

CORONAVIRUS COVID-19 - EDITORIAL

Businesses have to deal with the consequences of a pandemic for which no one was prepared!

Soulier Avocats and LightHouse LHLF have decided to join forces to bring together day after day practical information and analysis on the evolution of the government support measures in the fields of social law, tax law, economic law, banking law, customs law, etc.

Our wish, by pooling our resources together to inform companies, is to participate in the solidarity effort that this particularly challenging period requires. Do not hesitate to call the authors of the articles, notes and analysis gathered here to obtain clarification on these specific measures!

Yours sincerely,

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CORONAVIRUS COVID-19 - EMPLOYMENT LAW

Update on the latest measures relating to partial activity (short-time work)

March 23, 2020

Partial activity (also referred to as short-time work) allows the employer to reduce the working time of his employees or to temporarily close his establishment or part of it in order to maintain employment, and to compensate in part for the loss of remuneration suffered by employees as a result of the unworked hours. Because of the economic consequences associated with the spread of the Covid-19 pandemic, a draft Decree encourages and facilitates the use of the partial activity scheme.

Soulier Avocats provides an update on the latest measures in the form of a Q/A.

NB: The following information is based on the draft Decree modifying the short-time work scheme and is, therefore, subject to changes.

Question 1: Which companies can implement the short-time work scheme?

The employer may put its employees on short-time work when the company is forced to reduce or temporarily suspend its business activity for one of the following reasons: the economic situation; difficulties in the supply of raw materials or energy; a disaster or bad weather conditions of an exceptional nature; the transformation, restructuring or modernization of the company; any other circumstances of an exceptional nature.

In the context of the current health crisis, the Government indicated that a request for the implementation of a partial activity scheme can be made in the following situations:

Examples	Comments
Administrative closure of an establishment	
Prohibition of public demonstrations following an administrative decision	
(Massive) absence of employees who are essential to the activity of the company	If the employees who are essential to the continuation of the company are infected by the Covid-19 or quarantined, thereby making it impossible to continue the business, the other employees can be put on short-time work
Temporary interruption of non-essential activities	If the Government decides to limit travels to avoid aggravating the epidemic, employees may be put on short-time work

Examples	Comments
Suspension of public transportation pursuant to an administrative decision	All employees who are unable to travel to the workplace due to the lack of public transportation may be put on short-time work
Decline in business due to the epidemic	Supply difficulties, deterioration of sensitive services, cancellation of orders, etc. are all reasons for implementing the short-time work scheme

Question 2: How do to apply for the implementation of the short-time short scheme?

- *To whom should employers apply?*

The employer must send a request for authorization for the implementation of a short-time work scheme to the *préfet* of the department where the relevant establishment is located or, when the request concerns several establishments of the same company, to the *préfet* of the department where the company's head office is located.

- *What information is required?*

The request must specify the reasons justifying the implementation of the short-time work scheme, the foreseeable period of under-activity, the number of employees concerned, the commitments that the employer proposes to make wherever he makes a new request whereas it has already implemented the short-time work scheme in the previous 36 months.

The opinion of the Social and Economic Committee (SEC) must be annexed to the request. If such opinion has not yet been delivered, the request must specify the planned date of consultation of the SEC; in this last case, the opinion must be sent within a maximum of two months from the date of the request.

- - How is this done?

The request for authorization is made online on the website:

<https://activitepartielle.emploi.gouv.fr>, or by any means showing a so-called "*date certaine*" (i.e. a specific and indisputable date).

- *When is the deadline?*

The employer has a period of 30 days from the date the employees are placed in partial employment to submit his request.

- - *What is the response time?*

The Regional Directorate for Companies, Competition, Consumption, Labor and Employment (*Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi*, also known under the acronym "DIRECCTE") has two calendar days to make its decision. In the absence of a response within this period, the request for authorization shall be deemed tacitly granted. The employer must inform the SEC as well as the employees of the favorable or unfavorable decision to implement a short-time work scheme within the establishment.

Question 3: Are all employees eligible for the short-time work scheme?

All employees of the company (permanent, fixed-term, temporary) are in principle eligible for compensation under a short-time work scheme. The draft Decree provides for the extension of this scheme for employees working on under so-called *forfait jours* and *forfait heures* working time arrangements¹, including when there is not a total closure of the relevant establishment, i.e. even in the case of a reduction in working hours.

Question 4: What compensation under a short-time work scheme?

In return for the administrative authorization to implement the short-time work scheme, the employer must:

- pay to the employee the hours normally worked in case of reduction in working hours;
- pay to the employee an hourly allowance corresponding to 70% of the gross remuneration that serves as the basis for the holiday pay, i.e. 84% of the net remuneration, for the number of unworked hours giving entitlement to the payment of this allowance (i.e. up to 35 hours) or 100% of the previous net remuneration if training activities are implemented during the unworked hours;
- where applicable, pay to an employee on short-time work whose remuneration is lower in a given month, an additional remuneration at least equal to the net minimum wage (8.03 euros) based on 35 hours (for compliance with the minimum monthly remuneration);
- pay the allowance due under the short-time work scheme on the normal pay date.

¹ These are arrangements according to which working time is counted on the basis of a fixed number of working days (*forfait jours*) or working hours (*forfait heures*) per year.

This indemnity is subject neither to employees' and employers' social security contributions, nor to the flat rate contribution (*forfait social*). However, it is subject to the so-called general social contribution (*Contribution Sociale Généralisée*, commonly referred to as "CSG") at the rate of 6.20% and social debt repayment contribution (*Remboursement de la Dette Sociale*, commonly referred to as "CSG") at the rate of 0.50%.

These two contributions are calculated on the basis of 98.25% of the allowance paid (application of a 1.75% abatement for professional expenses). In these conditions, the employee will receive a compensation representing approximately 84% of his net salary.

Question 5: How does the employer get the short-time work compensation?

The employer receives a short-time work compensation jointly financed by the State and the body managing the unemployment insurance scheme (Unédic). The hourly rate of the short-time work compensation is equal to 70% of the hourly pay up to a maximum of 4.5 times the hourly rate of the minimum wage. This hourly rate may not be less than 8.03 euros (Article D. 5122-13 of the French Labor as it would be amended by the draft Decree).

Within one year following the end of the period covered by the authorization to implement the short-time work scheme, the employer must send a request for indemnification together with supporting documents (employees' pay slips showing the number of unworked hours) to the website <https://activitepartielle.emploi.gouv.fr>.



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"Emergency" Law: The main provisions regarding labor and employment

March 25, 2020

In the context of the coronavirus health crisis, an emergency health law to deal with the covid-19 pandemic (the "Law") was definitively voted on Sunday March 22, 2020 and published in the Official Gazette on March 24, 2020.

The Law empowers the Government to amend, by means of Ordinances and within 3 months from its publication, any measures in order to deal with the economic, financial and labor-related consequences of the spread of the pandemic, in particular with regard to labor law and social security.

The Law indeed includes a whole set of measures that are aimed at adapting labor law and that are of direct interest to employers. These measures focus on the following areas:

- **Partial activity (short-time work)**

The objective is to facilitate and reinforce the use of the short-time work scheme for all businesses, whatever their size (in particular by temporarily adapting the social treatment to allowances paid in this framework, extending it to new categories of beneficiaries, reducing the employer's contribution, etc.).

- **Sick leave**

The objective is to adapt the conditions and terms of allocation of the additional allowance provided for in Article L. 1226 1 of the French Labor Code (this concerns continued payment of the wage by the employer).

- **Paid vacation and so-called "RTT days" (i.e. additional rest days resulting from the reduction in the working time) et RTT**

The objective is to allow the employer, pursuant to a company-level or branch-level agreement, to impose or modify the dates for taking paid vacation within the limit of 6 working days, by derogating from the applicable notice periods and procedures for taking such leave; allow any employer to unilaterally impose or modify the dates for taking RTT, rest days provided under specific working time arrangements (so-called *forfait* working time arrangements) and rest days allocated to the employee's time savings account, by derogating from applicable notice periods.

[N.B.: currently, an employer may change the dates of paid vacation if such dates have already been set by the employee, but may not require an employee to take paid vacation days that he/she has not foreseen. In the case of RTT days, the applicable rules vary according to company-level or branch-level agreements].

- **Working time duration**

The objective is to allow businesses operating in industries that are essential for national security or the continuation of economic and social life to derogate from public policy rules and the provisions of agreements relating to working hours, weekly rest and Sunday rest (subject, however, to the limits on working hours laid down by European law).

- **Employee savings**

The objective is to exceptionally amend the deadlines and terms of payment of the amounts paid under mandatory and optional profit-sharing schemes.

[NB: currently, the amounts earned under mandatory and optional profit-sharing schemes must be paid before the first day of the sixth month following the end of the company's financial year, i.e. 31 May when the financial year corresponds to the calendar year].

- **Exceptional purchasing power bonus**

The objective is to change the deadline and terms of payment of the exceptional purchasing power bonus.

- **Elections in Very Small Businesses**

The objective is to adapt the organization of elections on the measure of the audience of trade union bodies in businesses with fewer than eleven employees (not bound by the obligation to organize professional elections) by modifying, if necessary, the definition of the electorate, and, consequently, extend, on an exceptional basis, the duration of the terms of office of labor court members and members of joint regional inter-professional committees.

- **Health in the workplace**

The objective is to adapt the terms and conditions in which occupational health services carry out their missions, in particular the monitoring of the health conditions of workers, and to define the rules according to which the monitoring of the health condition is ensured for workers who have not been able, due to the pandemic, to benefit from the planned monitoring.

[N.B.: An instruction of the Ministries of Labor and Agriculture of March 17, 2020 anticipates this provision].

- **Social and Economic Committee**

The objective is to amend the procedures for informing and consulting staff representative bodies, in particular the Social and Economic Committee, to enable them to deliver the required opinions within the prescribed timelines and to allow for the suspension of the electoral processes of social and economic committees currently under way.

- **Vocational training**

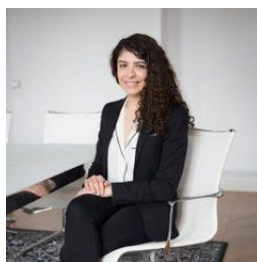
The objective is to allow employers, training bodies and operators to meet the legal obligations regarding the quality and registration of qualifications and authorizations and to adapt the conditions of remuneration and payment of social security contributions for vocational training trainees.

- **-Unemployment insurance**

The objective is to adapt, as an exceptional measure, the procedures for determining the duration of the allocation of replacement income to jobseekers.

25 Ordinances were adopted this morning during the Council of Ministers. Some of them contain provisions on the above-listed issues.

More info to come soon. Stay tuned...



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*The main labor and employment measures
provided for by the first “Covid-19 Ordinances”*

March 31, 2020

Three Ordinances on labor and employment matters adopted in furtherance of the emergency health law to deal with the Covid-19 pandemic² were published in the Official Gazette on Thursday March 26, 2020.

These Ordinances concern (i) derogations, subject to certain conditions, regarding paid vacation, working hours, rest days and work on Sundays, applicable until December 31, 2020, (ii) extension of the deadline for payments under mandatory and optional profit-sharing schemes to December 31, 2020, and (iii) extension of the scope of employees eligible for the supplemental allowance paid by the employer in the event of medical leave until August 31, 2020. Finally, one of the Ordinances provides for the extension of the compensation paid to jobseekers who no longer qualify for unemployment benefits.

Brief overview of these measures.

1. Emergency measures on paid vacation, rest days, working hours and work on Sundays, subject to conditions, applicable until December 31, 2020.

