

Legal Compass

Insolvency law and restructuring

Version 20 April 2020



COVID-19 affects debt collection and bankruptcy proceedings

The stay on debt collection proceedings will end on 22 April 2020.

The Federal government adopted emergency law on 16 April 2020, in order to prevent coronavirus-related bankruptcies and the resulting job losses.

The "COVID-19 Insolvency Ordinance" provides for a transitional exemption from the obligation to notify the judge in the event of overindebtedness, which would generally lead to immediate bankruptcy. It also introduces a COVID-19 moratorium of limited duration.

1. End of the stay on debt collection proceedings

From 19 March to 22 April 2020 inclusive, debt collection proceedings are suspended throughout Switzerland. In view of the extraordinary situation, the Federal Council has used its competence to order the suspension of proceedings. During this period, it is not possible to notify debtors with an order to pay.

This measure comes to an end on 22 April 2020 and the government took other measures to prevent coronavirus-related bankruptcies.

2. Notification duty in case of overindebtedness during COVID-19

Pursuant to Swiss company law, the company's board of directors must notify the court in case the (interim) balance sheet of a company shows an overindebtedness. The court commences insolvency proceedings, unless there is a prospect of financial restructuring.

In the current COVID-19 pandemic, a large number of companies are forced to enter losses in their balance sheets that, pursuant to the aforementioned legal situation, could lead to overindebtedness and as a consequence to the duty of notifying the court. Non-compliance with this duty may result in personal liability claims.

In light of this situation, the Swiss government decided to take measures to protect Swiss companies from COVID-19-related bankruptcy. In particular, the Swiss government has, on 16 April 2020, implemented a temporary arrangement whereby companies are omitted to comply with their notification duty if there is a threat of COVID-19-induced overindebtedness, provided the company was not overindebted as of 31 December 2019 as well as provided there is a chance that the COVID-19-induced overindebtedness can be remedied until 31 December 2020. In such a case, the company is also not obliged to draw up an interim balance sheet. The company's board of director is obliged to justify and document its decision in writing.

In order to mitigate the negative effects of the COVID-19 pandemic to companies, the Swiss government further decided to provide companies with sufficient liquidity. This should allow companies to cover their current fixed costs despite COVID-19-related sales losses by granting bridging loans subject to the condition outlined in

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the respective ordinance. For the calculation in connection with overindebtedness, these loans are not considered as third-party capital until 31 March 2022.

3. New COVID-19 moratorium

As a reminder, the moratorium of articles 293 et seq. of the Swiss Debt Enforcement and Bankruptcy Act, is a procedure allowing a debtor who is facing several creditors to try to find a solution with the latter in order to definitely reorganize his situation. The purpose of this moratorium is to find an agreement for the repayment of the debtor's debts. However, this procedure is considered to be too cumbersome and expensive for many small and medium companies.

The Swiss government proposed a COVID-19 moratorium, which is applicable to companies facing financial difficulties due to the COVID-19 situation. This moratorium provides a simple procedure to obtain a temporary stay of their payment obligations.

The procedure shall be applicable to the followings companies:

- a) companies that are not being publicly traded companies;
- b) companies that were not already over-indebted on 31 December 2019;
- c) companies with a balance sum of less than CHF 20 million;
- d) companies with a turnover of less than CHF 40 million; and
- e) companies with less than 250 full-time employees.

Please note that two of the criteria mentioned above under points c) to d) must have been fulfilled in two consecutive years.

The COVID-19 moratorium provides that debtors may request the court to grant a moratorium of a maximum of three months, which may be extended once upon request by another three months. The moratorium prohibits the repayment of all claims against the debtor which have arisen until 30 May 2020 (including any debts that arose after the granting of the moratorium). The debts arising after the moratorium are not concerned.

This moratorium is also characterized by certain restrictions (unknown to the normal moratorium), which are designed to protect creditors: salaries and maintenance contributions will not be subject to the moratorium and will remain due unconditionally.

4. Other amendments to the existing debt-restructuring moratorium

For companies, which do not qualify for the newly proposed COVID-19 moratorium listed under section 3, a few amendments to the existing debt-restructuring procedure are proposed, which can be read as follows:

- The company is not required to provide a restructuring plan to the court together with the request for the grant of a provisional composition moratorium;
- Extension of the maximum duration of the provisional moratorium from four to six months;
- The debtor should not be declared in bankruptcy before 31 May 2020 if the company was not over-indebted on 31 December 2019;
- The debtor should be allowed, with the consent of the administrator, to terminate long-term agreements at any point in time without the need to show, as under current law, that the purpose of the restructuring would otherwise be frustrated.

Links :

Press release by the Federal Council of 18 March 2020

<https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen/bundesrat.msg-id-78482.html>

Ordinance of 18 march 2020 on the suspension of proceedings under Article 62 of the Federal Act on Debt Collection and Bankruptcy (RS 281.214)

<https://www.admin.ch/opc/de/classified-compilation/20200804/index.html>

Press release by the Federal Council of 16 April 2020

<https://www.admin.ch/opc/de/classified-compilation/20200804/index.html>

COVID-19 Insolvency Ordinance (Ordinance of 16 April 2020 on insolvency law measures to deal with the Corona crisis; RS 281.242)

<https://www.admin.ch/opc/de/classified-compilation/20201083/index.html>

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