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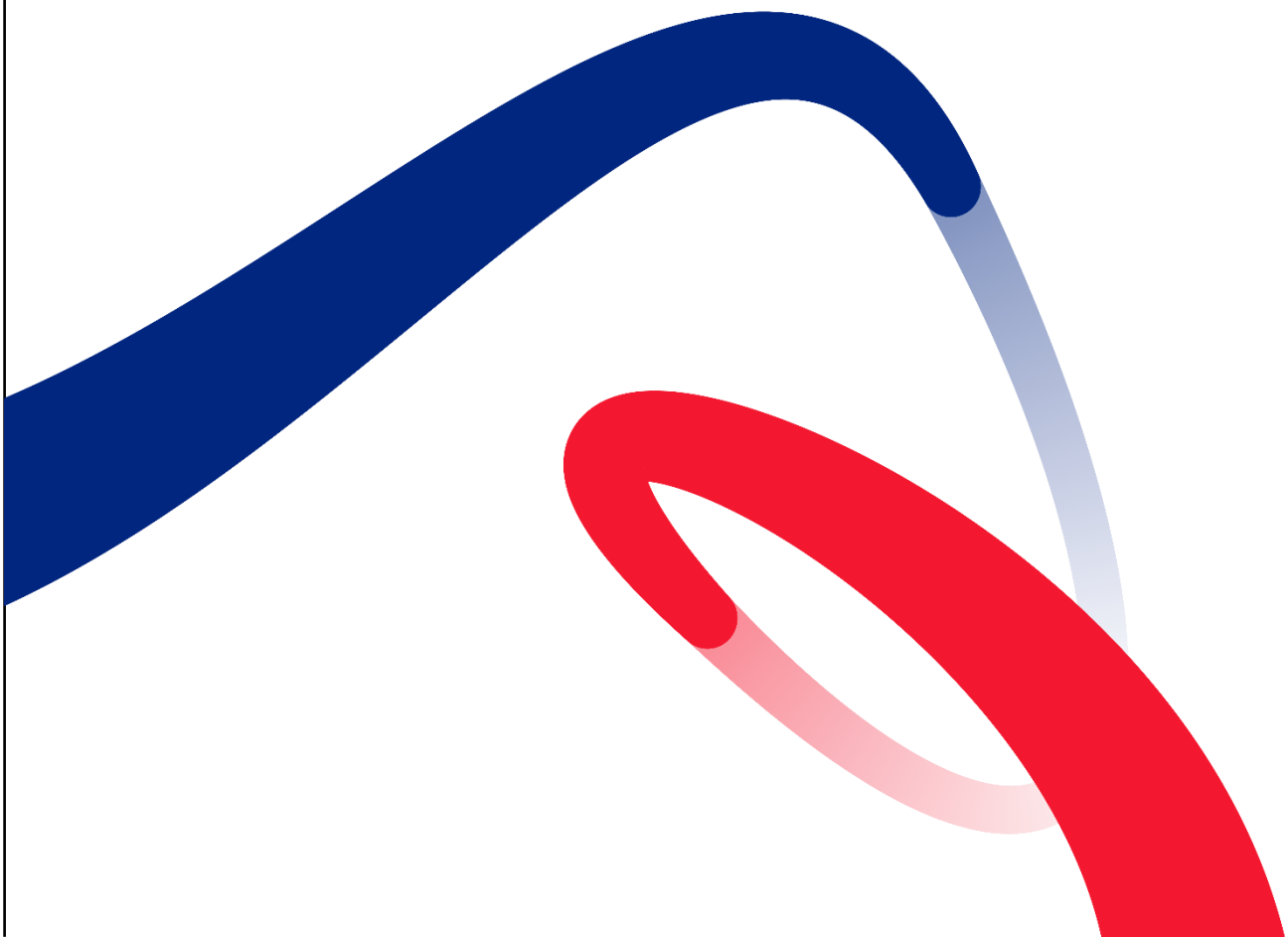
Coronavirus (COVID-19)

What to know about France

End of April 2020



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1 State of emergency

Parliament enacted on 23 March 2020 a law establishing a "state of emergency"; this relates to a state of health emergency and an economic emergency system.

The state of health emergency is a system operating alongside the ordinary state of emergency provided for by the law of 3 April 1955. This mechanism, introduced into the Public Health Code, is not permanent. Its provisions are valid for one year .i.e. until 1 April 2021.

The aim is to "strengthen the legal bases" on which the government measures taken to manage the Covid-19 epidemic have until then been based. The state of public health emergency is declared for two months, i.e. until 24 May 2020 throughout the country.

Within the framework of this state of emergency, the Prime Minister can take, by decree, measures listed by the law: order home confinement, requisitions, prohibit gatherings, etc. He may also take temporary measures to control the prices of certain products, allow patients to have access to medicines and decide on any regulatory limits to entrepreneurial freedom. The Minister responsible for health may, by order, determine other general measures and individual measures. Prefects may be empowered to take local enforcement measures.

Similarly, the Government has been authorized by Parliament to issue interim measures (some of them applicable as of 12 March 2020) by ordinances until 24 July 2020 to address the country's containment situation and the economic emergency and adaptation measures to combat the Covid-19 epidemic. Several ordinances have been enacted to date. The ones interesting businesses and commercial operations in France are detailed below from a tax, legal and labour law perspective.

2 Tax issues

2.1 COVID-19: SUMMARY OF THE TAX MEASURES TO SUPPORT COMPANIES

In the context of the Covid-19 health crisis, exceptional tax measures have been taken in the recent weeks to support companies experiencing difficulties, particularly with regard to their cash flow. Following various government announcements, the French Tax Authorities (“Direction générale des Finances Publiques” or “DGFiP”) have provided details on measures to support companies and the independent workers during the state of health crisis. The recent ordinances of 26 March 2020 allow us to recall these temporary rules.

Postponement of certain tax instalments and extension of payment periods

The payment of certain direct taxes has been suspended to protect the companies' cash flow. These include instalments of corporate income tax (CIT), payroll tax, etc. These deferrals were granted for a period of 3 months. For the March instalments that have already been paid (in particular CIT, the first instalment of which was due on 15 March), it is possible to request reimbursement before the competent Business Tax Center (“Service des impôts des entreprises” or “SIE”).

Monthly instalments of the business property tax (“Contribution foncière des entreprises” or “CFE”) and property tax (“taxe foncière”) may also be suspended without penalty.

Measures have also been taken for independent workers: the rate and instalments of the withholding tax on wages can be adjusted and the payment of monthly instalments deferred up to 3 times.

Value added tax (VAT) will not be affected by these measures and has to be declared and paid as usual.

There are no measures to change the withholding tax on wages, in so far as it is levied on wages payable to employees.

Specific measures for companies in financial difficulties

Where the support measures are not sufficient to relieve some companies, which are facing greater financial difficulties, provision is made for deferral of payment of their tax debts. If the concerned company is up to date with its tax and social security liabilities, it may submit a justified request to the Commission des chefs de services financiers (or "CCSF").

Finally, in exceptional situations, it is possible to apply for a tax remission, the granting of which will be subject to an individualized appreciation of the company's situation. This remission may concern, for example, CIT or the territorial economic contribution.

Accelerated reimbursement of payable tax credits

The French Tax Authorities have asked its services to speed up the reimbursement of payable tax credits that have become due. Companies will be able to obtain reimbursement of the balance of payable tax credits in 2020, after offsetting of the CIT due, even before the filing of the CIT return due in May of this year.

This concerns in particular the tax credit for competitiveness and employment (“Crédit d’impôt pour la compétitivité et l’emploi” or “CICE”), the research and development tax credit (“crédit d’impôt recherche” or “CIR” - only for the part that expires this year), as well as tax credits related to the artistic field.

VAT credits will also be subject to accelerated reimbursement by the tax authorities.

In order to do so, the taxpayer will have to complete
- the tax credit refund application form (form no. 2573),
- the form certifying the existence of this tax credit (form 2069-RCI or specific declaration),
- in the absence of a profit and loss statement, form n°2572 for the statement of the balance of the CIT to enable its liquidation.

Deferral of tax returns and suspensions of tax audits

Article 10 II of the ordinance of 25 March 2020 excludes the deferral of the filing dates of tax returns used for the assessment, liquidation and collection of taxes. The tax authorities’ guidelines will specify the declarations and taxes concerned.

The French tax authorities announced that no new tax audits should be launched during the state of health emergency, unless a higher instance of the competent administrative authority authorizes the competent tax center to do so.

Current tax audits are suspended. This suspension also covers the ruling procedures for the period between 12 March 2020 and the expiry of one month from the end of the state of health emergency. An equivalent suspension is put in place for the period of recovery, control and ruling provided for in the Customs Code.

With regard to collection notices already received, article 11 of ordinance 2020-306 provides that the time limits applicable to the collection and contestation of public claims are suspended for the duration of the state of health emergency, plus 3 months.

Finally, the limitation periods for the statute of limitation of the tax authorities, which expire on 31 December 2020, will be suspended for a period equal to the period between 12 March

2020 and one month after the end of the state of health emergency. Even after December 31, 2020, it will therefore be possible for the tax authorities to start an audit still taking into account a fiscal year ending on December 31, 2017.

What about tax measures applicable to individuals?

The measures mentioned above only concern companies.

As regards the filing of personal income tax returns, the filing deadlines have been postponed:
- French departments from 01 to 19: June 4, 2020
- French departments from 20 to 54: June 8, 2020
- French departments from 55 to 976: June 11, 2020

If the filing of the income tax returns are not made online but in paper form, the filing deadline is postponed to June 12, 2020.

For the time being, no other accompanying measures have been taken for individuals.

2.2 VAT

Should businesses continue to send “paper” invoices by mail service?

