



UNIVERSITÄT  
ZU KÖLN

# EMPTY ESTATES

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# Insufficient Assets („Massearmut“), Section 26 (1) InsO

- „The insolvency court refuses a request to open insolvency proceedings if the debtor's assets are likely to be insufficient to cover the costs of the proceedings.“
- Reason for refusal:
  - Insolvency proceedings are conducted in the interest of the creditors, not the public
  - At the same time, it is to be ensured that more proceedings reach commencement; prevention of intentional and disorganised asset stripping

# Insufficient Assets („Massearmut“), Section 26 (1) InsO

- Costs of the proceedings, Section 54 InsO
  - The court costs for the insolvency proceedings
  - The fees and expenses of the preliminary insolvency administrator, the insolvency administrator and the members of the creditor's committee
  - In principles, fees are a percentage of the free estate / system of cross-subsidisation

## Duty of Investigation ex officio

- The preliminary insolvency administrator or a court-appointed expert must supply the court with the documents necessary to investigate
- Investigations expand on discovering (hidden) assets or fraudulent transfers of assets to be reversed
  - Prospects of avoidance claims and claw-back actions are an important tool to ensure the opening

# Insufficient Assets („Massearmut“), Section 26 (1) InsO

- If the cost calculation (forecast) by the court shows that the costs of the proceedings are expected not to be met (it is sufficient if this is „*likely*“ to be the case), a refusal decision is mandatory
- Prevention Strategies (Section 26 (1) sentence 2 InsO):
  - Advance payment of a sufficient sum of money or
  - Deferral of the costs of the proceeding pursuant to Section 4a InsO (only possible if the debtor is a natural person)

Section 26 (5) InsO regulates the mandatory advance payment for persons who, contrary to the provisions of insolvency or company law, have intentionally or negligently and in breach of their duty failed to file an application for the opening of insolvency proceedings

# Legal Consequences of Refusal Decision

- Dissolution of Limited liability companies (GmbH) and stock corporations (AG)

According to Section 60 (1) No. 5 of the Limited Liability Companies Act (GmbHG), Section 262 (1) No. 4 of the Stock Corporation Act (AktG)

- Registration of the Debtor in the List of Debtors

The list of debtors is kept by the „enforcement courts“ according to Sections 882b to 882h of the Code of Civil Procedure (ZPO)

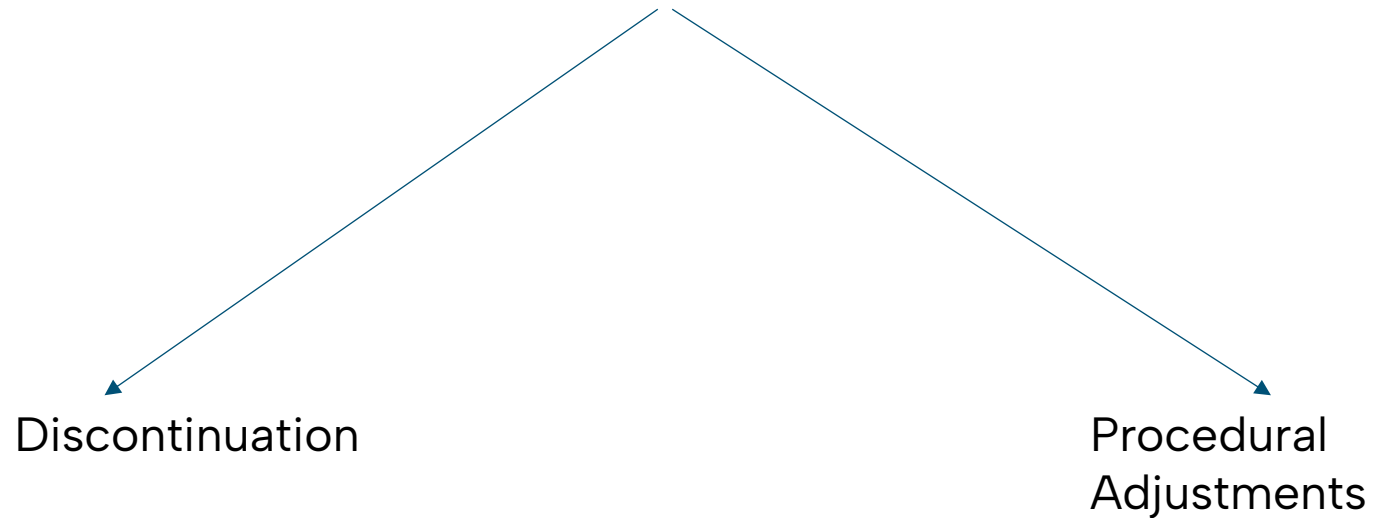
An entry in the list of debtors must be cancelled ex officio upon the expiry of three years from the date of the refusal

An entry may be cancelled early if the debtor proves that the claim on which the application for insolvency was based has been paid

- Consequences under other regulations

e.g. the authorisation to practise as a lawyer (Section 14 (2) No. 7 of the Federal Lawyers' Act (BRAO)) can be revoked

# Empty Estate during the pendency of insolvency proceedings



# Discontinuation due to Insufficient Assets, Section 207 (1) InsO

- „If, after the insolvency proceedings have been opened, it is found that the insolvency estate is insufficient to cover the costs of the proceedings, the insolvency court shall discontinue such proceedings.”

Discontinuation = the collective satisfaction of the insolvency creditors is not possible and therefore the proceedings end prematurely

- Ongoing liabilities and obligations after the commencement of a proceeding, such as employee or maintenance costs, can cause insufficiency
- The insolvency administrator must notify the court once the procedural costs cannot be covered



# Discontinuation due to Insufficient Assets, Section 207 (1) InsO

- After the insolvency court is notified, the court convenes a creditor's meeting for the interested parties to be heard
- Here, it is also possible to decide on an advance payment. If no advance payment is made, the court will discontinue the proceeding.
- End of office of the insolvency administrator
- According to Section 215 InsO, the order discontinuing the insolvency proceedings must be published.
- The power over the insolvency estate reverts to the debtor (Section 215 (2) InsO) and compulsory enforcement can be pursued by the creditors individually



# Deficiency of Assets („Masseunzulänglichkeit“), Section 208 (1) InsO

„If the costs of the insolvency proceedings are covered but the insolvency estate is insufficient to meet the other preferential liabilities which are due, the insolvency administrator shall notify the insolvency court that there is a deficiency of assets.“

- The proceedings will initially be continued until realisation and distribution of the available assets
- The administrator continues to manage and realise the insolvency estate
- He may incur new liabilities („new“ preferential debts) for this purpose
- The point in time when the notification of deficiency is received by the insolvency court is decisive for the ranking of claims

# Satisfaction subsequent to the Notification of Deficiency of Assets, Section 209 (1) No. 2 InsO

- Section 209 regulates the order of handling the preferential liabilities within a state of insufficiency
- All claims in one class must be satisfied in full before dividends on lower-ranking claims are permitted
- After the notification of deficiency, the „new“ preferential liabilities incurred take precedence over the other preferential liabilities

Thanks for your attention.

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