

ARTICLE

THE FRENCH COMPETITION AUTHORITY AT A STANDSTILL, THE EUROPEAN COMMISSION CONTINUES ITS WORK (FOR THE TIME BEING?)

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By a press release of March 27, 2020, the French Competition Authority (hereinafter the "**Authority**") informs companies what adjustments will be made to procedural deadlines and procedures due to the state of health emergency.

For its part, the European Commission (hereinafter the "**Commission**"), after a week of adaptation, has returned almost to normal activity.

The Authority's press release

Suspension of the procedural deadlines for the investigation of cases related to the proposed mergers and installation of legal professions governed by Law No. 2015-990 of 6 August 2015.

Ordinance No. 2020-306 of 25 March 2020 on the extension of procedural deadlines during the health emergency period and the adaptation of procedures during the same period provides in Article 7 that "[s]ubject to obligations arising from an international commitment or European Union law, the periods within which a decision, agreement or opinion of one of the bodies or persons referred to in Article 6 may or must be reached or is implicitly acquired and which have not expired before 12 March 2020 shall, on that date, be suspended until the end of the period referred to in I of Article 1.

The starting point of similar procedural deadlines which should have started to run during the period referred to in Article 1(I) shall be postponed until the end of that period.

The same rules shall apply to procedural deadlines set for the same bodies or persons to verify the completeness of a case or to request additional documents in connection with the examination of a notification, as well as to procedural deadlines set for public consultation or participation".

These provisions apply to "*state administrations*" within the meaning of article 6 of this ordinance, and therefore to the Authority.

Article 1(I) of the above-mentioned Ordinance provides that "(...) *the provisions of this Title shall apply to procedural deadlines and measures which have expired or which expire between 12 March 2020 and the expiry of a procedural deadline of one month from the cessation of the state of health emergency (...)*".

Consequently, the following, in particular, shall be suspended, with effect from 12 March 2020 and until the expiry of one month after the end of the state of public health emergency :

- with regard to merger control, the legal and regulatory procedural deadlines set out in particular in Articles L. 430-5 and L. 430-7 of the French Commercial Code;
- with regard to the freedom of establishment of the legal professions governed by Act No. 2015-990 of 6 August 2015 on growth, activity and equal economic opportunities ("loi Macron"):


-The legal period of two months during which the Authority decides, at the request of the Minister of Justice, on plans to create public and ministerial offices in controlled installations zones ("orange zones"), and at the end of which an implicit decision of the said minister is likely to take place;

- The deadline for public consultation, set by the Authority between 9 March and 9 April 2020, in order to drawing up a new opinion on the freedom of establishment of lawyers at the Conseil d'État (French Administrative Supreme Court) and the Cour de Cassation (French Supreme Court) (see press release of March 9, 2020)

The Authority states that it will make its best efforts, whenever possible, to make its decisions and opinions in advance, without waiting for the expiration of the additional procedural deadlines conferred by these provisions.

Extension of procedural deadlines for the submissions of observations and briefs in response to a statement of objections or to a report





In view of the exceptional circumstances, the Authority's Rapporteur Général has decided that the two-month period within which undertakings may submit their comments in response to a statement of objections or a report pursuant to Article L. 463-2 of the Commercial Code is suspended with effect from 17 March 2020. This period will restart as from the day after the publication of the decree withdrawing the travel restrictions initially introduced by Decree No. 2020-260 of 16 March 2020.

Leniency application

Until the lifting of the travel restrictions established by decree No. 2020-260 of 16 March 2020, and by derogation from article R. 464-5 of the French commercial code, leniency applications are filed electronically, to the exclusion of any other mode of transmission.

The periods already granted under the leniency marker are suspended as of 17 March 2020 and will be resumed when the travel restrictions are withdrawn.

Procedures for the transmission of procedural documents

Given these exceptional circumstances, for the entire duration of the travel restrictions initially established by Decree No. 2020-260, and by derogation from Articles R. 463-1, R. 463-11, R. 463-13, R. 463-15 and R. 464-30 of the French Commercial Code, referrals, observations to a statement of objections, briefs in response to a report, requests for trade secrecy or the lifting of trade secrecy are transmitted by electronic means to the Authority.

Similarly, statement of objections, reports, plans to downgrade confidential information and decisions of the Authority and the Rapporteur Général will be notified electronically to the persons concerned and to the government commissioner.

Decisions or opinions of the Authority are sent electronically to the persons concerned. The notification regarding procedural deadlines for appeal will only take place after the lifting of the travel restrictions.

These transmissions or notifications in electronic format can be carried out by any means: electronic mail, document exchange platform, file transfer application...

Acts sent to the Authority by registered letter during the period from 12 March 2020 to the present day must be resent by electronic means, to the address indicated above.

