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European Commission Delays Merger Notifications Until Further Notice, Develops Emergency State Aid Response to COVID-19 Outbreak

Introduction

As the COVID-19 pandemic spreads rapidly around the world, and countries take unprecedented measures to contain the spread of the disease, businesses are increasingly struggling with the economic impact of this crisis. While airlines, tour operators and event businesses have been among the first to be affected, many industry sectors are starting to feel the impact of the far-reaching social distancing measures being implemented.

Member states across the European Union (EU) are considering government support measures to help companies affected by the crisis maintain much-needed liquidity to keep operating. Many of these measures will be “state aid” under the EU rules and must be vetted by the European Commission (EC) before their implementation, to limit any harm to the EU single market. This may be the case not only for subsidies but also for tax advantages, reductions in social security contributions, capital injections, loans, guarantees, etc.

On March 13, 2020, EC President Ursula von der Leyen and EC Executive Vice President and Competition Commissioner Margrethe Vestager announced that the EC stands ready to “use the full flexibility of the state aid rules” to help member state governments mitigate the consequences of the pandemic. A Danish state aid package was the first to be approved on March 12, 2020. Many others are expected to follow, placing the EC’s Directorate General for Competition (DG COMP) once again at the forefront of the EC’s economic crisis management, a decade after it took the lead in policing member states’ bank bail-outs during the financial crisis.

On March 12, 2020, DG COMP announced that “companies are encouraged to delay merger notifications originally planned until further notice, where possible.” The statement refers to the difficulties its services are likely to face in collecting information from third parties, such as customers, competitors and suppliers, in the coming weeks. It also highlights that EC services may face limitations in terms of access to information and databases and in terms of information exchanges following DG COMP’s remote working measures as of March 16, 2020. The statement only relates to transactions in pre-notification. The EC remains bound to strict timelines in cases where the formal clock has started.

Key Points

- Companies seeking public support in EU member states should ensure that any aid is given in compliance with the EU state aid rules, to avoid recovery risk at a later stage.
- COVID-19 state aid can take the form of support schemes (*e.g.*, sectoral support for the events industry, or cross-sectoral support for small and mid-size enterprises (SMEs)) or state aid packages for individual companies (*e.g.*, for airlines struck by quickly evaporating traffic). Also, liquidity support to financial institutions may be considered as the crisis develops.
- The EC has pledged to "deal with new state aid very fast" and has dedicated extensive resources and a 7/7 hotline to help governments meet immediate needs for support.
- While current measures are evaluated on an ad hoc basis using existing frameworks, the EC is working on a temporary framework specifically for COVID-19 state aid.
- This also applies to the U.K., which remains bound by the EU state aid rules until the end of 2020.
- Meanwhile, transactions subject to review under the EU Merger Regulation may face delays, as the EC is encouraging companies to delay notifications until further notice.

First COVID-19 State Aid Approval

On March 12, 2020, the EC approved a €12 million Danish scheme to compensate organizers for the damage suffered due to the cancellation of large events with more than 1,000 participants or targeted at designated risk groups, such as the elderly or vulnerable people, irrespective of the number of participants, which had to be cancelled or postponed. The EC assessed the measure under Article 107(2)(b) of the Treaty on the Functioning of the European Union (TFEU), which enables the EC to approve state aid measures granted by member states to compensate for the damages directly caused by exceptional occurrences. The EC considers that the COVID-19 outbreak qualifies as an exceptional occurrence, as it is an extraordinary, unforeseeable event having a significant economic impact. It concluded that the Danish aid scheme will compensate damages that are directly linked to the COVID-19 outbreak. It also found that the measure is proportionate as the foreseen compensation does not exceed what is necessary to make good the damage. The EC's approval was granted within 24 hours of receiving the notification from Denmark.

