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Overview of State aid rules for COVID-19 outbreak

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The European Commission's response to the COVID-19 outbreak, we believe has been fast and effective. During recent weeks the Commission has taken many steps: it adopted a new Temporary Framework, approved tens of notifications under this Framework, clarified all potential ways to address COVID-19 related support measures under EU State aid law, and issued an amendment to the Framework after consultation with Member States. Furthermore, a second amendment to the Temporary Framework is already on its way. The Commission aims to adopt this second amendment this week.

For the time being, Member States are equipped with many different tools that they can use in order to mitigate the economic repercussions of the outbreak within the scope of EU State aid rules. This is a quick summary of all the steps taken by the European Commission.

Possible ways to approach COVID-19 related support measures

According to the European Commission's current approach, there are five potential ways to handle support measures for the COVID-19 outbreak:

(i) First, Member States have the option to implement certain measures that would not require the Commission's approval. Member States might adopt general policy measures applicable to all enterprises on their territory (such as wage subsidies, suspension of payments of corporate and value added taxes or social welfare contributions and direct financial support to consumers). Similarly, Member States can choose to grant small State aid amounts (up to € 200,000 per undertaking over a three-year period) or design support measures within the scope of the General Block Exemption Regulation.

(ii) Second, Member States can assist companies in difficulty in the form of guarantees or loans under the current Rescue and Restructuring Guidelines as per Article 107(3)(c) TFEU. This needs to be approved by the Commission.

(iii) Third, Member States can compensate companies' damages under the Article 107(2)(b) TFEU 'exceptional occurrence' clause. This needs to be approved by the Commission.

(iv) Fourth, Member States can implement support measures based on the 'serious disturbance' clause in Article 107(3)(b) TFEU, within the scope of the Temporary Framework. This needs to be approved by the Commission.

(v) Fifth, Member States can implement measures under Article 107(3)(c) TFEU within the scope of the Temporary Framework. This needs to be approved by the Commission.

The Commission's first approval for COVID-19 related measure was the Danish scheme on March 12, 2020. Now, almost one month later, there are 53 notifications approved by the Commission (as of April 14, 2020) according to the list published by the Commission on its website. The list is updated regularly by the Commission.

Temporary Framework

According to Article 107(3)(b) TFEU, any aid given to a company to remedy a serious disturbance in the economy of a Member State can be considered compatible with the internal market. Based on this exception, the European Commission adopted the Temporary Framework on March 19, 2020. The Framework recognizes that the COVID-19 outbreak caused a demand and supply shock to the economy of the Union as a whole and negatively affected investment plans. To remedy this situation, the Commission declared certain types of aid under the Temporary Framework to be compatible with the internal market. This was followed by many notifications approved by the Commission under the Framework.

Subsequently, the Commission adopted the first amendment to the Framework on April 3, 2020. The amendment introduces new types of aid for Member States and provides clarifications to some existing provisions of the Framework. In general, it is possible to categorize new types of aid under two headings: aid to preserve employment and aid to promote the process of R&D, production of COVID-19 related products and testing facilities for such products. By this way, the Commission included further essential elements to respond to the outbreak beyond ensuring access to liquidity and finance.

Together with the Amendment, the Temporary Framework contains 10 different types of aid in total. The first group of aid, introduced with the non-amended version of the Temporary Framework, is based on the serious disturbance clause under Article 107(3)(b) TFEU:

1) Member States can provide aid up to €800,000 in the form of direct grants, equity injections, selective tax advantages and advance payments to a company to address its urgent liquidity needs.

2) Member States can provide aid in the form of state guarantees on loans to cover both investment and working capital needs.

3) Member States may provide aid in the form of subsidized public loans to companies with favorable interest rates for both investment and working capital needs.

4) Member States can provide aid in the form of guarantees and loans channeled through credit institutions or other financial institutions. In this case, financial and credit institutions are merely intermediaries to direct the aid to the real beneficiary undertakings.

5) Member States can provide public short-term export credit insurance for all countries.

