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Client Alert

State Aid in Times of COVID-19: European Commission Prolongs and Expands Temporary COVID-19 State Aid Framework

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On January 28, 2021, the European Commission adopted its Fifth Amendment to the Temporary Framework for COVID-19 state aid measures. The Temporary Framework enables the EU Member States to support companies affected by the COVID-19 outbreak and subsidize coronavirus related R&D and production. As of February 1, 2021, the Commission has adopted about 400 COVID-19 state aid decisions approving national support mechanisms for a total value exceeding €3 trillion.

The Temporary Framework was set to expire on June 30, 2021. As the COVID-19 crisis continues to seriously affect the European economy, the Commission has decided to extend the application of the Temporary Framework to December 31, 2021. In addition, the Fifth Amendment expands the scope of the Temporary Framework by increasing the aid ceilings of certain measures, allowing the conversion of certain repayable instruments into direct grants, and relaxing the conditions that apply to some categories of aid. The Commission has already approved a few aid schemes under the amended Framework, including a €200 million scheme notified by Belgium to support companies in the Flemish Region that suffer a turnover decline due to the continuing COVID-19 measures.

State Aid and COVID-19 – Background

As we previously reported, the Temporary Framework adopted by the Commission on March 19, 2020 related to five types of state aid (most notably direct grants, state guarantees, and subsidized public loans) that Member States can provide to companies affected by the COVID-19 crisis. We also reported on the **First Amendment** of April 3, 2020, aimed at accelerating the research, testing and production of COVID-19 products, protecting jobs and further supporting the economy in the outbreak. On May 8, 2020, the Temporary Framework was amended a second time, to enable recapitalization and subordinated debt measures (**Second Amendment**). Such recapitalization is subject to several conditions including, among others, an appropriate remuneration in exchange for the State's intervention, a freeze on management compensation and a ban on certain acquisitions and on dividend payments.

A **Third Amendment** followed on June 29, 2020, to enable further support to micro, small and start-up companies and to incentivize private investments. On October 13, 2020, the Commission adopted a **Fourth Amendment** to prolong the Temporary Framework and to enable aid in relation to part of the uncovered fixed costs of companies affected by the crisis.

State Aid and COVID-19 – What is New?

Extension of the Temporary Framework to December 31, 2021

Previously, the Temporary Framework was set to expire on June 30, 2021, with the exception of the section applying to recapitalization measures, which was to continue to apply until September 30, 2021. With the adoption of the Fifth Amendment, the Commission has now **prolonged all sections of the Temporary Framework until the end of 2021**. Member States will continue to be able to notify COVID-19 state aid measures under the Temporary Framework, and the Commission will continue to apply the compatibility conditions laid down in this framework, which are more flexible than the conditions applicable to non COVID-19 related aid.

The Commission will assess before the end of 2021 whether the Temporary Framework needs to be further extended and/or adapted. A further extension can therefore not be excluded, depending on how the crisis evolves in the coming months.

Higher aid ceilings

With regard to limited amounts of aid granted under the Temporary Framework to companies that find themselves facing a sudden shortage or even lack of liquidity, the **previous ceilings per company have been doubled**. The new ceilings are:

- €225,000 per company active in the primary production of agricultural products (up from €100,000);
- €270,000 per company active in the fishery and aquaculture sector (up from €120,000); and
- €1.8 million per company active in all other sectors (up from €800,000).

For **companies which have been particularly badly affected** by the COVID-19 crisis, (meaning they are faced with turnover losses of at least 30% during the eligible period compared to the same period of 2019), the State can contribute to the part of the **fixed costs that are not covered by their revenues**, in an amount of up to €10 million per company – up from €3 million previously.

Conversion of repayable instruments into direct grants

The Fifth Amendment also enables Member States to **convert granted repayable aid** (such as guarantees, loans, repayable advances) **into other forms of aid** such as direct grants until December 31, 2022. In principle, the conversion may not exceed the new ceilings for limited amounts of aid set out above. The objective of this new conversion option is to encourage Member States to primarily choose repayable instruments as aid.

State guarantees on newly issued subordinated debt

The Fifth Amendment introduces a new tool in relation to state guarantees. In addition to guarantees on loans, companies may now also obtain a **state guarantee on newly issued debt instruments, which are subordinate to ordinary senior creditors in the case of insolvency proceedings**.

