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News

Commission expands Temporary Framework to recapitalisation and subordinated debt measures

The European Commission adopted a Communication amending the Temporary Framework, aiming to establish the conditions under which Member States may provide recapitalisation and subordinated debt to companies in need.

These conditions are stringent, as recapitalisation can only be used as a last resort ("if no other appropriate solution can be found") and cannot exceed the minimum needed to ensure the viability of the beneficiary, nor go beyond restoring its capital structure to the one predating the COVID-19 outbreak.

While the other forms of aid contained in the Temporary Framework can be granted by Member States until December 2020, recapitalisation can be provided until June 2021. The Communication includes transparency measures, such as the obligation for Member States to publish details on the identity of the companies that have received aid and the amount thereof within three months of the recapitalisation.

Concerning the types of recapitalisation measures Member States can provide, they may consist of (i) equity instruments and/or (ii) instruments with an equity component ('hybrid capital instruments'). Only aid above €250 million must be notified to the Commission for individual assessment.

Conditions on the State's entry in the capital of companies and remuneration

The capital injection by the State shall be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection. The State shall receive appropriate remuneration for its investment that should incentivise the beneficiaries to buy back the State capital injections.

Conditions regarding the exit of the State from the capital of the companies concerned

Beneficiaries other than SMEs that have received a COVID-19 recapitalisation of more than 25% of equity at the moment of intervention must prepare an exit strategy for the participation of the Member State, unless the State's intervention is reduced below the level of 25% of equity within 12 months from the date of the granting of the aid.

If six years after the COVID-19 recapitalisation, or seven years if the company is not a publicly listed company, the State's intervention has not been reduced below 15 % of the beneficiary's equity, the State must notify a restructuring plan to the Commission.

Conditions regarding governance

As long as the COVID-19 recapitalisation has not been fully redeemed, beneficiaries cannot make dividend payments. There will also be a limitation on directors' remuneration until 75% of the State's investment has been redeemed. This includes a prohibition on bonus payments.

Prohibition of cross-subsidisation and acquisition ban

Recapitalised companies cannot use State aid to support the economic activities of integrated companies that were in economic difficulties prior to 31 December 2019.

Until at least 75% of the recapitalisation is redeemed, beneficiaries other than SMEs will be prevented from acquiring a stake of more than 10% in competitors or other operators in the same line of business, including upstream and downstream operations. Such acquisitions will be possible, subject to the Commission's approval, only if this is necessary to maintain the beneficiary’s viability.

Aid to companies in the form of subordinated debt

Member States can also support companies through subordinated debt, which will be subject to the same conditions in terms of limits and duration as the subsidised interest rates for loans to companies under the Temporary Framework. If Member States wish to provide subordinated debt in excess of these limits, the conditions for recapitalisation measures set out above will apply.

By the end of May, the Commission has cleared more than 160 State aid measures under the Temporary Framework (including three Spanish measures), for every Member State except Cyprus. On 26 May, the Commission cleared its first recapitalisation measure for a €1billion Lithuanian fund.

Commission invites comments on updated proposal on simplified rules for State aid combined with EU support

The European Commission is inviting Member States and other stakeholders to comment on its updated proposal on an extension of the application of the General Block Exemption Regulation (“GBER”) to national funds in three areas: financing and investment operations supported by the InvestEU Fund; Research, Development and Innovation projects having received a “Seal of Excellence” under Horizon Europe, as well as projects under the future Co-fund programme; and European Territorial Cooperation (“ETC”) projects.

Some of the changes introduced from the first version of the proposal include the adjustment of the financing thresholds for InvestEU projects and of the minimum funding for projects stemming from Horizon Europe to 30%, and the alignment of the aid intensity for ETC to the level of the co-funding rate provided for in the draft ETC Regulation for all project partners.

The Commission recognizes that it intends to finalize the review of the GBER in time for the start of the next Multiannual Financial Framework for the period 2021-2027; stakeholders are invited to submit comments on the consultation by 6 July 2020.

Commission approves State financing granted by Spain for Correos's universal postal service obligation

Before this Decision, the compensation granted by Spain to Correos to fulfil its public service mission (so-called "universal service obligation" or USO) to Correos had already been examined by the Commission. More precisely, in 2018, the Commission found that Correos had been overcompensated for the 2004-2010 period and that Spain had to recover €167 million. This case concerns the compensation to Correos for the 2011-2020 period, which was notified by Spain in January 2020.

