CLIFFORD CHANCE

CORONAVIRUS: FRANCE TO GUARANTEE BANK LOANS IN RESPONSE TO COVID-19 PANDEMIC (UPDATE)

As SARS-CoV-2 virus (Covid-19 pandemic) spreads, France has announced several measures aimed at countering the economic repercussions of the epidemic. Among such measures, a guarantee to be granted by the French state for new bank loans for a total amount of EUR 300 billion (see previous Client Briefing). Such measures are state aid cleared under the EU Commission's revised framework (see linked article).

An emergency bill to deal with the COVID-19 epidemic was presented on 18 March to the French Council of Ministers, notably detailing the guarantee given by the French state for new loans granted by credit institutions and French financing companies (*sociétés de financement*) for a total amount of EUR 300 billion. This unprecedent decision was announced by the French President of the Republic in his speech on 16 March as part of the measures put in place to support the economy in response to the COVID-19 crisis and confirmed on 17 March in a statement by the French Minister of Economy and Finance.

The bill was adopted by the French Parliament on 20 March 2020 (LFR 2020) ("**LFR 2020**").

LFR 2020 contains a number of measures to counter the economic effects of the COVID-19 epidemic, amongst which the guarantee given by the French state for new loans granted by credit institutions and French financing companies. The purpose of this guarantee is to meet the financing needs of those French companies whose activity is undergoing a brutal shock following the health emergency measures taken by the authorities since 5 March 2020 and reinforced on 14 March 2020, and more generally to meet the overall decline in demand. Such guarantee should allow facilitating loans being granted to companies experiencing temporary cash flow issues as a result of the COVID-19 crisis, which could be detrimental notably to employment sustainability and economic outlook in general.

LFR 2020 is notably complemented by an order of the Minister of the Economy and Finance dated 23 March 2020 (the "**LFR Order**") and which came into force on 25 March 2020 (together with LFR 2020, the "**LFR Regime**") which has laid down the specific terms and conditions of the loans being subject to the guarantee (the "**Terms and Conditions**").

Key points

- On 18 March an emergency bill was presented to the French Council of Ministers to deal with the COVID-19 epidemic, which provides for a state guarantee for new bank loans for a total amount of EUR 300 billion.
- The bill was adopted by the French Parliament on 20 March.
- Only loans to French non-financial businesses granted during the period between 16 March 2020 and 31 December 2020 will benefit from the French State guarantee subject to certain terms and conditions being met.
- The terms and conditions of the guarantee shall meet certain requirements further specified by a ministerial order dated 23 March 2020.
- Loans to businesses having less than 5,000 employees or a turnover of less than EUR 1.5 billion will automatically benefit from the guarantee upon notice, provided that the requirements are met. For other companies, a prior approval would be required.
- Bpifrance Financement is commissioned by the French state with management the guarantee on its behalf.
- The scheme though raises a number of questions.

Similar measures are being adopted by other governments in Europe and at EU level with the EUR 750 billion Pandemic Emergency Purchase Programme (PEPP) announced by the European Central Bank (press release / decision).

IN-SCOPE LOANS

Only loans to non-financial[1] businesses (whether legal or natural persons, self-employed, farmers, etc.), excluding real estate companies (*sociétés civiles immobilières*) registered with the *répertoire national des entreprises et des établissements*, whatever their size, which are granted during the period starting on (and including) 16 March 2020 and ending on (and including) 31 December 2020 may benefit from the French State guarantee, subject to certain requirements being met. Outstanding loans made available prior to 16 March 2020 are excluded from the scope of the guarantee. In order to ensure that the guarantee is properly targeted towards loans meeting the particular needs of businesses in this context, the LFR Order provides for a number of conditions including:

- a repayment deferral period of at least 12 months;
- an option offered to the Borrower to extend the repayment of the loan over additional yearly periods, up to a maximum number of five years;
- a ban on obtaining additional security or guarantee on the loan, other than that of the LFR Regime (but see below, Practical Questions); and
- where several loans eligible to the guarantee are extended to the same borrower, the aggregate maximum amount of such loans (in principal and interest) does not represent: (i) regarding businesses set up as from 1 January 2019, more than the amount of the total payroll (*masse salariale*) recorded in France during the first two years of activity; and (ii) regarding businesses set up prior to 1 January 2019, more than 25% of the borrower's turnover in France in 2019[2].

The lending institution shall be a credit institution (which is meant to include EU credit institutions passported into France, as well as French branches of third country banks licensed by the *Autorité de contrôle prudentiel et de résolution,* "**ACPR**") or a financing company (*société de financement*) licensed by the ACPR.

Unfortunately other lenders which have become financing partners of the real economy, which include alternative investment funds (AIFs) and insurance companies, both authorised to lend to non-financial businesses subject to certain conditions, are *ipso facto* excluded from the benefit of the State guarantee.

