

# COVID-19 – Temporary French Bankruptcy Law Adjustments

June 5, 2020

The French Emergency Act of March 23, 2020 (the “Emergency Act”) established a “state of health emergency” due to the COVID-19 crisis, starting on March 24, 2020 and initially scheduled to expire on May 24, 2020. Pursuant to Act No. 2020-546 of May 11, 2020, the duration of the “state of health emergency” was extended to July 10, 2020.

Pursuant to the Emergency Act, the French government enacted Executive Decree No. 2020-341 on March 27, 2020 (the “First Executive Decree”) and Executive Decree No. 2020-596 on May 20, 2020 (the “Second Executive Decree”, and together with the First Executive Decree, the “Executive Decrees”), bringing about temporary amendments to French bankruptcy law.

This memorandum outlines the main provisions of the Executive Decrees and certain of their 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 for under Chapter 11 of the U.S. Bankruptcy Code) can be initiated only prior to the “cessation of payments”.

The First Executive Decree provides that, up to and including August 23, 2020, 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 or the following authors

For more information, please consult the [COVID 19 Resource Center](#).

PARIS

**Fabrice Baumgartner**  
+33 1 40 74 68 53  
[fbaumgartner@cgsh.com](mailto:fbaumgartner@cgsh.com)

**Aude Dupuis**  
+33 1 40 74 68 45  
[adupuis@cgsh.com](mailto:adupuis@cgsh.com)

**Magdeleine Dupé**  
+33 1 40 74 68 07  
[mdupe@cgsh.com](mailto:mdupe@cgsh.com)



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 not automatic stays of payments), which play a significant role in French restructurings and are generally viewed as effective restructuring tools, namely “*mandat ad hoc*” and “conciliation”.<sup>1</sup>

The First 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, is taken 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.

As from August 24, 2020, companies that are still in “cessation of payments” will have to file for bankruptcy within 45 days.<sup>2</sup>

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. The date of “cessation of payments” 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 23, 2020 (inclusive), 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 First 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 Decrees extend (or permit 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 an additional five months (*i.e.*, a total of ten months).

This appears to apply not only to “conciliation” proceedings pending on March 24, 2020, but also to “conciliation” proceedings initiated after March 24, 2020 and until August 23, 2020 included.

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:

<sup>1</sup> “Conciliation” can be initiated up to 45 days after the “cessation of payments”.

<sup>2</sup> Such an obligation shall not apply if conciliation proceedings are ongoing.

- Up to and including August 23, 2020, 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 up to five additional months. The public prosecutor's office may request an extension of up to one year.
- As from August 24, 2020, 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.
- Up to and including December 31, 2020, in addition to the aforementioned extensions, the bankruptcy court may extend the duration of the plan for up to two years maximum, at the request of the public prosecutor's office or the trustee supervising the implementation of the plan.
- In the event of substantial modification of the plan, the maximum duration of the plan may be up to twelve years.

Any extension of the plan must be associated with a readjustment of debt repayments over the new total duration 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 of, three months that is discussed below.

Third, the President of the bankruptcy court may extend deadlines applicable to bankruptcy trustees for five months, at their request.

Finally, the following deadlines are automatically extended for three months until June 23, 2020 (inclusive):

- 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 simplified liquidation proceedings.

### **3. Protection of the Liquidity of Distressed Companies**

The Second Executive Decree intends to protect the liquidity of distressed companies, in particular by preserving a debtor in “conciliation” proceedings against actions from creditors to obtain repayment of their debt claim, and by encouraging the debtor’s financial partners to make cash injections.

The Second Executive Decree thus extends and simplifies the courses of action available to debtors in “conciliation” proceedings against creditors, for all ongoing proceedings and until December 31, 2020 (inclusive). If the creditor does not accept the suspension of their claim for the duration of the “conciliation” proceedings within the time limit set by the conciliator, the debtor may request that the President of the bankruptcy court interrupt or prohibit any legal action or enforcement proceedings conducted by this creditor due to the non-payment of the claim and/or reschedule the repayment dates related to this claim without incurring late payment fees or penalties. Such measures shall remain effective for the duration of the proceedings.

In addition, the Second Executive Decree introduces a “new money” priority claim applicable to cash contributions made during the observation period with a view to ensuring the continuation of the company's activity, or made with a view to enabling the implementation of a safeguard or recovery plan (with the exception of capital contributions). These claims enjoy a preferential ranking for repayment, ranking immediately after wage claims, legal costs and the “conciliation” priority claim. Creditors benefiting from the safeguard priority claim may not be subject to any debt cancellation or deadlines under the plan. These measures are applicable to proceedings initiated on or

after May 22, 2020, and will apply until the transposition into French law of the European Directive on preventive restructuring frameworks<sup>3</sup> (and no later than July 17, 2021).

#### 4. Simplification of the Formalities of the Proceedings

The First 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, up to and including June 23, 2020:

- 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).

The Second Executive Decree also contains provisions applicable until December 31, 2020 (inclusive) adjusting the consultation of creditors, in order to facilitate the procedure for examining and adopting safeguard or recovery plans:

- the duration for consulting creditors in writing on the draft plan may be reduced from thirty to fifteen days by the supervisory judge, at the request of the bankruptcy trustees;
- as part of the preparation of the plan, proposals made to creditors for the settlement of debts and any responses to such proposals may be communicated by any means that enable the bankruptcy trustee to establish with certainty the date of their receipt; and

the proposed plan may comprise all declared claims, whether admitted or uncontested, as well as identifiable claims, which enables the establishment of a plan taking into account claims without waiting for their admission.

#### 5. Extension of the Prerogatives of the Proceedings' Stakeholders

The Second Executive Decree extends the prerogatives of some stakeholders in the proceedings with a view to facilitating and accelerating the course of the proceedings:

- until December 31, 2020 (inclusive), in the framework of the alert procedure, if the statutory auditor estimates that immediate measures are necessary and that they are not implemented or that the measures provided for are insufficient, they may inform the President of the bankruptcy court by any means and without delay as soon as the directors are first informed. To this end, the statutory auditor shall be exempted from professional secrecy;
- in the context of an accelerated safeguard procedure or an accelerated financial safeguard procedure – the threshold conditions of which are removed by the Second Executive Decree – if a plan fails to be adopted within the legal timeframe, the debtor, the bankruptcy trustees or the public prosecutor's office may request the opening of “judicial recovery” or “judicial liquidation” proceedings, if the conditions are met. These provisions are applicable to proceedings opened from May 22, 2020, until the transposition into French law of the European Directive on preventive restructuring frameworks (and no later than July 17, 2021);
- until December 31, 2020 (inclusive), in addition to the public prosecutor, the debtor and the bankruptcy trustee may request the bankruptcy court to authorize the transfer of the company in “judicial liquidation” proceedings to its director, provided that the transfer allows jobs to be

<sup>3</sup> Directive (EU) 2019/1023.

maintained. The transfer of the company in “judicial liquidation” proceedings is also accelerated by the reduction of the timeframe for the convening of a hearing of secured creditors and of co-contractors whose contracts are the subject of a transfer application from fifteen to eight days.

**6. Employees’ Claims Guaranteed by AGS<sup>4</sup>**

The First 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.

CLEARY GOTTLIB

---

<sup>4</sup> AGS guarantees the payment of certain sums due to employees in case of bankruptcy.