Corporate Reorganisations 2021

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Corporate Reorganisations*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on the Cayman Islands.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Nick Cline, Robbie McLaren and Janine Leeder of Latham & Watkins, for their continued assistance with this volume.

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Switzerland

Dominik Hohler, Urs P Gnos and Markus Vischer

Walder Wyss

LEGAL AND REGULATORY FRAMEWORK

Types of transaction

1 What types of transactions are classified as 'corporate reorganisations' in your jurisdiction?

In comparison with other jurisdictions, the term 'corporate reorganisation' is not consistently used in Swiss legal practice and does not presuppose specific legal qualifications (eg, tax-neutral transfers of assets or shares). In general, corporate reorganisations comprise transactions such as mergers, demergers or conversions of legal entities. However, the transfer of shares or assets and liabilities (business units or individual assets or liabilities) under the Swiss Merger Act or in the form of traditional share or asset deals within a group of companies, the change of a company's registered seat or domicile or the voluntary liquidation of a legal entity are also considered corporate reorganisations.

Restructuring transactions involving distressed entities and insolvency proceedings are not discussed in this chapter. The same is true for transactions with group external third parties (eg, strategic mergers).

Rate of reorganisations

2 Has the number of corporate reorganisations in your jurisdiction increased or decreased this year compared with previous years? If so, why?

The covid-19 pandemic has put pressure on numerous Swiss companies to reconsider their internal structures and adjust them to become more efficient and innovative within a very short time period. Also, larger groups had to reorganise their business under refinancing transactions. As a result, internal corporate reorganisations were stable or even increasing during 2020. Due to the measures of the Swiss government (the guarantee programme, short work easements, etc), there has not yet been a wave of insolvencies or restructurings on the Swiss market. However, given that some of these measures have run out, pressure on companies in several sectors will increase to have even more efficient corporate structures in place.

In addition, the Swiss corporate tax reform entered into force on 1 January 2020, which can be identified as a driver for internal group corporate restructurings. As a result of the Swiss corporate tax reform, previously existing tax privileges (such as finance branches, mixed domiciliary, principal and holding regimes) were abolished and replaced by other Organisation for Economic Co-operation and Development (OECD)-compliant measures (patent box, additional research and development (R&D) reduction etc), leading to a reduced corporate income tax liability.

Jurisdiction-specific drivers

3 Are there any jurisdiction-specific drivers for undertaking a corporate reorganisation?

In the course of the implementation of the corporate tax reform, as of 1 January 2020, Switzerland has abolished its previously existing tax privileges (such as finance branches, mixed, domiciliary, principal and holding company regimes) and has introduced other OECD-compliant measures such as the IP box, R&D super deduction, notional interest deduction and the step-up of hidden reserves for companies immigrating to Switzerland to defend its traditional premium ranking as a global business location. This change of the Swiss tax environment is expected to be an impetus for tax-driven corporate reorganisations and, particularly in view of the international pressure on offshore structures, Switzerland is often a favourable jurisdiction when it comes to the onshoring of offshore companies.

Structure

4 How are corporate reorganisations typically structured in your jurisdiction?

The main types of corporate reorganisations, such as mergers, demergers, conversions or simplified transfers of assets and liabilities, are governed by the Federal Act on Merger, Demerger, Conversion and Transfer of Assets and Liabilities of 3 October 2003 (the Merger Act). In contrast, internal group sales, and transfers of shares and assets (individually transferred) are governed by the Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: Code of Obligations) amended on 1 January 2021 (the Code of Obligations). 'Quasi-mergers' (ie, the combination of two entities without merging their legal forms or liquidating one of the entities) are also ruled by the Code of Obligations. In this scenario, the combination takes place by way of a share-for-share transaction or the formation of a new legal entity that assumes assets and liabilities of or the shares in the two combined legal entities in exchange for its own shares. Finally, demergers can also be implemented under the Code of Obligations by way of a two-step transaction (ie, incorporation of a special purpose vehicle (SPV) with a contribution-in kind of certain assets into the SPV followed by a distribution of the shares in the SPV). From a tax perspective, corporate reorganisations are often structured as book value transactions, as Swiss tax law allows the implementation of corporate reorganisations, in many cases, in a tax-neutral manner if, inter alia, assets or liabilities are transferred at book value.

