



Covid-19: Temporary Changes to the Swiss Insolvency and Restructuring Regime

Due to the spread of the coronavirus in Switzerland, many companies are currently facing financial difficulties. To mitigate the impact of Covid-19, the Swiss Federal Council implemented a series of unprecedented measures in the past weeks (see our previous [Bulletins](#)). These temporary measures include, among other things, a stay of enforcement according to art. 62 of the Swiss Debt Enforcement and Bankruptcy Act (**DEBA**), a general suspension of deadlines in court proceedings, relief with regard to the requirements for applying for short-time work compensation and the launch of a Covid-19-bridge loan program of up to CHF 40 billion.

On April 16, 2020, the Federal Council adopted additional temporary measures in relation to the Swiss insolvency and restructuring regime that aim at providing relief for Swiss companies in financial distress. These measures include:

- a suspension of the duty of directors to notify the bankruptcy court in case of overindebtedness;
- a new Covid-19 moratorium for small and medium-sized enterprises; and

- amendments to the existing restructuring regime such as an extension of the duration of the provisional moratorium to six months.

These additional measures enter into force on April 20, 2020 and will remain effective for a period of six months, i.e., until October 20, 2020.

Suspension of notification duties in case of overindebtedness

The Board of Directors of a Swiss company (**Board**) is normally under quite a strict duty (and liability) to notify the bankruptcy judge if, at any point in time, the company is overindebted, i.e., a balance sheet, on a stand-alone basis, shows that the liabilities of the company are covered neither if the assets are appraised on a going-concern basis nor if they are appraised at liquidation values. Such interim balance sheet must be prepared and submitted to the auditors for examination "if there is reasoned concern of overindebtedness" (art. 725 of the Swiss Code of Obligations, **CO**). Moreover, the balance sheet has to be drawn up in accordance with Swiss accounting principles, which provide that a company must switch from going concern to liquidation values if, in the twelve months

from the balance sheet date, "*it is intended or probably inevitable*" to cease the business activities in whole or in part (art. 958a CO). Facing the current economic uncertainty and actual or potential liquidity squeezes, directors are therefore concerned whether they have to switch the company's accounting to liquidation values and that such switch would show an overindebtedness, forcing the company to file for insolvency.

Against this background, the Federal Council has decided to temporarily exempt the Board from its duty to notify the judge, provided that (i) the company was not overindebted on December 31, 2019; and (ii) there is "*a prospect*" that the overindebtedness will be eliminated until December 31, 2020. With this measure, the Federal Council wants to prevent that fundamentally sound companies, which only ran into financial difficulties because of the corona crisis, are forced to file for bankruptcy or a moratorium.

Note, however, that given the current lack of visibility it will in our view not be an easy task for the Board to underpin and document its positive outlook in a way that stands a review in a subsequent insolvency of the company. This temporary exemption does not therefore necessarily shield the members of the Board from directors' liability suits. Moreover, the exemption only covers the duty to notify the judge. It does not address the accounting issue of a forced switch to liquidation values.

Covid-19 moratorium for small and medium-sized enterprises

General principles

The Covid-19 moratorium is designed as an alternative to the ordinary moratorium under the DEBA and can be applied for during the effective term of the ordinance. It provides small and medium-sized enterprises (**SME**) with a simple procedure to obtain a temporary deferral of their payment obligations in order to reorganize and prepare for the time after the crisis. For the purpose of the Covid-19 moratorium, an SME is defined as a company whose shares are not publicly traded and that did

not exceed at least two of the following three thresholds in 2019:

- a balance sheet total of CHF 20 million;
- sales revenues of CHF 40 million or more;
- 250 full-time employees on annual average.

Procedural aspects

Any such SME may request the court to grant such a moratorium for an initial period of up to three months provided, however, that (i) it was not already overindebted on December 31, 2019; or (ii) if there was an overindebtedness, certain creditors subordinate their claims to those of all other creditors to the extent of the overindebtedness. Upon request of the SME, the court may extend the moratorium for an additional period of up to three months.

By submitting the request for a Covid-19 moratorium, the company's Board is deemed to have satisfied its duty to notify the judge in case of an overindebtedness. Once the moratorium has ended, the Board will, however, have to reassess the company's solvency under the rules then applicable.

