

Coronavirus

A Quick Guide for Austria

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Status 23 March 2020

We will provide you with **regular updates** on all relevant legal developments regarding the Coronavirus disease in Austria.

Our team is **ready** to navigate you through these challenging times. Please don't hesitate to get in contact with our experts.

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New and Updated Issues

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Substantive and Procedural Time Limits (1)

Which statutory periods will be changed?

Meeting deadlines is crucial for companies, as failure will result in loss of rights, business opportunities and financial losses. There are substantive time limits (such as the statute of limitations), procedural time limits (for appeals, etc.) and administrative time limits (such as for the maintenance of lifts and other facilities, the commencement of construction work following building permission, etc.) and time limits for administrative proceedings (e.g. appeals against tax or punitive orders). The legislature will issue a special act as of today (Thursday, March 19, 2020), establishing special provisions on substantive and procedural time limits at courts and administrative authorities.

[UPDATE] How will procedural statutory periods be changed?

Procedural periods **at civil courts, administrative courts, administrative criminal and tax authorities, which had not expired as of March 22, 2020 (in fiscal matters: March 16, 2020)** shall be suspended. This applies to both court and administrative proceedings. These time limits will recur as of May 1, 2020. If such a period has already begun in the "pre-Corona period" but has not yet expired, it is suspended and restarts in full on May 1, 2020. If such a period has been initiated after the imposition of the restrictions, it shall be interrupted as well and shall also begin to run again in full on May 1, 2020. Furthermore, it is of significance that the statute of limitations for prosecution (the time period subsequent to the offence within which an authority may commence proceedings) is also interrupted (for administrative offences). **Similar provisions are intended for criminal proceedings, but have not yet been implemented. The Act has authorized the Minister of Justice to issue an ordinance in this regard. Caution: Performance periods in civil courts (an executive order in a judgement or decision within which time performance must be rendered to the opponent) are not interrupted.**

[UPDATE] What will happen to substantive statutory periods?

Substantive statutory periods (statute of limitations, infringement of ownership, etc.) shall be suspended. Consequently, these time limits are extended by the period from the effective date of the Act **on March 22, 2020** until April 30, 2020 (thus by **39** days).

Are there any plans for administrative statutory periods?

At present, no special provisions are intended for administrative time limits (elevators, facilities, etc.), which partially fall within the competency of federal states.



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Substantive and Procedural Time Limits (2)

How will statutory periods for insolvency be changed?

The statutory period within which one must file for insolvency will be extended. Previously, one had 60 days to file for insolvency or over-indebtedness. This period shall be extended to 120 days in order to provide more time for restructuring efforts - e.g. through public funding or support from the public sector in the context of Corona.

What are the implications for proceedings in foreign countries?

Any special provisions on statutory periods would, inherently, only affect Austrian legislation, excluding proceedings conducted by foreign courts or authorities or contracts concluded under foreign law. An evaluation of such circumstances is subject to an assessment in accordance with the applicable law.

[NEW] Which fees will be waved?

In Austria, fees for public authority acts and legal transaction fees continue to be of substantial interest. Under the 2nd Covid-19 Act ("2. Covid-19-Gesetz") relief measures have been introduced in this respect. Legal documents and official acts which are directly or indirectly subject to the required measures in connection with the management of the COVID-19 crisis situation are **excluded from fees and federal administrative charges**.

As a result, for example, no charges are raised for a temporary change in a lease that refers to the Corona crisis. In some cases there may be grey areas (what is caused by Corona, what is not). However, as an "indirect" connection is sufficient, the scope of application is regulated generously.

This provision does not apply to court fees.

This exemption from fees is limited until December 31, 2020.

[NEW] Which rules apply to the service of documents?

Similarly, Corona specific rules apply to the service of court and administrative documents (not in private transactions and not when served to the authorities).

Specifically, for deliveries bearing proof of delivery (RSb), **no authorized person's signature will be requested**. Rather, it is sufficient (as with "standard" letters) to place the mail item in the post box or at any other delivery point. It is thereby already considered delivered. The addressee or a person who can be assumed to be able to contact the addressee must then be informed verbally, in writing or by telephone (presumably also by e-mail or SMS) about the delivery process. This shall be documented.

As usual, the delivery shall be deemed as not performed if it subsequently is established that the recipient was absent from the place of delivery.

Businesses should therefore pay particular attention to the fact that all **mail items are to be opened and processed**, as court and administrative RSb documents may well contain content that could initiate a legal deadline. Failure to meet such a deadline can lead to a forfeiture of rights.

Tax Reliefs

[UPDATE] Are there extensions of time limits?

