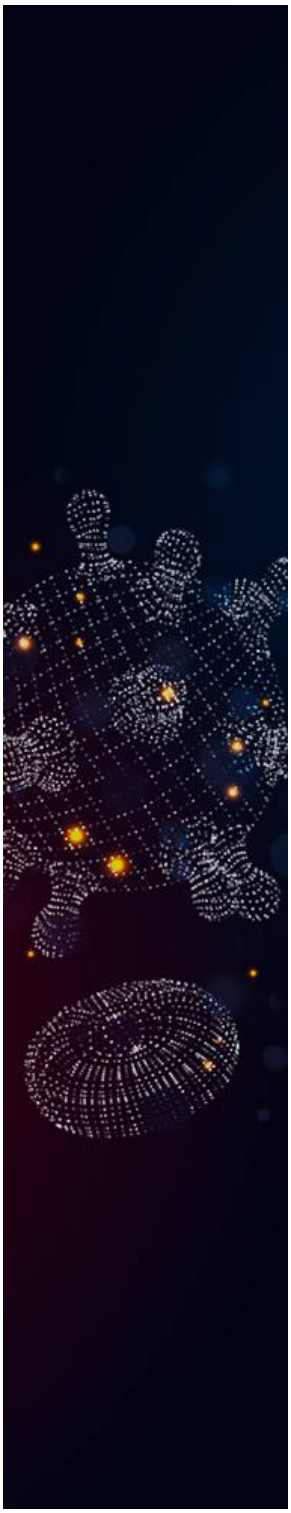


ARTICLE

STATE OF HEALTH EMERGENCY: WHEN, WHY, HOW?

Real Estate and Construction European Law Public Law and Public Procurement Law | 20/03/20 |
Emmanuelle Mignon

LIFE SCIENCES & HEALTHCARE

The Council of Ministers on Wednesday, March 18, adopted three bills (an organic bill, an amending finance bill and an ordinary bill) aimed at combating the covid-19 epidemic and enabling the Government to smooth the consequences of its decisions related to this crisis in all sectors of activity in the country. These texts were subsequently handed over to Parliament.

Among the various provisions of these three drafts, the creation of a new category of state of emergency, the state of health emergency, alongside those already provided for in Act No. 55-385 of 3 April 1955 on the state of emergency (serious breaches of public order and public calamity), has given rise to many comments. It is included in the ordinary bill entitled "emergency bill to deal with the covid-19 epidemic".

Subject to the fast-track procedure, the six-week delay between the tabling of the text before the first house and its discussion in session, and the four-week delay between its transmission and its discussion by the other house, do not apply to this bill. However, due to disagreements between the Senate and the National Assembly, the text could not be adopted at its first reading by both Houses. A joint committee therefore had to be convened this weekend, which reached an agreement, enabling an imminent enactment of the text.

We present here the reasons (I) and the content (II) of this new mechanism.

I. Reasons

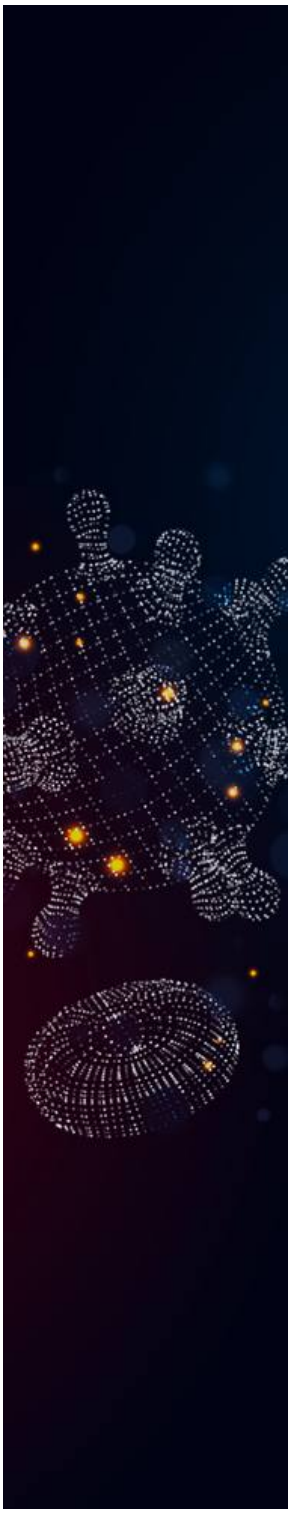
French public law provides for several provisions of legal or jurisprudential origin, enabling the Government to act efficiently in the event of a crisis situation. From such profusion stems some confusion, as shown by the way the French Government has handled up to now the covid-19 crisis:

