
URÍA MENÉNDEZ

COVID-19: CONSIDERATIONS
REGARDING COMPETITION LAW
ENFORCEMENT

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1.1 STATE AID

The Member States of the European Union (“EU”), including Spain through RDL 8/2020, have announced urgent measures to address the economic impact of COVID-19. These measures must comply with EU regulations on State aid and **may require prior authorisation from the European Commission**, in accordance with Articles 107 et seq. of the Treaty on the Functioning of the European Union (“TFEU”).

Even in times of crisis, it is important that potential beneficiaries of State aid verify that it is lawful before they take receipt of any funds. For up to ten years after receipt, the European Commission may order the repayment of State aid that is not compatible with the TFEU and was not approved in advance.

Not every state measure will require prior authorisation from the European Commission.

Several of the measures provided for in the approved regulations, which are intended to apply without distinction to all sectors of the economy (e.g. wage subsidies or the suspension of corporation tax or VAT payments or social security contributions), or direct payments to consumers (e.g. for services that have been cancelled) are generally not governed by the State aid rules.

The measures that do constitute State aid are those that apply to specific sectors, either pursuant to the regulations that govern them (they only apply to one sector of the economy) or de facto (in practice they only benefit companies in a given sector or which are in an exceptional situation that constitutes an exception to the general scheme). As a general rule, these measures must be notified in advance to and approved by the European Commission. **However, if the measures fall within the scope of existing exempting regulations and do not exceed the limits laid down therein** (e.g. *de minimis* aid, R&D or aid to SMEs), express prior authorisation from the European Commission is not needed. An example of this are the ICO¹ guarantees for self-employed workers and SMEs approved by RDL 8/2020, which have been configured as *de minimis* aid.

In response to this crisis, the European Commission initially announced a set of measures to deal with the COVID-19 crisis² that invited Member States to make use of two

¹ The Spanish “Instituto de Crédito Oficial”.

² https://ec.europa.eu/commission/presscorner/detail/es/ip_20_459

TFEU articles which are intended to be applied in an emergency or crisis situation such as the present one and which allow State aid to be granted to undertakings and complement traditional aid measures:

- (i) Aid to compensate undertakings for damage caused by “natural disasters or exceptional occurrences” (Article 107(2)(b) TFEU). This provision may be used to justify aid to sectors directly and specifically affected by the crisis, such as transport or tourism, or to undertakings in sectors affected by the order to close establishments to the public included in the State of Emergency RD, among which the European Commission highlights the transport, tourism, hotel, restaurant and retail sectors and organisers of events that have been cancelled. It is important to note that the “one time, last time” principle does not apply to this type of aid; that is, beneficiaries of aid aimed at rescuing and restructuring non-financial entities in crisis under Article 107(3)(c) TFEU may also be beneficiaries of the measures implemented to address COVID-19 during the same period of 10 years. Accordingly, aid justified on the basis of Article 107(2)(b) TFEU, can be combined with rescue and restructuring aid aimed at solving the serious liquidity needs and financial difficulties of undertakings caused or aggravated by the COVID-19 outbreak.
- (ii) Aid to “remedy a serious disturbance in the economy of a Member State” (Article 107(3)(b) TFEU). The European Commission has confirmed that the COVID-19 outbreak is a serious situation that requires a quick response and acknowledges that, as a consequence, “the entire EU economy is suffering a serious disturbance” and that public-sector support is necessary to ensure that undertakings have sufficient liquidity to be able to continue operating during and after the COVID-19 outbreak.

On 19 March 2020 the European Commission adopted a Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak³ (“Framework”). The Framework entered into force immediately and was extended on 3 April to include several additional measures (the last five listed below). This Framework will remain in force until 31 December 2020. The Framework, as extended, envisages several types of aid that may be offered by Member States:

- a) **Direct subsidies, selective tax benefits and repayable advances:** Member States can grant up to EUR 800,000 in aid per “undertaking” (not per individual company or subsidiary) to help it meet its urgent liquidity needs. There must

³ https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

be an estimated budget for the aid and it can only be granted to undertakings that were not in a crisis situation on 31 December 2019 but are currently as a result of the COVID-19 outbreak.

