



EMERGENCY ORDINANCE on granting facilities for the loans issued by credit institutions and non-bank financial institutions to certain categories of debtors and amending certain normative acts

! Including brief updates dated 7 April 2020 on prospective differences to the new law adopted in Parliament on the repayment moratorium. That law is in its promulgation stage at the date of this update and is not yet in force. We will refer to the law in its current form as the “Moratorium Law”.

To make sense of this, consider that there are essentially two competing pieces of legislation emanating from different branches of power: Government and Parliament. Although the Parliament ultimately has supremacy on any piece of legislation, the Moratorium Law is not yet in force and, as of this writing, the regime set out by the Government remains applicable. On 6 April, the Government also published a set of implementation norms to the original ordinance (the “Implementation Norms”), signalling that it does not intend to rollover the effects of the ordinance at this time. At the same time, the emergency ordinance has also been submitted for approval of the Parliament, as this is the standard procedure for emergency ordinances.

Please read the below only as a snapshot of the current regulatory framework as we continue to provide updates on developments.

I. The measures set forth by GEO 37/2020 refer to the following categories:

i. Creditors:

- a. Credit institutions such as banks, credit unions, savings and credit banks in the housing sector, mortgage loan banks;
- b. Non-banking financial institutions;
- c. Branches of the foreign credit institutions and non-banking financial institutions, which perform activities on the territory of Romania.

Under the Moratorium Law, Case de Ajutor Reciproc (i.e. entities offering mutual credit facilities between members) and entities registered as providing debt recovery services are explicitly excluded.

ii. Debtors:

- a. Natural persons;
- b. Self-employed persons (in Romanian *persoane fizice autorizate*);
- c. Individual undertakings and family businesses (In Romanian *întreprinderi individuale și întreprinderi familiale*);



- d. Liberal professions and professions exercised under a special law, irrespective of the form in which the profession is exercised; and
- e. Legal persons, without distinction.

Under the Moratorium Law, association and foundations are included, but the scope of legal entities that can request the moratorium is limited to small and medium sized enterprises, as these are defined by law¹.

II. Agreements to which the measures apply:

- Loan agreements; and
- Leasing agreements;

III. Measures that can be instated:

The debtor may opt for the suspension of the obligation to pay the due instalments (principal amounts, interest, fees) for a period comprised between one month and 9 months, which will not exceed December 31, 2020.

IV. Conditions for granting the suspension for debtors legal persons:

- The existence of an agreement that did not reach its maturity date and for which the creditor did not impose the accelerated repayment, before 30 March 2020;

Unlike the ordinance, which is addressed only to debtors which are not in any payment default, the Moratorium Law is applicable also to debtors whose payment defaults do not exceed 90 days.

- The debtor interrupts their activity in full or in part as effect of the decisions issued by the competent authorities during the enacted state of emergency;
- The debtors hold state of emergency certificates based on the debtors' sworn declarations, ascertaining the decrease of their revenues or proceeds by minimum 25% in March 2020 compared to the average revenues or proceeds for January and February 2020 or the interruption of their activity in part or in full as effect of the decisions issued by the competent public authorities during the enacted state of emergency;

Unlike the ordinance, these two conditions above are not relevant in the Moratorium Law. The only condition for debtors which are not private individuals is to make a declaration attesting that their revenues have decreased with at least 15% in the month in progress as opposed to the average of the two previous months.

- The debtor is not insolvent on the date when the loan reimbursement suspension is requested;

According to the Implementation Norms, this condition is checked by the creditors only by reference to the information published in the Trade Registry. This facilitates the already complex work volume that the creditors

¹ At this time, SMEs are undertakings which have: (i) under 250 employees; and (ii) an annual turnover below 50 million euros or total asset value under 43 million euros.

will need to make when processing the requests, but questions remain over what happens if insolvency requests were admitted against debtors in court, which have not yet been published with the Trade Registry.

The Moratorium Law adopted by Parliament excludes not only debtors under insolvency, but “judicial or extrajudicial procedures which tend towards suspension of the effects of credit agreements”. In particular, it remains to be seen exactly what type of extrajudicial processes are taken into account to justify the exclusion of certain credit agreements from the application of the Moratorium Law, as well as how the existence of such proceedings can be invoked.