Laws and regulations

5 What are the key laws and regulations to consider when undertaking a corporate reorganisation?

In Switzerland, the Merger Act governs the main parts of corporate reorganisations. The Merger Act has beenpartly revised and amended, the last time in 2014. The Merger Act is supplemented by other federal and cantonal statutes and circulars, including:

- the Federal Act on the Swiss Civil Code of 10 December 1907, amended on 1 January 2021;
- the Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: Code of Obligations), amended on 1 January 2021;
- the Federal Act on Private International Law of 18 December 1987, amended on 1 January 2021;
- the Ordinance on the Commercial Register of 17 October 2007, amended on 1 January 2021;
- the Federal Act on Direct Federal Tax of 14 December 1990, amended on 1 January 2021;
- the Federal Act on Harmonisation of the Direct Cantonal and Communal Tax as of 14 December 1990, amended on 1 January 2021;
- the Federal Act on Withholding Tax of 13 October 1965, amended on 1 January 2020;
- the Federal Act on Stamp Duty of 27 June 1973, amended on 1 January 2020;
- the Federal Act on Value Added Tax of 12 June 2009, amended on 1 January 2020;
- the Cantonal Acts on Cantonal Taxes;
- Circular Letter No. 5 of the Swiss Federal Tax Administration of 1 June 2004;
- Circular Letter No. 6 of the Swiss Federal Tax Administration of 6 June 1997;
- Circular Letter No. 27 of the Swiss Federal Tax Administration of 17 December 2009;
- Circular Letter No. 29a of the Swiss Federal Tax Administration of 9 September 2015; and
- Circular Letter No. 29b of the Swiss Federal Tax Administration of 23 December 2019.

National authorities

6 What are the key national authorities to be conscious of when undertaking a corporate reorganisation?

As many corporate reorganisations have a tax impact, it is often recommended to apply for a tax ruling with the competent Swiss tax authorities, in particular with the Swiss Federal Tax Administration and the relevant cantonal tax authorities. Transactions involving the change of the legal entities' articles of association or requiring the necessity for a filing with the competent register of commerce (eg, mergers, demergers, conversions, capital increases, liquidations) will have to be approved by the competent cantonal register of commerce. Finally, in corporate reorganisations involving the transfer of employees, the competent cantonal social security authority and, in the case of foreign employees, the competent cantonal office for economy and labour might have to be informed.

KEY ISSUES

Preparation

7 What measures should be taken to best prepare for a corporate reorganisation?

While due diligence in internal group reorganisations may only be required to a certain extent (eg, with regard to change-of-control clauses in third-party agreements) the assessment of the legal and tax consequences of the contemplated final structure is essential. To be certain of the potential tax impact, it is often recommended to apply for a tax ruling with the competent tax authorities. In corporate reorganisation transactions that comprise the transfer of assets, the statutory auditors of the legal entities (if any) are often involved. Finally, more complex transactions that require a filing with the competent cantonal register of commerce can be filed for review and pre-approval.

Employment issues

8 What are the main issues relating to employees and employment contracts to consider in a corporate reorganisation?

If a seller transfers a company's business or a part thereof to a purchaser in an asset deal (irrespective of whether in a traditional asset deal or an asset deal or a merger or a demerger under the Merger Act), the existing employment relationship with the seller, and all related rights and obligations, automatically pass to the purchaser as of the day of the transfer, unless the employee objects to the transfer, in which case the employment relationship with the purchaser terminates at the end of the notice period provided by law.

