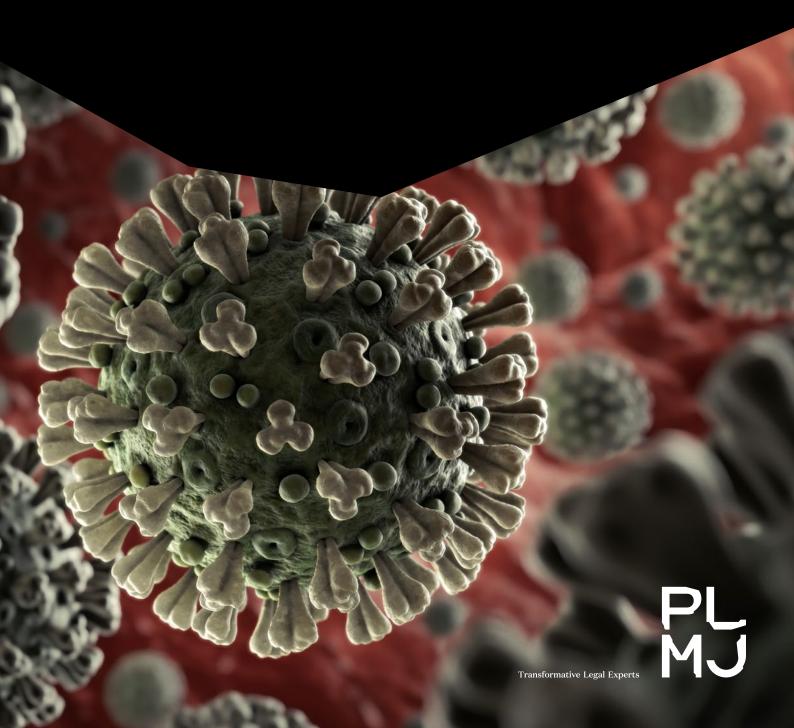
Coronavirus

Practical guide to state aid



How can undertakings access state aid and under what conditions can the state grant this aid?

Concept of state aid

- O State aid is any economic or financial support granted by the state, or from state resources, that gives an undertaking a selective advantage which may affect trade between Member States. State aid is, in principle, prohibited. Therefore, it must be notified to the European Commission in order for it to decide whether it is compatible with the internal market.
- O Public support does not constitute state aid when the state acts as a private investor in a market economy, maximising the return on risk, or when the measures adopted apply generally, in a non-selective way, to different economic agents. Examples of this include wage subsidies and suspension of corporate income tax and/or VAT payments or social security contributions.
- o In addition, there are European regulations that allow certain support to be granted, without imposing a duty to notify the European Commission. This is the case of the <u>De Minimis Regulation</u> (when the support granted does not exceed certain amounts) and of the <u>General Block Exemption Regulation</u> (an aid package aimed at SMEs considered compatible with the internal market provided the aid meets certain requirements).

The COVID-19 pandemic

- To combat the economic effect caused by the COVID-19 pandemic, the European Commission decided to relax the rules for granting state aid by **creating a Temporary Framework** ("TF19"). This will apply until the end of 2020, with some measures provided for in the framework possibly extending until July 2021. TF19 excludes from its scope of eligibility undertakings that were in difficulty as of 31 December 2019, subject to some limited exceptions.
- O If it is not possible to use the measures provided for in TF19, especially when the undertaking was in difficulty as at 31 December 2019, undertakings may benefit from public support under other aid schemes. In the context of the COVID-19 pandemic, the "compensation aid" scheme, which is aimed at remedying the damage caused by the pandemic and often takes the form of guarantees or loans, assumes particular relevance.

The following tables analyse the conditions for support that can be granted under TF19 and in the form of compensation aid.

