

## **COVID-19: COMPETITION AND STATE AID LAW DURING THE CORONAVIRUS CRISIS**

**Updated as at 15 April 2020**

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*As originally published this note reflected developments as at 26 March 2020. It has been updated to take account of developments to 15 April 2020. It will be further updated on a regular basis. It provides an overview of how UK and EU competition law and EU State aid law will apply during the COVID-19 crisis. It is not legal advice and should not be relied upon as such.*

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### **Updates made in this updated note**

Links have been provided to relevant materials referred to in this Note.

In relation to competition law, the following updates have been made:

The CMA launches on-line tool to report businesses behaving unfairly (paragraph 29 below).

New UK exclusion orders for certain agreements and practices concerning the supply of groceries, health services and Isle of Wight ferry services (paragraphs 10 to 15 below).

The Commission provides guidance on cooperation, particularly for critical hospital medicines and equipment, during the crisis (paragraphs 21 to 26 below).

In relation to State aid, the following updates have been made:

The Commission amends the COVID-19 State Aid Temporary Framework to permit public support for R&D, testing and production of products to fight the COVID-19 outbreak, to protect jobs and to further support the economy, and to expand other permitted measures (paragraphs 43 to 48 below).

The Commission proposes extending the COVID-19 State Aid Temporary Framework to include recapitalisation of companies in need (paragraph 49 below).

The Commission approves a £50 billion UK ‘umbrella’ fund to support businesses in the ‘real economy’ and R&D, testing and production of coronavirus-related products (paragraph 52 below).

## Introduction

1. The Coronavirus pandemic has already had significant economic effects that will last for some time. Restaurants, bars, cafés and leisure facilities, such as gyms and cinemas, have been ordered by the Government to shut. Most retail businesses have also now shut temporarily. Travel and tourism, domestic and international, has ground to a halt. Public transport services are being reduced. This will have a severe and long-lasting effect on businesses, large and small, which are faced with falling demand and delays in being paid. There have also been reports that some businesses are seeking to exploit the situation by charging inflated prices for goods and services sold by them. Responding to the COVID-19 crisis may require competing businesses to cooperate with each other to ensure the production and supply of essential goods and services. Many businesses will need public support to survive.
2. This note focuses on how competition and State aid laws will be applied during the COVID-19 crisis, both in the United Kingdom and at the European Union level, and in what circumstances collaboration between competitors, and public support for businesses affected by the pandemic, may be permitted. Under the UK/EU Withdrawal Agreement, EU competition and State aid law will continue to be applicable to and in the UK during the transitional period, which is currently due to expire on 31 December 2020, unless extended.
3. Both the Competition and Markets Authority (“**CMA**”) and European Commission (“**Commission**”) remain fully operational, with staff working from home.<sup>1</sup> The CMA has, for example, continued to progress investigations into suspected anti-competitive behaviour, although some have been paused to enable the CMA to reallocate resources to focus on urgent work.<sup>2</sup> It has also applied to the High Court to have disqualified two directors of companies that broke competition law.<sup>3</sup> The Commission has adopted new State aid rules to deal with the crisis (which are discussed below). It has also continued

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<sup>1</sup> See <https://www.gov.uk/government/news/covid-19-cma-working-arrangements>.

<sup>2</sup> See e.g. <https://www.gov.uk/cma-cases/pharmaceutical-drugs-suspected-anti-competitive-agreements>.

<sup>3</sup> See CMA press release, *Court proceedings seeking director disqualification* (26 March 2020).

to adopt decisions in on-going State aid cases unrelated to the coronavirus crisis, including cases concerning the United Kingdom.

