

# The Covid-19 Emergency: State aid and procurement reimagined

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# Topics

- Aid schemes and the Temporary Framework
- State aid and the ‘social’ dimension
- Procurement and scarce resources

# Covid-19 and State Aid: the social dimension

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# Some themes

- “The health of the nation is the supreme law.”

The Prime Minister (quoting Cicero)

- “The world will not and cannot go back to the way things were. There must be a new normal.”

Tedros Adhanom, Director, WHO

# Landscape (1)

- Existing state aid rules apply until end of transition (31 December 2020 – unless extended)
- Commission (and CJEU) retains jurisdiction for 4 years re aid granted before end of transition

# Landscape (2)

- (Draft) State Aid (EU Exit) Regulations 2019
  - In the event of ‘no deal’ Brexit
  - little change to “substantive” state aid rules
  
- EU legitimacy crisis
  - premium on flexibility (over suspension of state aid scheme)
  - Member State discretion

# State aid in ‘emergencies’

- Article 107(2)(b) – ‘natural disasters or exceptional occurrences’
  - Covid-19 not a ‘natural disaster’; it is an ‘exceptional occurrence’
  - Aid to make good damage caused by exceptional circumstances deemed compatible
- Article 107(3)(b) – ‘serious disturbance in the economy of a Member State’
  - Temporary Framework (i) to support economy (ii) increase market output for certain items (eg PPE) – at market prices pre outbreak.
  - Can benefit only one company or sector (eg financial sector)
- Notification required

# Otherwise ...

- Article 107(1) TFEU (i) aid (ii) State resources (iii) distort competition (iv) effect on inter-state state.
  - Generally applicable measures fall outside
  - As does financial support provided directly to consumers – though of indirect benefit to suppliers
- Concept of SGEI in Article 106(2) TFEU – legal device to protect public services from the economic rules of the Treaty.



# ‘Aid’ – without notification

- De Minimis regimes: (i) general (EUR 200,000/3 years)  
(ii) SGEI (EUR 500,000/3 years)
  - Aid under threshold deemed not to effect trade
  - Small Business Grant Funding (£10k) will primarily be delivered under de minimis exemption.
- Existing aid schemes (eg in favour of SMEs)
- General Block Exemption Regulation
  - eg regional aid and aid to SMEs
  - But does not cover “exceptional occurrences”.
- SGEI Block Exemption

# Services of general economic interest

- Services that can be identified as of particular importance to the public
  - Where (and for so long) the market cannot deliver (2012 Communication):

“Only services that are not and cannot be provided by the market “under conditions such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State can be defined as an SGEI.”
  - Typically delivered under PSOs (eg certain infrastructure costs – broadband, transport).
  - Built on *Altmark* criteria (for existence of aid)

# SGEI instruments

- **SGEI Decision – Block Exemption**
  - NB no threshold for compensation for the provision of SGEIs by “hospitals providing medical care, including, where applicable emergency services” or to those providing medical care, including, where applicable, emergency services” or those “providing SGEIs meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups.”
  - Otherwise EUR 15m threshold.
- **SGEI Framework**
  - larger more complex cases – notification required; enhanced transparency, public procurement and non-discrimination between providers of SGEIs required.

# SGEI difficulties

- Sufficiency of PSO or need for market gap
  - eg. Klinikum Osnabrueck SA.36798
  - Delimara power project SA.45779
- Selection of the SGEI provider – need for public procurement?
- Avoidance of overcompensation – how to quantify aid, define compensation
  - Kalmar Oland airport SA.43964

# Back to basics

- Does the measure amount to “aid”:
  - “undertaking”
  - selective advantage
  - “market economy operator” principle
  - effect on inter-state trade
  
- NB the “social dimension” to the analysis

# The Lisbon Treaty

- Article 3(3) TEU
  - EU as a ‘highly competitive *social* market economy’
  - Sustainable development based on economic growth and social progress.
  - Combat ‘social exclusion and discrimination’
- Article 9 TFEU
  - High level of employment, adequate social protection, the fight against social exclusion, protection of human health

## (i) “undertaking”

- orthodoxy
  - depends on whether recipient engages in an “economic activity”
  - which depends on whether there is a market for the services
  - regardless of whether the aid recipient is profit-making or ‘in-house’

- A different approach?

