

# Concurrences

REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

## Competition law and health crisis

On-Topic | Concurrences N° 2-2020

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### Christian Ahlborn

**Partner** Linklaters, London

### Jeremy Bacharach

**PhD Candidate** University of Geneva

### Christoph Barth

**Partner** Linklaters, Düsseldorf

### Christian Bovet

**Professor** University of Geneva

### Marcel Boyer

**Emeritus Professor of Economics** University of Montréal  
**Associate Member** Toulouse School of Economics

### Jacques Buhart

**Partner** McDermott, Will & Emery, Brussels and Paris

### María Pilar Canedo

#### Arrillaga

**Professor of Law** University of Deusto, Bilbao  
**Commissioner** Competition Chamber of CNMC, Madrid

### Michele Carpanano

**Partner** Dentons, Rome  
**Professor** Trento University

### Daniel A. Crane

**Professor of Law** University of Michigan, Ann Arbor

### Aymeric de Moncuit

#### Référendaire

Court of Justice of the European Union, Luxembourg

#### Lecturer

University Paris II Panthéon-Assas

### Valentine Delaloye

**Teaching Assistant** University of Geneva

### Jacques Derenne

**Partner** Sheppard Mullin, Brussels  
**Professor** University of Liège, Belgium & Brussels School of Competition

### David dos Santos-Goncalves

**Managing Associate** Linklaters, Düsseldorf

### David Gabathuler

**Legal Consultant** EU, Competition and Trade Law, Baker Botts, Brussels

### Mark Griffiths

**Director** Norton Rose Fulbright Africa, Johannesburg

### Leigh Hancher

**Senior Advisor** Baker Botts, Brussels  
**Professor of European Law** Tilburg University  
**Professor of EU Energy Law** Florence School of Regulation

### David Henry

**Counsel** McDermott, Will & Emery, Brussels

### Dr. Pierre M. Horna

**Legal Affairs Official** Competition and Consumer Policies Branch of the UNCTAD Secretariat, Geneva

### Frédéric Jenny

**Professor of Economics** ESSEC Business School, Cergy

### David Kupka

**Associate** Willkie Farr & Gallagher, Brussels

### Siún O'Keeffe

**Manager Academy** Netherlands Authority for Consumers and Markets, The Hague

### Christian Ritz

**Partner** Hogan Lovells, Munich

### Cesare Rizza

**Counsel** Cleary Gottlieb, Rome

### Matthias Schlau

**Associate** Hogan Lovells, Munich

### Mario Siragusa

**Senior Counsel** Cleary Gottlieb, Rome

### Anastasia Usova

**Partner** Redcliffe Partners, Kyiv

### Faustine Viala

**Partner** Willkie Farr & Gallagher, Paris

### Masako Wakui

**Professor of Law** Kyoto University Faculty of Law

# Competition law and health crisis

## ABSTRACT

*The unexpected shock provoked by the Covid-19 crisis and the measures taken to limit the spread of the pandemic have affected the functioning of many markets. Throughout the world, competition authorities which, in the last decade, had been enforcing their laws in the context of steady economic growth have had to adjust their enforcement practices not only to the difficulties of running their operations due to lockdowns but more importantly to adjust to collapsing markets or markets for essential goods characterized by severe shortages, in a context of deep economic depression with many firms facing severe liquidity constraints or even the threat of bankruptcy. Competition authorities have responded to these extraordinarily brutal circumstances by adjusting their enforcement priorities, exempting certain forms of cooperation, relaxing their standards for efficiency defence, adopting emergency procedures, allowing state aids under certain conditions, accepting mergers because the target had all of a sudden become a failing firm etc.... while at the same time insisting that these changes did not mean a weakening or an alteration of the competition law principles that they previously followed. This set of articles describes in detail the responses of a number of competition authorities, analyzes the differences in the responses of various governments and competition authorities to the Covid-19 crisis and discusses whether these responses imply a departure from the traditionally accepted goals and enforcement principles of competition.*

*Le choc inattendu provoqué par la crise du Covid-19 et les mesures prises pour limiter la propagation de la pandémie ont affecté le fonctionnement de nombreux marchés. Partout dans le monde, les autorités de la concurrence qui, au cours de la dernière décennie, avaient appliqué leurs lois dans le contexte d'une croissance économique régulière, ont dû adapter leurs pratiques non seulement aux difficultés de gestion de leurs opérations résultant du confinement de leurs agents mais surtout à l'effondrement de la demande sur certains marchés et l'existence de graves pénuries de biens essentiels pour lutter contre la pandémie sur d'autres marchés. Dans un contexte de profonde dépression économique, de nombreuses entreprises sont confrontées à de graves contraintes de liquidité voire à la menace de faillite. Les autorités de la concurrence ont réagi à ces circonstances extraordinairement brutales en ajustant leurs priorités, en exemptant certaines formes de coopération, en assouplissant leurs standards en matière de gains d'efficacité, en adoptant des procédures d'urgence, en autorisant sous certaines formes des aides d'État, en acceptant des concentrations au nom de la théorie de l'entreprise défaillante etc.... Simultanément, elles ont insisté sur le fait que ces changements ne signifiaient pas un affaiblissement ou une modification du droit de la concurrence. Ce dossier décrit en détail les pratiques d'un certain nombre d'autorités de la concurrence, analyse les différences dans les réponses à la crise Covid-19 de divers gouvernements et autorités de la concurrence et examine si ces réponses impliquent une modification par rapport aux objectifs ou aux principes traditionnellement acceptés de mise en œuvre du droit de la concurrence.*

## Introduction

**Frédéric Jenny**

**Professor of Economics** ESSEC Business School, Cergy

## Foreign investment lockdown

**Christian Ahlborn**

**Partner** Linklaters, London

**Christoph Barth**

**Partner** Linklaters, Düsseldorf

**David dos Santos-Goncalves**

**Managing Associate** Linklaters, Düsseldorf

## Covid-19 and competition policy: A Swiss perspective

**Christian Bovet**

**Professor** University of Geneva

**Jeremy Bacharach**

**PhD Candidate** University of Geneva

**Valentine Delaloye**

**Teaching Assistant** University of Geneva

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**Marcel Boyer**

**Emeritus Professor of Economics** University of Montréal  
**Associate Member** Toulouse School of Economics

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**Jacques Buhart**

**Partner** McDermott, Will & Emery, Brussels and Paris

**David Henry**

**Counsel** McDermott Will & Emery, Brussels

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**María Pilar Canedo Arrillaga**

**Professor of Law** University of Deusto, Bilbao  
**Commissioner** Competition Chamber of CNMC, Madrid

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**Michele Carpagnano**  
**Partner** Dentons, Rome  
**Professor** Trento University

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**Daniel A. Crane**  
**Economics Frederick Paul Furth, Sr. Professor of Law** University of Michigan, Ann Arbor

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## How might the Covid-19 crisis change the dynamics of competition law?