4. Both authorities are also progressing with merger investigations, although both agencies would prefer not to receive new merger notifications at this time. On 9 April 2020, the CMA prohibited a merger between two suppliers of airline booking software, Sabre and Farelogix;<sup>4</sup> it has also referred two mergers for a Phase 2 investigation<sup>5</sup> and will refer two others if suitable remedies are not given.<sup>6</sup> It has also requested the Commission to investigate a merger that has effects across the EU.<sup>7</sup> The Commission has recently approved a merger subject to a significant divestment remedy.<sup>8</sup>
5. The CMA, Commission and other competition authorities will continue to enforce competition law and, although there is some “relaxation” of competition law (but not a complete dis-application) in key sectors, businesses must continue to ensure that, the current crisis notwithstanding, they continue to comply with competition law. Public authorities and businesses must also ensure that any financial support provided to address economic difficulties caused by the crisis respects the EU State aid rules.

## **Competition law**

### ***Cartels and other cooperation between competitors***

6. Chapter I of the Competition Act 1998 (“**1998 Act**”) and Article 101 TFEU prohibit agreements and concerted practices that prevent, restrict or distort competition, unless they have countervailing benefits (such as new or improved products) for consumers and so are exempted. Heavy fines can be imposed on businesses that engage in prohibited agreements and practices, in particular price-fixing, sharing of markets and/or customers or the exchange of competitively-sensitive commercial and strategic information. In addition, in the UK, it is a criminal offence for individuals to enter into

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<sup>4</sup> *Anticipated acquisition by Sabre Corporation of Farelogix Inc.* (Final Report, 9 April 2020). See CMA press release, *CMA blocks airline booking merger* (9 April 2020).

<sup>5</sup> *Hunter Douglas/247 Home Furnishings* (Referral Decision, 8 April 2020) and *FNZ (Australia) Bidco/GBST Holdings* (Referral Decision, 8 April 2020).

<sup>6</sup> *Circle Health/BMI Healthcare* (Phase I decision, 8 April 2020); see CMA press release, *Private hospital merger to be approved if local concerns addressed* (8 April 2020); and *Kingspan Holdings/Building Solutions* (Phase I decision, 7 April 2020); see CMA press release, *Construction products merger raises competition concerns* (7 April 2020).

<sup>7</sup> *Mastercard/Nets* (Referral Request 23 March 2020). The request has now been accepted.

<sup>8</sup> Case M/9546 *Gategroup/LSG European Business* (3 April 2020). See Commission press release, *Mergers: Commission approves acquisition of the European catering business of LSG by Gategroup, subject to conditions* (IP/20/594, 3 April 2020).

prohibited cartel arrangements, namely price fixing, market sharing, bid-rigging and limiting output.

7. Competition law continues to apply during the Coronavirus crisis. Businesses must continue to ensure that they do not engage in agreements with competitors that restrict competition, in particular 'hard core' cartel arrangements such as price-fixing, customer- and/or market-sharing, bid-rigging and tender-allocation, and restrictions on output. Manufacturers must also not engage in 'resale price maintenance'.
8. The existence of an economic crisis does not justify anti-competitive behaviour. Accordingly, a so-called 'crisis cartel' remains an illegal cartel. There are numerous examples of when participants in markets under pressure have fixed prices (whether directly or through the imposition of surcharges), shared customers and/or geographic areas between them or agreed to reduce capacity (whether by closing or mothballing capacity, cancelling investment plans or buying up rivals' plants to induce them to exit the market). In each case, this led to heavy fines being imposed.
9. That said, in these exceptional circumstances, both governments and competition authorities recognise that suppliers may need to collaborate in order to ensure security of supply of essential goods and services, such as groceries, to consumers, particularly vulnerable consumers.

*United Kingdom: exclusion of certain agreements from the Chapter I prohibition*

10. On 19 March 2020, the UK Government announced that it would publish legislation to exclude from the 1998 Act some forms of collaboration between supermarkets to ensure that shops continue to be supplied with groceries. Three statutory instruments were adopted on 27 March 2020, covering groceries,<sup>9</sup> health services in England<sup>10</sup> and Isle of Wight ferry services,<sup>11</sup> permitting cooperation to ensure the continued provision of essential goods and services. Each order is time-limited. Those for groceries and health services apply as of 1 March 2020 and that for ferry services as of 16 March 2020. Each order excludes the application of specific agreements and practices (referred to as 'qualifying activities'), but none permit agreements on or the sharing of

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<sup>9</sup> The Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020, SI 2020/369.

