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,

Jean-Luc Soulier
Managing partner
Soulier Avocats

Renaud Roquebert
Managing partner
LightHouse LHLF

Jean-Luc SOULIER
Managing partner
Jl.soulier@soulier-avocats.com
+33(0)1 40 54 29 29
+33 (0)6 72 72 91 26

Renaud ROQUEBERT
Managing partner
renaud.roquebert@lh-lf.com
+33 (0)1 76 70 46 16
+33 (0)6 79 65 96 10

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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 arrangements[1], 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.

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%

[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.

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.

Fabien POMART
Partner
f.pomart@soulier-avocats.com
+33 (0)1 40 54 29 29
+33 (0)6 10 32 69 94

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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…

Sara Bellahouel
Associate
s.bellahouel@soulier-avocats.com
+33 (0)1 40 54 29 29

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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 pandemic[2] 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 arrangement**[3] (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).

Sara Bellahouel
Associate
s.bellahouel@soulier-avocats.com
+33 (0)1 40 54 29 29

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Telework: Reminder of the obligations imposed on businesses

April 29, 2020

Given the unprecedented health crisis that we are currently experiencing, one of the key measures imposed by the Government to contain the Covid-19 epidemic is the massive and imperative use of telework for all types of employment positions that allow it.

The legal framework for telework has become considerably more flexible in recent years to support the development of this work arrangement in France.

As such, telework, whether on a regular or occasional basis, can be set up either by a collective agreement, or in the absence of such an agreement, by a charter drawn up unilaterally by the employer, after consultation with the Social and Economic Committee, if there is one; or finally – in the absence of such an agreement or charter – by common agreement between the employer and the employee.

The Macron Ordinance adopted on September 22, 2017 provides for an exception to the principle of prior agreement of the employee since "*in exceptional circumstances, notably the threat of an epidemic, or in case of force majeure, the implementation of telework can be considered as an adjustment of the employment position made necessary to allow the continued operations of the company and guarantee the protection of employees.* "

In its "Q&A" on the Covid-19 epidemic, the French Ministry of Labor confirmed that the use of telework, wherever there is an epidemic risk, does not require the agreement of the employee and does not require any particular formalities.

Although the use of telework has been significantly streamlined, the employer remains subject to specific obligations that must be complied with.

1. The employer must bear the costs of telework if such costs are considered as professional expenses.

This compensation can take several forms:

- direct payment of the costs related to telework;
- reimbursement upon production of the supporting documents such as phone bill, Internet bill, etc.;
- reimbursement through the payment of a flat-rate allowance covering all the expenses incurred by telework (heating, electricity, Internet, phone, etc.).

In the latter case, URSSAF[4] specified that the lump-sum allowance is deemed to be used in accordance with its purpose and is exempt from social security contributions up to an overall limit of:

- 10 euros per month for an employee who teleworks one day per week;
- 20 euros per month for an employee who teleworks two days a week;
- 30 euros per month for an employee who teleworks three days a week.

When the employee teleworks 5 days a week, the flat-rate allowance could thus be increased up to 50 euros per month.

Whenever the amount paid by the employer exceeds these limits, exemption from social security contributions may be allowed provided that the employee can prove that the professional expenses have been actually incurred.

2. Telework cannot be combined with the short-time work scheme

It is not possible to ask an employee to telework if he/she has been put on short time work. Such a combination is fraudulent and considered as concealed employment.

In addition to the criminal sanctions incurred by companies, the use of telework in this context could give rise to a dispute before the labor court in which employees who are on short-time work and teleworking would ask for backpays or even damages for concealed work or unfair performance of their employment contract.

3. The employer has the obligation to ensure the safety of its employees who telework

In respect of health and safety at work, companies have under French law a so-called *obligation de résultat* and not only an *obligation de moyens*[5]. As such, a particular attention should be paid in this respect.

[4] URSSAF (Unions de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales) is the body responsible for collecting social related contributions

[5] With an *obligation de résultat*, a party must fulfill a specific obligation or arrive at a specific result. With an *obligation de moyens*, the party must simply implement or use, to his/her best efforts, all necessary means in order to fulfill a specific obligation or achieve a specific result. In other words, concerning safety at work, the employer will be presumed liable from the sole fact that a professional risk occurred and caused harm to its employees

It should first be recalled that the occupational risk assessment sheet (*document unique d'évaluation des risques professionnels*, i.e. a document that must record the risks related to the activities of the company) provided for in Article R. 4121-2 of the French Labor Code must be updated due to the Covid-19 pandemic in order to take into account the new risks generated by the changes brought to the company's work organization, including those related to the widespread implementation of telework.

Companies must therefore be particularly vigilant with regard to the risks that telework can generate on the health and safety of employees during the lockdown.

In this respect, the French National Research and Safety Institute for the Prevention of Occupational Accidents and Diseases (*Institut national de recherche et de sécurité pour la prévention des accidents du travail et des maladies professionnelle* or "INRS") recommends that companies be more vigilant on the following points:

- the risk of isolation ;
- the risk of hyper-connection;
- the management of autonomy;
- the balance between professional and personal life;
- the monitoring of employee's activities;
- the role of middle managers;
- maintaining team spirit.

The INRS has listed actions to be implemented to mitigate the increased risks associated with the current lockdown, in particular for managers/supervisors and companies.

For the managers/supervisors, it is advisable to:

- ensure regular contact with each teleworker;
- increasingly respect the right to disconnection, even if the terms to enforce such right have not yet been discussed within the company. It is, in particular, about respecting decent working hours, especially concerning telephone communications;
- adapt the objectives and monitoring of teleworkers' activity to their particular working conditions;
- define the means of virtual meetings of the site and establish "rituals";
- pay special attention to the situation of non-teleworkers and find ways to maintain the link.

At company level, it is also necessary to:

- assist the managers/supervisors and help them carry out their assignment of supporting and coordinating the teams in this particular situation during which they are asked to be more vigilant and available in supporting and assisting employees;
- organize a remote assistance for the use of the computer and communication tools used for telework, as well as mobilize the company's IT maintenance teams.

Fabien Pomart
Partner
f.pomart@soulier-avocats.com
+33 (0)1 40 54 29 29
+33 (0)6 10 32 69 94

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Covid-19 and Amazon: Employers must involve staff representatives in the assessment of the risks and the preparation of the resulting health related measures

May 5, 2020

On April 24, 2020, the Versailles Court of Appeals handed down an insightful decision concerning the implementation of employee protection measures by employers in the current health context and lockdown imposed by the Government on March 16.

Ruling on an appeal lodged by the American giant Amazon against the order issued by the Nanterre Judicial Court on April 14, 2020, the Versailles Court of Appeals upheld the order in that it provided for a mandatory obligation to implement a comprehensive national health and safety prevention plan for employees, with prior consultation with staff representatives. This decision is in line with the need to reconcile the necessity to maintain a business activity with the preservation of employees' health.

This decision implies communicating the prevention plan to employees, who must be trained in the perfect implementation of such plan, as well as updating the so-called occupational risk assessment sheet (*document unique d'évaluation des risques professionnels*, i.e. a document that must record the risks related to the activities of the company) for each of Amazon's sites in France.

In the current Covid-19 health crisis, some Amazon employees have exercised their right of withdrawal. In addition, several alerts for serious and imminent danger were triggered, as employees considered that the measures taken by Amazon's management were insufficient to effectively protect their physical and psychological health.

Union Syndicale Solidaires (a trade-union) then summoned Amazon before the Nanterre Judicial Court in order to have the warehouses cease their business activity due to the gathering of more than 100 people simultaneously in a closed environment, or, as a subsidiary measure, at least reduce the activity to the sole receipt of goods, preparation and dispatch of orders for food, hygiene and medical products.

By order dated April 14, 2020, the Nanterre Judicial Court ordered Amazon to carry out, with the assistance of staff representatives, an assessment of the health risks and to implement the resulting measures. Pending the effectiveness of these measures, the business activity was to be reduced to the online marketing of products considered essential, subject to a penalty payment of 1,000,000 euros per day of non-compliance and per established infringement.

Following the appeal lodged by Amazon, the Versailles Court of Appeals upheld the order of the Nanterre Judicial Court in that it ordered Amazon, with the active participation of staff representatives, to carry out an assessment of the occupational risks inherent in the Covid-19 epidemic, and to implement measures resulting therefrom. Pending such implementation, the business activity has been limited to the receipt of goods and the preparation and dispatch of orders for basic products, including computer and office supplies which are essential for telework.

What lessons can be drawn?

First of all, it should be noted that the argumentation of *Union Syndicale Solidaires*, based on the violation of the prohibition of gatherings of more than 100 persons simultaneously, was dismissed by the Court of Appeals. This argumentation was based on Ministerial Order dated March 14, 2020[6] and Decree dated March 23, 2020[7]. The Court rightly pointed out that not only was Amazon's business activity not affected by this restriction, but above all that the Government had provided for the continuation of the business operations of companies that could not use telework, under strict compliance with the rules for the protection of the health and safety of employees. Consequently, this argument cannot apply to companies that continue to carry on their business activity, even if the conduct of such activity require the gathering of more than 100 persons in a closed environment, provided that the obligations relating to the assessment of risks and the introduction of protective measures have been duly complied with.

