

## French Liquidity Support Measures Amid the COVID-19 Crisis: One Week After, Where Do Borrowers and Lenders Stand?

***One week after the French government launched state sponsored financing measures, a report from the trenches.***

Since the publication of the Emergency Law of 23 March 2020, the French government and other key regulators have produced a significant volume of hard and soft laws aiming at enhancing liquidity access and preventing financial defaults for French businesses. One week later, companies and banks have familiarized themselves with this new regulatory framework and its practical implications, with the French treasury department, Direction General du Tresor (DGT), endeavoring to address ambiguities and issues through ongoing communications to the public.

### **Automatic deferral and standstill measures applicable to loan agreements**

Impact of COVID-19 emergency laws and ordinances:

- Pursuant to emergency legislation published on March 26 (government ordinance of 25 March 2020, itself issued under the emergency law of 23 March 2020), France has declared a health emergency period, for two months from 24 March 2020. This emergency legislation applies (among other things) to contractual obligations with a deadline falling between 12 March 2020 and the date which is one month following the expiry of the health emergency period (the “protected period”). As a direct consequence thereof, any termination, acceleration, or penalty provisions in any existing contractual arrangements, the purpose of which is to sanction any default to perform an obligation during the above-mentioned protected period, shall be ineffective until expiration of a remedy period of one month after the expiry of the protected period (*i.e.*, within two months after the expiry of the health emergency period).
- The Ministry of Justice has specified (through a “circulaire” issued on 26 March and updated on 30 March) how those emergency regulations impact existing contractual arrangements and provided the following example with respect to loan agreements:

- If a loan agreement provides for a 20 March repayment instalment, and enables the lender to accelerate following a payment default, then the lender will not be able to accelerate following a 20 March payment default, and will only be able to do so if payment has not been made within two months after the expiry of the health emergency period.
- Such standstill measures will apply (in particular) to any failure to pay scheduled loan amortizations or interest and probably also to a breach of financial covenant under any loan agreement, provided that the payment date thereof or the relevant test date falls within the protected period, and if the relevant default has not been remedied within one month from the expiry of such period. Conversely, these standstill measures should not apply to any event of default under a loan agreement that does not relate to an undertaking of the borrower, such as any insolvency default or cross-default.

French Banking Federation (FBF) recommendations:

- The FBF has recommended that its 340 members, both French and foreign, consent to (a) set up accelerated financing request processing procedures, (b) defer repayment of facilities up to six months, and (c) waive additional costs related to delays in repayments.
- However, this recommendation does not have a binding nature on the relevant banks (and does not apply to debt funds), so this remains to be negotiated case-by-case on the basis of an amendment request to be accepted by lenders as per applicable lenders' consent provisions set forth in the relevant facilities agreement.

## State guaranteed loans (Prêts Garantis par l'Etat, or PGEs)

By government order of 23 March 2020, the State, through Bpifrance and in association with the FBF, has offered to guarantee credit facilities up to an aggregate limit of €300 billion. Banking networks started to market such facilities on 25 March 2020.

### Eligible borrowers:

- French legal and natural persons other than real estate companies (*sociétés civiles immobilières*), credit institutions (*établissements de crédit*), financing companies (*sociétés de financement*), and companies which were subject to certain insolvency proceedings (*sauvegarde*, *redressement judiciaire* or *liquidation judiciaire*) as of 24 March 2020.
- Conversely, the DGT has indicated that companies which are no longer subject to an insolvency proceeding but for which the insolvency plan is still ongoing may be eligible, and the same must apply to companies which are only subject to pre-insolvency procedures such as *conciliation* and *mandat ad-hoc*.
- Also, while not expressly set forth in the French emergency laws and regulations, the DGT has stressed that in accordance with EU Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market, a French entity would not be eligible if it were an "undertaking in difficulty" as defined in the Regulation (among others, if not a small- or medium-sized enterprise, where for the past two years its debt to equity ratio was higher than 7.5 times and its EBITDA interest coverage ratio was below 1 time).

**Reference turnover/employees:**

- Key PGE features (maximum loan amount, applicable procedure, guarantee percentage, and applicable guarantee premium) depend on the turnover and number of employees of the relevant business.
- The government order is not totally clear on this aspect, but based on communications made by the DGT, it appears that the relevant turnover must be calculated (i) on a tax-excluded basis, (ii) on the basis of figures for 2019 if available (a certificate from a certified accountant can be used, absent any certified financial statements), or of the previous year otherwise, and (iii) including all sales made by the relevant French entity(ies) (*i.e.*, including export sales); as mentioned below the consolidated turnover may also be retained in certain instances.
- The number of employees is by reference to those employed in France by the relevant French entity(ies) during the last financial year closed or, if the company has yet to close a financial year, as of 16 March 2020.

