



Webinar: State Aid and Coronavirus – the UK and EU Perspective

Thursday 30 April 2020

Moderated by Omblin Ancelin

With Jacques Derenne and George Peretz



1. Introduction by Omblin Ancelin

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Omblin Ancelin,
Partner at Simmons & Simmons Paris

1. Introduction

1.1 General comments on State aid

- Notion of State aid
- EU view on State aid : prohibited unless exempted
- EU exemption requires notification to the European Commission unless block exempted

Notification not required	Notification required
Non-selective national measures, i.e not State aid	Measures benefiting only to certain types of companies or companies in specific sectors (aid schemes)
State aids exempted under the General Block Exemption or below the de minimis threshold	Individual aid benefiting to one company

1. Introduction

1.2 Impact of Covid-19

- **The Covid-19 crisis:**
 - a huge impact on businesses across Europe and worldwide;
 - a good example of circumstances permitting an exception to the principles, if it is necessary and justified;
- **European Commission's quick reaction to help the Member States to support their businesses:**
 - (i) Dedicated mailbox and phone line for Member States;
 - (ii) Temporary Framework for State aid on 19 March.

1. Introduction

1.3 The Temporary Framework

- **Legal Basis of the TF : 107(3)(b) TFEU** : need to remedy a serious disturbance to the Economy of a Member State
- **Types of aid under TF include**
 - Initially five types of financial aids (i.e. direct grants, subsidised public loans, State guarantees for loans),
 - Extended to facilitation of R&D and expanded production into Coronavirus related products, facilitation of the protection of employment in the MS.
- **Duration** : due to run until 31 December 2020, but may be extended.
- **In practice,**
 - National measures notified have been rapidly approved
 - More than 90 national measures approved in the context of Covid, 84 under the TF

1. Introduction

1.4 The UK view of the current State aid response

- **3 UK schemes approved under the TF**
- **Brexit context**
 - State aid view in the UK
 - After Withdrawal agreement's vote, key matter in the current EU-UK negotiations
 - Transition period : State aid rules continues to apply to the UK.

Questions on the UK perspective

- *What use of the state aid regime by the UK over the last years and more recently in the context of the Covid crisis ?*
- *How to conciliate the transition agreement in respect of UK Covid-19 related state aid review by the Commission?*

State aid and Brexit: the current position and what has been agreed

George Peretz QC
Monckton Chambers
April 2020

Topics covered

- Transition
- The transition out of transition
- Post-transition: the Ireland/Northern Ireland Protocol and the future UK regime

Transition

- Articles 127-128 WA
- Art.127(3): EU law produces “in and in respect of the UK the same legal effects as those which it produces within the [EU]”
 - “in”: State aid law applies in the UK
 - “in respect of”: UK to be treated as a Member State (common interest; effect on trade; definition of “relocation”, etc.)
- No UK say in legislation/advisory committees etc.

Extending Transition beyond 31.12.2020

- Art 132(1) - Joint Committee decision
- For “up to 1 or 2 years”
 - Art 132(2)(c): looks as if non-whole years extension possible
- Decision must be taken before 1.7.2020
- Only one extension
- Money – to be agreed (Art 132(3)(a))
- Section 15A Withdrawal Act 2018

Politics of extending transition

- UK Government still maintaining extension will not be agreed
- Transition is “pay, obey, no say”
- BUT
 - Business/government tied up with Covid-19: can they realistically also prepare for new trading arrangements with EU?
 - Trade deal requires political focus and wide consultation
 - Meaningful trade deals with US, others look unlikely while world focus is on Covid-19
 - Many Brexiters relaxed about extension

Transition out of transition

- Art 92 WA – Commission remains competent for all matters given a case number before end of transition (complaints/notifications/own initiative inquiries)
- Commission can start new procedure any time before 4 years after end of transition in relation to State aid granted before end
- All such decisions bind UK – appeal to GC and ECJ
- UK courts can make Art 267 references up to end of transition – and ECJ can rule after transition and ruling binding

Ireland/Northern Ireland Protocol

- Article 10: -

“The provisions of Union law listed in Annex 5 to this Protocol shall apply to the United Kingdom ... in respect of that trade between Northern Ireland and the Union which is subject to this Protocol”

- Annex 5 lists all the State aid rules
- “that trade ...” is goods (and electricity)
- Apply “to the United Kingdom”

Enforcement of Article 10

- Art 12:
 - in relation to Art 10 “the institutions, bodies, offices and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred on them by Union law.”
 - acts of those institutions etc. “shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and Member States.”
- The Protocol has direct effect in the UK (Art 4 WA; s.7AEU Withdrawal Agreement Act 2018)

House of Lords EU Committee (2.4.20 letter to BEIS)

“It is troubling that no one we heard from thought that the UK Government had a clear understanding of what state aid provisions it had signed up to in the Protocol, and that the regions and devolved nations we heard from were not clear on how the Protocol might affect them.”

