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Restructuring and Insolvency

Schellenberg Wittmer

New Measures to Combat Abusive Bankruptcies in Switzerland

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Key Take-aways

1.
On 1 January 2025, new measures to combat abusive bankruptcies entered into force, introducing amendments to key laws, including the Criminal Code, Code of Obligations, Debt Enforcement and Bankruptcy Act, Ordinance on Commercial Registry and Federal Direct Tax Act.

2.
The reform addresses, among other things, enhanced enforcement of prohibition of business activities, nullity of shell company transfers, opting-out rules, public law creditors' rights in debt enforcement proceedings, and improved cooperation between tax authorities and commercial registries' authorities.

3.
Importantly, the new law codifies the nullity of shell company transfers, limits the opting-out of limited audit to future financial years only, and now allows public law creditors to continue debt enforcement by way of bankruptcy proceedings instead of seizure.

1 Introduction

Abusive practices in bankruptcy procedures have long been a major concern for authorities and economic stakeholders in Switzerland. Recurring cases reveal how some individuals **exploit loopholes in the system** to evade their financial obligations. A typical **scheme** involves declaring bankruptcy to shed existing debts and unpaid wages, then swiftly creating a new legal entity, often rehiring the same employees and purchasing assets from the liquidated company at a low price. This practice not only harms creditors and **distorts competition** but also imposes a financial burden on public funds, particularly when unemployment insurance must cover unpaid wages.

To address these issues, the recent **legislative reform**, effective from 1 January 2025, aims to close legal gaps and strengthen tools to combat such abuses. Although Swiss bankruptcy law and criminal law already provide some means of recourse, practical and legal obstacles have often deterred creditors and authorities from taking legal action. While combating abuse is a key objective, the reform has sought to carefully balance this with the principle that not all bankruptcies result from wrongdoing, nor do they justify restrictive measures.

This newsletter outlines the key changes introduced by the reform: i. powers and duties of the Bankruptcy Office, ii. extended scope of the prohibition on engaging in business activities, iii. search of individuals, iv. nullity of share transfers of shell companies, v. repeal of retroactive opting-out, vi. public creditors' right to request the continuation of debt proceedings by way of bankruptcy proceedings, and vii. enhanced collaboration between tax authorities and commercial registries.

2 Key changes of the reform

2.1 Powers and duties of the Bankruptcy Office

Article 13 of the Swiss Federal Constitution ensures the safeguarding of personal privacy, including the right to confidentiality in correspondence, postal communications, and telecommunications.

Under Swiss law, liquidation of bankrupt businesses is typically managed by the **Bankruptcy Office**, which is part of the State administration. The Bankruptcy Office is now empowered to request that postal service providers grant it **access to postal items** addressed to the debtor for the duration of the bankruptcy proceedings and have them delivered to the Bankruptcy Office. The Bankruptcy Office may open mail items that have been handed over to it, unless it is clear that their contents are of no importance to the bankruptcy proceedings. The debtor has the right to be present during the opening of mailings.

Bankruptcy Office officers are now also required to **report** to the criminal prosecution authorities all crimes and offenses to be prosecuted ex officio, that they or one of their subordinates observe in the course of their duties or that are reported to them and may constitute a suspicious case. Likewise, any person acting on behalf of the Bankruptcy Office is authorized to report such crimes and offenses to the prosecution authorities under the same conditions.

This obligation should enable the public prosecution authorities to more effectively prosecute crimes and offenses committed within businesses leading to bankruptcy. Consequently it also allows criminal courts to impose bans on engaging in business activities.

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2.2 Extended scope of the prohibition on engaging in business activities

A key change introduced by the reform involves extending the scope of the prohibition on engaging in business activities, which a criminal court may impose under Article 67*a* para 2 of the Swiss Criminal Code (SCC). The prohibition now explicitly applies not only to functions performed as a corporate organ of a legal entity or commercial enterprise but also to functions requiring registration in the commercial registry. This ensures that **individuals holding significant independent positions**, such as officers, branch managers or those with signatory authority or acting by way of proxy, fall within the scope of the prohibition.

