

European Commission publishes its emergency COVID-19 State aid rules and rapidly approves ten State aid schemes

March 2020

Authors: [Kai Struckmann](#), [Genevra Forwood](#), [Yann Utzschneider](#), [Christoph Arhold](#), [Orion Berg](#), [Irina Trichkovska](#), [Aqeel Kadri](#), [Kate Kelliher](#)

The European Commission has now adopted a Framework of temporary State aid rules enabling Member States to adopt measures to support the growing number of businesses suffering because of the COVID-19 outbreak. This is the first time since the 2008 financial crisis that the Commission has adopted special rules to allow State aid to remedy a serious disturbance to the entire EU economy under Article 107(3)(b) TFEU. The Framework complements the existing State aid rules, providing an additional avenue for the Member States to support businesses affected by COVID-19.

The Framework rules, applicable to all sectors, envisage a range of measures from direct grants, advance payments and tax advantages of up to €800,000 per company to subsidised loan guarantees and interest rates, and short-term export credit insurance. Companies are eligible for these measures only if they are not in economic difficulties or only ran into economic difficulties after 31 December 2019 because of the COVID-19 outbreak. Aid schemes providing for such measures will be approved very rapidly.¹ Moreover, the Commission indicated its readiness to assess alternative approaches of the Member States under Article 107(3)(b) TFEU, with respect to both schemes and individual measures.

The Commission also confirms in the Framework that the outbreak will constitute an “extraordinary occurrence” within the meaning of Article

¹ Indeed, schemes notified by Denmark, France, Germany, Italy and Portugal have already been approved. A continuously updated comprehensive overview of support measures adopted by European and Middle Eastern countries is available [here](#).

107(2)(b) TFEU. Therefore, the Commission may - upon notification - approve the grant of compensation to undertakings under Article 107(2)(b) in sectors that have been particularly hit by the outbreak (e.g. transport, tourism, culture, hospitality and retail) and/or organisers of cancelled events for damages directly caused by the outbreak. For this purpose, it has published its first template setting out the information needed by Member States when notifying aid schemes under Article 107(2)(b) TFEU. Even though, this template covers only aid schemes, notification of ad hoc individual State aid grants is also possible under Article 107(2)(b) TFEU. The Commission's intention is to provide guidance to the Member States in designing their State support measures and thus enable fast track approval of all COVID-19 related measures either under the Framework or other State aid rules, in particular under Article 107(2)(b) TFEU.

This is a timely opportunity for companies facing difficulties due to the outbreak to seek urgent support from their governments. That said, while immediate action is much needed to support the economy, given some companies may be better equipped to withstand temporary financial strain than others, it cannot be excluded that some of these measures may cause significant distortion of competition. The Commission and the Member States, as well as economic operators, would thus be well advised to ensure that the measures that are adopted are designed to preserve the level playing field.

On 19 March 2020 the Commission adopted a [Temporary Framework](#) (the "**Framework**") creating new possibilities for Member States to provide liquidity support to companies impacted by the COVID-19 outbreak, in addition to the normal EU State aid rules. The Framework complements the guidance provided in the Commission's [Communication](#) of 13 March 2020, which outlined the State aid measures available to Member States to support businesses affected by COVID-19 under the normal State aid rules, as discussed in our [previous](#) client alert.

1. State aid support under the Framework

The Framework sets out a series of State aid measures that the Commission will temporarily consider compatible with Article 107(3)(b) TFEU, which allows for State aid to remedy "*a serious disturbance in the economy of the Member State*". The Framework provides for five types of aid, which can be put in place up to 31 December 2020, and can be made available to companies that were not in difficulty on 31 December 2019. These are:

- **Aid schemes providing for direct grants, advance payments and tax advantages up to €800,000 per company.²**
- **Aid in the form of subsidised guarantees for both investment and working capital loans for companies facing a sudden liquidity shortage.** This measure is available for both large companies

² The threshold for the companies active in the agriculture, fisheries and aquaculture, is €120,000 per company in fisheries and aquaculture and €100,000 for the companies engaged in the primary production of agricultural products

and SMEs and could be provided for a maximum duration of 6 years, with a minimum level of guarantee premium based on the maturity of the loan, as set out in the Framework.

