



## Flash Covid-19 - Economic law team

### Competition Law : Adaptation of the time limits and procedures of the Autorité de la concurrence in times of health emergency

Ordinance No. 2020-306 of 25 March 2020 relating to the extension of expired deadlines during the health emergency period and the adaptation of procedures during this same period (**Ordinance**) enabled the French Competition Authority (**Autorité**) (and the DGCCRF) to adapt the procedural rules of Book IV of the French Commercial Code relating to procedures subject to strict constraints in terms of time limits and formalism during the period from March 12, 2020 until the expiry of a one month period from the date of cessation of the health emergency period (**Period**) imposing a slowdown on services and companies.

However, this slowdown period does not exempt companies from complying under unchanged conditions with the substantive rules of the Commercial Code and the Consumer Code: anti-competitive agreements, abuse of dominant position, restrictive competition practices and other misleading commercial practices remain prohibited. Any illicit practice that would be identified during this Period could be investigated, prosecuted and sanctioned after the health emergency period. A specific attention will be paid to this question in our next Flash.

Based on the Ordinance, the Authority specified in a press release dated 27 March 2020 (**Statement**) the that will apply to its pending or future procedures. Should their temporary implementation be satisfactory, some of these measures could subsequently be usefully perpetuated on a long term basis (the dematerialisation of exchanges with the *Autorité*, for example).



## SUSPENSION OF THE TIME LIMITS FOR INVESTIGATING CASES RELATING TO MERGER PROJECTS

(Adaptation of Articles L. 430-5 et L. 430-7 of the French Commercial Code)

**As from 17 March, the Authority indicated that it could no longer guarantee the processing times and procedures for examining operations already notified or about to be notified, inviting companies to “defer any proposed economic concentration which is not urgent».**

In its Statement, the *Autorité*, on the basis of Article 7 of the Ordinance, took more drastic measures, with the retroactive suspension for the duration of the Period (12 March - 24 June) of the legal deadlines with which the *Autorité* is bound to issue its merger control decisions.

By way of illustration, the *Autorité* is therefore no longer bound by the 25 working day period from the completeness of the notification file to issue its most common decision, phase 1 without remedies.

This measure will enable the Merger Department to manage operations with greater flexibility in line with the current staffing constraints.

The *Autorité*, however, showing pragmatism, states that it “*will make its best efforts, whenever possible, to make its decisions and opinions in advance, without waiting for the expiration of the additional time limits conferred by these provisions*».

**This measure is likely to be disrupting for companies, by lengthening the intermediary period between signing and closing, requiring greater vigilance on the issues of gun jumping and anti-competitive exchanges of information - which remain prohibited and liable to be prosecuted under unchanged conditions - and appropriate framework mechanisms for conditions precedent.**



## ADAPTATIONS CONCERNING INVESTIGATIONS AND PROCEDURES

### LITIGATION PROCEEDINGS: EXTENSION OF TIME LIMITS FOR THE PRODUCTION OF OBSERVATIONS

*(Adaptation of Articles L. 463-2 of the French Commercial Code)*

The *Autorité* states that “*the two-month period available to companies to submit (...) their comments in response to a statement of objections or a report, is suspended from 17 March 2020*”.

The same suspension also applies to time limits already granted under the leniency marker.

However, there is less latitude for companies for their written responsive observations. Indeed, the *Autorité* adds that the two-month period “*will resume as from the day following the publication of the decree lifting the travel restrictions initially introduced by Decree No 2020-260 of 16 March 2020*”.

In other words, a response period that would have expired in 20 days, currently suspended, would expire 21 days after the day following the publication of the decree lifting the travel restrictions.

In any event, companies that would have finalised observations before the end of the Period can still produce them electronically, using the dematerialised transmission procedure temporarily in force (see next point).

**Particular attention should be paid to the calculation of the time limits, taking into account the starting point of the resumption of the time limit (D+1 of the publication of the decree that will lift the measures of travel restrictions).**



## ADAPTATIONS CONCERNING INVESTIGATIONS AND PROCEDURES

### THE TEMPORARY DEMATERIALISATION OF EXCHANGES WITH THE AUTORITÉ (Adaptation of Articles R. 463-1, R. 463-11, R. 463-13, R. 463-15 et R. 464-30 of the French Commercial Code)

The *Autorité* indicates that during the Period “*referrals, observations to a statement of objections, briefs in response to a report, requests for trade secrecy or the lifting of trade secrecy are transmitted by electronic means to the Autorité, which will acknowledge receipt*”.

The same rule applies to leniency application.

Reciprocity is also introduced for the transmission by the *Autorité* of “*statement of objections, reports, plans to downgrade confidential information and decisions of the Autorité and the General Rapporteur*» to the parties and the Government Commissioner.

This measure takes account of the constraints imposed by homeworking and social distancing measures, as well as the slowdown in postal operations.

