ALERT MEMORANDUM

COVID-19: Temporary French Bankruptcy Law Adjustments

March 31, 2020

The French Emergency Act of March 23, 2020 (the "Emergency Act") has established a "state of health emergency" starting on March 24, 2020 and currently scheduled to expire on May 24, 2020, due to the Covid-19 crisis.

Pursuant to the Emergency Act, the French government enacted an Executive Decree (having the force of law), bringing about temporary amendments to French bankruptcy law on March 27, 2020 (the "Executive Decree").

This memorandum outlines the main provisions of the Executive Decree and certain of its implications for distressed companies.

1. Application of the "Cessation of Payments" Test as at March 12, 2020

Under French law, debtors are normally required to file for bankruptcy within 45 days of the "cessation of payments", which is deemed to occur when their debts due exceed their liquid assets. Filing for bankruptcy initiates either "judicial recovery" or "judicial liquidation" proceedings. In addition, certain types of pre-insolvency proceedings (including "safeguard", the French debtor-in-possession regime similar to the regime provided under Chapter 11 of the U.S. Bankruptcy Code) can be initiated only prior to the "cessation of payments".

The Executive Decree provides that, until the expiry of a period of three months after the end of the "state of health emergency" (*i.e.*, until August 24, 2020 under the current schedule), the "cessation of payments" test must be applied as at March 12, 2020, irrespective of subsequent events or situations.

As a result, if a company was not in "cessation of payments" on March 12, 2020, it will be able to continue operations as a going concern, and will not be required to file for bankruptcy even if its liquidity position subsequently meets the "cessation of payments" test.

If you have any questions concerning this memorandum, please reach out to your regular firm contact, the following authors or our COVID-19 task force directly by clicking here.

For more information, please consult the COVID-19 Resource Center.

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In addition, companies that were not in "cessation of payments" on March 12, 2020 will be permitted to initiate pre-insolvency proceedings that are normally available only to companies that are not in "cessation of payments", even if their liquidity position subsequently meets the "cessation of payments" test *i.e.*, as discussed above, the "safeguard" regime may be applicable, as well as proceedings involving court-appointed mediators (but no automatic stay of payments), which play a significant role in French restructurings and are generally viewed as effective restructuring tools, namely "*mandat ad hoc*" and "conciliation".[1]

The Executive Decree provides, however, that in the event that the "cessation of payments" test is satisfied after March 12, 2020, a debtor will still be permitted to file for bankruptcy and initiate "judicial recovery" or "judicial liquidation" proceedings. Certain debtors may opt to file for bankruptcy to obtain public funds for the payment of certain employee claims through *Assurance de garantie des salaires* ("AGS"). This option, however, will be in the sole discretion of the debtor: neither its creditors nor the public prosecutor's office may request the opening of "judicial recovery" or "judicial liquidation" proceedings with respect to a company that was in "cessation of payments" after March 12, 2020.

For practical purposes, a company in "cessation of payments" after March 12, 2020 will therefore be able to use every pre-insolvency and insolvency proceeding provided for under French law, depending on its circumstances and needs.

At the end of the three-month period following the end of the "state of health emergency", companies that are still in "cessation of payments" will have to file for bankruptcy within 45 days.[2]

The rules outlined above may have implications with respect to the application of fraudulent conveyance rules, which under French law apply during the "hardening period" (*période suspecte*). By way of background, the date of "cessation of payments" is normally determined by the bankruptcy court, which may determine that it occurred up to 18 months prior to the date of the judgement commencing the bankruptcy proceedings. That date is the starting point of the "hardening period", during which certain transactions may be challenged and cancelled. Since the "cessation of payments" test will not be applicable from March 12, 2020 through August 24, 2020, it is reasonable to expect that, in case of subsequent bankruptcy proceedings, bankruptcy courts should not rule that "cessation of payments" occurred during that period (at least for companies which were not in "cessation of payments" on or before March 12, 2020). As a result, transactions entered into by the debtor during that period would not be subject to the risk of cancellation pursuant to fraudulent conveyance rules. The Executive Decree contains an exception, however, in the case of fraud. In that case, the bankruptcy court will be permitted to rule that the "cessation of payments" occurred at any time (up to 18 months prior to the date of the judgment commencing bankruptcy proceedings).

2. Extension of Certain Deadlines

The Executive Decree extends (or permits the extension, if requested) of several deadlines provided for under French bankruptcy law.

First, the maximum duration of "conciliation" proceedings (normally five months) is extended for a period of time equal to the duration of the "state of health emergency" plus three months. If the "state of health emergency" that started on March 24, 2020 expires on May 24, 2020, as currently scheduled, the maximum duration of the "conciliation" proceedings would therefore be increased by an additional five months (*i.e.*, ten months total).

This appears to apply not only to "conciliation" proceedings pending on March 24, 2020, but also to "conciliation" proceedings initiated after March 24,

[1] "Conciliation" can be initiated up to 45 days after the "cessation of payments".

[2] Except if conciliation proceedings are ongoing.

2020 and until three months after the end of the "state of health emergency".

Second, where a company is subject to a "safeguard plan" or "recovery plan" (*i.e.*, a plan approved by the court upon exit from "safeguard" or "judicial recovery" proceedings), the duration of the plan may be extended as follows:

— Until three months after the end of the "state of health emergency", at the request of the trustee supervising the implementation of the plan, the President of the bankruptcy court may extend the duration of the plan for a duration equal to up to the duration of the "state of health emergency" plus three months (*i.e.*, up to five additional months maximum if the "state of health emergency" remains in effect for two months, as currently scheduled). The public prosecutor's office may request an extension of up to one year.

— After the expiry of the three-month period following the end of the "state of health emergency", and for a period of six months thereafter, the bankruptcy court may extend the duration of the plan for up to one year at the request of the public prosecutor's office or the trustee supervising the execution of the plan.

These provisions will allow companies which are unable to meet a deadline provided for in their plan to have that deadline postponed. This is in addition to the automatic extension equal to the duration of the "state of health emergency" plus one month (*i.e.*, three months under the current schedule) that is discussed below.

Third, the President of the bankruptcy court may extend deadlines applicable to bankruptcy trustees for the duration of the "state of health emergency" plus three months, at their request.

Finally, the following deadlines are automatically extended for the duration of the "state of health emergency" plus one month:

— deadlines relating to the "observation period", *i.e.*, the period available to develop an exit plan, in "safeguard" and "judicial recovery" proceedings;

— the deadlines relating to the implementation of "safeguard plans", "recovery plans" and "assets sale plans" approved following exit of "safeguard" or "judicial recovery" proceedings;

— the deadlines relating to continuing operations when "judicial liquidation" proceedings are pending; and

— the duration of the simplified liquidation proceedings.

3. Organization of the Proceedings

The Executive Decree intends to facilitate pre-insolvency and insolvency proceedings in circumstances where the organization of hearings and physical meetings may not be possible by providing that:

— court filings for the commencement of such proceedings may be made by any means (*i.e.*, including electronically);

— debtors may seek authorizations to submit claims and arguments in writing only (without any hearing);

— Presidents of bankruptcy courts may request that communications to them be sent by any means (*i.e.*, including electronically); and

— communications between bankruptcy courts and the trustees may be carried out by any means (*i.e.*, including electronically).

4. Employees' Claims Guaranteed by AGS

The Executive Decree facilitates the payment of employees' claims by AGS by extending the scope of the claims covered (to take into account, for example, the impossibility of terminating employment contracts within fifteen days of the judgment commencing "judicial liquidation" proceedings) and by accelerating the transmission by the trustees to the AGS of the list of employees' claims.

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