presumption rule in § 19 (1) sentence 2 InsO, which will again be applicable upon the expiry of § 1 COVInsAG, a large number of businesses would be required to apply for insolvency immediately.

However, with its limitation to September 30 of this year, the legislator seems to assume that, at this point in time, the massive measures undertaken to prevent infection will probably no longer be necessary and that the economic consequences will probably have been mitigated. This is also shown by the legislative reasoning for the Act: According to this, the suspension is for a period of time within which the disruptions caused by the spread of the virus can be remedied through financing and restructuring negotiations.[43] The legislator thereby assumes that the causal effect of the Corona pandemic on the inability of a business to prepare a positive continuation forecast will have been eliminated by 30 September 2020, or by 31 March 2021 at the latest. However, if the hope of the legislator that is expressed here, namely that rudimentary normalisation can be expected after 30 September 2020 or 31 March 2021, proves to be false, this must not be at the expense of the business, and its continued economic activity must be protected against liability and punishment despite the long-term prospects of recovery. The requirements for the continuation forecast must therefore be modi-

[41] This is not explicitly stated in the provisions of COVInsAG, nor in the Begr. COVInsAG. Having regard to the purpose of the norm as well as the clarification provided in this respect in the Begr. CorInsAG (processing status: 17 March 2020, 11:34 am), p. 9, it can be assumed that a new start of the period of time according to § 249 (1) ZPO is the legal consequence of the end of the suspension by the lapse of time.

[42] For more details see below § 2 at III 4.5.

[43] See COVInsAG Begr. p. 24 and p. 25, and more explicitly in the Begr. CorInsAG (processing status: 17 March 2020, 11:34 am), p. 9.

fied in the sense of a "crisis-adjusted continuation forecast". According to this, an adequate forecast for the business' continuation is already posed in cases in which "normal" economic framework and market conditions have not yet been restored and a normalised forecast is therefore not possible. This presupposes that there is a justified prospect that the business will (with the continuation of the current figures and with the restoration of normal framework and market conditions as they applied before the crisis occurred and that served as the basis for the preparation of continuation forecasts in pre-crisis times), with a predominant likelihood,[44] have a positive continuation forecast. If these requirements are met, the business has adequately demonstrated that it has a continuation forecast in terms of § 19 (2) InsO. As soon as a normalisation of the circumstances is foreseeable and a normalised forecast for the future is therefore possible, this crisis-adjusted forecast must be replaced by the conventional continuation forecast. In this way, the converse effect of the purposes of the COVInsAG can be prevented after its expiry.

III. § 2 COVInsAG: Consequences of the suspension

1. Systematic attribution

The COVInsAG extends significantly beyond the contents of the first drafts[45] and extends the legal protective shield over affected businesses considerably further. In addition to liability rules under corporate law, claw-back provisions are also stayed, finely-differentiated court decisions on (self-interested) restructuring loans as violations of public policy[46] became wastepaper at the stroke of a pen and the fundamental principles of the law on shareholder debt financing are encroached upon. All of these measures follow the simple verdict that the end justifies the means. However, even in spite of the fact that extraordinary circumstances justify extraordinary measures, a large number of the legal regulations can also be justified dogmatically and are a logical consequence of the legislator's undoubtedly formulated purpose for the statute.

2. Legislative methodology and scope of application

While § 1 COVInsAG directly governs the constituent tests and the legal consequences of the suspension of the duty to apply for insolvency pursuant to § 15a InsO, § 2 COVInsAG merely sets out further legal consequences for the suspension of the duty to apply for insolvency. However, it also imposes additional constituent tests for each of these.

Methodologically, § 2 (1) COVInsAG amounts to a referring provision from a factual perspective, since only § 1 COVInsAG is referred to for the application of the legal consequences provided for. The wording that the legal consequences of § 2 COVInsAG occur "to the extent that" the duty to apply for insolvency is suspended is misleading. This is because the statute does not merely provide for partial suspension, e.g. with regard to only individual application grounds. Otherwise, in their temporal application, the legal consequences of § 2 COVInsAG extend in part beyond the duration of the suspension of the duty to apply for insolvency. If the wording "to the extent that" were to be taken literally, the consequences of the suspension would also have to end with the suspension itself. However, this is obviously not intended, which is why the wording "to the extent that" must be tolerated as a permissible linguistic inaccuracy on the part of the legislator. The scope of application of the consequences imposed by § 2 COVInsAG is therefore always opened if the rule contained in § 1 sentence 1

[44] General standard of probability as a rule, continuation forecast, see instead of all Uhlenbruck/Mock, 15th ed. 2019, InsO § 19 note 228.
[45] See only the previous draft of the CorInsAG (processing status: 17 March 2020, 11:34 am)
[46] See most recently Federal Court of Justice dated 7 March 2017 - XI ZR 571/15, ZIP 2017 p. 809.

COVInsAG applies, i.e. the duty to apply for insolvency is suspended in any case until 30 September 2020, and none of the (reverse) exceptions set out in § 1 sentence 2 COVInsAG (re-imposing the duty to apply for insolvency) intervenes.

However, as a referral norm or as a referring provision, it is immanently clear from § 2 (1) COVInsAG that the application of the norm to which reference is made, namely § 1 COVInsAG, can only be correspondent in nature. Inappropriate comparisons must be avoided; differentiations required by the nature of the subject matter, i.e. the living conditions regulated, may not be excluded.[47] This must be complied with in applying § 2 COVInsAG and determining whether facts are covered by it (*Subsumtion*).

The legislator uses a different legislative methodology in the individual regulatory orders contained in § 2 (1) nos. 1 to 4 COVInsAG. Whereas § 2 (1) nos. 1 to 3 COVInsAG contain deemed exceptions from the statute at the constituent test level and thereby contain so-called covert restrictions (through which facts of life that are known to be identical result in an intended differentiation of legal consequences[48]), § 2 (1) no. 4 is a restrictive legal provision which normatively excludes the application of § 130 InsO and also § 131 InsO (within limits, namely in the cases expressly mentioned in no. 4). The legislative methodology selected in no. 4 for § 130 InsO is particularly meaningful; it would have been simple to first address a deemed lack of creditor prejudice (§ 129 InsO) (selected as a legislative methodology for the return of loans in no. 2) and to apply this in no. 4 to other claw-back tests in a general way, in order to then restrict it for incongruence claw-back with the exception of the cases mentioned under (a) to (e). It cannot be assumed that the legislator unknowingly selected a different legislative methodology. Instead, the choice of the method means that it was the legislator's intent to bring about differentiated legal consequences. The further explanations of the legislator also support this: The legislative reasoning for no. 4 states that, beyond the cases of incongruence claw-back that are not expressly protected there, claw-back may continue to take place if the counterparty was aware that the debtor's restructuring and financing efforts were not suitable to remedy insolvency grounds. With this (reverse) exception in the legislative methodology selected, the legislator clarifies that, in contrast to the provision contained in § 2 (1) no. 2 COVInsAG, it is no longer possible to invoke any lack of creditor prejudice in terms of § 129 InsO within the scope of application of the (reverse) exception.

3. General initial constituent test for the application of the consequences imposed (§ 2 (1) and (2) COVInsAG)

The constituent tests for application in § 2 COVInsAG have a two-stage structure: The general initial constituent test for the application of the consequences imposed is the reference to § 1 and the suspension of the duty to apply for insolvency. The individual consequences imposed by § 2 (1) nos. 1 to 4 COVInsAG then contain further individualised tests related to the specific consequences. Accordingly, at the first stage, the general applicability of § 2 (1) COVInsAG must first be established, in order to then examine at the second stage the individualised tests required with regard to each of the individual legal consequences.

