

Insights

COMPETITION LAW IN THE TIME OF COVID

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SUMMARY

The global COVID-19 pandemic is placing an unprecedented strain on healthcare systems around the world. At the same time, the knock on effects of the pandemic are hitting businesses and public authorities hard. As a result, the European Commission has made a number of announcements relating to how it will handle state aid and merger control matters during this time. These announcements will affect emergency funding to companies and M&A deals.

In this blog, we outline the Commission's recent communications relating to state aid and merger control, and also briefly touch on some of the other areas where competition law may come into play during the pandemic.

State Aid

On 17 March, the Commission announced that it had put forward a draft proposal for a state aid Temporary Framework to support the EU economy in the context of the COVID-19 outbreak, which it aims to have in place within a few days. The framework would be made under rules which allow the Commission to approve additional national support measures to remedy a serious disturbance to the economy of a Member State. The Commission has used these powers only once previously, during the 2008 financial crisis, when it adopted a Temporary Framework to support access to finance during the crisis.

The proposed Temporary Framework contains four key measures, the first three of which would allow EU Member States to:

- set up schemes to grant up to €500,000 to a company to address its urgent liquidity needs – either through a direct grant or a tax advantage;
- give subsidised state guarantees on bank loans; and
- enable public and private loans with subsidised interest rates.

The fourth measure recognises the importance of the banking sector and other financial intermediaries in dealing with the economic impact of the pandemic. In particular, the Temporary Framework makes clear that if Member States are to channel aid to the economy via banks, this will be direct aid to the banks' customers rather than to the banks themselves. The Temporary Framework also provides guidance on minimising undue residual aid to banks and ensuring the aid is passed on to customers.

The announcement follows a communication on 13 March in which the Commission outlined its response to the COVID-19 outbreak, including its proposed approach under the state aid rules to measures by EU Member States to tackle the crisis. Key points from the communication were:

- Government support measures which are available to all companies, such as wage subsidies, suspension of payments of corporate and value added taxes or social contributions, fall outside the state aid rules as they do not provide a selective advantage to specific companies. In addition, financial support granted by Member States directly to consumers, for example for cancelled services or tickets that are not reimbursed by the operators concerned, will fall outside the rules.
- Under the Commission's Rescue and Restructuring Guidelines, Member States can grant urgent and temporary assistance in the form of loan guarantees or loans to all types of companies in difficulty. In addition, companies that are not (yet) in difficulty can also receive such support, if they face acute liquidity needs due to exceptional and unforeseen circumstances such as the COVID-19 outbreak. Generally, companies that have already received such support in the past 10 years are not eligible for further aid. However, exceptions to that rule may be made in exceptional and unforeseeable circumstances such as the COVID-19 outbreak.
- EU state aid rules enable Member States to compensate companies for the damage directly caused by exceptional occurrences, and the Commission considers that the COVID-19 outbreak qualifies as an exceptional occurrence for these purposes. Measures under these provisions can be targeted to assist specific sectors (for example, transport, tourism and hospitality) or individual companies. Examples of previous schemes approved under this provision include:
 - support schemes in France and Germany to cover operating losses incurred by airlines in the period from 11 to 14 September 2001, linked to the closure of airspace as a result of the 9/11 attacks; and
 - in the context of the Icelandic volcanic eruption and dust cloud in April 2010, a support scheme in Slovenia to cover 60% of the economic losses of airlines and airports (compared to a situation where the disaster would not have occurred) in the period following the disaster, until the companies could again operate normally.

- On 10 March 2020, the Commission received a notification from Denmark (the first and so far only state aid notification linked to the COVID-19 outbreak) on a €12 million scheme to compensate organisers of events with more than 1,000 participants that had to be cancelled due to the COVID-19 outbreak. The Commission took a decision to approve this measure within 24 hours of receiving the notification from Denmark. It stands ready to provide assistance based on this template to other Member States that wish to implement similar measures.
- The Commission says it has put in place all necessary procedures to enable a swift approval process as it did during the financial crisis when a special unit was set up to deal with urgent state aid proposals. Decisions will be taken within days of receiving a complete state aid notification from Member States, where necessary. The Commission has set up a dedicated mailbox and telephone number to assist Member States with any queries they have.

