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EU State Aid

European Commission Expands COVID-19 State Aid Temporary Framework, and Approves 52 State Aid Notifications Worth Over €500bn

SUMMARY

On 3 April 2020, the European Commission amended its Temporary Framework for state aid in response to the COVID-19 outbreak, clarifying minor aspects of the original Temporary Framework and adding new types of permitted aid principally for COVID-19-related research and development construction and upgrade of testing facilities of COVID-19-related products, and additional capacities for the production for products needed to respond to outbreak. It also permits Member States to grant sector-specific tax payment deferrals and wage subsidy schemes. This memo provides both a brief summary of these changes and a full annex of analysis.

A further amendment is on the way, expected next week, which will include cash for equity aid within the ambit of the Temporary Framework.

As of now, the Temporary Framework has been used by the European Commission and the EFTA Surveillance Authority to adopt 46 approval decisions, covering at least €519bn of aid in 21 EEA countries and the United Kingdom. A further six approval decisions cover state aid outside the Temporary Framework. Eight EEA countries have yet to use the Temporary Framework at all, nearly four weeks after it was first adopted.

I. AMENDMENT TO THE TEMPORARY FRAMEWORK

A. BACKGROUND

On the evening of 19 March 2020, the European Commission (the "**Commission**") adopted a Temporary Framework relating to state aid in response to the COVID-19 outbreak (the "**Original TF**").[1] The Original TF is described and analysed in an earlier memo.

On 27 March 2020, the Commission announced that it was consulting Member States on an amendment to the Original TF.[2] The Commission adopted the amendment on the evening of 3 April

2020, publishing the text over the following days (the "**Amended TF**").[3] The Commission has also released a new notification template for Member States to complete their notifications quickly.[4]

On 9 April 2020, the Commission announced that it is consulting Member States again on a further extension of the Temporary Framework, this time to include recapitalisation measures including equity or hybrid capital instruments.[5] The availability of this type of aid will be subject to strict conditions, including an exit strategy.

B. SUMMARY

There are two main changes, which are summarised briefly below and are described in full in an annex to this memo.

1. Clarifications

The first set of changes are clarifications to the conditions of the aid permitted by the Original TF. These clarifications do not fundamentally alter the nature of the permitted aid, but clear up some of the ambiguities in the Original TF.

The most noteworthy clarification brings in loan guarantees and cash for equity aid under the €800,000 cap within the first category of aid permitted under the Amended TF. Under the Original TF, Member States were able to grant up to €800,000 per undertaking in the form of direct grants, repayable advances or tax advantages. The Commission in the Amended TF has expanded this to include loan guarantees and equity. Therefore, it appears Member States can give loan guarantees up to €800,000 without needing to meet the separate conditions applying specifically to loan guarantees.

2. New types of aid

The second set of changes are five new types of aid now included under the Amended TF, meaning any proposals for such aid will benefit from the same rapid approval.

Three types of aid are being approved under a different legal basis than the rest of the Amended TF, and relates to research and development aid as opposed to liquidity aid:

1. COVID-19-specific R&D
2. Construction and upgrade of testing facilities specific to COVID-19
3. Aid supporting manufacture of products relevant to COVID-19 (e.g., vaccines)

