

# COVID-19 Insolvency Ordinance

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## Selected amendments to the procedures governing the composition with creditors – introduction of a COVID-19 Moratorium for small and mid-sized companies – resolutions of the Swiss Federal Council of 16 April 2020

In the fight against the coronavirus, the Swiss Federal Council has taken numerous measures. The Ordinance 2 on Measures to Combat the Coronavirus (COVID-19) of 13 March 2020 as amended (hereinafter **"COVID-19 Ordinance 2"**) sets forth various orders, most of which remain in force until at least 26 April 2020.

### Background

The COVID-19 Ordinance 2 includes regulations that required various enterprises to stop running their businesses from one day to the next. Deprived of their income, such enterprises may run into serious financial problems. While some will go bankrupt, many may be able to save their business if given enough time to recover. In order to provide further protection for such enterprises, the Swiss Federal Council has taken numerous measures; these can be found in the Ordinance on Insolvency Related Measures to Overcome the Corona Crisis dated as of 16 April 2020 (hereinafter the **"COVID-19 Insolvency Ordinance"**). The COVID-19 Insolvency Ordinance comes into force on 20 April 2020, 0.00 am, and remains in force for six months. The main content covered can be grouped under the following headers:

- **Selected amendments to the procedures governing the composition with creditors ("Nachlassverfahren")**
- **Introduction of a COVID-19 Moratorium for small and mid-sized companies**
- **Partial suspension of the applicability of Art. 725 para. 2 Swiss Code of Obligations (hereinafter "SCO")**

### Introductory remarks

While insolvency law does not help restructure or refinance businesses, it can support debtors in various ways. In the current crisis, the most important of these is giving debtors time to recover. In a first step, the Swiss Federal Council declared a legal standstill as of 19 March 2020, 07.00 am, which, taking into account the statutory debt enforcement holidays ("Betreibungsferien"), will last until midnight on 19 April 2020. For the duration of the standstill, it is prohibited to perform any debt enforcement activities against individuals and legal entities. Thereafter, the performance of debt enforcement activities will once again be permitted and that is where the Swiss Federal Council identified the need for action.

The Swiss Federal Council concluded that further extending the legal standstill applicable to all debtors is not an appropriate means to support the economy in Switzerland, since a legal standstill lasting for a long period of time would undermine the trust of creditors. The Swiss Federal Council prefers therefore a scheme offering targeted protection to enterprises genuinely suffering from the effects of the Corona crisis.

The Swiss Federal Council expects that there will be a large number of enterprises seeking protection under Art. 293 et seq. of the Swiss Debt Enforcement and Bankruptcy Law (hereinafter **"Bankruptcy Law"**). The composition with creditors ("Nachlassverfahren") provided in Art. 293 et seq. Bankruptcy Law starts with a (provisional and then definite)

moratorium (“Stundung”) which, if granted, gives the debtor concerned the protections set forth in Art. 297 Bankruptcy Law (similar to the protection a legal standstill provides to all debtors).

However, in practice it is often difficult to fulfill the regular conditions to have such a moratorium approved by the court. In addition, the procedure leading to the grant of a moratorium requires considerable paperwork and is costly. The COVID-19 Insolvency Ordinance introduces a number of relief provisions for the procedures governing the composition with creditors (“Nachlassverfahren”).

### **Selected amendments to the procedures governing the composition with creditors (“Nachlassverfahren”)**

- The COVID-19 Insolvency Ordinance sets forth a **waiver of the requirement to submit a provisional recovery plan** (“provisorischer Sanierungsplan”) and makes **Art. 293a para. 3 Bankruptcy Law** inapplicable. In order to be granted a moratorium therefore, the applicant is not required to submit a provisional recovery plan and the court is released from the requirement to examine such provisional recovery plan. In addition, the applicant does not run the risk of bankruptcy procedures being initiated if the court concludes that there is neither a prospect of recovery nor a prospect of concluding a composition agreement (“Nachlassvertrag”).
- Art. 4 COVID-19 Insolvency Ordinance allows a moratorium of a period not exceeding **six months (instead of only four months)**. This means the debtor is provided with more time to resolve its solvency problems.
- Art. 5 COVID-19 Insolvency Ordinance states that **Art. 296b lit. a and b Bankruptcy Law is not applicable until 31 May 2020**, provided the debtor concerned was not overindebted as of 31 December 2019 or such debtor can provide evidence that company creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit in the meaning of Art. 725 para. 2 SCO. That means that opening of bankruptcy procedures is not possible for such debtors before 31 May 2020 even if the conditions set forth in Art. 296b lit. a or b Bankruptcy Law are met (the court comes to the conclusion that (a) there is neither a prospect of recovery nor a prospect of the conclusion of a composition agreement (“Nachlassvertrag”) or (b) opening bankruptcy procedure is necessary for the conversation of the debtor’s assets).