Further, to benefit from the State guarantee, the lending institutions must refrain from reducing their outstanding facilities compared to their amounts as at 16 March 2020, subject to normal amortisation schedule and borrowers' decision to make repayments.

It is worth noting that a lending institution may be able to immediately accelerate a loan if, after it was extended, it appears that the eligibility criteria

[1] i.e. more precisely, the borrower shall not be a credit institution or a financing company (*société de financement*).

[2] Exceptions should be introduced as regards innovative businesses within the meaning of article D. 313-45-1, II of the French Code on the Entry and Residence of Foreigners and the Right of Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*).

were not met, notably if the lending institution or Bpifrance Financement had been provided with intentionally inaccurate information by the borrower.

TERMS AND CONDITIONS OF THE GUARANTEE

In order to ensure a proper alignment of interests between the French state and the lenders, and in order to protect public finances, the LFR Regime provides for certain terms of the State guarantee, to be supplemented by the Terms and Conditions. According to the LFR Regime, the guarantee:

- shall be remunerated (the amount of the guarantee fee depends on the size of the business and the maturity of the covered loan and ranges from 25 to 200 basis points per annum);
- can only cover between 70% and 90% of the full principal amount of the loans benefiting from such guarantee, such percentage set pursuant to the size of the business:
  - 90% of the loan (in principal and interest) for businesses with a turnover of less than EUR 1.5 billion and employing in France less than 5,000 employees;
  - 80% of the loan (in principal and interest) for large businesses with a turnover between EUR 1.5 billion and EUR 5 billion; and
  - 70% of the loan (in principal and interest) for other businesses,
- cannot be called in relation to loans in respect of which a credit event occurs within two months after it was made available to the borrower; and
- cannot benefit businesses which are subject to French insolvency proceedings.[3] Note that the LFR Order is not in line with the French State Aid Clearance (as to which see below) which refers to the broader concept of "undertakings in difficulty" within the meaning of article 2(18) of Commission Regulation (EU) No. 651/2014 of 17 June 2014. In particular, an undertaking that is not an SME[4] is in difficulty, where, for the past two years: (i) the undertaking's book debt to equity ratio has been greater than 7,5; and (ii) its EBITDA interest coverage ratio has been below 1,0. The Commission's criteria should be applied, notwithstanding the LFR Order (in this respect, please see below, Practical Questions).

Further, it must be noted that the EUR 300 billion maximum amount of the guarantee covers all amounts in principal, interests and incidental costs of the guaranteed exposures.

The indemnified loss payable by the State under the guarantee (subject to the guarantee quota) shall be determined on the basis of the actual loss by the lender after the latter's exercise of any court proceedings or other recourse against the borrower to recover its claim, where they will have been capable of being normally exercised or, failing which, upon a petition for the opening of an insolvency proceeding following the occurrence of a credit event.

The LFR Order sets outs details for the calculation of the indemnifiable loss depending on whether the loss is incurred by the lender: (i) under the

---

3 Namely safeguard, judicial rehabilitation or liquidation under Book VI of the French *code de commerce*.

4 The category of small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million (article 2 of the annex to Recommendation 2003/361/EC).

completion of pre-insolvency/amicable arrangements with the creditors (*e.g. mandat ad hoc* or *conciliation*), in which case the indemnifiable amount is calculated on the basis of the value of the claim after the restructuring; or (ii) in connection with insolvency proceedings, the indemnification is calculated upon the completion of the proceeding by deducting the amounts recovered by the lender.

Attention is drawn to the fact that given the conditions under which the guarantee may be called and the indemnification will be determined, it is not, nor is it akin to, a first demand guarantee (*garantie autonome à première demande*). In this respect, it deviates from known recent precedents such as the State guarantee issued in the context of the rescue of Crédit Immobilier de France (CIF) in 2012 (see: https://www.3cif.com/garantie-donnee-par-l-etat-francais), which was a true blue first-demand guarantee.

PROCEDURE AND MONITORING

In order to meet a potentially large and urgent demand, LFR 2020 provides that:

- with respect to loans extended to businesses having less than 5,000 employees or a turnover of less than EUR 1.5 billion, unsecured eligible loans will automatically benefit from the state guarantee provided that they meet all the Terms and Conditions, upon the service of a mere notice by the lending institution identifying such loans on Bpifrance Financement acting on behalf of the French State (in practice, the notice is made *via* a secured and centralised system using a standardised IT files made available by Bpifrance Financement pursuant to an agreement entered into with the lending institution, and on the basis of a unique identifier certificate obtained by the borrower at https://attestation-pge.bpifrance.fr/description, following a pre-approval by the lending institution); and
- with respect to loans extended to all other businesses, the granting of the guarantee is subject to prior approval by way of an order of the Ministry of the Economy and Finance, following an assessment by the French Treasury with Bpifrance Investissement's assistance (the request must be addressed at the following email address: garantie.etat.grandesentreprises@bpifrance.fr).

