

Insights

FRANCE - MEASURES COVID-19 - 6 APRIL 2020

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In response to the pandemic of the Covid-19 Coronavirus, the Government put in place various measures to support businesses in difficulty.

First of all, the emergency law of 23 March dealing with the coronavirus pandemic was published on 24 March 2020, the date of its entry into force.

Thus, on the basis of Article 11 of this law, 26 orders (out of 40 envisaged) presented to the Council of Ministers on 25 March 2020 were published in the Official Gazette of 26 March 2020.

In addition, pursuant to this law, five other orders were issued by the Council of Ministers on 27 March 2020 and published in the Official Journal of 28 March 2020.

Amongst these 31 orders, four of them require special attention regarding real estate matters.

For the understanding of this note, it shall be first recalled that:

- Article 4 of the Law of 23 March 2020 declares a state of health emergency for a period of two months from the entry into force of this Law on 24 March 2020 (Article 22 of the Act of 23 March 2020 provides that it shall enter into force immediately). The date of cessation of the state of health emergency is therefore set for the time being at 24 May 2020, subject to a subsequent postponement linked to the evolution of the Covid-19 pandemic;
- the rules for calculating time limits in civil matters: by combining Articles 641 and 642 of the French Code of Civil Procedure, when a time limit is expressed in months, the time limit expires on the day of the last month which bears the same date as the event from which the time limit runs. Moreover, any time limit expires on the last day at twenty-four hours. Finally, a time limit which would normally expire on a Saturday, Sunday or public holiday or non-working day shall be extended until the first working day thereafter.

I. Order No. 2020-306 of 25 March 2020 on the extension of the time limits due during the period of health emergency and the adaptation of procedures during that same period and its circular presenting the provisions of Title I No. CIV/01/20 of 26 March 2020

Focus on several articles with practical implications:

Article 2:

Article 2 of that order provides for a mechanism **to extend** time limits that have expired during a certain period:

« Any act, appeal, legal action, formality, registration, declaration, notification or publication prescribed by law or regulation on pain of nullity, sanction, lapse, foreclosure, prescription, unenforceability, inadmissibility, lapse, withdrawal of the right of action, application of a special regime, nullity or forfeiture of any right whatsoever and which should have been completed during the period mentioned in Article 1 shall be deemed to have been done in time if it has been done within a period which may not exceed, as from the end of that period, the period legally prescribed for taking action, up to 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. »

In other terms, from the end of the state of health emergency, i.e. 24 June 2020 at 12.00 p.m. (date of the end of the state of health emergency + one month), practitioners shall have to complete the act or formality within an additional period of time whose duration is the same as that originally set, up to a maximum limit of two months.

NB: The wording of the text is open to interpretation since it provides that the additional period will start "*from the end of the period*". Although the state of public health emergency ends on 24 June 2020, it is likely that the additional period will not start until the next day, 25 June 2020, and will expire at the latest on 25 August 2020.

Therefore, two cases are possible:

- **Case 1:** If the initial period is longer than two months (e.g. there is only three months left to bring the matter before the judge on pain of prescription, the period expiring on 30 March 2020), the additional period will expire on 25 August 2020 (end of the period + two months) taking into account the cap on the two-month extension (the prescription period will expire on 25 August 2020).
- **Case 2:** If the initial period is less than two months (e.g. an appellant has only one month left to submit his submissions to the Registry, the period expiring on 15 March 2020), the additional period will begin at the end of the period **for the same duration as that initially envisaged**. Thus, the appellant will benefit from an additional period from 25 June 2020 of the same duration as that initially provided for, i.e. one month. He must therefore have submitted his conclusions by 25 July 2020 at the latest.

In any event, in practice, it may be difficult to find a bailiff to serve the legal notice by extrajudicial act on the lessee.

Article 3:

Article 3 of the order also provides for an **extension** mechanism in respect of:

"The following administrative or jurisdictional measures, the term of which expires during the period defined in Article 1(l), shall be automatically extended until the end of a period of two months following the end of that period:

1° Precautionary measures, measures of inquiry, investigation, investigation, conciliation or mediation;

2° Prohibition or suspension measures which have not been pronounced as a sanction;

3° Authorizations, permits and approvals;

4° Measures of assistance, accompaniment or support for persons in social difficulty;

5° Judicial measures to help manage the family budget.