Measures concerning paid vacation: only in case of a company level agreement or, in the absence such agreement, an industry-wide agreement

- **Possibility for employers to impose or modify the taking of paid vacation** (i) within the limit of 6 working days, (ii) with a notice period of at least 1 clear day, and (iii) over a period of leave up to December 31, 2020 at the latest:
 - Impose the taking of accrued paid vacation days, even before the start of the paid leave period (i.e. May 1, 2020 by default);
 - Unilaterally change the dates of paid leave already set.
- **Possibility for employers to split the main leave** (i.e. 4 consecutive weeks maximum) without the employee's consent.
- **Possibility for employers not to grant simultaneous leaves to spouses or partners under a so-called PACS** (i.e. a contractual form of civil union between two adults) working in the same company

² Cf. article entitled [Covid-19: “Emergency” Law: The main provisions regarding labor and employment](#) published on our Blog on March 26, 2020

Measures concerning so-called “RTT days” (i.e. additional rest days resulting from the reduction in the working time) and other rest days: only if the interest of the business justifies these measures in view of the economic difficulties resulting from the spread of the Covid-19, by unilateral decision of the employer

- **Possibility for employers to fix unilaterally the accrued RTT days, rest days accrued under an agreement on the organization of working time and rest days accrued under a so-called *forfait jours* working time arrangement³** (i) up to a maximum of 10 days, (ii) with a notice period of at least 1 clear day, (iii) over a period of leave up to December 31, 2020 at the latest:
 - Impose the taking of rest days on dates that they (i.e. employers) determine;
 - Unilaterally change the dates on which rest days are taken.
- **Possibility for employers to impose that the rights earned by employees under their Time Savings Account be used in the form of rest days, on dates they (i.e. employers) determine, under the same conditions and within the same limits as set out above.**

Measures concerning working time: only in companies operating in “business sectors that are particularly needed for the security of the Nation and the continuity of economic and social life”, as determined by (a to-be-published) Decree

- **Derogations from maximum working hours**, provided that the Social and Economic Committee (“SEC”) and the Regional Directorate for Companies, Competition, Consumption, Labor and Employment (*Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l’Emploi* or “DIRECCTE”) are informed without delay and by any means:
 - Up to **12 hours of work per day (instead of 10 hours)**;
 - Up to **60 hours of work per week (instead of the absolute maximum weekly working time of 48 hours)**;
 - Up to **48 hours of work per week over a period of 12 consecutive weeks** (instead of the average maximum weekly working time of 44 hours);
 - For **night workers**: up to 12 hours of work per day (subject to the granting of compensatory rest) and up to 44 hours of work per week over a period of 12 consecutive weeks (instead of the average weekly working time of 40 hours).
- **Daily rest reduced to 9 consecutive hours (instead of 11 consecutive hours)**, subject, however, to the granting of compensatory rest equal to the duration of the rest the employee was unable to take. Employers must inform the SEC and the DIRECCTE thereof without delay and by any means.

³ This is a contractual arrangement according to which working time is counted on the basis of a fixed number of working days per year.

Measures concerning work on Sundays: only in companies operating in “business sectors that are particularly needed for the security of the Nation and the continuity of economic and social life”, as determined by (a to-be-published) Decree AND in companies that which provide those in essential business sectors with the services necessary for the performance of their main business activity.

- **Possibility to derogate from the principle of Sunday rest:**
 - The weekly rest will in this case be granted to employees on a rotating basis;
 - It should be noted that these provisions also apply in the Moselle, Bas-Rhin and Haut-Rhin geographical departments.

2. Measures regarding payment of sums due under mandatory and optional profit-sharing schemes, without any condition, applicable until December 31, 2020

- **Postponement of the deadline for payment or allocation of sums due under mandatory and optional profit-sharing schemes to December 31, 2020:** the deadline for the payment of sums to be granted under mandatory and optional profit-sharing schemes in 2020, or for the allocation of such sums to an employee savings plan (or a frozen current account), is postponed to December 31, 2020 (instead of the 1st day of the sixth month following the close of the company's financial year).

3. Measures regarding the continued payment of the wage by employers (supplementary allowance) in case of medical leave applicable until August 31, 2020

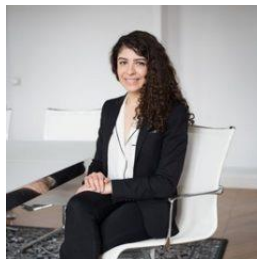
A brief reminder of applicable ordinary rules: the French Labor Code provides that an employee on medical leave due to illness or accident (whether work-related or not) is guaranteed to receive a supplementary allowance from his/her employer which complements the daily social security allowances. However, this continued payment is subject to a series of conditions, including a minimum of one year's seniority, a medical report on the employee's incapacity for work, the sending of the doctor's certificate to the employer within 48 hours, etc. This continued payment applies – except in exceptional cases – at the end of a waiting period of 7 days. Finally, some employees are excluded from this system (employees working from home, seasonal workers, intermittent workers and temporary employees).

- **Continued payment of the salary for employees on medical leave prescribed in the context of the Covid-19 pandemic** (including childcare, isolation, eviction, mandatory home-stay, etc.), including for employees working from home, seasonal workers, intermittent workers and temporary employees:
 - without any requirement as to seniority;
 - without having to justify his/her absence from work within 48 hours;

- without obligation to receive a care treatment on French territory or in one of the other Member States of the European Union or in one of the other States which are parties to the Agreement on the European Economic Area.
- **Continued payment of the salary for employees on medical leave, regardless of the reason of the leave**, including for employees working from home, seasonal workers, intermittent workers and temporary employees:
 - without any requirement as to seniority.

It is not specified whether these measures apply to medical leaves prescribed prior to the entry into force of the Order (i.e. March 26, 2020).

It should be noted that the Ordinance provides that a Decree may adjust the time limits and terms of payment of the supplementary allowance paid by employers: this decree could remove the 7-day waiting period for all medical leaves (currently removed by a decree of March 4, 2020 for medical leaves related to a measure of isolation, eviction or mandatory home-stay related to the Covid-19 pandemic).



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CORONAVIRUS COVID-19 - TAX LAW

Overview of the exceptional tax measures related to COVID-19 Who is concerned and what are the conditions?

March 20, 2020

In response to the Covid-19 outbreak, several economic, tax and customs announcements have been made by the French Government since March 3rd, 2020. The purpose of these measures is to provide exceptional and "immediate" support to all companies facing financial difficulties. These measures are for the most part welcome, and aim, generally speaking, to relieve companies of taxes due in March 2020, which is an excellent thing!

Having said that, the mere inventory of the proposed measures is not enough, and it deserves a little analysis, structuring and a few thoughts of opportunity. This is the purpose of this article.

Broadly speaking, there are two categories of tax measures: those aimed at deferring or waiving taxes, and those aimed at managing tax audit procedures.

I. Direct tax deferral or rebate measures

- **Direct tax payment deferral** (*Corporate income tax balance, payroll tax and local taxes*)

The deferral of the next payment of all direct taxes due on March 2020 can be requested by all companies (or their external accountants) "without justification and without penalties". Practically speaking, it means that, as soon as a request for deferral is filed, the payment of these taxes is automatically postponed until the 16 of June 2020 (three-month deadline).

However, the Minister of the Economy and Finance has indicated that VAT and personal income withholding tax cannot be included in these measures as this "would be too complicated, too burdensome and with risks for the tax security". Thus, unfortunately, the payment of these taxes is not deferred.

Furthermore, businesses who have opted for the monthly payment of the business property tax ("CFE") are allowed to suspend payments and defer them until the balance is paid, directly through their "impôts.gouv" accounts or by contacting the "Centre prélèvement service". The government's swiftness of action on these points is most welcomed!

But does this postponement only concern the March deadlines or also the payments due the following months? Given the current situation and subject to further measures, it seems likely that this deferral also concerns the April 2020 deadlines (i.e. in particular for the payroll tax)... but this remains to be confirmed.

In the event that companies have already paid the March deadlines, the Ministry of Finance has announced on its website that it is possible to object to the SEPA direct debit (by contacting the company's bank directly) or to request a reimbursement from the relevant Tax Authorities Business Tax Service ("Service des impôts des entreprises - SIE").

But in what form can the request be made (i.e. submission of a specific form) and within what timeframe? In practice, there are existing procedures for requesting a reimbursement; Are they applicable in the current situation? It is quite likely, but we recommend formally confirming this with the company's relevant SIE though.

It should be noted in conclusion on this point that these measures consist in deferring the payment of the taxes in question. The effect on the company's cash flow may be beneficial in the short term, however the tax debt will remain, unless the authorities announce otherwise, but no such initiative has been mentioned at this stage.

The announcements from the Government, which may vary if the economic situation were to be lastingly affected, must be carefully monitored on a daily basis. We will be vigilant.

- ***Direct tax rebate***

The government has also planned to allow companies to apply for a rebate of certain taxes. The mechanism is therefore different from the deferral mechanism, since the rebate removes part or all of the tax burden permanently.

These rebate requests will, however, be examined on an individual basis. Granted in a more restrictive manner than deferrals, they will have to be justified and can only be granted in the event of serious financial difficulties.

A priori, these "characterized difficulties" would be assessed by taking into account various factors, such as the compared amount of monthly sales in 2019 and 2020, the nature (other than tax) and amount of outstanding debts, the cash position, etc...

In practice, a specific request for deferral or rebate is available to taxpayers on the website impot.gouv.fr. On 16 March 2020, the Minister of the Economy and Finance also announced that "no deadline has been set for requesting this deferral".

Practically speaking, given the announced individual examination of files, it would appear that the 'immediate' effect of the measure is more relative. Indeed, to date, no specific deadline has been set for the processing of applications submitted in the context of the difficulties relating to the Coronavirus - Covid 19.

Practically speaking, we therefore recommend that, in order to compensate for any processing delays, a request for deferral should be submitted in parallel with a rebate request.

II. Tax audit measures

As tax agents working with the tax authorities are also affected by the containment measures in place in France, the Minister of Action and Public Accounts has announced that ongoing tax audits will be suspended and that no new audits will be initiated. At the same time, arrangements are reportedly being considered for the enforced recovery of tax debts.

However, this announcement was made by the Minister through social networks and press articles. Will this be officially confirmed? There is no assurance at this stage. Very close attention must be paid. In very concrete terms, will this mean that the tax audits that are undergoing and which are subject to specific deadlines are also suspended? Will it be possible, for example, not to respond within the time limits to a reassessment notice sent a few days before the announcements were made?

These questions are critical, and in the absence of a clear position of the authorities, we strongly recommend acting as if the ongoing procedures were continuing normally. Additionally, upon the closure of the courts, litigations before the administrative judge and the judicial judge are also suspended.

In conclusion, the Government has responded to some of the difficulties encountered by businesses today. The responsiveness of the authorities and the unprecedented scale of the measures announced should be enthusiastically welcomed.

We must, however, remain cautious with regard to the practical application of certain measures, and carefully monitor the scope of the most "emblematic" measures, such as tax rebates or the suspension of tax audits.



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Suspension of tax and customs audits: who, when, how?

March 26, 2020

Ordinance n°2020-306 of 25 March 2020, published in the Official Gazette of the French Republic on 26 March 2020, provides for the suspension and extension of time limits and measures that have expired or expire between 12 March 2020 and the end of a period of one month from the date of termination of the state of health emergency (Article 1 of the Ordinance).

This Ordinance has a general scope and covers any type of act or procedure, with the exception of time limits and measures resulting from the application of rules of criminal law and criminal procedure in particular.

