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The European Commission's Temporary Framework for State aid – impact on certain industries

On 19 March 2020, the European Commission ("**Commission**") adopted the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak ("**Temporary Framework**")[1] in light of the unprecedented damage being suffered by European businesses, which poses severe threats for the both the EU and wider global economy. The Temporary Framework allows Member States, up until the 31 December 2020,[2] to employ a range of measures to aid companies experiencing financial difficulties. These new measures complement (and do not replace) the existing rules on State aid. Such measures must be notified to the European Commission for approval but can be approved very rapidly upon receipt of a complete State aid notification. This marks the first time since the global financial crisis of 2007/2008 that the Commission has enacted special exemptions to the usual rules on State aid.

How the Temporary Framework operates?

Under the existing State aid rules, Article 107(3)(b) of the Treaty on the Functioning of the European Union ("**TFEU**") allows for Member States to employ certain state aid measures to *"remedy a serious disturbance in the economy of a Member State"*. In the first instance, therefore, the Temporary Framework provides clarity to Member States and businesses by stating explicitly that the present Covid-19 pandemic satisfies this criterion. On this basis, for a limited period, the Commission considers that aid to remedy the liquidity shortages faced by undertakings, specifically SMEs, and to ensure the disruptions caused by the outbreak do not undermine their viability, can be declared compatible with the internal market. Member States will need to demonstrate that the proposed financial measures are *"necessary, appropriate and proportionate to remedy a serious disturbance in [their] economy"* and that all the conditions of the Temporary Framework are satisfied.

The Temporary Framework lists five permitted types of State aid that Member States may (following Commission approval) enact under Article 107(3)(b):

1. **Up to €800,000 worth of relief**: Member States may set up various forms of aid schemes, such as direct grants, tax advantages and advance payments, to address urgent liquidity needs of companies in financial distress.
2. **State guarantees for corporate loans**: Member States may guarantee bank loans to both large companies and SMEs in order to ensure that banks can continue to provide financing to those customers that need it. This applies to both investment and working capital loans and guarantees can be valid up to a maximum period of six years.
3. **Subsidised State loans**: Member States may grant loans to corporations with subsidised interest rates. Such loans may cover both immediate cashflow requirements and investment needs. Such subsidised loans can be valid up to a maximum period of six years.
4. **Safeguards for banks that channel State aid to the real economy**: The Temporary Framework confirms that the various State aid measures channelled through banks will purely use these banks as intermediaries through which to pass the benefit of the measures on to the beneficiaries (*i.e.* the banks' customers). The

[1] Communication from the Commission – Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (C(2020) 1863 final) published on 19 March 2020. Available at: https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

[2] The end-date for the application of the Temporary Framework has provisionally been set as 31 December 2020, though this may be extended. Tax incentives granted before 31 December 2020 but which last, or take effect, beyond this deadline are exempt.

aid is not to be considered as direct aid to the individual banks themselves.[3]

5. **Short-term export credit insurance**: The Framework introduces additional flexibility on how to demonstrate that certain countries are not-marketable risks, thereby enabling short-term export credit insurance to be provided by the State where needed.

Importantly, the company or companies that would benefit from any State aid measure enacted by a Member State under options 1, 2 and 3 above must not have been in financial difficulty[4] before 31 December 2019. Additionally, the Commission must be satisfied that the company or companies have since encountered financial difficulties thereafter only as a direct result of the Covid-19 outbreak.[5]

Equally, whilst under normal circumstances companies that have received State aid in the last 10 years would not be eligible for further assistance under the "one time, last time" principle, the Commission has reiterated its willingness to relax this rule in exceptional circumstances pending an individual notification.

Indeed, Member States have so far been granted approval swiftly by the Commission, whichis making every effort to ensure that its approval process is not overly time-consuming or onerous. Denmark, for instance, gained approval for a State aid scheme before the Temporary Framework was even passed and within 24 hours of submitting the notification. Denmark secured approval for a scheme to compensate the organisers of major events planned for (and subsequently cancelled) in the period 6 to 31 March 2020 to the tune of DKK 91 million (approximately €12 million).[6] At the time of writing, the Commission has subsequently approved a raft of State aid measures for other Member States within 48 hours of notification including, for example:

1. France has secured approval for (*inter alia*) a package of State loan guarantees to support companies whose activities have been severely affected following the government's health measures introduced in light of COVID-19;[7]
2. Germany has introduced two separate loan programmes through the German promotional bank Kreditanstalt für Wiederaufbau ('**KfW**'). The different programmes will allow the KfW to provide liquidity in the form of subsidised loans to companies affected by the coronavirus outbreak;[8]
3. Italy has implemented a financial support package amounting to €50 million for companies who have diverted their resources and operations towards producing medical devices and protective equipment to combat the spread of COVID-19;[9] and
4. Ireland has launched measures to provide repayable advances to companies who expect or experience a decline in turnover of at least 15% as compared to before the coronavirus outbreak. The aggregate measure of the package amounts to €200 million.[10]
5. UK has had two State aid schemes to support SMEs, including guarantees that cover 80% of loan facilities for SMEs with a turnover of up to £45 million to cover their working and investment capital needs as well as direct grants with an overall budget of £600 million.[11]

More State aid schemes continue to be approved by the Commission on an expedited basis.

It is also worth noting that the Temporary Framework measures are equivalently available to almost[12] all sectors and industries.

Other forms of State aid that may be available

Notwithstanding the various forms of relief under the Temporary Framework, Member States may continue to have recourse to other forms of State aid and relief packages.

[3] See further the section on the Banking Sector below.
[4] In accordance with the definition of "difficulty" under Article 2(18) of the Commission Regulation (EU) No 651/2014 of 17 June 2014 (the General Block Exemption).
[5] It should be noted that the evidential burden of this requirement is not a high one.
[6] State Aid SA.56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19 (C(2020) 1698 final), published on 12 March 2020. Available at: https://ec.europa.eu/competition/state_aid/cases1/202011/285054_2139535_70_2.pdf
[7] Aide d'État SA.56709 (2020/N) – France – COVID-19: Plan de sécurisation du financement des entreprises (C(2020) 1698 final), published on 21 March 2020. Available at: https://ec.europa.eu/competition/state_aid/cases1/202012/285133_2141269_36_2.pdf
[8] See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_504
[9] See https://ec.europa.eu/commission/presscorner/detail/en/IP_20_507
[10] See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_557
[11] See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_527
[12] The exceptions to this are the agriculture, fisheries and aquaculture industries. There is a maximum threshold of €120,000 of aid per company in fisheries and aquaculture and €100,000 for those companies in the agricultural sector.

1. Article 107(2)(b), TFEU

Under Article 107(2)(b) the Commission may allow certain State aid measures enacted by Member States to remedy the damage sustained as a result of natural disaster or exceptional circumstances. The Commission has recently clarified that the Covid-19 pandemic would fall under this category.

Relying on Article 107(2)(b), Member States may devise schemes to aid those companies or sectors that have been particularly badly hit by the current pandemic. For all measures taken under Article 107(2)(b), there must be a direct causal link between the aid granted and the damage resulting from the exceptional occurrence for each beneficiary, and any aid must be limited to what is necessary to make good the damage. With regard to the latter, Member States will need to demonstrate, and support with evidence, how it calculated the amount of aid it wishes to provide to any individual company or sector.

Any measure enacted under Article 107(2)(b) will require prior Commission approval. To this end, the Commission has published specific guidance on the procedure to be followed in making a notification under Article 107(2)(b) of the TFEU.[13] Equally, the Commission has opened a 24/7 hotline for governments to raise questions or request advice.

2. Article 107(3)(c), TFEU

Article 107(3)(c) allows Member States to provide loan guarantees or loans to all types of company that may be facing acute liquidity needs or insolvency. In conjunction with the Commission Rescue and Restructuring Guidelines, companies need not yet be facing any such difficulties in order to qualify, so long as they pay market rates for any such loan. Any such loan granted by a Member State may cover any company's operating needs for a full six-month period.

Any measure enacted under Article 107(3)(c) will require prior Commission approval.

3. Measures applicable to all businesses

Measures can be structured so that they do not amount to State aid and can be implemented immediately. For instance, Member States are entitled to put in place any relief package without prior Commission approval provided that any such package is applicable to all companies (i.e. no selective advantage is granted to any company).

[13] See https://ec.europa.eu/competition/state_aid/what_is_new/Notification_template_107_2_b_PUBLICATION.pdf

Such a package may take the form (e.g.) of wage subsidies or a reduction in corporation tax. These measures are outside the scope of State aid rules.

4. Measures granted directly to consumers

Compensation paid directly to consumers as a result of the pandemic, for example, for cancelled services or tickets that have not been reimbursed by operators, would also be permitted. Only benefits or advantages granted to undertakings involved in economic activity can be State aid.