In addition, the Versailles Court of Appeals stressed the need for a sufficient and proportionate risk assessment and the implementation of appropriate health measures, pointing out incidentally the various (insufficient) measures taken by Amazon. The assessment must, as stated above, be carried out in collaboration with the employees and their representatives and address the psychosocial risks, in particular the stress caused by the need to continue working despites public authorities' orders to stay at home.

This necessarily entails a close collaboration with staff representatives, failing which employers risk being summoned – in the same way as Amazon was – for breach of their obligation to ensure the safety of their employees and to preserve their health. For companies which, like Amazon, operate several sites, the assessment of the risks and necessary measures must be carried out according to the specific features of each site: a general assessment for all sites would be insufficient and could be challenged. The Versailles Court of Appeals specified that the risk assessment would be of higher quality and more rigorous if the employer used external consultants to address medical, technical and organizational issues.

[6] https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041722917&categorieLien=id

[7] https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746694&categorieLien=id

Consequently, employees must be informed of, and trained in, the preventive measures adopted by their employer. For example, simply broadcasting slides on television screens in the break room and company's cafeteria is not enough to satisfy the obligation to provide information, which must be individualized according to the relevant workstations.

While no general ban on the use of e-commerce emerges from this decision, employers' attention should be drawn to the need to pay particular and scrupulous attention to the preparation of a risk assessment plan and related measures, in close partnership with staff representatives, in order to be fully in line with the applicable labor and employment provisions in this respect. Enhanced vigilance is needed in the context of the forthcoming general resumption of business activities scheduled for May 11, 2020. Indeed, employers who fail to do so would run the risk of having their employees invoke their right of withdrawal, thereby delaying the necessary resumption of business operations. As such, the above is both a health and an economic imperative.

Charlotte Desfontaines
Associate
c.desfontaines@soulier-avocats.com
+33 (0)4 72 82 20 80

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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 impôt.gouv. 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.

Renaud ROQUEBERT
Managing partner
renaud.roquebert@lh-lf.com
+33 (0)1 76 70 46 16
+33 (0)6 79 65 96 10

Clémence BAUCHÉ
Associate
clemence.bauche@lh-lf.com
+33 (0)1 89 33 93 35
+33 (0)7 70 26 79 75

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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.

Renaud ROQUEBERT
Managing partner
renaud.roquebert@lh-lf.com
+33 (0)1 76 70 46 16
+33 (0)6 79 65 96 10

Stanislas ROQUEBERT
Partner
stanislas.roquebert@lh-lf.com
+33 (0)9 72 44 38 94
+33 (0)6 63 85 26 86

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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 reel simplifié":

The refund of the VAT credit is claimed when filing the annual VAT return in the dedicated box.
This claim must be submitted:

- No later than the 2nd working day following 1 May, for the calendar year; or
- 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.

Renaud ROQUEBERT
Managing Partner
renaud.roquebert@lh-lf.com
+33 (0)1 76 70 46 16
+33 (0)6 79 65 96 10

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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 ...

Renaud ROQUEBERT
Managing partner
renaud.roquebert@lh-lf.com
+33 (0)1 76 70 46 16
+33 (0)6 79 65 96 10

Clémence BAUCHÉ
Associate
clemence.bauche@lh-lf.com
+33 (0)1 89 33 93 35
+33 (0)7 70 26 79 75

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Impacts of the Covid-19 sanitary crisis on the « Quick Fixes » Directive

27 April 2020

Businesses are now focusing on implementing the exceptional tax measures taken by the Government in order to optimally manage their cash flow. However, it should not be overlooked the fact that the Covid-19 crisis may have significant consequences regarding specific existing tax rules.
As a result, we focus our attention below on the consequences that the current health crisis may have on the application of the so-called « Quick Fixes » VAT rules applicable since January 1, 2020.

As a reminder, the « Quick Fixes » rules are based on three main points: (i) the call-of stock regime, (ii) the exemption of intra-Community supplies of goods and related proof of transport rules and (iii) the chain transactions.

I – Impact of the Covid-19 crisis on the call-of stock arrangements regime

Among the overall Quick Fixes rules, it appears that the call-of stock arrangements regime may be the most affected by the actual health crisis.

1 – As a reminder, the new regime provides that when goods are dispatched / transported by a taxable person A to another Member State in the view to being supplied at a later stage to an intended taxable person B, within 12 months of their arrival in that Member State, the transfer of the stored goods to B is treated as an exempt intra-Community supply by A (in the State of dispatch) and as a taxable intra-Community acquisition by B (in the State of arrival).

For this purpose, the following conditions must be met:

- Both the supplier and the intended acquirer are taxable persons,
- The supplier has not established his business, nor does he have a fixed establishment in the Member State to which the goods are dispatched or transported,
- The goods are transported from one Member State to another with a view to being supplied there at a later stage and after arrival to an intended acquirer,
- The intended acquirer is identified for VAT purposes in the Member State into which the goods are transferred,
- The intended acquirer's identity and VAT identification number are known by the supplier at the time when dispatch or transport begins,
- The supplier must file a recapitulative statement (i.e. exchange of goods declaration, the so-called Déclaration d'Echange des Biens in French),
- The goods cannot be imported or exported; only intra-Community supplies of goods are concerned by this regime.

If the above conditions are not met, the transaction will be subject to VAT in two steps:

- At the time of the dispatch by A to the Member State of B: realization of an exempt intra-Community supply by A and a taxable intra-Community acquisition by A in the Member State of B (generally entailing the need for A to register for VAT in that State);
- At the time of the transfer of stock to B: realization of a taxable local sale in the Member State of arrival of the goods carried out by A.

In the context of the Covid-19 crisis, the **risk of non-compliance with these new conditions may occur in two main cases**:

- **Termination of contracts**: unfortunately, this is today common practice. Practically speaking, in the event of the cancellation of the contract of deposit concluded between taxpayers A and B, in order for the new call-of stock arrangements regime to be continuously applied, it should be necessary for A to pre-identified a new intended acquirer in the Member State of B within the 12 month delay after the arrival of the goods. In practice, taking into account the current situation, it seems almost impossible.
- **Exceeded storage time**: in addition, due to the slowdown or even the stop of the goods flows traffic, **it is possible that the goods may be stored for a longer period than the 12 months planned**. Yet, the new regime expressly provides that the stored goods must be transferred within a maximum period of 12 months from the date of their entry into the Member State of arrival of the goods.

In both cases, **the conditions of the new regime might no longer be met** ... so that the subsequent transfer of the stocks would be **subject to VAT locally** in the Member State of arrival of the goods. This would also likely entail an obligation for A to register for VAT in that State.

2 – Furthermore, in order for this simplification scheme to apply, two declarative obligations must be fulfilled.Indeed, the supplier must keep (i) a **recapitulative statement** of the transferred goods comprising a description of these goods and the VAT identification number of the intended acquirer of the stocks (much known as the **Intrastat return**) as well as (ii) a **register** allowing the tax authorities to verify the correct application of the call-of stock arrangements.
As these new measures are of recent application, the practical implementation of all these reporting obligations was already raising questions before the current crisis. In this respect, the explanatory notes[8] published by the European Union authorities simply indicate **that different forms of registers could be accepted, notably electronic ones**. In the absence of specific communication on this point by the French tax authorities, it is to be hoped that such a format would be accepted in this particular time . Otherwise, keeping a typewritten register during a period of containment would really complicate the task of taxpayers.
Either way, taking into account the upheaval in work organization methods, to be compliant with these reporting obligations is undoubtedly more complicated. However, the Quick Fixes Directive (EU Council Directive 2018/1910 of December 4, 2018), as well as the explanatory notes published in December 2019, obviously **do not provide for a derogation regime concerning these obligations in relation to the current pandemic**.

[8] Explanatory Notes on the EU VAT changes in respect of call-off stock arrangements, chain transactions and the exemption for intra-Community supplies of goods ("2020 Quick Fixes").

As of now and in the post-crisis period, it is therefore necessary to be particularly vigilant to ensure compliance with the above-mentioned conditions, and especially to set up a rigorous monitoring of these operations in order to be prepared to regularize any operations that would not be strictly compliant with the new call-of stock arrangements conditions.

II – Impact of the Covid-19 crisis on the new exemption of intra-Community supplies of goods regime

In order to control intra-Community supplies of goods, the European Union has tightened the conditions for exempting intra-Community supplies (Livraison Intra-Communautaire, « LIC » in French) by making taxpayers responsible to report information about these transactions and provide significant evidence.

1 – In particular, to be exempt from VAT, the intended acquirer of the stored goods must communicate to the supplier its VAT identification number and the latter must ascertain the validity of this number.