Articles 10 and 11 of the Ordinance provide for a number of measures concerning fiscal and customs matters.

I - Are tax and customs audits suspended?

Among the questions raised during this unprecedented period, there is one that has been keeping businesses on the edge for several days: are tax and customs controls and procedures continuing?

The Government provides several answers to this question, by means of ordinances, which deserve clarification and some practical recommendations.

1 - First, the Ordinance provides for the **suspension of the statute of limitations expiring on 31 December 2020**. In fact, the Act of 23 March 2020 declares a state of health emergency for a period of two months from the promulgation of said Act to the JORF of 24 March 2020, i.e. until 24 May 2020.

As a result, in all likelihood, this suspension period should end, unless the legislator decided to postpone the state of emergency, on 24 June 2020.

It will be necessary, in the near future and once this suspension period has been set, to ensure that these deadlines are known. We will be there to keep you posted!

2 - Provision is also made for the suspension, both for the taxpayer and for the tax and customs authorities, of all the time limits provided for in the context of the conduct of audits and investigation procedures in tax and customs matters, *without the need for a decision to this effect from the authorities. The suspension of time limits also concerns those applicable to rulings, refund applications, etc...*

This announcement is more than welcome for ongoing controls (examples: suspension of the deadlines for replying to a notice of an investigation result / prior tax assessment notice, suspension of the deadlines for providing information or documents, etc.). However, we invite businesses to be prudent and pragmatic on this point. ***This suspension period will be of a duration equal to that presented in the previous point: from 12 March 2020 to the end date of the state of emergency increased by one month.***

In spite of the automatic postponement of tax and customs audits operations, it is strongly recommended to contact the authorities in charge of any ongoing audit, even if only to verify the effectiveness of the suspension provided for by the ordinance, in order to avoid any unpleasant surprises at the end of this state of emergency period.

3 - Finally, the Ordinance also suspends the time limits implemented as part of the experiment to limit the duration of tax audits on certain companies in the Hauts-de-France and Auvergne-Rhône-Alpes regions.

As a reminder, as of 1 December 2018 and for a period of four years, in these two regions, the cumulative duration of tax audits carried out by the tax authorities must not exceed, for small size businesses, nine months over a period of three years in accordance with the ESSOC Act of 10 August 2018. ***Although of limited territorial application, this suspension measure deserves to be highlighted.***

II - What about the payment of taxes and duties?

The ordinance is clear on this point: the deferral in respect of tax audit operations ***does not apply to declarations used for the assessment, liquidation and collection of taxes and duties.***

The suspension was granted for March, but uncertainty was allowed as to the payment of tax and customs debts for the month of April 2020, the Government has decided: ***the declaration and payment of taxes, duties and fees should not be suspended beyond March.*** According to the Report to the President of the French Republic, the objective is to "*preserve the collection of public revenue necessary for the operation of public services and the support of the economy*".

That being said, it is necessary to reconcile this provision with last week's announcement that the Government fully supports the companies facing the greatest difficulties due to the Coronavirus crisis ***by allowing them to request a deferral of the payment of direct taxes due for the month of March or direct tax rebates.***

In this respect, may new deferral requests be submitted for duties and taxes due for the month of April? Nothing is less certain, but the opportunity may arise. As for the requests already submitted for March, *a priori*, no worries: ***the payment of these taxes is postponed until June 16, 2020!***

However, doubts are now allowed regarding the following months, even though the cash flow of companies will be put to the test in the coming months.

Finally, it is important to recall that this postponement (in particular for the month of March) does not *ipso jure* concern duties and taxes collected by the customs authorities, although the latter have confirmed that they would show flexibility in cases of critical situations.

III - Is provision also made for the suspension of collection periods?

As a result of this Ordinance, the time limits applicable to the recovery and contestation of claims provided for under penalty of nullity, lapse, foreclosure, prescription, unenforceability or forfeiture of a right or action shall be ***suspended for the duration of the state of health emergency plus three months.***

These provisions concern all debts whose recovery is the responsibility of public accountants and should in all likelihood concern ***both tax and customs recovery and litigation.***

While all of these measures taken in this very particular context of a state of health emergency are to be welcomed, we invite businesses to be ***pragmatic and vigilant*** in monitoring and anticipating these matters and the associated time limits / statute of limitations.



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Tax debt payment facilities: for whom and what procedures?

April 1, 2020

While the Government announcements, legislation and other regulatory publications in response to the Covid-19 outbreak are proliferating, the actual applicable law and its clarity for taxpayers is suffering. Just yesterday, March 31, 2020, Gérald Darmanin, Minister of Action and Public Accounts, announced a deferral of the 2020 income tax reporting campaign.

In this context, LHLF team wishes to update everybody on payment facilities and other existing tax measures to relieve taxpayers in these troubled times.

I - Payment facilities and direct tax reliefs

The Government's response to the current situation was immediate in terms of direct taxes. As mentioned in several previous articles, a number of measures have enabled French companies to face the crisis, at least in the initial stages: **deferral of direct tax payments, accelerated reimbursement of certain tax credits** and, where appropriate, **tax rebates in the most difficult cases**.

At the same time, by suspending tax audits throughout the period of the state of health emergency, the Government has once again shown its willingness to temporarily ease the burden on taxpayers.

However, a large number of questions remain. Initially announced for March 2020, these measures, as they stand, do not concern direct tax debts for the months of April and after. Moreover, the Government has, in an Ordinance, maintained the taxpayers' reporting obligations for the coming deadlines. Does this mean that taxpayers are helpless? We do not think so!

1 - First of all, companies will always have the possibility of applying for a **deferral, adjustment or suspension** of their tax debt, with, if necessary, the establishment of a tax payment schedule. This decision to pay by instalments, adjustment or suspension is the responsibility of the Public Accountant. Of course, this prerogative of the Public Accountant falls within his **discretionary competence**!

In the absence of any indication as to the appropriateness of such requests during the state of emergency, reference should be made to common law. In this sense, although the Public Accountant may show leniency in view of the difficulties experienced during this period, it is to be expected that the Public Accountant will **carefully examine the reasons for the request**.

A certain number of **supporting documents** relating to the financial difficulties encountered by companies would in this sense be required, contrary to the requests for automatic deferral which could be made in respect of the payment of the direct taxes of March 2020.

Moreover, these requests are of a **voluntary nature**, and in practice it is expected that the processing of these requests will take longer. We therefore invite taxpayers to submit such requests as soon as possible in order to preserve their cash flow.

A clarification on this point by the tax authorities would be more than welcome!

2 - On the other hand, both the Government and the tax authorities have announced that they wish **to rapidly reimburse tax credit claims** (CIR, CICE, carry-back in particular) in order to relieve companies' cash flow as much as possible. *A priori*, these accelerated reimbursements would not be subject to any justification. This situation deserves to be maintained for the coming months. It is to be hoped for a rapid response on this point.

Thus, while companies will, in all likelihood, be able to benefit from payment facilities on a case-by-case basis for the upcoming months, **the situation we are going through invites the Government to take more structural tax deferral or rebate measures.**

Although companies' cash flow was "safeguarded" in March, the structural decline in economic activity is ongoing: reduction in the number of orders, non-payment of certain supplier invoices, etc... Although priority should be given to fixed charges and especially wages, it would also be appropriate to relieve companies of the burden of certain tax debts.

At the same time, it also seems essential that the Government **quickly announces the postponement of the April and May tax declaration deadlines.** The tax authorities have, in this sense, postponed the filing of the tax package from 16 to 31 May 2020.

However, other deadlines are looming for the next two months: DAS2, local taxes (CFE and CVAE) and C3S. A request has been made to the DGFIP (tax authorities) to postpone all these deadlines until 30 June 2020. It is still under consideration today. Work in progress...

These various considerations related to payment facilities are also part of the reflection that must be conducted to **think about the post-crisis period.** Companies will have a vital need for cash to continue or restart their activities.

II - Payment facilities and indirect tax relief

The impact of Covid-19 on businesses is the subject of many questions, particularly with regard to VAT and other indirect taxes.

However, while many measures in support of businesses have been adopted by the Government with regard to direct taxes, it seems that VAT has not received the same consideration.

In his press release dated 22 March 2020, the Minister for Action and Public Accounts announced that companies will not be able to postpone their VAT declaration deadlines. Consequently, companies will have to continue to declare and pay VAT according to the usual timetables. Failure to declare on time will expose companies to **late payment penalties and a 10% surcharge**. In addition, failure to pay VAT is subject to a **5% surcharge plus late payment penalties**.

However, **it has been announced that claims for VAT refunds will be treated in an accelerated procedure**. Companies are therefore advised to submit their refund claims electronically as soon as possible.

A brief reminder of the VAT refund procedure offered to businesses in a VAT credit situation:

When the company is in a VAT credit situation, it has the choice between:

- offset its VAT credit on the next VAT return or;
- apply for a refund of the VAT credit.

The company is in a VAT credit situation when input VAT is higher than the output VAT?

How to obtain the refund of a VAT credit?

1 - Procedures for a VAT credit refund

- Companies subject to the “régime reel normal”:

When the VAT return is filed monthly or quarterly: the refund of the VAT credit can be claimed if it **exceeds EUR 760**.

If the VAT return is filed annually: the refund of the VAT credit can be claimed if it **exceeds EUR 150**.

- Companies under the “régime reel simplifié”:

The VAT return is filed annually, in May, and advance payments are made in July and December. The VAT credit can be refunded if it **exceeds EUR 150**.

2 - The VAT refund application:

The refund application is **submitted electronically** to the company's tax authorities' agency (Service des Impôts des Entreprises).

- For companies under to the “régime reel normal”:

For a refund during the ongoing fiscal year, a **special form (cerfa n°3519-SD)** must be attached to the monthly or quarterly declaration.

For companies that declare their VAT annually, the special form must be filed at the end of their fiscal year.

- For companies falling under the “régime réel simplifié”:

The refund of the VAT credit is claimed when filing the annual VAT return **in the dedicated box**.

This claim must be submitted:

- o No later than the **2nd working day following 1 May**, for the calendar year; or
- o **within 3 months of the end of the financial year**.

Thus, VAT reporting obligations are not affected by the health crisis we are facing. Companies must continue to respect their usual deadlines, while continuing to benefit from the procedure for refunding their potential VAT credits, within, in principle, accelerated deadlines.

Nota Bene:

1- As the request for VAT credit refund is a litigation claim, it is nevertheless impacted by the measures relating to the suspension of tax audits and judicial proceedings announced in March 2020 by the Government.

Indeed, the claim for refund of VAT credit is a litigation claim whose rejection must be motivated by the tax authorities and can be contested before the administrative judge within two months. However, on 15 March 2020 the Minister of Justice announced the closure of the courts (except for "essential cases").

What are the consequences?

- If, on 12 March 2020, the tax authorities' two-month deadline to reply (or six months in the case of an implied rejection) to a request for a VAT credit refund had not expired, that period shall be suspended and shall start to run again, deducting the time that has already elapsed, at the end of the one-month period following the end of the state of public health emergency (i.e. the reference period), i.e., under the applicable law, starting 24 June 2020;
- If on 12 March 2020, the time limit for appealing to the administrative court against a tax authorities rejection decision had not expired, the time limit shall be suspended and taxpayer may file an appeal within the remaining time limit, which may not exceed a period of two months from the end of the aforementioned reference period. In practice and in the state of applicable law, this rejection decision may therefore be challenged, depending on the circumstances, until 24 August 2020.

However, it should be noted that the closure of the courts means that, in practice, a rejection of the refund request may not be able to be contested and treated before the administrative judge in an accelerated manner.

