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## *State Aid to Counter the Effects of COVID-19 Under the EU Rules*

March 20, 2020

The COVID-19 crisis is first and foremost a *health issue*, as governments around the world seek to limit and treat its effects and save lives. However, it is also an *immediate economic and social issue*, as companies and individuals strive to deal with its effects on their livelihoods—from airlines with no flights and passengers to small businesses which have to close for lack of cashflow and increased costs or due to governmental social distancing measures.

As a result, parallel to quarantine and travel restrictions, EU Member States are announcing State subsidy packages of huge scope daily. In the European Union, such subsidies (termed ‘aid’) are generally regulated in order to prevent unfair distortions of competition and trade within the EU’s Internal Market. To deal with this, on 13 March 2020 the European Commission (the ‘EC’) issued a “*Communication*” recalling the various options for Member States that are within the rules.<sup>1</sup> On 19 March 2020, it adopted a further, specific “*Temporary Framework*” for support measures to help with the effects of COVID-19, after consultation with the 27 EU Member States.<sup>2</sup>

This Alert aims to offer a high-level overview of key EU State aid issues relating to the COVID-19 outbreak, based on these measures.

WilmerHale has formed a [Coronavirus \(COVID-19\) Task Force](#) to lead the legal and strategic counselling of clients around the world in response to the outbreak. The task force consists of

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<sup>1</sup> Communication from the EC, 13 March 2020 “*Coordinated economic response to the COVID-19 Outbreak*”, available at: [https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf), (the ‘Communication’).

<sup>2</sup> Communication from the EC, 19 March 2020, “*Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*”, available at: [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/sa\\_covid19\\_temporary-framework.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf). (the ‘Temporary Framework’)

WilmerHale lawyers in multiple key disciplines. The [Crisis Management and Strategic Response Group](#) is also involved in helping clients respond to these challenges.

WilmerHale's European Antitrust and Competition team is closely following these issues. The lawyers listed below would be happy to answer any follow-up questions that readers may have.

## **EC action on State aid to address COVID-19**

The EC plans to use all the instruments at its disposal to mitigate the consequences of the outbreak, while Member States use their national budgets to minimize the fiscal effects of the COVID-19 pandemic. Member State subsidy plans may include support schemes *for specific industry sectors or types of companies* (e.g., small and medium-sized enterprises ('SMEs'), but also packages to support *individual companies* (e.g., airlines)).<sup>3</sup>

### **A. Instruments Available for EU Member States under the EU State Aid Rules**

As a general rule, aid granted by an EU Member State may need to be notified to the EC and suspended until the EC's approval. Under EU State aid law, aid by an EU Member State which affects trade in the EU and distorts competition by favoring some companies is *incompatible* with the EU Internal Market.<sup>4</sup> EU State aid law is designed to ensure that EU Member State measures are effective in helping companies affected by the Coronavirus outbreak, while preventing action which fragments the EU Internal Market.

These are the tools that are available to Member States to design support measures in line with existing EU State aid rules.

#### **1. Covering Damage Suffered due to the Outbreak**

**COVID-19 Outbreak as an Exceptional Occurrence.** A State aid to remedy the damage caused *by natural disasters or exceptional occurrences* is deemed compatible with the EU Internal Market.<sup>5</sup>

In a swift application of this rule in the context of the COVID-19 outbreak, on 12 March 2020 the EC approved a *EUR 12 million Danish aid scheme* to compensate organizers for the damage arising from the cancellations or rescheduling of public events due to the outbreak.<sup>6</sup> Under this approved scheme, Denmark will compensate organizers of events (i) with more

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<sup>3</sup> EC Press Release, 13 March 2020, "*COVID-19: Commission sets out European coordinated response to counter the economic impact of the Coronavirus*".

<sup>4</sup> Art. 107(1) Treaty on the Functioning of the European Union (the 'TFEU').

<sup>5</sup> Art. 107(2)(b) TFEU.

<sup>6</sup> EC Press Release, 12 March 2020, "*Commission approves €12 million Danish scheme to compensate damages caused by cancellations of large public events due to COVID-19 outbreak*".

than 1,000 participants, or (ii) targeted at designated risk groups, such as the elderly or vulnerable people.