Even if the new work systems introduced in response to containment (e.g. short-time working or teleworking measures) will undoubtedly disrupt the logistical organizations of companies, it is and will remain crucial to verify, as soon as possible, the validity of the VAT identification numbers provided by acquirers. To this end, a global monitoring file of the overall intra-Community supplies of goods carried out during the crisis should be kept in order to track, on a daily basis, the verification status of these VAT numbers (and retroactive verifications if this was not done during the crisis).

2 – Exemption from VAT of the LIC is also conditional on the effective dispatch / transport of the goods from one Member State to another Member State. To ensure it, the Quick Fixes Directive presumes that such dispatch / transport has been made when some specific evidence of the transport have been communicated by the supplier or the intended acquirer depending on whether one or the other is responsible of the transport.

For example, the vendor must provide as proof of transport a shipping note, or official documents issued by a public authority such as a notary, confirming the arrival of the goods in the Member State of destination. On the other hand, where the acquirer is responsible for the transport, he must provide, for example, a written statement to the supplier, confirming that the goods have been transported by him, by the tenth day of the month following the supply.
Many companies and plants are forced to close during the containment period. Therefore, it is unlikely that such evidence can be provided quickly given the relatively short time allotted. Once again, it should be appropriate to keep an accurate and rigorous tracking of the intra-EU operations that continue to be realized, and those that will be carried out when business will resume, so that adequate evidence can be gathered as quickly as possible.

III – Impact of the Covid-19 crisis on the chain transactions regime

This regime, which allocates transport to one of the successive supplies of goods between different operators, seems to be the one that could be least affected by the health crisis.

However, the **same difficulties of providing evidence of transport** by taxpayers and in **communicating their VAT identification numbers** may arise. In addition, the **same issues of reviewing or even terminating transport contracts** will necessarily impact the identification of the supply of goods to which the transport will be attributed and therefore the VAT exemption.

Conclusion

Therefore, even if other issues need to be addressed urgently, we believe it is essential to **document, as much and as far as possible, contractual changes within the supply chain** (see our dedicated article on this issue in relation to transfer pricing policies), as well as to carefully **monitor the receipt of transport evidence and the procurement of VAT identification numbers from commercial partners**.

Otherwise, in the event of a tax audit, the financial consequences could be significant (VAT registration in the Member States concerned, VAT adjustments and application of related penalties). At this stage, n**o communication has been made on the impact of the Covid-19 crisis on the "Quick Fixes" rules** by either the European Union nor the French tax authorities. In this context, and in order to avoid any unpleasant surprises once the crisis will be over, we recommend to **remain vigilant on the application conditions of the above rules, and to set up, as of now and during the post-crisis period, a more stringent monitoring of operations than usual**.

However, it is to be hoped that easing measures will be taken by the tax authorities. In this respect, for you, we continue to analyze European and French announcements on a daily basis.

Renaud ROQUEBERT
Managing Partner
renaud.roquebert@lh-lf.com
+33 (0)1 76 70 46 16
+33 (0)6 79 65 96 10

Clémence BAUCHÉ
Associate
clemence.bauche@lh-lf.com
+33 (0)1 89 33 93 35
+33 (0)7 70 26 79 75

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Impacts of the Covid-19 sanitary crisis on the financing methods: focus on the debt write-offs

28 April 2020

In the current context of the Covid-19 crisis, companies facing difficulty are looking for efficient solutions to limit the financial consequences arising from this crisis. If they can already benefit from payment facilities and other fiscal measures urgently adopted by the French Government, existing mechanisms improving their cash flow can also be put in place.

The financing of a company in poor financial health can be achieved through a variety of instruments with distinct aims: injection of cash into the treasury or debt relief.

When the goal is to reduce a company's debt, debt waivers may be appropriate. This operation may take the form of a subsidy, an interest-free loan and, in most cases, a debt write-off.

These days, where many activities have partially, or even totally, shutdown, debt waivers may be an interesting option for companies in order to maintain sales relationships and ensure the continuity of their activity as much as possible. However, before implementing such a mechanism, in order to prevent from any reconsideration by the tax authorities in the event of future tax audits, two main issues should / must be analyzed: (ii) the justification of the commercial nature of the waiver and (iii) its consequence, the partial or even total exclusion of this debt waiver from the charges of the supporting company.

I- Overview of the debt write-off notion and its tax treatment

The debt waiver is defined by the French Tax Authorities (« FTA ») as «*the renouncement by an enterprise to exercise its rights granted by an existing receivable*» [9].

From a tax perspective, two types of debt write-offs should be distinguished:

- The debt waiver **with commercial nature** originating in commercial relationships between companies and granted, notably, to maintain market opportunities or preserve sources of supply.
- The debt waiver **with financial qualification** granted with the aim of financially supporting an entity and no commercial purpose.

The characterization of the commercial or financial nature of the debt write-off is essential as it has an impact on its tax treatment.

[9] BOI-BIC-BASE-50-10,1.

In that respect, as regards **the waiving company**, where the debt waiver is of a **financial nature**, the corresponding charge will **not be deductible for tax purposes** unless the company benefiting from the waiver is subject to collective proceedings, or up to the negative net worth of this entity (see point III below).

As regards **the waiver benefiting company**, « *the debt waiver necessarily leads to a reduction in the liabilities of the debtor and, correspondingly, to an equivalent increase in its net assets* »[10]. Consequently, the amount of the waiver constitutes **a taxable revenue** at the standard corporate income tax rate.

II- Difficulties arising from the justification of the debt write-off's commercial nature between affiliated entities: disregardment of the notion of « group interest »

As a tax principle to any deduction of charges, the company granting the debt waiver must demonstrate that it constitutes a **normal act of management**.

Generally speaking, case law deems to be abnormal any act of management which consists in booking an expense or loss, or depriving a company of a revenue, without any justified commercial interest.

However, the **principle of non-interference** of the FTA in the management of a company enters into direct confrontation with the above point. As a result, the burden of proof of the abnormality of a management act lies on the tax authorities. Nevertheless, the proof is deemed to be provided when the taxpayer is unable to justify the expense arising from the waiver in its principle and in its amount.

1 – Thus, before any substantive discussion**, it is necessary for the write-off to be recorded in the accounts** as an « *expense* » in the P&L of the waiving company and as an « *income* » in the books of the benefiting entity. Otherwise, the **tax risk** would be the **requalification of the waiver as a liberality** so that the corresponding expense would have to be integrated in the taxable result of the waiving company. In this context, it is critical for the taxpayer to correctly account the waiver.

2 – Meanwhile, to support the normal nature of the write-off, a detailed documentation will have to be kept in order to **justify the self-interest of the waiving company**.

This self-interest is assessed on a case-by-case basis. To this end, the FTA and case law focus on several criteria such as the nature and amount of the debt waived, the effective motivations for the waiver and « the existence of tangible and sufficient consideration »[11].

[10] BOI-BIC-BASE-50-20-20, 1.

[11] BOI-BIC-BASE-50-10, 80.

In this context, is considered as relying on normal management, the waiver of rent granted by a lessor to its lessee, whose financial situation is temporarily deteriorated[12], the write-off allowing the preservation of an asset such as a brand[13] or to avoid the judicial liquidation of the benefiting company[14].

Taking into account the above, the commercial character of the write-off is therefore based on (i) the **existence of commercial relationships** between the granting and benefiting companies and (ii) the **write-off motivation** enabling the benefiting company to proceed with its **economic activity**.

3 – Such a debt waiver may also be carried out between affiliated companies (sister companies or between a subsidiary and its parent company). However, this circumstance does not alter the assessment of the normal nature of the waiver.

Consequently, like debt write-offs granted between legally independent companies, **only the self-interest of the waiving company justifies the deduction of the debt waiver**. Case law considers that the **general interest of the group is not in itself sufficient** to justify the normal nature of the write-off.

Hence, a subsidiary has no interest of its own in waiving a claim on its parent company so that the latter can itself waive a claim on another of its subsidiaries without any commercial or financial links between these sister companies[15]. Similarly, the existence of a longstanding business relationship between two companies having a common shareholder does not, in the absence of any other **consideration**, constitute sufficient justification for granting a no-interest loan[16].

Practically speaking, in relationships between related companies, **the line between the financial and commercial nature of the waiver is very tight**. In this context, the FTA rigorously examine whether the write-off is, in fact, intended to be financial rather than commercial. Consequently, there is only few case laws accepting the interest of the waiving company as a justification for the commercial purpose of the aid[17].

No communication or measure taken by the French Government **suggest that such criteria would be eased** in the context of the current health crisis. Thus, taking into account the uncertainty in which we are living, we can only recommend that companies, related or not, wishing to carry out such

[12] French Administrative Supreme Court « Conseil d'Etat », 16 June 2004, n°235647.

[13] Conseil d'Etat, 10 February 2016, n°371258.

[14] Conseil d'Etat, 26 June 1992, n°68646.

[15] Conseil d'Etat, 19 December 1988, n°55655.

[16] Conseil d'Etat, 4 February 1974, n°92009.

[17] See notably, Conseil d'Etat, 7 February 2018, n° 398676: « *waivers granted by a parent company to its subsidiaries where the parent company's turnover was almost exclusively provided by services invoiced to companies it controls, characterizing a commercial relationship* ».

waivers, draft a **robust and detailed documentation** to justify the normal nature of the write-off and highlight the self-interest of the waiving company.