- Where invoices are drawn up on paper (and even if they are subsequently scanned), only the original document can in principle justify the deduction of VAT.
- In view of the present challenge, particularly with regard to invoicing, the French tax authorities have admitted that during the period of state of sanitary emergency, it is possible to scan a "paper" invoice and send it by e-mail to the customer (updated on April 3rd 2020 on the website impots.gouv.fr). A mailing of the "paper" invoice is not necessary.
- E-mailing of the digitized "paper" invoice constitutes the original invoice and enables the customer to exercise his right to VAT deduction.
- Such a dispatch therefore does not deprive the invoice of its "probative" value for VAT purposes, provided, however, that taxable persons put in place the control measures necessary to establish a reliable audit trail (as must be the case for paper invoices).
- In terms of archiving modalities, a tolerance currently allows the customer to store the "paper" invoice received by e-mail in PDF format. However, after the period of state of sanitary emergency, it will be necessary to respect the usual archiving conditions (for both the supplier and the customer), i.e.:
    - either keep the invoice in paper format by printing it,
    - or scan the invoice in "secure" PDF format (time-stamped PDF with a server stamp, digital fingerprint, electronic signature or any equivalent secure device complying with the provisions of Article A 102 B-2 of the French Tax procedures code).

Is it possible to defer the payment of VAT?

- The French tax authorities have indicated and confirmed that **no extension** of the subscription or payment deadline could be granted **for VAT purposes**.
- It must therefore always be **declared and paid** in full amount within the usual time limits and conditions.
- However, the French tax authorities have just specified two tolerance measures based on a **flat-rate assessment** of the tax due for companies subject to the normal real regime which, in the current context of lockdown, cannot gather all the documents required for their VAT declarations.

What are the flat-rate VAT assessment schemes?

Your company is unable to correctly prepare its VAT declaration.

- This applies to firms which, **because of the lockdown**, are unable to gather the information needed to draw up an accurate VAT declaration.
- The tax authorities have therefore opened up the possibility of subscribing to monthly VAT declarations by making an **estimate of the amount of VAT** due for the month and paying a deposit the following month corresponding to the amount of this estimate (in the same way as for the existing holiday allowance).
- Caution : the tolerated margin of error is of 20 per cent.

Your company is experiencing a decline in turnover due to the health crisis.

- For these companies only, the French tax authorities have **exceptionally** opened the possibility of paying a **flat-rate VAT deposit for the duration of the lockdown**.
- This deposit will be determined as follows:
    - For the April declaration in respect of March:
      By default, a flat rate of 80% of the amount declared for February or**,** if you have already used a deposit the previous month, a flat rate of 80% of the amount declared for January**;**
      If the business has been shut down since mid-March (total closure) or has fallen sharply (estimated at 50% or more): flat rate of 50% of the amount declared for February or, if a deposit has already been made the previous month, a flat rate of 50% of the amount declared for January;
    - For the May declaration in respect of April: if the lockdown is extended and makes it impossible to declare a regularization declaration on that date, the above-mentioned measure may be **renewed**.
    - For the regularization declaration**:** at the end of the lockdown, **a regularization of the VAT due** will have to be carried out to take into account the real elements drawn from the activity over all the previous months paid in the form of deposits, with the deposit payments charged.
- Caution: The French tax authorities have announced that the implementation of these tolerance measures will be subject to **posteriori controls**.

What to do in case of an inability to pay?

In the event of a serious situation that is quite exceptional and directly related to the current crisis, we believe that it is possible to contact your local tax office in order to consider, on a case-by-case basis, a suitable solution. In any case, the VAT declaration should be made within the usual deadlines and conditions.

3 Commercial Law – Litigation

3.1 COVID 19 AND COMMERCIAL RELATIONSHIPS: ANTICIPATE, ANALYZE, INFORM

Today's unprecedented health crisis raises countless questions: from the relevance of the measures taken to contain this global pandemic and protect the most vulnerable citizens, to those taken to limit its impact on the economy. There are many questions and answers, the relevance of which can only be judged once the crisis is over.

In spite of these uncertainties, good reflexes must be adopted as of now by the company in order to effectively manage its commercial relationships with its suppliers, service providers and customers.

While the State was quick to recognize that COVID-19 constituted a case of *force majeure* for public contracts, the response in the case of private contracts will not be uniform depending on the date of signature of the contract, the existence of a *force majeure* clause or not, its scope, etc.

Let us recall that there is - according to the provisions of the French Civil Code (article 1218) - force majeure in contractual matters in the presence of an event:

- That is unforeseeable: which could not have been reasonably foreseen at the time of the conclusion of the contract.
- That is irresistible: in that it is beyond the control of the debtor and the effects of which cannot be avoided by appropriate measures.

In the past, case law has been inconsistent in this area:

- For example, a severe epidemic of foot-and-mouth disease was considered a case of force majeure (Soc. 29 June 1956).
- While the Nancy Court of Appeal, on the other hand, considered that the dengue fever epidemic in Martinique was not a case of force majeure in that it affected only 5% of the population (Nancy Court of Appeal, 22 November 2010).

As for its effects, the law distinguishes according to whether the impediment is temporary or permanent.

In the first case, the execution of the obligation may be suspended. If the impediment is permanent, the contract will be automatically terminated and the parties will be released from their obligations without incurring liability. Announcements by the public authorities, such as for example those aimed at prohibiting a certain number of gatherings, must be followed carefully as they are likely to limit the debate on the existence or not of a case of *force majeure*. This will be the case if the expected service is directly affected by the prohibition measure.

In many cases, however, it will nevertheless be necessary to refer to the contract's provisions or to the terms and conditions to identify whether there is a force majeure clause excluding certain events from its scope of application or framing the obligation to inform the contracting party.

The notion of force majeure, which is currently the subject of much debate, should not however make us forget that there are other provisions that can be invoked by the parties.

This is the case of:

- The "unforeseeability" introduced in 2016 within the framework of the reform of the law of obligations (Article 1195 of the French Civil Code). This mechanism, when it has not been set aside by the parties at the time of the conclusion of the contract, must allow a renegotiation of the contract in the presence of a change of circumstances unforeseeable at the time of the conclusion of the contract, when this change makes the execution of the contract excessively onerous for one of the parties.
- Loyalty in the performance of contractual relations (Article 1104 of the French Civil Code), since contracts must be performed in good faith.
- Abrupt termination of established commercial relations (L 442-1 of the French Commercial Code), the principle of which requires the author to be held liable in the event of abrupt or total termination of the commercial relationship.

Consequently, it is appropriate from now on:

- **To ANTICIPATE**: by identifying among its commercial and contractual relationships those presenting a risk for the continuity of its activity: to identify the ruptures in the supply chain but also on the contrary to anticipate the consequences of the drop in the order books of its own suppliers and service providers;
- **To ANALYZE** the legal impact of these events on existing contracts and commercial relationships. Be careful, there could be as many solutions as there are situations;

- **To INFORM** rapidly its co-contracting party of any difficulties encountered with its partners, and if necessary, to implement the existing contractual provisions.

3.2 COMMERCIAL LEASES AND FORCE MAJEURE

Following the speech by the President of the Republic, the Minister of Economy and Finance announced "a temporary suspension measure for the payment of rents, gas, water and electricity bills for companies in financial difficulty".

Encouraged by these words, many companies are considering suspending the payment of their rents and charges.

For some, force majeure is then the leading **ARGUMENT** to justify such a position.

Is this stance nevertheless justified? Can it be generalized?

In our previous article, we touched on the criteria for defining *force majeure*, namely the unpredictable and irresistible nature of the event. While the unpredictable nature of the epidemic we are currently experiencing is indisputable (except for the leases that have been signed in recent days), the "irresistible" nature could be assessed differently depending on the activity carried out in the leased premises. Indeed, the March 15th 2020 order instructs the shutdown of establishments receiving the public listed by category until April 15th 2020.

Must therefore be closed, restaurants and drinking outlets, except for their delivery and takeaway activities, sports establishments, museums, etc. If the tenant's activity is covered by the shutdown order, the "irresistibility" condition should be met, since the landlord is unable to perform its duty of delivery.

Conversely, may continue to receive the public not only mini-markets and supermarkets, but also mechanics shops, electronics stores, hardware stores, newspaper and stationery shops, machine rentals and leasing, etc.

For these tenants, it is far from certain that the voluntary closure of an authorized business - whether it is based on the partial unemployment of its employees or on the invoking by the latter of their right to withdraw - meets the last criteria of *force majeure* and thus allows tenants to validly free themselves from the payment of their rents and charges.

In reality, the President's words only refer to very small businesses. These words have already been heard by companies located in shopping centers, since the National Council of Shopping Centers - in a press release dated from the 19th of March 2020 - instructed its members to suspend rents and rental charges for the April deadline, again only for VSEs.

3.3 SUSPENSION OF THE PAYMENT OF RENTS AND ENERGY BILLS

Covid-19 crisis: Entry into force of the ordinance providing for the suspension of the payment of rents and energy bills relating to the business premises of companies whose activity is particularly affected by the epidemic.

On March 25th, 2020, the French Government adopted, pursuant to the law known as the "state of health emergency" (law no. 2020-290 of March 23rd, 2020), a series of 25 ordinances to take emergency measures to deal with the economic, financial and social consequences of the spread of COVID-19 and thus support the French economy.

Among these ordinances, one specifically concerns VSEs (Ordinance no. 2020-316), micro-entrepreneurs, the self-employed and the liberal professions most affected by the crisis by allowing them to benefit from a suspension of payments and from termination, resolution or prosecution for the payment of rents, water, gas and electricity bills relating to their business premises.

Beneficiaries of the scheme:

Can benefit from this scheme individuals and legal entities that are resident for tax purposes in France and pursuing an economic activity (shopkeepers, craftsmen, liberal professions and other economic agents) whose activity is affected by the spread of the epidemic, that meet all the criteria defined to be eligible for the solidarity fund, **even if they are the subject of collective insolvency proceedings**.

