SWITZERLAND

Trends and Developments

Contributed by:
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Walder Wyss Ltd. has a proven track record in corporate and financial restructuring. The firm manages both national and complex international cases, providing comprehensive legal services for strategic and financial restructuring as well as advice on non-performing business transactions. Walder Wyss advises the interest groups involved in Swiss insolvency and bankruptcy proceedings, and also supports foreign borrowers when launching and co-ordinating parallel and ancillary proceedings under Swiss insolvency law. The firm also enforces claims against assets located in Switzerland. The restructuring and insolvency team plays an active role in clients' affairs – this applies to out-of-court financial and debt restructuring and to court proceedings such as moratoriums under company law, standstill agreements and bankruptcy proceedings.

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Insolvency in Switzerland: an Introduction

The number of bankruptcies in Switzerland is on the way to setting new records

Similar to other jurisdictions, Switzerland has seen a significant increase of bankruptcies in 2024. According to a current forecast, around 11,000 companies are likely to go bankrupt in Switzerland in 2024, representing an increase of approximately 10% compared to 2022 and 2023, post-COVID. Compared to the average figures for 2018 and 2019, the years before the pandemic, this represents an increase of almost 35%.

In terms of the sectors affected, car businesses saw the largest increase in bankruptcies by far (43% increase compared to the same period last year), followed by real estate (36% increase). This is consistent with the general perception of two industries facing major problems due to technological change and innovation (automotive industry) and the interest rate environment (real estate industry). Other industries with above-average growth in bankruptcies are personal services, manufacturing and trade. In absolute numbers, the construction, legal, commercial and technical services, trade, gastronomy and hotel industries, as well as the manufacturing sector, are still the most affected by insolvencies.

New legislation combating abusive bankruptcies coming into force

On 1 January 2025, a raft of amendments to the law and ordinances will come into force in Switzerland, which are intended to combat or prevent the abuse of current bankruptcy law to harm creditors and put competitors at a disadvantage. In practice, there have been repeated cases in the past in which bankruptcy proceedings have been deliberately applied for in order to avoid having to meet obligations and to impose these on the social security providers, which have to pay for some of the losses. In particular, bankruptcy law allowed entrepreneurs to set up a new company immediately after the bankruptcy of their old insolvent company. In doing so, they could take over the previous employees and work equipment in order to continue business operations with no or minimal interruptions and subsequently harm new creditors and the social security providers in the same way.

Current Swiss bankruptcy law and criminal law already provide various means of punishing such abuses. However, it is evident that the factual and legal hurdles for creditors and authorities to

enforce their rights in various areas are too high, and therefore consistent legal action is not taken even in obviously abusive cases. In general, the prosecution of bankruptcy abuses fails less due to the lack of a legal basis than due to the (understandable) unwillingness of injured parties to take further financial risks in the form of civil proceedings or to file costly criminal charges.

Work on this legislative project began back in 2015 and was completed in Parliament in March 2022, followed by the amendment of various ordinances; finally, in October 2023, the Federal Council decided to bring the amended provisions into force on 1 January 2025, at the request of the cantons after a long transitional period to adapt cantonal regulations and processes. Amendments are planned to the Code of Obligations (CO), the Debt Enforcement and Bankruptcy Act (DEBA), the Criminal Code (SCC) and the Direct Federal Tax Act (DTA), and also to the Commercial Register Ordinance (CRO) and the Criminal Records Ordinance.

The core of the present draft is the improvement of the enforcement of the prohibition to engage in certain activities based on criminal law. In addition, various measures are implemented that are primarily intended to prevent the abuse of bankruptcy law. In particular, the following changes will be introduced.

Duty to report suspected bankruptcy abuses and deletion of entries in the commercial register

In future, the bankruptcy offices will be required to file a corresponding criminal complaint in all bankruptcy cases in which there are indications of a criminal offence. This is intended to ensure that enforcement of the law does not fail. There is no need to create new criminal offences for this, as the legal basis already exists.

Today, a court can order a prohibition of business activity on the basis of a bankruptcy or debt enforcement offence, and prohibit someone from exercising a function in a company. A bridge is now to be built between criminal law and commercial register law: in future, the Commercial Register Offices will also be notified of the prohibition of business activity entered in the criminal register. They must check whether a person is entered in the commercial register whose function is incompatible with a prohibition of business activity. If they identify such an incompatibility, they will inform the prosecution authorities so that they can sanction violations of the prohibition to engage in certain business activities. On the other hand, they ensure that the person concerned is deleted from the commercial register.

People search in the commercial register

In future, the website of the central company index (zefix.ch) will make it possible to search not only for companies but also for individuals. The personal data will be linked to the data of the legal entities. This will make it possible to see in which legal entity and in which function the person being searched for is or was entered in the commercial register. It will also be possible to see whether the person being searched for is or was registered with a legal entity for which bankruptcy proceedings have been opened. The person search makes it possible to obtain information on the economic background and involvement in bankruptcy proceedings of potential contractual partners.

