

COVID-19: What measures are still available to distressed companies?

Law No. 2020-1525 of December 7, 2020 on the acceleration and simplification of public action (often referred to under its French acronym “ASAP” Law) has extended until December 31, 2021 a number of derogations that adapt French legal provisions governing distressed companies to the COVID-19 health crisis.

The adoption of this Law provides the opportunity to recall the various measures that remain applicable to date.

Before detailing these measures, a reminder of the texts adopted in this respect since the beginning of the epidemic is necessary.

Reminder of the texts adopted since the outbreak of the epidemic

1. As a first step, the French Government was empowered on March 23, 2020 to take, by means of Ordinances, any measures to adapt the provisions of the French Commercial Code on distressed companies *“in order to take into account the consequences of the health crisis on businesses and farms”*^[1].

Two Ordinances were adopted in furtherance of the above-quoted Article.

The first Ordinance rapidly came into force, on March 27, 2020^[2], in order to provide a *“first response to the immediate challenges”*^[3] faced by companies.

The key measures introduced by this Ordinance included the automatic extension of the legal duration of the conciliation period by a period equal to that of the state of health emergency, plus three months, and the possibility of obtaining, in the same proportion, an extension of the duration of the safeguard and recovery plans.

A second Ordinance was then adopted by the French Government on May 20, 2020^[4].

In order to respond to the uncertainties relating to the various timelines/deadlines set by the March 27, 2020 Ordinance, the May 20, 2020 Ordinance replaced in this first piece of legislation the timelines that had been set with reference to the state of health emergency by precise dates.

In accordance with Article 9 of the May 20, 2020 Ordinance, most of the measures that had been taken pursuant to the March 27, 2020 Ordinance ceased to apply since August 23, 2020.

The only provision that remains applicable until February 23, 2021 is the provision resulting from Article 1, III, 2° of the March 27, 2020 Ordinance^[5] which allows the duration of the safeguard or recovery plan to be extended up to a maximum period of one year.

The May 20, 2020 Ordinance also introduced a more elaborate protection mechanism for distressed companies, the main provisions of which are outlined further below.

2. As a second step, the French Government was again empowered on November 14, 2020 to take, still by means of Ordinances, any measures to adapt the provisions of the French Commercial Code on distressed companies^[6].

A third - smaller-scale - Ordinance was thus adopted by the French Government on November 25, 2020^[7]. The provisions of this Ordinance which remain applicable until December 31, 2021 are also outlined further below.

3. As a third and last step, the ASAP Law dated December 7, 2020 entered into force. Among the many provisions of this Law, Article 124 addresses provisions on distressed companies and provides that the application of Articles 1 to 6 of the May 20, 2020 Ordinance is extended until December 31, 2021 inclusive.

The criticisms levelled against some provisions of the May 20, 2020 Ordinance seem, however, to have been heard by the legislator who did not extend them.

This is particularly the case for Article 7, which allowed the debtor and the receiver to apply directly to the court for the purposes of authorizing the manager of a company placed in judicial liquidation to acquire all or part of the assets of said company.

This measure had been criticized as it would have allowed managers to acquire their company at a lower price after benefiting from job cuts and debt write-offs. A bill aimed at removing this provision from the May 20, 2020 Ordinance had even been tabled.

Presentation of the main measures that are still applicable today to distressed companies

1. The temporary strengthening of the role of the statutory auditor in preventing companies from getting into financial difficulties was extended by the ASAP Law until December 31, 2021.

Article 1 of the May 20, 2020 Ordinance indeed allows the statutory auditor - within the framework of the alert procedure when it appears to him/her that the urgency of the situation requires the adoption of immediate

measures and when the manager refuses to do so or proposes measures that he/she considers insufficient - to inform the president of the competent court, as soon as the debtor has been first informed.

2. The ASAP Law has also extended the measures to encourage the use of the conciliation procedure until December 31, 2021.