- b) Public guarantees for bank loans granted to undertakings:** Member States will be able to offer public guarantees to ensure that banks continue lending funds to clients that need them. Guarantee premiums are set at a minimum level, distinguishing between SMEs and larger corporations, and on the basis of their duration. It is also possible for Member States to adopt different provisions, modulating maturity, price and guarantee coverage on the basis of what is indicated in the Framework. The maximum permitted duration of the guarantees is six years. Under the Framework, Spain has approved a first tranche of EUR 20 billion in guarantees for companies that are not SMEs.
- c) Subsidised public loans to undertakings or acquisition of subordinated debt:** Member States will also be able to grant loans to undertakings with reduced interest rates that will enable them to cover their immediate capital and investment needs. The Framework sets out a basic interest rate that can be adjusted by Member States. The duration of the loan contract may not exceed six years. For aid in the form of subordinated debt, the Framework establishes certain ceilings related to the amount of subordinated debt⁴ or the amount compared to senior debt⁵ above which, subordinated debt should be assessed in line with the conditions for recapitalization measures.
- d) Short-term export credit insurance:** the Framework provides for increased flexibility in how Member States can demonstrate that, in a given country, marketable risks are not covered by private insurance companies, making it possible for the Member State to offer short-term export credit insurance if required.
- e) Direct grants, repayable advances or tax advantages to facilitate research and development related to COVID-19** and other relevant antiviral research, including projects related to vaccines, medicines and treatment, sanitary products, hospital and medical equipment, disinfectant and personal

⁴ 1/3 for large enterprises and 1/2 for SMEs.

⁵ The following two cumulative ceilings should not be exceeded: (i) 2/3 of the annual wage bill of the beneficiary for large enterprises and the annual wage bill of the beneficiary for SMEs; and (ii) 8.4% of the beneficiary's total turnover in 2019 for large enterprises and 12.5% of the beneficiary's total turnover in 2019 for SMEs.

protective equipment. The aid may cover up to 80% or 100% of the eligible costs depending on the type of research and may be extended if more than one Member State supports the research project. In exchange, the beneficiary must commit to granting non-exclusive licences under non-discriminatory market conditions in the EEA area.

- f) **Direct grants, repayable advances or tax advantages for the improvement, construction and upscaling of infrastructures required for mass production of products related to COVID-19** (e.g. medicines, treatments, sanitary products, hospital and medical equipment, disinfectant or data collection and processing tools). The aid may cover up to 75% of eligible costs. Aid may also be granted to cover losses.
- g) **Direct grants, repayable advances or tax advantages for the creation of additional capacity to produce products necessary to respond to the outbreak** (e.g. medicines, sanitary material, disinfectant or medical equipment). The aid may cover up to 80% of eligible costs and may be increased if more than one Member State supports the project. Aid may also be granted to cover losses.
- h) **Tax or social security contribution deferrals:** may be granted on or before 31 December 2020 and to specific sectors or regions. The deadline for the payment of deferred contributions can be no later than 31 December 2022.
- i) **Wage subsidies to avoid lay-offs during the outbreak:** may be granted to undertakings in specific sectors, regions or of a certain size that are particularly badly affected by COVID-19. The subsidy may be granted for a maximum period of 12 months and cannot, in principle, exceed 80% of the monthly gross salary of the recipient employee.

In relation to the measures provided for in paragraphs (h) and (i), they will only constitute “State aid” if they are aimed at specific sectors, types of undertaking or regions, and not if they are approved and applied in a general manner to all undertakings.

On 8 May 2020, the Commission enacted the second amendment to the Framework, establishing the criteria under which Member States may provide capital to non-financial undertakings in difficulty through recapitalisations and subordinated debt.

The new recapitalisation measures apply until 1 July 2021, longer than the measures in the Temporary Framework, which apply until 31 December 2020.

Two types of recapitalisation measures, in the form of: (i) capital; or (ii) hybrid capital instruments (i.e. profit participation rights, silent participations and convertible secured or unsecured bonds) are foreseen. The granting of such aid is subject to the following requirements:

- i. **Necessity:** the aid should be the last resource and be granted only if it is duly proven that, without the State's support, the beneficiary's business would not be able to continue or would face serious difficulties. It must also be proven that the beneficiary would not have been able to get financing from the market on reasonable terms and that any other aid offered by the relevant Member State would not have sufficed to ensure its continuity.
- ii. **Public interest:** the aid must only be granted in favor of strategic companies, to avoid a significant loss of employment, an innovative or a systemically important company leaving the market or the risk of an important service being disrupted.
- iii. The **beneficiary must not have already been in a difficult situation** as at 31 December 2019.
- iv. The beneficiary must **formally request the aid in writing**.
- v. **The recapitalisation amount** is limited to the minimum amount required to ensure the continuity of the undertaking and cannot be used to improve its situation in respect of that preceding the COVID-19 pandemic.
- vi. An **adequate remuneration** mechanism to compensate the State for the investment risks it assumes should apply. The remuneration will be fixed by reference to the market remuneration. Remuneration will increase progressively as the duration of the State's guaranteed loan increases.
- vii. Drafting an **exit strategy** and monitoring the evolution of the company.