In addition, particular attention should also be paid to waivers in the event of **modification of the transfer pricing policy** implemented in the context of the health crisis (on this subject, you can read a detailed article on the necessary adaptation of transfer pricing policy in the current crisis context, on LightHouse LHLF website).

This justification is even more important as, since 1 January 2019, there is no longer any tax neutrality for such waivers granted within a tax consolidation group.

However, it could be observed a glimmer of hope following the **promulgation, on 26 April 2020, of the 2020 Amending Finance Lax for**[18] providing for a new derogatory case of **deductibility of rent waivers**. Article 39 of the French Tax Code (« FTC ») adds the possibility for lessors to **fully deduct rent waivers** granted between April 15 and December 31, 2020, relating to buildings leased to a company. At the same time, such waivers are **not taxable** for the beneficiary company. However, this measure does not apply when the waiver is granted between related entities within the meaning of Article 39, 12[19] of the FTC.

III- The necessary softening of financial waivers in the context of the Covid-19 crisis

1 – While a commercial waiver is fully deductible, **a financial waiver is excluded, for its full amount, from the deductible expenses** of the waiving entity.

However, it must be kept in mind that the deductibility of a non-commercial waiver may be subject to a tax deduction **limited in its amount** up to the negative net worth position of the benefiting company assessed after the waiver.
2 – It should also be reminded that **a waiver may be deductible when it is granted to a company which is subject to collective proceedings** (i.e. backup procedure, judicial statement, compulsory liquidation or insolvency proceedings) and when it is justified by the financial interest of the assisting company[20].

Therefore, the deduction of financial waivers is allowed only when it is **generally too late,** as the benefiting company is probably not in a position to meet its financial obligations. In the future, and especially in the current economic context, this may have **negative financial impacts** on the safeguarding of the activity of the waiving company itself.

3 – Finally, as regards the benefiting company, **the write-off may not be included in its taxable income** if (i) the waiver is granted by a **parent company** (holding at least 5% of the subsidiary's capital) and (ii)

[18] 2020 Amending Finance Law, n° 2020-473, 25 April 2020.

[19] « *A non-arm's length relationship shall be deemed to exist between two companies (i) where one of them holds, directly or through an intermediary, a majority of the capital stock of the other, or in fact exercises decision-making power in the other, or (ii) where they are both, under the control of the same third company* ».

[20] BOI-BIC-BASE-50-20-10, 63.

the subsidiary undertakes to **increase its capital to the benefit of the waiving company** by an equivalent amount **before the close of the second following financial year**[21] (in practice, for a waiver granted during April 2019, the capital increase must be completed no later than the close of the 2021 fiscal year).

Conclusion

Even though **the debt waiver mechanism** could be seen as an **opportunity** for companies wishing to provide financial support to related companies or commercial partners, **particular attention** must be paid to ensure compliance with the tax conditions regarding the deductibility of such write-off.
This scrutiny must be formalized through a **solid accounting and tax documentation** which will justify the normal management of the waiving company in any future tax audits

In any case, taking into the current period, limiting the tax deductibility of waivers to situations involving collective proceedings appears very harmful. In this context, and **in the lack of any easing measures regarding write-off's tax rules**, we would only be able to note the **increasing of the companies' financial difficulties.**

However, it is hoped that the FTA, during post-crisis tax audits, will look with indulgent eyes debt waivers granted during the crisis.

Renaud ROQUEBERT
Managing Partner
renaud.roquebert@lh-lf.com
+33 (0)1 76 70 46 16
+33 (0)6 79 65 96 10

Clémence BAUCHÉ
Associate
clemence.bauche@lh-lf.com
+33 (0)1 89 33 93 35
+33 (0)7 70 26 79 75

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[21] Article 216, A of the French Tax Code.

CORONAVIRUS COVID-19 – CORPORATE LAW

Extension of deadlines for the approval of the accounts of private law businesses

April 28, 2020

Adopted in furtherance of the Emergency Law No. 2020-290 of March 23, 2020 to deal with the Covid-19 epidemic, Ordinance No. 2020-318 dated March 25, 2020 *adapting the rules relating to the preparation, closing, audit, review, approval and publication of accounts and other documents and information that private law legal persons and entities without legal personality are required to file or publish in the context of the covid-19 epidemic* has introduced temporary exceptional derogations, particularly with regard to the approval of accounts.

First of all, it should be recalled that the scope of application of Ordinance No. 2020-318 (the "***Ordinance***") is quite broad since it applies to all legal persons and groups without legal personality governed by private law (the "***Concerned Entities***"), in particular:

- civil and commercial companies (*sociétés anonymes*, i.e. joint stock companies, *sociétés par actions simplifiés*, i.e. simplified joint stock companies, *société à responsabilité limitée*, i.e. limited liability companies, *sociétés en nom collectif*, i.e. general partnerships, etc.),
- associations, foundations and endowment funds,
- economic interest groups and European economic interest groups,
- cooperatives,
- supplementary health insurance funds and groupings of supplementary health insurance funds, etc.

However, some provisions of Ordinance No. 2020-318, have a much narrower scope of application, such as Article 2 thereof which only applies to commercial companies in liquidation.

In our opinion, one of the key measures of the Ordinance is included in Article 3 which provides, in particular, that for Concerned Entities, the deadlines imposed by laws or regulations or by the by-laws for the approval of the accounts or the convening of the meeting of shareholders/members responsible for such approval, are extended by three (3) months.

The report to the President of the French Republic concerning the Ordinance specifies, with regard to Article 3 thereof, that "*the purpose of these provisions is to take into account the situation of companies and entities for which the preparation/audit of the accounts was in progress at the time the administrative measures came into force and which could not be completed within a period of time compatible with the holding of the general meeting, insofar as the accounting documents may no longer be accessible*".

This automatic extension implies, however, that two (2) conditions be met. These provisions are indeed only applicable to Concerned Entities:

- that close their accounts between September 30, 2019 and the expiry of a period of one month following the end of the state of health emergency, i.e. 24 June 2020[22] (unless the state of emergency is extended) on the one hand, and

- whose statutory auditor, wherever the Concerned Entity has one, has not already issued its report on the accounts prior to March 12, 2020 on the other hand.

As an example, a *société par actions simplifiée* (simplified joint stock company) closing its accounts on December 31 of each year, and whose by-laws provide that the approval of the accounts must take place within five (5) months from the closing of the accounts, i.e. by May 31, 2020 at the latest, therefore benefits from a an additional period of three (3) months to approve its accounts.

As such, the company in question will thus have until August 31, 2020 to have its accounts approved by its shareholders(s).

In the event, however, that the simplified joint stock company has appointed a statutory auditor and that the latter has already issued its report on the accounts before March 12, 2020, the company will not be able to benefit from the three (3) month extension measure to approve its accounts.

If the conditions imposed by the Ordinance to benefit from the automatic three (3) month extension period are not met, or if it is necessary for the company to postpone the approval of its accounts beyond such three (3) month period, a time extension must be requested by the corporate officers under the conditions provided for under normally applicable rules, i.e. through a petition to the President of the Commercial Court.

The Ordinance also provides for the extension of other time limits with a more specific scope, including *inter alia*:

[22] The end date of the state of health emergency, as set forth by Article 4 of the Emergency Law No. 2020-290 of March 23, 2020 to deal with the Covid-19 epidemic is currently scheduled on May 24, 2020.

- within a *société anonyme* (joint stock company) closing its accounts between December 31, 2019 and June 14, 2020[23], the deadline for the presentation by the management board to the supervisory board, for verification and control purposes, of the documents mentioned in Article L 225-100, I§2 of the French Commercial Code (annual accounts, management report and corporate governance report) is extended by three (3) months[24],

- the deadline for the preparation, by the liquidator of a commercial company closing its accounts between December 31, 2019 and June 24, 2020[25], of the annual accounts and the written report in which he/she provides an account of the liquidation proceedings during the past financial year is extended by two (2) months[26],

- the deadline for the preparation of certain documents relating to the accounts or semesters closed between November 30, 2019 and June 24, 2020[27] by the corporate officers of commercial companies employing at least 300 employees or having achieved net revenues of at least 18 million euros (situation of realizable and available assets and current liabilities, forecast profit and loss account, cash flow statement, annual balance sheet, forecast financing plan) is extended by two (2) months[28], and

- the deadline for the submission of a financial report on the accounts closed between September 30, 2019 and June 24, 2020 by a private-law body which is the beneficiary of a grant for a specific expenditure exceeding an annual threshold of 153,000 euros, is extended by three (3) months[29].

