Covid-19 Special Alerts | 04 May 2020

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1. AMENDMENTS TO THE COVID-19 TEMPORARY FRAMEWORK: THE EUROPEAN COMMISSION EXPANDS THE SCOPE OF STATE AID TO TACKLE THE OUTBREAK

On 19 March 2020, the European Commission (“*Commission*”) adopted the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (“*Temporary Framework*”). On 4 April 2020, it published a first amendment to the Temporary Framework, which significantly broadens its scope of application. The amended Temporary Framework covers five additional categories of State aid: (i) support for coronavirus-related research and development (R&D); (ii) support for the construction and upscaling of testing facilities; (iii) support for the production of products relevant to tackle the coronavirus outbreak; (iv) targeted support in the form of deferral of tax payments and/or suspensions of social security contributions; and (v) targeted support in the form of wage subsidies for employees. In addition, the amended Temporary Framework provides for higher thresholds of State aid amounts. It should also be noted that on 9 April, the Commission launched a consultation with Member States to further extend the scope of the Temporary Framework. Therefore, another amendment may soon be adopted.

2. COMMISSION PUBLISHES TEMPORARY FRAMEWORK FOR ASSESSING ANTITRUST ISSUES RELATED TO BUSINESS COOPERATION IN RESPONSE TO COVID-19 OUTBREAK

On 8 April 2020, the European Commission ("*Commission*") published a Temporary Framework to assess possible forms of business cooperation in response to the emergency situation caused by the COVID-19 pandemic. More specifically, the Temporary Framework seeks to provide guidance to companies considering cooperation in order to ensure the supply and distribution of essential products, including medicines and medical equipment. The Temporary Framework also envisages cooperation between undertakings that are already active in the health sector, as well as between undertakings that are active in other sectors, which for example decide to convert part of their production lines to start producing scarce products.

First, the Temporary Framework aims at outlining the Commission's enforcement priorities during the crisis and establishing the main criteria on which the Commission shall base its assessment of cooperation projects that address the shortage of essential products and services. According to the Commission, adequately responding to this crisis might require varying degrees of cooperation.

On the one hand, the Temporary Framework identifies a number of activities which may lawfully be entrusted to a trade association, an independent advisor, a public body, or an independent service provider, provided that they are subject to sufficient safeguards (*e.g.*, ensuring that no individualised company information flows back to competitors). Such activities include:

- coordinating joint transport for input materials;
- contributing to identifying those essential medicines for which there are risks of shortages;
- aggregating production and capacity information, without exchanging individual company information;
- modelling demand on a Member State level and identifying supply gaps; and
- sharing aggregate supply gap information, and requesting participating undertakings, on an individual basis and without sharing information with competitors, to indicate whether they can fill the supply gap to meet demand (either through existing stocks of increase of production).

On the other hand, the Temporary Framework acknowledges that cooperation between businesses might require a degree of cooperation which would under normal circumstances raise EU competition law concerns. By way of example, overcoming critical supply shortages may require measures to adapt production, stock management, exchanges of commercially sensitive information and a level of coordination between sites that produce medicines, while others remain in under-production. However, in light of the current crisis, the Commission considers that cooperation measures may either be not problematic under EU competition law or would not give rise to an enforcement priority for the Commission, provided that they are:

- designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those used in the treatment of COVID-19;
- temporary, *i.e.*, applied only as long as there exists a risk of shortage or, in any event, during the COVID-19 outbreak; and

- not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.

To determine whether a cooperation project is problematic under EU competition law or whether it should constitute an enforcement priority, the Commission will also take into account the fact that a cooperation is encouraged, coordinated and/or carried out within a framework set out by a public authority. In any event, cooperation between businesses – for example, in the form of organising production and delivery to meet an urgent need for maintaining the functioning of healthcare for COVID-19 patients – shall be allowed when it stems from an imperative request from public authorities to undertakings.