4. Other

Moreover, Member States may put in place a form of State aid or other relief package without seeking Commission approval if it falls into one of the following categories:

1. National grants provided to healthcare and public services specifically designed to tackle the Covid-19 outbreak;
2. State loans or guarantees made at market rates;
3. Measures that fall within the *de minimis* Regulation;[14] or
4. Measures which fall within the General Block Exemption Regulation.[15]

How the Temporary Framework and State aid rules may apply to specific sectors

Whilst the Temporary Framework and State aid rules apply homogenously[16] to all companies in all sectors, there are some that will be hit harder than others by the present global economic slowdown.

1. Banking

As discussed above, banks will play an important role in channelling State funds to the intended beneficiaries on behalf of the relevant Member States. Whilst this will assist the liquidity shortages of the recipients, it also raises the question as to

[14] Under the de minimis Regulation (Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid), grants of up to €200,000 over a 3-year period do not constitute State aid. In the road freight transport sector, the threshold is €100,000 over a 3-year period. For agriculture and fisheries, the threshold amounts to €25,000 and €30,000, respectively.

[15] Commission Regulation (EU) N°651/2014 of 17 June 2014. For example, a Member State could utilise the GBER to provide aid to a pharmaceutical company researching a COVID-19 vaccine.

[16] See footnote 4 above.

how Member States may look to cover any liquidity shortages of the banks themselves.

As the Commission itself acknowledges, the banks have a vital role to play during the Covid-19 outbreak in maintaining the flow of credit to the economy.[17] If the banks themselves cannot survive the COVID-19 crisis, businesses and individuals will not be able to receive new credit and the wider economy will suffer accordingly.

The situation is further complicated by the fact that there are separate State aid rules applicable to the banking sector. Since the financial crisis of 2007/2008, both the Bank Recovery and Resolution Directive ('**BRRD**')[18] and the Single Resolution Mechanism ('**SRM**')[19] have been passed which, in effect, create carve-out considerations for Member States contemplating State aid for its financial institutions. The purpose of the former is, in essence, to largely avoid future bail-outs of struggling financial institutions with taxpayer funds while the latter creates a coordinated Union framework to decide whether a failing financial institution should be restructured and, if so, how this can be done to minimise the use of public funds.

For present purposes, the key issue is whether aid provided to banks by Member States would be considered in line with the usual rules on State aid under Article 107(2)(b) or whether it will be considered under the separate, more stringent, rules for the banking sector.

The Commission has confirmed that, should Member States provide aid to banks to compensate for the direct effects of the COVID-19 outbreak, this will not be considered to be *"extraordinary financial support"* under either the BRRD or the SRM. As such, it will not be subject to the separate State aid rules for the banking sector. Moreover, should Member States compensate banks at such a level that exceeds direct compensation for the COVID-19 outbreak, such measures will still not be considered to be compensating an institution which is *"failing-or-likely-to-fail"*, provided that the measures fulfil the criteria under Article 34(4)(d)(i),(ii) or (iii) of the BRRD or Article 18(4)(d)(i),(ii) or (iii) of the SRM. This means that Member States will, in effect, be able to compensate banks (following Commission approval) under Article 107(2)(b) in the same manner as would be done for any other industry or sector. It is also noteworthy that the Commission has further clarified that any Member State compensation of banks that links directly to COVID-19 will be deemed to fall under point 45 of the 2013 Banking Communication, which sets out an exception to the requirement of burden-sharing by shareholders and subordinated creditors.

In short, given the extraordinary circumstances presented by COVID-19, the banking sector has been given a temporary reprieve from the more onerous rules and obligations imposed after the financial crisis. For the time being, Member States may, provided the rules above are followed, compensate banks to such level as may be deemed necessary (contingent on Commission approval).

This will be welcome news to the banking sector. However, it remains to be seen whether Member States will, given the less-than-successful legacy of some bail-outs during or after the financial crisis, decide to make use of public funds in the same way again.

2. Rail

Following the publication of the Temporary Framework, a consortium of European rail operators wrote to the Commission to express their gratitude for the steps taken thus far to lift the restrictions on State aid.[20]

However, the consortium also stressed that the Temporary Framework, while welcome, did not go far enough in the context of the European rail sector. It has therefore requested the Commission to make two bespoke amendments to the Temporary Framework.

[17] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup: Coordinated response to the COVID-19 outbreak (Com(2020)) 112 Final) published on 13 March 2020. Available at: https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf

[18] Directive 2014/59/EU (15 May 2014).

[19] Regulation (EU) No 806/2014 (15 July 2014).

[20] A full copy of the letter is available to view at https://www.mlex.com/GlobalAdvisory/DetailView.aspx?ppo=25&cid=1174911&siteid=225&rdir=1.