1. Special state aid scheme under the COVID-19 temporary framework

TYPE OF AID	AID REQUIREMENT	rs/condition	ons		NOTES
SUPPORT UP TO EUR 800 000	 Provided the gross 800 000 per under payment facilities, equity capital. The aid is granted 	There are special rules for the primary sectors of agriculture, fisheries and aquaculture.			
	o The aid is granted				
	o The beneficiary und	dertaking was	not in difficulty o	n 31 December 2019.	
GUARANTEES ON LOANS TAKEN OUT BY UNDERTAKINGS	loan amount may be 18 months of the dependent of the dependent of the loan's maturi	cover up to 9 ne proportiona nd the state, of st charged to ss guarantee) ne guarantee is miums must re 1st year 25 bps* 50 bps of the loan de is paid back - to the loan de creased two increased to en which in this of the loan (dotal turnover in the	not in difficulty on some for investment of the principately and on the some forms of the principately and on the some forms of the state and on the spect with mining the spect with the spect of the annual state of the spect of the spe	t and/or treasury t and/or treasury t and/or treasury t and of the loan if ame terms by the ncipal of the loan y then to credit mum of six years. num thresholds: 4th - 6th years 100 bps 200 bps e - for example, mount should ember 2020, the lary bill or 25% of 19. Exceptionally, the equirements within e case of SMEs, e case of large er 2020 and this is wage bill or 25% of	Alternatively, Member States can notify guarantee schemes where the duration, premiums and coverage of the guarantee may be modulated for the capital of each individual underlying loan so that lower guarantee coverage can compensate for a longer period or allow for lower guarantee premiums. A fixed premium may be used over the total duration of the guarantee, provided this premium is higher than the minimum premiums for the first year indicated in the table for each type of beneficiary, adjusted for duration and guarantee coverage. In these cases, the guarantee will be allowed to exceed the maximum period of six years. This type of aid must not be cumulated with other aid granted in the form of public loans with subsidised interest rates for the same loan (see next line). If the aid is granted via financial intermediaries, it must be ensured that the benefits of the aid are passed on as far as possible to the final undertakings/beneficiaries.

AID REQUIREMENTS/CONDITIONS

NOTES

PUBLIC LOANS WITH SUBSIDISED INTEREST RATES

- o The loan agreement is signed no later than 31 December 2020.
- The beneficiary undertaking was not in difficulty on 31 December 2019.
- o The loan must relate to investment and/or treasury needs.
- o The loan agreement has a maximum maturity of six years.
- o The interest rates must respect with minimum thresholds:

Recipient	Maturity				
	1 year	2-3 years	4-6 years		
SMEs	25 bps	50 bps	100 bps		
Large undertaking	50 bps	100 bps	200 bps		

(1 year IBOR or equivalent published by the Commission plus the applicable risk margins)

- When the loan's maturity extends beyond 31 December 2020, the loan amount may not exceed twice the annual salary bill or 25% of the beneficiary undertaking's total turnover in 2019. Exceptionally, the amount of the loan may be increased, as set out above.
- If the loan's maturity does not exceed 31 December 2020 and this is justified, the limits of the loan (double the annual wage bill or 25% of the beneficiary's total turnover in 2019) may be exceeded, provided the proportionality of the aid is ensured.

Alternatively, Member States may notify loan schemes where the maturity of the loan and the level of credit risk margins may be modulated so that a fixed credit risk margin for the entire loan period can be used if it exceeds the minimum credit risk margin for the first year for each type of

beneficiary adjusted according to the maturity of the loan.

There is a prohibition on the cumulation of aid as referred to in the previous line and, similarly, the granting of aid through financial intermediaries must ensure that it is passed on as far as possible to the undertakings / final beneficiaries.

EXPORT CREDIT INSURANCE IN SHORT-TERM GUARANTEED TRANSACTIONS

- The Communication from the Commission on short-term export-credit insurance (STEC) states that marketable risks should not be covered by export-credit insurance supported by Member States
- However, TF19 considers all commercial and political risks associated with exports to the countries listed in the Annex to the STEC Communication as temporarily non-marketable until 31 December 2020. The requirements for support in the form of short-term export credit insurance apply.

The Commission has concluded that there is a shortfall in the capacity of private export credit insurers in short-term transactions in general, and that cover for marketable risks is temporarily unavailable.

