

THE IMPACT OF ORDINANCE N°2020-306 ON CERTAIN COMPANY LAW TRANSACTIONS: TUP, SHARE CAPITAL REDUCTION, SALE OF BUSINESS

Corporate | 23/04/20 | Virginie Desbois Jérôme Therond



The application of ordinance n°2020-306 of 25 March 2020^[1], as amended by ordinance n°2020-427 of 15 April 2020^[2] (**the Ordinance**), raises many questions about its application to certain company law transactions.

Article 2 of this Ordinance deems as having been carried out within the prescribed time limits "any act, recourse, legal action, formality, registration, declaration, notification or publication prescribed by law or regulation, under penalty of nullity, sanction, lapse, foreclosure, prescription, inopposability, inadmissibility, expiry, automatic withdrawal, application of a special scheme, forfeiture of any right", which should have been accomplished during the "legally protected period", in so far as they are carried out within the required time after the expiry of the "protected period" (and up to a maximum of two months). The "legally protected period" corresponds to the period between 12 March 2020 and the expiry of one month from the date of cessation of the state of public health emergency (the **Protected Period**). As it currently stands, it covers the period from 12 March 2020 to 24 June 2020 but could still change.

The broad scope of application of the aforementioned article makes it applicable to the legal and regulatory time limits (excluding contractual time limits) provided for by French company law, if they are required under penalty of inadmissibility, forfeiture or sanction and expire during the Protected Period. However, this does not apply to those expiring before or after the said period, nor to the deadlines for registration of the deeds.

The French Chancellery has provided some useful clarifications on the operation of this mechanism and its application to certain company law transactions^[3]. This mechanism does not suspend the mandatory deadlines. Thus, an act may still be performed before the expiry of the legally required period. However, this act will be deemed validly performed if it is performed within the required time limit (and, in any case, within the limit of two months) from the expiry of the Protected Period. In the light of this principle, this article reviews the impact of the Ordinance on certain corporate law transactions.

Dissolution with universal transmission of assets and liabilities (TUP) in favor of the sole shareholder

This transaction provided for in Article 1844-5 paragraph 3 of the French Civil Code gives creditors a right of opposition, which takes the form of a legal claim to be filed within 30 days of the publication of the decision to dissolve.

This 30-day period falls within the scope of the above-mentioned Article 2 of the Ordinance. Thus a creditor will be able to lodge an opposition within 30 days from the date of such publication. However, if the opposition period expires during the Protected Period, the creditor will have a new period of 30 days from the end of the Protected Period to oppose the transaction.

The wording of Article 1844- 5 paragraph 3 of the French Civil Code, which provides that "the TUP is completed and the corporate entity disappears only at the end of the opposition period or, as the case may be, when the opposition has been rejected in first instance or when the repayment of claims has been made or the guarantees provided" has raised concerns among practitioners about the possibility of completing the TUPs before the expiry of this abovementioned additional opposition period.

Indeed, the text conditions the completion of the TUP and the disappearance of the legal person and gives it an automatic character "at the end of the opposition period". The French Chancellery considers, however, that Article 2 of the Ordinance does not lead to the suspension of the creditors' opposition period and that therefore "the end of the opposition period" is not modified by the existence of this additional opposition period.

In other words, the date of completion of the TUP is not postponed as a result of the application of the Ordinance, which therefore only allows the creditor to exercise his right of opposition, upon expiry and within 30 days from the end of the Protected Period.

Consequently, even during the Protected Period, the TUP is completed at the end of the 30 day-period following the publication of the decision to dissolve or, if an opposition has been filed within this period, when this opposition is rejected at first instance or when the repayment of claims has been made or securities provided.

On the basis of this reasoning arising from the French Chancellery's position, the trade registries could thus agree to register the completion of the TUP at the end of the initial 30-day period from publication (in the absence of opposition during this period), even if it expires during the Protected Period. However, the position of the trade registry concerned should be ascertained.

Consequently, a creditor who would oppose the transaction on the basis of the Ordinance, i.e. within 30 days from the expiry of the Protected Period, whereas the TUP would have already taken effect, would be able to assert his rights against the sole shareholder, since all the assets and liabilities of the dissolved company would have been transferred to the latter.

Merger / demerger / partial contribution of assets subject to the merger regime

Mergers and similar operations between joint stock companies (*sociétés par actions*) and limited liability companies (*SARL*), which also involve the universal transfer of the assets and liabilities of the transferring companies to the benefit of the receiving companies, likewise provide protection for the non-bond creditors of the participating companies. The latter have a right of opposition to be exercised within 30 days from the publication of the project.

