COVID-19 and State aid

The measures government will provide to particular industries or businesses to bail out or help those suffering the impact of COVID-19 would ordinarily be subject to State aid law, although not all measures would fall foul of State aid law.

The European Commission has been working (at unprecedented speed) to deal with how State aid law will apply in the present circumstances to permit appropriate measures.

Application of ordinary rules

State aid law will continue to apply in the usual way, subject to special measures put in place by the European Commission. Any measures which would not normally be regarded as prohibited State aid may still be put in place. Measures which are generally applicable, for example, are permitted under Article 107 TFEU. Similarly, measures which otherwise fit within the General Block Exemption Regulations ("GBER") or other exemptions will also continue to be permissible.

Some desirable measures will be ones which are not possible to bring on a generally applicable basis, or may not fit within the GBER or other exemptions, for example bailing out a large company. Some of the GBER and other exemptions are driven by policy whose focus is not bailing out large businesses, and there will be circumstances where the GBER or other exemptions simply do not provide a suitable harbour for what is now up for consideration.

Special Measures

The Commission has taken two main actions, on different bases. First, it has approved specific applications made to it in respect of proposed aid packages, one of which was before it set up a special framework for COVID-19. Second, it has set up a temporary framework under which aid may be given in these circumstances, on "very rapid[…]" approval by the Commission. That framework has already been updated once, and a further update is anticipated in the coming days. Alongside these measures, the Commission has indicated future commitments to funding to help with COVID-19 related issues.

The first clearance, the Danish measure, was approved on the basis of Article 107(2)(b) TFEU, that there are exceptional circumstances. The Temporary Framework is made on the basis of Article 107(3)(b) concerning remedying a serious disturbance in the economy of a Member State.

The Temporary Framework recognises the impact to both demand and supply, the impact on undertakings and employees, and the particular impact on the health, tourism, culture, retail and transport sectors. It also recognises the specific issues of a severe lack of liquidity, and that SMEs are at particular risk. The measures are therefore targeted at helping banks and other financial intermediaries to maintain the flow of credit to the economy, and specifically to Member States taking measures to incentivise them.

The original version of the Commission's Temporary Framework[1], based on Article 107(3)(b) TFEU (where aid may be compatible with the internal market where it is to remedy a serious disturbance in the economy of a Member State), provided for five types of aid:

i. Direct grants, selective tax advantages and advance payments, whereby Member States can set up schemes to grant up to €800,000 to a company to address its urgent liquidity needs.
ii. State guarantees for loans taken by companies from banks
iii. Subsidies public loans to companies with favourable interest rates, with the intention of helping businesses cover immediate working capital and investment needs
iv. Safeguards for banks that channel State aid to the real economy, particularly SMEs (which is direct aid to the banks' customers, not to the banks themselves)
v. Short-term export credit insurance.

Each of those categories has specific conditions which must be met in order for the aid to qualify, some of which are sector specific (for example, with special rules as to agricultural, fisheries and aquacultural sectors).

In an update to the first version of the Temporary Framework the Commission has also now permitted public guarantees on individual loans in certain circumstances, and subsidies to public loans in certain circumstances. It has also provided for a wider range of measures intended to support businesses developing products to assist in the outbreak, as well as deferrals of tax and wage subsidies.

[1] Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C(2020) 1863 final, 19.3.2020
https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

Many clearances have already been given under the Temporary Framework, including in relation to the UK.

The Framework gives further guidance on measures which Member States may take. By way of example:

- Measures can be designed in line with the GBER, without the involvement of the Commission. These are likely to be of use to those dealing with regional state aid issues in particular, or dealing with local authorities.
- For matters which fall within the Rescue and Restructuring Guidelines, Member States can notify those schemes to the Commission, for example to meet acute liquidity needs and support undertakings facing financial difficulties due to or aggravated by the COVID-19 outbreak.
- Sectors particularly hit by the outbreak (examples identified are transport, tourism, culture, hospitality and retail) and organisers of cancelled events may be compensated, such schemes being notified and assessed under Article 107(2)(b).
- Notification of alternative approaches to the specific ones set out in the Temporary Framework are also noted as possibilities – either as aid schemes or as individual measures.

The Commission requires that Member States publish information as to each individual aid granted under the Communication within 12 months of its grant, and the submission of annual reports, a list of measures put in place and maintain detailed records.

Banks

The Temporary Framework is careful to define the aid it permits as aid granted by Member States benefiting the undertakings directly, which does not have the objective of preserving or restoring the viability, liquidity or solvency of banks. The point of doing so is that the aid therefore does not fall to be extraordinary public financial support under Directive 2014/59/EU (the BRRD) or Regulation 806/2014 (the SRM Regulation), nor is it assessed under rules applicable to the banking sector.

Measures which remain within the Temporary Framework are therefore safe from the Commission considering there is a breach of either the BRRD, the SRM Regulation or banking aid rules. Should banks need direct assistance (such as liquidity recapitalisation or impaired asset measures) that will have to be assessed in line with the BRRD.

Other Remediation

In its guidance on what should be contained in a notification application, the Commission sets out that any such application should set out confirmation that the payment of aid made to beneficiaries will be net of any amount recovered by insurance, litigation, arbitration or other source for the same damage. It further requires that if aid is paid out before any insurance, the authorities will recover the insurance amount from the beneficiary.

This is plainly designed to ensure no double dipping of remediation measures, and should be borne in mind when considering how this is to be dealt with in practice, by recipients, insurers and government.