- the case-law theory of emergency allows administrative authorities to act without complying with all the formalities required by the law, such as consultations. However, it does not, by itself, allow the administration to enact provisions falling within the field of competence of the Parliament or to infringe public freedoms;

- the general police power granted to the Government by the *Labonne* case (Conseil d'Etat 1919) allows the Government, the prefects and the mayors to take all the necessary and proportionate measures, justified by the circumstances, to ensure or restore public order in its four + one components: security, health, tranquillity, morality and, since the *Commune of Morsang-sur-Orge* case of 1995, which was not unanimously supported by the doctrine, human dignity. This power gives the Government great leeway, but in conditions of legal insecurity (permanent control of the ordinary judge on the duration and proportionality of the measures; lack of precision on the measures that can legally be taken) and above all political (lack of formalized control by the Parliament), not enabling the Government to be really at ease to curb the crisis by measures as coercive as those we know today;

- released by the Conseil d'Etat on the occasion of the First World War (1918 *Heyries* for the suspension of the right, provided by law, for public officials to consult their file before any dismissal; 1919 *Dames Dol and Laurent* for individual freedom and freedom of trade infringements of prostitutes who had been forbidden to solicit, run pubs and consume drinks in bars), the theory of exceptional circumstances enables the administration to free itself from all rules of competence, procedure and form in order to take the necessary decisions, including by infringing, where appropriate, public freedoms or by intervening in the field of competence of the Parliament. The Conseil d'Etat has already applied this theory in the event of a natural disaster (1983 *Rodes* No. 25308). However, for this theory to be applicable, the Government must prove that it was unable to act in accordance with the normal rules of legality (1969 *Chambre de commerce et d'industrie de Saint-Etienne,* on an unlawful ministerial order of the Minister of National Education in a matter that should have been regulated by a decree, on the occasion of the events of May 1968). In the present case, as the imminent enactment of the emergency bill to deal with the covid-19 epidemic shows, the government is not, on the whole, unable to act in accordance with the rules of ordinary legality;

- the Law No. 2004-806 of 9 August 2004, codified in the Public Health Code, enables the Minister of Health to prescribe all necessary measures in the event of a serious health threat calling for urgent public health measures (Article L. 3131-1), particularly in the event of an epidemic. The same Minister may empower prefects to take measures to implement his decisions, including individual measures. These measures include, where appropriate, compulsory vaccinations or compulsory prescriptions of medicines, with an *ad hoc* liability regime in such case. In the context of such particular situation of serious health threat, Articles L. 3131-8 and L. 3131-9 of the same Code allow prefects, Defence Zone prefects and the Prime Minister to order requisitions of all necessary goods and services, particularly from health professionals and facilities. Although the Government has based most of the measures it has taken since the start of the covid-19 crisis on these articles, these provisions nevertheless raise



some legal difficulties: they are not accompanied by specific sanctions (only Article R. 610-5 of the Criminal Code, which punishes with a first-class fine, i.e. a maximum of 38 euros, violation of prohibitions or failure to comply with obligations laid down by general police decrees and orders, applies), with the exception of failure to comply with requisition orders, which is punishable, very conventionally, by six months' imprisonment and a fine of 10,000 euros (Article L. 3136-1); due to a legislative flaw, compensation for these requisitions is no longer provided for, although there is no doubt that the jurisprudential principles of public law would apply and grant compensation; the Minister of Health is the competent authority to take appropriate measures, whereas the crisis unfolding before our eyes demonstrates at every moment the Prime Minister's involvement; the division of roles between the national and local authorities is confused;