However, the judge or the competent authority may modify these measures, or put an end to them, when they were pronounced before 12 March 2020."

In addition, Article 1(l) of the order states that:

"l. - The provisions of this Title shall apply to the time limits and measures which have expired or which expire between 12 March 2020 and the expiry of a period of one month from the date of cessation of the state of health emergency declared under the conditions of Article 4 of the abovementioned Law of 22 March 2020."

In other terms, the administrative or judicial measures referred to which expire between 12 March 2020 and 25 June 2020 at 12 a.m. hours shall be automatically be extended until 25 August 2020.

Therefore, we would like to draw your attention on the fact that the building permit orders and their posting are, for example, affected by these deadlines. Indeed, as Article 3 is broadly worded, the mechanisms of Article 3 and Article 2 seem to be confused. Consequently, the mechanisms are similar and lead to the same result, i.e. a two-month extension from 25 June 2020 (the day after the end of the state of health emergency) when the deadline for appeal expires within the "*defined period*".

E.g.: posting of a building permit on 15 April 2020 with expiry of the two-month period for appeal by third parties on 15 June 2020, which will be automatically extended to 25

August 2020.

Moreover, it seems that office approvals or those concerning public-access buildings (ERP) also benefit from this mechanism.

Article 7:

In respect of the relations with the administration, Article 7 of the order provides for the **suspension** of certain time limits, especially those under which an administrative decision may be taken in the absence of a response from the administration and the requests being investigated:

"Subject to obligations arising from an international commitment or from European Union law, time limits within which a decision, agreement or opinion of any of the bodies or persons referred to in Article 6 may or must be reached or is implicitly acquired and which have not expired before 12 March 2020 shall, as of that date, be suspended until the end of the period referred to in I of Article 1.

*The starting point of similar periods which should have started to run during the period referred to in Article 1(I) **shall be postponed until the end of that period.***

The same rules shall apply to time limits for the same bodies or persons to verify the completeness of a file or to request additional documents in connection with the review of an application and to time limits for public consultation or participation."

NB: the provisions of this order concerning town planning authorisations are due to be reviewed and clarified by the government in the near future.

Therefore, if administrative time limits for checking or investigating files were to begin to run during the state of health emergency, they are suspended until the end date of the state of health emergency.

Similarly, deadlines which began before 12 March 2020 and which had not expired by that date shall be suspended.

It will therefore be necessary to be vigilant with regard to these deadlines, which will therefore potentially offer additional months to appeal a decision. There will therefore be a suspension of time limits and it will be necessary in each case to calculate the time remaining from the end of the state of health emergency. A count in months and then in days must then be made.

For example, a building permit posted on 8 March 2020. The time limit for appealing to the ordinary law courts is two months. The deadline is therefore normally 9 May 2020. In application of article 2 of the order, the deadline for third party appeals expires on 9

May 2020, i.e. during the period of health emergency, the deadline is extended. In this case, the time limit for lodging an appeal is calculated from 12 a.m. on 25 June 2020 (one month after the end of the state of public health emergency), but may not exceed two months.

In the present case, in accordance with the suspension mechanism, the time limit will resume on 25 June after midnight.

As a conclusion, regarding the administrative delays:

- Time limits at the end of which an implied decision may arise and which have not expired by 12 March shall be suspended until the end of the state of public health emergency;
- All time limits from 12 March 2020 for time limits which had not expired by that date are suspended;
- Postponement from the first day of the deadline to 25 June 2020 for deadlines that should have started to run between 12 March 2020 and the expiry of the period of one month from the end of the state of public health emergency;
- All suspended or postponed deadlines resume on 25 June 2020, the day after the end of the one-month period following the end of the state of public health emergency.

In any case, these end dates are only provisional, as the Government can extend the state of health emergency at any time.

Article 4:

Article 4 of the order provides a suspension mechanism for:

"Periodic damages, penalty clauses, termination clauses and clauses providing for forfeiture, where their purpose is to penalise failure to fulfil an obligation within a specified period, shall be deemed not to have commenced or to have taken effect if that period has expired during the period defined in Article 1(l).