The Covid-19 moratorium shall be granted by the court in a simple and straightforward procedure. The SME applying for such a moratorium has to submit a corresponding request, in which it must credibly establish its financial situation and provide to the best possible extent the respective evidence. The debtor has to immediately notify all known creditors of the moratorium. If the debtor has made false statements to the court, the court may *ex officio* revoke the Covid-19 moratorium at any time. Other than under the rules regarding an ordinary moratorium, the SME is under no obligation to file a re-structuring plan. The implementation of a Covid-19 moratorium as well as a possible extension of the moratorium are made public and the relevant authorities (such as the bankruptcy authority, the land register and the commercial register) are notified *ex officio* by the court granting the moratorium.

The SME and its creditors have the right to challenge the bankruptcy court's decision by filing an

appeal (*Beschwerde*) according to the Swiss Civil Procedure Code.

As a rule, no judicial administrator is appointed in the case of a Covid-19 moratorium. This takes into account the nature of the Covid-19 moratorium as a routine measure for a large number of debtors, and it aims at keeping the administrative work and the costs low. However, if the circumstances so require, the court may – either *ex officio* or at the request of the SME or a creditor – appoint an administrator at any time. In such a case, the administrator has the power to supervise the SME, issue instructions and support the SME by taking the necessary measures and reaching agreements with the SME's creditors.

Effects of the Covid-19 moratorium

The effects of the Covid-19 moratorium are comprehensive. It affects all claims against the SME that have arisen prior to the granting of the moratorium (with the exception of claims that would be ranked in the first priority in case of a bankruptcy [so-called first-class claims], such as certain claims of employees). During the Covid-19 moratorium, the SME's creditors are precluded from commencing (or continuing) enforcement proceedings (debt collection proceedings pursuant to the DEBA) against the SME for such claims. This does not apply to first-class claims and to the enforcement of a mortgage; however, the realization of the relevant charge over the real estate is suspended under the moratorium. Furthermore, during the Covid-19 moratorium, no attachment orders (or similar preliminary measures) can be obtained for the deferred claims. Limitation and forfeiture periods concerning deferred claims are suspended during the moratorium.

If the Covid-19 moratorium is granted, the SME is prohibited from satisfying claims that are subject to the moratorium. In case of non-compliance, the court may *ex officio* declare the SME bankrupt. The purpose of the ban on payment is to provide the SME that is under financial pressure with a justification for refusing to pay his creditors. At the same time, the payment ban is meant to facilitate

the payment of new liabilities, as the available funds may be used only for this purpose. However, it remains to be seen whether a forced non-payment of old trade creditors will enhance the liquidity situation of the company, given that unpaid suppliers may start to make further supplies subject to advance payment or security.

Claims arising after the granting of the Covid-19 moratorium are not affected by the moratorium. This shall allow the SME to continue its business operations during the moratorium. However, during the Covid-19 moratorium, the debtor may not perform any legal acts that impair the legitimate interests of the creditors or favor individual creditors to the detriment of others. If the court appoints an administrator, it may also order that certain acts need the administrator's consent or authorize the administrator to take over the management of the business.

If the SME wishes to conclude a composition agreement or benefit from the additional effects of an ordinary moratorium, it can apply to the court for a provisional moratorium at any time.

Additional modifications of the existing restructuring regime

The Federal Council has also implemented additional measures in the restructuring and insolvency area, from which all debtors – not only SME – can benefit. These measures include the following:

- In order to reduce the workload of the bankruptcy courts during the coronavirus crisis, the Federal Council suspended the existing requirement of art. 293 lit. a DEBA, according to which a debtor that intends to obtain an ordinary provisional moratorium has to submit a provisional restructuring plan (*provisorischer Sanierungsplan*). Consequently, the court seized with a request for a provisional moratorium does not have to examine whether or not the debtor will be able to recover during the moratorium.
- The Federal Council extended the maximum period for which a provisional moratorium can

be granted from four to six months. This measure is intended to promote direct restructuring during the temporary moratorium.

Legal text and further information

The legal text of the ordinance discussed herein as well as further information about the extraordinary situation are available on our [Covid-19 information hub](#).

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