DEFERRAL OF TAXES AND/OR SOCIAL SECURITY CONTRIBUTIONS

- Aid schemes should consist of temporary deferrals of taxes or social security contributions applicable to undertakings (including self-employed workers) particularly affected by the COVID-19 pandemic, for example, in specific sectors or regions or in those of a certain size.
- The aid must be granted before 31 December 2020 and the expiry date of the deferral must not be later than 31 December 2022.

Aid that has general application is not considered selective and may therefore be granted without prior authorisation from the Commission.

Member States may notify loan schemes where the maturity of the loan and the level of credit risk margins may be modulated

AID REQUIREMENTS/CONDITIONS

NOTES

WAGE SUBSIDIES FOR WORKERS TO AVOID LAY OFFS DURING THE COVID-19 PANDEMIC

- The aid is granted in the form of schemes to help undertakings in specific sectors or regions or in those of a certain size that are particularly affected by the COVID-19 pandemic.
- The wage subsidy is granted for a period not exceeding 12 months after the aid application and is intended for workers who would otherwise have been laid off as a result of the suspension or reduction in business activities due to the COVID-19 pandemic.
- The staff of the beneficiary undertaking must remain in continuous employment for the duration of the aid.
- The monthly wage subsidy may not exceed 80% of the gross monthly salary (including employers' social security contributions) of the staff in the beneficiary undertaking.
- o The aid must be granted before 31 December 2020.

This type of aid is intended to avoid lay-offs during the COVID-19 pandemic. Aid that has general application is not considered selective and may therefore be granted without prior authorisation from the Commission.

As regards the calculation of the amount of aid, the Commission may accept alternative methods of calculation of the aid intensity, provided the proportionality of the aid is maintained.

In certain circumstances, the wage subsidy may be combined with other employment support measures. It may also be combined with tax deferrals and deferrals of social security payments (see previous line).

RECAPITALISATION OF NON-FINANCIAL COMPANIES

General requirements

- o The measure must be granted by 30 June 2021 at the latest.
- Without the intervention of the State, the beneficiary would cease its activity or would face serious difficulties in maintaining its activity.
- Member States can only opt for one of these forms of aid following a written request from potential beneficiary undertakings.
- Recapitalisation measures can take two forms: equity instruments (such as the issuance of new common or preferential shares) and hybrid equity instruments (with debt and equity components, such as convertible bonds).
- Member States must ensure that the recapitalisation instruments chosen and the conditions attached to them are the most appropriate to meet the recapitalisation needs of the beneficiary, while also being the least likely to distort competition.
- The intervention must be in the "common interest of the state" the need to avoid social difficulties and market failures due to a significant loss of jobs, the exit of an innovative undertaking, the exit of a systemically important undertaking, the risk of disruption of a major service or similar situations duly justified by the Member State concerned.
- The beneficiary is unable to find financing on the markets at affordable prices.
- The beneficiary undertaking was not in difficulty on 31 December 2019.
- The amount of the COVID-19 recapitalisation may not exceed the minimum necessary to ensure the viability of the beneficiary, and it must not go beyond the restoration of its capital structure before 31 December 2019.

Remuneration

- The State should receive an adequate return on investment.
- The COVID-19 recapitalisation must be repaid when the economy stabilises. The Member State should set up a mechanism to encourage gradual redemption.
- The remuneration from the COVID-19 recapitalisation should be increased to bring it into line with market prices, so that beneficiaries and other shareholders have incentives to repay the state recapitalisation measure and to minimise the risk of distortions of competition.

The closer the State's remuneration is to market conditions, the less distortion of competition the aid may cause.

As an alternative to the remuneration methodologies mentioned above, Member States can notify individual schemes or measures where the remuneration methodology is adapted in line with the characteristics and order of preference of the capital instrument. However, this is subject to the condition that any alternative must generally lead to a similar outcome as regards the incentive's effects on the state's exit and a similar overall impact on the state's remuneration.

As a general principle, the lower the State's share in the capital and the higher the remuneration, the less safeguards are needed.