As a general note, the Moratorium Law sometimes refers to notions which are not necessarily aligned with established legal institutions – such as “extrajudicial procedures which tend towards suspension of the effects of credit agreements”. If the Law does come into force, it remains whether there will be made changes to the final form in order to further clarify these concepts.

V. Procedure to be followed and terms:

- Submission to the creditor of a request to suspend the reimbursement of the instalments, interest and fees, in paper format, by telephone or by e-mail;
- The request will be submitted no later than 45 days from the entry into force of this emergency ordinance;

The Moratorium Law does not specify any term for sending the request.

VI. Effects of the suspension:

The extension of the contractual term will become effective as from the date of communication of the suspension request for the requests approved by the creditors.

According to the Moratorium Law, the condition of creditor approval is not provided – in turn the suspension is simply specified as taking place by law from the date of communicating the request.

The interest related to the due amounts whose payment is suspended will be capitalized in the loan balance existing at the end of the suspension period. The capital thus increased will be paid in instalments throughout the period remaining until the new maturity date of the loans, after the suspension period. The interest for mortgage loans contracted by natural persons has a different regime, and constitutes a distinct debt for which the interest will be zero.

According to the Moratorium Law, interest owed and any fees related to the outstanding amounts that have been suspended are not capitalized at the end of the suspension period – the Moratorium Law does not specify how the interest incurred during the suspension period will be paid.

VII. Key aspects

With respect to the application of the suspension: application by operation of the law or based on the approval by the creditors?

Pursuant to Art. 2 para. (1), the suspension seems to apply by operation of the law, at the debtor’s request, if the conditions for granting the suspension are met.

Pursuant to Art. 3 paragraphs (4) and (5), the creditors will analyze and approve the requests in accordance with the conditions set forth in the norms for the application of GEO 37/2020.

The provisions appear to be contradictory, unless the role of the creditors' approval is only to check if the conditions for granting the suspension provided by GEO 37/2020 are met.

The Implementation Norms confirm our original interpretation that the moratorium takes effect only after the approval by the creditors of the requests – the approval or rejection must be issued within 15 calendar days from receiving the request. After taking effect, the credit is deemed suspended from the date of communication of the request. The legal text does not limit the reasons for rejections but only specifies that the creditor will check the conditions of eligibility – which suggests, in a reasonable interpretation, that only if these conditions are not met can the request be rejected.

On the other hand, with regards to the Moratorium Law adopted by Parliament, this nuance regarding the verification of eligibility and approval by creditors of the request is not provided in the Law – an operational risk remains in respect of processing the requests, especially with regards to analysing eligibility of companies mentioned above.

With respect to the categories of debtors: extended or limited scope of application?

A first aspect that should be noted is the category of debtors to whom the proposed measures apply. Before the enactment of the ordinance, the media announced that this will concern small and medium-sized enterprises. Moreover in the very recitals of the normative act it is claimed that the intention is to support small and medium-sized enterprises that may be faced with difficulties due to the new coronavirus pandemic. However, the ordinance does not make a distinction between legal persons, therefore, any legal person that meets the conditions below may request the application of the measure.

On the other hand, the number of legal persons that may request the suspension is significantly limited by the conditions set out in the ordinance. In addition to the submission of a request to the creditors, the companies must hold: (i) a findings certificate issued by the National Trade Registry Office ascertaining the fact that they are not insolvent on the date of the request and (ii) **state of emergency certificates**.

While in the ordinance, eligibility was practically attested by the appropriate certificates, the regime provided by the Moratorium Law requires an analysis of the conditions for considering the company as an SME (conditions regarding number of employees, turnover and asset value).

The state of emergency certificates will be issued only for legal persons who declare on their own responsibility that their revenues or proceeds decreased by minimum 25% in March 2020 compared to the average revenues or proceeds for January and February 2020 or they have totally or partially interrupted their activity following the decisions issued by the competent public authorities during the enacted state of emergency. We consider that the range of eligible legal persons is significantly limited by this condition.