2- On the other hand, within the framework of the refund application, the tax authorities have the right to carry out material controls and to consult any accounting or supporting documents relating to this claim. However, again, tax audits are suspended and cannot be carried out before the end of the one-month period following the end of the state of emergency.



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*Opportunities to improve cash flow:
deferral of payment of direct taxes and flexibility in the computation of vat*

Where do we stand on April 8, 2020?

April 8, 2020

As we reported in a previous alert, measures related to COVID-19 are increasing. In this context, while it should be noted the remarkable responsiveness of the Government, it is obvious that the application of the tax rule is becoming more complex in the hurly-burly of all the Government announcements and measures, some of which may seem contradictory.

In this respect, two themes in particular have caught our attention because they offer opportunities to improve cash flow for companies: the deferral of the payment of direct taxes due in April (I) and the measures to ease the computation of VAT due during the containment period (II).

I - Extension of the deferral of payment for direct taxes

Gérald Darmanin, Minister of Action and Public Accounts, announced in a press release dated 3 April 2020 an extension of the deferral of payment for direct taxes and social contributions. While the measure was expected and seemed inevitable, several remarks are worth making.

1 - This **deferral mechanism**, which was initially introduced for direct taxes due in March, has been extended for April. This news, which deserves to be welcomed, marks a certain turnaround from the government in this area. Initially expressly excluded by the French Government, a new deferral seemed unavoidable as the crisis and the decline in activity continues...

It should also be noted that, based on its press release dated April 3, 2020, the Ministry of Action and Public Accounts, initially seemed to be targeting only requests for tax deferrals.

However, the [specific form](#) to be sent to the French Tax Authorities Department dealing with businesses (SIE) in order to benefit from this deferral has been updated, and it still includes the **option to requesting a rebate of direct taxes, interest on late payments and penalties**. Also, companies experiencing significant financial difficulties due to the COVID-19 crisis will still be able to apply for such rebates.

Once again, this announcement is to be welcomed. The effect on companies' cash flow will be positive in the short term. However, this deferral option will not wipe out the tax debt, unless the authorities announce otherwise, but no such initiative has so far been mentioned. On the contrary, the Ministry has pointed out that the incentives were **financed by the French State debt** and that they should be paid back in due course. To date, the modalities are still under discussion.

2 - Among the new features, this deferral mechanism is **now conditional** for large companies or companies belonging to a large group of companies.

In practice, the companies covered by this conditional mechanism are those which, during the last fiscal year, **employed at least 5,000 people in France** or had **consolidated turnover of at least 1.5 billion euros**. In addition, the government specifies in a [FAQ](#) that the concept of group can be understood by referring either to the definition used for the CVAE (Article 1586 quater I bis of the CGI) or to the definition used for tax consolidation (Article 223 A of the CGI).

These companies will be able to benefit from the possibility of deferral and/or rebates of direct taxes due for the month of April on condition that they do not (i) **distribute any dividends** and (ii) **repurchase any shares** for the period from March 27, 2020 to December 31, 2020.

From this perspective, the notion of dividend was assessed by the Government in a broad manner. In particular, it includes interim dividends and exceptional distributions of reserves. The same applies to share buyback operations.

In order to assess whether a large company is eligible for this deferral request, it will be necessary to verify that the date on which the competent corporate body to decide the distribution of dividends or the share buyback happened **before March 27, 2020**.

What will happen if this condition is not complied with?

As it currently stands, the company will be subject to the late payment penalties applicable in the event of non-payment of taxes and contributions (**5% initial increase + 0.2% per month of delay**), as provided for in the tax legislation.

In addition, the Government has specified that the company will not be able to benefit from a time limit agreement for the extended deadline and will have to pay the unpaid amounts immediately.

Thus, a certain number of clarifications are still awaited on the various points presented above. Indeed, in the current state of the specific deferral request form and of the Government's announcements, what will happen to a large company having benefited from a deferral or rebate request in March (i.e. before the Government's announcements in early April), but proceeding with a dividend distribution or share buyback after 27 March 2020? Would it still benefit from the favorable measures in relation to March? Nothing is less certain!

Urgent clarifications are awaited on this last point in particular.

II - Expected easing related to VAT payments

Quite left behind by the exceptional measures taken by the Government since 13 March 2020, unlike some of our European neighbours, VAT now benefits from temporary easing measures aiming at simplifying the determination of the VAT due.

Beware however, unlike direct taxes, these measures do not allow the deferral or remittance of the VAT to be paid.

1 - In concrete terms, **companies subject to the normal VAT regime** (filing of monthly or quarterly VAT return), **unable to gather the required documentation to establish their March VAT return**, have the possibility to **estimate a flat amount of VAT to be paid** in the form of a deposit. To be noted that companies subject to the simplified VAT regime are not concerned by this measure.

Practically speaking, for the March VAT return filed in April, the advance payment can be determined as follows: (i) estimation of the VAT due for March and payment of a deposit equal to 80% of this estimation or (ii) payment of a deposit equal to 80% of the VAT paid in February 2020.

These instalments must be mentioned in box 5B of the VAT return. Moreover, in the absence of clarification by the French Tax Authorities, it seems necessary to us to indicate in the box dedicated for correspondence with the French Tax Authorities the reference « *Covid-19 advance payment, March 2020: application of the administrative tolerance* » (in French, « *Acompte Covid-19 mars 2020 : application de la tolérance administrative* »).

Even if this measure is welcome, some questions remain outstanding: does the French Tax Authorities reserve the right to carry out an *a posteriori* audit of these instalments, and if so, how would « *the inability of companies to gather the required documentation to establish their VAT returns* » be interpreted?

Furthermore, what about the regularization of the VAT effectively due? Finally, does this softening only concern the VAT due for March? Given the current context, it is likely that it also concerns the VAT due for April, but this remains to be confirmed.

2 - In addition, **companies that have experienced a decrease of their turnover** due to the Covid-19 crisis have the possibility to **pay the VAT due during the containment period based on a flat amount instalment** (to date, this measure concerns the **months of March and April**). It remains to be determined what the tax authorities understand as being “a decrease of turnover” in the event of a retrospective audit of the VAT returns.

This advance payment corresponds to **80% of the amount of VAT paid for the previous month** or **50%** in the event that activities have been stopped since mid-March (or if the decrease of turnover is estimated at 50% or higher). When proceeding with the deposit, the mention « *Covid-19 advance payment - Flat amount 80% of month xx* » must be indicated on the VAT return (in French, « *Acompte Covid-19 – Forfait 80% du mois xx* »).

To be noted that companies will have to regularize their situation in the VAT declaration filed after the confinement period in box 2C.

In conclusion, even if we can only welcome these measures which have a short-term beneficial effect for companies' cash flow, it is necessary to follow them assiduously, in particular, in view of the regular announcements which specify, or even condition, the benefit of these tolerances.

For this purpose, we continue to follow up on a daily basis, for you, the announcements of the public authorities, which may evolve in the coming days ...



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CORONAVIRUS COVID-19 - COMPANY LAW

What measures to prevent business failures?

March 20, 2020

While French households are beginning to organize themselves, French companies are seeking to protect themselves against the devastating financial effects of Covid-19.

As early as March 12, 2020, i.e. the date on which **French President Emmanuel Macron** announced the nationwide shutdown of childcare centers, schools and universities, the French Government started implementing an exceptional and massive partial unemployment mechanism as well as the possibility for all companies to defer the payment of social security contributions and taxes due in March 2020, without any penalty being due⁴.

A growing number of measures are being taken since the **French President** announced the confinement of the entire population across the territory, effective as of March 17.

Exceptional circumstances call for exceptional measures. It is indeed absolutely essential to protect and support companies during this highly critical period, until the crisis eases.

This protection and support involve not only a **temporary easing of the burdens** on companies, but also the possibility of **benefiting from external liquidity** to balance companies' operating accounts.

Many companies have already taken the necessary steps to defer the repayment of their outstanding bank loans⁵ and the payment of their charges and taxes⁶, and to implement partial unemployment⁷.

For the most affected Small- and Medium-Businesses, the Minister of the Economy and Finance has confirmed the suspension of water, gas and electricity bills as well as the payment of rent installments. Through these measures, the Government intends to limit as much as possible payment defaults which are the dreaded precursor to bankruptcy.

⁴ https://www.economie.gouv.fr/coronavirus-soutien-entreprises#https://minefi.hosting.augure.com/Augure_Minefi/r/ContenuEnLigne/Download?id=AA250A5D-9FF3-4C32-AAE6-3F07C19C8739&filename=987%20bis%20CP-ACOSS%20DGFIP.pdf

⁵ <https://www.impots.gouv.fr/portail/actualite/coronavirus-covid-19-mesures-exceptionnelles-de-delaix-ou-de-remise-pour-accompagner-les>

⁶ <https://www.economie.gouv.fr/mesures-exceptionnelles-urssaf-et-services-impots-entreprises>

⁷ <https://travail-emploi.gouv.fr/actualites/presse/communiqués-de-presse/article/coronavirus-covid-19-et-monde-du-travail>

Although the Minister of Justice has announced the shutdown of the courts – with the exception however of “essential litigation” that will continue to proceed – nothing has yet been specified concerning **commercial courts**. However, in the current fragile economic context, it is to be feared that there will be an influx of cases concerning distressed companies.

Commercial courts judges are awaiting clarification – which is hopefully imminent – from the **Ministry of Justice** on the measures and instructions to be implemented.

As the first line of support for managers before commercial courts in case of financial difficulties, **receivers, administrators and court-appointed agents**, in conjunction with the commercial court judges and magistrates and the **Ministry of the Economy**, will open a toll-free number (0 800 94 25 64) from Monday March 23 to advise companies on the actions to be taken and inform them of the various available support measures.

Procedures for the prevention of business difficulties such as the ad hoc mandate or conciliation procedures, designed to avoid receivership or compulsory liquidation through the conclusion of a confidential agreement to reschedule the company's debt, are still in force. However, their implementation should be reduced in view of the measures that have been adopted to make the payment of social security contribution, taxes and bank charges more flexible.

As early as March 15, the **French Banking Federation** announced that French banks were fully mobilized and presented the business support measures that had been decided by the banking institutions⁸.

In addition to these measures, the State should provide 300 billion euros in government loan guarantees to encourage the massive release of financings.

Invited by various media, Mr. Nicolas Dufourcq, Head of **BPI France** (France's State-backed investment bank), presented two days ago the aid scheme put in place for SMBs.

In practice, this mechanism takes two forms: the guarantee of private bank loans granted by banks and the granting of loans by BPI France, without guarantees, for a period of 5 years, which can go up to 7 or even 10 years.

The conditions for granting this type of financing are still to be defined and the French Parliament should quickly authorize a dedicated budget line. BPI France has reportedly already received nearly 3,600 applications from companies. Still according to the Head of BPI France, several tens of millions of euros in cash have already been injected.

⁸ Press release from the French Banking Federation:

<http://fbf.fr/fr/files/BMQP34/CP%20FBF%2015%20mars%202020%20-%20Coronavirus%20mobilisation%20totale%20des%20banques%20fran%C3%A7aises.pdf>

As the switchboard for toll-free number that had been created (0 969 370 240) has been very quickly saturated, it is recommended to go to the website www.bpifrance.fr.

As the situation is changing from day to day, we will keep you informed of further developments and details on the implementation of the arsenal of measures taken by the government. Stay tuned...



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CORONAVIRUS COVID-19 - CUSTOMS LAW

Are flows of goods included in the containment-related measures? Update on Customs measures related to COVID-19

March 20, 2020

While people see their freedom of movement drastically, but necessarily, restricted, the same cannot be said for goods that must continue to move: show must go on!