If the beneficiary of COVID-19 recapitalisation of more than EUR 250 million is an undertaking with significant market power in at least one of the relevant markets in which it operates, Member States should propose additional measures to preserve effective competition in those markets.

Large undertakings must show how the aid received supports their activities, in line with EU objectives and national obligations linked to ecological and digital transformation and, in particular, the EU objective of climate neutrality by 2050.

TYPE OF AID AID REQUIREMENTS/CONDITIONS NOTES

RECAPITALISATION OF NON-FINANCIAL COMPANIES

Limitations on governance / Avoidance of undue distortions of competition

- In order to avoid undue distortions of competition, the beneficiaries may not engage in aggressive commercial expansion financed by the state aid and they may not take excessive risks.
- The beneficiaries of COVID-19 recapitalisation measure are prohibited from advertising this for commercial purposes.
- Until at least 75% of the COVID-19 recapitalisation measure has been reimbursed, beneficiaries other than SMEs must, as a rule, be prevented from acquiring a holding of more than 10% in competing undertakings or other operators in the same line of business.
- Companies that belong to the same group must establish a clear separation of accounts to ensure that the recapitalisation measure does not benefit those other activities.
- Until COVID-19 recapitalisation measures are paid back in full, beneficiaries may not make dividend or non-compulsory coupon payments. They are also prohibited from buying back shares, except in relation to the state.
- Until at least 75% of the COVID-19 recapitalisation measure has been reimbursed, the remuneration of the management of the beneficiary companies must not exceed the fixed part of their remuneration as of 31 December 2019.

State exit strategy

- Beneficiaries other than SMEs that have received a COVID-19 recapitalisation of more than 25% of the equity capital at the time of the intervention must draw up a credible exit strategy for the Member State's investment within 12 months of the aid being granted. This requirement does not apply if the State intervention is reduced to less than 25% of the equity capital within 12 months of the aid being granted.
- Until COVID-19 recapitalisation measure have been paid back in full, their beneficiaries, other than SMEs, must, within 12 months of the granting of the aid and at 12-monthly intervals thereafter, publish information on the use made of the aid received.
- o If, six years after the COVID-19 recapitalisation, the state intervention has not been reduced to less than 15% of the beneficiary's equity capital, this must be notified to the Commission for the approval of a restructuring plan in accordance with the <u>Guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty</u>. If the beneficiary is not a listed company, or if it is an SME, the Member State may decide to notify a restructuring plan only if the state intervention has not been reduced to less than 15% of the equity seven years after the COVID-19 recapitalisation.

Companies that belong to the same group must establish a clear separation of accounts to ensure that the recapitalisation measure does not benefit those other activities.

AID REQUIREMENTS/CONDITIONS

NOTES

SUBORDINATED DEBT SUBSCRIPTION

- The measure must be granted no later than 31 December 2020.
- Without the intervention of the State, the beneficiary would cease its activity or would face serious difficulties in maintaining its activity.
- The intervention must be in the common interest of the state as set out above.
- The beneficiary is unable to find financing on the markets at affordable prices.
- Debt instruments subordinated to ordinary preferential creditors in the event of insolvency can be granted at reduced interest rates which are at least equal to the base rate and the credit risk reference margins for aid in the form of loans plus 200 basis points for large undertakings and 150 basis points for SMEs:

Recipient	Maturity				
	1 year	2-3 years	4-6 years		
SMEs	175 bps	200 bps	250 bps		
Large undertaking	250 bps	300 bps	400 bps		

(taxa IBOR a 1 ano ou equivalente, publicada pela Comissão acrescida das referidas margens de risco)

- o The debt subscription must relate to investment and/or treasury needs.
- The amount of subordinated debt subscription compared to senior debt is limited to the ratio of one third for large undertakings and one half for SMEs. Besides these ceilings, the measure must be assessed in light of the recapitalisation measures.
- o The beneficiary undertaking was not in difficulty on 31 December 2019.

This aid increases the ability of undertakings to take on preferential debt in a form equivalent to capital support. Therefore, a credit risk mark-up and a further limitation on the amount in relation to preferential debt – one third for large enterprises and one half for SMEs – also apply.