Limitation period and deadline for appeal

The first paragraph of Article L. 462-7 of the French commercial code provides that "*the Authority cannot be seized of facts going back more than five years if no act tending to their research, their finding or sanction has been taken*". The third paragraph of the same article provides that "*limitation period is acquired in any event when a period of ten years from the termination of the anti-competitive practice has expired without the Authority ruling on it*".

The first paragraph of article 2 of ordinance No. 2020-306 provides that "*Any act, remedy, legal action, formality, registration, declaration, notification or publication prescribed by law or regulation under penalty of nullity, sanction, lapse, foreclosure, prescription, unenforceability, inadmissibility, expiration, automatic withdrawal, application of a special scheme, non-existence or forfeiture of any right and which should have been completed during the period mentioned in article 1 will be deemed to have been made on time if it has been made within a period which cannot exceed, from the end of this period, the period legally allowed to act, within the limit of two months*".

Therefore, acts or decisions mentioned in article L. 462-7, which should have taken place during the period from 12 March 2020 until the expiration of a procedural deadline of one month from the termination of the state of health emergency, in order to avoid the prescription of action by the Authority, may be completed within two months from the end of this period, without being penalized for their lateness.

Similarly, appeals against the decisions of the Authority, which should have been filed in the period from 12 March 2020 until the expiration of a period of one month from the cessation of the state of health emergency, in accordance with the deadlines provided for in Articles L. 464-7, L. 464-8 and L. 464-8-1 of the French Commercial Code, may be completed within two months of the end of this period, without being penalized for their lateness.

Procedural deadlines for the execution of commitments and injunctions

Article 8 of Ordinance No. 2020-306 provides that "*When they have not expired before 12 March 2020, the procedural deadlines imposed by the administration, in accordance with the law and the regulations, on any person to carry out inspections and work or to comply with prescriptions of any kind are, on this date, suspended until the end of the period mentioned in I of article 1, except when they result from a decision of justice*".

The starting point for procedural deadlines of the same kind which should have started during the period mentioned in I of article 1 is postponed until its completion."

Consequently, procedural deadlines for implementing commitments, injunctions or interim measures are therefore suspended or postponed until the expiration of a period of one month from the end of the state of health emergency.

The quasi-normal activity of the Commission

On March 16, 2020, the Commission asked all its teams to work from home. The Commission then asked companies not to notify non-urgent transactions and has suspended certain merger review procedures.

Ten days later, and at the same time than the Authority, many competition authorities around the world are announcing a suspension of procedural deadlines and notifications in merger control, the Commission has returned almost to normal activity.

It reaccepts simplified merger notification files on an almost daily basis.

It has relaunched the review procedure for the EssilorLuxottica-GrandVision operation and other complex cases, and yesterday announced that it has authorized a phase 1 operation.

However, the Commission points out that the health crisis is expected to complicate its work over the next few months and that the most complex cases will be those for which the timetable will be the most impacted.

Nonetheless, the Commission is likely to face delays from operators and companies, when the notifying parties to an operation will have to respond to requests for information or when third parties will be approached for market testing. For example, this undoubtedly had an impact on the transition into phase 2 of the acquisition of TachoSil by Johnson & Johnson, regarding a surgical patch: hospitals consulted in the market test objectively had other things to do than to reply to the Commission.

Regarding anti-competitive agreements and abuses of dominant position, the European competition authorities, including the Commission, had stated on 23 March that they were remaining particularly watchful and that the current situation could not be used as an excuse for anti-competitive practices.

On 30 March, the Commission set up a website to help companies that wish to collaborate lawfully, such as food distributors and producers who need to cooperate on food stocks and distribution to keep food shops supplied.

The Commission has already released several guidelines that may help companies to assess the compatibility of their trade agreements with EU competition law. Nevertheless, for specific cooperation initiatives at a Europe-wide scale, which need to be implemented quickly in order to fight effectively against the Covid-19 outbreak, and where there is still uncertainty about the compatibility of such initiatives with European competition law, the DG Comp (a division of the Commission) is ready to guide companies, associations and their legal advisers.

In addition to the website, a dedicated e-mail address has also been created to collect requests for informal advice on specific initiatives. In order to facilitate a quick follow-up, companies are invited to provide as much details as possible about the initiative, including (i) the undertaking(s), product(s) or service(s) concerned; (ii) the scope and structure of the cooperation; (iii) aspects that may raise concerns under competition rules on anticompetitive agreements; and (iv) the benefits that the cooperation aims to achieve as well as an explanation of why the cooperation is necessary and proportionate to obtain such benefits in the present circumstances.

The Commission expressly reiterates that this e-mail address is only designed to provide guidance on the compatibility of such initiatives with the competition rules on anti-competitive agreements. For companies, this channel of communication should be used with restraint, only in cases where the answer cannot be given in-house or by recourse to lawyers.