Second, where there is still uncertainty about whether contemplated initiatives are compatible with EU competition rules, the Temporary Framework sets out an exceptional procedure for DG Competition to provide *ad hoc* guidance to undertakings and trade associations on specific cooperation projects aimed at addressing the shortage of essential products and services during the outbreak. In this context, the Commission shall, exceptionally and at its own discretion, provide its guidance by way of *ad hoc* comfort letters. To this end, DG Competition has set up a dedicated webpage and an e-mail address that can both be used to seek informal guidance on specific initiatives. Companies and trade associations which seek guidance from the Commission are requested to provide detailed information on the initiative, including: (i) the firm(s), product(s) and service(s) concerned; (ii) the scope and set-up of the cooperation; (iii) the aspects that may raise concerns under EU competition law; and (iv) the benefits that the cooperation seeks to achieve and an explanation as to why the cooperation is necessary and proportionate to achieve said benefits under the current circumstances.

Third, the Temporary Framework emphasises that the circumstances require that both undertakings and consumers enjoy the continued protection of competition law. Accordingly, the Commission will actively monitor relevant market developments to detect anticompetitive conduct on the part of undertakings which seek to exploit the crisis to unlawfully collude or abuse their dominant position. In particular, the Temporary Framework identifies the following behaviours as problematic: (exploiting consumers and customers by charging prices above normal competitive levels, and limiting production to the ultimate prejudice of consumers by obstructing attempts to scale up production to face shortages of supply. Therefore, undertakings and citizens remain encouraged to report suspected cartels and antitrust violations, including abuses of dominant positions, through the leniency or whistle-blower tools at their disposal.

The Temporary Framework has applied since 8 April 2020 and will remain so until its termination by the Commission, who may review it depending on the evolution of the COVID-19 outbreak.

3. BELGIAN FEDERAL GOVERNMENT IMPLEMENTS LOAN GUARANTEE SCHEME TO SUPPORT COMPANIES AFFECTED BY COVID-19 CRISIS

On 14 April 2020, the Belgian federal government adopted a Royal Decree implementing the Belgian loan guarantee scheme in response to the Covid-19 crisis, approved by the European Commission. The Royal Decree lays down conditions to benefit from the aid granted in the form of state guarantees or loans. The key conditions to be eligible for aid are as follows:

- To be registered as an undertaking in the Crossroads Bank for Enterprises (excluding financial undertakings);
- Not be in default of payments of credit, taxes or social contributions on 1 February 2020 (or be in default for more than 30 days on 29 February 2020);
- Not be subject to restructuring proceedings with banks on 31 January 2020; and
- Not be qualified as an undertaking in financial difficulty

Undertakings that fulfil these conditions may apply to credit institutions for a guaranteed credit. The guaranteed credit will have to comply with the other conditions set out in the Royal Decree (available here).

4. EUROPEAN COMMISSION APPROVES EUR 7 BILLION FRENCH "UMBRELLA" SCHEME TO SUPPORT FRENCH COMPANIES IN THE CONTEXT OF THE COVID-19 CRISIS

On 20 April 2020, the European Commission ("*Commission*") reported in a press release that it had approved a EUR 7 billion French "umbrella" scheme to support small and medium-sized enterprises (SMEs) and large companies in France in the context of the COVID-19 crisis. The scheme, called "*Regime Cadre Temporaire*", was approved under the State aid Temporary Framework adopted by the Commission on 19 March 2020, as amended on 3 April 2020.

The French scheme allows for the provision of aid in the form of:

1. Direct grants, equity injections, repayable advances and subsidised loans, up to a maximum nominal amount of EUR 100,000 to a company active in the primary agricultural sector; EUR 120,000 to a company active in the fishery and aquaculture sector; and EUR 800,000 to a company active in all other sectors;
2. State guarantees for loans, subject to safeguards for banks to channel State aid to the real economy; and/or
3. Public loans to companies with favourable interest rates.

The aid may be granted by French authorities at all levels, including central government, regional and local authorities and other bodies administering schemes involving state resources.

The Commission found that the French measures were necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State, in line with Article 107(3)(b) TFEU, and that the measures were in line with the conditions set out in the Temporary Framework. The aid may be granted until the end of 2020 and is limited to undertakings that were not in difficulty before 31 December 2019. On this basis, the Commission approved the measure under EU State aid rules.