- in a more targeted manner, but which has proved its usefulness, Article L. 410-2 of the Commercial Code authorises the Government, by decree after the opinion of the Conseil d'Etat, to take temporary measures against excessive price increases or decreases, motivated by a crisis situation, exceptional circumstances, a public calamity or a manifestly abnormal market situation in a given sector ;

- adopted in the context of the Algerian war, Act No. 55-385 of 3 April 1955 on the state of emergency enables the Government to take a number of appropriate measures in the event of serious breaches of public order or public calamity. Declared by the Government and then confirmed by law after 12 days, the state of emergency gives the Government and prefects means of action of the nature of those that have been mobilized to date: ban on movement (pronounced by the prefects), closure of meeting places, ban on meetings, processions and gatherings, requisitions. If the notion of public calamity seems to be aimed primarily at natural disasters, it seems to us that the administrative judge would have agreed to include the notion of pandemic. Moreover, as indicated above, health is a component of public order, so that a pandemic constitutes an eminent danger resulting from a serious breach of public order. It is true, however, that the state of emergency regime provided for by the 1955 Act has so far been mobilized only in the case of serious disorders resulting from human activities (Algerian war, events in New Caledonia, suburban crisis, terrorist attacks...) and that its successive modification to respond to the constraints of the present time (particularly after the so-called Bataclan attacks) has given it a highly repressive complexion (house arrest, closure of places of worship, administrative searches, seizure of weapons...) which is not suited to a health crisis. It is understandable that, for both legal and political reasons, the government did not want to act on the basis of this text;

- finally, for the record, article 16 of the Constitution allows the President of the Republic to take the measures required by the circumstances, should the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments be seriously and immediately threatened and the regular functioning of the constitutional authority interrupted. Despite its seriousness, the current situation obviously does not fall within this hypothesis. There is no threat to the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments. Moreover, the regular functioning of the constitutional authorities (a cumulative condition that must be met) is not interrupted. On the contrary, without discussing either the merits or the timing of the measures taken, the impression is that the public authorities are functioning rather well.

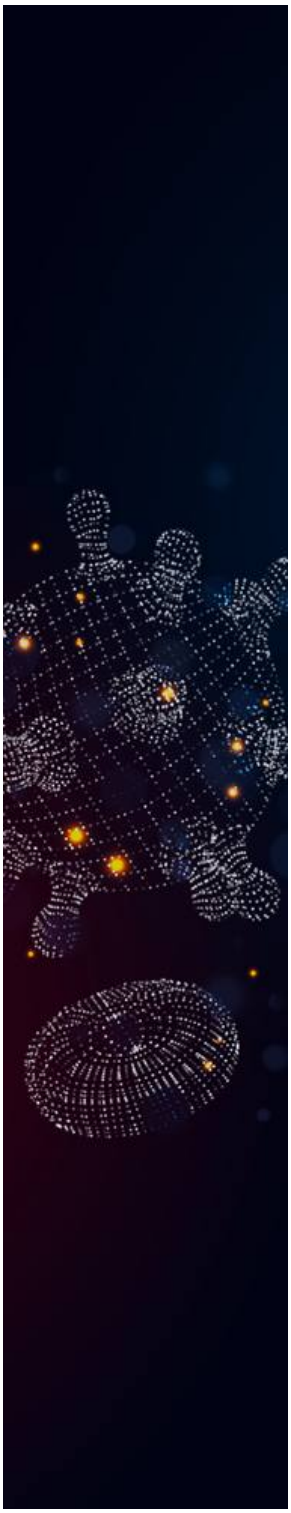
In this prolific, but not always clear, context, the government has taken the following steps against covid-19:

- under the Public Health Code, two decrees dated 3 March and 13 March 2020 have ordered the requisition until 31 May 2020 of respiratory protection masks and anti-projection masks, the difference between the two decrees being that the second decree specifies the list of respiratory protection masks concerned. However, by a decree of 20 March, this provision was relaxed to limit the requisition orders to masks already present on the national territory or produced on it, and to allow companies to import masks up to a limit of 5 million units per quarter per legal entity. This easing responds to the concern of some private companies that are crucial for the continued satisfaction of the population's basic needs (food chain, waste management, etc.) and need to protect their employees, failing which they run the risk of seeing their employees exercising the right of withdrawal;

