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France: A Country at War against the Coronavirus Pandemic

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Synopsis

On 16 March, the French President held a speech to the nation in which he made a call to his fellow citizens for solidarity and responsibility. ‘The country is at war,’ he said, ‘against an invisible, elusive and progressing enemy.’ Accordingly, by the end of March, containment measures to prevent the spreading of the coronavirus¹ pandemic had been implemented and renewed. A law, instituting the state of emergency² and authorising the Government to take immediate measures by ordinance, had also been enacted.³ Companies and businesses of all sorts were temporarily shut down, forcing their employees and workers to stay home and/or working remotely, causing the country to review its growth forecasts. Approximately nine million employees have since been furloughed and, as in many other countries, the stock markets fell brutally.

The author briefly presents some of the main measures⁴ of the rescue package implemented to support companies and businesses and enable them to survive a crisis of this magnitude.

I. Amendments to existing rules

I.1 Amendments to insolvency legislation

The Government specified by ordinance⁵ that the section of the insolvency legislation dedicated to the state of insolvency (*l'état de cessation des paiements*) should temporarily be construed to provide that, until the expiry of a three months period following the end of the state of emergency, the state of cessation of payments would be assessed having regard to the debtor's situation as of 12 March 2020.

Accordingly, and as specified in an explanatory report⁶ to the ordinance:

- Companies in financial trouble before 12 March, but not insolvent (i.e. unable to pay their outstanding debt with their available assets) by then, are eligible to apply for preventative measures⁷ or safeguard proceedings within the extended time period (three months following the end of the state of emergency) even if they become insolvent during that period;
- For ongoing confidential preventative measures and particularly *conciliation proceedings*, the section of the code, providing that a conciliation cannot last more than five months in a row and cannot be resumed until the expiry of a three months period, is not applicable. This means that a new conciliation can be implemented immediately to enable the debtor to continue its negotiations and reach an agreement with its key creditors;
- By assessing the state of the debtor's cessation of payments by reference to 12 March, until the expiry of the time period set by the ordinance (see above), the management is temporarily protected from personal sanctions for mismanagement linked to their failure to timely file for insolvency, i.e. within 45 days from the date of cessation of payments.

The ordinance also provides that further to an application by the plan implementation commissioner (*commissaire à l'exécution du plan*) or the public prosecutor, the presiding judge of the court⁸ having adopted a safeguard or a continuation plan, or the court,⁹ may extend the latter's duration either by three months

Notes

- 1 Commonly called Covid 19 in France.
- 2 For two months as from the publication of the Law, i.e. until 24 May 2020.
- 3 Loi No. 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 (1).
- 4 26 Ordinances were published on 26 March 2020 and many others thereafter – this article is however only up to date as of 15 April.
- 5 Ordonnance No. 2020-341 du 27 mars 2020.
- 6 Rapport au Président de la République relatif à l'ordonnance No. 2020-341 du 27 mars 2020 portant adaptation des règles relatives aux difficultés des entreprises et des exploitations agricoles à l'urgence sanitaire et modifiant certaines dispositions de procédure pénale.
- 7 As per Article L 611-4 of the Code of Commerce, the commencement of a conciliation is subject to the debtor not being insolvent for more than 45 days. Article L 620-1 of the Code provides that the commencement of a safeguard is subject to the debtor not being insolvent.
- 8 When the application is filed before the expiry of the three months' time period after the end of the state of emergency.
- 9 When the application is filed after the above three months' time period but within the next six following months.

beyond the end of the state of emergency or by a maximum of one year.

A faster handling of the payment by the AGS,¹⁰ on behalf of insolvent employers, of unpaid wages, notice periods and redundancy costs is also implemented until the end of the three-month period following the end of the state of emergency.

1.2 Amendments to corporate related rules

Two ordinances published on 26 March¹¹ followed by a decree dated 10 April,¹² extended the time period for accomplishing several key corporate steps linked to the preparation and approval of companies' annual accounts.