1. **No requirement to seek Commission approval to compensate public transport operators**: Under Article 93 TFEU, Member States may compensate companies which provide public services in the form of land transport for any losses they may suffer without breaching EU competition laws. Any such compensation must be paid in accordance with Regulation 1370/2007.[21] Companies in this area operate under public service obligation ("**PSO**") contracts. The consortium has requested the Commission to provide clarification that Member States may provide aid relief for such companies without first seeking the approval of the Commission.
2. **Raising the aid scheme cap of €800,000**: In order to guarantee short-term liquidity requirements, the consortium has submitted that the maximum threshold of €800,000 per company should not be applicable in the rail sector. Such threshold needs to be substantially higher in order to cover the losses of these companies, the majority (if not all) of which will be suffering from inevitable and acute short-term liquidity deficits given the much-reduced passenger numbers across the EU.

The consortium's letter concludes by noting that, given the EU's target of cutting CO_2 emissions by 50% by 2030, it will be critical for the rail sector to mobilise again quickly after the Covid-19 pandemic has passed.

If the Commission were to approve the requested amendments to the Temporary Framework, this would certainly be a welcome development for companies in the rail sector and provide them with justification to petition national authorities. It would not guarantee, however, that each individual Member State would have the required resources and the wherewithal to buoy rail companies' finances during this pandemic.

In the Commission's tailored guidance for submitting notifications under Article 107(2)(b) (see above), it is noted that, with regard to the transport sector (airlines, airports, ground handling, rail and bus undertakings, maritime companies, *etc.*), the assessment of support to be given to this sector will be decided on a case-by-case basis. Specifically, the Commission will require for these sectors:

1. An identification of those additional costs and/or lost revenues that are directly linked to the Covid-19 outbreak;
2. A defined reference period, *i.e.* an analysis of the expected situation since December 2019 had it not been for the Covid-19 outbreak; and
3. Reconstitution of damages caused by comparison of the situation during the period of spread of the COVID-19 and the reference period. The reconstitution should factor in the change of important parameters (e.g., fall in price of fuels).

3. Aviation

Many national airline carriers are seeking emergency support from their governments to provide urgent financial support. The UK government has already signalled that there will be no industry-wide bailout for the aviation sector, but that the Treasury would consider the petitions of individual companies if it was satisfied that all other avenues for relief had been exhausted. It has been recently reported that Virgin Atlantic will seek State aid from the UK government in the form of hundreds of millions of pounds in the forms of loans and guarantees. Even if the UK government were to agree to such a package, it would need to seek Commission approval under Article 107(2)(b) of the TFEU, as this would be outside the scope of the Temporary Framework.

A difficulty for airlines seeking State aid will be quantifying those of its losses that are directly linked to the Covid-19 pandemic. Many carriers have been suffering financial difficulties before 31 December 2019, and both Member States and the Commission will need to be satisfied that the extent of financial support being claimed will be commensurate with the losses caused by COVID-19. There will be no blank cheque to cover airlines' poor finances that pre-date the outbreak.

[21] Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public transport services by rail and road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.

As a result, it is likely that, even if Member States were to grant aid on a case-by-case basis, companies which had no (or weak) cash reserves in the preceding months and years before the COVID-19 outbreak may not survive.

Should this happen, it is equally likely that there will be further consolidation in the industry as rival companies seek to purchase those that have entered (or are on the verge of) insolvency.

A further complication may be the corporate structure of different airlines. Some, such as British Airways, have parent companies or major shareholders who are not domiciled in the Member State of the carrier airline. Politically, this may mean that Member States are unwilling to provide support to such companies if they are not confident that it will have a national benefit.

As with the rail sector, Member States submitting a notification under Article 107(2)(b) on behalf of any company in the aviation sector will need to follow the procedure outlined in the Commission's tailored guidance, as described above.

Conclusion

Importantly, the Temporary Framework does not relieve Member States from having to obtain Commission approval for their aid in circumstances where no specific block exemption covers their support. Therefore, if the aid is not approved or exempt, it remains prohibited and businesses must understand that the Commission may require the recovery of some or all of the aid provided.

This is likely to be particularly key for any aid granted by the UK government. Currently during the Transition Period the UK remains subject to EU State aid rules. Any aid measures considered to go beyond the scope of the Temporary Framework could result in the Commission challenging such measures and ordering their recovery going forward.

Consequently, it is prudent for businesses to confirm in each instance that any form of support is appropriately structured and lawful under the State aid rules. Likewise, it is sensible for any business receiving support to keep clear and detailed records of what they have received, and how they have complied.

Contact us

If you would like to know about any of the issues raised in this briefing, our Competition Team would be happy to speak to you.

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