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COVID-19: Excluded enterprises from SACE S.p.A.'s guarantees

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Obstacles to access the guaranteed financial support from SACE S.p.A.: the concepts of "enterprise in economic in difficulty" and "deteriorated liabilities" mentioned in the so-called "Liquidity Decree" (Law Decree no. 23 of 8 April 2020).

Introduction

Article 1, paragraph 2, letter b) of the so called Liquidity Decree mentions the conditions for an enterprise to benefit from a loan granted by a bank and other authorized financial entities to be supported by a guarantee issued by SACE S.p.A. (the guarantee's requirements are mentioned in Article 1, paragraph 2, letter f)).

Such conditions provide, inter alia, for an enterprise NOT to be in economic difficulty (see below category A) and NOT to have deteriorated liabilities (see below category B). However, such negative circumstances are framed within certain timeframe, beyond which they do not apply and thus such enterprises are not prevented from accessing the financial support.

An enterprise is not to be in economic difficulty as at 31 December 2019 (category A below), whereas an enterprise is not to have deteriorated liabilities as at 29 February 2020 (category B below).

The purpose of the SACE guarantee support measure seems to be twofold. On the one hand, it facilitates access to credit by those entities whose financial situation has been negatively affected by the Covid-19 pandemic; but on the other hand, it excludes enterprises which were already in a difficult position before the spread of the Covid 19 virus.

(A) The concept of enterprise in economic difficulty

In order to determine whether or not an enterprise is in economic difficulty, the above mentioned law decree refers to the criteria set by the following EU regulations issued by the European Commission:

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- 1) EU Regulation No. 651/2014 of 17 June 2014¹;
- 2) EU Regulation No. 702/2014 of 25 June 2014²;
- 3) EU Regulation No. 1388/2014 of 16 December 2014³;

The criteria set in the above mentioned EU regulations are analysed together because, except for certain peculiarities (mentioned in foot notes 5 and 6 herein), such regulations provide a similar set of circumstances qualifying when an enterprise has an economic difficulty, just with some differences as different sectors are covered (including agriculture and fishing).

Such regulations apply to all types of enterprises contemplated in our legal system⁴ and set a similar criteria which qualifies any of the following events as circumstances of economic difficulty:

- (a) more than half of the subscribed corporate capital is reduced by losses⁵;
- (b) the enterprise is either subject to an insolvency procedure or there are the conditions under national law for such procedure to be triggered at the request of creditors;
- (c) the enterprise has received a State financial support aid and has not yet repaid the loan or revoked the guarantee, or has received a debt restructuring aid and is still subject to a debt restructuring plan;
- (d) an enterprise, other than a SME, has in the last two years:

¹ The Regulation covers certain categories of State aid compatible with the internal market under Articles 107 and 108 of the Treaty. The concept of "enterprise in economic difficulty" is mentioned in Article 2(18).

² The Regulation declares certain categories of State aid in the agricultural, forestry and rural areas and/or sectors compatible with the internal market. The definition of "enterprise in economic difficulty" is mentioned in Article 2(14).

³ The Regulation qualifies certain categories of State aid to enterprises involved in the production, processing and marketing of fisheries and aquaculture products compatible with the internal market. An enterprise in economic difficulty is defined under Article 3(5).

⁴ For the purpose of identifying an enterprise in economic difficulty, companies are divided into two categories: 'limited liability companies' and 'companies in which at least some shareholders have unlimited liability for the debts of the company'. In our legal system, according to Annexes I and II to the EU Directive 2013/34, a "limited liability company" means "società per azioni", "società in accomandita per azioni" and "società a responsabilità limitata", whereas a "company in which at least some shareholders have unlimited liability for the debts of the company" means the following types of companies: "società in nome collettivo" and "società in accomandita semplice". The difference is not particularly relevant given the same treatment, in this context, of corporations and partnerships.

