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State aid in the context of the COVID-19 outbreak,
including the Temporary Framework 2020

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European University Institute

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Abstract

The present working paper concerns a chapter on the application of the EU State aid rules in the context of the COVID 19 outbreak, which is to be published in Hancher et al 'EU State Aids', 6th edition, forthcoming in 2021. The severe economic crisis accompanying the public health crisis of the COVID-19 outbreak led to an unprecedented wave of State aid cases, which the Commission had to assess in record time. First, the paper analyses the Temporary Framework, a set of guidelines that the Commission announced for the assessment of compatibility of State aid in response to the COVID-19 outbreak. The Temporary Framework concerns mainly aid to remedy the serious disturbance in the economy of Member States caused by the COVID-19 outbreak. Second, the paper elaborates on cases of aid that also had such purpose but did not fall within the scope of the Temporary Framework, and therefore they were assessed directly under the Treaty. Third, the paper analyses cases of aid to compensate undertakings for damage directly caused by an exceptional occurrence such as the COVID-19 outbreak. Since such aid may cover only damage directly caused by the outbreak, it has a different scope of application than aid under the Temporary Framework, which addresses more generally the negative economic consequences of the outbreak. Finally, the paper addresses certain amendments to existing (at the moment that COVID-19 broke out) regulations and guidelines, which were adjusted in view of that outbreak.

Keywords

State aid, COVID, Temporary Framework.

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1. Introduction*

This chapter considers the application of the EU State aid rules in the context of the COVID-19 outbreak. Given the central role of the green transition and the digital transformation in ensuring a successful recovery from the negative economic consequences of the outbreak, several Member States have taken these challenges into account when designing their support measures. Therefore, an effective response in terms of State aid necessary to address the liquidity and solvency problems of undertakings due to the COVID-19 outbreak plays also an important role in preparing the ground for the achievement of EU climate and digital objectives during the upcoming recovery period.

As soon as Member States imposed the first lock-down measures, it became evident that State aid would be required to support several sectors of the economy in the severe economic crisis that would accompany the public health crisis of that outbreak. This led to probably the most intensive wave of State aid notifications by Member States and corresponding decisions by the Commission since the foundation of the EU. Only between 19 March and 9 April 2020, the Commission had adopted 39 State aid decisions based on the Temporary Framework to approve 49 national measures that provided much needed liquidity to European businesses.¹ The Commission continued adopting State aid decisions with the same intensity in the months that followed, leading to a rich decisional practice on several aspects of EU State aid law. From 12 March to 26 October 2020, the Commission had adopted 435 decisions on COVID-19 related State aid measures.

The present chapter starts by analysing in section 0 the Temporary Framework, which is a set of guidelines that the Commission announced for the assessment of compatibility of State aid in response to the COVID-19 outbreak. The Temporary Framework concerns mainly aid to remedy the serious disturbance in the economy of Member States caused by the COVID-19 outbreak. Subsequently, section 0 concerns cases of aid that also had such purpose but did not fall within the scope of the Temporary Framework, and therefore they were assessed directly under the Treaty. Then, section 0 elaborates on cases of aid to compensate undertakings for damage directly caused by an exceptional occurrence such as the COVID-19 outbreak. Since such aid may cover only damage *directly* caused by the outbreak, it has a different scope of application than aid under the Temporary Framework, which addresses more generally the negative economic consequences of the outbreak. Finally, section 0 concerns certain amendments to existing (at the moment that COVID-19 broke out) regulations and guidelines, which were adjusted in view of that outbreak.

When reading this chapter, it should be remembered that, much like the COVID-19 outbreak, the rules on State aid in response to that outbreak are constantly evolving. The Temporary Framework has already been amended four times in only a few months and one cannot exclude that further amendments will take place. Furthermore, at present, the Temporary Framework has been prolonged once, together with the addition of one further category of compatible aid, therefore towards a slightly more permissive direction. It is currently unknown whether the Temporary Framework will be prolonged beyond its current end date, which is 30 June 2021.² Moreover, it is currently unforeseeable whether a hypothetical further prolongation of that framework would consist in a mere prolongation or whether it would be combined with an adjustment of that framework towards a stricter direction (if e.g. the economy recovers

* The views expressed in this chapter are purely those of the author and may not in any circumstances be regarded as stating an official position of the European Commission.

A final version of this working paper will be published in Hancher et al 'EU State Aids', 6th edition, forthcoming in 2021.

¹ See the Commission's statement 20/610 of 9 April 2020 entitled "Coronavirus: Commission Statement on consulting Member States on proposal to further expand State aid Temporary Framework to recapitalisation measures".

² Except for section 3.11 of the Temporary Framework (recapitalisation aid), whose end date is 30 September 2021.

to some extent) or towards a more permissive direction (if e.g. the outbreak becomes more severe and so do its economic consequences).

In addition, some of the decisions adopted by the Commission in the COVID-19 context have been challenged. For example, Ryanair has vowed to challenge Commission decisions approving State aid to competing airlines, a promise that it has honoured so far.³ Therefore, it remains to be seen whether the General Court and the Court of Justice will agree with the judgment calls that the Commission had to make on several legal issues concerning the implementation of Article 107(2)(b), 107(3)(b) and 107(3)(c) TFEU in the context of the COVID-19 outbreak. The present chapter was sent for publication on 26 November 2020 and it thus reflects the legal situation on that date.

2. The Temporary Framework

2.1 Background

In March 2020 Member States began imposing unprecedented restrictions on citizens and businesses in order to contain the spread of the COVID-19 pandemic. Only days after most of these public safety measures had been enacted at national level, on 19 March 2020 the Commission adopted a Temporary Framework outlining the basic requirements for compatible State aid in these exceptional economic circumstances.⁴ At the time of drafting of the present chapter, that framework has already been amended four times in a period of only seven months: on 3 April 2020, on 8 May 2020, on 29 June 2020 and on 13 October 2020.⁵ Moreover, the Temporary Framework initially applied until 31 December 2020. However, by the fourth amendment of 13 October 2020, the Commission prolonged the Temporary Framework until 30 June 2021.⁶

Given the speed of economic developments and the frequent need for clarifications on the Commission's extensive decisional practice under the Temporary Framework, it cannot be excluded that that framework might soon undergo further amendments. The present chapter is based on the legal status quo on 26 November 2020. Any references to the "Temporary Framework" concern the Temporary Framework as amended to date.

In the Temporary Framework, the Commission recognised early on that the COVID-19 outbreak was a severe public health emergency for citizens and societies, with infections in all the Union's Member States. Since it was also a major shock to the global and EU economies, a coordinated economic response of Member States and EU institutions was crucial to mitigate these negative repercussions on

³ See Ryanair's "COVID-19 market update" of 1 May 2020 available at: <https://investor.ryanair.com/wp-content/uploads/2020/05/Ryanair-May-1-2020.pdf> [Accessed 28 September, 2020]. On 22 and 23 September 2020, the first hearings took place in such actions brought by Ryanair in Cases T-238/20 and T-259/20, respectively.

⁴ Communication from the Commission – Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 91I/1.

⁵ See respectively: Communication from the Commission on the (first) amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 112I/1; Communication from the Commission on the second amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 164/3; Communication from the Commission on the third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 218/3; Communication from the Commission on the fourth amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and on the amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 TFEU to short-term export-credit insurance [2020], OJ C 340I/1.

⁶ Except for section 3.11 of the Temporary Framework on recapitalisation aid, which initially applied until 30 June 2021 and which was subsequently prolonged to 30 September 2021.

the EU economy. That shock affected the economy through different channels: a supply shock from the disruption of supply chains, and a demand shock caused by lower consumer demand. Moreover, negative effects stemmed from uncertainty on investment plans, while undertakings suddenly faced significant liquidity constraints.⁷

The various containment measures adopted by the Member States, such as social distancing measures, travel restrictions, quarantines and lock downs, had an immediate impact on both demand and supply, and hit undertakings and employees, especially in the health, tourism, culture, retail and transport sectors. Beyond the immediate effects on mobility and trade, the COVID-19 outbreak affected undertakings in all sectors and of all kinds, small and medium enterprises (hereinafter “SMEs”) as well as large undertakings. The impact was also felt on global financial markets, in particular with concerns for liquidity. These effects were not contained to one particular Member State and they had a disruptive impact on the EU economy as a whole.⁸

In the exceptional circumstances created by the COVID-19 outbreak, solvent or less solvent undertakings of all kinds might face a severe lack of liquidity. SMEs are at particular risk given that they cannot source funding as easily as large enterprises. Apart from insufficient liquidity, undertakings might also suffer significant damage because of the COVID-19 outbreak. The exceptional nature of the COVID-19 outbreak means that such damages could not have been foreseen, are of a significant scale and hence put undertakings in conditions that sharply differ from the market conditions in which they normally operate. Even healthy undertakings, well prepared for the risks inherent to the normal course of business, can struggle in these exceptional circumstances, to such an extent that their viability may be undermined.⁹

The COVID-19 outbreak poses the risk of a serious downturn affecting the whole economy of the EU, hitting businesses, jobs and households. Therefore, the Commission recognises that well-targeted public support is needed to ensure liquidity in the markets, to counter the damage inflicted on healthy undertakings and to preserve the continuity of economic activity during and after the COVID-19 outbreak. However, the Commission also admits that, given the limited size of the EU budget, the main response will come from Member States’ national budgets. Therefore, in the Temporary Framework the Commission aims at putting forward compatibility rules that, together with the rest of EU State aid rules, enable Member States to take swift and effective action to support citizens and undertakings, in particular SMEs, facing economic difficulties due to the COVID-19 outbreak.¹⁰

Although the Commission notes that EU State aid control “avoids harmful subsidy races, where Member States with deeper pockets can outspend neighbours to the detriment of cohesion within the Union”,¹¹ the Temporary Framework admittedly allows for rather generous amounts of aid. Although such aid might be justified when looking at the individual case of an undertaking that entered into difficulty after the COVID-19 outbreak at no fault of its own, in the wider picture other similar undertakings might not be able to receive such aid (or not to the same extent) from the Member State where they mainly operate. It is possible that not all Member States have the financial capacity to use the possibilities of the Temporary Framework to the maximum extent. Therefore, it is crucial for a level-

⁷ Temporary Framework, points 1 and 2.

⁸ Temporary Framework, point 3.

⁹ Temporary Framework, points 4 and 8. On the role of banks, see section 0 of the present chapter.

¹⁰ Temporary Framework, points 9, 11 and 18. In point 9, the Commission also included a message to the airline industry, probably in an effort to invite airlines to honour their obligation to reimburse passengers for cancelled flights based on Regulation (EC) 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L 46/1. The Commission stated that “*Member States can decide support to operators in the travel and tourism industry to ensure that reimbursement claims caused by the COVID-19 outbreak are satisfied with a view to ensuring the protection of passenger and consumer rights, and equal treatment of passengers and travellers*”.

¹¹ Temporary Framework, point 10.

playing field in the internal market that aid from national funds is complemented by support from resources pulled together at EU level, a matter which is currently under discussion between the EU institutions.¹² Meanwhile, the Temporary Framework sets out the basic lines for coordinating urgently needed aid at national level.

Before listing the different types of aid allowed under Temporary Framework, the Commission starts by recalling other existing possibilities of public support.¹³

Already in the Communication on a coordinated economic response to the COVID-19 outbreak of 13 March 2020,¹⁴ the Commission mentioned various options available to Member States outside the scope of EU State aid control, which they may put in place without the involvement of the Commission. These include measures applicable to all undertakings regarding wage subsidies, suspension of payments of corporate and value added taxes or social welfare contributions, or financial support directly to consumers for cancelled services or tickets not reimbursed by the concerned operators. Member States may also design support measures in line with Block Exemption Regulations¹⁵ without the involvement of the Commission.

In addition, on the basis of Article 107(3)(c) TFEU and as further specified in the Rescue and Restructuring Guidelines,¹⁶ Member States can notify to the Commission aid schemes to meet acute liquidity needs and support undertakings facing financial difficulties, also due to or aggravated by the COVID-19 outbreak.

Furthermore, on the basis of Article 107(2)(b) TFEU Member States may compensate undertakings for damage directly caused by the COVID-19 outbreak. This type of aid is further analysed in section 0 of the present chapter. It is important to keep in mind that only damage *directly* caused by the outbreak falls within the scope of Article 107(2)(b) TFEU, such as damage directly caused by quarantine measures precluding the beneficiary from operating its economic activity. By contrast, other kind of aid addressing more generally the economic downturn from the COVID-19 outbreak is to be assessed under the different compatibility basis of Article 107(3)(b) TFEU, and therefore in principle on the basis of the Temporary Framework.¹⁷

The Temporary Framework complements the above possibilities with: (i) aid to address the liquidity and solvency needs of otherwise healthy undertakings due to the negative economic impact of the

¹² After marathon negotiations between EU leaders, the European Council proposed on 21 July 2020 a Recovery Fund of EUR 750 billion, to be borrowed on the markets by the Commission and then used for back-to-back loans as well as for expenditure in the Member States channelled through various programmes. In Resolution 2020/2732(RSP) adopted on 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020, the European Parliament welcomed the proposal but requested several improvements. The conclusions of the European Council and the resolution of the European Parliament are available at:

<https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf> and

https://www.europarl.europa.eu/doceo/document/TA-9-2020-0206_EN.html [Accessed 28 September, 2020].

¹³ Temporary Framework, points 12 to 15bis.

¹⁴ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup on Coordinated economic response to the COVID-19 Outbreak COM(2020) 112 final.

¹⁵ Commission Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1; Commission Regulation (EC) 702/2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 TFEU [2014] OJ L 193/1; Commission Regulation (EU) 1388/2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 TFEU [2014] OJ L 369/37.

¹⁶ Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty [2014] OJ C 249/1.

¹⁷ Temporary Framework, points 15 and 15bis.

COVID-19 outbreak, which is considered compatible on the basis of Article 107(3)(b) TFEU, and (ii) aid to facilitate the development of economic activities that protect public health in the context of the COVID-19 outbreak, which is considered compatible on the basis of Article 107(3)(c) TFEU. Such aid is meant to be approved very rapidly upon notification by the Member State concerned, in order to face effectively the urgent circumstances of the COVID-19 outbreak. According to the Commission, from March to October 2020, the median duration for approval of COVID-19 measures was 13 calendar days.¹⁸ The aid is also temporary, usually until 30 June 2021,¹⁹ so that the Commission can re-examine the need for such support at that moment. Nevertheless, the fact that the Temporary Framework foresees specific types of aid does not mean that all other types of aid in response to the COVID-19 outbreak are prohibited. Member States may still notify alternative approaches, both as aid schemes and as individual aid, which the Commission will assess directly under the Treaty,²⁰ if they do not fall within the scope of any of its guidelines.²¹

Especially as regards the compatibility basis of Article 107(3)(b) TFEU, the Commission recognises in the Temporary Framework that the COVID-19 outbreak has currently caused a serious disturbance in the economy of all Member States, which can justify compatible State aid on that basis for the limited period of duration of the Temporary Framework. The outbreak affects all Member States and the containment measures taken by Member States impact the liquidity and solvency of undertakings, especially SMEs.²² Nevertheless, the Commission also recalls the principle of strict interpretation of all compatibility bases of Article 107 TFEU, since they constitute an exception to the rule of Article 107(1) TFEU that State aid is prohibited.²³

The following sections analyse the detailed requirements that State aids must meet in order to be considered compatible under the Temporary Framework. Section 0 below concerns the horizontal requirements that all (or almost all) types of aid under the Temporary Framework must meet. Then, the specific requirements of each specific type of aid are analysed, as follows:

- a) Section 0 of the present chapter analyses three types of liquidity aid foreseen in the Temporary Framework: aid in limited amounts, aid in the form of State guarantees and aid in the form of public loans at subsidised interest rates, which are foreseen in sections 3.1, 3.2 and 3.3 of the Temporary Framework, respectively.
- b) Section 0 of the present chapter analyses aid to facilitate the development of economic activities that protect public health, which is foreseen in sections 3.6, 3.7 and 3.8 of the Temporary Framework.
- c) Section 0 of the present chapter analyses aid in the form of deferrals of taxes and social security contributions, which is foreseen in section 3.9 of the Temporary Framework.
- d) Section 0 of the present chapter analyses aid in the form of wage subsidies for employees to avoid lay-offs, which is foreseen in section 3.10 of the Temporary Framework.
- e) Section 0 of the present chapter analyses recapitalisation aid, which is foreseen in section 3.11 of the Temporary Framework.

¹⁸ See the answer given on 1 October 2020 by Executive Vice-President Vestager on behalf of the European Commission to question P-004846/2020 raised by the Member of European Parliament Rasmus Andresen.

¹⁹ Except for recapitalisation aid under section 3.11 of the Temporary Framework, which may be granted until 30 September 2021.

²⁰ See for example the types of aid analysed in section 0 of the present chapter.

²¹ Temporary Framework, points 16 and 16bis.

²² Temporary Framework, points 17-19.

²³ Temporary Framework, point 17. See *Freistaat Sachsen and Others v Commission* (Joined Cases T-132/96 and T-143/96) EU:T:1999:326, para.167. See also the decisions mentioned in point 17 (fn.13) of the Temporary Framework.

- f) Section 0 of the present chapter analyses aid for uncovered fixed costs, which is foreseen in section 3.12 of the Temporary Framework.

Furthermore, sections 0 and 0 of the present chapter analyse specific issues that arise in relation to the banking sector and short-term export credit insurance, respectively.

2.2 Horizontal requirements for all types of aid under the Temporary Framework

2.2.1 Deadline for granting the aid

The Temporary Framework foresees rather generous but temporary aid measures in order to address the consequences of the COVID-19 outbreak. In view of the temporary nature of such exceptional aid, all types of aid under the Temporary Framework must be granted by 30 June 2021.²⁴ The only exception so far concerns recapitalisation aid under section 3.11 of the Temporary Framework, which may be granted also a few months later, but in any event no later than 30 September 2021.²⁵

The abovementioned deadline concerns the date of *granting* of the aid measure, which does not necessarily coincide with the date of *disbursement* of the aid to the beneficiary.²⁶ According to the case-law, an aid measure is granted “*at the time that the right to receive it is conferred on the beneficiary under the applicable national rules*”.²⁷ Therefore, beneficiaries of aid under the Temporary Framework must have the legal title to receive the aid under national law by 30 June 2021 (or by 30 September 2021 for aid under section 3.11), whereas the aid may actually be paid to them later, if the Member State wishes so.

If the aid is granted in the form of a tax advantage, the tax liability in relation to which that advantage is granted must have arisen no later than 30 June 2021.²⁸ This means that the tax liability may also have arisen in earlier years, e.g. in 2019.²⁹

The Commission will review the Temporary Framework before 30 June 2021 on the basis of important competition policy or economic considerations.³⁰ Therefore, it is not excluded that the Temporary Framework is further prolonged or adjusted after 30 June 2021, depending on the economic and public health developments by that date. For example, in response to the global financial crisis of 2008, the Commission adopted the 2009 Temporary Framework,³¹ which was subsequently replaced by the 2011 Temporary Framework,³² where the Commission prolonged certain types of aid but under

²⁴ Temporary Framework, points 22(d), 25(c), 27(c), 35(a), 37(b), 39(b), 41, 87(a) and 93. It is worth noting that section 3.10 on wage subsidies does not specify explicitly that such aid must be granted by 30 June 2021. Nevertheless, that deadline seems to apply implicitly also to section 3.10, since the Temporary Framework applies only until 30 June 2021 with the sole exception of section 3.11 (see point 93 of the Temporary Framework).

²⁵ Temporary Framework, point 48. See also point 93 of the Temporary Framework, which stipulates that section 3.11 may be applied until 30 September 2021.

²⁶ *Arriva Italia and Others* (C-385/18) EU:C:2019:1121, paras 35-36.

²⁷ *Magdeburger Mühlenwerke v Finanzamt Magdeburg* (C-129/12) EU:C:2013:200, para.40.

²⁸ See the footnote in point 22(d) of the Temporary Framework.

²⁹ For example, see recitals 19, 30-32, 38-41, 48 and 68, fifth bullet-point, of Commission Decision of 26 June 2020, Italy: *COVID-19 – Tax exemptions and tax credits* (SA.57429 (2020/N)).

³⁰ Temporary Framework, point 93.

³¹ Communication from the Commission on the Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis [2009] OJ C 16/1.

³² Communication from the Commission on the Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis [2011] OJ C 6/5.

stricter conditions (especially for large undertakings) in view of a gradual return to normal State aid rules.³³

2.2.2 Beneficiary not in difficulty on 31 December 2019

Almost all types of aid foreseen in the Temporary Framework must comply with a fundamental requirement: they must not be granted to undertakings that were already in difficulty on 31 December 2019.³⁴ The idea behind that horizontal requirement is that aid under the Temporary Framework should support only undertakings which were healthy prior to the COVID-19 outbreak, even if they subsequently entered into financial difficulty due to the economic consequences of the COVID-19 outbreak. Undertakings that were already in difficulty, irrespective of the negative economic consequences of the COVID-19 outbreak, should not receive aid under the Temporary Framework. Instead, such undertakings might be eligible for aid under the Rescue and Restructuring Guidelines.³⁵

Therefore, except for two important derogations analysed below in this section, the rule of principle is that the Temporary Framework aims at supporting only undertakings that would have been healthy absent the COVID-19 outbreak. As clarified in the third amendment of the Temporary Framework, “*the main purpose of the Temporary Framework is to provide targeted support to otherwise viable companies that have entered into financial difficulty as a result of the COVID-19 outbreak. This is an important principle to avoid undue distortions of competition*”.³⁶

Whether an undertaking qualified as an “undertaking in difficulty” on 31 December 2019 is assessed pursuant to the definition of Article 2(18) of the General Block Exemption Regulation³⁷ (hereinafter “GBER”), which is a simplified version³⁸ of the definition of “undertaking in difficulty” in the Rescue and Restructuring Guidelines.³⁹ The use of that simplified definition of the GBER, even if aid under the Temporary Framework must still be approved by the Commission and is not block-exempted, aims at facilitating Member States in implementing aid authorised by the Commission under the Temporary Framework to a (usually) large group of beneficiaries.

Especially as regards aid to undertakings active in the primary production of agricultural products or to undertakings active in the fishery and aquaculture sector, the qualification as “undertaking in difficulty” on 31 December 2019 is assessed pursuant to the similar definitions in the respective block-exemption regulations covering those sectors: Article 2(14) of Regulation 702/2014⁴⁰ and Article 3(5) of Regulation 1388/2014.⁴¹

On the other hand, having entered into financial difficulty due to the COVID-19 outbreak is not as such a precondition for an undertaking to receive aid under the Temporary Framework. Undertakings that have managed to stay healthy despite the COVID-19 outbreak might still face liquidity problems, even if they do not (yet) formally qualify as undertakings in difficulty. Therefore, both undertakings that

³³ See section 1.2, seventh paragraph, of the 2011 Temporary Union Framework.

³⁴ See points 22(c), 25(h), 27(g), 35(h), 37(k), 39(i), 49(d) and 87(f) of the Temporary Framework.

³⁵ See the Guidelines for non-financial undertakings in difficulty. See also point 4 of the Third amendment to the Temporary Framework.

³⁶ See point 4 of the Third amendment to the Temporary Framework.

³⁷ Commission Regulation 651/2014 of 17 June 2014 OJ L187, 26.6.2014, p.1. See points 22(c), 25(h), 27(g), 35(h), 37(k), 39(i), 49(d) and 87(f) of the Temporary Framework.

³⁸ See in that regard *Nerea v Regione Marche* (C-245/16) EU:C:2017:521, para.34.

³⁹ For the more complex definition of “undertaking in difficulty” under the Rescue and Restructuring Guidelines, see points 19-24 of the Guidelines for non-financial undertakings in difficulty.

⁴⁰ Commission Regulation 702/2014.

⁴¹ Commission Regulation 1388/2014 of 16 December 2014 OJ L369, 24.12.2014, p.3.

entered into difficulty following the COVID-19 outbreak and undertakings that have managed (so far) to stay healthy during that period are in principle eligible for aid under the Temporary Framework, as long as they were not in difficulty on 31 December 2019. Nevertheless, the financial situation of a given undertaking might have an impact of the amount of aid it can receive, especially in cases of individual aid, such as a significant amount of guarantee or loan under sections 3.2 or 3.3 of the Temporary Framework or a significant amount of recapitalisation aid under section 3.11 of the Temporary Framework.

