

kr facts

COVID-19: Abuse of Coronavirus loans and criminal consequences

On 26 March 2020, as a result of the Coronavirus the Ordinance on the Grant of Loans and Joint and Several Loan Guarantees (COVID-19 Ordinance on Joint and Several Loan Guarantees) entered into force. According to this Ordinance, businesses are to be provided with sufficient liquidity through bridging loans in order to be able to cover their fixed costs, despite the revenue losses caused by the Coronavirus. Alongside the measures relating to reduced working hours and COVID loss of earnings compensation in order to cover salary costs, which have already approved by the Federal Council, these additional measures offer a comprehensive package of measures to avert the economic consequences of the Coronavirus pandemic.

Businesses must fulfil various prerequisites, documented by self-declaration, in order to receive a joint and several loan guarantee or a loan. Applicants are required to confirm in writing that the information contained in the application is complete and accurate. In addition, the loans granted are earmarked. They are intended exclusively in order to deal with liquidity difficulties resulting from the economic effects of measures to combat the Coronavirus. In addition, certain procedures, for example the distribution of dividends and profit shares, are prohibited for the duration of the joint and several loan guarantee.

Article 23 of the COVID-19 Ordinance on Joint and Several Loan Guarantees also contains a criminal law provision. The reason for this criminal law provision is that loans are to be granted without any examination, or at least without a thorough examination, of the information submitted by businesses. In addition, according to the Federal Council it is not clear whether any of the classic criminal offences, in particular fraud (Article 146 of the Swiss Criminal Code [SCC]), could be engaged. It is not certain whether the mere provision of false information by the applicant – in view of the lack of any control of the information – could in itself be classified as deceitful. The criminal offence of forgery of a document pursuant to Article 251 SCC could not be committed because the information provided by the applicant is in most cases not provided in a document [*Urkunde*] within the meaning of that provision. The criminal law provision contains the express reservation that it is only applicable where no other serious criminal offences under the SCC have been committed.

We examine below whether the criminal offences provided for under Article 23 of the COVID-19 Ordinance on Joint and Several Loan Guarantees could in principle also be classified as fraud (Article 146 SCC) or misappropriation (Article 138 SCC). These criminal offences potentially cover: (1) the grant of a loan on the basis of false information wilfully provided and/or (2) the wilful usage of the loan contrary to the purpose of the Ordinance. The first scenario must be examined with reference to the aspect of fraud. The *actus reus* for the offence of deceit will be now considered in greater detail. A person is deemed to have acted with deceit if he avails himself of a straightforward lie or fails to disclose certain information, where it is foreseeable – for the offender – that the information provided by the offender will not be checked by the injured party. According to the Federal Supreme Court, this requirement of foreseeability is met under circumstances in which there are clear assurances or rules stating that no checks will be carried out (BGE 107 IV 171). In situations involving the grant of loans or joint and several loan guarantees as a consequence of the Coronavirus, all applicants are aware that, due to the extraordinary situation and the structure of the scheme as a fast lending scheme, in most cases no checks will be carried out. The special and rational structuring of the loan scheme is intended to protect the Swiss economy at an extraordinary time and, in our view, may therefore be classified as the result of a special relationship of trust deserving particular protection under the criminal law. This means that the prerequisite of deceit will be met and fraud may be committed if all other prerequisites for the offence are met.

The second scenario may also constitute fraud. However, this scenario will be considered with reference to the aspect of misappropriation (Article 138 SCC). According to the case law and the literature, a loan or credit may be deemed to have been misappropriated if *inter alia* four prerequisites are all met. First, a loan agreement providing for the earmarking of the money lent must be concluded: this means that the lender and the borrower must jointly specify in writing for what purpose the money is to be used. Secondly, it must be apparent from the circumstances that the lender would not have given the money to the borrower had it known that the latter would have used it for a purpose different from that agreed to. Thirdly, the designated purpose agreed to must be capable of limiting the risk of loss. The fourth and fifth prerequisites are that the earmarking of the loan agreed to must either serve the interest exclusively of the lender or both parties, or alternatively of a beneficiary designated at the request of the lender. In our view these prerequisites are met. The loan granted is earmarked for a specified purpose. It is intended – as specified above – exclusively in order to deal with liquidity difficulties resulting from the economic effects of measures to combat the Coronavirus. It may not be used for any other purpose and it would not have been granted had the lender known that it would have been used other than in order to deal with liquidity difficulties resulting from the COVID-19 pandemic. The designated purpose is to deal with liquidity difficulties and thus to allow businesses to continue trading. Once the current crisis has been overcome, it will be more likely that businesses receiving support will be able to get back on their feet and pay back the loans received over time. Moreover, the designated purpose agreed to is intended to assist borrowers by providing them with the necessary liquidity, and also in order to assist the Federal Government as various businesses will not become bankrupt, thus enabling jobs to be secured. Finally, the measures mentioned above also help to avert an impending collapse of the national economy. To conclude from the above, it may therefore be stated that the offence of misappropriation may be committed in the event that a Coronavirus loan is not used for the designated purpose.

I. Further questions

Due to the developing situation and the different circumstances of each individual case, we recommend that you contact us with any legal questions.

Kontaktpersonen



Dr. Davide Pinelli
Attorney-at-Law
davide.pinelli@krlaw.ch

[Davide Pinelli profile page](#)



Dr. Markus Kaufmann
Attorney-at-Law | Notary
markus.kaufmann@krlaw.ch

[Markus Kaufmann profile page](#)

Kaufmann Rüedi Attorneys at Law Ltd
Lucerne office: Alpenquai 28a | CH-6005 Lucerne
Zug office: Lindenstrasse 16 | CH-6340 Baar
Tel. +41 41 417 10 70 | Fax +41 41 417 10 77
krlaw@krlaw.ch | www.krlaw.ch

Certified according to ISO 9001 and SQS 9004



Member of **DIRO**
The Network of European Law Firms