

Wilhelm Gilliéron

AVOCATS



Auteur: Steve Gomes | Le : 24 January 2022

How to deal with COVID loans in case of bankruptcy?

Despite the support made available to combat the effects of the measures taken to tackle the COVID-19 pandemic, many companies did not survive and had to declare bankruptcy. When these companies have received a COVID loan, it is not uncommon for the COVID loan guarantor organisation to come forward and request additional information in order to obtain repayment of the COVID loan. In these situations, the beneficiary of the COVID loan can avoid unnecessary hassle if he or she can demonstrate that the conditions of the COVID loan have been met and explain how the loan has been used. We therefore recommend that the beneficiaries of such loans keep a copy of all the documents proving compliance with the conditions for granting and using the loan even in the event of bankruptcy.

The Federal Council wanted to set up a system that would make it possible to obtain a loan guaranteed by the Confederation in a simple and unbureaucratic manner. The simplicity of the system had as a corollary an **increased risk of abuse of COVID loans**. Aware of this problem, the authorities have put in place an action plan to combat abuse, which can be accessed via the following link: <https://www.news.admin.ch/news/message/attachments/61334.pdf>

In this context, **the Law** on joint and several guarantees linked to COVID-19 (RS 951.26 / LCaS-COVID-19) **requires the guarantee organisations to take all necessary measures to recover the COVID loan** (art. 8 al. 1 let. a LCaS-COVID-19). In other words, the guarantee organisation must do everything in its power to obtain repayment of the COVID loans, unless recovery is doomed to failure or if the charges and costs incurred by the guarantee organisation are disproportionate with respect to the amount in dispute (art. 8 para. 5 SVGW-COVID-19).

It should, however, be possible to avoid any dispute with these organisations, provided that the answers to following questions are duly anticipated :

1. Have the conditions for granting the loan been complied with?

The Ordinance on joint and several guarantees linked to COVID-19 (art. 3 para. 1 aOCaS-COVID-19) provided that COVID loans could only be granted under the following conditions

- The applicant entity was registered before 1 March 2020;
- The applicant entity is not bankrupt, over-indebted, in debt restructuring proceedings or in liquidation;
- The applicant entity is substantially affected economically as a result of the COVID-19 pandemic
- The entity has not already obtained other aid under the emergency legislation relating to sport or culture.
- The amount of the loan is maximum 10% of the turnover.

If one of these conditions is not met, the guaranteeing organisation may consider that the loan has been obtained fraudulently and initiate civil or criminal proceedings against the organisers of the applicant entity.

It is therefore the responsibility of each beneficiary entity to carefully document in advance the evidence of compliance with the above rules.

2. Was the COVID loan used in accordance with the COVID law?

The COVID-19 Act prohibits the beneficiaries of COVID loans from incurring a series of expenses before the COVID loan is repaid (art. 2 LCaS-COVID-19).

COVID loans are intended to cover the applicant's current liquidity needs. It is difficult to distinguish between expenses that are considered current needs and those that are not. We believe that this creates legal uncertainty to the disadvantage of COVID loan beneficiaries and that guarantee organisations may be tempted to exploit these loopholes to justify the recovery of COVID loans.

Furthermore, there is a whole series of **prohibited expenses**, namely the distribution of dividends or directors' fees, the extraordinary repayment of shareholder loans or intra-group loans (Art. 2 LCaS-COVID-19).

On this point too, the beneficiary entity of the COVID loan must be able to compile a detailed file explaining for what purposes and in what context the COVID loan was used. We are thinking in particular of the accounting documents and the minutes of the management or administrative body of the beneficiary entity.

3. Did the managers of the company that used the loan act in accordance with their obligations?

The guarantee organisations may need to examine the behaviour of the promoters to determine whether they acted in accordance with their obligations in the management of the company, in particular whether adequate measures were taken when the situation of overindebtedness was discovered.

In this respect, the minutes of the management or administrative body of the beneficiary entity will be of crucial importance in order to trace the context of the time when the company resorted to this type of aid and the reason why it was led to use it.

If the guarantee organisations come to the conclusion that the conditions for granting the loan have been met, that the loan has been used in accordance with the law and that the beneficiary's facilitators have not violated their duties in managing the over-indebtedness, no further steps should be taken.

If this is not the case, the guarantee organisations can take legal action – civil and/or criminal – to recover the amount of the COVID loan. The law on joint and several guarantees linked to COVID provides for **the personal liability of the organs of the beneficiary of a COVID loan and of all persons involved in its management or liquidation for any use of the COVID loan for a purpose other than that stipulated in art. 6 of the COVID law.** The law on joint and several guarantees linked to COVID also contains a penal provision punishing the obtaining of a COVID loan on the basis of false information, it being specified that the more serious offences of the Penal Code such as fraud or forgery are expressly reserved.

It is therefore essential for any entrepreneur in this situation to have **reliable documentation to show that the conditions for**

granting the loan have been respected and that the funds received have been spent in accordance with the law on joint and several guarantees.

Source : <https://www.wg-avocats.ch/en/news/covid-19-en/how-deal-covid-loans-case-bankruptcy/>