<sup>10</sup> The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020, SI 2020/368.

<sup>11</sup> The Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020, SI 2020/370.

information on costs and pricing. In each case, the Chapter I prohibition will continue to apply to agreements and practices that are not covered by the relevant exclusion order.

11. The groceries order is not limited to supermarkets. A 'retailer' includes a person carrying on business in the supply of groceries to the public. It also applies to 'suppliers' of groceries, which includes manufacturers, importers and wholesale. The groceries order permits retailers and/or suppliers of groceries (food, non-prescription medicines, pet food, drinks, cleaning products, toiletries and household goods, but not other goods commonly sold by supermarkets) to enter into agreements concerning the groceries supply chain on:

- limiting consumer purchases of particular groceries;
- sharing labour or facilities, or coordinating the deployment of labour from other industries;
- coordinating the range of groceries to be supplied by retailers or suppliers (which includes;
- sharing information on the day-to-day stock position and shortages of groceries;
- sharing information on logistics service providers;
- coordination on assistance for particular groups of customers, including critical works, clinically vulnerable or socially isolated people, e.g. by prioritising deliveries or store opening times;
- coordination on the temporary closure of stores or opening hours; and
- coordination on supplying groceries in areas that are particularly vulnerable to shortages of groceries.

12. The groceries order also permits certain activities between groceries logistics providers:

- sharing information on labour availability;
- sharing labour or facilities or coordinating the deployment of labour;
- sharing information on storage capacity, including ambient, chilled and frozen warehouse capacity for groceries;
- sharing information on storage or warehouse services for groceries; and

- sharing information on delivery vehicle capacity, size, type or destination.
13. The Isle of Wight ferries order applies to specific named operators of ferry and hovercraft services and permits coordination on timetables, routes and the sharing of labour or facilities.
  14. The health services order applies to independent providers of health services in England for the purposes of the NHS. It permits the following:
    - information sharing in relating to providing health services of a particular kind, including information on staff and facilities;
    - coordination on the deployment of staff between NHS bodies and independent providers, and between independent providers;
    - the sharing or loan of facilities;
    - the joint purchasing of goods, materials, vehicles, plant, apparatus, facilities, services and staff for the provision of healthcare services; and
    - coordination on the provision of health services by independent providers and NHS bodies, including on the provision of specific services general or in specific areas or limiting or expanding the scale or range of services to be or being supplied by a particular provider or NHS body.
  15. The orders require notification of an agreement to be made to the Secretary of State, within 14 days of the order being made or, if the agreement is made after this date, 14 days of the agreement being made. This will include information on the parties, the nature of the agreement, when it was made and the groceries or health services to which it relates. The Secretary of State will maintain a register of notified agreements.

*United Kingdom: CMA guidance on business cooperation*

16. On 25 March 2020, the CMA published guidance, *CMA approach to business cooperation in response to COVID-19*.<sup>12</sup> It has stated that it will not take action against cooperation or coordination between competing businesses that (i) is undertaken solely to address the crisis and (ii) does not go further or last longer than is strictly necessary. It will continue to take enforcement against any other conduct that does not satisfy these

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<sup>12</sup> *CMA approach to business cooperation in response to COVID-19* (CMA118, 25 March 2020), available at: <https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19>.

stringent conditions and which is not otherwise lawful under the 1998 Act or Article 101 TFEU, e.g. because a block exemption applies or the conditions for individual exemption (under s.9 of the 1998 Act or Article 101(3)) are satisfied.