“We agree that it should be a key UK priority to renegotiate provisions on state aid in the Protocol as part of the future relationship agreement with the EU, or negotiate alternative arrangements for Northern Ireland-Republic of Ireland trade, as envisaged in the previous Withdrawal Agreement, which would replace the Protocol entirely.”

Post-transition

- UK Government: new regime based on WTO regime; no commitment to EU on content
 - NB grumbles about Covid-19 and State aid rules – esp on rules for undertakings already in difficulty
- EU – UK must adopt EU State aid rules, with Commission and ECJ (NB not even Ukraine, accession states accept that)
- But
 - UK will want to renegotiate NI Protocol – means commitments to the EU
 - UK wants an anti-subsidy regime for domestic purposes
 - Agreement on substance (same effect as State aid rules) if not form?

What effectiveness of the current measures ?

- *Lessons from a first-phase of decisions since mid-March 2020 ?*
- *Interaction between varied measures under the Temporary Framework*
- *Focus on the “compensation measures” (Article 107(2)(b) TFEU)*

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- Comments on the first phase since mid-March
- Compensation of damages caused by Covid-19

Jacques Derenne

Partner, Brussels & Paris bars

Professor, Liège University & Brussels School of Competition

Comments on the first phase (1)

- Impact of no aid measures or *de minimis* aid
 - general measures
 - support to citizens
 - wage subsidies
 - suspension or deferral of corporate taxes & VAT (w/o sector differentiation)
 - de minimis aid
- Quick reaction targeting liquidity needs
 - Legal clarification (similar to October 2008 communication)
 - Procedure (notification templates, waiver on language, speed, dedicated means & webpage)
- TF too general and not targeted enough?
 - Moral hazard? Zombies firms? Cleansing effect? Sufficient safeguards?
 - How loans and loan guarantees can make good a lockdown effect for several months?
- No rescue and restructuring cases?

Some comments on the first phase (2)

- **Unbalanced reaction by Member States:** (95 decisions as at 30.4.2020 - 9:15 am)

Article 107(2) b)	Article 107(3) b)	Article 107(3) c) under TF
8 decisions	79 decisions under TF – 3 107(3) b)	4 decisions (Covid-19 products)
No discretion by Commission	Discretion by Commission	
Past	Future	
Detailed financial data required	Limited to no financial data required	
Can be cumulated		
Cash needed in principle	Less cash needed	Cash needed

Some comments on the first phase (3)

- Aid tailored by sector?
 - TF not sector by sector but 107(2)(b) notification template focuses on sectors (aviation)
 - Mostly: (air) transport, automotive, agriculture, energy, digital sector, health, event companies
 - Commissioner Vestager on 107(2)(b) measures: “*the most obvious way to go*”
- Global competition and recovery plans
 - State aid as a unique control system in the world
 - Many FTAs include “State aid” provisions but weak enforcement
 - Need for reciprocity
- EU distortion - disparity
 - Big pocket Member States
 - EU-wide recovery fund for certain sectors?
 - Recovery plans and Green Deal and Digital Agenda?
- Litigation?

Article 107(2) b) – “*to make good damages caused by exceptional occurrences*”

- “*Natural disaster*”
 - storms, earthquake, floods, eruptions
- “*Exceptional occurrences*”
 - war, strikes, major industrial accidents, terrorism (9/11 – 11/15 & 3/16)
- Aid compatible in law
 - No discretion for the Commission
 - T-268/06 *Olympiaki Aeroporia Ypiresies AE v Commission*, para 51
 - But aid still to be notified and approved
 - Covid-19 notification template published by DG COMP
 - Objective conditions to be construed restrictively

Article 107(2) b) – conditions

- Exceptional occurrence
 - The Covid-19 outbreak constitutes such an exceptional occurrence
 - TF, § 8, 15
 - 8 decisions (DK (4), FR (1), SW (2), GE (1))
 - Sectors (not limited to):
 - transport, tourism, culture, hospitality, retail, organisers of cancelled events
- Damage caused by the exceptional occurrence
- Direct causal link
- Damage assessed as precisely as possible
 - C-346/03 and C-529/03 *Atzeni a.o. v Commission*, para. 79
 - T-268/06 *Olympiaki Aeroporia Ypiresies v Commission*, para. 52
- Reference period?
 - When companies “could not operate normally”
 - Income recorded during the reference period v. income recorded prior to the event
 - This can include costs which occurred beyond the days of the event (progressive exit)
 - catching-up phase following the reopening of the business
 - additional costs linked to the restart of the operations
 - decision 1.8.2011 SA.32163 - 2010/N - Slovenia – Icelandic volcano ash in April 2010

