Kluwer Competition Law Blog

EU State Aid and COVID-19

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Overview

Given the unprecedented challenge faced by European businesses in the wake of the public health measures being adopted, the EU and its Member States are taking extraordinary measures to minimise the economic fallout from COVID-19. Over the coming weeks, Member States will make available billions in financial aid an in a speech on 13 March 2020, Commission President Von der Leyen noted that the EU "*will do whatever is necessary to support the Europeans and the European economy."*[1]

Under the State aid regime, many forms of government aid must be notified and cleared by the European Commission in advance; otherwise, aid is unlawful and could subsequently be liable to recovery (plus interest). However, it is well understood that the regime must not impede urgent assistance to companies at a time of economic crisis.

The Commission is showing it has learnt lessons from the Global Financial Crisis and is moving extremely fast. It has declared it intends to use the "full flexibility" of State aid rules,[2] is dedicating significant resources to this area and is fast tracking all necessary approvals. Example of this include:

- The first decision relating to a Danish aid scheme to compensate organisers for damage suffered due to the cancellation of large events was adopted within 24 hours.[3] Decisions taken under the Temporary Framework, as outlined below, have also been adopted in a matter of days.
- A dedicated email address and phone line for Member States have been set up which are staffed 7 days a week.

Further, on 19 March 2020, the Commission adopted – after only 3 days of consultation – a Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak.[4] The Framework will apply to a range of measures put in place between 1 February 2020 and 31 December 2020.

The EU State aid regime affects companies operating in the EU and (until the end of the transitional period – 31 December 2020) the UK. If companies are in doubt as to whether aid is compatible with the State aid regime, they should confirm this with the aid-giver and may wish to obtain their own legal advice. In general, however, as Member States are in close contact with the EC, we do not expect State aid rules to impede financial assistance at this time of crisis.

I. Measures requiring notification to the Commission but which are likely to be found compatible with State aid rules

Support to remedy a serious disturbance in a Member State's economy (Art. 107(3)(b) TFEU).

The Commission has issued the **Temporary Framework** under Art. 107 (3)(b). This is aimed at remedying liquidity shortage (in particular of SMEs) for a limited period. The Temporary Framework will only apply to companies that entered into difficulty after 31 December 2019 and cover aid granted no later than 31 December 2020. The Framework covers the below measures (these schemes must be notified by Member States and, as has been seen, will be approved within a matter of days):

- **Direct grants, repayable advances, or tax or payment advantages** up to a gross amount of €800,000 to a company. Any such advantages must form part of a scheme notified by Member States as opposed to grants of individual aid. Special rules apply for the primary agricultural, fishery and aquaculture sectors.
- **State guarantees for loans** received by companies from banks. For loans with a maturity date beyond 31 December 2020, the amount of the loan principal cannot not exceed twice the beneficiary's actual or estimated annual wage bill, 25% of total turnover in 2019 or, if justified, the total amount of its liquidity needs for the next 12 months for large enterprises, and 18 months for SMEs. The amount of the loan principal may be higher if maturity is until 31 December 2020. The guarantee duration is limited to six years and the guarantee amount limited to 90% of the underlying loan (or 35% in case of a first-loss guarantee). Guarantee premiums are set at the below minimum levels (though Member States may notify schemes whereby maturity, pricing and guarantee coverage can be modulated (e.g. lower guarantee coverage offsetting a longer maturity):

Type of recipient	Credit risk margin for a 1-year maturity loan	Credit risk margin for a 2-3 years maturity loan	Credit risk margin for a 4-6 years maturity loan
SMEs	25bps	50bps	100bps
Large enterprises	50bps	100bps	200bps

- **Subsidised public loans** with favourable but minimum interest rates. The amount of the loan cannot exceed twice the beneficiary's actual or estimated annual wage bill, 25% of total turnover in 2019 or, if justified, the total amount of its liquidity needs for the next 12 months for large enterprises, and 18 months for SMEs. The amount of the loan principal may be higher if maturity is until 31 December 2020. The maximum loan duration is six years. Loans may be granted at reduced interest rates which are at least equal to the base rate (1 year IBOR or equivalent as published by the Commission) applicable on 1 January 2020 **plus** the credit risk

margins as set-out in the table above. The same underlying loan principal cannot benefit from both a state guarantee and subsidised interest rates.
- **Possible exemptions from restrictions on Member States providing short-term export-credit insurance** (protection against the risk that an overseas customer would default on payment) to companies for so-called marketable risk countries.[5] The Member State must demonstrate (based on market evidence) that private insurance is no longer available for such risks.[6]

The Temporary Framework recognizes the importance of the banking sector to deal with the economic effects of COVID-19. If Member States decide to channel aid via banks (or other financial intermediaries), it clarifies that this is direct aid to the banks' customers, not to the banks themselves.

- Any direct aid required to banks for compensation for COVID-19 related damage under Art. 107(2)(b) TFEU or indirect advantages resulting from aid being channelled through them will not be considered as "extraordinary public support" as per the Banking Union rules and will not be assessed under the State aid banking rules.
- Additionally, liquidity recapitalisation or impaired asset measures required for banks due to COVID-19 will exceptionally not trigger the usual burden-sharing requirements which apply to shareholders and subordinated creditors of banks in receipt of State aid.