Ordinance No. 2020-318 extended the time period for:

- The board to present its report, the annual and consolidated accounts to the supervisory board, by three months;
- The board, supervisory board and managing director to prepare the documents specifically required¹³ for companies employing more than 300 employees and with a turnover in excess of EUR 18 million, by two months;¹⁴
- Liquidators to prepare the annual accounts of the companies in liquidation for which they are appointed, by two months beyond the three months period starting from the end of the relevant financial year;
- The management to convene the annual shareholders' meeting, by three months, provided that the statutory auditors of these companies had not issued their report in relation to the accounts by 12 March 2020, in which case the extension granted by the ordinance does not apply.

Ordinance No. 2020-321 provides *inter alia* that:

- Board and management meetings can validly be held, even when not provided for in the articles of incorporation or internal management procedures, by conference call and video conference provided that the attendees can be identified, and their effective attendance is guaranteed;
- Decisions by the board and management are also valid, when made in writing by their members

provided that the collegiality of the deliberation is guaranteed, even when not provided for in the articles of incorporation or internal management procedures;

- Shareholders' meetings, when the gathering of shareholders is prohibited because of the sanitary measures linked to the coronavirus, can be validly convened by the relevant corporate bodies and held without the shareholders being physically present and participating by conference call or video conference;
- The convening of the meetings can be made by any means, enabling the shareholders or any person entitled to participate to be provided with effective information regarding the date and time of the meeting and the conditions under which they can exercise their rights;
- The shareholders attending by video or conference call are deemed to be present for the calculation of the quorum and the required majority for the vote of the resolutions. The other persons allowed to attend are entitled to participate by the same means. The ordinance adds that the technical means enabling the remote attendance must at least transmit the voice of the participants and allow the continuous and simultaneous retransmission of the deliberations.

1.3 Amendments to the labor code and collective agreements and to the duration of the working week

By ordinance dated 25 March¹⁵ the Government authorised employers, subject to the prior signature of a company-wide or an industry-wide collective agreement, to instruct their employees to take up to six days of paid holidays (*congés payés*), either sequentially or non-sequentially, when convenient for the employer, or to unilaterally modify the dates of their leave period without these amendments to their holiday dates requiring the employees' consent. The ordinance, however, limits the employer's faculty to impose holidays on employees, including before the start of the period during which they are normally intended to be taken, to leave periods ending 31 December 2020.

As of today, many employers have already implemented these measures, particularly in the banking and insurance sectors.

Notes

10 Association pour la Gestion du régime d'assurance des créances de Salaires.

11 Ordonnances No. 2020-318 et 321 portant adaptation des règles relatives à l'établissement, l'arrêté, l'audit, la revue, l'approbation des comptes et autres documents ... et des règles de réunion et de délibération des assemblées et organes dirigeants des personnes morales ... en raison de l'épidémie de covid-19.

12 Decree No. 2020-418 published on 11 April 2020.

13 A report on the available and realisable assets and outstanding debts, a cash flow statement and a forecasted financing plan.

14 Provided that they relate to the financial years closing between 30 November 2019 and a month after the end of the state of emergency.

15 Ordonnance No. 2020-323 du 25 mars 2020 portant mesures d'urgence en matière de congés payés, de durée du travail et de jours de repos.

The ordinance also authorises employers, when justified by the financial difficulties linked to the pandemic, to (i) set the rest day dates (*jours de repos*) to which employees are entitled under specific agreements or the collective bargaining agreements, at pre-determined and agreed dates, and (ii) unilaterally modify these dates.¹⁶ This option remains limited to a maximum of 10 rest days.

Finally, the ordinance amends the daily and weekly maximum working hours to extend them to 12 hours per day and 60 hours per week for companies belonging to an industry sector necessary for the nation's security or the continuation of its economic and social activities.¹⁷

Several other ordinances were also implemented in early April. These were essentially addressed to professional training (*formation professionnelle*) issues, the postponement of the election of staff representatives (*représentants du personnel*) for a period ending three months after the expiry of the state of emergency and the prorogation of their ongoing functions and statutory protection until the holding of these elections.