Moreover, undertakings that were in difficulty on 31 December 2019 but subsequently became healthy undertakings are also eligible for aid under the Temporary Framework, if they no longer qualify as an undertaking in difficulty at the moment of granting of the aid under the Temporary Framework. One may wonder what kind of undertaking could be in difficulty pre-COVID-19 but then become healthy post-COVID-19. Indeed, such a case would normally seem at odds with economic expectations and thus rather suspicious on how genuinely such undertaking suddenly became “healthy”. However, there might be particular circumstances convincingly explaining such evolution. For example, on 31 December 2019 an undertaking might still be under a restructuring plan (due to restructuring aid that it received in the past), which it successfully completes, e.g. in March 2020, prior to receiving aid under the Temporary Framework, e.g. in April 2020.

In cases where the company receiving the aid is a subsidiary of a wider group and that subsidiary was in difficulty on 31 December 2019, the Commission may nevertheless approve the aid on two conditions. First, the wider group (the “undertaking” in State aid terminology) must not have been in difficulty on 31 December 2019. Second, the undertaking must render the subsidiary healthy (e.g. through a capital injection raising the subsidiary’s equity above 50% of its subscribed share capital) prior to the granting of aid.⁴²

Furthermore, there are two important derogations from the general requirement that recipients of aid under the Temporary Framework must not have been already in difficulty on 31 December 2019.

First, micro and small enterprises are not subject to that requirement.⁴³ The definition of “micro enterprises” and “small enterprises” is found in Annex I of the GBER. According to Article 2(3) of that Annex, a micro enterprise is an undertaking which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million. According to Article 2(2) of the same Annex, a small enterprise is an undertaking which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

The rationale behind that derogation is threefold: (i) micro and small enterprises have been particularly affected by the liquidity shortage caused by the economic impact of the COVID-19 outbreak, (ii) aid to micro and small enterprises is not as distortive as aid to larger undertakings, and (iii) certain start-up companies might technically meet the definition of an undertaking in difficulty, while not actually suffering from financial difficulties.

In particular, micro and small enterprises contribute heavily to jobs and growth in the European Union by generating more than 37% of value added and almost 50% of employment in the non-financial business sector. The unprecedented supply and demand shock due to the crisis has exacerbated the difficulties such undertakings face to access financing on the market, as compared to medium-sized and large enterprises. If left unaddressed, those difficulties could lead to a large number of bankruptcies of micro and small undertakings causing serious disturbances to the whole EU economy. Therefore, in the context of the third amendment of the Temporary Framework, the Commission considered it appropriate

⁴² See recitals 32, 33 and 50(f) of Commission Decision of 26 May 2020, France: *COVID-19 – Groupe Novares* (SA.57405 (2020/N)); see also Commission Decision of 7 July 2020, Belgium: *COVID-19 – Recapitalisation of Aviapartner* (SA.57637 (2020/N)).

⁴³ See points 22(c)bis, 25(h)bis, 27(g)bis, 35(h)bis, 37(k)bis, 39(i)bis, 49(d)bis and 87(f) of the Temporary Framework.

to allow aid to all micro and small enterprises, even if they qualified as undertakings in difficulty on 31 December 2019. Given their limited size and limited involvement in cross-border transactions, the Commission considered that State aid to micro and small enterprises was less likely to distort competition in the internal market and affect intra-EU trade than State aid to medium-sized and large companies.⁴⁴

As regards innovative start-up companies, which are in their high-growth phase and are therefore crucial for the economic recovery of the EU, the Commission wished to increase support possibilities to such undertakings. Whilst there is no EU definition for start-ups, the vast majority of such start-up companies are micro or small enterprises.⁴⁵ It is worth noting that, even prior to the third amendment of the Temporary Framework, all SMEs that were in existence for less than three years on 31 December 2019 could already receive aid under the Temporary Framework, since they could not qualify as undertakings in difficulty on 31 December 2019 according to the definition of Article 2(18) of the GBER, apart from exceptional cases of insolvency procedure or rescue or restructuring aid.⁴⁶

Therefore, for the abovementioned reasons, the Commission considered that all micro and small enterprises may receive aid under the Temporary Framework, even if they qualified as undertakings in difficulty on 31 December 2019. However, micro and small enterprises would become ineligible to receive aid under the Temporary Framework in three cases of “aggravated financial difficulty”, if at the moment of granting of such aid:⁴⁷

- i. the micro or small enterprise is subject to collective insolvency proceedings⁴⁸ under national law; or
- ii. it has received rescue aid which it has not paid back, in the sense that it has not reimbursed the loan or terminated the guarantee through which the rescue aid was granted; or
- iii. it has received restructuring aid and is still subject to a restructuring plan.

The second derogation from the general requirement not to have been already in difficulty on 31 December 2019 concerns aid under sections 3.9 and 3.10 of the Temporary Framework.

Section 3.9 provides for aid in form of deferrals of tax and/or social security contributions. Since such aid consists merely in a temporary deferral of the respective tax or social security contribution, it provides a rather limited advantage as compared to an exemption or reduction of that tax or social security contribution. Moreover, it is likely to cover a large group of beneficiaries.

Section 3.10 provides for aid in form of wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak, as well as in form of subsidies supporting the wage equivalent income of self-employed individuals whose business activity was suspended or reduced due to national measures in response to the outbreak. Such aid is also likely to be granted to a large group of beneficiaries. Furthermore, this aid directly supports employment, which is a particularly high priority in the context of the COVID-19 outbreak.

⁴⁴ See points 5 and 6 of the Third amendment to the Temporary Framework.

⁴⁵ See point 7 of the Third amendment to the Temporary Framework.

⁴⁶ According to Article 2(18) of the GBER, SMEs that have been in existence for less than three years do not qualify as undertakings in difficulty, except if: (i) they are subject to collective insolvency proceedings or fulfil the criteria under domestic law for being placed in collective insolvency proceedings at the request of creditors, (ii) they have received rescue aid and have not yet reimbursed the loan or terminated the guarantee, or (iii) they have received restructuring aid and are still subject to a restructuring plan.

⁴⁷ See points 22(c)bis, 25(h)bis, 27(g)bis, 35(h)bis, 37(k)bis, 39(i)bis, 49(d)bis and 87(f) of the Temporary Framework.

⁴⁸ According to the case-law, the term “collective insolvency proceedings” covers all collective insolvency proceedings for undertakings provided for by national law, whether they are opened by the national administrative or judicial authorities of their own motion or on the initiative of the undertaking concerned. See *Nerea* EU:C:2017:521, paras 21-29.

It is probably for the above reasons that the Commission considered that Member States do not have to exclude from aid under sections 3.9 and 3.10 undertakings that were in difficulty on 31 December 2019. Those two types of aid are analysed in further detail in sections 0 and 0 of the present chapter.

2.2.3 No relocation

Any kind of aid under the Temporary Framework, whether based on Article 107(3)(b) TFEU or on Article 107(3)(c) TFEU, must not be conditioned on the relocation of the beneficiary's production or other activities from another country within the EEA to the territory of the Member State granting the aid. Such condition would be harmful to the internal market, as it reflects a beggar-thy-neighbour policy. It would ultimately lead to subsidy wars whereby Member States would have to grant increasing amounts of aid in order to lure beneficiaries in their territory from other Member States, where they were previously established without aid (or at least with less aid).

However, point 16ter of the Temporary Framework merely requires that Member States do not request the relocation of the beneficiary's activity as a precondition for granting the aid. By contrast, the beneficiary itself is not obliged to commit not to relocate in the near-future, or not to have relocated in the recent past. This is why this requirement of the Temporary Framework applies irrespective of the number of job losses actually occurred in the initial establishment of the beneficiary in the EEA, since it does not constrain the beneficiary's conduct as such.

In practical terms, point 16ter of the Temporary Framework merely requires that the national act granting the aid does not contain any precondition on relocation. By contrast, if the beneficiary has recently relocated or will soon relocate to the Member State granting the aid, that fact as such does not breach the requirement in point 16ter of the Temporary Framework. Admittedly, such conduct by the beneficiary could be seen (under a suspicious angle) as hiding an informal relocation arrangement with the Member State granting the aid. Nevertheless, that same conduct could also be seen (under an innocent angle) as a rational restructuring of the beneficiary's operations, which incidentally involved certain relocation of activities to the Member State granting the aid. In view of the wide range of restructuring operations that are likely to take place in response to the economic impact of the COVID-19 outbreak, the Commission opted for the latter "innocent" perspective.

The above approach of the Temporary Framework can be compared with the stricter approach on relocation followed in the GBER,⁴⁹ which requires specific compliant conduct also from the beneficiary (not only from the Member State), in order to be eligible to receive regional investment aid. Under Article 14(16) of the GBER, "[t]he beneficiary shall confirm that it has not carried out a relocation to the establishment in which the initial investment for which aid is requested is to take place, in the two years preceding the application for aid and give a commitment that it will not do so up to a period of two years after the initial investment for which aid is requested is completed". Article 2(61a) of the GBER defines relocation as "a transfer of the same or similar activity or part thereof from an establishment in one contracting party to the EEA Agreement (initial establishment) to the establishment in which the aided investment takes place in another contracting party to the EEA Agreement (aided establishment). There is a transfer if the product or service in the initial and in the aided establishments serves at least partly the same purposes and meets the demands or needs of the same type of customers and jobs are lost in the same or similar activity in one of the initial establishments of the beneficiary in the EEA".

Nevertheless, it must be noted that even the relocation requirements of the GBER have recently been softened in view of the necessary restructuring that many undertakings have to undergo in response to the economic crisis caused by the COVID-19 outbreak. Such restructuring might involve transfer of activities between Member States, which could fall within the wording of the strict definition of

⁴⁹ Commission Regulation 651/2014.

relocation in the GBER, and put at risk the block-exemption of regional investment aid. Therefore, on 2 July 2020, the Commission added the following sentence in Article 14(16) of the GBER: “*With regard to commitments given prior to 31 December 2019, any loss of jobs, in the same or similar activity in one of the initial establishments of the beneficiary in the EEA, occurring between 1 January 2020 and 30 June 2021, shall not be considered a transfer within the meaning of Article 2(61a) of this Regulation*”.⁵⁰

2.2.4 Residence of the beneficiary

The compatibility of State aid with the internal market can be influenced by aspects of that measure breaching other provisions of EU law, while being indissolubly linked to the object of the aid.⁵¹ For example, in the *A-fonds* case, the Court found such an “indissolubly linked breach” in case of State aid granted through refund of a dividend tax subject to a condition of residence on the territory of the granting Member State. Such State aid would entail a breach of Article 63 TFEU on the free movement of capital, which would be indissolubly linked to the object of that aid, and therefore it would affect the compatibility assessment of that aid.⁵²

Not every breach of other EU law provisions would affect the compatibility of a State aid measure, but only an “indissolubly linked breach”, i.e. a breach concerning an aspect of that measure which cannot be separated from the very object of the aid. Although it is admittedly difficult to provide a more precise definition, an “indissolubly linked breach” is highly likely to occur in case a Member State imposes, as a precondition for granting the aid, a requirement that breaches the free movement of goods, persons, services or capital. Therefore, the Commission would be expected to scrutinise thoroughly a requirement of residence on the territory of the granting Member State.⁵³ By contrast, a requirement that the beneficiary be resident in the EEA would not entail any indissolubly linked breach of the four freedoms.

A requirement of registration of the beneficiary in the granting Member State would also not entail such a breach, provided that the registration process is open to undertakings from other Member States and not excessively burdensome. Member States are also free to exclude from the scope of the aid undertakings whose main beneficial owner has tax residence in a tax haven.⁵⁴ Actually, the Commission has recommended that Member States do not grant financial support to undertakings with links to countries that are on the EU’s list of non-cooperative tax jurisdictions, as well as to undertakings that have been convicted of serious financial crimes, including financial fraud, corruption or non-payment of tax and social security obligations.⁵⁵ However, to date the Commission has not elevated that recommendation to a requirement for the compatibility of State aid under the Temporary Framework.

⁵⁰ Commission Regulation (EU) 2020/972 amending Regulation (EU) 1407/2013 as regards its prolongation and amending Regulation 651/2014 as regards its prolongation and relevant adjustments [2020] OJ L 215/3. See also section 0 of the present chapter.

⁵¹ *Ianelli v Meroni* (C-74/76) EU:C:1977:51, para.14.

⁵² *A-Fonds v Inspecteur van de Belastingdienst* (C-598/17) EU:C:2019:352, paras 48 and 49. See, however, also the very recent judgment in *Hinkley Point C*, where the Court stated in rather absolute terms that any kind of breach of EU environmental law by the subsidised activity (without mentioning the requirement of indissoluble link) would preclude the Commission from declaring the aid compatible under Article 107(3)(c) TFEU (*Austria v Commission* (C-594/18 P) EU:C:2020:742, paras 44, 45 and 100).

⁵³ Evidently, in case of aid to undertakings that are natural persons, a requirement of nationality of the granting Member State (excluding other EU nationals from the aid) would also be suspicious. To the author’s knowledge, this issue has not arisen (so far) in State aid cases under the Temporary Framework.

⁵⁴ See recitals 16 and 55 of Commission Decision of 27 April 2020, Poland: *COVID-19 – repayable advance scheme for micro, small and medium-sized enterprises* (SA.56996 (2020/N)).

⁵⁵ Commission Recommendation 2020/1039 on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions [2020] OJ L 227/76.

2.2.5 Cumulation

In general, the different types of aid foreseen in the Temporary Framework may be cumulated with one another.⁵⁶ However, aid in the form of public loans (section 3.3 of the Temporary Framework) cannot be cumulated with aid in the form of State guarantees (section 3.2 of the Temporary Framework) for the same underlying loan principal.⁵⁷

Aid under the Temporary Framework may be cumulated with aid under de minimis Regulations⁵⁸ or with aid under Block Exemption Regulations⁵⁹ provided the provisions and cumulation rules of those Regulations are respected.

2.2.6 Monitoring and reporting obligations

Regarding aid granted under any section of the Temporary Framework, Member States must commit to publish on a specific website⁶⁰ relevant information on each individual grant above EUR 100 000 within 12 months from the moment of granting.⁶¹ That threshold is EUR 10 000 in the agriculture and fisheries sectors.⁶²

Especially as regards recapitalisation aid granted under section 3.11 of the Temporary Framework,⁶³ Member States must publish on that website relevant information on each individual recapitalisation granted under section 3.11 within 3 months from the moment of the recapitalisation. They should indicate the nominal value of the recapitalisation per beneficiary.⁶⁴

However, aid granted under sections 3.9 (deferrals of taxes and social security contributions) and 3.10 (wage subsidies) of the Temporary Framework⁶⁵ is exempted from that publication requirement, probably because of the high number of beneficiaries of such measures, which tend to cover many sectors of the economy.

⁵⁶ Temporary Framework, point 20.

⁵⁷ See sections 2.3.2 and 2.3.3 of the present chapter.

⁵⁸ Commission Regulation (EU) 1407/2013 on the application of Articles 107 and 108 TFEU to de minimis aid, [2013] OJ L 352/1; Commission Regulation (EU) 1408/2013 on the application of Articles 107 and 108 TFEU to de minimis aid in the agriculture sector [2013] OJ L 352/9; Commission Regulation (EU) 717/2014 on the application of Articles 107 and 108 TFEU to de minimis aid in the fishery and aquaculture sector [2014] OJ L 190/45; Commission Regulation (EU) 360/2012 on the application of Articles 107 and 108 TFEU to de minimis aid granted to undertakings providing services of general economic interest [2012] OJ L 114/8.

⁵⁹ Commission Regulation 651/2014 (GBER); Commission Regulation 702/2014; Commission Regulation 1388/2014.

⁶⁰ The publication must take place on the “comprehensive State aid website” or on the “Commission’s IT tool”. This refers to the State aid transparency public search, which gives access to state aid individual award data provided by Member States in compliance with the European transparency requirements for State aid. It can be found at: <https://webgate.ec.europa.eu/competition/transparency/public?lang=en> [Accessed 28 September, 2020].

⁶¹ Referring to information required in Annex III of the GBER and Annex III of Regulation 702/2014. For repayable advances, guarantees, loans, subordinated loans and other such forms of aid, the nominal value of the underlying instrument must be inserted per beneficiary. For tax and payment advantages, the aid amount of the individual aid may be indicated in ranges.

⁶² Referring to information required in Annex III of Regulation 702/2014 and Annex III of Regulation 1388/2014. For repayable advances, guarantees, loans, subordinated loans and such forms of aid, the nominal value of the underlying instrument must be inserted per beneficiary. For tax and payment advantages, the aid amount of the individual aid may be indicated in ranges.

⁶³ Recapitalisation aid is analysed in section 0 of the present chapter.

⁶⁴ Temporary Framework, point 88.

⁶⁵ Those two types of aid are analysed, respectively, in sections 0 and 0 of the present chapter.

Member States must also submit annual reports⁶⁶ to the Commission on the aid granted under the Temporary Framework. By 30 June 2021, Member States must provide the Commission with a list of measures put in place on the basis of schemes approved based on that framework. They must also ensure that detailed records regarding the granting of aid under the Temporary Framework are maintained. Such records, which must contain all information necessary to establish that the necessary conditions have been observed, must be maintained for 10 years upon granting of the aid and be provided to the Commission upon request.⁶⁷

In any event, the Commission may also request additional information regarding the aid granted, in order to verify whether the conditions laid down in the Commission decision approving the aid measure have been met.⁶⁸

2.3 Liquidity support to undertakings facing a serious disturbance in the economy due to the COVID-19 outbreak

The three types of aid in sections 3.1, 3.2 and 3.3 of the Temporary Framework aim at ensuring access to liquidity for undertakings facing a sudden shortage thereof. They are based on Article 107(3)(b) TFEU, which entitles the Commission to authorise aid “*to remedy a serious disturbance in the economy of a Member State*”, such as the negative economic consequences of the COVID-19 outbreak.

Those three types of aid are analysed in sections 0, 0 and 0 of the present chapter.

2.3.1 Limited amounts of aid

Section 3.1 of the Temporary Framework provides for temporary limited amounts of aid to undertakings. The aid is “temporary” in the sense that it must be granted no later than 30 June 2021. The amount of such aid is “limited” because it must not exceed EUR 800 000 per undertaking.⁶⁹

The *rationale* behind such aid is that it should support undertakings that find themselves facing a sudden shortage or even unavailability of liquidity. Nevertheless, the Temporary Framework does not stipulate that Member States must demonstrate the liquidity problems of the undertakings that they wish to support with such aid. During the circumstances of the COVID-19 outbreak, undertakings are in a way “presumed” to face liquidity problems that can be addressed through such temporary and limited amounts of aid.

Such aid goes beyond “*the existing possibilities based on Article 107(3)(c) TFEU*”.⁷⁰ Therefore, this type of “crisis aid” is an additional possibility based on Article 107(3)(b) TFEU, which does not exclude the existing possibilities of regular “non-crisis aid” under Article 107(3)(c) TFEU.⁷¹ As clarified in the third amendment of the Temporary Framework, “*the Temporary Framework complements rather than replaces existing possibilities for Member States to provide support*”.⁷²

⁶⁶ As to the formalities of such reports, the Temporary Framework refers to the Implementing Regulation: Commission Regulation (EC) 794/2004 implementing Council Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2004] OJ L 140/1.

⁶⁷ Temporary Framework, points 89-91.

⁶⁸ Temporary Framework, point 92.

⁶⁹ That threshold is lower for undertakings active in the primary production of agricultural products (EUR 100 000) and for undertakings active in the fishery and aquaculture sector (EUR 120 000).

⁷⁰ Temporary Framework, point 21.

⁷¹ Including, of course, the Commission’s guidelines interpreting Article 107(3)(c) TFEU.

⁷² See point 4 of the Third amendment to the Temporary Framework.

The aid provided in section 3.1 of the Temporary Framework is inspired from a similar type of aid that used to be foreseen in section 4.2.2 of the 2009 Temporary Framework.⁷³ That latter type of aid was in turn inspired from *de minimis* aid.⁷⁴ It was a kind of “generous *de minimis* aid” temporarily allowed in order to provide for fast but relatively limited liquidity support to a wide range of undertakings in the economy of a Member State. In the 2009 Temporary Framework the Commission had foreseen a general threshold of EUR 500 000 per undertaking for such aid in response to the global financial crisis of that period. The fact that the current Temporary Framework provides for a significantly higher general threshold of EUR 800 000 (even if adjusted for inflation) indicates that the economic consequences of the COVID-19 outbreak could be worse than those of the global financial crisis of 2008.

According to point 22 of the Temporary Framework, aid under section 3.1 must comply with the following cumulative requirements:

- a) The overall aid amount must not exceed EUR 800 000 per undertaking. 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 that the total *nominal* value of such measures remains below the cap of EUR 800 000 per undertaking.⁷⁵ Of course, the actual aid element of State aid in form of e.g. a loan or a guarantee is likely to be lower than the nominal amount of such loan or guarantee. Nevertheless, for the sake of administrative simplicity and rapid approval of this type of “generous *de minimis* aid”, the Temporary Framework sets the ceiling of EUR 800 000 by reference to the nominal amount of such measures.⁷⁶ Moreover, the Commission has made clear that aid under section 3.1 which has been reimbursed before 30 June 2021 will not be taken into account in determining whether the ceiling is exceeded.⁷⁷ The Commission focuses on “*the actual advantage at a given moment in time*” from such aid, which must always be within the overall limits of the Temporary Framework.⁷⁸ For example, if a repayable advance of EUR 800 000 was granted to an undertaking under section 3.1 and has already been reimbursed, the undertaking would be eligible again for aid under section 3.1, provided the conditions set out therein are fulfilled. Of course, for the subsequent aid to fulfil the conditions of section 3.1, the reimbursement of the previous aid must have happened before 30 June 2021. Otherwise, the subsequent aid would fall foul of the requirement listed under letter d) below.
- b) The aid must be granted on the basis of a scheme with an estimated budget. Therefore, the aid cannot be granted to only one individual undertaking, but it must be granted to a group of undertakings defined in a general and abstract manner in the granting act.⁷⁹
- c) The aid may not be granted to undertakings that were already in difficulty on 31 December 2019, except for micro or small enterprises that are not subject to collective insolvency proceedings and have not received rescue aid or restructuring aid. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- d) The aid must be granted no later than 30 June 2021. For further analysis of this horizontal requirement, see section 0 of the present chapter.

⁷³ Communication on the 2009 Temporary Community Framework for State aid.

⁷⁴ Compare sections 4.2.1 and 4.2.2 of the 2009 Temporary Framework.

⁷⁵ All figures used must be gross, that is before any deduction of tax or other charges.

⁷⁶ See, however, also section 2.3.3 of the present chapter.

⁷⁷ See the footnote added in point 22(a) of the Temporary Framework by the Fourth amendment to the Temporary Framework.

⁷⁸ See point 9 of the Fourth amendment to the Temporary Framework.

⁷⁹ See the definition of an aid scheme in Article 1(d) of the Procedural Regulation (Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 TFEU [2015] OJ L 248/9).

- e) If the beneficiary undertaking is active in the processing and marketing of agricultural products,⁸⁰ the aid must be conditional on not being partly or entirely passed on to primary producers and must not be fixed on the basis of the price or quantity of products purchased from primary producers or put on the market by the undertakings concerned.

According to point 23 of the Temporary Framework, in particular as regards aid granted to undertakings in the agriculture, fishery and aquaculture sectors, the following cumulative requirements must also be met in addition to those listed under letters b) to e) above:

- a) The ceiling of overall aid to those sectors is lower. It must not exceed EUR 120 000 per undertaking active in the fishery and aquaculture sector⁸¹ or EUR 100 000 per undertaking active in the primary production of agricultural products.⁸² Again, it is the total *nominal* value of the aid measure that must remain within the threshold, even in case of aid through loans or guarantees. Moreover, the Commission focuses on “*the actual advantage at a given moment in time*”, which must always be within the overall limits of the Temporary Framework. Therefore, an undertaking that has already reimbursed aid of this type (e.g. a loan reimbursed before 30 June 2021) may receive again aid of this type (necessarily by 30 June 2021).⁸³
- b) Aid to undertakings active in the primary production of agricultural products must not be fixed on the basis of the price or quantity of products put on the market.
- c) Aid to undertakings active in the fishery and aquaculture must not concern any of the categories of aid referred to in Article 1, paragraph (1) (a) to (k), of Commission Regulation (EU) No 717/2014.⁸⁴

Where an undertaking is active in several sectors to which different maximum amounts apply in accordance with points 22(a) and 23(a) of the Temporary Framework, appropriate means, such as separation of accounts, must ensure that the relevant ceiling is respected for each of those activities. Moreover, the overall maximum amount of EUR 800 000 must not be exceeded per undertaking. Where an undertaking is active in primary agricultural production as well as in fishery/aquaculture, the overall maximum amount of EUR 120 000 should not be exceeded.⁸⁵

2.3.2 Aid in the form of guarantees on loans

This type of aid in section 3.2 of the Temporary Framework takes the form of State guarantees on loans for a defined period and loan amount. Although point 24 of the Temporary Framework refers explicitly to State guarantees on “loans”, the Commission has also accepted State guarantees on similar instruments, such as: recourse factoring and reverse factoring products;⁸⁶ business finance facilities such as asset finance and invoice finance;⁸⁷ and financial leasing.⁸⁸

⁸⁰ As defined in Article 2(6) and Article 2(7) of Commission Regulation 702/2014.