I- What about the free movement of goods within the EU?

The free movement of goods is not questioned. Both the European Commission and the Member States have communicated clearly to this effect.

However, in practice, emergency measures adopted by some Member States may necessarily affect the transport of goods between Member States since some borders (e.g. between Spain and France) may be closed or restricted.

II- And with non-EU countries, can we still import/export?

At this stage, no import/export restrictions have been promulgated for certain products or countries. Movement restriction measures do not apply to goods.

On the contrary, the movement of goods is well maintained, especially with the United States (i.e. the restrictions imposed only concern people), and China, since scientists consider that "the risk of being infected with the Covid-19 Coronavirus by touching an object imported from a risk area is considered to be extremely low".

In practice, some trade could of course be restricted (e.g. the port of Le Havre has decided to limit the arrival of ships, and the majority of cargo travels on passenger flights, which are also severely restricted), but there are no restrictions in principle and the time of stupor will necessarily give way to effective practical supply chain organization.

Finally, and given the current circumstances, personal protective goods such as masks and gloves, but also food products, should be subject to import flexibilities rapidly.

III- Is it still possible/necessary to carry out import and export customs clearance formalities?

Obviously, customs clearance formalities must be carried out independently of the current situation since any import/export must be subject to the filing of a declaration at all times.

In this sense, the administration continues to function remarkably:

- All customs declarations are computerized and the software work;
- The customs officials are currently in a teleworking system. A minimum service is therefore efficiently guaranteed.

IV- Is the payment of customs duties suspended or facilitated?

At this stage, the emergency measures taken by the French Government only concern direct taxes, but not customs duties or indirect contributions (excise duties, ICT, etc.).

Nevertheless, the Customs authorities has confirmed "that in case of emergency and in accordance with the regulations in force, situations will be studied on a case-by-case basis".

V- What about ongoing customs controls?

The ongoing controls are continuing, and new controls can be initiated, even if the administration is necessarily busy on other priorities.

Some practical situations:

- a) I have 15 days to provide documents or answer questions, do I have to do so?
- b) I have received a notice of the outcome of an investigation and have 30 days to make comments, is the deadline suspended?
- c) I have received a notice of payment following a notification of infringement, requesting payment within 10 days, is the time limit suspended?
- d) I have received an assessment notice; do I have to make payment or dispute promptly?

Please note that deadlines are always running and there is no general suspension. Nevertheless, the Customs authorities have confirmed that they will probably not oppose extensions of time limits given the context.

This is why we recommend, as a precaution, to request in writing and in a reasoned manner additional time limits (in particular for observations to notices of investigation results or assessment notice contestation), justified by the containment. For companies, their boards and the Customs Authorities, it seems preferable, except in emergencies, that the pre-litigation/litigation activity regains its full effect after containment.

This being said, it is important to continue the procedures in progress in order to avoid a harmful bottleneck when the situation has returned to normal and we recommend, if at all possible, to respond/advance as far as possible.

VI- What about ongoing Customs disputes in Courts?

As far as judicial and customs procedures are concerned (except for specific criminal proceedings), it has been agreed with the courts, the National Bar Association and professional associations, to request the postponement of all the proceedings scheduled for the next few weeks until the situation returns to normal.

For all scheduled hearings, we therefore recommend, as a precautionary measure, to request referrals and to follow the procedural deadlines, including during periods of confinement. Likewise, we recommend taking advantage of these calmer times to make progress on possible conclusions or draft writings in order to be reactive and avoid bottlenecks during the resumption.



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Exceptional business support measures and payment facilities

April 1, 2020

The customs administration provides for exceptional business support measures - Payment facilities to help economic operators through the health crisis: a broad scope and a remarkable action plan.

These measures have a very broad scope of application as they can :

- cover **all types of duties and taxes collected by the customs administration**, including customs duties, indirect taxes, internal consumption taxes, environmental taxes, etc. ;
- **be of any kind**: payment by instalments, adjustment, deferred payment, suspension, etc. ;
- cover several months (unlimited period at this stage);
- be **complementary to other measures** for deferring payment of a general nature (i.e. customs clearance procedures

On the other hand, in order to benefit from these measures, operators must meet certain **formal and substantive conditions**:

- as regards **form**, the operator must send the customs local office in charge of collection the **form** provided for this purpose - we recommend also sending an **explanatory letter justifying the economic need to obtain these measures**, with supporting figures ;
- on the **substance**, the request must be motivated by a critical situation and proven financial difficulties.

Each application will be analysed on a **case-by-case** basis by the customs authorities, which is quite exceptional and demonstrates remarkable adaptation.

Finally, we recommend that we should also "**take advantage**" of the **confinement to consider the implementation of optimisation measures** that already exist but are not used enough despite the proposals of the administration, in particular:

- the **benefit of suspensive customs procedures/reliefs** (storage, repair or transformation under suspension of duties and taxes for non-EU goods re-exported after these operations) ;
- the request for **reverse charge of VAT on imports** (cash flow gain);

- requests for **tariff suspension** (for cases of taxed imports when there is no supply in the EU);
- the benefit of **preferential origin** (reduced or zero customs duties) provided for in the Free Trade Agreements in force with certain countries (possible change of sourcing).



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CORONAVIRUS COVID-19 - COMMERCIAL LAW

What impact on your business contracts?

March 17, 2020

The question is on every business operator's lips: Does the Covid-19 pandemic make it possible to suspend or terminate one's obligations under a business contract to be performed in France by invoking the existence of a force majeure event?

It should be recalled that under French law force majeure allows a debtor who is unable to comply with his obligations due to an event that is unforeseeable on the day the contract is concluded, irresistibly happening and whose effects are unavoidable - i.e. an event beyond the debtor's control -, to be relieved from such obligations without any penalty being due.

Pursuant to Article 1218 of the French Civil Code, in contractual matters, *"there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor."*

This Article further stipulates that if contract performance is temporarily impossible, the performance of the obligation is suspended unless the resulting delay justifies the termination of the contract. If contract performance is permanently impossible, the contract is terminated by operation of the law and the parties are discharged from their obligations.

That being said, the parties are free to contractually determine precisely which events may constitute a case of force majeure, alter the meaning they give to it in their business relationships or even waive their right to invoke it.

Any business partner must therefore first of all check if the relevant contract includes a force majeure clause, if any adjustments on the meaning of force majeure has been agreed upon between the parties and what are the effects of such clause on their contractual relationship.

French Minister of Economy and Finances Bruno Le Maire declared that Covid-19 will be considered as *"a case of force majeure for companies"*, in particular for public procurement contracts. However, is this systematic for all business contracts?

While case law has already considered that an epidemic can be invoked by a business partner as being a case of force majeure, this epidemic must not have been known at the time of the conclusion of the contract and must have a causal link with the invoked contractual non-performance.

As such, the Covid-19 epidemic should be difficult to invoke as force majeure for contracts concluded from January 2020 onwards as this is the date on which the epidemic began to spread.

In any event, any business partner invoking force majeure will have to prove that the requirements necessary for force majeure to be established have been met, and should rely in this respect *inter alia* on the unprecedented scale of what has now become a worldwide pandemic, the difficulty in avoiding the effects of Covid-19 by circumvention measures and the measures taken by the authorities.

In addition to the existence of a case of force majeure, the impacted business partner may also wonder whether it is possible to request renegotiation of the terms of the contract on the basis of the theory of unforeseeability ("*imprévision*") provided for by French law.

Pursuant to Article 1195 of the French Civil Code, if a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party, that party may ask the other contracting party to renegotiate the contract. If renegotiation falls through, the parties may terminate the contract or ask the court to revise the contract.

In such a case, a business partner who is forced to implement particularly onerous measures to continue to perform its contractual obligations could invoke the existence of a case of unforeseeability.

Since the parties have full latitude to adjust in their contract the conditions governing unforeseeability, business partners should carefully analyze the relevant contract, verify the existence of such a clause and adjust the terms and conditions thereof.

In any event, before suspending or terminating its obligations, the business partner should closely analyze all the provisions of the relevant business contract in order to consider all the available measures and demonstrate its good faith in implementing any of them.



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Covid-19 and business contracts: What strategy to follow?

April 7, 2020

The current Covid-19 pandemic is affecting many economic operators operating in a variety of industrial sectors and raises questions about their ability to meet their contractual obligations.

While some wonder about the mechanisms that could be invoked to escape or adjust obligations, the performance of which has become difficult, excessively expensive or even impossible, others would like to block the implementation of such mechanisms.

The possibility for an economic operator to evade compliance with any of its obligations, to adapt it and, more generally, to be exposed to the risk of being held liable in the context of the current pandemic must be analyzed in the light of the contractual provisions and the specific features of the relationship.

1. Preliminary analysis

First of all and irrespective of the legal basis that might be invoked, it is recommended to carry out a careful review of the relevant contracts in order to determine the rights and obligations of each contracting party as well as any formality that might be applicable for the implementation of one or several contractual or legal provision(s).

In any event, the current circumstances related to the Covid-19 pandemic cannot in any way allow an unfair use of contractual prerogatives.

By way of examples, the following checks could in particular be carried out:

- the existence of essential provisions that may be affected by or implemented in the light of the current circumstances (for example, *force majeure* clause, unforeseeability ("*imprévision*") clause, renegotiation clause, adaptation clause, revision clause, etc.);
- the existence of specific formalities for any notification under the relevant contracts;
- the existence of information duties/requirements to be implemented due to changing circumstances;
- the possibility of fulfilling the relevant obligation by alternative means;

- the existence of any provision sanctioning non-performance or delayed performance⁹;
- the specifics of the dispute resolution clause, including any prior formal notice, in order to anticipate any possible litigation, etc.;

The co-contracting party must also consider whether the pandemic prevents performance of the obligations or whether it merely delays such performance.

Depending on the specific features of the relationship, an amicable renegotiation or adaptation of the contractual clauses in the interest of both parties could be envisaged, in particular by clarifying the difficulties faced by each party, and in particular by informing the other party of any possible local emergency regulations affecting it.

2. Can force majeure be invoked?

Under French law, in contractual matters “*there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of its obligation by the debtor.*”

As such, French courts traditionally use three criteria to establish the existence of *force majeure* in contractual matters and they assess these criteria on a case-by-case basis:

- irresistibility, i.e. the impossibility for the debtor to perform its obligation;
- unpredictability, i.e. the event could not reasonably have been foreseen at the time of the conclusion of the contract; and
- exteriority, i.e. the event is beyond the debtor's control.

As the parties to a contract may under French law adjust the events likely to constitute a *force majeure* event or even waive the right to invoke it, any claim of *force majeure* must be assessed in the light of applicable contractual provisions.

⁹ It should be specified that Ordinance No. 2020-306 of March 25, 2020 on the extension of deadlines expiring during the state of health emergency and on the adaptation of procedures during that same period, provides that the clauses sanctioning a debtor's non-performance (in particular, penalty payment, penalty clause, termination clause) are ineffective between March 12, 2020 and the expiry of a period of one month from the end of the state of health emergency

See online version of the Ordinance available in French only at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000041756550&dateTexte=20200406>

It will be necessary to check the possibilities offered to the parties regarding, for example, the suspension of the performance of the obligations and the definition of the circumstances allowing it.

In the absence of any specific clause, the provisions of the French Civil Code relating to *force majeure* will apply.

Regarding specifically the possibility of considering the Covid-19 pandemic as a *force majeure* event, it should be pointed out that French courts have been so far reluctant to consider that an epidemic may constitute a *force majeure* event. As such, H1N1 influenza, SARS, Chikungunya or the plague bacillus have not been considered as *force majeure* events¹⁰.