The Commission introduced in the Amendment a second group of aid, some of which are declared compatible with the internal market under Article 107(3)(c) TFEU. According to Article 107(3)(c) TFEU, aid to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the internal market. The new aid types introduced in the Amendment are without prejudice to other possibilities under Article 107(3)(c) TFEU, such as aid under Rescue and Restructuring Guidelines. These new aid types under Article 107(3)(c) TFEU are as follows:

6) Member States can provide aid to support COVID-19 related R&D.

7) Member States can provide investment aid to support the construction and upscaling of testing facilities to develop and test COVID-19 related products.

8) Member States can provide investment aid to support the production of COVID-19 related products.

Finally, the Commission also introduced certain aid types to preserve employment under Article 107(3)(b) TFEU:

9) Member States can provide aid in the form of a deferral of tax payments and/or suspensions of social security contributions in a targeted way.

10) Member States can provide aid in the form of wage subsidies for employees in a targeted way.

It is already possible to see notifications by Member States approved under the first amendment to the Temporary Framework. For example, recently the Commission approved a Luxembourg scheme to support coronavirus related R&D and investments in the production of products relevant to the outbreak. The aid is in the form of direct grants and loss cover guarantees for the production of COVID-19 related products (SA.56954).

To sum up, the Temporary Framework consists of aid types either under Article 107(3)(b) TFEU or Article 107(3)(c) TFEU. It is important to underline that fulfilment of the Temporary Framework conditions does not eliminate an obligation to notify the Commission. Undertakings that were already in difficulty on December 31, 2019, are not eligible for any aid under the Temporary Framework. However, undertakings that entered into difficulty or faced difficulty after December 31, 2019, as result of the COVID-19 outbreak are eligible for aid under the Temporary Framework. The Temporary Framework will not be applicable after December 31, 2020. Member States have already notified various measures under the Temporary Framework to the Commission in the last few weeks and the Commission approved these notifications in short order.

Finally, the Temporary Framework will be subject to a second amendment in the upcoming weeks. The Commission already sent a draft proposal to Member States for their comments on April 9, 2020 and aims to adopt the second amendment this week. Under the second amendment, Member States will be able to provide recapitalisations to companies in need. In its press release, the Commission stresses that these measures should remain as last-resort, as they might have essential impact on competition in the internal market. The draft is not publicly available yet. According to the Commission's press release, it will include straightforward conditions on State's entry, remuneration and exit from the companies to limit potential anti-competitive effects as much as possible. Executive Vice-President Margrethe Vestager ensured that there are controls and governance provisions for companies that receive capital support. According to the Commission's press release, the second amendment will be complementary to the Commission's existing guidelines on foreign investment screening in time of crisis.

As can be seen, the Temporary Framework is a 'living creature' subject to changes, amendments and clarifications as the crisis evolves with time. The Commission quickly responds to changing conditions. It is possible that we might see further changes to the Temporary Framework and how the Commission interprets the Framework in the upcoming weeks and months.

Damage compensation under Article 107(2)(b) TFEU

According to Article 107(2) TFEU, the law grants an automatic exemption for aid that is planned to make good the damage caused by natural disasters or exceptional occurrences. The Commission already recognized COVID-19 outbreak as an exceptional occurrence in its recent decisions, since the outbreak was not foreseeable and it is clearly distinguishable from ordinary events (State Aid SA.56685, SA 56791, SA.56765 and SA.56774). According to the information provided by the Commission, Member States are required to describe the causal link between (i) the COVID-19 outbreak and the damage suffered and (ii) the damage and the aid. Furthermore, the proposed aid should also be proportional to the damage.

The notification should include a detailed description of the type of damages to be compensated. This can include loss of income or additional costs related to the outbreak. The description of the damages should be as precise as possible and Member States should avoid using general wordings such as "economic losses". Instead, the Commission wants Member States to elaborate on the specific damages, such as compensation for the tickets sold in pre-sales or payment of artist fees and such.

