

What does the Covid-19 crisis mean for victims of fraud?

Country: Malta

1. THE MOST CRITICAL PHASE OF THE CRISIS

As long as measures to prevent the spread of Covid-19 restrict freedom of movement: What are the effects of the Covid-19 crisis on civil justice?

Amid the Covid-19 pandemic, the Superintendent of Public Health took several unprecedented measures affecting civil justice as empowered by the Public Health Act.

Court process

Firstly, by virtue of Legal Notice 65 of 2020 (as amended by Legal Notice 97 of 2020), the Superintendent ordered the closure of all courts with effect from Monday 16 March 2020, which closure shall remain in force until it is revoked by the Superintendent. The legal notice applies to the "designated court" meaning any of the courts of justice, that is the superior courts and the inferior courts including appellate courts irrespective of their competence or jurisdiction, and includes also any tribunal established by law which operates from the building of the Courts of Justice, and any boards, commissions, committees or other entities which operate from the building of the Courts of Justice before which any proceedings are heard or procedures undertaken which are subject to legal, judicial or administrative time limits for filing any claims, defences or other acts. The said Legal Notice also extends to the closure of the court registry.

Additionally, the running of any legal and judicial times and of any other time limits including peremptory periods applicable to proceedings or other procedures before the said designated courts was suspended by virtue of Legal Notice 61 of 2020 following the closure of the courts. The suspension shall last until seven (7) days following the lifting of the repeal of this order by the Superintendent. Any legal, judicial or administrative time limit for the filing of any acts before the court following the conclusion of any proceedings before any Tribunal, board, commission, committee or other entity which does not fall within the definition of 'designated court', shall be suspended for a period of twenty (20) days from the lifting of the repeal of the order by the Superintendent. Legal Notice 84 of 2020 further clarified that the aforesaid suspension shall also apply to prescription in criminal and civil matters.

It ought to be clarified that Legal Notice 61 of 2020 provides that any designated court may still order the opening of its registry, the hearing of any case and anything consequential and incidental thereto in urgent cases or in cases where it deems that the public interest in having the case heard should prevail, and this subject to any specific arrangements for the guarding against and, or controlling dangerous epidemics or infectious disease as the respective court may determine. Unless, therefore, a designated court decides to hear a case with urgency on grounds of public interest, court hearings are not taking place and, presently, there are no appropriate facilities to allow such hearings to take place via video conferences.

Related legal publications were Legal Notice 43 of 2020 and Legal Notice 64 of 2020 in terms of which the Superintendent ordered the suspension of legal timeframes relating to promise of sale agreements, notarial and other related matters, following the closure of government departments. All such legal timeframes shall remain suspended for a period of forty five (45) days following the lifting of the repeal of such order by the Superintendent, provided that if the last day of any legal term expires during the first five (5) days immediately following the lifting of the repeal of such order by the Superintendent, in this case, the running of any legal terms shall be deemed to be suspended for a period of twenty (20) days from the lifting of the repeal of such order by the Superintendent.

More recently, the Legal and Other Time Periods (Suspension and Interruption) Act (Cap 609 of the Laws of Malta) and Legal Notice 141 of 2020, namely the “General Provisions applying to the Suspension of Legal and Judicial Times Regulations, 2020, issued under the same Act, were also enacted to secure the legal validity of the suspension of legal timeframes.

Other enforcement efforts

With respect to enforcement outside the court process, regulators are still very active. In particular, the Malta Financial Services Authority (“MFSA”), which is the regulator of financial services in Malta, as well as the Financial Intelligence Analysis Unit (“FIAU”), responsible for the supervision of AML/CFT legislation locally, have been undertaking routine compliance inspections remotely since the onset of the pandemic. Regulators have also been issued administrative penalties and other measures, which, however, cannot be appealed unless and until the orders relating to the suspension of legal timeframes and the closure of the courts are revoked by the Superintendent. On a related note, the Police Force is still active in enforcing the law relating to traditional criminal activity (such as theft, drug trafficking, etc.) as well as taking on new roles, including the enforcement of quarantine and self-isolation measures introduced by the Superintendent as well as other

measures relating to the closure of outlets offering non-essential products and services and social distancing.

