

Coronavirus

A Quick Guide for Austria

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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

- **Financial Assistance**
- **Public Procurement**
- **Shareholder's Meetings, Dividend Payments**
- **Substantive and Procedural Time Limits**
- **Insolvency Act, Enforcement Act**
- **Curfews, Bans on Access**
- **Reduction in Rent for Business Premises**

Financial Assistance (1)

[UPDATE] Which government support schemes are in place?

The Federal Government has set up a **fund of initially EUR 4 billion** by establishing financing companies. With the third 3rd COVID-19 Act, which was passed in the National Council on 03 April, the Federal Government is increasing the fund's resources to up to EUR 28 billion.

An additional financial aid package of up to **EUR 34 billion** shall consist of

- EUR 15 billion in emergency aid for particularly affected sectors ("Corona Relief Fund"),
- 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.

Who is eligible to apply for financial aid under the Hardship Fund?

The federal government has put together a package of measures for the time being of **EUR 1 billion (which will be extended to EUR 2 billion)** for affected single-person businesses and microentrepreneurs (fewer than 10 employees and less than EUR 2 million turnover or balance sheet total). This so-called hardship fund is intended to support those self-employed persons who are no longer able to generate sales due to the COVID-19 crisis and are in acute financial distress. The funds are designed as one-off grants and no longer have to be repaid.

In the first disbursement phase, which has already been running since 30 March, an "immediate aid" of EUR 1,000 will be granted, whereby strict eligibility criteria must be met (e.g. foundation of the company before the end of 2019, upper and lower income limits, no further monthly income above the marginal earnings threshold).

The second phase is to **start after Easter**, with eligibility criteria to be significantly relaxed following the announcement of the government. In phase two there will be a maximum of three payments of up to EUR 2,000, but further details are not yet known. **Within the framework of the third 3rd COVID-19 Act, which is to be passed in the National Council on 03 April, the circle of persons eligible for support in the second phase will be extended to include private room renters who are not subject to the trade regulations and to agricultural and forestry enterprises.**



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Financial Assistance (2)

[NEW] What are the eligibility criteria under the Corona Relief Fund?

The Austrian ministry of finance – considering State Aid rules – has published the following guidelines on 8 April:

- **Definition of the group of beneficiary companies.** Beneficiaries are to be healthy companies that have suffered "financial difficulties" due to COVID-19, with their headquarters or permanent establishment in Austria, and which carry out their main operational activities in Austria. Supervised legal entities in the financial sector, such as in particular credit institutions, insurance companies, investment firms and pension funds, as well as companies that were already in financial difficulties on 31 December 2019 are not allowed to apply for funds under the Corona Relief Fund.
- **Structuring of the financial measures.** The aid is to be provided primarily in form of guarantees and by granting direct loans. The government also intends to hand out direct grants, but their structure is subject to a separate directive which has not been adopted yet.
- **Purpose of the financial measures.** The funds provided under the Corona Relief Fund shall, in particular, cover payment obligations of the enterprise which cannot be borne by the enterprise itself due to loss of turnover. Debt refinancing is excluded.
- **Amount and duration of the financial measures.** In accordance with the specifications of the European Commission (C(2020) 1863 final, as amended by C(2020) 2215 final), working capital loans of up to EUR 500,000 can be secured with a 100% guarantee of the Republic of Austria. For amounts above EUR 500,000 the guarantee covers 90% of the loan amount. The upper limit is three months' turnover or EUR 120 million. The term is 5 years and can be extended once by 5 years.
- **Liability fee and interest.** Also comply with the Commission's requirements and are graded according to the amount of liability, size of the company and duration of the loan. The maximum loan interest rate is 100 bp, the guarantee fee ranges from 25 bp to 200 bp.
- **Obligations of the beneficiaries.** Enterprises applying for subsidized loans have to take special care to preserve jobs in the enterprise (e.g. by short-time work). In addition, there is a ban on dividends and profit distribution in the period 16 March 2020 and 16 March 2021, and bonuses paid to board members or managing directors may not exceed 50% of the previous year's bonuses.

Where can I apply for the funds?

The newly founded COFAG - Covid-19 Finanzierungsagentur is entrusted with the liquidation together with AWS, ÖHT and OeKB. The point of contact is the house banks as single point of contact, which forward applications to the appropriate institutions. Applications have been possible since 8 April 2020 and the first loans are to be paid out in the week after Easter.

Financial Assistance (3)

Will there be direct grants?

The Corona Aid Fund will also provide direct non-repayable grants to cover fixed costs (e.g. electricity, rent, personnel costs). Eligible are companies that have had to record sales losses of at least 40% due to the COVID-19 crisis. Further framework conditions are to be specified in more detail in the week after Easter by a guideline of the Federal Ministry of Finance. It should be possible to submit an application as early as 15 April 2020.

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.