Finally, it should be noted that another special piece of legislation has been adapted as a matter of urgency to adapt the rules relating to the holding of meetings of companies and other groupings under private law in order to deal with the exceptional situation resulting from the strict lockdown imposed by the Covid-19 epidemic, i.e. Ordinance No. 2020-321 of March 25, 2020 *adapting the rules*

[23] i.e. one month after the end of the state of health emergency currently scheduled on May 24, 2020 (unless the state of emergency is extended)

[24] Article 1 of the Ordinance

[25] i.e. one month after the end of the state of health emergency currently scheduled on May 24, 2020 (unless the state of emergency is extended)

[26] Article 2 of the Ordinance

[27] i.e. one month after the end of the state of health emergency currently scheduled on May 24, 2020 (unless the state of emergency is extended)

[28] Article 4 of the Ordinance

[29] Article 5 of the Ordinance

governing the meetings and deliberations of meetings and governing bodies of legal persons and entities without legal personality governed by private law as a result of the Covid-19 epidemic.

Florence Grangerat
Counsel
f.grangerat@soulier-avocats.com
+33 (0)4 72 82 20 80
+33 (0)6 84 98 81 59

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CORONAVIRUS COVID-19 - BUSINESS 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 due30.

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 loans31 and the payment of their charges and taxes32, and to implement partial unemployment33.

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.

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[30] 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

[31] https://www.impots.gouv.fr/portail/actualite/coronavirus-covid-19-mesures-exceptionnelles-de-delais-ou-de-remise-pour-accompagner-les

[32] https://www.economie.gouv.fr/mesures-exceptionnelles-urssaf-et-services-impots-entreprises

[33] https://travail-emploi.gouv.fr/actualites/presse/communiques-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 institutions34.

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.

[34] 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…

Catherine NOMMICK
Partner
c.nommick@soulier-avocats.com
+33 (0)4 72 82 20 80
+33 (0)6 37 23 44 06

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CORONAVIRUS COVID-19 – FOREIGN INVESTMENTS

Covid-19: What consequences on foreign direct investments?

April 29, 2020

In the context of the Covid-19 epidemic and its impact on the European Union's economy, the European Commission published on March 26, 2020 a communication designed to alert Member States to the need to protect strategic European assets from foreign direct investments.

While reaffirming the European Union's openness to foreign investments, which is essential to its growth and competitiveness, the European Commission encourages Member States to protect assets that cover the health needs of their citizens (in particular the production of medical and protective equipment, medical research activities) and, more generally, to safeguard Europe's strategic capacities.

On March 26, 2020, the European Commission presented its "Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI[35] Screening Regulation)"[36].

"*The Covid-19 outbreak has highlighted the need to preserve and enhance the sharing of such precious capacities within the single market, as well as with those who need them elsewhere in the world. In this context, acquisitions of healthcare-related assets would have an impact on the European Union as a whole*" explained the European Commission on March 26.

As such, it called upon Member States (i) to make full use already now of their domestic FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors, and (ii) for those Member States that currently do not have a screening mechanism, to set up a full-fledged screening mechanism or to use all other available tools.

At the European level, a common legal framework for Member States, stemming from Regulation (EU) 2019/452 of March 19, 2019, introduces a screening of direct investments from non-EU countries and establishes a cooperation mechanism between Member States. It will enter into force on October 11, 2020.

This screening aims at coordinating, at the level of the Member States, the control of acquisitions by foreign investors and taking into account the effects of these acquisitions on the European Union as a whole.

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[35] Foreign Direct Investments

[36] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0326%2803%29

As such, Member States may take measures to prevent a foreign investor from acquiring or taking control over a company if such acquisition or control would result in a threat to a public health emergency and, more generally, to their security or public order.

In its communication of March 26, 2020, the European Commission reiterated its intention to be consulted and to issue opinions, in particular if the investment in question is likely to affect projects or programs of Union interest.

These investments will be subject to a closer scrutiny by the European Commission, whose opinions have to be taken into utmost account by the relevant Member States. This screening will apply to all Horizon 2020[37] research projects launched in response to Covid-19 pandemic.

The European Commission has always sought to preserve the delicate compromise between a security approach and the promotion of free trade, but the Covid-19 has shot up the European Union's agenda, and Europeans cannot wait until October 2020 to implement the EU foreign investment screening mechanism.

It was therefore important for the European Commission to send a strong message to the Member States, especially since only 14 out of the 27 Member States have set up national mechanisms for the screening FDI[38].

France now has a highly developed legal framework for the control of foreign investments. For more than a year it has engaged in a reform in this area, the final part of which, resulting from Decree No. 2019-1590 of December 31, 2019 and from a Ministerial Order of the same date, came into force on April 1, 2020.

For more information on French regulations governing the screening of FDI, please refer to a separate publication of the author of this article[39].

As pointed out by researchers from the Jacques Delors Institute[40] in a very recent study on "*the urgent need to tighten foreign investment control*" in the context of the Covid-19, tighter controls must not lead to an increase in nationalist reactions which could ultimately lead to the fragmentation of the Single Market and undermine the visibility and stability that European companies need to maintain their attractiveness.

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[37] EU Research and Innovation program: https://www.horizon2020.gouv.fr/

[38] For a presentation of the national screening mechanism, please see: https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf

[39] See article entitled Foreign Investment Control in France: Strengthened rules but greater clarity for investors published on our Blog in February 2020

[40] European think tank founded by Jacques Delors in 1996 at the end of his presidency of the European Commission: https://institutdelors.eu/

"Proportionality of measures is more essential than ever because FDI is as necessary for recovery as it is harmful if it further weakens the economy by targeting strategic assets, particularly in terms of technological know-how." [41]

Catherine Nommick
Partner
c.nommick@soulier-avocats.com
+33 (0)4 72 82 20 80
+33 (0)6 37 23 44 06

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[41] https://institutdelors.eu/wp-content/uploads/2020/04/PP253_FDIscreening_Fabry_200427_FR.pdf (in French only).

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.

Stanislas ROQUEBERT
Partner
stanislas.roquebert@lh-lf.com
+33 (0)9 72 44 38 94
+33 (0)6 63 85 26 86

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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).

Stanislas ROQUEBERT
Partner
stanislas.roquebert@lh-lf.com
+33 (0)9 72 44 38 94
+33 (0)6 63 85 26 86

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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.

Anaëlle IDJERI
Associate
a.idjeri@soulier-avocats.com
+33 (0)4 72 82 20 80

Geoffroy LACROIX
Partner
g.lacroix@soulier-avocats.com
+33 (0)1 40 54 29 29
+33 (0)6 37 49 22 67

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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 performance[42];

- 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.

[42] 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* events[43].

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 pandemic[44]. 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 occurred[45].

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.

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[43] 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

[44] 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"

[45] 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 obligations[46], 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 situation[47].

[46] 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)

[47] 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 questionable[48]. Even more explicitly, the *Cour de Cassation* has even held that:

[48] 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" [49].

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" [50].

- 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.

[49] Commercial Chamber of the *Cour de Cassation*, March 15, 2017 – 15-16.406
[50] 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 crisis[51].

Anaëlle Idjeri
Associate
a.idjeri@soulier-avocats.com
+33 (0)4 72 82 20 80

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[51] 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 contracts[52].

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 Government[53] (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 rules[54].

[52] 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)

[53] 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)

[54] 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 contracts[55] 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 rents[56].

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 principle[57]. In particular, the payment of contractual obligations is not suspended and contractual payment installments must be respected.

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[55] 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)

[56] 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)

[57] 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.

Geoffroy Lacroix
Partner
g.lacroix@soulier-avocats.com
+33 (0)1 40 54 29 29
+33 (0)6 37 49 22 67

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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.

Force majeure or hardship: You do not have to choose

May 26, 2020

Can a party to a commercial contract escape its obligations because of the economic disruption caused by the Covid-19 pandemic?

The answer to this question, which is of utmost interest to companies of all sizes, is to be found in the new French contract law introduced by Ordinance of February 10, 2016.

For quite a long time, the following principle has prevailed: a party could only be released from its contractual obligation if performance thereof was rendered impossible by a *force majeure* event, which had to meet three requirements to be established: unpredictability, irresistibility and exteriority (this last requirement was abandoned by the Plenary Assembly of the *Cour de Cassation* – French Supreme Court – in 2006).

Since an unforeseeable disruption of existing economic conditions was not in itself considered as a *force majeure* event, the judge was unable to revise the contract under the theory of unforeseeability (a concept close to that of hardship) ("*imprévision*") because of the sacrosanct principle of the sanctity of contracts. And too bad if the consequence was a business failure.

In retrospect, the aforementioned 2016 Ordinance seems to have been created to provide a toolbox for businesses that must deal with the economic upheavals caused by the pandemic and its consequences.

While the principle that contracts lawfully entered into have the force of law for those who have made them is recalled by new Article 1103 of the French Civil Code in terms almost identical to those of former Article 1134 §1, several provisions now grant the judge the right to interfere wherever there is a too great imbalance in the obligations of the parties due to an unforeseeable event or change of circumstances.

Pursuant to new Article 1195 of the French Civil Code, where an "*unforeseeable change of circumstances*" renders performance of the contract "*excessively onerous for a party who had not accepted to assume the risk of such a change*", that party is now entitled to ask the other contracting party to renegotiate the contract.