1.4 Amendments to tax rules and payment deadlines

Further to decisions by the French Government, the payment of direct taxes (i.e corporate income tax, payroll tax and corporate local taxes) due in March was deferred. For instance, the 15 March corporate income tax instalment was deferred to 15 June, with no need for the companies proceeding with the deferral to justify it, provided however that a specific form is filed with the tax authorities. For those who had paid it ahead of the deferral announcement, it was indicated that a refund would be made upon request.

Likewise, for the payment of local taxes (*Cotisation Foncière des Entreprises* and *Taxe Foncière*), a temporary deferral until year end was authorised for companies paying them on a monthly term, with no need to justify the deferral, provided however that a specific form is filed with the tax authorities

The tax authorities also announced that they were agreeable to speeding up the refunding of outstanding receivables including VAT credits and R&D tax credit.

VAT or other indirect taxes have so far remained outside of the scope of the deferral measures.

Similar measures were taken for the payment of social security contributions.

2. Other measures taken by the French Government or institutions

2.1 Loans

The Government, via Bpifrance Financement¹⁸ ('BPI') has implemented a very supportive rescue package,¹⁹ modelled on the German package, consisting in the guaranteeing of unsecured new loans granted by banks as well as direct lending, which can be obtained by companies and businesses if they meet the required criteria.

2.1.1 State guaranteed loans ('Prêts Garantis par l'Etat', hereafter 'PGE')

The PGE is a global EUR 300 billion²⁰ State guarantee scheme granted by BPI for unsecured loans, syndicated or not, made by banks from 16 March 2020 to 31 December 2020, at a rate close to nil,²¹ to meet the cash flow needs of companies and businesses impacted by the coronavirus outbreak. Even though not expressly excluded from the rescue package, it is doubtful that all cash flow needs will fall under the scope of the PGE, such as the funding of redundancy plans for example, even when caused by the pandemic.

The PGE is intended for companies and businesses involved in all economic activities except for:

- (i) Credit institutions, finance companies (*sociétés de financement*) and real estate companies (*société civiles immobilières*);
- (ii) Companies subject to insolvency proceedings (safeguard, administration or liquidation): This seems to imply that companies, subject to insolvency proceedings earlier in the year, but which exited these proceedings via reorganisation plans adopted by court before 24 March (i.e the date of publication of the law and decree instituting the PGE), but possibly also companies which may exit these proceedings thereafter and which are not undergoing any proceedings when applying for a PGE, may be eligible. Likewise, companies or businesses

Notes

16 Article 2 of the Ordinance.

17 Subsequently determined by decree.

18 BPI stands for *Banque Publique d'Investissement*.

19 Arrêté du 23 mars 2020 accordant la garantie de l'Etat aux établissements de crédit et sociétés de financement en application de l'article 4 de la loi de finances rectificative pour 2020.

20 This total amount represents approximately 13% of France's 2019 GDP.

21 At 'resource' rate.

undergoing preventative measures (*mandat ad hoc and conciliation*) are also eligible;

- (iii) Undertakings ‘in difficulty’ on 31 December 2019, as defined by the EU Commission Regulation dated 17 June 2014²² to which the Commission specifically refers in its 19 March 2020 Communication²³ under ‘aids in the form of guarantees on loans’. Assessing whether a company applying for a PGE qualifies as an undertaking in ‘difficulty’ may not, in some instances, be straightforward until its 2019 accounts are certified and approved. The Government has therefore recommended that steps to be taken to assess whether a borrower’s situation remain proportionate and that sworn statements would not be required.²⁴

Amount covered by the guarantee:

In principle, the coverage of the PGE may not exceed 25% of the 2019 / latest FY turnover (excluding VAT), with the following derogations:

- For newly created or innovative companies, the coverage is capped at two years of payroll;
- For companies with less than 5,000 employees and a turnover below EUR 1.5 billion,²⁵ the guarantee will cover 90% of the outstanding principal amount, interest and incidental charges under the loan; and
- If an event of default occurs within the first two months of the granting of the loan, the PGE will not apply, leaving the bank which granted the loan without any collateral at all.

