



# Avoiding the Pitfalls: What Companies Need to Know About EU State Aid Rules and the Commission's Temporary Framework During the Coronavirus Crisis

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## **Introduction**

The global economy has come to a standstill and governments around the world have had to intervene massively to support their domestic economies during the Coronavirus crisis. Government support to industry is only likely to increase as companies face ever-greater financial difficulties due to the continuing public health restrictions.

In the EU, government aid (State aid<sup>i</sup>) to companies is in principle forbidden as it distorts competition in the Single Market, but there are specific exceptions foreseen in the EU Treaty. The damage caused by the coronavirus pandemic clearly falls within these exceptions.<sup>ii</sup> However, any aid (or aid scheme) falling within the EU State aid rules is subject to notification and prior approval by the European Commission ('**Commission**') if the aid is not to be illegal and subject to possible recovery – i.e., clawback.

The Commission has introduced a Temporary Framework ('**TF**'), which it last amended on 3 April 2020, to cover Member State aid to locally based industries during the coronavirus crisis (see earlier Baker Botts [Alert](#)).<sup>iii</sup> To date, the Commission has approved approximately 90 aid schemes worth several hundreds of billions of euros under the TF.

Many companies will be receiving State aid in the EU for the first time or will consider applying for such aid, but will have limited experience or insight into the rules. ***Beneficiaries (or potential beneficiaries) need to familiarise themselves with certain key elements of the State aid rules. Recent court rulings confirm that it is the beneficiaries of aid and not the granting authorities that are exposed to significant risks if there are failings.*** Two important categories of government failings which can impact beneficiaries are procedural failures and failure to observe relevant conditions when implementing aid schemes.

This Alert flags up some of the basic EU State aid rules that should not be overlooked by potential beneficiaries and highlights the consequences and risks if the rules are not respected. It concludes with a short checklist of key take-aways.

### **Reliance on existing aid schemes and EU instruments**

There are many existing aid schemes that have been subject to prior approval by the Commission and which provide the means for national governments to support locally based companies.<sup>iv</sup> There are also specific EU instruments ('block exemptions' or 'safe harbours') that allow European governments to channel aid to large numbers of companies without pre-approval.

These schemes and EU instruments are mainly intended to incentivise companies to invest in innovation, training and employment, environmental protection and energy savings and to help regional development. They invariably prioritise support to small and medium-sized companies ('SMEs').

The two main EU instruments that allow aid to be channelled to companies are:

- *General Block Exemption Regulation (GBER)*<sup>v</sup>: the GBER automatically declares specific categories of aid as compatible with EU State aid rules subject to the aid meeting the conditions of the GBER. However, the eligibility and compatibility criteria are complex and often difficult to apply. Care is required to ensure compliance with the GBER.
- *de minimis Regulation*<sup>vi</sup>: subject to certain exceptions for a few sensitive sectors<sup>vii</sup>, the EU regulation allows a Member State to grant aid of up to a strict limit of €200,000 to a "single undertaking"<sup>viii</sup> over a three-year period without such grants constituting State aid.

However, the economic fallout of the coronavirus outbreak is so extensive that the Commission has introduced the TF to ensure that Member States can quickly provide unprecedented levels of liquidity to their industries. The Commission has also reminded governments and companies that many government support measures do not fall within the scope of the EU State aid rules as, for example, they apply to all sectors of the economy or concern the provision of essential public services that the market cannot provide.<sup>ix</sup>

### **Key issues for beneficiaries/potential beneficiaries**

Aid beneficiaries must take care not to inadvertently receive so-called illegal aid. This includes aid that has not been notified, aid paid out before receiving Commission approval, or aid paid out in breach of conditions under an approved scheme or in breach of transparency requirements. **As the TF allows Member States to notify aid schemes and the Commission to clear them with minimum scrutiny, the main issue for companies subsequently applying for aid under these schemes in**

***their Member States is to ensure that the national authorities have complied with all the relevant formal and substantive conditions.***

The Court of Justice in a recent ruling in *'Eesti Pagar'* has placed a considerable burden on beneficiaries.<sup>x</sup> If a national authority grants aid based on a misapplication of the conditions in the TF, the company cannot claim that it has a legitimate right to retain the aid. Moreover, a national authority is obliged to recover (clawback) any aid of its own initiative if it later discovers that the conditions for granting the aid were not met.