Pursuant to LFR 2020, Bpifrance Financement is commissioned by the French state with the management of the guarantee on its behalf, which includes:

- monitoring the guaranteed outstanding amounts;
- collecting the guarantee fees from the lending institutions; and
- verifying the conditions under which the guarantee is called by the lending institutions, and notably that the Terms and Conditions are complied with; and
- making payments under the guarantee on behalf of the French State.

Following such payments, Bpifrance Financement is repaid by the French State pursuant to an agreement to be entered into with the French State.

The conditions under which the management of the guarantee will be performed by Bpifrance Financement and the State's oversight will be exercised will be specified in a forthcoming decree.

The French government has released a practical guide in relation to the guarantee.

STATE AID CLEARANCE

The French State notified the measures taken under the emergency bill to the European Commission and received state aid clearance on 19 March (within 48 hours from the notification)(the "**French State Aid Clearance**"). The clearance was published just after the Commission adopted a temporary framework setting out the conditions for clearing EU government's state aid measures to support businesses affected by the COVID-19 outbreak (see linked article). The Commission confirmed in the French State Aid Clearance that the bank guarantees granted under the French aid package complied with the Commission's new framework, in particular regarding: (i) the amount of the bank guarantee renumeration; (ii) the limitation in time (guarantees will be granted prior to 31 December 2020); (iii) guarantees cannot exceed certain thresholds (depending on the size of the individual company); (iv) the duration of the guarantee which is limited to six years; and (v) exclusion of companies that were already in financial difficulties prior to the COVID-19 outbreak. On this basis the Commission considered the measures as necessary, adequate and proportionate.

PRACTICAL QUESTIONS

The French State Aid Clearance and the LFR Regime are silent concerning certain questions which may be of interest, notably for the lending institutions among other things:

- Which loans are eligible to the guarantee? There is indeed a variety of loan types and their eligibility could be subject to discussions. For instance, would a revolving credit facility (RCF) granted prior to 16 March 2020 but remaining available for drawing after such date qualify for the guarantee? In the same vein, what about restated facilities, and more generally old money?
- How the absence of insolvency proceedings opened against the borrower should be assessed? Shall this be solely in the light of the LFR Order or should EU rules (which include in particular the French State Aid Clearance) be taken into consideration?
- Will Bpifrance Financement make a verification at the time the unique identifier certificate (as to which, see above) is issued to the borrower?
- Would the benefit of the State guarantee result in the exclusion from the benefit of other measures or devices such as the Bpifrance facilities or guarantees (*e.g*. LCC or *Prêts Atout*)?
- It is unclear whether the ban on security interests applies to all loans (as article 1 of the LFR Order seems to suggest) or only to those loans benefiting automatically from the guarantee upon notice to Bpifrance Investissement, *i.e.* loans to businesses whose turnover is below EUR 1.5 billion or having less than 5,000 employees (as reflected in article 4 of the LFR Order).

- Is the State guarantee transferable in the event the guaranteed exposure is sold by the lending institution to a third party (as the LFR Regime does not seem to prohibit them from doing so)?
- It is unclear whether the State guarantee will qualify as unfunded credit risk mitigation for the purposes of Regulation (EU) No. 573/2013 ("**CRR**") in the light of the eligibility requirements set out in CRR.

CLIFFORD CHANCE

CONTACTS

FINANCIAL REGULATION

Frédérick Lacroix
Avocat à la Cour
Partner

T +33 14405 5241
E frederick.lacroix
@ cliffordchance.com

Hélene Kouyate
Avocat à la Cour
Senior Associate

T +33 14405 5226
E helene.kouyate
@cliffordchance.com

Pierre d'Ormesson
Avocat à la Cour
Associate

T +33 14405 5135
E pierre.dormesson@
cliffordchance.com

STRUCTURED FINANCE / F&CM

Julien Rocherieux
Avocat à la Cour
Partner

T +33 14405 5952
E julien.rocherieux
@ cliffordchance.com

Daniel Zerbib
Avocat à la Cour
Partner

T +33 14405 5352
E daniel.zerbib
@ cliffordchance.com

Jonathan Lewis
Avocat à la Cour
Partner

T +33 14405 5281
E jonathan.lewis
@ cliffordchance.com

Thierry Arachtingi
Avocat à la Cour
Partner

T +33 14405 5292
E thierry.arachtingi
@ cliffordchance.com

ANTITRUST

Katrin Schallenberg
Avocat à la Cour
Partner

T +33 14405 2457
E katrin schallenberg
@ cliffordchance.com

RESTRUCTURING

Delphine Caramalli
Avocat à la Cour
Partner

T: +33 14405 5240
E: delphine.caramalli
@cliffordchance.com