Financial Assistance (4)

Deferral of principal and interest payments under certain loan agreements

The 4th COVID-19 Act provides that creditors' claims arising from credit agreements concluded by consumers or micro-enterprises before 15 March 2020 and due between 1 April 2020 and 30 June 2020 are deferred for a period of three months. However, the borrower must prove that, as a result of the exceptional circumstances caused by the spread of the COVID 19 pandemic, he/she has suffered a loss of income which makes it unreasonable to expect him/her to perform the service owed (i.e. to pay the loan instalments due, including interest).

However, the contracting parties are granted the right to agree deviating arrangements (such as, for example, continuous performance within the repayment schedule agreed in the credit agreement). In particular, the legislator calls for amicable arrangements to be made regarding possible support measures. We therefore recommend that affected credit institutions proactively communicate to borrowers appropriate proposals for implementing the deferral in order to keep the expected flood of inquiries as low as possible.

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.

This support measure has already started. The processing is carried out **in cooperation with the respective house banks** of the exporters to which the applications are to be submitted.

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.

What ist COFAG and what is its purpose?

The Transparency Database has to provide separate performance records for services rendered under Covid 19, thus revealing which services were specifically rendered for the purpose of the Covid 19 crisis.

In order to implement financial measures in connection with the Covid 19 crisis, the Federal Government has founded its own subsidiary of ABBAG (the Federal Government's decommissioning unit, formerly Hypo-Abbaugesellschaft), COFAG. Under the 3rd Covid Act, the Federal Government shall consistently provide said entity with the necessary funds, which provides a high level of security for transactions with COFAG.

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)

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.

Procurement – End of Suspension of Time Limits (1)

[UPDATE] Are there still extensions of time limits regarding new review procedures (including application for a declaratory finding)?

Are there still extensions of time limits regarding the challenging of decisions of Contracting Authorities in current public procurement procedures?

By the adoption of the 2nd COVID-19-legislation in March 22, 2020, time limits in **new review procedures** including applications for assessment and procedures for interim measures before the Administrative Courts were suspended until May 1st, 2020.

The 4th COVID-19 legislative package, which came into force on April 5, and was passed in Parliament on April 4 and announced on April 4, the **suspension of time limits ended at 00:00 on April 5.**

As of April 5, therefore, the time limits for requests for review and for requests for an interim injunction against decisions of contracting authorities resume. It is therefore necessary to carefully examine precisely which time period remained for review against separately contestable decisions upon entry into force of the 2nd COVID-19 Act on March 22. The remaining **time period for the review is now available as of April 5.** For separately contestable contracting authorities decisions issued after March 22, the period for review shall commence on April 5 or on the date of the announcement of the decision to be contested.

For decisions of contracting authorities, that are communicated as of April 5, the time limits run as usual.

Consequently, it may be the case that a time limit for contesting a separately contestable decision of a contracting authority **expires on April 6 or within a few days!** For this reason, please examine any deadlines very carefully. For any questions you may have, we are at your disposal at covidsupport@bakermckenzie.com or in person.

For new proceedings regarding declaratory requests the time limits resume to run on April 5 or on the date foreseen by the Public Procurement Act.

[UPDATE] Are there still extensions of time limits regarding pending review procedures?

The extension of time limits provided for in the COVID-19 VwBG with regard to review proceedings pending before the Administrative Courts as well as proceedings for the issue of interim injunctions ends on April 6. The time limits recommence on April 7. Pls note that the pending procedures regarding **applications for assessment as well as pending procedures before the High Administrative Court and the Constitutional Court still remain suspended until April 30 and will resume on May 1.**



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Procurement – End of Suspension of Time Limits (2)

[UPDATE] Are there changes regarding interim measures?

The 4th COVID19-legislation provides, that in particular cases in connection with the urgent prevention or combating of the spread of COVID-19 or for reasons of maintaining public order in connection with COVID-19 the **request for interim measures** with respect to the opening of bids, the conclusion of a framework agreement and the award of a contract **has no suspensive effect**. Contracts may be concluded in this case.

[NEU] Which rules apply to appeals to the Administrative Court?

In the case of appeals to the Administrative Court, in two constellations the **suspension was lifted on April 5**:

- In those cases in which the deadline commenced before COVID-19 BVwG came into force, and
- in those cases in which a decision of an Administrative Court has been issued in the meantime (i.e. after the entry into force of COVID-19 BVwG).

Furthermore, for new appeals to the Administrative Court - for decisions of an Administrative Court served after April 5 - time limits commence to run as usual.

Procurement – New Tender Procedures (1)

Do I have to apply the Public Procurement Act 2018 for urgent procurements?

Yes. The Federal Ministry of Justice (Austria) has indicated that the **exception** referring to the "protection of essential security interests of the Republic of Austria" does **not** apply at this stage, as the procurements are neither secret nor (currently) pose a threat to internal security to such an extent that the existence of the State as such would be endangered. The European Court of Justice also demands the use of "lenient measures" such as the implementation of **special procedures**.

