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COVID-19 AFFECTED STATE AID PROVISION IN THE EU

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ABSTRACT

The EU State Aid regulation is based on the premise that the market and the entities within it must operate independently without additional unnecessary intervention by the state. In other words, state intervention must be kept to a minimum. Unjustified aid to one or another entity may distort the situation in the market and lead to a number of undesirable consequences, including market advantage acquired by the aided entity. The willingness of the state and its institutions to help those who face difficulties may be understandable, but not always justified. However, the prohibition on a state and its institutions to grant aid is not unconditional and, in some cases, may cause serious undesired consequences. The coronavirus disease (COVID-19), which hit EU member states in the first half of 2020, led to a re-thinking of the rules in force and a broadening of the scope for state aid exemptions. However, there are a number of questions about the nature of the EU State Aid regulation and its correlation with COVID-19 outbreak-conditioned decisions. The article analyses the state aid granting practices across the EU (including the UK) related to COVID-19. It covers approximately two-year period—from the start of the pandemic in Europe to March 2022.

KEYWORDS

EU competition law, state aid, coronavirus disease (COVID-19), pandemic, exemptions, distortion, impact

INTRODUCTION

Articles 107–109 of the Treaty on the Functioning of the European Union ('TFEU')¹ establish general state aid rules. The main provision states that any form of state aid aimed at supporting certain undertakings or the production of certain goods distorts or has the potential to distort competition and trade. These rules for state aid provision are common for all EU member states, and when they cause a broader impact, the TFEU is applicable. The EU's internal market is protected from action by any Member State that could give an artificial advantage to their national undertakings. Advantage in the market should be gained through the normal practice of undertakings. The practice of granting unjustified advantage to undertakings through support is incompatible with the policy of the EU Member States and the EU itself. The TFEU also provides conditional exceptions from the general rule.

The European Commission and the EU Member States are entrusted with the supervision and review of the granting and legality of state aid. The granting of certain sorts of aid may be justified by the Council in the case of exceptional circumstances. State aid, by its nature, is an exemptional option that is applicable when other less distortive measures cannot be applied.² It is important not to forget that state aid in ordinary and not ordinary (exceptional) situations differs: "In not ordinary situations state aid can be seen as a response to a system failure resulting from a severe economic shock, either hitting one sector or several sectors"³.

In principle, the exemptions related to the granting of state aid are applied in strict compliance with the rules and with an assessment of compliance with the requirements laid down. However, in case of an emergency or not ordinary situation, the rules can be changed for a while. In such cases, there is a kind of overestimation of the values protected by the law. That happened in 2020, when the COVID-19 outbreak hit the EU. In the case of the EU, the so-called 'unexpected' COVID-19 crisis was not really so unpredictable: despite the alarming signals from China, the first serious measures and actions in the EU started just after the pandemic crossed the borders of its Member States, when people and governments were pushed into corner.⁴

¹ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326.

² Paulina Kubera, "The State Aid Instruments in Response to the COVID-19 Crisis," *The Journal of Organizational Management Studies* (February 2021) // DOI: 10.5171/2021.930488.

³ Massimo Motta and Martin Peitz, "State Aid Policies in Response to the COVID-19 Shock: Observations and Guiding Principles," *Intereconomics* Vol. 55, No. 4 (2020) // DOI: 10.1007/s10272-020-0902-4.

⁴ Milan Brglez, Boštjan Udovič, and Amalija Maček, "COVID-19 and the European Parliament (Policies): A year of perilous ad-hoc solutions," *Journal of Comparative Politics* Vol. 14, No. 2 (July 2021); Andrius Puksas, "The Influence of Covid-19 Pandemic on the Choice of Co-Production of Public Services," *Contemporary Research on Organization Management and Administration* Vol. 9, No. 1 (February 2021) // DOI: 10.33605/croma-012021-001.