The March 31st, 2020, decree provides that:

Can benefit from the schemes mentioned in articles 2 to 4, of the aforementioned Ordinance no. 2020-316, individuals and legal entities governed under private law that are residents for tax purposes in France and pursuing an economic activity, meeting the conditions and criteria set:

- 1° and 3° to 8° of Article 1 of the aforementioned Decree no. 2020-371
    - 1° They started their activity before February 1st, 2020;
    - 3° Their workforce is less than or equal to ten employees.
    - 4° The amount of their turnover recorded during the last financial year is less than 1 million euros. The average monthly turnover over the period between the date of creation of the company and February 29th, 2020 must be less than 83,333 euros.
    - 5° Their taxable profit, plus any sums paid to the head of the company in respect of the activity carried out, does not exceed 60,000 euros for the last ended financial year;
    - 6° Individuals or, for legal entities, their majority manager, do not hold, as of March 1st, 2020, a full-time employment contract or an old-age pension and have not received, during the period between March 1st, 2020 and March 31st, 2020, daily social security benefits in excess of 800 euros;
    - 7° They are not controlled by a commercial company within the meaning of Article L. 233-3 of the French commercial Code;
    - 8° When they control one or more commercial companies within the meaning of Article L. 233-3 of the French commercial Code, the sum of the employees, turnover and profits of the related entities comply with the thresholds set above;
- 1° and 2° of Article 2 of the aforementioned Decree no. 2020-371
    - 1° They were subject to a prohibition of receiving the public that took place between March 1st, 2020 and March 31st, 2020;
    - 2° **Or** they have suffered a loss of turnover of at least 50% during the period between March 1st, 2020 and March 31st, 2020,

How the scheme works:

(i) Prohibition of interruption or suspension of water or power supply

The ordinance prohibits, from March 26th, 2020 and until the date of cessation of the state of health emergency (May 24th; 2020 at this time but subject to extension), the interruption or suspension of the supply of electricity, gas and water to the beneficiaries of the scheme for non-payment of their bills.

(ii) Possibility to request the staggering of water, electricity and gas bills

The Ordinance provides for the possibility for beneficiaries to request the staggering of the payment of the corresponding bills, due from March 26th, 2020 until the date of cessation of the state of health emergency (May 24th, 2020 at this time but subject to extension), without any penalty, from the water and energy distributors.

The payment of the due installments is then deferred and spread equally over the payment installments of the subsequent bills over six months, starting from the month following the date of the end of the state of health emergency.

(iii) Suspension of the payment of professional/commercial rents and charges

The order introduces, for the creditors of the beneficiaries of this scheme, a prohibition on the enforcement of financial penalties or interest for late payment, damages, periodic penalty payments, the enforcement of a termination clause, a penalty clause or any clause providing for forfeiture, or the activation of guarantees or sureties, due to the non-payment of rent or rental charges relating to professional and commercial premises for which the payment due date falls between March 12th, 2020 and the expiry of a period of two months after the date of cessation of the state of health emergency.

According to the French Ministry of the Economy, the suspended rents and charges will therefore be subject to deferred payment or spread out without penalty or late payment interest and adapted to the situation of the companies, for recovery restarting after the expiry of a period of two months following the date of cessation of the state of health emergency.
Please note that this mechanism is not automatic and rests on the beneficiary's request to the lessor.

In addition to this scheme - which only benefits certain lessees - it will still be possible to have recourse to the judge of expedited maters in order to obtain an urgent postponement or staggering of a debt, (once the courts are operational again). As a reminder, Article 1343-5 of the French civil Code authorizes the judge not only to stagger a debt but also to postpone it, within the limit of 24 months. This provision is, for its part, of general application with the exception of maintenance claims.

3.4 EXTENSION OF LEGAL DEADLINES

COVID-19: Extension of legal deadlines, but retention of contractual deadlines

Order 2020-306 was issued by the French Government to ensure that litigants would not be taken aback by delays during the state of health emergency related to the Covid-19 epidemic. This order extends, on a general basis, the term of the due deadlines during the period from March 12th 2020 to one month starting from the end of the state of health emergency (hereinafter "the period").

It refers in particular to "any act, appeal, legal action, formality, registration, declaration, notification or publication laid down by law or regulation on pain of nullity, sanction, lapse, extinction of rights, prescription, unenforceability, inadmissibility, preemption, automatic withdrawal, application of a special regime, nullity or forfeiture of any right whatsoever and which should have been accomplished during this period".

The obligation, which should have been fulfilled during this period, must be fulfilled, at the end of the period, within a period, which may not exceed the legal deadline, up to a maximum of two months.

For example, if a deadline for filing an appeal expired on March 16th, i.e. 4 days after the beginning of the period, the litigant will have 4 days from the end of the period to file to appeal.

Certain measures are automatically extended for the entire two months after the end of the period, such as precautionary measures, measures of inquiry, investigatory measures, conciliation, mediation, prohibition measures and suspension measures, which are not sanctions, authorizations, permits and approvals.

Similarly, the deadlines for terminating a contract are extended by two months from the end of the period.

However, the order does not cover contractual obligations.

For example, a bank guarantee payable on first demand valid until March 20th will not be extended: it must be activated before March 20th, 2020.

Likewise, bills that are due, and those that fall due during the period, will have to be paid on time.

It should be recalled in this respect, that failure to comply with payment deadlines may lead to an administrative fine for legal entities of up to 2 million euros.

In line with the policy of stigmatizing bad payers, it is highly likely that the behavior of certain companies, consisting on the one hand in benefiting from the loan or guarantee mechanisms announced by the State, and on the other hand in not paying their own suppliers, will be heavily condemned.

However, the periodic penalty payments, penalty clauses, termination clauses and forfeiture clauses, which should have taken effect during the period, are suspended: they will take effect one month after the expiry of the period.

Thus, regarding commercial leases, it should be noted that a lessor may perfectly well serve a summons to pay during the period of a health crisis pursuant to an potential termination clause included in the lease. The effects of the summons will then be suspended for the duration of the period of health emergency and will only continue to have effect one month after the end of this period.

Likewise, periodic penalty payments and penalty clauses that had begun to run before March 12th, 2020 will be suspended and will resume their due course on the day following the period. In conclusion, the order does not remove the obligation that should have been fulfilled during the period: it only allows the obligation to not be considered late when it has been fulfilled within the additional period granted.

3.5 AID AND SUPPORT FOR THE TOURISM SECTOR

Covid-19 crisis: Publication and immediate entry into force of the ordinance on aid and support for the tourism sector instituting a derogatory scheme of credit notes.

On March 25th, 2020, the French Government adopted a series of 25 ordinances, pursuant to the law known as the "state of health emergency" (law n° 2020-290 of March 23rd, 2020), to take emergency measures to deal with the economic, financial and social consequences of the spread of COVID-19 and thus support the French economy.

Among these ordinances, one specifically concerns the tourism sector (Ordinance No. 2020-315). The purpose of the ordinance is to introduce a system of exemption from the usual regulations on cancellation and reimbursement of travel services by replacing it with a credit system. The aim is thus to preserve cash flow and avoid the failure of associations and agencies offering travel services.

Scope of the credit note scheme:

The scheme applies to travel contract cancellations either notified by the customer or by the travel professional or association after March 1st and before September 15th, 2020 included.

With regard to the contracts referred, the ordinance indicates that these are contracts offered by professionals or associations for the sale of trips and stays (e.g. organized trips, cruises, school trips), as well as contracts relating to travel services sold by professionals who produce them themselves (e.g. accommodation, car hire, stays in theme parks).

Are expressly excluded from the scheme the sale of transport tickets (train, plane or coach tickets)

If the ordinance does not expressly specify this, the consumer association **UFC-Que Choisir, consulted during the drafting of this ordinance, indicates that the system would only apply to contracts concluded with professionals established or registered in France**. For travel services purchased from professionals established outside France, it is therefore necessary to check the applicable local law. Nevertheless, the credit scheme introduced in France is consistent with the guidelines published on March 18th by the European Commission, in such a way that is likely that other EU member states have incorporated a similar scheme into their national law.

How the credit scheme works:

The ordinance provides that, by way of derogation from the provisions of the Tourism Code and ordinary law applicable in normal times, the professional or association may offer (but is not obliged to do so), instead of the reimbursement of all payments made by the client, a credit note valid for a period of 18 months.

The amount of the credit note is equal to the total amount paid by the client for the cancelled trip or service.

The ordinance requires the professional or association to offer the client, in order to use his credit, a new tourism service **identical or equivalent** to the cancelled one and at a price equal or lower **without charging any fees.**

If the credit note is used for a service of higher quality and price, the professional or the association may require payment by the client of an additional sum. In the event of a different service, for lesser price, than the amount of the credit note, the client will keep the balance of this credit note, which can be used until the end of the initial validity period of 18 months.
Failure to use the credit note by the end of its 18-month validity period, the professional or association shall reimburse all sums paid by the client for the cancelled trip or service.

3.6 COVID 19 DOES NOT LEGITIMIZE ALL PRACTICES

Beware, the economic and financial crisis that companies are facing due to the Covid-19 pandemic, does not legitimize all practices

The preservation of one's own cash flow cannot justify the suspension of payment of overdue invoices

The temptation is obvious: faced with the need to hold on for many more weeks and the uncertainty (relating to the possibility of the economy starting again), some operators have taken the decision to suspend the payment of overdue invoices from their suppliers.

However, if these practices become widespread, "a chain reaction could be set in motion and lead to the premature disappearance of many companies", as the Crisis Committee on payment periods set up at the beginning of April points out.

It should be reminded, that while the order from March 25th 2020 extends, on a general basis, the payment deadlines during the period of 12 March 2020 to one month following the end of the state of health emergency, this order does not cover payment periods.

