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European Commission Adopts Initiatives to Support the Real Economy Amid the COVID-19 Outbreak

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Yannis Ioannidis

The COVID-19 outbreak has already had dramatic effects on the real economy and many European-based companies are scrambling for State support, such as the transport sector, the hotel and restaurant sector and SMEs more generally. In fact, some Member States have already taken steps to adopt schemes to bail out businesses (e.g. Denmark will subsidise companies with up to 75% of employees' salaries for COVID-19 induced losses) while others are planning to do so in the next few weeks *e.g.* France, Italy, Spain and Greece.

However, before implementation, the grant of any subsidy must first be notified to, and approved by, the European Commission. This means that Member States cannot just go ahead and grant financial aid to companies suffering from damages due to the COVID-19 outbreak, without first having gone through the European Commission authorization process. Failure to comply with this requirement would subject the national authorities that granted the obligation to recover it from the beneficiary with compound interest as of the day the aid was granted.

Given that the EU has gone through many crises before, most notably the 2008 financial crisis, the European Commission already has vast experience with taking urgent measures and has thus already started issuing new rules for authorizing State aid in the context of the COVID-19 outbreak.

First, in a one page document published on 13 March the Commission has reminded EU Member States that, based on the already existing State aid rules, national authorities may grant aid to ensure that companies have sufficient **liquidity.** Second, on 20 March the Commission adopted a **State aid Temporary Framework** based on Article 107(3)(b) TFEU regarding aid to "remedy a serious disturbance in the economy of a Member State". Third, on 13 March the Commission also recalled that it may authorize aid directly under Article 107(2)(b) TFEU "**to make good the damage caused by exceptional occurrences**" such as a COVID-19 pandemic outbreak. Altogether, these steps signal a high degree of willingness from the European Commission to allow the use of State aid to salvage the European economy.

The conditions for using these instruments and their practical use are briefly reviewed in the following.

I. State aid to repair companies' liquidity problems

On 13 March the Commission reminded EU Member States that State support to solve companies' **liquidity problems** may be granted without it constituting notifiable State aid, and that, even if such State support would constitute aid, various existing State aid rules allow liquidity aid to be authorized.

First, the Commission noted that EU Member States may simply **postpone tax and social security payments** for all companies nation-wide, because, if support is offered to *all* nationally-based companies on the same terms, it would not involve State aid. However, since this type of measure cannot be targeted to the companies and individuals who need the aid and must be granted to all companies or individuals (in order to be free of State aid), it is unlikely that many Member States will have sufficient resources to adopt it.

Second, the Commission also noted that EU Member States may grant another type of non-State aid support, consisting of the granting of **State loans and State guarantees at market rates**. However, this option is subject to significant risk and may not be viable. In particular, if companies are unable to receive loans and guarantees from commercial banks because they are in financial difficulties, any State loan or State guarantee would, in fact, constitute State aid - even if they are granted at what would be considered as market rates.

Instead, the best way to provide support in a non-State aid form would probably be to grant ***de minimis* aid** consisting in the grant to companies of (i) € 200,000 over 3 years; (ii) below market interest for loans of a value of up to € 1 million over 5 years; or (iii) below market rate premiums for State guarantees with a value of up to €1.5 million over 5 years. However, it should be noted that *de minimis* aid is time dependent in the sense that companies may not receive *any other aid during the indicated time limits* - otherwise the support will be considered as State aid. Therefore, even the grant of *de minimis* aid may be a path that involves risk for the future.

The Commission also highlighted that if the grant of support to solve companies' liquidity would involve aid, it is possible to authorize that kind of aid. Indeed, Member States may grant **rescue aid** to both SMEs and large companies in difficulty in the form of State loans or guarantees covering cash flow shortfalls for up to 6 months (large companies) and 18 months (SMEs). Member States may also adopt across the board schemes for granting State aid to SMEs (that are not in difficulty) under the SME guidelines. While such aid must, however, be notified and approved by the European Commission, the latter has committed to work on a fast track procedure implying that approvals may be granted within two or three days of receiving the notification (as opposed to the normal 1 to 2 year deadline).

II. New State aid Temporary Framework for the real economy

On 20 March the European Commission sent Member States a draft proposal for a State aid Temporary Framework in order to **compensate the real economy** from losses suffered from the COVID-19 outbreak, on the basis of 107(3)(b) TFEU regarding aid to remedy a serious disturbance across the EU economy. Just like the temporary State aid banking framework that was set up during the 2008 financial crisis, this new framework includes rules and guidance on how crisis aid may be granted swiftly and without substantial difficulties. This Framework is applicable for companies that entered into difficulty after 31 December 2019 .

Under the Framework, the Commission will authorize aid schemes allowing the grant of: (i) lump sums or tax advantages for up to €500,000 per company; (ii) below market rate premiums for State guarantees, and below market interest rates for bank loans; and (iii) below market rate interest rates for loans issued by both public and private financial institutions. In addition, aid to companies – especially to SMEs – may also be channeled through banks and other institutions based on conditions that ensure that the banks do not receive any residual benefits of increasing their customer base or their range of business with a single customer.