- **Subsidised interest rates for loans for companies' investment and working capital needs, available to both large companies and SMEs.** Again, these rates should apply for a limited period and loan amount, and with a maximum duration of six years. The subsidised rates should be at least equal to the base rate (on 1 January 2020) plus the indicated credit risk margins set out in the Framework. Subsidised interest rates cannot be provided in conjunction with State-subsidised guarantees.
- **Short-term export credit insurance.** The Framework, exceptionally, allows Member States to provide such support to normally *marketable risks* if insurance has become temporarily unavailable and the other criteria set out in the Framework are met.
- **Safeguards for banks that channel State aid to the real economy.** The framework confirms aid channelled through banks will be viewed as direct aid to the banks' customers, not to the banks themselves. The intermediary institution is required to pass on the advantages of the subsidised guarantees or interest rates to the final beneficiaries.

The Member States can nevertheless also compensate banks for *direct damage* suffered as a result of the COVID-19 outbreak under Article 107(2)(b) TFEU (see below under point 2b). Because that aid will be designed to deal with the direct effects of the outbreak, the Framework makes clear it will not be treated as “*extraordinary public financial support*” to the bank under [Directive 2014/59/EU \(“BRRD”\)](#) nor under [Regulation 806/2014 \(“SRM”\)](#)³, and therefore would not need to be assessed under the separate State aid rules applicable to the banking sector.

If, due to the COVID-19 outbreak, banks need direct support in the form of liquidity recapitalisation or impaired asset measures going beyond the compensation for direct damage, those measures will be assessed by reference to the conditions in Article 32(4)(d)(i), (ii) or (iii) of the BRRD⁴ or Article 18(4)(d) of the SRM,⁵ If the latter conditions are fulfilled, the bank receiving such direct support would not be deemed to be ‘failing’ or ‘likely-to-fail’. To the extent such measures address problems linked to the COVID-19 outbreak, they would also be deemed to fall under point 45 of the 2013 Banking Communication⁶, which sets out an exception to the requirement of burden sharing by shareholders and subordinated creditors.

Aid falling under the Framework has to be notified to the Commission, which has committed to approving them within a few days of notification. The Commission approved the first ([Danish](#)) aid scheme before the Framework was even published. Since the Framework's publication, the Commission had approved three [French](#) schemes, two [German](#) schemes, an [Italian](#) measure and four [Portuguese measures](#) – all within just three days of the Framework's adoption.

To further expedite Member States' ability to deploy State aid measures to deal with the crisis, the Commission has also set up a dedicated mailbox and a State aid hotline, which is open seven days a week, for public authorities to raise questions and ask for advice directly from the Commission on potential State aid measures to cope with the outbreak.

³ Article 3(1)(29) of the SRM.

⁴ Under Article 32 BRRD, resolution authorities shall take a resolution action in relation to a financial institution if the institution is failing or is likely to fail. This is deemed to be the case if the financial institution needs extraordinary public financial support, i.e. State aid, except when that State aid is needed in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, and the extraordinary public financial support takes any of the following forms: (i) a State guarantee to back liquidity facilities provided by central banks according to the central banks' conditions; (ii) a State guarantee of newly issued liabilities; or (iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the institution, where neither the circumstances referred to in point (a), (b) or (c) [of Article 32(4)] nor the circumstances referred to in Article 59(3) are present at the time the public support is granted. The existence of a serious disturbance in the economy has been confirmed by the Temporary Framework, so that the Member States have to demonstrate only that the conditions laid down in (i), (ii) or (iii) are met.

⁵ Article 18(4)(d) of the SRM.

⁶ Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 216, 30.7.2013, p. 1–15.

Member States will have to publish the name of the beneficiary and the amount of aid of each individual aid measure within 12 months of the date of grant.

The Framework is applicable until the end of December 2020.

2. State aid support available outside the Framework

The Framework reiterates that Member States also have a range of possibilities when adopting support measures. Member States can introduce a variety of supports that fall outside the scope of the State aid rules. Measures in this category do not require prior notification to, nor approval from, the Commission and so can be particularly suited to urgent support. Equally, Member States have a range of options that could be deemed compatible with the regular State aid rules, specifically under Article 107(2)(b) or Article 107(3)(c) TFEU.

