Coronavirus Information Hub: FAQ
Restructuring & Insolvency

What measures did the Swiss Government put in place to help companies in distress due to COVID-19?

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The Swiss Federal Council decided against an extension of the measures under the COVID-19 Ordinance Insolvency Law and repealed the ordinance in general.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.

Finally, the Swiss Federal Council adopted an ordinance on 20 May 2020 which granted a standstill of deadlines for reimbursement claims filed by travellers against certain types of travel agencies in the event these claims were related to a travel package that could not have been offered. This standstill lapsed on 31 December 2020.

Which COVID-19 reliefs are still in place?

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

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 until 31 March 2022; see also below).

b. 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.

c. 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 surety-ships, 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. In particular, the COVID-19 Hardship Ordinance

provides for an amendment of Article 293 lit. a and Article 293a of the Debt Collection and Bankruptcy Act of 1889 and allows a company in financial distress to apply for a debt moratorium if it satisfies the requirements of chapter 2 of the COVID-19 Hardship Ordinance (legal form, date of the incorporation, minimum turnover requirements, deficit as a result of the governmental COVID measures, costs structure, etc.) and if it has already applied for hardship measures or will soon do it. In order to minimize the costs for the applying debtor, no commissioner ("Sachwalter") needs to be appointed in such cases and the court will not charge any fees for the application procedure. Furthermore, Article 21 of the COVID-19 Hardship Ordinance provides that loans or sureties that were granted by the cantons in accordance with the COVID-19 Hardship Ordinance are not considered as debt ("Fremdkapital") for the purpose of the balance sheet test (Article 725 Swiss Code of Obligations; see question below).

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.

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.

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Coronavirus Information Hub
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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