Provision of legal and financial services

A vast majority of professionals, including lawyers, have resorted to working remotely whilst still servicing clients via email, telephone calls and video conferencing. In light of the restrictive measures imposed on the courts, the nature of legal work has necessarily changed. Primarily, litigation proceedings have been put on hold together with transactional work as the parties await a return to 'normality'. The COVID-19 crisis has however led to a spike in other areas of work, including the interpretation of the rights and obligations of parties to a contractual agreement (especially the application of the force majeure clause and the rights of termination arising thereto), re-financing considerations, re-possession of high-value assets (such as aircrafts), advice in relation to capital markets (particularly in connection with market abuse considerations such as the disclosure of inside information regarding financial difficulties), employment matters (including redundancy schemes, reduced working hours, etc), and liability considerations (for example in relation to the exposure of directors in connection with wrongful and fraudulent trading).

Financial services providers are still open for business, albeit having taken measures to reduce exposure by their employees to the pandemic. Such measures include reduced opening hours, promotional campaign encouraging customers to make use of non-branch services (including online services, ATMs, telephone services, etc), increase in contactless card limits, and restricting the range of services offered through the branch network. Banks have also upped their efforts in making available additional funding for businesses which are struggling to survive the crisis and have also introduced moratoriums on the repayment of personal and corporate loans. Insurers, on their part, have been trying to keep up with the spate of claims, particularly in relation to travel insurance and business interruption insurance. They have sought to exclude COVID-19 pandemic cover from travel insurance policies immediately following the first few cases, such that, going forward, such policies will no longer provide coverage in relation to claims connected to the pandemic. Insofar as business interruption insurance is concerned, COVID-19 pandemic type events were typically already excluded such that coverage only extended to situations where the disease was actually present within the premises. It is expected that renewals of such business interruption insurance will further clarify exclusions relating to COVID-19.

Furthermore, specifically in relation to credit and financial institutions, Legal Notice 142 of 2020 provides for a moratorium on credit facilities (capital and interest) for economically

vulnerable persons (as defined in a directive issued by the Central Bank of Malta), which moratorium shall last for a period of six months.

Insolvency law

At the time of writing, Malta has not introduced any measure in connection with insolvency law. We are aware of discussions amongst policymakers as to whether steps should be taken around the suspension of provisions relating to wrongful trading, as is already the case in other jurisdictions, however no concrete action has been taken so far.

2. FORECAST: AFTER THE CRISIS AND LONG-TERM EFFECTS

What are the consequences of the Covid 19 pandemic once the pandemic has abated, in the gradual return to a new normality and what are the long-term effects?

It is expected that as the pandemic subsides, Malta will take steps to gradually re-open for business. As a first step, one would expect the revocation of the orders relating to the close of the courts, the suspension of legal timeframes, and the close of government departments, to allow for the administration of justice to steadily resume normality.

It is further anticipated that government will stop the financial assistance packages that it has announced during the pandemic depending on how quickly affected sectors can recover. With Malta being heavily dependent on tourism, certain sectors will take longer to recuperate than others. These include the aviation and hospitality industries as well as catering establishments, language schools, and other related industries. It is possible that government aid allocated to these sectors will need to remain for a longer-term.

One would also expect a spike in M&A transactions and potentially company recovery procedures as the dust settles and there is better visibility on the financial situation of the different parties.

The enforcement of economic crime is not expected to weaken. Although, the crisis has not, so far, led to an increase in corruption or any other economic crime, the Maltese government had already taken steps to bolster Malta's fight against economic crime, including corruption, by increasing resources within law enforcement agencies. Hence, once the courts resume hearings, prosecutions are expected to continue.

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