Loan term and amortisation:

The PGE is a one-year bullet cash loan. Its maturity cannot be shorter than 12 months and at the end of the initially agreed maturity, the borrower may decide to amortise the loan over a further one, two or more years with a maximum of five years. As a result, a PGE may have a maximum 6-year maturity with a grace period over the first 12 months.

No other security than the PGE, except for loans granted to large companies and new money privilege:

The PGE may not be secured by any liens or collateral over the borrower’s assets to the benefit of the bank and the guarantee issued by BPI to secure the PGE loans is not collateralised either, except for large companies, i.e. those employing more than 5,000 employees and generating a turnover in excess of EUR 1.5 billion. For PGEs granted to large companies, only the portion of the loan not covered by BPI will be eligible to coverage by collateral.

Interestingly, in a Q&A session between professionals, BPI and the French Banking Federation (FBF) advertised by the Government,²⁶ the latter has taken the view that a lender granting ‘new money’ in a court approved conciliation,²⁷ and benefiting from the statutory ‘new money’ privilege may also benefit from the PGE, thereby granting said lender a double guarantee. This opinion position has recently given rise to the commencement of conciliation procedures solely to obtain that the new money granted under that framework also benefit from that specific privilege, beyond the BPI guarantee.

Applying for a PGE:

A PGE is applied for directly with the company’s bank with a view to obtaining the bank’s pre-approval. Further to an agreement reached with the FBF it must be granted at no cost, i.e. a resource rate.

Once the bank’s pre-approval is issued, the borrower then applies for the BPI guarantee. For small and medium sized companies, BPI does not conduct a second review beyond the review carried out by the bank and the latter is in principle granted if the required criteria are met. A question, however, remains: will the BPI accept to guarantee a loan to a borrower who is notoriously not complying with statutory payment terms to its suppliers?

Companies employing more than 5,000 employees and with a turnover in excess of EUR 1.5 billion must make application for a PGE directly to the French government.

Many applications have been turned down so far. In that event, the ousted applicant can reach out to the *médiateur du crédit* at the Banque de France, who will check whether the applicant meets the required criteria and contact the bank to discuss the reasons for the rejection of the loan request.

Notes

22 Article 2 (18) of the Commission Regulation (EU) No. 652/2014 of 17 June 2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. According to Article 2 (18): companies (i) which have received rescue aid and not yet reimbursed the latter or received restructuring aid and are still subject to a restructuring plan, or (ii) that are not SMEs and where their book debt to equity ratio has been greater than 7.5 and their EBITDA interest coverage ratio has been below 1.0 for the past two years, are considered as ‘undertakings in difficulty’. Likewise, limited liability companies which are not SMEs and which have lost more than half of their share capital as a result of accumulated losses also qualify as ‘undertakings in difficulty’.

23 Regarding the Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak.

24 Foire aux Questions – Prêt Garanti par l’Etat, 31 mars 2020, page 3.

25 Above these ceilings, the coverage decreases to (i) 80% of the loan for companies with a turnover below EUR 5 billion but with more than 5,000 employees, and (ii) 70% for companies with a turnover in excess of EUR 5 billion.

26 Foire aux Questions – Prêt Garanti par l’Etat, 31 mars 2020.

27 ‘Une conciliation ayant donné lieu à un accord homologué’ as per Article L 611-11 of the Code of Commerce.

