



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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Webinar: “State Aid and Coronavirus – the UK and EU perspective”

Date: Thursday 30 April 2020
Speakers: George Peretz QC and Jacques Derenne
Moderator: Omblin Ancelin

Introductory remarks – Omblin Ancelin

- Under EU law, the basic rule is that State aid is prohibited unless it falls within one of the exemptions (found within the Treaty and in various block exemption regulations). Member States are required to give prior notification to the Commission where a measure may amount to State aid. Unlike in the competition field, the Commission (rather than national competition authorities) has sole responsibility for monitoring and approving State aid, and national courts are only involved in enforcing the violation by Member States of their notification and standstill obligations (“unlawful aid”), in particular through prevention, cease and desist orders and recovery as well as in enforcing negative decisions of the Commission.
- The current COVID-19 crisis is a good example of the kind of ‘exceptional occurrences that engage the exemption under Article 107(2)(b). However, most of the measures taken so far have either not constituted aid (general measures to the economy) or fallen within the de minimis rules, general block exemptions, or within the exemption under Article 107(3)(b).
- The Commission reacted very quickly to the crisis, setting up a dedicated mailbox and hotline service, and publishing a Temporary Framework Notice on 19 March. Approvals (over 90) have so far been granted very quickly, and most did not benefit individual companies. The Framework will last to the end of 2020.
- Three UK schemes have been notified and approved, including one for small businesses. As the UK is still in the post-Brexit transition period, EU State aid rules remain applicable.

George Peretz

(i) Transition

- Under the transitional provisions agreed in the Withdrawal Agreement, EU state aid law continues to apply in the UK, with the UK effectively treated as a member state (see Article 127(3)) – albeit one without any involvement in legislation or policy.
- Any extension to the transition period will need to be agreed by the Joint Committee, but must be decided upon before 1 July this year. Only one extension is allowed and financial terms will have to be negotiated as well. A further complicating factor is that s.15A of the Withdrawal Act (as amended) precludes ministers from agreeing any extension (though this could be repealed).



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- The UK Government still maintains the position that it will not ask for an extension, and wants to move forward. However, there is no real prospect of meaningful trade deals with third countries before the end of the year.

(ii) Transition out of transition

- The Commission will retain competence for all matters given a case number before the end of the transition period and will have four years to start an investigation for any granted before the end of it.
- Under Article 10 of and Annex 5 to the Northern Ireland Protocol, EU state aid rules will in any event continue to apply to any UK measure that affects trade between Northern Ireland and the EU. Given the notoriously low threshold for the 'effect on trade' criterion, this will have a wide scope and would be likely to cover everything the government is doing as regards state aid during the current crisis (giving the Commission a continuing role here).
- Enforcement: the Commission retains its powers as regards state aid subject to the Protocol, and private enforcement in the UK courts will remain possible too.
- The House of Lords EU Internal Market Sub-Committee recently recommended that the government should try to renegotiate the state aid aspects of the Protocol; but there is not much time to do this.

(iii) Post-transition

- At the time of the last election, the Conservative party brought forward proposals for a 'WTO-style anti-subsidy regime'.
- It is not clear precisely what this will be mean. The main difference with the WTO approach is the relatively weak level of enforcement, which occurs only at the state-to-state level. Enforceability (rather than the substance of what is prohibited) is thus likely to be the key issue going forward.
- The EU position is that the UK must adopt EU rules and remain subject to Commission and CJEU supervision. This is more than is required from Ukraine and EEA countries.
- There may be room for an agreement whereby the UK commits to its own framework having the same substantive effects as EU rules, but without such rigorous EU oversight and enforcement powers.



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Jacques Derenne

(i) First phase of the crisis

- The Transitional Framework provides a 'safe harbour'. Member States still need to notify aid, but can be confident that the measures they propose to take will be approved.
- Unusually, the Commission has published notification templates to assist.
- Approvals have been rapid so far, typically within two or three days following notification often after pre-notification talks.
- Is the Transitional Framework too general? The Commission did what it could in the short term, but there is a risk of giving support to 'zombie' firms, and, going forward, care must be taken so that only efficient firms are assisted (and only they survive).
- At the present, loan guarantees are not especially helpful. Many firms have immediate liquidity problems and may be unlikely to be able to repay loans, so need immediate cash assistance from the State instead.
- So far there has been no rescue or restructuring cases. There are some undertakings reported as being in the process of securing financial assistance beyond the aid provided by the Temporary Framework from the governments to help them survive; this may be a taste of things to come.
- So far there have only been eight decisions under Article 107(2)(b), compensating for damage suffered (where the Commission has no discretion, the exemption being by law once its objective conditions are fulfilled).
- The Transitional Framework focuses on those sectors most affected (such as aviation).

(ii) The future

- Problems in respect of global competition: other countries do not have equivalent State aid rules, so reciprocity will be required to stop EU businesses being undercut by subsidised products. The EU has previously had some success in exporting its approach.
- Problems of budget disparities across Member States. If only some countries can afford to subsidise their industries, this is likely to have a distortive effect across the internal market.
- Do not expect a significant amount of litigation immediately. Ryanair has threatened action, but this should concern the Commission's decisions approving the measures duly notified by Member States. There does not seem to be violations of the notification obligation (otherwise, national courts will be the best placed to intervene).



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(iii) Article 107(2)(b)

- ‘Exceptional occurrences’ allow Member States to grant aid to make good damage suffered in consequence. There is no need for an internal market compatibility assessment.
- The ‘exceptional’ nature of the present crisis has already been confirmed by the Commission in approving grants to organisers of cancelled events in Denmark and waiver of French airport taxes before approving Danish and Swedish aid to SAS and German aid to Condor.
- States need to prove damage (typically loss of revenue) suffered by the undertakings concerned. Compelling evidence is required, and there must be a direct causal link between the exceptional occurrence and the damage.
- The extent of the loss must be quantified as precisely as possible, by comparison with normal circumstances.
- Compensation can cover ‘catching up’ costs incurred after the exceptional circumstances have ceased (aid approved following the Icelandic ash cloud disruption confirmed this).
- There must be no overcompensation, and various safeguarding measures are in place.
- No aid can be paid if an undertaking was in difficulty previously, and Article 107(2)(b) cannot be used for restructuring aid (and previously rescued or restructured undertakings can still obtain compensation even if they benefitted rescue and restructuring aid less than ten years before – deactivation of the “one time, last time” principle).

(iv) Recapitalisation measures

- The Commission is consulting Member States on providing a possible extension to the Transitional Framework to include this (either in the form of equity, or hybrid capital instruments or subordinated loans). A decision will be made soon.
- Capital injections will in principle be classified as aid unless the State is already a shareholder and/or acts *pari passu* with private investors.
- The financial crisis ten years ago provides a model here; States will be encouraged to exit supported businesses as soon as possible.
- Behavioural restrictions may also apply to beneficiaries.
- However, any firm already in difficulty before the end of 2019 will not be eligible to aid.
- Member States must be careful to avoid accumulation of measures which may breach rules (for example, R&D aid overlapping with aid to develop a specific COVID-19 related product).