The magnitude and the seriousness of the current pandemic could however be factors that support the classification of Covid-19 as a *force majeure* event, particularly as regards its unpredictability.

In a recent decision, the Colmar Court of Appeals ruled on the *force majeure* nature of the Covid-19 pandemic¹¹. This being said, while this decision concerns administrative custody and special circumstances, it recalled that *force majeure* is assessed on a case-by-case basis.

In this respect, the contracting party invoking *force majeure* must demonstrate the existence of a direct causal link between the pandemic and the impossibility of performing its obligation and prove that it has taken all the necessary steps to prevent the event from occurring and to overcome the consequences once it has occurred¹².

It will also be necessary to demonstrate that the pandemic makes it impossible to perform the obligation in question, it being recalled that *force majeure* is not intended to apply in the case of a claim for a sum of money. In this respect, the *Cour de Cassation* (French Supreme Court) has held that “*the debtor of an unfulfilled contractual obligation of a sum of money cannot be relieved [from its obligation] by invoking a force majeure event*”.

In such a case, it would then seem more appropriate to enter into amicable discussions with the other party to the contract, or even to invoke a possible unforeseeability (“*imprévision*”) clause in order to request a renegotiation.

¹⁰ Court of Appeals of Besançon, January 8, 2014 – No. 12/02291; Court of Appeals of Paris, June 29, 2006 – No. 04/09052; Court of Appeals of Saint-Denis de la Réunion, December 29, 2009 – 08/02114; Court of Appeals of Basse-Terre, December 17, 2018 – No. 17/00739; Court of Appeals of Paris, September 25, 1998 – No. 1996/08159

¹¹ Court of Appeals of Colmar, March 12, 2020 – No. 20/01098: “*These exceptional circumstances, resulting in the absence of Mr. G. at today's hearing, have the character of force majeure, as they are exterior, unpredictable and irresistible, given the time-limit imposed for rendering judgment and the fact that, within that time-limit, it will not be possible to ascertain that there is no risk of contagion and that it will not be possible to have a [police] escort authorized to take Mr. G. to the hearing. Moreover, the Administrative Detention Center of Geispolheim has indicated that it does not have equipment that would enable Mr. G. to be heard by videoconference, which means that such a solution is not possible for this hearing either*”

¹² Court of Appeals of Rouen, September 16, 2004 – No. 03/01728

On the other hand, if it is really impossible to comply, for instance, with the obligation to produce as a result of the pandemic, in particular because operations can no longer be conducted due to the various measures taken by competent authorities which have for example disorganized a contracting party's business, it then appears conceivable to invoke the existence of a *force majeure* event.

In any event, the possibility of invoking *force majeure* must be assessed, in particular, with regard to the date of conclusion or renewal of the relevant contract. It must be specified that when the contract was concluded or renewed after the outbreak of the epidemic, it is to be feared that *force majeure* cannot be invoked since the situation was already known, and the unpredictability requirement would not be considered as fulfilled.

In such a case, an economic operator could nevertheless argue that all the public policy measures taken by the Government, involving in particular a closure of borders and the discontinuation of some business activities, constitute a so-called *act of the Prince* (i.e. an arbitrary decision of the Government) making it legally impossible for it to fulfil its obligations¹³, it being specified that the theory of an *act of the Prince* produces the same effects as *force majeure*.

Subject to specific contractual provisions, *force majeure* allows for a suspension of contractual obligations until the event ends whenever the impediment is temporary, provided however that performance of the obligation continues to be meaningful after the pandemic is over. In this case, the contractual obligations will be suspended without the co-contracting party being able to claim compensation for the damage suffered as a result of the suspension.

By contrast, when the impediment is permanent, for example because the goods are destroyed, the contract is automatically terminated. In a chain of contracts, it will thus be necessary to demonstrate for each contract the existence of a *force majeure* event.

Whenever obligations have been only partially performed, the two-fold question of (i) a possible refund of the sums already paid, and (ii) the release from the mutual obligations remaining to be performed will have to be thoroughly analyzed and a specific response will have to be given to each situation¹⁴.

¹³ By way of illustration, a decision of the public authorities having the effect of cancelling previously granted authorizations and permits in an unforeseeable and irresistible manner relieved the debtor from its obligation (3rd Civil Chamber of the *Cour de Cassation*, June 1, 2011 – No. 09-70.502)

¹⁴ As a reminder, Article 1229 §3 and §4 of the French Civil Code stipulates as follows: “Where the goods or services exchanged could only prove useful through the full performance of the rescinded contract, the parties must return all the items they have provided to each other. Where the goods or services exchanged proved useful as and when the contract was reciprocally performed, there is no need to return such items for the period before the last good or service that has not received consideration; in such case, the rescission is qualified as a termination. Returns must be carried out in the conditions provided for in Articles 1352 to 1352-9”

3. Can the theory of unforeseeability/hardship ("*imprévision*") be invoked?

Whenever an event does not meet the required conditions to successfully invoke *force majeure* but makes the performance of the obligation in question more expensive, or even impossible, the contracting party may, under the theory of unforeseeability (concept close to that of *hardship*), request a renegotiation of the contract, or even ask the court to order the judicial termination of the contract (Article 1195 of the French Civil Code).

While unforeseeability/hardship, just like *force majeure*, presupposes a change in circumstances that was unpredictable at the time of conclusion of the contract, that change does not, however, make performance impossible but only "excessively expensive" for one of the contractual parties. In our opinion, unforeseeability/hardship should thus apply where there is financial difficulty in performing the obligation.

This being said, since the concept of unforeseeability/hardship was introduced into the French Civil Code by Ordinance n°2016-131 on the reform of contract law, which provisions apply only to contracts concluded as from October 1, 2016, a distinction should be made between contracts entered into before October 1, 2016 and those concluded or renewed after that date.

To put it simply:

- For contracts concluded before October 1, 2016, the current provisions of the French Civil Code are inapplicable. As such, these contracts should be carefully examined to ensure that no other provisions can be invoked (e.g. a renegotiation clause).

It should be stressed however that while case law applicable prior to the 2016 reform of French contract law considered contracts to be intangible and that it was not within the courts' purview to modify/adapt them in the light of changing circumstances, it has nevertheless allowed on some occasions contracts to be adapted or even recognized that the parties had the obligation to renegotiate.

The contractual good faith requirement can indeed lead to an obligation to renegotiate the contract and the contractual liability of the party that does not comply with this obligation can be sought.

By way of illustration, French courts have accepted the possibility of adapting a contract when changes in economic circumstances have had the effect of unbalancing the general scheme of the contract, thereby depriving the commitment of one of the parties of any real consideration and rendering the obligation questionable¹⁵. Even more explicitly, the *Cour de Cassation* has even held that:

¹⁵ Commercial Chamber of the *Cour de Cassation*, June 29, 2010 – 06-67.369

“loyalty required to negotiate, if the memorandum of understanding proved difficult to implement, and to propose acceptable conditions”¹⁶.

In particular, in a case concerning a supply contract, French courts have invited the parties to renegotiate their contract and ruled that a legislative amendment, unpredictable for the parties, required a revision of the supply contract in the interest of the contracting parties. Specifically, the Court of Appeals of Nancy found that:

“The majority of French legal writers have, moreover, given a new dimension to the obligation to perform agreements in good faith, considering that “over and above individual interests, the contracting parties must be guided by a search for the common interest (or even the common good)” and

“individualistic ethics must partially give way to contractual justice, based on solidarity”¹⁷.

- For contracts concluded after October 1, 2016, it seems necessary to distinguish according to whether the contract contains a clause that adjusts, excludes or that does not provide for unforeseeability/hardship.

Where the contract contains a clause that adjusts the application of the concept of unforeseeability/hardship, the parties must refer to the provisions set forth in that clause because they will apply, unless they are invalid.

Indeed, French courts have consistently and strictly held that contractual provisions agreed upon between the parties should be first considered.

When the contract contains provisions that excludes unforeseeability/hardship, a revision of the contract on that basis is impossible and any attempt by a party to rely on it could be considered as bad faith performance.

If the contract does not contain a clause addressing the issue of unforeseeability/hardship, the provisions of the French Civil Code can apply.

In our opinion, whenever an economic operator intends to invoke unforeseeability/hardship, it is recommended that all contractual provisions be rigorously analyzed and that verifications be carried out to make sure that all required conditions are met.

¹⁶ Commercial Chamber of the *Cour de Cassation*, March 15, 2017 – 15-16.406

¹⁷ Court of Appeals of Nancy, September 26, 2007

If these conditions are met, it then seems possible to invoke hardship, it being specified however that the parties must continue to perform their contractual obligations.

This being said, the obligations arising from unforeseeability/hardship and the length of the negotiations that the implementation of hardship implies may be out of step with the economic interests of the parties.

Moreover, the public policy provisions set forth in Article 1104 of the French Civil Code on the obligation of good faith during the negotiation, formation and performance of contracts may also be invoked to induce a party to agree to renegotiate the terms of a current contract because of the unforeseen consequences of this unprecedented health crisis¹⁸.



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¹⁸ Article 1104 of the French Civil Code: "Contracts must be negotiated, formed and performed in good faith. This provision is a public policy provision"

COVID-19 and Business Contracts
Suspension and extension of contractual deadlines during the state of health emergency

April 8, 2020

One of the Ordinances adopted in furtherance of the Emergency Law of March 23, 2020 to deal with the Covid-19 epidemic provides – for a limited period of time – for (i) the suspension of the effects of clauses sanctioning contractual non-performance, and (ii) the extension of contractual deadlines for the termination or renewal of contracts¹⁹.

How long does the suspension period last?

The newly enacted rules apply to measures and time-periods which have expired or are due to expire between March 12, 2020 and the expiry of a one-month period from the end of the state of health emergency declared by the Government²⁰ (the “Suspension Period”).

It should be recalled that the state of health emergency began on March 24, 2020 and is currently supposed to last for a period of two months. On the date hereof, the Suspension Period therefore runs from March 12 to June 24, 2020. However, a subsequent extension of the state of health emergency leading to the extension of the Suspension Period cannot be excluded at this stage.

Which contracts are concerned?

In principle, all private law contracts are affected by the new rules adopted in the context of the health crisis, in particular contracts for the provision of services as well as distribution, supply or insurance contracts.

However, contracts, the deadlines of which have been subject to particular arrangements under the Emergency Law of March 23, 2020 or in application thereof, are excluded from the scope of these rules²¹.

¹⁹ Ordinance No. 2020-306 of March 25, 2020 on the extension of deadlines expiring during the state of health emergency and on the adaptation of procedures during that same period

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755644&dateTexte=20200401> (in French)

²⁰ Emergency Law No. 2020-290 of March 23, 2020 to deal with the COVID-19 epidemic

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746313&dateTexte=20200406> (in French)

²¹ The related financial and guarantee obligations mentioned in Articles L. 211-36 *et seq.* of the French Monetary and Financial Code are also excluded

These particular arrangements pertain, for example, to the termination of tourist travel and holiday contracts²² or, for micro-businesses, to the payment and termination of contracts for the supply of electricity, gas and water or the payment of professional and commercial rents²³.

What happens with periodic penalty payments and clauses aimed at sanctioning the debtor's non-performance?

During the Suspension Period, periodic penalty payments ordered by courts or administrative authorities as well as contractual clauses sanctioning the non-performance of an obligation within a given period are suspended.