- under the same code, the Minister of Health issued a series of ministerial orders to quarantine people returning from Wuhan (orders of 30 January and 20 February), prohibit meetings of more than 5,000 people (order of 4 March), 1,000 people (order of 9 March), 100 people (order of 13 March), authorise the manufacture of hydro-alcoholic gel by pharmacies (order of 6 March), order the closure of buildings open to the public, close schools and universities, authorize the delivery of medicines despite the expiry of a prescription (order of 14 March completed on 15 March for the closure of non-essential shops, on 16 March to adjust the list of the shops concerned and allow the free distribution of masks in pharmacies to health professionals, on 17 March to limit the sale of paracetamol in pharmacies and authorize the transport of patients by military means). In the first few weeks, the prefects of the departments in which the first cases were multiplying also took special measures in conditions of rather doubtful legality, particularly in the absence of express authorization to do so by the Minister of Health;

- under Article L. 410-2 of the above-mentioned Commercial Code, the Decree No. 2020-197 of 5 March 2020 capped the selling price of hydro-alcoholic gels;

- finally, under the Public Health Code and the theory of exceptional circumstances and emergency, the Decree No. 2020-260 of 16 March 2020 restricted population movement under the known conditions and empowered prefects to take more restrictive measures locally. The Decree n°2020-264 of 17 March 2020 makes it possible



to punish failure to comply with these restrictions and the requirement to have a supporting document to leave home with a more dissuasive fine than that resulting from the aforementioned Article R. 610-5 of the Criminal Code, i.e. a fourth class fine (i.e. 750 euros or 135 euros in the case of a lump-sum fine and 375 in the case of a higher lump-sum fine).

For all the reasons mentioned above, these various decisions raise a number of legal difficulties. While they have not prevented the Government from acting, they have led it to propose, on the model of the 1955 Act, but separately, the creation of a special health emergency regime, enabling it to take all measures infringing freedoms justified by the situation under more solid legal and political conditions.

II. Contents

Like the law of 1955, the emergency law to deal with the covid-19 epidemic therefore creates a new mechanism called "state of health emergency".

On the recommendation of the Conseil d'Etat, this new mechanism will be codified in the Public Health Code following the abovementioned provisions, which already allow the Minister of Health to take appropriate measures in the event of a threat of epidemic. The law therefore creates a sort of graduation of the means available to the public authorities, first in the event of a health threat (existing provisions slightly modified to restore compensation for requisitions and allow the Minister of Health to continue to take measures, at the end of the health crisis, to eradicate the problem definitively) and then in the event of a health crisis (state of health emergency).

The new state of health emergency regime then has many points in common with the state of emergency of the 1955 law:

- a state of health emergency is a health catastrophe which, by its nature and seriousness, endangers the health of the population;

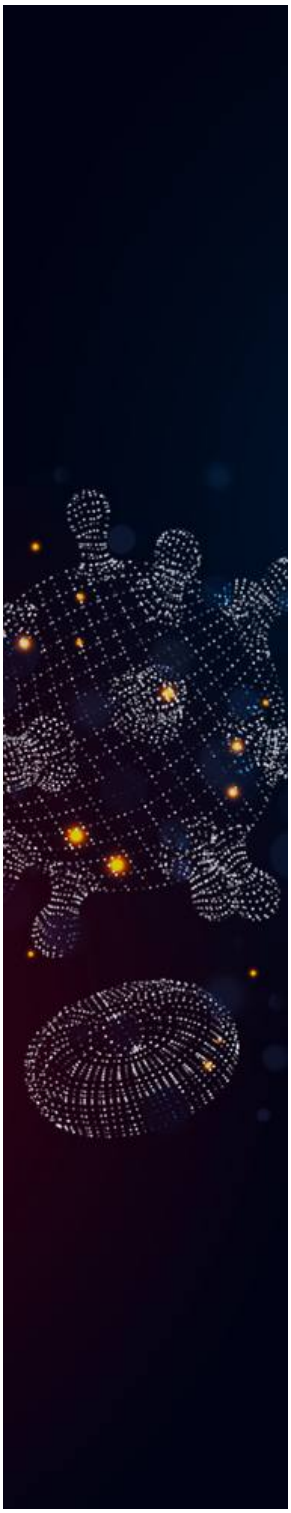
- like the state of emergency referred to in the 1955 law, which we dare not to call "regular", it shall be declared, over all or part of the territory, by the Council of Ministers through a decree;