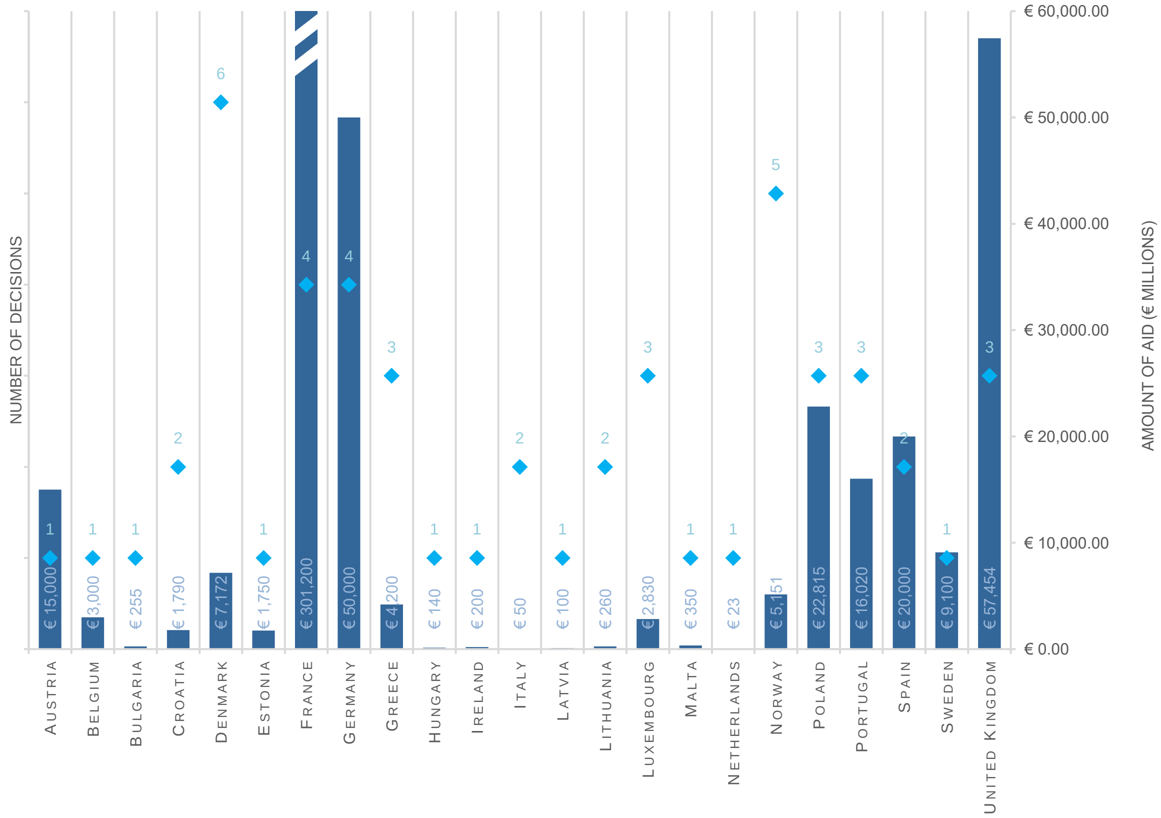
These three measures are all designed to provide investment support to ramp up European production and capacity for COVID-19-related activities, including manufacture of personal protective equipment, ventilators, vaccines and testing kits. These measures are designed to target support for projects likely to benefit European countries quickly: any R&D projects benefiting from the aid must grant non-exclusive licences in the EEA at their completion, and any infrastructure or manufacturing projects must be completed within six months. Luxembourg has already used the Amended TF to grant €30m of aid for R&D and manufacture of equipment.[6]

The two remaining new types of aid are variations of a type of measure already implemented by many Member States: tax payment deferrals and wage subsidies. The measures already implemented by Member States did not need the Commission's approval under state aid rules because they apply to the whole economy without exception. However, if a Member State wishes to target such measures towards a particular sector or region, the aid becomes "selective" and therefore must be approved by the Commission. The Commission has therefore streamlined approval of such measures by including them in the Amended TF:

1. Sector-specific deferral of tax payments and social security contributions
2. Sector-specific wage subsidies for employees

II. SUMMARY OF STATE AID APPROVED IN RESPONSE TO COVID-19

To date, the Commission and the EFTA Surveillance Authority[7] have approved 52 notifications of state aid relating to COVID-19 from 22 EEA countries and the United Kingdom. Forty-six notifications used the Temporary Framework. The remainder relate to compensation under Article 107(2)(b), rather than liquidity measures. These notifications together relate to at least €519bn of aid.[8]



A breakdown of the types of measures notified is as follows:

- 27 notifications related to public guarantees of loans;
- 16 notifications included direct grants or repayable advances;

- 11 notifications related to subsidised loans;
- 6 notifications related to compensation for damage suffered by businesses from COVID-19 (notified not under the Temporary Framework, but Article 107(2)(b));
- 2 notifications were for so-called “umbrella schemes”, whereby Member States notify a framework to grant all types of aid under the Temporary Framework, and are included in each of the subtotals above (Spain and the United Kingdom); and
- 1 notification was for COVID-19-related R&D and manufacturing investment aid under the Amended TF.

Eight EEA member states have yet to notify any aid relating to COVID-19: Cyprus, Czech Republic, Finland, Iceland, Liechtenstein, Romania, Slovakia, and Slovenia.

Of the 52 decisions, we know the time taken by the relevant authority to issue its approval for 33. The average time taken for the authorities to approve a notification is just under three days. The quickest approval was same-day approval by the EFTA Surveillance Authority for an expansion of Norway’s existing guarantee scheme, and by the Commission for two Lithuanian subsidised loan schemes. The slowest approval was by the Commission in approving a Greek repayable advance scheme, though it appears that Greece only provided necessary supplementary information three days before the Commission’s decision. Fifteen decisions were made within one day of notification, and all but three were made in under a week.