Due to current legislation (2n COVID19-legislation), **time limits are generally extended**.

Due to section 323b para 1 Tax Procedural Code (BAO) all time limits in tax procedures, in particular time limits for tax appeals, will – provided that the time limit commenced after the 16th March, 2020, or that the limit had not expired before 16th March, 2020 – restart on 1st May, 2020. In practical terms, the appeal period of four weeks will restart on 1st May, 2020 (and end on 1st June, 2020).

In addition, if the taxpayer wants to extend a deadline in his/her individual case (ie, for filing his tax return), a specific request is also admissible. Further, surcharges for late payments of taxes due, which are a significant sanction in case of failure to observe a time limit, can also be reduced (even to zero) upon request (see below).

Which tax reliefs get granted?

Beside the above-mentioned extension of time limits, the Federal Ministry of Finance has announced four reliefs for tax payments in order to secure the taxpayer's liquidity (see for details <https://www.bmf.gv.at/public/informationen/coronavirus-hilfe.html>):

- First, **no interest will be charged** in case of a respite for tax payments (currently, 3,88% interest become due per annum) if a respective request is filed (the request is also simplified).
- Second, **prepayments** (*Vorauszahlungen*) for income or corporate tax can be reduced more easily (even to zero) which also requires a request (see below for details regarding the request).
- Third, **surcharges for late payments** of taxes due can also be reduced (even to zero) upon request (see below for details regarding the request). Such request is recommended for monthly or quarterly prepayments of VAT (*Umsatzsteuervoranmeldungen*) and also, for example, payroll tax.
- Finally, **specific interest due** (which results from an additional claim assessed in an income or corporate tax decree) can be reduced (also to zero) by request. Such reduction will however not become effective - regarding income and corporate tax for 2019 – until October 1st, 2020.

How can I apply for the reliefs?

A **combined form** for all said reliefs can be found on <https://www.bmf.gv.at/public/informationen/coronavirus-hilfe.html>.



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Insolvency Act, Enforcement Act

[NEW] Is there an extension of the application period?

Upon the occurrence of insolvency, managers of an affected company are obliged under section 69 of the Austrian Insolvency Act (*Insolvenzordnung - IO*) to file for the opening of insolvency proceedings without undue delay, but no later than 60 days after the occurrence of insolvency. In the event of insolvency due to a natural disaster, this period is extended to 120 days. Until now it was unclear whether epidemics also fall under the term natural disaster. The amendment under the 2nd COVID-19 Act clarifies that epidemics and pandemics meet the exceptional circumstances and lead to an **extension of the application period from 60 to 120 days**.

[NEW] Will executions be postponed?

Likewise, section 200b of the Austrian Enforcement Act (*Exekutionsordnung - EO*) clarified that the **postponement of execution** in the case of natural disasters, which is to be granted upon application by the obligated party, is also possible in the event of an epidemic or pandemic.



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Curfews, Bans on Access (1)

To whom does the EU entry ban apply?

The EU entry ban applies to all persons who are not citizens of an EU member state, Switzerland, Liechtenstein, Norway, Iceland or the United Kingdom (yes, despite leaving). Family members of citizens and non-citizens who have acquired a long-term permit of residence in one of the above-mentioned states may also enter. The entry ban is effective for an initial period of 30 days. This means that further travelers are not permitted to enter the EU and the territories of the other mentioned countries. Exceptions for professional purposes are to date, in so far as published, not provided for.

[UPDATE] Who is permitted to enter customer areas?

Entering the customer area of business premises of retailers and service providers as well as leisure and sports facilities for the purpose of purchasing goods or services or using leisure and sports facilities is prohibited.

Excluded from this ban are inter alia: public pharmacies, food trade, drugstores and drugstore chains, sale of medical and sanitary products, healing devices and adjuvants, health- and care services, services for people with disabilities, veterinary services, sale of animal feed, sale and maintenance of safety and emergency products, emergency services, agricultural trade, including auctions of animals to be slaughtered and horticultural and agricultural products as well as trade in seeds, feed and fertilizers, petrol stations, banks, post offices, telecommunications, services related to the administration of the law, delivery services, public transport, tobacco shops and newsagents, hygiene and cleaning services, waste disposal services, car repair shops.

Furthermore, it is also **forbidden to enter the business premises of all types of operation in the hospitality industry.**

Excluded are catering establishments which are operated within the following facilities: hospitals, nursing homes and homes for the elderly, facilities for the care and accommodation of children and young people including schools and kindergartens, business establishments if these may be used exclusively by employees.

Cure and rehabilitation facilities are closed since March 20, 2020.



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Curfews, Bans on Access (2)

[UPDATE] Who is prohibited to enter public spaces?