These special procedures allow the procurement of works and the delivery of goods and services in **classic emergency situations** such as the Covid-19 pandemic through the use of negotiated procedures without prior publication.

Do I have to make a public announcement?

According to the Public Procurement Act 2018, a **negotiated procedure without prior publication** may be conducted if "extremely urgent overriding reasons unrelated to the conduct of the contracting authority/entity, connected with events unforeseeable by the contracting authority/entity, make it impossible to comply with the [normal] time limits". The Covid-19 pandemic is such an unforeseen and urgent reason. Immediate needs of the infected, but also of the emergency personnel and the operators of critical infrastructure must be met as soon as possible in order to effectively prevent further spread of Covid-19.

The reasons for the choice of the special procedure must be **precisely documented** in the respective award file; the burden of proof for the existence of the prerequisites lies with the contracting authority.

Am I allowed to make use of direct award procedures?

According to the opinion of the EU-Commission „the current legislative framework does not allow for a direct award to a preselected economic operator **unless only one** will be able to deliver within the technical and time constraints imposed by the extreme urgency”.

However, the **shortage of critical goods** on the world markets currently often reduces the number of potential suppliers. This must at least be "verified quickly", e.g. by phone calls or emails. To overcome this situation, the Federal Ministry of Justice (Austria) considers it possible to cover **this urgent, short-term need** with a single supplier who can, for example, meet the delivery deadlines. This only applies to certain goods which are **no longer generally available** due to the current extraordinary demand.

The existing regulations on direct awards of the Public Procurement Act 2018 remain in force.

Procurement – New Tender Procedures (2)

What deadlines am I subjected to?

Since the negotiated procedure without prior publication is not subject to **any legal minimum time limits** (e.g. for submission of offers), this procedure can also be carried out very quickly. However, the deadlines must still be **reasonable**. Regular time limits may be shortened on **grounds of urgency**. In many cases, participation or submission deadlines will have to be **extended** in the sense of maintaining a competition. The current restrictions in the daily work routine ("home office") slow down or make it impossible for companies to carry out their processes. Companies are advised to review their respective **offer commitment period** and extend it if necessary.

For which time period new contracts may be concluded?

Newly concluded contracts without publication may only serve as a **temporary measure** until longer-term solutions are found. Is therefore advisable to start regular award procedures simultaneously in order to switch to the **regular awarding procedure** as soon as possible. In view of the current uncertainty, it is advisable to conclude **framework agreements**. In any case, make sure you have good **internal documentation** for the period you consider the temporary solution as justified.

Are there special requirements for the security sector?

In the area of the **Federal Procurement of Defense and Security Act 2012**, the special procedures without prior publication are also available for "crisis procurements" and for "additional, unforeseen construction services or services in general".

Is e-procurement within the lower value limit possible?

Yes. The implementation of an electronic procurement procedure is already required **above EU thresholds**, but it is also **permitted below EU thresholds**, especially in light of the current situation caused by the restrictions on freedom of movement. However, it should be considered that the issuing of a **new qualified electronic signature** and its handling may only be realized to a limited extent given the current situation. Relevant arrangements should be implemented **quickly and in due time**.

We would be pleased to be at your disposal for support in this matter as well (covidsupport@bakermckenzie.com).

Procurement – New Tender Procedures (3)

Do I have to announce the conclusion of a contract?

All contracts concluded by the **Federal Administration or public entities within the competence of the Federation** in the classical sector with a contract value of **EUR 50,000** or more must be announced in the Open Government Data System (OGD system) and within the upper value limit also in Tenders Electronic Daily (TED). Attention: This also applies to **retrievals** from existing **framework agreements**!

A violation of these announcement obligations is considered an **administrative offence** and is penalized with a fine of up to EUR 50,000.

In the area of **Regional Administrations and their public entities**, all contracts issued within the upper value limit must be announced in TED and in the OGD system.

In the area of the **Federal Procurement of Defense and Security Act 2012**, the announcement obligation is limited to a publication in TED.

Do deadlines for ongoing procurement procedures change?

According to the **proportionality principle**, the (public) authority must determine deadlines in a way that allows the affected contractors to take the appropriate actions in sufficient time.

Since many companies are currently restricted in their ability to act due to the increased use of home offices, the Federal Ministry of Justice (Austria) considers **extensions of the participation and submission deadlines** even for simple tenders as advisable.

Therefore, one should set generous deadlines or extend current deadlines. Also bear in mind that electronic participation requests and offers must be provided with a **qualified electronic signature and that signing and uploading participation requests or offers currently takes considerably longer, which is why one should take the appropriate precautions in due time**. We would be pleased to assist you in this regard as well and **support you with an electronic signature** or appropriate training for your employees.

How can I avoid physical contact?