In practical terms, periodic penalty payments, penalty clauses (i.e. contractual clauses, the purpose of which is to determine in advance the financial penalty applicable in case of non-performance of a contractual obligation by one of the contractual parties), termination clauses (i.e. contractual clauses providing for the automatic termination of the contract in case of non-performance of a contractual obligation by one of the contractual parties) and forfeiture clauses which should have been, or have started to be, effective between March 12, 2020 and the end of the Suspension Period are suspended. They will take effect upon expiry of a one-month period after the Suspension Period, insofar as the debtor has not performed his obligation in the meantime.

The course of periodic penalty payments and penalty clauses which started running before March 12, 2020 is suspended during the Suspension Period. They will become operative again the day after the end of this Suspension Period.

By way of example, a contract that was to be performed on March 25, 2020 and that provided for automatic termination in the event of non-performance on that date will not be terminated immediately if the debtor has not performed his obligation within the contractually fixed time limit. On the other hand, the termination clause will take effect if the debtor has still not complied with his obligation within one month following the end of the Suspension Period.

It should be specified that the other provisions of the contract continue to apply as a matter of principle²⁴. In particular, the payment of contractual obligations is not suspended and contractual payment installments must be respected.

²² Ordinance No. 2020-315 of March 25, 2020 on the financial conditions for terminating certain tourist travel and holiday contracts in the event of exceptional and unavoidable circumstances or *force majeure*)

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755833> (in French)

²³ Ordinance No. 2020-316 of March 25, 2020 relating to the payment of rent, water, gas and electricity bills for the business premises of companies, the operations of which are affected by the spread of the covid-19 epidemic

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755842&categorieLien=id> (in French)

²⁴ It being specified that ordinary legal provisions remain applicable, such as those relating to *force majeure* in contractual matters (Article 1218 of the French Civil Code) or unforeseeability ("*imprévision*") (Article 1195 of the French Civil Code): Cf. our articles

What happens with clauses that govern the termination or renewal of the contract?

The contractual period for terminating a contract or for notifying its termination or non-renewal, if due to expire during the Suspension Period, is extended by two months following the end of such Period.

For example, if a contract concluded on April 20, 2017 for a period of 3 years provides that it will be tacitly renewed unless terminated by one of the parties no later than 1 month before its end date (i.e. no later than March 20, 2020), each of the parties may still oppose to the renewal of the contract within two months following the end of the Suspension Period.



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entitled [COVID-19: What impact on your business contracts?](#) and [COVID-19 and business contracts: what strategy to follow?](#) published respectively on our Blog in March and April 2020.

CORONAVIRUS COVID-19 - CIVIL PROCEDURE

What implications for civil proceedings?

March 24, 2020

For several days now, the French have been observing a strict confinement following presidential and governmental instructions to stem the spread of the Covid-19 virus. There are many concerns and uncertainties remaining as to the outcome of this international crisis.

What is the impact of this situation on the French judicial life? Here is an update on the measures taken and envisaged with regard to civil proceedings.

As the epidemic was gaining ground, the Ministry of Justice issued a circular on March 14, 2020 concerning the adaptation of the criminal and civil court proceedings to the measures that have been taken to prevent and combat the Covid-19 pandemic.

The circular specifies that the essential missions in civil matters are to be maintained, i.e.:

- summary proceedings and the handling of civil litigation of an urgent nature;
- the protection of vulnerable persons.

For the last mission, it is specified that if the required appearance of the person to be protected through his/her placement under guardianship or curatorship cannot be ensured, a temporary judicial protection measure – which does not require the relevant person to be heard – may be ordered in case of emergency.

More generally, the aforementioned circular recalls the powers that are granted to judges to extend the time limits for proceedings, and invites as a matter of fact each court to establish for itself the conditions for the continuation or suspension of pending proceedings.

On Sunday March 15, 2020, French Minister of Justice Nicole Belloubet announced the implementation as from the following day of a plan for the continuation of court activities providing for the closure of all courts except for the handling of essential litigation, namely for civil matters:

- the hearings before juvenile courts and juvenile judges for the management of emergencies, in particular for educational assistance;

- summary proceedings before judicial courts for urgent matters, and urgent measures falling within the jurisdiction of family court judges (in particular buildings that threaten to collapse, eviction of a violent spouse);
- hearings before the *juge des libertés et de la détention civil* (civil liberty and custody Judge). (forced hospitalization, detention of foreigners).
- Standby service at juvenile courts, emergency educational assistance.

Apart from these essential disputes, hearings are postponed.

On March 16, 2020, the European Court of Human Rights (“ECHR”) took exceptional measures and decided to suspend for one month the six-month time-limit for the lodging of applications under Article 35 of the Convention European Convention on Human Rights.

More generally, the ECHR decided to suspend all pending proceedings for one month, effective from March 16, 2020.

As early as March 18, 2020, the National Council of Bars initiated discussions with the Minister of Justice in order to obtain the suspension of procedural deadlines.

As a result of these discussions, the emergency Bill to deal with the Covid-19 pandemic provides that the Government will be empowered to legislate by way of Ordinances to take all measures allowing, in particular, for the adoption of the following measures:

- The time limits, the non-observance of which may lead to nullity, voidness, extinction, limitations, unenforceability, forfeiture of a right, termination of an approval or authorization, or cessation of a measure may be adjusted, interrupted, suspended or their term may be postponed until three months after the end of the administrative police measures taken by the Government. These measures are reportedly applicable retroactively from March 12, 2020.
- The following set of rules may be adapted:
 - rules on territorial jurisdiction;
 - rules on court formation;
 - rules relating to time limits for proceedings and judgments;
 - rules on public access to hearings and on the conditions for holding hearings;
 - rules on the use of videoconferencing before the courts;
 - rules on the procedure for bringing cases before the courts;
 - rules governing the organization of adversarial proceedings before the courts.

The Bill was adopted by the French Parliament on Sunday March 22, 2020.

In this context, a temporary suspension of time limits for proceedings is envisaged by the Minister of Justice and could be put in place very quickly.



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French rules of civil procedure adapted to deal with the Covid-19 crisis

April 1, 2020

The Emergency Law to deal with the Covid-19 epidemic of March 23, 2020 (the “Emergency Law”) came into force on March 24, 2020, i.e. the date on which it was published in the Official Gazette. Article 4 of the Emergency Law declares health emergency throughout the national territory for a period of two months, i.e. until May 24, 2020.

Article 3 of the Emergency Law also empowers the Government to take, by means of Ordinances, the adaptation measures intended to put in place health emergency arrangements, under the conditions set out in Article 38 of the French Constitution.

As a result, the Government adopted 25 Ordinances on March 25, 2020.

In judicial matters, several Ordinances were issued to govern the organization of courts and procedures during this crisis.

In particular, the rules of criminal procedure were adapted by Ordinance No. 2020-303 of March 25, 2020²⁵ and rules applicable before administrative courts were amended by Ordinance No. 2020-305 of March 25, 2020²⁶.

Regarding specifically civil proceedings, two Ordinances have been adopted:

- Ordinance No. 2020-304 of March 25, 2020²⁷ on the adaptation of the rules applicable to the judicial courts ruling in non-criminal matters and matters related to homeowner association contracts (*contrats de syndic de copropriété*);
- Ordinance No. 2020-306 of March 25, 2020²⁸ on the extension of deadlines expiring during the state of health emergency and on the adaptation of procedures during that same period.

This article focuses on the two abovementioned pieces of legislation which have a significant impact on applicable time-limits and the conduct of civil proceedings (1) and the operation of judicial courts ruling in non-criminal matters (2).

²⁵ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755529&dateTexte=20200401>

²⁶ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755612&dateTexte=20200401>

²⁷ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755577&dateTexte=20200401>

²⁸ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755644&dateTexte=20200401>

1. The adaptation of time-limits and civil proceedings

The most notable measure in this exceptional legislative package is undoubtedly the introduction of an extension of procedural deadlines, which are to be understood in a broad sense.

Article 2 of Ordinance No. 2020-304 of March 25, 2020 provides as follows:

"Any act, appeal, legal action, formality, registration, declaration, notification or publication prescribed by law or regulation under penalty of nullity, sanction, lapse, foreclosure, limitations, unenforceability, inadmissibility, expiration, automatic withdrawal, application of a special regime, nullity or forfeiture of any right and which should have been performed/completed during the period mentioned in Article 1 shall be deemed to have been made in time if it has been made within a period which may not exceed, from the end of the aforementioned period, the period legally prescribed for taking action, within a maximum of two months.

The same shall apply to any payment prescribed by law or regulation with a view to the acquisition or retention of a right".

This provision is applicable for the **period from March 12, 2020 until the expiry of a one-month period from the end of the state of health emergency** (Article 1 of the aforementioned Ordinance). As indicated above, the Emergency Law, applicable from March 24, 2020, declared health emergency for 2 months, i.e. until May 24, 2020.

Consequently, the reference period covered by the Ordinance currently runs from March 12, 2020 to June 24, 2020. As such, any action that should have been taken within this period, but was not carried out until two months later, i.e. until August 24, 2020 (for the time being), will therefore be deemed to have been carried out on time.

Article 3 of Ordinance No. 2020-306 also provides for an automatic extension until the end of the two-month period following the end of the health emergency (i.e., for the time being, until August 24, 2020) of the following administrative or jurisdictional measures which would otherwise expire during that period:

"1° Interim, investigative, conciliation or mediation measures;

2° Prohibition or suspension measures that have not been pronounced as a sanction/penalty;

3° Authorizations, permits and approvals;

4° Measures to assist, help or support socially disadvantaged people;

5° Measures to assist in the management of the family budget".

Some provisions have also been adopted to clarify contractual relationships.

As such, Article 4 of Ordinance No. 2020-306 provides that penalty payments, penalty clauses, termination clauses and forfeiture clauses intended to sanction the non-performance of an obligation may not take effect during the period from March 12 to June 24, 2020, but only from one month thereafter, i.e. from July 24, 2020. Penalty payments and other similar clauses which took effect before March 12, 2020 shall also be suspended from March 12 to June 24, 2020.

Article 5 of the same Ordinance specifies that concerning deadlines for terminating and withdrawing from contracts which are to expire within the period from March 12 to June 24, 2020, those deadlines are extended by two months from the end of that period, i.e. until August 24, 2020.

2. The adaptation of the operation of judicial courts ruling in non-criminal matters

Needless to say that the functioning of the French justice system is of course very much affected by the current situation: except for emergencies, hearings are postponed and many courts have shut down.

To remedy this situation, and to avoid as far as possible a total paralysis of the operation of the French justice system, Ordinance No. 2020-304 of March 25, 2020 provides for a certain number of measures aimed at adapting the rules governing the operation of judicial courts ruling in non-criminal matters.

First of all, Article 2 of said Ordinance specifies that the extension of procedural time limits provided for under Ordinance No. 2020-306 of March 25, 2020 applies to all judicial courts ruling in non-criminal matters, with the exception of the following:

- the *juge des libertés et de la détention civil* (civil liberty and custody Judge) before whom specific legislative and regulatory rules apply;
- juvenile courts for which special provisions have been adopted (Articles 13 *et seq.* of the aforementioned Ordinance);
- attachments of real estate properties for which applicable time-limits have been suspended.

In addition, the measures for the protection of adults and victims of domestic violence are extended until August 24, 2020 (Article 12 of the aforementioned Ordinance).

Regarding the organization of French courts, the following measures have been adopted.

Territorial jurisdiction

The First President of the Court of Appeals is empowered to designate, pursuant to a court order, a court within its own jurisdiction to replace another court within the same jurisdiction that is unable to operate (Article 3 of the aforementioned Ordinance).

