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Measures against COVID-19-related bankruptcies adopted:

As announced on 9 April 2020, the Swiss Government today adopted measures to prevent a wave of bankruptcies as a result of the COVID-19 pandemic. At the heart of the measures is the suspension of the duty to notify the court in the event of over-indebtedness and a new moratorium designed for SMEs (COVID-19 Moratorium).

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New COVID-19 Insolvency Ordinance to enter into force on 20 April 2020

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The Federal Council today adopted a new "Ordinance on Insolvency Law Measures to Cope with the Corona Crisis" (the COVID-19 Insolvency Ordinance) with targeted measures to prevent Corona related bankruptcies and the associated loss of jobs. The COVID-19 Insolvency Ordinance provides for (i) a temporary suspension of the obligation to notify over-indebtedness, (ii) amendments to the "ordinary" composition proceedings, and (iii) the option of a temporary, pragmatic COVID-19 moratorium, particularly for SMEs. The COVID-19 Insolvency Ordinance will enter into force on 20 April 2020 and apply for a period of 6 months. The nation-wide standstill of deadlines for debt collection proceedings, which ends on 19 April 2020, will not be extended.

Suspension of the duty to notify the court in case of over-indebtedness

Pursuant to Article 725(2) of the Swiss Code of Obligations (CO) the board of directors of a company must notify the bankruptcy court without delay if an audited (interim) balance sheet shows that the company is over-indebted unless creditors subordinate their claims to the extent of the over-indebtedness. Art. 1 of the COVID-19 Insolvency Ordinance reliefs the board of directors of this duty if the company was not over-indebted at 31 December 2019 and if there are prospects of remedying the over-indebtedness by 31 December 2020. The board of directors must record the reasons for its decision and the decision itself.

The new rules call for the following clarifications and explanations:

Duty to draw up interim balance sheet

The board of directors remains obliged to continuously monitor the financial situation of the company and, if there are signs of over-indebtedness, to prepare an interim balance sheet. The duty to have the interim balance sheet audited, however, is suspended under the COVID-19 Insolvency Ordinance.

No over-indebtedness as of 31 December 2019

If the company was not over-indebted as of 31 December 2019 there is an assumption that over-indebtedness is due to the COVID-19 pandemic, without an obligation of the board of directors to give any explanations or reasons in this respect. 31 December 2019 will correspond to the end of the fiscal year for most companies; if this is not the case, a company would have to draw an interim balance sheet to show that it was not over-indebted at that point in time. IMPORTANTLY, companies that were over-indebted as of 31 December 2019 but were relieved from the duty to notify the court because creditors subordinated their claims to a sufficient extent cannot benefit from the relief of suspension of the duty to notify the court granted under the new rules, if the over-indebtedness is not covered anymore by subordinated claims.

Prospects of remedying the over-indebtedness by 31 December 2020 and duty to record reasons and decision in writing

The board of directors needs to consider all information relevant for the economic situation of the company and on that basis be able to make a positive forecast for the company. An interim balance

sheet which shows the over-indebtedness (prepared at going concern and liquidation values) and liquidity plans are particularly suitable to document and justify the forecast that over-indebtedness can be overcome by the end of 2020. The decision of the board of directors regarding the over-indebtedness of the company, the positive forecast and the renouncement to notify the court will typically by recorded in the board minutes. It is advisable to keep all supporting documents which lead to this decision as annexes to the board minutes as well.

Legal entities subject to new rules

The new rules apply to joint stock corporations (AG, SA), limited liability companies (GmbH; Sàrl), cooperatives (Genossenschaft; société coopérative) and foundations (Stiftung; fondation). They do not apply to banks and financial services providers pursuant to the Collective Investment Schemes Act.

Exemption for auditors

Auditors are exempt from their obligation to notify the court if the board of directors has no duty to do so under the COVID-19 Insolvency Ordinance.

COVID-19 Moratorium

The COVID-19 Insolvency Ordinance introduces a new moratorium for small and medium-sized enterprises (SMEs) that run into liquidity problems due to the corona crisis (COVID-19 Moratorium). With this measure, SMEs can be granted a temporary moratorium of three months in a fast and pragmatic manner without the need to submit a restructuring plan. The moratorium can be extended for an additional three months.

Prerequisites

The conditions to have a COVID-19 Moratorium approved by the court are deliberately low in order to grant access to this moratorium for as many affected companies as possible:

1. Public listed companies and companies that exceed two of the following thresholds in two successive financial years are excluded from the scope of the COVID-19 Moratorium: (a) a balance sheet total of CHF 20 million, (b) sales revenue of CHF 40 million, or (c) 250 full-time positions on annual average.
2. Any other company may file for a COVID-19 Moratorium, provided that the company was not over-indebted as per 31 December 2019 or had subordinated its debt according to Article 725(2) CO in the amount covering the over-indebtedness.

Application to Composition Court

The board of directors of the company must submit a written request to the composition court at the place of its registered office accompanied by evidence of its financial situation as of 31 December 2019.

Effects

During a period of three months starting from the decision of the composition court, the debts covered by the COVID-19 Moratorium (i.e. the debts existing prior to the COVID-19 Moratorium decision) are under moratorium and creditors may not enforce these claims (with some exceptions such as claims of employees). Moreover, the company must not settle the debts that are under moratorium but is only allowed to pay the debts that arose after the court granted the COVID-19 Moratorium. This allows the companies to focus on the running business. In addition, creditors may not request a court to issue freezing orders.

Amendments to composition proceedings

If a company cannot benefit from the suspension of the duty to notify the court (e.g. because there are no prospects of remedying the over-indebtedness in due time), or request for a COVID-19 Moratorium (e.g. because of the size of its balance sheet) the company can still apply for the ordinary debt-restructuring moratorium. The COVID-19 Insolvency Ordinance temporarily eases the conditions for this slightly as follows:

– The company does not have to file a draft restructuring plan with its request for composition proceedings. Moreover, the court will not declare the company bankrupt if the company fails to establish that there are sufficient reasons to believe that the company may be restructured (as would be the case under normal circumstances).

– The temporary composition moratorium (the phase that allows the company to consider whether it is able to take measures such as restructuring or whether there is a chance that the creditors agree on the principle of a composition agreement) may last up to six months (as opposed to four months under normal circumstances).

– Under normal circumstances, the court will declare the company bankrupt if the trustee or the court concludes during the final composition moratorium (the phase during which the restructuring measures are enforced, or the creditors negotiate and enter into a composition agreement) that bankruptcy is the only way to preserve the assets of the company. However, given the extraordinary circumstances, the court will stay the decision until 31 May 2020, provided the company was not over-indebted (or creditors subordinated their claims to a sufficient extent) as per 31 December 2019.

Conclusion

The new rules adopted by the Federal Council today have received strong support in the consultation process and it is hoped that they will fulfil the expectations placed in them. It is expected that the temporary suspension of the obligation to notify the court in case of over-indebtedness will prevent numerous bankruptcies in the coming months. But the fact that the Federal Council made the conscious decision not to let companies benefit from the new rules if they were over-indebted as per 31 December 2019 but relieved from the duty to notify the court thanks to a sufficient amount of subordinated claims will most probably lead to many companies file for a COVID-19 Moratorium.