Many More Cases Expected

The EC's case load is expected to increase in the coming days as many member state governments are putting in place wide-ranging COVID-19 state aid plans for businesses. These plans may include support schemes for specific industry sectors or types of companies (*e.g.*, SMEs), but also packages to support individual companies (*e.g.*, airlines). The EC has announced it will use the full flexibility offered by the existing state aid legal framework to help the member states mitigate the effects of COVID-19. In particular:

- **COVID-19 will be recognized as an exceptional occurrence under Article 107(2)(b) TFEU**. Certain sectors or individual companies, *e.g.*, airlines and other transport providers, tourism companies, hotels, restaurants, events organizers, etc. are hit especially hard by the current crisis. Following the Danish precedent, support schemes or individual aid packages may be approved at record speed provided that they will compensate for damages that are directly linked to the COVID-19 outbreak and are proportionate (i.e., limited to what is necessary to make good the damage, thus limiting any distortions of competition). Absent further guidance, upcoming cases will shed light on how these criteria will be applied in practice.
- **Emergency support also may be granted in accordance with the EC's 2014 Rescue and Restructuring State Aid Guidelines, based on Article 107(3)(c) TFEU**. In its March 13, 2020, announcement, the EC recalls that several member states already have rescue and restructuring aid schemes in place specifically for SMEs. There is a clear template for such schemes. For example, in February 2019, the EC approved a budget increase for Ireland's existing scheme to prepare for the potential effects of Brexit. The EC stands ready to swiftly approve similar measures. The EC's Rescue and Restructuring Guidelines could also serve as a basis for more bespoke aid measures that may exceptionally not be covered by Article 107(2)(b).
- **Last, banks in need of support could rely on the EC's 2013 Banking Communication.** European banks have become much more resilient more than a decade afte rthe financial crisis. Nevertheless, if banks do run into liquid-ity issues as the COVID-19 situation evolves, the EC has a well-established framework and extensive experience in place to evaluate financial sector state aid

Not All Support Measures Are State Aid

While we expect that large parts of member states' support packages will require EC prior approval, some measures can be implemented without the need for a (new) notification:

- **The state aid rules only cover aid to "undertakings."** Financial support given to regional and local public health services is not covered. Also, measures providing support directly to individuals (*e.g.*, a fund to reimburse people for tickets to cancelled events) would not require the EC's prior review under the state aid rules.

- **Generally applicable measures are not state aid**. Member states may decide to offer generally applicable aid (*e.g.*, deferred corporate tax payments) without the need for prior approval. As long as the measure does not involve a selective advantage to specific companies vis-à-vis others in comparable situations, there is no state aid.
- **Government loans and guarantees are not state aid provided they occur at market rates**. A case-by-case assessment is warranted to determine if state aid is involved.
- **Certain measures have been "block exempted" by the EC and may be implemented without requiring prior approval**. The most notable example in the current context relates to *de minimis* aid, allowing €200,000 in aid over a three-year period to be granted to a corporate group without the need for prior EC approval.
- **Previously approved state aid measures may be used in response to COVID-19**. For example, companies could benefit from aid under existing rescue and restructuring aid schemes for SMEs in several member states without the need for prior EC approval. Only if the conditions of such existing schemes would need to be altered, or the budget increased, would a new notification to the EC be required.

Dedicated State Aid Guidelines Forthcoming

The EC realizes that the situation is changing quickly, and governments may soon need to implement state aid programs at a much larger scale to stabilize the economy. The state aid rules allow for such wide-ranging support measures, based on Article 107(3)(b) TFEU, "to remedy a serious disturbance in the economy of a Member State." In its March 13, 2020, announcement, the EC confirmed that it regards this to apply in the case of Italy, and that the situation in other member states is going in the same direction. Therefore, the EC is preparing dedicated COVID-19 state aid guidelines, much as it did in 2008 and the years thereafter to cope with the financial crisis, to further streamline member states' approaches. It remains to be seen if, and when, these new dedicated guidelines will enter into force.

Next Steps

The EC has only just started applying the state aid rules to COVID-19 measures, and the legal framework will no doubt evolve going forward. Meanwhile, companies seeking to benefit from COVID-19 support in the EU should carefully assess compliance with the state aid rules, to ensure that aid can be granted swiftly and without the risk of recovery.

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