There is, however, no duty for a bank to grant a loan eligible for BPI's guarantee. Credit institutions remain entitled to exercise their discretionary right to grant, or not to grant, a loan depending on the applicant's financial situation and rating and provided that the purpose of the loan is to remedy a liquidity shortage caused by the coronavirus outbreak. So far, according to the press, banks have shown limited enthusiasm in granting such loans, particularly to small companies, because of the (i) risk of some borrowers filing for insolvency before the expiry of the two months grace period until the BPI guarantee becomes effective, and (ii) lack of remuneration for such loans and the banks' exposure over the portion of the loan which remains uncovered by the PGE in case of default.

The Government therefore announced on 15 April that it would make a EUR 500 million loan package available to companies eligible for a PGE, but whose applications have been turned down by their banks.

2.1.2 Loans granted by the BPI

As part of the rescue package, the BPI also offers direct liquidity support loans. These loans are unsecured, with no collateral over the assets of the borrower. They are dedicated to very small companies (VSEs), small and medium sized companies (SMEs) or middle sized companies (MSEs) which are facing financial difficulties linked to the pandemic.

Two types of loans can be made available:

- the *Prêt Rebond* (literally meaning rebound loan), from EUR 10,000 up to EUR 300,000, granted over a period of seven years with a two-year grace period; and
- the *Prêt Atout* (literally meaning advantage loan), up to EUR 5 million for SMEs, EUR 30 million for MSEs, granted over a period of three up to five years with a deferred amortisation.

The Prêt Rebond

This loan is intended for SMEs, provided that they have been in business for at least one year.

All industries are eligible, except for certain marginal exclusions (real estate companies, financial intermediation companies, etc.).

The loan is designed to finance:

- cash requirements linked to the economic situation;
- an increase in working capital requirements;

- intangible investments; and
- tangible investments with low pledge value (equipment designed/built by the company for its own needs, computer equipment...)

The Prêt Atout

This loan is intended for VSEs, SMEs and MSEs provided that the borrower has been in business for at least one year. All industries are eligible, except for some marginal exclusions (real estate companies, financial intermediation firms, etc.). It is designed to finance:

- a one-off cash requirement; and/or
- an exceptional increase in working capital requirement, caused by the pandemic.

It produces interest at a fixed or variable rate and has a term of three to five years, with a grace period of up to 12 months.

2.2 Creation of a solidarity fund for small businesses, SMEs and self-employed entrepreneurs (artisans, travailleurs indépendants, artistes-auteurs) particularly affected by the coronavirus

According to an ordinance published on 26 March and a decree published on 31 March²⁸ the fund's purpose, created for three months, is to provide financial assistance (*aide financière*) in the form of a lump sum aid of EUR 1,500, which may be increased by another EUR 5,000.²⁹

Eligible for such assistance are individuals and SMEs, which are French tax residents and operating an economic activity (hereafter 'Businesses'):

- having not filed for insolvency by 1 March 2020;
- employing ten or fewer employees;
- having generated a turnover below EUR 1 million during the last financial year;
- having generated a taxable profit of less than EUR 60,000 during that financial year;
- not controlled by a commercial company as per the definition of the code of commerce;
- subject to an administrative ban of the reception of public (*interdiction d'accueil du public*) or having suffered a loss of at least 50%³⁰ of their turnover between 1 and 31 March 2020 compared to the same period during their previous financial year;

Notes

28 Ordonnance No. 2020-317 du 25 mars 2020 portant création d'un fonds de solidarité à destination des entreprises particulièrement touchées par les conséquences économiques, financières et sociales de la prorogation de l'épidémie de covid-19 et décret No. 2020-371 du 30 mars 2020 relatif au fonds de solidarité.

29 Initially, this amount was EUR 2,000.

30 In the initial decree, which was amended in early April, this amount was 70% of the turnover.

- whose manager does not benefit from a full-time working agreement or old age pension, nor from a daily social security allowance exceeding EUR 800;
- which were not in financial trouble on 31 December 2019, as per Article 2 of the EU Regulation³¹ declaring certain aids compatible with the interior market.

The application must be filed digitally with an estimation of the lost turnover and a sworn statement that the Business meets the required conditions.

