

Coronavirus Information Hub: FAQ

Restructuring & Insolvency

I have heard that the Swiss Government declared a nationwide standstill of deadlines for debt collection proceedings. What does that mean for me as a director and my company?

On 18 March 2020, the Swiss Federal Council published an ordinance ordering a nation-wide standstill of deadlines in debt-collection proceedings which lasts until 19 April 2020.

In practical terms, such standstill of deadlines means that debt collection offices and courts will not take any actions to collect debts; in particular, they will not serve any payment orders on debtors or declare a company bankrupt. However, among others, freezing orders against debtors can still be initiated.

Even though the suspension of the deadlines applies to all Swiss companies it does not release them from their duty to settle due invoices and their boards of directors to notify the judge in case of over-indebtedness. Moreover, creditors may still initiate debt collection proceedings against their debtors; however, the enforcement measures will be stayed.

The Swiss Federal Council decided against an extension of this standstill of deadlines for debt collection proceedings. One of the fundamental functions of the state and the economy is to ensure a functioning debt collection system, and debtors should keep paying their debts despite the extraordinary situation. However, the Swiss Federal Council put in place additional measures (e.g. guaranteed credits, suspension of notification duties of directors or a COVID-19 moratorium) to mitigate the financial consequences of the COVID-19 crisis.

My company is in financial distress (loss of capital / over-indebtedness). What are the duties of the directors?

According to the Swiss Code of Obligation, the duties of the board of directors in case of over-indebtedness of the company are as follows:

Capital loss

If the last annual balance sheet of a company shows that half of the share capital and the legal reserves are no longer covered by the net asset value (at going-concern value) of the company, the board of directors shall without delay call a general meeting of shareholders and propose adequate measures for restructuring. Concrete options for restructuring need to be considered based on the specific financial situation of the individual Swiss companies concerned.

Over-indebtedness

In case of substantiated concern of over-indebtedness an interim balance sheet must be prepared and submitted to the company's auditors for examination. If the interim balance sheet shows that the claims of the creditors are neither covered if the assets are appraised at ongoing business values nor at liquidation values (balance sheet test), the board of directors is obliged to notify the bankruptcy or composition court. To maintain going-concern value, a sound cash flow plan securing operations for a reasonable period (typically 12 months) will be requested.

There are two exceptions to this:

- a. No notification is required if creditors subordinate their claims to the claims of all other creditors in the amount of the over-indebtedness;
- b. The board of directors can refrain from notifying the bankruptcy or composition court for a short period of time if it has sufficient reasons to believe that the company can restructure within a short period of time. However, mere hope or a vague expectation of a restructuring does not justify the postponement of the filing for bankruptcy.

COVID-19 Reliefs

Given the extraordinary circumstances and the drastic measures limiting economic activities, the Swiss Federal Council decided to order an additional set of exceptions:

- a. Any loan of up to CHF 500,000 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 only until 31 March 2022).
- b. In case of substantiated concern of over-indebtedness an interim balance sheet must still be prepared. However, the board of directors is released from the duty to submit this interim balance sheet for examination (this relief comes into effect on 20 April 2020 and will remain in force for the duration of six months).
- c. In case of over-indebtedness the board of directors does not have to notify the bankruptcy or composition court, provided the company was not over-indebted as per 31 December 2019 and there are sufficient reasons to

believe that the company will overcome over-indebtedness by 31 December 2020 (this relief comes into effect on 20 April 2020 and will remain in force for the duration of six months). The board of directors must justify and document the decision in writing.

In addition, the board of directors can file for composition proceedings (instead of bankruptcy). The Swiss Federal Council also simplified some requirements in order to allow companies suffering from the financial impact of the COVID-19 measures to file for composition proceedings.

Therefore, under the current and modified regimes, companies in financial distress are not out of options; however, their strategy should be planned carefully.

My company has applied for a loan which is guaranteed by the Swiss Confederation. What does that mean with respect to my duties as a director?