The certificate issuance system is “by-passed” under the Moratorium Law and the reduced income percentage is lowered to 15%. Also, in the Moratorium Law, the months of January/February/May are no longer taken as a reference explicitly. This aspect, together with the absence of the term for filing the request suggests that SMEs can justify their request based on any two previous months as opposed to the month during which the request is made.

With respect to the conditions for granting the suspension: the condition of not having arrears

Note should be made that Art. 2 sets forth in paragraphs (5) and (6) the condition of (i) not having arrears when the state of emergency is enacted (March 16) or that these arrears are paid until the submission of the suspension request and (ii) the condition that the debtors’ revenues have been directly or indirectly affected by the severe situation generated by the COVID-19 pandemic. The Implementation Norms exemplify the types of consideration take into account as “contraction of the relevant market, reduction of employees, decrease in the number of suppliers, etc.

By contrast, the Moratorium Law extends its applicability to debtors that are under payment defaults as well, as long as the non-payment did not occur more than 90 days in the past. This approach will certainly cover debtors whose economic situation was deteriorated before the implementation of the measures for controlling the spreading of the virus. However, debtors which are under certain enforcement procedures or other judicial or non-judicial procedures are excluded (one of the more ambiguous provisions in the Moratorium Law at this time) which may raise the question to creditors whether it would be wise to take enforcement actions before the entry into force of the Moratorium Law.

Impact on third party guarantees under the Implementation Norms

The Implementation Norms related to the framework set out by the Government Ordinance includes a provision which raises discussions over the obligations of any co-debtors, security providers or personal guarantors of credit agreements. With respect to legal entities, the Norms provide that these guarantees are maintained, but the effects of the changes to credit agreements as a result of the ordinance are effective against any co-debtors, security providers, personal guarantors or any other parties to the credit agreement, only with their prior consent. It is difficult to anticipate at this time all the implications of this provision for private individuals (including inferences from the fact that the regime applicable to private individuals with mortgage loans does not confirm the maintenance of third party guarantees in the same way) – but it appears that the anticipated effect is that in case the guarantors do not provide their consent, then the credit extension period as well as any additional resulting amounts (for instance, the interest component incurred on the capitalised interest) will not be covered by the guarantee.

These aspects require further analysis, including by reference to the actual provisions of the finance documents – because usually these are worded in order to cover unforeseen additional periods or amounts, in which case it appears that a conflict between contracts and legal provisions may emerge.

Suspension of all enforcement proceedings under the Moratorium Law

In previous legal acts addressing the state of emergency, it emerged that enforcement proceedings (with certain exceptions) are not suspending. Now, the Moratorium Law purports to suspend until 31 December 2020 all enforcement proceedings that have begun prior to the entry into force of the Moratorium Law. The text raises some questions, as it does not explicitly refer to enforcement actions initiated after the entry into force of the Moratorium Law, but most of all because it does not specify whether it relates only to the limited categories of debtors defined in the act or to all enforcement proceedings whatsoever. In its current language, it would appear that an avenue is opened for any debtor under an enforcement procedure to invoke the suspension of proceedings.

Moreover, the measure is not backed up by provisions addressing the approach to insolvency measures - at the date of this writing, no changes to insolvency rules have been made.

Application of the measures to cross-border loans is under discussion

Last but not least, the listed categories of creditors do not explicitly include foreign credit institutions, providing services cross border, but only the branches of the foreign credit institutions and non-banking financial institutions performing activities on the territory of Romania. Therefore, it is debatable to what extent the moratorium measures are applicable to them, especially given that the government regulation puts pressure on creditors to analyse eligibility conditions linked to the Romanian jurisdiction as well as to rapidly implement approval or rejection of moratorium requests communicated at a distance.

This aspect will be particularly relevant to analyse in the context of syndicated loans where the lenders include both entities in Romania and abroad. If indeed the interpretation that the measures do not apply to entities providing services cross border will prevail, these transactions will be in a unique situation where some of the creditors are required to accept a moratorium and others will not.