**EC's Assessment.** According to the press release, the EC considered the COVID-19 outbreak as an exceptional occurrence under the EU State aid rules. The EC also concluded that the Danish scheme was proportionate, directly linked to the pandemic, and addressed the economic damage caused by the virus in Denmark, without unduly distorting competition in the EU Internal Market.

**EC's Readiness for Similar Actions.** The EC approved the Danish scheme *within 24 hours* from its notification. The EC stressed that it was ready to work with Member States to ensure that economic measures to deal with the outbreak can be put in place as effectively as possible. The EC also noted that Member States may design similar schemes to compensate damage suffered by companies *in sectors such as aviation, retail, tourism and hospitality* due to the outbreak, without the need for entities having their viability or liquidity at risk.<sup>7</sup>

## 2. Aid to Companies Facing Financial Difficulties Due to the Outbreak

**Aid to Meet Liquidity Needs Arising from the Outbreak.** Member States may grant aid to companies *facing bankruptcy* due to the COVID-19 outbreak, subject to the EC's approval under the EU State aid rules.<sup>8</sup> As the EC considers the COVID-19 outbreak an "exceptional and unforeseen circumstance", *companies that are not facing bankruptcy, but are in acute liquidity need due to the outbreak* can also receive support.<sup>9</sup> The rescue aid can be in the form of *loan guarantees or loans*.

**Exceptions to the "One Time, Last Time" Principle Possible.** Generally, companies that have received such aid in the past 10 years would not be eligible for further aid, in order to avoid keeping economically unviable companies in the market artificially.<sup>10</sup> However, considering the severity of the circumstances, the EC has *announced its readiness to accept exceptions to that rule, following an individual notification*.

**Temporary Restructuring Support, Adaptation of Current Schemes.** As an alternative to rescue/restructuring aid, Member States may also cover *acute liquidity needs of SMEs and smaller State-owned companies, through temporary restructuring support for a maximum duration of 18 months*.<sup>11</sup> France, Germany, Ireland and some other EU Member States have such support schemes in place. The national authorities may repurpose already approved

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<sup>7</sup> The Communication, p. 6.

<sup>8</sup> Article 107(3)(c) TFEU. *Also see* the EC's Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (the 'Guidelines').

<sup>9</sup> The Communication, p. 9; and Annex 3, p. 6.

<sup>10</sup> Section 3.6.1 of the Guidelines.

<sup>11</sup> The Guidelines, para. 13.

schemes and use them for the COVID-19 outbreak, or directly increase the budget approved for the scheme up to 20% without further involvement of the EC.

## **B. A Dedicated Framework to Counter the Outbreak Across the EU**

The EC has noted that the situation is escalating very quickly and that Member States may need soon to implement State Aid programs on a much larger scale to stabilize the economy. Taking into account the scope of the outbreak and the severe public health measures taken by Member States, the EC considers that State aid is justified “*to remedy a serious disturbance in the economy of a Member State*” caused by the COVID-19 outbreak.<sup>12</sup>

**Temporary Framework.** On 19 March 2020, the EC adopted a *Temporary Framework on State aid* (the ‘Framework’) which lays down certain measures which will enable EU Member States to ensure that sufficient liquidity remains in the market to maintain the continuity of economic activity during and after the COVID-19 outbreak.<sup>13</sup> It is noteworthy that the European Commission has put the Framework in place *within days*, following consultation with the EU Member States.<sup>14</sup>

This Framework is a legal instrument, applicable for a limited period of time, defining support measures that the EU Member States can use to remedy the serious disturbance across the European economy in connection with the pandemic, consistent with the EU rules.