This 30-day period, which is required on pain of inadmissibility, should also benefit from the mechanism provided for in Article 2 of the Ordinance, if it expires during the Protected Period.

Regarding these transactions, Article L.236-14 of the French Commercial Code expressly states that opposition by a creditor does not have the effect of prohibiting the continuation of the transactions. Thus, a certificate of non-opposition is in principle not required from the trade registry in order to register the merger.

Therefore, it can be considered that the timetable for the completion of the merger is not impacted by the extension of the creditors' period of opposition provided for by the Ordinance. This position is all the more supported by the above-mentioned position of the French Chancellery with regard to dissolutions with TUP (for which, as we have seen, the text delays their completion at the end of the opposition period, contrary to what is provided by the merger regime). However, the merger timetable would be impacted if the draft merger agreement expressly includes a condition precedent of no opposition from creditors.

Share capital reduction not motivated by losses

In the event of a capital reduction not motivated by losses concerning an SA, an SCA or an SAS, a special procedure is also provided for to protect creditors: creditors, whose claim arose prior to the date on which the minutes of the shareholders' decision on the capital reduction are filed with the trade registry, may file an objection to the decision within 20 days of such filing.

Once again, this opposition period, which is required on pain of inadmissibility, should benefit from the mechanism provided for in Article 2 of the Ordinance, if it expires during the Protected Period. Thus, creditors will have a new period of 20 days to file an opposition at the end of the Protected Period, if this right is not exercised within the initial period.

Article L.225-105 of the French Commercial Code suspends capital reduction operations, which may not begin during the creditors' opposition period or before a ruling has been made in first instance on such opposition. However, it is generally considered that the share capital reduction is final as of the date of the shareholder's decision approving it, unless a condition precedent is included in the said decision of no opposition from creditors^[4].

Following the reasoning adopted by the French Chancellery for dissolutions with TUP, it should be considered that the 20-day period for creditors to oppose the share capital reduction from the filing of the shareholders' decision is not suspended by the Ordinance and, thus, the company could carry out the share capital reduction at the end of this period, even if it expires during the Protected Period. The company would then have to settle the case of an opposition filed by a creditor during the additional period after the Protected Period (provision of guarantees or repayment of claims). Here again, however, the timetable would be impacted if the shareholders' decision expressly included a condition precedent of absence of opposition from creditors.

Based on this reasoning, and even if to our knowledge there is no formal position of the French Chancellery regarding share capital reduction, the trade registries could agree to register the capital reduction transaction, at the end of the initial 20-day period from the filing of the shareholders' decision (in the absence of opposition during this period), even if it expires during the Protected Period. However, the position of the relevant trade registry should be ascertained, in particular in the absence of a formal position in this respect.

Transfer of business (*cession de fonds de commerce*)

Article L.141-12 of the French Commercial Code requires the purchaser of a business to publish the sale in two legal newspapers within 15 days of its date. In addition, Article L.141-14 of the same code gives the seller's creditors the right to object to the payment of the price in his hands. This opposition right is to be exercised within 10 days following the last of the two aforementioned publications. In accordance with Article L.141-17 of the same code, the purchaser who pays the seller before the expiry of this 10-day period is not released *vis-à-vis* third parties.

According to the French Chancellery, the 15-day time limit for advertising the sale is not covered by Article 2 of the Ordinance as it is not required under penalty of nullity. Non-compliance has in fact only the effect of postponing the starting point of the time limit for creditors' opposition.

On the other hand, the 10-day creditors' opposition period benefits from the mechanism provided for in the Article 2 of the Ordinance, if it expires during the Protected Period. Thus, creditors will have a new period of 10 days to file an opposition at the end of the Protected Period, if this right is not exercised within 10 days of publication.

However, the creditors' opposition period is not suspended and can thus be exercised within the initial 10-day period. Consequently, the French Chancellery considers that the purchaser may pay the sale price into the hands of the seller and be discharged *vis-à-vis* the creditors after the publications have been made and the initial 10-day period has elapsed. Thus, a creditor who lodges an objection within the additional period after the Protected Period will not be able to recover the sale price from the buyer who has made the publications and waited until the expiry of the initial 10-day period before making payment.

[1] Relating to the extension of time limits during the period of health emergency and the adaptation of procedures during the same period.

[2] Related to various provisions on time periods to deal with the covid-19 epidemic.

[3] "Direction des Affaires Civiles et du Sceau" – 10 and 14 April 2020.

[4] However, the "CCRCS" (coordination committee of the trade registries) seems to consider that the completion of the share capital reduction is subject to the expiry of the creditors' opposition period and, thus, the trade registry may refuse to register the share capital reduction if the creditors' opposition period is not expired.



