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COVID-19 loans: beware of restrictions on use

Entities that have made use of COVID-19 loans guaranteed by the Confederation must be very rigorous in the use they make of them. Indeed, both the Ordinance on COVID-19 guaranteed loans and the draft bill currently under discussion in the Federal Assembly prohibit the beneficiaries of these loans from making certain expenditures until the said loans are repaid. If these prohibitions are not complied with, the beneficiary of the loan incurs civil and criminal liability.

Following the semi-containment measures pronounced in March 2020, the Federal Council has enacted a series of measures to help companies affected by the pandemic. Among these measures is the Ordinance of 25 March 2020 on the granting of credits and joint and several guarantees following the coronavirus (hereafter: OCaS-COVID-19), which enabled eligible entities to obtain a loan guaranteed by the Confederation for an amount of 10% of their turnover up to CHF 500,000 through a procedure that was intended to be quick and unbureaucratic.

The OCaS-COVID-19 having been enacted as an emergency law, it will be replaced by a law, the preliminary draft of which is currently under discussion in the Federal Assembly (hereafter: AP-LCaS-COVID-19).

According to statistics published by the Confederation, only 4,030 of the 136,608 loans applied for have been repaid. The majority of these loans were requested by entities at the very beginning of the pandemic and it was difficult for them at that time to determine the precise impact that COVID-19 would have on their business. However, there were some business sectors that were not affected by the pandemic.

In this context, it should be pointed out that the governing bodies of the entities that have obtained loans guaranteed on the basis of the Ordinance are not free as to the use of their cash as long as the loan lasts. Indeed, both OCaS-COVID-19 and the preliminary draft of LCaS-COVID-19 currently under discussion in the Federal Assembly provide that the guaranteed loan is used to guarantee the liquidity needs of the borrower following the COVID-19 epidemic (art. 6 OCaS-COVID-19; art. 2 al. 1 AP-LCaS-COVID-19). The purpose of this limitation is to prevent taxpayers' money from being used for purposes other than to compensate for a one-off drop in the liquidity of the beneficiaries.

In addition to this general clause, certain expenses are expressly prohibited. For example, the current OCaS-COVID-19 prohibits the following for the beneficiaries of the loan during the loan period:

- execution by the borrower of new investments in fixed assets other than replacement investments (art. 6 para. 2 let. b OCaS-COVID-19)
- the distribution of dividends and directors' fees as well as the repayment of capital contributions (Art. 6 para. 3 let. a OCaS-COVID-19);
- the granting of active loans or the refinancing of loans to shareholders in the form of active loans, with the exception of the refinancing of account overdrafts accumulated since 23 March 2020 with the bank granting the credit guaranteed by this Ordinance (Art. 6 para. 3 let. b OCaS-COVID-19) ;

- the repayment of intra-group loans, and (art. 6 para. 3 let. c OCaS-COVID-19) ;

- the transfer of funds guaranteed by a joint and several guarantee to a group company not having its registered office in Switzerland which is directly or indirectly linked to the applicant (Art. 6 para. 3 lit. d OCaS-COVID-19)

The preliminary draft of LCaS-COVID-19 takes up the essence of these restrictions but specifies that it is admissible to reimburse interest and amortisation due under ordinary obligations existing prior to the granting of the COVID loan for shareholder loans, intra-group loans and transfers of funds guaranteed by a joint and several guarantee to a group company with its registered office abroad. This clarification was already included in the commentary on the provisions of OCaS-COVID-19 published by the Federal Department of Finance on 14 April 2020 and is now expected to be included in the law, thus resolving this issue.

It should be noted, however, that the prohibition on making new investments is not included in the draft bill. Thus, it will be possible to use COVID-19 loans that have not yet been used to make investments as soon as LCaS-COVID-19 comes into force (Art. 26 al. 2 AP-LCaS-COVID-19).

The organs of “sound” entities that initially made use of COVID loans and have not yet repaid them must therefore scrupulously ensure that the restrictions set out above are respected, otherwise they will be exposed to the criminal and civil consequences of their actions. Indeed, both the Ordinance and the draft law provide that if one or more of t

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