



EBA publishes Guidelines on treatment of general payment moratoria in light of COVID-19 measures

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On 2 April 2020, the European Banking Authority (EBA) published Guidelines on legislative and non-legislative moratoria on loan payments applied in the light of the COVID-19 crisis following the publication of a previous statement on the application of the prudential framework regarding default, forbearance and IFRS 9 in light of COVID-19 measures.

EU Member States including Austria have implemented a broad range of support measures to minimize the economic impacts of the efforts taken to contain the COVID-19 pandemic, in many instances including some forms of moratoria on payment of credit obligations, with a view to supporting the short-term operational and liquidity challenges faced by borrowers.

In order to ensure that the regulatory definitions of forbearance and default continue to be applied consistently within the Member States, the Guidelines

- specify the criteria that legislative and non-legislative payment moratoria have to fulfil in order not to trigger the “forbearance” classification in accordance with Regulation (EU) No 575/2013 (CRR)
- supplement the EBA Guidelines on the application of the definition of default as regards the treatment of distressed restructuring (which contains a reference to forbearance)
- clarify the continuing obligations of institutions where payment moratoria apply and set out documentation requirements

Criteria for general payment moratoria

Legislative and non-legislative moratoria which cumulatively fulfil the following criteria do not trigger classification of forbearance in accordance with Art 47b CRR:

(1) The moratorium is based on national law (legislative moratorium) or on a non-legislative payment relief initiative coordinated within (a material part of) the banking industry.

In Austria, a legislative moratorium has entered into force on 1 April (Section 2 of the 2nd COVID-19 Act on judicial accompanying measures (2nd COVID-19-JuBG), forming Art 37 of the 4th COVID-19-Act).

(2) The Moratorium applies to a large group of obligors predefined on the basis of broad criteria such as industry sector, exposure class (e.g. retail, SMEs, corporates), product ranges or geographical location. This condition aims to ensure that the moratorium does not address specific financial difficulties of specific obligors as this would meet the definition of forbearance. The criteria that determine the scope of the moratorium

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should allow obligors to make use of the moratorium without the assessment of their creditworthiness. The EBA Guidelines permit limiting the scope of application of the moratorium to performing obligors, but a moratorium should not be applied only to obligors who experienced financial difficulties before the outbreak of COVID-19 pandemic.

In Austria, loans granted to consumers or microenterprises which have been contractually entered into prior to 15 March 2020 are subject to a moratorium if (i) consumers have suffered a loss of income due to the COVID-19 crisis as a result of which they cannot be expected to continue the debt service (in particular because their reasonable maintenance or the reasonable maintenance of dependent family members would be threatened) (ii) microenterprises are unable to continue their debt service or cannot be expected to continue their debt service without compromising the economic basis of their business as a result of the COVID-19 crisis. The moratorium extends to any payments under the relevant loans (including principal and interest) which would otherwise fall due between 1 April 2020 and 30 June 2020, deferring such payments for a period of 3 months from the original due date.

(3) The moratorium envisages only changes to the schedule of payments for a predefined limited period of time; no other terms and conditions of the loans, such as the interest rate, should be changed.

In addition to the standardised deferral of payments under the relevant loans (including principal and interest) which would otherwise fall due between 1 April 2020 and 30 June 2020 for a period of 3 months the Austrian moratorium regulates that where the borrower has provided security in connection with a relevant loan for a limited period (only), such period will automatically be extended so that the lender will have the same time for enforcement after the secured obligation has fallen due which it would have had in the absence of a moratorium. As such change would not have a negative impact on borrowers and is a general rule for all secured loans, a mere general prolongation of the security-related status quo should comply with the spirit of the EBA guidance.

Banks that conclude more flexible arrangements with borrowers that deviate from the standard deferral rules have to assess on a case-by-case basis if such arrangements meet this criterion.

(4) The moratorium offers the same conditions for the changes of the payment schedules to all exposures subject to the moratorium, even if the application of the moratorium is not compulsory for obligors.