The outbreak of COVID-19 has had a direct or indirect impact on a number of values protected by the law, as well as on social, economic, and other processes,⁵ and it is no coincidence that both individual and larger entities have focused on managing the situation. It is clear that the restrictions imposed by COVID-19 have affected not only the weakest and previous entrants in the market but also businesses that have been relatively stable and comfortable. "Every single policy area already in crisis was affected, including eurozone and migration policy, and many of those with seemingly settled policies and politics were also disrupted, such as in competition policy and health policy".⁶ Such a global negative effect of the COVID-19 outbreak requires quick responses from policymakers.

The COVID-19 outbreak and the reaction to it naturally raised a number of questions:

1. Will the EU Member States with different economic capacities, through state aid mechanisms, create even greater gaps between individual Member States in the internal market?
2. Is the European Commission in a position to ensure proper control and monitoring of state aid mechanisms?
3. How to ensure that some undertakings after receiving aid in the long term will not run to re-apply for state aid or go bankrupt?
4. Will support not be given to undertakings that have survived the crisis before the start of COVID-19?
5. How to ensure that applied measures will not distort competition and trade in the internal market?

Taking into account the scale of the pandemic, the above questions are only a small part of the issues that inevitably arise with the need to respond as quickly as possible and the different starting positions of not only undertakings but also of the Member States.

The COVID-19 outbreak fostered not only a chaotic or reasonable response to the situation but also stimulated research activities and the search for proper solutions balancing state aid provision and values protected by competition law.⁷ Despite the number of articles emerging on separate related issues (especially

⁵ Delia Ferri, "The Role of EU State Aid Law as a 'Risk Management Tool' in the COVID-19 Crisis," *European Journal of Risk Regulation* Vol. 12, No. 1 (July 2020) // DOI:10.1017/err.2020.71.

⁶ Vivien A. Schmidt, "Theorizing institutional change and governance in European responses to the COVID-19 pandemic," *Journal of European Integration* Vol. 42, No. 8 (December 2020) // DOI: 10.1080/07036337.2020.1853121.

⁷ Massimo Motta and Martin Peitz, *supra* note 3; Kai P. Purnhagen, Anniek De Ruijter, Mark L. Flear, Tamara K. Hervej, and Alexia Hetwig, "More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak," *European Journal of Risk Regulation* Vol. 11, No. 2 (April 2020) // DOI:10.1017/err.2020.35; Delia Ferri, *supra* note 5; Paulina Kubera, *supra* note 2; Irene Agnolucci, "Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures," *Journal of European Competition Law & Practice* Vol. 13, No. 1 (August 2021) // DOI: 10.1093/jeclap/lpab060.

analysing the reaction of the European Commission and its legislative process) and the publication of Bouchagiar⁸ on EU state aid rules in the time of the pandemic, there is still a gap in systematic research.

The aim of this article is to assess legal measures providing state aid, taken in order to control the COVID-19 outbreak, as well as to reveal the measures granted by the EU Member States.

Towards this goal, several tasks have been formulated: to disclose the nature of state aid exemptions; to reveal the changes in the EU state and the UK aid legislation; and to analyse state aid granting practices related to COVID-19 across the EU.

In the light of the COVID-19 outbreak and the shock to economies, state support (state aid) and additional attention to the measures are necessary in seeking to avoid long-run consequences for undertakings, workers, and their human capital.⁹

All EU Member States responded swiftly to the challenges posed by the COVID-19 outbreak, as failure or delay in responding would be disastrous in many ways. The first and most important priority of the response related to the protection of lives. Equally important was the protection of health systems from overheating. At the same time, it was important not to forget about the economic and social issues.

Several methods were used in the research: *document analysis* was used to analyse the EU Member States' national, EU, and UK legislation. The *comparison method* was used in the analysis of the situation of individual countries. The *summarisation method* was used to formulate summaries and conclusions in the article. *The statistical method* disclosed what state aid was granted to businesses.