Such periodic damages shall take effect and be enforceable as from the expiry of a period of one month after the end of that period if the debtor has not performed his obligation before that time.

The duration of periodic damages and the application of penalty clauses which took effect before 12 March 2020 shall be suspended during the period defined in l of Article 1. "

It is specified that "the defined period" refers to the periods and measures that have expired or will expire between 12 March 2020 and 24 June 2020 inclusive.

E.g.: a lessor issued a legal notice referring to the termination clause on 28 February 2020. On 28 March, the causes of the legal notice are not settled between the parties. The effect of the termination clause is postponed from the expiry of a period of one month after the end of the period defined by Article 1 of the Order, i.e. as from 25 July 2020 (25 June 2020 at 12.am + one month). The lessee will thus have until 25 July 2020 to make the payment.

However, periods that do not expire within the protected period do not benefit from this mechanism. Consequently, the period could expire very quickly from the end of this period. As an illustration, if the deadline expires on 27 June, it does not benefit from any extension.

In respect of commercial leases, the lessor and the lessee cannot take advantage of this Article to justify the non-performance of a contractual obligation to be performed during this period. If one of the parties is in default in the performance of its contractual obligation, it must then justify itself on the basis of ordinary law.

Different time limits have a legal origin and will therefore be extended.

For example, this is the case of the mechanism of the lessee's right of pre-emption in the event of the sale of the premises. Article L. 145-46-1 of the French Commercial Code stipulates that the lessee has a period of one month from receipt of the offer to make a decision. If this period expires during the period of a state of health emergency, the lessee will therefore benefit from a further period of one month from June 25, 2020 at 00:00 a.m. to 25 July at 11:59 p.m. In addition to this initial period, all those mentioned in the procedure envisaged by the Article would benefit from the extension.

However, if, within the period of the state of emergency, the lessee decides to waive its right of pre-emption, it could choose not to benefit from this additional period granted by the legislator.

Article 5:

Article 5 of the order also provides for an **extension** mechanism:

"Where an agreement may be terminated only during a specified period, or where it is renewed if no denunciation is made within a specified period, that period or period shall be extended, if it expires during the period defined in I of Article 1, by two months after the end of that period."

Since the "*defined period*" runs from 12 March to 24 June 2020 inclusive, the period will be automatically extended by two months after the end of the "*defined period*", i.e. from 25 June 2020 to 25 August 2020 inclusive.

NB : the wording is again confusing :

- **Case 1** : A lease expires on 20 September 2020 and the lessor's deadline for granting a holiday expires on 20 March 2020, i.e. within the "*defined period*" (from 12 March to 25 June 2020 at 00:00 a.m.). Can the lessor grant leave after 20 March 2020? On a strict reading of the text, we could think that the lessor would have until 25 August 2020 to terminate the lease with effect from 20 September 2020. The lessor would thus benefit from a shortened notice period. This interpretation is difficult to understand since it would have the effect of reducing the time for informing and organising the lessee's departure...
- **Case 2** : The text is in fact aimed at extending the effective date of termination.

E.g.: A lessor gave notice to its lessee on 20 September 2019 for 20 March 2020, which is the lease expiry date. The effective date of the termination would then be extended to 25 August 2020, in order to make it possible to vacate the premises. This interpretation of the text seems more consistent with the spirit of the measures adopted.

Common points to all the articles and clarifications of the circular presenting the provisions of Title I No. CIV/01/20 of 26 March 2020:

It is clear that these time limits are **optional**. Indeed, the circular relating to the order specifies that Article 2 does not provide for an interruption or suspension but for a *sui generis* mechanism.

Consequently, if the beneficiary of a right wishes to use one of his prerogatives during the period of a state of health emergency, **nothing can prevent him from doing so**. The aim here is not to paralyse the national economy. It is therefore an additional period of time, which is by no means a deadline that must be compulsorily observed.

However, despite the *sui generis* nature of this period, it follows the regime of **interruption**. Consequently, the periods will start running again from scratch as from 25 June 2020 at midnight. However, these periods starting to run again may not exceed a deadline of two months.