Openings of offers, hearings and rounds of negotiations can also be conducted **via video conference systems**.

Procurement – Adaption of Existing Contracts (4)

Am I allowed to exceed the order value?

As in the past, a new procurement procedure must be carried out for "significant" contract amendments. However, exceeding the contract volume is considered a "**non-significant**" (de minimis) contract amendment under the following conditions:

- The applicable EU value limits AND
- 10% of the initial contract amount (the concession) in case of supply contracts, service contracts and concession contracts or 15% in the case of works shall not be exceeded.

Are overruns of more than 10 or 15% possible?

Yes, provided that the change "was made necessary by circumstances which could not have been foreseen by the public authority exercising due diligence and the **overall nature** of the contract... is not altered due to the amendment", however the **total value of these amendments** may not exceed **50%** of the original contract.

The Federal Ministry of Justice (Austria) acknowledged the poor predictability of the coronavirus pandemic, particularly due to the dynamics of the spread of Covid-19.

As a result, the overall character is not altered if only the delivery quantities of the agreed services are increased or an existing delivery contract for certain medical aids is complemented by other **similar deliveries**. However, the type of service (goods vs. service) may not be changed.

Any contractual amendment above the **EU thresholds** must be **published**.

Can service periods be adjusted?

Yes, the **change of service periods or the exchange of key personnel** for services will qualify as an insignificant contractual amendment under the current circumstances.

Will public authorities pay more quickly?

The Federal Ministry of Justice (Austria) has advised authorities in the public sector to process **all payments immediately** to support the liquidity of suppliers.

Health Sector and Health Products (1)

What legal effect does the pandemic situation have on clinical trials?

A special regulatory authorization for clinical trials of medicinal products and medical devices is adopted. This authorization extends the special provisions in connection with crisis situations (Section 94d (1) Medicines Act, Section 113a Medical Devices Act), so that in the event of a pandemic, the Federal Minister can now also issue regulations for the area of clinical trials if the necessary care of the population would otherwise be seriously and considerably endangered, regarding supply and provision obligations for marketing authorization holders, manufacturers, depositors, pharmaceutical wholesalers, authorized representatives and public pharmacies or delivery points for medical devices, if and as long as this is necessary due to the special situation.

What legal effect has the situation on HCOs?

Special rights of the state legislators (federal states) to deviate from the requirements of hospital law in times of crisis (§ 42 f KaKuG), for example, the requirements of the Regional Health Structure Plan (RSG) will no longer be complied with if hospitals are to be used as COVID-19 hospitals as a priority, contrary to their other care mandate. In addition, approval procedures could be converted into registration procedures or changes could be made to the institutional rules (for example, to visiting rights). This if and as long as this is necessary due to the special situation and the protection of life and health of people is maintained.

What legal effect will the situation have on physicians?

Epidemiologists (Section 27(1) of the Epidemics Act) are put on an equal footing with public health officers (Section 41(8) of the Physicians Act). This is the case if the doctors available in the affected areas (primarily public health officers) are not sufficient to combat the disease effectively.

What legal effect will the pandemic have on psychotherapists?

In order to protect against the risk of transmission and infection in the context of a pandemic, the meetings of the Psychotherapy Advisory Board, which must be held at least twice every six months, may be suspended by the Federal Minister (Section 22a, paragraph 1 of the Psychotherapy Act). In this context, the advisory activities of the Psychotherapy Advisory Board are also suspended for this period.



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Health Sector and Health Products (2)

What legal effects has the situation on paramedics medical technical personnel?

For the special authorizations created in connection with a pandemic (2nd COVID-19 Act) (e.g. taking swabs, carrying out laboratory tests without a physician's order, etc.), combating the spread of the pathogen SARS-CoV-2 (COVID-19) is defined or restricted as the exclusive area of application (Section 69 (9) of the Paramedics Act; 36 (25) of the MTD Act). Authorizations based on these provisions will continue to exist after the pandemic, but at the latest until the end of 31 March 2021.

What are the legal effects on nursing?

Due to the increased demand for intensive care personnel and, if necessary, for other specializations such as hospital hygiene and anesthesia care, a temporary relaxation of qualification requirements will be made in order to enable the deployment of diploma nursing staff during the critical period and more flexible deployment of nursing staff in the other specialist areas as well (Section 17(3a)). For the special authorizations created in connection with a pandemic (2nd COVID-19 Act), the fight against the spread of the pathogen SARS-CoV-2 (COVID-19) is defined as the exclusive area of application (§ 117 para. 33); these authorizations continue to exist after the pandemic, but at the latest until the end of 31 March 2021.

Tax Reliefs (1)

What does the 3rd COVID-19-legislation bring?

