ALLEN & OVERY

Covid–19 coronavirus and the EU State aid response

The Covid-19 outbreak is both a serious health emergency and a threat to the global economy. Both the EU and EU Member States are seeking to avert this threat with ambitious aid packages. This creates an unprecedented challenge for the application of EU State aid rules.

The European Commission (**Commission**) has responded to this challenge by adopting a Communication setting out a temporary framework for State aid measures to support the economy in the current Covid-19 outbreak (the **Temporary Framework**). The Temporary Framework will apply from 19 March 2020 to 31 December 2020. It provides detailed guidance on what aid measures may be taken to remedy a serious disturbance in the economy of a Member State because of the Covid-19 outbreak, in particular what aid measures Member States can take without requiring prior approval of the Commission and how the Commission will assess measures that do need to be notified. On 27 March 2020, the Commission announced its intention to extend the Temporary Framework to additional aid measures.

KEY INFORMATION

- Temporary Framework applies from 19 March 2020 to 31 December 2020
- Provides guidance on what aid measures can be taken without prior Commission approval and how Commission will assess measures needing to be notified
- Commission has proposed inclusion of five additional aid measures
- Further measures may be adopted as situation develops
- Notified aid packages currently being approved very swiftly

The Commission has also acted swiftly to approve Covid-19-related State aid measures notified by Member States. Within a very short period of time, it has adopted a number of decisions under the Temporary Framework, covering a wide range of Member States. The Commission has also published a notification template for Member States. In this alert we consider the content of the Temporary Framework and the Commission's recent decisions.

The Temporary Framework covers six types of aid measures

The Temporary Framework outlines six types of measures that Member States can deploy. A broad distinction can be made between (a) measures that do not need to be notified to the Commission for prior approval and (b) measures that do require notification and Commission approval.

The following can be implemented by Member States without prior approval of the Commission:

- *Measures that apply to all companies*: measures such as general wage subsidies, suspension of payments of corporate and value added taxes or social contributions that apply to all companies. These types of measures do not qualify as State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (**TFEU**) because they do not confer a selective advantage.
- *Financial support granted directly to consumers*: measures that directly benefit consumers such as cancelled services or tickets not reimbursed by the operators concerned. These types of measures do not qualify as State aid within the meaning of Article 107(1) TFEU because they do not confer an advantage on undertakings.
- *Measures designed in line with the General Block Exemption Regulation*: aid measures that fall within the scope of the General Block Exemption Regulation qualify as State aid within the meaning of Article 107(1) TFEU but can be implemented by Member States without prior notification to the Commission.

The following types of State aid measures need to be notified to and approved by the Commission before they can be implemented:

- *Rescue and restructuring aid (Article 107(3)(c) TFEU)*: aid measures developed to meet acute liquidity needs and support undertakings facing financial difficulties, also due to or aggravated by the Covid-19 outbreak. These need to be in line with the strict criteria set out in the Restructuring State aid Guidelines.
- *Compensation for damages caused by natural disasters and exceptional occurrences (Article 107(2)(b) TFEU)*: Member States can compensate undertakings in sectors that have been particularly affected by the Covid-19 outbreak (eg transport, tourism, culture, hospitality and retail) for damages directly caused by the pandemic. Within 24 hours of notification, for example, the Commission approved a Danish State aid measure to compensate organisers of large events for damages suffered as a result of the cancellation of these events. The Commission qualified the Covid-19 outbreak as an "exceptional occurrence" and established that there was a direct causal link between this exceptional occurrence and the damages suffered because of the cancellations. The Commission found that the measure was proportionate because the aid did not exceed what is necessary to make good the damages suffered.
- *Measures to remedy a serious disturbance in the economy of a Member State (Article 107(3)(b) TFEU)*: Member States can take aid measures to remedy a serious disturbance in their economy if that disturbance affects the whole or an important part of the economy. The Temporary Framework explains that in the context of the Covid-19 outbreak, Member States may invoke this ground

for aid measures granted for a limited period to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the pandemic do not undermine their viability, especially that of small and medium-sized enterprises.

In detail: measures to remedy a serious disturbance in the economy of a Member State

The Temporary Framework provides more detailed guidance on the compatibility conditions the Commission will apply to any aid granted by a Member State to remedy a serious disturbance in its economy. It specifically addresses aid in the form of: (i) direct grants, repayable advances or tax advantages, (ii) guarantees on loans, and (iii) subsidised interest rates for loans. And it sets out additional conditions where aid in the form of guarantees and loans is channelled through credit institutions or other financial institutions. The Temporary Framework also considers an exemption from the rule that marketable risks cannot be covered by export-credit insurance with the support of Member States. We consider the main principles below.