**Aymeric de Moncuit**  
**Référendaire** Court of Justice of the European Union, Luxembourg  
**Lecturer** University Paris II Panthéon-Assas

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## EU State aid control and Covid-19 outbreak: A first commentary

**Jacques Derenne**  
**Partner** Sheppard Mullin, Brussels  
**Professor** University of Liège, Belgium & Brussels School of Competition

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## South Africa: Comprehensive package of antitrust measures adopted in response to Covid-19 pandemic

**Mark Griffiths**  
**Director** Norton Rose Fulbright Africa, Johannesburg

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## Avoiding the pitfalls: What companies need to know about EU State aid rules and the Temporary Framework during the coronavirus crisis

**Leigh Hancher**  
**Senior Advisor** Baker Botts, Brussels  
**Professor of European Law** Tilburg University  
**Professor of EU Energy Law** Florence School of Regulation

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**David Gabathuler**  
**Legal Consultant** EU, Competition and Trade Law  
Baker Botts, Brussels

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## A global overview of the impact of Covid-19 on competition policies in key sectors

**Dr. Pierre M. Horna**  
**Legal Affairs Official, Competition and Consumer Policies**  
**Branch** UNCTAD Secretariat, Geneva

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## Competition in a time of Corona: “Primum non nocere”

**Siún O’Keeffe**  
**Manager ACM Academy** Netherlands Authority for Consumers and Markets, The Hague

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## “Crisis Cartels” in times of Covid-19: Lessons from former crises teach a cautious approach

**Christian Ritz**  
**Partner** Hogan Lovells, Munich

**Matthias Schlau**  
**Associate** Hogan Lovells, Munich

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## Two challenges posed by the economic shock caused by Covid-19 to the level playing field in the EU internal market: The current State aid race and the risk of hostile takeovers by state-owned companies from third countries

**Mario Siragusa**  
**Senior Counsel** Cleary Gottlieb Steen & Hamilton, Rome

**Cesare Rizza**  
**Counsel** Cleary Gottlieb Steen & Hamilton, Rome

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## Investigations into price hikes and other responses by the Ukrainian competition authority to the Covid-19 crisis

**Anastasia Usova**  
**Partner and Head of the Antitrust practice** Redcliffe Partners, Kyiv

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## Cooperation between companies in times of health crisis

**Faustine Viala**  
**Partner** Antitrust & Competition, Willkie Farr & Gallagher, Paris

**David Kupka**  
**Associate** Antitrust & Competition, Willkie Farr & Gallagher, Brussels

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## Liberalisation of the Covid-19 testing service market to ensure individual access to testing and the role of competition laws and authorities: Lessons from Japan

**Masako Wakui**  
**Professor of Law** Kyoto University Faculty of Law

# Avoiding the pitfalls: What companies need to know about EU State aid rules and the Temporary Framework during the coronavirus crisis

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## Leigh Hancher

leigh.hancher@bakerbotts.com

Senior Advisor

Baker Botts, Brussels

Professor of European Law

Tilburg University

Professor of European Union Energy Law

FSR/RSCAS/EUI

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## David Gabathuler

david.gabathuler@bakerbotts.com

Legal Consultant

EU, Competition and Trade Law, Baker Botts, Brussels

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## I. Introduction

1. The global economy has come to a standstill, and governments around the world have had to intervene massively to support their domestic economies during the coronavirus crisis. Government support to industry is only likely to increase as companies face ever-greater financial difficulties due to the continuing public health restrictions.

2. In the EU, government aid (State aid) to companies is in principle forbidden as it harms the integrity of the Single Market, but there are specific exceptions foreseen in the EU Treaty. The damage caused by the coronavirus pandemic clearly falls within these exceptions.<sup>1</sup> However, unless block exempted, aid measures (or aid schemes) falling within the EU State aid rules are subject to notification and prior approval by the European Commission (“Commission”) if the aid is not to be found illegal and subject to possible recovery.

3. The Commission adopted a Temporary Framework (“TF”) on 19 March 2020 (amended on 3 April 2020) to address Member State aid to domestic industries

during the coronavirus crisis.<sup>2</sup> To date, the Commission has approved over 120 aid schemes worth hundreds of billions of euros under the TF.

4. Given the scope of the crisis, many companies will be receiving State aid in the EU for the first time or will consider applying for such aid, but they may have limited experience or insight into the complexity of the rules. This article is intended to clarify the application of the State aid rules and, in particular the operation of the TF.

5. The article (1) briefly outlines government support measures that do not constitute State aid and then (2) highlights existing EU State aid instruments and schemes that provide some means for Member States to channel aid to large numbers of companies. The article then provides (3) an overview of the TF before discussing in detail (4) some of the key points that should not be overlooked by beneficiaries/potential beneficiaries, in particular as regards the operation of the TF. The article also highlights the consequences and risks if EU State aid rules are not respected.

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1 The exceptions include aid to compensate companies for the damage caused by natural disasters or exceptional occurrences (Article 107(2)(b) TFEU) and aid to remedy a serious disturbance in the economy of a Member State (Article 107(3)(b) TFEU). The Treaty also allows aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest (Article 107(3)(c) TFEU).

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2 Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak, adopted on 19 March 2020 and amended on 3 April 2020. A consolidated version of the text is available at: [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/TF\\_consolidated\\_version\\_as\\_amended\\_3\\_april\\_2020.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_as_amended_3_april_2020.pdf).