⁸¹ As defined in Article 2(1) of Commission Regulation 717/2014.

⁸² All products listed in Annex I to the TFEU with the exception of the products of the fisheries and aquaculture sector.

⁸³ See the footnote added in point 23(a) of the Temporary Framework by the Fourth amendment to the Temporary Framework. See also point 9 of the Fourth amendment to the Temporary Framework.

⁸⁴ Commission Regulation 717/2014.

⁸⁵ Temporary Framework, point 23bis.

⁸⁶ See recital 53 of Commission Decision of 23 July 2020, Poland: *COVID-19 – Guarantees on factoring* (SA.57452 (2020/N)). See also recitals 17 and 41 of Commission Decision of 23 November 2020, Romania: *COVID-19 – Guarantees on factoring* (SA.58462 (2020/N))

⁸⁷ See recital 39 of Commission Decision of 25 March 2020, United Kingdom: *COVID-19 – Guarantees under the Coronavirus Business Interruption Loan Scheme (CBILS)* (SA.56792 (2020/N)).

⁸⁸ See recital 47, fifth bullet-point, of Commission Decision of 23 March 2020, Latvia: *COVID-19 – Loan guarantee scheme and subsidised loan scheme* (SA.56722 (2020/N)).

According to point 25 of the Temporary Framework, State guarantees under section 3.2 must comply with the following conditions:

- a) The premiums to be paid by the beneficiaries to the State as remuneration for the guarantee must be set per individual loans at a minimum level, which must increase progressively as the duration of the guaranteed loan increases, as set out in the following table:

<i>Type of recipient</i>	<i>For 1st year</i>	<i>For 2nd-3rd year</i>	<i>For 4th -6th years</i>
<i>SMEs</i>	<i>25bps</i>	<i>50bps</i>	<i>100bps</i>
<i>Large enterprises</i>	<i>50bps</i>	<i>100bps</i>	<i>200bps</i>

However, the above table does not have to be followed in all details. Member States may alternatively notify aid considering the above table as a basis, while modulating the duration, premiums and coverage of the State guarantee for each underlying individual loan principal. For example, a Member State may notify a State guarantee covering a lower proportion of the underlying loan than the 90% maximum foreseen in letter g) of this list, which could be offset by a longer duration than that in the above table or lower premiums than those in the above table. Furthermore, a flat premium may be used for the entire duration of the State guarantee, if it is higher than the minimum premiums for the first year set out in the table above for each type of beneficiary, but with appropriate adjustments of the duration and coverage of the guarantee based on modulations of the above table.

- b) The State guarantee may not be granted to undertakings that were already in difficulty on 31 December 2019, except for micro or small enterprises that are not subject to collective insolvency proceedings and have not received rescue aid or restructuring aid. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- c) The State guarantee must be granted no later than 30 June 2021. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- d) For loans with a maturity beyond 30 June 2021, the overall amount of loans per beneficiary must not exceed:
- i. double the annual wage bill of the beneficiary (including social charges as well as the cost of personnel working on the undertaking's site but formally in the payroll of subcontractors) for 2019, or for the last year available. In the case of undertakings created on or after 1 January 2019, the maximum loan must not exceed the estimated annual wage bill for the first two years in operation; or
 - ii. 25% of the beneficiary's total turnover in 2019; or
 - iii. with appropriate justification provided by the Member State to the Commission, the amount of the loan may be increased to cover the liquidity needs from the moment of granting for the coming 18 months for SMEs⁸⁹ and for the coming 12 months for large enterprises. For example, such justification might concern the characteristics of certain type of undertakings.⁹⁰

⁸⁹ As defined in Annex I of the GBER.

⁹⁰ For example, the Commission has accepted as appropriate justification the combination of the following factors: the State guarantee would be granted only to SMEs and mid-caps, while the usual benchmarks might not accurately reflect the liquidity needs of certain beneficiaries, such as newly created companies or beneficiaries that were heavily impacted by the crisis or operate in a strategic sector of the economy (see recitals 19 and 45(c) of Commission Decision of 24 April 2020, France: *COVID-19 – Garanties des préfinancements des entreprises françaises exportatrices* (SA.56868 (2020/N-2))); in urgent cases and for undertakings whose turnover or wage bill of 2019 is not a good proxy to forecast their expenses in the next months, e.g. if the beneficiary is a new enterprise or an early stage enterprise, the undertaking has incurred particularly high costs due to the COVID-19 outbreak or it needs higher liquidity to restart its business, after the suspension of industrial and commercial production activities (see recitals 21 and 45, fifth bullet-point, of Commission Decision of 29 April 2020, Hungary: *COVID-19 – Grants, guarantee and subsidised interest measures* (SA.57064 (2020/N))); the State guarantee had to be provided urgently and it was capped to a relatively low absolute amount (EUR 1 million), while beneficiaries were

The liquidity needs should be established through self-certification by the beneficiary. The liquidity plan may include both working capital and investment costs.

- e) However, for loans with maturity until 30 June 2021, the amount of the loan principal may be higher than under letter d) of this list with appropriate justification provided by the Member State to the Commission, and provided that the proportionality of the aid remains assured and is demonstrated by the Member State to the Commission.⁹¹
- f) The duration of the State guarantee is limited to maximum six years, unless modulated as explained in letter a) of this list.
- g) The coverage of the State guarantee may not exceed:
 - i. 90% of the loan principal where losses are sustained proportionally and under same conditions by the credit institution and the State; or
 - ii. 35% of the loan principal, where losses are first attributed to the State and only then to the credit institutions (i.e. a first-loss guarantee); and
 - iii. in both cases, when the size of the loan decreases over time, for instance because the loan starts to be reimbursed, the guaranteed amount must decrease proportionally.
- h) The State guarantee must relate to investment and/or working capital loans.

Although point 25(b) of the Temporary Framework refers to “schemes”, the Commission has accepted that aid under section 3.2 does not necessarily have to take the form of a scheme. A State guarantee to an individual beneficiary may also be granted under that section.⁹²

Moreover, the Commission focuses on “*the actual advantage at a given moment in time*”, which must always be within the overall limits of the Temporary Framework. Therefore, an undertaking that has already reimbursed a State-guaranteed loan before 30 June 2021 may receive again a State guarantee (fulfilling all the conditions of section 3.2 of the Temporary Framework, therefore necessarily granted by 30 June 2021) for a new loan. Furthermore, where a State guarantee has been granted under section 3.2 and its terms have been adjusted before 30 June 2021, the aid already received and the new aid must overall remain in conformity and within the limits set out in section 3.2 for the entire duration of the measure.⁹³

Finally, point 24bis of the Temporary Framework sets out certain rules on cumulation of this type of aid. First, aid granted under section 3.2 (through State guarantees) must not be cumulated with aid granted for the same underlying loan principal under section 3.3 (through public loans). However, aid granted under those two sections may be cumulated for different loans provided the overall amount of loans per beneficiary does not exceed the ceilings set out in point 25(d) or in point 27(d) of the Temporary Framework. Moreover, a beneficiary may benefit in parallel from multiple measures under section 3.2 provided the overall amount of loans per beneficiary does not exceed the ceilings set out in point 25(d) and (e) of the Temporary Framework.⁹⁴

solely SMEs (see recitals 15 and 42, third bullet-point, of Commission Decision of 8 April 2020, Bulgaria: *COVID-19 – Intermediated SME loan guarantee program* (SA.56933 (2020/N))).

⁹¹ See above.

⁹² For example, see Commission Decision of 29 April 2020, France: *COVID-19 – Aide sous forme de garanties de prêts au profit du groupe Renault* (SA.57134 (2020/N)).

⁹³ See point 9 of the Fourth amendment to the Temporary Framework.

⁹⁴ Points 25(d) and (e) of the Temporary Framework correspond, respectively, to the requirements in letters d) and e) of the above list.

2.3.3 Aid in the form of subsidised interest rates for loans

This type of aid in section 3.3 of the Temporary Framework takes the form of public loans in more favourable interest rates than those that the beneficiaries would find in the market. Since the aid must be granted through *public* loans at beneficial interest rates, those loans must be granted by the State or State-owned entities, including of course State-owned banks. By contrast, if a loan is granted by a private lender and the State only subsidises the interest through payments to the borrower, or even directly to the lender, such aid should be assessed under section 3.1 of the Temporary Framework.⁹⁵ Aid designed in line with section 3.1 may also be earmarked for repayment of the principal amount of a loan or for payment of a guarantee premium.⁹⁶

Although section 3.3 of the Temporary Framework refers to “loans”, the Commission accepts also equivalent instruments, which do not constitute loans strictly speaking but which can be assimilated to loans from an economic point of view. For example, the Commission has accepted a moratorium on debts of an undertaking to the State subject to payment of interest for the delayed payment,⁹⁷

According to point 27 of the Temporary Framework, subsidies on the interest rate of public loans under section 3.3 must comply with the following conditions:

- a) The loans may be granted at reduced interest rates which are at least equal to the base rate (1 year IBOR or equivalent as published by the Commission)⁹⁸ available either on 1 January 2020 or at the moment of notification, plus the credit risk margins as set-out in the following table:

<i>Type of recipient</i>	<i>Credit risk margin for 1st year</i>	<i>Credit risk margin for 2nd -3rd year</i>	<i>Credit risk margin for 4th-6th year</i>
<i>SMEs</i>	<i>25bps</i>	<i>50bps</i>	<i>100bps</i>
<i>Large enterprises</i>	<i>50bps</i>	<i>100bps</i>	<i>200bps</i>

However, the above table does not have to be followed in all details. Member States may alternatively notify aid considering the above table as a basis, while modulating the loan maturity and the level of credit risk margins. For example, a Member State may notify public loans with longer maturity than in the above table, which would be offset by higher credit risk margins than in the above table. A flat credit risk margin may be used for the entire duration of the loan, if it is higher than the minimum credit risk margin for the first year for each type of beneficiary, as adjusted according to the loan maturity based on modulations of the above table. Nevertheless, the minimum all in interest rate (base rate plus the credit risk margins) should be at least 10bps per year.

- b) The public loans may not be granted to undertakings that were already in difficulty on 31 December 2019, except for micro or small enterprises that are not subject to collective

⁹⁵ See recitals 6 and 50 of Commission Decision of 10 April 2020, Poland: *COVID-19 – Interest rate subsidy scheme* (SA.56979 (2020/N)); recital 45 of Commission Decision of 12 June 2020, Poland: *COVID-19 – Interest rate subsidies for farmers* (SA.57568 (2020/N)); recital 42 of Commission Decision of 14 May 2020, Malta: *COVID-19 – Interest rate subsidy scheme administered by the Malta Development Bank* (SA.57163 (2020/N)); recital 61 of Commission Decision of 28 April 2020, Estonia: *COVID-19 – Aid schemes in the form of guarantees on loans, loans and subsidised interest rates for loans* (SA.57028 (2020/N)); recital 48 of Commission Decision of 18 June 2020, Slovakia: *COVID-19 – Restrictions Alleviation Instrument of Guarantee* (SA.57483 (2020/N), SA.57484 (2020/N), SA.57485 (2020/N)).

⁹⁶ See recitals 32 and 56 of Commission Decision of 22 June 2020, Portugal: *COVID-19 – Direct grant and loan guarantee scheme – Autonomous Region of Madeira* (SA.57494 (2020/N)).

⁹⁷ See recitals 2, 9 and 54 of Commission Decision of 11 April 2020, Belgium: *COVID-19 – Mesures de soutien en faveur des aéroports wallons – Moratoire sur les redevances de concession* (SA.56807 (2020/N)).

⁹⁸ Base rates calculated in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates [2008] OJ C 14/6, and published on the website of DG Competition at https://ec.europa.eu/competition/state_aid/legislation/reference_rates.html [Accessed 28 September, 2020].

insolvency proceedings and have not received rescue aid or restructuring aid. For further analysis of this horizontal requirement, see section 0 of the present chapter.

- c) The public loans must be granted no later than 30 June 2021. This means that the loan contracts must have been signed by that date. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- d) For loans with a maturity beyond 30 June 2021, the overall amount of loans per beneficiary must not exceed:
 - i. double the annual wage bill of the beneficiary (including social charges as well as the cost of personnel working on the undertaking's site but formally in the payroll of subcontractors) for 2019, or for the last year available. In the case of undertakings created on or after 1 January 2019, the maximum loan must not exceed the estimated annual wage bill for the first two years in operation; or
 - ii. 25% of the beneficiary's total turnover in 2019; or
 - iii. with appropriate justification provided by the Member State to the Commission, the amount of the loan may be increased to cover the liquidity needs from the moment of granting for the coming 18 months for SMEs⁹⁹ and for the coming 12 months for large enterprises. For example, such justification might concern the characteristics of certain type of undertakings.¹⁰⁰ The liquidity needs should be established through self-certification by the beneficiary. The liquidity plan may include both working capital and investment costs.
- e) However, for loans with maturity until 30 June 2021, the amount of the loan principal may be higher than under letter d) of this list with appropriate justification provided by the Member State to the Commission, and provided that the proportionality of the aid remains assured and is demonstrated by the Member State to the Commission.¹⁰¹
- f) The maturity of the public loans is limited to maximum six years, unless modulated as explained in letter a) of this list.
- g) The public loans must relate to investment and/or working capital needs.

Although point 27(b) of the Temporary Framework refers to “schemes”, aid under section 3.3 of the Temporary Framework does not necessarily have to take the form of a scheme. A public loan to an individual beneficiary may also be granted under that section.¹⁰²

Moreover, the Commission focuses on “*the actual advantage at a given moment in time*”, which must always be within the overall limits of the Temporary Framework. Therefore, an undertaking that has already reimbursed a public loan before 30 June 2021 may receive a new public loan (fulfilling all the conditions of section 3.3 of the Temporary Framework, therefore necessarily granted by 30 June

⁹⁹ As defined in Annex I of the GBER.

¹⁰⁰ For example, the Commission has accepted as appropriate justification the combination of the following factors: the State guarantee would be granted only to SMEs and mid-caps, while the usual benchmarks might not accurately reflect the liquidity needs of certain beneficiaries, such as newly created companies or beneficiaries that were heavily impacted by the crisis or operate in a strategic sector of the economy (see recitals 19 and 45(c) of *COVID-19 – Garanties des préfinancements des entreprises françaises exportatrices* Decision (SA.56868 (2020/N-2))); in urgent cases and for undertakings whose turnover or wage bill of 2019 is not a good proxy to forecast their expenses in the next months, e.g. if the beneficiary is a new enterprise or an early stage enterprise, the undertaking has incurred particularly high costs due to the COVID-19 outbreak or it needs higher liquidity to restart its business, after the suspension of industrial and commercial production activities (see recitals 21 and 45, fifth bullet-point, of *COVID-19 – Grants, guarantee and subsidised interest measures* Decision (SA.57064 (2020/N))); the State guarantee had to be provided urgently and it was capped to a relatively low absolute amount (EUR 1 million), while beneficiaries were solely SMEs (see recitals 15 and 42, third bullet-point, of *COVID-19 – Intermediated SME loan guarantee program* Decision (SA.56933 (2020/N))).

¹⁰¹ See above.

¹⁰² See also section 2.3.2 of the present chapter.

2021). Furthermore, where a public loan has been granted under section 3.3 and its terms have been adjusted before 30 June 2021, the aid already received and the new aid must overall remain in conformity and within the limits set out in section 3.3 for the entire duration of the measure.¹⁰³

In addition, with the second amendment of the Temporary Framework, the Commission introduced in section 3.3 the possibility for Member States to grant subordinated debt as a less distortive instrument than equity or hybrid capital, given that it cannot be converted automatically into equity when the company is a going concern.¹⁰⁴ Subordinated debt is debt that is subordinated to ordinary senior creditors in case of insolvency proceedings. Therefore, since the second amendment Member States may grant aid in this additional form under point 27bis in section 3.3 of the Temporary Framework. However, if subordinated debt goes beyond the ceilings set out in point 27bis, such subordinated debt measure should be assessed in line with the conditions for COVID-19 recapitalisation measures set out in section 3.11 of the Temporary Framework,¹⁰⁵ in order to ensure equal treatment.¹⁰⁶

In principle, aid in form of subordinated debt¹⁰⁷ must fulfil the requirements listed above, which concern debt instruments in general. However, given that subordinated debt increases the ability of companies to take on senior debt in a way similar to capital support, a credit risk mark-up and a further limitation as to the amount¹⁰⁸ compared to senior debt applies in addition.

On that basis, point 27bis of the Temporary Framework sets out the detailed requirements that subordinated debt instruments must meet. First, their minimum interest rate is the sum of the base rate and the credit risk margins referred to in the table in letter a) of the above list plus 200 bps for large enterprises and 150 bps for SMEs. The alternative possibility of modulating accordingly the loan maturity and the level of credit risk margins in that table¹⁰⁹ applies also to such debt instruments. Second, the requirements analysed in letters b), c), f) and g) of the above list must also be complied with. Third, the amount of subordinated debt must not exceed both of the following ceilings:

- i. Two thirds of the annual wage bill of the beneficiary for large enterprises and the annual wage bill of the beneficiary for SMEs.¹¹⁰
- 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.

If coupon payments are capitalised this must be taken into account when determining the above ceilings, provided that such capitalisation was planned or foreseeable at the time of notification of the measure to the Commission. Moreover, any other State aid measure in the form of subordinated debt granted in the context of the COVID-19 outbreak, even outside the Temporary Framework, must be included in such calculation. However, subordinated debt granted as "limited amounts of aid"¹¹¹ does not count for these ceilings.

¹⁰³ See point 9 of the Fourth amendment to the Temporary Framework.

¹⁰⁴ See point 12 of the Second amendment to the Temporary Framework. See also point 26 of the Temporary Framework.

¹⁰⁵ See section 0 of the present chapter.

¹⁰⁶ See point 12 of the Second amendment to the Temporary Framework. See also points 26 and 27bis of the Temporary Framework.

¹⁰⁷ Except if such aid complies with the conditions of section 3.1 of the Temporary Framework analysed in section 0 of the present chapter.

¹⁰⁸ One third for large enterprises and half the amount for SMEs, as defined in point 27(d) (i) or (ii) of the Temporary Framework.

¹⁰⁹ As explained immediately after that table in letter a) of the list above.

¹¹⁰ As defined in letter d), bullet-point (i), of the list above.

¹¹¹ See section 0 of the present chapter.

Finally, point 26bis of the Temporary Framework sets out certain rules on cumulation of aid under section 3.3 of the Temporary Framework (including both regular loans and subordinated debt). First, aid granted under that section must not be cumulated with aid granted for the same underlying loan principal under section 3.2 (through State guarantees). However, aid granted under those two sections may be cumulated for different loans provided the overall amount of loans per beneficiary does not exceed the ceilings set out in point 25(d) or in point 27(d) of the Temporary Framework. Moreover, a beneficiary may benefit in parallel from multiple measures under section 3.3 provided the overall amount of loans per beneficiary does not exceed the ceilings set out in point 27(d) and (e) of the Temporary Framework.¹¹²

2.4 The banking sector

As explained in the introductory paragraphs of the Temporary Framework, banks and other financial intermediaries play a key role in dealing with the effects of the COVID-19 outbreak, by maintaining the flow of credit to the economy. If the flow of credit is severely constrained, economic activity will decelerate sharply, as undertakings struggle to pay their suppliers and employees.¹¹³

Against this background, the Temporary Framework allows aid based on Article 107(3)(b) TFEU that incentivises credit institutions and other financial intermediaries to continue to play their role in financing the real economy. Nevertheless, such aid should benefit directly undertakings active in the real economy, whereas banks act merely as financial intermediaries channelling that aid to the direct beneficiaries in the real economy. Even if banks might also derive an indirect advantage from that role, the main objective of such aid is to support the respective undertakings in the real economy. Therefore, such aid does not have the objective to preserve or restore the viability, liquidity or solvency of banks, which means that it does not qualify as “extraordinary public financial support” within the meaning of Article 2(1)(28) of the Bank Recovery and Resolution Directive¹¹⁴ (hereinafter “BRRD”) and Article 3(1)(29) of the Single Resolution Mechanism Regulation¹¹⁵ (hereinafter “SRMR”). Therefore, aid under the Temporary Framework does not render the channelling bank “failing or likely to fail” under Article 32(4)(d) of the BRRD and Article 18(4)(d) of the SRMR.¹¹⁶ Otherwise, such qualification would risk triggering the resolution of that bank, if the other conditions of Article 32(1) of the BRRD and Article 18(1) of the SRMR were met, which would evidently have significant consequences for the bank.

The reasoning that aid which does not have the objective to preserve or restore the viability, liquidity or solvency of banks does not qualify as “extraordinary public financial support” has already been developed in State aid decisions prior to the COVID-19 outbreak. For example, in 2018 the Commission approved aid whereby the Cypriot State paid part of the monthly instalments of non-performing loans of vulnerable borrowers who had also collateralised them with their primary residence. The Commission explained that such aid did not have the objective to preserve or restore the viability, liquidity or solvency of the banks holding those loans, because it rather pursued a predominantly social objective of supporting the vulnerable borrowers. With respect to borrowers that were natural persons, the aid objectively pursued the social goal of Article 107(2)(a) TFEU. With respect to borrowers that were micro or small enterprises, the aid objectively pursued the goal of addressing the social hardships

¹¹² Points 27(d) and (e) of the Temporary Framework correspond, respectively, to the requirements in letters d) and e) of the list in section 2.3.3 of the present chapter.

¹¹³ Temporary Framework, point 5.

¹¹⁴ Directive 2014/59 of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L 173/190.

¹¹⁵ Regulation (EU) 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund [2014] OJ L 225/1.

¹¹⁶ Temporary Framework, points 5 and 6.

particular to the vulnerabilities faced by owners of such businesses under Article 107(3)(c) TFEU.¹¹⁷ The same reasoning was applied to a similar Greek aid scheme that the Commission approved a few months later.¹¹⁸

In the same vein, the Temporary Framework also clarifies that aid granted by Member States to banks under Article 107(2)(b) TFEU to compensate for direct damage suffered by such banks as a result of the COVID-19 outbreak would also not qualify as “extraordinary public financial support”.¹¹⁹ Of course, such aid would have to comply with the specific conditions of Article 107(2)(b) TFEU.¹²⁰

Moreover, aid to the real economy under the Temporary Framework (even if channelled through banks), as well as aid granted directly to banks but under Article 107(2)(b) TFEU, do not fall within the scope of the Commission’s Communications regarding State aid to the banking sector (hereinafter “Banking Communications”).¹²¹ The Banking Communications concern aid that reinforces the viability, liquidity or solvency of banks,¹²² whereas those two types of aid do not have such objective, as explained above.

If due to the COVID-19 outbreak banks need and receive aid to preserve or restore their viability, liquidity or solvency, such aid would qualify as “extraordinary public financial support”, which normally renders those banks “failing or likely to fail”. However, even such aid does not render those banks “failing or likely to fail”, if it fulfils the conditions of precautionary aid provided for in Article 32(4)(d) (i), (ii) or (iii) of the BRRD and in Article 18(4)(d) (i), (ii) or (iii) of the SRMR.

Such precautionary aid to banks, which must still be approved by the Commission under the State aid framework, aims at remedying a serious disturbance in the economy of a Member State and at preserving financial stability. Precautionary aid may take one of the following three forms: (i) a State guarantee to back liquidity facilities provided by central banks according to the central banks’ conditions; (ii) a State guarantee of newly issued liabilities; or (iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an undue advantage upon the bank. In all three cases, the aid must be of a precautionary and temporary nature and proportionate to remedy the consequences of the serious disturbance. It must be granted only to solvent banks and it must not be used to offset losses that the bank has incurred or is likely to incur in the near future.

Since precautionary aid may cover only losses of the bank which, at the moment that the aid is granted, are considered unlikely to occur, such aid cannot cover all of the losses that a bank has incurred

¹¹⁷ See recitals 70-76 of Commission Decision of 3 December 2018, Cyprus: *Cypriot scheme for non-performing loans collateralised with primary residences (Estia)* (SA.49554 (2018/N)).

¹¹⁸ See recitals 68-74 of Commission Decision of 19 September 2019, Greece: *Primary Residence Protection Scheme* (SA.53520 (2018/N)).

¹¹⁹ Temporary Framework, point 6.

¹²⁰ See section 0 of the present chapter.