Aid in the form of direct grants, repayable advances or tax advantages

The Commission considers this type of aid to be compatible with the internal market if it does not exceed EUR 800,000 per undertaking. It must be granted on the basis of a scheme with an estimated budget and granted no later than 31 December 2020. Undertakings that were not in difficulty on 31 December 2019 but that faced or entered into difficulties as a result of the Covid-19 outbreak can benefit. Specific rules apply for the agricultural, fisheries and aquacultural sectors and undertakings active in the processing and marketing of agricultural products.

Aid in the form of loan guarantees

New public loan guarantees will be compatible with the internal market, says the Commission, provided that the guarantee premiums are set at a minimum level, as defined in the Temporary Framework. The guarantee must be granted by 31 December 2020 at the latest. For loans with a maturity beyond 31 December, the amount of the loan principal may not exceed: (i) double the 2019 annual wage bill of the beneficiary, (ii) 25% of total 2019 turnover of the beneficiary, or (iii) a higher amount subject to justification and self-certification. For loans with a maturity date up to 31 December 2020, the amount may also be higher subject to justification and proportionality.

The guarantee must be limited to a maximum six years and may not exceed: (i) 90% of the loan principal where losses are sustained proportionally and under the same conditions, by the credit institution and the State, or (ii) 35% of the loan principal, where losses are first attributed to the State and only then to credit institutions. In both cases the guaranteed amount must decrease proportionally with the size of the loan as it starts to be reimbursed. The guarantee may relate to both investment and working capital loans. And guarantees may be granted to undertakings that were not in difficulty on 31 December 2019 but faced or entered into difficulties as a result of the Covid-19 outbreak.

Aid in the form of subsidised interest rates for loans

The Commission considers aid in the form of subsidies to public loans to be compatible with the internal market provided that the reduced interest rates are at least equal to 1 year IBOR applicable on 1 January 2020 plus a credit risk margin as specified in the Temporary Framework. Member States may notify alternative schemes whereby maturity, pricing and guarantee coverage can be modulated. The loan contracts must be signed by 31 December 2020 at the latest and must be limited to a maximum of six years. As with the conditions for loan guarantees outlined above, for loans with a maturity beyond 31 December 2020, the amount of the loan may not exceed: (i) double the 2019 annual wage bill of the beneficiary, (ii) 25% of total 2019 turnover of the beneficiary, or (iii) a higher amount subject to justification and self-certification. For loans with a maturity date up to 31 December 2020, the amount may also be higher, subject to justification and proportionality. The loan may relate to both investment and working capital loans. And as before, the measure may be granted to undertakings that were not in difficulty on 31 December 2019 but faced or entered into difficulties as a result of the pandemic.

Aid in the form of guarantees and loans channelled through credit institutions or other financial institutions

Where aid in the form of public guarantees and reduced interest rates, as described above, is granted through credit institutions and other financial institutions as financial intermediaries, that aid may constitute an indirect advantage to the latter. Therefore the Temporary Framework puts in place safeguards to limit undue distortions to competition. To the extent possible, the credit institutions or other financial institutions must pass on, and must demonstrate that they have passed on, the advantages of the public guarantee or subsidised rates on loans to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or low interest rates.

Short-term export credit insurance

Under the current State aid rules, marketable risks cannot be covered by export credit insurance with the support of Member States. Due to the Covid-19 outbreak, the Commission announced on 27 March 2020 that it will temporarily remove all countries from the list of "marketable risk" countries under the Short-term export-credit insurance Communication until 31 December 2020.

Proposed extension of the Temporary Framework

The Commission has also announced that it will consult the Member States on an extension of the Temporary Framework to five additional types of aid measures. In particular: (i) more support for Covid-19 related R&D, (ii) more support for the construction and upgrading of testing facilities for products relevant to tackle the Covid-19 outbreak, (iii) more support for the production of products relevant to tackle the pandemic, (iv) targeted support in the form of deferral of tax payments and/or suspensions of employers' social security contributions, and (v) targeted support in the form of wage subsidies for employees. The extension is expected imminently.

A rapid response by the Commission, but more to come?

The speed at which the Commission put together, consulted on and adopted the Temporary Framework is impressive. As is the rate of decisions it has adopted to approve aid measures from all corners of the EU, with many approvals granted only a day or two following notification. But some are still urging the Commission to do more (Germany's economy minister, Peter Altmaier, for example), saying that additional emergency steps may be needed. What is clear is that the Commission continues to assess the situation and appears willing to adapt the State aid rules as the impact of the outbreak unfolds. Following the financial crisis, the Commission's temporary measures were refined and supplemented over the course of the months and years that followed. We may well see something similar happen again.

We are closely monitoring the Commission's decisions approving aid measures under the Temporary Framework. Please get in touch with your usual antitrust contact if you would like to discuss this further.