BRIEFING

State aid and the pandemic

How State aid can back coronavirus economic support measures

SUMMARY

The coronavirus pandemic and its financial and economic consequences have caused a major economic downturn, and the European Union (EU) has moved rapidly to respond with monetary and fiscal policy measures. The fiscal policy instruments deployed include the adaptation of State aid rules to the exceptional circumstances to allow Member States to support their economies by means of direct or indirect intervention.

From a competition law point of view, measures that constitute State aid are in principle illegal, unless issued under an exemption, such as the *De minimis* Regulation or the General Block Exemption Regulation, subject to notification and European Commission approval. The State aid rules do, however, already allow for aid to compensate for damage caused by natural disasters and exceptional events, such as a pandemic.

State aid can also be used to remedy serious disturbances to the economy. The temporary framework adopted by the Commission in March 2020 sets out temporary State aid measures that the Commission will consider compatible with the State aid rules, allowing Member States full flexibility in supporting their coronavirus-stricken economies. The temporary framework is in place to address Member States' various needs more effectively.

The framework initially focused on measures to ensure liquidity. Since early April, it has been widened to include measures to support the economy and coronavirus-related medical investment, research and production, as well as measures to ease the social and tax liabilities of companies and the self-employed and measures to subsidise workers' wages.

In this Briefing

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The pandemic and support for the economy

The emergence and subsequent spread of a new coronavirus (Covid-19) constituted a public health emergency of international concern, before turning into a global pandemic, meaning that the epidemic occurs worldwide, crossing international boundaries and affecting large numbers of people. The pandemic, which hit Europe at the end of the winter, led the Member States to adopt confinement and lockdown measures, enforcing 'social distancing' to decelerate the spread of the contagious disease.

The containment measures have brought large parts of the economy to a standstill. According to the International Monetary Fund (IMF), economic policies responding to the Covid-19 pandemic need to be tailored to two different phases, first the pandemic mitigation phase during which economic activity is severely limited, and second the economic recovery phase that will start once the pandemic is under control with vaccines or drugs, partial herd immunity, and continued but less disruptive containment measures. Economic measures are designed to cushion the adverse effects on people and economic activity as much as possible; the essential driver being precaution.

Countries around the world and in the European Union are adopting economic support measures in parallel to the measures to mitigate the healthcare crisis. The economic measures relate to both monetary policy (under central bank control/leadership) and fiscal policy (under government remit involving government spending and tax policies to influence economic conditions). For the moment, economists are united in support of the coronavirus lockdown while they gauge the costs and how best to mitigate them without interfering with the expected epidemiological effects; they are also looking into potential longer term action.

EU Member States have taken budgetary, liquidity and other policy measures to help their economies face the economic impact of the coronavirus and to support the people and companies affected. The economic situation caused by the pandemic has also led to calls for a coordinated economic response. A Commission communication of 13 March 2020 listed the various options available with a view to:

- ensuring solidarity in the single market (relating to the supply of medical equipment, transport and tourism),
- mobilising the EU budget and the European Investment Bank Group (relating to liquidity measures to support firms, sectors and regions, alleviating the impact on employment,
- launching the coronavirus response investment initiative (CRII),
- making use of the full flexibility of the European fiscal framework, and
- preparing a temporary framework for State aid flexibility to allow adequate national support of companies and customers.

The aim of competition policy is to ensure a level playing field between companies, through antitrust, cartel, merger and State aid policies. As pointed out in a March 2020 joint statement by the European Competition Network (ECN) on the application of competition law during the coronavirus crisis, this objective remains relevant in a period when companies and the economy as a whole are suffering from crisis conditions. Under competition policy, State aid rules ensure both fairness for economic operators (undertakings in competition terminology) and smooth operation of the internal market between Member States.

Member States' intervention in the economy and State aid

Articles 101 to 109 of the Treaty on Functioning of European Union (TFEU) and the Protocol on the internal market and competition attached to the Treaties establish the primary law provisions on competition. In principle, the definition of State aid is simple: public support for a company giving it an advantage over its competitors. The EU State aid regime is based on Treaty provisions (Articles

107-109 TFEU), and further detailed in secondary legislation (directives, regulations and decisions) and soft law (communications – some establishing specific frameworks, guidelines and notices).