¹²¹ Temporary Framework, point 6. These Communications are the following: Communication from the Commission on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (Recapitalisation Communication) [2009] OJ C 10/2; Communication from the Commission on the treatment of impaired assets in the Community financial sector (Communication on Impaired Assets) [2009] OJ C 72/1; Communication from the Commission on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules [2009] OJ C 195/9; Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis (2010 Prolongation Communication) [2010] OJ C 329/7; Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis (2011 Prolongation Communication) [2011] OJ C 356/7; Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (2013 Banking Communication) [2013] OJ C 216/1.

¹²² At least this is the case at the moment of drafting of the present chapter concerning the Communications mentioned in the immediately preceding footnote.

because of the COVID-19 outbreak. Even if the outbreak was unforeseeable in the period before it occurred, it is of course no longer an “unlikely event” in the period after it has occurred. Therefore, during the COVID-19 outbreak, banks cannot receive precautionary aid to cover losses due to that outbreak which they have *already incurred* at the moment of granting of aid or which they are *likely* to incur based on the expectations at that moment of granting. Nevertheless, banks may still receive precautionary aid to cover losses that are *unlikely* to occur based on the expectations at the moment of granting of aid, i.e. increased losses that correspond to a particularly adverse evolution of the negative economic consequences of the COVID-19 outbreak.

With respect to precautionary aid in the form of recapitalisation, which is also known as “precautionary recapitalisation”, such aid must be limited to the injections necessary to address capital shortfall established in national, EU or SSM-wide stress tests, asset quality reviews or equivalent exercises conducted by the European Central Bank, the European Banking Authority or national authorities. On 28 July 2020, the European Central Bank published a vulnerability analysis of banks directly supervised within the Single Supervisory Mechanism (SSM). The exercise assessed how the economic shock caused by the COVID-19 outbreak would impact 86 euro area banks and aimed to identify potential vulnerabilities within the banking sector over a three-year horizon. The analysis focused on two scenarios: a “central scenario”, as the most likely to materialise according to ECB staff, and a “severe scenario”, which represents a more adverse but still plausible development of the crisis.¹²³

Moreover, aid to banks which addresses problems linked to the COVID-19 outbreak is deemed to fall under point 45 of the 2013 Banking Communication,¹²⁴ which sets out an exception to the requirement of burden-sharing by shareholders and subordinated creditors. Therefore, shareholders and subordinated creditors would not have to contribute fully to offset any losses of the bank before State aid is granted, as normally required in points 43 and 44 of the Banking Communication. The exception foreseen in point 45 concerns situations where the requirement of burden-sharing would “*endanger financial stability or lead to disproportionate results*”. The COVID-19 outbreak has caused unforeseeable and important negative economic consequences to many undertakings that would otherwise not have entered into economic difficulties. Therefore, requiring burden-sharing of shareholders and subordinated creditors of banks that entered into difficulty at no fault of their own would arguably be disproportionate and it could endanger financial stability, at least at this initial stage of the COVID-19 outbreak.

Of course, the fact that burden-sharing under the 2013 Banking Communication is currently not required does not mean that it is also prohibited. Member States are in principle entitled to require full or partial burden-sharing of shareholders and subordinated creditors, even if not required to do so by the Commission. Member States might have very good reasons of their own to impose burden-sharing measures on an aided bank. For example, burden-sharing reduces the amount of taxpayers’ money used to restructure a bank, since the amount of State aid needed to restore a bank’s viability is reduced by the amount of money generated in favour of the bank by burden-sharing measures, such as a write-down of subordinated debt or its conversion into equity. Except for extreme cases where such initiative of the Member State would manifestly endanger financial stability or it would lead to manifestly disproportionate results, the Commission would have no reason to oppose such proposal, since “*under EU State aid rules, no undertaking can claim a right to receive State aid; or, to put it differently, no Member State can be considered obliged, as a matter of EU law, to grant State aid to a company*”.¹²⁵

¹²³ See the press release of the European Central Bank, available at: <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200728~7df9502348.en.html> [Accessed 30 September, 2020].

¹²⁴ 2013 Communication on State aid rules in favour of banks.

¹²⁵ Opinion of A.G. Wahl in *Kotnik and Others v Državni zbor Republike Slovenije* (C-526/14) EU:C:2016:102, para.79. See also to that effect: *Milchindustrie-Verband and Deutscher Raiffeisenverband v Commission* (T-670/14) EU:T:2015:906, para.29; Order in *Abaco Energy v Commission* (T-186/18) EU:T:2019:206, paras 58 and 82.

Since the Temporary Framework aims at providing support to the real economy, aid to banks does not fall within its scope of application, except for (i) indirect advantages that banks receive when channelling aid in the form of loans or guarantees under sections 3.1, 3.2, 3.3 and 3.12 of the Temporary Framework,¹²⁶ and (ii) aid under section 3.10 of the Temporary Framework in the form of wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak.¹²⁷

With respect to the second exception, aid in the form of wage subsidies for employees to avoid lay-offs may also cover employees from the financial sector, as long as it does not target exclusively that category of employees.¹²⁸ Such wage subsidies to employees of banks as well as to employees of undertakings in the real economy have a predominantly social objective, and therefore they do not have the objective to preserve or restore the viability, liquidity or solvency of the respective banks. Therefore, aid schemes under section 3.10 of the Temporary Framework do not constitute “extraordinary public financial support” and do not fall within the scope of the Banking Communications.¹²⁹

With respect to the first exception, any indirect advantage that banks receive by channelling aid in the form of loans or guarantees to the real economy must be limited, so that the main advantage of that aid is transferred to the beneficiary undertakings in the real economy. Since banks are not the main beneficiaries of such aid, but only financial intermediaries channelling that aid to the real economy, that type of aid does not have the objective to preserve or restore the viability, liquidity or solvency of those banks. Therefore, aid in the form of loans or guarantees under sections 3.1, 3.2, 3.3 and 3.12 of the Temporary Framework does not constitute “extraordinary public financial support” and does not fall within the scope of the Banking Communications.¹³⁰ However, this conclusion presupposes that such aid complies with the safeguards of section 3.4 of the Temporary Framework, which ensure that the channelling banks pass on, to the largest extent possible, the advantage of the State guarantees or the subsidised interest rates on loans to the final beneficiaries in the real economy.¹³¹ In particular, the financial intermediary must be able to demonstrate that it operates a mechanism that ensures that the advantages are passed on to the largest extent possible to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or lower interest rates than without such public guarantees or loans.¹³²

In its decisional practice, the Commission has considered several combinations of safeguards as suitable mechanisms to ensure that the advantage of the aid is passed on, to the largest extent possible, to the real economy. For example, the State may pay directly to the bank part of the interest owed by the aided borrower, while the list of participating banks is public (allowing potential borrowers to receive competing offers) and the subsidised interest rate cannot be higher than the average interest rate on other working capital loans granted by the lending bank.¹³³

The safeguards to ensure maximum pass on should be particularly strong in cases where the aid takes the form of a State guarantee on *existing* loans. As explained in the Guarantee Notice, a State guarantee on a newly contracted loan usually benefits the borrower, who obtains a better interest rate on the loan

¹²⁶ See sections 0, 0, 0 and 0 of the present chapter.

¹²⁷ See section 0 of the present chapter.

¹²⁸ Temporary Framework, point 20bis.

¹²⁹ See Temporary Framework, point 43bis, which cites two (pre-COVID-19) cases where the Commission approved with a similar reasoning a Cypriot and a Greek aid scheme involving banks based on Article 107(3)(a) TFEU and Article 107(3)(c) TFEU. Although aid under section 3.10 of the Temporary Framework is based on Article 107(3)(b) TFEU, it still pursues a predominantly social objective (avoiding lay-offs) in the context of remedying the serious disturbance in the economy caused by the COVID-19 outbreak. See also above in this section, where the Cypriot and Greek precedents are analysed.

¹³⁰ Temporary Framework, points 28-29.

¹³¹ Temporary Framework, points 20bis, 30 and 31.

¹³² Temporary Framework, point 31, last sentence.

¹³³ For example, see recital 50 of *COVID-19 – Interest rate subsidy scheme* Decision (SA.56979 (2020/N)).

than without the State guarantee. However, a State guarantee on a pre-existing loan whose terms remain unadjusted mainly benefits the lender, who obtains increased security for that loan.¹³⁴ Therefore, in cases of State guarantees covering also existing loans, the Member State needs to ensure that the terms of those loans will be adjusted in favour of the borrowers and to put in place particularly strong safeguards ensuring maximum pass on of the aid from the banks to the borrowers. In practice, the Commission has generally accepted as such safeguards: the restructuring of the existing loans (longer maturities, lower interest rates, lower collateral, increased funding); the borrower's consent on such restructuring; the communication of the advantage to the borrower; the exclusion of non-performing loans from the scope of the aid scheme; capping of interest and administrative costs to those normally charged (to non-aided borrowers) by the bank; limitation of existing loans to their unused credit line with interest cap.¹³⁵

Finally, at the moment of drafting of the present chapter, the Commission has not adopted any framework of rules concerning specifically aid to banks in the context of the COVID-19 outbreak. Nevertheless, the COVID-19 outbreak could lead the Commission to adjust certain requirements of the Banking Communications currently in force, where it would be justified by exceptional circumstances resulting from the outbreak. According to the case-law, the Commission must keep under continuous review the rules set out in its guidelines on Article 107(3) TFEU, in order to anticipate any major developments not covered by those guidelines. Moreover, if an aid measure exceptionally falls under circumstances different from those of a given set of guidelines, the Commission should adapt accordingly its assessment of that measure.¹³⁶

For example, in its recent approval of an orderly liquidation aid scheme for small banks in Italy, the Commission increased the maximum threshold of total assets of banks that may fall under such schemes from EUR 3 billion (provided in point 86 of the 2013 Banking Communication) to EUR 5 billion. The higher threshold is justified by the exceptional circumstances of the economic impact of the COVID-19 outbreak, which was not foreseen at the time of adoption of the 2013 Banking Communication, and it applies until 31 December 2021. Moreover, in order to apply the increased threshold to future cases, the Commission intends to verify the safeguards in the applicable national procedure in terms of ensuring a swift market exit of failing banks, as well as the market structure of the banking sector in the Member State concerned.¹³⁷

¹³⁴ See point 2.3.1 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees [2008] OJ C 155/10.

¹³⁵ See recitals 18, 27 and 43, seventh bullet-point, of Commission Decision of 9 April 2020, Belgium: *COVID-19 – Loan guarantee – Flemish Region* (SA.56919 (2020/N)); recitals 20 and 48 of Commission Decision of 21 April 2020, Italy: *COVID-19 – Loan guarantees and grants under the ISMEA Guarantee Fund* (SA.57068 (2020/N)); recitals 23-25, 47 and 48 of Commission Decision of 22 April 2020, Poland: *COVID-19 – anti-crisis measures in the form of loans and guarantees financed from the re-use of resources returned from 2007-2013 financial instruments* (SA.57065 (2020/N)); recitals 19 and 46 of Commission Decision of 13 April 2020, Italy: *COVID-19 – Loan guarantee schemes under the Fondo di garanzia per le PMI* (SA.56966 (2020/N)); recitals 25 and 41, seventh bullet-point, of Commission Decision of 28 April 2020, Hungary: *COVID-19 – Loan guarantee scheme under the Temporary Framework* (SA.57121 (2020/N)); recitals 20, 27, 29 and 46, seventh bullet-point, of Commission Decision of 5 May 2020, Czechia: *COVID-19 – Loan guarantee scheme* (SA.57094 (2020/N)); recital 45 of *COVID-19 – Interest rate subsidies for farmers* Decision (SA.57568 (2020/N)); Commission Decision of 16 June 2020, Lithuania: *COVID-19 – Individual guarantees and interest and guarantee premium compensation* (SA.57529 (2020/N)).

¹³⁶ *Greece v Commission* (C-431/14 P) EU:C:2016:145, paras 71-72. For further analysis of that case-law, see also Antonios Bouchagiar, “The Binding Effects of Guidelines on the Compatibility of State Aid: How Hard is the Commission’s Soft Law?” (2017) 8(3) *Journal of European Competition Law & Practice*, p. 157.

¹³⁷ See recital 77 of Commission Decision of 20 November 2020, Italy: *COVID-19 – Orderly liquidation scheme for small banks* (SA.57516 (2020/N)).

2.5 Short-term export credit insurance

The Communication from the Commission on short-term export-credit insurance¹³⁸ (hereinafter “STEC”) provides that marketable risks should not be covered by export-credit insurance with the support of Member States. However, as a consequence of the current COVID-19 outbreak and after having conducted the public consultation on the availability of short-term export-credit insurance for exports to all currently marketable risk countries, the Commission found that there is a lack of sufficient private insurance capacity for short-term export credits in general and that the cover for marketable risks is temporarily unavailable.

On that basis, the Commission specifies in section 3.5 of the Temporary Framework that it considers all commercial and political risks associated with exports to the countries listed in the Annex¹³⁹ to the STEC as temporarily non-marketable until 30 June 2021.¹⁴⁰

2.6 Aid to facilitate the development of economic activities that protect public health in the context of the COVID-19 outbreak

Article 107(3)(c) TFEU entitles the Commission to authorise “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”.

Beyond the *existing* possibilities¹⁴¹ of compatible aid based on Article 107(3)(c) TFEU, the Temporary Framework provides for aid to the real economy on the basis of Article 107(3)(b) TFEU. However, the Temporary Framework provides also for *additional* possibilities of compatible aid based on 107(3)(c) TFEU in sections 3.6, 3.7 and 3.8 thereof. Those three sections concern, respectively, aid to accelerate COVID-19 relevant research and development, aid to support testing and upscaling infrastructures that contribute to develop COVID-19 relevant products and aid to support the production of products needed to respond to the outbreak.

Such aids pursue an objective of common interest that consists in tackling the health emergency crisis provoked by the COVID-19 outbreak. As required in the compatibility assessment under Article 107(3)(c) TFEU,¹⁴² the Commission has balanced the positive effects of such aids in terms of protecting public health against their potential negative effects on competition. It has concluded that the former

¹³⁸ Communication from the Commission to the Member States on the application of Articles 107 and 108 TFEU to short-term export-credit insurance [2012] OJ C 392/1. The STEC was due to expire in 2018, but it was prolonged until 31 December 2020 by the Commission Communication concerning the prolongation of the STEC [2018] OJ C 457/9. Subsequently, the STEC was prolonged until 31 December 2021 by the Commission Communication concerning the prolongation and the amendments of the Guidelines on Regional State Aid for 2014-2020, Guidelines on State Aid to Promote Risk Finance Investments, Guidelines on State Aid for Environmental Protection and Energy 2014-2020, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication on the Criteria for the Analysis of the Compatibility with the Internal Market of State Aid to Promote the Execution of Important Projects of Common European Interest, Communication from the Commission – Framework for State aid for research and development and innovation and Communication from the Commission to the Member States on the application of Articles 107 and 108 TFEU to short-term export-credit insurance [2020] OJ C 224/ 2.

¹³⁹ Communication from the Commission amending the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2020] OJ C 1011/1. See also the Fourth amendment to the Temporary Framework, which further amended that Annex.

¹⁴⁰ Temporary Framework, point 33.

¹⁴¹ i.e. “existing” at the time of adoption of the Temporary Framework, in particular in existing guidelines based on Article 107(3)(c) TFEU. See also section 2.3.1 of the present chapter.

¹⁴² *Smurfit Kappa Group v Commission* (T-304/08) EU:T:2012:351, paras 82 and 91. See also the very recent judgment of the Court of Justice in *Austria v Commission (Hinkley Point C)* EU:C:2020:742, in particular paras 20, 24, 26, 80, 86 and 98-102.

outweigh the latter, provided that the specific requirements of sections 3.6 to 3.8 of the Temporary Framework are complied with.¹⁴³ Those specific requirements are analysed in sections 0, 0 and 0 of the present chapter.

2.6.1 Aid for COVID-19 relevant research and development

Section 3.6 of the Temporary Framework provides for aid to facilitate COVID-19 relevant research and development (R&D) in order to address the COVID-19 emergency health crisis. Such R&D concerns projects carrying out COVID-19 and other antiviral relevant research, including research into vaccines, medicinal products and treatments, medical devices and hospital and medical equipment, disinfectants, and protective clothing and equipment, and into relevant process innovations for an efficient production of the required products. It also includes projects having received a COVID-19-specific Seal of Excellence quality label under the Horizon 2020 SME-instrument.¹⁴⁴

According to point 35 of the Temporary Framework, such R&D aid needs to fulfil the following conditions:

- a) The aid must be granted in the form of direct grants, repayable advances or tax advantages.
- b) The aid must be granted by 30 June 2021. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- c) The aid must not be granted to undertakings that were already in difficulty on 31 December 2019, except for micro or small enterprises that are not subject to collective insolvency proceedings and have not received rescue aid or restructuring aid. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- d) The aid must have an incentive effect, in the sense that it causes the beneficiary to develop activities or projects in which that beneficiary would not have engaged under market conditions alone, i.e. absent the aid.¹⁴⁵ For R&D projects started as of 1 February 2020 or for projects having received a COVID-19-specific Seal of Excellence, the aid is deemed to have an incentive effect. For projects started before 1 February 2020, the aid has an incentive effect, if the aid is necessary to accelerate or widen the scope of the project. In such cases, only the additional costs in relation to the acceleration efforts or the widened scope are eligible for aid.
- e) Eligible costs may refer to 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, for R&D services, for pre-clinical and clinical trials (trial phases I-IV), for obtaining, validating and defending patents and other intangible assets, for obtaining the conformity assessments and/or authorisations necessary for the marketing of new and improved vaccines and medicinal products, medical devices, hospital and medical equipment, disinfectants, and personal protective equipment. Phase-IV trials are eligible as long as they allow further scientific or technological advance.
- f) The aid intensity for each beneficiary may cover 100% of eligible costs for fundamental research and must not exceed 80% of eligible costs for industrial research and experimental development.¹⁴⁶ If the aided projects consist of different work packages which fall under fundamental research and industrial research/experimental development, the maximum aid intensity for industrial research and experimental development applies, if the majority of costs

¹⁴³ Temporary Framework, point 16bis.

¹⁴⁴ Temporary Framework, point 35.

¹⁴⁵ For a description of the idea behind the requirement of incentive effect in the compatibility assessment of State aid, see *Eesti Pagar v Ettevõtlike Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium* (C-349/17) EU:C:2019:172, para.63.

¹⁴⁶ As defined in paragraphs (84), (85) and (86) of Article 2 of the GBER.

incurred do not arise from work packages that fall under the category of fundamental research. However, if the majority of costs incurred arise from work packages that fall under the category of fundamental research, the respective aid intensities apply separately for eligible costs falling under fundamental research (i.e. 100%) and for eligible costs falling under industrial research/experimental development (i.e. 80%).¹⁴⁷ Furthermore, the aid intensity for industrial research and experimental development may be increased by 15 percentage points, if more than one Member State supports the research project, or it is carried out in cross-border collaboration with research organisations or other undertakings. Aid may be combined with support from other sources for the same eligible costs, provided the combined aid does not exceed these ceilings.

- g) The aid beneficiary must commit to grant non-exclusive licences under non-discriminatory market conditions to third parties in the EEA.

2.6.2 Investment aid for testing and upscaling infrastructures

Section 3.7 of the Temporary Framework provides for investment aid to support the construction or upgrade of testing and upscaling infrastructures that contribute to develop, test and upscale, up to first industrial deployment prior to mass production, COVID-19 relevant products. The production of COVID-19 relevant products is outlined in section 3.8 of the Temporary Framework, which concerns aid to that production.¹⁴⁸

According to point 37 of the Temporary Framework, investment aid for testing and upscaling infrastructures must fulfil the following conditions:

- a) The aid must be granted in the form of direct grants, repayable advances or tax advantages.
- b) The aid must be granted by 30 June 2021. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- c) The aid must not be granted to undertakings that were already in difficulty on 31 December 2019, except for micro or small enterprises that are not subject to collective insolvency proceedings and have not received rescue aid or restructuring aid. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- d) The aid is granted for the construction or upgrade of testing and upscaling infrastructures required to develop, test and upscale, up to first industrial deployment prior to mass production, COVID-19 relevant products as outlined in section 3.8 of the Temporary Framework.¹⁴⁹ Eligible costs are the investment costs necessary for setting up the testing and upscaling infrastructures required to develop these products.
- e) The aid intensity must not exceed 75% of the eligible costs. The maximum allowable aid intensity of the direct grant or tax advantage may be increased by an additional 15 percentage points, either if the investment is concluded within two months after the date of aid granting or date of application of the tax advantage, or if the support comes from more than one Member State. If the aid is granted in form of a repayable advance, and the investment is completed

¹⁴⁷ See recitals 18 and 60 of Commission Decision of 3 June 2020, Ireland: *COVID-19 – Scheme to facilitate COVID-19 relevant research and development, to support construction and upgrade of testing and upscaling facilities for COVID-19 relevant products and to support investments into the production of COVID-19 relevant products* (SA.57453 (2020/N)).

¹⁴⁸ Temporary Framework, point 37.

¹⁴⁹ As outlined in section 3.8 of the Temporary Framework, these products include relevant medicinal products (including vaccines) and treatments, their intermediates, active pharmaceutical ingredients and raw materials; medical devices, hospital and medical equipment (including ventilators, protective clothing and equipment as well as diagnostic tools) and necessary raw materials; disinfectants and their intermediary products and raw chemical materials necessary for their production; data collection/processing tools.

within two months, or if the support comes from more than one Member State, an additional 15 percentage points may be granted.

- f) The aid under this measure cannot be combined with other investment aid for the same eligible costs.
- g) The aid must have an incentive effect, in the sense that it causes the beneficiary to develop activities or projects in which that beneficiary would not have engaged under market conditions alone, i.e. absent the aid.¹⁵⁰ For projects started as of 1 February 2020, the aid is deemed to have an incentive effect. For projects started before 1 February 2020, the aid has an incentive effect, if the aid is necessary to accelerate or widen the scope of the project. In such cases, only the additional costs in relation to the acceleration efforts or the widened scope are eligible for aid.
- h) The investment project must be completed within six months after the date of granting the aid. An investment project is considered completed when it is accepted by the national authorities as completed. Where the six-month deadline is not met, per month of delay, 25% of the amount of aid awarded in form of direct grants or tax advantages must be reimbursed, unless the delay is due to factors outside the control of the aid beneficiary. Where the deadline is respected, aid in the form of repayable advances is transformed into grants; if not, the repayable advance is reimbursed in equal annual instalments within five years after the date of granting the aid.
- i) A loss cover guarantee may be granted in addition to a direct grant, tax advantage or repayable advance, or as an independent aid measure. The loss cover guarantee is issued within one month after the undertaking applied for it. The amount of loss to be compensated is established five years after completion of the investment. The compensation amount is calculated as the difference between the sum of investment costs, reasonable profit of 10% per year on the investment cost over five years and operating cost on the one hand, and the sum of the direct grant received, revenues over the five year period, and the terminal value of the project on the other hand.
- j) The price charged for the services provided by the testing and upscaling infrastructure must correspond to the market price.
- k) The testing and upscaling infrastructures must be open to several users and access must be granted on a transparent and non-discriminatory basis. However, undertakings that have financed at least 10% of the investment costs may be granted preferential access under more favourable conditions.

2.6.3 Investment aid for the production of COVID-19 relevant products

Section 3.8 of the Temporary Framework provides for investment aid to facilitate the production of COVID-19 relevant products, which include the products mentioned under letter d) of the list below.¹⁵¹ According to point 39 of the Temporary Framework, such investment aid must fulfil the following conditions:

- a) The aid must be granted in the form of direct grants, repayable advances or tax advantages.
- b) The aid must be granted by 30 June 2021. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- c) The aid must not be granted to undertakings that were already in difficulty on 31 December 2019, except for micro or small enterprises that are not subject to collective insolvency proceedings and have not received rescue aid or restructuring aid. For further analysis of this horizontal requirement, see section 0 of the present chapter.

¹⁵⁰ For a description of the idea behind the requirement of incentive effect in the compatibility assessment of State aid, see *Eesti Pagar* EU:C:2019:172, para.63.

¹⁵¹ Temporary Framework, point 38.