17. The following conditions must be met for the CMA not to take enforcement action against cooperation or collaboration between competitors:
  - it must be temporary;
  - it must be appropriate and necessary in order to avoid a shortage, or ensure security, of supply;
  - it must be clearly be in the public interest;
  - it must contribute to the benefit or well-being of consumers (whether generally or a specific group, for example, key workers or vulnerable people);
  - it must deal with critical issues that arise as a result of the COVID-19 pandemic; and
  - it must last no longer than is necessary to address these critical issues.
18. This is not limited to collaboration in the grocery sector, but will extend to other sectors manufacturing or supplying essential goods and services (such as agriculture and food manufacturing, pharmaceuticals, medical equipment, energy and transport), where some form of cooperation (short of a cartel) may be necessary to ensure the production and continued availability of key goods and services. This could include joint production or R&D, sharing logistics and distribution assets, identifying customers which should receive priority delivery and cross-supplies of scarce raw materials and finished products.
19. The CMA has, however, made it very clear that this is limited to activities necessary to address the COVID-19 crisis and does not extend to wider cooperation or collaboration. It will not permit price-fixing or sharing of longer-term pricing or business strategies. It also does not apply to agreements and practices that do not relate to essential goods and services.

*European Union: ECN and Commission guidance*

20. Similarly, on 23 March 2020, the European Competition Network ("**ECN**", comprising the European Commission, the EFTA Surveillance Authority and the 27 national competition authorities of the EU Member States) announced that cooperation that is necessary to ensure the supply and fair distribution of scarce products is unlikely to give

rise to problems, if it is temporary and limited to addressing shortages of supply.<sup>13</sup>

However, ECN authorities will not cease to take action against cartels that restrict supply or raise prices for customers.

*The Commission's 'Temporary Framework Communication' provides antitrust guidance on cooperation during the crisis and its 'comfort letter' on cooperation relating to generic medicines*

21. On 8 April 2020, the Commission published a 'Temporary Framework Communication'<sup>14</sup> setting out guidance on the application of Article 101 TFEU to cooperation between businesses during the coronavirus crisis. This applies to cooperation that is intended to urgently increase production and optimise the supply of critical products, in particular hospital medicines and equipment used to test and treat COVID-19 patients, or to mitigate and possibly overcome the outbreak. This may include cooperation to address shortages, for example:
- coordinating production, so firms specialise in specific products, which can ensure efficient use of capacity and materials;
  - coordinating logistics;
  - sharing information to identify stocks, shortages and available production capacity; and
  - sharing information to predict demand, identify supply gaps and how to address these gaps.
22. Businesses must normally self-assess whether agreements and practices to which they are a party comply with Article 101 TFEU, taking account of the Commission's various guidance notices and decision-making practice, and the EU courts' case law. This will not change as a result of the crisis. However, the Commission will – in these exceptional times – provide guidance, ad hoc feedback and/or comfort on the legality of specific

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<sup>13</sup> *Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis* (23 March 2020), available at: [https://ec.europa.eu/competition/ecn/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf).

<sup>14</sup> Commission, Framework Communication addressing the antitrust issues related to cooperation between competitors in COVID-19 related urgency situations (8 April 2020), available at: [https://ec.europa.eu/info/files/framework-communication-addressing-antitrust-issues-related-cooperation-between-competitors-covid-19-related-urgency-situations\\_en](https://ec.europa.eu/info/files/framework-communication-addressing-antitrust-issues-related-cooperation-between-competitors-covid-19-related-urgency-situations_en). See also Commission press release, *Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak* (IP/20/618, 8 April 2020).



cooperation initiatives, in order to assist businesses' self-assessment. It will do so if cooperation needs to be implemented quickly to tackle COVID-19.