A number of schemes have already been adopted by the date of this article pursuant to the Temporary Framework and further clearance decisions are expected in the coming days:

- **Portugal:** Four guarantee schemes for SMEs and midcaps affected by the Coronavirus outbreak, active in four different sectors: (i) tourism; (ii) restaurants (and other similar activities); (iii) extractive and manufacturing industry; and (iv) travel agency activities, certain tourism activities, event organisation (and similar activities).[7] The four schemes have a total budget of €3 billion.
- **Italy:** A €50 million support scheme in the form of direct grants or repayable advances for the production and supply of medical devices and personal protection.[8] Under the scheme, financial support will be available to companies of all sizes which (i) set up new facilities for the production of medical devices and personal protection equipment; (ii) expand the production of their existing structures producing such equipment; or (iii) convert their production line to that effect. The beneficiaries of the support will make the products available to the Italian authorities at the market prices applied in December 2019.
- **Germany** a scheme implemented through the German promotional bank Kreditanstalt für Wiederaufbau ("**KfW**") consisting of: (i) a loan programme covering up to 90% of the risk for loans for companies of all sizes – eligible loans may have a maturity of up to 5 years and can reach €1 billion per company, depending on the company's liquidity needs, and; (ii) a loan programme in which the KfW participates together with private banks to provide larger loans as a consortium. For this scheme, the risk taken by the State may cover up to 80% of a specific loan but not more than 50% of total debt of a company.[9]
- **Denmark**: A DKK 1 billion (approx. €130 million) guarantee scheme for SMEs

affected by the Coronavirus outbreak.[10] The scheme aims at limiting the risks associated with issuing operating loans to those companies that are most severely affected by the economic impact of the Coronavirus outbreak.
- **France:** Two schemes enabling the French public investment bank Bpifrance to provide State guarantees on commercial loans and credit lines, respectively, for enterprises with up to 5,000 employees and a third scheme to provide State guarantees to banks on portfolios of new loans for all types of companies. [11] The French plan is expected to mobilise more than €300 billion of liquidity support.

Support to make good the damage caused by COVID-19 as an "exceptional occurrence" (Art. 107(2)(b) TFEU). The Commission found that the COVID-19 outbreak qualifies as an exceptional occurrence when it approved the Danish aid scheme to compensate damages caused by cancellations of large public events due to COVID-19 outbreak.[12]

- For any aid to be granted a causal link must be shown.
- Payments must be net of any amount recovered by insurance, litigation, arbitration or other source for the same damage. If the aid is paid out before the insurance, the authorities must recover the amount.
- Aid cannot be cumulated with other aid for the same eligible costs.
- The "one time last time" principle for rescue aid received in the last ten years (e.g. by airlines) does <u>not</u> apply to compensation for COVID-19 caused damage.
- Expected to be used in particular for sectors such as aviation and transportation (e.g. cancellation of flights / sailings and grounding of fleets), tourism and hospitality (e.g. closure of hotels, restaurants and pubs), entertainment and events (e.g. cancellation of larger events and closures), and retail (e.g. shop closures).

Aid granted in line with the guidelines for rescuing and restructuring firms – the guidelines are based on Art. 107(3)(c) TFEU. These enable Member States to help companies cope with liquidity shortages and provide for urgent rescue aid. This includes:

- Dedicated support schemes for SMEs and small public companies in the form of loans or guarantees, e.g. covering operating cash-flow shortfalls up to 18 months.
- For large firms loans or guarantees, e.g. covering operating cash-flow shortfalls up to 6 months.

II. Measures that do <u>not</u> have to be notified under State aid rules

General measures that are not State aid as they apply to all companies in the economy.

- For example, wage subsidies and permitting the suspension of payments of corporation or VAT taxes and social contribution payments.

Financial support from EU or national funds to health services to tackle the COVID-19 situation fall outside of the scope of State aid rules and so does any public financial support given directly to citizens (e.g. for cancelled services or nonreimbursed tickets).

***De minimis* aid** provided to individual companies:

- Direct aid not exceeding €200,000 over a 3-year period for most sectors.
- Subsidised loans up to €1 million for a period up to 5 years or subsidised guarantees for loans for €1.5 million for a period of up to 5 years.

Certain aid falling under the scope of the General Block Exemption Regulation, which covers a range of categories of aid including regional, training, SMEs, R&D, infrastructure and environmental.

Outlook

The Commission is well equipped to deal with this crisis, given the experiences from the Global Financial Crisis and is moving even faster than it did then. The desire to be part of a solution and to use State aid rules as tools rather than constraints is especially to be welcomed given that other jurisdictions, such as the US, are announcing major state funding packages and these jurisdictions are not bound by State aid rules.

Indeed, while the discussions on the UK's exit from the EU are suspended and it is unclear if the current transition period will be extended, the UK has maintained that it will not to keep the same State aid rules post-Brexit moving towards a WTO based system. This will need to be borne in mind, as it may be that UK companies could in future benefit from restructuring aid not open to companies in the EU. For now, however, the UK remains bound by the EU State aid regime.