**Eligible facilities:**

- Drawn or (as confirmed by the DGT) undrawn; if undrawn, the available state guarantee basket will nevertheless be used as from the commitment date (also, the guarantee will not be immediately effective but only two months after drawing, as mentioned below).
- Lenders: credit institutions and financing companies.
- Date of grant of the facility: between 16 March 2020 and 31 December 2020 included.
- Purpose: improving the financial capacity of the borrower (would therefore exclude the refinancing of existing facilities).
- Maximum amount:
  - For companies registered as from 1 January 2019, the French payroll estimated over the first two years of activity.
  - For companies registered before 1 January 2019, 25% of the turnover (or if higher, for innovative businesses meeting certain criteria, twice the French payroll for 2019 if available, or of the previous year otherwise.
  - When the borrower is part of a group and applies for other French entities part of the same group as described below, the reference turnover is obtained by adding up the individual turnover of each eligible French entity (without intra-group adjustments); for businesses with more than 5,000 employees in France or a turnover greater than €1.5 billion, the French consolidated turnover, if available, may also be used for the purpose of determining the maximum loan amount.
- Security package: none, save for companies with more than 5,000 employees in France or with a turnover greater than €1.5 billion, where security interests may be requested.
- Repayment: no amortization for at least the first 12 months; furthermore the facility agreement must allow the borrower to defer amortization for a further period of one, two, three, four, or five years.

- Remuneration: the legal framework is silent on this aspect, but the FBF has indicated that its members will offer the state guaranteed loans in the form of cost price facilities; *i.e.*, no charge besides financing costs of the lender and the costs of the state guarantee (detailed below).
- Transferability: the legal framework is silent on this aspect; however the DGT indicated at the same time that (i) PGEs could be in the form of syndicated loans, but (ii) the state guarantee would expire upon transfer of a participation in the PGE (other than in the context of an ECB refinancing). While the situation is not totally clear on this aspect, transfer of drawn participations should therefore be avoided.
- Documentation: no particular form is required by law; technically each bank may therefore include its own terms and conditions in addition to, and as long as they do not contravene with, those necessary for the loan to remain eligible to the state guarantee; for the time being, each French bank appears to have developed its own short form, French language, template, to document the loan on a bilateral basis; it is possible that banks will constitute club deals for the purpose of granting the larger state guaranteed facilities.

#### **Guarantee terms and conditions:**

- Guaranteed amount (as a percentage of principal, interest, and other amounts due under the loan):
  - 90% for companies with less than 5,000 employees in France and with a turnover of less than €1.5 billion.
  - 80% for companies with a turnover greater than €1.5 billion and less than €5 billion.
  - 70% for other companies.
  - The guaranteed amount is calculated by reference to the loss recorded by the lender after having exercised all available in and out of court remedies following a default.
  - Calculation of the payable amount: in the context of a restructuring (outside of formal insolvency proceedings), taking into account the value of the receivables held by the lender after the restructuring and, in the context of insolvency proceedings, taking into account the value of the receivables at the end of the proceedings net of the sums recovered by the lender.
- Conditions for calling upon the guarantee:
  - The lender must demonstrate that the level of its financial support to the borrower after the grant of the guaranteed facility was greater than that level as of 16 March 2020 (disregarding repayments made since that date either on a voluntary basis or in accordance with the amortization schedule agreed prior to 16 March 2020).
  - No default must occur within two months after funding of the guaranteed facility.
- Guarantee premium: Bpifrance will receive a fee from the lender (cost borne by the borrower) calculated on the principal amount according to the following fee structure depending on the borrower's size and the facilities' maturity:
  - For companies with more than 250 employees or a turnover in excess of €50 million or a total balance sheet in excess of €43 million: for the first year: 50 basis points, (if the borrower defers

the amortization payments for a further period) for each of the first and second additional years: 100 basis points and for each of the third, fourth and fifth additional years: 200 basis points.