This article is a part of a larger study. An analysis of the practices of individual EU Member States and a comparative study of measures applied will be provided in other articles.

1. THE NATURE OF STATE AID EXEMPTIONS

The authorisation of the state to grant aid to one or another entity is an exceptional measure that must be justified not only by the desire to keep such entities in the market but also by compliance with a number of other criteria. In principle, the EU State Aid regulation is selective in its nature: in one form or another, support is

⁸ Antonios Bouchagiar, "State aid in the context of the COVID-19 outbreak, including the Temporary Framework 2020," *Robert Schuman Centre for Advanced Studies Florence School of Regulation, EUI Working Papers RSC 2021/03* (2021).

⁹ Massimo Motta and Martin Peitz, *supra* note 3.

provided to chosen entities which, for one or another reason, are important to protect or save. The dilemma of choosing which undertakings deserve to be aided arises.¹⁰

The application of state aid rules requires not only compliance with the rules, but also the clarity of the granting of the aid itself. "The problem with state aid is less that it represents an a priori exemption to the norm of competition, but that there is too much of it and its effects are not made explicit."¹¹

State aid cannot be based solely on a short-term assessment of the situation; it must also consider the long-term impact of the aid. It is completely inappropriate to support an undertaking without forecasting and expecting it to remain viable after the granting of state aid.¹² Nor should it be forgotten that aid is based on the principle that if the state aid was granted once, it should not be granted again. Repeated aid partly shows that the financial injections do not help the undertaking to achieve stability in its activity in the market. From another side, financial injections disclose which undertakings are important to the state. However, the situation caused by COVID-19 is extraordinary, causing a risk of negative impact for both weaker market players and for undertakings that felt relatively stable before the start of the pandemic. Before granting state aid, it is important to check whether companies that have already received aid do not only become a burden on the countries that support them on a regular basis but also do not distort competition and trade in the internal market.

The coronavirus disease (COVID-19) broadly justifies the use of state aid measures to support businesses affected by the pandemic, but the critical situation in the markets must not be used as a pretext to apply state aid where there is a desire to strengthen a competitive advantage by creating an infringement of EU competition law. The context of COVID-19 should not be a reason to rescue entities that, despite the pandemic, were relatively weak in the market and for which COVID-19 did not necessitate the adaptation of state aid schemes.

One of the main problems arises from the capacity of every single EU Member State to support undertakings. Economically stronger Member States have more opportunity to have a softening effect on the crisis, and, in the long-run, provide a competitive advantage to supported undertakings. Practice shows that doubts are not without reason: "The analysis carried out on Commission decisions shows a disproportionate distribution of aid, as Germany and France represent 66 per cent of

¹⁰ Jesse Groenewegen, Sjoerd Hardeman, and Erik Stam, "Does COVID-19 state aid reach the right firms? COVID-19 state aid, turnover expectations, uncertainty and management practices," *Journal of Business Venturing Insights* Vol. 16 (2021) // DOI: 10.1016/j.jbvi.2021.e00262.

¹¹ William Davies, "When Is a Market Not a Market?: 'Exemption', 'Externality' and 'Exception' in the Case of European State Aid Rules," *Theory, Culture & Society* Vol. 30, No. 2 (February 2013) // DOI: 10.1177/0263276412456567.

¹² Jesse Groenewegen, Sjoerd Hardeman and Erik Stam, *supra* note 10.

total aid, thus outreaching all other Member States plus the UK by far. It appears that the increasing disparities are linked to States' GDPs and their fiscal capacities which thus produce unfair advantages for some companies vis-à-vis the competitors"¹³.

The principle of proportionality must also not be forgotten when applying state aid measures to undertakings. State aid should be proportional to the intended aims.¹⁴ It is important to be sure that the state would benefit from a share of future gains proportionate to the amount of aid.¹⁵ However, the need to apply this principle is reinforced not only by the logic of the decisions taken but also by the fact that the funds available for support are limited. Given that the pandemic has hit a number of sectors, there is inevitably a need to choose what to support full-scale, what to support less, and what not to support.

