

STATE AID FOR COMPANIES IN FINANCIAL DIFFICULTY AS A RESULT OF COVID-19

The scale of the global economic fallout from COVID-19 is immense, and growing. Within Europe, governments have raced to put in place a range of schemes to support businesses through the crisis. However, the State aid rules remain in place and may constrain the steps that a Member State can take without European Commission approval. The UK also continues to be part of this regime during the transition period.

With significant levels of public resource being made available for State intervention during the crisis, the European Commission will be concerned to ensure the preservation of a level playing field. In addition, there is the risk that other market operators may complain that beneficiaries have been assisted unfairly is heightened – as seen by Ryanair’s prompt legal challenges against aid granted by Sweden, France and Germany to national airlines.

Against that background, this briefing sets out a high level guide to the relevant State aid considerations for an individual company that is in financial difficulties and considering seeking State support as a result of Covid-19.

Does the proposed support involve the grant of State aid?

General measures (i.e., those not addressed to a particular sector or company), are not considered State aid. Moreover, to the extent a Member State makes funds available to a particular company in a manner that is consistent with the likely behaviour of a commercial, market economy operator (on so-called ‘MEO terms’), the measures will not involve the grant of State aid.

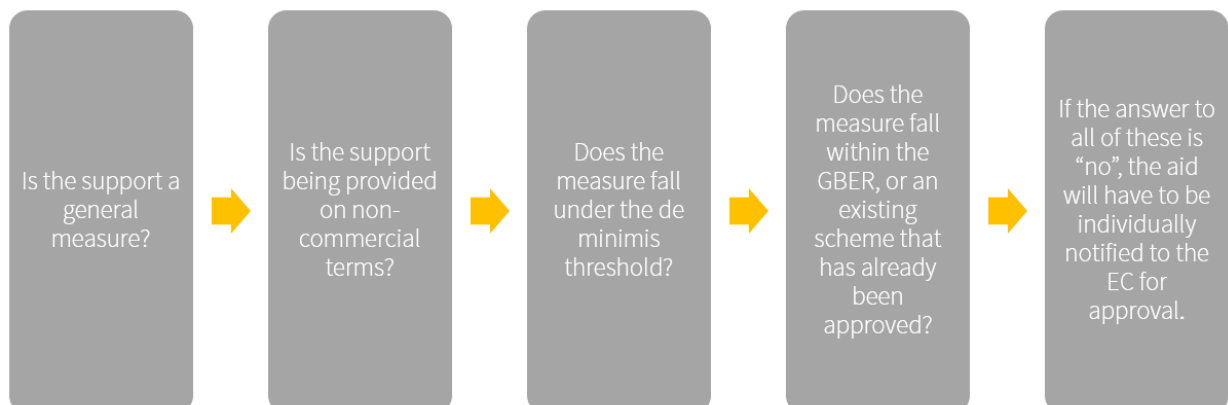
The best evidence that a transaction is on market terms is where a significant contribution is made by a private investor on equivalent terms. This could be relevant if, for example, a Member State were to agree to a loan or defer payment of amounts due to it in circumstances where other creditors in an equivalent position were agreeing to the same thing.

Where a Member State cannot be said to be acting on MEO terms, then any financial assistance or equivalent measures that are directed at an individual beneficiary or group of beneficiaries is likely to involve aid and will need to be authorised under the State aid rules.

Potential grounds for State aid approval without an individual notification

Where support measures are covered by an existing scheme or block exemption then no individual notification to the Commission will be required. The main options here are:

- The De Minimis Aid Exemption Regulation, which covers aid provided to a single undertaking not exceeding €200,000 over a three year period.
- The General Block Exemption Regulation (GBER) – this covers a range of categories of aid including regional, training, SMEs, R&D, infrastructure and environmental. However, this route will generally not be available to “undertakings in difficulty” (with some limited exceptions) so may not be of assistance to companies struggling financially.
- Pre-approved schemes that individual Member States have put in place either under the Covid-19 framework discussed below (or more generally). The options here will vary by jurisdiction but, for example, the UK has an approved “umbrella scheme” (the National Temporary Framework for State aid) that provides a basis for the provision of grants, loans and guarantees within certain limits. Several Member States have introduced similar “umbrella schemes”, many of which mirror the Temporary Framework approved by the European Commission.