## II. Aid measures that fall outside EU State aid rules

6. The EU State aid rules are extremely broad and apply to any support granted by a State through state resources, that provides a selective advantage to a company (or companies) and which distorts (or has the potential to distort) competition and affects trade between EU countries.<sup>3</sup>

7. Many government support measures, nonetheless, do not fall within the scope of the EU State aid rules as they apply to all sectors or concern the provision of essential public services that the market cannot provide. State intervention may also be deemed to be market conform if the state is acting as a normal market investor. If potential beneficiaries are in doubt as to whether a measure may be caught by the State aid rules, they can encourage their national authorities to notify the measure to the Commission for reasons of legal certainty. Obviously, this can be a time-consuming process and even though the Commission is currently assessing notifications at considerable speed, governments and beneficiaries may be reluctant to wait for a green light given the economic challenges that the coronavirus outbreak poses to most industries.<sup>4</sup>

8. Generally, non-State aid measures include the following government support:

- Horizontal aid measures applicable to all companies: aid measures that apply to all companies across sectors and activities are not selective and do not fall within the definition of State aid. Examples include wage subsidies and the suspension of corporate tax and VAT payments or social security contributions.<sup>5</sup>
- Financial support paid directly to consumers: the State aid rules only concern aid to companies or other actors that are engaged in an economic activity and thus direct payments to consumers are not caught. Examples include compensation paid to consumers for cancelled services that are not reimbursed by the operators themselves.

<sup>3</sup> The concept of State aid is very broad in scope. In particular, it is not limited to subsidies, but may encompass any form of support that mitigates costs normally included in the budget of a company, including for example tax exemptions. Moreover, it captures not only measures adopted at national level, but also regional or even local measures.

<sup>4</sup> Even if the measure is notified as “non-aid,” the standstill obligation can only be overlooked at the risk of potential recovery.

<sup>5</sup> Wage subsidies for particular activities even if available across all sectors are considered selective. See State Aid SA.57007 (2020/N) of 17 April 2020 – Hungary – Covid-19 – Employment scheme for supporting the employment of researchers and developers in all sectors affected by coronavirus outbreak. Available at: [https://ec.europa.eu/competition/state\\_aid/cases/1/202017/285509\\_2149572\\_60\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/1/202017/285509_2149572_60_2.pdf). See also State Aid SA.56994 (2020/N) of 17 April 2020 – Hungary – Aid from Structural Funds aiming at supporting undertakings affected by the economic repercussions of the Covid-19, at recital 28. Available at: [https://ec.europa.eu/competition/state\\_aid/cases/1/202017/285491\\_2149570\\_32\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/1/202017/285491_2149570_32_2.pdf).

- Compensation for the provision of public services: aid that is granted to provide public services in the general interest (e.g., aid to hospitals or nursing homes) can fall outside the EU State aid rules provided certain specific conditions are met.<sup>6</sup>
- Government intervention on market terms: the EU rules do not forbid EU governments from investing in private companies, but the terms must be acceptable to a private investor if such interventions are not to be considered State aid.<sup>7</sup>
- Intermediaries: Banks and financial institutions may simply be intermediaries passing on the government aid to the ultimate beneficiary companies. As long as such institutions do not receive any of the aid themselves, there will be no State aid to those organisations.<sup>8</sup>
- Support from EU funds: support which comes from EU funds such as the European Investment Bank (EIB) and which are granted directly to companies without coming under the control of national authorities will not constitute State aid. If the EU funds are channelled through national authorities, EU State aid rules may be applicable.<sup>9</sup>

## III. Reliance on existing instruments

9. Member States can choose to continue to rely on existing schemes to channel aid to large numbers of companies, especially to small and medium-sized (“SMEs”) companies. The schemes are mainly intended to give incentives to undertake new or additional investments and are not meant to cover daily operating costs. However, the economic fallout of the coronavirus outbreak is so extensive that the Commission has introduced the TF to ensure that Member States can quickly provide unprecedented levels of liquidity—i.e., operating aid to their local industries.

<sup>6</sup> Under EU law, economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention are identified as services of general economic interest (SGEI). Examples are transport networks, postal services and social services. Under certain conditions, compensation paid to companies for the provision of such public services does not constitute State aid or is automatically permitted below a certain revenue threshold.

<sup>7</sup> See for example, the Danish government will implement the following extraordinary procurement measures: (i) advance payment for deliveries agreed to take place in the period until 1 July 2020 (or possibly extended to 31 October 2020) and (ii) flexible application of remedies for breach of contract caused by Covid-19, including waiving payment of penalties for delay effective until 31 October 2020. Source: Presentation of Preben Sandberg Petterson at the Lexxion Live Webinar: Follow-up on Main Features of Covid-19 and State Aid Law, 20 April 2020.

<sup>8</sup> See for example, SA.56985 (2020/N) of 20 April 2020 – France – Covid-19: Régime cadre temporaire pour le soutien aux entreprises, at section 4. Available at: [https://ec.europa.eu/competition/state\\_aid/cases/1/202017/285598\\_2149988\\_102\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/1/202017/285598_2149988_102_2.pdf).

<sup>9</sup> See State Aid SA.56994 (2020/N) of 17 April 2020. *supra* note 5.

10. There are also specific EU instruments (“block exemptions” or “safe harbours”) that allow European governments to provide aid to large numbers of companies without pre-approval. In particular, Member States may continue to rely on the following two instruments:

– General Block Exemption Regulation (GBER):<sup>10</sup> the GBER automatically declares specific categories of aid (e.g., aid for SMEs and aid for environmental protection) as compatible with EU State aid rules subject to the aid meeting the conditions of the GBER. The GBER is complex and due care is required to ensure compliance with its formal as well as its substantive conditions. Some informal guidance can be found in the FAQs issued by the Commission (and EFTA).