(a) Measures which do not require prior notification to the Commission

These include the following State support measures, which are either not State aid or block exempted:

- Measures that are available to all companies, such as wage subsidies, suspension of payment of corporate and value added taxes or social contributions;
- Aid to consumers for cancelled services or tickets not reimbursed by the concerned operators;
- Measures that fall under the [General Block Exemption Regulation](#);
- National funds granted to health services or other public services to tackle COVID-19;
- The provision of loans or State guarantees at market rates;
- Support that is within the thresholds set by the [De Minimis Regulation](#). This can include aid of up to €200,000 over three years in most sectors, subsidised loans of up to €1 million, and subsidised guarantees for loans of up to €1.5 million.

(b) Measures which require prior notification to the Commission

Along with the Framework measures, Member States can also introduce other State aid measures, which would fall to be assessed either under Article 107(2)(b) or Article 107(3)(b) or (c) TFEU.

[Article 107\(2\)\(b\) TFEU](#)

The Commission recognises COVID-19 as an “exceptional occurrence” under Article 107(2)(b), which allows Member States to implement measures to help sectors particularly hit by the outbreak, such as transport, tourism, culture, hospitality, retail, and event organisers. To grant such State aid, Member States would need to demonstrate the following:

- The aid should be triggered by the damage caused by the COVID-19 outbreak and not exceed what is necessary to make good that damage. The Member State should explain the causal link between the outbreak and the damage suffered and between the damage and the aid. Member States also have to indicate the type of damage that is being remedied, such as loss of income and/or additional costs related to COVID-19.
- The Member State will also need to explain the methodology used to calculate the level of aid, and support that methodology with evidence including documents submitted by beneficiaries to the granting authority; certification of the documents by independent experts; verification by competent authorities; and precise descriptions of the damage/eligible costs of each beneficiary. Member States must prevent overcompensation by committing, inter alia, that aid exceeding the damage suffered will be recovered or reduced by any sums paid out by insurance or litigation/arbitration. Member States will also need to ensure that the eligible costs are not compensated by any other types of aid that may already be in place.

The above aid can be granted to companies that have received rescue and restructuring aid in the last 10 years as the “one time-last time” principle does not apply. This means that companies such as airlines that have received such aid in the past are not prevented from receiving support to address the impacts of COVID 19.

In order to process these notifications in an expedient manner and prevent abuses, the Commission has published a [template](#), describing the information to be provided by Member States notifying aid schemes under Article 107(2)(b) TFEU. The template contains a special annex concerning the assessment of aid to the transport sector, which suggests that the Commission will conduct a case-by-case analysis for the aid granted to this sector.

Although the template only refers to schemes, it is also possible to grant individual aid under Article 107(2)(b), and the Commission is expected to publish more templates in the coming days.

[Article 107\(3\)\(b\) TFEU](#)

The Framework explains, the conditions under which aid schemes compatible with Article 107(3)(b) be rapidly approved by the European Commission. However, nobody knows how the crisis will further develop and what other measures may be necessary in the future. The Commission has therefore indicated its readiness to assess alternative approaches by the Member States under Article 107(3)(b), with respect to both schemes and individual measures.

[Article 107\(3\)\(c\) TFEU](#)

Member States can also grant urgent and temporary assistance in the form of loan guarantees or loans to all types of companies suffering acute lack of liquidity or facing bankruptcy due to the COVID-19 outbreak, under Article 107(3)(c) and pursuant to the criteria established in the [Rescue Aid and Restructuring Guidelines](#), which include:

- Measures can cover companies’ expected operating needs for up to a 6 month period;
- Companies do not yet need to be in difficulty to obtain such support, provided that the Member States ensure that the beneficiary is required to pay the appropriate rates for the State guarantee or loan.

Generally, companies that have already received such support in the past 10 years would not be eligible for further aid to avoid economically unviable companies being kept in the market artificially (the “one time, last time” principle). However, the Commission stands ready to accept exceptions to that rule in exceptional and unforeseeable circumstances such as the COVID-19 outbreak, following an individual notification (see Annex 3 to the Commission’s communication of 13 March 2020).

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
T +44 20 7532 1000

White & Case LLP
Wetstraat 62 rue de la Loi
1040 Brussels
Belgium
T +32 2 239 26 20

White & Case LLP
John F. Kennedy-Haus
Rahel Hirsch-Straße 10
10557 Berlin
Germany
T +49 30 880911 0

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

© 2020 White & Case LLP