It should also be kept in mind that clawback of unlawful state aid can be enforced in national courts as well as by way of complaint to the Commission. Aggrieved competitors may have the option to follow both routes.

## **Checklist (we highlight first several substantive conditions and then several formal points)**

### ***1. Timeframe***

The TF applies from 19 March to 31 December 2020, although the Commission can review its application before then. The Commission will apply the rules in the TF to non-notified (i.e. unlawful aid) if the aid was granted after 1 February 2020. Aid measures granted before this date will be assessed in the light of the pre-existing State aid rules.

The aid must also be granted by 31 December 2020 and beneficiaries must have a legally enforceable right and must claim the aid by this date. In the case of aid granted in the form of a tax advantage, the aid is considered granted when the 2020 tax declaration is due.

### ***2. Beneficiaries as undertakings***

As a general rule, the TF provides that the overall aid granted should not exceed €800,000 per "undertaking". The aid may be granted in the form of direct grants, tax and payment advantages or other forms such as repayable advances, guarantees, loans and equity provided the total nominal value of such measures remains below the overall cap of €800,000 per undertaking.

This raises the question of what is an "undertaking" for the purposes of EU law?

- An undertaking is a well-established concept in EU law and the classification of a particular entity as an undertaking depends entirely on the nature of its activities and whether such activities are of an economic nature.
- Several separate legal entities may be considered to form one economic unit for the purposes of the application of EU State aid rules. That economic unit is then considered to be the relevant undertaking. The Court of Justice's case law considers the existence of a

controlling share and other functional, economic and organic links to be relevant factors in this assessment.<sup>xi</sup>

If a group of companies can be considered to be one economic unit (i.e., a single 'undertaking'), aid by a Member State to any part of the group needs to be taken into account in checking that the €800,000 aid ceiling is not exceeded. However, subsidiaries of the group can receive aid granted by other Member States as it is usually assumed that the relevant ceiling applies per Member State.

### **3. Carve out for undertakings in difficulty**

Aid may not be granted under the TF to undertakings that were already in difficulty within the meaning of the GBER on 31 December 2019. An undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term. This will be the case if at least one of the five criteria listed in Article 2(18) of the GBER is satisfied (e.g., an undertaking is subject to collective insolvency proceedings).

An undertaking in difficulty may still be entitled to *de minimis* aid.

### **4. Calculating the amount of aid – challenges**

#### **a. Higher limits for SMEs**

The TF is more generous towards support schemes for SMEs. Under EU rules, SMEs are generally companies which employ fewer than 250 persons and which have an annual turnover not exceeding €50 million and/or an annual balance sheet total not exceeding €43 million.<sup>xii</sup>

However, the EU SME definition is extremely complex and, for example, the rules require the data of 'linked enterprises' (i.e., companies that form a group through direct or indirect control) to be taken into account in the analysis.

#### **b. Cumulation of aid**

Aid covered by the TF can be 'cumulated' or added together and it can also be cumulated with aid falling within the GBER and *de minimis* regulation provided the conditions for cumulation under those EU instruments are respected. However, the TF does not provide blanket approval. There are specific exceptions to cumulation for aid in the form of loan guarantees and aid in the form of subsidised interest rate loans as well as aid for specific activities to fight the coronavirus outbreak (e.g., aid for coronavirus related R&D).<sup>xiii</sup> If there

are errors in applying the rules on cumulation, it is the beneficiary that bears the risk, including potentially repayment of incompatible aid.

c. Eligible costs

The amount of aid that a company can receive depends on a number of factors, including the type and level of costs that can be taken into account in the assessment. This will vary depending on the category of aid and the relevant EU aid instrument. For example, eligible costs relating to the production of coronavirus relevant products include all investment costs necessary for their production.

The TF provides that aid concerning the same eligible costs cannot be cumulated when granting aid for specific activities to fight the coronavirus outbreak, i.e., there should be no double counting.

## **5. Formalities: Transparency requirements - monitoring and reporting**

There are clear EU rules on transparency in respect of aid granted by Member States. Subject to certain limited exceptions, a Member State must publish relevant information on each individual aid granted pursuant to the TF on a comprehensive State aid website or the Commission's specific state aid transparency search page within 12 months from the moment of the grant of the aid.