Article 107 TFEU generally prohibits State aid, while reckoning that in some circumstances aid can be compatible. Article 108 relates to Commission control, and Article 109 provides the grounds for general exemption of certain categories of aid.

Measures constituting State aid

Article 107(1) TFEU states that: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

It is now well-established in the case law of the Court of Justice of the European Union that Article 107(1) TFEU lays down four cumulative criteria that determine whether a public measure constitutes State aid:

- There must be a **transfer of state resources**, for instance by way of a payment out of the state budget, i.e. when an authority forgoes revenue it could otherwise obtain or it accepts a liability without charging an adequate fee to offset the risk of that liability such as for instance a sufficiently high guarantee premium or rate of interest, when an entity owned or controlled by the state provides undertakings with grants or funds in accordance with state instructions or directives, or when an entity that is not owned or controlled by the state is obliged by law or administrative act to make specified resources available to undertakings.[1]
- The transfer must **confer a competitive advantage** to an undertaking. This means in particular that aid and support granted directly to citizens do not fall within the scope of State aid.
- The advantage must be **selective** to some undertakings. This means that support measures applicable to all operators do not fall within the scope of State aid.
- The aid must be **liable to affect trade** between Member States and distort competition.

As a result, measures not applying to businesses (such as for instance direct support for consumers for cancelled services or tickets that are not reimbursed by the operators concerned) as well as measures of general application to all businesses – no selectivity – (such as deferred payment of tax and VAT for all sectors) do not constitute State aid.

A whole range of measures can contribute to the same objective, but only those providing state support to some undertakings may qualify as State aid.[2] As early as mid-March the rules were adapted through the temporary framework, using the possibility existing under the Treaty to consider the coronavirus pandemic as an exceptional circumstance, necessitating measures to remedy a serious disturbance to the economy.

State aid compatible with the internal market

The prohibition on aid does not apply to certain categories of aid considered to be compatible with the internal market. Article 107(2) TFEU nowadays lists two categories: a) aid having a **social character**, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned and b) aid to make good the damage caused by **natural disasters** or **exceptional occurrences**. The aid covered by these categories does not require prior assessment by the Commission. However, there are still some requirements: in particular, there must be evidence that the aid is of a social nature or relates to natural disasters or exceptional occurrences, and that the amount of the aid is related to the damage suffered by the beneficiaries.

Article 107(3) TFEU covers aid that 'may be considered to be compatible with the internal market' that aims to: a) 'promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation'; b) 'promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State'; c) 'to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' and (d) 'to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest'.[3] Aid falling within these categories has to be examined on an individual basis by the Commission.

State aid control also takes the *de minimis* principle into account, as aid below certain thresholds is deemed to have no impact on competition or trade in the EU's internal market. Measures that do not exceed the *de minimis* threshold per undertaking (i.e. €200 000 over a period of three years for most businesses) can be adopted without notification. Above the *de minimis* thresholds, State aid may be granted without notification or Commission approval provided it complies with the substantive and procedural requirements of Article 50 of the General Block Exemption Regulation (GBER).[4]

Common principles of compatibility can be summarised along the following lines: the purposes of the aid must be covered by Article 107(3) TFEU, there must be a need for state intervention, the aid must be appropriate and contribute to the common good, it must also be proportionate and avoid undue negative effects on competition and trade between Member States. Finally the aid must be transparent.[5]

A State aid regime adapted to the circumstances

As explained above, the Treaty provisions already include the possibility for Member States to provide help with addressing exceptional occurrences and remedying serious disturbance to the economy. Furthermore, the temporary framework details additional flexibility to allow for a quick and smooth State aid assessment of those measures requiring prior approval.

Exceptional circumstances and serious disturbance

Aid that is compatible on the basis of Article 107(2) TFEU expressly encompasses that which makes good 'damage caused by natural disasters or exceptional occurrences'.

