

Establishment in France of a “Legally Protected” Period Extending Many Legal Deadlines and Neutralizing Certain Contractual Prerogatives

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Order No. 2020-306 dated March 25, 2020 relating to the extension of expired deadlines during the health emergency period and the adjustment of procedures during the same period (as amended, the "Order") was enacted by the Council of Ministers on March 25, 2020. It entered into force on March 26, 2020¹ and has been amended by Order No. 2020-427 dated April 15, 2020. The Order establishes a "legally protected" period neutralizing many legal deadlines, adjusting certain prerogatives of the creditor of an obligation and extending certain contractual deadlines.

Creation of a "legally protected" period; neutralization of legal deadlines and administrative and jurisdictional measures

The Emergency Health Act No. 2020-290, enacted on March 23, 2020 to address the covid-19 pandemic, empowered the French Government to declare a “state of health emergency” for a period of two months from its entry into force, i.e. from March 24, 2020². It also allowed the French Government to take certain emergency measures where it deems necessary, by way of orders. Unless it is extended, the state of health emergency will cease on May 24, 2020.

The Order, published in this context, provides for the creation of a "legally protected" period which, subject to certain exceptions³, relates to all of the statutory periods and measures that have expired or that will expire between March 12, 2020 and the date that is one month following the end of the state of health emergency, i.e., unless extended, June 24, 2020 (the "**Legally Protected Period**").⁴

¹ A circular from the Ministry of Justice dated March 26, 2020 (Circ. JUSC 2008608C) provides useful clarifications and examples to better understand the scope of the Order.

² Article 4 of Act no. 2020-290 dated March 23, 2020.

³ Article 1, II. of the Order excludes from the scope of the measure, in particular, (i) the financial obligations and related guarantees specified in articles L. 211-36 et seq. of the French Monetary and Financial Code and (ii) the deadlines and measures that have been the subject of other specific adjustments by Act no. 2020-290 dated March 23, 2020 (which refers, for example, in commercial matters, to the Order no. 2020-318 dated March 25, 2020 which provides for the extension by three months of the deadlines for the approval of the annual accounts of commercial companies ending their financial year between September 30, 2019 and the expiration of a period of one month after the ending date of the state of health emergency).

⁴ Article 1, I. of the Order. It is worth noting that the Report to the President of the French Republic regarding the Order no. 2020-427 dated April 15, 2020 confirms that the ending date of the Legally Protected Period is tentative and that it will need to be reviewed as part of the legislative measures preparing for the end of the lockdown. Given that the end of the lockdown should be organized as from May 11, 2020, the Report to the President of the French Republic points out that the Legally Protected Period may end sooner than originally anticipated.

The Order establishes a mechanism for postponing the term or deadline for any act, remedy, legal action, formality, registration, declaration, notification or publication prescribed by law or regulation⁵ that had to be carried out during the Legally Protected Period⁶. The same applies to any payment prescribed by law or regulation for the purpose of the acquisition or the preservation of a right.⁷

The purpose of this regime is not to eliminate the obligation to carry out all acts or formalities whose term expires during the Legally Protected Period, but to prohibit that an act performed within the new time limit may be considered as a late fulfillment of the obligation; all the aforementioned acts and measures will be deemed to have been performed on time if they have been carried out within a period which may not exceed, as from the end of the Legally Protected Period, the time limit legally prescribed for taking action, up to a maximum of two months.⁸

Under this regime, a one-month period to file an appeal which would have expired during the Legally Protected Period will therefore expire on July 24, 2020 (June 24, 2020 + 1 month). Similarly, a five-year limitation period that would have expired during the Legally Protected Period will expire on August 24, 2020 (June 24, 2020 + 2 months).

The Order also provides that the administrative or judicial measures that were due to expire during the Legally Protected Period are extended until August 24, 2020.⁹ These measures include, *inter alia*, provisional measures, investigation measures, conciliation measures, mediation measures, authorizations, permits and approvals.

Adjustment of certain contractual remedies

In order to take into account the difficulties of contractual performance resulting from the state of health emergency, the Order provides for the neutralization of certain contractual remedies available in case of breach of contract such as the penalties for late performance (*astreintes*), liquidated damages clauses (*clauses pénales*), termination clauses as well as acceleration clauses.

When their purpose is to sanction the non-performance of a contractual obligation within a specified period, these clauses are deemed not to have entered into force nor been effective if such period has expired during the Legally Protected Period.¹⁰

The Order provides that the effect of such clauses will be postponed as of the end of the Legally Protected Period for a period of time equal to the number of days between, on the one hand, March 12, 2020 or the date on which the contractual obligation arose (if this date is later than March 12, 2020) and, on the other hand, the date on which the contractual obligation must be performed.¹¹ In practice, if a contractual obligation arose on April 1, 2020 and must be performed on April 15, 2020, i.e. fifteen days

⁵ By referring to "law or regulation", the Order excludes deadlines contractually stipulated. Consequently, the time period for exercising a put option (failing which it shall be deemed to have lapsed) expiring during the Legally Protected Period is not extended under this mechanism.