It should also be reminded, that as the Court of Cassation ruled in 2014 (Cass. Com. 16 September 2014, No. 13-20306), a case of force majeure does not in any event exonerate a debtor from his obligation to pay his claim for a sum of money. Pursuant to this case law, the current epidemic, whether or not it is qualified as a case of force majeure, cannot exonerate a company from its obligation to pay the invoices addressed to it.

Finally, it should be recalled that Article L 441-16 of the French Commercial Code provides for an administrative penalty of up to 2 million euros for legal entities in the event of failure to comply with payment deadlines.

It is highly likely that a particularly severe examination will be reserved for bad payers who have also benefited from the solidarity scheme set up by the State: partial unemployment, guaranteed loans, etc.

In the presence of payment difficulties, we recommend:

- to favor direct and loyal negotiation with one's creditor or through the Mediator of companies;
- negotiate with your bank to obtain a State-guaranteed loan: as announced by the French BPI, companies of all sizes, whatever their legal form (companies, traders, craftsmen, farmers, liberal professions, micro-entrepreneurs, associations and foundations with an economic activity, etc.), with the exception of non-trading property companies, credit institutions and finance companies, will be able to apply - until 31 December 2020 - to their usual bank for a State-guaranteed loan to support their cash flow. This loan may represent up to 3 months of turnover, or two years of payroll for new or innovative companies. No repayment will be required in the first year. If after one year the company decides to do so, it will be able to amortize the loan over a further one to five years.
- applying for treasury support loans: the BPI launches with partners (regions, banks) loans without any guarantee, without security on the assets of the company or its manager, they are dedicated to VSEs, SMEs, and mid-cap enterprises that are going through a difficult time linked to the COVID-19 health crisis,
- to have recourse to credit mediation, a public scheme that comes to the aid of any company that is experiencing difficulties with one or more financial institutions (banks, financial lessors, factoring companies, credit insurers, etc.) ; to negotiate with your bank to reschedule bank loans;
- in the event of a failure or impossibility to negotiate, and depending on the seriousness of the financial difficulties encountered, consider a preventive measure (ad hoc mandate, conciliation), safeguard, or receivership in order to avoid compulsory liquidation. (See our article on this subject: here)

The force majeure argument must be advanced with discernment.

If there is one certainty, it is this: the notion of force majeure is no longer simply in the mouths of doctors of law, lawyers and jurists. It is now everywhere.

Since the beginning of the crisis, the recurring (and non-exhaustive) questions have been the following: Can my supplier refuse to execute an approved order on the grounds that he lacks the personnel to produce satisfactorily? Will the answer be the same if he is unable to source raw materials?

Or: my customer operates a store that is affected by the closure order. Does he have the right to refuse delivery of a placed order? What happens if he cannot find a carrier to load goods purchased under the Incoterm Ex works.

For many, force majeure constitutes therefore THE answer.

While it might be relevant (depending on the situation) to bring forward the force majeure as a lever for negotiation, it would be dangerous to persist without a prior in-depth legal analysis. It should be reminded, that the concept of force majeure allows the debtor of an obligation - faced with an unforeseeable external event that is beyond his control - to suspend the performance of his obligation, or even to justify the termination of the contract in the event of a definitive impediment, without the risk of his liability being engaged.

Wrongly raised, the notion of force majeure could, on the other hand, prove disastrous from a financial point of view and lead, once the period of health crisis is over, to the award of damages, the amount of which could be very high in view of the loss suffered by the other party.

This includes, although the bases are not exhaustive, contractual liability or tort liability for the brutal breach of contract, without ignoring restrictive agreements or practices such as the concept of significant disparity.

To this conviction, could then be added the risk of a very significant administrative fine.

Therefore, if the time is ripe for a swift decision, it should not be rushed.

The current crisis cannot justify the implementation of anti-competitive practices

The European Commission and the European Competition Network, which brings together all the national competition authorities of the Member States of the European Union, published a message on March 23rd 2020 to the attention of companies.
The European Competition Network (ECN), in its statement, acknowledges the difficulties currently faced by a large number of companies.

However, it reiterates that competition rules ensure a level playing field between companies and that these rules remain fully applicable even in this period of crisis.

Nevertheless, the ECN goes on to state that it understands that cooperation between companies is necessary to ensure the production and fair distribution of basic necessities throughout the territory and that it will not actively intervene against necessary and temporary measures put in place to avoid a shortage of supply of these products.

The ECN clarifies that such cooperation and understandings between companies, given the current circumstances, should in any event not raise competition law concerns as they would not constitute a restriction of competition under Article 101 of the Treaty on the Functioning of the European Union (TFEU), or would likely to lead to efficiency gains which would most likely outweigh the restrictions of competition brought about.

Companies that have doubts as to the compatibility of these cooperation initiatives with competition law are invited by the ECN to contact the Commission or the national coopetition authority concerned for informal advice.

We remain at your disposal to discuss and analyze, with regards to competition law, possible cooperation measures with third-party companies that you might implement during this current situation.

4 Corporate issues

4.1 CLOSING OF ACCOUNTS

Closing of accounts

Since the current health crisis due to the coronavirus is not an event resulting from conditions existing at closing date, there is no need for companies closing on December 31st, 2019 to modify the accounts of the past financial year. However, the accounting firms of companies required to issue an annex to their financial statements will take care to mention in such annex the post-closing impact of the evolution of the pandemic.

Indeed, the WHO declared a state of health emergency on January 30th, 2020. Companies closing as of this date will therefore have to take into consideration the consequences of the pandemic in the context of their financial statements (deferred taxes, impairment of assets, etc.).

Management report

Companies closing on December 31st, 2019 and required to issue a management report will need to set out in detail, under the "significant events having occurred since the closing date", the post-closing impact of the evolution of the pandemic as well as the measures taken within the company (employee protection, postponing of tax deadlines, etc.).

In this context, we strongly recommend that companies, whether or not they are required to issue a management report, draw up such a report and carefully document this point, in order to ensure that the shareholders are properly informed and to obtain a discharge as to the adequacy of the measures taken by the management in the best interest of the company.
Companies with statutory auditors, which are required to produce information on payment delays, shall take into account the measures taken by the government in this regard.

Adaptation of procedures for holding general and board meetings

The law, in particular for public limited companies and for meetings approving the accounts of limited liability companies – or more generally the company's articles of association – do not always provide for the possibility for meetings and boards (boards of directors, supervisory boards, executive committees, etc.) to be held other than in person. Some companies may therefore face organizational difficulties due to the confinement, a fortiori in the run-up to the approval of the accounts.

To alleviate these difficulties, on March 25th, the government issued an order (published today) aiming at facilitating the holding of general meetings and other meetings of governance bodies affected by measures limiting or prohibiting gatherings for health reasons, held between March 12th, 2020 and July 31st, 2020 (unless such deadline be extended, in any event no later than November 30th, 2020). In particular, this order provides for :

- the possibility for the competent body convening the meeting to decide to hold it without the physical presence of the members or other persons entitled to attend;
- the reliance on alternative methods (even where the articles of association are silent or contain precluding clauses): distance vote, telephone or audiovisual conferences (provided, in the latter case, that adequate technical means are available); and
- the members concerned being informed by any means ensuring that they are effectively informed of the date and time of the meeting, as well as of the possible conditions for exercising their rights.

These provisions are applicable regardless of the matter of the decision on which the meeting is called to vote. A decree shall specify the conditions of application of this order as necessary.

Extension of the deadline for the approval of the annual accounts

The disorganization resulting from the confinement can render the preparation of financial statements difficult and delay their approval.

In the event of difficulties, companies may apply to the commercial court for an extension of the deadline for the approval of the annual accounts. Such application should preferably be filed before the expiry of the legal or statutory deadline.

Here again, the government has been authorized to take a series of measures to simplify, refine and adapt the rules relating to the preparation, closing, auditing, review, approval and publication of annual accounts, in particular as regards deadlines, which are extended by 3 months expect if the statutory auditor, as the case may be , has issued its report before March 12th, 2020.

Here again, by an order of March 25th (published today), the government has adopted a set of measures simplifying, refining and adapting the rules relating to the preparation, closing, auditing, review, approval and publication of annual accounts. In particular, the legal or statutory deadlines for the approval of the accounts and further documents or for convening the meeting for said approval are extended by 3 months, unless the statutory auditor, as the case may be, has issued his report on the accounts before March 12th, 2020. This exceptional extension is applicable to entities closing their accounts between September 30th, 2019 and the expiry of a period of 1 month after the state of health emergency has been lifted (the lift being set today at May 24th, 2020, subject to extension, though).

Please note that, in the event of difficulties extending beyond the exceptionally extended deadlines due to the health crisis, companies could still apply to the commercial court, on a case-by-case basis, for a further extension of the deadline.

Finally, please note that a government order also exceptionally extends the deadline for the payment of profit-sharing and incentive schemes from June 1st to December 31st, 2020.

4.2 PREVENTIVE PROCEEDINGS

Covid-19: preventive and collective proceedings adapting to the health emergency situation

In addition to the governmental measures set up to support companies in the context of the Covid-19 global health crisis, the latter can seek protection under the law by petitioning for the opening of a preventive or collective insolvency procedure aiming at adopting a comprehensive approach of the difficulties encountered and ensuring the sustainability of their activities.

Preventive and collective measures benefiting companies in difficulty

Difficulties encountered by companies in the context of the Covid-19 global health crisis can be addressed through preventive procedures, namely**: ad hoc mediation and conciliation**.

These are amicable and confidential proceedings aiming to open, under the aegis of insolvency practitioners, negotiations with the partners and/or creditors of the company (i.e. banks, investors, lessors, public treasury, social organizations) in order to put an end to its difficulties. These proceedings do not entail a divestment of the manager from the corporate management.

In an ad hoc mediation proceeding, the company cannot be in a cessation of payments situation, that is being unable to settle its current liabilities with its available assets. In a conciliation proceeding, the company can be in a cessation of payments situation for less than 45 days.