23. More generally, the Commission has indicated that, in the current exceptional circumstances, the following measures (which ordinarily would be problematic under EU competition law) will not give rise to an enforcement priority for the Commission:
- sharing information (particularly if it is aggregated) on production and capacities, stocks, demand and supply gaps;
  - coordinating and adapting production between individual producers, to increase output in the most efficient way or to avoid shortages of supply;
  - coordinating stock management and distribution; and
  - cooperation in response to an imperative request by public authorities for businesses to temporarily cooperate to address an urgent situation.
24. However, this can only apply to essential products and services, such as those used to treat COVID-19 patients. It is not of general application across the economy. This cooperation must be temporary in nature and not exceed what is strictly necessary to address or avoid the shortage of supply. Full documentary records must be kept, which the Commission may request to see.
25. In these exceptional circumstances, and in a departure from its usual practice, the Commission is prepared to offer ad hoc informal guidance on the application of Article 101 TFEU to specific cooperation initiatives that are being contemplated to address the crisis.<sup>15</sup> This process will be confidential.
26. On 8 April 2020, the Commission also published its first ad hoc 'comfort letter' given to the European Generics Medicines Association. In this letter, the Commission states that voluntary cooperation between pharmaceutical manufacturers to target the risk of a shortage of critical hospital medicines was in line with the 'Temporary Framework Communication' and did not infringe EU competition law.<sup>16</sup> The comfort letter has not been published, but the cooperation relates to the supply of medicines for intensive care

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<sup>15</sup> See <https://ec.europa.eu/competition/antitrust/coronavirus.html>.

<sup>16</sup> See Commission press release IP/20/618, *supra*.

patients under mechanical ventilation, including sedatives, muscle relaxants, analgesics and antibiotics.<sup>17</sup>

### **Excessive prices**

27. Chapter II of the 1998 Act and Article 102 TFEU prohibit the abuse of a dominant position, which includes charging an unfair or excessive price for a good or service. In *Flynn Pharma v CMA* [2020] EWCA Civ 339, the Court of Appeal recently confirmed that a price is unfair if it could not be obtained in conditions of normal competition or if it bears no reasonable relation to the economic value of the good or service, either because the supplier's profit margin (revenues less costs) is unfairly high as compared to a benchmark return (such as return on sales or return on capital employed) or is unfairly high in comparison to the price of a comparable product in the same or a different geographic market. Exactly what is an 'excessive' price in times of economic turmoil is not clear, but dominant firms (with large market shares) can expect close scrutiny if they unjustifiably increase prices at this time. In its guidance, the CMA states that it will investigate prices that are "significantly above normal competitive levels".
28. The CMA has established a 'COVID-19 taskforce' to identify businesses that exploit consumers through unjustifiable or excessive prices for essential goods.<sup>18</sup> It has also published an open letter to the pharmaceutical and food and drink industries, warning against charging unjustifiably high prices.<sup>19</sup>
29. On 4 April 2020, it launched an online tool that can be used to report businesses that are behaving unfairly.<sup>20</sup> The CMA has also written to businesses in the pharmaceuticals and food and drink sectors to warn them against such practices. It may also recommend that the Government adopt additional measures to restrict excessive prices or 'price-gouging'.
30. Similarly, the ECN has made clear that essential products (such as face masks, sanitizing gel and groceries) must remain available at competitive prices. The ECN authorities will take action against dominant businesses should they charge excessive prices.

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<sup>17</sup> See Medicines for Europe press release, *Medicines for Europe welcomes European Commission decision to enable secure supply of hospital medicines* (8 April 2020).

<sup>18</sup> See <https://www.gov.uk/government/news/cma-launches-covid-19-taskforce>.

<sup>19</sup> See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/874240/COVID\\_19\\_Open\\_letter\\_to\\_pharmaceutical\\_and\\_food\\_and\\_drink\\_industries2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874240/COVID_19_Open_letter_to_pharmaceutical_and_food_and_drink_industries2.pdf).

<sup>20</sup> See <https://www.coronavirus-business-complaint.service.gov.uk/>.

31. The CMA and ECN have also made clear that manufacturers may set maximum resale prices, in order to prevent retailers from engaging in excessive pricing or 'price gouging'. This does not constitute 'resale price maintenance', which is prohibited by the Chapter I prohibition and Article 101(1) TFEU.