If the amount of subordinated debt exceeds the following ceilings, the instrument's compatibility with the internal market is determined under the terms applicable to the recapitalisation measures:

- two-thirds of the beneficiary's annual wage bill for large undertakings and one half of it for SMEs, and
- 8.4% of the total turnover of the beneficiary in 2019 for large undertakings and 12.5% of the total turnover of the beneficiary in 2019 for SMEs.

Large undertakings must show how the aid received supports their activities, in line with EU objectives and national obligations linked to ecological and digital transformation and, in particular, the EU objective of climate neutrality by 2050.



AID REQUIREMENTS/CONDITIONS

NOTES

RESEARCH AND DEVEL-OPMENT ACTIVITIES IN THE CONTEXT OF THE COVID-19 PANDEMIC

- The aid must take the form of direct grants, repayable advances or tax concessions.
- o The aid must be granted by 31 December 2020.
- The aid intensity for each beneficiary may cover 100% of the eligible costs of fundamental research and must not exceed 80% of the eligible costs of industrial research and experimental development. In exceptional circumstances, the aid intensity may be increased by 15 percentage points. The aid beneficiary undertakes to grant licences on a non-exclusive basis and under non-discriminatory market conditions to third parties within the EEA.
- o The beneficiary undertaking was not in difficulty on 31 December 2019.

Aid under this measure may be combined with support from other sources to cover the same eligible costs (the combined aid may not exceed 100% of the eligible costs of fundamental research and 80% of the eligible costs of industrial research and experimental development).

AID FOR
INVESTMENT
IN TESTING AND
OPTIMISA-TION
INFRASTRUCTURE
FOR MEDICAL
TESTS AND
PRODUCTS
RELEVANT
TO THE FIGHT
AGAINST THE
COVID-19
PANDEMIC

- The aid must be granted in the form of direct grants, tax benefits or repayable advances by 31 December 2020.
- The investment project must be completed within six months of the date on which the aid is granted.
- The aid intensity must not exceed 75% of the eligible costs (investment costs linked to the creation of the testing and optimisation infrastructure necessary to develop products used for the testing and optimisation of medical tests for COVID-19). In exceptional circumstances, the aid intensity may be increased by 15 percentage points. Aid under this measure must not be combined with other investment aid for the same eligible costs:
- The price charged for the services provided by the testing and optimisation infrastructure must correspond to the market price.
- The testing and optimisation infrastructure must be open to different users and access to it must be provided in a transparent and non-discriminatory manner. Preferential access may be granted on more favourable terms to undertakings that have financed at least 10% of investment costs.
- The beneficiary undertaking was not in difficulty on 31 December 2019.

This type of aid is granted to construct or modernise the testing and optimisation infrastructure needed to develop, test and optimise, up to the first industrial use preceding the large-scale production of medicines and treatments relevant to the fight against COVID-19 (including vaccines), its intermediates, active pharmaceutical ingredients and raw materials; medical devices, medical and hospital equipment (including fans, protective clothing and equipment, and diagnostic instruments), among others

TF19 sets out special rules that apply in the event of a failure to comply with the six-month period and with the rules on cumulation with guarantees to cover losses.

INVESTMENT AID FOR THE PRODUCTION OF RELEVANT PRODUCTS TO FACE THE COVID-19 PANDEMIC

- The aid must be granted in the form of direct grants, tax benefits or repayable advances.
- o The aid must be granted by 31 December 2020.
- The investment project must be completed within six months of the date on which the aid is granted.
- If the deadline is met, the aid in the form of a repayable advance is converted into a grant. Otherwise, the repayable advance is repaid in equal annual instalments within five years of the date on which the aid was granted.
- o The aid intensity does not exceed 80% of the eligible costs (all investment costs necessary for the production of the products listed in the column opposite and the costs of testing new production facilities). In exceptional circumstances, the aid intensity may be increased by 15 percentage points. Aid under this measure must not be combined with other investment aid for the same eligible costs.
- $\circ~$ The beneficiary undertaking was not in difficulty on 31 December 2019.