With the 3rd COVID-19-legislation, various tax reliefs have been introduced:

Regarding **Income Tax**, new tax reliefs have been granted on the one hand; on the other hand, it was secured that previous tax reliefs can still be applied:

- **New tax reliefs** are a **tax exemption for all donations from a public body** (ie, the COVID-19-fund, or other funds connected with the COVID-19-pandemic) given as of 1st March, 2020. Further, **bonus payments given to employees in connection with the COVID-19-crisis are tax-exempt** in 2020 up to a threshold amount of EUR **3.000,-** (provided they are effectively connected to the COVID-19-crisis and if they had not been granted before).
- In addition, it was secured that previous tax reliefs (such as a tax deduction for commuters, or certain tax reliefs for employees can also be applied in case of working in a home-office, in case of teleworking or short-time work.

Finally, an **exemption from Stamp Duties** was introduced, provided that the underlying contract is necessary in order to exercise measures to overcome the COVID-19-crisis.

Are there extensions of time limits?

Due to current legislation (2nd COVID19-legislation), **time limits will generally be extended.**

Due to section 323c para 1 Tax Procedural Code (BAO) all time limits in ordinary 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, 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).



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Tax Reliefs (2)

Which tax reliefs get granted?

Beside the above-mentioned extension of time limits, the Federal Ministry of Finance has announced five 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 until 30th September, 2020 (even to zero) which also requires a request (see below for details regarding the request). Interest charged in connection with said reduction of prepayments (ie, 1,38%) will automatically not be fixed.
- 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.
- Fourth, **the time limit for the annual tax returns 2019 (IncomeTax, CIT and VAT)** will automatically be extended until 31st August, 2020.
- Fifth, surcharges for late filing of tax returns will automatically not be fixed.

How can I apply for the reliefs?

A **combined form** for all said reliefs (provided that they are not automatically granted) can be found on <https://www.bmf.gv.at/public/informationen/coronavirus-hilfe.html>.

Financial Market Supervision

Extension of application periods in relation to financial market supervision

If an act assigned to the Austrian Financial Market Authority (FMA) requires the supervised entities to file certain applications, such as the Banking Act, Insurance Supervision Act, Securities Supervision Act, the FMA may extend the applicable time periods for such notification, reporting, submission, publication or other contribution obligations. A prerequisite is a justified request by the supervised company. As reasons for extending the periods, the materials cite, for example, general meetings being delayed due to COVID-19. Other reasons (e.g. the absence of key personnel due to COVID-19, e.g. of a bank) will probably also have to be recognized. This change makes sense, especially as it is not explicitly limited to COVID 19 scenarios.

According to our reading of this new provision, such an application would have to contain

- a reference to the exception in § 22 para. 13 FMABG
- the reason for the impediment;
- the duration of the impediment; and
- the date by which the company can fulfil its obligation.



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Shareholder's Meetings, Dividend Payments (1)

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

The Corporate COVID-19 Act allows meetings of shareholders and boards of most Austrian companies **without physical presence** of the participants. The details of these "virtual meetings" have now been set out in a regulation by the Austrian Minister of Justice published on April 8. The regulation provides that virtual meetings are generally to be carried out through the use of online videoconferences giving each participant the possibility to speak and cast his/her vote.

[NEW] Are there special rules for virtual shareholder meetings?

There are special rules for virtual shareholder meetings of listed companies, providing that it is sufficient for each shareholder to be able to follow the meeting and make statements and/or cast his/her vote by other means. In addition, the company may require shareholders to make use of proxy representatives in order to make proposals for a resolution, cast votes and/or raise an objection. The company must propose at least four suitable persons as proxy representatives, all of whom need to be independent from the company and two of whom need to be lawyers or notaries. The costs of the special proxy representatives are borne by the company.

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. Holding GMs can also be impossible or problematic for limited companies, depending on the situation and wording of their articles and regulations. 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. The regulation now also applies to limited liability companies and cooperatives.

Any additional meetings provided for in the articles and regulations can now be held until the end of 2020.

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.



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Shareholder's Meetings, Dividend Payments (2)

Preparation of financial statements

The statutory time period for the preparation of the annual financial statements and other accounting documents may now be **exceeded by up to 4 months** without penalty pursuant to the 4th COVID Act.

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.

Capital Markets

ESMA Recommendation: No supervisory actions for delayed publication of financial reports

In a statement dated March 27, 2020, the European Securities and Markets Authority (ESMA) recommended that national authorities do **not prioritize supervisory actions** for a delay in the publication of financial reports for periods ended prior to April 1, 2020. With this guidance, ESMA intends to address difficulties that issuers may encounter in finalizing their financial reports in light of the COVID-19 outbreak. The “tolerated” period of delay is to be two months for annual reports and one month for half year reports.

Issuers have to inform the authority and the market as soon as possible of the delay, the reasons for the delay (e.g. relevant employees are sick; relevant work cannot be done remotely; overload of IT systems because of increased use of home office; etc.) and to the extent possible the estimate publication date. In case the expected publication date is again delayed, another communication to the authority and the market would be required.