If the parties cannot reach an agreement within a reasonable period of time, the judge may be asked to revise or terminate the contract, on such date and subject to such terms and conditions as he/she shall determine.

Another major change: under new Article 1104 of the French Civil Code, the principle according to which contracts must be negotiated, formed and performed in good faith has become a public policy provision while former Article 1134 §3 merely provided that contracts lawfully entered into ought to be performed in good faith.

New Article 1228 of the French Civil Code on force majeure refers to "*any 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 cannot be avoided by appropriate measures*"

A global health crisis is clearly beyond the control of a debtor contracting party and can have devastating economic effects that no "appropriate measure" can avoid.

Companies that cannot meet their obligations because of the Covid-19 pandemic and its consequences are wondering: should they rely on force majeure or unforeseeability/hardship?

The choice is not insignificant.

A contracting party invoking unforeseeability/hardship may request a renegotiation of the contract, and, if negotiation with its contractual partner falls through, ask the judge to revise or terminate the contract. Problem: during the time of the renegotiation, the party must continue to perform its obligations. Second problem: obtaining a decision from the judge asked to revise or terminate the contract may take several months.

On the other hand, invoking force majeure allows one party to stop performing its obligations without being forced to enter into negotiation and without the need to refer the matter to the judge.

Force majeure and unforeseeability/hardship are not mutually exclusive. The contracting party who cannot meet its obligations due to the economic upheavals caused by the Covid-19 pandemic may therefore notify the other party of the force majeure event while inviting it to negotiate a revision of the terms of the contract.

And if the other party turns a deaf ear, a reminder of the public policy obligation to perform contracts in good faith should bring it back to its senses. Indeed, there is little doubt that a judge would classify as bad faith a refusal to renegotiate the terms of a contract, the performance of which has become excessively onerous because of the economic consequences of the health crisis.

And since the duty of good faith is a public policy obligation, a party refusing to take into account the new situation created by the pandemic could not rely on contractual provisions to try to escape it.

Jean-Luc Soulier
Managing Partner
jl.soulier@soulier-avocats.com
+33 (0)1 40 54 29 29
+33 (0)6 72 72 91 26

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The Paris Commercial Court rules that Covid-19 is to be considered as a force majeure event

May 29, 2020

On May 20, the President of the Paris Commercial Court, ruling in summary proceedings, considered that the requirements for establishing the existence of force majeure provided for in the framework agreement signed by EDF and Total Direct Energy were met and ordered EDF to accept the suspension of this framework agreement.

Before being discussed before the Commercial Court, the force majeure clause had already been debated during summary proceedings before the *Conseil d'Etat* (French Administrative Supreme Court) on April 17.

As a reminder, the conclusion of a framework agreement is a prerequisite for an alternative supplier to have the right to purchase energy from EDF under the so-called ARENH mechanism ("*Accès Régulé à l'Electricité Nucléaire Historique"*, i.e. regulated access to historic nuclear electricity).

However, the declaration of the state of health emergency in March 2020 caused a considerable decrease in consumption and market prices of electricity. Energy suppliers, no longer able to sell the energy purchased from EDF in anticipation for the year 2020, were forced to sell it at low prices on the markets.

In these circumstances, a number of alternative suppliers chose to invoke in summary proceedings before the *Conseil d'Etat* the force majeure clause provided for in the framework agreement and according to which "*force majeure means an external, irresistible and unpredictable event making it impossible to perform the Parties' obligations under reasonable economic conditions*".

On March 26, 2020, the Electricity Regulatory Commission ("*Commission de régulation de l'électricité"* or "CRE") acknowledged the existence of a disagreement between EDF and the beneficiaries of the ARENH mechanism, ruled that the force majeure requirements were not met and refused to revise the volumes to be supplied under this mechanism.

An appeal for misuse of authority and an application for interim measures for the purpose of the provisional suspension of the CRE decision were lodged with the *Conseil d'Etat*. On April 17, 2020, the latter dismissed the application for the provisional suspension of CRE decision on the ground that the claimants had not demonstrated the urgency to suspend the objected decision, all the more so since – according to the judges – EDF and the beneficiaries of the ARENH mechanism could still reach an amicable solution. On the other hand, the appeal for misuse of authority continues.

It is under these circumstances that Total Direct Energie, one of the beneficiaries of the ARENH mechanism, initiated summary proceedings before the Paris Commercial Court.

Total Direct Energie considered that EDF's refusal to acknowledge the existence of force majeure and consequently to agree to the suspension of the performance of the framework agreement constituted a manifestly unlawful nuisance insofar as said agreement provided that as soon as the force majeure event occurred, the obligations of the parties were to be suspended, resulting in the automatic interruption of the annual electricity sale.

It also claimed that the definition of force majeure had been adjusted in the agreement insofar as performance could continue only under "reasonable economic conditions". However, Total direct Energie contended that it was obliged to sell on a particularly weak market the quantities purchased from EDF that were not consumed by its customers because of the restrictions on business activities imposed by the public authorities.

EDF, for its part, considered that its co-contractor did not demonstrate that it was unable to perform inasmuch as performance was reflected, in particular, by taking delivery of the volumes reserved and by the payment of the corresponding invoices. EDF argued that Total Direct Energie was not claiming that it was unable to perform but wanted to call the agreement into question. It also pointed out that case law relating to force majeure does not apply to a contractual obligation to pay a sum of money.

The defendant also claimed that Total Direct Energie was able to obtain energy at the price of the ARENH mechanism, that the market price was not within the scope of the agreement and that, in any event, the force majeure clause could not be applied unilaterally.

EDF was seeking to justify the existence of a serious objection in that the interpretation of the clause, the enforcement of which was requested by Total Direct Energie, exceeded the powers of the summary judge and that the plaintiff in no way demonstrated proof of the existence of an imminent damage.

RTE, as operator of the public electricity transmission system, and the French Independent Association of Electricity and Gas were also parties to these proceedings.

The President of the Paris Commercial Court granted Total Direct Energie's request and held in particular that, although the Covid-19 crisis did not make it impossible for Total Direct Energie to perform its contractual obligations, specifically with regard to the receipt of the quantities ordered and payment, "*this analysis does not take into account the totality of the force majeure as per Article 10 of the agreement binding the parties, which also includes the performance of obligations under reasonable economic conditions*".

In this respect, the President of the Commercial Court pointed out that "*the notion of reasonable economic conditions is not defined in any way*" and that "*its connection with the occurrence of a force majeure event nevertheless allows us to assume a disruption of previous economic conditions which results in losses arising from the performance of the contract*". In these conditions, the summary order noted that the requirements to establish force majeure were met.

Consequently, the President of the Commercial Court held that, according to the framework agreement, the occurrence of a force majeure event results in the immediate and automatic suspension of its performance and the interruption the annual sale of electricity. As such, the summary order specifies that "*this automaticity does not authorize, at this stage, a discussion on the circumstances alleged by the party implementing the provisions of Articles 10 and 13 of the above-mentioned agreement*".

The Commercial Court thus ordered EDF to "*no longer oppose the application of the framework agreement (...) and, in particular, the provisions relating to the suspension of its performance*" and, consequently, to "*do all that is necessary in order to achieve the interruption of the annual sale of electricity*".

EDF has already announced that it intends to appeal this order.

On May 27, 2020, the Paris Commercial Court once again confirmed the possibility for an alternative energy supplier, i.e. Gazel Energie, to invoke the existence of a force majeure event and to suspend its commitments accordingly.

The debate as to whether the Covid-19 pandemic is to be considered as constituting a force majeure event is now open before commercial courts.

Anaëlle Idjeri
Associate
a.idjeri@soulier-avocats.com
+33 (0)4 72 82 20 80

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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.

Pauline KUBAT
Associate
p.kubat@soulier-avocats.com
+33 (0)4 72 82 20 80

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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, 2020[58] and rules applicable before administrative courts were amended by Ordinance No. 2020-305 of March 25, 2020[59].

Regarding specifically civil proceedings, two Ordinances have been adopted:

- Ordinance No. 2020-304 of March 25, 2020[60] 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, 2020[61] 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).

[58] https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755529&dateTexte=20200401

[59] https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755612&dateTexte=20200401

[60] https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755577&dateTexte=20200401

[61] 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.

Pauline Kubat
Associate
p.kubat@soulier-avocats.com
+33 (0)4 72 82 20 80

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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 2020-303[62] (the "Ordinance") in furtherance of the Emergency Law of March 23, 2020[63]. 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.

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[62] 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

[63] 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.

Charlotte Desfontaines
Associate
c.desfontaines@soulier-avocats.com
+33 (0)4 72 82 20 80

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CORONAVIRUS COVID-19 – DATA PROTECTION

Covid-19 and Telework: Data protection

April 28, 2020

The COVID-19 pandemic has prompted many companies to implement teleworking solutions. The implementation of this type of working method requires that rules be duly followed to guarantee the security of information systems and processed data.

The French Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés* or "CNIL") has published recommendations to help secure personal data in this context.