In principle, it is **prohibited to enter public spaces** (for exceptions see below). This applies to streets, footpaths, squares, public transport, its stations, etc. Taxis may be used for the purpose of exceptions. It is permitted to enter public areas to get to or from work or to pursue professional purposes (e.g. mail delivery) provided it is relevant in an economic context. However, this is only permissible if a **minimum distance of one metre** from one another can be maintained in public transport and at the workplace – otherwise one is not allowed to enter public places.

Otherwise, one may only enter public spaces in the event of a hazard to one's life or property, in order to help those in need of support, to ensure one's own primary needs and alone or with a member of the household. Physical exercise and walks are therefore permitted, provided that the minimum distance is maintained and trips to a second residence are also permitted (alone or with members of the household). However, the use of public transportation (for endeavors such as walks etc.) is restricted.

In some regions and communities (e.g. in Tyrol, Salzburg and the Arlberg region) stricter regulations are in force, which in particular stipulate a legitimate reason for leaving one's own home **and also prohibit leaving the residential community (excluding, inter alia, travel to and from work)**.

The reasons of exception must be made credible when stopped by an official. Companies are therefore recommended to **issue confirmations to their employees** confirming that their employees are travelling for professional purposes. The address of the business premises should be stated.

Upon extension, these restrictions now apply (provisionally) until the end of April 13, 2020.

[NEW] Is there a compulsory provision for home office?

In an amendment, following some confusion about a compulsory provision for **home offices** (which does not exist), a **shall provision** has been added. It shall be ensured that professional activities are carried out at home if possible and by mutual agreement between employer and employee.

Which penalties could be imposed?

If business premises are opened in contravention of the ordinance, **penalties of up to € 30,000** for the **shopkeepers** and **up to € 3,600** for **customers**, who violate the ban on entering the premises, may be imposed. It can be assumed that these regulations are strictly controlled. Beyond that, however, court punishments (and thus also criminal records) are also possible.

If someone approaches another person in such a way that the transfer of Corona is possible, he or she will be sentenced with up to **three years imprisonment** (§ 178 StGB). In the event of negligence, the penalty is up to one year.

State Aid Rules, Competition Law (1)

Are the EU state aid rules applicable to the measures adopted by Austria?

To the extent companies receive payments / subsidies from the state, this may qualify as state aid within the meaning of Art 107 TFEU. However, the European Commission already made clear that the current COVID-19 outbreak qualifies as an **exceptional occurrence**, as it is an extraordinary, unforeseeable event having a significant economic impact. As a result, exceptional interventions by the Member States to compensate for the damages linked to the outbreak are justified. In addition, the European Commission already indicated that it is prepared to approve state measures, which will contribute to mitigate the negative consequences of COVID-19 without unduly distorting competition in the Internal Market. In this respect, it can be expected that the measures adopted by the Austrian state are justified.

What principles apply?

In line with EU law the following principles apply:

- EU State aid rules and more specifically the Rescue Aid and Restructuring Guidelines, which are based on [article 107\(3\)\(c\) TFEU](#), enable Member States to help companies cope with liquidity shortages and needing urgent **rescue aid**. In this context, Member States can, for example, put in place dedicated support schemes for Small and Medium Enterprises (SMEs) including to cover their liquidity needs for a period of up to 18 months.
- [Article 107\(2\)\(b\) TFEU](#) enables Member States to compensate companies for the damages directly caused by natural disasters and **exceptional occurrences**.
- In case of particularly severe economic situations, such as the one currently faced by most European countries, EU State aid rules allow Member States to grant support to remedy a **serious disturbance to their economy**. This is foreseen under [article 107\(3\)\(b\) TFEU](#).
- Financial support from EU or national funds granted to **health services or other public services** to tackle the COVID-19 situation falls outside the scope of State aid control. The same applies to any public financial support given directly to citizens.
- Public support measures that are **available to all companies** such as for example the extension of payment deadlines for corporate tax do not fall under State aid control, as they do not provide a selective advantage to specific companies vis-à-vis others in comparable situations. These measures can be implemented by Member States without the need of the Commission's approval under EU State aid rules.



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State Aid Rules, Competition Law (2)

[UPDATE] Is it possible to submit merger notifications with the Austrian Competition Authority?

The Austrian Competition Authority (BWB) just announced that it now offers the possibility to submit filings electronically. For notifications that are filed with the BWB before 30 April 2020 and after entry-into-force of the relevant law (Second COVID-19 Act), the merger control deadline (Phase I) will only start running from 1 May 2020.

The BWB is still closed to the public and therefore asks the public, undertakings and parties to contact it electronically.