III*.* Compensation for damages caused by an exceptional occurrence

Last but not least the Treaty already provides that State aid may be approved for companies that **suffered damages due to a serious disturbance of the economy** under Article 107(2)(b) TFEU and on 13 March, the Commission announced that it considers the COVID-19 outbreak a serious disturbance qualifying for aid under this provision. Thus, the Commission will authorize State aid for COVID-19 related damages under this provision, especially to airline companies. This applies even if a company has already received State aid in the last ten years - something which is normally not possible under the State aid rules.

The Commission has even taken the practical step of adopting a communication informing Member States of the kind of information it requires (*e.g.* description of the measures, damages suffered as a result of COVID-19, and the extent of the requested support, etc.) in order to authorise aid notifications quickly under Article 107(2)(b) TFEU.

This opportunity is very real as is also evidenced by the fact that on 12 March 2020, the Commission already authorised aid to large-scale event companies in Denmark under Article 107(2)(b) TFEU. The authorisation was granted within 24 hours of the receipt of the Danish notification of the scheme.

IV. Compensation to the financial sector

Finally, it is very likely that the adverse impact of the COVID-19 outbreak on the real economy combined with the dramatic impact the outbreak has had on the stock markets, means that financial institutions will be negatively impacted as well. On 18 March, the European Central Bank announced a €750 billion asset-purchase programme (lasting until the end of 2020), which targets in particular public- and private-sector assets. However, over time this may be insufficient. To this end the European Commission already has in place guidelines allowing Member States to bail out financial institutions (dating back to the 2008 financial crisis), although they may need to be adapted in order to address circumstances unique to the COVID-19 outbreak.

We are available to advise companies on how they may benefit from any type of support in the EU in response to COVID-19. Given that State aid grants may not distort competition unduly, we can also assist companies that are worried about competitors receiving support which does not comply with State aid rules in the context of COVID-19.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team.

The following Gibson Dunn lawyers prepared this client update: Lena Sandberg and Yannis Ioannidis. Gibson Dunn lawyers regularly counsel clients on the issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn lawyer with whom you usually work, the authors, or any member of the firm's Antitrust and Competition Practice Group:

Antitrust and Competition Group:

Brussels
Peter Alexiadis (+32 2 554 7200, palexiadis@gibsondunn.com)
Attila Borsos (+32 2 554 72 11, aborsos@gibsondunn.com)
Jens-Olrik Murach (+32 2 554 7240, jmurach@gibsondunn.com)
Christian Riis-Madsen (+32 2 554 72 05, criis@gibsondunn.com)
Lena Sandberg (+32 2 554 72 60, lsandberg@gibsondunn.com)
David Wood (+32 2 554 7210, dwood@gibsondunn.com)

Munich
Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)
Kai Gesing (+49 89 189 33 180, kgesing@gibsondunn.com)

London
Patrick Doris (+44 20 7071 4276, pdoris@gibsondunn.com)
Charles Falconer (+44 20 7071 4270, cfalconer@gibsondunn.com)
Ali Nikpay (+44 20 7071 4273, anikpay@gibsondunn.com)
Philip Rocher (+44 20 7071 4202, procher@gibsondunn.com)
Deirdre Taylor (+44 20 7071 4274, dtaylor2@gibsondunn.com)

Hong Kong
Kelly Austin (+852 2214 3788, kaustin@gibsondunn.com)
Sébastien Evrard (+852 2214 3798, sevrard@gibsondunn.com)

Washington, D.C.
D. Jarrett Arp (+1 202-955-8678, jarp@gibsondunn.com)
Adam Di Vincenzo (+1 202-887-3704, adivincenzo@gibsondunn.com)
Scott D. Hammond (+1 202-887-3684, shammond@gibsondunn.com)
Kristen C. Limarzi (+1 202-887-3518, klimarzi@gibsondunn.com)
Joshua Lipton (+1 202-955-8226, jlipton@gibsondunn.com)
Richard G. Parker (+1 202-955-8503, rparker@gibsondunn.com)
Cynthia Richman (+1 202-955-8234, crichman@gibsondunn.com)
Jeremy Robison (+1 202-955-8518, wrobison@gibsondunn.com)
Andrew Cline (+1 202-887-3698, acline@gibsondunn.com)

New York
Eric J. Stock (+1 212-351-2301, estock@gibsondunn.com)

Los Angeles
Daniel G. Swanson (+1 213-229-7430, dswanson@gibsondunn.com)
Samuel G. Liversidge (+1 213-229-7420, sliversidge@gibsondunn.com)
Jay P. Srinivasan (+1 213-229-7296, jsrinivasan@gibsondunn.com)
Rod J. Stone (+1 213-229-7256, rstone@gibsondunn.com)

San Francisco
Rachel S. Brass (+1 415-393-8293, rbrass@gibsondunn.com)

Dallas
Veronica S. Lewis (+1 214-698-3320, vlewis@gibsondunn.com)
Mike Raiff (+1 214-698-3350, mraiff@gibsondunn.com)
Brian Robison (+1 214-698-3370, brobison@gibsondunn.com)
Robert C. Walters (+1 214-698-3114, rwalters@gibsondunn.com)

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