Allowing Member States to provide aid for national economic undertakings does not eliminate the risk that the granting of such aid may create restrictions on trade and competition in the internal market.

Thus, the support has the following potential threats:

1. An undertaking gains a competitive advantage.
2. National support will create restrictions on trade and competition in the internal market.
3. Not all countries have the same financial capacity to provide support to those in difficulty.
4. The entity's actual situation before and after COVID-19 may be underestimated.
5. Other threats.

Legislation allows the provision of support in the case of economic damage caused by natural disasters or exceptional occurrences. There is a possibility of applying measures in order to compensate undertakings for the damage they have suffered. However, there should be a connection between damage and measures aimed to support such an undertaking. "There must be a direct link between the damage caused by the exceptional occurrence and the State aid and as precise an assessment as possible must be made of the damage suffered."¹⁶

It is important that any exceptional measures aim to maintain the integrity of the EU internal market and ensure equal conditions for undertakings. It is clear that

¹³ Irene Agnolucci, *supra* note 7.

¹⁴ Massimo Motta and Martin Peitz, *supra* note 3.

¹⁵ Nicole Robins, Laura Puglisi, and Ling Yang, "State Aid Tools to Tackle the Impact of COVID-19: What Is the Role of Economic and Financial Analysis?" *European State Aid Law Quarterly (ESTAL)* Vol. 19, No. 2 (2020).

¹⁶ *Judgment of the General Court of 9 June 2021 – Ryanair v Commission (Condor; Covid-19)*, Case T-665/20.

Member States will not be able to support all those who need that, but support mechanisms must do their utmost to ensure that the basic principles are not violated.

It should be noted that current measures to revive and sustain economies are not a novelty; similar measures have been used successfully in the past at the EU level. A recent example of this is the attempt to overcome the 2008 global economic crisis. Thus, a European Economic Recovery Plan was adopted in 2008¹⁷, and a number of important legal acts were subsequently adopted, including the State Aid Temporary Framework measures to support access to finance in the current financial and economic crisis, etc.¹⁸

The European Commission has an obligation to assess all provided information related to state aid and to predict possible threats. The Commission "is required...to conduct a diligent and impartial examination of the aid measures at issue, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose."¹⁹ Additional risks also arise when state aid is granted or is expected to be granted to several interrelated undertakings under separate measures; for instance, in 2020, Koninklijke Luchtvaart Maatschappij NV (KLM) from Netherlands, which is a member of the Air France-KLM group, while Air France separately asked for aid.²⁰ Such support can be beneficial for the members of the group but can also contribute to the distortion of the situation in the market.

As a reaction to the pandemic, the OECD Directorate for Financial and Enterprise Affairs, in its leaflet 'COVID-19: Competition policy actions for governments and competition authorities',²¹ provided some recommendations to Governments and national competition authorities. Alongside the recognition of the obvious fact that COVID-19 has caused considerable damage to the economies of the EU and EU Member States, the abovementioned subjects are called to apply state aid measures following competition principles. In essence, this is a reminder to decision-making bodies and institutions to ensure that competition rules are followed and that, despite the unconventional situation, fair competition must be ensured.

¹⁷ *Communication from the Commission to the European Council. European Economic Recovery Plan*, COM(2008) 800 final.

¹⁸ *Communication from the Commission. Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis*, 2009; 2011.

¹⁹ *Ryanair DAC v European Commission of 19 May 2021 – Ryanair DAC v European Commission*, Case T-643/20.