In order to prevent undue distortions of competition stringent conditions should be imposed on the beneficiaries until the redemption of the recapitalization measures:

- i. **Beneficiaries cannot make dividend payments**, nor non-mandatory coupon payments, nor buy back shares other than to the State.
- ii. **Beneficiaries cannot pay bonuses or other variable remuneration to the members of the management nor increase their remuneration** until at least 75% of the recapitalization measures has been redeemed.
- iii. **Beneficiaries are banned from advertising the fact that they have received recapitalization aid for commercial purposes.**

- iv. **Beneficiaries (other than SMEs) are prevented from acquiring more than 10% stake in competitors** or other operators in the same line of business until at least 75% of the recapitalization measures has been redeemed.

It is noteworthy that the Framework expressly indicates that this aid is **aimed directly at undertakings** and that the role of banks is limited to channelling it to undertakings. Accordingly, any aid that is granted to financial institutions falls outside the scope of the Framework and will follow the ordinary State aid procedures.

Member States **must notify the European Commission in advance of measures constituting State aid that they intend to adopt** under the Framework. If the measures comply with the Framework's requirements, they will be considered to be compatible with the internal market. In practice, this means that the different types of aid being granted by the Member States are being authorised very quickly following notification, and more than 40 aid schemes have already been approved since the Framework was announced.⁶ Recapitalization individual aid above 250 million euro should be notified separately to the European Commission.

In the case of Spain, the European Commission has already approved, in the context of the Framework, the first tranche of the EUR 20 billion guarantee line notified by Spain, as well as a second aid programme for self-employed workers, SMEs and large companies. This second scheme concerns other measures set out in the Framework, such as direct grants, repayable advances, tax advantages and payment facilities or loans granted under favourable conditions by any Spanish authority (either at national, regional or local level) within the limits of the Framework.

⁶ The European Commission has set up an email account and a dedicated telephone number so that Member States may submit notifications of COVID-19 aid.

1.2 MERGER CONTROL

The State of Emergency RD **suspends all administrative deadlines** for as long as it remains in force. The procedural deadlines to adopt and issue merger-control decisions in the context of ongoing proceedings are therefore suspended and the Council of the National Markets and Competition Commission (the “**CNMC**”) is no longer under an obligation to issue a decision within the normal terms. Similarly, neither the parties to those proceedings nor third parties are under an obligation to respond to requests for information when the deadline to respond had not expired on or before 14 March 2020 and, accordingly, cannot be sanctioned by the CNMC for failing to respond during the term of the State of Emergency RD.

However, paragraph 3 of the third additional provision of the State of Emergency RD provides that the CNMC may adopt organisation and investigation measures to avoid serious harm being caused to the rights and interests of the parties to proceedings, as long as the parties agree to them. Accordingly, the Council of the CNMC in full session recently announced through its agreement of 6 April 2020 that it may decide on the continuation of administrative proceedings that are deemed essential.

In practice, on the basis of this provision and at the request of the interested parties, the CNMC is ordering the continuation of certain proceedings that clearly do not pose any competition concerns and that, consequently, do not require consultations with third parties such as competitors, clients or suppliers, and may therefore be readily managed. Moreover, the Council of the CNMC, which is holding its meetings remotely, has approved several transactions which cases were already underway and has even accepted – and approved – notifications submitted while the State of Emergency RD was in force.

In this context, the European Commission has published a communication⁷ in which it requests parties to consult the investigation team in advance and to delay merger notifications for as long as this is feasible. It justifies this request by stating that it may encounter difficulties in collecting information from third parties during this period and restrictions in terms of accessing information and databases as a result of the measures adopted to encourage remote-working. However, in practice, the processing of simpler transactions that do not require information from third parties has not been significantly affected. The European Commission is temporarily accepting formal

⁷ <https://ec.europa.eu/competition/mergers/news.html>

electronic or remote notifications of transactions and has issued some authorisation decisions in recent weeks.