**C-113/13 *Spezzino***: award of emergency ambulance services to voluntary body without procurement, despite market for those services:

“56. [...] account must be taken of the fact that the health and life of humans rank foremost among the assets or interests protected by the Treaty and it is for the Member States, which have a discretion in the matter, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved.”



**T-138/15 ‘*TenderNed*’** – whether there was an economic activity when the Netherlands introduced an e-platform (TenderNed) to implement the new Directives on public procurement.

“68. the State does not forgo the right to carry out an activity that it deems necessary to ensure that its public bodies comply with their statutory obligations by acting at a point in time when private operators – perhaps due to lack of prior action by the State – have already taken the initiative to offer services to the same end. Ensuring public authorities comply with their statutory obligations by channelling public procurement may be an economic activity for the complainants. It is not, however, an inherent economic activity, which can be commercially exploited only so long as the State fails to offer that service itself.”

# Example of PPE: the options

- Temporary Framework
  - aid to incentivise production (ie to stimulate the market to deliver); at (pre-outbreak) market prices.
- SGEI
  - where market cannot deliver (due to increased demand).
  - but should PPE be dependent on market forces?
  - PSOs may be unsuitable in emergencies
- ‘social’ notion of ‘aid’
  - where despite there being a market for PPE/ competitors, Member State may choose to make eg ‘in-house’ (at cost price).

## (ii) selectivity

- UK Aid Schemes:
  - (i) coronavirus job retention scheme
  - (ii) VAT and income tax payment deferrals
  - (iii) HMRC Time to Pay SchemeAll “non-selective”.
  
- Cf 12 month business rates holiday for all RHL businesses – Govt considers not “State aid”
  - see guidance on Expanded Retail Discount.

- Social dimension: cases underlining the importance of the objectives of the aid measure when determining whether a certain undertaking/group of undertakings is in a comparable situation with others:
  - **C-78/08 *Paint Graphos*** – the factual and legal situation of workers and producers’ cooperatives in Italy was quite different from that of ordinary capital companies “in the light of the objective pursued by the corporation tax regime”. Therefore the application of a special regime of corporate tax exemptions for these cooperatives did not amount to state aid.
  - See also **C-233/16 *ANGED v Catalonia*** – re tax on large commercial establishments to offset environmental footprint

## (iii) Market economy operator principle

- Whether the aid confers an advantage on the recipient
- A more socially oriented interpretation of the MEO principle – Case **T-565/08 Corsica Ferries** –

“82. [...] in a social market economy, a reasonable private investor would not disregard, first, its responsibility towards all the stakeholders in the company and second, the development of the social, economic and environmental context in which it continues to develop. The challenges relating to social responsibility and the entrepreneurial context are, in actual fact, capable of having a major impact on the specific decisions and strategic planning of a reasonable private investor. The long-term economic rationale of a reasonable private entrepreneur’s conduct cannot therefore be assessed without taking account of such concerns.”

- Concept of “social market economy” informing concept of “reasonable private investor”.

## (iv) effect on trade

- Commission more willing to recognise that certain measures had a purely local impact, and unlikely to attract customers or investment from other Member States. Eg sports and leisure facilities serving predominantly a local audience, cultural events, social support services to the elderly.
- Charities – concerns have been raised that the State aid limit on claims for the Retail Hospitality and Leisure Grant Fund is likely in practice to limit claims from charity retailers to approx. 30 shops. Exploring possibility of relying on lack of effect on trade.

# Conclusion

- Start from the beginning – is this ‘aid’?
- Adopt layered approach
- Look at Commission enforcement decisions re Covid-19 assistance
- Will CMA take a more lenient view?

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