*Aid measures contemplated by EU Member States will have to be notified to the Commission. The Commission plans to quickly approve the notified measures according to the principles set forth in the Framework.*<sup>15</sup> The Framework will be in effect until the end of December 2020, with a possibility of extension.<sup>16</sup>

**Measures in the Framework.** The Framework provides for *five forms of aid*, each of which is subject to more specific conditions:

1. **Direct grants, selective tax advantages and advance payments.** Member States will be able to set up schemes to grant *up to EUR 800,000* to a company to address its *urgent liquidity needs*.<sup>17</sup> This limit is set at *EUR 120,000* for a company in the fishery and aquaculture sector, *EUR 100,000* for the primary production of agriculture products.<sup>18</sup>

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<sup>12</sup> Article 107(3)(b) TFEU and the Framework, para. 18.

<sup>13</sup> The Framework, para. 9.

<sup>14</sup> EC Statement dated 17 March 2020, “*Statement by Executive Vice-President Margrethe Vestager on a draft proposal for a State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak*”.

<sup>15</sup> The Framework, paras. 16 and 19.

<sup>16</sup> The Framework, para. 39.

<sup>17</sup> The Framework, paras. 21 and 22(a).

<sup>18</sup> The Framework, para. 23(a).

2. **State guarantees for bank loans.** Member States can grant *State guarantees for loans taken out by companies* for a limited period and loan amount to ensure banks keep providing loans to customers.<sup>19</sup>
3. **Subsidized public loans to companies.** Member States can enable *public loans to companies with subsidized interest rates* for a limited period and loan amount.<sup>20</sup> These loans can cover immediate working capital and investment needs. The subsidized loan amount can be determined on the basis of the company's annual wage bill, turnover, or liquidity needs.<sup>21</sup>
4. **Aid channeled through banks to businesses.** Member States may grant State guarantees or subsidized public loans to companies through banks' existing lending capacities, *using banks as a channel for support to businesses, particularly SMEs*.<sup>22</sup> The Framework emphasizes the ways in which banks may pass on the advantages to the beneficiaries (e.g., higher volumes of financing, riskier portfolios, lower collateral requirements).<sup>23</sup> Member States may also compensate banks, like other companies, for the damage resulting directly from the COVID-19 outbreak, as described above.<sup>24</sup>
5. **Short-term export credit insurance.** As a rule, marketable risks cannot be covered by export credit insurance with the support of EU Member States.<sup>25</sup> The Framework introduces guidance on how to demonstrate the unavailability of the private insurance market for export credits in certain countries, because of the COVID-19 outbreak.<sup>26</sup> In that case, EU Member States can provide short-term export credit insurance.

**Monitoring and Reporting.** The Framework also requires EU Member States to publish individual aid granted under the Framework and submit annual reports to the EC.<sup>27</sup> By 31 December 2020 EU Member States must provide the EC with a list of measures put in place on the basis of the Framework and maintain detailed records showing that the necessary conditions have been observed.<sup>28</sup> The EC may also request additional information regarding the aid granted, to verify whether the conditions laid down in the EC's decision approving the aid measure have been met.<sup>29</sup>

### C. Other Exemptions from State Aid Rules

**De Minimis Aid.** An aid granted to a single company or corporate group ('undertaking' in EU terminology) that does not exceed a certain fixed amount (*de minimis* aid) is exempted from the

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<sup>19</sup> The Framework, para. 24.

<sup>20</sup> The Framework, para. 26.

<sup>21</sup> The Framework, para. 27(d).

<sup>22</sup> The Framework, para. 28.

<sup>23</sup> The Framework, para. 31.

<sup>24</sup> The Framework, para. 6.

<sup>25</sup> Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance.

<sup>26</sup> The Framework, para. 33.

<sup>27</sup> The Framework, paras. 34 and 35.

<sup>28</sup> The Framework, para. 37.

<sup>29</sup> The Framework, para. 38.

requirement of notification to the EC.<sup>30</sup> Accordingly, over a three year period, a Member State may grant a company a grant of *up to EUR 200,000*. This limit is set at *EUR 100,000* for a single company in the road freight transport sector, *EUR 30,000* for the fishery and aquaculture sector<sup>31</sup> and *EUR 25,000* for the agriculture sector.<sup>32</sup>

**Aid under the EU's General Block Exemption Regulation.** Member States may immediately grant aid under the General Block Exemption Regulation without the requirement to obtain the EC's approval.<sup>33</sup> Accordingly, subject to certain conditions, certain categories of aid, such as *regional aid, aid to SMEs in the form of investment aid, operating aid, and SMEs' access to finance* are exempted from a notification to the EC.

