

Belgian Covid-19 guarantee scheme

Introduction

On 27 March 2020, the Belgian Federal Parliament adopted an act (the **Act**) authorising the Belgian government to provide a State guarantee for certain credit facilities in an effort to curb the effects of the Covid-19 virus on the economy.

To implement the Act, the Belgian Federal Government adopted a royal decree on 14 April 2020 (the **Royal Decree**) granting a State guarantee (the **State Guarantee**) for certain credit facilities in an effort to curb the effects of the Covid-19 virus on the economy (the **Guarantee Scheme**). The main objective of the Guarantee Scheme is to maintain lending to the real economy and the non-profit sector.

The Guarantee Scheme forms the second pillar of the two-part agreement between the government, the National Bank of Belgium and the banking sector. The first pillar includes a commitment by the banking sector to grant affected businesses (and individuals) a six-month deferral of payment (the **Deferral of Payment**). This commitment took the form of two charters published on the Belgian banking federation Febelfin's website, both dated 31 March 2020. The second pillar is the Guarantee Scheme laid down in the Royal Decree. From a policy point of view, both pillars are interlinked, so that the Royal Decree occasionally refers to the Deferral of Payment as a modality, or as a condition for maintaining the State Guarantee.

The Guarantee Scheme is based on, among others, the following general features:

- Firstly, the scheme aims at a broad mutualisation of the risk. This is a deliberate choice, which aims to spread both the advantages and the burdens of the Guarantee Scheme as widely as possible. The State Guarantee is granted to all credit institutions

governed by Belgian law and branches in Belgium of credit institutions governed by foreign law. It applies to most new loans of up to 12 months. If the eligibility criteria (set out below) are satisfied, the scheme applies ipso jure and automatically to all credit facilities covered by the Royal Decree. By the State Guarantee applying automatically to all eligible credit facilities, the aggregate guaranteed credit portfolio is as diversified as possible. This also makes it possible to spread the cost of the State Guarantee (the premium) as widely as possible.

- Secondly, the Guarantee Scheme is based on a portfolio approach. The State does not guarantee individual loans, but guarantees loan portfolios per credit institution. The loss and the loss contribution is calculated at portfolio level. Each credit institution may build up a portfolio of new credits within the limits of an envelope assigned to it. That envelope shall be the share of the credit institution in the maximum amount of credit facilities guaranteed by the State Guarantee (EUR 50 billion).
- Thirdly, the proposed scheme provides for a distribution of the losses between the State and credit institutions. This loss sharing reflects the principle that the State aid should be limited to the minimum and aims to make the risk for the State and the taxpayer as manageable as possible.
- Fourthly, the scheme must fit into the European legal framework on state aid.

This briefing provides an overview of certain of the key elements of the Guarantee Scheme set out in the Royal Decree, with a particular focus on the eligibility criteria.

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State Guarantee

Subject to the conditions laid down in the Royal Decree, the State Guarantee applies automatically to the guaranteed losses incurred by a lender on its guaranteed portfolio.

The guaranteed portfolio of a lender consists, within the limits set out in the Royal Decree, of the guaranteed credit facilities of that lender.

Scope of application

For credit facilities to fall within the scope of the Guarantee Scheme and to be covered by the State Guarantee, certain eligibility criteria need to be met with respect to the borrower, the lender and the credit facility itself.

Eligibility criteria with respect to the borrower

An eligible borrower under the Guarantee Scheme is any company or self-employed person which is registered in the Belgian commercial registry (the Crossroads Bank for Enterprises) to which a credit facility is granted, except for the following persons:

- any person who, on 1 February 2020, was overdue on his existing credit facilities or on his taxes or social security contributions or, on 29 February 2020, was more than 30 days overdue on his existing credit facilities or on his taxes or social security contributions;
- any person who was involved in an active credit restructuring with one or more credit institutions on 31 January 2020;
- any person who, on the basis of the information available, is to be regarded as an undertaking in difficulty¹;
- any of the following persons:
 - public entities;
 - financial counterparties², payment or electronic money institutions and electronic

¹ An undertaking in difficulty is defined in the Royal Decree an enterprise in respect of which, on 31 December 2019, at least one of the circumstances referred to in Article 2.18 of Regulation No 651/2014 arose; for the self-employed, these conditions apply *mutatis mutandis*. From a Belgian law perspective, these circumstances include, among other things, the relevant company being in a state of bankruptcy without having filed for bankruptcy proceedings.

money institutions and special purpose securitisation entities;

- persons who grant credit exclusively or mainly for their own account in the course of their usual trade, business or profession; and
- persons whose subsidiaries are exclusively or mainly one or more of the persons referred to in the two points above.

Eligibility criteria with respect to the lender

An eligible lender under the Guarantee Scheme is any credit institution or branch which, at 31 December 2019, had credits outstanding towards one or more eligible borrowers for a total principal outstanding amount of at least EUR 20,000 and which is:

- a licensed credit institution under Belgian law within the meaning of Article 7 of the Belgian law of 25 April 2014 on the status and supervision of credit institutions and listed companies (the **Banking Act**); or
- a branch registered or licenced in Belgium of a foreign credit institution (within the meaning of Article 312 or Article 333 of the Banking Act).