Loans guaranteed by the Swiss Confederation 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 CHF 500,000 which are guaranteed by the Swiss Confederation are not considered debt when applying the balance sheet test (see above; Article 725 Swiss Code of Obligations).

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

The loans guaranteed by the Swiss Confederation shall be used for certain purposes only; for instance, they cannot be used to pay dividends to shareholders or to grant a private loan or a loan to a shareholder. The board of directors must ensure that the company complies with these provisions. In the event the loan is used for prohibited purposes, the members of the board of directors will be held jointly and severally liable for the repayment of the loan guaranteed by the Swiss Confederation.

I have heard that the Swiss Government introduced a new COVID-19 Moratorium. What is it about?

The Swiss Federal Council developed a new instrument in order to grant extra time to small and mid-size companies hit by the financial impact of the COVID-19 measures to reorganise themselves and to recover from the crisis (the so-called COVID-19 Moratorium). The COVID-19 Moratorium is limited in time (three to six months) and shall address the financial impact of the COVID-19 measures on small and mid-size companies by granting them some protection from creditors enforcing their claims against them.

Can my company benefit from the COVID-19 Moratorium? What are the prerequisites?

The prerequisites 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 2019 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 creditors subordinated their claims to the claims of all other creditors in the amount of the over-indebtedness.

I want to file for a COVID-19 Moratorium. What do I have to do and which documents do I have to submit?

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 (balance sheet as of 31 December 2019) and a list of its creditors.

What is the impact of the COVID-19 Moratorium on my company?

During a period of three months (which can be extended to six months), starting from the decision of the 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). Moreover, the company must not settle the debts that are under the moratorium but is only allowed to pay the debts that arose after the court granted the COVID-19 Moratori-

um. This allows companies to focus on the running business.

In addition, creditors may not request a court to issue freezing orders. Moreover, during the COVID-19 Moratorium, the limitation and forfeiture periods stand still for the debts covered by the COVID-19 Moratorium and a special regime regarding the assignment of future claims and set-off applies.

While the company under the COVID-19 Moratorium may continue its business activities, it must not sell or pledge its fixed assets (unless the court authorised the transaction). The court may appoint a trustee to oversee the management of the company and authorise certain transactions, if this is requested by the company, a creditor or considered appropriate by the court.

My company does not meet the prerequisites of the COVID-19 Moratorium. What options does it have?

Public listed companies, companies that exceed two of the following thresholds in two successive financial years: 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 and companies that were over-indebted as per 31 December 2019 or that did not have enough subordinate creditors to cover the amount of the over-indebtedness may file for "ordinary" composition proceedings, whose access prerequisites have also been lowered. Finally, if the prerequisites of "ordinary" composition proceedings are not met, the board of directors may file for bankruptcy.

What are the amendments to "ordinary" composition proceedings under Swiss law?

The Swiss Federal Council ordered punctual changes in provisions regarding "ordinary" composition proceedings; these changes will come into effect on 20 April 2020 and will remain in force for the duration of six months:

1. During the crisis, the prerequisites for filing for composition proceedings are lower and 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).
2. 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)

Links

[Newsletter 135 - The Swiss Government declares a nationwide standstill of deadlines for debt collection proceedings](#)

[Verordnung vom 20. März 2020 über den Stillstand der Fristen in Zivil- und Verwaltungsverfahren zur Aufrechterhaltung der Justiz im Zusammenhang mit dem Coronavirus \(COVID-19\)](#)

[Verordnung vom 25. März 2020 zur Gewährung von Krediten und Solidarbürgschaften in Folge des Coronavirus \(COVID-19-Solidarbürgschaftsverordnung\)](#)

[Verordnung über insolvenzrechtliche Massnahmen zur Bewältigung der Coronakrise \(COVID-19-Verordnung Insolvenzrecht\)](#)

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Walder Wyss is committed to supporting our clients through the challenges the pandemic presents. We will be publishing regular insights on this Information Hub.

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