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# CORONAVIRUS: FRANCE TO GUARANTEE BANK LOANS IN RESPONSE TO COVID-19 PANDEMIC

## "PRÊTS GARANTIS PAR L'ETAT" (PGE) SCHEME IN DETAIL

**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).**

### Key points

- On 18 March 2020 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 and was amended on 25 April 2020.
- Only loans to French 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, as amended on 17 April 2020 and a Q&A released on 31 March 2020, as amended on 22 April 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 managing the guarantee on its behalf.

An emergency bill to deal with the COVID-19 epidemic was presented on 18 March 2020 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 2020-1) ("**LFR 2020-1**"). LFR 2020-1 was amended by a new law promulgated on 25 April 2020 (LFR 2020-2) ("**LFR 2020-2**", and together with LFR 2020-1, "**LFR 2020**"), which materially amends certain terms of the State guarantee.

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, which is known as the "PGE" scheme ("**PGE**"). 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 "**PGE Order**") and which came into force on 25 March 2020 (together with LFR 2020, the "**PGE Regime**") which has laid down the specific terms and conditions of the loans being subject to the guarantee (the "**Terms and Conditions**"). The PGE Order was further amended by an order of the Minister of the Economy and Finance dated 17 April 2020. The French government released on 31 March 2020 a Q&A, updated on 23 April 2020, aimed at giving some clarity in response to certain questions raised by market participants (the "**Q&A**"). As at 14 April 2020, the French government reported that more than EUR 24 billion of PGE loans had been extended to 162,296 businesses so far, of which more than 54% are microenterprises (TPE).

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

Further to LFR 2020-2, only loans to businesses (whether legal or natural persons, self-employed etc.), other than credit institutions and financing companies (*sociétés de financement*)[1] 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. According to the Q&A[2], loan or facility agreements which are entered into on 31 December 2020 but which will be drawn down after such date shall remain eligible to the PGE scheme.

In order to ensure that the guarantee is properly targeted towards loans meeting the particular needs of businesses in this context, the PGE Order provides for a number of conditions including:

- a repayment deferral period of at least 12 months; according to the Q&A[3], customary provisions which provide for mandatory early repayments (e.g. in the case of change of control) are permitted as long as they are not abusive as they would circumvent the option left to the borrower to extend the maturity of the loan as aforesaid;
- 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;
- where the borrower has less than 5,000 employees or a turnover of less than EUR 1.5 billion in France, a ban on obtaining additional security or guarantee on the loan, other than that of the PGE Regime. According to the Q&A[4], where the borrower is a large corporate, the PGE guarantee may be topped up by additional security interests, which is consistent with the lower percentage of cover assigned to such loan (and through subrogation, the State will access such security on a *pari passu* basis). In

[1] As a result of such modification, financial sector firms other than banks and financing companies are eligible without ambiguity. The Q&A (question no. 7) further specifies that payment or electronic money institutions or asset management companies can be extended PGEs. This should therefore also hold true for investment firms.

[2] Question no. 43

[3] Question no. 33

[4] Question no. 42

any case, a loan benefiting from the new money lender's lien (*privilège de conciliation*) is eligible to the PGE Regime; and

- the aggregate maximum amount of the loan(s) (in principal and interest) granted to the same borrower must 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[5]. The Q&A[6] gives details as to how the metrics must be calculated.

According to the Q&A[7], debt securities (such as bonds or notes), as well as, by assimilation, money market instruments (also known as commercial paper notes) are not eligible to the PGE scheme.

The lending institution shall either be: (i) a credit institution (which is meant to include EU credit institutions passported into France, including under the cross-border passport, 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; or (ii) those persons who are authorised to lend *via* crowdfunding platforms operated by crowdfunding intermediaries (*intermédiaires en financement participatif*) ("**IFPs**")[8].

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, remain *ipso facto* excluded from the benefit of the State guarantee.

According to the Q&A[9], a syndicated loan may benefit from the guarantee, in which case the facility agent will be instructed with calling the guarantee in the name of all lenders and its benefit being shared amongst them. Furthermore, the borrower may also take out a club deal, *i.e.* a single loan arranged by several banks. However, the Q&A[10] states that the loan may not be taken out as a back-up (or as a forward start facility), should the borrower anticipate liquidity needs, except for PGEs extended to large corporates (*i.e.* those in respect of which the guarantee is granted by way of a bespoke ministerial order). More generally, revolving loans, as well as multiple drawing loans, are eligible. However, it is worth noting that in all such cases the two-months waiting period (*délai de carence*, as to which, see below) will run from the moment the funds are released, but not from the time at which the facility agreement is entered into. It is though specified that the whole amount of the facility (*i.e*. both the used and the available portions thereof) will count for the determination of the maximum amount of the guarantee. The Q&A[11] finally specifies that, whilst the lending institution is not prohibited from deleveraging its balance sheet by transferring its PGE loans to third parties, the State guarantee will not transfer and will therefore be cancelled upon such transfer being made, unless the transfer is made either between financial institutions

[5] 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*).
[6] Question no. 15
[7] Question no. 31
[8] Mainly individuals that are not acting in a professional or commercial capacity.
[9] Question no. 38
[10] Question no. 39
[11] Question no. 44

belonging to the same group or to the European Central Bank (ECB) as collateral for Eurosystem liquidity purposes.

Further, to benefit from the State guarantee, the lending institutions (or IFPs) 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.