**Measures Applicable to All Companies, Support for All Consumers.** Member States can also take immediate, non-selective measures applicable to (i) all companies in the form of *wage subsidies and suspension of payments of taxes or social contributions*, or (ii) consumers in the form of *direct financial support for the damage* that they might have suffered.<sup>34</sup> These measures are not considered aid and therefore escape State aid discipline altogether.

#### **D. Next Steps**

As the EC is providing this welcome guidance on the ways in which EU Member States can grant aid to businesses under the State aid rules, some Member States have already announced economic packages for citizens and businesses. For example, France and Spain are granting EUR 300 billion and EUR 100 billion of loan guaranties to businesses in order to incentivize banks to continue extending credit.<sup>35</sup> Germany, through the state development bank, is planning to provide up to EUR 500 billion in loans.<sup>36</sup>

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<sup>30</sup> 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

<sup>31</sup> Art. 3 of Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector.

<sup>32</sup> Art. 3 of Commission Regulation (EU) No 1408/2013 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 in the agriculture sector.

<sup>33</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.

<sup>34</sup> Communication, p. 9.

<sup>35</sup> “*France, Spain and UK unleash rescue packages to help companies*”, Financial Times, Victor Mallet and Daniel Dombey, 17 March 2020, available at: <https://www.ft.com/content/7eb398ac-6839-11ea-800d-da70cff6e4d3>.

<sup>36</sup> “*Germany pledges unlimited cash for virus-hit businesses*”, Financial Times, Naomi Rovnick, 13 March 2020, available at: <https://www.ft.com/content/c1f3507c-f59c-3068-905e-f1ae4938dfe0>.

Several sectors have also voiced the need for massive rescue plans. Most significantly, the aviation sector estimates that it would need EUR 150-200 billion worldwide to recover from the effects of the outbreak and continue business.<sup>37</sup>

We should expect therefore that, in addition to the measures described in this Alert, there may be use of the general EU guidelines on rescue and restructuring aid, referred to above.

Nationalizations, which may be lawful if concluded at market value,<sup>38</sup> also cannot be excluded. For example, Italy is reported to be considering taking control of Alitalia<sup>39</sup> while France is reported to have expressed readiness to nationalize large French companies if required, which could include Air France-KLM, subject to consultation with the Netherlands.<sup>40</sup>

With thanks to Su Şimşek and Alessia Varieschi for their assistance.

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<sup>37</sup> “*Coronavirus-stricken airlines call for state aid to avert ruin*”, Reuters, Sarah Young and Laurence Frost, 17 March 2020, available at: [https://www.reuters.com/article/us-health-coronavirus-airlines/coronavirus-stricken-airlines-call-for-state-aid-to-avert-ruin-idUSKBN21433Y?feedType=mktg&feedName=businessNews&WT.mc\\_id=Partner-Google](https://www.reuters.com/article/us-health-coronavirus-airlines/coronavirus-stricken-airlines-call-for-state-aid-to-avert-ruin-idUSKBN21433Y?feedType=mktg&feedName=businessNews&WT.mc_id=Partner-Google).

<sup>38</sup> See Answer given by Ms Vestager on behalf of the EC, 13 May 2015, available at: [https://www.europarl.europa.eu/doceo/document/E-8-2015-003938-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-8-2015-003938-ASW_EN.html).

<sup>39</sup> “*Italy to bail out Alitalia, as COVID-19 scares off buyers*”, Euractiv, 16 March 2020, available at: <https://www.euractiv.com/section/aviation/news/italy-to-bail-out-alitalia-as-covid-19-scares-off-buyers/>.

<sup>40</sup> “*Le Maire : La France est prête à nationaliser des entreprises si nécessaire*”, Le Figaro with Reuters, 18 March 2020, available at: <https://www.lefigaro.fr/flash-actu/le-maire-la-france-est-prete-a-nationaliser-des-entreprises-si-necessaires-20200318>.

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