

AUSTRIA

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COVID-19 Update: Insolvency Law / Restructuring

The corona virus, and the measures taken to contain it, present companies with far-reaching financial challenges. Ongoing fixed costs and payment obligations to suppliers can often lead to a financial crisis if corona-related sales losses occur.

To prevent the corona pandemic from causing a wave of insolvencies in Austria, the legislature has already taken remedial action in some areas – [text in blue below indicates updates from the 3rd/4th/5th COVID-19 Acts](#):

- **[The obligation to file for insolvency in cases of over-indebtedness has been suspended¹:](#)**

A debtor is [not required to file an insolvency petition](#) for over-indebtedness (within the meaning of the Austrian Insolvency Act²) occurring between [1 March 2020 and 30 June 2020](#). As long as the debtor is solely over-indebted (*überschuldet*), but not also illiquid (*zahlungsunfähig*), insolvency proceedings are not to be opened during this period, even at the request of a creditor. Given the current uncertainties in the valuation of company assets, and the impossibility of making a well-founded going concern forecast (*Fortbestehensprognose*) in the current market situation, companies that are essentially viable as a going concern should be protected from being crushed in insolvency.

If the debtor is over-indebted after 30 June 2020, they must petition for insolvency without undue delay, at the latest within (i) 60 days after 30 June 2020, or (ii) 120 days from when the over-indebtedness started, whichever period ends later.

[Between 1 March 2020 and 30 June 2020, the management liability for payments made after the occurrence of over-indebtedness \(under the Austrian Joint-Stock Corporation Act³\) will not apply.](#) Because the obligation to file for insolvency caused by over-indebtedness has already been suspended during this period, there is also no management liability for payments made after the occurrence of over-indebtedness under the Austrian Limited Liability Company Act⁴.

The statutory materials clarify that management liability due to a [violation of the filing obligation under the Insolvency Act⁵](#) as a protective law does not apply if debtors become over-indebted and management does not petition for insolvency during this period.

[Important: these forms of relief only apply when the reason for insolvency is over-indebtedness; if the debtor becomes illiquid, the insolvency petition must still be filed without culpable delay, at the latest within 60/120 days \(see below\), and there is no relief from any liability for the management!](#)

¹ § 9, 2. COVID-19 Judicial Accompanying Act

² § 67 Abs 1 IO

³ § 84 Abs 3 Z 6 AktG

⁴ § 25 Abs 3 Z 2 GmbHG

⁵ § 69 Abs 2 IO

- **Extending the maximum period for filing for insolvency⁶:**

In general, if the debtor is illiquid (*zahlungsunfähig*) or over-indebted (*überschuldet*), debtors are obliged to petition for the opening of insolvency proceedings over its assets without culpable delay, but at the latest within 60 days⁷. If the illiquidity or over-indebtedness is caused by a natural disaster (e.g. floods, earthquakes, and, since the amendment by the 2nd COVID-19 Act, epidemics and pandemics), this deadline is extended to 120 days⁸. The natural disaster need not be the sole cause of insolvency, but it is a necessary condition (without the natural disaster, insolvency would not have occurred). Filing without culpable delay is still the general rule, and in order to properly invoke the extension, a debtor must undertake serious, promising, restructuring efforts. It should also be noted that this extended maximum period only applies to insolvency applications by the debtor; insolvency applications by creditors are not affected.

- **Deadlines in insolvency proceedings⁹:**

Duration / extension of time limits: As a basic rule: the general interruption of time limits in court proceedings until 30 April 2020¹⁰ does not apply in insolvency proceedings; time limits already interrupted by the 1. COVID-19 Judicial Accompanying Act start to run again. The aim is to ensure that insolvency proceedings are conducted quickly, and thus increase the chances of restructuring. However, the insolvency court can reasonably extend (for a maximum of 90 days) procedural deadlines by official means or upon request.

There are special rules for extending the following deadlines in the Austrian Insolvency Act (IO): § 11 (2) IO (fulfilment of claims for separation and segregation that could endanger the continuation of the company), § 25a IO (termination of contracts that could endanger the continuation of the company), and § 26a IO (reclaiming of property provided by a shareholder that endangers the continuation of the company): here, the extension must be suitable to agree on a restructuring plan, on the basis of a prospective improvement of the economic situation, that is likely to be able to be fulfilled, and that corresponds to the common interest of the insolvency creditors; in addition, any party entitled to separation, segregation creditor, or contracting party has the opportunity to be heard, prior to the decision on the extension.