At the first stage of the general initial constituent test, § 2 (1) COVInsAG refers to § 1 COVInsAG. The general condition for the debtor to be able to rely upon the consequences of the suspension under § 2 (1) COVInsAG is therefore the determination that the duty to apply for insolvency is suspended.

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[47] So explicitly *Larenz*, Methodenlehre der Rechtswissenschaft (6th ed. 1991), p. 261.
[48] *Larenz* (footnote 47), p. 262.

For debtors who are not subject to a duty to apply for insolvency or in whose assets no grounds for insolvency have (yet) materialised, the fact-expanding norm under § 2 (2) COVInsAG applies, which sets out that (1) nos. 2 to 4 also apply to those businesses and entrepreneurs.

It follows from this that: Where § 1 sentence 1 COVInsAG (suspension of the duty to apply for insolvency) does not apply to a business that is generally required to apply for insolvency under § 15a InsO or § 42 (2) BGB, namely because the exception contained in § 1 sentence 2 COVInsAG applies, then the consequences in § 2 also do not apply to this business under a duty to apply. The general liability matters under insolvency law and also under corporate law remain applicable. The principles applicable to the presumption and rebuttal of causality and the substantiated prospect of a (sustainable) restoration of liquidity in the context of § 1 sentence 2 COVInsAG then apply on an unlimited basis for the consequences of the suspension under § 2 COVInsAG. If, in contrast, no business or entrepreneur that is under a duty to apply for insolvency is involved, the available relief (in particular in nos. 3 and 4) applyies unconditionally beyond the factual requirements mentioned therein.

4. Consequences of the suspension (§ 2 (1) nos. 1 to 4 COVInsAG)

4.1 Corporate law payment prohibitions (§ 2 (1) no. 1 COVInsAG)

Taking into account the lessons[49] learned from flood protection legislation,[50] the legislator has recognised that the suspension of the application duty cannot be the end of the story if an effective protective framework is to be created, since the payment prohibitions under corporate law also conflict with the continuation of companies threatened with extinction in the ordinary course of business.[51] The legislative reasoning for COVInsAG therefore states that the payment prohibitions are suspended until 30 September 2020.[52] It is therefore all the more surprising that precisely this is not reflected in the provision contained in § 2 (1) no. 1 COVInsAG. The legislation does not contain a suspension of the payment prohibitions.

§ 2 (1) no. 1 COVInsAG is a legislative fiction. However, it only intervenes at the level of the respective subjective constituent tests for the liability norms contained in § 64 sentence 1 GmbHG, § 92 (2) sentence 1 of the German Stock Corporation Act (AktG), § 130a (1) sentence 1 of the German Commercial Code (HGB) (in conjunction with § 177a sentence 1 HGB) and § 99 sentence 1 of the German Cooperatives Act (GenG) as the test of culpable fault, namely where it is required that those payments covered by § 2 (1) no. 1 COVInsAG are deemed to be compatible with the due care of a prudent and conscientious manager. Since, however, § 2 (1) no. 1 COVInsAG applies only where the duty to apply for insolvency is suspended under § 1 sentence 1 COVInsAG, the payments in question here are necessarily made only after insolvency grounds have arisen and accordingly initially objectively amount to a breach of duty. This is not changed by § 2 (1) no. 1 COVInsAG. The release of the manager from liability only takes place at the level of culpable fault, namely by way of a deemed exculpation that is imposed under certain circumstances. However, it follows from this that, contrary to what is implied by the legislative reasoning, the application of the corporate law estate protection requirements is not suspended as a whole. Instead, only the subjective elements of the payments for which the manager is responsible and which are objectively a breach of duty in terms of estate pro-

[49] See e.g. *Schmidt*, ZInsO 2013 p. 1463 at 1466; *Müller/Rautmann*, DStR 2013 p. 1551 at 1553.
[50] See BT-Drucks only with regard to the 2013 Expansion Assistance Act. 17/14078.
[51] Begr. COVInsAG, p. 2: "The objective of the proposed insolvency law provisions is to enable and facilitate the continuation of businesses".
[52] Begr. COVInsAG, p. 4.

tection requirements are suspended for the period of the suspension of the duty to file an application subject to certain additional tests.

As a legal fiction, § 2 (1) no. 1 COVInsAG is irrefutable, since it involves a referral in the form of a covert restriction.[53] The legislator explicitly clarifies that not only payments for the continuation in the ordinary course of business are covered, but also all measures for the recommencement of business operations as well as those which become necessary in the course of a reorientation of the business in the context of a restructuring.[54]

While the first draft of the legislation contained the explicit clarification that the payment prohibitions are only suspended to the extent that payments which serve to maintain business operations are concerned, and that other payments (for example those to shareholders based on the corporate relationship) remain impermissible,[55] the final legislative reasoning for the legislation explicitly no longer contains this restriction. Instead, at the corresponding place in the legislative reasoning, it is now stated that the payment prohibitions under corporate law referred to are to be "temporarily suspended in order to clarify and facilitate the negotiations and claims settlement in clearly defined cases".[56] However, it follows from the reference to "clearly defined cases" in the legislative reasoning that the fiction does not apply without distinction to all payments, but only to those made in the ordinary course of business. It must be positively demonstrated that the payment to be protected was made in the ordinary course of business. The legislation does not provide for any easing of the burden of proof at this point, which is why the general allocation of the burden of proof applies within the framework of the liability norms under corporate law. Since the existence of grounds for insolvency is part of the general initial constituent test for the scope of application of § 2 (1) COVInsAG, the burden of proof imposed on the insolvency administrator to prove the existence of grounds for insolvency, which otherwise applies within the scope of the payment prohibitions, is not relevant. Only the duty of the manager to exculpate remains; in accordance with this, the manager must substantiate and, if necessary, prove that the disputed payment was compatible with the due care of a prudent businessperson.[57] It follows from this, that the explicit clarification that was still contained in the previous draft legislation also applies unchanged to the current version of the legislation; its omission is apparently due to the fact that (unlike the prior draft) § 2 (1) no. 2 COVInsAG now also contains regulations on the repayment of shareholder loans. This leads to the limitation of that statement only for this partial area.

In the case of the exculpation incumbent on the manager, the regular examples cited by the legislator in the context of the fiction are helpful. According to these, payments made for the maintenance or recommencement of business operations, including their reorientation, and for the implementation of a restructuring plan, are not considered culpable.[58] Applying the court decisions of the Federal Court of Justice accordingly, it can be assumed that payments serve the maintenance or resumption of business operations where these avoid major prejudice to the (future) insolvency estate. If these court decisions are applied to the legislator's purpose of not endangering the maintenance of the

[53] *Larenz* (footnote 47), p. 262.
[54] Begr. COVInsAG, p. 27.
[55] Begr. CorInsAG (processing status: 17 March 2020, 11:34 am), p. 7.
[56] Begr. COVInsAG, p. 23.
[57] Prevailing opinion, see with numerous further citations, instead of many *K. Schmidt*, in: Scholz, GmbHG (11th ed. 2015), § 64 note 206.
[58] Federal Court of Justice dated 5 November 2007 - II ZR 262/06, GmbHR 2008 p. 142.

debtor's business relationships with its contractual partners,[59] it follows that payments are considered to be covered by the presumption if they are objectively suitable for maintaining business operations in the ordinary course of business and within the scope of implementing a restructuring plan. However, the economic perspective that must otherwise be accounted for in the framework of the requirements under corporate law, namely where the reference standard is the specific effects of the payments on the future insolvency estate in terms of creditor satisfaction prospects,[60] cannot be the primary consideration in a continuation-related assessment based on the stabilisation of business operations as set out in the legislative reasoning for the COVInsAG.