Eligibility criteria with respect to the credit facility

Credit facilities that are guaranteed by the State Guarantee pursuant to the Guarantee Scheme are credit facilities with a maximum duration of 12 months (including credit facilities of indefinite duration which may be terminated by the lender or the borrower during the first 12 months after being made available) provided by a lender to a borrower between 1 April 2020 and 30 September 2020, including credit facilities repaid before 30 September 2020, except for the following types of credit facilities:

- any refinancing, being a credit facility (or part of a credit facility) provided for the purpose of the repayment of a credit facility provided before 1 April 2020, including the extension of any credit facility provided before 1 April 2020;
- any redrawing, rollover or renewal of a credit facility that has been repaid in full or in part before 1 April 2020 to the extent that such redrawing, rollover or

² Within the meaning of article 3(3) of Regulation No 2015/2365, which includes (among others) investment firms, credit institutions, insurance or reinsurance undertakings, UCITS and AIFs.

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renewal does not exceed the principal amount provided before 1 April 2020;

- any credit facility in relation to which it is contractually agreed that such facility may only be used for non-Belgian activities of the borrower. In this respect it should be noted that any guaranteed credit facility must also contain a provision pursuant to which the credit facility may only be used by the borrower to finance activities carried out in Belgium subject to a limited exception for qualifying foreign activities (see section on Grounds for reduction of the State Guarantee below for more detail);
- any credit facility that, in application of the provisions of the Royal Decree, would be deemed to be a guaranteed credit facility, but that is specifically identified by the lender as 'excluded' at the time it is granted. The exclusion of a credit facility can only take place at the moment such credit facility is granted and is final: an excluded credit facility is not included in the guaranteed portfolio and any losses on such credit facility shall not be covered by the State Guarantee.

Under the Royal Decree, a credit facility is any agreement by which a lender provides or promises to provide a credit facility, in the form of a loan, an overdraft facility, a permitted debit balance, or any other similar payment arrangement, except for:

- leasing agreements;
- factoring agreements; and
- consumer credits and mortgage credits.

Credit facilities provided by way of a facility under a facilities agreement, where the separate facility constitutes a sufficiently distinct commitment on the part of the lenders, qualify in themselves as a credit facility within the meaning of the Royal Decree and are subject to the application of the Royal Decree, including:

- credit facilities granted under a syndicated credit facilities agreement, even if the other lenders do not qualify as lenders under the Royal Decree;
- credit facilities granted under a facilities agreement consisting of several credit facilities, even if the other facilities do not qualify as guaranteed credit facilities under the Royal Decree.

Maximum guaranteed amounts

The Royal Decree provides for upper limits to the guaranteed portfolio of a lender, whereby there are limits set with respect to (i) the maximum guaranteed principal

amounts and interests in relation to each borrower and (ii) the guaranteed portfolio of each lender.

Maximum guaranteed principal amounts and interests

Pursuant to the Royal Decree eligible credit facilities granted by a lender shall form part of the guaranteed portfolio of such lender up to the following maximum guaranteed principal amount and maximum guaranteed interest amounts for each borrower.

The **maximum guaranteed principal amounts** are the total of all the principal amounts made available or outstanding at any time (during the first 12 months of a credit facility) under all the eligible credit facilities of a lender, limited to the lowest of the following amounts determined on a group level for the group to which the relevant borrower belongs:

- €50,000,000, except as set out below, or
- the amount of the borrower's liquidity needs for its operations over an 18-month period for SMEs and a 12-month period in the case of other companies, such period starting from the envisaged availability date of the credit facility, as estimated by the borrower in a duly substantiated written statement in which the borrower also explains whether and to what extent it or any connected person has made or intends to make other credit applications to cover those needs. For the purpose of determining the liquidity needs of a borrower, the following liquidity needs may not be included: (i) for the refinancing of existing credit facilities or (ii) for the redrawing or renewal of credit facilities, in each case provided before 1 April 2020,

By decree adopted after consultation in the Council of Ministers, the government may, at the request of a borrower, allow a derogation from the €50,000,000 amount referred to above, within the limit of the liquidity needs determined as set out above.

The **maximum guaranteed interest** is both the interest and the guarantee fee payable by a borrower under an eligible credit facility up to and including the due date (which may not exceed twelve months after the granting of the credit facility), capped at:

- 1.25% interest on an annual basis, taking into account the principal amounts actually drawn down, increased by;
- a guarantee fee charged by the lender to the borrower of a maximum of 25 basis points for SMEs and a maximum of 50 basis points for other companies, calculated on an annual basis in each case.

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Limitation on the guaranteed portfolio

Pursuant to the Royal Decree, the guaranteed portfolio of a lender is eligible for the State Guarantee to the extent that the total amount of principal amounts made available or outstanding at any time (during the first 12 months) of all guaranteed credit facilities granted by such lender (or a related person) does not exceed the “allocated envelope” of that lender.