– *de minimis* Regulation:<sup>11</sup> subject to certain exceptions for a few sensitive sectors,<sup>12</sup> the Regulation allows a Member State to grant aid of up to a strict limit of €200,000 to a “single undertaking” over a three-year period without such grants constituting State aid. A single undertaking is defined in Article 2(2) of the Regulation (see note 42 below).

11. There are also numerous existing aid schemes that have been previously approved by the Commission and which provide the means for national governments to support their domestic companies. Governments can extend the scope of these aid schemes, especially to benefit from the additional flexibility provided by the TF. Nonetheless, they must notify and seek approval from the Commission prior to granting aid under the extended scheme.<sup>13</sup> Similarly, if the Member State extends the scope of emergency measures already notified under the TF, it must notify any updates to these authorised schemes.<sup>14</sup>

## IV. Overview of the Temporary Framework

12. The Commission recognises that the entire EU economy is experiencing a serious disturbance due to the coronavirus and that Member States have to provide public support to ensure that there is sufficient liquidity to protect healthy undertakings and to preserve economic activity. The TF identifies specific State aid measures that the Commission considers compatible with Article 107(3)(b) TFEU and which can be quickly approved by the Commission following notification by the Member States.<sup>15</sup>

13. Each section of the TF sets out relevant conditions that apply to particular temporary State aid measures.<sup>16,17</sup> These conditions must be properly observed on implementation at the national level.

### 1. Direct grants, repayable advances or tax advantages (Section 3.1)

14. Member States can provide aid—on the basis of a scheme—of up to €800,000 per undertaking (before deduction of tax or other charges).<sup>18</sup> The aid can be in the form of direct grants, tax and payment advantages, repayable advances, guarantees, loans and equity. Aid may not be granted under the TF to undertakings that were already in difficulty within the meaning of the GBER on 31 December 2019 (this condition applies to all relevant measures under the TF).<sup>19</sup>

10 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014R0651-20170710>.

11 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1407&from=EN>.

12 There are lower thresholds for the road freight sector and the agriculture and fisheries sectors.

13 The German government amended two aid schemes to support companies affected by the coronavirus outbreak to benefit from the additional flexibility provided by the TF. The Commission approved the notified amendments. See Commission press release IP/20/651 of 11 April 2020, State aid: Commission approves amendments to previously approved German schemes to further support economy in coronavirus outbreak. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_651](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_651).

14 See, for example, State Aid SA.56804 of 30 March 2020 – Republic of Estonia – State Loan Guarantees and subsidised loan scheme under the Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak as updated by State Aid SA.57014 (2020/N) of 21 April 2020 – Republic of Estonia – Estonian aid schemes in the form of grants and payment advantages under Section 3.1 of Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak. Available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202017/285592\\_2149989\\_52\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202017/285592_2149989_52_2.pdf).

15 It is understood that the Commission is working on a short FAQ on the TF.

16 The TF also clarifies that credit and other financial institutions who act as financial intermediaries should not be the recipients of indirect aid, but identifies certain safeguards that can be introduced to limit undue distortions of competition between financial institutions (Section 3.4). For an example, see State Aid SA.57068 (2020/N) of 21 April 2020 – Italy – Loan guarantees and grants under the ISMEA Guarantee Fund. Available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202017/285610\\_2150492\\_134\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202017/285610_2150492_134_2.pdf).

17 The TF also references the Commission’s Communication addressing short-term export credit insurance C(2020)244 final of 27 March 2020 and clarifies that Member States can provide short-term export credit insurance for all countries without the need for the Member State in question to demonstrate that the respective country is temporarily “non-marketable” (Section 3.5).

18 For an example of an aid scheme granting undertakings up to €800,000, see State Aid SA.56790 (2020/N) of 24 March 2020 – Germany – Federal Framework “Small amounts of aid 2020” (“Bundesregelung Kleinbeihilfen 2020”). Available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202013/285205\\_2142884\\_55\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202013/285205_2142884_55_2.pdf).

19 The TF contains specific rules for aid to the agriculture, fisheries and aquaculture sector. For an example of its application to fisheries, see State Aid SA.56998 (2020/N) of 17 April 2020 – Croatia – State aid in fisheries and aquaculture supporting the economy under the Temporary Framework. Available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202017/285495\\_2150432\\_42\\_4.pdf](https://ec.europa.eu/competition/state_aid/cases1/202017/285495_2150432_42_4.pdf).

## 2. Aid in the form of public guarantees on loans (Section 3.2)

15. Member States can provide beneficiaries with a public guarantee of up to 90% for loans for a period of up to six years subject to certain minimum premiums set out in the TF.<sup>20</sup> The public guarantee is capped at 35% where losses are first attributed to the State and only then to the credit institutions (i.e., the State providing a “first-loss guarantee”). The guarantee must relate to investment and working capital loans.

The premiums increase as the duration of the guaranteed loans increases. The guarantee coverage, duration and premiums can also be modulated (e.g., a lower guarantee coverage could allow lower guarantee premiums).<sup>21</sup>

For loans with a maturity beyond 31 December 2020, the overall amount of the loans per beneficiary is capped in accordance with specific criteria.<sup>22</sup> There are also specific rules on the cumulation of aid (see section V below).

The Commission has shown a willingness to be flexible when assessing loan guarantees.<sup>23</sup>

## 3. Aid in the form of subsidised interest rates for public loans (Section 3.3)

16. Member States can provide public loans at reduced interest rates for up to six years which are at least equal to the base rate (1 Year LIBOR or equivalent) plus the credit risk margins set out in the TF. The terms can be modulated and the amounts can be determined as set out above for loan guarantees. The loans must relate to investment and/or working capital needs. There are also specific rules on the cumulation of aid (see section V below).

20 For an example of a liquidity guarantee scheme, see State Aid SA.56808 (2020/N) of 30 March 2020 – Denmark – Liquidity guarantee scheme under the Temporary Framework. Available at: [https://ec.europa.eu/competition/state\\_aid/cases/1/202014/285239\\_2143817\\_59\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/1/202014/285239_2143817_59_2.pdf).

21 In State Aid SA.57068 (2020/N) – Italy – Loan guarantees and grants, the guarantee premiums were to be calculated according to the calculation method approved by a prior Commission decision. See recital 19(c). *supra* note 16.