On the other hand, payments cannot be tolerated even within the scope of application of § 2 (1) no. 1 COVInsAG where these weaken a business' economic basis, and accordingly its ability to be continued. Payments that are unrelated to the continuation of the business, its restructuring, or reorganisation, are therefore not protected. This applies in particular to the repayment of shareholder loans granted prior to the suspension of the application duty and which therefore do not fall within the scope of application of § 2 (1) no. 2 COVInsAG. If creditor protection is reduced due to the special circumstances caused by the health crisis, this cannot serve to give shareholders the opportunity to use an information advantage to their own benefit.[61]

In view of the continued application of the liability constituent tests and only a fictional effect at the level of subjective constituent tests, the close monitoring of payment transactions by the managers and increased care in payment management is urgently called for. In particular, there remains the residual risk that the causality of the pandemic for the occurrence of insolvency grounds will be refuted or that the hopelessness of restoring liquidity in terms of § 1 sentence 1 COVInsAG will be established – in either case *ex post*. In those cases, liability under the payment prohibition norms will be attracted in full, unless the presumption rule contained in § 1 sentence 3 COVInsAG is - accordingly - also[62] applied in favour of the manager when assessing indebtedness. This is only possible, however, if such a presumption does not conflict with the duty of the manager to closely examine and continuously monitor the economic condition of his or her business, especially during the crisis.[63] In spite of the provision contained in § 2 (1) no. 1 COVInsAG, payment approvals processes must therefore be adapted to the special situation. Due to the changed reference standard (continuation instead of estate protection), the same strict release criteria do not apply as they do in emergency management after the occurrence of insolvency and outside the suspended application duty,[64] but the same duty of care standard applies and compliance with the same documentation obligations is urgently recommended.

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[59] Begr. COVInsAG, p. 2.

[60] See in particular Federal Court of Justice dated 4 July 2017 - II ZR 319/15, ZIP 2017 p. 1619.

[61] See in detail *Hölzle*, ZIP 2011 p. 650; *ibid* on the justifying motives for the shareholders' responsibility for financing and the liability regime based on this, *Hölzle*, ZIP 2011 p. 650; *ibid* ZIP 2009 p. 1939; *ibid* ZIP 2010 p. 913.

[62] For (only) corresponding application taking into account the necessary differentiation, see above § 2 section 2.

[63] Federal Court of Justice dated 19 June 2012 - II ZR 243/11, ZIP 2012 p. 1557; Federal Court of Justice dated 20 February 1995 - II ZR 9/94, ZIP 1995 p. 560.

[64] See for example *Parzinger/Lappe/Meyer-Löwy*, ZIP 2019 p. 2143.

4.2 Repaying and securing restructuring loans during the suspension period (§ 2 (2) no. 2 COVInsAG)

4.2.1 Legislative methodology

§ 2 (2) no. 2 COVInsAG likewise contains a legal fiction, which in this case, however, has retroactive effect on the objective constituent tests for the norms of insolvency claw-back laws, namely upon all claw-back norms. Within its scope of application, § 2 (1) no. 2, COVInsAG excludes creditor prejudice in terms of § 129 InsO, which is a prerequisite for any claw-back constituent tests. The norm therefore applies at the level of the facts as lived which are considered worthy of protection, and not at the circumstances of their realisation, which could trigger the constituent tests for the individual claw-back provisions. As a legislative fiction, § 2 (2) no. 2 COVInsAG is also irrefutable.

The regulation goes far beyond the first draft of the legislator, which did not yet contain any claw-back protection. In contrast, the final legislative reasoning now states that claw-back constituent tests should be very largely excluded on an interim basis. The associated prejudice to the entire creditor community in a possible subsequent insolvency must be accepted in order to avoid a collapse of entire economic sectors, which would be otherwise threatened by the lack of access to necessary new loans or by making it more difficult to continue business.[65] Despite this stated legislative purpose, the different legislative methodology for § 2 (1) no. 2 COVInsAG for loans on the one hand and § 2 (1) no. 4 COVInsAG for other exchanges of services on the other hand is of particular importance when applying the (reverse) exception set out in no. 4.[66]

4.2.2 Material scope of application

According to the explicit wording of the legislation, the protection initially applies only to the repayment and securing of loans granted during the suspension of the application duty pursuant to § 1 COVInsAG. For a debtor who is not subject to the duty to apply, the regulation pursuant to § 2 (2) COVInsAG applies accordingly.

The material scope of application of the norm must be interpreted broadly. The term ‘loan’ is not limited only to loans of sums of money in terms of § 488 BGB. Instead, it also expressly covers trade credits and other forms of performance on credit terms.[67] The interpretation must be based on the legislative purpose of not making the debtor's exchange of services more difficult in that its contractual partners, suppliers and service providers are no longer prepared to make advance payments because, if they settle their claims in arrears outside the period relevant for a cash transaction (§ 142 InsO), they must fear claw-back and repayment duties in any subsequent insolvency proceedings. The material scope of application of § 2 (1) no. 2 COVInsAG therefore includes, in addition to the granting of loans as such, all cases in which the debtor's contractual partner waives analogous protection under § 320 BGB and makes advance payments.

In addition to the granting of loans itself, the securing of loans and financial support is also covered by the scope of application of the norm. However, this applies only to the initial securing of loans covered by the constituent test of this no. 2 as agreed. Neither § 2 (1) no. 2 nor no. 4 COVInsAG contains protection for the subsequent securing of a monetary or trade credit loan that was initially granted on an unsecured basis during the suspension of the application duty, e.g. based on the fur-

[65] Begr. COVInsAG, p. 23.
[66] See section 2 above and section § 2 III 4.4.1 below.
[67] Begr. COVInsAG, p. 27.

ther deterioration of circumstances. Such subsequent collateralisation, even of a restructuring loan granted during the suspension phase, may be clawed back in any subsequent insolvency proceedings as incongruent collateral under general laws.

The same applies in principle to the granting of shareholder loans. Here, the wording of the legislation already expressly refers to § 39 (1) no. 5 InsO, which includes all payments of the shareholder which correspond economically to a loan. Here too, protection is therefore not limited to loans of sums of money. However, the protection extending vis-à-vis shareholders does not extend to the securing of shareholder loans. As is shown by the legislative reasoning, § 135 (1) no. 1 InsO is expressly excluded from protection. Although the provision is intended to encourage shareholders to make liquid funds available to the business, it is not intended to secure these funds through the business' existing liability substratum and in doing so to deprive the business of assets that may be necessary for its continued operation. The legislator has thus not completely abandoned the principles of shareholder debt financing.

Moreover, the protected treatment for shareholder loans requires that these are also treated as loans from third parties in any subsequent insolvency proceedings. For this reason, the applicability of § 39 (1) no. 5 and § 44a InsO had to be excluded for loans granted within the factual scope of application of § 2 (1) no. 2 COVInsAG; otherwise, in subsequent insolvency proceedings, the shareholder would be subordinated with the restructuring assistance granted in the crisis and would have to be given priority from collateral provided. Since this considerably restricts the willingness of shareholders to make financial resources available, but since it is regularly demanded by financing banks as a commitment of the shareholder to the business and the restructuring plan pursued concurrent to the restructuring loans granted by the banks, the privileged treatment of shareholder loans is also correct in this respect.

4.2.3 Constituent tests

4.2.3.1 Suspension of the duty to apply for insolvency

As a constituent test, the privileged treatment of liquidity assistance covered by the scheme is subject first to the condition that the duty to apply for insolvency pursuant to § 1 COVInsAG is suspended or that, pursuant to § 2 (2), the business or entrepreneur is not subject to the duty to apply for insolvency. It follows from this that the protection of the norm against claw-back does not apply if the duty to apply for insolvency is actually not suspended under the (reverse) exception in § 1 sentence 2 COVInsAG. In this case, a residual risk remains for the lender. If the duty to apply for insolvency is not suspended under § 1 sentence 1 COVInsAG, the fiction of a lack of creditor prejudice also lapses; however, since insolvency grounds are certain, the constituent tests for claw-back are probably met, and in any case are definitely met in the case of § 130 InsO.