²⁰ *Ibid.*

²¹ OECD Directorate for Financial and Enterprise Affairs, "COVID-19: Competition policy actions for governments and competition authorities" // <https://www.oecd.org/competition/COVID-19-competition-policy-actions-for-governments-and-competition-authorities.pdf>

2. CHANGES IN EU STATE AID LEGISLATION

The first and most significant reaction to the COVID-19 situation from the European Commission was the 13 March 2020 Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank, and the Eurogroup on Coordinated economic response to the COVID-19 Outbreak.²² Section 5 of this Communication was dedicated purely to the state aid issue. From the outset, it was envisaged that the main response to the COVID-19 pandemic would be possible only from Member States' national funds. Measures should have been targeted at helping citizens and businesses, with a special focus on small and medium-sized enterprises.

Important facilitations were taken by the Commission, such as the simplification of procedures and shortening of deadlines. This was done in order to address the challenges facing Member States more quickly. Taking into account the actual situation (the first half of 2020) in Italy, the Commission allowed easier use of measures under Article 107(3)(c) of the TFEU if the situation of any EU Member State was similar.

Other measures were broadly in line with existing state aid rules:

1. Possibility to decide to take measures for all companies (such as wage subsidies and suspension of payments of corporate and value added taxes or social contributions). As they fall outside the scope of state aid control, it is possible to apply them immediately without the involvement of the Commission.

2. Possibility to decide to grant financial support directly to consumers (for cancelled services or tickets that are not reimbursed by the operators concerned). As they fall outside the scope of state aid control, it is possible to apply them immediately without the involvement of the Commission.

3. After Commission approval, to apply Article 107(3)(c) of the TFEU measures (to meet acute liquidity needs and support companies facing bankruptcy due to the COVID-19 outbreak).

4. After the Commission's approval, to apply Article 107(2)(b) of the TFEU seeking to compensate companies for the damage suffered in exceptional circumstances, such as those caused by the COVID-19 outbreak (hardly affected sectors and compensations due to cancelled events).

5. Without the involvement of the Commission, to immediately apply other additional measures (under the de minimis Regulation; the General Block Exemption Regulation).

²² *Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup on Coordinated economic response to the COVID-19 Outbreak*, COM(2020) 112 final.

Annex 3 of the Communication is dedicated to state aid issues and provides some important guidelines for future actions, such as:

1. Eligibility to be aided for undertakings which are not yet in financial difficulties but may be at risk.
2. Avoidance to aid in the last 10 years already-aided undertakings. However, in exceptional circumstances, it is possible to apply an exception to this rule.
3. Possibility of creating separate support schemes for small and medium-sized state-owned enterprises.

The exceptional situation resulting from the scale of the pandemic has not only called for simplification of procedures but also for the non-application of important principles in certain cases: "The Commission has proposed disapplication of the normal 'one time, last time' principle, and it will permit national measures ensuring access to liquidity and finance, preserving employment, and, crucially, facilitating COVID-19-relevant research and development, supporting the construction and upgrading of testing facilities of COVID-19—relevant products and expanding production capacity for products needed to respond to the outbreak"²³.

Article 107(2)(b) of the TFEU allows state aid to make good the damage caused by natural disasters or exceptional occurrences. COVID-19 is considered to be such an exceptional circumstance because:

1. it was hard or impossible to foresee it;
2. the economic impact is significant;
3. it differs from the normal, ordinary state.

In principle, there is a wide range of measures available to Member States, some of which can be applied directly and some of which require the Commission's 'blessing'. It should be noted that Member States are not prevented from channelling financial flows to protect non-viable and potentially unsustainable undertakings.

Another important step aimed to regulate the state aid on the EU level was taken by adopting the State Aid Temporary Framework on 19 March 2020 (Temporary Framework).²⁴ The Temporary Framework provides rules for state aid until 31 December 2020. According to this legal act, "EU State aid rules enable Member States to take swift and effective action to support citizens and undertakings, in particular SMEs, facing economic difficulties due to the COVID-19 outbreak"²⁵. The Temporary Framework emphasises that the COVID-19 shock poses a serious threat to public health and is affecting the economy in a number of ways: "There is a supply shock

²³ Kai P. Purnhagen, Anniek De Ruijter, Mark L. Flear, Tamara K. Hervey, and Alexia Hetwig, *supra* note 7.

