PRAGER DREIFUSS

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Expiry of Measures against Bankruptcies – Revival of Duties of Board of Directors

On 14 October 2020, the Federal Council decided not to extend the measures against bankruptcies caused by COVID-19. The resulting consequences are explained in this newsletter.

1. Background

On 16 April 2020, the Federal Council issued the *COVID-19-Ordinance on Insolvency Law*[1] which provides for measures to prevent bankruptcies caused by COVID-19 measures. The ordinance and the corresponding measures expired on 20 October 2020. What this means for companies is explained below.

[1] To be found at https://www.bj.admin.ch/dam/data/bj/aktuell/news/2020/2020-04-16/vo-covid19-insolvenz-d.pdf

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1.1. Notification of the judge / depositing the balance sheet

According to sec. 725 para. 2 Swiss Code of Obligations, the Board of Directors is generally required to notify the court if the company is over-indebted. The *COVID-19-Ordinance on Insolvency Law* provided an extraordinary relief in this context, which was valid for six months until 19 October 2020. Specifically, the obligation of the Board of Directors to notify the court was waived if the company was not already over-indebted at the end of 2019 and there was a prospect of eliminating the over-indebtedness by 31 December 2020.

On 14 October 2020, the Federal Council decided not to extend these measures. However, the Federal Council reserves the right to return to its decision and, depending on the development of the COVID-19 pandemic, to adopt new insolvency measures based on the *COVID-19 Act*[2] of 26 September 2020.

In the meantime, companies which are over-indebted under current law as of 20 October 2020 must notify the court and deposit their balance sheet. It should be noted that for the calculation of over-indebtedness, COVID-19 loans of less than CHF 0.5 million are not to be taken into account as debt capital for the calculation of over-indebtedness up to 31 March 2022.[3] This exception does not apply to COVID-19 loans over CHF 0.5 million.

If an over-indebted company has reasonable prospects of being restructured, the Board of Directors may postpone the deposit of the balance sheet (declare the company bankrupt) for the duration of the so-called tolerance period. The tolerance period must be determined in each individual case. Generally, four to six weeks are considered appropriate.

If there is a reasonable prospect of restructuring, the debtor can instead file an application for a moratorium. An amendment to the debt enforcement and bankruptcy act entered into force early on 20 October 2020, thus extending the total duration of the provisional debt-restructuring moratorium from four to eight months. This should facilitate the restructuring of companies. In particular, moratoriums which are not publicly announced, so-called silent moratoriums (*stille Nachlassstundungen*), can now last up to eight months.

2. COVID-19 deferral

Within the framework of the *COVID-19 Ordinance on Insolvency Law*, the Federal Council also provided a COVID-19 deferral as an instrument for a temporary deferral for SMEs. As a result, a debtor did not have to and was not allowed to pay claims against him that arose before the COVID-19 deferral was granted. In practice, however, this instrument has only been used very rarely.

The COVID-19 deferral also expired on 19 October 2020 and can no longer be applied for.

[2] To be found at https://www.admin.ch/opc/de/classified-compilation/20202070/index.html

[3] According to sec. 24 of the COVID-19-Solidarbürgschaftsverordnung dated 25 March 2020, to be found at https://www.admin.ch/opc/de/official-compilation/2020/1077.pdf

3. Outlook

With the increase of COVID-19 cases in Switzerland and the corresponding interventions of the authorities in the economic cycle, the bankruptcy risk of companies also increases. It remains to be seen whether the Federal Council will again take measures to prevent a wave of bankruptcies caused by COVID-19. For the time being, companies in financial difficulties should consider applying for a moratorium in order to seek restructuring and secure their going concern.

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