



CIL & STATE AID – ISSUES ARISING DURING THE OUTBREAK OF COVID-19

Kelly Stricklin-Coutinho

Authorities can expect to be faced with requests that Community Infrastructure Levy (“CIL”) payments are deferred, or that relief from CIL liability is given because of the impact of the outbreak of coronavirus. One potential issue with an authority doing so is that “state aid” law applies to all elements of the CIL regime, as well as those where the relief is actually stated to be subject to state aid law. As such, any deviation from the usual strict application of the CIL regime should be considered from a state aid perspective. Failure to do so could result in the authority giving prohibited state aid with potential legal and financial impacts on the authority as well as the applicant.

The State Aid regime

The prohibition from granting state aid is set out in Article 107 TFEU. It prohibits a government (which includes local authorities) from giving a selective advantage from its resources to an undertaking, where there is a potential distortion of competition and an effect on trade between Member States.

Examples of such advantages include relief from charges or levies which the authority might otherwise be entitled to receive.

Where a regime is of general application, it does not give selective relief and as such is not in breach of Article 107 TFEU. However, relief given to a specific entity may well be regarded as a selective advantage to that entity.

Application of state aid law to CIL

The CIL regime takes account of the application of State Aid Law, expressly so in some areas, such as social housing relief. In ordinary circumstances, the CIL regime works (broadly) so that an authority may give an exemption from the liability to pay CIL, unless giving that exemption would amount to a prohibited state aid. Some of the exemptions are

expressly subject to state aid law (for example, the exemption for charities). Some exemptions do not state that they are specifically subject to state aid law, but they are nonetheless subject to it.

The outbreak of coronavirus does not change that position.

Temporary Framework – Application to CIL

The European Commission has recently set up a “Temporary Framework” under which governments can give aid in certain circumstances.

Generally speaking, under the Temporary Framework aid will be permitted in circumstances where the need for the assistance arises from the outbreak of the coronavirus.

The Temporary Framework has also indicated the Commission’s willingness to accept certain measures which permit assistance through the tax system which help with liquidity. For example, it has identified that deferral of tax payments, or allowing payments by instalments are likely to be permissible measures. Similarly, granting interest free periods and the suspension of debt recovery may be permitted. Any such measures have to be given by 31 December 2020 and the end date for the deferral must be 31 December 2022.

It is crucial to note that if the Temporary Framework is to be relied upon, notification to and approval from the European Commission is required (although these are being turned around at very high speed).

Although the Temporary Framework refers specifically to taxes, one would expect similar considerations to apply to Community Infrastructure Levy, as a charge raised by Government.

Exceptional Circumstances?

A more classic example of circumstances which could be described as ‘exceptional’ would be difficult to find than the current C19 situation. Indeed, within the meaning of State aid law, the Commission considers the outbreak of coronavirus to be exceptional.¹

¹ Commission Decision SA.56774

Many authorities may be approached under Regulation 55 – discretionary relief for exceptional circumstances. It is for the charging authority to determine, by reference to (among other things) viability impacts upon the development, whether the circumstances are exceptional, but it should be noted that this provision is also **expressly** subject to State aid law.

Those authorities which have not made relief for exceptional circumstances available in their areas but which may wish to grant relief in the present circumstances will have difficulty unless doing so falls under one of the other specific exemptions.

In our CIL Briefing Note 2, Celina Colquhoun, covers recent Government guidance on covid-19 and CIL relief as well as considering Regulation 55.

Other measures

The Commission has also pointed out that relief for coronavirus related difficulties may be given under other State aid mechanisms which are already in place. These include the General Block Exemption Regulation (Commission Regulation (EU) No. 651/2014 of 17 June 2014) and the De Minimis Exemption (Commission Regulation (EU) No 1407/2013 of 18 December 2013), as well as other arguments as to why the aid is not prohibited within the meaning of Article 107 TFEU. For example, any advantage which is given on market terms will not fall within the prohibition set out in Article 107 TFEU.

Those arguments continue to work in the usual way such that using the General Block Exemption Regulation, the De Minimis Exemption or other arguments need not be notified to the European Commission, but may need to be included in reporting by local authorities to central government.

Some practical issues

Deferrals of CIL liabilities including instalments also need to be approached with care. Authorities considering permitting deferrals should consider the basis on which they do so, both in terms of what is permissible under the CIL Regulations (and their specific charging schedule), and in state aid terms as an exercise of an authority's discretion must nonetheless comply with State aid law. For example, a deferral which also did not require interest to run as required by the regulations perhaps foreshadowing the Government's CIL changes may not comply with State aid law. Permitting payments by instalments outside of the scope of the CIL Regulations or an instalment policy should be done with similar care. In both of these examples it may nonetheless be possible to give that assistance in line with State aid law, depending on the specific facts concerned.

Where liabilities are at the higher end, the de minimis exemption will not be available, so the position must be considered with particular care. If the amount is sizeable and the primary position is that Article 107 TFEU is triggered and no exemption applies, the authority can consider applying (using the usual government channels to deal with state aid) for a specific measure to permit the aid. The types of measure which have been approved so far have been sizeable, so notification should be considered in that context.

Finally, it is worth noting that where State aid is concerned, MHCLG audit of compliance with matters like State aid and procurement may become relevant in due course.

39 CIL Team



Andrew Tabachnik QC

andrew.tabachnik@39essex.com

Andrew regularly advises developers on the proper calculation of CIL in accordance with schedule 1, relief availability, reviews, and forward-planning terms of permissions. To view full CV click here.



John Pugh-Smith

john.pugh-smith@39essex.com

John's CIL expertise, both as planning counsel and as a neutral dispute resolver, includes development agreement phasing, self-build exemptions and enforcement liabilities. To view full CV click here.



Celina Colquhoun

celina.colquhoun@39essex.com

Celina specialises in all aspects of Planning and Environmental Law, including CIL, and regularly acts for and advises both developers and local authorities.

To view full CV click here.



Christiaan Zwart

christiaan.zwart@39essex.com

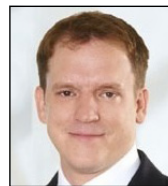
Christiaan has considerable experience in all CIL matters, uniquely specialising in development, planning and environment, and related tax law, and having acted regularly for HMRC. To view full CV click here.



Kelly Stricklin-Coutinho

ksc@39essex.com

Kelly has expertise on the interaction between CIL and state aid, and judicial review on this topic. She also advises on CIL generally. To view full CV click here.



Daniel Stedman Jones

daniel.stedmanjones@39essex.com

Dan specialises in planning and frequently advises developers and collecting authorities on CIL including all aspects of CIL liability, appeals or litigation. To view full CV click here.



Jonathan Darby

jon.darby@39essex.com

Jon has a broad experience of advising authorities and applicants across the full breadth of CIL-related issues as they arise in relation to potential liabilities. To view full CV click here.

Key Contacts

Michael Kaplan

Senior Clerk

T: +44 (0)20 7634 9076

M: +44 (0)7775 997 230

michael.kaplan@39essex.com

Elliott Hurrell

Practice Manager

T: +44 (0)20 7634 9023

M: +44 (0)7809 086 843

elliott.hurrell@39essex.com

Andrew Poyser

Deputy Senior Clerk

T: +44 (0)20 7832 1190

M: +44 (0)7921 880 669

andrew.poyser@39essex.com