The fact that the legislative reasoning for the legislation notes that the lender also benefits from the rules on the burden of proof and the presumption effect regulated in § 1[68] does not help, since the constituent test for § 2 (1) no. 2 COVInsAG is the grant of a loan in the suspension period. Good faith in the suspension is not protected. In other words: Suspension is an objective, and not a subjective test, just like the deemed lack of creditor prejudice. If suspension tests are not met, the claw-back protection also lapses. Since, inversely, the knowledge of the occurrence of insolvency grounds in terms of § 130 (1) no. 1 InsO is mandatory, there would be nothing to prevent claw-back in this case.

[68] Begr. COVInsAG, p. 27.

When granting restructuring loans in terms of § 2 (1) no. 2 COVInsAG, the lender must therefore also carefully examine whether the causality requirements and the expectation that illiquidity can (sustainably) be eliminated are sufficiently justified, irrespective of the burden of proof under § 1 COVInsAG. Within the scope of the credit assessment, the liquidity planning required[69] for the sustainable restoration of liquidity should therefore in any case be subjected to a plausibility review meeting the usual standards.

4.2.3.2 New loan

The loan must be new. According to the legislative reasoning, only the injection of fresh liquidity is protected.[70] This is understandable, since the aim is to absorb a crisis-related slump in turnovers, and not to privilege business financing and only to reorganise it in response to the crisis.

The injection of fresh liquidity requires that additional liquidity is actually made available. The mere non-removal of liquidity that is already available by novating or extending loans that were already granted, or economically comparable circumstances that amount to back-and-forth payments, are not favoured.[71] This is also correct, taking into account the grounds for insolvency that have occurred, since the partial value of funds already granted is reduced as a result of the grounds for insolvency that have occurred. Leaving these in the business does not amount to a support measure that is comparable to a new injection of liquid funds. At the most, such measures may be covered by the special claw-back protection in § 2 (1) no. 4 COVInsAG, which must be examined in each individual case.

This can have a particularly significant effect on trade credits, in which, for example, an extended and expanded retention of title is agreed to in general terms and conditions. If the supplier's outstanding claims exist at the time of delivery during the suspension period, the delivery and processing or sale of the goods by the debtor results in the assignment of the claims generated from this. The supplier relies on this collateral obtained during the suspension period, which is supposedly protected against claw-back. However, the constituent test for claw-back protection is often not actually fulfilled: In the absence of any differing repayment terms, under § 366 (2) BGB, the claims assigned under the extended retention of title initially secure the oldest liabilities, namely those that were already founded prior to the suspension period. Since this is a subsequent collateralisation of an already-existing claim, it is covered by neither the claw-back protection in § 2 (1) no. 2 COVInsAG nor by § 2 (1) no. 4 COVInsAG. Accordingly, in agreeing on further deliveries during the suspension period, repayment terms would in any case also have to be agreed on such that any collateral granted individually or in general terms and conditions would secure only the claims arising during the suspension period.

The same applies to the granting of loans by shareholders. Where these have already granted a subordinated loan, any form of extension, novation, repayment and renewed deployment[72] is not covered by the claw-back protection.[73]

4.2.3.3 Temporal scope of application

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[69] See above § 1 section 2.2.2
[70] Begr. COVInsAG, p. 27.
[71] Begr. COVInsAG, p. 27.
[72] For the resulting consequences for cash pools, see also section 4.2.5.
[73] Begr. COVInsAG, p. 27.

A distinction must be drawn between two reference dates in the temporal scope of application of the norm: First, the new loan must have been granted during the suspension period under § 1 sentence 1 COVInsAG. This is the reference period for the beginning of the protection. This period therefore ends when the provisions on the suspension of the application duty expire, initially on 30 September 2020 - irrespective of the option of extension by statutory order until 31 March 2021 at the latest.

Second, the norm defines the end of the protection under claw-back laws, namely the end of the fiction of a lack of creditor prejudice, as the end of 30 September 2023. This means that any repayment of loans granted during the suspension period and repaid in full or in part in the medium term after the economic conditions have stabilised following the overcoming of the corona crisis[74] are not exposed to any risk of claw-back. Extending the protection against claw-back beyond the suspension period is necessary and correct, since protecting only those loans that are granted and repaid during the suspension period would not be conducive to the purpose of securing the business' long-term future. On the contrary, the restoration of sustainable liquidity that is actually required needs consideration beyond 30 September 2020.[75] It must then also be possible to leave the protected loan funds within the business beyond this period and only to return them at a later date - also on a privileged basis.

However, if loans are granted with a shorter term than 30 September 2023 and are then extended after the expiry of the suspension of the application duty, they are no longer protected loans and repayments on these are no longer protected payments under claw-back laws. Only the first agreed loan term and the extension of an already protected, initially short-term, loan and its collateralisation during the suspension period is privileged in terms of the norm.

The situation is different with regard to collateral provided during the suspension period. This remains permanently protected without an expiry date. If, for example, a loan is granted until 31 December 2026, and the business becomes insolvent in 2026 (and that is no longer corona-related), the realisation of the collateral remains free of claw-back (unless it was granted for a shareholder loan).

A special provision is contained in § 2 (3) COVInsAG for loans granted by the Kreditanstalt für Wiederaufbau, its financing partners, or by other institutions within the framework of state aid programmes. These are permanently protected under claw-back laws irrespective of the time of their granting or repayment, and including the collateral provided for them.

4.2.4 Legal consequence

The legal consequence of § 2 (1) no. 2 COVInsAG is the fiction of the lack of creditor prejudice in terms of § 129 InsO. Since § 129 (1) InsO is an initial constituent test for the application of the claw-back provisions contained in § 130 to § 146 InsO, claw-back laws lapse entirely when applying the fiction, and irrespective of the specific claw-back constituent tests, since the initial basis for an assessment of these claw-back tests is missing. The circumstances of the granting of the protected loan or the provision of the collateral and subjective tests, such as, for example, certain knowledge of insolvency grounds that have occurred or an intention to prejudice creditors, are irrelevant.

[74] The legislative reasoning itself states that it is not foreseeable when this point in time will be reached, see COVInsAG, p. 21.
[75] See above § 1 section 2.2.2

4.2.5 Not (directly) covered: Cash pools

The clarification in § 2 (1) no. 2, second half-sentence COVInsAG is intended to create incentives for shareholders to provide liquidity to the business in crisis.[76] The protection granted seems sufficient for the isolated injection of shareholder loans. However, the legislator has obviously not taken into account the financing conditions often found in group structures, especially in the form of cash pools.

It is true that the repayment of shareholder loans is favoured under § 2 (1) no. 2 second half-sentence COVInsAG. However, this constituent test applies to new loans granted during the suspension period. According to the most recent court decisions of the Federal Court of Justice, when considering the claw-back of the repayment of cash pool balances,[77] the (highest) balance that has been repaid in total during the claw-back period is decisive. Due to the passage of time (which was also recognised by the legislator[78] as being decisive for the retroactive effect of the legislation, namely that the effects of the crisis were already noticeable well before the conclusion of the legislative process), it will not be unusual that the highest balance in the cash pool, namely the maximum utilisation, was already reached before the suspension of the application duty. If the affected business now receives financial aid, the balance in the cash pool will be (proportionately) reduced (potentially making use of that financial aid). If the balance is not replenished later on up to the amount of the maximum utilisation, the payment will amount to the repayment of old loans granted prior to the suspension of the application duty (and otherwise merely a back-and-forth payment) that is not protected by § 2 (1) no. 2 second half-sentence COVInsAG. The complete contestability of the balances repatriated in the cash pool under § 135 (1) no. 2 InsO would be the necessary consequence. Businesses participating in the cash pool would be required to terminate the cash pool immediately in order to exclude their own liability risks, which would trigger further negative liquidity effects in the corporate group.