Moreover, the Commission seeks to ensure that aid is only given to COVID-19 outbreak related damages. For that reason, the Commission wants Member States to explain how the aid mechanism ensures that the aid amount does not exceed the damage suffered. In fact, if any aid is given to a beneficiary that exceeds the damage suffered due to the outbreak, this aid will be recovered. The aid given to compensate the damages cannot be put together with other kinds of aid for the same eligible costs. The aid should also be net of any amount that is covered by insurance, litigation and such. Furthermore, the Commission also noted that the principle of "one time, last time" in the Rescue and Restructuring Guidelines does not cover aid under Article 107(2)(b) TFEU. In other words, an undertaking that received aid under the Rescue and Restructuring Guidelines might be still entitled to receive compensation for COVID-19 related damages.

In practice, we have seen four notifications approved by the Commission under Article 107(2)(b) TFEU as of April 14, 2020. In a first decision, the Commission approved a Danish scheme to compensate organizers of events that had to be cancelled or postponed due to the outbreak (SA.56685). In its second decision, the Commission approved another Danish scheme that compensates the turnover losses of the self-employed registered in the Civil Registration System. The expected loss of turnover will be calculated based on the average monthly turnover in 2019 (SA.56791). In its third decision, the Commission approved a French scheme that defers the payment by airlines of certain aeronautical taxes, with the aim to temporarily reduce pressure on their cash flows (SA.56765). Finally, in its fourth decision, the Commission approved a Danish scheme which compensates companies for their damages that have a proven decline of revenues of more than 40% because of the outbreak. The compensation will be based on part or full of their fixed costs that they continue to bear (SA.56774).

Banks and financial institutions

Banks and other financial intermediaries are important when it comes to dealing with economic repercussions of the outbreak. The European Commission recognizes the crucial role of banks and financial intermediaries in terms of preserving the flow of credit to the markets. There were already very detailed State aid rules for banks in difficulty, applied hand in hand with banking regulations. In order to protect this balance, the Commission carefully draws the line between already existing rules for banks and aid given for the COVID-19 outbreak.

First, the Temporary Framework makes it clear that, if Member States choose to channel the aid under Framework to the real economy via banks and financial institutions, this aid must be passed on to the customers that should be the final beneficiaries of the aid. However, the Framework also recognizes the possibility that such aid might constitute an indirect advantage for the banks and the financial institutions. Therefore, certain safeguards should be introduced to limit undue distortions of competition in relation to these kinds of indirect advantages. Nevertheless, the Framework also notes that such indirect aid should not be considered as 'extraordinary public financial support' as per banking regulation (Directive 2014/59/EU "BRRD" and Regulation 806/2014 "SRMR" more specifically) and should not be separately evaluated under State aid rules for banking sector. To summarize, banks should not be direct beneficiaries of any aid given under the Temporary Framework, and even if any indirect State aid arises, this does not trigger the rules and procedures in the banking regulation or the State aid rules for the banking sector. In its decisions under the Temporary Framework, the Commission also reviews whether notified measures appear to violate intrinsically linked provisions of Directive 2014/59/EU on bank recovery and resolution ("**BRRD**") and of Regulation (EU) 806/2014 on the Single Resolution Mechanism (SRMR) (see for example SA.56714).

Second, the Commission also notes that aid granted by Member States to banks under Article 107(2)(b) TFEU to compensate for damages under the 'exceptional occurrence' clause, should also not be considered as 'extraordinary public support' under banking regulations and State aid rules for the banking sector. Therefore, the same logic is also applicable for damage compensation under Article 107(2)(b) TFEU: if banks receive damage compensation, this should not trigger the rules and procedures in the banking regulation or the State aid rules for the banking sector.

