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Covid-19 – Restrictions to distributions of dividends and reserves and to share buybacks for large companies in France benefiting from liquidity supporting measures of the French government

Introduction

The French government has adopted measures aiming at providing financial support to French companies, including measures intended to protect their short-term cashflow needs by way of deferring the payment of direct taxes and social contributions or through loans guaranteed by the French State (the ***Covid-19 Liquidity State Aid***), through ordinances issued pursuant to the Emergency Act passed to address the covid-19 epidemic[1] or through other administrative measures. Since the Emergency Act and even before such Act, in anticipation of the economic impacts of covid-19, a number of French companies have decided either to reduce the amount of dividends to be distributed in 2020 or not to distribute any dividends this year. What seems to have become a general practice in major companies has however not (yet) been subject to any legislative or regulatory act, save for instructions published by the French government on 2 April 2020 in the form of a Q&A relating to dividend distribution for companies requesting the Covid-19 Liquidity State Aid (the ***Q&A***)[2]. As at the date of this note, the Q&A is the best form of guidance available on the questions arising in relation to distributions of dividends or reserves and share buybacks in French companies requesting the Covid-19 Liquidity State Aid.

Please note that some provisions of the Q&A are unclear and subject to different interpretations. This note summarises some of the primary impacts of the guidelines provided through the Q&A on distributions of dividends or reserves and share buybacks in France. Given the evolving situation, definitive conclusions on the scope and impact of the restrictions provided for in the Q&A cannot yet be made, and certain of its provisions remain open to interpretation. Further clarification and guidance may also be provided by further legislation, including sector-specific legislation and/or recommendations (such as banking or insurance sectors).

"Responsibility commitment" of French large companies

The Q&A has introduced a "responsibility commitment" (*engagement de responsabilité*) to be taken by French large companies requesting a Covid-19 Liquidity State Aid, either in the form of direct taxes and/or social contributions deferral and/or a State-guaranteed loan, under which large companies (as described below) shall commit to:

- not to pay dividends or interim dividends, or not to distribute reserves, either in cash or in shares, in 2020 to their shareholders in France or abroad (excluding entities with a legal obligation to distribute dividends in 2020);
- not to proceed with share buybacks in 2020, notably by way of a share capital decrease (i) not justified by losses or (ii) through a reduction of the nominal value of the shares, for financial management purposes. Exceptions to this commitment are as follows: (i) allocation of shares to employees, (ii) acquisitions made in application of a liquidity agreement (provided that such liquidity agreement is dated before 27 March 2020 and has not been amended since this date), and (iii) share buybacks as part of an external growth transaction (provided that such buybacks are necessary and result from a legal commitment prior to 27 March 2020).

[1] Emergency Act n°2020-290 dated 23 March 2020 to address the Covid-19 epidemic (*Loi n°2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19*) (https://www.legifrance.gouv.fr/eli/loi/2020/3/23/2020-290/jo/texte).

[2] Q&A published by the French Ministry of Economy on 2 April 2020 (https://www.economie.gouv.fr/files/files/PDF/2020/covid-faq-termes-references-dividendes.pdf)

Which French large companies shall make such responsibility commitment?

The French Ministry of Economy requires that this responsibility commitment be made by French companies or groups with more than 5,000 employees as at the last financial year or a consolidated turnover above 1.5 billion euros in France, which request a Covid-19 Liquidity State Aid.

According to the Q&A, the "group" notion may be defined by reference to articles 1586 quarter I bis and 223 A of the French tax code, meaning in practice that companies should be regarded as being part of a "group" where their share capital and voting rights are ultimately held for 95% at least by a common controlling parent.

As regards the computation of the headcount of a company, it is not clear whether the French government intends to consider only the number of employees in France or the aggregate number of employees of a group, in France and abroad; a cautious approach would be to consider the global number of employees of a French company or group when assessing that company's or group's eligibility to the Covid-19 Liquidity State Aid.

With respect to groups, all entities composing one group shall be subject to the responsibility commitment, including the top company of a group, even if one or some subsidiaries benefit or request to benefit from a Covid-19 Liquidity State Aid.

This responsibility commitment should therefore not apply to:

- companies and groups below the threshold of 5,000 employees and a consolidated turnover exceeding 1.5 billion euros in France;
- large companies meeting those criteria but in which decisions to distribute dividends, interim dividends or reserves or to buy back shares have been made prior to 27 March 2020 (see below regarding the assessment of the 27 March 2020 deadline);
- large companies only requesting other protective measures which do not consist in tax and/or social contributions deferral and/or a State-guaranteed loan, such as short-time working measures (*activité partielle*).

Restricted distributions of dividends, interim dividends or reserves and share buybacks

Distributions of dividends, interim dividends or reserves and share buybacks subject to the responsibility commitment required from French large companies and which may not be compatible with the benefit of a Covid-19 Liquidity State Aid are summarised in the table below:

Distributions of dividends, interim dividends or reserves / Share buybacks	Compatible (yes) / Not compatible (no)	Additional conditions
Distribution of dividends, *i.e.* distribution of sums decided by the annual general meeting of the shareholders, either in cash or in shares of the company:		
• **resulting from a decision taken before 27 March 2020**	yes	N/A
• **resulting from a decision taken after 27 March 2020**	no	N/A
Other forms of distribution in cash or in shares of the company, including interim dividends and exceptional distributions of reserves:		
• **resulting from a decision of distribution taken before 27 March 2020**	yes	N/A