Generally, while the Austrian moratorium is not compulsory (it does not apply to borrowers which continue to service their debt as originally agreed) the Austrian moratorium sets out the same standardised conditions for the changes of the payment schedules (i.e. a deferral of payments for a period of 3 months from the due date of the payments) to all consumers and microenterprises falling within the scope of the moratorium in line with the EBA guidance. The conditions for the changes of the payment schedules to exposures that are subject to more flexible arrangements between banks and borrowers may, however, not comply with the EBA guidance as the conditions applied to such exposures will likely deviate both from the standard deferral rules and among themselves.

(5) The moratorium does not apply to new loan contracts granted after the date when the moratorium was announced. In this context, the use of existing credit lines or renewal of revolving loans is not to be considered a new loan.

Generally, the Austrian moratorium that entered into force on 1 April 2020 requires that the loan contracts were concluded prior to 15 March 2020. Banks that conclude more flexible arrangements with borrowers that deviate from the standard deferral rules have to assess this criterion on a case-by-case basis.

(6) The moratorium was launched in response to the COVID-19 pandemic and was applied before 30 June 2020 (deadline is subject to revision depending on evolution of the current situation).

The Austrian moratorium was launched in response to the COVID-19 pandemic. It extends to any payments under the relevant loans which would otherwise fall due between 1 April 2020 and 30 June 2020, deferring payments for a period of 3 months. A payment that falls due on 30 June 2020 would consequently be deferred until the end of September 2020.

The EBA Guidelines require that the moratorium is announced and applied before 30 June 2020. It does not seem very clear what the EBA means by a moratorium “to be applied” before 30 June 2020. This could be interpreted in a way that payments that fall due on 29 June 2020 by the latest may be deferred by a not specified period in time (the more favourable interpretation which would be largely in line with the Austrian moratorium except for payments falling due on 30 June 2020) or that payments may be deferred only until 29 June 2020 (the less favourable interpretation).

Banks that conclude more flexible arrangements with borrowers that deviate from the standard deferral rules have to assess this criterion on a case-by-case basis.

Application of the definition of default to exposures subject to payment moratoria

The definition of default pursuant to Art 178 CRR is (not cumulatively) based on the “unlikely to pay”-criterion and the “90 days past due”-criterion. Where forbearance measures are extended towards a borrower, this should be considered distressed restructuring, which, in accordance with Art 178(3)(d) CRR, is an indication of unlikelihood to pay if it leads to diminished financial obligation.

The EBA Guidelines clarify that the application of a general moratorium is not a forbearance measure and should consequently not be considered distressed restructuring and the consideration of diminished financial obligation is not applicable.

Furthermore, the EBA Guidelines clarify that for the purpose of Art 178(1)(b) CRR (90 days past due-criterion) and in accordance with Art 178(2)(e) CRR (policies in respect of the counting of days past due), institutions should count the days past due based on the revised schedule of payments resulting from the application of a moratorium.

Continuing obligations of institutions where payment moratoria apply and documentation requirements

Throughout the duration of the moratorium, institutions should assess the potential unlikelihood to pay of obligors subject to the moratorium in accordance with the usually applied policies and practices based on the most up-to-date payment schedule. Where institutions perform manual assessments of individual obligors, they should prioritise the assessment of obligors who will most likely be financially affected in the longer term.

Following the end of the moratorium, institutions should assess cases with priority where obligors experience payment delays shortly after the end of the moratorium or where any forbearance measures are applied shortly after the end of the moratorium.

Any form of credit risk mitigation such as guarantees provided by third parties to institutions should not exempt institutions from assessing the potential unlikelihood to pay of the obligor or affect the results of such an assessment.

Pursuant to the EBA Guidelines, institutions should collect at least all of the information on the clear identification of the exposures or obligors for which the moratorium was offered and to which the moratorium was applied, the amounts that were suspended, postponed or reduced because of the application of the moratorium and any economic loss resulting from the application of the moratorium on individual exposures and the associated impairment charges.

This Client Alert is provided as a matter of courtesy and should not be construed, or relied on, as legal advice. We understand that a process is under way within the Austrian banking industry to clarify how the EBA guidelines described in this Client Alert should be construed.

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