

Questions Clients Are Asking

QE Paris Client Alert

COVID-19: What You Need To Know About Order No. 2020-306 Of 25 March 2020 Creating A “Moratorium” On Deadlines And On Several Of The Contractual Default Mechanisms

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The Covid-19 virus has created a health crisis that is having serious impacts on businesses, which are facing everything from brutal decline to a complete shutdown of their activities, as well as on public services that are having to adapt to the crisis situation. The public service of justice has been restricted to dealing with urgent matters, pursuant to continuation plans implemented in each of the Courts. In this deteriorated environment, the French Parliament passed the *Emergency Law No. 2020-290 to address the Covid-19 epidemic* on 23 March 2020 that, notably, declares a state of health emergency as of 24 March 2020 for a period of two months (i.e. until 24 May 2020). Among the measures taken to enforce this legislation, Order No. 2020-306 of 25 March 2020 relates more specifically to the *extension of deadlines expiring during the health emergency*.

The title of this Order does not accurately reflect the real bearing of its provisions, which will significantly impact the rights of both litigants and parties to ongoing contracts.

The provisions of this Order have two key purposes:

(1) to extend certain deadlines provided by law or regulation, including statutes of limitations and debarment periods, and (2) to create a moratorium on certain contractual mechanisms applicable in case of defaults

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1) Extension of statutes of limitations and debarment periods

Article 1 of the Order clarifies that its provisions apply to all deadlines and measures expiring between 12 March 2020 and the expiry of a 1-month period after the end of the state of health emergency, i.e. 24 June 2020 (unless the state of emergency is extended by a new law).

Article 2 of the Order sets the following principle:

“Any deed, appeal, claim, formality, registration, declaration, notice or measure of publicity required by laws or regulations upon penalty of invalidity, sanction, voidance, debarment, unenforceability, inadmissibility, expiry, withdrawal ex officio, application of a derogatory regime, nullity or forfeiture of any right whatsoever that should have been completed during the period mentioned under Article 1 shall be deemed to have been completed in a timely fashion if completed within a period that cannot exceed, after the end of [the suspension period provided by Article 1], the legal timeframe for this action, up to a maximum of two months.”¹

The material scope of this “moratorium” is very broad, to such an extent that it is partly repetitive. It extends far beyond the scope of purely procedural matters. Certain deadlines are nonetheless expressly excluded by Article 1-II, such as deadlines applicable in criminal matters and criminal procedure.

The drafting of Article 2 of the Order prompts several comments:

First: importantly, the extension does not apply to deadlines that expired before 12 March 2020, or to deadlines expiring after 24 June 2020 (unless the state of emergency is extended). The Report to the President of the Republic introducing the Order expressly clarifies this: “*deadlines expiring more than one month following the end of the state of health emergency: these deadlines are neither suspended, nor extended*”. By way of example, the Order will have no suspensive effect on a 5-year limitation period (which is the standard limitation period) expiring in September 2020. In other words, the so-called “moratorium” does not apply indiscriminately to any unexpired deadline. Although Article 2234 of the French Civil Code allows the suspension of limitation periods in cases where it was impossible for a party to act, the burden of proof is on the defaulting party and it must be noted that the judicial system is still operating, albeit on a very limited basis. It therefore remains advisable to address deadlines with particular vigilance, to avoid taking any unnecessary risks.

Second: the duration of the extension could be subject to interpretation because of the relatively unclear wording of the provision: “*within a period that cannot exceed, after the end of [the suspension period provided by Article 1], the legal timeframe for such action, up to a maximum of two months*”.

Our preliminary analysis of this provision is that the initial period for completing a required action is postponed until 24 June 2020 (or later if the state of emergency is extended). In other words, the provision interrupts the lapse of limitation periods rather than simply suspending them, so that the initial period to complete the requisite action starts afresh, but with a 2-month cap, i.e. ending on

¹ Original provision in French: « Tout acte, recours, action en justice, formalité, inscription, déclaration, notification ou publication prescrit par la loi ou le règlement à peine de nullité, sanction, caducité, forclusion, prescription, inopposabilité, irrecevabilité, péremption, désistement d’office, application d’un régime particulier, non avenu ou déchéance d’un droit quelconque et qui aurait dû être accompli pendant la période mentionnée à l’article 1er sera réputé avoir été fait à temps s’il a été effectué dans un délai qui ne peut excéder, à compter de la fin de cette période, le délai légalement imparti pour agir, dans la limite de deux mois ».