Distributions of dividends, interim dividends or reserves / Share buybacks	Compatible (yes) / Not compatible (no)	Additional conditions
• **resulting from a decision taken after 27 March 2020**	**no**	N/A
Allocation of securities in relation with a group reorganisation	**yes**	N/A
Intragroup dividends[3]**:**		
• **intragroup distributions of dividends to a French company in order to financially support a French company**	**yes**	*provided that the ultimate effect of such distribution is to financially support a French company (in particular, to enable it to comply with its contractual obligations vis-à-vis its creditors)*
• **intragroup distributions of dividends to a foreign company**	**to be further confirmed**	*It is unclear at this stage whether intragroup dividends distributed to a foreign company could be compatible with the eligibility of a French subsidiary to the benefit of a Covid-19 Liquidity State Aid under certain circumstances (it being specified that the Q&A does not explicitly address distributions of intragroup dividends made to non-French entities). Under one possible reading of the Q&A, dividends paid to non-French entities could be compatible provided that such distributions ultimately provide a financial support to a French group member. Despite the fact that this reading of the Q&A is likely to be the one triggering as little as possible frictions with EU law (as far as distributions to European companies are concerned), considering the uncertainties surrounding this tolerance in favour of intragroup dividends, it should be carefully considered to disclose any contemplated dividend distribution to a (EU or non-EU) foreign entity to the French authorities in advance, in order to confirm whether this distribution could trigger the forfeiture of the guarantee granted by the French State as part of a Covid-19 Liquidity State Aid.*

[3] The Q&A expressly indicates that distributions of intragroup dividends made by foreign companies to the benefit of French companies of the same group do not jeopardize the eligibility of those French companies to Covid-19 Liquidity State Aids.

Distributions of dividends, interim dividends or reserves / Share buybacks	Compatible (yes) / Not compatible (no)	Additional conditions
Distribution made by foreign entities of the group for the benefit of the French entities of the group	yes	N/A
Share buybacks for financial management purposes, notably through share capital decrease for reasons others than losses or share capital decrease by way of reduction of the nominal value of shares	**no**	N/A
Buybacks of shares to be allocated to employees	yes	N/A
Share buybacks for the purpose of complying with legal commitments, notably under securities giving access to the share capital:		
• **if legal commitments are dated prior to 27 March 2020**	yes	N/A
• **if legal commitments are dated after 27 March 2020**	**no**	N/A
Share buybacks under a liquidity agreement:		
• **if the liquidity agreement is dated prior to 27 March 2020**	yes	*provided that such liquidity agreement has not been amended since 27 March 2020*
• **if the liquidity agreement is dated prior to 27 March 2020 but has been amended since that date**[4]	**no**	N/A
• **if the liquidity agreement is dated as from 27 March 2020**	**no**	N/A
Share buybacks as part of an external growth transaction	yes	*provided that such buybacks are necessary and result from a legal commitment prior to 27 March 2020*

[4] Note: as per the Q&A, we understand that any and all amendments to a liquidity agreement dated before 27 March 2020 will trigger a restriction on the benefit of the Covid-19 Liquidity State Aid for the relevant company, if such amendments are made after 27 March 2020. It remains to be clarified whether amendments to a liquidity agreement which do not affect the terms of share buybacks may however be compatible with the benefit of the Covid-19 Liquidity State Aid or whether certain amendments to such terms may also not impact the benefit of the Covid-19 Liquidity State Aid.

Dividends and assimilated - 27 March 2020 deadline

If the decision of (i) the general meeting to distribute dividends or reserves or (ii) the board to pay interim dividends is made before 27 March 2020, large companies are not required to apply the responsibility commitment. For the application of such deadline, the date of announcement of dividends (*e.g.* in the annual results press releases of listed companies) or the date of the meeting/convening notice to the shareholders meeting, or the date of dividend payment are irrelevant. In addition, if one or several shareholders propose to include a new draft resolution relating to a dividend distribution within applicable time limits which is then approved by the general meeting, such decision should affect the capacity of the large companies to benefit from the Covid-19 Liquidity State Aid. The eligibility of a company to benefit from a Covid-19 Liquidity State Aid shall thus be impacted even if a distribution was proposed and included to the agenda of the shareholders meeting before 27 March 2020, if the decision has not been effectively taken before this deadline.

Share buybacks – justifications

In the event of verifications by the French administration of share buybacks, the relevant company will be required to substantiate the reasons of any share buybacks which were completed and the actual use of the shares which were bought back, regardless of the date of actual use (it is not required that the shares be used on the date of verification).

Practical modalities

In practice, large companies will make this responsibility commitment before asking for the benefit of the Covid-19 Liquidity State Aid, through:

- the online form to be submitted to the French tax administration for the request of tax deferral;
- by mail or email to the relevant URSSAF (the French organization for the payment of social security contributions). With respect to groups, the top company of a group shall make the responsibility commitment on behalf of the entire group with its URSSAF, even if the payment deferral of social contributions is requested by one or some entities of the group (*i.e.* not all entities of that group);
- a resolutive condition which will be provided in the loan agreement to be guaranteed by the French State and which will be reviewed by the French Ministry of Economy before accepting or refusing to guarantee a loan.

Sanctions

The absence of, or the default under, this responsibility commitment by French large companies will not trigger any sanctions for shareholders themselves but direct sanctions on the relevant companies, preventing them from benefitting from the Covid-19 Liquidity State Aid.

Should a French large company not make the required responsibility commitment, its request for a Covid-19 Liquidity State Aid will be rejected by the relevant French administration and thus it will not be allowed to benefit from any deferral in the payment of due direct taxes or social contributions or from a State-guaranteed loan.

In the event that a French large company accepts to make this responsibility commitment and then does not comply with such commitment, it will be required to reimburse the deferred social contributions and/or taxes and/or to repay the State-guaranteed loan, as the case may be, as well as pay all applicable penalties for late payment pursuant to tax and social security laws. In case of a State-guaranteed loan which has been granted but not yet drawn down, no draw-down will then be allowed.

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