The opening of a collective **safeguard or receivership proceeding** can equally be considered. These proceedings aim to reorganize the company in order to enable the pursuit of its activity, safeguard jobs and settle the liabilities. They notably enable to freeze liabilities existing prior to the initiation of the proceeding and to stop legal and executory proceedings against the company benefiting from them.

The opening of an observation period leads to the establishment of a recovery solution by repayment of instalments to creditors: a safeguard or receivership plan. In a receivership proceeding, a sale of the company can be organized by the court administrator ("*administrateur judiciaire*").

The safeguard proceeding is open to any company unable to overcome its difficulties without being in a cessation of payments situation, whereas the receivership proceeding can only be initiated in a cessation of payments situation.

Order n°2020-341 adapting the regulations regarding companies in difficulty: what is going to change in a nutshell

The emergency act n°2020-290 of March 23rd, 2020 in response to the outbreak of Covid-19 empowered the government to issue any measures to adapt the provisions of Book VI of the French Commercial code. The order n°2020-341 of March 27th, 2020 adapting the regulations regarding companies in difficulty and agricultural entities to the health emergency and modifying certain provisions of criminal procedure, taken under the emergency act, adapts temporarily the applicable proceedings in order to take into account their implementation during the health emergency and the months following its ending. It applies to the pending procedures.

The main objectives of this order is on the one hand to promote the initiation of preventive proceedings and on the second hand to lengthen the processing deadlines of collective proceedings.

- Appreciation of the situation of companies regarding cessation of payments on the basis of the situation on March 12th, 2020

  This provision enables the company to benefit from measures or preventive proceedings even in case of deterioration of its situation after March 12th 2020 and for a period equivalent to the length of the health emergency plus three months. This provision applies mainly to conciliation and safeguard proceedings.

- Easing of time constraints arising from provisions regarding conciliation and the implementation of safeguard or receivership plans

  The legal duration of conciliation proceedings is extended ipso jure by a period equivalent to the length of the health emergency plus three months. The president of the court, ruling upon request of the administrator appointed to implement the plan ("*commissaire à l'exécution du plan*"), can extend the safeguard or receivership plans within the limit of a period equivalent to the length of the health emergency plus three months. Upon request of the public prosecutor, the president of the court can extend the duration of the plan up to one year. At the expiration of the three-month deadline following the ending of the health emergency and for a six-month period, the court can extend the duration of the plan for a maximal period of one year upon request of the public prosecutor or of the administrator appointed to implement the plan ("*commissaire à l'exécution du plan*").

- Speeding up of the processing of salary debts by the AGS

  The order authorizes the transfer without delay of the statement of wage claims by the judicial representative ("*mandataire judiciaire*") to the association for the management of the guarantee scheme of salary debts (AGS), without waiting for the intervention of the

employees and the bankruptcy judge ("*juge-commissaire*"). This transmission of information triggers the payment by AGS of the due amounts.

- Extension of the length of proceedings imposed on insolvency practitioners

  The president of the court can extend the deadlines imposed on court administrators ("*administrateurs judiciaires*"), judicial representatives ("*mandataires judiciaires*"), liquidators ("*liquidateurs*") or on administrators appointed to implement the plan ("*commissaires à l'exécution du plan*") by a period equivalent to the length of the health emergency plus three months. Correlatively, the limits of coverage by the AGS are extended ipso jure by a period equivalent to the length of the health emergency plus one month, in order to mitigate the impossibility for the judicial representative ("*mandataire judiciaire*"), the court administrator ("*administrateur judiciaire*") or the liquidator ("*liquidateur*") to meet the deadlines regarding the processing of wages or allowances by the AGS.

- Extension ipso jure of the length of safeguard, receivership and liquidation proceedings

  The legal durations of observation periods and safeguard, receivership and liquidation plans are extended ipso jure by a period equivalent to the length of the health emergency plus one month.

- Facilitating the formalities

  Until the expiration of a one-month period following the end of the health emergency, the mandatory deposit before the court registry is alleviate and the legal acts by which the debtor petitions to the competent court are sent to the court registry by any means. In the same way and within the same timeframe, exchanges between the court registry, the court administrator ("*administrateur judiciaire*"), the judicial representative ("*mandataire judiciaire*") as well as between the bodies of the proceeding can be realized by any means. The debtor is furthermore encouraged to request the right not to appear before the commercial court and present its claims and pleads in writing.

These measures enable an adaptation of the answers and means of the commercial courts during the period of confinement, the latter being closed to the public since March, 16th 2020. Only emergency procedures were handled so far. The different courts organize their own operating modes (electronic communication, digital signature, video-conferences…) to enable the processing of these urgent proceedings.

It is to be noted that the court administrators ("administrateurs judiciaires") and the judicial representatives ("mandataires judiciaires") have set up a support platform in the form of a toll-free number (0 800 94 25 64).

4.3 DIVIDEND DISTRIBUTIONS TO SHAREHOLDERS

Dividends distribution to shareholders

The emergency act n°2020-290 of March 23rd, 2020 in response to the outbreak of Covid-19 empowered the government to issue by way of orders and within three months following the publication of the said emergency act, any measures adapting the current regulations regarding allocation of profits and dividends payments. Despite this authorization, the Government has not as of today issued any order regarding this subject and does not intend to go further than the position outlined by the Minister of Economy and Finance Bruno Le Maire who announced that the benefit of support measures from the State will be conditioned to the absence of allocation of dividends and the absence of repurchase of shares.

Announcements from the Government regarding large companies

On March, 27th 2020, the Minister of Economy and Finance Bruno Le Maire called on large companies to the "utmost restraint" regarding dividends distributions. He went further by announcing that the benefit of support measures from the State will be conditioned to the absence of dividends distributions: large companies benefiting from cash flow measures set out by the Government such as the carry-over of social and/or tax contributions or State-guaranteed bank loan will not be able to pay any dividends to its shareholders nor to proceed to any repurchase of shares. The term "large companies" refers to companies or groups of several linked entities having at least 5,000 employees in the last financial year or having a consolidated turnover superior than 1,5 billion euros in France. If they proceed to dividends distributions or to any repurchase of shares, they will have to renounce the said public mechanisms.

It is to be noted that several companies from SBF 120 have already announced the cancellation of any dividends payments for the financial year 2019, either in response to the governmental recommendations or to protect their cash positions.

The consequences of non-compliance with these recommendations are as follows:

- large companies having benefitted from carry-over measures regarding social and/or tax contributions and having paid dividends **shall reimburse this treasury advance on social and tax contributions with penalties** ;
- equally, large companies willing to pay dividends or to proceed to a repurchase of shares **will not be able to benefit from a State-guaranteed bank loan.**

Regarding company groups, this commitment includes the totality of entities and French affiliates of the concerned group. It is to be noted that large companies having made the decision to pay dividends before the setting out of the said mechanism (namely, before March 27th, 2020) are not to be affected by this commitment. It is however still unclear whether dividends distributions decided previously but not yet paid on March 27th, 2020 are excluded from this mechanism. Companies being in this case must remain alert in this regard because the risk of the distribution being put into question later is not totally excluded.

It is to be equally noted that intercompany dividends aiming to support an affiliate's economic activity (notably in order to enable the latter to fulfill its contractual commitments and its terms of payments) are not affected by this commitment.

The Government established a document outlining the details of this responsibility commitment:
https://www.economie.gouv.fr/files/files/PDF/2020/covid-faq-termes-references-dividendes.pdf

Regarding partial unemployment measures, the latter mainly aim to avoid layoffs and to preserve skills within the company. It is therefore not a treasury-linked measure. Nevertheless, the Government calls on large companies having benefitted from the said exceptional mechanism to the utmost restraint regarding dividends distributions.

Position of the Afep

On March, 29 th 2020, the French Association for Private Companies (Afep) which represents the 110 largest French groups called on the concerned companies benefitting from carry-over measures regarding social and/or tax contributions or having obtained a State-guaranteed bank loan to follow the governmental recommendations and to apply the interdiction of the dividends payments in 2020.

Regarding partial unemployment measures, the Afep's board of directors called on its adherents benefitting from partial unemployment measures to present during their next

general meetings a new resolution aiming to reduce the dividends to be paid in 2020 by 20% compared to the previous financial year.

Recommendations for the banking sector

The European Central Bank (ECB) asked in a recommendation to banks dated March 27th, 2020 not to pay any dividends to its shareholders nor to proceed to any repurchase of shares for the 2019 and 2020 financial years and at least until October 1st, 2020.

The objective being pursued is to increase the banks' capacity to absorb losses and to support households and small, medium and large companies loans during the Covid-19 epidemic.

This recommendation does not result in the retroactive cancellation of already paid dividends by banks for the 2019 financial year. Moreover, banks who have already invited their shareholders to vote on a dividends distribution proposition at the next general meeting are called on to adapt this proposition to take the ECB's recommendation into account.

It is to be noted that the ECB does not exclude the possibility to take legally coercive measures if necessary.

The French prudential supervision authority and conflict resolution for lending institutions (ACPR) followed this recommendation on March 30th, 2020 and equally called on the lending institutions under its direct supervision as well as financing companies to abstain from distributing any dividends and from repurchasing any shares during the crisis period. Some banks such as Société Générale and Natixis have already communicated on their intention not to distribution any dividends for the financial year 2019.

Even if no order will be issued by the Government on applicable rules regarding the dividends distributions or payments and that recommendations from Government and regulators are only aimed at large companies, **any company having benefitted from supporting public mechanisms in the context of the current Covid-19 crisis will have to exercise extreme caution in its profit allocation for the financial year 2019.**

Employment-related dividends: profit-sharing and incentive plans

Payment or investment deadline

In application of the emergency act n°2020-290 of March 23rd, 2020 in response to the outbreak of Covid-19, the Government issued the order n°2020-322 of March 25th, 2020 regarding the modalities of payments due under employees incentive and profit-sharing schemes.