The allocated envelope of a lender is the portion of the maximum total amount of the State Guarantee (i.e. €50 billion) in outstanding or available principal amounts allocated to a lender, as determined by the competent Minister after having obtained the opinion of the National Bank of Belgium, *pro rata* to the lender's market share at 31 December 2019 for credit facilities to eligible borrowers.

Guaranteed losses

The guaranteed loss by the State Guarantee is the total of the losses incurred by a lender on guaranteed credit facilities that are part of its guaranteed portfolio. The guaranteed loss is partially borne by the State. The portion borne to the State differs for each tranche of the guaranteed loss, expressed as a percentage of the reference portfolio of the relevant lender, according to the table below:

Tranche of the guaranteed loss expressed as % of the reference portfolio	Portion of the guaranteed loss borne by the State
0-3%	0%
3-5%	50%
5-100%	80%

The loss is the amount of principal and interest due that is certain to be irrecoverable by the lender through recourse against the borrower, a third party or in any other way.

Grounds for reduction and loss of the State Guarantee

The Royal Decree includes extensive lists of grounds that may lead to a reduction or loss of the State Guarantee for the guaranteed losses. In this briefing, we have only included a selection of such grounds for reduction and loss of the State Guarantee.

Grounds for reduction of the State Guarantee

Pursuant to the Royal Decree, the guaranteed loss is reduced, among others, as set out below:

- The guaranteed loss has to be reduced by all losses on guaranteed credit facilities that were transferred in whole or in part by a lender. Transfers also include pledging or securitisation with a view to use the securitisation securities as collateral.
- The guaranteed loss has to be reduced by all losses on guaranteed credit facilities which do not include each of the following provisions:
 - The State must, for an amount equal to the guaranteed loss, after the final settlement of the State Guarantee in accordance with the Royal Decree, be substituted in all rights which the lender derives from the guaranteed credit facility or from measures taken in connection with the guaranteed credit facility.
 - **The guaranteed credit facility may only be used by the borrower to finance activities carried out in Belgium**, with the understanding that the guaranteed credit facility may provide that it can be used for qualifying foreign activities to the extent that such use is limited to 10% of the guaranteed credit facility, and such use of the guaranteed credit facility for qualifying foreign activities is not to the detriment of Belgian activities.

Under the Royal Decree, qualifying foreign activities are defined as foreign activities of a borrower that meet the following conditions:

- the foreign activities are conducted by the borrower itself or by an entity under the exclusive or joint control of the borrower;
 - the continuity of foreign activities is crucial for Belgian activities;
 - the foreign activities, considered in isolation, can be regarded as a viable enterprise; and
 - there is no other possibility of financing foreign activities on a sustainable basis and under normal market conditions.
- The guaranteed loss is reduced by all losses on guaranteed credit facilities for which the lender makes the application or the granting of the credit facility conditional on the conclusion by the borrower

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or a person associated with him of agreements relating to other products or services.

- The guaranteed loss must be reduced by all losses on guaranteed credit facilities in respect of which the lender charges the borrower, in connection with the granting or performance thereof, costs that would not have been payable on the basis of the general terms and conditions of the lender as at 29 February 2020.

Grounds for loss of the State Guarantee

Pursuant to the Royal Decree, the guaranteed loss is forfeited in a number of situations including, among others, if a lender systematically or on a large scale during the period from 1 April 2020 to 30 September 2020, without objective justification, refuses the renewal of credit facilities that meet each of the following conditions:

- the credit facility expires before 30 September 2020;
- the credit facility was granted before 1 April 2020; and
- the person is a borrower that meets the eligibility criteria set out above and has not requested application of the Deferral of Payment.

Obligations of the lenders and the borrowers under the Guarantee Scheme

The Royal Decree provides for specific obligations on lenders and borrowers of guaranteed credit facilities.

Lenders are obliged to:

- comply with the maximum guaranteed interest rate on the guaranteed credit facilities. The borrower is entitled to the repayment, by the lender, of interest paid in excess of the maximum guaranteed interest rate;
- demonstrate good credit practices, including obtaining collateral, on a market practice basis and in accordance with their customary practices prior to the entry into force of the Act;
- avoid that the grounds for reduction of the State Guarantee occur; and
- refrain from practices the main purpose of which is to place itself, borrowers or credit facilities, contrary to the objectives of the Act and the Royal Decree, within or outside its scope of application.

Borrowers are obliged:

- not to apply for a guaranteed credit facility when they know or should know that they do not meet the conditions of application;

- to provide truthfully the information required by the Act and the Royal Decree;
- to only use the guaranteed credit facility to finance their activities in Belgium or their qualifying foreign activities insofar as such use is limited to 10% of the guaranteed credit facility and such use is not to the detriment of the Belgian activities; and
- to refrain from practices the main purpose of which is to place themselves or their credit facilities in violation of the objectives of the Act and the Royal Decree within or outside its scope.

Entry into effect of the Royal Decree

This Royal Decree enters into effect as of 1 April 2020 and shall therefore apply to all eligible credit facilities granted on or since 1 April 2020.

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