Competition Law International

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JOURNAL OF THE ANTITRUST SECTION
OF THE INTERNATIONAL BAR ASSOCIATION

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Vol 16 No 1 pp 1–102 **OCTOBER 2020** **ISSN 1817 5708**

VOL 16 NO 1 2020

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The journal of the Antitrust Section of the International Bar Association

October 2020 **Vol 16 No 1** *Citation (2020) 16 CLI*

Competition Law International is published twice a year.

The views expressed in this journal are those of the contributors and not necessarily those of the International Bar Association.

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Subscriptions
Competition Law International (two issues a year) Vol 14
ISSN: 1817 5708

- Free to members of the IBA Antitrust Committee
- £83.50/$103 single issue
- £155/$228 print subscription (two issues/year)
- £106.58/$159.60 online-only subscription (save 30%)

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Printed by Pensord, UK.

FSC www.fsc.org MIX Paper from responsible sources FSC® C004116

Postal Information
Postmaster – send corrections to:
Competition Law International
C/O Mercury Airfreight International Ltd
2323 Randolph Avenue, Avenel NJ 07001
(US Mailing Agent)
Periodicals postage paid at Rahway, NJ, USA

All previous *Competition Law International* articles are available online to members of the IBA Section on Antitrust and Trade Law. To access them, please see the following page of the IBA website:
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In the past few months, the Commission has adopted an unprecedented number of decisions allowing Member States to grant State aid to economic sectors and undertakings in financial difficulty due to the Covid-19 outbreak. The majority of the measures were adopted under a Temporary Framework (Article 107(3)(b) TFEU), which set out a toolbox of measures available to Member States. By contrast, Member States have been reluctant to make use of other available instruments, such as aid to compensate damages caused by exceptional occurrences under Article 107(2)(b) TFEU, or rescue and restructuring aid to support undertakings facing financial difficulties under Article 107(3)(c) TFEU.

Member States have also made little use of recapitalisation measures included in the Framework at a later stage. This is probably due to the restrictions the Commission attached to these measures in order to limit distortions.

As regards the air transport sector, Member States have been active in seeking Commission approval for several measures to support national airlines and airports. These decisions have been adopted in a short timeframe but have not been immune to challenges before the EU courts. As the situation is still evolving and the extent of the crisis is still unknown, it is yet to be seen how the Commission's approach might change and if Member States will continue to 'choose from the toolbox' of the Temporary Framework or be more creative, for instance, by making financial support subject to compliance with EU green and digital objectives.

EU State aid control during Covid-19

Jacques Derenne, Ciara Barbu-O'Connor and Caterina Romagnuolo[1]

'State aid control is part of the solution, not part of the problem.' These were the words of former European Commissioner for Competition Neelie Kroes at the beginning of the financial crisis in October 2008, which led some heads of European Union Member States and their finance ministers to try to 'deactivate' EU competition law. Now, these words apply to the economic crisis resulting from the current Covid-19 pandemic.

Although a comparative analysis of the crises of 2008 and 2020 is beyond the scope of this article, analogies can be made from the perspective of State aid control. However, important differences are also apparent: the 2008 crisis was a systemic financial crisis with a rather limited impact on the real economy, whereas the 2020 situation stems from a global health pandemic leading to an unprecedented economic crisis impacting the *real* economy. The full extent of this crisis cannot yet be measured, but a long convalescence and deep structural changes will likely be required in some sectors.

In this context State aid control coordinates and provides a framework for the public support responses of different Member States. In particular, in times of crisis[2] State aid control allows the EU to shape Member State choices to avoid destructive outbidding by the strongest Member States. In this sense State aid control is one of the ultimate instruments for combating the nationalist reactions of Member States affected by the '*sovereignty virus*'. As in 2008, we must analyse the sources of the crisis (health and economic), its development and impact, and then identify the proper measures to remedy it. As it did in 2008, State aid control must adapt to this exceptional situation and provide sufficiently flexible (and evolving) responses, while maintaining the essential principles that will prevent Member States from taking action that could undermine European integration.

