*State Aid in the Time of COVID 19.*

While EU national governments are fighting both to contain the spread of COVID-19 and to alleviate its serious economic repercussions, the EU has set in motion a series of initiatives and measures to support its Member states. In particular, the European Commission has been extremely fast in rethinking how existing state aid rules were operating. On 13 March the Commission issued a Communication on the Coordinated economic response to the epidemic and on 19 March it adopted a second Communication establishing a Temporary Framework to assess coronavirus related state aid scheme in support of national economies. (<https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf>) This Communication – applicable until 31 December 2020 – is primarily aimed at simplifying and shortening state aid procedures, however it also contains policy indications on the interaction between EU and national economic policies.

*The framework of the Framework*.

The Commission fully acknowledges that as well as being a major public health emergency, Covid-19 also represents *a major shock to both the global and Union’s economies*. Unlike any other past crises, the COVID-19 pandemic is having an impact on every single sector of the economy from transport to SMEs, to retail and banking. The Framework therefore addresses an extensive range of possible state interventions: from sector-specific support to more general measures to incentivise the flow of liquidity and access to credit. The Framework is also extremely candid in reminding all interested parties of a basic truth: that the money to support the economy at this stage will have to come mostly from the pockets of national governments, however a coordinated effort will make the measures adopted more effective and may even foster a quicker recovery. The Framework also emphasizes that this is really not the time for a harmful subsidies race. In the Commission’s view, a coordinated and proportionate application of state aid rules could be vital in preserving at least some level of European solidarity.

*The main tenets of the Temporary Framework.*

The Commission’s Framework is essentially based on two main tenets. First, it reaffirms that a vast array of national measures in response to COVID-19 are not caught by state aid rules. For instance, any kind of horizontal measures aimed at all undertakings regarding wage subsides or direct financial support to consumers do not fall within the scope of Article 107 TFEU. Other measures, such as incentives directed towards SMEs are likely to be block exempted and subject only to general transparency requirements. Secondly, in cases of notified aid, the Commission will assess whether the Member state’s measures are, or may be, compatible with EU law under two of the compatibility clauses provided by Article 107(2) and (3) TEFU:

*Damages caused by exceptional occurrences.*

Under Article 107 (2)(b), aid to rectify the damage caused by natural disasters or exceptional occurrences can be declared *de jure* compatible by the Commission. Thus, the Framework seems to suggest that any measures adopted to compensate undertakings in sectors hit particularly badly by the outbreak and/or by organisers of cancelled events for damages suffered due to and directly caused by the outbreak would be compatible. Arguably the criteria developed by the Commission’s decisional practice under 107(2)(B) should still be applicable. Most importantly, the Commission must always verify the exceptionality of the situation and that the following conditions are met: the damage for which the compensation is granted must be a direct consequence of the natural disaster, the aid cannot result in overcompensation for damage and the aid can only rectify the damage caused by the natural disaster. Thus, in probably the first Coronavirus related notified measure, the Commission – in less than 24 hours – found a scheme devised by Denmark to compensate organisers for the damage suffered due to the cancellation of events with more than 1,000 participants was compatible with EU law. According to the Commission, the COVID-19 outbreak qualifies *as an exceptional occurrence, as it is an extraordinary, unforeseeable event having a significant economic impact* and considered that the Danish aid scheme compensates damages that are *directly linked to the COVID-19 outbreak*. Interestingly, the Framework further specifies how COVID-19 related measures would be applied in relation to the Rescue and Restructuring Guidelines. According to the Commission, the principle of ‘one time last time’ would not apply to aid declared compatible under Article 107(2)(b) TFEU. The practical consequence of this specification is that Member states can still compensate the damages directly caused by the Covid-19 outbreak to undertakings that have already received aid under the R&R Guidelines. For instance, the probable granting of aid measures to Alitalia – a company that is currently being considered for rescue aid – may thus be exempted under the Temporary Framework.

*A Serious disturbance to the economy*.