Deadline to accept the restructuring plan: in restructuring proceedings with self-administration, the deadline to accept the restructuring plan is increased from 90 to 120 days, before the self-administration of the management is to be recalled. In view of the crisis, this is intended to give the parties involved more time to reach a restructuring plan.

- **Service in insolvency proceedings:**

Through 30 April 2020, a special service on creditors may be omitted; the essential content of the document to be served must be published in the insolvency database¹¹.

Since it was not relevant in practice, the opening of insolvency proceedings is no longer reported to local airports, railway stations, and ship stations, to the supervisor of a debtor in public service,

⁶ § 69 Abs 2a IO

⁷ § 69 Abs 2 IO

⁸ § 69 Abs 2a IO

⁹ § 7, 2. COVID-19 Judicial Accompanying Act

¹⁰ § 1, 1. COVID-19 Judicial Accompanying Act

¹¹ § 8, 2. COVID-19 Judicial Accompanying Act

or to credit institutions¹². The insolvency administrator now only receives a certificate of service upon request, because in practice this was only necessary if the administrator was active abroad¹³.

- **Protecting bridge loans for short-time work from being challenged¹⁴:**

Since the short-time work subsidy from AMS (the Austrian Labor Market Services) is only paid retrospectively, companies have to finance their employees' salaries temporarily, and they often use bridge loans. Such loans, granted between 1 March 2020 and 30 June 2020, in the amount of the subsidy, and their immediate repayment upon receipt of the subsidy, are not subject to challenge under § 31 of the Austrian Insolvency Act, as long as (i) no collateral was provided by the borrower, and (ii) the lender was not aware of the borrower's illiquidity at the time the loan was granted. The restriction on borrower collateral is meant to prevent cases where the last assets of a company are used to secure a bridge loan and therefore a restructuring following the opening of insolvency proceedings – which the statutory materials expect for a significant number of cases – is frustrated. However, bridge loans may be secured by third parties and still be protected from challenge.

- **Protection for delay in fulfilling the restructuring plan¹⁵**

In general, strict rules apply to the fulfilment of a restructuring plan adopted in insolvency proceedings: if the debtor defaults on fulfilment vis-à-vis individual creditors, the haircut and the benefits of the restructuring plan lapse vis-à-vis these creditors ("revival of the claim"). In general, such a default presupposes that the debtor has not paid a due debt, despite a written reminder sent to it by the creditor granting a grace period of at least 14 days¹⁶.

As a result of the Corona crisis, there are now fears that debtors will increasingly not be able to meet restructuring plan quotas on time, and that payment requests from several creditors would lead the debtor back into insolvency. Therefore, the described consequences of default in the restructuring plan will not occur in relation to a debt falling due at or after 22 March 2020, if the creditor's payment request is sent between 22 March 2020 and 30 April 2020¹⁷.

- **Deferring payment plan installments for natural persons¹⁸**

If a debtor's income and financial situation change as a result of the COVID 19 measures, and the debtor is no longer able to make scheduled payments, they can apply to defer the liabilities for up to 9 months. The application can be made before a payment reminder is sent, or up to 14 days afterwards. The application is published in the insolvency database. Creditors are invited to comment within 14 days, and failure to comment is deemed to be consent. A deferral should be granted if a majority of the insolvency creditors entitled to vote in accordance with § 147 IO agree. Even if a majority of creditors do not agree, the court may nevertheless grant the deferral if it would not affect any creditor unfairly for personal or economic reasons.

¹² § 78 IO

¹³ § 80 IO

¹⁴ § 10, 2. COVID-19 Judicial Accompanying Act

¹⁵ § 5, 1. COVID-19 Judicial Accompanying Act

¹⁶ § 156 Abs 1-2 IO

¹⁷ § 5, 1. COVID-19 Judicial Accompanying Act

¹⁸ § 11, 2. COVID-19 Judicial Accompanying Act

- **Stop on insolvency applications for social security contributions¹⁹**

Section 733 of the Austrian Social Insurance Code provides, among other relief measures, that social security contributions due in the calendar months of March, April and May 2020 will not be collected, and that no insolvency applications will be filed for non-payment of such contributions that are due and payable.

- **Deferring payments under credit agreements, for consumers and small businesses²⁰:**

If the COVID-19 pandemic causes a loss of income that renders a consumer unable to make payments on a credit agreement, claims for repayment, interest, and principal payments due between 1 April 2020 and 30 June 2020 (the "deferred period") are deferred for three months from the due date. The consumer credit agreement must have been executed before 15 March 2020. The inability to pay means it would be unreasonable to expect the consumer to pay, for example if the sustenance of the consumer or their dependents is at risk. The timetable for the enforcement of collateral granted to secure the deferred claims is prolonged correspondingly with the deferred period.