The Covid-19 pandemic has been acknowledged to constitute such an exceptional circumstance, in the same way that past earthquakes, severe floods and major forest fires[6] triggered the same mechanism. Aid that is compatible does not necessitate an assessment, but must still meet some requirements. In the current situation, it must be established that the compensation is limited to pandemic-related damage.[7] The Commission found that the Covid-19 pandemic qualified as an exceptional occurrence in its first decision on the Covid-19 outbreak since it meets the following cumulative criteria: (i) it was unforeseeable or difficult to foresee, (ii) it is of a significant scale/economic impact, and (iii) it is extraordinary. A description of the information to be provided for the notification of measures was prepared and is available online.

State measures that do not fall under these provisions may nevertheless fall within the categories of aid that can be considered compatible with the internal market, as stated in Article 107(3)(b) TFEU, in particular those that 'remedy a serious disturbance in the economy of a Member State'.[8] Assessing the damage caused by the pandemic to the company benefiting from State aid will necessarily involve an economic analysis of the scale of the damage.

In addition to general State aid schemes, Member States can take individual measures for large undertakings; these must be notified to the Commission, and they will be tested by the Commission under its rescue and restructuring guidelines. However, the temporary framework clarifies that the 'one time last time' principle of the rescue and restructuring guidelines does not apply to compensation for exceptional circumstance damages as provided for in Article 107(2)(b) TFEU for sectors particularly hard hit by the coronavirus outbreak.[9]

On 27 March 2020, the Commission also amended the Annex to the communication on the application of Articles 107 and 108 TFEU to short-term export-credit insurance, further to a request by Member States to assess how the pandemic shock is affecting this sector.

Temporary framework allowing for a larger range of *a priori* compatible measures

The temporary framework is designed to help Member States provide economic support for companies by defining a larger range of *a priori* compatible measures under Article 107(3)(b). It applies to Covid-19-related State aid that is not *de minimis* and is not exempted under the GBER.

It was adopted on 19 March 2020 and has already been amended to respond more effectively to the circumstances (on 3 April 2020, with a further amendment on recapitalisation measures adopted on 8 May 2020). The initial framework and its amendments are presented below.

The Commission has set up a dedicated Covid-19 contact point to assist the authorities, and is committed to assessing the compensation measures as rapidly as possible. Templates to facilitate the design of support measures are available on the Commission website.

The temporary framework has been established:

- for a limited period (it applies from 19 March 2020 until the end of 2020, and covers measures granted after February 2020),
- to remedy difficulties faced by undertakings, and
- to ensure that the disruption caused by the Covid-19 pandemic does not undermine companies' viability, especially that of small and medium-sized enterprises (SMEs).

There are monitoring and reporting obligations placed upon Member States. In particular they must publish the relevant information on each individual aid package granted under the temporary framework within a year of the granting of the aid. In addition to the annual reports under State aid rules, the Commission must be sent a list of measures put in place and Member States must ensure that detailed records are maintained. Finally the Commission may request additional information.[10]

State aid to cushion the economic impact of the coronavirus pandemic

In its initial form the temporary framework is centred on enabling Member States to ensure that sufficient liquidity remains available to businesses of all types and to preserve the continuity of economic activity during and after the coronavirus crisis.

It defines a first series of measures that the Commission will consider compatible with the internal market on the basis of Article 107(3)(b) TFEU, subject to certain conditions set out in the communication.

The initial temporary framework allows five types of temporary measure:

- aid in the form of direct grants, repayable advances or tax benefits (with specific conditions for agricultural, fisheries and aquaculture sectors),
- aid in the form of guarantees on loans,
- aid in the form of subsidised interest rates for loans,
- aid in the form of guarantees and loans channelled through credit institutions or other financial institutions, and
- short-term export credit insurance.