FULL ANALYSIS OF CHANGES MADE BY THE AMENDED TF

A. CLARIFICATIONS TO THE ORIGINAL TF

1. Cumulation of aid

EU State Aid rules contain restrictions on the "cumulation" of aid, meaning how much a single beneficiary can receive under different aid schemes. These restrictions exist to prevent a single company exceeding the limits of aid under each aid scheme in aggregate.

a. Loan guarantees and loan subsidies

In the Original TF, the Commission had made clear that a beneficiary could receive any combination of all of the types of aid in the Original TF, with one exception: any loan guarantee could not be combined with a loan subsidy relating to the same loan principal.

The Amended TF adjusts this exception slightly. Not only must the loan guarantee and loan subsidy be for different underlying loans, but the aggregate of the loan principal being supported by both types of aid must not exceed the ceilings (i.e., 25% of turnover for 2019, double the beneficiary's wage costs in 2019, or the beneficiary's liquidity needs for the coming 18 months for SMEs, or 12 months for large companies).

b. *De minimis* aid and block exempted aid

The Amended TF also makes expressly clear that any aid under the Amended TF may be cumulated with any *de minimis* aid. Generally speaking, up to €200,000 of aid to any given beneficiary and its group in any three-year period qualifies as *de minimis* and does not require the Commission's approval. There are exceptions to this general rule, including a higher limit for loan guarantees, which may be up to €1,000,000.

In addition, any aid under the Amended TF can be cumulated with any aid under the General Block Exemption Regulation.[9]

2. Direct grants

Section 3.1 of the Original TF provided for aid in the form of direct grants, repayable advances or tax advantages, which the Commission refers to as "**Section 3.1 measures**".

The Amended TF expands the list of measures falling into this category to also include "guarantees, loans and equity", so long as the total of aid under such measures remains below €800,000 per undertaking.

For example, it is now clear that Member States may provide loan guarantees of up to €800,000 per undertaking without needing to comply with the separate conditions provided in Section 3.2 of the Amended TF, such as minimum premiums and maximum maturities.

3. Loan guarantees and loan subsidies

Section 3.2 of the Original TF provided for state guarantees of loans, and Section 3.3 provided for interest rates subsidised by the state.

a. Minimum premiums and interest rates

The main clarification to this type of aid is that the minimum premiums and interest rates are intended to *escalate* during the maturity of a loan, rather than remaining fixed for the entire duration. For example, the table of minimum premiums in the Original TF stated that for a large enterprise with a loan of two-three years' maturity, the minimum premium was 100bps. A reasonable interpretation of this is that the guarantee must have a minimum premium of 100bps for its entire duration. Under the Amended TF, it is clear that for the first year of the guarantee, the minimum premium is in fact only 50bps for a large enterprise, only increasing to 100bps in the second year. However, see below regarding modulation, which permits a flat premium across the duration of the loan.

b. Individual loans

The Amended TF makes clear that the conditions relating to loan guarantees and loan subsidies apply to *each individual loan*. This makes clear two things.

Firstly, the guarantees cannot be applied to a pool of loans in order to meet the conditions in the Amended TF.

Secondly, it is expressly possible for a Member State to notify an individual aid measure for an individual loan. Denmark has done this in relation to its Travel Guarantee Fund.[10] The onus is on the Member State to demonstrate that the aid under the Amended TF remedies the disturbance in the whole economy of the Member State, which is a high bar to achieve for a single loan guarantee. Denmark was able to demonstrate this because the loan supports a national fund that reimburses travellers in case of travel cancellations.

c. Modulation

The Original TF already contained a provision allowing Member States to "modulate" loan guarantees or subsidies in order to satisfy the conditions in the Original TF. What this means is that a Member State can offer a loan guarantee with, for example, a premium *lower* than the minimum prescribed in the Original TF, so long as one of the other prescribed variables is "modulated" accordingly, e.g., the maximum maturity of the loan is reduced from six to four years.

The variables that can be modulated are: (i) guarantee duration, (ii) guarantee premium, and (iii) guarantee coverage.

The Amended TF makes clear that a flat premium or interest rate may be used for the entire duration of the guarantee or subsidy, provided that it is higher than the minimum premiums for the first year, as adjusted according to guarantee duration and guarantee coverage.

The Commission approved a scheme notified by Malta, whereby it was able to offer guarantee premiums of 15bps in the first year for SMEs and 25bps for large enterprises for loans with a maturity of four years or less, which is 40-50% lower than is prescribed in the text of the Amended TF.[11]

4. Short-term export credit insurance

Since the adoption of the Original TF, the Commission adopted an amendment to its Communication on short-term export credit insurance.[12] This amendment recognised the unavailability of insurance for previously marketable risks following a consultation. The Commission now considers all commercial and political risks associated with exports to countries listed in the annex to the amended Communication as temporarily non-marketable until 31 December 2020.