### **The COVID-19 Moratorium for small and mid-sized companies**

The Swiss Federal Council introduces the COVID-19 Moratorium for small and mid-sized companies with the following main features (Art. 6 et seq. of the COVID-19 Insolvency Ordinance):

- Easy accessible for small and mid-sized enterprises affected by the Corona crisis
- Provides protection for up to six months
- There is (as a rule) no need to appoint a commissioner (“Sachwalter”)

The most important provisions governing the COVID-19 Moratorium can be summarized as follows:

- Accessible for all debtors organized in the legal form of sole proprietorships, partnerships or legal entities, **except for** listed companies in the meaning of Art. 727 para. 1 section 1 SCO and large companies which have exceeded two of the thresholds set forth in Art. 727 para. 1 section 2 SCO in the year 2019;
- Pursuant to Art. 6 para. 1 COVID-19 Insolvency Ordinance, a debtor will be granted a COVID-19 Moratorium for a period of up to three months (which can be extended to up to six months) if:
  - such debtor can show that it was not overindebted on 31 December 2019, or
  - such debtor can provide evidence that company creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit in the meaning of Art. 725 para. 2 SCO
- By submitting a request for the COVID-19 Moratorium, the competent organs of a legal entity fulfill the requirements set forth in Art. 725 para. 2 SCO (Art. 8 COVID-19 Insolvency Ordinance);
- The COVID-19 Moratorium is as a rule given without the appointment of a commissioner (“Sachwalter”) but will be published;
- The COVID-19 Moratorium covers all claims against the debtor which came into effect prior to the COVID-19 Moratorium being granted, **except for claims** which fall under the first class in the meaning of Art. 219 para. 4 Bankruptcy Law. This means that salary and alimony claims are privileged. The debtor must not pay claims falling under the COVID-19 Moratorium (Art. 11 para. 3 COVID-19 Insolvency Ordinance);
- Whether or not the COVID-19 Moratorium expires without any further involvement of the court remains unclear.

Debtors under a COVID-19 Moratorium have the right at any time to convert such a COVID-19 Moratorium into a moratorium granted by applying the procedures governing the composition with creditors (“Nachlassverfahren”) if the debtor in question intends to enter into a composition agreement (“Nachlassvertrag”) or prefers such procedures. In such cases, the maximum time period for the provisional moratorium shall be shortened by the time corresponding to half of the time spent under the COVID-19 Moratorium (Art. 15 COVID-19 Insolvency Ordinance).

### Other amendments (Art. 725 para. 2 SCO)

Art. 725 para. 2 SCO is amended under Art. 1 COVID-19 Insolvency Ordinance. The board of directors of debtors which were not overindebted as of 31 December 2019 and which, it can reasonably be assumed, will no longer be overindebted by no later than 31 December 2020, does not have to notify the court. The board of directors of such debtors is not obliged to have the interim balance sheet (the two interim balance sheets, one in which the assets are appraised at going concern and the other in which the assets are appraised at liquidation values) examined by the auditor. However, the board of directors has to justify its decision in writing and document it. The auditor is also released from the duty to notify the court in the event that the board of directors' duty is waived by the circumstances described above.

Please refer to the COVID-19 Insolvency Ordinance published on the webpage of the Swiss Federal Council and the homepage of the Federal Office of Justice for more details:

- [COVID-19 Insolvency Ordinance](#)
- [Homepage of the Federal Office of Justice on: Coronavirus – measures against bankruptcy](#)

Staying updated will help organizations counteract any future stressful situations or unwanted legal consequences. The KPMG Corporate and M&A Team will update you regularly on this matter.

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