The Commission has determined that Correos has benefited from illegal aid as of the total amount of the aid (€1,280 million), €1,219 million was already paid to Correos prior to the notification. Nevertheless, after having examined the national measure under EU State aid rules on public service compensation, the Commission has found the aid lawful.

In this case, Spain developed a detailed model to calculate the net avoided cost of the universal postal service that, contrary to what happened in 2018, ensures that discounts granted to certain customers, do not unduly increase the net cost. Since the compensation granted by Spain will not exceed the net cost of the public service mission, there is no overcompensation.

Finally, the decision takes into account a specific commitment of Spain regarding the timely notification, in the course of 2020, of USO compensations envisaged for the period 2021-2025.

The CNMC authorises Barceló to purchase Globalia's travel agency business

The Spanish Competition and Markets Authority (CNMC) has authorised Barceló to acquire exclusive control of certain assets belonging to Globalia, namely its wholesale and retail travel agency and occasional road passenger transport businesses as it finds that the operation will not have any adverse effects on competition in the markets affected.

As regards the wholesale travel agency market, the parties to the operation have a combined market share of less than 25%. As for the retail market, the resulting entity would be the second leading operator and its market share would be significantly smaller than in the wholesale market.

Regarding passenger air transport, the CNMC recalls that Air Europa is expected to be sold to the IAG Group and that the agreement excludes from the operation Air Europa, which remains under Globalia's control. In any case, the business models of Barceló's property Evelop Airlines, with a limited fleet focused on charter flights, and Air Europa, owned by Globalia and focused on scheduled flights, are different.

Case law & Analysis

The General Court annuls the Commission's decision to block the proposed acquisition of Telefónica UK by Hutchison 3G UK in the mobile telephony market sector

On 11 May 2016, the Commission adopted a decision in which it blocked the proposed acquisition of Telefónica UK ('O2') by Hutchison 3G UK ('Three') on the grounds that the acquisition would have removed an important competitor on the United Kingdom mobile telephony market and the merged entity would have faced competition only from two mobile network operators. The Commission had feared that the prices would rise, the choice for consumers would be reduced and innovation in the mobile sector would be at stake. Three lodged an appeal before the General Court, attacking the three theories of harm applied by the Commission in its Decision.

As regards the first theory of harm, even though the Commission can prohibit oligopolistic markets concentrations which, although not giving rise to the creation or strengthening of a dominant position, are liable to affect the competitive conditions on the market to an extent equivalent to that attributable to such positions, the Court affirms that the mere effect of reducing competitive pressure on the remaining competitors is not, in principle, sufficient in itself to demonstrate a significant impediment to effective competition in the context of a theory of harm based on non-coordinated effects. Such an interpretation would lower the standard of proof required to demonstrate significant impediment to effective competition and would allow the Commission to treat as an 'important competitive force' any undertaking in an oligopolistic market exerting competitive pressure.

In addition, the Court found that the Commission provided 'weak probative value' that Three and O2 are close competitors on the overall retail market, since being close competitors in some segments of a concentrated market does not prove the elimination of the competitive constraints which the parties to the concentration exerted upon each other and did not suffice to find a significant impediment to competition. Furthermore, the Court held that Commission's quantitative analysis of the effects of the concentration on prices does not establish, with a sufficiently high degree of probability, that prices would increase significantly, and therefore lacked probative value.

The second theory of harm concerns the retail market in relation to network sharing. In UK, there are two network-sharing arrangements, MBNL formed by BT/EE and Three, and Beacon concluded between Vodafone and O2. The Court said that the fact that such agreements may result in pro-competitive effects when they are concluded (sharing the costs of rolling out their networks) does not necessarily mean that the termination, renegotiation or an alteration to its balance following a concentration may necessarily lead to an impediment to competition. The Court noted that the

Commission did not analyse the non-coordinated effects of the merger in relation to a possible exercise of market power, in the form of a degradation of the services offered by the merged entity or of the quality of its own network, even though the assessment of a possible elimination of important competitive constraints between the parties to the concentration and the reduction of competitive pressure on the remaining competitors lies at the heart of the assessment of a concentration's effects.

The third theory of harm related to the existence of non-coordinated effects on the wholesale market arising from the reduction of mobile network operators wishing to host non-mobile network operators offering retail services to subscribers. The Court found that the reduction of the operators in the wholesale market is not in itself capable of establishing a significant impediment to competition.