The COVID-19 global health crisis required the implementation of lockdown measures and strict travel restrictions allowing only travels for essential reasons. Companies, associations, administrative authorities or communities that had the possibility to do so had no other choice but to implement telework in order to preserve at the very least the continuation of essential activities that this working method can allow.

Some were already prepared to cope with telework but assuredly not on such a massive scale and over such a long period. Others had to implement it urgently, perhaps even "remotely". In some cases, and because it has not been possible to deploy the necessary means, telework is even carried out from employees' personal equipment (within the framework of the Bring Your Own Device (BYOD) practice), the level of security of which cannot be assessed, let alone guaranteed. And the use of this equipment makes it more difficult to draw a clear line between private life and professional life.

At the same time, cybercrime has increased since the start of the COVID-19 pandemic as cybercriminals are seeking, like in any exceptional situation, to make the most of it.

Employers are responsible for the security of their company's personal data, including when stored on terminals over which they have no physical or legal control but that they have authorized to be used to access the company's IT resources.

The risks against which it is essential to take precautions range from a one-off attack that impacts the availability of the system or the integrity and confidentiality of the data, to the general compromise of the company's information system (intrusion, viruses, Trojan horses, etc.).

How to reduce such risks? This article outlines the best practices to be followed to set up and manage telework.

Securing the information system

Opening up a company's information system to the outside world can create serious security risks that could jeopardize the company, and even threaten its survival in case of a cyberattack. It is therefore essential for every company to secure its information system by implementing the following recommendations:

- publish a telework security policy or, in the current context, at least a minimum set of rules to be followed, and circulate this document to your employees in accordance with the internal rules and regulations. As far as possible, favor for teleworking purposes the use of means that are made available, secured and controlled by the company. When this is not possible, give clear instructions concerning equipment use and security to employees but be aware that their personal equipment can never have a verifiable level of security;

- if necessary, amend the management rules of the information system to allow teleworking (change the authorization rules, remote administrator access, etc.), measure the risks involved and, if necessary, take the necessary measures. In particular, provide external or remote access (Remote Desktop Protocol (RDP)) only to essential persons and services, and strictly filter such access through the firewall. To preserve systems for which remote access is not necessary, isolate them, especially if they are sensitive for the company's business;

- equip all employee workstations with at least one firewall, antivirus software and a tool for blocking access to malicious websites;

- set up as soon as possible a Virtual Private Network (VPN) to avoid direct exposure of services on the Internet, and activate, if possible, a two-factor authentication processes. In addition to encrypting external connections, this device also makes it possible to strengthen the security of remote access by limiting such access to authenticated devices only.

Internet Services

For the Internet, it is recommended to:

- use protocols that guarantee the confidentiality and authentication of the receiving server, e.g. HTTPS for websites and SFTP for file transfers, using the most recent versions of these protocols;

- apply the latest security patches to the equipment and software used (VPN, remote desktop solution, messaging, videoconferencing, etc.), and regularly consult the CERT-FR News Bulletin[64] to get to know the latest software vulnerabilities and how to protect against them;

[64] The news bulletin of the National Cybersecurity Agency of France: https://www.cert.ssi.gouv.fr/actualite/

- implement two-factor authentication mechanisms on remotely accessible services to limit the risk of intrusion;

- regularly check access logs for remotely accessible services to detect suspicious behaviors;

- refrain from making unsecured server interfaces directly accessible. In general, limit the number of services made available to the strict minimum to reduce the risk of attacks.

Laure Marolleau
Partner
l.marolleau@soulier-avocats.com
+33 (0)1 40 54 29 29
+33 (0)6 08 35 16 86

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Covid-19 and Contact Tracing

May 12, 2020

While France is entering the first phase of its end-of-lockdown plan, the Government's strategy to combat a resumption of the epidemic is now based on monitoring "contact tracing", i.e. the swift identification of any person who has been close to a patient in order to also test him/her and, if necessary, isolate him/her to avoid the spread of the disease.
French authorities are planning an "information system" based on two medical databases: Sidep and Contact Covid. As the design of the StopCovid app. is still under way, its deployment was not included in the end-of-lockdown plan presented on April 28, 2020.

StopCovid is a mobile app. project launched by the French government and led by the National Institute for Research in Digital Science and Technology (*Institut National de Recherche en Informatique et en Automatique* or "INRIA") with the objective of tracking populations, using the Bluetooth system of phones.

The controversial StopCovid digital tracking app. could be ready in early June, which would then pave the way for a debate on the subject in the French Parliament.

Following the exceptional Council of Ministers meeting on Saturday May 2, 2020, the Health Minister announced that contact tracing of people tested positive for Covid-19 will (for the time being) not be done through a phone app.:

"*As of May 11, no, there will not be a StopCovid app. available in our country and the Prime Minister was very clear: if this type of app. were to be introduced, there would be a specific debate in Parliament, nothing has changed from that point of view*."

Following a request from the Minister of State for the Digital Sector on the possible implementation of this app., the French Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés* or "CNIL") issued its opinion on April 24, 2020[65].

It considered that the system could comply with the General Data Protection Regulation ("GDPR") if certain conditions were met.

Insofar as the use of the app., as envisaged by the Government, is voluntary, the CNIL specified that this implies that there would be no negative consequences for those who do not use it, in particular regarding the access to tests and healthcare, or public transportation.
The CNIL considers that the app. can be deployed if its usefulness for crisis management is sufficiently established and if certain safeguards are provided. In particular, the use of the app. must be temporary and the data must be kept for a limited period of time.

[65] https://www.cnil.fr/en/publication-cnils-opinion-stopcovid-mobile-application-project

Finally, the CNIL considered that the use of a voluntary contact monitoring scheme to manage the current health crisis should have an explicit legal basis in national law. It asked the Government to refer the app. project and the standard governing its implementation back to it once the decision has been taken and the project further specified.

In the meantime, the Government has chosen to set up an official tracing system to enable the National Healthcare Insurance Fund or the Regional Health Agencies, hospital and city doctors to access a maximum of information on the status of the epidemic in France.

In practical terms, the Bill extending the state of health emergency[66] provides for the creation of "health brigades" which will be responsible for recording positive Covid-19 cases and contact cases to detect chains of transmission.

Three levels of tracing are planned:

- Level 1 tracing carried out by doctors, primary healthcare professionals in cities and hospitals, to define the first circle of cases, potential contacts of patients;

- Level 2 tracing organized by the National Healthcare Insurance Fund. It aims at enhancing the list of potential contacts beyond this first circle, verifying that no potentially infected person has been able to escape the first tracing and giving instructions to the persons concerned;

- Level 3 tracing organized by the Regional Health Agencies. The aim is to identify chains of contamination of chains of transmission, which were at one time called "clusters".

These data will then be compiled in two national data files: Sidep and Contact Covid[67].
Sidep will list all persons tested positive for SARS-CoV-2 by medical biology laboratories.

The Contact Covid database, inspired by the National Healthcare Insurance Fund's website, will notably provide the contact details of the people to be contacted.

Specifically, the Bill provides that "*for the sole purpose of combating the spread of the Covid-19 epidemic and for the period of time strictly necessary for that purpose or, at most, for a period of six months from the end of the state of health emergency declared by article 4 of Emergency Law No. 2020-290 of March 23, 2020 to deal with the covid-19 epidemic, personal health data relating to persons infected by this virus and to persons who have been in contact with them may be processed and shared, as the case may be without the consent of the persons concerned, within the framework of an information system set up by a Governmental Decree approved by the Council of State and implemented by the Health Minister*."

[66] Legislative package on the extension of the state of health emergency: http://www.assemblee-nationale.fr/dyn/15/dossiers/prorogation_etat_urgence_sanitaire

[67] Description of the data files of the Ministry for Solidarity and Health: https://solidarites-sante.gouv.fr/soins-et-maladies/maladies/maladies-infectieuses/coronavirus/tout-savoir-sur-le-covid-19/article/contact-covid-si-dep

The purposes of the data files is the identification of infected persons, the identification of persons at risk of infection, the referral of infected persons and those likely to be infected, depending on their situation, to prophylactic isolation medical prescriptions, as well as the support of these persons during and after the end of these measures, and epidemiological monitoring at national and local levels, as well as research on the virus and the means of combating its spread. The development or deployment of a computer application intended for the public and available on mobile equipment to inform persons of the fact that they have been in close proximity to persons diagnosed with Covid-19 is explicitly excluded from the above-mentioned purposes.

Personal data collected by these information systems for these purposes may not be kept after the end of a 3-month period from their collection.

Personal data concerning health shall be strictly limited to the virological or serological status of the person with regard to the Covid-19 and to evidence of clinical diagnosis and medical imaging, as specified by the aforementioned Governmental Decree to be approved by the Council of State.

The terms and conditions according to which the Bill will be applied concerning the creation of these data files must be laid down within the next few days by Governmental Decrees approved by the Council of State following the positive opinion from the CNIL.

Laure Marolleau
Partner
l.marolleau@soulier-avocats.com
+33 (0)1 40 54 29 29
+33 (0)6 08 35 16 86

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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.