In addition, the legislative reasoning for the COVInsAG on corporate law limitations on payments into a cash pool, in particular under § 30 (1) sentence 2 GmbHG,[79] does not have a single word to say on this.

This contradicts the purpose that was explicitly formulated by the legislator of enabling and facilitating the continuation of businesses[80] and, above all, of creating incentives for the granting of loans by third parties and shareholders.[81] Businesses affected by the crisis should be given the time required to obtain necessary financing, and to develop and implement restructuring plans. This should be possible within the framework of the continuation of the ordinary course of business without the risk of business relations with the debtor being broken off.[82] The purpose is therefore to secure the debtor's operational business structures in the ordinary course of business. If, in contrast, cash pooling is undoubtedly a contractual relationship induced by the corporate relationship, the motives for this are predominantly of an operational nature, because cash pooling is intended to reduce the (external) financing costs of the business.[83] The maintenance of operational structures in terms of the

[76] Begr. COVInsAG, p. 27.
[77] Federal Court of Justice dated 27 June 2019 - IX ZR 167/18, ZIP 2019 p. 1577.
[78] Begr. COVInsAG, p. 48.
[79] See e.g. *Bauer*, Die GmbH in der Krise (6th ed. 2020), note 1158 *et seq*.
[80] Begr. COVInsAG, p. 2.
[81] Begr. COVInsAG, p. 27.
[82] Begr. COVInsAG, p. 19.
[83] See e.g. *Larisch*, in: Eilers/Rödding/Schmalenbach, Unternehmensfinanzierung (2nd ed. 2014), notes 534 and 542 *et seq*.

continuation of the ordinary course of business (as intended by the legislator) therefore includes, even if this is not explicitly expressed in the legislative reasoning for the legislation, that reasonable operational financing structures should be maintained as far as possible in order not to further aggravate the crisis, since these are customary in the group and these have been explicitly[84] referred to as "economically sensible" in other legislative reasoning.

To resolve this contradiction, it is necessary to answer the question of under which conditions the maintenance of a cash pool is permissible in the phase of the suspended application duty. For example, for the GmbH, this depends above all on the interpretation of the constituent test of the full value[85] of the repayment claim in terms of § 30 (1) sentence 2 GmbHG. Since the (corporate bodies of the) subsidiary risk making impermissible capital repayments to the parent business, the loan repayment claim resulting from the payment into the cash pool cannot be qualified as fully valued due to the insolvency grounds that have occurred. This assumption is initially obvious, since the determination of full value is based on the balance sheet, i.e. on whether the claim can be shown at nominal value in the balance sheet in accordance with § 253 HGB.[86] According to § 253 (3) sentence 5 HGB, there is a devaluation obligation in the event that the claim becomes permanently impaired. The claim would have to be written down to the lower going-concern value or, if the debtor is unable to pay, usually to zero. The coverage requirement[87] contained in § 30 (1) sentence 2 GmbHG would not be fulfilled. The term 'permanent impairment' is not understood in the sense of a final reduction in value; depending on the asset to be considered, a temporary reduction in value is sufficient for permanent impairment, if it is not foreseeable whether, when, and to what extent a reversal of the impairment will occur again.[88] If the loan debtor is materially insolvent, and this is beyond any doubt during the suspension of the application duty, then in principle a permanent reduction in value must be assumed.

For balance sheet recognition at the nominal amount of the claim, i.e. for the assumption of an increase in value despite the insolvency of the loan debtor, specific indications of this must be available. The mere prospect of a future increase in value is generally not sufficient.[89] Here, however, the question then arises of whether the presumption contained in § 1 sentence 3 COVInsAG (that liquidity can be restored) is sufficient to assume the existence of such specific indications.[90]

If the legislator presumes positive restructuring prospects in the assumption that liquidity can be restored once again (which assumption can be refuted only under the most stringent requirements), this must also apply in light of the overall legislative purpose pursued by the legislation when assessing the coverage requirement under sec. 30 (1) sentence 2 GmbHG. As long as the debtor can therefore assume that it will receive financing or enter into a (promising) restructuring agreement, the full value of the repayment claim from payments made into the cash pool must also be assumed. This will be compromised only by proof that the sustainable remedying of the grounds for insolvency (even making use of state or other assistance) will not succeed.

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[84] Expressly Begr. RegE MoMiG, BT-Drs. 16/6140, p. 41.

[85] See *Verse*, in: Scholz, GmbHG (12th ed. 2018), § 30 notes 76 *et seq*.

[86] Begr. RegE MoMiG, BT-Drs. 16/6140, p. 41; Federal Court of Justice dated 1 December 2008 - II ZR 102/07, ZIP 2009 p. 70 ("MPS").

[87] *Verse*, in: Scholz, GmbHG (12th ed. 2018), § 30 note 81 *et seq*.

[88] *Schubert/Andrejewski*, in: Beck'scher Bilanz commentary (12th ed. 2020), § 253 note 316 *et seq*.

[89] *Schubert/Andrejewski* (footnote 88), recitals 316 *et seq*.

[90] See on the general presumption rule in § 1 sentence 3, see above § 1 section 2.1.3 and on the significance of the presumption rule in the context of obtaining financial assistance to eliminate insolvency, see above § 1 section 2.2.2.

It follows from this that the maintenance of cash pools during the period of the suspension of the application duty under § 1 sentence 1 COVInsAG does not in principle violate capital maintenance prohibitions under corporate law.

This approach also has retroactive effect on the assessment of the insolvency claw-back risks associated with the continuation of a cash pool. While the ruling of the Federal Court of Justice dated 27 June 2019[91] already significantly reduced the risks of claw-back under § 134 InsO at the level of the relevant constituent tests, since it cannot be assumed that a contractual cash pool is a service without consideration, the risk of claw-back under § 135 (1) no. 2 InsO has already been reduced in its legal consequences to the balance reduced over the entire claw-back period. The question can also be asked whether the maintenance of a cash pool and the repayments received from it on balances actually found any prejudice to creditors (also necessary to found claw-back under § 135 (1) no. 2 InsO) or whether this should not be rejected outside of the direct scope of application of § 2 (1) no. 2 COVInsAG.

This is because the following also applies here: As long as maintaining the cash pool subject to applying the presumption in § 1 sentence 3 COVInsAG serves to implement a seriously pursued and promising financing or restructuring plan, each repayment claim is fully recoverable and it can be assumed that repayments made to the cash pool on balances can be reclaimed again in the future due to the promising plan of a business that was economically sound before the crisis; no creditor prejudice is posed. The maintenance of the cash pool then serves to improve the creditors' prospects of satisfaction.[92] It helps to justify the prospect of full satisfaction once the crisis is overcome. The occurrence of prejudice to creditors would then not need to be assumed, in spite of any net outflow of funds (which in principle founds direct prejudice to creditors) in accordance with the principles generally applicable to the lack of any creditor prejudice for the payment of appropriate restructuring expenses.[93]

Admittedly, this argument could be applied to any maintenance of cash pools in a business' crisis. This would conflict with the fundamental statement of the Federal Court of Justice[94] that there is no special law for cash pools. However, for restructuring measures outside of COVInsAG, there is no dispute about the legislative reasoning for the law which, while recognising the important function which insolvency law fulfils for the protection of contractual partners and the integrity of economic transactions, calls for the suspension of estate preservation requirements which also protect creditors and corresponding intervention in constitutionally protected creditor positions with the aim of overcoming the extraordinary macroeconomic difficulties caused by the Corona crisis on the basis of prevailing public welfare interests.[95] However, since insolvency claw-back laws and the payment pro-