Continued Pay in Case of a Shut-Down

[UPDATE] Is there an obligation to continue payment of remuneration in the event of a ban or restriction on entering the business operation?

Yes, if this is a measure based on the COVID-19 measures legislation.

However, at the employer's request, **vacation days and time off** must be taken by the employees affected for a total of a maximum of eight weeks. However, vacation days from the current vacation year may only be taken up to a maximum of two weeks.

Excluded from this consumption obligation - which only occurs at the employer's request - are the so-called "**leisure options**" provided for in some collective bargaining agreements. These are time credits of employees which are based on a conversion of cash entitlements to time off, based on provision of a collective bargaining agreement (example: collective bargaining agreement in the electrical and electronics industry).

What happens, if the government shuts down business operations?

The employees' remuneration must be fully paid despite the shut-down. This applies even if employee cannot work from home. However, the employer may apply with the Austrian authorities for a refund of such remuneration within six weeks as of the end of the measures. Caution: If the claim is not made in time, the entitlement will expire.



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Special Leave for Childcare

[UPDATE] Who can use the special leave for childcare?

If a teaching or kindergarten institution or an educational institution or institution for people with disabilities is partially or completely shut down, the employer can (!) release employees who are obliged to provide child care from their duties of work under the following conditions, whereby the employer is reimbursed one third of the continued paid remuneration (so-called "**special care time**") for the maximum period of three weeks:

- partial or complete closure of the above institutions;
- the employee does not work in an area that is critical to the maintenance of care (e.g. medical care, food trade and production, public safety and transport);
- the child to be cared for is not older than 14 years of age or there is a duty to care for a disabled person;
- the respective employee has no other entitlement to time off due to care for a child or a person with disabilities (this refers in particular to an entitlement to leave in the event of care and support according to section 16 Austrian Vacation Act and any other prevention due to good cause according to section 8 para 3 Salaried Employees Act and section 1154b para 5 of the Austrian Civil Code).

Does the employee have a legal claim to such special leave?

No. The agreement remains at the employer's discretion.

[UPDATE] How much is the state funding for the special leave?

In the event that the special care time is granted, the employer is entitled to remuneration amounting to **one third of the remuneration** paid according to the agreed normal working hours during this time. This **entitlement is capped** at the monthly maximum contribution basis according to the Labor and Social Security Act (currently: EUR 5,370.00 gross) and must be filed with the competent tax authority of the permanent business operation within 6 weeks as of the day of the administrative measure.



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Update of Short-Time Work (1)

What does short-time work mean?

During the short-time work period the weekly normal working time is reduced by min. 10% and max. 90%. This does however not mean that every day and week employees will be constantly working 10% to 90%. There will be rather weeks with 0 working hours and others with work exceeding the agreed working time reduction. Thus, only on an **average basis** the reduced working time needs to be adhered to at last.

Which costs do have employers to expect when implementing the updated model of short-time work?

Employers will only have to bear the costs for the actual work employees are performing in the business during the short-time work period. Thus, the costs of the short-time work will only amount to (at least) 10% of the gross remuneration including pro-rated social security contributions. **Thus, short-work is very much recommended as it will significantly save labor costs.**

[NEW] Who bears the costs in case of sickness?

In contrast to the conventional short-time working provisions, the LMS also bears the **corresponding percentage** of the costs for sick leave in the case of short-time working due to corona. For example, in the case of a reduction of 75%, the LMS also bears 75% of the costs during sick leave within the short-time working period.

Which regulation is in place regarding the 13th and 14th payment?

These shall be calculated on the basis of the gross monthly remuneration (according to the applicable collective bargaining agreement) paid before short-time work was introduced. However, also these payments shall be borne by the LMS.

What are the implications for the social security contributions?

These shall be calculated on the basis of the gross monthly remuneration paid before implementing the short time work. However, the LMS will reimburse the employer for the additional expenses (i.e. costs exceeding the pro-rated part of 10%) from the first month of short-time work onwards.



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Update of Short-Time Work (2)

How can I introduce short-time work in my company?

First, an agreement on the introduction of short-work must be concluded (as shop agreement in operations with a works council, otherwise as agreement with each individual employee) to regulate duration, reduction of working time, consumption of time and holiday credits, short-time allowance and retention period. As next step, the employer must apply for short-work aid (see below) with the competent LMS – a decision (approval, request consultation, rejection) will be made within 48 hours.

The new short-time work model applies in retrospective as of March 1, 2020.

How much does the employer have to pay to employees during short-time work?

The employer pays an aliquot part-time remuneration. In addition the employees receive a staggered short-time allowance – these payments will be refunded to the employer by the LMS as "short-time work aid".