ESMA made it clear that its recommendation **covers only regular reporting requirements** according to the Transparency Directive. In particular, issuers continue to remain subject to the disclosure requirements in Art. 17 of the Market Abuse Regulation, i.e. issuers must continue to inform the market as soon as possible of any inside information that directly concerns them. Any violations of this requirement would continue to have to be sanctioned by national authorities.

The Austrian financial markets authority (FMA) has announced that it will follow the ESMA recommendation.

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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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 has issued a special act, establishing special provisions on substantive and procedural time limits at courts and administrative authorities.

The suspension of deadlines has been extended, but in some cases the provisions have been changed. The legislator also provided some minor clarifications.

The deadlines (4 weeks) for registration in the **Economic Owners' Register**, which had not yet expired on March 16, 2020, are suspended as well. They are set to recommence on May 1, 2020.

In **criminal financial proceedings** brought before the Financial Criminal Authority, the deadline has now also been extended. Basically, time limits for appeal and retrial begin to run anew on May 1, 2020. Ruling senates and the Federal Finance Court may decide by way of circulation if no oral proceedings have taken place by September 30, 2020.

Administrative statutes of limitations shall also be suspended (from 22 March to 30 April). **Decision deadlines for authorities** will be extended by six weeks (if initially shorter, they will be doubled). Payment of organ penalty orders now can be settled within four weeks instead of two, and payment of criminal penalty orders within six weeks. Deadlines imposed under automotive law are suspended until May 31, 2020, while temporary documents remain valid until May 31, 2020 (at the latest).



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Substantive and Procedural Time Limits (2)

[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).

For criminal proceedings a similar regulation has been implemented by regulation.

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.

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.

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.

Substantive and Procedural Time Limits (3)

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.

The 2% transaction fee is waived for legal transactions conducted in the implementation of the measures taken in response to the crisis situation. This provision is not limited in time.

Electronic notarial acts and electronic authentication by notaries are generally permitted during the period of Covid-19 measures.

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.

Effects on Arbitration Institutions (1)

Do arbitral institutions continue to operate?

Arbitration is also affected by the COVID-19 pandemic. However, many arbitration institutions have signaled that they will continue their work as far as possible:

The **Vienna International Arbitral Centre (VIAC)** is working remotely and its case management is fully operational due to the new electronic case management system that was introduced in 2019. Case managers are available by phone. Parties are encouraged to submit all written submissions and supporting documents, such as exhibits, witness statements and expert reports electronically.

The **Court of Arbitration of the International Chamber of Commerce (ICC)** informs that all offices of the Secretariat and the ADR Centre are operational. However, the ICC strongly recommends that all communication be conducted by e-mail. Other arbitration institutions such as the London Court of International Arbitration (LCIA) and the Hong Kong International Arbitration Centre (HKIAC) have taken similar precautions.

Will in-person hearings be postponed?

In person hearings pose a greater challenge in times of COVID-19. It is to be expected that in-person oral hearings based in Austria will be adjourned. This is the case with all hearings at the ICC Hearing Centre in Paris too. This applies at least where ordinances or general decrees at state level prohibit public and non-public meetings regardless of the number of participants.

In all other respects, the arbitral tribunals shall decide on the continuation of the respective proceedings within the scope of their discretionary powers. The **independent arbitral institution DELOS** has provided a useful checklist on holding arbitration and mediation hearings in times of COVID-19: <https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/>.



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Effects on Arbitration Institutions (2)

Are online hearings an alternative?

In many cases, it may be possible to **conduct oral hearings by video conference**. Civil law jurisdictions are generally expected to be more at ease with using such technologies, as there is less cross-examination than in common law jurisdictions. Impressive examples, like an ICC online hearing with 70 participants from around the world, have been reported to have worked perfectly.

The **World Bank's center ICSID** operates its own online hearing services with virtual court stenographers and IT professionals present at online hearings to ensure it runs smoothly. ICSID reports that already last year about 60 percent of the 200 sessions were held by video-conference.

The quarantine period will **accelerate the use of technologies** and may revolutionize established habits. Readily available conference portals, such as Zoom, enable attaching highlighted documents, PowerPoint presentations or the muting of participants who are breaking the rules. There are more sophisticated alternatives, which makes you feel more in the same room with the other participants, but include expenses and equipped facilities at all locations.

Insolvency Act, Enforcement Act

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**.

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.

[NEW] Are there any filing exemptions?

A debtor is not obliged and a creditor is prohibited from filing for the opening of insolvency proceedings in case of over-indebtedness if such over-indebtedness is occurring in the period from 1 March 2020 to 30 June 2020. Please note that the filing is still necessary if, in addition to being over-indebted, a debtor is also unable to pay its due obligations.



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Continuation of Construction Sites

Can construction sites continue?