- d) The investment aid is granted for the production of COVID-19 relevant products, such as medicinal products (including vaccines) and treatments, their intermediates, active pharmaceutical ingredients and raw materials; medical devices, hospital and medical equipment (including ventilators, protective clothing and equipment as well as diagnostic tools) and necessary raw materials; disinfectants and their intermediary products and raw chemical materials necessary for their production; data collection/processing tools. Eligible costs relate to all investment costs necessary for the production of these products and to the costs of trial runs of the new production facilities.
- e) The aid intensity must not exceed 80% of the eligible costs. The maximum allowable aid intensity of the direct grant or tax advantage may be increased by an additional 15 percentage points, either if the investment is concluded within two months after the date of the aid granting or the date of application of the tax advantage, or if the support comes from more than one Member State. If the aid is granted in the form of a repayable advance and the investment is completed within two months, or if the support comes from more than one Member State, an additional 15 percentage points may be granted.
- f) Aid under this measure cannot be combined with other investment aid for the same eligible costs.
- g) The aid must have an incentive effect, in the sense that it causes the beneficiary to develop activities or projects in which that beneficiary would not have engaged under market conditions alone, i.e. absent the aid.¹⁵² For projects started as of 1 February 2020, the aid is deemed to have an incentive effect. For projects started before 1 February 2020, the aid has an incentive effect, if the aid is necessary to accelerate or widen the scope of the project. In such cases, only the additional costs in relation to the acceleration efforts or the widened scope are eligible for aid.
- h) The investment project must be completed within six months after the date of granting the aid. An investment project is considered completed when it is accepted by the national authorities as completed. Where the six-month deadline is not met, per month of delay, 25% of the amount of aid awarded in form of direct grants or tax advantages is to be reimbursed, unless the delay is due to factors outside the control of the aid beneficiary. Where the deadline is respected, aid in the form of repayable advances is transformed into grants; if not, the repayable advance is reimbursed in equal annual instalments within five years after the date of granting the aid.
- i) A loss cover guarantee may be granted in addition to a direct grant, tax advantage or repayable advance or as an independent aid measure. The loss cover guarantee is issued within one month after the undertaking applied for it. The amount of loss to be compensated is established five years after completion of the investment. The compensation amount is calculated as the difference between the sum of investment costs, reasonable profit of 10% per year on the investment cost over five years, and operating cost on the one hand, and the sum of the direct grant received, revenues over the five year period, and the terminal value of the project on the other hand.

2.7 Deferrals of taxes and social security contributions

Deferrals of payment of taxes or of social security contributions can reduce the liquidity constraints of undertakings, including self-employed individuals, and preserve employment. If such deferrals are of a general application and do not favour certain undertakings, or the production of certain goods, they are not selective measures. Such general measures do not constitute State aid, and therefore they do not fall within the scope of Article 107 TFEU. However, if deferrals of payment of taxes or of social security

¹⁵² For a description of the idea behind the requirement of incentive effect in the compatibility assessment of State aid, see *Eesti Pagar* EU:C:2019:172, para.63.

contributions are restricted for example to certain sectors, regions or types of undertakings, they involve aid within the meaning of Article 107(1) TFEU.¹⁵³

Moreover, in the recent *Saint-Malo* case, the Court ruled that a reduction of social security contributions of employees does not automatically confer an advantage to the undertaking employing them, even if the latter is obliged to pay those contributions to the State by deducting them from the employee's salary. The Court considered that the actual beneficiary of such a measure is the employee, unless the Commission proves an indirect advantage to the employer, which however cannot be automatically presumed from the fact that it employs the benefitting employees.¹⁵⁴ That case-law would seem equally applicable to exemptions or reductions of income tax of employees, even if the employing undertaking is obliged to pay such tax to the State by deducting it from the employee's salary. Therefore, such relief from fiscal or social security charges of *employees* would not amount to State aid for the undertaking employing them, unless the Commission demonstrates an indirect advantage to that undertaking. Nevertheless, relief from fiscal or social security charges of *employers* provides an advantage to the respective undertaking, and therefore it would normally amount to State aid, if granted selectively.

On the basis of Article 107(3)(b) TFEU, the Commission considers compatible aid schemes that consist in temporary deferrals of taxes or of social security contributions which apply to undertakings particularly affected by the COVID-19 outbreak, for example: undertakings in specific sectors, in specific regions or of a certain size. Such undertakings may of course include self-employed individuals.¹⁵⁵

Since aid under section 3.9 of the Temporary Framework must be granted on the basis of a scheme, the deferral cannot be granted to only one individual undertaking, but it must be granted to a group of undertakings (particularly affected by the outbreak) defined in a general and abstract manner in the granting act.¹⁵⁶

The aid under section 3.9 of the Temporary Framework must be granted before 30 June 2021. For further analysis of this horizontal requirement, see section 0 of the present chapter. The end date for the deferral of taxes or social security contributions must not be later than 31 December 2022.¹⁵⁷

As explained in section 0 of the present chapter, section 3.9 of the Temporary Framework exceptionally does not require that the beneficiary must not have been an undertaking in difficulty on 31 December 2019. Nevertheless, something not required is not also prohibited. Therefore, a Member State is still free to exclude from aid under section 3.9 undertakings that were in difficulty on 31 December 2019. For example, this could make sense if it helps the horizontal implementation of such aid together with other aid to the same beneficiaries entailing that requirement, such as aid under section 3.1 of the Temporary Framework.¹⁵⁸

Section 3.9 applies also to measures provided for in relation to fiscal and social security obligations intended to ease the liquidity constraints faced by the beneficiaries, included but not limited to the deferral of payments due in instalments, easier access to tax debt payment plans and of the granting of

¹⁵³ Temporary Framework, point 40. See also point 118 of the Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU [2016] OJ C 262/1.

¹⁵⁴ *Ministre de l'Agriculture et de l'Alimentation v Compagnie des pêches de Saint-Malo* (C-212/19) EU:C:2020:726, paras 42-49.

¹⁵⁵ Temporary Framework, point 41.

¹⁵⁶ See the definition of an aid scheme in Article 1(d) of Council Regulation 2015/1589.

¹⁵⁷ Temporary Framework, point 41.

¹⁵⁸ See recitals 29 and 53 of Commission Decision of 8 September 2020, *Czechia: COVID-19 – Public health insurance reliefs for self-employed* (SA.57358 (2020/N)).

interest free periods, suspension of tax debt recovery, and expedited tax refunds.¹⁵⁹ In its decisional practice, the Commission has also accepted tax measures that were not mere tax deferrals but rather credit facilities, whereby the State would reimburse a recently due and paid tax while at the same time deferring its payment for a later date. The Commission considered such measures as retroactive tax deferrals.¹⁶⁰ The advantage of dealing with such measures in section 3.9, as compared to section 3.3 of the Temporary Framework,¹⁶¹ is that the credit facility may be provided at zero interest and that the Member State does not have to control that the beneficiaries were not in difficulty on 31 December 2019. However, the credit facility must still be based on a recently paid tax (which would otherwise have been deferred), it must be granted through a scheme (not to only one individual undertaking) and the deferral cannot go further than 31 December 2022 (whereas section 3.3 allows also longer maturities, with appropriate interest).

2.8 Wage subsidies for employees to avoid lay-offs

In order to preserve employment, section 3.10 of the Temporary Framework provides for aid in the form of contribution by Member States to the wage costs of undertakings which, due to the COVID-19 outbreak, would have otherwise laid off personnel. If such support schemes apply to the whole economy, they fall outside the scope of EU State aid control, since they are not selective. However, if those schemes are restricted to certain sectors, regions or types of undertakings, they confer a selective advantage to those undertakings, and therefore they constitute State aid.¹⁶²

With the third amendment of the Temporary Framework,¹⁶³ the Commission clarified that self-employed individuals also fall within the scope of section 3.10 of the Temporary Framework. Member States may contribute to the wage equivalent income of such individuals for whom the adoption of national measures in response to the COVID-19 outbreak resulted in the suspension or reduction of their business activity.

In order to be compatible based on Article 107(3)(b) TFEU, aid under section 3.10 of the Temporary Framework must comply with the following requirements:¹⁶⁴

- a) The aid aims at avoiding lay-offs during the COVID-19 outbreak and at ensuring the continuation of business activities of self-employed individuals.
- b) The aid must be granted in the form of schemes to undertakings in specific sectors, regions or of a certain size that are particularly affected by the COVID-19 outbreak. Since the aid must be granted on the basis of a scheme, it cannot be granted to only one individual undertaking, but it must be granted to a group of undertakings (particularly affected by the outbreak) defined in a general and abstract manner in the granting act.¹⁶⁵
- c) The wage subsidy is granted over a period of not more than twelve months after the application for aid, for employees that would otherwise have been laid off as a consequence of the suspension or reduction of business activities due to the COVID-19 outbreak (or for self-employed individuals whose business activity has been negatively impacted by the COVID-19 outbreak). The aid is subject to the condition that the benefitting personnel is maintained in continuous employment for the entire period for which the aid is granted (or subject to the

¹⁵⁹ Temporary Framework, point 41.

¹⁶⁰ See recital 51, second bullet-point, of Commission Decision of 30 April 2020, Denmark: *COVID-19 – Credit facility and tax deferrals linked to VAT and payroll tax* (SA.57027 (2020/N)).

¹⁶¹ Section 3.3 of the Temporary Framework is analysed in section 0 of the present chapter.

¹⁶² Temporary Framework, point 42.

¹⁶³ See points 17 and 18 of the Third amendment to the Temporary Framework.

¹⁶⁴ Temporary Framework, point 43.

¹⁶⁵ See the definition of an aid scheme in Article 1(d) of Council Regulation 2015/1589.

condition that the relevant business activity of the self-employed individual is maintained for the entire period for which the aid is granted).

- d) The monthly wage subsidy must not exceed 80% of the monthly gross salary (including employer's social security contributions) of the benefitting personnel (or 80% of the average monthly wage equivalent income of the self-employed individual). Member States may also notify, in particular in the interest of low wage categories, alternative calculation methods of the aid intensity, such as using the national wage average or minimum wage, provided the proportionality of the aid is maintained.
- e) The wage subsidy may be combined with other generally available or selective employment support measures, provided that the combined support does not lead to overcompensation of the wage costs of the personnel concerned. Wage subsidies may further be combined with tax deferrals and deferrals of social security payments.

As explained in section 0 of the present chapter, aid under section 3.10 of the Temporary Framework may also cover employees from the financial sector, as long as it does not target exclusively that category of employees.¹⁶⁶

Furthermore, section 3.10 does not specify explicitly that aid must be granted by 30 June 2021. Nevertheless, that deadline seems to apply implicitly to section 3.10, since the Temporary Framework applies only until 30 June 2021 with the sole exception of section 3.11, which applies until 30 September 2021.¹⁶⁷ The horizontal requirement that the aid must be granted by 30 June 2021 is further analysed in section 0 of the present chapter.

Finally, as explained in section 0 of the present chapter, section 3.10 of the Temporary Framework exceptionally does not require that the beneficiary must not have been an undertaking in difficulty on 31 December 2019.

2.9 Recapitalisation aid

Section 3.11 of the Temporary Framework provides for recapitalisation aid, which could be described as the most “heavyweight” category of aid currently foreseen in that framework. Recapitalisation aid takes the form of equity or hybrid capital instruments or both. The possibility of offering aid in the form of equity or hybrid capital instruments is also provided in section 3.1 of the Temporary Framework, but for much lower nominal amounts.¹⁶⁸

Recapitalisation aid may be granted as an aid scheme to a group of beneficiaries or as individual aid to a specific beneficiary.¹⁶⁹ However, even in cases of schemes, the Commission requires separate notification of any individual aid (under that scheme) above EUR 250 million.¹⁷⁰

Moreover, both large undertakings and SMEs may receive recapitalisation aid. However, Section 3.11 of the Temporary Framework applies only to aid to non-financial undertakings.¹⁷¹ By contrast, any recapitalisation aid to banks is to be assessed under the applicable Banking Communications, since it reinforces their liquidity, viability and solvency.¹⁷²

¹⁶⁶ See in particular section 2.4 of the present chapter. See in that regard points 20bis and 43bis of the Temporary Framework.

¹⁶⁷ Temporary Framework, point 93.

¹⁶⁸ See section 0 of the present chapter. See also point 46 of the Temporary Framework.

¹⁶⁹ Temporary Framework, point 45.

¹⁷⁰ Temporary Framework, point 51.

¹⁷¹ Temporary Framework, points 20bis and 46.

¹⁷² See section 0 of the present chapter.

Section 3.11 is based on Article 107(3)(b) TFEU and was introduced by the second amendment to the Temporary Framework, which also explains the policy reasons behind it.¹⁷³

The Commission considered that some otherwise viable non-financial undertakings subject to a temporary liquidity crisis due to the COVID-19 outbreak might face longer-term solvency issues. For a large number of these undertakings, the emergency measures put in place to control the spread of the COVID-19 outbreak resulted in a decrease or even suspension of their production of goods or provision of services, as well as a significant demand shock. The resulting losses would be reflected in a decrease of undertakings' equity and would negatively affect their ability to take on loans from banks. Reduced equity for undertakings in markets with low demand and disrupted supply aggravates the risk of a serious economic downturn affecting potentially the whole EU economy for a longer period. Therefore, in order to reduce the risk for the EU economy of a significant number of insolvencies, the Commission introduced in the Temporary Framework aid in the form of well-targeted public interventions providing equity and/or hybrid capital instruments to undertakings active in the real economy. Such aid could contribute to preserving the continuity of economic activity during the COVID-19 outbreak and to supporting subsequent economic recovery.¹⁷⁴

Since recapitalisation aid aims at ensuring that the disruption of the economy does not result in the unnecessary exit from the market of undertakings that were viable before the COVID-19 outbreak, the aid must not exceed the minimum needed to ensure the beneficiary's viability. It should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak.¹⁷⁵

Given that recapitalisation aid does not merely provide liquidity support to the beneficiary undertakings (as e.g. aid under sections 3.1 to 3.3 of the Temporary Framework),¹⁷⁶ but also significantly reinforces their solvency, Member States should consider that aid only if no other appropriate solution can be found. For that same reason, recapitalisation aid is subject to more stringent conditions than other types of aid in the Temporary Framework. Public support in the form of equity or hybrid capital instruments is highly distortive for competition, and therefore it is subject to clear conditions as regards the State's entry, remuneration and exit from the undertakings concerned, governance provisions and appropriate measures to limit distortions of competition.¹⁷⁷

However, if support were to be granted at EU level, taking into account the EU common interest, the risk of distortion to the internal market could be lower, and may therefore require less stringent conditions to be imposed. With EU level support, the global symmetric economic crisis of the COVID-19 outbreak is less likely to transform into an asymmetric shock to the detriment of Member States with less possibility to support their economy and the EU's competitiveness as a whole.¹⁷⁸

Moreover, since the green transition and the digital transformation play a central and priority role in ensuring a successful recovery, the Commission invites Member States to take these challenges into account when designing national support measures and recalls their responsibility in ensuring that such measures do not hinder the achievement of EU climate and digital objectives. Designing national support measures in a way that meets the EU's policy objectives related to green and digital transformation of their economies allows for a more sustainable long-term growth and promotes the transformation to the agreed EU's objective of climate neutrality by 2050. Given that in the assessment of compatibility of aid under Article 107(3)(b) TFEU the Commission verifies whether the aid remedies a serious disturbance in the economy of Member States, environmental and digital policy objectives are not per

¹⁷³ See points 4 to 11 of the Second amendment to the Temporary Framework.

¹⁷⁴ See points 4 and 5 of the Second amendment to the Temporary Framework.

¹⁷⁵ See point 6 of the Second amendment to the Temporary Framework. See also point 44 of the Temporary Framework.

¹⁷⁶ See sections 0, 0 and 0 of the present chapter.

¹⁷⁷ See point 7 of the Second amendment to the Temporary Framework. See also point 45 of the Temporary Framework.

¹⁷⁸ See point 8 of the Second amendment to the Temporary Framework.

se the subject-matter of such assessment. It is therefore primarily the responsibility of Member States to design national support measures in a way that meets their environmental and digital policy objectives. Nevertheless, the Commission still requires a reporting obligation on how large undertakings use aid under the Temporary Framework to support their activities in line with EU objectives and national obligations linked to the green and digital transformation.¹⁷⁹

Finally, while introducing recapitalisation aid, the Commission also recalled several other existing rules. Regarding Member States which consider taking an equity stake in strategic companies, the Commission noted that the Treaty is neutral as regards public versus private ownership, according to Article 345 TFEU. Member States may purchase existing shares of undertakings at market price or invest *pari passu* with private shareholders, which normally does not constitute State aid.¹⁸⁰ If Member States wish to purchase newly issued shares or provide undertakings with other types of equity support or hybrid capital instruments on market terms, i.e. under conditions complying with the Market Economy Operator Principle, this also does not constitute State aid. Moreover, the Commission reminded that there are a number of additional tools to deal with acquisitions of strategic companies from non-EU jurisdictions. In its Communication of 25 March 2020,¹⁸¹ the Commission called upon Member States that already have an existing foreign direct investment screening mechanism in place to make full use of such tools to prevent capital flows from non-EU countries that could undermine EU's security or public order. The Commission also called on Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, to set up a fully-fledged screening mechanism in full compliance with Union law, including the FDI Screening Regulation,¹⁸² free movement of capital¹⁸³ and international obligations.¹⁸⁴

With the above considerations in mind, the Commission stipulates in section 3.11 of the Temporary Framework the detailed conditions for authorising recapitalisation aid as compatible with the internal market. To date, the Commission has approved recapitalisation aid schemes notified by several Member States, such as Lithuania,¹⁸⁵ Poland,¹⁸⁶ Latvia¹⁸⁷ and Germany,¹⁸⁸ including a specific scheme for Bavaria.¹⁸⁹ The Commission has also approved individual recapitalisation aid in favour of specific undertakings, such as the EUR 6 billion German measure to recapitalise Lufthansa,¹⁹⁰ the EUR 1 billion

¹⁷⁹ See point 9 of the Second amendment to the Temporary Framework. See also points 44, 45 and 83 of the Temporary Framework.

¹⁸⁰ See section 4.2.3 of the Notice on the notion of State aid.

¹⁸¹ Communication from the Commission – Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) [2020] OJ C 99I/1.

¹⁸² Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L 79I/1.

¹⁸³ Article 63 TFEU.

¹⁸⁴ See points 10 and 11 of the Second amendment to the Temporary Framework.

¹⁸⁵ Commission Decision of 26 May 2020, Lithuania: *COVID-19 – Aid Fund for Business* (SA.57008 (2020/N)).

¹⁸⁶ Commission Decision of 11 June 2020, Poland: *COVID-19 – anti-crisis measures – equity instruments* (SA.57055 (2020/N)).

¹⁸⁷ Commission Decision of 6 July 2020, Latvia: *COVID-19 – Recapitalisation Fund* (SA.57409 (2020/N)).

¹⁸⁸ Commission Decision of 8 July 2020, Germany: *COVID-19 – Wirtschaftsstabilisierungsfonds* (SA.56814 (2020/N)).

¹⁸⁹ Commission Decision of 20 August 2020, Germany: *COVID-19 – BayernFonds* (SA.57447 (2020/N)).

¹⁹⁰ Commission Decision of 25 June 2020, Germany: *COVID-19 – Aid to Lufthansa* (SA.57153 (2020/N)).

Swedish and Danish measure to recapitalise SAS¹⁹¹ and the EUR 250 million Latvian measure to recapitalise Air Baltic.¹⁹²

2.9.1 Deadline for granting the aid

COVID-19 recapitalisation measures must not be granted later than 30 September 2021.¹⁹³ Further analysis of this requirement is provided in section 0 of the present chapter.

2.9.2 Eligibility and entry conditions

The COVID-19 recapitalisation measure must fulfil the following cumulative conditions:¹⁹⁴

- a) The aid must not be granted to undertakings that were already in difficulty on 31 December 2019, except for micro or small enterprises that are not subject to collective insolvency proceedings and have not received rescue aid or restructuring aid. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- b) Without the State intervention the beneficiary would go out of business or would face serious difficulties to maintain its operations. Such difficulties may be shown by the deterioration of, in particular, the beneficiary's debt to equity ratio or similar indicators.
- c) It is in the common interest for the Member State to intervene. This may relate to avoiding social hardship and market failure due to significant loss of employment, the exit of an innovative company, the exit of a systemically important company, the risk of disruption to an important service, or similar situations duly substantiated by the Member State concerned.
- d) The beneficiary is not able to find financing on the markets at affordable terms and the horizontal measures existing in the Member State concerned to cover liquidity needs are insufficient to ensure its viability.

Furthermore, Member States should grant COVID-19 recapitalisation measures under an aid scheme approved by the Commission only following a written request for such aid by the prospective beneficiary undertakings. As regards individually notifiable aid, Member States must provide evidence of such a written request as part of the notification of the individual aid measure to the Commission.¹⁹⁵ Although not perfect, this requirement aims at limiting recapitalisation aid to those cases where it is genuinely needed, and thus requested by the undertaking itself, despite the drawbacks that such aid will have for the management and the owners of that undertaking, for example in terms of caps on management remuneration, ban on dividends and dilution of existing shareholders by the State. By contrast, cases where the undertaking estimates that it can weather through the crisis without recapitalisation aid would normally not be eligible for this highly distortive type of aid.

2.9.3 Types of recapitalisation measures

Member States may provide COVID-19 recapitalisation measures using two distinct sets of recapitalisation instruments:¹⁹⁶

¹⁹¹ Commission Decision of 17 August 2020, Denmark and Sweden: *COVID-19 – Recapitalisation of SAS AB* (SA.57543 (2020/N), SA.58342 (2020/N)).

¹⁹² Commission Decision of 3 July 2020, Latvia: *COVID-19 – Recapitalisation of Air Baltic* (SA.56943 (2020/N)).

¹⁹³ Temporary Framework, point 48.

¹⁹⁴ Temporary Framework, point 49.

¹⁹⁵ Temporary Framework, point 50.

¹⁹⁶ Temporary Framework, point 52.

- a) Equity instruments, in particular the issuance of new common or preferred shares.
- b) Instruments with an equity component (hereinafter “hybrid capital instruments”), in particular profit participation rights, silent participations and convertible secured or unsecured bonds. Hybrid capital instruments are instruments that have characteristics of debt as well as of equity. For instance, convertible bonds are remunerated like bonds until they are converted into equity. The assessment of the overall remuneration of hybrid capital instruments thus depends on the one hand on their remuneration while they are debt-like instruments and on the other hand on the conditions for conversion into equity-like instruments.

The State intervention can take the form of any variation of the above two kinds of instruments, or even a combination of equity and hybrid capital instruments. Member States may also underwrite the above instruments in the context of a market offering, under the condition that any resulting State intervention in a beneficiary meets the conditions set out in section 3.11 of the Temporary Framework. The Member State must ensure that the selected recapitalisation instruments and the conditions attached thereto are appropriate to address the beneficiary’s recapitalisation needs, while at the same time being the least distortive to competition.¹⁹⁷

2.9.4 Amount of the recapitalisation

In order to ensure proportionality of the aid, the amount of the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak, i.e. the situation on 31 December 2019. In assessing the proportionality of the aid, State aid received or planned in the context of the COVID-19 outbreak is also taken into account.¹⁹⁸ It is particularly important that such other COVID-19 related aid in favour of the same beneficiary be taken into account in the business plan projections on which the proportionality of the recapitalisation aid should be based.¹⁹⁹

2.9.5 Remuneration and exit of the State

The State must receive appropriate remuneration for the investment. The closer the remuneration is to market terms, the lower the potential competition distortion caused by the State intervention. The COVID-19 recapitalisation should be redeemed when the economy stabilises. Although the beneficiary should have sufficient time to redeem the recapitalisation, the Member State must also put a mechanism in place to gradually incentivise redemption.²⁰⁰

Therefore, the remuneration of the COVID-19 recapitalisation measure should be increased in order to converge with market prices to provide an incentive to the beneficiary and to the other shareholders to redeem the State recapitalisation measure and to minimise the risk of distortions of competition. With the aim of incentivising the beneficiary to redeem the recapitalisation and to look for alternative capital when market conditions permit, the Commission proposes in the Temporary Framework certain methodologies in order to set a sufficiently high remuneration of the State for the recapitalisation. However, Member States may also notify alternative remuneration methodologies adapted in accordance with the features and seniority of the capital instrument, provided that they overall lead to a

¹⁹⁷ Temporary Framework, point 53.

¹⁹⁸ Temporary Framework, point 54. By the Fourth amendment to the Temporary Framework, the Commission added a footnote in point 54 clarifying that, for the purpose of subsection 3.11.4 of the Temporary Framework, hybrid instruments granted by the State should be counted as equity.

¹⁹⁹ See recitals 19 and 102 of *COVID-19 – Recapitalisation of SAS AB* Decision (SA.57543 (2020/N), SA.58342 (2020/N)).