The seller and the purchaser are jointly and severally liable for any claims of an employee that fall due before the transfer, or that fall due between the transfer and the date on which the employment relationship could normally be terminated or is terminated following refusal of the transfer.

The seller (as the employer) has to inform the employees' representatives or, if there are none, the employees directly, in good time before signing, of the reason for the transfer, and the legal and socio-economic consequences of the transfer for the employees. If, as a result of the transfer, measures affecting the employees are planned (such as a change of their usual place of work) the employees' representatives or, if there are none, the employees themselves have to be consulted in good time before a decision is made on these measures.

If such consultation and information rights are breached, the asset sale does not automatically become null and void. The employees' representatives or all employees concerned can, however, block the acquisition by injunctive relief. It is disputed whether they can have the acquisition prohibited until the rights have been complied with. They can in any case sue for damages.

If the asset sale occurs through an asset deal under the Merger Act, the employees' representatives, or all employees concerned have the additional possibility of blocking the registration of the acquisition in the relevant registry of commerce.

Irrespective of whether the sale of assets has been implemented by way of a traditional asset deal or as an asset deal under the Merger Act, if the transferred relationship is governed by a collective employment contract, the purchaser must comply with it for at least one year, unless it expires or is terminated sooner. If the employee refuses the transfer, the employment relationship ends upon expiry of the statutory notice period; until then, the purchaser and the employee must perform the contract.

The principles of an asset deal, as outlined above, apply mutatis mutandis for a merger, demerger or conversion under the Merger Act.

9 What are the main issues relating to pensions and other benefits to consider in a corporate reorganisation?

Private pension schemes

Private pension schemes are mandatory. Thus, the employer has to conclude an accession agreement with a separate legal entity as the carrier of such private pension scheme. This legal entity, normally a foundation, is either set up by the employer itself or, more commonly, by an insurance company or another third party. The legal entity is the carrier of the private pension scheme, which is mainly financed by the employer and, normally, the employees. If the employer changes (eg, because of a transfer of a business unit), the employees have to be registered with the new employer's pension scheme.

Pensions on a business transfer

A reorganisation in the form of a share or asset purchase does not as such affect the separate legal entity that is the carrier of the private pension scheme. It may be, however, that the transaction affects the legal entity indirectly. In some instances, for example, the legal entity needs to be fully or partially liquidated and assets resulting from the liquidation passed on to the legal entity or entities newly in charge of the employees concerned. Such full or partial liquidation is heavily regulated and supervised by the state authorities entrusted with the supervision of the mentioned legal entities.

Financial assistance

10 Is financial assistance prohibited or restricted in your jurisdiction?

Upstream or cross-stream financial assistance within a group of companies is a controversial topic in Switzerland. In the light of recent case law, the granting of an upstream or cross-stream: (1) security (eg, granting of a guarantee) by a Swiss subsidiary to secure obligations of its parent company or any of its affiliates, other than 100 per cent direct or indirect subsidiaries; or (2) loan (also in the form of cash pools) by a Swiss subsidiary to its (direct or indirect) parent company or to any of its affiliates, other than 100 per cent direct or indirect subsidiaries must:

- be allowed by the Swiss subsidiary's articles of association, which shall include the purpose of group support and financial assistance;
- be in the interest of the Swiss subsidiary (ie, dealing at arm's length, provision against consideration, review of importance of the security or loan compared to the other assets of the companies involved, financial capacity of the recipient); and
- not constitute a repayment of the equity capital of the Swiss subsidiary or an unjustifiable contribution.

Otherwise, in case of any doubt (in particular with regard to whether the relevant case constitutes an arm's-length transaction), the amount of the security or loan shall be limited to the freely distributable funds of the Swiss subsidiary that needs to be blocked in the amount of the security or loan, and the subsidiary's shareholders' meeting shall resolve on and approve the granting of such security or loan.

Non-compliance

If an upstream or cross-stream transaction does not meet the financial assistance rules as outlined above, the transaction may be null and void (eg, because it violates the company's purpose clause or it infringes the protected equity capital of the company), can be challenged by the company or its shareholders, and may lead to directors' liability.