A lending institution may be able to immediately accelerate a loan if, after it was extended, it appears that the eligibility criteria were not met, notably if the lending institution or Bpifrance Financement had been provided with intentionally inaccurate information by the borrower, or according to the Q&A[12], in the event that the PGE is in breach of the E.U. Commission's criterion relating to the absence of "difficulty" of the borrower (as to which, please see below).

## 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 PGE Regime provides for certain terms of the State guarantee, to be supplemented by the Terms and Conditions. According to the PGE Regime, the guarantee:

- is irrevocable, unconditional and valid for the entire duration of the loan; such legal features which have been added by the order of 17 April 2020 amending the PGE Order, make it a *sui generis* guarantee close to a typical first demand 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[13]:
  - 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 (this is the so-called "*délai de carence*" which is referred to in the LFR 2020). This feature though apparently seems to conflict with the irrevocable nature of the guarantee state above. One way to clear such conflict is to consider that the guarantee becomes irrevocable only after the lapse of such "*délai de carence*"; and

[12] Question no. 2

[13] With respect to the thresholds relating to the number of employees and turnover, the Q&A states that such thresholds have to be assessed on the basis of the consolidated numbers (with respect to each eligible entity of the relevant group) in France.

- cannot benefit businesses which are subject to French insolvency proceedings[14] as at 31 December 2019, as such date is specified by the temporary framework of the European Commission, published on 19 March 2020 and modified on 4 April 2020. The Q&A[15] confirms that the guarantee must be granted 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: a business undergoing difficulties as at 31 December 2019 cannot benefit from State aid. An undertaking that is not an SME[16] is in difficulty, where, for the past two years: (i) its book debt to equity ratio has been greater than 7,5; and (ii) its EBITDA interest coverage ratio has been below 1,0; or where (iii) its own funds (*fonds propres*) are lower than 50% of its share capital. For such purposes, the concept of own funds can be broadly construed to include shareholder loans (*comptes courants d'associés*) and hybrid instruments (*instruments de quasi-fonds propres*). The Q&A[17] further specifies that businesses undergoing amicable preventive procedures (such as *mandat ad hoc* or *conciliation*) and businesses executing a safeguard plan (*plan de sauvegarde*) or a restructuring plan (*plan de redressement)* as at 24 March 2020 remain eligible.

As a result, with respect to:

- TPEs[18] and SMEs, the relevant test is the absence of insolvency proceedings as at 31 December 2019; and
- Corporates which are not SMEs (which includes ETIs and CAC 40 companies for instance), the "undertaking in difficulty" test as described above is also applicable on top of the above test.

The PGE Regime does not provide for any minimum rating of the borrower. However, as the guarantee will only cover part of the amount of the loans (and as a result, the bank will retain credit exposure with respect to the unguaranteed portion of the loan), it is expected that the lending institutions will take into account the rating granted by the Banque de France (or any equivalent rating) to the businesses applying for a loan covered by the PGE Regime. Given the risk incurred by the lending institutions, the Q&A[19] states that a minimum rating of 5+[20] by the Banque de France (or any equivalent rating) would be justified.

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 State guarantee may now be immediately called upon the occurrence of a credit event or a payment default in respect of the loan. No later than 90 days after such payment request is made, the State shall make a provisional

[14] Namely safeguard, judicial rehabilitation or liquidation proceeding under Book VI of the French *code de commerce*.

[15] Question no. 2

[16] 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 (the Q&A have confirmed that the definition in article 2 of the annex to Recommendation 2003/361/EC is applicable in this instance).

[17] Question no. 1

[18] The category of TPEs (*très petites entreprises*, known as microenterprises under the E.U. regime) is made up of enterprises which employ fewer than 10 persons and which have an annual turnover and/or an annual balance sheet total not exceeding EUR 2 million.

[19] Question no. 9

[20] The Banque de France rates a company's ability to meet its financial commitments over a three-year horizon; more specifically, a 5+ rating reflects that the company’s ability to meet its financial commitments is deemed fairly poor. The best rating in the FIBEN rating scale is 3++.

payment equal to a robust estimate of the loss that the lending institution is likely to incur. Once the definitive amount of losses is established, the lending institution must promptly refund the State if the provisional payment was too high. Conversely, the State must promptly indemnify the lending institution if the provisional payment was too low.

Such features, which were introduced by the order of 17 April 2020 amending the PGE Order, materially differ from those of the State guarantee under the initial PGE Order, as the guarantee was then capable of being called (and the guarantor liable to pay), only on the basis of the determination of a final loss.

## PROCEDURE AND MONITORING

In order to meet a potentially large and urgent demand, the PGE Regime 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). The Q&A[21] indicates that, with respect to such loans, it is the sole responsibility of the lending institution to verify the eligibility to the PGE scheme and that neither the State, nor Bpifrance Financement will make a second-look verification; 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). The Q&A[22] specifies that the approval will be granted within a week of the receipt of a complete file and that it will not mention the amount of the loan; however, it will state the maximum authorised amount.

The turnover is calculated on the basis of 2019 audited accounts or, in case of unaudited accounts, with an auditor certificate (*attestation du commissaire aux comptes*) or, failing which, the 2018 audited accounts. Turnover is exclusive of tax and includes export figures.

Pursuant to PGE 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

[21] Question no. 2
[22] Question no. 19

- 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.

Finally, it is worth noting that the French government in a notice dated 2 April 2020 urged large businesses which are benefiting from the PGE scheme or from tax and social payment delays to not pay out dividends.

## 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 2020 (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.

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