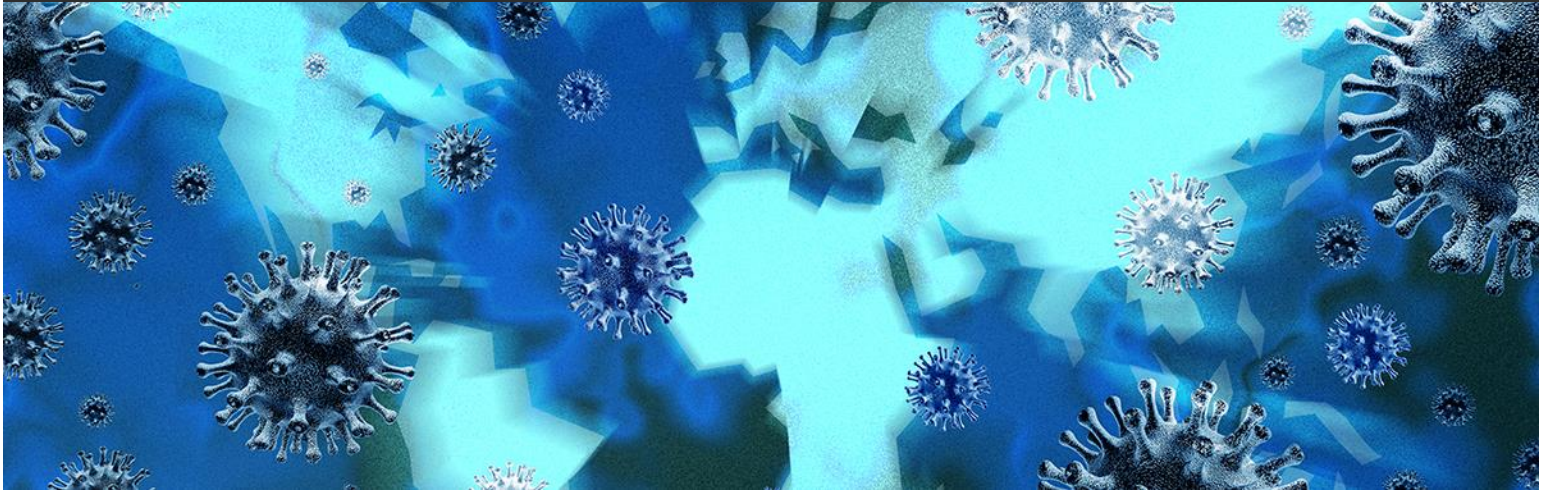


Alert | Health Emergency Preparedness Task Force: Coronavirus Disease 2019



16 March 2020

State Aid and COVID-19: The EU Commission’s Approach

On March 13, 2020, European Commission (“**Commission**”) President Ursula Von Der Leyen gave an important speech about the health and economic crisis caused by the spread of COVID-19 in the European Union, clarifying that the Commission “*will do whatever is necessary to support the Europeans and the European economy*”.¹

The Commission is setting up several public support measures to address the concerns of EU governments, to potentially provide state aid as a result of losses related to the suspension and/or the slowdown of economic activities in their countries. The Commission’s approach is partially described in its March 13, 2020, communication titled “*Coordinated economic response to the COVID-19 Outbreak*” (“**COVID-19 Communication**”).

First, the COVID-19 Communication clarifies that EU Member States can design measures to support undertakings in line with the existing rules on EU state aid.

Indeed, **Article 107(2)b of the Treaty on the Functioning of the European Union (“TFEU”)** already provides that aid “*to make good the damage caused by **natural disasters or exceptional occurrences** [...] shall be compatible*” with the EU internal market, which implies that such aid must be

¹ This speech was anticipated, as Commission Vice President and Commissioner for Competition Margrethe Vestager previously made reference to the worsening of the Italian economy: “*We are ready to work with Italy on additional measures that could be necessary to face economic serious disturbances*”.

authorized by the Commission (with no discretion). Such provision could be used, for instance, to compensate companies for the damages **directly** caused by COVID-19 in several sectors, such as tourism and transportation.

Moreover, **Article 107(3)b TFEU** provides that aid “*to remedy a serious disturbance*” in the economy of an EU Member State “*may be considered*” to be compatible with the internal market. Such provision – which was largely used during the 2008-2013 economic crisis to provide banks with financial assistance – leaves more discretion to the Commission on deciding whether to authorize the aid granted by the Member State.