### **State aid**

32. The United Kingdom and other governments have already announced wide-ranging support for businesses during the economic crisis caused by COVID-19. It can be expected that further support measures will be announced in the coming weeks and months. The EU State aid rules are applicable to such support. The Commission has established a specific section of its website to address this topic.<sup>21</sup>
33. In the UK, measures already announced include: support to cover part of the salary costs of furloughed employees (the Coronavirus Job Retention Scheme); deferring VAT and income tax payments; support to SMEs for statutory sick pay payments; grants for small businesses; a business rates holiday and grants for retail, hospitality and leisure businesses; and loans for both SMEs and larger businesses.
34. Public bodies (including devolved administrations, local authorities and organisations such as local enterprise partnerships) that wish to support businesses in the current crisis must satisfy themselves that they do so in compliance with the State aid rules. Equally, entities in receipt of public support must also satisfy themselves of this: if they receive funding that is aid and is not exempted, they could be required to pay it back. That said, the majority of funding will be compatible with the State aid rules, whether under the existing rules or the new Temporary Framework.

### ***EU State aid law continues to apply in the UK, notwithstanding Brexit***

35. Although the UK left the EU on 31 January 2020, EU State aid law continues to apply to and in the UK until 31 December 2020 (or such later date as the UK and EU may agree to extend the transition period by). Therefore, unless exempted, all aid granted by the UK (whether by central, devolved or local government, or other public bodies) must be notified to and approved by the Commission before it can be implemented. This includes measures introduced to support businesses in difficulty as a result of the COVID-19 pandemic.

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<sup>21</sup> See [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html).

36. The State aid rules apply to any entity that carries on an economic activity, irrespective of its size, legal status and whether it is profit-making. They therefore apply to all entities that provide goods or services for remuneration, including charities and other non-profit organisations and certain activities of local authorities.
37. Public funding constitutes aid if it (i) is granted by a Member State or through State resources, (ii) provides a selective advantage that favours certain undertakings or the production of certain goods, (iii) distorts competition, and (iv) affects inter-State trade. Typical aid measures include: grants, subsidised loans, guarantees, investments that are not on market terms, the supply of goods at subsidised prices, and debt and tax deferrals or write-offs.
38. Some types of public funding during the COVID-19 crisis will not be 'State aid', because they apply to the economy as a whole, and so are not 'selective'. Funding to SMEs active only in a local area might not have an effect on inter-State trade. Other measures will be exempted without prior notification (see paragraph 39 below). Where measures do constitute aid and are not exempted, for example because they benefit only specific sectors or individual businesses, the Commission has stated that it will approve notified Coronavirus-related aid measures very quickly, typically in 24-48 hours (see paragraphs 40 ff below).

### ***Existing exemptions: de minimis aid and the General Block Exemption Regulation***

39. The Commission can investigate non-exempted and non-notified aid granted during the transitional period and the British courts can also require its suspension or even repayment until it is approved. Over 95% of aid does not require notification, as it is covered by an exemption, typically either because it is 'de minimis' aid (less than €200,000 over three years) or is covered by the Block Exemption Regulation ("**GBER**", which exempts a wide variety of aid, including regional aid, aid to SMEs, aid for R&D, training aid, aid for environmental protection, aid for cultural purposes and aid for certain types of infrastructure). These exemptions continue to apply.

### ***The Commission's Temporary Framework for State aid during the COVID-19 crisis***

40. On 19 March 2020, the Commission adopted a 'Temporary Framework' that will apply until 31 December 2020 to measures taken to provide liquidity, support businesses that

have suffered significant damage due to the crisis and preserve the continuity of economic activity.<sup>22</sup>

41. This exempts (without the need for notification) the provision of aid to individual businesses of up to €800,000 in the form of grants, repayable advances, and tax or payments advantages, as well as (subject to certain conditions) loan guarantees, subsidised loans, funding for guarantees and loans that are channelled through private banks and export credit insurance.
42. Measures falling outside the Framework, such as rescue and restructuring aid for fundamentally-sound businesses that are in difficulty only as a result of COVID-19, must be notified to the Commission, but can be expected to be approved quickly.
43. On 4 April 2020, the Commission adopted its first amendment to the Temporary Framework.<sup>23</sup> This amendment permits Member States (and the UK) to provide, without the need to notify the Commission, funding to:
  - accelerate COVID-19 research and development;
  - provide investment aid for infrastructures for testing and upscaling COVID-19 related products before mass production;
  - provide investment aid for the production of COVID-19 related products;
  - aid in the form of temporary deferrals (until no later than 31 December 2020) of tax and/or social security contributions to ease businesses' liquidity constraints and to protect employment; and
  - wage subsidies for employees and self-employed individuals to avoid lay-offs in specific sectors that are particularly affected by the COVID-19 outbreak, of up to 80% of gross monthly salary.