24 August 2020 at the latest (subject to the usual reservations). For example: a judgment is issued on 27 February 2020 and is subject to a 1-month appeal period. The deadline for appealing is therefore due to expire on 27 March 2020. Pursuant to the Order, the appeal could be filed until 24 July 2020 (i.e. end of the period defined at Article 1 + 1-month appeal period).

Third: the reference to the “*legal timeframe for such action*” is inadequate as, in the French text, it appears to refer only to deadlines that are provided by statute, as opposed to those created by other types of regulations that are included in the scope of Article 2.

Fourth: there is room for questioning whether the Order exceeds the scope of the powers granted to the Government by Article 11 I 2° b) of Emergency Law No. 2020-290 *to address the Covid-19 epidemic*, which could raise concerns regarding the legality of the Order.

Article 3 of the Order provides that certain administrative and judicial measures expiring between 12 March and 24 June 2020 (or later in case the state of emergency is extended) are automatically extended until two months after the end of this période, i.e. in principle until 24 August 2020, unless the measures are withdrawn or adjusted by the relevant authority in the meantime. Among these measures, the Order lists provisional measures (e.g. repairs or restoration), investigative measures (court-appointed expert appraisals, technical appraisals, etc.), mediations and “*restrictions or suspensions that have been ordered for reasons other than sanctions*”. This last part is subject to interpretation since it does not specify what is meant by “*sanctions*”. One possible interpretation is that it intends to differentiate between (i) restrictions or suspensions based on provisions that are criminal in nature according to the definition of the ECHR (which includes administrative sanctions), which would not be extended, and (ii) measures ordered by a Court outside of legal provisions providing for this type of measure (e.g. restrictions arising from the breach of a non-competition clause), which would be extended insofar as they protect the other party.

By way of conclusion, despite the good intentions of the authorities, the Order leaves areas of uncertainty in respect of the extension of deadlines. An in-depth case-by-case analysis will be required to assess whether any given situation is indeed covered. In this respect, we recommend adopting a prudent approach and taking appropriate steps within the initial deadlines, if only on a conservative basis. It is certain, in any event, that abundant litigation will arise from the implementation of these provisions.

2) Imposing a moratorium on certain contractual default mechanisms

The Report to the President clarifies that Article 2 of the Order is applicable only to deadlines “*provided by laws or regulations*”, which effectively excludes contractual provisions. The Report concludes that “*payment of contractual obligations must always occur within the contractual deadlines*”, subject to exceptions (for instance, in cases of force majeure).

The Order nonetheless includes provisions, under Articles 4 and 5, that will have a significant impact insofar as they momentarily - and partially - protect the defaulting contractual party and, consequently, limit the means of action of the creditor. The Order thus creates a moratorium on several contractual mechanisms frequently used to address contractual defaults.

Article 4 provides that delay penalties (“*astreintes*”, that usually translate as a lump-sum indemnity per day of delay), penalty provisions (“*clauses pénales*”, that contractually determine in advance the amount of damages due), unilateral termination and forfeiture provisions, where they are triggered by a party’s failure to perform its obligations within a specified timeframe, are unenforceable for the period between 12 March and 24 June 2020 (subject to an extension of the state of emergency). These penalties and clauses will begin to produce their effects 1-month after the end of this period (i.e. after 24 July) if the debtor has still not performed its obligations at that time. Finally, Article 4 clarifies that delay penalties and penalty provisions that had been triggered prior to 12 March 2020 are suspended until 24 June 2020.

In other words, the creditor of a contractual obligation - even though contracts remain enforceable as a matter of principle - is deprived of several means of action in the event the debtor of the obligation defaults between 12 March and 24 July 2020. It will therefore be necessary to assess, in such cases, the means of action that may remain available to the creditor to obtain satisfaction (withholding performance, judicial termination, interest for late payments, protective measures, hourly summary claims, etc.).

Article 5 provides, lastly, that where a contract can only be terminated within a specific timeframe or is automatically renewed if no termination notice is sent within a specific timeframe, these timeframes - if they expire between 12 March and 24 June 2020, shall be extended by two months after the end of this period, i.e. until 24 August 2020.

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If you have any questions about the issues addressed in this memorandum or otherwise, please do not hesitate to reach out to us.

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