

## COFAG Consolidation Act Brings Significant Changes for the handling of Funding Claims

**Vienna, 10 July 2024 – On 3 July 2024, the Austrian National Council adopted the draft COFAG Consolidation Act, which introduces significant changes to the handling and processing of funding claims and refunds by the COVID-19 Financing Agency of the Federal Government (COFAG). This marks a major step towards the final dissolution of COFAG.**

Under the new law, all pending funding applications must be legally decided by 31 July 2024. A key aspect is the legal separation of disbursement claims by applicants and refund claims by COFAG. As of 1 August 2024, the latter will be converted into public-law claims (refund claims) in accordance with the Federal Fiscal Code.

Tanja Melber, attorney at Wolf Theiss, explains: "This may result in applicants losing offsetting possibilities, as a tax debtor is not entitled to offset receivables due to them (especially of a private-law nature) against claims by the government. Whether the exception provision of § 1441 second sentence ABGB ('same state treasury') applies, when on the one hand the Federal Minister of Finance is responsible for deciding on financial measures from funding applications in a private-law context, and on the other hand the tax office is responsible for enforcing refund claims, remains to be examined."

### Impacts on Applicants

Melber adds: "However, the draft stipulates that offsetting should be possible if the applicant (contractual partner) has already acquired an 'enforceable' claim 'from a funding contract against COFAG' or 'from any other legal title against the government.' This generally means that the applicant must have obtained a positive final court judgment. A mere out-of-court agreement on an amount likely does not meet this requirement."

"Applicants who are awaiting disbursement from their funding applications and are also threatened with refunds are well advised to have their claims reviewed in a timely manner. According to the wording of the draft law – if it indeed comes into force in this form – the public-law refund claim ceases

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(and remains a private-law matter without dual proceedings) if the refund claim by COFAG is asserted in court before 1 August 2024," emphasises Melber.

## **Eligibility and Refunding of Lease Payments**

The draft law also has significant implications for discussions regarding the eligibility and refunding of rent payments during entry bans. § 3 paragraph 4 of the draft includes a regulatory authorisation and largely adopts the wording of the repealed § 3b ABBAG Act (supplemented by a de minimis threshold below which collection can be waived). Any refunds (repayments) are thus linked to the actual usability of the leased object due to an official entry ban. Actual usability can be calculated based on the loss of revenue.

Melber further explains: "Particularly with lease contracts, the loss of revenue is not indicative; periodic fluctuations in economic returns are inherent in the nature of a lease contract and say nothing about actual usability, which may still be present (e.g., take-away use, use as office space, etc.). The newly inserted paragraph 7 in the National Council's plenary session appears to put a stop to this notion: The provision clarifies that actual usability does not exist 'to the extent that an applicant or contractual partner was entitled to a reduction in rent according to §§ 1104 and 1105 ABGB or would have been entitled to such a reduction in the case of a different agreement.' Additionally, it must be proven 'whether and to what extent an entitlement to a reduction in rent existed.'"

"It seems like a catch-22: The diligent applicant (e.g., lessee) had to comply with certain damage mitigation obligations at the time of application and thereafter – considering an ex-ante perspective (e.g., mutual reduction, payment under reservation, etc.). If they have now done so, negotiated a mutual reduction, and still operated their business to generate revenue (actual usability), it could mean they face a refund not only due to the discussion involving lease payments during entry bans per se, but also because they complied with their damage mitigation obligation (mutual reduction). The question of how to prove their claim for a reduction in rent (through a court proceeding against the lessor?) also remains open," says Melber.

"It is therefore noteworthy in the materials that it may be possible 'depending on the contract design' that the FAQs published by COFAG have become part of the funding contract. After all, these FAQs were explicitly laid down in the funding conditions for the applications. If these were complied with (and the conditions of the funding contract were otherwise fulfilled), there are in my opinion good arguments against a refund, especially if the leased object was actually used," concludes Melber.

## **Contact Information**

Attorney Tanja Melber advises on the enforcement of claims by applicants from COFAG funding, specifically regarding the eligibility of rent payments.

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