Moreover, nothing seems to prevent the **possibility of contractually derogating** from these new deadlines in future contracts during the period of the state of health emergency. Thus,

for a contract entered into before 12 March 2020, it seems possible to waive the additional time limits enshrined in the order by means of an amendment to the contract.

Furthermore, if a deed, such as a promise, is entered into during a state of health emergency, a party could knowingly waive these time limits. A counselling clause should then be introduced in the deed.

It is also important to specify that these extensions apply only to **statutory and regulatory time limits** and therefore do not concern contracts, with the exception of penalty clauses, termination clauses or periodic damages (Articles 4, 5 and 6).

Penalty damages that penalise failure to comply with an obligation during a period, which expired during a state of public health emergency, do not take effect until one month after the end of the state of public health emergency. Again, these periods remain optional for the debtor. Nothing prevents him from performing during the period of the state of health emergency.

Thus, we draw your attention on the fact that it would seem that, for example, the time limits for reiterating consent before a notary, the fulfilment of a suspensive condition, the option period for a unilateral promise of sale or other purely contractual conditions are not affected by the order. Therefore, periods do not appear to be currently suspended.

Moreover, as it has been seen, the administrative periods are extended as they are affected by the order.

A question then arises when a conventional time limit is backed by a legal time limit, particularly in the case of a suspensive condition. For example, a promise stipulating that the permit must be obtained and purged of any recourse by setting a deadline: a problem may arise since the time limit for the investigation will be extended by the order, but the deadline provided for in the agreement is not adapted since the order applies only to the legal time limits.

The same applies to contracts with a condition precedent to obtain the final building permit.

This could be a mean of waiving the transaction for the party having an interest in availing itself of this nullity.

Consequently, in the absence of amendment to the contract, the condition could therefore fail if, upon the deadline, the building permit is not purged because of the increased time for investigation and appeal.

Finally, in order to justify contractual non-performance, it shall be necessary to rely on ordinary law, as stated in the report presenting the order, which explicitly refers to articles

2234 and 1218 of the French Civil Code.

The possible mechanisms are therefore:

- force majeure (article 1218 of the Civil Code);
- unforeseen circumstances (article 1195 of the Civil Code);
- the exception of non-performance (Articles 1219 and 1220 of the Civil Code);
- price reduction (article 1223 of the Civil Code);
- termination by notification or before the judge (Article 1224 of the Civil Code).

It should be noted that these mechanisms are not mandatory and the parties may therefore derogate from them. Care should be taken in the drafting of contracts to ensure that the legitimate causes of delay and the definition of force majeure are clearly stated.

II. Order No. 2020-316 of 25 March 2020 on the payment of rent, water, gas and electricity bills for the business premises of companies whose activity is affected by the spread of the covid-19 epidemic

Article 4 of the order provides that:

*“The persons mentioned in Article 1 may not incur any financial penalties or interest for late payment, damages, penalty payments, performance of a termination clause, penalty clause or any clause providing for forfeiture, or **activation of guarantees or sureties**, due to non-payment of rent or rental charges relating to their professional and commercial premises, notwithstanding any contractual stipulation and the provisions of Articles L. 622-14 and L. 641-12 of the French Commercial Code.*

The above provisions apply to rents and rental charges for which payment is due between 12 March 2020 and the expiry of a period of two months after the date of cessation of the state of health emergency declared by Article 4 of the aforementioned Act of 23 March 2020.”

This order was issued in order to prevent and limit the cessation of activity of very small enterprises (VSEs).

In addition, these VSEs shall be able to request the deferral of the payment of unpaid invoices and their rescheduling **over at least six months, without penalty.**

The businesses concerned are enterprises or self-employed workers:

- with less than 10 employees,
- of up to one million euros in turnover,

- that have been banned from receiving the public or have suffered a loss of at least 70% of their turnover compared to March 2019. According to a statement by the Minister for the Economy, Bruno Le Maire, this threshold will be reduced to 50%.

Businesses which continue their activity in the context of insolvency proceedings may also benefit from these provisions if they are provided with a certificate from one of the judicial representatives appointed by the judgment that opened the proceedings.

