

Germany

Rescue procedures in insolvency

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| Phase | Insolvency statute; Act to further facilitate the restructuring of companies; Act to facilitate the insolvency procedure of large companies (holdings); Act on the advancement of restructuring and insolvency law |
| Native name | Insolvenzordnung (InsO); Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (ESUG); Gesetz zur weiteren Erleichterung von Konzerninsolvenzen; Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts (SanInsFoG) |
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Article

270, 270a-b Insolvency statute; 67 (2) ESUG; Act to facilitate the insolvency procedure of large companies (holdings) whole regulation; 5 SanInsFoG

Description

Under certain conditions, a company which can no longer pay its creditors and is deemed illiquid can be granted three months' time for developing a restructuring plan. During these three months the company does not have to pay its creditors; rather the creditors shall be involved in the process leading up to the restructuring plan.

The legal requirements are:

- the company makes its request for the opening of insolvency proceedings with the insolvency court on grounds of imminent insolvency or over-indebtedness,
- it requests debtor-in-possession management which implies that the management of the insolvency process is not handled by a foreign agency or consultant,

- the company provides certification by a tax advisor, accountant or lawyer with experience in insolvency matters or a person with comparable qualifications which gives evidence of the imminent insolvency or over indebtedness but also shows that the debtor is not already insolvent and that the intended restructuring does not manifestly lack the prospect of success.

The insolvency court, without external inputs from the creditors, takes a decision depending on the prospect of success to save the business. A positive decision implies the allowance not to pay the creditors' demands for three months and to develop a plan on how to restructure the business. The insolvency court appoints an insolvency observer, an independent expert who monitors the process of developing the plan. The debtor as well as the creditors have a right to suggest a person to take the position of the insolvency observer.

Under the act on the further facilitation of the insolvency procedure (ESUG), communication and cooperation between the debtor and the creditors shall be improved by the establishment of a committee gathering all creditors. Better communication between the two sides and the insolvency monitor shall speed up the drafting of a plan aimed at rescuing the business. The insolvency ordinance (article 67.2), stipulates with respect to ESUG that a worker representative shall be member of the creditors' committee (Gläubigerausschuss). In case a works council is in place, the worker representative typically is a works council member. There is no legal provision on how the worker representative shall be appointed in other cases.

The law also institutes a 'debt-to-equity-swap' whereby liabilities can be transformed into company shares. Early assessments have largely shown that the new measures are successful.

On 1 January 2021, the Act on the advancement of restructuring and insolvency law (SanInsFoG) came into force, including several amendments to the Insolvency Code. In particular, the SanInsFoG has tightened the requirements for court approval of self-administration (270a InsO). Thus, the application must provide for:

- a financial plan for six months for the continuation of business operations and the costs of restructuring,
- a concept for the implementation of the insolvency proceedings in self-administration,
- a description of the status of negotiations with creditors,
- a description of the measures to ensure compliance with the obligations under insolvency law,
- a description of additional or reduced costs in comparison to the standard insolvency proceedings.

With the corporate stabilisation and restructuring act (StaRUG), the SanInsFoG also provides for an independent restructuring procedure to avoid insolvency (implementation of EU Directive 2019/1023).

Commentary

The ESUG has been in force since 1 December 2012; in spring 2017 another act for facilitating the insolvency procedures of large companies ('Gesetz zur Bewältigung von Konzerninsolvenzen') was passed, stipulating also the establishment of a joint committee of creditors for large companies (holdings).

In August 2018, the federal government released its report on the usage of the ESUG based on an evaluation conducted at Bielefeld University (Jacoby et al., 2018). The evaluation is positive but finds that the establishment of the committee of creditors and the debt-to-equity-swaps are less often used than expected. The ESUG has no negative impact neither on companies nor on workers (Jacoby et al., 2018).

Consultant group Roland Berger together with HgGUR, a non-profit group of consultants, runs non-representative surveys on ESUG on a regular basis. In 2018, the ESUG study was published based on about 2,300 responses by management and insolvency experts. It finds that ESUG is by now widely known and accepted. In 2022, the ESUG was in effect for ten years and still judged to be widely accepted (Hielscher, 2022).

Insolvency and COVID-19:

In the wake of the COVID-19 crisis, the insolvency notification requirement was temporarily suspended from March 2020 to July 2021. The Federal Statistical Office (2021) reported on 15,841 corporate insolvencies in 2020. The figure was 15.5% lower when compared to 2019 and represented the lowest level since the introduction of the Insolvency Code in 1999. This all time low was also attributed to the suspended obligation to file for insolvency.

Additional metadata

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| Cost covered by | None |
| Involved actors other than national government | Works council Court Other |

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| Involvement (others) | Creditors; consultants; insolvency monitor |
| Thresholds | Affected employees: No, applicable in all circumstances Company size: No, applicable in all circumstances Additional information: No, applicable in all circumstances |

Sources

- [Insolvenzordnung](#)~~~ [Insolvency Statute](#)~~~ [ESUG published \(in German only\) in the Federal Papers, Bundesgesetzblatt \(BGBl\) 7 Dec. 2011](#)~~~ [Act facilitating the Insolvency of large companies \(Gesetz zur Erleichterung von Konzerninsolvenzen\) \(German only\) in the Federal Papers, Bundesgesetzblatt \(BGBl\) 13 April 2017](#)~~~ [Die Bundesregierung \(2018\): Bericht der Bundesregierung über die Anwendung des Gesetzes zur weiteren Erleichterung der Sanierung von Unternehmen \(ESUG\) vom 7. Dezember 2011](#)~~~ [Tornau, J.F. \(2013\), Die Chancen der Pleite, Magazin Mitbestimmung, Ausgabe 01+02/2013](#)~~~ [Wroblewski, A. \(2012\), Das ESUG aus Arbeitnehmersicht, Arbeit und Recht, p. 188-194](#)~~~ [Deutscher Anwaltsverein \(2017\), Stellungnahme zur ESUG Evaluation](#)~~~ [Roland Berger and HgGUR \(2018\), 5 Jahre ESUG](#)~~~ [Jacoby, F.; Madaus, S.; Sack,d; Schmidt, H.; Thole, C. \(2018\), Evauation. Kurzbericht Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen vom 7 Dezember 2011](#)~~~ [Act on the Advancement of Restructuring and Insolvency Law \(SanInsFoG\)](#)~~~ [Temorary Suspension of insolvency notification requirement](#)~~~ [Hielscher, H. \(2022\), Zehn Jahre mit dem Schutzschirm - Eine Bilanz](#)~~~

Citation

Eurofound (2016), Germany: Rescue procedures in insolvency, Restructuring legislation database, Dublin