22 For loans with a maturity beyond 31 December 2020, the overall amount of the loans per beneficiary shall not exceed (i) double the annual wage bill of the beneficiary for 2019, (ii) 25% of the beneficiary's total turnover, or (iii) with appropriate justification, the liquidity needs for the coming 18 months for SMEs and 12 months for large enterprises.

23 In State Aid SA. 56966 (2020/N) of 13 April 2020 – Italy – Covid-19: Loan guarantee schemes under the *Fondo di garanzia per le PMI*, the Commission stated at recital 45 that “given that the cases where the overall amount of loans per beneficiary exceeds the ceilings of point 25(d), i. and ii. of the [TF] are properly justified, the Commission considers the corresponding aid to be proportionate, since it includes a maximum ceiling linked to the actual liquidity needs of the beneficiary, which the aid granting authority are able to verify.” Available at: [https://ec.europa.eu/competition/state\\_aid/cases/1/202016/285511\\_2148349\\_27\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/1/202016/285511_2148349_27_2.pdf).

## 4. Aid for Covid-19 relevant R&D (Section 3.6)

17. Member States can provide aid for R&D projects carrying out Covid-19 and other antiviral research. Aid may be granted in the form of direct grants, repayable advances or tax advantages. The aid can cover 100% of eligible costs<sup>24</sup> for fundamental research and up to 80% of eligible costs for industrial research and experimental development. There is a “bonus” of 15%-points if more than one Member State supports the project or there is cross-border collaboration. For R&D projects started after 1 February 2020, the aid is deemed to have incentive effect. If the project started before this date, the aid is deemed to have an inventive effect if it is necessary to accelerate or widen the scope of the project. The TF also requires the aid beneficiary to commit to grant non-exclusive licences under non-discriminatory market conditions to third parties in the EEA.

## 5. Investment aid for testing and upscaling infrastructures (Section 3.7)

18. The TF allows Member States to provide investment aid for the construction or upgrade of testing and upscaling of infrastructures required to develop, testing and and scale up Covid-19 relevant medicinal products (including vaccines) and treatments, medical devices and equipment, etc. The aid can cover up to 75% of eligible costs with a bonus of 15%-points if a project finishes within two months from the moment the aid is granted or if more than one Member State supports the project.<sup>25</sup> The aid can be granted in the form of direct grants, tax advantages or repayable advances. A loss cover guarantee can also be granted. The rules on incentive effect are the same as those for aid for Covid-19 relevant R&D. There are also specific rules on the cumulation of aid (see section V below).<sup>26</sup>

## 6. Investment aid for the production of Covid-19 relevant products (Section 3.8)

19. Member States can also provide investment aid to facilitate the production of Covid-19 relevant products such as medicinal products and treatments, medical

24 The eligible costs concern all the costs necessary for the R&D project during its duration, including amongst others, personnel costs, costs for digital and computing equipment, for diagnostic tools, for data collection and processing tools, etc. See point 35(c) of the TF.

25 The eligible costs are all investment costs necessary for setting up the testing and upscaling infrastructures required to develop the relevant medicinal products and treatments, etc. See point 37(e) of the TF.

26 The TF further also requires that prices charged for the services provided by the testing and upscaling infrastructure correspond to the market price and that the infrastructures must be open to several users and must be granted on a transparent and non-discriminatory basis (subject to the possibility of granting preferential access for undertakings which have financed at least 10% of the investment costs).

devices and equipment, etc.<sup>27</sup> The aid can cover up to 80% of eligible costs. Many of the conditions that apply to the investment aid for testing and upscaling infrastructures also apply to aid for the production of Covid-19 relevant products.<sup>28</sup>

## 7. Selective tax and/or social security contribution deferrals (Section 3.9) and selective wage subsidies (Section 3.10)

20. The TF states that the Commission will also authorise aid schemes that consist in temporary deferrals of taxes or social security contributions which apply to undertakings that are particularly affected by the Covid-19 outbreak, for example undertakings in specific sectors, regions or of a certain size. Member States can also provide support schemes to undertakings in specific sectors, regions or of a certain size in the form of wage subsidies. There are a number of conditions that must be met if the Commission is to authorise such schemes. For example, the monthly wage subsidy must not exceed 80% of the monthly gross salary of the benefitting personnel (alternative calculation methods are possible).

21. The scope of the TF is expected to be extended further to enable Member States to provide recapitalisations to companies in need.

## V. Key issues for beneficiaries/potential beneficiaries

22. The TF is intended to provide a framework to enable Member States to use the full flexibility foreseen under State aid rules to support the economy in the context of the coronavirus outbreak, but that flexibility must still be exercised with care. As the TF allows Member States to notify aid schemes and the Commission to clear them with minimum scrutiny, the main issue for companies applying for aid under these schemes is to ensure that the national authorities have complied with all the relevant formal and substantive conditions.

27 For example, see State Aid SA.57035 (2020/N) of 17 April 2020 – Portugal – Covid-19 – Support to R&D projects, testing infrastructures and production of Covid-19 related products. Available at: [https://ec.europa.eu/competition/state\\_aid/cases/1/202017/28555\\_6\\_2150148\\_79\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/1/202017/28555_6_2150148_79_2.pdf). The Commission noted that the measure is made available for projects that have started as of 1 February 2020. Where the aid is necessary to accelerate works or to widen the scope of a project, which started before 1 February 2020, only the additional costs in relation to the acceleration efforts or the widened scope are eligible, as required by point 39(e) of the TF. Eligible investment projects have to be completed within six months after the investment aid was granted. If this deadline is not respected, the aid amount is reduced by 25% per month of delay for aid in the form of direct grants in conformity with point 39(d) of the TF.

28 The type of aid, the bonus of 15%-points for the aid intensity, the incentive effect, the penalty and the cumulation of aid rules.

23. It must also be noted that the Court of Justice in its recent ruling in *Eesti Pagar* has placed a considerable burden on beneficiaries.<sup>29</sup> If a national authority grants aid based on a misapplication of the conditions in the TF, the company cannot claim that it has a legitimate right to retain the aid. Moreover, a national authority is obliged to recover any aid of its own initiative if it later discovers that the conditions for granting the aid were not met.