We expect to see both a spate of notifications under the Temporary Framework but also in parallel, targeted measures for certain sectors or for certain companies under other provisions such as Article 107(2)(b) TFEU. Some grey areas are likely to emerge especially in relation to companies that were already in financial difficulty before the COVID-19 outbreak but that have been further damaged as a result of COVID-19. It will have to be seen just how flexible the rules are.

Going forward, it is likely that the focus will shift from crisis aid to more permanent restructurings of companies, as cheaper credit may only be a partial reprieve for struggling businesses. While the impact on banks is being foreshadowed in the Temporary Framework, the approach will have to be monitored to allow banks take on additional risk. Again, the Commission and many Member States have a wealth of experience from the banking crisis. The hope is that the flexible approach of the Commission will continue and that State aid tools are used as a sensible road map and not a rigid rulebook preventing required assistance and future recovery.

All views expressed are the authors' personal views and do not necessarily reflect those of Kirkland & Ellis.

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[1] See press release available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_459.

[2] See statement by Executive Vice-President Margrethe Vestager on a draft proposal for a State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak, available at https://ec.europa.eu/commission/presscorner/detail/en/statement_20_479.

[3] See the EC's press release announcing the decision, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_454.

[4] COMMUNICATION FROM THE COMMISSION: Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, available at https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf. A draft of Temporary Framework was sent by the Commission to Member States for consultation on 16 March 2020 and was subsequently adopted by the Commission on the evening of 19 March 2020.

[5] The countries listed as "marketable risk countries" in the 2012 Short-term export-credit Communication are the EU Member States and certain countries (Australia, Canada, Iceland, Japan, New Zealand, Norway, Switzerland and the US) belonging to the OECD.

[6] The Commission has launched an urgent public consultation to assess the availability of private short-term export-credit insurance capacity for exports to all countries listed as marketable risk countries, see https://ec.europa.eu/commission/presscorner/detail/en/mex_20_512.

[7] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_506.

[8] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_507.

[9] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_504.

[10] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_505.

[11] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_503 and decision available at https://ec.europa.eu/competition/state_aid/cases1/202012/285133_2141269_36_2.pdf.

[12] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_454 and decision available at https://ec.europa.eu/competition/state_aid/cases1/202011/285054_2139535_70_2.pdf.

The Kluwer Competition Law Blog is closely following the impact of COVID-19

on global antitrust law, both practically and substantively. We wish our global readers continued health and success during this difficult time. All relevant coverage can be found here.

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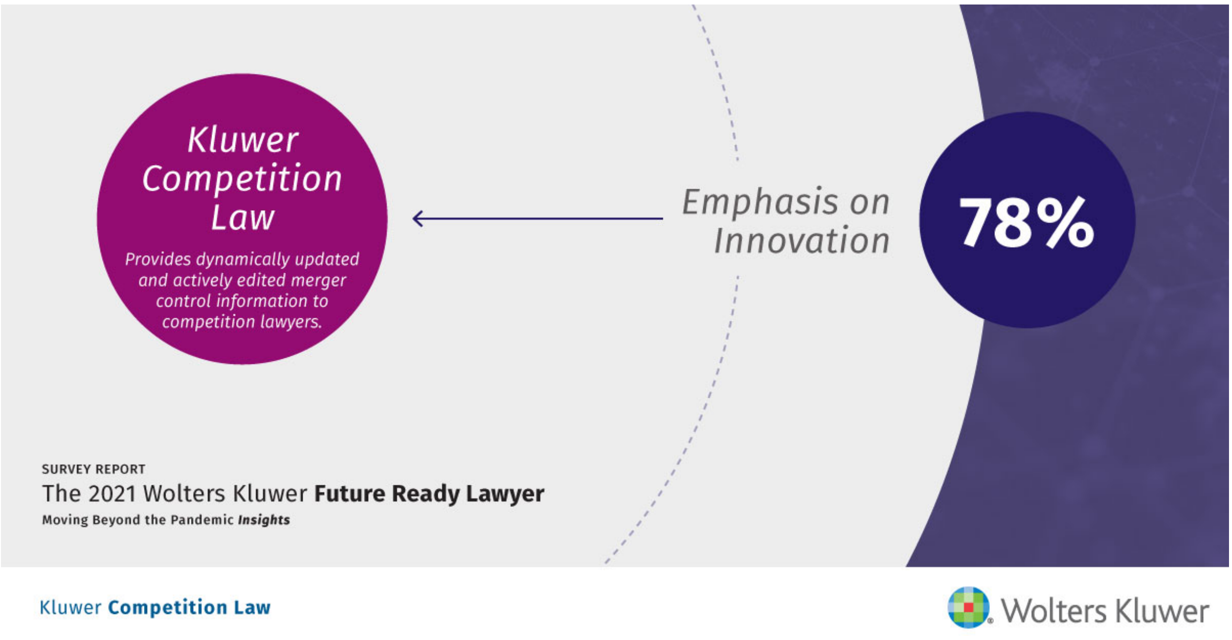

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