[91] Federal Court of Justice dated 27 June 2019 - IX ZR 167/18, ZIP 2019 p. 1577.
[92] Although the Federal Court of Justice dated 21 November 2019 - IX ZR 223/18, ZIP 2020 p. 128, recently undermined this line of argumentation in the regular scope of application of § 135 InsO and clarified that only the restoration of actual access to assets for the creditors can compensate for creditor prejudice which has occurred once, the Federal Court of Justice's criterion here as well was the consideration of the effects on the satisfaction of creditors; and this is precisely where the argumentation for the exceptional case given here starts.
[93] *Kayser*, in: MünchKomm-InsO (3rd ed. 2013), § 129 notes 163 *et seq*.
[94] Federal Court of Justice dated 16 January 2006 - II ZR 76/04, ZIP 2006 p. 665.
[95] Begr. COVInsAG, p. 49.

hibition laws under corporate law serve the same legislative purpose (under corporate law,[96] the assets serving the joint satisfaction of all insolvency creditors should be preserved together and corporate body liability should be founded for this[97] and claw-back laws serve the objective of restoring the existence of the debtor's assets, which are equally available to all creditors, to the extent that these assets were reduced by the debtor's acts prior to the insolvency application and this is not especially justified[98]), the argumentation put forward for the non-application of payment prohibitions can also be made to bear fruit, in any case in the area of application of the maintenance of cash pools, which are described by the same legislator as economically sensible. Claw-backs of returned balances under § 135 (1) no. 2 InsO will therefore fail in any subsequent proceedings, provided that the return took place during the suspension of the duty to file an application and as a result of the lack of prejudice to creditors in terms of § 129 InsO and even if this is not covered by the scope of application of § 2 (1) no. 2 COVInsAG.

4.3 No restructuring loan contrary to public policy (§ 2 (1) no. 3 COVInsAG)

4.3.1 Legislative methodology

Since the provision of easier access to financing is also a primary component of the mitigation of the economic consequences of the Corona crisis, the legislator must also answer the question of whether the grant of a loan after insolvency has occurred and in the event of an unclear forecast situation is characterised as a bridging or restructuring loan that is contrary to public policy.

§ 2 (1) no. 3 COVInsAG is also an - irrefutable - legal fiction which has an exclusionary effect on the constituent tests for a violation of public policy in the referral provisions of § 138 and § 826 BGB.

4.3.2 Material scope of application and constituent tests

The wording "granting of credit and collateral during the suspension period" refers to the constituent tests in § 2 (1) no. 3 COVInsAG and § 2 (1) no. 2 COVInsAG. Accordingly, in both cases only the granting of new loans and the provision of contractually agreed collateral is privileged. The protection does not apply to novation, back-and-forth payments, other conversion of credit financing and also not to subsequent collateralisation. Reference can be made in this respect to the comments above on § 2 (1) no. 2 COVInsAG.

4.3.3 Legal consequence

Due to the exclusion of the relevant tests contained in § 138 and § 826 BGB for the assessment of restructuring loans that are contrary to public policy, already at the level of the objective tests there is no remaining risk for lenders of new loans during the suspension period. This applies equally to bridging loans and restructuring loans. In particular, the question of the period in which a bridging loan may be granted[99] does not arise if the existence of a risk is already excluded at the objective test level. Further examination is then unnecessary.

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[96] *Goette*, in: FS Kreft, p. 53 at 58 *et seq.*; *Schulze-Osterloh*, in: Baumbach/Hueck (18th ed.) § 64 note 78; *Thole*, protection of creditors by insolvency law (2010) p. 701 *et seq*.; *Haas*, in: FS Gero Fischer (2008), p. 209 at 210 *et seq*.

[97] See Federal Court of Justice dated 25 January 2010 - II ZR 258/08, GmbHR 2010 p. 428; Federal Court of Justice dated 26 March 2007 - II ZR 310/05, ZIP 2007 p. 1006.

[98] *Kirchhof*, in: MünchKomm-InsO (3rd ed. 2013), prior to § 129 to § 147 note 1.

[99] For the rejection of a formulaic consideration of the maximum duration, see Federal Court of Justice dated 7 March 2017 - XI ZR 571/15, ZIP 2017 p. 809.

4.4 Exclusion of claw-back (§ 2 (1) no. 4 COVInsAG)

4.4.1 Legislative methodology

In contrast to the consequences set out in § 2 (1) nos. 1 to 3 COVInsAG, § 2 (1) no. 4 sentence 1, first half-sentence COVInsAG does not make use of a legal fiction, but instead excludes the constituent test contained in § 130 InsO by setting out that congruent coverage acts are not subject to claw-back. § 2 (1) no. 4 sentence 1, second half-sentence COVInsAG then contains a (reverse) exception if the counterparty was aware that the debtor's restructuring and financing efforts were not suitable to remedy existing illiquidity. If the (reverse) exception constituent tests are met, § 130 InsO applies without limitation.

The choice of a different methodology here shows that, in the event that the (reverse) exception tests are met, the legislator does not assume any additional claw-back relief, and in particular, that recourse to the potential lack of any creditor prejudice in terms of § 129 InsO[100] based on a connection with the legislative purpose of securing the continuation of the business is not available.[101]

In addition to excluding the application of § 130 InsO, § 2 (1) no. 4 COVInsAG also contains an exclusion for the application of § 131 InsO for the cases enumerated in (a) to (e). The list is exhaustive.[102] The application of these to other similarly-situated circumstances is not possible.

Since § 2 (1) no. 4 COVInsAG does not make use of the statutory fiction with effect on the test of creditor prejudice (unlike § 2 (1) no. 2 COVInsAG), but instead excludes the application of certain claw-back norms, this provision has no effect on other claw-back matters. These remain fully in force. This applies to § 132 to § 134 and § 136 InsO, which also remain applicable without limitation to payments made in the suspension period.

4.4.2 Material scope of application

The material scope of the exclusion of claw-back is not limited. Rather, § 2 (1) no. 4 sentence 1, first half-sentence COVInsAG covers all legal acts which may be the subject of congruence claw-back pursuant to § 130 (1) InsO. This concerns services rendered to contractual partners under long-term contracts, such as lessors and landlords, as well as suppliers and service providers. The aim of the legislator is to maintain the willingness of such contractual partners to perform and not to burden them with the risk of claw-back in a possible subsequent insolvency.[103] Without this measure, it would be expected that, if the service relationship as a whole is not terminated, a switch to advance payment would be made in any case, which would further burden the liquidity of the business concerned.[104]

4.4.3 Constituent tests

§ 2 (1) no. 4 COVInsAG does not initially appear to have any constituent test requirements that go beyond the initial constituent test of application.[105] However, the legislative reasoning refers to § 2 (1) no. 2 COVInsAG and emphasises that, in addition to the protection for new loans under no. 2, protection against claw-back is also needed for other legal acts, since these can support the restruc-

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[100] See also the comments on § 2 section 4.2.5 in the scope of application of cash pools.
[101] See the explanations on § 2 section A.III.2 above.
[102] Begr. COVInsAG, p. 28.
[103] Begr. COVInsAG, p. 2 and 28.
[104] With regard to the fact that this consequence may nevertheless occur, see § 2 5 below.
[105] See above § 2 section III 3.

turing efforts and the liquidity of the business in the same way as the granting of new loans. It follows from this reference that those legal acts protected pursuant to § 2 (1) no. 4 sentence 1 first half-sentence COVInsAG must also be carried out during the suspension period, i.e. that are "new" legal acts in corresponding application of no. 2. Retroactive protection against claw-back is therefore not available under § 2 (1) no. 4 sentence 1 first half-sentence COVInsAG.