Thus, for lessees falling within this scope of application, the lessor no longer has the legal tools enabling it to sanction the lessee's non-payment, who can no longer incur "*enforcement of a termination clause*" for non-payment of rent and charges due between 12 March 2020 and 25 July 2020.

In addition, Article 4 is broadly drafted and provides for the impossibility of raising "payment *guarantees*". It therefore seems to prohibit the lessor from being paid by a third party.

Finally, the broad wording also seems to prevent any compensation of the default with the security deposit and to impose on the lessee the reconstitution of the latter.

In any event, it should be pointed out that these Articles do not authorise lessees, whether or not they fall within the scope of order 2020-316, **not to pay their rent when due**, but only have the effect of neutralising clauses sanctioning non-performance of contractual obligations, such as penalty clauses, termination clauses, forfeiture clauses or interest for late payment, for example.

Thus, the question arises as to the validity of a legal notice referring to the termination clause of a lease following the non-payment of rental arrears that fall due within the defined period (between 12 March and 24 April)? The same question arises with respect to an action for automatic termination of the lease that is based on a legal notice requiring payment of sums falling due within the defined period?

Or will the effects of the legal notice follow the treatment provided for in Article 4 of Order No. 2020-306, which provides a mechanism for extending the time limit for settling the causes of the legal notice?

The consistency of application of Article 4 of order No. 2020-306 and Article 4 of order No. 2020-316 is not obvious here.

Moreover, in practice, it is likely to be complicated to succeed in finding a bailiff to serve the legal notice by extrajudicial act on the lessee.

It is not unlikely that a judge would consider that the issuance of a legal notice during a state of health emergency characterizes the bad faith of the lessor.

Moreover, a risk for the latter should be mentioned. Since the termination clause is not effective until one month after the end of the state of public health emergency, the lessor must then proceed with a writ of summons in the emergency proceedings to terminate the lease.

Moreover, there is a risk that the lessee may be placed under insolvency proceedings.

The judgment initiating proceedings to reorganise or liquidate the lessee automatically prohibits the lessee from paying any claim arising prior to the judgment initiating such proceedings. The lessor will then have no choice but to declare his debt without the possibility of recovering his rental arrears arising prior to the opening judgment (Article L.622-21 of the French Commercial Code).

However, this article does not in any way prohibit the lessor from using the traditional mechanisms of ordinary law to sanction non-performance of the contract, as set forth above. In order to bring them into play, the lease agreement should be carefully studied, as the parties may have agreed to derogate from them.

III. Order No. 2020-331 of 25 March 2020 on the extension of the winter truce

This order postpones from 31 March to 31 May 2020 the end of the winter truce, i.e. the period during which rental eviction measures are suspended (Article 2).

Therefore, this order allows for the suspension of any eviction order that has not been enforced, **unless the relocation of the persons concerned is ensured under sufficient conditions that respect the unity and needs of the family.**

During the same period, suppliers may not cut off electricity, gas or heating to persons who have not paid their bills.

IV. Order No. 2020-304 of 25 March 2020 adapting the rules applicable to the Courts of the judiciary ruling in non-criminal matters and to co-ownership syndic contracts

The aim of this order is to streamline the functioning of civil, social and commercial courts by making the organisation of hearings more flexible, by allowing the parties to be informed and by enabling the organisation of adversarial proceedings by any means.

In addition, to facilitate the operation of co-ownerships (Article 22), it provides for the renewal of contracts of owners' association that expire or have expired since 12 March 2020.

As a result of the order, current contracts of owners' association shall be renewed until a new contract of the owners' association appointed by the next general meeting of co-owners takes effect.

However, this general meeting can only be held after the end of the state of health emergency and no later than 31 December 2020.

Moreover, the provisions of the order "*are not applicable when the general meeting of co-owners has appointed, before [26 March 2020], an owners' association whose contract takes effect from 12 March 2020*".

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MEET THE TEAM



Henry Ranchon

Paris

henry.ranchon@bclplaw.com

[+33 \(0\) 1 44 17 77 62](tel:+330144177762)



Suzy Lasry

Paris

suzy.lasry@bclplaw.com

[+33 \(0\) 1 44 17 77 64](tel:+330144177764)

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