²⁴ *Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, 2020/C 91 I/01.

²⁵ *Ibid.*

resulting from the disruption of supply chains, there is a demand shock caused by lower consumer demand and there is the negative effect of uncertainty on investment plans and the impact of liquidity constraints for undertakings”.

COVID-19 created a circumstance where the risk appeared not only for businesses on the verge of bankruptcy but also for successful businesses. Such a situation could lead to a number of unwanted results in the long run. The various management measures targeted at COVID-19 have a direct impact on citizens, society, and businesses, so certain exceptions to the measures normally applied are justified.

The exceptional nature of the COVID-19 outbreak is related to the fact that for undertakings, damages could not have been foreseen (by undertakings), and those unplanned damages could radically change the situation.

As the COVID-19 outbreak has affected all EU Member States, the challenge posed to the Community’s economic capacity has made it necessary to address the issue on an EU-wide basis. In the face of the threat of a recession in the EU economy, Member States have been allowed to address important issues effectively with assistance from their national budgets. One of the reasons is the limited EU budget.

The Temporary Framework provided rules to apply in the case of the following measures: direct grants, repayable advances, or tax advantages; aid in the form of guarantees on loans; aid in the form of subsidised interest rates for loans; aid in the form of guarantees and loans channelled through credit institutions or other financial institutions; and short-term export credit insurance.

Article 107(3)(b) of the TFEU is applicable if a Member State has to deal with a distortion that affects the economy of that Member State or that has a negative impact on a large part of the economy (it is not enough to affect one region of that Member State). Measures can also be taken in case of a liquidity shortage.

The European Commission also provides for certain control and monitoring mechanisms, such as the obligation for a Member State to make information measures public and the submission of annual reports. The measures included in the list of temporary schemes shall also be provided to the Commission.

Up to the end of 2021, the Temporary Framework was amended six times (four amendments in 2020; two, in 2021)²⁶; the last one was made on 18 November 2021.

²⁶ *Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 2020/C 112 I/01; Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 2020/C 164/03; Communication from the Commission Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 2020/C 218/03; Communication from the Commission 4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the 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, 2020/C 340 I/01; Communication from the Commission Fifth Amendment to the*

The application of the Temporary Framework currently has been prolonged until 30 June 2022.

An assessment of the rules that came into force after the COVID-19 outbreak shows that certain safeguards have been put in place to prevent the misuse of state aid measures, leaving the European Commission not only to approve measures but also to examine aid measures granted by Member States. At the same time, the Temporary Framework has allowed Member States to react more quickly and enabled the European Commission to take decisions more quickly. "The temporary framework sets limits on state aid, establishes the temporary nature of those instruments and does not lose sight of the aid effectiveness considerations."²⁷

In general, the EU state aid policy and the measures softened by the Temporary Framework should be seen as positive tools for managing the global crisis. "EU State aid law has been an important tool in the Commission's arsenal that is capable of reducing the economic risk associated with the pandemic, with a view to ensuring the survival of the internal market."²⁸

3. CHANGES IN STATE AID LEGISLATION: UK CASE

In the light of the results of the June 2016 referendum on the UK's withdrawal from the EU and the actual withdrawal on 31 January 2020, the situation in the UK should receive special attention. According to the European Union (Withdrawal) Act 2018,²⁹ EU State aid rules continue to apply in the UK until 31 December 2020.