Since the prohibition targets all independent activities, it also covers de facto corporate organs who may not be officially registered but act in a managerial capacity. By broadening the interpretation of independence, the reform aims to prevent potential abuse by individuals seeking to bypass restrictions.

To enforce these prohibitions effectively, the Federal Registry of Commerce (FRC) will be responsible for verifying compliance and reporting suspected violations to criminal prosecution authorities. The Criminal Records Service will also periodically send a list of all professional disqualifications relevant to the commercial registry to the federal authority responsible for the commercial registry. The strengthening of the enforcement of activity prohibitions under Article 67 SCC provides greater legal certainty for companies and all other stakeholders by ensuring that individuals subject to such prohibitions are removed from the commercial registry.

2.3 Search of individuals

The reform enhances the ability to **search for individuals** listed in the commercial registry through the Central Business Name Index (Zefix) website. Users will be able to retrieve information about individuals' roles within companies, helping to assess their involvement in businesses, including those subject to bankruptcy proceedings.

A central database of individuals, created as part of the 2017 amendment to the Swiss Code of Obligations (SCO), will be used to link public information on individuals with their roles in legal entities. The old-age and survivor's insurance (OASI) number will serve as a backend identifier for accurate matching across cantonal registers, though it will not be publicly displayed.

This functionality aims to **deter repeated abusive bankruptcies** by making patterns of such behavior easier to detect. It will also support authorities, including courts, in obtaining

a complete view of an individual's economic activities to assist in decisions such as imposing activity prohibitions under Article 67 SCC.

2.4 Nullity of share transfers of shell companies

The reform codifies long-standing (dating back to 1929 and 1938) Federal Supreme Court case law regarding **the transfer of shares in shell companies**. The transfer of shares in shell companies is defined as the sale of shareholding rights, allowing the purchaser to dispose of a company that, while not legally dissolved, has been economically liquidated. The company may still retain certain cash assets (cash, bank accounts) on its balance sheet, which can be used to determine the market value of the shares.

For decades, the Federal Supreme Court has held that transactions involving such shell companies are null and void. In its view, this process must be treated as a liquidation of the company, followed by a creation of a new company. Such transfer is considered **null and void** (Art. 19 SCO) due to the transaction's illegality, as it contravenes specific legal provisions; in effect, the purpose of the transfer is to circumvent the mandatory legal provisions concerning the liquidation and the foundation of companies, thereby constituting an abuse of the law. A dissolved company is to be deregistered, and can no longer pursue any other goal; in particular, it cannot engage in new activities that are not related to the process of dissolution and liquidation. Despite this established case law and the nullity of the transfer, the practice of buying and selling shell companies persists, and is even advertised online or in newspapers. Buyers and sellers engage in these transactions to avoid the costs of liquidation and registration of a new company, benefiting from tax and time savings. Additionally, acquirors may exploit the company's pre-existing name and reputation. It is worth noting that the nullity of the transfer of shareholdings in shell companies was, until now, deliberately not addressed in the SCO: when reforming the SCO back in 1928, the legislator decided not to amend the law in this respect, instead relying on the commercial registry authorities to prevent such transfers.

This measure aims to prevent the fraudulent use of inactive companies

Accordingly, to counter organized schemes involving shell companies, the reform codifies (with one important change) the Federal Supreme Court case law by **explicitly declaring null and void** any share transfer of companies that are no longer operational, have no disposable assets, and are overindebted, as specified in the new Article 684a SCO. The same rule applies to limited liability companies under Article 787a SCO. Interestingly, the Swiss Parliament introduced a new condition (not provided for by the Swiss Federal Council in the draft bill sent to the Swiss Parliament) to the long-standing definition of the transfer of shareholdings in shell companies: the overindebtedness of the company. Overindebtedness is defined in Article 725b SCO as the situation where a company's liabilities exceed its assets. This addition is hardly understandable as it may be seen as a general recognition of the validity of transfer of shareholdings in shell companies, which is certainly not desirable and goes against well-established principles of corporate law.