Postponement of hearings and production of procedural documents

The conditions in which hearings can be postponed are simplified and postponement can be carried out by any means, including electronic means (Article 4 of the aforementioned Ordinance).

Documents, written submissions and briefs may also be produced by any means, provided however that the principle of adversarial proceedings is respected (Article 6 of the aforementioned Ordinance).

Single judge

Rulings may, pursuant to a decision of the President of the court, be rendered by a single judge in first instance and on appeal (Article 5 of the aforementioned Ordinance) and the President of the court may also decide that the proceedings will be held with limited public access to court or even in chambers (Article 6 of the aforementioned Ordinance).

Use of videoconference and conference call

Hearings may take place by videoconference or even, if videoconference is impossible, by conference call, provided however that the technologies used must enable the identification of the parties, guarantee a good transmission quality and preserve the confidentiality of the exchanges between the parties and their lawyers (Article 7 of the aforementioned Ordinance).

Rulings without hearings

The court may also decide to issue rulings without any hearing being held, by following a procedure based exclusively on the parties' written submissions and briefs.

The parties will have 15 days to object to this procedure, except in case of urgent and expedited proceedings (Article 8 of the aforementioned Ordinance).

Filter for applications for summary proceedings

Regarding summary proceedings for interim measures, the court may, pursuant to an *ex parte* order, dismiss an application for summary proceedings if said application is inadmissible or does not meet the applicable requirements (Article 9 of the aforementioned Ordinance).

In our opinion, these new rules governing the organization and the operation of judicial French judicial courts should be viewed with caution by legal practitioners and litigants.

While they make it possible to ensure to some extent the continued operation of justice, they nevertheless entail a restriction of essential procedural principles such as the adversarial principle or the public conduct of proceedings. As for the possibility of “dematerialized” hearings, these will have to meet high security requirements.



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CORONAVIRUS COVID-19 - CRIMINAL PROCEDURE

French rules of criminal procedure have been adapted

April 9, 2020

In order to ensure the continued operation of French criminal courts necessary to maintain public order, the Government adopted on March 25, 2020 Ordinance 2020-303²⁹ (the “Ordinance”) in furtherance of the Emergency Law of March 23, 2020³⁰. The Ordinance adapts the rules applicable to courts ruling on criminal matters, an adaptation made necessary to face the current health crisis in France.

These derogations from the procedural rules usually applicable in criminal matters were taken primarily for obvious health reasons, in order to reduce physical contacts, but also to ensure the continued operation of the French public Justice System, a public service which, in the context of the minimum service due to all citizens, cannot afford to come to a complete standstill.

The provisions of the Ordinance are immediately applicable until up to one month after the end of the state of health emergency, as provided for in Article 4 of the Emergency Law of March 23, 2020.

Adaptation of applicable time limits

Chapter 1 of the Ordinance is devoted to the adaptation of the time limits initially provided for in the French Code of Criminal Procedure.

As such, Article 3 of the Ordinance provides that the time limits for prosecution and the time limits for sentencing are suspended as of March 12, 2020. Contrary to the interruption of time limits, suspension does not wipe out the period that has already elapsed. Consequently, the period elapsed before the suspension (i.e. before March 12, 2020) is to be taken into account in the calculation of the limitation period.

Article 4 doubles the time limits for exercising remedies provided for in the French Code of Criminal Procedure, which may not be less than 10 days (subject to exceptions specified by the Ordinance). As such, for example, the time limit for lodging an appeal is increased from 10 days to 20 days.

²⁹ [Ordinance No. 2020-303 of March 25, 2020 adapting the rules of criminal procedure adopted in furtherance of the Emergency Law No. 2020-290 of March 23, 2020 to deal with the Covid-19 epidemic](#)

³⁰ [Law No. 2020-290 of March 23, 2020 to deal with the Covid-19 epidemic](#)

This Article also relaxes strict procedural formalities by allowing to lodge an appeal before the Court of Appeals or the *Cour de Cassation* (French Supreme Court) by registered letter, return receipt requested, or by e-mail.

Receipt of the e-mails sent in this context to the courts must be acknowledged by the latter and are considered as received on the date of dispatch of the notice of receipt.

Specific arrangements for hearings

Article 5 of the Ordinance provides for the generalized use of videoconferencing which is normally exceptional and limited to the very specific situations provided for in Article 706-71 of the French Code of Criminal Procedure (i.e. only if the judge in charge of the proceedings or the President of the court deems it necessary, in the conditions strictly provided for in the Article in question, etc.).

The special feature of this derogatory provision under which videoconferencing becomes the rule rather than the exception is that the parties may not raise any objection whereas their consent is always required in normal circumstances.

Article 5 also specifies that if videoconferencing is technically or materially impossible, the use of any other means of electronic telecommunication is possible, as long as this is authorized by the Judge. Indeed, the Judge remains responsible for guaranteeing respect for the rights of the defense and the rules of adversarial proceedings, as the right to a fair trial is not to be prejudiced despite the current exceptional health circumstances.

It should also be pointed out that these provisions are not applicable to criminal courts adjudicating crimes but they are applicable to all other criminal courts.

Pursuant to Article 6 of the Ordinance, wherever it is impossible for a first-instance criminal court to operate normally, the First President of the Court of Appeals within the territorial jurisdiction of that court may designate another first-instance criminal court within the same territorial jurisdiction to take over the matters to be adjudicated. The replacement court thus designated shall then have the power and authority to rule on all cases that were pending on the date of entry into force of the First President's designation order.

Article 7 of the Ordinance authorizes the President of the court to restrict public access to hearing, in a coherent logic of limiting physical contacts.

Composition of the courts

Consistent with the same health approach, Article 9 authorizes the criminal investigation chamber, criminal courts adjudicating misdemeanors, the criminal appeals division and the special juvenile division to sit as a single judge, thereby derogating from the principle of collective decisions by a panel of judges.

Similarly, Article 10 of the Ordinance provides that the juvenile court may also sit as a single judge, i.e. without the presence of lay assessors. The same applies to the sentence enforcement court (Article 11 of the Ordinance).

Article 12 of the Ordinance stipulates that if an investigating judge is unable to fulfill his/her duties, a sitting judge may be called upon to replace him/her, pursuant to an appointment order of the President of court where the investigating judge works.

Police custody

In line with Article 5, Article 13 of the Ordinance provides that the 30-minute interview between a person in police custody or in customs detention and his/her lawyer may be conducted by electronic means of communication. Similarly, the assistance of the person held in police custody or in customs detention during hearings/examinations may be carried out via electronic communication.

The extended role of the lawyer during police custody, a recent breakthrough in French rules of criminal procedure, has been reduced and weakened – although it is essential since persons in police custody are in a particularly vulnerable situation where the physical presence of their lawyer is intended to be reassuring.

Pre-trial detention

In anticipation of a major disruption of the judicial activity of the courts, in particular in the time limits for investigations and hearings, Articles 15 to 20 of the Ordinance authorize the extension of the maximum time limits for pre-trial detention and house arrest. It is unfortunate to note that through these provisions, the Government does not take into account the increased risks of spreading Covid-19 within places of deprivation of liberty, which are already congested.

Inmate placement and enforcement of custodial sentences

Articles 21 to 29 of the Ordinance concerning inmate placement and the enforcement of custodial sentences depart from the provisions of the French Code of Criminal Procedure, in particular by authorizing the pretrial detention of persons indicted, under investigations or accused in prisons if *maisons d'arrêt* (i.e. detention centers for prisoners awaiting trial or sentencing, or those sentence to a short term of imprisonment) become congested.

This is obviously one of the major problems raised by the prison system crisis, as the risk of spreading contamination is very high because of the overcrowding in prisons and other places of deprivation of liberty.

Prosecution and sentencing of juveniles

Measures for the placement of juvenile offenders may, under Article 30 of the Ordinance, be extended upon expiry, for a period not exceeding four months. For the other measures provided for in the Ordinance of February 2, 1945 on juvenile offenders, the period of extension may not exceed seven months.



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CORONAVIRUS COVID-19 - CONTAINMENT MEASURES & STATE OF HEALTH EMERGENCY

Confinement: Measures taken by the Government and applicable penalties

March 24, 2020

On March 16, 2020, French President Emmanuel Macron decided to take exceptional measures to deal with the global Covid-19 pandemic that is spreading across France.

In this exceptional health context, what are the measures taken by the Government? What is the legal framework for such measures? What penalties for those who do not comply with the new rules?

The French Parliament has passed the health emergency Bill: What does this new legislation contain?

On Sunday March 22, 2020, the French Parliament definitively adopted the so-called “state of health emergency” legislation for two months (the “Law”). It has been published in the Official Gazette on March 23, 2020.

The Law creates a legal framework for the measures taken by the French Government since March 16, 2020. The extension of the state of health emergency for an additional period of more than one month can only be authorized by law, after the opinion of the scientific committee.

In practical terms, the state of health emergency allows the Prime Minister to take general measures by ways of Decrees, based on the report of the Minister of Health, to restrict or prohibit the movement of persons and vehicles; prohibit people from leaving their homes, subject to travels that are strictly essential for family or health reasons; order measures for the quarantine of persons likely to be infected; order measures for the placement and isolation of infected persons; order the closure of one or more categories of establishments opened to the public as well as meeting places with the exception of establishments providing basic goods or services; limit or prohibit gatherings in the streets and meetings of any kind; order the requisitioning of all goods and services needed to combat the health disaster; take temporary measures to control the prices of certain products made necessary to prevent or correct the tensions observed on the market for these products; take any measures allowing patients to be provided with appropriate drugs for the eradication of the health disaster; take any other regulatory measures by Decree in order to restrict entrepreneurial freedom.

The scientific committee is made up of eleven experts who make recommendations to the Executive for effective management of the health crisis.

The opinions of the scientific committee are made public and its chairman is appointed by Decree of the President of the Republic.

What are the measures taken by the Government since March 16, 2020?

Among the main measures taken by the President of the French Republic, confinement was certainly the one that was the most expected – but also the most feared – by French citizens. Who says confinement, says lockdown, social distancing and restrictions of individual liberties.

Indeed, non-essential outings have been banned since March 17, 2020 at noon, and for a minimum of 15 days.

There are some exceptions and derogations, but only if you are in possession of a derogatory travel form duly completed and signed. A different form is required for each outing. Needless to say that health professionals are not affected by these measures, as they must be able to travel freely to their place of work as many times as and whenever their job dictates.

The main exception concerns persons working in establishments authorized to remain opened to the public: food markets, food shops, pharmacies, gas stations, banks, tobacco shops and press distribution shops.

Any person working in an authorized establishment may travel between his/her home and place of work. Similarly, persons for whom teleworking is strictly impossible are allowed to travel to their place of work.

For all other people, derogations are possible, provided that they can present a form stating that they are travelling for:

- shopping for basic grocery supplies in authorized local shops;
- going to see a health professional;
- childcare or to help vulnerable people on the strict condition that so-called “*barrier gestures*” are duly respected (avoid contact, stay more than one meter away from each other, etc.);
- taking physical exercise only on an individual basis, around the home and without any gathering.

Any breach of these rules is punishable by a lump-sum fine of 135 euros.

This is a 4th class fine for violation of the travel ban or disregard of the obligation to carry a document justifying authorized travel.

Faced with too little compliance with governmental instructions during the first days confinement was in place, the Government decided to tighten sanctions. As such, in the event of repeated breaches of confinement rules, the lump-sum fine increases to 1,500 euros for a repeated offence within fifteen days of the first offence, and up to a maximum of 3,700 euros, plus a 6-month term of imprisonment and an additional term of community service in case of 4 repeated breaches within a period of thirty days.



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