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The French Government Response to the COVID-19: Highlights of Measures Taken

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In an effort to halt the spread of the novel coronavirus Covid-19 ("Covid-19"), on March 14, 2020 the French government mandated a shut-down of non-essential businesses and other venues open to the public. The shut-down ended on May 11, 2020. Among the businesses concerned were retail stores, shopping centers, and restaurants. Businesses were authorized to continue their online activities and related deliveries. The shut-down did not impact businesses that are considered "essential to the life of the nation", such as food shops, drugstores, banks, and gas stations (the list is much longer).

Further, on March 16th the French government implemented a lock-down, which also ended on May 11th. In light of these constraints, many businesses had to adapt their way of functioning by allowing all or most of their employees to work from home or by implementing special safety measures. As in many places in the world, the Covid-19 pandemic is also impacting the ability of certain businesses to satisfy their contractual obligations.

Since May 11th, the non-essential businesses that were required to shut down have been allowed to reopen, except for certain businesses and venues like restaurants, hotels, cinemas, theaters, etc.

Emergency Law no. 2020-290, dated March 23, 2020, empowered the French government to take emergency measures in order to address the negative consequences of the current restrictive measures, and in particular to prevent companies from going out of business. The government has since issued numerous ordinances, decrees and orders implementing the measures contemplated by the Emergency Law.

In addition, Law no. 2020-289, also dated March 23, 2020, and Law no. 2020-473 dated April 25, 2020, which modify the French 2020 Finance Law, provide that the French State will guarantee up to 90% of an eligible loan with respect to up to €300 billion of loans granted to companies registered in France by banks, financial institutions and certain financial intermediaries between March 16, 2020 and December 31, 2020. An eligible loan must provide a 12-month payment deferral and an option for the borrower to elect at the end of the first year to repay its loan over an additional period of up to five years (Order dated March 23, 2020).

The measures taken to date pursuant to the Emergency Law impact tax, financial, employer/employee relationships, company's governance, and private contracts. We provide below some highlights of these measures, together with an explanation of certain pronouncements of the Ministry of Economy and other economic actors that could have an impact on decisions as to whether or not a French company should pay dividends in the coming months.

- **Tax and financial measures**

All businesses, regardless of size, were allowed to defer social security contributions and tax payment (such as corporate income tax) due in March, April and May, 2020. Companies also may request the reimbursement of social security contributions and taxes paid in March. In the case of companies facing extremely difficult situations, the French tax authorities may decide to grant direct tax rebates. The payment of property taxes and of real estate occupancy taxes are also suspended for March, April and May, 2020. The French government is considering the cancellation of social and tax charges for companies which are on the verge of bankruptcy due to the shut-down.

To further help "small" companies impacted by Covid-19[1], certain payments will be made to such companies out of a "solidarity fund" of approximately €7 billion, to partially offset the negative impact of crisis during the month of March (Decree n° 2020-371 dated March 30, 2020**)** up to €1,500 per entity, which may be increased by an additional amount (from €2,000 to €5,000) for companies facing proven cash difficulties, if certain conditions are met. The same measures apply in April and May. The payments made are exempt from corporate income tax, income tax and all social security contributions and charges required by law or by a collective bargaining agreement.

In addition, for those companies eligible to participate in the solidarity fund, gas, electricity and water service providers must spread over time the payment of invoices, if requested, and all financial penalties or interest charges for late payments must be waived (Ordinance n°2020-316 dated March 25, 2020).[2] Landlords may not enforce termination clauses against an eligible company due to its failure to pay rent or rental charges between March 12, 2020 and the expiry of a two-month period after the end of the health emergency state.[3] Companies not eligible to benefit from the solidarity fund will be able to rely on the general provisions of Ordinance no. 2020-306 dated March 25, 2020 described below, which provides for a temporary freeze on enforcement of contractual penalty or termination clauses.

These measures are in addition to the measures generally available to companies facing difficulties in France and aimed at preventing bankruptcy (possibility of requesting payment delays in court, conciliation proceeding to renegotiate debts with the creditors, and safeguard proceeding). Businesses should avail themselves of these measures at the first signs of financial difficulty, since it is anticipated that the Commercial Courts and other players who participate in the implementation of these preventive measures, such as ad-hoc and court-designated administrators, will be extremely busy in the months to come.

- **Measures concerning the employer/employee relationship**

Article 11 of the Emergency Law lists the measures that may be taken by the government to limit lay-offs and ease the impact of the decrease in activity. The main ones, as already implemented by the government, are detailed below.