Since the beginning of March 2020, the European Commission's response appears to have been equal to the challenge. First, the Commission fairly quickly adopted a communication on 13 March 2020 on the 'crisis' and its economic impact.[3] Then, with regard to State aid, the Commission demonstrated a responsiveness comparable to October 2008, quickly adopting, on 19 March 2020, the State aid Temporary Framework to support the economy in the context of the Covid-19 outbreak (the 'Temporary Framework'). Subsequently, the framework for the approval of support measures notified by Member States developed with a speed similar to the 2008 crisis and using the same exceptional procedures: urgent notifications, exclusive use of the English language based on a language waiver (except by France for French), dedicated teams, transparency and rapid adoption of compatibility decisions that favoured guarantee schemes under the Framework.

2 The word 'crisis' is generally understood to have only the limited Latin origin of 'serious manifestation of a disease', But the Latin 'crisis' comes from the ancient Greek '*κρίσις*', associated with the verb '*κρίνεω*, *κρίνειν*, *krinéô*, *krinein*', which covers multiple meanings: (1) the action or the ability to distinguish; (2) the action of choosing; (3) the struggle; (4) the action of deciding, hence the decision, the judgment; and, finally, (5) the outcome, the decisive phase of an illness. By '*κρίνεω*', the ancient Greeks meant 'I discern, I understand, I judge, I decide, I act, I find a cure'. A 'crisis', therefore, is a state of emergency that pushes us, through rational analysis, to discern the (right) decisions to be taken and the (right) actions to be taken and to implement them in order to come out of a difficult situation (in order to avoid 'chaos', which the ancient Greeks referred to as '*κρᾶσις*, *krasis*' – pun intended – which says it all).

3 Communication from the European Commission on a coordinated economic response to the COVID-19 outbreak, COM/2020/112.

Since then, the Commission has regularly amended its Temporary Framework, with the fourth and latest amendment adopted on 13 October 2020.[4]

Typology of available measures

Urgent support measures adopted by the Member States represented one of the most important responses to the crisis. Most were required to be submitted for the Commission's prior approval and to be declared compatible with the internal market on one of three different legal bases: (1) Article 107(2)(b) of the Treaty on the Functioning of the European Union (TFEU); (2) Article 107(3)(b) TFEU; and (3) and Article 107(3)(c) TFEU.

Under Article 107(2)(b) TFEU, Member States may automatically grant aid 'to make good the damage caused by natural disasters or exceptional occurrences'. This is an automatic exemption by law provided that certain conditions are met, including the causal link between the crisis and the measure and the necessary and proportionate nature of the measure. The Commission must therefore expressly approve the notified measure. EU case law provides guidance on the application of this provision.[5] The Commission also required that specific data in relation to the Covid-19 outbreak be provided.[6] Measures adopted under this provision could target specific sectors that have been particularly affected by the pandemic.

Under Article 107(3)(b) TFEU, the Commission has the discretion to deem compatible with the internal market a State aid measure to 'remedy a serious disturbance in the economy of a Member State'. The Temporary Framework (as amended) lists a number of measures that Member States may choose to adopt, such as grants, guarantees on loans, subsidised interest rates for loans (including

4 Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJEU C 91 I, 20 March 2020, pp 1–9); First Amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak (OJEU C 11 2 I, 4 April 2020, pp 1–9); Second amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak (OJEU C 164, 13 May 2020, pp 3–15); Third amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak (OJEU C 218, 2 July 2020, pp 3–8); Fourth amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak (OJ C 340 I, 13 October 2020, pp 1–10); an informal consolidated version of the Temporary Framework, which has not been published in the Official Journal, can be found at: https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_amended_3_april_8_may_and_29_june_2020_en.pdf, accessed 10 September 2020.

5 See, eg, Judgment of the Court of 23 February 2006, *Atzeni a.o. v Commission*, Cases C-346/03 and C-529/03, EU:C:2006:130, para 79 and Judgement of the General Court of 25 June 2008, *Olympiaki Aeroporia Ypiresies v Commission*, Case T-268/06, EU:C:2008:222, para 52.

6 See the amended notification template for the Temporary Framework after the third amendment, available at: https://ec.europa.eu/competition/state_aid/what_is_new/notification_template_TF_coronavirus_revised_after_3rd_amendment.pdf, accessed 10 September 2020.

subordinated debts), guarantees and loans channelled through credit institutions or other financial institutions, deferrals of tax and/or of social security contributions, wage subsidies for employees to avoid lay-offs during the Covid-19 outbreak, short term export credit insurance, research and development, investment aid for testing and upscaling infrastructures, and recapitalisation measures.