Tax

In the case of a financial assistance issue from a corporate law perspective (eg, if an upstream loan exceeds the distributable reserves of the respective Swiss company), no Swiss tax consequences should be triggered. However, if a subsidiary has granted an upstream or cross-stream loan and the granting of the loan was not in the interest of the subsidiary, or did not meet the dealing at an arm's-length standard in another way (eg, in cases in which the repayment of the loan is unlikely from the beginning), Swiss tax authorities may, depending on the individual case, requalify such loan as a constructive dividend distribution, subject to Swiss withholding tax of 35 per cent (or 53.8 per cent grossed-up if the Swiss withholding tax has not been transferred to and is not borne by the recipient).

Further, to avoid any deemed dividend distribution subject to Swiss withholding tax, the thin cap rules and the safe-haven interest rates as annually published by the Swiss Federal Tax Administration need to be observed or, alternatively, evidence needs to be provided that the applied interest rate complies with the arm's-length principle.

Common problems

11 What are the most commonly overlooked issues or frequently asked questions in a corporate reorganisation?

Book value transactions

It is very likely that, in the case of an intra-group upstream or cross-stream sale of assets or shares by a Swiss company at book value (if it is lower than the fair market value), such transaction will be a financial assistance case and the financial assistance rules will have to be complied with (freely distributable funds available, board of directors and shareholder's meeting approving the transaction).

Factual liquidation

If a Swiss company sells all, substantially all or the material part of its assets without reinvesting the consideration, such transaction often qualifies as a factual modification of the company's purpose without the consent of the shareholders' meeting regarding its liquidation and, therefore, as a factual liquidation of the company. Such sale does not lie, as a matter of principle, in the competence of the board of directors of a Swiss company. Further, a sale of all, substantially all or the material part of assets of a company can hardly be justified by the company's interests. If such a sale qualifies as factual liquidation, it will be null and void, and may lead to directors' liability. To address this issue, the company can be put into voluntary liquidation before the sale transaction takes place. In cases where it is doubtful whether the contemplated sale will qualify as factual liquidation and the initiation of voluntary liquidation proceedings is not feasible, it is recommended to have the shareholders' meeting decide on the planned transaction to reduce the risk of personal liability of the directors. Such a shareholders' resolution should take place in the presence of a notary public and might include a change of the purpose clause in the articles of association.

Transfer pricing

Although specific transfer pricing provisions are not known in Switzerland, Swiss tax authorities may add commercially unjustified expenses of legal entities to their taxable profit. To avoid such qualification, intra-group services and assets have to pass the arm's-length test and serve a business purpose of the entities involved.

ACCOUNTING AND TAX

Accounting and valuation

12 How will the corporate reorganisation be treated from an accounting perspective? How are target assets and businesses valued?

The Swiss statutory accounting principles also apply to corporate reorganisations. However, to benefit from a tax-neutral corporate reorganisation, assets and liabilities need to be transferred at book value. Such book value transfers often trigger financial assistance issues if, for example, the book value of the transferred assets by a Swiss subsidiary to its parent company is lower than the fair market value of the assets.

Tax issues

13 What tax issues need to be considered? What are the tax implications of carrying out a corporate reorganisation?

Corporate reorganisations (eg, mergers, demergers, share-for-share exchanges (quasi-mergers) or the transfer of assets and liabilities) may qualify as tax-neutral restructurings if certain preconditions are met. Such tax-neutral transaction requires, inter alia, that the assets and liabilities are transferred at book value and remain subject to unlimited taxation in Switzerland. Otherwise, corporate income tax, issuance stamp tax, securities transfer tax, withholding tax, value added tax, real estate capital gain or transfer taxes might be triggered. Therefore, corporate reorganisations are usually structured in a way to meet the requirements for a tax-neutral reorganisation. To obtain tax certainty about the contemplated new structure, it is often recommended to apply for a tax ruling with the competent tax authorities.