The Court of Justice has taken a strict approach to the requirements of transparency: a failure to comply with the relevant EU rules would render aid measures that were otherwise fully compliant with the conditions for exemption to be illegal. This means that the aid can be recovered (clawed back) with compound interest from the beneficiary even if it is the national authority that is at fault for failing to comply with the transparency requirements.

### **Key take-aways**

Beneficiaries (or potential beneficiaries) need to be wary and cannot afford to simply rely on the national authorities to ensure that they are eligible to receive aid and that the specific conditions in the TF have been met.

Companies should in particular carefully check the following points:

- ✓ Certain government support measures are not State aid (e.g. aid measures that are available to all companies across sectors such as wage subsidies and the suspension of corporate tax and VAT payments). If potential beneficiaries are in any doubt, they should encourage their Member State to notify the measure to the Commission for legal certainty.

- ✓ Check the company's status as a beneficiary:
  - Have all relevant group companies been taken into account in the application?
  - Is the company making a claim as an SME and does it meet the conditions to fall within the SME definition?
- ✓ Check that for the aid claim, no member of the group was already in financial difficulty on 31 December 2019, i.e. prior to the coronavirus outbreak.
- ✓ Check that the cumulation rules have been complied with and that the eligible costs have been correctly calculated.
- ✓ Ensure that EU and, as appropriate, national transparency requirements have been complied with.
- ✓ Ensure that any aid covered by the TF is granted by 31 December 2020 - this means beneficiaries must have a legally enforceable right and must claim the aid by this date at the latest.

If you have any questions please contact [Leigh Hancher](#) and [David Gabathuler](#).

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<sup>i</sup> The EU State rules prohibit governments from giving aid to companies that distorts (or has the potential to distort) competition within the Single Market. State aid is not limited to subsidies, but may encompass any form of support that mitigates costs normally included in the budget of a company, including for example tax exemptions. Moreover, it captures not only measures adopted at national level, but also regional or even local measures.

<sup>ii</sup> The exceptions include aid to compensate companies for the damage caused by natural disasters or exceptional occurrences (Article 107(2)(b) TFEU) and aid to remedy a serious disturbance in the economy of a Member State (Article 107(3)(b) TFEU). The EU Treaty also allows aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest (Article 107(3)(c) TFEU).

<sup>iii</sup> Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, adopted on 19 March 2020 and amended on 3 April 2020. A consolidated version of the text is available at: [Consolidated Communication](#).

<sup>iv</sup> Governments can extend the scope of these aid schemes, especially to benefit from the additional flexibility provided by the TF. Nonetheless, they must notify and seek approval from the Commission prior to granting aid under the extension of the scheme.

<sup>v</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. Available at: [GBER \(Consolidated\)](#).

<sup>vi</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis aid*. Available at: [de minimis Regulation](#).

<sup>vii</sup> There are lower thresholds for the road freight sector and the agriculture and fisheries sectors.

<sup>viii</sup> See Article 2(2) of the *de minimis* Regulation.

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<sup>ix</sup> For example, government aid measures that apply to all companies across sectors are not State aid, e.g., wage subsidies and the suspension of corporate tax and VAT payments or social security contributions. Aid that is granted to provide public services in the general interest (e.g. aid to hospitals or nursing homes) can also fall outside the EU State aid rules provided certain specific conditions are met. Moreover, the EU rules do not forbid EU governments from investing in private companies, but the terms must be acceptable to a private investor if such interventions are not to be considered State aid.

<sup>x</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar v Ettevõtluse Arendamise Sihtasutus*, C-349/17.

<sup>xi</sup> See Commission Notice on the notion of State aid (2016), para. 11 referring to judgment of the Court of Justice of 16 December 2010, *AceaElectrabel Produzione SpA v Commission*, C-480/09 P, paras 47 to 55.

<sup>xii</sup> See Commission User guide to the SME definition (2015), available at: [User guide](#).

<sup>xiii</sup> Aid in the form of loan guarantees and aid in the form of subsidised interest rate loans cannot be cumulated if the aid is granted for the same underlying loan and the loan amount per undertaking exceeds certain thresholds. For aid concerning specific activities to fight the coronavirus outbreak, the aid cannot be cumulated if it concerns the same eligible costs.