[UPDATE] Are there updated documents available yet?

Updated versions of agreements on short-time work as well as the newly designed LMS-application form are available on the webpage of the [Austrian Federal Economic Chamber](#) > "7. Wie kann ich als Arbeitgeber Kurzarbeit einleiten?".

Shareholder's Meetings, Dividend Payments

[UPDATE] Can shareholders' meetings be held by electronic means?

As part of the 2nd COVID-19 Act, in force as of 22 March 2020, general meetings (GMs) of (public and private) limited companies will now also be possible without physical presence of the participants. This is primarily relevant for the GMs of listed companies, as the normal statutory rules rendered the holding of GMs practically impossible. The recent legal changes also permit the use of virtual board meetings, although this was already possible under the relevant provisions of the articles and regulations of many companies. Detailed rules specifying the requirements for holding virtual GMs will be published shortly by the Ministry of Justice.

[UPDATE] For how long can a shareholders' meeting be postponed?

Despite the recent changes allowing for online GMs, it must still be assumed that many listed companies will have to postpone their shareholders' meetings. The statutory time period for holding a regular shareholders' meeting has now been **extended from eight to twelve months** from the end of the relevant financial year, which is of particular importance for companies whose financial year ended last autumn.

[UPDATE] Which measures mandatorily require a shareholders' meeting?

The recent legal changes mean that it will now likely be possible for companies to hold GMs for the most important and urgent measures which require a shareholder vote under mandatory corporate law rules. This includes **capital increases**, which may be of particular importance in the situation we are currently in.

[NEW] Can I approve a dividend payment?

The changes also mean that **dividend payments** can now be authorized by the GM, although it may not always be advisable for companies to make payments to their shareholders in the current circumstances from a business perspective. Furthermore, such payments may also be deemed illegal and lead to shareholder liability, eg where they result in a company losing vital resources or where they cause (or deepen) a company's insolvency.

Which ad-hoc announcements should be made?

Since the developments are generally public knowledge but the specific effects on individual companies vary significantly, corporations listed on the stock exchange should make ad-hoc announcements regarding their plans in this respect as well as the effects on their companies that are already foreseeable but not publicly known. This applies in particular to the awaited dividend payments that will be paid with delay as a consequence of the likely cancellation of the regular shareholders' meeting.



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Reduction in Rent for Business Premises (1)

Does the rent have to be paid despite loss of sales opportunities?

These days, retail stores and the catering trade are not only threatened with massive sales losses, they also need to continue to cover their running costs. This is because agreements have to be fulfilled in accordance with the principle of sanctity of contracts even under adverse circumstances. However, the Austrian Civil Code (ABGB) contains special regulations on the transfer of risk in Sec 1104 and 1105, especially for long-term obligations such as rent and lease, which can provide relief for the tenant.

What are the legal foundations?

Sec 1104 ABGB grants a claim for **exemption from the rent** or lease if the property taken into use **cannot be used** or put to use at all due to **extraordinary coincidences**, as fire, war or **epidemic**, great floods, weather shocks, or due to complete lack of growth. If the tenant keeps a **limited use** of the rented item despite such a coincidence, a **proportionate part of the rent is to be waived** in accordance with Sec 1105 ABGB. Up to now, the Supreme Court had to judge cases on the basis of these norms in which the occupying power seized a rented property in the post-war years (3 Ob 434/56) or when political changes led to the danger of terrorist attacks on a rented property (8 Ob 610/90).

Is the COVID-19-pandemic an extraordinary coincidence?

According to case law, **extraordinary coincidences** in the sense of Sec 1104 Austrian Civil Code (ABGB) are only those **elementary events** that **cannot be controlled by humans**, so that generally no one can expect to be compensated for the consequences. Such massive, indeterminable events that cannot be grasped by the individual cannot be covered by provisions that merely deal with regular cases. These elementary events always affect a larger group of persons in a way that cannot be adequately compensated by a statutory provision on compensation claims (see OGH 1 Ob 306/02k). The **COVID-19-pandemic** is classified by experts as such an elementary event and thus as an extraordinary coincidence.



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Reduction in Rent for Business Premises (2)

What exactly are the legal consequences?

Tenants of business premises whose activities are impaired or completely prevented by the curfew under emergency legislation thus have the possibility of demanding a **reduction in rent** or **complete exemption from rent**. However, the concrete extent of the rent reduction is to be determined **individually** on the basis of the **concrete impairment of use**. Therefore, it cannot be said in general that tenants of business premises directly affected by the curfew do not have to pay any rent, nor can it be said that businesses not affected by the curfew have to pay the full rent in any case.