5. EUROPEAN COMMISSION APPROVES FRENCH GUARANTEE SCHEME FOR EXPORTERS DURING THE COVID-19 CRISIS

On 24 April 2020, the European Commission ("*Commission*") approved a French guarantee scheme for small and mid-size companies (SMEs) with export activities that are affected by the COVID-19 crisis.

The scheme takes the form of state guarantees on loans and will be accessible to all French exporting companies with an annual turnover below EUR 1.5 billion. According to the Commission, the scheme is expected to amount to a total of EUR 150 million.

The purpose of the scheme is to ensure the continuation of the activities of the exporting companies concerned by limiting the risk associated with the issuance of loans.

The Commission concluded that the scheme was necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State, in line with Article 107(3)(b) TFEU. The scheme was found to also be consistent with the State aid Temporary Framework adopted by the Commission on 19 March 2020, as amended on 3 April 2020, because (1) it covers guarantees on operating loans with a limited maturity and size; (2) it is limited in time; (3) it limits the risk taken by the French state to a maximum of 90%; (4) it provides for minimum remuneration of the guarantees; and (5) it contains adequate safeguards to ensure that the aid is effectively channelled by the banks to the beneficiaries in need. On this basis, the Commission approved the measure under EU State aid rules.

6. GERMANY ADOPTS FINANCIAL MEASURES TO HELP ITS ECONOMY OVERCOME DIFFICULTIES CAUSED BY THE CURRENT COVID-19 CRISIS

Based on the European Commission's decisions reported in our previous COVID-19 alert, Germany has put in place a number of schemes, focusing on providing short-term liquidity for companies, self-employed and freelancers. The programs are mainly channelled through the German Kreditanstalt für Wiederaufbau ("KfW") bank, which is a state-owned development bank. The different measures consist of direct grants, subsidised loans, guarantees and tax relief measures.

The Federal Ministry of Economic Affairs and Energy ("BMWi") provides detailed information for companies regarding the COVID-19 aid schemes, and a catalogue of Coronavirus FAQs (both in German language only). Further information in English, French, Italian, Turkish and Arabic is available on this BMWi website. The website includes further guidance with regard to the various aid schemes and eligibility.

Grants and loans

The main instruments discussed below are the KfW Special Programme 2020, the KfW Rapid Loan 2020 and schemes of the federal states.

The KfW Special Programme 2020 (KfW-Sonderprogramm 2020) is available to commercial companies of all sizes and to liberal professions. The following are eligible to apply: commercial enterprises that are in majority privately-owned; social enterprises that operate commercially (*i.e.* for profit); housing companies for own investments and working capital; leasing companies for own investments and working capital; landlords with a registered business; cooperatives, if they are subject to corporation tax; companies in which private equity investors have an interest, regardless of the size of their stake and companies in which foreign state funds have an interest, subject to coordination with in the Federal Ministries of Economic Affairs and Energy ("BMWi") and Finances ("BMF") in the event of a controlling position.

The loan can be used for investment and working capital. There are two separate schemes for new companies up to 5 years after their foundation and for companies that have been in the market for more than 5 years, with largely similar conditions. There is also a direct investment scheme for syndicated financing for large scale loans of more than EUR 25 million.

The loans are aimed at companies experiencing temporary financing difficulties due to the corona crisis and which were not a company in difficulty according to the EU definition as of 31 December 2019. For each group of companies, loans of up to EUR 1 billion can be granted. The loans are limited to 25% of the applicant company's annual turnover in 2019 or the applicant company's current liquidity requirements for the next 18 months in the case of small and medium-sized enterprises ("SMEs") or 12 months in the case of large enterprises, or twice the company's personnel costs in 2019.

Loans of up to EUR 10 million benefit from low interest rates and a simplified risk assessment by KfW. KfW offers SMEs (up to 50 million annual turnover, less than 250 employees) a 90% risk coverage (exemption from liability) and for all enterprises above this limit, an 80% risk coverage, which are backed by a full federal guarantee. Interest rates have been reduced and range from 1% to 1.46% for SMEs and from 2% to 2.12% for large companies.