Should this temporary experiment be satisfactory, it would be advisable to consider whether it should be continued afterwards, in an environmental approach and with a view to facilitating exchanges with the *Autorité*.

**In short, the exchange of documents with the *Autorité* during the Period is continued exclusively by electronic means. However, the time periods following the receipt of such documents will only start following the end of the Period.**

**For all your mailings, there is only one address to remember:**

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## ADAPTATIONS CONCERNING INVESTIGATIONS AND PROCEDURES

### SUSPENSION OF THE STATUTE OF LIMITATION AND APPEAL TIME LIMITS (Adaptation of Articles L. 462-7, L. 464-7 et L. 464-8 of the French Commercial Code)

The question of the suspension of statutes of limitation and time limits for appeal is now cleared pursuant to Article 2 of the Ordinance.

For the record, Article L. 462-7 of the French Commercial Code provides that “*the Autorité cannot be seized of facts going back more than five years if no act tending to their research, their finding or sanction has been taken*”, and that in any event, it may not be referred practices dating back more than ten years from the cessation of the anti-competitive practice.

Articles L. 464-7 and L. 464-8 of the French Commercial Code provide respectively for a period of 15 days (protective measures) and one month (proceedings on the merits) from notification of the decision to file an appeal.

The *Autorité* indicated that the interruptive acts of statute of limitations of Article L. 462-7 of the Commercial Code (such as requests for investigations, applications, search and seizure operations, hearings, requests for information, acts taken in the context of criminal proceedings relating to the same practices, transmission of the criminal file, appeals against search and seizure operations, etc.) that should have taken place during the Period, “*may be completed within two months from the end of this period, without being penalized for their lateness*”.

Thus, a limitation period that should have expired on 1 April 2020, will not actually expire until the end of a two month period following the end of the Period (*i.e.* 24 August 2020, unless the state of emergency is extended), unless an interruptive act is carried out during this two month period.

Similarly, with regards to appeals against decisions of the *Autorité*, two measures are indicated:

(i) Postponement of the starting point of the time limit for appealing against a decision of the *Autorité*: the formal notification of the decision to the parties and the Government Commissioner, starting point of the time limits for appeal, will not take place before the lifting of the travel restrictions, except in exceptional cases (which are not specified, but it is conceivable that requests for provisional measures relating to the urgent cessation of anti-competitive practices would have to be notified as soon as they are issued).

(ii) Independently of this measure, for decisions already notified, which should have been appealed during the Period, they still may be appealed within two months following the end of the Period, without any risk of inadmissibility.

**The *Autorité* is silent on the absolute ten-year statute of limitations, beyond which non-judged practices are considered as definitively time-barred. In the silence, it could be relevant to consider that this provision is not concerned by this measure, since it is “*acquired in any event*”. However, it is acquired only in the absence of a positive act by the *Autorité*, *i.e.* when that 10 year period “*has elapsed without the *Autorité* having taken a decision*” on the practice in question. Prevented temporarily from doing so during the Period, the Authority could, in exceptional cases affected by the elapse of this 10 year period during the Period, postpone its effects until the end of the Period.**



## SUSPENSION OF TIME LIMITS FOR THE EXECUTION OF COMMITMENTS AND INJUNCTIONS (Adaptation of Articles L. 430-5, R. 464-2 of the French Commercial Code)

Article 8 of the Ordinance provides that the time limits imposed by the administration, in accordance with the law and regulations, on any person to carry out “*inspections and work or to comply with prescriptions of any kind are*” shall be suspended until the expiry of a one month period starting from the date of cessation of the state of health emergency.

The *Autorité* has therefore decided that “*time limits for implementing commitments, injunctions or interim measures are therefore suspended or postponed until the expiration of a period of one month from the end of the state of health emergency*”.

Without further clarification, we can consider that this measure applies to both injunctions and undertakings imposed within the context of litigation and/or merger control.

This measure, however, raises two sets of questions.

(i) the postponement of deadlines for the implementation of undertakings, injunctions or provisional measures is likely to have a significant impact on the victims of the practices the cessation of which would, for example, have been ordered. What consequence will such a postponement and the subsequent persistence of damage during the Period have on possible subsequent compensation actions?

(ii) Without further clarification, does this measure also apply to remedies already entered into and being implemented, in particular in the context of merger clearance decisions, or only to remedies the implementation of which has not yet begun?

The suspension of the time limits in Article 8 of the Ordinance could also have an impact on the implementation of the offences of opposition and obstruction of investigations which could sanction the non-response of a party to a request for information or communication of documents within the time limit set, for example.

Another point of interest is the monitoring of the implementation of remedies undertaken by companies. The continuation of their monitoring may in certain cases be crucial in order to remedy serious infringements to competition.

**This set of measures is undoubtedly the one that is to be used by companies with particular caution, so as not to risk exposing themselves to possible subsequent complaints and prosecution for non-compliance with mandatory measures that were intended to continue to be implemented without interruption during the Period.**

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04/01/2020