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Gómez-Acebo & Pombo

Covid-19
The European Commission adopts a Temporary Framework for State aid

Competition Area, Gómez-Acebo & Pombo

I. General prohibition of State aid and possibility of exceptional authorization

Art. 107(1) of the Treaty on the Functioning of the European Union ("TFEU") as a rule prohibits State aid when said aid may affect trade between Member States. This prohibition applies to any subsidy, tax deduction or tax exemption and to social security contributions, loans or guarantees granted by public authorities or charged to public funds. This aid is considered incompatible with the internal market and may only be granted if previously authorised by the European Commission.

Exceptionally, however, the TFEU provides that aid used to compensate undertakings for damage caused by "natural disasters or exceptional occurrences" (Art. 107(2)(b)) is compatible with the internal market. Aid used to remedy a serious disturbance in the economy may also be compatible (Art. 107(3)(b)).

On the basis of these provisions of the TFEU, particularly the second provision, on 19 March 2020, the Commission issued a communication establishing a temporary framework that defines the conditions under which the Member States of the Union may aid undertakings in dealing with the economic impact of Covid-19 (hereinafter the "Communication").

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II. The temporary framework adopted by the Commission

II.1. Aid to make good the damage caused by an exceptional occurrence (Art. 107(2)(b) TFEU)

The Commission highlights in its Communication that on the basis of this provision of the Treaty Member States can also compensate undertakings in sectors that have been particularly hit by the COVID-19 outbreak (e.g., tourism, culture, hospitality and retail). In Spain, the hospitality sector after the adoption of Order SND/257/2020 of 19 March comes to mind.

The Commission must be notified of these compensation measures for urgent assessment. This was done in record time to analyse the Danish compensation scheme for event organisers (Decision SA 56685).

Along with these specific measures, the Communication sets out the conditions under which different types of aid may be approved to remedy liquidity problems for undertakings. We review them in section II.2.

II.2. Aid to remedy a serious disturbance in the economy (Art. 107(3)(b))

This is the most important section of the framework adopted by the Commission. The Communication sets out a number of conditions for aid agreed by Member States to fall within the scope of the exemption provided by Art. 107()3(b) TFEU:

- **Aid in the form of a direct grants or tax advantages**:

  Member States may provide direct grants, repayable advances or tax advantages, provided that: (i) the measure does not exceed EUR 800,000 per undertaking; (ii) it is within a general framework; and (iii) it is granted before 31 December 2020.

  Additionally, the Communication provides a specific scheme for the agriculture, fishery and aquaculture sectors, with lower thresholds (100,000 EUR in the agriculture sector, 120,000 EUR in fishery and aquaculture).

- **Aid in the form of guarantees on loans:**

  Also, public guarantees may be granted or guarantee schemes may be established for bank loans granted to undertakings facing unexpected liquidity problems.

  These undertakings may benefit from guarantee premiums, whose amount will vary based on the type of recipient (SME or large enterprise) and on the maturity of the loan.

  Similarly, there is a possibility of establishing general guarantee schemes (generally applicable or applicable to a broad sector of the economy), which will apply to loans limited in their amount based on parameters such as wage bills or turnover of the beneficiary in 2019. Thus, for loans maturing after 31 December 2020, the loan may not exceed twice the wage bill or 25% of turnover.

The guarantee may relate to both investment and working capital loans. The duration of at the guarantee is limited to maximum six years and the public guarantee may not exceed 90% of the loan principal.

- **Aid in the form of subsidised interest rates for loans:**

  Member States may authorise granting public loans with subsidised interest rates to undertakings with sudden liquidity problems. The interest rate applicable to these loans will be equivalent to: (i) the IBOR interest rate for one year (base rate); and (ii) a differential margin based on the maturity of the loan and the type of recipient (SME or large enterprise); a margin that will vary between 25 and 200bps.

  There are also limits to the maximum amount of the loans, also based on the wage bill or turnover of the beneficiary in 2019 or on the liquidity needs of the beneficiary, provided that the loan matures after 31 December 2020. If the loan matures before, the amount of the loan may be higher.

  Loans may relate to both investment and working capital needs. The limit of the aid is set at six years.

- **Aid in the form of guarantees and loans channelled through credit institutions or other financial institutions**

  The framework adopted by the Commission contains safeguards to prevent the measures that Member Stats may approve from becoming aid to financial institutions. The Commission asserts that these institutions must ensure, insofar as possible, that the aid be passed on to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or lower interest rates.

- **Short-term export credit insurance:**

  The Commission lastly establishes the possibility of reducing the limits on short-term export-credit insurance in the Communication of the Commission to the Member States of 2012 on the application of Arts. 107 and 108 TFEU to these instruments, if the Member States demonstrate that cover for certain risks is temporarily unavailable for the exporters.

To prevent granting aid to undertakings that were experiencing difficulty before the current health crisis, all these measures must be applied to undertakings facing financial problems after 31 December 2019 due to the COVID-19 outbreak.

The Communication also establishes general transparency obligations. Thus, by 31 December 2020, Member States must provide the Commission with a list of measures put in place on the basis of schemes approved based on the Communication.

The Communication began to be applied on 19 March 2020, in view of the need for fast action upon the possible impact of the COVID-19 outbreak.

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