CONSENT AND APPROVALS

External consent and approvals

14 What external consents and approvals will be required for the corporate reorganisation?

If one or several legal entities change their legal structure or their articles of association, the registration by (and thus approval of) the cantonal register of commerce is required. As a general rule, no approvals are required from a tax perspective.

Internal consent and approvals

15 What internal corporate consents and approvals will be required for the corporate reorganisation?

Depending on the type of corporate reorganisation, only the approval by the board of directors (or managing officers in the case of a limited liability company) or also the shareholders at a general meeting (eg, for financial assistance or factual liquidation transactions) will be required. The approval of the shareholders' meeting is always necessary if the legal entity changes its articles of association, in demergers or, with exceptions, mergers. No shareholders' meeting approval but the information of the shareholders, either at the next shareholders' meeting or in the notes to the company's annual accounts, is required in the case of a transfer of assets and liabilities under the Merger Act.

ASSETS

Shared assets

16 How are shared assets and services used by the target company or business typically treated?

Specific transfer pricing provisions are not known in Switzerland. Transactions (including intra-group shared assets and services) between related parties are accepted by the Swiss tax authorities as long as they comply with the arm's-length principle. Otherwise, such transactions may be re-qualified as deemed dividend distributions subject to corporate income and Swiss withholding tax of 35 per cent.

With regard to the arm's-length character of the interest rate applicable to intra-group loans, the safe-haven interest rates, as annually published by the Swiss Federal Tax Administration in its circular letters 'Safe Harbour Interest Rates for Intra-Group Loans in Swiss Francs' and 'Safe Harbour Interest Rates for Intra-Group Loans in Foreign Currencies' need to be observed. A higher interest rate might apply, provided that the interest rate is at arm's length and that evidence can be provided by the taxpayer.

Transferring assets

17 Are there any restrictions on transferring assets to related companies?

According to Swiss law, a transfer of assets to a company within the same group of companies is generally permitted. However, as Swiss corporate law does not provide a full formal legal framework for groups of companies, each group company has to be considered separately as an independent entity. Consequently, the law requires that each legal entity pursue its own corporate scope independently of the interests of its shareholders or affiliates. Therefore, even a company that is wholly controlled by another company has to act within its statutory limits and may not act in the interest of its shareholders only.

As a result of this principle, intra-group upstream and cross-stream transactions have to comply with the financial assistance rules. In addition, transferring assets downstream to a subsidiary has to be covered by the articles of association and must be in the best interest of the contributing Swiss parent company. Finally, selling all, substantially all or the material part of the legal entity's assets without reinvesting the consideration may qualify as factual liquidation. In such case, voluntary liquidation proceedings might have to be initiated before the sale to address this issue.

18 Can assets be transferred for less than their market value?

Yes, shares and assets can be transferred for less than their (fair) market value, and in practice they are often transferred at book value because such transfer value is often more favourable from a tax perspective. However, transferring the assets for less than the fair market value will generally not be considered an arm's-length transaction and may qualify as hidden distribution of assets (in the case of an upstream or cross-stream transfer) or hidden contribution without consideration (in the case of downstream transfer). Thus, in case of upstream or cross-stream transfers, the financial assistance rules have to be observed.

FORMALITIES

Date of reorganisation

19 Can a corporate reorganisation be backdated or deemed to have already taken place, for example, from the start of the financial year?

With regard to the civil law effects of a transaction (eg, the transfer of ownership according to Swiss law, the increase of share capital, the merger of two entities or the dissolution of a company), a transaction cannot be backdated. However, with regard to the economic effects (which have a direct impact on accounting and tax qualifications), a transaction may have retro-active effects, for example, to the beginning of the financial year.