Extended protection against claw-back (including for incongruent coverage transactions) under § 2 (1) no. 4 sentence 2 (a) to (e) COVInsAG is governed by the performance of the respective and conclusively-listed legal acts mentioned in these subsections. For each of the incongruent transactions mentioned there, the legislator has expressed the specific reasons why it considers the financing or restructuring contributions set out in the respective measure to be worthy of protection and subject to special protection against claw-back. [106] There is no room for analogies or the corresponding application to similar circumstances, also because of the exceptional character of the norm.[107]

4.4.4 (Reverse) exception, claw-back upheld

With the legal effect of a so-called norm for the preservation of claims, § 2 (1) no. 4 sentence 1 half-sentence 2 COVInsAG provides that § 130 InsO continues to apply if the counterparty had knowledge that the debtor's restructuring and financing efforts were not suitable to remedy existing illiquidity. In this context, it is striking that the wording of the legislation refers to the remedy of existing illiquidity (*Zahlungsunfähigkeit*), whereas the legislative reasoning for the legislation refers to the elimination of insolvency grounds (*Insolvenzreife*).[108] The latter would mean that for the question of claim preservation, not only the remedy of illiquidity, but also the remedy of over-indebtedness would have to be taken into account. However, the effects of this are likely to be small, since, assuming that liquidity is restored, over-indebtedness will also be remedied. However, the link to the elimination of grounds for insolvency in any case justifies the requirement that, when restoring liquidity within the meaning of the Federal Court of Justice's court decisions, a restoration of liquidity should not be required as of a cut-off date, but instead, that a sustained restoration of liquidity is needed,[109] which is why the debtor is also required here to submit a plausible liquidity plan taking into account current framework conditions.

With respect to constituent tests, the preservation of a claim pursuant to § 2 (1) no. 4 sentence 1 half-sentence 2 COVInsAG requires three things, namely first, that the debtor initially seriously undertakes restructuring and financing efforts and second, that these are suitable to remedy the grounds for insolvency. In assessing these first two constituent tests, recourse can be made to existing court decisions[110] on the lack of prejudice to creditors inherent to legal acts which are carried out to implement restructuring plans. The constituent tests are absolutely comparable, since it is recognised in those decisions that the measures must not be manifestly unsuitable, must be seriously pursued and the plan must have been put into practice from the outset; in doing so, financing discus-

[106] Begr. COVInsAG, p. 28.
[107] For an exclusion of the analogy for exceptions see most recently Federal Court of Justice dated 8 January 2019 - II ZR 364/18, ZIP 2019 p. 701, and *Stephan*, GmbHR 2019 p. 528.
[108] Begr. COVInsAG, p. 28.
[109] See in detail above § 1 section 2.2.2.
[110] Federal Court of Justice dated 4 December 1997 - IX ZR 47/97, ZIP 1998 p. 248; Federal Court of Justice dated 8 December 2011 - IX ZR 156/09, ZIP 2012 p. 137.

sions with individual creditors which enable the debtor to satisfy its other creditors with sufficient probability are enough for this.[111]

The third constituent test for the preservation of a claim is that the counterparty must have positive knowledge of the absence of one of the first two constituent test elements.[112] The burden of proof for this lies with the party asserting claw-back rights. Since the positive knowledge is an internal fact, it can be proven by recourse to circumstantial evidence, as is otherwise customary in claw-back law.[113]

4.5 Claw-back limitation periods

Although the scope of application of § 2 (1) no. 2 and no. 4 COVInsAG very largely excludes the essential constituent tests for claw-back in accordance with the intention of the legislator,[114] the question is still posed as to how to assess any limitation periods for the exercise of claw-back rights in the event of a subsequent insolvency and any determination that the constituent tests for a suspension of the application duty or the respective privilege coverage tests were no longer available at the late of the legal transaction that is contested.

Since the suspension of the duty to file an application under § 1 sentence 1 COVInsAG does not apply if there is no prospect to remedy existing illiquidity, this (reverse) exception, i.e. the re-imposition of a duty to file an application, can also arise after an initial suspension.[115] The conditions for this must therefore be constantly monitored. Where the prospect to remedy the grounds for insolvency is subsequently extinguished, the duty to file an application will immediately be revived without the three-week maximum period under § 15a InsO commencing again. Instead, in this case, an application for insolvency must be filed immediately; § 15a (1) InsO. The corresponding application of § 249 (1) of the German Civil Code of Procedure (ZPO) does not apply here, since an interruption is not ended. Instead, the constituent test entitling the business to rely on the interruption is no longer met.

If an insolvency application is filed during the period in which COVInsAG applies or following a suspension period used by the debtor, the question arises of whether the periods for contesting the application are assessed from the date when the suspension of the duty to file an application ceased, or from the date when the suspended duty to file an application begins. The latter is the case in corresponding application of § 139 (2) InsO.

The Federal Court of Justice[116] has repeatedly clarified that the calculation of the claw-back limitation period depends on a consideration of the uniform insolvency constituent tests. Where a "uniform insolvency" exists, the first insolvency application is decisive, regardless of whether the proceedings were opened in response to this application or whether the application was dismissed or was withdrawn in the meantime. Since there is no doubt about the existence of a uniform insolvency in the assessments here (since the COVInsAG does not eliminate the grounds for insolvency but only suspends the duty to apply for insolvency), the same principles apply. In the case of a subsequent insolvency (and this is a mandatory requirement for creditor protection), the time when the (suspended)

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[111] Federal Court of Justice dated 8 December 2011 - IX ZR 156/09, ZIP 2012 p. 137.
[112] Begr. COVInsAG, p. 28.
[113] See e.g. Federal Court of Justice dated 22 June 2017 - IX ZR 111/14, ZIP 2017 p. 1379.
[114] Begr. COVInsAG, p. 23.
[115] See § 1 section 2.2.2 above and also § 1 section 2.3.1.
[116] Federal Court of Justice dated 15 November 2007 - IX ZR 212/06, ZIP 2008 p. 235; Federal Court of Justice dated 18 September 2014 - IX ZA 9/14, ZVI 2015 p. 22.

duty to apply for insolvency arose is decisive for the calculation of claw-back limitation periods. The situation is different only if the uniform insolvency event is interrupted by the fact that, in the meantime, insolvency grounds were completely overcome, i.e. also the complete continuation forecast in terms of § 19 (2) sentence 1 second half-sentence InsO was restored.

5. Unregulated consequence: Protection of creditors in tort and criminal law

The legislator clearly states that the intent and purpose of the legislation is (not least) also to ensure that promising restructuring efforts are not thwarted by the fact that payments to suppliers and service providers are not made as a result of liability risks associated with these and that further deliveries are subsequently discontinued as a result of this. However, creditor protection, which is comprehensively differentiated in current law,[117] is not completely suspended as a result. Instead, limits with respect to intentional damage undertaken in violation of public policy under § 826 BGB and (credit or inducement) fraud continue to exist, as well as associated liability under § 823 (2) BGB in connection with § 263 and § 265b of the German Criminal Code (StGB).[118]

The liability risk for management arising from the changes on the borderline to inducement fraud accordingly is present in any COVInsAG-supported restructuring just like in a "normal" out-of-court restructuring, but extends even further. Since material grounds for insolvency are established in the reference to the suspension of the duty to apply for insolvency, it is also clear that goods and services ordered from suppliers and service providers cannot be remunerated *prima vista.* The debtor's implied declaration in entering into a contractual obligation that it is willing and also able to fulfil the contract[119] therefore constitutes, from the outset, deception in the sense of § 263 StGB and accordingly amounts to a violation of protective law in the sense of § 823 (2) BGB. It is incumbent upon the debtor or the corporate body to rebut the presumption of implied deception, which lies in the occurrence of material grounds for insolvency.