⁶ Article 2, para. 1 of the Order.

⁷ Article 2, para. 2 of the Order. By referring to "the acquisition or (...) preservation of a right", the Order confirms that the payment of contractual obligations is not suspended during the Legally Protected Period and that contractual deadlines must always be respected (subject to the provisions of Article 4 of the Order).

⁸ A period less than or equal to two months will therefore begin to run again at the end of the Legally Protected Period, while longer periods will be extended by a maximum of two months.

⁹ Article 3 of the Order.

¹⁰ Article 4, para. 1 of the Order.

¹¹ Article 4, para. 2 of the Order.

after the date on which it arose, such clauses will only enter into force or be effective following a fifteen-day period as from the termination of the Legally Protected Period, i.e. on July 9, 2020 (June 24, 2020 + 15 days), unless the relevant party performed the contractual obligation by such date.

Let's take as another example a loan agreement with monthly instalments (due on the 25th of each month) entered into on February 11, 2020. This agreement provides that the lender is entitled to accelerate the loan and declare it immediately due and payable in the event of a borrower's default to repay a monthly instalment. Firstly, the lender will not be able to require the full repayment of the loan if the instalment of March 25 is not paid. Secondly, the effect of this acceleration clause will be postponed as follows: since the instalment was due on March 25, 2020, i.e. thirteen days after March 12, 2020, the acceleration clause will be effective after a thirteen-day period as from the end of the Legally Protected Period, i.e. on July 7, 2020.

The Order also provides for specific postponement rules with respect to clauses sanctioning the non-performance of contractual obligations whose date of performance falls after the end of the Legally Protected Period and which do not consist in the payment of a sum of money¹². This postponement will be for a period of time equal to the elapsed time between, on the one hand, March 12, 2020 or the date on which the contractual obligation arose (if this date is later than March 12, 2020) and, on the other hand, the end of the Legally Protected Period.¹³ This provision has been designed to help parties who must perform an obligation after June 24, 2020 to face the difficulties resulting from the lockdown.

For example, if a services agreement entered into on March 11, 2020 provides for the delivery of a specific service on June 26, 2020, the liquidated damages clause (*clause pénale*) sanctioning the non-performance would be neutralized for a period of three months and twelve days (i.e., a period of time equal to the duration of the Legally Protected Period). If the contract has been entered into on April 12, 2020, the effectiveness of such clause would be postponed for a period of time equal to two months and 12 days (i.e., a duration equal to the period of time from April 12, 2020, i.e., the date on which the contractual obligation arose, until June 24, 2020).

Finally, the Order provides that the penalties for late performance (*astreintes*) and liquidated damages clauses (*clauses pénales*) that took effect before March 12, 2020 are suspended during the Legally Protected Period and will only start to run again from the day after its expiration¹⁴. Therefore, a liquidated damages clause providing for a debtor's payment of an indemnity of 100 euros per day of delay having started to run on February 29, 2020 will be suspended as from March 12, 2020 and will only take effect again on June 25, 2020, unless the state of health emergency is extended.

In any event, the parties remain free to exclude the application of these provisions by way of clauses expressly stipulated. They may either decide to take into account differently the impact of the health crisis on how the contract should be performed or fully waive these suppletive provisions.

¹² To justify the exclusion of the obligations consisting in the payment of a sum of money, the Report to the President of the French Republic regarding the amending Order no. 2020-427 dated April 15, 2020 indicates that the consequences of the measures resulting from the state of health emergency on the performance of monetary obligations are only indirect and that, as from the end of Legally Protected Period, financial difficulties of debtors should be addressed based on existing statutes (grace periods and insolvency proceedings).

¹³ Article 4, para. 3 of the Order

¹⁴ Article 4, para. 4 of the Order.

Extension of certain contractual deadlines relating to termination or tacit renewal

Furthermore, the Order provides for the extension of the contractual periods relating to the termination or the renewal by tacit agreement when such termination or non-renewal rights can only be activated during a specific time period and this time period expires during the Legally Protected Period.¹⁵

Therefore, in order to allow the party who was not able to terminate a contract or to prevent its renewal within the contractual time period because of the covid-19 pandemic, such time limits are extended by two months from the end of the Legally Protected Period, i.e. until 24 August 2020, unless the state of health emergency is extended.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Jacques Naquet-Radiguet	+33 1 56 59 36 20	jacques.naquet@davispolk.com
Georges Terrier	+33 1 56 59 36 80	georges.terrier@davispolk.com
Jean-Christophe Devouge	+33 1 56 59 36 27	jc.devouge@davispolk.com
Géraldine Fromage	+33 1 56 59 36 18	geraldine.fromage@davispolk.com
Stéphane Daniel	+33 1 56 59 36 46	stephane.daniel@davispolk.com
Ferdinand Barbé	+33 1 56 59 36 71	ferdinand.barbe@davispolk.com

¹⁵ Article 5 of the Order.