Under the new rule, commercial registries must request current and signed financial statements if they suspect that a share or quota transfer involves a shell company. If the company fails to provide the requested documents or if the submitted statements confirm the suspicions, the commercial registry will refuse to register the transfer (for limited liability companies) or any related changes, such as modifications to the company's purpose, seat, or name.

This measure aims to **prevent the fraudulent use of inactive companies** for personal gain and ensures that shares in empty-shell companies cannot be transferred to bypass legal obligations or creditors.

By requiring prospective application only, the new rule ensures that audits for completed financial years cannot be circumvented retroactively

2.5 Repeal of retroactive opting-out

Under both the old and new law, companies with no more than ten full-time employees can **opt out of a limited audit** (opting-out) with unanimous shareholder consent. However, under the new law, opting-out declarations now only take effect for future financial years, with the result that companies can no longer retroactively opt out of limited audits for previous years.

This change **closes a loophole** that allowed some companies to evade scrutiny by opting out retroactively after auditors raised concerns, such as overindebtedness or other irregularities. By requiring prospective application only, the new rule ensures that audits for completed financial years cannot be circumvented retroactively.

Under the amended Article 727a para. 2 SCO, opting-out is valid only if the related notification is provided to the commercial registry before the start of the financial year. Additionally, Article 727a para. 2bis SCO requires that the company's most recent annual accounts be submitted with the opting-out notification.

For example, if a company decides to opt out during the 2025 financial year, the opting-out will only take effect from the 2026 financial year. The accounts for 2025 and earlier years must still undergo a limited audit. This amendment increases transparency and prevents abuse of the opting-out mechanism.

2.6 Public law creditors' right to request the continuation of debt proceedings by way of bankruptcy proceedings

Debt enforcement proceedings against a company registered in the Swiss commercial registry are intended to result in the opening of bankruptcy proceedings if the debtor fails to repay the debt. Until recently, certain creditors enforcing their claims (taxes, fees, fines owed to public law creditors and mandatory accident insurance premiums) against a debtor registered in the commercial registry were however not granted the right to

request the bankruptcy of the debtor: this regime was designed to maximize their chances of repayment. As a result, certain debtors deliberately prioritized payments to other creditors in order to avoid bankruptcy, leaving public law creditors with unsuccessful seizures.

Overall, this amendment is expected to increase the number of bankruptcies initiated

The reform introduces a **significant change** in Article 43 of the Debt Enforcement and Bankruptcy Act (DEBA) by allowing public creditors to request bankruptcy proceedings. The reform aims to prevent insolvent companies from accumulating further debt and harming new creditors.

Overall, this amendment is expected to lead to an additional increase in the number of bankruptcies initiated against overindebted or insolvent companies, resulting in enhanced creditor protection.

2.7 Enhanced collaboration between tax authorities and commercial registries

The reform also introduces an important measure to **improve collaboration** between cantonal tax authorities and commercial registries. Under the new Article 112 para. 4 of the Federal Direct Tax Act (FDTA), if a legal entity fails to submit its annual accounts in accordance with Article 125 para. 2a FDTA, the tax authorities must inform the commercial registry office within three months after the relevant deadline has expired.

This provision ensures that companies cannot continue operating for extended periods without maintaining proper accounting records, making it less likely that potential financial difficulties are concealed. If a company fails to submit its annual accounts to the tax authorities, it raises a suspicion that the company has not properly maintained its accounts. This, in turn, calls into question whether the company still meets the conditions for opting out of a limited audit (opting out).

In cases where a company had previously opted out of a limited audit, the commercial registry must require the company to either renew its opting-out declaration or appoint an auditor if notified by the tax authorities under Article 112 para. 4 FDTA. However, if the company is already subject to an audit, such a request will not be necessary.

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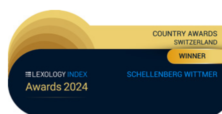

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