Charlotte DESFONTAINES
Associate
c.desfontaines@soulier-avocats.com
+33 (0)4 72 82 20 80

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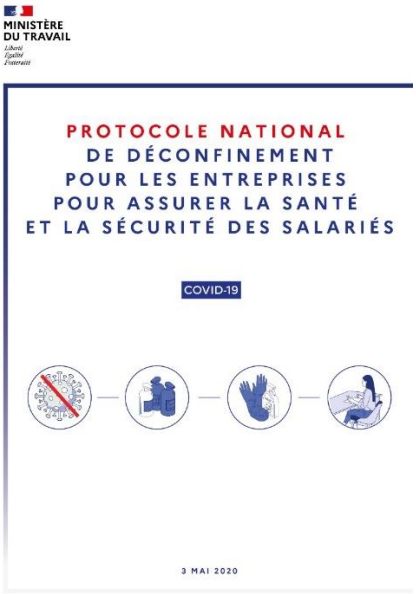
National lockdown exit protocol for businesses

May 5, 2020

The *National lockdown exit protocol for businesses to guarantee the safety and health of employees* intended for employers has just been published by the French Ministry of Labor.



The resumption of business activities is essential to avoid the collapse of the economy. However, this resumption must necessarily take place in a way that ensures the protection of employees' health.

To this end, the French Ministry of Labor has released a national lockdown exit protocol to help and support companies and associations, whatever their size, activity and geographical location, to resume their business operations while ensuring the protection of their employees' health through the application of universal rules.

This protocol is divided into 7 distinct parts and provides details on:

- recommendations in terms of distancing in open spaces;
- flow management;
- personal protection equipment;

- covid-19 testing;
- protocol for the management of a symptomatic person and his/her close acquaintances;
- temperature taking;
- cleaning and disinfection of the premises.

Click here to read the protocol (in French only)

Fabien Pomart
Partner
f.pomart@soulier-avocats.com
+33 (0)1 40 54 29 29
+33 (0)6 10 32 69 94

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Extension of the state of health emergency

May 15, 2020

Law No. 2020-546 of May 11, 2020 (the "Law") extends the state of health emergency until July 10, 2020 included. As a reminder, the state of health emergency was declared by the Law of March 23, 2020 for an initial period of two months. In addition to this one-and-a-half-month extension of the state of emergency, the provisions of the Law mark a cautious and progressive lifting of the lockdown in France.

The Law extending the state of health emergency and supplementing its provisions[68] was adopted on May 9, 2020 by a Joint Committee of the French Parliament (i.e. a legislative committee composed of an equal number of members from the Senate and the National Assembly).

On the same day, the Law was referred to the French Constitutional Council by the President of the Republic, the President of the Senate and also by several members of the French Parliament the following day, for a prior constitutional review.

In a decision No. 2020-800 DC of May 11, 2020[69], the Constitutional Council invalidated some of its provisions and expressed several reservations concerning the interpretation of the Law which are detailed below.

What is the content of the Law that has been finally promulgated? This article provides an overview of the main measures adopted.

Extension of the state of health emergency

Unsurprisingly, the main provision of the Law is the extension of the state of health emergency in France. Initially scheduled to last until May 23 included, the state of emergency will be maintained until July 10.

It is important to specify that the reference period that had been set for the extension of the procedural deadlines by Ordinance No. 2020-306 of March 25, 2020 will not follow the extension of this state of health emergency period.

[68] https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=3004CE478209C6EC503C8296EB222F98.tplgfr35s_2?cidTexte=JORFTEXT000041865244&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000041865241

[69] https://www.conseil-constitutionnel.fr/decision/2020/2020800DC.htm

In fact, a new Ordinance No.2020-560 of May 13, 2020[70] specifies that the reference period will remain fixed from March 12 to June 23, 2020 included (and no longer until the expiry of a one-month period after the end of the state of emergency, as previously indicated).

For more information on the impact of Covid-19 on procedural deadlines, please refer to previously published articles[71].

Ordinary criminal law provisions on pre-trial detention become applicable again

Ordinance No. 2020-303 of March 25, 2020 provided for the automatic extension of the maximum periods of pretrial detention in the context of the state of health emergency.

This measure has not been renewed since the Law now provides that pretrial detention may only be extended by decision of a competent court following an adversarial debate.

Criminal liability of mayors and employers

Many parliamentary debates have focused on the issue of the criminal liability of mayors and employers in the context of the pandemic.

The French Parliament finally chose to clarify the regime established by the Law of July 10, 2000, known as the Fauchon Law, on unintentional offences.

A new article L3136-2 has been introduced in the French Public Health Code and provides that, in the event of prosecution, liability must be assessed "*taking into account the skills, power and means available to the perpetrator in the crisis situation that justified the state of health emergency, as well as the nature of his/her missions or functions, in particular as a local authority or employer*".[72]

[70] https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=FF8F14BC9ADF0C8D10C3C9D437F30C3B.tplgfr29s_3?cidTexte=JORFTEXT000041876355&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000041875892

[71] See in particular our articles entitled Covid-19: French rules of civil procedure have been adapted and Covid-19: French rules of criminal procedure have been adapted published on our Blog in April 2020

[72] https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=01DB44E684C5CDA362FE78AF11CB610F.tplgfr35s_2?idArticle=LEGIARTI000041866200&cidTexte=LEGITEXT000006072665&dateTexte=20200513&categorieLien=id&oldAction=&nbResultRech=

Quarantine and isolation measures

In order to allow the gradual ease of the lockdown of the population, specific quarantine and isolation systems have been introduced.

The measures, which will be specified in a Decree of the Prime Minister after the opinion of the scientific committee, shall apply to "*persons who, having stayed during the previous month in an area where the virus is circulating, enter the national territory, arrive in Corsica or in one of the overseas territories*."

Individual measures will be taken by the *préfet* (local representative of the Government), following the advice of the General Director of the local Regional Health Agency on the basis of a medical certificate. An appeal against such measures may be lodged before the *juge des libertés et de la détention civil* (civil liberty and custody Judge) who will rule within 72 hours.

Quarantine or isolation may take place, at the choice of the person concerned, at his/her home or in other suitable accommodations. The duration of the measure is limited to 14 days, may be renewed only on medical advice and may in no event exceed one month.

A welcome clarification: persons who are victims of domestic or family violence may not be placed in quarantine or isolation in the same place as the violent spouse or parent, including in cases of alleged violence.

The French Constitutional Council has validated the provisions of these quarantine and isolation systems as it considers it necessary to pursue the objective of health protection, an objective recognized as having constitutional value, insofar as these measures are aimed at preventing the spread of the disease.

It nevertheless made a reservation on the interpretation of the Law: since isolation or quarantine constitute, in the event of a prohibition to leave/exit the place where a person stays, a deprivation of liberty, any prefectoral measure requiring the person concerned to remain at home or in a specific place of accommodation for a period of at least one month, must be approved by the judge.

Implementation of the patient monitoring system

Another controversial subject is the computerized tracing of the Covid-19 contamination chains. For more information in this respect, please refer to our previous article on the subject[73].

The Law empowers the French Health Minister to implement a system for the processing and sharing of health data relating to persons infected by the virus and to persons who have been in contact with them.

[73] See our article entitled Covid-19 and Contact Tracing published on our Blog in May 2020

The information system, which will be created by Decree, should be based on two tools:

- a national database called *Sidep* (integrated screening and prevention service) to centralize information and share it with the various health actors and practitioners;
- the Health Insurance Fund's *Contact Covid* teleservice to monitor patients and identify contact cases.

The system will be strictly regulated:

- it will only be set up for a maximum period of six months;
- the nature of the processed and shared data will be limited, in particular to the virological or serological status of the person;
- the data may not be kept for more than three months;
- the personnel having access to the data will be bound by professional secrecy;
- data used for epidemiological monitoring purposes will be anonymized.

In addition, the creation of a Covid-19 monitoring and liaison committee made up of members of the French Parliament and civil society is planned in order to monitor the system put in place.

The terms and conditions governing the practical implementation of the new system will be specified by Decree following a public opinion from the French Data Protection Authority.

The French Constitutional Council has considered that the introduction of this system corresponds to the objective of health protection, an objective recognized as having constitutional value.

Several reservations concerning the interpretation of the Law have nevertheless been expressed, in particular concerning the anonymization of data, which must now be extended to the telephone and e-mail addresses of the persons concerned.

The French Constitutional Council also invalidated a provision of the law allowing bodies to access data without the consent of the individuals, a provision which violated the right to privacy.

Other measures

A number of other measures have also been adopted, again with the aim of ensuring a gradual lifting of the lockdown.

As such, the Prime Minister will be able to regulate, by means of Decrees, the movement, access and use of transport and the opening of establishments open to the public (and no longer just limit or prohibit openings).

Finally, the so-called winter truce (*trève hivernale*, i.e. a period during which tenant evictions are officially prohibited) is extended until July 10, 2020, just like the ban on cutting off tenant's electricity or gas.

Pauline Kubat
Associate
p.kubat@soulier-avocats.com
+33 (0)4 72 82 20 80

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