24. It should also be kept in mind that the State aid rules can be enforced in national courts as well as by way of complaint to the Commission. Aggrieved competitors may have the option to follow both routes.

25. It follows that aid beneficiaries must take care not to inadvertently receive unlawful aid, i.e., aid that has not been notified, or paid out before receiving Commission clearance, or paid out in breach of conditions under an approved scheme or the related transparency requirements.

## 1. Timeframe

26. The TF applies from 19 March 2020 to 31 December 2020, although the Commission can review its application before then. It should be noted that the Commission will apply the rules in the TF to non-notified (i.e., unlawful aid) if the aid was granted after 1 February 2020. Aid measures granted before this date will be assessed in the light of the pre-existing State aid rules.

27. If a Member State intends to prolong or otherwise amend a scheme as originally notified and approved by the Commission, it must notify it for further clearance unless the amendments are minor and do not change the scope of the scheme. An extension in the duration of the scheme would not usually be considered to be minor.<sup>30</sup>

28. A further complex question is whether a Member State can continue to provide liquidity support to individual companies in the period after 31 December 2020 if the TF is not extended. The TF is clear that in order to qualify as a compatible scheme “*the aid must be granted no later than 31 December 2020*,”<sup>31</sup> unless the aid is granted in form of tax advantages (the aid is then considered granted when the 2020 tax declaration is due). This means that the beneficiary must have a legally enforceable right to and must claim the aid on or prior to this date—it is not enough to just have lodged an application for support.<sup>32</sup> Moreover, if the approved scheme relates to guarantees, then any loans covered by

29 Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar v. Ettevõtjuse Arendamise Sihtasutus*, Case C- 349/17, EU:C:2019:172.

30 Judgment of the Court of Justice of 20 September 2018, *Carrefour Hypermarchés and Others*, Case C-510/16, EU:C:2018:751.

31 Point 22(d) of the TF.

32 Judgment of the Court of Justice of 14 January 2004, *Fleuren Compost*, Case T-109/01, EU:T:2004:4, at para. 75 et seq.



the guarantee must be either payable before 31 December 2020 or if the loans expire after that date, the total due under the guarantee must not exceed the total budget as approved.<sup>33</sup>

29. Separately, it should also be noted that support schemes approved under Article 107(2)(b) TFEU may be subject to specific timeframes in order to establish (i) eligibility for compensation and (ii) payment of that compensation.<sup>34</sup>

## 2. Beneficiaries as undertakings

30. As a general rule, the TF provides that the overall aid granted should not exceed €800,000 per “undertaking” (section 3.1TF) The Commission does not make any distinction regarding partially or fully state-owned undertakings, which are equally eligible for different aid schemes. The aid may be granted in the form of direct grants, tax and payment advantages or other forms such as repayable advances, guarantees, loans and equity provided the total nominal value of such measures remains below the overall cap of €800,000 per undertaking.

31. It should also be noted that in case SA.57036 Ireland – Sustaining Enterprise Scheme supporting undertakings affected by the economic repercussions of the Covid-19 outbreak (a scheme to replace an earlier approved scheme<sup>35</sup>), the decision states that if the same “beneficiary” has received aid under the earlier scheme then the amount is taken into account as well for calculation of the limit of €800,000 under the later scheme.<sup>36</sup>

32. A critical question is, therefore, what is an “undertaking” for the purposes of EU law?

- An undertaking is a well-established concept in EU law and the classification of a particular entity as an undertaking depends entirely on the nature of its activities and whether such activities are of an economic nature.
- Several separate legal entities may be considered to form one economic unit for the purposes of the application of EU State aid rules. That economic unit is then considered to be the relevant undertaking. The Commission’s Notice on the notion

33 SA.56985 (2020/N) of 17 April 2020 – France – Covid-19: Régime cadre temporaire pour le soutien aux entreprises, at 57–58. *supra* note 8.

34 See for example State Aid SA.57051 (2020/N) of 22 April 2020 – Sweden – Covid-19 Aid for cancelled or postponed cultural events. Available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202017/285609\\_2150593\\_42\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202017/285609_2150593_42_2.pdf).

35 The Repayable Advance Scheme of Ireland for which the Commission had adopted a no objection decision on 30 March 2020 under case SA.56845 (2020/N) of 31 March 2020 – Ireland – Irish scheme to support the economy in the current coronavirus outbreak. Available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202016/285288\\_2148118\\_55\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202016/285288_2148118_55_2.pdf).

36 State Aid SA.57036 (2020/N) of 21 April 2020 – Ireland – Sustaining Enterprise Scheme supporting undertakings affected by the economic repercussions of the Covid-19 outbreak. Available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202017/285558\\_2150261\\_31\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202017/285558_2150261_31_2.pdf).

of State aid (2016) at paragraph 11 gives some informal guidance on the key concept of the “economic unit” developed in that case law and highlights that relevant factors are the existence of a controlling share and other functional, economic and organic links.<sup>37</sup>

33. If a group of companies can be considered to be one economic unit (i.e., a single “undertaking”),<sup>38</sup> aid by a Member State to any part of the group needs to be taken into account in checking that the €800,000 aid ceiling is not exceeded. Otherwise, a company with numerous legal entities in the same Member State could obtain multiple times the €800,000 aid ceiling, with a much greater risk that such aid could be substantial and thus distort competition.

34. Nonetheless, a group company can receive aid for its separate subsidiaries in other Member States as the relevant ceiling is generally assumed to apply per Member State. This also avoids the problem of Member States being in a race to give aid up to an EU-wide ceiling if a company has operations in different EU countries.<sup>39</sup> However, where different Member States support the same activities, such aid may be problematic.<sup>40</sup>

## 3. Carve out for undertakings in difficulty

35. Aid may not be granted under the TF to undertakings that were already in difficulty within the meaning of the GBER on 31 December 2019. An undertaking is generally considered to be in difficulty when, without intervention by the state, it will almost certainly be condemned to going out of business in the short or medium term. This will be the case if at least one of the five criteria listed in Article 2(18) of the GBER are satisfied (e.g., an undertaking is subject to collective insolvency proceedings).