On 6 April 2020, the UK umbrella scheme to support businesses affected by the COVID-19 outbreak was approved by the European Commission³⁰. The provided measures, which were open to all sectors, were aimed "at remedying the liquidity shortage faced by undertakings and ensuring that disruptions caused by the COVID-19 outbreak do not undermine their viability"³¹. The following aid instruments were included: direct grants, tax and payment advantages, or other forms, such as repayable advances, guarantees, loans, and equity; guarantees on loans; subsidised interest rates on loans; guarantees channelled through credit institutions or other

Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the 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, 2021/C 34/06; Communication from the Commission Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the 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, 2021/C 473/01.

²⁷ Paulina Kubera, *supra* note 2.

²⁸ Delia Ferri, *supra* note 5.

²⁹ *European Union (Withdrawal) Act (2018)*.

³⁰ *State Aid SA.56841(2020/N) – United Kingdom – COVID-19 Temporary Framework for UK authorities*, European Commission, C(2020) 2230 final.

³¹ *Ibid.*

financial institutions; direct grants, repayable advances or tax advantages for COVID-19 relevant research and development; investment aid for testing and upscaling infrastructures; and investment for the production of COVID-19 relevant products. It was expected that aid not exceeding approximately EUR 56 billion could be granted until 31 December 2020. Small and medium-sized enterprises and large companies that had not faced financial difficulties by 31 December 2019, were eligible for aid.

On 23 April 2020, the European Commission approved an amendment³² replacing a flat fee structure and changing the pricing of guarantees on loans. On 31 July 2020, the European Commission approved a second amendment³³, which, in principle, gave more opportunities to small and medium-sized enterprises by abolishing the requirement by 31 December 2019, to have no financial difficulties. On 8 December 2020, the European Commission approved the following amendments:

1. An increase in the total budget from approximately EUR 56 billion to EUR 90 billion.
2. Prolongation of applicability of the scheme until 30 June 2021, permissible under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as amended ('the Temporary Framework').
3. The provision permissible of subsidised interest rates for subordinated loans under Section 3.3 of the Temporary Framework as amended by the second amendment of 08 May 2020, to provide for subsidised interest rates for subordinated loans.
4. The inclusion of support for uncovered fixed costs as set out in Section 3.12 of the Temporary Framework as amended by the fourth amendment of 13 October 2020.³⁴

4. PRACTICES

As COVID-19 caused a number of adverse events (closure of businesses or restrictions on their normal activities, transition to teleworking, downtime, etc.) across the European Union, Member States could expect an EU-wide review of

³² *State Aid SA.57078 (2020/N) – United Kingdom – Amendment to the aid scheme SA.56841 (2020/N) – United Kingdom – COVID-19 Temporary Framework for UK authorities*, European Commission, C(2020) 2682 final.

³³ *State Aid SA.58078 (2020/N) – United Kingdom COVID-19: Modification – 1. Guarantees under the Coronavirus Business Interruption Loan Scheme (CBILS) under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2. Coronavirus Business Interruption Loan Scheme Grant (CBILS grant) under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 3. COVID-19 Temporary Framework for UK authorities 4. COVID-19 Temporary Framework for Gibraltar Authorities*, European Commission, C(2020) 5446 final.

³⁴ *State Aid SA.58823 (2020/N) – United Kingdom COVID-19: Amendments to SA.56841 (2020/N) – United Kingdom – COVID-19 Temporary Framework for UK authorities*, European Commission, C(2020) 8933 final.

existing state aid rules at the outset of the pandemic. The analysis of Member States' practices is relevant in a number of aspects:

1. The economic and financial capacity of each of them is different.
2. Member States have their own interests and priority areas for providing support.
3. COVID-19 gives the possibility to revive some undertakings more easily.

However, despite the simplification of state aid procedures, all economies have faced a global phenomenon, with almost all areas affected by the pandemic (impact on health systems, employment issues, etc.). In such circumstances, it is not appropriate to aid only a few specific areas that would be supported in the absence of a pandemic.

