

Coronavirus and competition law – state aid, merger control, crisis cartels and price hikes

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Competition law has an important role to play in assessing the legitimacy of economic actions taken by EU member states and businesses in dealing with the impact of the coronavirus. National measures to mitigate economic harm may constitute state aid, which has to be approved by the Commission. The Commission has adopted a temporary framework to test the compatibility of national measures with EU state aid rules.

M&A deals are also affected as competition authorities are calling on companies not to submit new notifications, while some ongoing reviews have been paused. Stand-still obligations stay in place, but an exemption might be available if the target company is in serious financial difficulty.

Competition authorities are supportive of sector-wide initiatives that are justified in view of the new challenges, such as those in the supermarket and pharmaceutical sectors. But they will remain vigilant in identifying anti-competitive behaviour that can result in price hikes.

Temporary state aid framework

The Commission has adopted a coronavirus-related [temporary framework](#) to assess state aid schemes in support of the economy. EU rules allow for the possibility to approve state aid granted to remedy a serious disturbance of the economy of a member state. To assess that disturbance, the Commission uses a series of macro-economic indicators. The Commission must approve state aid measures (as described below) which comply with the framework. The temporary nature of the framework is demonstrated by the fact that it will expire by the end of 2020.

The framework allows four types of aid schemes to operate after the Commission has been notified of them, and approves them. First, it allows direct grants and/or tax advantages of up to EUR 800,000 in total to undertakings. Second, it allows states to provide short-term export credit insurance (STEC) for risks which are normally covered by private insurance companies, but which are now temporarily unavailable in the market due to the corona outbreak; this is in deviation of the Commission's [Communication](#) on STEC. Third, it allows member states to guarantee bank loans provided to undertakings. Finally, it allows for loans with subsidised interest rates.

The Commission has indicated that banks can play a crucial role in the last two state aid schemes by ensuring that the aid goes to their professional customers, especially SMEs. For banks this will result in, for example, higher and riskier volumes of financing and lower guarantee premiums or interest rates. The framework

indicates that banks must ensure to pass on the aid “to the largest extent possible” and to avoid receiving any undue residual aid themselves. This could constitute illegal state aid which can be recovered, although the Commission indicates in the framework that such aid is not to be “qualified as extraordinary public financial support” and “should not be assessed under the State aid rules applicable to the banking sector”. Banks must be able to demonstrate that they operate mechanisms to ensure the passing on of the aid.

State aid measures

Member states have expressly communicated their strong commitment to supporting companies in need. This can be done by giving guarantees to companies, allowing them to get bank loans more easily, and by delaying payment obligations on taxes and social premiums. The Commission has already set the options out in an informative [flow-chart](#) and in its [communication](#) on how aid measures fit within the existing state aid framework.

Measures that constitute state aid are illegal if they are not approved by the Commission, unless an exemption applies, such as the De Minimis [Regulation](#) or the General Block Exemption Regulation ([GBER](#)). And if not approved by the Commission, the undertakings that received the illegal state aid risk having to repay that aid at a later stage. The Commission is demonstrating that it is taking this seriously by setting up dedicated communication channels for notifications and by acknowledging that speedy decision-making is needed. To underline this, the Commission [decided](#) within a day on Denmark's request to compensate the organisers of cancelled events. Aid schemes which compensate only the damage caused by confinement measures are, in general, more easily approved than schemes to support the financial liquidity of undertakings, which are to be assessed under the temporary framework.

Compensation for damages

In addition to measures supporting the financial solvability of companies, damages caused by the pandemic might also be compensated by member states under EU rules allowing this as an exceptional occurrence. But this compensation could also result in state aid and must therefore be notified to the Commission, as Denmark has already done. With regard to this type of aid, the Commission has [indicated](#) that the “one time last time” principle of the [Rescue & Restructuring Guidelines](#) does not apply to the compensation. Normally, this principle means that new aid is not to be granted to undertakings which have received rescue aid in the last ten years. But the Commission uses the full flexibility under state aid rules to make it possible to compensate undertakings affected by the coronavirus, for example, in the aviation sector. Consequently, an airline company such as Alitalia, which has already been and [currently is](#) under state aid scrutiny for rescue aid, might also receive compensation for losses suffered as a result of the coronavirus.