Most notably, the third amendment to the Temporary Framework introduced recapitalisation measures as a type of aid aimed at addressing the long-term financial difficulties facing non-financial undertakings, namely aid in the form of equity instruments (ie, issuance of new common or preferred shares) and/or hybrid capital instruments (ie, profit participation rights, silent participations and convertible secured or unsecured bonds). However, strict conditions are attached to these measures. For instance, the state may only intervene where necessary: to avoid the beneficiary going out of business or facing serious difficulties in continuing to operate; if the beneficiary is not able to find other resources on the market; or if the undertaking was not already in difficulty[7] before the pandemic, with the exception of micro or small enterprises.

Under Article 107(3)(c) TFEU, the Commission has the discretion to approve rescue and restructuring aid measures for undertakings in difficulty. Individual aid measures and schemes may also be approved to meet liquidity needs and support undertakings encountering financial difficulties as a result of, or exacerbated by, the Covid-19 outbreak.

In principle, the measures falling within the scope of this Framework may be combined with one another. The only exceptions concern (1) different types of aid relating to the same eligible costs; and (2) guarantees on loans and loans at subsidised interest rates which cannot be cumulated for the same loan or if the overall amount exceeds the relevant thresholds.

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7 Within the meaning of EU State aid law, pursuant to the 2014 Rescue and Restructuring State aid guidelines (Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJEU C 249, 31 July 2014, p 1), as well as Article 2(18) of the General Block Exemption Regulation, the Agricultural Block Exemption Regulation and the Fisheries Block Exemption Regulation. In substance, this notion covers one of the following instances: (1) in the case of a limited liability company (other than a small to medium-sized enterprise (SME) that has been in existence for less than three years) where more than half of its subscribed share capital has disappeared as a result of accumulated losses; (2) where the borrower is subject to collective insolvency proceedings or fulfils the criteria for being placed in collective insolvency proceedings at the request of its creditors; (3) where the borrower has received rescue aid and has not yet reimbursed the loan or terminated the guarantee, or has received restructuring aid and is still subject to a restructuring plan; or (5) in the case of an undertaking that is not an SME, where, for the past two years, the undertaking's book debt to equity ratio has been greater than 7:5 and the undertaking's earnings before interest, taxes, depreciation and amortisation (EBITDA) interest coverage ratio has been below 1:0.

Aid measures based on the Temporary Framework may be complemented by, and cumulated with, other support provisions, such as general measures not qualifying as State aid, measures benefiting from the *de minimis* rule, measures to compensate for direct damage within the meaning of Article 107(2)(b) TFEU, or aid measures for rescuing or restructuring firms in financial difficulty.

To date (as of 15 October 2020), 13 Member States (Austria, Denmark, Estonia, Finland, France, Germany, Hungary, Lithuania, Romania, Sweden, The Netherlands, Poland and Slovenia) have notified a total of 29 measures under Article 107(2)(b) TFEU; nine Member States (Austria, Belgium, Czechia, Denmark, Finland, France, Germany, Italy and The Netherlands) and the United Kingdom have notified a total of 14 measures under Article 107(3)(b) TFEU; and two Member States (Portugal and the UK), have notified three measures under Article 107(3)(c).[8] These measures have been notified outside of the scope of the Temporary Framework, as they did not fulfil the Framework conditions but were nevertheless captured by Articles 107(2)(b), 107(3)(b) and 107(3)(c) TFEU. By comparison, to date, the Commission has adopted approximately 277 decisions under the Temporary Framework. The decisions, often adopted shortly following notification, are for the most part Article 107(3)(b) measures and are generally in line with the General Block Exemption Regulation (GBER).[9] They concern all Member States plus the UK (under the transitional provisions of the withdrawal agreement) and over some €1.5tn. Most of this amount was committed by France, Germany, Italy and the UK.