Article 107(2)b TFEU traditionally serves as legal basis mainly with reference to the first hypothesis, i.e., “**natural disasters**”,² whilst the notion of “**exceptional occurrences**” has been restrictively interpreted by the Commission: in fact, the latter was successfully invoked in relation to **outbreaks** only in a few cases concerning the BSE (bovine spongiform encephalopathy).³ On the contrary, several measures taken in past years by the Italian, French and other EU governments in relation to *avian influenza* have been authorized pursuant to Article 107(3)b TFEU.⁴

In this regard, the COVID-19 outbreak might lead to a significant change of pace, probably due to the unprecedented nature and scale of this disease (a virus only affecting human beings qualified as a pandemic by the World Health Organization), opening for a broader use of Article 107(2)b TFEU (see the Danish case referenced below).

Second, given that several medical experts are suggesting that the COVID-19 outbreak will not subside quickly, the Commission is designing a **special legal framework under Article 107(3)b to be adopted** in order to provide guidance to Member States on how to draft national measures. As pointed out in the COVID-19 Communication, this was already done in one exceptional case in the past, during the financial crisis, when the Commission adopted a Temporary Framework in 2009.

Such a special legal framework could be initially designed in order to provide enough “flexibility”, and then amended to gradually reduce the level of intervention of EU Member States, in a second stage.

It remains to be seen which kind of interventions will be allowed under the new legal framework. In fact, subsidies and compensations to undertakings directly affected by the COVID-19 outbreak will probably be authorized. However, the treatment of broader measures remains an open question.

Third, the Commission has put in place necessary procedural facilitations to enable a swift authorization process. This will allow the Commission to make decisions **within days after receiving a complete state aid notification** from the Member State in question. Moreover, the Commission has set up a dedicated mailbox and telephone number to assist Member States.

The Commission has recently demonstrated that a swift authorization process is possible; on March 12, 2020, it approved pursuant to Article 107(2)b TFEU, within just 24 hours, the first national aid scheme

² Also, Article 50 of the General Block Exemption Regulation (“GBER”) - which provides a generally applicable exemption regime for certain categories of aid – while listing the categories of aid exempted under Article 107(2)b TFEU only refers to “*natural disasters*”, meaning “*earthquakes, avalanches, landslides, floods, tornadoes, hurricanes, volcanic eruptions and wild fires of natural origin*” but not diseases or outbreaks. No reference is made by the GBER to the notion of “*exceptional occurrences*”.

³ See *inter alia* the Commission’s decisions D(2001) 290558 of 27.7.2001 (ref. AGR 25807) case NN46/01, letter D(2001) 292096 of 9.11.2001 (ref. AGR 37860) case N 657/01, and letter D(2001) 290526 of 27.7.2001 (ref. AGR 25798) case N 437/01.

⁴ See for instance the Commission Decision of 10 December 2008 concerning State aid C 31/06 (ex N 621/05) granted by Italy on urgent measures to prevent avian influenza, para 58: “*as a general rule, the Commission does not accept that outbreaks of animal or plant diseases can be considered to constitute natural disasters or exceptional occurrences*”.

related to COVID-19, which was designed by Denmark, by providing about EUR 12 million, in order to compensate event organizers for losses suffered due to cancellation or postponement of events (in particular, events with more than 1,000 attendees).

Such a swift authorization process could imply a shift of resources to the state aid units from other services of the Commission, which could potentially have an impact on the enforcement of antitrust rules in other areas of competition law.

Such an impact is foreseeable especially if one considers the number of notifications that will probably be addressed to the Commission in the coming months. German Chancellor Angela Merkel recently announced that measures designed by the government to counter COVID-19's adverse economic effects (loans, subsidies, compensations etc.) could reach EUR 500 billion.

Finally, the existing rules on rescue and restructuring aid continue to apply to companies in financial difficulties. This implies that, for state aid to be granted the following elements remain to be proved: (i) causal link between loss of profits and the ongoing emergency; (ii) the extent of liquidity needs; (iii) the required aid is limited to the minimum necessary.

Authors

This GT Alert was prepared by **Edoardo Gambaro** and **Pietro Missanelli**. Questions about this information can be directed to:

- **Edoardo Gambaro** | + (39) 02.77197205 | Edoardo.Gambaro@gtlaw.com
- **Pietro Missanelli** | + (39) 02.77197280 | Pietro.Missanelli@gtlaw.com

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