Article 2 of the May 20, 2020 Ordinance indeed allows the debtor, when a creditor asked to engage in conciliation has not accepted the request made by the conciliator to suspend the enforceability of his/her/it claim, to file a petition to that effect with the president of the court.

The debtor may thus request that any legal action initiated by the creditor to obtain the payment of a sum of money be discontinued or prohibited, or that any enforcement proceedings initiated by the creditor against the debtor's assets be discontinued or prohibited as well.

This measure must be combined with that resulting from Article 1 of the November 25, 2020 Ordinance which allows the conciliator, until December 31, 2021, to ask the president of the court to extend the conciliation procedure, without however the duration of this procedure exceeding 10 months.

3. Article 3 of the May 20, 2020 Ordinance that temporarily removed the threshold requirements set by Article L. 628-1 of the French Commercial Code prior to the opening of an accelerated safeguard procedure has also been extended by the ASAP Law until December 31, 2021.

4. The simplified communication procedures introduced by the November 25, 2020 Ordinance will remain applicable until December 31, 2021. Article 3 of this Ordinance provides that communication with the clerk's office and with the judicial bodies can be made by any means, except concerning documents for which the French Commercial Code provides for the possibility of consulting them at the court clerk's office.

5. Several provisions relating to the implementation of safeguard and recovery plans introduced by the May 20, 2020 Ordinance have also been extended by the ASAP Law.

These measures include the reduction of timelines and the simplification of a number of formalities. Article 4 of this Ordinance allows, in the context of the preparation of the safeguard or recovery plan, to reduce to fifteen days the time-limit for consulting creditors and to communicate the debt settlement proposals and the responses to such proposals *"by any means that allow the creditors' representative to establish with certainty the date of their receipt"*.

In addition, the duration of safeguard and recovery plans may, at the request of the public prosecutor's office or the court-appointed administrator responsible for supervising the proper performance of the plan, be extended up to a maximum of two years, in accordance with Article 5, I, of the May 20, 2020 Ordinance. This option may be combined with the option referred to above resulting from the March 27, 2020 Ordinance that allows, until February 23, 2021, an extension of the duration of the safeguard or recovery plan up to a maximum of one year.

Furthermore, creditors who have granted financing to the debtor during the observation period or who undertake to grant such financing for the performance of the plan will still benefit, until December 31, 2021, from the so-called “post-money” privilege established by Article 5, IV of the May 20, 2020 Ordinance.

Finally, in accordance with Article 5, III, of the May 20, 2020 Ordinance, substantial amendments to the plans remain facilitated until December 31, 2021, as the consulted creditors’ failure to reply will be deemed acceptance of the proposed new payment terms.

6. Article 6 of the May 20, 2020 Ordinance - which opens up the simplified liquidation proceedings, under certain conditions, to debtors who are natural persons and whose assets do not include any real estate asset - also remains applicable until December 31, 2021.

[1] Article 11 of the Emergency Law No. 2020-290 of March 23, 2020 to deal with the COVID-19 epidemic

[2] Ordinance No. 2020-341 of 27 March 2020 adapting the rules relating to the difficulties of companies and farms to the health emergency and amending some provisions of the French Code of Criminal Procedure

[3] Report to the President of the Republic on Ordinance No. 2020-596 of May 20, 2020 adapting the rules relating to the difficulties of companies and farms to the consequences of the covid-19 epidemic

[4] Ordinance No. 2020-596 of May 20, 2020 adapting the rules relating to the difficulties of companies and farms to the consequences of the covid-19 epidemic

[5] Pursuant to this Article, *“After the expiry of the period provided for in I [i.e., after August 23, 2020], **and for a period of six months**, at the request of the public prosecutor or court-appointed administrator responsible for supervising the proper performance of the plan, the court may extend the duration of the plan for a maximum of one year.”*

[6] Article 10 of Law No. 2020-1379 of November 14, 2020 authorizing the extension of the state of health emergency and introducing various measures to manage the health crisis

[7] Ordinance No. 2020-1443 of November 25, 2020 adapting the rules relating to the difficulties of companies to the consequences of the covid-19 epidemic

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