In exchange for the state guarantee certain minimum (below market) premiums are to be paid by the beneficiary. Several other conditions have to be fulfilled, including that the amount of the guaranteed subordinated debt must not exceed the following ceilings:

- Two thirds of the annual wage bill of the beneficiary for large enterprises and the entire annual wage bill of the beneficiary for SMEs; and
- 8.4% of the beneficiary's total turnover in 2019 for large enterprise and 12.5% of the beneficiary's total turnover in 2019 for SMEs.

Aid to compensate damages directly caused by the COVID-19 outbreak

Member States can compensate companies for damages suffered due to the COVID-19 outbreak under Article 107(2)(b) TFEU. This instrument has been used by Member States to grant aid to organizers of cancelled events or to sectors that have been particularly hard hit by the outbreak (e.g., transport, tourism, culture, hospitality and retail). Such aid may only compensate damages that have been directly caused by the COVID-19 outbreak. The Fifth Amendment clarifies the notion of a direct causal link in the context of the current crisis. It explains that this requirement is fulfilled when **damages caused by restrictive measures preclude the beneficiary, *de jure* or *de facto*, from operating its economic activity** or a specific and severable part of its activity.

Such measures can include measures which require the complete cessation of an economic activity (e.g., closure of bars, restaurants or non-essential shops), or its cessation in certain areas (e.g., restrictions on flights or other transport to or from certain points of origin or destination). The prevention of activities by certain highly significant categories of clients (e.g., leisure travel for hotels, school trips for dedicated youth accommodation) also constitutes a measure that creates a direct link between the crisis and damages resulting from the exclusion of those client categories. To avoid overcompensation a rigorous quantification of such damage must take place.

Other modifications

Further, the Fifth Amendment provides that Member States **can grant aid in the form of subsidized interest rates for loans to micro or small enterprises that were already in difficulty on December 31, 2019,** provided that they are not subject to collective insolvency procedure under national law and that they have not received rescue aid or restructuring aid (subject to some exceptions). This possibility already existed in relation to other types of aid granted to micro and small enterprises.

However, the Fifth Amendment does **not** make it possible for Member States to grant aid to medium and large companies that were already in difficulty on December 31, 2019. This is meant to prevent medium or large companies whose financial problems predate the COVID-19 crisis from being artificially kept afloat through state support.

Lastly, the European Commission has decided that there is a continued general lack of sufficient private capacity to cover all economically justifiable risks for exports. Therefore, the **temporary removal of all countries from the list of "marketable risk" countries** under the Short-term export-credit insurance Communication has been **extended until December 31, 2021**.

State Aid and COVID-19 – What to Expect?

Continued notifications of new and amended COVID-19 state aid measures

As the COVID-19 crisis continues to negatively impact the European economy, the Member States can be expected to make use of the amended Temporary Framework which creates more opportunities to support companies affected by the crisis. For example, the Commission has already approved a €200 million scheme supporting companies active in the Flemish region (Belgium) whose revenues will have dropped at least 60% in January and February 2021, or who are active in the food and drink sector, or run cinemas, fitness and wellness centers, and indoor playgrounds.

Companies should keep in mind that new support measures as well as amendments to existing measures have to be notified by the Member State to the Commission and can only be implemented after Commission approval. In an effort to reduce red tape, Member States will be able to submit one notification to prolong all existing aid measures until December 31, 2021 and extend their scope in line with the Fifth Amendment. The Commission will subsequently adopt one decision covering all measures.

Temporary Framework to be tested in Court

The Irish low-cost carrier Ryanair has been very vocal in its disapproval of aid being granted to airlines in context of the COVID-19 crisis. Ryanair takes the view that this aid unduly distorts competition by favoring specific, mostly national flag carriers, and it is systematically appealing all Commission decisions authorizing those aid measures. As of February 1, 2021, Ryanair has filed 15 appeals before the EU General Court.

Ryanair has consistently requested that the EU General Court apply the expedited procedure. The first judgments assessing the application of the Temporary Framework in practice are therefore expected to be handed down in the coming months.

Crowell & Moring will continue monitoring developments in this area and provide regular updates.

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