This order enables on an exceptional basis in 2020 the postponement of the deadline set out for the payment of the amounts due under an incentive or profit-sharing schemes **to December 31st, 2020** instead of the last day of the fifth month following the closing of the financial year (that is on May 31st, 2020 for financial years closing on December 31st, 2019).

Conclusion of a new incentive agreement

The order n° 2020-385 of April 1st, 2020 modifying the deadline and the conditions of payment of the exceptional purchasing power exceptional bonus postpones the possibility to conclude an incentive agreement of a derogatory length (from one to three years) to **August 31st, 2020** (before: June 30th, June 2020).

4.4 FINANCIAL SUPPORT

To support businesses, the government has announced on 16 March 2020 that it would set-up a 300 billion financial assistance plan to support businesses during the health crisis. This plan takes the form of State guaranteed loans provided by private banks.

Bpifrance, who is the French State investment bank, innovation agency, export credit insurance agency and sovereign fund, has also taken several measures for the repayment of existing loans and to grant new loans to provide additional financial support in the context of the sanitary crisis.

Finally, the French State has also established a solidarity fund for very small enterprises and business concerns especially affected by the economic, financial and social consequences of the Covid-19 and subsequent lockdowns.

Loans guaranteed by the French State

Until 31 December next, business of all sizes, regardless of their legal form (but to the exception real estate non-trading companies (SCI) and credit institutions and finance companies), will be able to request their regular bank to provide them with a state-guaranteed loan to support their cash flow needs during the crisis.

The maximum loan amount is up to 3 months of 2019 turnover, or two years of mass turnover for innovative enterprises or businesses created since 1st January 2019. No reimbursement will be required in the first year and the company may choose to amortize the loan over a maximum period of time of five years.

The banks undertake to examine all applications made to them and to give them a quick response. They are committed to massive distribution, at cost price, of loans guaranteed by the State to relieve the cash flow needs of companies and professionals without delay.

The State guarantee covers 90 per cent of the loan for all professionals and for all companies except for companies in France employing more than 5,000 employees or with a turnover of more than EUR 1.5bn, where the share of the loan guaranteed by the State is limited to 70 or 80 per cent.

Of the 10 per cent of the loan not covered by the State guarantee, banks must not take any guarantee or suretyship.

Banks therefore retain a share of the risk and thus shall carry out the appropriate due diligence before deciding to grant a loan. In this respect, there is no entitlement to the loan.

However, as many professionals and businesses will need such loan, banks have made a commitment to make their best efforts to grant the loan to a very large extent to the professionals and the companies that need it and which credit rating (“Fiben”) before the Covid-19 outbreak was strong, correct or acceptable.

Banks also committed to provide a response within 5 days of receipt of a request for businesses which revenue does not exceed 10 Million euros.

Bpifrance Covid-specific-support

Bpifrance has agreed to adopt several measures to release pressure on businesses, consisting in the:

1. Extension of term or guarantees already granted by the BPI to accommodate the possible extension of existing loans

2. Suspension of the call for capital and interest for the majority of financing granted by Bpifrance, as of March 24 and for a period of 6 months.

3. Establishing of new loans in collaboration with partners (regions/ banks…) to support businesses' cash flow needs:

   - The "Prêt Rebond", in collaboration with the French Regions, from €10,000 to €300,000, subsidized over a 7-year period with a 2-year grace period;
   - An "Prêt Atout", up to €5M for SMEs and up to €15M for ETIs , granted over a period of 3 to 5 years with a grace period.

Solidarity fund for very small entities

By Order dated 25 March 2020, the Government created a solidarity fund, also contributed to by the French Regions, the purpose of which is to assist the very small enterprises (less than 10 employees) which have been particularly affected by the health crisis as they have been subject to a complete lockdown (bars, restaurants, entertainment activities…) or that have suffered a loss of turnover of at least 50 per cent during the period between 1 March 2020 and 31 March 2020 compared to the same period of the previous year (or, for businesses created after 1 March 2019, in relation to the average monthly turnover over the period between the date of creation of the business and 29 February 2020).

The subsidy is of a maximum lump sum of 1,500 euros with an additional amount of 2,000 euros if such businesses have more complex difficulties (inability to pay invoices, did not manage to obtain further financing from banks and that they employ at least one employee).

5 Employment issues

5.1 POSTPONEMENT OF DEADLINE FOR PAYMENT OF SOCIAL SECURITY

In order to take into account the impact of the coronavirus epidemic on the economic activity, the URSSAF network triggers exceptional measures to support companies with serious cash flow difficulties.

Employers had the opportunity to defer all or part of the payment of employee and employer's contributions due to URSSAF on March 15, and April 15, 2020 (companies with less than 50 employees) and April 5, 2020 (companies with more than 50 employees):

- Postponement for up to 3 months without penalties. The same system may be renewed until the date of cessation of the state of health emergency,
- Possibility to adjust the amount paid/postponed (nil or part of the contributions),
- If the payment is not made using the DSN ("déclaration sociale nominative"), possibility to either adjust the amount of the bank wire transfer or not to proceed with the bank wire transfer,
- If the employer does not wish to defer all contributions and prefers to pay only the employee contributions, the employer can spread out payment of the employer's contributions, as it is usually the case.
- As a counterpart, "big companies" must take on a commitment to responsibility not to distribute dividends in 2020.

The postponement is also possible for complementary retirement pension contributions. Companies must contact the insurance company.

For the supplementary health insurance and the welfare scheme, companies must also contact the insurance company.

5.2 PAID LEAVE – REST DAYS

Paid leave

According to decree Nr.2020-323 dated March 25, 2020, a collective bargaining agreement or a company-wide agreement may allow the employer to prescribe the taking of paid leave or to change the dates of leave already taken, within the limit of six working days, i.e. one week of paid leave, subject to a notice period of at least one full day.

The employee's consent is not required (especially in the case of splitting paid leave).

The imposed or modified holiday period may not extend beyond December 31, 2020.

Branches have already negotiated on this subject (Metallurgy, Automotive Services).

Others rest days: “RTT” (Reduced Working Time), Rest days of employees working under the “forfait jour” system (fixed number of days per year), CET (Time Savings Account)

The above-mentioned decree provides for the necessary justification to implement the following measures. This justification has been drafted as follows: “if it is justified by the interest of the company in view of the economic difficulties linked to the dissemination of Covid-19”.

If this condition is met, the employer may, by way of derogation from the legal or contractual provisions, prescribe or amend the following, subject to one full day's notice:

- rest days which the employee has acquired as "jours de réduction du temps de travail",
- contractual rest days established in accordance with the provisions of Articles L. 3121-41 to L. 3121-47 of the French Labour Code
- days or half-days of rest acquired by the employee with a day-per year scheme,
- under certain conditions, the days deposited in the time savings account.

However, the total number of days of rest that the employer may impose on the employee or of which he may change the date , may not exceed 10 days.

The period for taking rest days imposed or changed may not exceed December 31, 2020.

The use of the provisions of the above-mentioned decree on leave and other rest requires concomitant information from the CSE. The CSE shall then have a period of one month to issue its opinion. However, use of the provisions of the decree may begin before the opinion is issued.

5.3 SICK LEAVE

Specific medical leave for childcare (Covid-19)

As part of the measures to limit the spread of the Covid-19, the authorities have decided to close temporarily all childcare facilities and schools.

This decision gives rise to an exceptional payment of daily allowances by the Health Insurance scheme for parents who have no other option for childcare (such as teleworking) than to stay at home or who do not benefit from the childcare facilities set up for priority professions as follow:

- Beneficiaries: Parents of children under 16 years and of children with disabilities without age limit.
- Procedure:
    - Transmission by the employee to the employer of a sworn statement of the absence of an alternative childcare solution.
    - Declaration of work interruption by the employer on the teleservice "declare.ameli.fr".
    - Judgment issued without waiting period or conditions for entitlement for a period of 1 to 21 days up to April 15, 2020.
- Compensation: social security payment (IJSS) + maintain of remuneration by the employer (according the CBA rules notably)
  In case of “part” short-time activity of the company/employees’ service, the employee cannot get more remuneration than employees get in short-time activity (70% calculated for 35 hours).
  This specific medical leave is not applicable if the employee is working in Home office and if ”total” short-time activity is set-up within the company (see hereafter).

According to decree Nr. 2020-434 dated April 16, 2020, the following derogatory rules apply if the employee benefits from a work interruption provided for in Article 1 of the decree of January 31, 2020 (cases of persons who are subject to a measure of isolation, eviction or home support as well as those who are parents of a child under sixteen who is himself subject to such a measure):
- The additional allowance is paid from the first day of absence (except in exceptional cases),
- Neutralization of previous durations regarding the total duration of compensation,
- From March 12 and until April 30, 2020, the amount of the additional indemnity is equal to 90% of the gross remuneration that the employee would have received if he or she had continued to work, taking into account the amount of the daily social security benefits,.

Sick leave and short-time activity

The Ministry of Labour has clarified the relationship between short-time activity and employees placed on sick leave (distinguishing according to the nature of the sick leave: ordinary sick leave or exceptional sick leave, in particular for "childcare", introduced as part of the management of the epidemic) in a question-answer form (which does not correspond to a legal provision).

Different rules apply depending on the situation, as follows:

Situation 1: The employee benefits from prior sick leave (common law interruption) and the company's employees are subsequently placed in short-time activity.	The employee remains on compensated sick leave until the end of the prescribed leave. On the other hand, an employee on sick leave may not receive more compensation than he or she would have received if he or she had been placed in short-time activity. The employer's supplement, paid in addition to the daily social security allowance, is therefore adjusted in order to maintain the remuneration at a level equivalent to the amount of compensation due for the short-time activity. The employer's supplement remains subject to contributions and social security contributions under ordinary law, as if it were remuneration. At the end of the work interruption, the employee switches to the short-time activity.