Remote work

If working remotely is possible given the employee's position, an employer may not request its employees to come to their usual work location. The French Labor Code mentions the epidemic risk as a justification for putting in place remote work without the employee's consent. The government insisted that employees should continue working remotely, to the extent possible, despite the end of the lock-down.

Safety measures for employees who have to go to their usual work location

If employees have to continue to come to work, employers must adopt special safety measures to ensure the safety of their employees and to protect their physical and mental health. The government insists that businesses must continue to operate and that shutting down must remain the exception. Prior the end of the lock-down on May 11, 2020, the Ministry of Labour published a “going back to work” protocol aimed at ensuring the health and safety of the employees.

The appropriate safety measures are obviously to be decided on a case by case basis. Companies are strongly encouraged to check often the list of recommended measures (notably on the website of the Health Ministry) since it is updated on a regular basis. Implementation of these measures should also be consistent with other labor and employment law requirements, and may notably require the staff representative bodies to be involved with the related decisions.

French law provides that employees have the right to withdraw from a work situation if they have a reasonable belief that the situation presents a serious and imminent danger to their life or health. It seems, however, that the government does not consider that this withdrawal right (“*droit de retrait*”) would be justified if the employer complies with the government’s safety recommendations.

Employers may have a tendency to collect sensitive health data from their employees with a view of ensuring their safety and the protection of their health. On March 6, 2020, the French data protection authority (the "CNIL") published initial recommendations as to what employers are authorized to do and what they should refrain from doing, which were supplemented on May 7, 2020. Employers should not collect health data which is not required to manage concerns of exposure to the Covid-19. As such, employers should not collect information related to the research of possible symptoms experienced by an employee/agent and his/her relatives, in a systematic and generalized manner, or through individual investigations and requests. Examples of what the CNIL considered as in breach of the applicable data protection laws because they are systematic and generalized measures, not strictly necessary to manage concerns of exposure to the Covid-19, include mandatory body temperature readings to be sent to the employees' managers on a daily basis,[4] the use of thermal cameras, and the collection of medical questionnaires from all employees. Employers may encourage their employees to report information related to their individual exposure to the Covid-19, and the CNIL recommends putting in place a dedicated channel for that purpose. Employers are also authorized to keep records of the identity of the contaminated employees and of the measures put in place with respect thereto.

Partial unemployment

In exceptional circumstances, it is possible for companies to (i) reduce the working hours of their employees below the duration provided by law or by a collective bargaining agreement, or (ii) temporarily close their business completely.

Special provisions were introduced by Decree n°2020-325 dated March 25, 2020, in case of partial unemployment due to Covid-19, resulting in a better coverage of the employees concerned and a reduction of the financial burden on the employer.

The French State will contribute up to 70% of the gross salary of each employee within the limit of 4.5 of the hourly minimum wage (the allowance is a fixed amount of €8,03/unemployment hour), in the case of full unemployment. Employers must, in any case, provide the employees with 70% of their gross salary during the application of the partial unemployment scheme, so the employer may need to supplement the government allowance depending on the concerned employee's salary. Social security on the amounts paid by the employers are reduced.

There is great flexibility for companies impacted by Covid-19 to resort to the partial unemployment scheme (for instance, formalities have been simplified). However, the French government has made it clear that situations will be closely reviewed, as the guiding principle is that companies should continue to operate. Companies desiring to resort to partial unemployment will need to demonstrate a decrease in their activities, supply issues, cancellation of orders, etc.; use of partial unemployment based solely on the existence of Covid-19 epidemic in itself will certainly be deemed invalid.

For more information on partial unemployment, **click here**.

Ordinance no. 2020-323 dated March 25, 2020 allows companies to utilize a maximum of six days paid leave in order to defray the number of partial unemployment days so long as an industry-wide or company-wide collective agreement specifically addressing this topic is in effect. Other types of rest days, such as "JRTT", may be imposed unilaterally even in the absence of such agreement.

In companies operating in sectors that are particularly necessary for the security of the country and the continuity of its economic and social life, the maximum weekly working time may be extended to sixty hours at some point.[5]

- **Measures concerning companies' governance**

Ordinance no. 2020-321 dated March 25, 2020 simplifies and adapts the conditions under which the shareholders of a company and its management bodies can meet and deliberate.

Irrespective of their legal form, companies will be able to hold shareholders' meetings by means of telephone or audiovisual conference, without the need for specific authorization in the by-laws, and including with respect to a meeting related to the approval of the accounts, which in normal times must be a physical meeting for certain types of companies. Shareholders' decisions may also be taken by way of a written consultation, when the law provides that decisions may be taken in this way, without the need for specific by-law authorization, and including with respect to a meeting related to the approval of the accounts.