2.3 Deferral of the duty to pay rent, electricity, gas and water bills owed by Businesses impacted by the coronavirus and eligible for the solidarity fund

According to an ordinance published on 26 March,³² complemented by a decree, such deferral must be granted upon request³³ for rent and rental charges, electricity, gas and water bills due between 12 March and the end of the state of emergency, including for Businesses undergoing safeguard, administration and liquidation proceedings.

At the end of the state of emergency, the deferred bills for electricity, gas and water will be payable in equal installments over a period of no less than six months. Rent and related charges payments are deferred until the expiry of a further two months period beyond the end of the state of emergency. Thereafter, the tenant will benefit from a similar period of at least six months to settle the deferred rent and charges. During the deferral period, the eligible Businesses will be protected against any termination and financial damages provisions or the activation of guarantees by their landlords linked to the failure to pay their rent and charges in relation to their professional premises.

2.4 Proceedings before the Paris Commercial Court and more generally in France

The presiding judges of the chambers of the Paris Commercial Court dealing with insolvency and pre-insolvency scenarios issued a note³⁴ providing that since the beginning of the containment measures:³⁵

- Pre-insolvency applications for *mandat ad hoc* and *conciliation* proceedings must be made electronically at the following address: prevention@greffe-tc-paris.fr and all the corresponding hearings held via conference calls every Tuesday and Thursday;
- Other applications, including for example the extension of the scope, the duration and the end of these proceedings are also handled digitally; and
- As of 5 April, 18 *mandats ad hoc* and 23 *conciliation proceedings* had been commenced in relation to debtors with a combined annual turnover in excess of EUR 2 billion, employing more than 12,000 employees and with debts in excess of EUR 1.2 billion.

According to a recent report posted by Deloitte's head of restructuring in France,³⁶ the number of insolvency filings in the country dropped substantially between mid-March and mid-April compared to the same period in 2019. This is essentially, according to him, because of (i) the temporary amendments in relation to the assessment of the cessation of payments concept (see above), which validly enable a number of companies in distress to defer their filings, and (ii) the reduced capabilities of courts to handle all the matters during the containment period. In his opinion, by the end of the state of emergency, the restructuring professionals will be faced with a considerable number of cases, including the deferred filings and those linked to future defaults.

2.5 Payment of dividends and eligibility to the rescue package

Bruno Le Maire, the Minister of Finance, stated on 27 March that companies paying dividends to their shareholders would not be entitled to benefit from the rescue package and other measures implemented by the Government.

So far, his statement has not translated into a regulatory measure but various large companies,³⁷ i.e. essentially those targeted by the Minister's statement, announced that they would either defer the payment of dividends, reduce them or propose not to pay any dividends at all³⁸ at their next shareholders' meeting.

Notes

31 EU Regulation No. 651/2014 dated 17 June 2014.

32 Ordonnance No. 2020-316 du 25 mars 2020 relative au paiement des loyers, des factures d'eau, de gaz et d'électricité afférents aux locaux professionnels des entreprises dont l'activité est affectée par la prorogation de l'épidémie de covid 19.

33 Including inter alia a sworn statement confirming that the applicant meets the required criteria, i.e. being (i) a Business, and (ii) impacted by the coronavirus.

34 Communiqué du 5 avril 2020 des Délégations Générales de la Présidence du tribunal de commerce de Paris à la Prévention et au Traitement des Difficultés des Entreprises.

35 As from 17-March 2020.

36 Jean Pascal Beauchamp, partner, Deloitte Finance.

37 Employing more than 5,000 employees or generating a turnover in excess of EUR 1.5 billion.

38 JC Decaux, Airbus, Tarkett, Autogrill, Auchan Holdings, Elior and others.

Conclusion

As in every war, there will be winners and losers. To be among the winners and exit the crisis in a better position than competition, acquire a target or settle a litigation at optimised conditions, professional advice and strategy will matter more than ever.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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