Amendments to the temporary framework for State aid were adopted by the Commission in its 3 April and 8 May 2020 communications. The April communication identifies additional measures considered compatible under Article 107(3) TFEU in light of the pandemic, and clarifies some of the elements and conditions set for the five categories introduced in the initial framework:

- aid for Covid-19-related research and development (projects carrying out research into Covid-19 and other relevant antiviral research[11] (including projects having received a Covid-19-specific seal of excellence quality label under the Horizon 2020 SME instrument),
- investment aid for testing and upscaling infrastructure,[12]
- investment aid for the production of Covid-19 relevant products,[13]
- aid in form of deferrals of tax and/or of social security contributions (to reduce the liquidity constraints of undertakings, including self-employed individuals, and to preserve employment),
- aid in form of wage subsidies for employees to avoid lay-offs during the Covid-19 outbreak.

As regards procedural requirements, for the latter two categories there is no obligation to publish each individual measure. Otherwise, they need to be published on the State aid website or using the Commission's IT tool within 12 months of the grant being made.

The May amendment relates to recapitalisation measures aimed at providing severely affected companies with public support in the form of equity or hybrid capital instruments. Subordinated loans[14] can be appropriate to support undertakings facing financial difficulties due to the Covid-19 outbreak. Member States are allowed to implement recapitalisation measures until 30 June 2021. Recapitalisation by the state of enterprises in need negatively affects competition and must remain a last resort. Specific conditions regulate states' entry into, remuneration and exit from the companies concerned, and a rigorous governance framework and measures will limit distortions to competition.[15] In this line, recapitalisations must not exceed 'the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the Covid-19 outbreak'. Additionally, the Commission will request separate notification of individual aid above the threshold of €250 million. Member States are encouraged to design national support measures meeting the EU's policy objectives related to green and digital transformation.[16]

The Commission recalls that equity stake purchases of strategic companies may not constitute State aid in the case that Member States purchase newly issued shares and/or provide undertakings with other types of equity support or hybrid capital instruments on market terms.[17] According to the IMF, financially stable and well-governed state-owned enterprises may contribute to combat crises and promote development, but many would require reforms because, on the contrary, the costs to society and the economy can be large.

The question has arisen of the need to accompany the necessary state support with conditions. Some Member States have therefore decided that companies with links to tax havens will not be eligible for state support.[18] Academics have argued that 'firms which receive state aid must have constraints on their managerial remuneration, must not distribute dividends, and should not engage in mergers and acquisitions'. Furthermore, as stated in the temporary framework, the measures adopted need to be consistent with the green and digital twin transitions, in accordance with EU objectives.[19]

As of 2 June 2020, about 140 decisions had been adopted by the Commission approving State aid schemes. An overview of these schemes under Article 107(2)(b) TFEU, Article 107(3)(b) TFEU and under the temporary State aid framework is provided in the Annex below. Nearly all the Member States have adopted State aid schemes. The schemes focus chiefly on support for the economy and companies, general support and measures specific to companies depending on their size and sector of activity (cancellation of events, travel and airlines, fisheries and aquaculture). In addition, a

Luxembourg: 24 March helping companies and liberal professions cover their operating costs and weather the crisis; guarantee measures, 27 March; scheme to support investments by companies, 20 May; scheme for companies, 29 May

Spain: guarantee scheme for companies and self-employed, 24 March; umbrella scheme, 2 April; second umbrella scheme, 24 April

Estonia: support for the entire economy, 30 March; direct grants and payment advantages, 21 April; schemes to support companies, 28 April; rent compensation scheme, 28 May

Ireland: scheme to support the economy, 31 March; scheme to support the economy, 21 April

Malta: guarantee scheme, 2 April; scheme to support investments in the production, 12 May; scheme to grant interest rate subsidies to companies, 14 May

Sweden: guarantee scheme, 2 April; rent rebate scheme, 15 April

Netherlands: scheme to support the economy, 3 April; guarantee scheme, 22 April

Poland: public guarantee, 4 April; loan and guarantee scheme, 8 April; support scheme,10 April; loan and guarantee scheme, 22 April; schemes to support companies, 23 April; scheme to support companies, 24 April; advance scheme to support companies, 27 April; scheme to support companies, 11 May; subsidised loan scheme to support large enterprises, 25 May

