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EU AND COMPETITION LAW

Coronavírus: Implications for state aid and competition

Faced with the implications of the spread of the new Coronavirus (COVID-19) for economic activity, national governments will be called on to intervene to mitigate the negative consequences of a stoppage or slowdown in that activity

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Therefore, we expect that, in the coming days, weeks and months, the number of notifications to the European Commission in the field of state aid will see a significant increase. Indeed, the Commission has already relaxed the rules currently in force by introducing a new [temporary framework](#) for state aid measures to support the economy in the current COVID-19 outbreak.

In parallel, the Portuguese Competition Authority (“PCA”) has issued a [statement](#) to the effect that it will focus on detecting any anticompetitive practices that exploit the current situation and especially on any practices that harm families and companies. This is in line with what has been done by other competition authorities, in particular the [Italian](#) authority.

1. How should companies react?

- a) **State aid:** companies should focus on closely monitoring any opportunities for financing in view of the changes being made to the legal rules on state aid, and they should also ensure that all the public support they are granted is in accordance with these rules. It is important to note that, if the European Commission decides that certain state aid is incompatible with the internal market, the companies benefiting from it will have to pay back any aid they have received, plus interest.
- b) **Possible adaptation of business strategies:** it is very important to carry out a preventive analysis of the competition and regulatory risks associated with adapting business strategies, in particular, to deal with crisis situations at a time when the effects of scarce resources can lead companies to act in breach of competition rules.

"The Commission has just announced a new state aid temporary framework to support the economy in the context of the COVID-19 outbreak."

These commercial strategies may include unilateral actions, such as setting excessive prices; restrictions of a horizontal nature, such as entering into cooperation agreements with competitors; or the imposition of certain vertical restrictions within the distribution chain, particularly with regard to the resale price of the products.

- c) **Merger control:** At the moment, there are no operational reasons to prevent the notification of transactions to the PCA. Merger cases continue to be submitted to the PCA through the [SNEOC website](#) and the PCA will continue to analyse them.

The European Commission has [issued a communication](#) on the merger notifications that must be submitted to it and this communication discourages companies from submitting notifications until further notice. However, this possibility is not excluded outright.

2. In what terms can companies benefit from state aid?

The legal rules on state aid are primarily contained in articles 107 and 108 of the Treaty on the Functioning of the European Union (“TFEU”). These rules are intended to eliminate distortions in the internal market caused by public interventions that selectively benefit certain companies (“incompatible aid”). However, in certain circumstances, it is understood that the benefits of public intervention outweigh the distortions caused and, therefore, the state measures are implemented (“compatible aid”). As a rule, and putting aside the exceptions that exist, states are under a duty to give notice to the European Commission of the state measures in question. If they do not do so, the aid will be considered illegal.

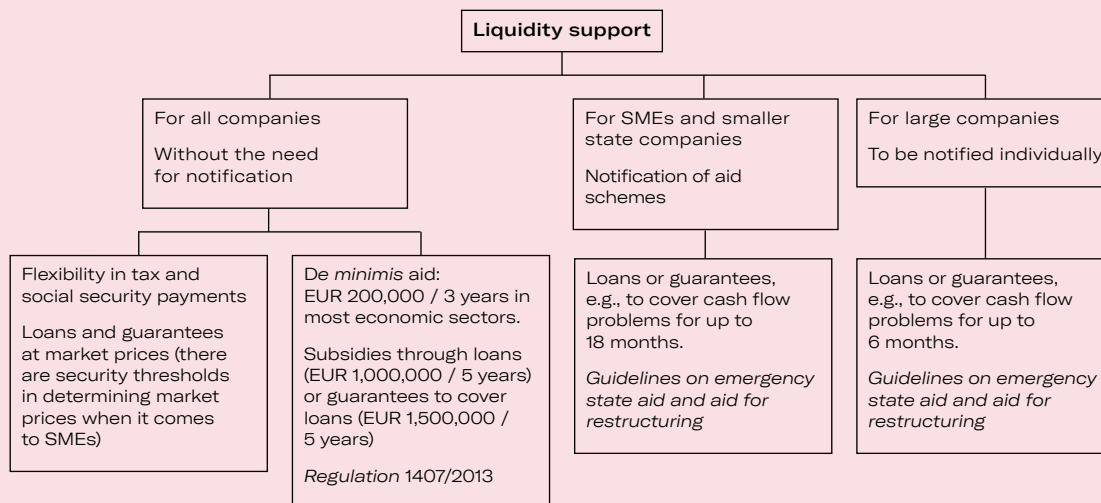
Under the legal framework currently in force, it is important to note the following:

- a) If Member States decide to adopt measures applicable to all companies, such as the [extension of deadlines](#) for to submit the corporate income tax return or to pay social security contributions, the measures are not selective because they apply all companies. Therefore, they do not amount to state aid.
- b) Under the [de minimis Regulation](#), some aid is so low in value that it is not capable of affecting the internal market and, therefore, it may be granted without notification.
- c) In parallel, the [General Block Exemption Regulation](#) identifies certain categories of aid intended, in particular, for SMEs, that are considered to be compatible with the internal market. The Member States can grant this aid without having to begin a procedure to notify the European Commission.

"Companies should focus on monitoring very closely any opportunities for financing in view of the changes being made to the legal rules on state aid, and they should also ensure that all the public support they are granted is in accordance with these rules."