Most of the Temporary Framework, however, is devoted to the possible use of Article 107(3)(b) TFEU, that makes aid to ‘*to remedy a serious disturbance in the economy of a Member State’* compatible with EU law. It is well known that Article 107(3)(b) has been used and relied upon by Member States and the EC during the financial and banking crises. In that context, the Commission had to initially to make up new rules and principles, while the COVID-19 Temporary Framework relies heavily on the now copious decisional and regulatory experience of the Commission in the banking sector. Thus the Communication makes it very clear at the outset that a strict interpretation of any exceptional provision such as Article 107(3)(b) TFEU is necessary and that only those measures which are appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned will be deemed compatible. The Framework, mostly based on principles developed in the context of the banking crises and by relying on a series of macro-economic indicators, lists five types of aid which would be deemed compatible:

1. Direct grants, selective tax advantages and advance payments - Member States will be able to set up schemes to grant up to €800,000 to a company to address its urgent liquidity needs;
2. State guarantees for loans taken by companies from banks - Member States will be able to provide State guarantees to ensure credit access;
3. Loans to companies - Member States will be able to grant loans with favorable interest rates to companies;
4. Short-term export credit insurance (known as STEC) for risks which are normally shouldered by private insurance companies, but which are now temporarily unavailable in the market due the Covid-19 pandemic. This is actually a derogation from the rules ordinary applicable to STEC.
5. Measures to ensure that banks can continue to guarantee liquidity to the real economy. The Framework ‘transforms’ such aid into aid directly to the banks' customers, not to the banks themselves, and provides some guidelines on how to ensure minimal distortion of competition between banks.

Apart from these *ex ante* general categories, it would still be possible for Member States to notify to the Commission of ‘*aid schemes to meet acute liquidity needs and support undertakings facing financial difficulties, also due to or aggravated by the COVID-19 outbreak’*.

The Communication seems to attribute a crucial role to banks in the implementation of Covid-19 related measures, particularly by facilitating credit for SMEs – one of the worst affected businesses. Thus, it specifies that aid granted by Member States both under Article 107(2) (b) and under (3)(b) TFEU does not have the objective of preserving or restoring the viability, liquidity or solvency of banks. Consequently, such aid would not qualify as extraordinary public financial support under the Directive 2014/59/EU of the European Parliament and of the Council (so called the BRRD), and would also not be assessed under the strict State aid rules – bail-in rules, for example, would not be applicable to the banking sector. However, the Framework requires that ‘*credit institutions or other financial institutions should, to the largest extent possible, pass on the advantages of the public guarantee or subsidised interest rates on loans to the final beneficiaries.’* Banks will therefore be under an obligation to show that they can effectively implement mechanisms to ensure that aid is passed on.

*Will it work?*

At the time of writing, the Commission – at the speed of light – has already approved several schemes under the Temporary Framework (<https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html>): some are very straightforward, such as the €50 million Italian aid scheme available to all companies to support the production and supply of medical devices, such as ventilators, and others are much more complex. On 20 March, for instance, Germany notified (directly in English!) two measures for subsidised interest rates for loans for any kind of undertakings that require liquidity for their business. The aid can be granted to undertakings that are not in difficulty and/or to undertakings that were not in difficulty on 31 December 2019, but that faced difficulties or entered into difficulty thereafter as a result of the COVID-19 outbreak. The aid was to be granted either directly by KfW, the German state-owned development bank or through other credit institutions. On the 22 of March, the Commission approved the scheme. Cynics may say that two days is not enough time to assess the full complexity of the German scheme. This is a fair point of concern, however Germany carefully constructed the measures in the form of subsidised interest rates for loans as laid down in the Framework, in line with the specific rules on applicable interest rates/duration/amounts laid down in the Framework itself. Furthermore, the Commission paid specific attention to rules intended to ensure that banks were only ‘conduits’ to underlings, for instance by defining maximum interest rates for the loan contracts between the credit institutions and the final beneficiaries.

Clearly the hard lessons of the 2008 financial crisis have been learned and it seems that both Member States and the Commission realise the importance of following an orderly and transparent set of rules. Of course the temptation to sweep under the carpet of these new and more flexible state aid rules, dubious rescue packages for weak and ailing companies may soon appear, and further action will surely needed in the future but at the moment one can hope that every party is only interested in the safety of our continent. Then surely tutto andra’ bene. Everything will be all right.

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