The aim of the KfW Rapid Loan 2020 (KfW Schnellkredit 2020) is to quickly provide SMEs with liquidity through KfW loans up to a maximum amount of EUR 800,000 and with 100% risk coverage. Eligible enterprises are the same as the ones listed for the KfW Special Programme 2020. The loan can be used for investment and working capital.

The KfW rapid loan is available to all enterprises with more than 10 employees that have been active on the market since at least 1 January 2019 and that were not a company in difficulty according to the EU definition as of 31 December 2019. The company must have been profitable between 2017 and 2019.

The loan volume per company/ group of companies is limited to a maximum of 25% of the applicant's annual turnover in 2019, a maximum of EUR 500,000 for enterprises with up to 50 employees and a maximum of EUR 800,000 for enterprises with more than 50 employees. The interest rate is 3% for ten years.

In the interest of expediting the approval, neither the applicant's bank or the KfW will conduct any further credit risk assessment. However, before the loan is paid out, the applicant's bank will check and confirm the number of employees, the turnover, the declaration of compliance with the loan amount ceiling and the total profit for the years 2017 to 2019.

In addition, each of the sixteen German Federal States set up similar financial emergency aid for businesses which differ slightly in requirements and conditions. Information on the most appropriate scheme, details on funding and financing and the competent contact person is available on the BMWi's grant database (in German only) which can be searched using different parameters (geographic scope, company size, type of grant etc.).

Guarantees

For companies that had sustainable business models before the crisis, the KfW and guarantee banks ("Bürgschaftsbanken") can provide guarantees for working capital and investment financing. Up to an amount of EUR 2.5 million, the guarantees are processed by the guarantee banks; beyond that, the federal states or their development institutions are responsible. Companies can apply for a financing project of up to EUR 2.5 million free of charge via the financing portal of the guarantee banks. Guarantee banks may in particular issue "express guarantees" up to an amount of EUR 250,000, independently and within 3 days.

Tax relief measures

The German Federal Ministry of Finance provides information on tax relief measures for all businesses on its website (available in English). Such measures include interest-free deferrals of tax payments (income tax, corporation tax and VAT) upon application until 31 December 2020, adjustments to income and corporation tax prepayments upon application, suspension of enforcement measures and waiver of late-payment fees for income tax, corporation tax and VAT.

7. EUROPEAN COMMISSION APPROVES DUTCH GUARANTEE SCHEME OF UP TO EUR 10 BILLION

On 22 April 2020, the European Commission ("*Commission*") approved a Dutch guarantee scheme to support the Dutch economy in response to the COVID-19 crisis.

In order to address the liquidity shortages of companies stemming from the COVID-19 crisis, the scheme only covers loans granted by banks as of 24 March 2020. The Dutch State will guarantee 90% of new loans to small and medium-sized enterprises, and 80% of new loans to large enterprises. Banks are obliged to grant a 6-month moratorium on loan repayments to borrowers before they can invoke the State guarantees on loans provided under the scheme.

The Commission found that the Dutch scheme is appropriate to remedy the COVID-19 crisis in the economy of the Netherlands, considering that (i) the guarantees can only be granted until 31 December 2020, (ii) the underlying loan amount per company is limited to what is needed to cover the company's liquidity needs for the near future, (iii) the guarantees are limited to a maximum of six years, and (iv) the guarantee fee premiums respect the minimum levels.

Companies who already faced difficulties before 31 December 2019 will not be able to benefit from the Dutch guarantee scheme. Please find a link to the Commission's press release here.

8. SPANISH COMPETITION AUTHORITY ANNOUNCES THE CREATION OF A COVID19 RELATED MAILBOX

The National Commission of Markets and Competition of Spain (Comisión Nacional de los Mercados y la Competencia in Spanish, hereinafter the "*CNMC*") has announced the creation of a centralized mailbox (covid.competencia@cnmc.es) in which it will receive all complaints and queries related exclusively to the application of competition rules during the COVID19 breakdown. The mailbox will stand as a specific inlet for any complaint related to anti-competitive practices in the context of the ongoing pandemic. It will be open for complaints related to abuses of dominant positions through excessive prices as well as anti-competitive agreements between operators or deception in goods and services affected by the health crisis. Additionally, the mailbox will be available for companies wanting to consult potential agreements concluded with other operators, including competitors, amid the health crisis, in order to assess their compatibility with the Spanish competition legislation.