Portugal: scheme to support the economy, 4 April

United Kingdom: umbrella scheme, 6 April

Croatia: guarantee scheme, 6 April; support scheme, 9 April

Greece: repayable advances to support the economy, 7 April; guarantee measure to support companies, 30 April

Hungary: scheme to support the economy, 8 April; aid scheme to support the economy, 17 April; guarantee scheme to support companies, 28 April; schemes to support companies, 29 April; scheme to support companies, 20 May

Lithuania: guarantee scheme, 8 April; scheme to support the economy, 10 April; compensation scheme to support sectors affected by coronavirus outbreak, 30 April; support to medium-sized and large enterprises, 26 May

Austria: liquidity scheme, 9 April; scheme to compensate companies, 23 May

Belgium: Flemish Region support scheme, 10 April; Walloon area support scheme, 30 April; scheme to support internationally active companies, 14 May

Finland: public guarantee and subsidised loan scheme, 21 April, scheme to support companies, 24 April; guarantee scheme to support maritime companies, 28 May

Slovenia: umbrella scheme to support the economy, 24 April; guarantee and rent relief schemes to support companies, 30 April

Czechia: guarantee scheme for loans to large exporting companies, 5 May; guarantee scheme for companies, 15 May

Denmark: schemes to support start-ups, 5 May

	agricultural and fishery sectors, 19 May; support for companies active in the agricultural sector, 28 May Belgium: direct grant scheme to support agricultural and aquaculture sectors in Brussels-Capital region, 24 April Greece: scheme to support companies in the floriculture sector, 5 May Finland: direct grant schemes to support companies in the agriculture and fishery sectors, 6 May Netherlands: scheme to compensate companies, 8 May Hungary: scheme to support the agri-food, aquaculture and forestry sectors, 19 May	
Production of medical equipment	Italy: production and supply of medical equipment and masks, 22 March Czechia: support investment in the production of coronavirus-relevant products, 15 April	Temporary framework
Research and development investment for coronavirus	Belgium: support for research and development projects, 27 April; support research and development activities in Wallonia, 12 May Luxembourg: support for research and investment in the production of coronavirus-relevant products, 8 April Portugal: support for investment in research, development, testing and production of coronavirus-relevant products, 17 April Hungary: aid scheme to support researchers and developers in all affected sectors, 17 April Malta: scheme to support research and development related to coronavirus outbreak, 22 April Germany: 'umbrella' scheme to support research, development, testing and production of coronavirus-relevant products, 29 April Czechia: scheme to support research and development, 7 May Austria: schemes to support companies and investment in research, development, 19 May	Temporary framework
Airlines	France: deferring payment of certain taxes, 31 March Denmark: compensation for damages, 15 April Germany: compensation for damages, 27 April	Article 107(2)(b) – exceptional occurrence
	Sweden: guarantee support scheme, 11 April Belgium Walloon Region: deferring payment of concession fees, 11 April France: urgent liquidity support to Air France, 4 May Finland: loan to Finnair, 18 May	Temporary framework
Employment aid scheme	Bulgaria: employment aid scheme in sectors most affected, 15 April Slovakia: scheme to preserve jobs and support self-employed, 21 April	Temporary framework

	Malta: employment aid scheme to support sectors affected, 24 April Portugal: schemes to preserve jobs in the Azores Region, 20 May	
Culture and art	Lithuania: scheme to support cultural and art institutions and organisations, 20 May	

Source: This table is based on publicly available information on Member States' coronavirus measures that have been approved under Article 107(2)(b) TFEU, Article 107(3)(b) TFEU and the temporary State aid framework (consulted on 2 June 2020).

ENDNOTES

1 On the question of whether this includes EU funding when managed by public authorities see: State Aid and EU funding: Are they compatible?, Policy Department for Budgetary Affairs, European Parliament, May 2018.

