SQUIRE PATTON BOGGS

Impacts of COVID-19 in Relation to Distribution of Dividends

France – April 17, 2020

In application of the emergency law No. 2020-290 of 23 March 2020, which brought in a state of health emergency from 24 March to 24 May 2020, the government has legislated in relation to corporate law, particularly in relation to the approval of accounts (order No. 2020-318 of 25 March 2020) and meetings of corporate bodies (order No. 2020-321 of 25 March 2020).

None of the measures taken in these orders relate to the distributions of dividends, even though, paradoxically, these distributions constitute one of the major points that shareholders have to state during the approval of the annual accounts of their companies, when it is not the management bodies who use the legal faculty to distribute interim dividends.

The government, mainly voluntarily, has chosen not to use one of these orders to legislate on the distributions of dividends. However, the ministry of economy and finance, after having orally announced by the minister Bruno Le Maire that companies using "state aid cannot allocate dividends", has clarified his position on this point in a document called "Responsibility commitment for large companies benefiting from treasury support measures", dated 2 April 2020.

This document, without any intrinsic judicial value, should not be taken lightly.

In summary, it indicates that a large company that benefits from the treasury support measures should engage itself formally to not proceed with distributions of dividends from 27 March 2020 and for the remainder of 2020.

Which Companies Are Affected?

It affects companies or groups that employ at least 5,000 employees or have a consolidated turnover of more than €1.5 billion in France. In the case of groups, all the entities of the group are affected, even if only certain entities of the group benefit from the support.

Which Transactions Are Affected?

All payments of dividends in the broad sense are affected (dividends where the distribution is decided through the approval of annual accounts, exceptional dividends decided in the financial year by shareholders, interim dividends where the distribution is decided by the management body), whether these distributions are in money or in shares.

However, the distributions of intragroup dividends remain possible if they ultimately have the effect of supporting a French company financially, notably in order to allow it to respect contractual obligations in relation to creditors.

Note that, in addition to the distribution of dividends, the buyback of shares effected in order to reduce capital share not motivated by losses for the purpose of financial management are also targeted (however, the buybacks intended for giving out to employees, as well as buybacks linked to the execution of a judicial engagement, to a liquidation contract or to an external growth transaction before 27 March, remain possible).

Which Support Measures Are Affected?

All requests to postpone tax deadlines and/or corporate deadlines and/or requests for loan guarantees by the state are affected. Note that, in the document from the ministry of economy and finance, the measures in relation to employment law (notably the recourse to partial unemployment) are not cited, even though Bruno Le Maire had orally invited companies having recourse to these measures to not pay dividends.

What Is the Affected Period?

No distribution of dividend should be decided from 27 March 2020 and for the rest of 2020. The essential criteria is, therefore, the date of the decision of the competent body. If the shareholders or the management body of the company have decided the distribution of a dividend before 27 March 2020, the company is not affected by the obligation to not distribute. This is because, in conforming to the jurisprudence, this decision has already resulted in creating a debt to shareholders of the company, of which it cannot go back on, except in exceptional cases. However, from the 27 March 2020, shareholders or the management body of the company, which solicit(s) the help of the state, cannot decide to distribute a dividend throughout 2020, even if an announcement has been made in preparation for a general meeting.

What Are the Consequences of Failing to Respect the Commitment?

The social security contributions, the postponed due date of taxes or the state loan guarantee should be paid back, and common law late penalties will be applied, taking effect from the date of the normal payment of the postponed due date.

In conclusion, rather than prohibit the distribution of dividends by certain companies by a legal means, Bercy has opted for the obligation to take a formal commitment not to proceed with distributions when a request for state aid is filed.

In our opinion, apart from the measure set out above, the very general declarations of the minister of economy encourage all companies that intend to benefit from the exceptional measures put into place by the state in the current health crisis to stay very prudent in relation to payment of dividends this year. Equally, employees, especially those impacted by the partial work measures, could perceive such payments very badly.

Therefore, for example, companies that have made a distribution decision before 27 March 2020 have every interest in postponing the payment of this dividend until the date nine months after the closure of the exercise or even, in light of the state of their finances at this date, in asking by request to the President of the Commercial Tribunal to postpone this period of nine months. Even if this type of request is not treated as a priority by the tribunals now, the single submission, in our opinion, will allow the civil liability of directors to be limited.

An intermediary solution for companies that find themselves currently in the middle of the period to pay their dividends voted before 27 March 2020 could be to propose to their shareholders on the condition of their prerequisite agreement, to pay the dividend on their current account, in order to allow the company to keep its finances in the medium term. This assumes that the shareholders will not immediately request the repayment of their current account; however, it is then the responsibility for each shareholder not to endanger the company by making such a request in the current circumstances.

Generally, the government statements seem to rely on the collective responsibility of different stakeholders of the company (directors and shareholders) in the management of dividends in this unprecedented time. The responsibility commitment put in place by Bercy only represents the most successful expression of a general invitation of moderation, which should, in our opinion, be interpreted very generally.

If you would like to discuss any of the issues raised in this advice note, please contact:

Contacts

Florence Cotillon
Partner, Corporate
T +33 1 5383 7064
E florence.cotillon@squirepb.com

Audrey Scheibel
Senior Associate, Corporate
T +33 1 5383 0451
E audrey.scheibel@squirepb.com

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