The borrower may continue to make the contractual payments during the deferred period on the original payment dates, in which case the deferral will not apply. In addition, different agreements are permissible - in particular partial payments, adjustments of interest and repayment dates, and debt rescheduling. The borrower must be protected against termination: if the deferral applies, the lender cannot terminate the contract based on late payment or significant deterioration of the borrower's financial circumstances, until the end of the deferred period.

The parties must attempt to settle these matters: the lender must offer to discuss an agreement and sources of support with the borrower. If no amicable settlement is reached for the period after 30 June 2020, the term of the contract, and any payment dates, will be extended by three months. In addition, the lender must provide an updated version of the contract.

These rules also apply to small businesses, that have less than 10 employees, with annual turnover or budget not exceeding EUR 2 million, if circumstances arising from the COVID 19 pandemic render them unable to pay, or unable to pay without putting the business in financial jeopardy.

- **Relief for default²¹:** for contracts executed before 1 April 2020, the following relief is available:

- **Default Interest:** if the debtor does not make a payment due in the period from 1 April 2020 to 30 June 2020, or does not pay it in full, because their economic capacity has been significantly impaired by the COVID-19 pandemic, the debtor must pay no more than the statutory interest (4% per annum) for the arrears, notwithstanding deviating contractual agreements, and is not obliged to reimburse the costs of extrajudicial debt collection or recovery measures.
- **Contractual penalties:** if the debtor is in default because their economic capacity has been significantly impaired, or they are unable to pay because of restrictions in their

¹⁹ § 733 Abs 3 ASVG

²⁰ § 2, 2. COVID-19 Judicial Accompanying Act

²¹ §§ 3-4, 2. COVID-19 Judicial Accompanying Act

ability to carry on their business, as a result of the COVID-19 pandemic, the debtor is not obliged to pay agreed contractual penalties, including no-fault penalties.

- **Exemption from the Equity Replacement Act (EKEG) for short-term liquidity²²:**

The COVID-19 crisis has caused extensive liquidity problems for many companies. Recent measures will allow shareholders to inject funds quickly and without so much red tape.

Cash loans that are granted and disbursed for no more than 120 days between 5 April and 30 June 2020, where the borrowing company has not provided a pledge or comparable security from its assets, will not be subject to the EKEG. As a result, such loans would be able to be repaid before the company is restructured (instead of being frozen under EKEG), and in the event of insolvency, they rank equally with the other insolvency creditors. Until now, the EKEG had only provided an exception for cash loans of up to 60 days.

- **Extension for rank annotations in the land register²³:**

The 2. COVID-19 Judicial Accompanying Act clarifies the scope of certain provisions in the first act. Specifically, the suspended deadline for filing actions, applications, and declarations, between 22 March 2020 and 30 April 2020, also applies to registering rights or deletions, for which a rank annotation has been noted in the land register²⁴.

- **No registration fees for mortgages to secure bridge loans²⁵:**

No court fees will be charged on mortgage registrations that secure loans to maintain liquidity and overcome liquidity difficulties of companies, associated with the COVID-19 pandemic and its economic effects. The application to register must be received by the court before 1 July 2020. The connection with the COVID-19 pandemic must be certified by presenting a confirmation from Austria Wirtschaftsservice GmbH (AWS), the Österreichische Hotel- und Tourismusbank GmbH (ÖHT), or in any other suitable way.

- **No stamp duty for legal transactions to cope with the COVID 19 crisis²⁶:**

Legal transactions necessary to carry out the measures in connection with overcoming the COVID 19 crisis are exempt from stamp duty. Examples include sureties securing liquidity for

²² § 13, 2. COVID-19 Judicial Accompanying Act

²³ § 12, 2. COVID-19 Judicial Accompanying Act

²⁴ §§ 55 und 56 Abs. 1 GBG

²⁵ § 16, 2. COVID-19 Judicial Accompanying Act

²⁶ § 35 Abs 8 GebG

companies, or lease agreements for space to provide medical care. It remains unclear if and how the applicability of this exemption must be proven.

- **Easier postponement of property foreclosure auction²⁷**

If the obligated party has been affected by natural disasters (e.g. floods, earthquakes, and, since the amendment by the 2nd COVID-19 Act, epidemics and pandemics), and has thereby experienced economic difficulties which have led to the initiation of the foreclosure, and the foreclosure would destroy its economic existence, the foreclosure will be postponed at the request of the obligated party, without the imposition of a security deposit. However, this does not apply if there is a risk of serious damage to the creditor (e.g. if the claim becomes irrecoverable).

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²⁷ § 200b EO