- For other companies: for the first year: 25 basis points, (if the borrower defers the amortization payments for a further period) for each of the first and second additional years: 50 basis points and for each of the third, fourth and fifth additional years: 100 basis points.
- The premium is payable for the first time upon the guarantee being granted, and afterwards upon the exercise by the borrower of the deferral option; the DGT specified that the borrower should not be required to make any payment before the first anniversary of the PGE's execution date; the lender will have to finance itself the guarantee premium for the first 12 months, before being able to ask for its reimbursement by the borrower.

#### **Procedure for obtaining the guarantee:**

- For businesses with less than 5,000 employees in France and with a turnover of less than €1.5 billion: the process is automatized; the borrower must obtain pre-approval from its bank, then file a request through a dedicated server which can be accessed from the Bpifrance website; it can then communicate to the bank the corresponding identification number and enter into the relevant loan agreement; for groups of companies, the DGT also specified that each eligible entity may make an individual application separately, or one of the group entities (which may be a holding company) may apply for all eligible entities (in which case it will be the only one receiving the state guaranteed loan); in either case the DGT indicates that it's up to the group to organize the cash circulation among its entities.
- The French Ministry has indicated that until end of April, only one request may be made by a given entity; it has also reminded potential borrowers that in the event of a bank's refusal, it can contact the French Financial Ombudsman (Mediateur du Crédit aux Entreprises); indeed, while the DGT has stated that French banks had undertaken to consider all requests and respond to them promptly; they are under no legal obligation to accept a specific request.
- for large businesses (more than 5,000 employees in France or with a turnover of more than €1.5 billion): the state guarantee is granted by individual governmental order following specific review of the request; for groups of companies, the DGT specified that it is possible to make only one application at the level of any of the eligible French entities (it is not clear whether individual applications may nevertheless alternatively be made by French group members independently).

#### **Impact of dividend policy:**

- As widely reported by newspapers, the French Minister of Economy, Bruno Lemaire, announced that dividend distributions and shares buybacks were not compatible with support from the French treasury. The French government published on 2 April 2020 a note specifying that such restriction applies to distributions and shares buybacks made in 2020 by entities or groups with more than 5,000 employees or with a consolidated turnover of more than €1.5 billion in France (which shall exclude de facto a large part of the French LBO portfolio companies) and that related PGEs will include a corresponding termination event (however such restriction does not apply to intra-group distributions made to provide financial support to French entities).
- At the level of banks, the French Autorité de Contrôle Prudentiel et de Résolution, or ACPR, said it was "essential" for banks to hold onto capital to maintain their ability to support the economy given

the deep uncertainty due to the pandemic (echoing earlier recommendations from the European Central Bank) and advised banks not to pay any dividends or buy back shares until at least October 1, in line with recommendations by the ECB. At this stage it is unclear how failure to comply with those announcements may impact the availability of the state guarantee.

## **Bpifrance specific measures**

### **Bpifrance guarantee of facilities and overdrafts**

Aside from the state guaranteed loans, Bpifrance has notified the market through its website that it can guarantee up to 90% of facilities and overdrafts.

Eligible companies: SMEs and intermediate-sized enterprises with less than 5,000 employees and an annual turnover inferior to €1,500 million or a total balance sheet inferior to €2,000 million (*entreprises de taille intermédiaire* or ETIs).

Eligible facilities: with a term of between two and seven years (and up to 15 years if the facility is secured over a real estate asset).

Eligible overdrafts: with a term of between 12 and 18 months.

### **BPI facilities**

Bpifrance has also notified the market through its website that it grants unsecured facilities.

Eligible companies: SMEs and ETIs with at least 12 months of activity regardless of the business sector except for, among others, real estate companies (*sociétés civiles immobilières*) and businesses already facing difficulties.

Eligible facilities:

- Unsecured
- Amount: €50,000 to €5 million for SMEs and up to €30 million for ETIs
- Rate: fixed or floating
- Duration: three to five years
- Amortization periods: three months, the first to be deferred by up to 12 months

### **Factoring**

Bpifrance has also notified the market through its website that it provides receivables factoring, with the possibility to obtain in addition a loan equal to 30% of the face value of the factored receivables. Details (eligibility criteria, maximum amounts, etc.) are still to be clarified.

### **Suspension of repayment for facilities granted by Bpifrance**

Bpifrance has also notified the market through its website that it has suspended, as from 16 March 2020, any interest payments and principal repayments for previously granted BPI facilities. It has not specified the duration of the suspension.

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