Documentation

20 What documentation is required in a corporate reorganisation?

The documentation depends on the contemplated corporate reorganisation. The Merger Act and the Ordinance on the Commercial Register explicitly list the minimal documentation required for a merger, a demerger, a conversion or an asset transfer according to the Merger Act. A simplified subsidiary in a parent-merger, for example, requires at least a merger agreement, a merger balance sheet (being the balance sheet of the acquired entity) and the approval of the boards of directors of the merging entities, which have to be submitted together with the applications of each merging entity to the competent cantonal commercial register. Group internal sales, and transfers of shares and assets governed under the Code of Obligation are most commonly implemented under a share purchase or asset purchase agreement in written form, although the written form is, in general, not required by law. The transfer of the shares or assets must comply with the relevant underlying statutory provisions (eg, handing over of the endorsed share certificates or issuing a written declaration of assignment in case of a transfer of shares in a corporation).

Representations, warranties and indemnities

21 Should representations, warranties or indemnities be given by the parties in a corporate reorganisation?

Whether representations, warranties or indemnities will have to be given has to be decided case by case and depends on the contemplated transaction. However, in internal group corporate reorganisation transactions, it is often the case that only a representation of the unencumbered title of the assets or shares is granted by the selling or transferring party. These transactions will generally not pass the arm's-length test.

Assets versus going concern

22 Does it make any difference whether assets or a business as a going concern are transferred?

Yes. If a transfer of assets is considered a transfer of a (going concern) business or business unit, the employment relationships of such business's employees will be permanently transferred to the transferee by law, unless the employees (but not the employer) object to such transfer.

Types of entity

23 Explain any differences between public, private, government or non-profit entities to consider when undertaking a corporate reorganisation.

In general, in the case of a corporate reorganisation, the same civil and tax law principles apply for listed or non-profit entities (as far as they are not exempted from taxes) as for private entities. Moreover, the special statutorylaw that governs public or governmental entities in the legal form of a corporation (eg, in sectors such as public transport, nuclear power or the military) usually refers to the general principles of corporate law that are applicable for private corporations in the case of a corporate reorganisation.

Post-reorganisation steps

24 Do any filings or other post-reorganisation steps need to be taken after the corporate reorganisation?

Corporate
In intra-group transactions, acquirers or subscribers of shares are obliged to report and disclose the beneficial owner or owners (ie, the natural person or persons) of the shares to the board of the legal entity of which shares have been acquired or subscribed to, if they reach or exceed a qualified holding of 25 per cent of the share capital or the voting rights in the legal entity by acquiring or subscribing to the shares. In addition, acquirers or subscribers of bearer shares have to report and disclose, irrespective of their holding, their names and addresses to the board of the legal entity.

Tax
Depending on the type of corporate reorganisation, certain tax filings need to be made with the competent tax authorities (eg, withholding tax declarations or value added tax declarations).

UPDATE AND TRENDS

Hot topics

25 What are your predictions for next year and how will these impact corporate reorganisations in your jurisdiction (for example, expected trends or pending legislation)?

On 1 January 2020, the Swiss corporate tax reform entered into force. As a result of the reform, previously existing tax privileges (such as finance branches, mixed domiciliary, principal and holding regimes) were abolished and replaced by other OECD-compliant measures (patent box, R&D super deduction and notional interest deduction, etc), leading to a reduced corporate income tax liability. This change of the Swiss tax environment is expected to be an impetus for tax-driven corporate reorganisations in near future.

26 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

On 18 March 2020, the Swiss Federal Council published an ordinance ordering a nationwide standstill of deadlines in debt-collection proceedings, which lasted until 19 April 2020. In practical terms, such standstill of deadlines means that debt collection offices and courts did not take any actions to collect debts; in particular, they did not serve any payment orders on debtors or declare a company bankrupt. Even though the

suspension of the deadlines applied to all Swiss companies, it did not release them from their duty to settle due invoices and their boards of directors to notify the judge in the case of over-indebtedness. Moreover, creditors were still able to initiate debt collection proceedings against their debtors; however, the enforcement measures were stayed. The Swiss Federal Council decided against an extension of this standstill of deadlines for debt collection proceedings.