Article 107(2) b) – No overcompensation

- **Counterfactual value-added (average value-added of the previous year): what the company would have accrued if the event would not have happened**
 - foregone revenues due to the closure + additional costs directly attributable to the closure
 - minus operational costs avoided during the closure
 - actual damage: the difference in turnover and costs between what actually occurred and what should have happened (the counterfactual scenario)
- **Indicators**
 - revenue and cost items likely to be affected by the event
 - cost items unlikely to be affected under the counterfactual scenario compared to the actual one (not considered for compensation)
- **Safeguards**
 - verification of aid applications at several levels by specially appointed bodies
 - documentary evidence
 - prosecution for false or incorrect declarations and recovery with interests.

Article 107(2) b) and Temporary Framework

- No aid granted to an undertaking in difficulty at the time of the event
 - Difficulty:
 - Economic death certain w/o State intervention
 - Loss of +50% of capital or be subject to collective insolvency proceedings
 - Large undertakings (past two years)
 - debt to equity ratio > 7.5
 - EBITDA interest coverage ratio < 1.0
- “One time last time” principle does not apply (107(2) not an ‘R&R’ aid)
 - Member States may compensate damages directly caused by Covid-19 to undertakings that have received aid under the R&R Guidelines.
 - However, they should no longer be ‘in difficulty’: i.e. having completed the restructuring plan
- No circumvention of rescue and restructuring aid principles
 - Not used to remedy undertakings' problems unrelated to the relevant events.
- Non-discriminatory

Article 107(2)(b) decisions (as at 29 April 2020)

- Only four Member States: DK, FR, SW, GE
 - Cancellation of events and schemes
 - Airlines
- Only three individual measures:
 - DK and SW – SAS
 - DK+SW: partial compensation (2 X €137 m guarantees on revolving credit facility) for the cancellation or re-scheduling of flights
 - DK: exact damage quantified after the crisis (2020 operating accounts); quantification method subject to Commission's prior approval; claw-back mechanism
 - SW: complementary to another State guarantee scheme for airlines (difficulties in obtaining loans); alternative to the guarantee scheme; claw-back mechanism
 - GE - Condor (rescued Thomas Cook German subsidiary)
 - flights cancellations, loan guarantee (€550 m), no cash, claw-back mechanism

What's next ?

- *Recapitalization ?*
- *Rescue and restructuring ?*

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Next steps?

- Recapitalisation (Article 107(3) b TFEU)
- Rescue & Restructuring?

Jacques Derenne

Partner, Brussels & Paris bars

Professor, Liège University & Brussels School of Competition

Recapitalisation measures?

- Commission consulted Member States on 9 April 2020
 - ongoing debate on the strict conditions for such structural measures
- Inspiration from the financial crisis?
 - miscellaneous financial instruments, not limited to capital
 - subordinated loans? [max 5% turnover; 40% annual wage bill?]
 - repayment terms with incentives to exit the State at the earliest
 - State remuneration increasing over time to reach the market price
 - restrictions on the behaviour of beneficiaries
 - commercial restraint, ban on acquisitions, dividends, bonuses, buyback programmes
 - State remuneration in proportion to the size of the beneficiary company
 - specific structural and behavioural remedies (divestitures) and exit strategy
 - according to the size of the companies and their market position
 - restructuring plan if State stays on beyond a certain date?
 - exit depending on the State's concerned situation?

Other types of measures? Rescue & restructuring aid?

- If in difficulty after 31.12.2019
- Rescue
 - Temporary, reversible; minimum necessary (formula)
 - Social hardship or market failure
 - Loans or guarantees - max. 6 months, 1-year IBOR + 400 bps
- Restructuring
 - Restructuring plan (LT viability)
 - Aid limited to the minimum
 - Burden sharing - Significant contribution of the beneficiary
 - Avoidance of undue distortions of competition
 - Counterfactuals / compensatory measures
- New Covid-19 adjusted R&R guidelines?
 - 2014 guidelines very much shaped by 2009 financial crisis guidelines
 - Shift from “bail out” towards “bail in” applicable for Covid-19?

Q&A

Most frequent questions

- Cumulation of measures : permitted?
- Beneficiary of the aid : ‘undertaking’ (company or group of companies?)
- Undertakings in difficulty : how to apply the rule?

Other questions from attendees ?