EU Merger Control

Given potential staff shortages and other considerations, the Commission has also encouraged merging companies to delay merger notifications where possible, while also adopting special measures to ensure the safety of its staff and others. In particular:

- The Commission has asked that, where possible, merging parties delay making merger notifications until further notice. This is because the Commission's staff will likely face issues carrying out their usual merger reviews, given the potential lack of availability of third parties and also potential issues faced by the large number of Commission staff who are working remotely.
- Usually, merging companies are required to hand deliver paper submissions to the Commission's offices. During this period, the Commission will temporarily accept electronic submissions and is actively encouraging parties to do this (with the required paper originals to be delivered at a later date).

While, as things stand, the Commission is officially "open for business" and merger filings that are (or already have been) made will need to be considered by the Commission in line with its usual timelines, parties undertaking transactions should seriously consider whether merger filings (and consequently transaction timelines) can be pushed out during this period.

Businesses that do not heed the Commission's advice, and continue to engage with the Commission as usual during this period, face a number of risks. For example, there may be delays in the Commission accepting a filing as "complete" (and therefore starting its formal review timeline). Furthermore, in cases where there are potential competition concerns associated with a transaction, the parties risk being pushed into a lengthy "Phase Two" review if the Commission is unable to assess the transaction fully during the initial Phase One period.

In addition to the Commission's request to delay notifications, the COVID-19 lockdowns in EU countries may raise problems for transactions that have already been notified to the Commission. For example, there is a chance that a number of high-profile transactions already before the Commission will face delays if the Commission is unable to contact customers and competitors as part of their investigation and market testing. It remains to be seen how such delays will be dealt with and whether the Commission will need to "stop the clock" in its review of these cases and whether in any event that will be sufficient.

Merging parties should also brace for delays and COVID-19 related changes in other merger control regimes worldwide. For example, the UK's Competition and Markets Authority ("CMA") [has said that it has the position under review](#) and the US agencies are temporarily allowing electronic merger filings while suspending "early termination" decisions (where parties can get a quicker-than-usual clearance) ([see our alert here](#)). The Chinese agency has moved to an electronic and post-based notification system following a resumption of halted operations in early February.

Other Competition Law Issues

Competition law may play a role in other aspects of the COVID-19 crisis too. For example, competitors may be required to work together in order to ensure supplies of key goods and services (such as essential utilities, foods and medical supplies) can reach those in need. Ordinarily such cooperation between competitors could raise competition law concerns, and competition agencies and governments may look to ease up enforcement temporarily in order to allow such cooperation to take place. For example, the UK previously introduced specific powers for Government (after the 2005 Buncefield fuel storage fire) to disapply the competition law rules for a period to allow fuel suppliers to coordinate their activities such that emergency and other critical service providers would still have fuel at times of broader supply shortage.

On the flipside, some traders may seek to benefit financially from the crisis – for example by increasing prices for key medicines or hygiene products, such as hand sanitisers. While EU and UK competition law can generally only intervene when such exploitative conduct is undertaken by a "dominant" company charging "excessive" prices, [competition agencies such as the UK's CMA](#) have already made it clear that they have an eye on such conduct during this exceptional time. It may be that, if an agency's competition law toolbox is insufficient to police such conduct including price gouging, other mechanisms such as general consumer protection laws or specific legislation or regulation will need to be used.

BCLP's global Antitrust & Competition group is monitoring developments in this area and will keep clients update of any material changes. If you have any questions in relation to the EU or other jurisdictions, do not hesitate to get in contact with any member of the team.

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