

Federal Act on Combating Abusive Bankruptcy

In addition to amendments to the Debt Enforcement and Bankruptcy Act (DEBA) and the Criminal Code (SCC), the Federal Act on Combating Abusive Bankruptcy also brings important changes to the Code of Obligations (CO) and the Commercial Register Ordinance (CRO). The new Act aims at increasing the hurdles for a company to release its debts to the detriment of its creditors. The amendments to the law and ordinances are expected to enter into force in January 2024.

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Background

With the Federal Act on Combating Abusive Bankruptcy, the Swiss Federal Council and Parliament intend to reduce the potential to abuse bankruptcy proceedings through specific amendments of the law. In the future, debtors shall no longer be able to abuse bankruptcy proceedings to obtain a release of their financial obligations such as salary payments and other debts at the expense of creditors and social security insurances or to compete unfairly with other companies.

Relevant amendments

The Federal Act on Combating Abusive Bankruptcy leads to amendments in several laws, namely the CO, the DEBA, the SCC and the Federal Act on Direct Federal Tax (DFTA).

The changes in the law come with further amendments to provisions in the CRO and in the Ordinance on the Criminal Register Information System VOSTRA.

Of particular practical relevance are the following amendments:

- Abolition of the retroactive opting-out;
- Introduction of a search for individuals in the commercial register (via Zefix), indicating the legal entity and function of the person;
- Nullity of the trading of shell companies (so-called "Mantelhandel"), i.e. the transfer of shares of an over-indebted company without business activity and realisable assets;
- Obligation to enforce a claim by a request for bankruptcy also for authorities;
- Extension and improved enforceability of the criminal ban to carry out an activity.

Abolition of the retroactive opting-out

Companies with a maximum of 10 full-time employees on an annual average can waive the limited audit with the consent of all shareholders by filing a respective notice with the commercial register. Under current law, such an opting-out declaration can also be made retroactively, i.e. for both the previous and the current financial year, provided that the opting-out declaration is made before the end of the six-month period since the close of the financial year and prior to the approval of the annual accounts of the last completed financial year.

Under revised law, an opting-out declaration will only apply to future financial years and must be filed with the competent commercial register before the beginning of the financial year. In addition, the financial year as of which the limited audit is waived will also be recorded in the commercial register. This date must be stated in the opting-out declaration.

The new provisions will be applicable as of their entry into force, and hence, no transitional provisions will be adopted. Companies planning to waive the limited audit for the 2024 financial year should therefore take this decision in the course of the 2023 financial year and submit the opting-out declaration, including a copy of the last audited and approved financial statements, to the competent commercial register. The documents on which the application is based are subject to a limited public access, i.e. only federal and cantonal authorities are authorised to inspect them.

Introduction of a search for individuals in the commercial register

With the planned amendment to the CRO, public personal data will be linked to the social security number, which serves as identification for individuals. In the future, the search request of a person's name or assigned number will provide information on the legal entity as well as all previous and current functions of the individual. The data will be made available free of charge via Zefix.

The Federal Council not only hopes that disclosure of economic background and involvement in bankruptcy proceedings will have a deterrent effect, but also that it will serve as a useful tool for authorities when examining and ordering a ban to carry out an activity under the new Art. 67a SCC.

However, the new law regarding the search for individuals will only be fully effective when the centralised database of personal data is updated by the cantons. This is not expected for several years.

Nullity of trading in over-indebted shell companies ("Mantelhandel")

In the interest to protect good faith in commercial transactions, the Swiss Federal Supreme Court has for years considered the trading of shell companies ("Mantelhandel") as a void legal transaction. It defines a shell as "a company which has been economically completely liquidated and abandoned by the parties involved, but legally not yet dissolved", which is used to circumvent statutory incorporation provisions and disregards the duty to delete a company.

The nullity of trading shell companies affects the acquisition of the shares, i.e. the share purchase agreement which is the underlying contract. According to the wording of the revised law, the transfer of shares will be null and void if the following criteria are cumulatively met:

- No business activity;
- No assets of value;
- Over-indebtedness of the company.

In addition, based on the new Art. 65a and Art. 152 para. 1 CRO, the commercial register shall be authorised to request an updated balance sheet of the company if it has reasons to believe that there is a case of a transfer of shares of a shell company.

Obligation to enforce a claim by a request for bankruptcy also for authorities

Under current law, public law creditors (i.e. authorities) are in principle not entitled to request the opening of bankruptcy proceedings, but have so far only been able to enforce their claim by way of seizure of assets. In the case of over-indebted companies, this leads to an incentive not to pay public law debts and instead to satisfy other creditors. As a result, factually insolvent companies continue to exist. In such cases, bankruptcy proceedings are often initiated too late or not at all.

For authorities, the advantage of an enforcement by way of seizure of assets is that, other than in bankruptcy proceedings, they can be requested without having to pay an advance on costs. The deletion without replacement of Art. 43 para. 1 and 1bis DEBA represents a paradigm shift and abolishes the previous "authorities' privilege". Going forward, claims of authorities are now also subject to bankruptcy proceedings.

Extension and improved enforceability of the criminal ban to carry out an activity

With the amendment of Art. 67a para. 2 SCC, the criminal ban to carry out an activity is extended to all persons who exercise a function to be registered in the commercial register. In other words, it is no longer only a person's role as member of a corporate body which is taken into account. In fact, a criminal ban to carry out an activity may also be ordered against directors, managing directors, managers of a branch office as well as persons with mere signing authority or registered power of attorney.

The enforcement of such bans will be improved by extending the obligations of the Federal Commercial Registry Office (FCRO) to inspect and supervise commercial register entries.

Moreover, the improved enforceability will be supplemented by the new Art. 11 para. 2 and 3

DEBA, which commit bankruptcy officials to file a criminal complaint with the prosecutor in the event of concrete indications of criminal offences.

Outlook

The Federal Act on Combating Abusive Bankruptcy was adopted in the Swiss Parliament in March 2022. The referendum period expired unused on 7 July 2022. On 25 January 2023, the Federal Council opened the consultation on the necessary amendments to the relevant ordinances. This consultation will last until 5 May 2023. The amendments to the law and ordinances are expected to enter into force in January 2024.

Please do not hesitate to contact us if you have any further questions on this subject.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

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