The following examples shall illustrate this:

- A trader uses the rented premises not only as a salesroom with personal advice and collection of goods but also as a platform for online trading.
- An innkeeper is no longer allowed to receive guests in his seating area, but continues to use the kitchen for the still permissible delivery service.
- A pharmacist suffers massive losses in turnover because he cannot let customers into the pharmacy for the protection of the employees, but has to serve them through a window in the door.

Can the lease agreement contain other provisions for elementary events?

The risk transfer rules of §§ 1104 f ABGB are not mandatory law, and, hence, **deviating contractual regulations** are **permissible and conceivable**. These could oblige the tenant to bear the price risk even in the case of extraordinary coincidences. § 1106 ABGB states: "If the tenant has accepted all risks without any specification, this shall be understood to comprise only fire, water and weather damage. Other extraordinary accidents are not at his risk.

Other accidents, such as the COVID-19-pandemic, are therefore not covered per se by a risk-of-loss-rule that deviates from the law, but must be expressly assumed by the tenant.

What should tenants or landlords do now?

Required is a **contract review** based on the individual cases for both, landlord and tenant. It is also advisable to **check** the concrete **insurance protection** of the landlord and the tenant (e.g. business interruption insurance). With the Covid-19 FondsG the COVID-19 crisis management fund was established. It is therefore important for **landlords** to check whether its financial resources are also used to cushion the **loss of rent**.

What about penalties? Is a termination of the lease agreement possible?

It is certain that under these circumstances the lessee does not have to fear any **penalties** for the interruption of a possibly agreed operating obligation. **For the time being**, it is not to be assumed that lease agreements for business premises can be terminated by the tenant due to **prolonged or permanent unusability** (§ 1117 ABGB). Conversely, the landlord will also not be able to terminate the lease because the rented premises **are not regularly used** for the business activities stipulated in the contract (§ 30 Abs 2 Z 7 MRG).

Capital Markets

Prohibition of short-selling

On 18 March 2020, in response to the general economic uncertainty caused by the spread of COVID-19 and the associated massive losses of the Austrian benchmark index ATX, the Austrian Financial Market Authority (FMA) issued a **ban on short sales of all shares** admitted to official trading on the Vienna Stock Exchange (FMA Ordinance on the Restriction of Short Sales of Certain Financial Instruments in an Exceptional Situation). Due to the urgency of the ban on short selling, the ordinance entered into force upon publication on the FMA website.

The prohibition does not apply to those transactions that an institution conducts in course of its role as a market maker, but also to transactions relating to financial instruments that only lead to indirect short positions. This includes, for example, financial instruments that relate to an index or basket of securities, but also exchange-traded funds (ETF).



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Data Protection (1)

Which data can companies collect to prevent the spread of COVID-19 between their employees and on their premises?

It is generally **unlawful** for companies to conduct **temperature checks** of employees and visitors of company premises. This would qualify as a collection of sensitive data for which there is no apparent legal basis under the GDPR. As an **exception**, a legal basis does exist for

- conducting temperature checks of employees if a **works council agreement** authorizes such checks (Art. 9(2)(b) GDPR);
- conducting temperature checks of employees and/or visitors to protect public health (Art. 9(2)(i) GDPR) if the data subject (i) has been **diagnosed** with COVID-19 or (ii) is **suspected** of being infected as a result of contact with an infected person or as a result of his or her stay in a risk region.

However, employers are allowed to require employees to **inform HR / their line manager** if their temperature rises above the normal threshold. The collection of such data is possible on the basis that this is necessary to comply with **duty-of-care obligations under the employment contracts** (Art. 9(2)(b) GDPR).

It is also allowed to require employees (and visitors of company premises) to complete a **declaration / self-assessment** as to whether they have travelled to any of the high risk areas, or whether they have been in close contact with someone who has been positively tested for COVID-19. The collection of such data is covered by a **prevailing legitimate interest** of the company (Art. 6(1)(f) GDPR).

If done **electronically** (e.g. via email), employers are **not permitted to disclose the identity** of any worker who is confirmed to have COVID-19, to other co-workers as this would qualify as a processing of sensitive data for which there is no apparent legal basis under the GDPR. However, to the extent that such disclosure is performed **orally** in a face-to-face meeting, an argument can be made that the **GDPR does not apply** (Art. 2(1) GDPR). According to the Austrian Data Protection Authority, disclosing the identity of such worker to **health authorities** is covered by a **necessity to protect public health** (Art. 9(2)(i) GDPR).

Generally, whenever data is collected and processed, companies must provide employees and visitors with a **privacy policy** including detailed information about the data processing. If a works council is established at a company, any processing of employee data that exceeds what has to be collected and processed to comply with legal obligations requires the prior conclusion of a **works council agreement**.