Likewise, with respect to the meetings of a company's management bodies, (i) the members that participate by means of telephone or audiovisual conference are deemed to be present at the meetings, and (ii) the decisions may be taken by way of a written consultation, in both cases without the need for specific authorization in the by-laws or any internal rules in that respect, and irrespective of the subject matter of the meetings,

For now, this Ordinance applies to meetings held between March 12, 2020 and July 31, 2020.

In addition, Ordinance no. 2020-318 dated March 25, 2020 extends by three months the deadline for the approval of a company's annual accounts, which in many companies needs to take place within six months of the end of the fiscal year by three months.

- **Specific measures concerning contracts**

Ordinance no. 2020-306 dated March 25, 2020 provides that penalty or termination clauses sanctioning the non-performance of an obligation within the contractually-required time frame cannot be enforced if the deadline for the performance of the obligation is between March 12, 2020, and the expiration of one month after the end of the state of emergency related to Covid-19. This freeze on the enforcement of penalty or termination clauses is not limited by the Ordinance to contracts governed by French law, and the Ministry of Justice's note dated April 17, 2020 provides that these provisions constitute a mandatory overriding provision ("loi de police") within the meaning of Article 9 of Regulation no. 593/2008 of June 17, 2008 on the law applicable to contractual obligations, known as "Rome I".

In the event a contract is entered into during the period protected by Ordinance no. 2020-306, the parties may wish to waive the application of this mechanism for freezing the above-mentioned contractual clauses. To the extent that this is done knowingly, the Ministry's note provides that such a waiver would be valid.

Ordinance no. 2020-306 further specifies that in the event a contract provides that it may only be terminated during a specific timeframe, or that it is renewed automatically unless a notice of termination is issued within a specific timeframe, if such timeframe ends between March 12, 2020 and the expiration of one month after the end of the state of emergency related to Covid-19, the deadline to give notice of termination is extended by three months following the end of the state of emergency.

- **Dividend distributions to be cautiously considered**

The French Ministry of Economy strongly advised companies that put in place partial unemployment not to distribute dividends during the Covid-19 epidemic (in its press release dated April 2, 2020). The Ministry also announced that companies that distribute dividends and ask for the State's aid (via the deferral of the payment of social security contributions and taxes, for instance) will be required to reimburse this aid and will be subject to penalties. Companies that request a loan after having distributed dividends will not be eligible for the State's guarantee. The Afep (*Association Française des Entreprises Privées*), an organization of 113 French private companies, asked its members to reduce the dividends to be paid in 2020 by 20% if they resort to partial unemployment, and suggested that their executives reduce their compensation by 25% for the period during which their employees are on partial unemployment so as to support national solidarity actions in connection with Covid-19. Bills for the suspension of dividends were introduced by certain political parties. The European Central Bank advised credit institutions of the Euro zone to conserve capital to support the economy during the Covid-19 epidemic. It recommended credit institutions to refrain from paying dividends and implementing share buy-backs aimed at remunerating shareholders until October 1, 2020. It further recommended that no irrevocable commitment to pay out dividends be undertaken by credit institutions for the fiscal years 2019 and 2020.

[1] "Eligible companies" are companies that started their activity before February 1, 2020, that employ no more than 10 employees and have an annual turnover of less than €1,000,000 and an annual net taxable income of no more than €60,000. Further, to be eligible, these companies must have had to close down due to Covid-19 **or** have a March, 2020 turnover at least 50% less than their March, 2019 turnover. There are some additional conditions related to the company not being subject to a court-ordered liquidation as of March 1, 2020 or related to the status of its main shareholder if he/ she also works for the company. Concerning the months of April and May, the turnover is to be compared with the April or May, 2019 turnover, as applicable, or the average monthly turnover throughout the year 2019.

[2] However, in such case, the eligible companies must have had to close down due to the Covid-19 **and** have a March, 2020 turnover at least 50% less than their March, 2019 turnover (Decree n°2020-378 dated March 31, 2020).

[3] The date on which the health emergency state will end is currently set at July 10, 2020.

[4] Further, the "going back to work" protocol of the Labour Ministry does not recommend that employers put in place temperature screenings, even without any recording of the information, which would be in compliance with law, because fever (or lack of fever) is not a systematic symptom of Covid-19.

[5] These sectors were meant to be determined by a decree. They were anticipated to cover, in particular, energy, telecommunication, transport, agriculture and the food industry. This decree might not come out. The Labour Minister indicated that for the time being, there has been no need to derogate from the current working hours rules.

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