36. A company belonging to or being taken over by a larger business group is not normally eligible for rescue or restructuring aid, except where it can be demonstrated that the company’s difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the

37 See Commission Notice on the notion of State aid (2016), C/2016/2946, OJ C 262, 19.7.2016, pp. 1–50, para. 11 referring to judgment of the Court of Justice of 16 December 2010, *AccuElectrabel Produzione SpA v. Commission*, C-480/09 P, EU:C:2010:787, paras. 47 to 55. The Notice states at para. 11 that “[s]everal separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice considers the existence of a controlling share and other functional, economic and organic links to be relevant.”

38 The EFTA Surveillance Authority’s FAQ on the GBER notes at point 15 that “[t]he concept of an undertaking applies and all conditions of the GBER need to be met at the level of the group. Aid awards could, for example, be identified either through the consolidated accounts of the group or with the use of declarations.” Available at: [http://www.eftasurv.int/media/esa-docs/physical/Revised-document-FQA\\_GBER.pdf](http://www.eftasurv.int/media/esa-docs/physical/Revised-document-FQA_GBER.pdf).

39 It should be noted that national authorities may request information from a potential beneficiary to understand whether the company may be receiving aid in other EU countries.

40 See for example the Commission decision to open a formal investigation in State aid to DAF Trucks in Belgium and the Netherlands (NN 27/93, NN 43/93 and NN 58/93), OJ 1994 C31/4 (Belgium) and C31/9 (the Netherlands).

group, and that the difficulties are too serious to be dealt with by the group itself. Where a company in difficulty creates a subsidiary, the subsidiary, together with the company in difficulty controlling it, will be regarded as a group and may receive aid only under certain conditions.<sup>41</sup>

#### Box

**It is useful to note the specific guidance provided in the Commission’s GBER FAQs in relation to undertakings in difficulty (point 5)**

“Article 1(4)(c) prohibits the granting of aid to undertakings in difficulty and Article 2(18) defines such undertakings. In case the aid beneficiary is a daughter company of the group, does it mean that the aid grantor has to control the whole concern? And if e.g. another daughter of the concern is in difficulty then no aid can be granted to the group and other companies belonging to it?”

*In accordance with the case law, an undertaking is defined as a single economic entity having a common source of control. Therefore, as long as the group acts as a single economic unit, it shall be considered as one undertaking and the economic situation of all the legal persons part of the group shall be considered when granting aid under the GBER. Otherwise, a company that is in difficulty might bypass the GBER prohibition of aid to enterprises in difficulty, by simply setting up a wholly owned subsidiary and transferring its liabilities to that company.”*

Source:  
[https://ec.europa.eu/competition/state\\_aid/legislation/practical\\_guide\\_geber\\_en.pdf](https://ec.europa.eu/competition/state_aid/legislation/practical_guide_geber_en.pdf)

37. An undertaking in difficulty may still be entitled to *de minimis* aid. Note that here the calculations relate to the concept of a “single undertaking” as defined in Article 2(2) of the *de minimis* Regulation.<sup>42</sup> It may also have recourse to Member State schemes under the rescue and restructuring guidelines, especially with regard to aid to SMEs.

41 The criteria laid down in Annex I to Commission Recommendation 2003/361/EC will be taken into account to determine whether the company is part of a group.

42 Article 2(2) of the *de minimis* Regulation provides:  
 “‘Single undertaking’ includes, for the purposes of this Regulation, all enterprises having at least one of the following relationships with each other:  
 (a) one enterprise has a majority of the shareholders’ or members’ voting rights in another enterprise;  
 (b) one enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;  
 (c) one enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;  
 (d) one enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders’ or members’ voting rights in that enterprise.  
 Enterprises having any of the relationships referred to in points (a) to (d) of the first subparagraph through one or more other enterprises shall also be considered to be a single undertaking.”

## 4. Calculating the amount of aid: Challenges

### 4.1 Higher limits for SMEs

38. The TF is more generous towards support schemes for SMEs. SMEs are generally companies which employ fewer than 250 persons and which have an annual turnover not exceeding €50 million and/or an annual balance sheet total not exceeding €43 million.<sup>43</sup>

39. The main factors determining whether an enterprise is an SME are (1) staff headcount and (2) either the turnover or balance sheet total.

Table

Company category	Staff headcount	Turnover	or	Balance sheet total
Medium-sized	<250	≤ €50 m		≤ €43 m
Small	<50	≤ €10 m		≤ €10 m
Micro	<10	≤ €2 m		≤ €2 m

40. A company that exceeds these thresholds is usually to be considered a large enterprise. However, certain “hybrid” cases—where only one threshold is exceeded—may still fall within the definition of an SME.<sup>44</sup>

41. Nevertheless, the EU’s SME definition is extremely complex and covers not only different types of firm (micro, small- and medium-sized), but also different categories. In order to determine whether a particular enterprise is a “genuine SME,” the Commission takes into account the economic relationships that this enterprise has with other companies. In simplified terms, this leads to distinguishing between three categories of companies: (i) autonomous, (ii) partner and (ii) linked enterprises.<sup>45,46</sup>

42. The difference between partnership and linked enterprises has been, to some extent, clarified in recent General Court rulings, albeit that these rulings do not deal with the State aid field. A certain degree of legal uncertainty, therefore, remains.<sup>47</sup>

43 See Commission Recommendation on definition of micro, small and medium-sized enterprises, 2003/361/EC, OJ L 124, 20.5.2013, pp. 36–41.

44 Full details as well as the conditions of application are to be found in the User Guide to the SME Definition from the Commission. Commission User Guide to the SME Definition and GBER 2014, annex 1. User Guide available at: [https://ec.europa.eu/regional\\_policy/sources/conferences/state-aid/sme/smedefinitionguide\\_en.pdf](https://ec.europa.eu/regional_policy/sources/conferences/state-aid/sme/smedefinitionguide_en.pdf).