Is there information from the Data Protection Authority on the processing of personal data for the purpose of identifying COVID-19 cases?

Yes, the **Austrian Data Protection Authority** has issued a **public guideline** stating that:

- sensitive data may be collected at least concerning persons who have been diagnosed or are suspected of being infected as a result of contact with an infected person or as a result of their stay in a risk region; for an employer, the legal basis is the necessity to comply with duty-of-care obligations under the employment contract (Art. 9(2)(b) GDPR);
- the transfer of sensitive data to health authorities is covered by a legal basis (Art. 9(2)(i) GDPR);
- an employer may collect its employees' private contact details for emergency contact purposes but may not force the disclosure of such information.

Data Protection (2)

How can data protection compliance be guaranteed in the home office?

Anyone who has been forced by current circumstances to introduce home office for their employees at short notice should consciously control the resulting data protection risks. This includes technical, organizational and legal measures.

In order to prevent security breaches, the **security of remote accesses**, for example, should be checked (e.g. "123456" is still the most frequently used password). If data breaches occur - regardless of the current situation - a report must be made to the Data Protection Authority within 72 hours and, in cases of high risk, to all data subjects affected.

If **private end devices** are used for remote access, it may be necessary to access these end devices - e.g. for maintenance purposes. If a works council has been established, this will require a works agreement. In any case, however, a policy on the use of private devices should be issued. In particular, employees should be instructed on how to provisionally secure their private devices.

Since remote access also involves new data processing activities regarding employee data, a **home office data protection policy** should also be made available to all employees.



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Financial Assistance (1)

Further financial assistance by the government

The Federal Government announced yesterday, that it will provide further assistance of **up to EUR 38 billion**. This package shall consist of EUR 15 billion in emergency aid for particularly affected sectors, EUR 10 billion for tax deferrals and EUR 9 billion for guarantees and warranties for current loans of affected companies. The package shall be made available through a mix of instruments adapted to the respective needs of the sectors. According to the Federal Government, the details, in particular the form in which the aid is to be provided, are still being worked out.

ECB emergency purchase program

In addition, the ECB has also announced that it will launch a **EUR 750 billion pandemic emergency purchase program** for securities. This measure is intended to partially cushion the economic slump caused by the spread of COVID-19. The emergency purchase program is expected to run at least until the end of the year and will be open to all classes of securities permitted under the ECB's regular Asset Purchase Program (APP). The ECB has also signaled that it will expand the program if necessary.

Working capital credit lines for exporting companies

In addition to the resources from the COVID-19-Compensation Fund, which is equipped with up to EUR 4 billion, the Federal Government has announced that it will support affected companies with **additional credit funds** of up to EUR 2 billion via Oesterreichische Kontrollbank AG (OeKB). Exporting companies shall be able to apply for a credit line of 10% (large companies) or 15% (SMEs) of their export revenue to be granted by OeKB. The credit amount made available per customer is capped at EUR 60 million. Beneficiaries of this credit line shall be economically healthy export-oriented companies affected by COVID19.

The details of this funding, in particular the forms of application therefore shall follow shortly.



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Financial Assistance (2)

What is the COV19 Fund?

The Federal Government has set up a **fund of initially EUR 4 billion** by establishing financing companies. For this purpose it will make use of the AbbaubeteiligungAG (ABBAG), a company known from the Hypo case.

These are primarily financial measures in favour of companies, which are necessary to *"maintain the solvency and bridge liquidity difficulties of these companies in connection with the spread of the SARS-CoV-2 pathogen and the economic effects caused by it"*.

The BMF will outsource the **economic assessment of the necessity and appropriateness** of the measures, i.e. the examination of the admissibility, appropriateness, amount and determination of the conditions of the financial aid applied for, to so-called authorized representatives, i.e. to **banks licensed in Austria**. The procedures shall primarily follow those provided for under the Export Promotion Act (*Exportförderungsgesetz*) and the Corporate Liquidity Strengthening Act (*Unternehmensliquiditätsstärkungsgesetz*). This will be done by authorising the banks, especially the Austrian Control Bank (*Oesterreichische Kontrollbank - OeKB*).

The latter argues in favour of support being provided mainly in the form of loans with terms, conditions and termination provisions that are more favourable than those on the market. This puts the support measures in a tense and possibly competitive relationship with the activities of commercial banks, which is why **restrictions under state aid law** must be observed.

Who can apply for financial assistance?