²⁰⁰ Temporary Framework, points 55-56.

similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration.²⁰¹

2.9.5.1 Remuneration and exit of the State in equity instruments

The Temporary Framework sets out a remuneration methodology for equity instruments. A capital injection or equivalent intervention by the State must be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection. If the beneficiary is not a publicly listed company, an estimate of its market value should be established by an independent expert or by other proportionate means.²⁰²

Any recapitalisation measure shall include a step-up mechanism increasing the remuneration of the State, to incentivise the beneficiary to buy back the State capital injections. This increase in remuneration can take the form of additional shares²⁰³ granted to the State or other mechanisms. The step-up should correspond to a minimum of 10% increase in the remuneration of the State for its participation in the undertaking. However, the minimum 10% increase concerns only the participation resulting from the State's COVID-19 equity injection. Therefore, if the State also had a previous participation in that undertaking, unrelated to the COVID-19 equity injection, that does not count for the calculation of the minimum 10% increase. Moreover, if part of the State's participation resulting from the COVID-19 equity injection has been repaid, that part also does not count for the calculation of the minimum 10% increase.²⁰⁴

The step-up mechanism is triggered in two stages. It is activated for the first time four years after the COVID-19 equity injection, if the State has not sold at least 40% of its equity participation resulting from the COVID-19 equity injection. Subsequently, it is activated again six years after the COVID-19 equity injection, if the State has not sold in full its equity participation resulting from the COVID-19 equity injection.²⁰⁵ If the beneficiary is not a publicly listed company, Member States may decide to implement each of the two steps one year later, i.e. five years and seven years after granting of the COVID-19 equity injection, respectively.²⁰⁶

The beneficiary should have at any time the possibility to buy back the equity stake that the State has acquired. To ensure that the State receives appropriate remuneration for the investment, the buy-back price should be the higher amount of:²⁰⁷

- i. the nominal investment by the State increased by an annual interest remuneration 200 basis points higher than presented in the table below;²⁰⁸ or
- ii. the market price at the moment of the buy-back.

As an alternative, the State may sell at any time its equity stake at market prices to third-party purchasers, meaning entities other than the beneficiary that are neither public authorities nor public undertakings

²⁰¹ Temporary Framework, points 57-59, 62 and 68-70.

²⁰² Temporary Framework, point 60.

²⁰³ For instance, additional shares can be granted via the issuance of convertible bonds at the date of the recapitalisation, which will be converted into equity at the date of trigger of the step-up mechanism.

²⁰⁴ Temporary Framework, point 61.

²⁰⁵ For instance, if the step-up takes the form of the grant to the State of additional shares: if the State's participation in a beneficiary is 40% as a result of its capital injection, and if the State does not sell its participation before the requested date, the State's participation should increase by at least $0.1 \times 40\% = 4\%$ to reach 44% four years after the COVID-19 equity injection, and to reach 48% six years after COVID-19 equity injection, resulting in a corresponding dilution of the stakes of other shareholders.

²⁰⁶ Temporary Framework, point 61.

²⁰⁷ Temporary Framework, point 63.

²⁰⁸ The 200 basis points increase does not apply in year 8 and onwards.

within the meaning of Article 2 of Directive 2006/111/EC.²⁰⁹ Such a sale requires, in principle, an open and non-discriminatory consultation of potential purchasers or a sale on the stock exchange. The State may give existing shareholders, i.e. shareholders before the COVID-19 recapitalisation, priority rights to buy at the price resulting from the public consultation. Nevertheless, such priority rights should not cause the existing shareholders to exceed their stake in the equity of the beneficiary prior to the COVID-19 recapitalisation. If the State sells its equity stake at a price below the minimum price laid down in the previous paragraph, the governance rules laid down in section 3.11.6 of the Temporary Framework²¹⁰ continue to apply at least until four years after the COVID-19 equity injection measure was granted.²¹¹

A particular situation arises in case of negative value of the beneficiary at the moment of the recapitalisation. In such a case, the beneficiary's negative value means that the market value of its shares, pursuant to point 60 of the Temporary Framework, is "negative", which in practical terms means that its shares are worthless. Therefore, after the COVID-19 equity injection the State becomes 100% shareholder of the beneficiary. In such a case, the step-up mechanism of point 61 of the Temporary Framework cannot incentivise a buy-back of the State capital injection, since there are no other shareholders to be diluted through such step-up. Moreover, the State's remuneration is not affected by the step-up. For those reasons, the Commission has not required a step-up mechanism in such cases, considering that an exit strategy pursuant to section 3.11.7 of the Temporary Framework²¹² is sufficient. On the other hand, however, in such cases the Commission has been stricter in relation to point 64 of the Temporary Framework by receiving a commitment from the Member State not to sell at any time its equity stake at market prices to purchasers other than the beneficiary, unless the exit price received by the State exceeds the cash injection of the recapitalisation together with the remuneration called for in point 63 of the Temporary Framework. Nevertheless, the beneficiary may still seek equity financing from the market in order to buy back the State's equity stake pursuant to point 63 of the Temporary Framework.²¹³

Another particular situation concerns undertakings that were wholly or partly State-owned prior to the COVID-19 recapitalisation. Point 64 of the Temporary Framework was drafted having in mind the usual case of an undertaking that was privately owned prior to the COVID-19 recapitalisation. In such a case, point 64 foresees that the undertaking may "return to the market" through a sale of the State's equity stake at market prices to private purchasers, which therefore ensures the State's exit from that (previously privately owned) undertaking. That possibility of point 64 remains of course available also for undertakings that were State-owned prior to the COVID-19 recapitalisation, in case the Member State wishes to privatise the respective undertaking. Nevertheless, a sale to a private purchaser under point 64 cannot be the only possibility for beneficiaries that were wholly or partly State-owned prior to the COVID-19 recapitalisation. Member States cannot be forced to privatise pre-COVID public undertakings in order to make use of the exit possibility of point 64.²¹⁴

In order for the mechanism of point 64 of the Temporary Framework to respect the principle of neutrality between public and private ownership enshrined in Article 345 TFEU, the Commission added certain adjustments to that mechanism by the fourth amendment of the Temporary Framework. Those

²⁰⁹ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L 318/17.

²¹⁰ Those governance conditions are analysed in section 0 of the present chapter.

²¹¹ Temporary Framework, point 64. See also the clarifications in point 13 of the Fourth amendment to the Temporary Framework.

²¹² See section 0 of the present chapter.

²¹³ See recitals 96-99 and 111 of Commission Decision of 11 August 2020, Estonia: *COVID-19 – Recapitalisation of Nordica* (SA.57586 (2020/N)).

²¹⁴ Of course, the exit possibility of point 63 of the Temporary Framework remains available to (pre-COVID) public and private undertakings alike, but it is more burdensome than point 64 since it requires, at a minimum, the beneficiary to pay back the State (with interest) for the nominal investment of the COVID-19 recapitalisation.

adjustments ensure that the exit of the State from undertakings in which the State is an existing shareholder, i.e. before the COVID-19 recapitalisation, takes place at conditions equivalent to those applicable to private undertakings.²¹⁵ Therefore, point 64bis of the Temporary Framework foresees that, if a beneficiary was anyway 100% State-owned prior to the COVID-19 recapitalisation, the State may “exit” from that recapitalisation aid two years after the granting of that aid by performing a positive independent valuation of the beneficiary. In order to be independent, such valuation must be performed by an entity independent from the beneficiary and from the State.

The independent valuation in point 64bis has the same function as the sale at market price to a private purchaser in point 64 of the Temporary Framework. Therefore, if that independent valuation establishes a positive market value, the State is deemed to have exited from the COVID-19 recapitalisation, even if the beneficiary remains State-owned. Nevertheless, if the positive market value is less than the minimum price laid down in point 63 of the Temporary Framework, the governance rules laid down in section 3.11.6 of that framework continue to apply until four years after the grant of the COVID-19 recapitalisation measure (as would be the case also under point 64 of the Temporary Framework).

For COVID-19 recapitalisation measures that exceed EUR 250 million, the Member State must submit the independent valuation of point 64bis to the Commission. In any case, the Commission may on its own initiative request the submission of the independent valuation and may evaluate it to ensure that it complies with the standard set to ensure transactions that are in line with market conduct.

Point 64ter of the Temporary Framework applies the same adjusted mechanism (of point 64bis) to beneficiaries that were only partly State-owned prior to the COVID-19 recapitalisation. Nevertheless, that adjusted mechanism applies only for the part of the COVID-19 equity that the State would need to retain in order to restore its shareholding to that before the COVID-19 recapitalisation. For the remainder, the (regular) mechanism of point 64 applies.²¹⁶

2.9.5.2 Remuneration and exit of the State in hybrid capital instruments

The Temporary Framework sets out a remuneration methodology for hybrid capital instruments. The overall remuneration of hybrid capital instruments must adequately factor in the following elements:²¹⁷

- a) the characteristics of the instrument chosen, including its level of subordination, risk and all modalities of payment;
- b) built-in incentives for exit (such as step-up and redemption clauses); and
- c) an appropriate benchmark interest rate.

²¹⁵ See point 14 of the Fourth amendment to the Temporary Framework.

²¹⁶ In order to explain those various mechanisms of exit of the State, the Commission provides the following example in a footnote in point 64ter of the Temporary Framework. Let us assume that prior to the COVID-19 recapitalisation, the State owns 50% of the beneficiary undertaking. Following the COVID-19 recapitalisation, the State owns 90% of the undertaking (10% shareholding concerns pre-COVID-19 State-owned shares and 80% shareholding concerns COVID-19 shares). Two years after the COVID-19 recapitalisation, the State sells 40% of the undertaking (corresponding to 50% of the COVID-19 shares) via a competitive process to private investors (for a positive market value), in application of point 64ter, letter (b). The State retains the remaining part in application of point 64ter, letter (a). The sale is akin to an independent valuation of the company. The State is deemed to have redeemed the COVID-19 recapitalisation since the part of COVID-19 shares it retains restores its shareholding to pre-COVID-19 levels, i.e., 50%, and is equivalent to the State exercising its priority right under point 64. If the market price of the COVID-19 equity is less than the minimum price laid down in point 63, the governance rules laid down in section 3.11.6 continue to apply for two more years.

²¹⁷ Temporary Framework, point 65.

The minimum remuneration of hybrid capital instruments until they are converted into equity-like instruments must be at least equal to the base rate (1 year IBOR or equivalent as published by the Commission)²¹⁸ plus the premium as set out in the table below:²¹⁹

<i>Type of recipient</i>	<i>1st year</i>	<i>2nd and 3rd year</i>	<i>4th and 5th year</i>	<i>6th and 7th year</i>	<i>8th year and after</i>
<i>SMEs</i>	<i>225 bps</i>	<i>325 bps</i>	<i>450 bps</i>	<i>600 bps</i>	<i>800 bps</i>
<i>Large enterprises</i>	<i>250 bps</i>	<i>350 bps</i>	<i>500 bps</i>	<i>700 bps</i>	<i>950 bps</i>

The conversion of hybrid capital instruments into equity must be conducted at 5 percent or more below TERP (Theoretical Ex-Rights Price) at the time of the conversion. After conversion into equity, a step-up mechanism must be included to increase the remuneration of the State, in order to incentivise the beneficiaries to buy back the State capital injections. If the equity resulting from the State's COVID-19 intervention is still owned by the State two years after the conversion into equity, the State must receive an additional share of ownership of the beneficiary in addition to its remaining participation resulting from the State's conversion of the COVID-19 hybrid capital instruments. This additional share of ownership shall be at a minimum 10 percent of the remaining participation resulting from the State's conversion of the COVID-19 hybrid capital instruments.²²⁰

Since the nature of hybrid instruments varies significantly, the Commission does not provide guidance for all types of instruments. Nevertheless, hybrid instruments shall in any event follow the above principles, with remuneration reflecting the risk of the particular instrument.²²¹

2.9.6 Governance and prevention of undue distortions of competition

In order to prevent undue distortions of competition beneficiaries must not engage in aggressive commercial expansion financed by State aid. Moreover, beneficiaries should not take excessive risks. As a general principle, the smaller the equity stake of the Member State and the higher the remuneration, the less there is a need for safeguards against competition distortions.²²²

If the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with significant market power in at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. In proposing such measures, Member States could be inspired by the structural or behavioural commitments foreseen in the Commission Remedies Notice applicable to merger control proceedings.²²³ For example, such additional measures to preserve effective competition were foreseen in the EUR 6 billion recapitalisation of Lufthansa by Germany. Before the coronavirus outbreak, Lufthansa's hub airports of Munich and

²¹⁸ Base rates calculated in accordance with the Communication on reference and discount rates and published on the website of DG Competition at https://ec.europa.eu/competition/state_aid/legislation/reference_rates.html [Accessed 30 September, 2020].

²¹⁹ Temporary Framework, point 66.

²²⁰ Temporary Framework, points 67-68.

²²¹ Temporary Framework, point 70.

²²² Temporary Framework, point 71.

²²³ Temporary Framework, point 72. Commission Notice on remedies acceptable under Council Regulation (EC) 139/2004 and under Commission Regulation (EC) 802/2004 [2008] OJ C 267/1.

Frankfurt were congested, and thus landing and take-off slots were in short supply. Therefore, Germany and Lufthansa committed to divest up to 24 slots per day at Frankfurt and Munich hub airports, as well as related additional assets, to allow competing carriers to establish a base of up to four aircraft at each of those airports.²²⁴

Beneficiaries are also prohibited from advertising for commercial purposes that they have received State aid. The idea behind this restriction is that such advertisement could imply that the beneficiary benefits more generally from the State's protection, which could favour it further in its dealings in the market as compared to competitors that did not receive aid.²²⁵

As long as at least 75% of the COVID-19 recapitalisation measures have not been redeemed, beneficiaries other than SMEs are prevented from acquiring a more than 10% stake in competitors or other operators in the same line of business, including upstream and downstream operations. In exceptional circumstances and without prejudice to merger control, such beneficiaries may acquire such a stake in operators upstream or downstream, if the acquisition is necessary to maintain the beneficiary's viability. In such a case, the Commission's prior authorisation is required.²²⁶

State aid shall not be used to cross-subsidise economic activities of integrated undertakings that were in economic difficulties already on 31 December 2019. A clear account separation shall be put in place in integrated companies to ensure that the recapitalisation measure does not benefit those activities.²²⁷

As long as the COVID-19 recapitalisation measures have not been fully redeemed, beneficiaries cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State.²²⁸ Nevertheless, the Commission may deviate from that rule in case a prohibition of such payments would dissuade a significant participation of private investors in the recapitalisation, for example through the conversion of outstanding privately-held debt instruments into equity, which accordingly reduces the amount of State aid needed for the undertaking's viability.²²⁹

Moreover, as long as at least 75% of the COVID-19 recapitalisation measures has not been redeemed, the remuneration of each member of the beneficiaries' management must not go beyond the fixed part of his/her remuneration on 31 December 2019. For persons becoming members of the management on or after the recapitalisation, the applicable limit is the fixed remuneration of the members of the management with the same level of responsibility on 31 December 2019. Under no circumstances, shall bonuses or other variable or comparable remuneration elements be paid.²³⁰

2.9.7 Exit strategy of the State and reporting obligations

Beneficiaries other than SMEs that have received a COVID-19 recapitalisation of more than 25% of equity at the moment of intervention must demonstrate a credible exit strategy for the participation of the Member State, unless the State's intervention is reduced below the level of 25% of equity within 12 months from the date of the granting of the aid. For the purpose of this requirement, hybrid instruments granted by the State are counted as equity.²³¹

²²⁴ *COVID-19 – Aid to Lufthansa* Decision (SA.57153 (2020/N)).

²²⁵ Temporary Framework, point 73.

²²⁶ Temporary Framework, points 74 and 75.

²²⁷ Temporary Framework, point 76.

²²⁸ Temporary Framework, point 77.

²²⁹ See recitals 177-180 of *COVID-19 – Recapitalisation of SAS AB* Decision (SA.57543 (2020/N), SA.58342 (2020/N)).

²³⁰ Temporary Framework, point 78.

²³¹ Temporary Framework, point 79.

The exit strategy shall lay out:²³²

- a) the plan of the beneficiary on the continuation of its activity and the use of the funds invested by the State, including a payment schedule of the remuneration and of the redemption of the State investment (hereinafter “repayment schedule”); and
- b) the measures that the beneficiary and the State will take to abide by the repayment schedule.

The exit strategy should be prepared and submitted to the Member State within 12 months after aid is granted and it must be endorsed by the Member State. Subsequently, beneficiaries must report to the Member State every 12 months on the progress in the implementation of the repayment schedule and on their compliance with the governance rules and the conditions to prevent undue distortion of competition, described in section 0 of the present chapter. Moreover, as long as the COVID-19 recapitalisation measure has not been fully redeemed, beneficiaries other than SMEs must publish information every 12 months on the use of the aid received. This concerns in particular how the beneficiaries use the aid to support their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050. The Member State should also report annually to the Commission.²³³

If six years after the COVID-19 recapitalisation the State’s intervention has not been reduced below 15% of beneficiary’s equity, a restructuring plan in accordance with the Rescue and Restructuring Guidelines²³⁴ must be notified to the Commission for approval. The Commission will then assess whether the actions contemplated in the restructuring plan ensure the beneficiary’s viability and the exit of the State without adversely affecting trade to an extent contrary to the common interest. In assessing the beneficiary’s viability under the restructuring plan, the Commission might also take into account EU objectives and national obligations linked to the green and digital transformation. If the beneficiary is an SME or if it is not a publicly listed company, the Member State may provide in the notification of the recapitalisation aid that it will notify a restructuring plan only if the State’s intervention has not been reduced below the level of 15% of equity seven years after the COVID-19 recapitalisation.²³⁵

2.9.8 State aid through equity injection on the same terms as private investors

Points 78bis and 78ter of the Temporary Framework provide for more lenient conditions regarding State aid granted through equity injection on the same terms as private investors. The instinctive reaction of the reader of the previous sentence is to wonder how State aid would exist if the State injects equity on the same terms as private investors. Indeed, such operation would normally not constitute State aid, if provided *pari passu* with private shareholders under the detailed conditions outlined in points 86 to 88 of the Commission’s Notice on the Notion of Aid.²³⁶ However, pursuant to the *BP Chemicals* case-law, such measures might exceptionally constitute State aid, if “polluted” by other aid measures to which they are closely linked in view of their chronology, their purpose and the circumstances of the undertaking at the time of those interventions.²³⁷

For example, suppose an undertaking that cannot attract any investor in the current COVID-19 crisis. A Member State could grant to it a substantial State guarantee, which attracts investors, who then make a supposedly *pari passu* equity injection together with that State only a few days after the granting of the State guarantee. In such a case, the State’s interventions should arguably be seen as a single

²³² Temporary Framework, point 80.

²³³ Temporary Framework, points 81-84.

²³⁴ Guidelines for non-financial undertakings in difficulty.

²³⁵ Temporary Framework, point 85.

²³⁶ Notice on the notion of State aid.

²³⁷ *BP Chemicals v Commission* (T-11/95) EU:T:1998:199, paras 170-171.

intervention supporting that undertaking, since they are closely linked by virtue of their chronology, their purpose and the circumstances of the undertaking at the time of those two interventions. For example, in its decision on the recapitalisation of Finnair, the Commission found such a single intervention composed of the recapitalisation (involving public and private investors) and a previous State guarantee to the airline.²³⁸

However, in such cases the incremental aid element of the equity injection performed on the same terms as private investors is lower than if it was performed on more favourable terms for the beneficiary. In addition, the participation of private investors limits accordingly the amount of State aid needed. Therefore, the conditions for authorising such recapitalisation aid are more lenient than the usual conditions in section 3.11 of the Temporary Framework.

Specifically, provided that the State injects new equity on the same terms as a significant²³⁹ injection by private investors, the dividend ban is lifted for all holders of new shares. For existing shares, the dividend ban is lifted, provided the holders of such existing shares are altogether diluted to a share in the company below 10%. In any event, however, the remuneration due for COVID-19 hybrid capital and subordinated debt instruments held by the State must be paid before any dividends are paid to shareholders in a given year.²⁴⁰ This ensures that such State-held hybrid capital and subordinated debt instruments, which are supposed to be a form of capital that is senior to equity, are paid in priority to dividends.

Furthermore, the conditions for authorising such recapitalisation aid are even more lenient in case the State was already an existing shareholder before the COVID-19 equity injection. Provided that the State injects new equity on the same terms as a significant²⁴¹ injection by private investors and pro rata to its existing shareholding (or below), it is not necessary to impose specific conditions as regards the State's exit and the step-up mechanism does not apply. Moreover, the acquisition ban and the cap on the remuneration of management are limited to three years. In addition, the dividend ban is lifted for all holders of new shares. For existing shares, the dividend ban is lifted, provided the holders of those existing shares are altogether diluted to below 10% in the company. If holders of existing shares are not altogether diluted to a share in the company below 10%, the dividend ban applies to existing shareholders for three years. However, again, the remuneration due for COVID-19 hybrid capital and subordinated debt instruments held by the State must be paid before any dividends are paid to shareholders in a given year, in order to respect the seniority of such instruments in relation to equity.²⁴²

2.10 Aid for uncovered fixed costs

Section 3.12 of the Temporary Framework was added during the fourth amendment.²⁴³ It provides for a type of aid that resembles an "extension" of Article 107(2)(b) TFEU by means of Article 107(3)(b) TFEU. While certain losses might not be eligible for compensation through aid under Article 107(2)(b) TFEU, for example because they are not in direct causal link with the exceptional occurrence of the COVID-19 outbreak,²⁴⁴ such losses might still be linked to the wider negative economic consequences

²³⁸ See Commission Decision of 9 June 2020, Finland: *COVID-19 – Recapitalisation of Finnair* (SA.57410 (2020/N)).

²³⁹ In principle at least 30% of the new equity injected.

²⁴⁰ Temporary Framework, point 78ter.

²⁴¹ In principle at least 30% of the new equity injected.

²⁴² Temporary Framework, point 78bis.

²⁴³ A few decisions have already been adopted based on that recent section of the Temporary Framework. For example, Commission Decision of 20 November 2020, Germany: *COVID-19 – Fixkostenhilfe 2020* (SA.59289 (2020/N)); Commission Decision of 20 November 2020, Austria: *COVID-19 – Fixed Cost Compensation according to 3.12 Temporary Framework* (SA.58661 (2020/N)).

²⁴⁴ See section 0 of the present chapter.

of the outbreak. Therefore, such losses may be compensated through aid based on Article 107(3)(b) TFEU, whose purpose is to remedy the serious disturbance in the economy of Member States following the outbreak of COVID-19. Section 3.12 of the Temporary Framework aims at providing that latter type of aid based on Article 107(3)(b) TFEU.

As a result of the COVID-19 outbreak, many undertakings temporarily face lower demand that does not allow them to cover part of their fixed costs. According to the Commission, in many instances demand is expected to recover over the months following the fourth amendment of the Temporary Framework. Therefore, it may not be efficient for those undertakings to downsize if doing so entails significant restructuring costs. Supporting those undertakings by contributing to part of their fixed costs on a temporary basis may be an efficient way of bridging the gap, thereby avoiding the deterioration of their capital, maintaining their business activity and providing them with a strong platform from which to recover.²⁴⁵

The Commission therefore considers that Member States may envisage contributing to the uncovered fixed costs of those undertakings, for which the COVID-19 outbreak resulted in the suspension or reduction of their business activity. The Commission considers that aid granted under such measures is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, for a limited period, to address the wider negative economic effects of the economic disturbance caused by the COVID-19 outbreak.²⁴⁶

Based on those principles, section 3.12 foresees aid contributing to the uncovered fixed costs of those undertakings for which the COVID-19 outbreak resulted in the suspension or reduction of their business activity, provided that the following cumulative requirements are fulfilled:²⁴⁷

- a) The aid must be granted no later than 30 June 2021. For further analysis of this horizontal requirement, see section 0 of the present chapter.
- b) The aid covers uncovered fixed costs incurred during the period between 1 March 2020 and 30 June 2021, including such costs incurred in part of that period ('eligible period'). Uncovered fixed costs are the fixed costs incurred by undertakings during the eligible period which are not covered by the profit contribution (i.e. revenues minus variable costs) during the same period and which are not covered by other sources, such as insurance, aid under other sections of the Temporary Framework or support from other sources.²⁴⁸ The aid intensity shall not exceed 70% of the uncovered fixed costs, except for micro and small enterprises,²⁴⁹ where the aid intensity shall not exceed 90% of the uncovered fixed costs. The aid may be granted based on forecasted losses, while the final amount of aid is determined after the losses have materialised based on audited accounts or, with appropriate justification provided by the Member State to the Commission (for example in connection with the characteristics or size of certain type of undertakings) on the basis of tax accounts. Any payment exceeding the final amount of the aid must be recovered

²⁴⁵ See point 11 of the Fourth amendment to the Temporary Framework.

²⁴⁶ See point 12 of the Fourth amendment to the Temporary Framework.

²⁴⁷ Temporary Framework, points 86 and 87.