Situation 2: The employee first benefits from a derogatory work interruption implemented as part of the management of the epidemic (interruption for isolation or childcare) and the company places its employees in short-time activity after this interruption.	The Ministry of Labour distinguishes two cases in this situation: **Case 1: The company places its employees in short-time activity due to the total closure of the establishment or part of it.** The purpose of the derogatory work interruption is to compensate the employee who is unable to go to his workplace either as a protective measure or because he is forced to take care of his child. When the employee's activity is interrupted due to the short-time activity (closure of the establishment or part of the establishment to which the employee is attached), the employee has no longer to go to work. The work interruption is no longer necessary and the employer must notify the health insurance of the early end of the interruption according to the same procedures as an early resumption of activity in the event of an ordinary sick leave. The employee is then working in short time. Nevertheless, the Ministry of Labour seems to tolerate that if the exceptional work interruption is in progress at the time of the employee's partial employment due to the closure of all or part of the establishment, the employer may wait until the end of the current interruption to place the employee in short-time activity. However, the employer may not request any extension or renewal of the interruption. **Case 2: The company places its employees in short-time activity due to a reduction in activity.** In this situation, the derogatory work interruption for childcare or for vulnerable persons prevails and the employer cannot therefore place his employee in short-time activity for reduction of the number of hours worked as long as a work interruption is in progress.
Situation 3: The employee is first working in short time and then falls ill.	An employee placed in short-time activity retains the right to take sick leave (except for exceptional sick leave for childcare or vulnerable persons). In this case, the partial employment scheme is interrupted until the end of the prescribed leave (the employee receives daily allowances without a waiting period). The same consequences apply as in **situation 1**: The employer pays to the employee an employer's supplement to the daily social security benefits which is adjusted in order to maintain the remuneration at a level equivalent to the amount of

	compensation due for the short-time activity (the employer's supplement may not lead to the employee being paid a higher amount than he would receive if the employee were not on leave and placed in short-time activity). This employer's supplement is subject to contributions and social security contributions under ordinary law as if it were remuneration.

5.4 SHORT-TIME WORK

To date, decree Nr. 2020-325 of March 25, 2020, order Nr. 2020-346 of March 27, 2020 decree of March 31, 2020, and decree Nr. 2020-435 of April 16, 2020 have modified the short-time activity regime as follows.

Opinion of the Social and Economic Committee (CSE)	The opinion of the CSE may be obtained after the request for short-time activity has been submitted to the Direccte within two months of the application for prior authorization for partial activity.
Request made on the webside of the Ministry	**Extended deadlines:** – 30-day period to file the application with retroactive effect, – Maximum duration of 12 months of authorization. **Tacit acceptance:** until December 31, 2020, the period at the end of which silence constitutes implicit acceptance of the prior request for a short-time activity authorization is reduced to two days. In its last question-answer form of April 10, 2020, the Ministry of Labour specifies that the deadline for submitting an application for a short-time activity permit is a maximum of 30 days from the placement of employees in short-time activity (retroactive) - however for March 2020, by way of tolerance, the deadline is extended to April 30, 2020 (taking into account the malfunctioning of the platform).
Foreign companies	Foreign companies employing employees in France are eligible for the short-time activity scheme: – if employees are subject to a French employment contract, – in the event of payment of social security contributions in France, and this even in the absence of an establishment in France. For information, the platform for requesting short-time activity should evolve (deadline to follow).

Beneficiary employees	**Extension of the system:** – Executives with annual hour or day-per year scheme benefit from short-time activity also in the event of a reduction in working hours (cases of total or partial closure of establishments have always been applicable). – part-time employees in short-time activity may benefit from the minimum monthly remuneration (under certain conditions), – Apprentices and professionalization contracts may benefit from a short-time activity allowance equal to their previous remuneration, – For protected employees, the short-time activity is binding (and does not require their agreement) if it applies to all employees of the company, establishment or department to which the protected employee belongs, – childminders and employees employed at home by private employers, – Top executives (“cadres dirigeant”) in the case of temporary closure of their establishment, – « VRP »(travelers, representatives and salespersons “Voyageurs, représentants, placiers”). For employees on secondment, in order to benefit from the short-time activity, the employee must have an employment contract under French law and the establishment must be subject to the French Labour Code. Thus, an employee on secondment from a foreign company working in France may not be eligible and a French employee working on a site abroad may not be eligible.
Allowance paid to companies	**Increase of the allowance amount:** The amount of the refund is limited per employee to: – 70 per cent of the previous gross wage, within the legal working time (limit 35 hours), – 70 per cent of 4.5 SMIC (i.e. maximum hourly rate of 31.98 euros, i.e. 4.849,173 euros per month), – Minimum allowance set at 8.03 euros (not applicable to apprenticeship or professionalization contracts). **Increase of the annual quota of compensable hours:** 1607 hours per employee (instead of 1000 hours previously) until December 31, 2020. In its last question-answer form of April 10, 2020, the Ministry of Labour clarified **the methods for calculating the short-time allowance** and in particular the taking into account the variable

elements of remuneration and overtime, and in particular:

- Confirmation: overtime and its increase, even structural, are not taken into account in the calculation of the short-time activity allowance.
- Premiums:
  - The following are taken into account: variable remuneration elements (commissions, for example), bonuses paid calculated on the basis of the employee's attendance time and affected by the short-time activity (annual seniority or attendance bonus, etc.),
  - The following are excluded: bonuses or indemnities in the form of reimbursement of professional expenses, profit-sharing and incentive schemes, bonuses that are not affected by the short-time activity, exceptional purchasing power bonuses.
- The possibility of resorting to the short-time activity without claiming reimbursement from the State. In this case, companies must pay their employees the short-time allowance under the conditions provided for in the Labour Code.
  In order to benefit from the exemption of social security contributions on short-time activity allowances, companies will have to apply for authorization under the normal conditions of short-time activity. They will not have to apply for compensation afterwards. They will inform the DIRECCTE of this commitment not to benefit from compensation by the State.

Furthermore, Decree Nr. 2020-435 specifies the methods for taking into account **variable remuneration and expenses** (Articles 2 and 3):

- Variable remuneration components or paid at a non-monthly frequency: the reference salary used to calculate the compensation and short-time activity allowance also takes into account the average of the variable remuneration components, excluding professional expenses and excluded items (see below), received during the twelve calendar months, or over the totality of the months worked if the employee has worked less than twelve calendar months, preceding the first day of short-time activity in the company.
- Excluded from the base are sums representing professional expenses and elements of remuneration, which, although having the character of a wage, are not the counterpart of

actual work or are not affected by the reduction or absence of activity and are allocated for the year. Where remuneration includes a fraction of remuneration corresponding to the payment of holiday indemnity, that fraction shall be deducted in order to determine the basis for calculating the compensation and the short-time activity allowance, without prejudice to the payment by the employer of paid holiday.

The above-mentioned decree specifies also the methods of application of the short-time activity for **executives with annual hour or day-per year scheme** (article 1-I-1° and article 1-II).

The compensation (see hereafter) and the short-time activity allowance are determined by taking into account the number of hours or days or half days not worked converted into hours according to the following methods:

- a half-day not worked corresponds to 3.5 not worked hours,
- a day not worked corresponds to 7 not worked hours,
- a non-worked week corresponds to 35 not worked hours.

Days of paid leave and rest taken during the period provided for and public holidays not worked, which correspond to working days, shall, where appropriate, be converted into hours. The hours resulting from this conversion shall be deducted from the number of hours not worked.

The number of hours giving rise to the payment of the compensation and the short time activity allowance may not exceed the legal working hours mentioned in Article L. 3121-27 of the French Labor Code for the period in question.

The terms and conditions of application of the short-time activity to **sales representatives/ VRP** (article 1-I-3° and article 1-II):

- Reference monthly remuneration: average gross remuneration received over the last twelve calendar months, or where applicable all calendar months worked if the employee has worked for less than twelve months, preceding the first day of short-time activity (excluding professional expenses and the salary elements provided for in Article 3 of the decree - see below).

	– Hourly amount determined by relating the amount of the monthly reference pay to the legal working time (35 hours). – Loss of remuneration referred to in Article L. 5122-1 of the French Labour Code corresponds to the difference between the reference monthly remuneration (see above) and the monthly remuneration actually received during the same period. – Number of compensable hours not worked (limit 35 h) corresponds to the difference in remuneration obtained under the preceding paragraph ("loss of earnings") in relation to the hourly amount.
Compensation of employees by the employer	**No change:** the employer remains obliged to compensate its employees up to at least 70 per cent of their gross salary - calculated over 35 hours (i.e. approximately 84 per cent of net salary). However, nothing prevents an employer from compensating its employees for more than 70 per cent of the gross salary if it can/wishes to do so. Please note that some collective bargaining agreements (e.g. “Syntec”, Metallurgy, Chemical Industries) provides for rules that are more favorable.

5.5 WORKING TIME

The fields concerned, as well as the derogations allowed within the limits set by this Article, will be specified by decree.

The draft ordinance provides for derogations in the following areas:
- maximum daily working hours (12 hours),
- maximum daily duration accomplished by a night worker (12 hours with allocation of compensatory rest),
- daily rest period (reduced to 9 hours),
- absolute maximum weekly duration (60 hours) and maximum average weekly duration over 12 consecutive weeks (46 hours or 48 hours, to be confirmed) ,
- maximum average of weekly working time over 12 consecutive weeks of the night worker (44 hours).

The principle of weekly rest remains unchanged (except in certain sectors which will be specified by decree and which may derogate from the Sunday rest rule).

The decree provides for the Social and Economic Committee (CSE) and the Regional Director for Enterprise, Competition, Consumer Affairs, Labour and Employment (DIRECCTE) to be informed immediately.