These statistics are ever-changing. While the above figures are striking, an important part of these commitments are state loan guarantees, which, as in the financial crisis, will not necessarily be activated. It therefore appears that while Member States make eye-catching headlines with the amounts of aid committed to the sectors most impacted by Covid-19, these do not necessarily correlate with actual commitments to individual companies. An important distinction should be drawn between the amounts of loan guarantees Member States announce and the amounts actually 'used' in the concluded loan (because of the borrower's choice not to seek these guaranteed loans or the banks' reluctance to grant them). By way of example, as of 14 July 2020, Germany budgeted €756bn, but only €36bn was actually committed; the UK budgeted €360bn, with only €66bn actually being committed; France budgeted €300bn, with only €108bn actually being committed;

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8 See the regularly updated list of Member State measures approved by the Commission at: https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf, accessed 10 September 2020.

9 Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal state aid, OJEU L 248, 24 September 2015, pp 1–8.

Italy budgeted €300bn, but only committed €51bn; and, finally, Spain budgeted €183bn, with only €85bn actually being committed.[10]

The headline figures seem intended to garner attention and reflect a huge willingness on the part of governments to 'save' their economic players, even if the banks are reluctant to grant the guaranteed loans. This may suggest that the allowed schemes and mechanisms are too complex and therefore simply not the right type of aid for the current crisis.

The Temporary Framework and the decisions adopted thus far

The Commission appears to want to provide as much guidance as possible to Member States, just as it did during the crisis of 2008. However, the Temporary Framework seems to have had the effect of making Member States' actions too rigid, in a similar way to the GBER. Member States can choose from the Temporary Framework 'toolbox' measures that more or less correspond to their needs, and the Commission adopts its compatibility decisions 'mechanically' by verifying compliance with the conditions imposed. In effect, the Framework system is somewhat similar to the GBER system, but with standstill obligation and formal prior notification (which are fundamental differences). Furthermore, the Commission has gained new insight in the past months; indeed, the Temporary Framework was amended four times in order to include new types of aid, changes and/or explanations in regard to existing sections.

Why do Member States prefer Article 107(3)(b) TFEU?

The number of approval decisions the Commission has adopted during the Covid-19 emergency is unprecedented. The majority were approved under Article 107(3)(b) TFEU and the Temporary Framework, while a limited number of decisions were adopted under Article 107(2)(b) TFEU. This can be explained by the fact that Article 107(3)(b) TFEU can be used by Member States without having to demonstrate that a specific sector or company has been hit harder than others. Furthermore, aid granted under Article 107(3)(b) TFEU covers indirect damages and offers more legal certainty for Member States that can fulfil the conditions established by the Commission in the Temporary Framework and are sure to respect State aid rules.

By contrast, under Article 107(2)(b) TFEU, Member States should carry out financial (or economic) analyses that are much more complex and detailed than

10 See J Anderson (Breugel), F Papadia (Breugel) and N Véron (PIIE), '*Government-guaranteed bank lending in Europe: Beyond the headline numbers*', available at: www.bruegel.org/2020/07/government-guaranteed-bank-lending-beyond-the-headline-numbers, accessed 10 September 2020.

Temporary Framework decisions based on Article 107(3)(b) TFEU. Indeed, if a state wishes to compensate damages for 'exceptional occurrences', it must assess several elements, including the counterfactual, the causal link and the exact extent of the aid in relation to the damage. This exercise can be burdensome – especially as calculating damages can be difficult absent clear data or benchmarks to make the counterfactual assessment comparing the status quo of the beneficiary ex ante the pandemic – as most companies in the same industry will be suffering as a result of the outbreak and could receive state support. In addition, Member States will usually have to claw back any excessive funding.

Notifying an aid measure under Article 107(2)(b) TFEU may be more complex, but as there is no ceiling to the damages that can be compensated, some Member States are opting for it, especially when taking decisive action in favour of sectors of their economies that have suffered more than others due to the pandemic.

These legal bases are in fact complementary: Article 107(3)b) measures are better suited to schemes to restore confidence in the markets and provide liquidity to undertakings heavily hit by the closure of their sources of revenue, while Article 107(2)b) measures aim at compensating very specific damages clearly demonstrated by specific undertakings.

Recapitalisation measures and the air transport sector

Recapitalisation measures were included in the Temporary Framework at a later stage. The Commission recognised that including this type of measures was important to allow Member States to support eligible companies, in particular those that were healthy before Covid-19 struck and that fell into difficulty because of the outbreak. At the same time, the Commission has noted that these types of measures should be used as a last resort.