²⁴⁸ For the purpose of this requirement, costs refer to fixed and variable costs: the former are incurred independently of the level of output, while the latter are incurred depending on the level of output. Moreover, the losses of undertakings from their profit and loss statements during the eligible period are considered to constitute uncovered fixed costs. One-off impairment losses are not included in the calculation of the losses. See point 87(c) of the Temporary Framework, including the footnotes therein.

²⁴⁹ As defined in Annex I of the GBER.

- c) The aid must be granted on the basis of a scheme. Therefore, the aid cannot be granted to only one individual undertaking, but it must be granted to a group of undertakings defined in a general and abstract manner in the granting act.²⁵⁰
- d) The aided undertakings must have suffered a decline in turnover during the eligible period of at least 30% compared to the same period in 2019. The reference period is in 2019 irrespective of whether the eligible period is in 2020 or in 2021.
- e) In any event, the overall aid shall not exceed EUR 3 million per undertaking. The aid may be granted in the form of direct grants, guarantees and loans provided the total *nominal* value²⁵¹ of such measures remains below the overall cap of EUR 3 million per undertaking.²⁵²
- f) The aid must not be cumulated with other aid for the same eligible costs.
- g) The aid may not be granted to undertakings that were already in difficulty on 31 December 2019, except for micro or small enterprises that are not subject to collective insolvency proceedings and have not received rescue aid or restructuring aid. For further analysis of this horizontal requirement, see section 0 of the present chapter.

3. Cases dealt directly under Article 107(3)(b) TFEU

As stated in point 16 of the Temporary Framework, the fact that that framework foresees specific types of aid does not mean that all other types of aid in response to the COVID-19 outbreak are prohibited. Member States may still notify alternative approaches, both as aid schemes and as individual aid, which the Commission will assess directly under the Treaty, if they do not fall within the scope of any of its guidelines.

Such is the example of aid to trade credit insurance, which the Commission approved directly on the basis of Article 107(3)(b) TFEU as aid to remedy a serious disturbance in the economy of the Member States concerned.

Trade credit insurance is used to cover the producer of a product or service against the risk of non-payment of the purchaser. The COVID-19 outbreak increased the risk of trade payment defaults, which could push insurers to decrease their internal limits of coverage, thereby freezing the market for trade credit. This would force the producer and the purchasers to trade on a pay-in-advance basis, which is likely to have a detrimental effect on trade.

On 12 and 13 April 2020, the Commission approved a French aid scheme and a German aid scheme, which followed two different models to address that problem. The Commission approved those two schemes as compatible aid on the basis of Article 107(3)(b) TFEU.²⁵³

Under the French model, the public reinsurer Caisse Centrale de Réassurance (CCR) receives a State guarantee, in order to reinsure two types of credit insurance instruments issued by private insurers: “additional” guarantees supplementing the insurance of credit risks in the primary insurance policy and “substitution” guarantees in case the credit insurer does not want to cover the risk at all. The budget of the measure at EUR 10 billion might seem significant, but it should be compared with a total market of credit insurance in France of EUR 197 billion at the end of 2019. Moreover, the State guarantee to CCR is supposed to be in place only until 31 December 2020. The aid scheme covers only supplier credits

²⁵⁰ See the definition of an aid scheme in Article 1(d) of Council Regulation 2015/1589.

²⁵¹ See in that regard letter a) of the list in section 2.3.1 of the present chapter.

²⁵² All figures used must be gross, that is before any deduction of tax or other charge.

²⁵³ Commission Decision of 13 April 2020, Germany: *COVID-19 – First-loss portfolio guarantee on trade credit insurance* (SA.56941 (2020/N)). Commission Decision of 12 April 2020, France: *COVID-19 – State guarantee for the reinsurance cover of domestic trade credit insurance risks* (SA.56903 (2020/N)).

made to French micro companies, SMEs and mid-caps, given that credit insurance for supplier credits to large undertakings is less impacted by the Covid-19 outbreak. The scheme only covers insurance contracts entered into from 6 April 2020 to 31 December 2020. The scheme includes a risk-sharing mechanism between CCR, the insured company and the private insurer. It also provides for an individual cap per insured company, as well as for a remuneration to be paid by the insured companies to CCR.

Under the German model, there are two stages. At a first stage, up to EUR 5 billion in total claims volume, the State covers 90% of the losses, while trade credit insurers remain responsible for the remaining 10%. At a second stage, for a total claims volume between EUR 5 billion and EUR 30 billion, the State provides full coverage. In return, trade credit insurers pay to the State 65% of their total gross premiums for 2020. The scheme applies only to insurance contracts in place between 1 January and 31 December 2020. Actual claims can be put under the aid scheme only if the missed payment date is after 1 March 2020, in order to ensure that only COVID-19 related events are covered.

Following the Commission's approval of the French and German schemes, several other MS, such as Denmark, the Netherlands and Italy, followed the German model and received similar approvals by the Commission.²⁵⁴

4. Cases dealt under Article 107(2)(b) TFEU

Article 107(2) TFEU lists three types of aid that "shall be compatible with the internal market". Letter (b) thereof includes "aid to make good the damage caused by natural disasters or exceptional occurrences".

Aid fulfilling the conditions of Article 107(2)(b) TFEU "shall" be compatible with the internal market. The use of the term "shall" in the compatibility bases of Article 107(2) TFEU, as opposed to the use of the term "may" in the compatibility bases of Article 107(3) TFEU, means that in assessing the former compatibility bases the Commission does not enjoy the wide discretion²⁵⁵ that it enjoys in implementing the latter compatibility bases. Therefore, aid fulfilling the conditions of Article 107(2)(b) TFEU is compatible *ex lege*, meaning that the Commission is obliged to declare it compatible.²⁵⁶

Nevertheless, pursuant to Article 108(3) TFEU, Member States are still obliged to notify the aid and suspend its implementation until the Commission concludes that the conditions of Article 107(2)(b) TFEU are fulfilled and authorises the aid as compatible with the internal market. The *ex lege* compatibility of aid under Article 107(2) TFEU means that, on substance, the Commission is obliged to declare it compatible, but it does not entitle Member States not to follow the prior notification procedure of Article 108(3) TFEU.

According to Article 107(2)(b) TFEU, State aid is compatible if it fulfils the following three cumulative conditions: (i) existence of a natural disaster or exceptional occurrence; (ii) the natural disaster or exceptional occurrence has caused damage to the undertaking(s) receiving the aid; and (iii) the aid does not compensate more than the damage suffered by the respective undertaking.

²⁵⁴ Commission Decision of 15 May 2020, Denmark: *COVID-19 – Portfolio guarantee on trade credit insurance* (SA.57112 (2020/N)). Commission Decision of 25 May 2020, Netherlands: *COVID-19 – Portfolio guarantee on trade credit insurance* (SA.57095 (2020/N)). Commission Decision of 13 August 2020, Italy: *COVID-19 – State guarantee for portfolio of trade credit insurances* (SA.57937 (2020/N)).

²⁵⁵ *Holland Malt v Commission* (C-464/09 P) EU:C:2010:733, para.46; *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13) EU:C:2015:151, paras 66-67.

²⁵⁶ *Philip Morris v Commission* (C-730/79) EU:C:1980:209, para.17; *Olympiaki Aeroporia Ypiresies v Commission* (T-268/06) EU:T:2008:222, para.51.

Those three conditions are analysed in relation to the COVID-19 outbreak in sections 0, 0 and 0 below. Subsequently, sections 0 and 0 elaborate on the form that such aid may take and on the scope of beneficiaries.

4.1 First condition: exceptional occurrence

In order to qualify as an “exceptional occurrence”, an event must be (i) unforeseeable or difficult to foresee; (ii) of significant scale or economic impact; and (iii) extraordinary, in the sense that it differs sharply from the conditions under which the market normally operates.²⁵⁷ In the past, the Commission has accepted as exceptional occurrences: war, internal disturbances or strikes, and, with certain reservations and depending on their extent, major nuclear or industrial accidents and fires which result in widespread loss.²⁵⁸

In a decision adopted on 12 March 2020, the Commission acknowledged that the COVID-19 outbreak was an exceptional occurrence. The outbreak was not foreseeable, it distinguishes itself from ordinary events by its character and by its significant effects on the affected undertakings and the economy in general and therefore it lays outside of the normal functioning of the market.²⁵⁹ The following day, in its Communication on a coordinated economic response to the COVID-19 outbreak,²⁶⁰ the Commission stated explicitly that the COVID-19 outbreak qualifies as “exceptional occurrence” within the meaning of Article 107(2)(b) TFEU. Therefore, the Commission considers that condition fulfilled in the context of the COVID-19 outbreak.

4.2 Second condition: direct causal link between damage and exceptional occurrence

The second condition is the trickiest one of the three. According to settled case-law, there must be a “direct causal link” between the exceptional occurrence and the damage to be compensated by the aid. The requirement of direct causal link stems from the narrow interpretation of Article 107(2)(b) TFEU, which is an exception to the general principle laid down in Article 107(1) TFEU that State aid is incompatible.²⁶¹ Therefore, a mere causal relationship between the exceptional occurrence and the damage suffered by the undertaking is not sufficient. Instead, there must be a sufficiently *direct* causal link between the exceptional occurrence and that damage.

In order to better grasp that requirement, it is useful to compare with the case-law on non-contractual liability of EU institutions, where the same term is used even if it concerns the direct causal link between two different events: the unlawful conduct and the damage incurred by the applicant. According to the Court, a “direct causal link” means that the unlawful conduct must be *the determining cause* of that damage.²⁶² In other words, even in case of contribution by the unlawful conduct to the alleged damage, that contribution *must not be too remote* because of some responsibility resting on others, such as the

²⁵⁷ See recital 25 (especially footnotes 7-9) of Commission Decision of 12 March 2020, Denmark: *Compensation scheme for cancellation of events related to COVID-19* (SA.56685 (2020/N)). See also page 6 of the Communication on Coordinated economic response to the COVID-19 Outbreak.

²⁵⁸ See point 330 of the European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020 [2014] OJ C 204/1.

²⁵⁹ See recitals 26-30 of *Compensation scheme for cancellation of events related to COVID-19* Decision (SA.56685 (2020/N)).

²⁶⁰ See page 6 of the Communication on Coordinated economic response to the COVID-19 Outbreak.

²⁶¹ *Greece v Commission* (C-278/00) EU:C:2004:239, paras 81-82; *Spain v Commission* (C-73/03) EU:C:2004:711, paras 36-37; *Atzeni and Others* (Joined Cases C-346/03 and C-529/03) EU:C:2006:130, para.79; Order in *Albergo Quattro Fontane and Others v Commission* (Joined Cases C-227/13 P to C-239/13 P) EU:C:2014:2177, para.46; *Germany v Commission* (C-156/98) EU:C:2000:467, para.49; *Olympiaki Aeroporoi Ypiresies* EU:T:2008:222, paras 49 and 52.

²⁶² Order in *Mauerhofer v Commission* (C-433/10 P) EU:C:2011:204, para.127 and the case-law cited therein.

applicant.²⁶³ For example, damage consisting in bank guarantee charges incurred by a company penalised by a Commission decision later annulled by the General Court was not in direct causal link with the unlawfulness of that decision, because that damage was the consequence of the company's own decision to provide a bank guarantee so as to avoid paying the fine immediately.²⁶⁴

An attempt by the General Court to widen the interpretation of "direct causal link" was recently rejected by the Court of Justice. The General Court tried to distinguish from the case-law mentioned in the preceding paragraph cases where EU Courts exceed the reasonable time for adjudicating in a case. The General Court found that such unlawfulness was in direct causal link with the damage consisting in bank guarantee charges during that overrun period. It argued that the causal link has not become too remote by the applicant's initial decision not to pay immediately the fine imposed by a Commission decision and to provide a bank guarantee instead, for two reasons. First, at the time when the applicant provided a bank guarantee, the breach of the obligation to adjudicate within a reasonable time was unforeseeable, since the applicant could legitimately expect its action to be dealt with within a reasonable time. Second, the reasonable time for adjudicating the court case was exceeded after the applicant's initial decision to provide a bank guarantee.²⁶⁵

Nevertheless, the Court of Justice set aside the General Court's judgment and dismissed the action for damages. According to the Court, there would be a direct causal link only if it were compulsory to maintain the bank guarantee, so that the applicant would not be entitled to pay the fine and put an end to the bank guarantee before the date of the delayed judgment. Like the provision of the bank guarantee, the maintenance of that guarantee is a matter for the discretion of the applicant in the light of its financial interests. As a matter of EU law, nothing prevents that undertaking from terminating at any time the bank guarantee and paying the fine, where that undertaking deems that option more advantageous for it in view of a possible evolution of circumstances, such an expectation that the judgment might be delayed, which would increase the cost of the bank guarantee. Therefore, the Court concluded that the breach of the obligation to adjudicate within a reasonable time could not be the determining cause of the damage suffered by the applicant as a result of paying bank guarantee charges during the period by which that time was exceeded. Such damage was the consequence of the applicant's own decision to maintain the bank guarantee throughout the court proceedings.²⁶⁶

The Court's strict interpretation of "direct causal link" in the context of non-contractual liability should not be transposed automatically to cases under Article 107(2)(b) TFEU. Although the same term is used, the context is different, since the direct causal link is not between a damage and the unlawful conduct of a specific person, but rather between a damage and an exceptional, unforeseeable and widely harmful occurrence, which might be nobody's fault. Therefore, one cannot exclude that the case-law on Article 107(2)(b) TFEU moves in a different direction in relation to some aspects of the strict interpretation of the term "direct causal link" in the case-law on non-contractual liability. Nevertheless, the latter case-law is certainly a useful compass for the main direction that the case-law on Article 107(2)(b) TFEU could follow on the interpretation of that term.

Although in non-expert language many economic disadvantages could be ultimately attributed to the COVID-19 outbreak, only damage in "direct causal link" with the outbreak is eligible for compensation on the basis of Article 107(2)(b) TFEU. The case-law on non-contractual liability indicates that the COVID-19 outbreak must be *the determining cause* of the damage suffered by the undertakings that the Member State seeks to compensate. Therefore, the outbreak cannot be merely one of several other factors equally contributing to that damage. Even if the outbreak has contributed to the damage, that

²⁶³ *Trubowest Handel and Makarov v Council and Commission* (C-419/08 P) EU:C:2010:147, para.59.

²⁶⁴ *Holcim (Deutschland) v Commission* (T-28/03) EU:T:2005:139, paras 119-124; *Inalca and Cremonini v Commission* (C-460/09 P) EU:C:2013:111, paras 117-121.

²⁶⁵ *Kendrion v European Union* (T-479/14) EU:T:2017:48, paras 83-90.

²⁶⁶ *European Union v Kendrion* (C-150/17 P) EU:C:2018:1014, paras 52-62 and 119.

contribution *must not be too remote* because of other intervening factors, including the responsibility resting on the undertakings to mitigate their damage as much as possible. The degree of freedom that undertakings enjoy or not in taking certain actions in the context of the COVID-19 outbreak, especially the freedom to exercise profitably their economic activity, would seem an important consideration in that regard.

In the same vein, the Commission explains in point 15bis of the Temporary Framework that “*aid on the basis of Article 107(2)(b) TFEU must compensate for damage directly caused by the COVID-19 outbreak, such as damage directly caused by quarantine measures precluding the beneficiary from operating its economic activity. By contrast, other kind of aid addressing more generally the economic downturn from the COVID-19 outbreak is to be assessed under the different compatibility basis of Article 107(3)(b) TFEU, and therefore in principle on the basis of this Temporary Framework*”.²⁶⁷

Therefore, the Commission considers that damage directly caused by quarantine measures precluding the beneficiary from operating its economic activity is eligible for compensation under Article 107(2)(b) TFEU. The Commission has also mentioned as possible beneficiaries of aid under that provision undertakings in sectors particularly hit by the outbreak, such as transport, tourism, culture, hospitality and retail, or organisers of events cancelled due to the outbreak.²⁶⁸ The latter group of undertakings was the subject-matter of the Commission’s first decision approving aid on the basis of Article 107(2)(b) TFEU in the context of the COVID-19 outbreak. By that decision, which was adopted on 12 March 2020, the Commission authorised a Danish aid scheme compensating organisers of events with more than 1 000 participants²⁶⁹ that had to be cancelled, postponed or substantially changed due to the COVID-19 outbreak and pursuant to an official recommendation by the Danish authorities. The scheme included events planned in the period from 6 to 31 March 2020.²⁷⁰

It follows that the requirement of “direct causal link” is likely to be fulfilled in cases of damage directly caused by official recommendations²⁷¹ or prohibitions²⁷² of the competent authorities aimed at limiting the COVID-19 outbreak. For that purpose, the notifying Member State would have to provide information to the Commission on how it has dealt with the COVID-19 outbreak, such as: the date of first case reported in that country; the number of affected persons; the economic impact of the outbreak, notably in the sectors covered by the aid; the official recommendations or prohibitions decided by the competent authorities, including the dates of adoption, entry into force, expiry and prolongation of such recommendations or prohibitions.²⁷³

The Commission has accepted a direct causal link not only concerning the reduced economic activity of undertakings directly subject to government imposed sanitary restrictions or quarantine measures, but also concerning the reduced economic activity of undertakings whose main clients or suppliers were subject to similar coercive measures. Such measures resulted in broken supply and demand chains with direct and significant consequences on the activity and financial performance of the undertakings at

²⁶⁷ In that regard, see also section 0 of the present chapter, which analyses aid under section 3.12 of the Temporary Framework.

²⁶⁸ Temporary Framework, point 15.

²⁶⁹ The aid scheme included also events targeted at designated COVID-19 related risk groups, such as the elderly and vulnerable persons, irrespective of the number of participants. Such events were also within the scope of the official recommendation of the Danish authorities.

²⁷⁰ *Compensation scheme for cancellation of events related to COVID-19* Decision (SA.56685 (2020/N)).

²⁷¹ See also recitals 5-8, 29 and 54-55 of Commission Decision of 22 April 2020, Sweden: *aid for cancelled or postponed cultural events* (SA.57051 (2020/N)).

²⁷² See also recitals 60-63 of Commission Decision of 27 May 2020, Denmark: *Compensation scheme for the Danish media sector* (SA.57106 (2020/N)).

²⁷³ See page 1 of the European Commission, “Notification template for State aid measures notified under Article 107(2)(b) TFEU in the Covid-19 outbreak context”, which is available at: https://ec.europa.eu/competition/state_aid/what_is_new/notification_template_107_2_b.pdf [Accessed 2 October, 2020].

issue. This is especially the case for large undertakings, which are particularly dependant on long, complex and highly intertwined supply and demand chains.²⁷⁴ By contrast, the reduced activity of beneficiaries must not stem merely from lower overall demand following the COVID-19 outbreak, which in itself would not be damage directly caused by the outbreak but rather part of the economic downturn following the COVID-19 outbreak, which is to be assessed under the different compatibility basis of Article 107(3)(b) TFEU.²⁷⁵

In the same vein, the Commission has accepted a direct causal link in case of an aid scheme where the beneficiaries' capability to operate at normal capacity had to be affected directly by at least one of four situations: (i) the beneficiary was affected by an administrative decision or recommendation on sanitary or public health restrictions aimed at counteracting the COVID-19 outbreak; (ii) the beneficiary or its employees were under partial or full quarantine due to the infection of one of its employees; (iii) the beneficiary was affected by a partial or entire restriction of business activity resulting from the unavailability of key deliveries of goods, materials or services in connection with broken supply chains as a result of the outbreak; (iv) the beneficiary was affected by the loss of income caused by the entire or partial inability to carry out sales of ordered goods or services because its clients were not able to collect them or did not make payment as a direct and proven result of the outbreak. In addition, compensation was limited to the period from 12 March 2020 to 31 August 2020. The Commission noted that large undertakings were particularly affected by such factors affecting complex value chains. It also hinted that lower demand following the outbreak would be insufficient on its own to establish a direct causal link.²⁷⁶

Furthermore, a direct causal link was also confirmed in a Swedish case of tax deductions on wage-related costs for seafarers employed on ten specific vessels that were taken out of traffic and lied at quay due to closed borders and travel restrictions imposed in response to the COVID-19 outbreak in the period from 24 March to 31 July 2020.²⁷⁷

4.3 Third condition: no overcompensation

Pursuant to Article 107(2)(b) TFEU, the aid must not exceed the damage suffered by the undertakings concerned, which must be assessed as precisely as possible.²⁷⁸

In order to demonstrate that the third condition of Article 107(2)(b) TFEU is fulfilled, the Commission has requested notifying Member States to provide certain information on the damage covered by the aid. In particular, the notifying Member State should provide information on the type of damage to be compensated, which could consist in expenses incurred (*damnum emergens*) or revenue foregone (*lucrum cessans*) by the undertakings due to the outbreak. For example, undertakings might have foregone revenue during a period that the authorities obliged certain establishments to stay closed in order to limit the dissemination of the virus. Another example of foregone revenue could concern the loss of traffic for (air, maritime or land) transport operators as a result of restrictions imposed by Member States, such as flight bans or lock-downs. Nevertheless, costs avoided by the beneficiaries, such as operating costs not incurred during a lock-down or flight ban, should be deducted from the damage to be compensated by the aid.

²⁷⁴ See recital 74 of Commission Decision of 29 May 2020, Poland: *Anti-crisis measures* (SA.57054 (2020/N)).

²⁷⁵ Temporary Framework, point 15bis. See also recital 74, last sentence, of *Anti-crisis measures* Decision (SA.57054 (2020/N)).

²⁷⁶ See recitals 25, 26 and 56 of Commission Decision of 23 June 2020, Hungary: *COVID-19 – Compensation scheme related to future investment* (SA.57375 (2020/N)).

²⁷⁷ See recitals 41-45 of Commission Decision of 6 July 2020, Sweden: *COVID-19 – Compensation for damage suffered by passenger ferries due to COVID-19* (SA.57710 (2020/N)).

²⁷⁸ *Spain v Commission* EU:C:2004:711, paras 36-37; *Atzeni and Others* EU:C:2006:130, para.79.

Notifying Member States should also communicate to the Commission the methodology used for assessing the damage per beneficiary, including the documents to be submitted by beneficiaries to the granting authority, certification of those documents by independent experts, verifications to be performed by the competent authorities, precise description of the damage and eligible costs of each beneficiary. If Member States use a reference period in their methodology (e.g. if the beneficiary's revenues during a lock-down period in 2020 are compared with its revenues in the same period in 2019), they should explain why such reference period is relevant and representative.²⁷⁹ The comparison with the reference period should factor in changes of important parameters, such as a reduction in the price of fuels for an airline. Moreover, if aid has already been granted to the same beneficiaries in the COVID-19 context (e.g. under the Temporary Framework or directly under Article 107(3)(b) TFEU), Member States should explain why the aid measures taken together are proportionate and do not lead to overcompensation.²⁸⁰

Furthermore, the Commission has listed certain commitments that are expected from the notifying Member States, in order for their aid measures to comply with Article 107(2)(b) TFEU. In particular:²⁸¹

- Member States should confirm that any payment exceeding the damage suffered as a direct consequence of the COVID-19 outbreak will be recovered. Such claw-back mechanism aims at ensuring that aid is limited to the damage actually suffered by the undertaking concerned, and thus to avoid overcompensation.
- The payment made to beneficiaries must be net of any amount recovered by insurance, litigation, arbitration or other source for the same damage. As explained in relation to the second condition of Article 107(2)(b) TFEU, the direct causal link is broken in case an undertaking fails to mitigate its damage as much as possible. Therefore, if an undertaking were to negligently not pursue the reimbursement of certain COVID-19 related damage from its insurer, that damage would not be in direct causal link with the COVID-19 outbreak, and therefore it should not be compensated with aid under Article 107(2)(b) TFEU. Similarly, if aid is paid out before any insurance payments, the Member State must commit to recover from the beneficiary the amounts paid by such insurance.
- In the same vein, Member States should generally exclude from the scope of the aid any undertaking that is responsible for the damage suffered or did not conduct its activities with due diligence or in compliance with applicable legislation or did not take any measure to mitigate its damages.
- Aid under an aid scheme based on Article 107(2)(b) TFEU cannot be cumulated with other aid for the same eligible costs. Member States are also expected to submit a report to the Commission within one year from the adoption of the decision authorising the aid. The report should elaborate on the amount of compensations and recoverable advances granted and it must include a summary of all recoveries ordered under the aid measure.

The above safeguards have been implemented in various Commission decisions authorising compatible aid based on Article 107(2)(b) TFEU, such as aid for cancelled or postponed cultural events in

²⁷⁹ For example, see recital 73 of Commission Decision of 30 June 2020, Slovenia: *Compensation scheme for damage caused by the COVID-19 outbreak* (SA.57459 (2020/N)).