1.3 SANCTION PROCEEDINGS – COOPERATION BETWEEN UNDERTAKINGS AND DEADLINES

The CNMC has warned undertakings that it does not consider that the current crisis means, generally speaking, that they can infringe the rules on agreements between undertakings or the abuse of dominant positions. In fact, the CNMC has become more vigilant of possible abuses or practices that could hinder the supply, or increase the price, of products that are considered essential to protect the health of consumers and has even announced the start of investigations into the financial and funerary sectors due to multiple consumer complaints filed through the specific mailbox that the CNMC had set up to receive information, consultations and claims related to COVID-19

However, the CNMC, as other competition authorities have done, has also demonstrated a certain degree of understanding in light of the exceptional situation caused by the COVID-19 outbreak. A recent joint communication issued by the European Commission and Member States' national competition authorities, states that competition authorities intend to adopt a certain degree of flexibility when assessing temporary cooperation agreements between undertakings that concern the supply and distribution of scarce consumer products and which generate efficiencies to avoid supply shortages. They have gone so far as to indicate that they have no intention of intervening in these cases and are willing to respond to consultations and offer informal guidance on projects that facilitate the production and supply of essential products.⁸

In this regard, the European Commission approved, on 8 April 2020, a Communication regarding a Temporary Framework that offers guidance to undertakings that enter into cooperation agreements in emergency situations related to the current COVID-19 health crisis.⁹ The objective is to deal with situations where competing undertakings may cooperate to manage production, stock or distribution and is mainly aimed at pharmaceutical companies. The

⁸ https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

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https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

guidelines provide the European Commission's criteria in assessing these types of agreements and establishes a procedure for undertakings to communicate their agreements and obtain the corresponding comfort letters. In line with the general rules applicable to agreements between undertakings, companies have an obligation to self-assess the compatibility of their cooperation agreements, assuming the risk of such assessment being different from the one carried out by the authorities at a later stage. Accordingly, the newly approved framework restores, temporarily, the possibility of companies notifying horizontal agreements to the European Commission so that it can issue a comfort letter in which the compatibility of the agreements is assessed, thus giving undertakings legal certainty.

The Temporary Framework provides that cooperation in the healthcare sector is compatible with competition rules if it is carried out through an association or an independent entity that is responsible for collecting the information. This entails establishing sufficient safeguards to avoid direct exchanges of individualised confidential information. It also recognises that, at times, undertakings may need to be allowed to directly exchange confidential information regarding production capacity, stock or distribution structure so as to organise the production and distribution of specific essential medical products (i.e. who produces specific medicines and where) to ensure supply. This exchange of information, which would generally be considered contrary to competition rules, is permitted in this scenario as long as: (i) it is designed and is objectively necessary to increase production in an efficient manner in order to respond to a foreseeable shortage in essential products; (ii) it is temporary; and (iii) it does not exceed what is strictly necessary to avoid the shortage. In these scenarios, undertakings must record the exchange of information and the agreements reached as the European Commission may request evidence. The fact that the cooperation is requested or managed by a public authority will be relevant when determining whether there are any compatibility issues with competition rules. In fact, if cooperation is the result of a mandatory instruction ordered by a public authority, cooperation is permitted.

The **maximum deadline for the CNMC to conclude sanction proceedings has been automatically suspended**, as have procedures or requests that had not concluded on or before 14 March 2020, such as responses to requests for information or submissions of written observations regarding statements of objections or decision proposals.

1.4 CONTACT LAWYERS



Jaime Folguera Crespo

Partner

+34 915 860 366

jaime.folguera@uria.com



Alfonso Gutiérrez Hernández

Partner

+34 915 860 663

alfonso.gutierrez@uria.com



Antonio Guerra Fernández

Partner

+34 915 860 563

antonio.guerra@uria.com



Patricia Vidal Martínez

Partner

+34 915 864 597

patricia.vidal@uria.com



Edurne Navarro Varona

Partner

+322 639 6462

edurne.navarro@uria.com



Ana Raquel Lapresta

Principal Associate

+3226396464

raquel.lapresta@uria.com

BARCELONA
BILBAO
LISBOA
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