Rescue and Restructuring

In addition to general state aid schemes, member states can take individual measures to address critical situations for large undertakings and their specific needs. These also need to be notified to the Commission, and they will be tested by the

Commission under its [Rescue & Restructuring Guidelines](#). These guidelines were used widely during the financial crisis when individual banks were supported by member states through rescue aid, and the Commission only authorised this aid after approving restructuring plans. In the current coronavirus crisis, airlines are likely to be the first in line for this type of measure. It remains to be seen to what extent the Commission's recent [Green Deal](#) will influence its approval of restructuring plans, although it is currently not part of the guidelines.

Impact on merger control

Due to the confinement measures in place to stem the spread of the coronavirus, a number of competition authorities, including the Commission, have put measures in place affecting their M&A transaction review process. In terms of pre-notification and notification of new mergers, certain authorities request that parties delay a transaction or notification where possible. In addition to staff observing confinement measures, authorities are experiencing difficulties in getting information from third parties as part of their market investigations. This is also relevant for ongoing merger notifications, particularly in sectors that are severely impacted by confinement measures. For this reason, certain authorities have already announced and implemented deadline extensions or have issued stop-the-clock-decisions.

Failing firm acquisitions

The stand-still obligation not to complete a merger before notification and approval by a competition authority continues to apply. Therefore, notification and approval are still required if notification thresholds are met. However, many merger control regimes offer the possibility of requesting an exemption from the stand-still obligation, allowing completion to occur in specific circumstances. This might be needed if target companies face severe liquidity problems or even bankruptcy. We expect the competent competition authorities in those circumstances to act swiftly on a request for relief, similar to speeding up the state aid process.

State acquisitions

If a member state acquires a failing firm, merger control rules may apply if the relevant merger control thresholds are met. The remarks above on merger control therefore also apply to state acquisitions. In addition, the state aid rules cannot be ignored. If a member state acquires shares in a company as a private market investor (expecting a reasonable return on its investment), no advantage and therefore no aid is transferred to the selling party, or to the acquired firm. However, when it comes to failing firms, such a return on investment is usually not anticipated and the acquisition could amount to state aid. This is what we witnessed when failing banks were nationalised in the 2008 financial crisis. Those acquisitions have to be notified as state aid to the Commission, with strict measures being imposed in line with the [Rescue & Restructuring Guidelines](#).

Sector-wide cooperation and the cartel prohibition

Cooperation between companies, including competitors, which does not have an anti-competitive object, might be exempted from the cartel prohibition and there is now more room to cooperate

due to the exceptional circumstances. Sector-wide coordination may for example help to improve, or even guarantee, the distribution of food. In the [UK](#), the government has decided to grant an exemption from the cartel prohibition to allow competing supermarkets to cooperate in order to ensure sufficient stores remain open during the confinement period. The [Dutch](#) competition authority seems to allow: (i) supermarkets to exchange information on their actual stock; (ii) competing distributors of foods to cooperate; (iii) pharmaceutical wholesalers to exchange sales information; and (iv) sector-specific agreements to ease recovery from debtors. All of this in view of the exceptional problems which arise from the coronavirus. The [Norwegian](#) government has exempted competing airlines SAS and Norwegian from the cartel prohibition for three months. They have to cooperate in order to guarantee air transport of persons and goods in Norway. Another example is the joint research by pharmaceutical companies to find a vaccine against the coronavirus, for example, between [Pfizer and BioNtech](#).

Interventions by authorities on price hikes

The coronavirus is leading to certain product shortages, for example personal protective equipment (PPE). In a free market, when demand outstrips supply, prices go up. However, in the current circumstances, competition and consumer authorities will be keen to counter those price hikes. The Polish competition authority has already looked into a [case](#) where two wholesalers terminated their supply contracts with hospitals, apparently to obtain higher prices for products, including surgical masks.

Competition authorities are aware of this and are communicating their concerns and need for vigilance, for example, in the [UK](#), the [US](#), [Spain](#), the [Netherlands](#) and [Greece](#). Enforcement actions for misleading consumers in relation to PPE has also taken place under consumers laws, for example, in [Italy](#) and [China](#).