²⁸⁰ See pages 2 and 4 of the Commission “Notification template”, which is available at: https://ec.europa.eu/competition/state_aid/what_is_new/notification_template_107_2_b.pdf [Accessed 2 October, 2020].

²⁸¹ See page 3 of the Commission, “Notification template”, which is available at: https://ec.europa.eu/competition/state_aid/what_is_new/notification_template_107_2_b.pdf [Accessed 2 October, 2020].

Sweden,²⁸² aid for the media sector in Denmark²⁸³ anti-crisis measures in Poland,²⁸⁴ aid to the restaurant sector in Finland²⁸⁵ and the Austrian²⁸⁶ and Swedish²⁸⁷ compensation schemes.

Once the damage suffered by the undertaking has been properly established, Member States may compensate 100% of that damage based on Article 107(2)(b) TFEU, but they are also free to compensate only part of the damage, if they wish so. For example, in the context of the Icelandic volcanic eruption and dust cloud in April 2010, the Commission approved an aid scheme in Slovenia covering 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.²⁸⁸ Moreover, in the context of the COVID-19 outbreak, the Commission authorised aid compensating only 75% of foregone revenue up to EUR 90 600 of organisers of cultural events in Sweden, and 50% of foregone revenue above that threshold.²⁸⁹ Similarly, the Polish anti-crisis measures required the beneficiary to bear at least 25% of the COVID-19 related damage.²⁹⁰ The possibility for Member States to compensate less than 100% of the damage eligible under Article 107(2)(b) TFEU also stems from point 345 of the Commission's guidelines on State aid to the agricultural sector, which states that such aid must be limited to 100% of the eligible costs, and therefore may also be less than that maximum threshold.²⁹¹

4.4 Form of the aid

Article 107(2)(b) TFEU does not require that the aid takes a specific form, such as a direct grant to be used for the restoration of eligible damage. In fact, the Commission has never required in its decisional practice that beneficiaries use such aid to restore their damage. Member States simply compensate beneficiaries for eligible damage and then those beneficiaries are, in principle, free to use their compensation as they see fit.

Since aid based on Article 107(2)(b) TFEU does not have to take the specific form of a direct grant, it may also be granted through other forms, such as a State guarantee, a loan, or an equity injection. For example, based on Article 107(2)(b) TFEU the Commission authorised aid to airline SAS in the form of State guarantees by Denmark and Sweden, while explaining that, even if the full amount of the guarantees constituted aid, it would still be below the damage that SAS would incur due to the COVID-19 outbreak.²⁹² Moreover, the Commission approved aid to Austrian Airlines in the form of a

²⁸² See recitals 18, 27 and 61-66 of *Aid for cancelled or postponed cultural events* Decision (SA.57051 (2020/N)).

²⁸³ See recitals 67-76 of *Compensation scheme for the Danish media sector* Decision (SA.57106 (2020/N)).

²⁸⁴ See recitals 78-84 of *Anti-crisis measures* Decision (SA.57054 (2020/N)).

²⁸⁵ See recitals 62-65 of Commission Decision of 28 May 2020, Finland: *Damage compensation scheme for restaurants* (SA.57284 (2020/N)).

²⁸⁶ See recitals 69-74 of Commission Decision of 23 May 2020, Austria: *Directive for fixed cost subsidies* (SA.57291 (2020/N)).

²⁸⁷ See recitals 61-75 of Commission Decision of 11 June 2020, Sweden: *Compensation scheme for undertakings faced with turnover losses due to COVID-19* (SA.57372 (2020/N)).

²⁸⁸ Commission Decision of 1 August 2011, Slovenia: *Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010* (SA.32163 (2010/N)).

²⁸⁹ See recital 60 of *Aid for cancelled or postponed cultural events* Decision (SA.57051 (2020/N)).

²⁹⁰ See recital 82(a) of *Anti-crisis measures* Decision (SA.57054 (2020/N)).

²⁹¹ See point 345 of the Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020.

²⁹² See recital 66 of Commission Decision of 15 April 2020, Denmark: *Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines* (SA.56795 (2020/N)). See recital 68 of Commission Decision of 24 April 2020, Sweden: *Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines* (SA.57061 (2020/N)). Applications for the annulment of those two decisions are currently pending in *Ryanair v Commission* (T-378/20) and in *Ryanair v Commission* (T-379/20).

subordinated loan, convertible into a grant,²⁹³ as well as aid to undertakings in Poland in the form of subsidised loans.²⁹⁴

In any event, the aid element of a measure under Article 107(2)(b) TFEU must not exceed 100% of the beneficiary's eligible damage and the form of that measure must not distort the compensatory nature of aid under Article 107(2)(b) TFEU. For example, aid which is essentially regional investment aid or aid for the provision of services of general economic interest (SGEI) should not take the form of aid based on Article 107(2)(b) TFEU, merely in order to circumvent the compatibility requirements of such aid under Article 107(3) TFEU and Article 106(2) TFEU, respectively. Instead, Member States may perfectly well grant compensation based on Article 107(2)(b) TFEU and in parallel grant, through separate measures, regional investment aid or aid for the provision of SGEI in compliance with the applicable compatibility requirements. Moreover, the Commission has accepted that a Member State includes the size of future investments promised by an applicant for aid as one of several equally weighted criteria (including also the relative size of the damage incurred and the number of staff it commits to maintain) to prioritise applications in view of the limited budget of the aid scheme. The Commission hinted that, although such consideration was acceptable as a prioritisation criterion for aid based on Article 107(2)(b) TFEU, it could have been problematic if it were an eligibility condition.²⁹⁵

It is also worth noting that the General Court has rejected an argument whereby a beneficiary of aid belatedly tried to invoke Article 107(2)(b) TFEU as a supposed compatibility basis for State guarantees and a capital injection that were unconnected to the alleged exceptional occurrences, which concerned work accidents and delayed payments by the Greek State. The General Court found that there was no correspondence between the amount of damage allegedly caused by the two occurrences and the size of the guarantees and capital injection granted by the State. Moreover, such aid measures were of a general nature unsuited to that kind of compensatory use under Article 107(2)(b) TFEU. According to the General Court, the aid measures “*were not of a kind as to be useful in the making good of damage caused by exceptional occurrences, but were instead general measures unconnected with the damage allegedly caused by exceptional occurrences*”.²⁹⁶ Nevertheless, that statement was made in the context of a case where the State aid granted was entirely unconnected to the alleged exceptional occurrences, as evidenced also by the lack of correspondence between the aid amounts and the alleged damage. Therefore, in the author's view, it would be erroneous to interpret the General Court's statement in isolation, as an absolute rejection of State guarantees and capital injections as eligible forms of aid under Article 107(2)(b) TFEU.

4.5 Scope of beneficiaries

Article 107(2)(b) TFEU does not require Member States to exclude undertakings in difficulty from the scope of the aid. Nevertheless, if they wish, Member States may exclude such undertakings or a subgroup thereof. For example, when providing aid based on Article 107(2)(b) TFEU to the restaurant sector, Finland decided to exclude undertakings that had already declared bankruptcy.²⁹⁷ Similarly, Austria wished to exclude from its aid scheme undertakings that were in difficulty within the meaning of the GBER on 31 December 2019, as well as companies not facing serious economic problems by a decline in turnover of at least 40%. In addition, Austria provided for restrictions on the remuneration policy of the beneficiary undertakings, including restrictions on bonuses and dividends in the period

²⁹³ See Commission Decision of 6 July 2020, Austria: *Aid to Austrian Airlines* (SA.57539 (2020/N)).

²⁹⁴ See recital 82 of *Anti-crisis measures* Decision (SA.57054 (2020/N)).

²⁹⁵ See recitals 19 and 62 of *COVID-19 – Compensation scheme related to future investment* Decision (SA.57375 (2020/N)).

²⁹⁶ *Larko v Commission* (T-423/14) EU:T:2018:57, paras 38 and 159.

²⁹⁷ See recitals 24 and 64(e) of *Damage compensation scheme for restaurants* Decision (SA.57284 (2020/N)).

2020-2021.²⁹⁸ Furthermore, Sweden decided to exclude undertakings that were already in difficulty on 29 February 2020, which it considered as the beginning of the outbreak. Sweden also wished to exclude insolvent undertakings, undertakings prohibited from conducting business, undertakings with tax debts and undertakings that had not yet reimbursed previous incompatible aid.²⁹⁹

Moreover, the question arises whether Article 107(2)(b) TFEU requires that aid be non-discriminatory.

Prior to the COVID-19 outbreak, the Commission seems to have required that aid be non-discriminatory in certain cases. For example, in its communication on aid to the transport sector under Article 107(2)(b) TFEU following the terrorist attacks of 11 September 2001 in the United States, the Commission had requested that compensation be paid in a non-discriminatory manner to all airlines in a given Member State.³⁰⁰ The Commission approved such aid 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 terrorist attacks.³⁰¹ Moreover, in the context of the Icelandic volcanic eruption and dust cloud in April 2010, which led to the closure of most of European airspace, the Commission approved an aid scheme in Slovenia covering part of the economic losses of airlines and airports. The Commission noted that the aid was non-discriminatory since it was granted to all air carriers with a valid Slovenian operating licence, who were the only companies directly damaged from the closure of the Slovenian airspace.³⁰² In another case, the Commission approved a Cypriot scheme to compensate damage suffered by airlines affected by the ban to overfly Turkish airspace. The Commission concluded that the scheme was non-discriminatory because it was open to all air carriers with a valid Cypriot operating licence and in a position to operate flights. However, in practice there was only one beneficiary, Cyprus Airways, which was the only airline operating with a Cypriot licence at the time.³⁰³ On the other hand, the Commission also approved individual aid on the basis of Article 107(2)(b) TFEU.³⁰⁴

However, despite the abovementioned Commission decisions, it is questionable that a requirement of non-discrimination stems from Article 107(2)(b) TFEU. It must be clarified from the outset that State aid necessarily entails a degree of discrimination, since it is by nature selective. According to the case-law, the condition of “selectivity” in Article 107(1) TFEU presupposes a discriminatory treatment between the undertaking(s) receiving the aid and those that do not.³⁰⁵ Therefore, the real question is not whether aid based on Article 107(2)(b) TFEU should be non-discriminatory (State aid is always discriminatory), but whether Article 107(2)(b) TFEU imposes an upper limit on how discriminatory such aid can be.

²⁹⁸ See recitals 28, 37, 46, 71(h) and 73 of *Directive for fixed cost subsidies* Decision (SA.57291 (2020/N)).

²⁹⁹ See recitals 22, 23 and 71 of *Compensation scheme for undertakings faced with turnover losses due to COVID-19* Decision (SA.57372 (2020/N)).

³⁰⁰ See point 35 of the Communication from the Commission to the European Parliament and the Council on the repercussions of the terrorist attacks in the United States on the air transport industry COM(2001)574 final.

³⁰¹ Commission Decision of 2 July 2002, Germany: *Compensation of losses following the closure of airspace in the period from 11 to 14 September 2001* (N 269/2002). Commission Decision of 19 March 2003, France: *Sûreté aérienne - Compensation des coûts à la suite des attentats du 11 septembre 2001* (N 309/2002).

³⁰² See recitals 35 and 50 of *Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010* Decision (SA.32163 (2010/N)).

³⁰³ See recitals 51, 65 and 66 of Commission Decision of 27 June 2012, Cyprus: *Compensation scheme for air carriers registered in Cyprus for additional costs linked to the impossibility to overfly the Turkish airspace* (SA.32523 (2010/N)).

³⁰⁴ Commission Decision of 24 February 2010, Spain: *Aid to compensate for the damages caused by the fire to Palmitos Park* (N 622/2008). Commission Decision of 15 December 2014, Poland: *Reconstruction of heating infrastructure in Jaslo destroyed by the floods of 2010* (SA.38178 (2014/N)).

³⁰⁵ *Commission v World Duty Free Group* (C-20/15 P) EU:C:2016:981, para.54.

The wording of Article 107(2)(b) TFEU does not include any mention of non-discrimination, let alone an upper limit on how discriminatory an aid can be. The case-law has not imposed any such requirement in relation to Article 107(2)(b) TFEU and EU Courts are certainly not bound by previous decisions of the Commission. If the drafters of the Treaty wished to include considerations of non-discrimination in Article 107(2)(b) TFEU, they would have made that explicit as in Article 107(2)(a) TFEU, which foresees compatible “*aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned*”. Therefore, the literal and the *a contrario* interpretation of Article 107(2)(b) TFEU indicate the absence of any requirement of non-discrimination. The latter provision does not include either any other requirement that could raise indirectly a question of discrimination, such as an assessment of the distortion of competition in the market.

From a teleological point of view, the primary aim of aid to compensate an exceptional occurrence is “*to make good the damage*”, and therefore to ensure that at least some economic activity survives in the Member State concerned. This aim is not necessarily compatible with the compensation of all undertakings damaged by a given exceptional occurrence. In case of exceptional occurrences causing damage of great magnitude, such as the COVID-19 outbreak, many (if not all) Member States would simply not have sufficient resources to fully compensate all damaged undertakings. Even compensating all undertakings of a given sector could be impossible, if that sector has suffered very high damage, as did the air transport sector during the COVID-19 outbreak. Obliging Member States to distribute their limited resources proportionately to all damaged undertakings in a given sector could result in minor amounts of compensation per undertaking, which would defeat the purpose of Article 107(2)(b) TFEU by providing not so meaningful relief. If Member States are faced with the difficult choice between the disappearance of an entire sector and saving at least one undertaking, the latter could be a legitimate choice.

Moreover, a requirement of non-discrimination in Article 107(2)(b) TFEU could not entitle the allegedly discriminated undertakings to receive an aid measure from which they were initially excluded. Such outcome would run counter to the case-law that “*under EU State aid rules, no undertaking can claim a right to receive State aid; or, to put it differently, no Member State can be considered obliged, as a matter of EU law, to grant State aid to a company*”.³⁰⁶

Since Article 107(2)(b) TFEU does not distinguish between aid schemes and individual aid measures, aid can be granted in either form as long as it fulfils the three cumulative conditions of that provision.³⁰⁷ Furthermore, Member States are in principle free to delineate the group of beneficiaries of an aid scheme by defining accordingly the general eligibility conditions of the scheme. For example, a Member State may wish to compensate all airlines operating in its territory, while another Member State (with lower budget or simply with less appetite to grant State aid) may choose to compensate only one or some of the airlines operating in its territory.

However, a possible upper limit on the level of discrimination that aid measures may entail could stem from the case-law on indissolubly linked aspects of State aid that breach other provisions of EU law.³⁰⁸ The case-law has stated that such breaches could affect the Commission’s assessment of compatibility of the respective State aid measure, but it has not yet clarified how exactly that compatibility assessment is affected. For example, it is not clear whether the Commission must simply take into account the indissolubly linked breach, while remaining free to approve or prohibit that aid depending on its overall assessment of compatibility, or whether there are cases of such serious indissolubly linked breaches that would require the Commission to consider the aid incompatible. It is

³⁰⁶ Opinion of A.G. Wahl in *Kotnik* EU:C:2016:102, para.79. See also to that effect: *Milchindustrie-Verband* EU:T:2015:906, para.29; *Order Abaco Energy* EU:T:2019:206, paras 58 and 82.

³⁰⁷ See above in the beginning of section 4 of this chapter.

³⁰⁸ See section 0 of the present chapter.

also not yet clear whether the answer would be the same concerning the compatibility assessment under Article 107(3) TFEU, where the Commission enjoys wide discretion, and the compatibility assessment under Article 107(2) TFEU, where the Commission is obliged to authorise the aid if it fulfils all the applicable conditions.

Since arguments of non-discrimination have been raised in pending litigation³⁰⁹ against decisions whereby the Commission approved aid based on Article 107(2)(b) TFEU in the context of the COVID-19 outbreak, EU Courts will have the opportunity to provide clarity in that regard.

Furthermore, the Commission has clarified that the principle of “one time last time”³¹⁰ of the Rescue and Restructuring Guidelines does not cover aid under Article 107(2)(b) TFEU, since the latter type of aid is not “*rescue aid, restructuring aid or temporary restructuring support*” within the meaning of point 71 of the Rescue and Restructuring Guidelines. Therefore, Member States may compensate under Article 107(2)(b) TFEU the damages directly caused by the COVID-19 outbreak to undertakings that have received aid under the Rescue and Restructuring Guidelines.³¹¹

5. Targeted amendments to existing State aid regulations and guidelines

In July 2020, the Commission introduced two significant amendments to existing State aid legal instruments, in order to adjust them to the exceptional circumstances of the COVID-19 outbreak.

The first amendment concerns the eligibility of undertakings in difficulty to receive block-exempted aid under the GBER, as well as notifiable aid under various sets of guidelines.

In principle, undertakings in difficulty are not eligible to receive any type of aid except for rescue and restructuring aid. As the Commission explains in the Rescue and Restructuring Guidelines, “[g]iven that its very existence is in danger, an undertaking in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured”.³¹²

However, due to the negative economic consequences of the COVID-19 outbreak, many undertakings have entered into difficulty at no fault of their own. The qualification of such undertakings, which would otherwise be financially healthy, as “undertakings in difficulty” in the current COVID-19 context does not result from their mismanagement. In normal economic circumstances, an undertaking in difficulty would be a mismanaged, to the point of non-viability, undertaking in a world of generally healthy competing undertakings. However, in the context of the COVID-19 outbreak, most undertakings face liquidity and even solvency problems due to an external, unforeseeable and widespread event: the negative economic impact of the outbreak. The temporary difficulties of those undertakings are not the result of their own mismanagement or other structural and inherent viability problems.

For that reason, undertakings that are in difficulty only due to the outbreak are expected to return to viability, once the economic environment becomes normal again, without the need to restructure their

³⁰⁹ See, for example, the OJ publications of the applications in pending cases *Ryanair v Commission* (T-378/20) and (T-379/20).

³¹⁰ See section 3.6.1 of the Guidelines for non-financial undertakings in difficulty.

³¹¹ Temporary Framework, point 15.

³¹² See point 23 of the Guidelines for non-financial undertakings in difficulty. Certain very limited exceptions in the GBER concern aid schemes to make good the damage caused by certain natural disasters, start-up aid schemes and regional operating aid schemes, provided those schemes do not treat undertakings in difficulty more favourably than other undertakings (see Article 1(4)(c) of the GBER). Moreover, in case of aid fulfilling the conditions of a compatibility basis of Article 107(2) TFEU, the Commission would not be entitled to require Member States to exclude undertakings in difficulty. Aid under Article 107(2) TFEU is compatible *ex lege*, and therefore the Commission cannot use its discretion to impose a requirement not foreseen in that provision of the Treaty.

business. Indeed, apart from one limited exception,³¹³ the Temporary Framework does not require the restructuring of beneficiaries of aid, even if they may qualify as “undertakings in difficulty” at the moment of granting of the aid (after 31 December 2019). This rule indicates that, as a matter of principle, the Commission considers that undertakings are capable of overcoming their COVID-induced difficulties with the help of temporary State aid under the Temporary Framework but without having to restructure their business.

However, other State aid rules were not fully adapted to the exceptional circumstances of the COVID-19 outbreak, since they required the beneficiary not to qualify as an “undertaking in difficulty” at the moment of granting of the aid, even if that was during the economic crisis of the outbreak. The widespread economic impact of the COVID-19 outbreak would render many undertakings ineligible to receive any type of aid, except for rescue and restructuring aid. Moreover, since their qualification as “undertakings in difficulty” is due to no fault of their own, such outcome would seem disproportionate and unequitable in this exceptional context.

In view of the above, the Commission introduced an amendment whereby the exclusion of undertakings in difficulty as beneficiaries of various types of aid did not apply to undertakings which were not in difficulty on 31 December 2019 but entered into difficulty in the period from 1 January 2020 to 30 June 2021. This amendment was introduced in the GBER³¹⁴ and in several sets of guidelines.³¹⁵

The second of the two abovementioned amendments concerns the requirement in the GBER that beneficiaries of regional investment aid must not “relocate” to the Member State granting the aid.

The idea behind that GBER requirement is that a Member State should not try to lure undertakings in its territory by granting them aid that leads to new production facilities built in that Member State, but to the closure of other facilities of that undertaking in other Member States.³¹⁶ Therefore, Article 14(16) of the GBER requires the beneficiary of regional investment aid to “confirm that it has not carried out a relocation to the establishment in which the initial investment for which aid is requested is to take place, in the two years preceding the application for aid and give a commitment that it will not do so up to a period of two years after the initial investment for which aid is requested is completed”. Article 2(61a) of the GBER defines relocation as “a transfer of the same or similar activity or part thereof from an establishment in one contracting party to the EEA Agreement (initial establishment) to the establishment in which the aided investment takes place in another contracting party to the EEA Agreement (aided establishment). There is a transfer if the product or service in the initial and in the aided establishments serves at least partly the same purposes and meets the demands or needs of the same type of customers and jobs are lost in the same or similar activity in one of the initial establishments of the beneficiary in the EEA”.

The scope of the above GBER provisions is admittedly rather wide. They target transfers of activity to the granting Member State involving job losses in another Member State, although such transfers and job losses could also be the result of rational restructuring of the beneficiary’s EEA operations, especially during such long period of time (from two years before the application for aid to two years

³¹³ See point 85 of the Temporary Framework.

³¹⁴ Commission Regulation 2020/972.

³¹⁵ Commission Communication concerning the prolongation and the amendments of the Guidelines on Regional State Aid for 2014-2020, Guidelines on State Aid to Promote Risk Finance Investments, Guidelines on State Aid for Environmental Protection and Energy 2014-2020, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication on the Criteria for the Analysis of the Compatibility with the Internal Market of State Aid to Promote the Execution of Important Projects of Common European Interest, Communication from the Commission – Framework for State aid for research and development and innovation and Communication from the Commission to the Member States on the application of Articles 107 and 108 TFEU to short-term export-credit insurance [2020] OJ C 224/ 2.

³¹⁶ For more background on that requirement, as well as a comparison with a similar but lighter horizontal requirement of the Temporary Framework, see section 0 of the present chapter.

after the aided investment is completed). “Relocation” in the sense of the GBER catches cases where a Member State lures an undertaking with regional investment aid causing it to close down facilities in other Member States, but it might also catch cases of rational restructuring of the beneficiary’s EEA operations which is not caused by the aid.

Nevertheless, ascertaining whether a transfer of activity or a job loss is caused by the aid or is due to rational restructuring unrelated to the aid, would require a complex assessment of causality and counterfactuals as well as an examination of genuine internal documents of the beneficiary. Such complex assessments are not suitable for block-exempted aid, which must be based on strict criteria that are “*clear and easily enforceable by the national authorities*”.³¹⁷ This is all the more so as regards the requirement of “no relocation” under the GBER, where the Member State granting the aid (and therefore in charge of implementing it correctly) is the Member State possibly luring the beneficiary in its territory, and therefore at risk of not taking fully into account detrimental effects in other Member States. The Commission has therefore opted for a simple “false positive” approach in defining relocation under the GBER. Any cases that a Member State considers unduly caught within the scope of such strict definition, may always be notified to the Commission for individual examination, where more complex and refined compatibility assessments are possible.

However, the Commission’s conservative approach on defining relocation in the GBER could be too strict in the context of the COVID-19 outbreak, where many undertakings across the EU restructure their operations in order to survive the economic crisis. They might have to temporarily or permanently lay-off staff in several Member States, which could technically qualify as “relocation” and thus render them ineligible for regional investment aid under the GBER, although such job losses would be unrelated to that aid. Therefore, the Commission added in Article 14(16) of the GBER that “[w]ith regard to commitments given prior to 31 December 2019, any loss of jobs, in the same or similar activity in one of the initial establishments of the beneficiary in the EEA, occurring between 1 January 2020 and 30 June 2021, shall not be considered a transfer within the meaning of Article 2(61a) of this Regulation”.³¹⁸

Finally, with respect to the transport sector, it is worth noting that the services of the Commission (DG COMP and DG MOVE) have prepared three working documents with useful overviews of the State aid rules applicable to the air, maritime and land transport sectors during the COVID-19 outbreak.³¹⁹

³¹⁷ *Eesti Pagar* EU:C:2019:172, paras 60-61. See also *Nerea* EU:C:2017:521, paras 34-35.

³¹⁸ Commission Regulation 2020/972.

³¹⁹ The three working documents are available on DG COMP’s website at the following links:
https://ec.europa.eu/competition/state_aid/what_is_new/air_transport_overview_sa_rules_during_coronavirus.pdf;
https://ec.europa.eu/competition/state_aid/what_is_new/maritime_transport_overview_sa_rules_during_coronavirus.pdf
https://ec.europa.eu/competition/state_aid/what_is_new/land_transport_overview_rules_during_coronavirus.pdf
[Accessed 2 October, 2020].

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