This removes the requirement in the Original TF for Member States to demonstrate non-marketability.

B. NEW TYPES OF AID COVERED BY THE AMENDED TF

The Original TF used Article 107(3)(b) as the legal basis to permit various types of liquidity aid. This ground is discretionary, i.e., aid under this ground "may" be compatible with the internal market, which is why the Commission adopted a temporary framework to make clear the conditions for compatibility under this ground.

Article 107 contains other legal bases for permitting aid. As noted in our previous memo, one such ground is Article 107(2)(b), which permits compensation for damage caused by natural disasters or exceptional occurrences and is *not* discretionary (i.e., aid under that ground "shall" be compatible).

Another ground available to the Commission is Article 107(3)(c), which is a discretionary ground permitting "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest".* The Amended TF uses this ground to include new types of aid within a single temporary framework. In order to qualify under Article 107(3)(c), the aid must (i) contribute to a well-defined objective of common interest, (ii) be necessary, (iii) be appropriate, (iv) have an incentive effect,[13] (v) be proportionate, and (vi) avoid undue negative effects on competition and trade between Member States. The conditions in the Amended TF for aid under this ground seek to streamline the fulfilment of these conditions.

1. COVID-19-specific R&D

New section 3.6 of the Amended TF allows direct grants, repayable advances and tax advantages for R&D projects carrying out COVID-19 and other antiviral relevant research. This is defined as "*research into vaccines, medicinal products and treatments, medical devices and hospital and medical equipment, disinfectants, and protective clothing and equipment, and into relevant process innovations for an efficient production of the required products".*

The aid must meet the following conditions for approval under the Amended TF:

1) The aid must be granted before 31 December 2020;

2) In order to demonstrate that the aid has an "incentive effect", the R&D project must:

   a) Have started on or after 1 February 2020, or received a COVID-19-specific Seal of Excellence; or

   b) Require the aid in order to accelerate or widen its scope, in which case only the additional costs associated with doing so are eligible for the aid;

3) The aid must not cover more than 80% of eligible costs[14] for industrial research[15] and experimental development.[16] This threshold increases by 15% to 95% of eligible costs if more than one Member State supports the project or it is carried out in cross-border collaboration. The aid can cover 100% of eligible costs for fundamental research;[17]

4) The beneficiary must commit to granting non-exclusive licences under non-discriminatory market conditions to third parties in the EEA; and

5) The beneficiary must not have been in difficulty on or before 31 December 2019.[18]

This aid can be cumulated with other types of aid in the Amended TF, so long as the ceilings in point 3) above are not exceeded.

2. Aid supporting manufacture of products relevant to COVID-19 (e.g., vaccines)

New section 3.8 of the Amended TF allows direct grants, repayable advances and tax advantages for the production of COVID-19-related products. Member States may also grant a loss cover guarantee assuming a 10% annual profit on investment costs over five years.

Eligible products include: (i) medicinal products (including vaccines) and treatments, their intermediates, active pharmaceutical ingredients and raw materials; (ii) medical devices, hospital and medical equipment (including ventilators, protective clothing and equipment as well as diagnostic tools) and necessary raw materials; (iii) disinfectants and their intermediary products and raw chemical materials necessary for their production; and (iv) data collection/processing tools.

The aid must meet the following conditions for approval under the Amended TF:

1) The aid must meet the same criteria in points 1), 2) and 5) above for R&D projects; and

2) The aid may only cover up to 80% of the project's eligible costs, which include all investment costs necessary for the production of the relevant products and to the cost of any trial runs of new production facilities. This threshold increases by 15% if (i) the project is completed within two months of the aid being granted, or (ii) more than one Member State supports the project.

The investment project must be completed (in the view of the Member State) within six months of the aid being granted. Delays attract a penalty of 25% of the aid awarded for each month of delay, unless the delay is caused by factors outside the control of the beneficiary. If the aid was in the form of a repayable advance and the project is completed on time, the advance is converted into a grant that is not repayable.

This aid may *not* be cumulated with any other aid in respect of the same eligible costs.

3. Construction and upgrade of testing facilities specific to COVID-19

New section 3.7 of the Amended TF allows direct grants, repayable advances and tax advantages for the construction or upgrade of testing and upscaling infrastructures required to develop, test and upscale, up to first industrial deployment prior to mass production, of products related to COVID-19 such as those listed in section 2 above.