Member States have so far notified only a few recapitalisation measures. This is likely due to the Temporary Framework setting out several restrictions with regard to those measures in order to limit distortion and ensure that the participation of Member States is as limited as possible.

Many of those measures were targeted at supporting companies active in the air transport sector, which was particularly affected by Covid-19. By way of example, the recapitalisation of Lufthansa[11] attracted attention as the Commission made the approval conditional on slot divestitures at Lufthansa's Frankfurt and Munich hubs. The Lufthansa case clearly shows that the Commission is keen to ensure

11 Decision of 25 June 2020, *SA.57153*, COVID-19 Aid to Lufthansa (this is a 'package' decision, including other measures, as well as a recapitalisation).

that aid does not unduly distort competition and is aware that its decisions may be challenged before the EU Courts.

The Commission's decisions in favour of companies active in the air transport sector have given rise to legal challenges. In particular, Ryanair has challenged several Commission approval decisions, claiming that the Commission violated the TFEU and the general principles of EU law regarding the prohibition of discrimination based on nationality and free movement of services.[12] It remains to be seen whether the General Court will be more tolerant than it would otherwise be because of the Covid-19 crisis.

With respect to the aid granted to Air France,[13] it is worth noting that the French state (not the Commission) was reported as having imposed several 'green' obligations on the airline.[14]

As mentioned, under the Temporary Framework, the Commission has stated that aid cannot be granted to undertakings that were already in difficulty on 31 December 2019, that is, prior to the pandemic. In this way, the Commission has tried to ensure that aid will only be granted to those companies facing financial difficulty due to the Covid-19 outbreak that were otherwise sound. However, in June the Commission included a slight derogation to allow Member States to provide public support under the Temporary Framework to micro and small companies, even if they were already in financial difficulty before 31 December 2019. This greater flexibility was nonetheless conditional upon the undertaking not being subject to collective insolvency procedures under national law and not having received rescue or restructuring aid. Given the huge impact of the pandemic on small companies, the Commission has adopted a more favourable approach, especially considering that the distortion of competition is limited.

Conclusion

The Commission's approach has allowed several Member States to respond quickly to this unprecedented crisis and support their economies. However, as the situation

12 See, at this stage, the following cases lodged by Ryanair against several of the Commission's decisions: T-238/20 (Swedish guarantee scheme to support airlines), T-259/20 (French deferral payment scheme of certain aeronautical taxes for airlines), T-378/20 (Danish support in favour of SAS), T-379/20 (Swedish support in favour of SAS), T-388/20 (Finnish scheme in support of Finnair) and T-465/20.

13 Decision of 4 May 2020, *SA.57082*, COVID-19 – *Cadre temporaire* 107(3)(b) – *Garantie et prêt d'actionnaire au bénéfice d'Air France*.

14 In particular, to reduce its carbon emissions and domestic flights; to derive two per cent of the fuel used by its planes from alternative sustainable sources by 2025; to direct future investments to renewing the fleet of long and medium-range planes (statements by Minister of Finance Lemaire to the National Assembly's Economics Committee on 28 April 2020).

is still evolving and the extent of the crisis is unknown, it remains to be seen whether the Commission's approach will need to be updated to be more effective and to fend off challenges.

There is also the question of the efficiency of the measures approved by the Commission. As aforementioned, a large portion of the approved measures takes the form of guarantees that may never be used by the targeted undertakings. Therefore, it may have been more efficient to respond to the liquidity needs of undertakings by granting them compensation damages or subsidies rather than offering guaranteed loans that these undertakings have no way of repaying, especially when there are sufficient measures available under the Temporary Framework that do not require repayment.

With regard to Member States, it is not yet clear if they will be willing to make more use of Article 107(2)(b) TFEU to support the sectors most affected by the outbreak and if they will make financial support subject to compliance with EU green and digital objectives.

Finally, this begs the question: what will happen when the crisis is 'over'? Several Member States, like Germany, have granted more aid than others during the pandemic. This will have an impact on the EU economy. Countries with less capacity to support their economies will likely suffer from unfair competition and weaker economies. The recent EU recovery plan (in particular, the Next Generation EU (NGEU) of €750bn) adopted by the EU on 21 July 2020 will hopefully alleviate the asymmetry of the aid support capacity among the Member States.

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