Employment on construction sites: Construction sites are workplaces in the sense of the regulation on exit restrictions. At these sites, a safety distance of at least one meter from any other person must be maintained or other appropriate protective measures must be in place.

Are the guidelines issued by the Social Partners binding?

The social partners of the construction industry (Chamber of Commerce, Labour Union) have issued guidelines in consultation with the authorities (Central Labour Inspectorate). This is not a legal regulation by itself and represents an interpretation of the above-mentioned regulation. However, this interpretation can be relied upon with good reason and it can be assumed that the Covid-19 measures are complied with if these guidelines are followed.

In particular, the guidelines provide for

- Sanitizers (and likely gloves) must be kept available at the construction site.
- Machines and vehicles must be sterilized after use or gloves must be worn.
- A safety distance of one meter shall be maintained, if possible.
- If one meter safety distance cannot be maintained, a FFP1 mask must be worn outdoors and a FFP2 mask indoors.
- Persons belonging to a risk group must not be assigned where the minimum distance of one meter cannot be maintained,
- The safety and health protection (SiGe) plan, to be drawn up for each construction site, must be adapted to Covid-19.



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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 until April 30, 2020 in principle prohibited.

Excluded from this ban are inter alia (category one): 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.

As of April 14, 2020, customers will also be allowed to enter hardware and garden stores, stores of construction materials, iron and wood shops as well as pawn broking institutions and precious metal stores, regardless of their floor space, to shop.



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Curfews, Bans on Access (2)

Similarly as of April 14, 2020, customer premises dedicated to the sale, manufacture, repair or processing of goods are permitted to open if the customer area inside the premises does not exceed 400 m² on April 7, 2020 (category two). The area accessible to customers inside a shop is to be defined as the area accessible to customers inside a shop, which excludes, for example, warehouses, delivery areas, offices, recreation rooms and sanitary facilities for employees, wardrobes, etc. It must be ensured that there is no more than one customer per 20 m² of interior retail space in the store. In all premises accessible to customers, employees with customer contact and customers must wear MNS masks or a similar device. In these premises all persons must keep a distance of 1 m from any other person. Shopping centres are not allowed to open, shops in retail parks if they are not connected by a building (e.g. mall). The restriction to shops with an indoor sales area of up to 400 m² and the non-consideration of space limitations (barriers) after April 7, 2020, we consider to be legally problematic, as no objective justification can be identified.

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.

[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.

Other suitable measures are also permitted at workplaces (e.g. MNS masks, plexiglass), for MNS masks the agreement of employer and employee is necessary, unless their wearing is prescribed by regulation.

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, **to shop in stores that are allowed to open** 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).

Public transport (including stations) may be entered from April 14, 2020, only with MNS masks or similar protective devices.

Curfews, Bans on Access (3)

As of April 14, 2020 as well, a separate regulation for **carpools** of people who do not live in the very same household will be introduced: These are only permitted if a distance of one metre is maintained between all persons and additionally individuals over the age of 6 years wear an MNS mask or a similar protective device. As a result, carpooling with persons not living in the same household is (still) prohibited.

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 30, 2020**.

As known, so-called **MNS masks (so-called quick mouth and nose masks)** are now to be worn (at present in shops). To ensure that these can be put into circulation quickly, no certification under the Medical Devices Act is to be obtained for three months.

Weekend and holiday restrictions for trucks can be suspended for three months by regulation. An extension of three months may be granted once.

Streets may be opened to pedestrians during the Covid 19 crisis. In such a case, motor vehicle traffic is prohibited on these roads. Exceptions are entrance and exit (e.g. from and to companies).

As of April 4, 2020, the **collection of pre-ordered meals will be permitted again**, as long as these meals are not consumed on site. The minimum distance of one meter must also be maintained during collection. This also applies to payment transactions.

Similarly as of April 4, 2020, overnight stays in accommodation establishments for business purposes are permitted. Nevertheless, most of these establishments are **currently closed**.

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.

Curfews, Bans on Access (4)

Where can I find the current regulations on exit and business restrictions and quarantine?

Regulations issued by the district administrative authorities under the Epidemic Law can now be issued in a simplified manner. Such ordinances may well concern drastic measures such as local exit restrictions, assembly bans, business closures, quarantine measures, etc. They can now be announced as legally binding on the authority's website, by posting them on the authority's notice board or on the notice boards of the affected municipalities. If regulations are issued for several districts of a federal state, it is the State Governor who is now responsible.

To facilitate the municipal administration, the municipal council can now also pass decisions by way of circulation.

The security authorities are now also called upon to participate in measures to prevent impending administrative violations under the Epidemic Act and the Covid 19 Act.

Employment Law

Extension of works council office

The office of work councils which ends between March 16 and October 31, 2020 is extended until a new work council is elected after October 31, 2020.

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

Who can use the special care leave?