There is no doubt that the analysis of aided areas in different Member States will disclose which areas have been given priority. The European Commission periodically provides data about the measures adopted under Articles 107(2)b, 107(3)b, and 107(3)c of the TFEU and the Temporary Framework. On 11 March 2022, the publication 'Coronavirus Outbreak – List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework'³⁵ was updated. The data reflect that, since the spring of 2020, state aid measures were used to support sectors that were important for every single EU Member State. Also, it reflects different activity and, in some cases, different priorities of individual states.

Notwithstanding the exceptional circumstances, state aid instruments, as in non-pandemic situations, must be applied strictly in accordance with established rules. Some research on state aid allocations was completed; for instance, empirical research on the effectiveness of state aid during COVID-19 in the Netherlands showed that support was mainly provided for the undertakings that needed it in the short-term because of poor turnover prospects.³⁶ In Poland, the provision of state aid (called the 'Anti-Crisis Shield') allowed control of the number of deregistered businesses.³⁷

COVID-19 reshaped the number of applications for state aid and the scale of state aid provided. For example, according to the data provided by the Competition Council of the Republic of Lithuania³⁸, in 2020, state aid in Lithuania was granted for around EUR 1.3 billion. That is almost 59% more than in 2019. The largest amount

³⁵ *Coronavirus Outbreak – List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework*, European Commission, 11 March 2022.

³⁶ Jesse Groenewegen, Sjoerd Hardeman and Erik Stam, *supra* note 10.

³⁷ Agnieszka Łopatka and Karol Fedorowicz, "Evaluation of the effectiveness of state aid offered to enterprises during the COVID-19 pandemic," *Procedia Computer Science* Vol. 192 (2021) // DOI: 10.1016/j.procs.2021.09.261.

³⁸ Competition Council of the Republic of Lithuania, "Full National State Aid in Lithuania in 2020 (Statistics)" // https://kt.gov.lt/uploads/documents/files/VP_ataskaita_statistika_2020.pdf.

(EUR 457 mln.) was allocated to the business sectors affected by the COVID-19 pandemic, as well as to environmental protection and energy saving (EUR 305 mln.), culture (EUR 243 mln.), and research (EUR 55 mln.) sectors; agriculture and fisheries received EUR 65 mln. (almost four times more than in 2019); however, regional aid fell from EUR 110 mln. in 2019 to EUR 76 mln.

The analysis of both the state aid measures granted and of the aid recipients allows agreement with Agnolucci's³⁹ observation that the classical policy objectives of state aid measures, such as environmental protection, regional aid, and R&D and innovation, have been set aside in order to aid undertakings in difficulty.

CONCLUSIONS

The situation caused by the COVID-19 pandemic fostered a review of the EU's state aid rules and their implementation in the light of changes. The European Commission adopted a Temporary Framework, which underwent six amendments by the end of 2021.

On the one hand, the comprehensive measures envisaged to combat COVID-19 enable EU Member States to target aid in a timely manner where it is needed most (or intentionally wanted to transfer). On the other hand, the European Commission has not put in place a reliable control mechanism to ensure that aid will not be provided to undertakings:

1. which also experienced difficulties during the non-COVID-19 period.
2. were aided before (there is exceptional possibility to repeat state aid).
3. the aiding of which does not guarantee their long-term viability.

Despite the intention to avoid supporting undertakings that were in difficulty before the start of the pandemic, the possibility of using state aid measures was left to national entities. For instance, the requirement not to have had financial difficulties until 31 December 2019, was abolished for UK small and medium-sized enterprises, together with the second amendment to the Temporary Framework. From a social point of view, such a decision could be welcomed, but from a competition law perspective, it raises a number of additional questions.

Despite the fact that the European Commission has set up mechanisms for Member States to assist their undertakings in difficulty, the fact that not all EU Member States are equally able to provide such assistance creates additional risks that the gap will widen further. In this context, certain undertakings may not receive any state aid at all or receive much less than a comparable market player in another EU Member State.

³⁹ Irene Agnolucci, *supra* note 7.

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