On the basis of the search results, the person or company interested in a business relationship can then consider whether they are prepared to enter into a contractual relationship with the person they are looking for. On the other hand, this search option should also act as a deterrent to

persons who deliberately and repeatedly bring about bankruptcy proceedings. It will now be possible to uncover such patterns of behaviour with a simple search query. The legislator hopes that this will have a certain deterrent effect on people who deliberately and repeatedly bring about bankruptcy proceedings.

Regulation of shell companies and control by the Commercial Register Office

Article 684a of the CO now explicitly provides that the transfer of shares in a company is null and void if the company has no business activities and no realisable assets and is over-indebted. The wording more or less corresponds to that of the Federal Supreme Court, which had already declared shell trading null and void in a long-standing case law (which was repeatedly not known or deliberately ignored in practice).

In the past, shell companies have repeatedly been misused for "organised company burials". Typically, these are companies of small business owners who can no longer pay their bills or are already over-indebted. In times of need, they call on the help of a so-called "agent". Before bankruptcy proceedings are opened against the company, this agent arranges a so-called "corporate mortician" for the entrepreneur, for a fee of several thousand Swiss francs. The "corporate mortician" agrees to take over the bankrupt company in return for compensation.

The "agent" advises both the entrepreneur and the "corporate mortician" on how they can generate the greatest possible profit in this process. For example, the entrepreneur may try to reduce the assets of the shell company before handing it over by hollowing out the company and transferring all materials and equipment that are still usable to a rescue company. He or she may also increase the company's debts or order goods for private use on behalf of the over-indebted company. When the company is transferred, the existing business documents are also disposed of in order to destroy evidence so that the actual asset situation and, above all, the time of the over-indebtedness can no longer be determined.

As soon as the "corporate mortician" is entered in the commercial register as a director of the company, they typically move the company's registered office to another canton (often one in which another language is spoken) and changes its purpose and company name. Instead of liquidating the ailing company, they delay the company's bankruptcy and make purchases in the company's name without paying the bills. Often, employees or social security funds are also harmed.

If the Commercial Register Office has reasonable grounds to suspect a void shell company in connection with a registration, it shall request the company to submit its current signed and, if the company has an auditor, audited annual financial statements. According to Article 65a of the CRO, a reasonable suspicion exists in particular if:

- several registered facts are changed simultaneously or successively – namely, the purpose, registered office, company name or members of the board of directors;
- the company has the same legal domicile as a company that was refused registration pursuant to Article 684a of the CO; or
- persons who transfer or acquire shares were already involved in a transfer that led to a refusal of registration pursuant to Article 684a of the CO.

If the company does not comply with the request or if the annual financial statements confirm

the suspicion of unauthorised shell trading, the Commercial Register Office will refuse the requested entry. The Commercial Register Office also has the option of deleting the company from the commercial register ex officio on the basis of Article 937 of the CO.

No retroactive opting out

Companies that are not subject to an ordinary audit and have no more than ten full-time employees on an annual average can waive the requirement for a limited audit with the consent of all shareholders. Such a waiver can generally be seen in the commercial register entry for the company in question.

Under current law, however, an opting-out resolution comes into force immediately, but can also be registered in the commercial register at a later date. In the past, companies have taken advantage of this to opt out in the event of the resignation of the auditors or (foreseeable) reservations of the auditors in charge against the annual financial statements of the current financial year and then – once the auditor is not in charge any more because of the opting-out – approve the (unaudited) annual financial statements and elect new auditors at the same time. In such a scenario, it was therefore not apparent to the public that the company had validly decided to opt out at the time the annual financial statements were approved and had accordingly approved non-audited annual financial statements.

Under the new law, this will no longer be possible, as an opting-out can only be resolved and registered for future financial years – ie, not even for the current one. The opting-out must be registered in the commercial register before the start of the financial year, and the annual financial statements for the most recently completed financial year must now also be submitted as a commercial register document.

Creditors' right to choose whether to continue debt enforcement proceedings

Specific cases of abuse show that companies can continue to exist under current law despite chronic non-payment of public law debts, such as taxes or premiums for compulsory accident insurance. Under current law, the tax authorities and compulsory accident insurance companies are not entitled to file for bankruptcy. In the case of over-indebted companies, this leads to an extraneous incentive not to pay public law debts in order to satisfy other creditors. The continuation of such an over-indebted company is abusive and distorts competition.

The fact that bankruptcy often comes too late or is not opened at all in such constellations often also has negative consequences for employees' insolvency insurance cover. In order to prevent this abuse in future, the new rules stipulate that bankruptcy proceedings can also be filed for unpaid tax claims or claims under compulsory accident insurance.