This aid is subject to precisely the same conditions as the aid described in section 2 above, except the aid may cover only 75% of eligible costs (but can still be increased in the same way as above).

Beneficiaries must charge a market price when selling the services provided by the infrastructure developed using this aid. The infrastructure must be open to multiple users on a transparent and non-discriminatory basis, though any investor contributing more than 10% of the investment costs may be given preferential access.

4. Sector-specific deferral of tax payments and social security contributions

The EU state aid rules regulate aid measures that are selective. Therefore deferrals of tax payments and social security contributions that apply to the whole economy without favouring any particular class of beneficiary are not caught by the rules. However, if a Member State wants to defer these payments for a particular sector, region or type of company, the scheme become selective and therefore subject to EU state aid rules.

To facilitate Member States using these measures on a selective basis, the Commission has included them within the Amended TF using Article 107(3)(b) as the legal basis (the same basis as the measures in the Original TF relating to serious disturbances in a Member State economy).

The only conditions are that the aid is granted before 31 December 2020, and the payments are deferred until 31 December 2022 at the very latest.

This aid is therefore available even to undertakings in difficulty before 31 December 2019.

5. Sector-specific wage subsidies for employees

Like deferral of tax payments, wage subsidies applied to the entire economy are not selective enough to be subject to EU state aid rules. To facilitate a wage subsidy scheme for particular sectors, regions or types of undertaking, the Commission will approve such schemes under the Amended TF provided that the scheme meets the following conditions:

1) The aid aims to avoid lay-offs during the COVID-19 outbreak in specific sectors, regions or types of undertaking that are particularly affected by COVID-19;

2) The subsidy is granted over a period no longer than 12 months after the application for aid, and only subsidises the wages of employees that would otherwise have been laid off as a result of suspension or reduction of the beneficiary's business activities caused by COVID-19: the employees must be kept in continuous employment for the entire period of the subsidy; and

3) The subsidy must not exceed 80% of the monthly gross salary, and can also be calculated on the basis of national minimum or average wages.

This aid may be cumulated with other types of employment support provided it does not lead to overcompensation. The aid is available even to undertakings in difficulty before 31 December 2019.

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ENDNOTES

1 See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2020.091.01.0001.01.ENG&toc=OJ:C:2020:091I:TOC.

2 See https://ec.europa.eu/commission/presscorner/detail/en/statement_20_551.

3 See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2020.112.01.0001.01.ENG&toc=OJ:C:2020:112I:TOC, with an informal consolidated version available at https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_as_amended_3_april_2020.pdf.

4 See https://ec.europa.eu/competition/state_aid/what_is_new/amended_notification_template_TF_coronavirus.pdf.

5 See https://ec.europa.eu/commission/presscorner/detail/en/statement_20_610.

6 See case SA.56954 Luxembourg scheme to support research and development and investments in the production of coronavirus relevant products.

7 The EFTA Surveillance Authority is responsible for the enforcement of competition law in the EFTA states (Iceland, Liechtenstein and Norway) rather than the Commission.

8 Some notifications did not specify a maximum budget.

9 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

10 See case SA.56856 State loan for the Danish Travel Guarantee Fund as a result of COVID-19.

11 See case SA.56843 Malta COVID-19: Loan guarantee scheme.

12 See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2020.101.01.0001.01.ENG&toc=OJ:C:2020:101I:FULL.

13 An incentive effect changes the behaviour of an undertaking in such a way that it engages in additional activity which it would not carry out without the aid or would carry out to a lesser extent or at different condition.

14 "Eligible costs" means all the costs necessary for the R&D project during its duration, including, amongst others, personnel costs, costs for digital and computing equipment, for diagnostic tools, for data collection and processing tools, for R&D services, for pre-clinical and clinical trials (trial phases I-IV), for obtaining, validating and defending patents and other intangible assets, for obtaining the conformity assessments and/or authorisations necessary for the marketing of new and improved vaccines and medicinal products, medical devices, hospital and medical equipment, disinfectants, and personal protective equipment; phase-IV trials are eligible as long as they allow further scientific or technological advance.

15 "Industrial research" has the meaning given in paragraph 85 of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (the "**GBER**"), namely the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation.

16 "Experimental development" has the meaning given in paragraph 86 of the GBER, namely acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services. This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services. Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real-life operating conditions where the primary objective is to make further technical improvements on

products, processes or services that are not substantially set. This may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes. Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if those changes may represent improvement.

[17] "Fundamental research" has the meaning given in paragraph 84 of the GBER, namely experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view;

[18] "In difficulty" carries a specific meaning for the purposes of state aid, and is defined by reference to specific metrics. The definition is contained in Article 2(18) of the GBER.

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