2 Guarantees provided to secure wages and social contributions can either be general measures (including short-term work schemes), measures specific to some companies, and additional support provided by helicopter money to citizens. This also raises the question of how the measure is financed, not covered by this briefing.

3 Article 107(3) also provides the possibility to define other categories.

4 If measures fail to comply with State aid rules, they may be considered unlawful, in which case the aid is recovered with interest from the companies concerned. For more details on this see Phedon Nicolaides 'a) Natural Disasters and b) Absolute Impossibility to Recover Incompatible State Aid, on StateAidHub.eu,15 March 2016.

5 For a more in-depth presentation of the State aid framework and Commission control, see N. Pesaresi and R. Peduzzi, 'State Aid Modernization', in B. Nascimbene and A. Di Pascale (eds), *The Modernisation of State Aid for Economic and Social Development*, Studies in European Economic Law and Regulation, Springer, Vol. 14, 2018.

6 It has also been applied to tornadoes, avalanches, landslides and rockslides internal disturbances and strikes, nuclear disasters and the 2010 volcanic ash aviation lockdown.

7 See Commission Decision (EU) 2016/195 of 14 August 2015, SA.33083 (on the earthquake in Abruzzo, Italy, in 2009).

8 Article 107(3) b) TFEU was seldom used before the 2008 financial crisis, when it was intensively used. For more information on the latter see Banks stabilization and resolution: an assessment of State aid rules and of their past and present enforcement, European Banking Authority, 2016.

9 Point 15 of the temporary framework. Normally, this principle means that new aid is not to be granted to undertakings that have received rescue aid within the last 10 years.

10 See framework point 37 – 'Member States must ensure that detailed records regarding the granting of aid provided for by this Communication are maintained. Such records, which must contain all information necessary to establish that the necessary conditions have been observed, must be maintained for 10 years upon granting of the aid and be provided to the Commission upon request' – and point 38 – 'The Commission may request additional information regarding the aid granted, to verify whether the conditions laid down in the Commission decision approving the aid measure have been met'.

11 Including research into vaccines, medicinal products and treatments, medical devices and hospital and medical equipment, disinfectants, and protective clothing and equipment, and into relevant process innovations for efficient production of the required products.

12 'The aid is granted for the construction or upgrade of testing and upscaling infrastructures required to develop, test and upscale, up to first industrial deployment prior to mass production, COVID-19 relevant medicinal products (including vaccines) and treatments, their intermediates, active pharmaceutical ingredients and raw materials; medical devices, hospital and medical equipment (including ventilators and protective clothing and equipment as well as diagnostic tools) and necessary raw materials; disinfectants and their intermediary products and raw chemical materials necessary for their production; as well as data collection/processing tools'.

13 'This includes: relevant medicinal products (including vaccines) and treatments, their intermediates, active pharmaceutical ingredients and raw materials; medical devices, hospital and medical equipment (including ventilators, protective clothing and equipment as well as diagnostic tools) and necessary raw materials; disinfectants and their intermediary products and raw chemical materials necessary for their production; data collection/processing tools'.

14 As a less distortive instrument than equity or hybrid capital because it cannot be converted into equity when the company is a going concern, that is to say, it has resources to continue operating.

15 Additional EU-level support and funds are necessary to ensure that the crisis does not transform into an asymmetric shock for the Member States with less possibility to support their economy and for the EU's competitiveness in general.

16 Member States can also decide to grant State aid in order to support green and digital innovation and investment, and increase the level of environmental protection.

17 Commissioner Vestager warned that there is a real risk that vulnerable businesses may be the object of Chinese takeovers. In this line, she stated that Member States can act as market participants and take shares in a company if they want to prevent such takeovers.

18 See for more details, for instance, Tax Justice Network, 23 April 2020, Bail, or bailout? Tax experts publish 5-step test for Covid19 business bailouts.

19 Some stakeholders stress that the climate objective must be taken into account in State aid, in particular in sector-based State aid, see for instance the 21 April 2020 report, 'Climat, santé: mieux prévenir, mieux guérir', Haut conseil pour le climat.

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