- d) Under article 107(2)(b) of the TFEU, aid to make good the damage caused by natural disasters or exceptional occurrences, such as the one we are currently experiencing, is compatible with the internal market. Moreover, in the context of the current crisis, the European Commission has already authorised [aid provided by Denmark](#) of approximately EUR 12 million to compensate organisers of events with more than 1000 participants for the losses caused by their cancellation. This compatibility decision was taken only 24 hours after Denmark gave notice of it to the European Commission and the Commission justified its approval based on the losses arising from an extraordinary event.
- e) Also with regard to the restructuring of companies, the Commission has a well-established practice of holding that certain instances of [aid intended to support](#), in particular, businesses in difficulty are compatible with the internal market. In this respect, the procedure set out in the Communication on state aid in an emergency takes on particular relevance.
- f) If it proves necessary, Member States can provide aid to the banking sector under article 107(3)(b) of the TFEU.

Diagram with the mechanisms available to Member States to support the liquidity of companies



Source: [European Commission](#)

It should be noted that, as mentioned above, the Commission has just announced a new state aid [temporary framework](#) to support the economy in the context of the COVID-19 outbreak. This new framework will remain in force until 31 December 2020 and it allows Member States to provide:

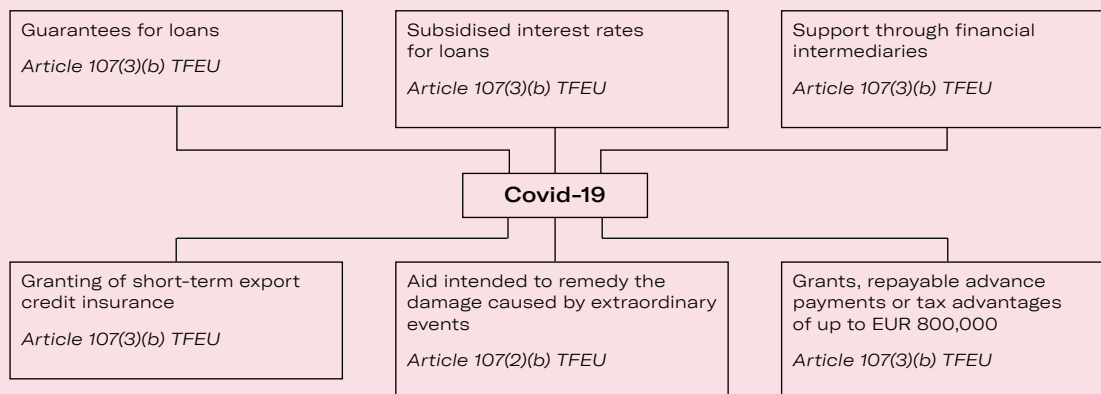
- a) Aid in the form of direct grants, selective tax advantages and repayable advance payments, up to EUR 800,000, to companies in most economic sectors to meet their urgent liquidity needs;
- b) State guarantees for loans taken out by companies from banks and the framework defines, among other possibilities, minimum guarantee premiums for this purpose;
- c) Aid to companies in the form of subsidised interest rates for loans;
- d) State guarantees for loans or aid in the form of interest rates subsidies may be granted not only directly to companies, but also through credit institutions or other financial institutions;

- e) Short-term export credit insurance, upon presentation of evidence of the unavailability of risk coverage in the private insurance market.

"The preventive analysis of competition law and regulatory risks associated with making changes to commercial strategies, in particular to deal with crisis situations, assumes particular importance."

In addition, the Commission has declared that it is prepared to approve aid intended to remedy the damage caused by extraordinary events.

**Diagram of the mechanisms available to Member States
to support the economy under the new temporary framework**



To keep Member States informed, the European Commission has created a dedicated [mailbox](#) and a [phone number](#) for any queries they have or measures they would like to discuss in these times of uncertainty.

"The European Commission has created a dedicated mailbox and a phone number for any queries."

Finally, the European Commission has already published a [notification form](#) for the state measures implemented to mitigate the effects of the Coronavirus (COVID-19), which should be used by Member States, depending on the type of measure in question. The European Commission has also undertaken to take a decision quickly on measures notified to it.

3. How should companies adapt their business strategies in accordance with the competition rules?

Any adaptation of business strategies must respect (i) the rules on competition between companies, particularly in the field of horizontal cooperation (between competitors) and vertical cooperation (for example, between undertakings operating at different levels in the distribution chain), and (ii) the rules on unilateral behaviour. In this respect, it is important to note the following:

- a) As a rule, the existence of crisis situations does not justify a company engaging in anti-competitive practices such as price-fixing agreements or sharing of markets between competitors (known as “crisis cartels”).

"Among the measures that are likely to be subject to scrutiny by the PCA and by other public authorities are excessive pricing or price speculation, unfair trading practices, and the imposition of export restrictions."

b) However, [cooperation agreements](#) between competitors may be justified in specific circumstances, provided they are essential and proportionate to deal with the current crisis and ensure security of supplies of essential products and services. However, it is necessary to take care and get the proper advice before implementing any such practices. Otherwise, they could be considered unlawful and lead to heavy penalties.

c) Like horizontal agreements, vertical agreements may also be subject to change. The high demand for certain goods can lead distributors to choose to increase price levels and their margins against the wishes of the suppliers/producers of those goods. To prevent any such increases, the suppliers/producers may, in certain circumstances, impose maximum resale prices to be applied by distributors.

d) Among the measures that are likely to be subject to scrutiny by the PCA and by other public authorities are excessive pricing or price speculation, unfair trading practices, and the imposition of export restrictions.

This note was drawn up on 20 March 2020. It is not intended to be exhaustive and it should never substitute specific legal advice. ■