- its extension beyond one month (and not 12 days) shall be authorized by law (a duration that seems very long to us when, with a little hindsight, we become aware of what is today imposed on the population, such as having a supporting document to go buy bread). This law shall set the duration of the state of health emergency, the government being able to put an end to it before;

- within the framework of the state of health emergency, the Prime Minister may restrict or prohibit the movement of persons and vehicles, prohibit persons from leaving their homes subject to compelling family or health reasons (the professional reason having disappeared in the course of the debates), order quarantine or isolation measures, order the closure of buildings open to the public except for facilities providing goods or services essential to the needs of the population, limit or prohibit public gatherings and meetings of any kind, order the requisition of all goods and services needed to combat the danger and of any persons needed for the operation of such services or the use of such goods (the specification of the possibility to order the requisition of persons is welcome), take measures for price control or in the area of the supply of medicines. The bill adopted by the Parliament is much more precise than that of the Government, which only provided that the Prime Minister could take measures infringing freedom of movement, freedom of enterprise and freedom of assembly. The risk of such an editorial choice is that it may overlook a measure that would be necessary but which no one has yet thought of. The joint committee has, however, partially resolved the problem by providing that the Prime Minister may also take any other measures restricting entrepreneurial freedom necessary to resolve the crisis. Every measure shall, of course, have as its sole objective the protection of public health and be proportionate to the risks involved;

- the Minister of Health and the prefects (upon authorization) may, each in their own field, take measures to complete or implement the Prime Minister's decisions;

- finally, in the event of a state of health emergency, a committee of scientists is convened. Its chairman is appointed by the President of the Republic. It comprises two qualified personalities appointed respectively by the President of the National Assembly and the President of the Senate and qualified personalities appointed by decree. The extension of the state of health emergency shall be authorised by Parliament only after obtaining the opinion of this committee. Throughout the crisis, the committee shall also periodically deliver opinions on the measures taken.



Unlike the state of emergency in the 1955 Act, the Conseil d'Etat, when giving its opinion on the bill, has removed the obligation for the Government to inform the Parliament of the measures it takes under the state of health emergency, on the grounds that it is an injunction from the Parliament to the Government. However, the Parliament reinstated it at the end of the intermediary bill, which seems indispensable to us given, once again, the extent of the infringements of freedoms likely to be taken. Similarly, the law provides that all available scientific data on which the declaration of a state of health emergency was based and all the opinions of the committee of scientists shall be made public.

Let us specify that the compensation for requisitions ordered within the framework of the state of health emergency will be governed by the provisions already in force provided for by the Defence Code. Failure to comply with these requisitions will be punishable by six months' imprisonment and a fine of 10,000 euros (50,000 euros for a legal entity). Failure to comply with the measures of restriction or prohibition imposed on the population will be punished for its part with a fourth class fine (see above). In case of a new violation within 15 days, the fine is that of a fifth class contravention. In the event of four violations within a period of one month, the facts become a misdemeanour punishable by six months' imprisonment and a fine of 3,750 euros. The text also provides for the possibility for the administrative authority to enforce its measures ex officio (in practice under duress).

Finally, in order to avoid the need for the Government, pursuant to the new law, to adopt a decree declaring the state of health emergency, when it has already been installed by force of circumstance, an *ad hoc* provision of the law declares directly the state of health emergency for two months as of the entry into force of the law, charging the Parliament to extend this duration later if, at the end of May 2020, the crisis is not over, or the Government to end it by decree if, on the contrary, it ends earlier.