The CNMC has announced that its priority during the pandemic is consumer protection. According to the CNMC, the COVID19 crisis is an exceptional situation that could lead economic operators to various forms of cooperation in order to facilitate the supply of essential products. However, CNMC warned that the COVID19 pandemic could be abused by undertakings which could implement various anti-competitive practices, especially regarding prices and be justified by market conditions of supply and demand. The CNMC's main concerns are the sectors of sanitary material and funeral or crematorium services.

The CNMC will examine if the measures by the undertakings are adopted with the purpose of resolving the difficulties that may arise during the current health crisis and in the public interest. The CNMC will also analyse if the measures exceed what is strictly necessary for the achievement of such purpose, in compliance to what was agreed between all the competition authority members of the European Competition Network (ECN).

Finally, the CNMC has warned that it will investigate and sanction any behaviour that pursues an uncompetitive advantage during the COVID19 crisis and in the detriment of consumers. For this purpose, the CNMC will closely follow the evolution of the affected markets and, in particular, the formation of prices.

9. UK CMA DECISIONS PROVIDE GUIDANCE AS TO WHEN COVID-19 MAY AFFECT OUTCOME OF MERGER REVIEW

CMA blocks Sabre's acquisition of Farelogix

Despite recognising that its decision comes "*at a time of uncertainty and disruption in the global travel industry due to the COVID-19 pandemic*" (see press release), the UK's Competition and Markets Authority ("**CMA**") announced its decision to block Sabre's proposed purchase of Farelogix – a tie up between two US companies that supply IT solutions to airlines to manage aspects of the flight booking process.

Although the merging parties operate in supply chains severely impacted by the pandemic (making it difficult to foresee how the competitive situation will develop in the relevant markets either with or without the transaction), the CMA was not deterred from blocking the deal. With respect to the COVID-19 crisis, the CMA noted that it had not seen any evidence of a "*disproportionate impact on Sabre or Farelogix relative to the rest of the industry*". The CMA stated that "*the Parties have not made representations on how* [COVID-19] *may impact the assessment, nor have they submitted that either Sabre or Farelogix will exit the markets, or become substantially weakened competitors relative to their rivals.*"

CMA provisionally clears Amazon's investment in Deliveroo

Approximately one week after the CMA found COVID-19 to not be an obstacle to its decision to block the *Sabre/Farelogix* transaction, the CMA announced its provisional clearance of the acquisition by Amazon of a minority shareholding and certain rights in Deliveroo "*in light of a detoriation in Deliveroo's financial position as a result of coronavirus*" (see press release and summary of provisional findings).

The CMA assessed whether COVID-19's impact on Deliveroo had created an "exiting firm scenario" enabling Deliveroo to take advantage of the "failing firm" defence. The CMA found that "*Deliveroo's exit from the market would be inevitable without access to significant additional funding".* It also considered that *"only Amazon would be willing and able to provide* [the required investment] *at this time"*, noting that "*the pandemic has severely limited the availability of finance for early-stage businesses such as Deliveroo*." Furthermore, the CMA predicted that allowing Deliveroo to exit the market would lead to a reduction in quality (in terms of price and service) of the offerings of the remaining online restaurant platforms (Just Eat and Uber Eats).

Concluding remarks

The CMA's decision in *Amazon/Deliveroo* is broadly in line with its comments regarding the relevance of COVID-19 in its *Sabre/Farelogix* decision: Deliveroo, as a developing business particularly reliant on access to continued investment, has been more severely impacted by the pandemic *relative to the rest of the industry*. That being said, the question remains as to whether the CMA has now set the bar at "failing firm" before it will consider COVID-19 relevant to its review, or whether a less severe impact on the target's business (whilst still proportionately higher relative to competitors) may suffice.

The CMA is, to the best of our knowledge, the first national competition authority in Europe to specify circumstances in which the COVID-19 pandemic may affect the outcome of a merger review. It remains to be seen whether other national competition authorities (and indeed, the European Commission) will follow suit.