Notification for individual approval

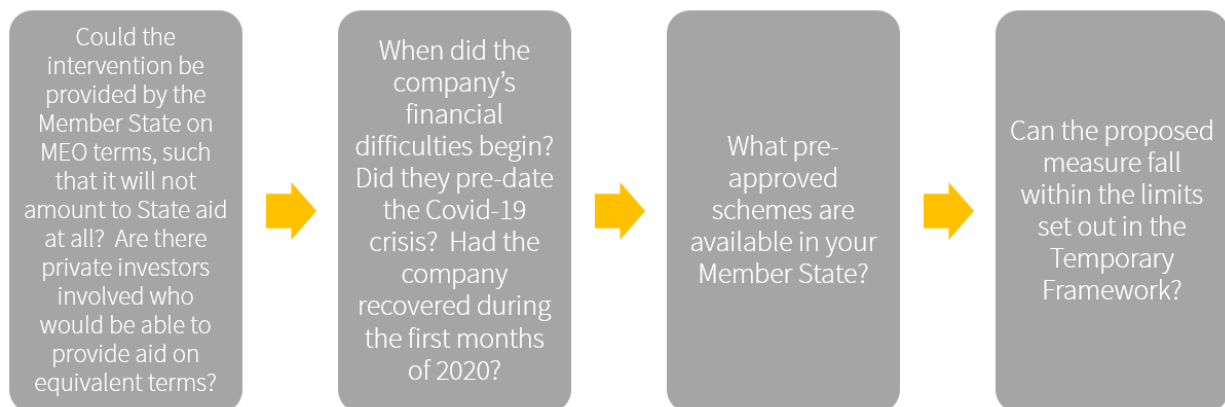
If there is no pre-existing basis for approval then the support will need to be notified to the European Commission for an individual approval before it can be implemented. For measures that are introduced in response to Covid-19, the European Commission has been using two “exceptional” grounds for approval that are available under the EU Treaty:

- Art 107(2)(b) which permits compensatory aid to make good damage directly caused by “exceptional occurrences”. However, aid provided under this ground may only cover damage suffered as a direct consequence of Covid-19. It is not intended to be used for measures that are directed at the more general preservation or restoration of the viability, liquidity or solvency of the aid beneficiary; and
- Art. 107(3)(b) TFEU, which deals with the provision of aid to remedy a “serious disturbance” in the economy of a Member State. The European Commission has issued a Temporary Framework for State aid measures to support the economy in light of the Covid-19 outbreak, which sets out certain categories of aid measures that it is able to review and approve on an expedited basis (it also remains possible to seek approval of proposals going beyond this framework). The Temporary Framework indicates that the Commission will approve (amongst other things):
 - direct grants, equity injections, selective tax advantages and advance payments, up to a value of €800,000 per company;
 - State guarantees for new loans or subsidised public loans for up to six years for investment and/or working capital needs (with prescribed minimum guarantee premiums). For loans or guarantees that extend beyond 31 December 2020, the value is capped at the higher of (i) double the annual wage bill of the beneficiary; (ii) 25% of the turnover of the beneficiary; or (iii) the justified liquidity needs of the beneficiary for the coming 12 months; and
 - subordinated debt and “last resort” equity recapitalisations by a Member State. Any recapitalisation will be subject to detailed conditions which, broadly speaking, are intended to minimise support given and incentivise exit (e.g. dividend bans and remuneration and acquisition restrictions). The exact scope of these restrictions will depend on the extent to which there is significant private participation in the restructuring.
- In most cases, aid can only be provided under the Temporary Framework to undertakings that were not in financial difficulty (as defined in the GBER) as at 31 December 2019. This restriction does not apply to micro and small companies, or to other SMEs that have been in existence for less than 3 years, provided in each case they are not already in insolvency proceedings or in receipt of rescue and restructuring aid.

Non-Covid-19 framework options

For companies that are not eligible for the Covid-19 frameworks, the main option for State aid approval is likely to be the Rescue and Restructuring guidelines under Article 107(3)(c) TFEU. These provide, in summary, for the provision of initial “rescue aid”, meaning temporary, reversible support (such as loans and guarantees) generally for an initial six month period to provide short-term liquidity support. To extend the aid for a longer period a restructuring plan must be submitted for approval that shows how the long term viability of the business will be restored and, amongst other things, normally requires that the beneficiary contributes at least 50% of the costs of the restructuring (for example, through the provision of new financing or the sale of profitable activities) whilst investors and creditors will be expected to share the burden of accumulated losses. Restructuring aid granted on this basis will therefore impose very onerous obligations on the company and its shareholders.

One such recent example is the European Commission’s approval of rescue aid for the Portuguese airline TAP which, as it had been facing financial difficulties prior to 31 December 2019, was not eligible to receive support under the Temporary Framework. The European Commission therefore assessed the measure under the Rescue and Restructuring guidelines. As part of the approval, the Portuguese authorities have committed that TAP will either reimburse the loan or submit a restructuring plan within 6 months.

Key questions

If you would be interested in discussing these issues in further detail, please speak to your usual Best Friend contact or one of the following:



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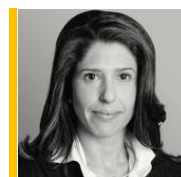
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