Financial measures under COV19FG may only be taken in favour of companies that have their **registered office or a permanent establishment** in Austria and carry out their "essential operational activities" in Austria. This means two things:

In addition to the requirement of a registered office in Austria, which can be easily clarified with a view to the registration requirements under the companies register law, the company making the application must carry out its main operational activities in Austria. This means that foreign activities must not be "more important" than those in Austria. As a general rule, a company that achieves the **majority of its turnover** through activities in the domestic market fulfils these requirements. In the case of sales in several countries, this can probably be assumed if the share of domestic sales is greater than that achieved in any other country, even if this domestic share is less than 50% of total sales. Details are to be laid down in a regulation of the BMF that is currently (as of today, 16 March 2020, 9:00 a.m.) not issued.

Financial Assistance (3)

How to get COV19 funding?

The BMF has to issue guidelines by decree in compliance with EU state aid law, which in particular have to contain the following regulations:

- definition of the **group of beneficiary companies**. Beneficiaries shall be economic healthy companies with business activities in Austria that suffer "financial difficulties" by COV19. The phrase "in favour of companies" is to be understood in such a way that the funding procedure can also be carried out via a company domiciled abroad, provided that the service or financial measure is of economic benefit to the domestic subsidiary. Therefore, it is decisive who controls the domestic activity and that the company in Austria is sufficiently independent in terms of organization to be able to handle the funding.
- details and **purpose** of the financial measures,
- the **nature and amount** of the financial measures. In this respect, the explanatory remarks on the COF19FG state that: "this includes in particular the granting of bridge loans and working capital financing to cover current unavoidable costs during the period of limited business activity". Non-repayable subsidies are not intended as a measure against liquidity bottlenecks caused by COV19.
- **duration** of the financial measures,
- **rights of information and inspection** of the federal government or the authorized representative.

What losses are considered eligible?

The following losses from business activities that are not conclusive according to the explanatory remarks are eligible for funding or compensation:

- losses of income can affect **both employees and companies** and can be mitigated by financial resources from the COV19 Fund. The applicant for funding must demonstrate that (and how) it suffers from liquidity problems due to COV19 without a fault on its own part;
- aid in the event of **short-time working**, or other support programs, e.g. those of the Austrian Labor Market Service;
- existing **support programs** (e.g. of AWS, FFG, ÖHT) are expanded;
- additional costs related to the requirements for **educational institutions**.

The explanations on the COF19FG state that "ABBAG can provide all services and take financial measures of any kind in favor of ... affected companies, which are necessary to **maintain solvency and to bridge liquidity difficulties** in connection with the spread of the pathogen SARS-CoV-2 and to combat the spread". In particular, this also includes the granting of bridge loans and working capital financing to cover current so-called "unavoidable" costs during the period of the restricted business activity. It is to be expected that the grant administration will also require a contribution from the company itself in such a way as to **minimize the adverse effects of COV19**. This will also include the introduction of short-time working.

It remains to be seen how the application forms will be drafted; any affected company can apply for the claim if it incurs COV19-related losses or additional costs.

Performance, Compensation

Do you still need to perform?

In case you cannot perform due to an **order by the authorities** or in case the performance is **unreasonable** due to important circumstances (e.g. because of the risk of infection), the contract can be **terminated**. The consequence is that the performances and payments need to be unwinded (each party has to give back what it has received).

In case **performance can be separated** in more parts and in case of continuing obligations, the contract might stay in force for the already performed parts. Cancellation charges or penalties are typically not payable under these circumstances. The same applies to penalties, based on the lack of fault. However, any specific agreements have to be analyzed as they would generally overrule the statutory provisions. In any case, each individual case needs to be assessed separately.

If one side is ready to perform but the performance has no value any more for the recipient, the question arises whether the contract is frustrated because it **has lost its basis**. Such frustration leads to the adaptation or the contestation of the contract.

Compensation for lost profits?

In Austria, a **COVID-19-Compensation Fund** has been installed. Such fund is currently equipped with EUR 4 billion. It serves to compensate the loss of income due to COVID-19 and to take measures for the economic recovery. The Finance Minister will publish details by decree. Only businesses with **seat or commercial establishment and relevant business operations in Austria** can apply for support from such fund. There is no respective legal entitlement for support. Some (regional) chambers of commerce grant some cash subsidies, e.g. the Chamber of Commerce of Lower Austria in the amount of EUR 5,000,- for companies with a maximum of 10 employees. Some regional countries also provide guarantees for liabilities.

According to the Austrian Epidemic Act, businesses are entitled to a compensation for losses caused by the order of authorities, like the closure or restriction of operations. Alert: such compensation needs to be applied for before the district administration within 6 weeks upon end of the order. If not applied in time, such compensation is time barred.



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