

INSOL Europe/LexisNexis coronavirus (COVID-19) Tracker of Insolvency Reforms—Switzerland

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Restructuring & Insolvency analysis: We look at the reforms to the insolvency law of Switzerland prompted by the coronavirus (COVID-19) pandemic. Written by Andrea Trost, LL.M. Attorney at Law, Associate, Dunja Koch, LL.M. Attorney at Law, Partner and Jérôme Pidoux, LL.M. Attorney at Law, Associate.

On 16 April 2020, the Federal Council passed a special ordinance in relation to the Swiss insolvency and restructuring regime to protect companies who ran into financial difficulties caused by the coronavirus pandemic (the COVID-19 Insolvency Ordinance). The COVID-19 Insolvency Ordinance entered into force on 20 April 2020 and will remain effective for a period of six months.

The COVID-19 Insolvency Ordinance contains three temporary insolvency measures, namely (1) a suspension of the duty of the board of directors to notify the judge in the event of over-indebtedness, (2) a new moratorium for small and medium-sized enterprises (SMEs), the so called COVID-19 moratorium and (3) amendments to the existing debt restructuring regime.

Suspension of duty to notify the judge in the event of over-indebtedness

Under Swiss law, the board of directors must notify the judge without delay if the company is over-indebted unless certain creditors are willing to subordinate their claims to those of all other company creditors in an amount sufficient to cover the capital deficit and any losses anticipated to be incurred in the next twelve months. Failure to notify the judge in due time may trigger civil and criminal liability. Upon receiving such notification, the court will commence insolvency proceedings unless there is a prospect of financial restructuring.

The COVID-19 Insolvency Ordinance temporarily exempts the board of directors from its duty to notify the judge, provided that: (1) the company was not over-indebted on 31 December 2019 and (2) there is a prospect that the over-indebtedness can be remedied by 31 December 2020.

The same applies for the auditors who have a statutory duty to notify the judge, if the board of directors fails to do so.

The board of directors must document and provide in writing the reasons for its decision.

New COVID-19 moratorium

As an alternative to filing for bankruptcy companies may also apply for a debt moratorium. The new COVID-19 moratorium provides SMEs with a simple procedure to obtain a temporary stay of their payment obligations. As such it is a simpler alternative to the ordinary debt moratorium under the Debt Enforcement and Bankruptcy Act (DEBA) which very often leads to the liquidation of a company rather than its restructuring.

The conditions for the COVID-19 moratorium are: (1) that the SME was not over-indebted on 31 December 2019 or if there was an over-indebtedness, certain creditors subordinated their claims to those of all other creditors to the extent of the over-indebtedness, (2) that the shares of the company are not publicly traded and (3) the company did not exceed two of the following three thresholds in 2019: (i) a balance sheet total of CHF 20 million; (ii) sales revenues of CHF 40 million or more; (iii) 250 full-time employees (annual average).

A moratorium may be granted for an initial period of up to three months. The court may extend the moratorium for an additional period of up to three months.

SMEs can apply for a COVID-19 moratorium in a simple procedure by filing an application in which they present their financial situation in a credible way and provide evidence thereto. It is not necessary to provide a

restructuring plan. By filing an application for a COVID-19 moratorium, the board of directors is deemed to have satisfied its obligation to notify the court of the over-indebtedness. The granting of a COVID-19 moratorium is published and must be immediately notified by the debtor to all known creditors in writing or by email.

The court has the authority to appoint an administrator at the request of the SME, a creditor or on its own volition, although the Ordinance provides that it should be the exception.

The COVID-19 moratorium applies to all claims against SMEs which have arisen before the moratorium is granted, except for certain privileged claims, in particular claims of employees (some of which are capped at CHF 148,200). During the COVID-19 moratorium creditors cannot commence or continue debt enforcement proceedings under the DEBA for the deferred claims. In addition, during the moratorium no attachment orders and other similar preliminary measures are possible for the deferred claims and statute of limitation and forfeiture periods are suspended for such claims. The moratorium further prohibits SMEs from repaying the deferred claims.

During a COVID-19 moratorium, SMEs may continue to carry out their business activities. Claims arising after the granting of the COVID-19 moratorium are not affected by the moratorium. However, SMEs may not do any acts which harm the legitimate interests of creditors or favour individual creditors to the detriment of others. In addition, SMEs may not dispose of, pledge or otherwise encumber their fixed assets during the COVID-19 moratorium without court approval.

Amendments to the existing debt restructuring regime

The Federal Council has further implemented measures in order to simplify the existing ordinary moratorium under the DEBA, which unlike the COVID-19 moratorium is not limited to SMEs. In particular, companies are released from the obligation to provide the judge with a provisional restructuring plan (Sanierungsplan/plan d'assainissement) when applying for an ordinary moratorium. Furthermore, the maximum duration of the provisional moratorium which the court may grant in this context has been extended from four to six months and the ability of the court to declare a company bankrupt before the end of the provisional moratorium is limited. The granting of a COVID-19 moratorium does not preclude an SME from applying for an ordinary moratorium at any time, the duration of which is however reduced by half of the duration of the COVID-19 moratorium.

INSOL Europe/LexisNexis Coronavirus Tracker of Insolvency Reforms

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We look at various countries worldwide which are expediting reforms to their restructuring and insolvency laws, temporarily suspending onerous insolvency law provisions, increasing limits for statutory demands, suspending enforcement powers and introducing other measures to deal with the coronavirus crisis. As the situation is rapidly evolving with more countries adding new measures daily, you should contact local lawyers in the relevant jurisdiction to check the current measures in force.