However, the Swiss Federal Council adopted the COVID-19 Ordinance Insolvency Law on 16 April 2020, which remained in force for six months and lapsed on 19 October 2020. The ordinance provided various relief measures for businesses in financial difficulties due to the covid-19 crisis, such as the suspension of notification duties of directors in the case of over-indebtedness, facilitated prerequisites for filing for composition proceedings or the extension of the temporary composition moratorium period up to six months (as opposed to four months) and introduced a simplified moratorium for small and mid-size companies (the COVID-19 Moratorium). The Swiss Federal Council decided against an extension of the measures under the COVID-19 Ordinance Insolvency Law and repealed the ordinance in general. This decision was justified on the grounds that reliefs for debtors always entail a burden for creditors and thus for the entire economy.

For constitutional reasons, Swiss parliament passed the COVID-19 Act in September 2020. This act democratically legitimises the emergency ordinances of March 2020. Section 9 of the COVID-19 Act allows the measures taken by the Swiss Federal Council regarding insolvency law to remain in force until 31 December 2021, and therefore provides legal certainty for companies in financial difficulties due to coronavirus for the following year. The COVID-19 Act authorises the Swiss Federal Council to react dynamically to changes in the pandemic situation and take further action if necessary. Based on this legal framework, the Swiss Federal Council is enabled to reinstate the COVID-19 Ordinance Insolvency Law without delay if the economic situation requires such measures again.

Covid-19 loans

In addition to the above-mentioned emergency legislation, the Swiss Confederation guaranteed loans to small and mid-sized companies to easily bridge liquidity problems of such companies (COVID-19 loans). Eligible companies could apply for such loans in an unbureaucratic way to their principle bank and receive the required liquidity in a short space of time.

Such loans under the guarantee programme must be booked by the borrower as normal liabilities (debt). They are not subordinated to other claims. However, loans of up to 500,000 Swiss francs that are guaranteed by the Swiss Confederation are not considered debt when applying the balance sheet test.

This rule is intended to prevent companies from getting into a capital loss or over-indebtedness situation as a result of financing under the guarantee programme by the Swiss Confederation. However, this relief is valid only until 31 March 2022. After that date, such loans will have to be considered debt again when applying the balance sheet test.

Loans exceeding 500,000 Swiss francs under the guarantee programme are considered normal debt with respect to article 725 of the Swiss Code of Obligations and can therefore result in a capital loss or even over-indebtedness situation for the company.

Covid-19 reliefs in a nutshell

The exceptions and reliefs still in force ordered by the Swiss Federal Council can be summarised as follows:

- Any loan of up to 500,000 Swiss francs guaranteed by the Swiss Confederation in accordance with the federal guarantee programme shall not be considered a liability in the company's balance sheet. Therefore, such loan is not taken into account in the over-indebtedness test (this relief is valid until 31 March 2022).
- As compensation for non-extension of the COVID-19 Ordinance Insolvency Law, the Swiss Federal Court decided to set some insolvency law-related provisions of the planned corporate law revision already into force in October 2020. As a result, under article 293a of the Debt Collection and Bankruptcy Act of 1889, as amended, the maximum duration of the temporary debt moratorium can now be extended up to eight months. By doing so, the Swiss government intends to facilitate restructuring proceedings by alleviating the pressure of reaching an agreement between creditors and the debtor in a short period of time. However, time will tell if four additional months will have a significant impact on the chances of a successful restructuring of companies in financial distress due to the covid-19-crisis.
- On 1 December 2020, the Covid-19 Hardship Ordinance entered into force. It was last amended on 14 January 2021. It provides for a framework regime under which businesses can apply for state aid in the form of suretyships, guarantees, loans or *à fonds perdu* contribution if they meet certain criteria, particularly regarding a reduced turnover and uncovered fixed costs due to state measures combating coronavirus, like closures of businesses and the like.

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