5.6 HEALTH AND SAFETY

Covid-19-related work interruptions and testing

The occupational physician can prescribe and renew a work interruption in case of infection or suspicion of infection with Covid-19 and carry out screening tests (awaiting a decree specifying the terms and conditions).

Postponement of monitoring visits and other measures (job surveys, incapacity procedures) unrelated to the epidemic

Follow-up visits to the occupational doctor (as well as other follow-up measures unrelated to the epidemic) may be postponed, unless there are legal exceptions or the occupational physician's assessment decides the contrary.

Maintain of the activity

The employee must get a specific form from his employer.

The Paris Law Court indicates in a judgement of April 9, 2020 that:

- The employer cannot limit only himself to take over the public and official recommendations of the Government. It is up to the employer to justify "having implemented the appropriate health and safety measures and systems",
- The risk assessment effort must be assessed in the light of the epidemiological context (brutality, lack of medical treatment, dangerousness and capacity to spread) without being influenced by the number of specific and local incidents and malfunctions (once precautionary and preventive measures have been taken),
- The employer must inform employees and employee representatives of the risks, in particular by updating the single risk assessment document (DUER).

5.7 EXCEPTIONAL BONUS AND INCENTIVE PLANS

Exceptional bonus (“prime exceptionnelle de pouvoir d’achat”)

The allocation of this exceptional bonus is no longer reserved for companies with a profit-sharing agreement.

The amount of the bonus remains fixed at 1,000 euros (exempt from social security contributions and income tax) and can be increased to 2,000 euros for companies with a profit-sharing agreement.

The deadline for payment of the bonus is extended from June 30, 2020 to August 31, 2020. The bonus can be modulated to take into account working conditions linked to the epidemic (and specifically reward employees who worked during the epidemic).

In addition, a profit-sharing agreement may be concluded until August 31, 2020.

Profit-sharing and incentive plans

The deadline set out for the payment of the amounts due within the framework of an incentive or profit-sharing schemes is postponed to December 31, 2020 instead of the last day of the fifth month following the closing of the financial year (that means on May 31, 2020 for financial years closing on December 31, 2019).

The deadline and conditions for the conclusion of a new incentive agreement are modified: derogatory length (from one to three years) to August 31, 2020 (before: June 30, June 2020).

5.8 STAFF REPRESENTATIVES

Suspension of electoral procedures

Elections in progress on April 2, 2020 are interrupted with retroactive effect as from March 12, 2020 until the end of a 3-month period following the end of the health emergency state.

Staff representatives' mandates will be extended until the announcement of the results of the next election.

Organization of "remote" meetings

It is currently possible to hold meetings by audiovisual or telephone conference or, if accepted collectively, by instant messaging systems.

5.9 MISCELLANEOUS

Residence permits

The period of validity of residence documents (visas, residence permits with the exception of foreign diplomatic and consular staff, provisional residence permits, receipts for applications for residence permits and certificates of asylum applications) expiring between March 16 and May 15, 2020 is extended by 90 days.

Mandatory meetings development career

The professional interview summarizing the employee's career may be postponed at the employer's initiative until December 31, 2020.

Deadline extension

The decree n° 2020-306 of March 25, 2020 specified that a legal act or formality that had to be carried out during the period of a state of emergency increased by one month could be regularly carried out within a subsequent maximum period of two months.

The decree n° 2020-427 of April 15, 2020 specifies that this period is not applicable to the periods of reflection, retraction or renunciation provided for by the law or regulation; this confirms that the periods of reflection applicable for reclassification leave, CSP, modification of the employment contract for economic reasons, etc. remain applicable (without deferral).

Litigation

All proceedings are suspended.

6 Data protection

6.1 ALERT ON CYBER THREATS TO COMPANIES USING TELEWORKING

The health crisis linked to Covid-19 has led several companies to set up, sometimes in a hurry and in a disorganized manner, telecommuting in order to preserve at least part of their activity. An uncontrolled implementation of telework accentuates the risks in terms of security for the companies that resort to it (information theft, fraud, ransomware, etc.).

This can go as far as putting the company in pure and simple danger in regards to cybercriminals who try to take advantage of a vulnerability and the dematerialization of nearly all of the company's internal procedures.

What are the risks?

- **Phishing**: These are messages (emails, SMS, etc.) that aim at stealing confidential information (passwords, bank details, etc.) by impersonating a trusted third party (colleague, superior, etc.). This practice can lead to the hacking of e-mail accounts, access to information systems, false orders or false transfer orders, etc.
  For example, on the 21st of March, a French wholesaler working for pharmacies was offered an order of more than 6 million euros in hydro-alcoholic gel and masks by swindlers posing as a supplier known to the company.
- **Hostage-taking of information systems or ransomware**: This type of attack consists in encrypting or preventing access to the information system of the company in exchange for a ransom payment. This type of attack may be accompanied by data theft or prior destruction of backups, as well as by suspending affected company's activity.
  As an example, on March 22nd, the Paris Hospitals (AH-HP) were fell victim to a cyber-attack by a massive connection on their servers. Although the attack was brought under control by the AH-HP, this type of attack is likely to become widespread and concern both public institutions and private companies.
- **Data theft:** This type of attack consists of breaking into the company's information system in order to steal data with the aim of blackmailing it by threatening to resell it or distribute it to third parties in order to harm the company. This can lead to a suspension or even a total halt of activity, depending on the data concerned, as well as damage to the company's image and reputation.

What are the best practices and measures to adopt?

As the activity of most companies is already impacted by the health crisis, preserving the security of the information system, which is at the heart of their operations, must be a priority.

You will find below a non-exhaustive list of recommendations and good practices, which will have to be adapted on a case-by-case basis:

- **Reinforcement of security measures to detect or prevent cyber-attacks**: Each company should work with its CIO and/or CISO and/or IT service provider to strengthen authentication procedures (stronger passwords, double authentication if possible) and check that all security updates are carried out, etc.

- **Use of professional tools**: It is advisable for each company to provide as far as possible professional tools to teleworking staff and avoid the use of personal equipment (mobile phones and computers) whose security level is often faulty or difficult to control.

- **Awareness raising of teleworkers**: The following recommendations, among others, should be communicated to staff:
  - Exercise caution in regards to messages of unknown or unexpected origin (e.g. mentioning a good deal, a refund, an order confirmation, etc.);
  - Be aware of the risk of false orders or changes in bank details (always check the information with the person in question by other means);
  - Make updates (especially security updates) as soon as they are available on all connected equipment (servers, telephones, computers, etc.);
  - Download only applications authorized by the company (on professional hardware) and through official platforms;
  - Make regular backups of data and keep a disconnected copy;
  - Notify the hierarchical superior or the IT department in case of doubt;
  - Remind them, if necessary, that the IT charter may provide for sanctions in the event of non-compliance with its provisions.

What to do in the event of fraud or a cyber-attack?

In case of fraud or a financial scam, the company must act quickly and contact its bank in order to block the last transfer made, within 24 to 48 hours.

Any fraud or financial scam making use of the internet must be reported on the PHAROS platform set up by the Government.

Finally, in case of data violation (breach, hacking, etc.), companies must notify the CNIL within 72 hours.

6.2 THE DATA PROTECTION CHALLENGES FOR EMPLOYERS IN FRANCE

The coronavirus (Covid-19) continues to expand all over the world. In France measures are taken by the authorities to contain the spread and mitigate the effects of the virus.

While companies must take measures to ensure the good health of their employees and to prevent the propagation of the virus, they must be careful not to violate the privacy of the data subjects and to comply with the GDPR.

The French data protection authority (the CNIL) has edited recommendations for employers about what they can do and what they cannot do in accordance with the GDPR and in order to respect the employees' privacy.

Some essential reminders

Information about employees' health are classified as "sensitive personal data", in the sense of article 9 of the GDPR, and the processing of these data is particularly supervised.

Employers can process medical data relating to a data subject where it is necessary for the employer to comply with its legal obligations in relation to health and safety.

Even in case of an epidemic, key principles of the GDPR must apply:

- the retention period is limited and it does not exceed the period strictly necessary for processing;
- the legal basis of the processing must be indicated: in this case it should be a "legal obligation" (e.g. the legal obligation of the employer to ensure the good health of employees, Government measures), or the "legitimate interest" of the employer;
- the collection of personal data must respect the principle of minimization: e.g. it is possible to ask if employees return from a country "at risk" and to advice not to go to these areas but it is not possible to ask for the schedule of employees or to force them to declare whether any of their relatives have travelled to such destination;
- the security of the data shall be highly guaranteed and the identity of affected individuals should not be disclosed to third parties or to their colleagues without a clear justification;
- measures implemented to manage the virus, which involve the processing of personal data, should be documented in the name of the principle of accountability that applies;
- companies must be transparent regarding the measures they implement in this context and they must provide their employees information about the processing of their personal data, the purpose of the collection and how long it will be retained for. This information must be provided in a format that is concise, easily accessible, easy to understand, and in a clear and plain language.

What an employer can do in accordance with the GDPR?

If contamination is reported, employers can collect some data:

- The date and the identity of the person suspected of having been exposed;
- The organizational measures taken (containment, teleworking, orientation and contact with the occupational physician, etc.);

Employer will thus be able to communicate to the health authorities, at their request, the information relating to the nature of the exposure necessary for any health or medical care of the exposed person and also to limit contamination.

What the employer cannot do under the GDPR?

According to the CNIL, it is not possible to collect data in a systematic and generalized manner, or through individual inquiries and requests, to seek possible symptoms presented by an employee or his/her relatives.

For example, it is not possible to:

1. Take daily temperature readings of its employees or visitors;
2. Ask its employees for their medical records;
3. Collect and process information about the health of the relatives of employees.

These recommendations are likely to change as the spread of the virus progresses. In this regard, it is recommended to keep informed through the Government's website and to be attentive to officials guidelines. The CNIL recommendations are accessible here and can evolve.

7 Contact

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