What would happen if banks need direct support in the form of liquidity recapitalization or impaired asset measure (for example transferring the toxic assets into a special purpose vehicle)? The Framework also clarifies this point. Any State aid given to a bank that falls outside the scope of the Temporary Framework or Article 107(2)(b) TFEU should be separately examined under current State aid rules for the banking sector. If banks need direct support in the form of liquidity recapitalization or impaired asset measure, these support measures should be evaluated under Article 32(4)(d)(i), (ii) or (iii) of the BRRD and other State aid rules for the banking sector. Interestingly, the Commission also notes that if banks encounter problems due to the outbreak and such measures are aimed at overcoming these problems, then these measures would fall under point 45 of the 2013 Banking Communication. According to point 45 of the 2013 Banking Communication, it is possible to make an exception to the burden-sharing requirements.

Transport sector

Application of Article 107(2) TFEU becomes especially relevant for the transport sector (airlines, airports, ground handling, rail and bus undertakings, maritime companies and such) which was the first and one of the most hard hit industries by the virus. Interestingly, it seems as the Commission made an exemption for the transport sector. According to this exemption, the assessment of the support will be made on a case-by-case basis. This could mean that even if there is a planned scheme by a Member State for the transport sector, this scheme should include specific names of the beneficiaries and how the damage is calculated for each of these beneficiaries. This would be also in line with the previous decisions of the Commission for aid given to airports due to natural disasters (see SA.32163). Recently, the Commission approved a French scheme to compensate airlines for COVID-19 outbreak under Article 107(2) TFEU (SA.56765). We only have access to the press release of the case for the time being, therefore it is not possible to see how the Commission analyzed this matter in the transport sector. We will see in the upcoming weeks how the Commission will make its case-by-case analysis in the transport sector, once the decisions are published.

Furthermore, when it comes to aid notifications for companies in the transport sector, the Commission requests additional information from Member States. First, Member States should identify the additional costs and foregone revenues that are directly related to the COVID-19 outbreak. For example, this would cover the situations where there is a loss of traffic because of the public measures taken by Member States or a general decrease in demand by customers. Second, Member States should define a reference period in their notification. Third, Member States should demonstrate the repair of incurred damages by comparing the situation during the period of the spread of the outbreak and the reference period.

Nevertheless, Article 107(2) TFEU is not the only option for supporting transport companies for COVID-19 related economic effects. For example the Commission recently approved Swedish measure to support airline industry under the Temporary Framework in the form of State guarantees for new loans in light of the travel bans and border closings due to COVID-19 outbreak. The aim of the measure is to ensure the viability and continuity of airlines with a Swedish license that are important to ensure connectivity in Sweden (SA.56812). To give another example, the Commission also approved a Belgian scheme under Temporary Framework to support airport operators (Charleroi and Liege airports) by way of deferring payments of the concession fees to ensure airport operators have sufficient liquidity (SA.56807).

Measures to preserve employment

The Commission acknowledges the fact that it is crucial for Member States to preserve employment. With this in mind, the Commission further clarifies in the Amendment the steps that can be taken by Member States to preserve employment without containing any State aid. The key element here is that if these measures are applied to the whole economy (i.e. not being selectively applied to certain undertakings, regions or sectors) they generally fall outside the scope of State aid rules. In line with this, Member States might defer payment of taxes and social security contributions, contribute to the wage costs of undertakings or introduce temporary lay-off schemes. These kinds of measures do not require the approval of the Commission, provided that they are applied to the whole of the economy.

However, Member States might need targeted employment measures to better address the situation. The Amendment to the Temporary Framework acknowledges this need. In case Member States want to implement selective measures to preserve employment, under certain conditions the Commission considers selective temporary deferrals of taxes or of social security contributions and wage subsidies for employees to be compatible with the internal market.

Conclusion

The Commission is very active and productive in the State aid field. This is an on-going crisis and therefore the Commission continues to develop its practice every day depending on the new conditions. Even the very recently adopted Temporary Framework is already subject to further changes. Each day, the Commission approves new notifications by different Member States. Therefore, it is very important to be informed about the situation. If your company might benefit from a COVID-19 related support measure implemented by a Member State, you should ensure that it is in line with EU State aid rules.
If you would like to discuss support measures of Member States for the COVID-19 outbreak and how EU State aid rules will address these measures, please contact us.

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