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).
- **[UPDATE: A respective care leave entitlement also exists for relatives of care recipients if their care is not secured anymore due to the absence of a care taker as well as by relatives of disabled persons if their personal assistance by a care taker cannot be secured anymore due to COVID-19.]**

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

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

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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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.**

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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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".

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?".

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.

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. The **COVID-19-pandemic** is classified by experts as such an elementary event and thus as an extraordinary coincidence.

[UPDATE] 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**. But other tenants are affected as well, as the government has issued an explicit recommendation for home-office-work. 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.



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Reduction in Rent for Business Premises (2)

What exactly are the legal consequences?

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**. 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).

[NEW] What does apply, if the tenant has continued paying rent despite the government curfew?

If the tenant has paid rent despite having a claim for rent reduction, his claim for repayment is a claim on account of unjust enrichment ("*Leistungskondition*") in accordance with § 1431 ABGB (Austrian Civil Code).

The tenant must therefore assert and prove that he has paid the previous rent payments either in error or subject to reservation. An error can probably also be assumed if the rent has been transferred by means of a standing order at the bank.

On the other hand, if the rent is paid unconditionally and the tenant is aware of the defect, a reclaim is excluded and usually means an implicit waiver of the reclaim for previous periods.

Protective Measures for Tenants of Private Residences (1)

What does Sec 1 of the 2. COVID-19-JuBG regulate?

§ 1. If the tenant of an apartment does not pay a rent due in the period from 1 April 2020 to 30 June 2020, or does not pay it in full, because his economic capacity has been significantly impaired as a result of the COVID 19 pandemic, the landlord may not terminate the lease or demand its cancellation under Section 1118 of the Austrian Civil Code solely on account of this arrears in payment. The landlord may not legally claim the arrears of payment until the end of 31 December 2020 or cover them from a deposit handed over by the tenant.

What does this mean for the tenant?

A qualified default of rent entitles the landlord to terminate the lease by means of an action for eviction according to Sec 1118 ABGB (Austrian Civil Code) or to terminate the lease according to Sec 30 para. 2 no. 1 MRG (Austrian Tenancy Act). This consequence shall be suspended for residential leases if the tenant defaults on rent payments in the period from April to June 2020, which is particularly affected by the pandemic, due to a corona-related impairment of his economic performance. However, § 1 sentence 1 only provisionally excludes the possibility of the landlord to terminate or cancel the lease agreement due to rent arrears from the months of April, May and June 2020.

The exclusion of termination or eviction shall expire again at the end of 30 June 2022. If the tenant does not pay the arrears of payment incurred in the second quarter of 2020 by the end of 30 June 2022, the landlord has the right to base a termination of the lease or an action for termination of the lease on this arrears as of 1 July 2022. The landlord's right to terminate the lease agreement because of a default in payment by the tenant is therefore postponed by two years.

Does the landlord have the right to terminate the lease agreement because of other reasons?

The Lessor's right to terminate the lease agreement or to bring an action for eviction for other reasons than arrears of rent remains unaffected. The same applies to the landlord's right to terminate or terminate the lease due to such rent arrears that are outside the second quarter of 2020; a termination due to the tenant's default in paying the rent for, say, February 2020 or September 2020 is not covered by the restriction.



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Protective Measures for Tenants of Private Residences (2)

May the landlord use the deposit?

Sec 1 sentence 2 regulates that the landlord can judicially claim payment arrears from the second quarter of 2020 at the earliest from the beginning of 2021. This is not a postponement of the due date, but only a temporary suspension of the enforceability of the claim. However, the landlord also has no option to cover the rent arrears from the deposit and, if necessary - depending on the terms of the contract - demand that the tenant shall replenish the deposit. As this would counteract the facilitation regulation on the enforceability of the rent, the landlord may not use the deposit for the same period of time.

In which area do the new rules apply? Do they also apply to business premises rented or lease?

The new regulations apply regardless of whether the provisions of the Austrian Tenancy Act are wholly, partly or not all applicable to the tenancy. However, these provisions do not apply to commercial leases or other leases.

Can these provisions be waived in a lease agreement?

The provisions of Sec 1 of the 2nd COVID-19-JuBG are mandatory. As these are protective regulations in favour of the tenant of a private residence affected by the Corona crisis, these provisions cannot be waived by contractual agreements to the detriment of the tenant.

Can the landlord demand interest on arrears and costs of collection?

For rent payments due in April/May/June 2020 that will not be paid or not paid in full during this period, tenants whose performance is impaired as a result of the COVID-19 pandemic will also be granted additional relief in the payment of interest on arrears and the payment of collection costs.

The default interest for rent payments in the 2nd quarter of 2020 is limited to the statutory interest rate of 4% pa, despite a different agreement in the lease agreement. In addition, there is no obligation for the tenant to reimburse collection costs. Despite legal alleviations, tenants are required to settle the rent arrears for the 2nd quarter of 2020 as soon as possible.

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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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 28 billion (see "Financial Assistance"). 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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