45 An enterprise is “autonomous” if the enterprise is either completely independent or has one or more minority partnerships (each less than 25%) with other enterprises. If holdings with other enterprises rise to at least 25% but no more than 50%, the relationship is deemed to be between “partner enterprises.” If holdings with other enterprises exceed the 50% threshold, these are considered “linked enterprises.”

46 For checking if a company [A] is an SME, the Commission Services have developed a methodology requiring (in simplified terms) to sum up: (i) the relevant figures for company [A]; (ii) the proportion of the share of the partner companies (equal to the level of participation in the partner companies); and (iii) 100% of the shares of the linked companies. See the Annex to Recommendation 2003/361.

47 Judgment of the General Court of 15 September 2016, *K-Chemica*, Case T-675/13, EU:T:2016:480, at paras. 35–37 and judgment of the General Court of 15 September 2016, *Crosfield*, Case T-587/14, EU:T:2016:475 at paras. 34–37.

43. It is also important to emphasise that the Commission does not check *ex ante* if particular firms qualify. It is for beneficiaries to check that they do not fall into a category that would disqualify them from the SME categorisation. For example, companies backed by private equity funds may be excluded if they are treated as “linked enterprises.”

## 4.2 Cumulation of aid

44. Aid covered by the TF can be “cumulated” or added together and it can also be cumulated with aid falling within the GBER and *de minimis* Regulation provided the conditions for cumulation under those EU instruments are respected. The Commission has also confirmed that regional aid may be cumulated with ‘TF’ measures. However, the TF does not provide blanket approval.

45. There are specific exceptions to cumulation for aid in the form of loan guarantees and aid in the form of subsidised interest rate loans as well as aid for specific activities to fight the coronavirus outbreak (e.g., aid for coronavirus-related R&D).<sup>48</sup> If there are errors in applying the rules on cumulation, it is the beneficiary that bears the risk, including potentially repayment of incompatible aid.

## 4.3 Eligible costs

46. The amount of aid that a company can receive depends on a number of factors, including the type and level of costs that can be taken into account in the assessment. This will vary depending on the category of aid and the relevant EU aid instrument. For example, eligible costs relating to the production of coronavirus relevant products include all investment costs necessary for their production.

47. The TF provides that aid concerning the same eligible costs cannot be cumulated when granting aid for specific activities to fight the coronavirus outbreak, i.e., there should be no double counting.

## 5. Formalities: Transparency requirements: monitoring and reporting

48. There are clear EU rules on transparency in respect of aid granted by Member States. Subject to certain limited exceptions, a Member State must publish relevant information on each individual aid granted pursuant to the TF on a comprehensive State aid website or the Commission’s specific State aid transparency search page within 12 months from the moment of the grant of the aid.

49. The Court of Justice has taken a strict approach to the requirements of transparency: a failure to comply with the relevant EU rules would render aid measures

that were otherwise fully compliant with the conditions for exemption to be illegal.<sup>49</sup> This means that the aid can be recovered with compound interest from the beneficiary even if it is the national authority that is at fault for failing to comply with the transparency requirements.

50. Finally, national authorities must confirm that they will respect the monitoring and reporting obligations laid down in Section 4 of the TF (e.g., by 31 December 2020, Member States must provide the Commission with a list of measures that they have put in place on the basis of the schemes approved by the TF). Detailed records regarding the granting of aid must also be maintained for ten years upon granting of the aid. This primarily allows the Commission to conduct *ex post* assessments of the effectiveness of the authorised aid schemes, but it should not be forgotten that the limitation period for recovery of illegal aid is also ten years.

## VI. Conclusion

51. As we have explained in this article, the TF allows Member States to notify extensive schemes of financial support to their industries and for the Commission to clear them with minimum scrutiny. The main issue for companies applying for aid under these schemes is to ensure that the national authorities have complied with all the relevant formal and substantive conditions. Given the scope of the crisis, many companies will be receiving State aid in the EU for the first time, but they may have limited experience or insight into the complexity of the rules. Beneficiaries (or potential beneficiaries) need to familiarise themselves with the various elements of the State aid rules outlined in this article. This is not just a matter of formalities. Recent case law from the Union courts confirms that it is the aid beneficiaries and not the granting authorities that are exposed to significant economic risks if there are failings, including potentially recovery (i.e., clawback) of the aid with compound interest. The conditions attached to the different types of aid that can be approved under the TF need to be fulfilled. In addition, and as we have explained, there is an important body of precedent that governs the implementation of these conditions in granting aid to applicants at national level.

52. The case law also confirms that beneficiaries can rarely succeed in relying on a plea of legitimate expectations that the national authorities themselves should have known and complied with the rules. The fact that beneficiaries acted in good faith is irrelevant. As we have explained, two important categories of government failings to bear in mind are procedural failures and failure to observe relevant conditions when implementing aid schemes. Both types of failure may lead to an obligation to repay aid received in breach of these rules. Furthermore, that obligation can be enforced by the national authorities as well as by national courts. Complaints that the rules have not been respected can also be investigated by the Commission. ■

<sup>48</sup> Aid in the form of loan guarantees and aid in the form of subsidised interest rate loans cannot be cumulated if the aid is granted for the same underlying loan and the loan amount per undertaking exceeds certain thresholds. See, for example, State Aid SA.56873(2020/N) of 4 April 2020 – Portugal – Covid-19: Direct grant scheme and loan guarantee scheme. Available at: [https://ec.europa.eu/competition/state\\_aid/cases/1/202015/285326\\_2145493\\_24\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/1/202015/285326_2145493_24_2.pdf). For aid concerning specific activities to fight the coronavirus outbreak, the aid cannot be cumulated if it concerns the same eligible costs.

<sup>49</sup> See Court of Justice judgment of 14 November 2019, *Dilly’s Wellnesshotel*, Case C-585/17, EU:C:2019:969. See also D. Gabathuler, L. Hancher et al., The EU Court of Justice reinforces its strict approach and holds that alterations to an approved aid scheme are to be cleared by the Commission (*Dilly’s Wellnesshotel*), *e-Competitions* News Issue November 2019, Art. No 92616, [www.concurrences.com](http://www.concurrences.com).

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