



PRESS RELEASE

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Criminal procedure during the COVID-19 epidemic: the Conseil d'État censors two measures of the French Ordinance of 25 March 2020

The Conseil d'État considers that the possibility of imposing video-conferencing before the criminal courts, as well as the automatic extension of the maximum time limits for detention pending trial, is contrary to the European Convention on Human Rights (ECHR). The effects for the past of the annulment of these measures of the French Ordinance of 25 March 2020 will be specified, after examination of the observations of the claimants and the administration.

Professional organisations of lawyers and an individual claimant asked the Conseil d'État to annul the French Ordinance of 25 March 2020 adapting the rules of criminal procedure to deal with the COVID-19 epidemic. They contested in particular:

- the possibility for the judge to impose the use of videoconferencing, or even telephone means of communication, before all the lower criminal courts (Article 5);
- the automatic extension of the maximum time limits for detention pending trial and appearance (Articles 15, 16 and 17).

Articles 5 and 16 of this Ordinance have already been declared contrary to the Constitution by the Constitutional Council¹. However, it was up to the Conseil d'État to rule on the two appeals against the ordinance and to judge whether it was in conformity with France's international commitments, particularly the ECHR.

The Conseil d'État underlines, on the one hand, the importance of the guarantee that is attached to the physical presentation of the litigant before the criminal courts. It therefore considers that the possibility of imposing the use of videoconferencing, although it is not subject to any legal condition or criterion, infringes the right to a fair trial, protected by Article 6 of the European Convention on Human Rights, which the context of the efforts to combat the COVID-19 epidemic does not suffice as justification.

On the other hand, the right to security guaranteed by Article 5 of the European Convention on Human Rights does not prevent, particularly in the exceptional context of the efforts to combat the COVID-19 epidemic, the provision of procedures for extending the time limits for detention pending trial. However, the Conseil d'État reiterates that this right requires that, even in exceptional circumstances, the competent court must systematically rule, after a debate between the parties, and within a short period of time, on the merits of maintaining pre-trial detention. This intervention by the judge must be provided for by the law itself, which was not the case in the contested ordinance.

By today's decision, the Conseil d'État therefore finds that the relevant articles of the French Ordinance of 25 March 2020 are unlawful. Their retroactive annulment may nevertheless have excessive consequences because of the effects they produced when they were in force. On this specific point, the Conseil d'État deferred its decision and invited the applicants and the administration to submit, within one month, observations intended to enlighten it on the scope to be given to the annulments for the past.

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