The question is posed of what the requirements are for this. First, there is no doubt that suppliers, service providers and other contractual partners whose services are (or are to be) used must be informed about the situation that the business is in the phase of suspended application duty and is negotiating on financing or restructuring measures. Such a duty to disclose the economic situation of the business is assumed by the Federal Court of Justice[120] if the performance of the contract is seriously endangered from the outset, for example, due to the over-indebtedness of the business.

Even if the COVInsAG legislator founds the legal presumption in § 1 sentence 3 COVInsAG that liquidity can be restored, the forecasting risk (recognised for the necessity of imposing a presumption) cannot be shifted to the suppliers in an even stronger limitation of creditor protection. Here, the principle outlined at the beginning[121] applies that the referral is only a corresponding one, which has to take into account necessary differentiations. Instead, suppliers must be put in a position to make

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[117] Detailed *Bitter*, ZInsO 2018 p. 625 *et seq*.

[118] *Bitter*, Blog GmbHR, entry dated 17 March 2020 available at https://blog.otto-schmidt.de/gesellschaftsrecht/2020/03/17/corona-krise-aussetzung-der-insolvenzantragspflicht-geplant/ last accessed on 24 March 2020.

[119] Federal Court of Justice dated 25 January 1984 - VIII ZR 227/82, ZIP 1984 p. 439.

[120] Federal Court of Justice dated 1 July 1991 - II ZR 180/90, ZIP 1991 p. 1140; Federal Court of Justice dated 27 October 1982 - VIII ZR 187/81, ZIP 1982 p. 1435; finally, in criminal law terms, again Federal Court of Justice dated 4 August 2016 - 4 StR 523/15, ZIP 2017 p. 370.

[121] See above § 2 section A.III.2.

an informed, and thus conscious, decision on the further supply of the debtor business.[122] Although this may also mean that some, perhaps the majority of the suppliers, switch to advance payment, this must be taken into account in the amount of the financial assistance applied for and in the liquidity planning prepared. It is only where the regularly increased liquidity requirements can be covered under the more difficult conditions of continuing the business in a crisis that the restructuring negotiations have the prospect of success necessary for the suspension of the application duty. This is not unique to a COVInsAG-supported restructuring; it applies to every business restructuring, both outside and within insolvency proceedings.

In addition, the debtor must always attentively monitor the progress of the financing and restructuring efforts - in accordance with general principles[123] - and, depending on the situation, closely in time. If the debtor discovers that, from a certain point in time onwards, there is no longer any substantiated prospect of financing or restructuring, the debtor is no longer entitled to accept and consume advance performance from its suppliers and service providers if it cannot ensure that they will still be paid.[124]

In the pending phase of restructuring under the protection of the COVInsAG, there is therefore - properly - no relief with regard to the protection of creditors under tort and criminal law.

IV. § 3 Grounds for opening insolvency proceedings in the case of creditor insolvency applications

According to the unambiguous wording of the legislation, the provision in § 1 does not affect the right to file an application for the commencement of insolvency proceedings. However, § 3 COVInsAG provides for a three-month suspension of creditor application rights.

1. Debtor application right unaffected

The sudden economic effects of the pandemic, combined with the lack of forecasting possibilities, may be a sufficient reason to suspend the application *duty*. If, however, businesses exhaust liquidity, i.e. become illiquid, even before an application for state aid has been processed or an emergency package has been valued, it may be sensible and helpful to fall back on the economic performance-related measures provided for under insolvency law and, despite the suspended duty, to rely on (long-term) restructuring using the toolbox provided by insolvency law. The suspension of the duty to file an application does not, therefore, correctly imply a suspension of the debtor's right to file an application for insolvency on the basis of illiquidity.

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[122] On the legal-economic correctness of the statute of disclosure obligations with regard to economically unproductive information, as it is also discussed here, see in detail *Hölzle*, Verstrickung durch Desinformation (habil. 2012), p. 91 *et seq*., p. 254 *et seq*.

[123] Federal Court of Justice dated 19 June 2012 - II ZR 243/11, ZIP 2012 p. 1557; Federal Court of Justice dated 20 February 1995 - II ZR 9/94, ZIP 1995 p. 560.

[124] Although in such cases fraud is only found if, in exceptional cases, a guarantor's obligation to disclose can be assumed to be based on a special relationship of trust, which can, for example, arise from a permanent supply relationship, see: *Bitter*, ZInsO 2018, p. 625 at 641 *et seq.*, however, when goods are consumed or services are received in the knowledge of the grounds for insolvency, intentional damage within the meaning of § 826 BGB (contrary to public policy) must be assumed.

2. Restricted creditor right of application

Unlike the previous regulations and the preliminary drafts, § 3 COVInsAG provides for the suspension of the right to apply for insolvency for creditors, but only for a period of three months. A creditor's application is inadmissible during this period. § 3 COVInsAG suspends to this extent the creditor's entitlement to file an application in terms of § 13 (1) sentence 2 alternative 1 InsO. The legislative reasoning for the legislation states that this suspension is intended to prevent insolvency proceedings from being commenced before state measures are obtained which are suitable to eliminate the grounds for opening insolvency proceedings.[125] It is questionable whether a period of three months is considered sufficient in this respect and that a conspicuous discrepancy in time between the suspension of the duty to file an application and the creditor's right to file an application is thus created.

In this respect, the question arises in particular of how to deal with creditor applications after the expiry of the three-month period. Taking into account the special admissibility requirement of § 14 (1) sentence 1 InsO, which is not affected by the COVInsAG, a creditor's application is likely to be inadmissible in many cases during the validity of the COVInsAG. Pursuant to § 14 (1) sentence 1 InsO, a creditor application always requires a legal interest in the opening of insolvency proceedings.[126] This is usually affirmed if the other admissibility requirements are met.[127] However, the legal interest becomes significant as an admissibility criterion if circumstances exist which give rise to serious doubts as to whether the requesting creditor's interest is worthy of protection.[128] Having regard to the fundamental suspension of the duty to file an application under § 1 COVInsAG provided for in the final draft, the suspension alone should not be sufficient to accept these doubts. This is also contradicted by the final regulation of the general consequences of suspension in § 2 COVInsAG, which does not contain a general suspension of the creditor's right to file an application. Doubts as to whether the interest of the requesting creditor is worthy of protection may, however, also exist after the expiry of the three months in any event if the grounds for insolvency are recognisably based on the pandemic and it is foreseeable that the grounds for insolvency can be eliminated after expiry of the suspension period with a predominant likelihood. If these conditions are met, the rule-exception relationship assumed up to now is likely to be reversed. In a differing exceptional case, the creditor would have to substantiate why it is in that creditor’s particular interest that the business does not attempt to survive the crisis (in particular by making use of emergency measures), but instead should be excluded from this opportunity, which the legislator regards as being in the interest of the economy as a whole. With the exception of cases of abuse, this will hardly ever be justifiable.

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[125] Begr. COVInsAG, p. 29.

[126] See on this requirement in particular *Baur*, JZ 1951, p. 209; *Unger*, KTS 1962, p. 205 at 209 *et seq.*; see also Federal Court of Justice NZI 2011, p. 540 .

[127] MüKoInsO/Vuia, 4th ed. 2019, InsO § 14 note 19.

[128] Federal Court of Justice NZI 2006, p. 588 at 589 *et seq*.; see also Jaeger/Gerhardt, § 14 note 2, at 15; Uhlenbruck/Wegener, § 14 note 68.