⁵ The EU regulations provide that this is the case when a company has lost more than half of its subscribed capital due to accumulated losses. They specify that this occurs when the deduction of accumulated losses from reserves (and all other items generally considered as part of the company's own funds) results in a total negative amount of more than half of the subscribed capital. For these purposes, the corporate capital includes any issued premiums. For general and limited partnerships, reference is made to the loss of more than half of their "own funds" as shown in the company's accounts due to accumulated losses (the difference of terminology does not appear to produce different consequences).

However, the loss of more than half of the corporate capital does not qualify SMEs established within the last three years as "enterprises in economic difficulty" and does not prevent SMEs within seven years of their first commercial sale to be eligible for risk financing aid, following a due diligence by the selected financial intermediary (such exception does not apply to SMEs involved in the agriculture and fisheries sectors).

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- (1) a debt/net equity ratio exceeding 7.5; and
- (2) an interest coverage ratio (EBITDA/interest) less than 1.0⁶.

For an enterprise to be considered to be in economic difficulty, it is sufficient just for one of the above mentioned circumstances to occur.

(B) Having deteriorated liabilities towards banks

An enterprise is also prevented from accessing SACE's guaranteed credit support pursuant to the Liquidity Decree if it has "deteriorated liabilities" towards banks as identified by EU rules.

Such rules, which are harmonised within the so-called Single Supervisory Mechanism, consists of the technical standards published by the European Banking Authority in 2013 and by the European Commission⁷.

At the domestic level, such rules are encompassed in a Notice issued by the Bank of Italy⁸.

Briefly, in order for a enterprise not to be prevented from accessing SACE's guaranteed financial support, it is necessary that as at 29 February 2020 it is NOT classified as:

- non-performing (that is, enterprises which are insolvent or in similar conditions);
- unlikely to pay (that is, enterprises whose liabilities, not classified as non-performing, are considered by the bank unlikely to be satisfied without the enforcement of guarantees);
- with overdue payments and/or almost deteriorated exposures (other than those classified as non-performing or unlikely to pay), that is, payments overdue for more than 90 days and above a relevant agreed threshold.

The most problematic circumstance, among those mentioned above, preventing an enterprise from accessing the guaranteed financial support, seems to be the liability exposure qualified as "unlikely to pay". This is because such qualification is based on a discretionary decision made by the bank before the disruptive effects of the pandemic and the coming into force of the Liquidity Decree⁹.

⁶ This circumstance, for the qualification of an enterprise in economic difficulty, is not provided for the fishery products sector.

⁷ See EU Implementing Regulation No 680/2014 of 16 April 2014 issued by the EU Commission establishing implementing technical rules on reporting by institutions for monitoring purposes in accordance with EU Regulation No 575/2013 issued by the EU Parliament and Council.

⁸ Circular No. 272 of 30 July 2008, Banking and Financial Supervision. Matrix of accounts.

⁹ According to the aforementioned Circular No. 272 of 30 July 2008, the qualification for an enterprise to be "unlikely to pay" is based first of all on the judgement of the bank that the debtor is unlikely to meet its debt obligations in full (principal and/or interest) without

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It is also appropriate to point out that laws regulating urgent Covid-19 related measures are still in progress given that regulatory powers are attributed to various authorities involved, and that there is a more favourable treatment for some enterprises to access other financial support measures¹⁰.

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enforcement of guarantees. Such assessment must be made independently of any overdue and unpaid amounts (or instalments). Therefore, it is not necessary to wait for lack of repayment when there are elements that imply a risk of default by the debtor (i.e. a crisis in the industrial sector in which the debtor operates).

¹⁰ By way of example, a more favourable regime has been provided for SMEs to access the Central Guarantee Fund's support measure. Such favourable regime consists mainly of the extension of the guarantee also to:

- enterprises classified by banks as "unlikely to pay" as well as to entities with "overdue payments" and/or "almost deteriorated exposure" after 31 January 2020;
- enterprises which, after 31 December 2019, are subject to a creditors' arrangement or a debt restructuring or a recovery plan procedure.