Products relevant to facing the COVID-19 pandemic include drugs and treatments (including vaccines), their intermediates, active pharmaceutical ingredients and raw materials, medical devices, medical and hospital equipment (including ventilators, clothing and protective equipment, and diagnostic instruments), among others.

TF19 sets out special rules that apply in the event of a failure to comply with the six-month period and with the rules on cumulation with guarantees to cover losses.

2. Aid to make good damage caused by extraordinary events

REQUIREMENTS

- Direct causal link between the aid to be granted and the damage resulting from the pandemic, assessed in relation to each beneficiary. The support may cover not only damage already incurred, but also damage that can reasonably be foreseen.
- Prohibition on overcompensation: any aid should be proportionate, that is, it must not exceed what is necessary to remedy the damage caused.

The aid to be granted can target (i) specific sectors that have been particularly affected by the pandemic (for example, transport, tourism, culture, hotels and retail), in the form of **aid schemes**, or (ii) individual undertakings, in the form of **individual aid**. Specific requirements are established for the agriculture and fisheries/aquaculture and transport sectors.

It is not necessary for the undertaking not to have been in difficulty on 31 December 2019.

PROCEDURE

Member States are under an obligation to notify the Commission in advance of any aid they intend to grant on this basis.

The Commission has made available a <u>template</u> which provides for a set of information that must be presented, in particular, in order to be able to evaluate:

- o the extent of the damage caused, ensuring
- that there is no overcompensation or compensation for difficulties unrelated to the pandemic.

For this purpose, Member States must make a number of **commitments/guarantees** such as (i) the recovery of any payment exceeding the damage, (ii) the deduction of any amount recovered through insurance, legal action or arbitration, (iii) the non-cumulation of aid granted on this basis with other aid relating to the same eligible costs and (iv) the submission of a report no later than one year after the Commission's decision.

DECISION--MAKING PRACTICE¹

A number of aid measures have been authorised by the Commission to remedy the damage caused by the pandemic. Highlights include:

- Aid to compensate event organisers, travel operators and the restaurant sector;
- Aid to partially compensate large undertakings and some SMEs through the direct provision of liquidity in the form of loans;
- Aid to partially compensate the self-employed for the turnover losses suffered

¹ Full information on decision-making practice in this context, which is updated daily, is available here.

About PLMJ

We are a law firm based in Portugal that combines a full-service with all the mastery and skill of legal craftsmanship. We have a genuine enthusiasm for overcoming the impossible that often takes us down the "road less travelled" and transforms old certainties into new disruptions. For more than 50 years, our bold and transformative approach has translated into real solutions that respect the requirements of the law and effectively defend our clients' interests.

We focus on specialisation and our lawyers have the academic and professional experience needed to be essential team-mates in the lives and businesses of our clients and partners.

We know our clients, share their risks and support their decisions by giving our opinions and proposing strategic solutions that bring them added value. This has been and will always be our greatest commitment.

About the EU and competition law team

We have the experience necessary to assist our clients in any competition law or European Union law matter, regardless of its size and complexity.

In the area of competition law, we advise our clients in proceedings relating to possible cartels, abuses of dominant position and vertical restraints, as well as in merger control and state aid cases.

We have played a role in several of the most important competition cases involving companies operating in Portugal, from sectors as diverse as financial, pharmaceutical, telecommunications and food distribution. Our experience includes dealing with cases before the Portuguese Competition Authority and the European Commission, and with cases before the courts and arbitral tribunals.

Our team is skilled in implementing compliance programmes and provides ongoing support for the commercial activities of our corporate clients to identify and prevent potential risks of violation of competition rules. This advice also focuses on legal matters relating to competition, in particular, the rules applicable to individual trade-restrictive practices, which include selling at a loss or refusal to sell.

In the area of European Union law, we have vast experience in areas such as structural funds, the common agricultural policy and the free movement of goods, persons, services and capital. We frequently represent clients before the European Commission and the courts of the European Union.

We also regularly handle proceedings before the European Court of Human Rights on behalf of individuals and businesses.

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