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<sup>22</sup> Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (2020/C 91 I/01) (19 March 2020). See Commission press release, *State aid: Commission adopts Temporary Framework to enable Member States to further support the economy in the COVID-19 outbreak* (IP/20/496, 19 March 2020).

<sup>23</sup> Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (C(2020) 2215 final, 3 April 2020). See Commission press release, *State aid: Commission extends Temporary Framework to enable Member States to accelerate research, testing and production of coronavirus relevant products, to protect jobs and to further support the economy in the coronavirus outbreak* (IP/20/570, 4 April 2020). An informal consolidated version of the Temporary Framework is available at: [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/TF\\_consolidated\\_version\\_as\\_amended\\_3\\_april\\_2020.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_as_amended_3_april_2020.pdf).

44. Three other aid measures are now also permitted under the Temporary Framework:
- interest-free loans of up to €800,000;
  - guarantees covering 100% of loans of up to €800,000; and
  - equity capital injections of up to €800,000 per company.
45. R&D and investment aid may be provided through grants, repayable advances or tax advantages. It is available for projects concerning R&D into, testing of or production of COVID-19 relevant medicinal products (including vaccines), intermediates, active ingredients and raw materials; medical devices and equipment (including ventilators, PPE and diagnostic tools), disinfectants and raw materials; and data collection and processing tools.
46. Aid for R&D can cover up costs of an R&D project, of up to 100% for fundamental research and 80% for industrial research and experimental development, with higher limits for projects supported by two or more states and for projects involving cross-border collaboration. Aid beneficiaries must grant non-exclusive and non-discriminatory licences of the research results to third parties in the EEA.
47. Investment aid for testing and upscaling infrastructures can have a maximum aid intensity of 75% of eligible costs. The testing and upscaling infrastructure must be open to several users on a transparent and non-discriminatory basis.
48. In the case of investment aid for the production of COVID-19 relevant products, the investment project must be completed within six months of the granting of the aid. The aid must not exceed 80% of the eligible costs, or up to 95% if the project is completed within two months.
49. On 9 April 2020, the Commission announced proposals to further extend the Temporary Framework to include measures for the recapitalisation of individual companies in need of additional capital as a result of decreased demand for their products and services and reduced liquidity.<sup>24</sup> If adopted, this would enable public support through equity or hybrid capital. This will, however, be subject to strict conditions to minimise distortions to competition, including on the behaviour of companies receiving support and the need for the State to have a clear exit strategy. It is

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<sup>24</sup> See Commission press release, *Coronavirus: Commission Statement on consulting Member States on proposal to further expand State aid Temporary Framework to recapitalisation measures* (STATEMENT/20/610, 9 April 2020).

likely that these rules will be similar to those applied to state recapitalisation of banks and insurance institutions during the 2008/2009 financial crisis, including requirements to sell assets or businesses, restrictions on M&A activity and prohibitions on dividend payments and share buybacks.

### ***The Commission's approval of numerous State aid measures under the COVID-19 Temporary Framework***

50. The Commission has now adopted over 50 decisions approving national measures that either provide liquidity to businesses or compensation for losses suffered as a result of the exceptional circumstances caused by the coronavirus outbreak. It has approved a range of aid schemes notified by almost all Member States. These schemes have included grants, loan guarantees, and subsidised loans provided by state-owned banks and were approved within 24 to 48 hours of notification, including over the Easter holiday weekend.<sup>25</sup>
51. On 25 March 2020, the Commission approved, under the Temporary Framework, two UK measures to support SMEs affected by the COVID-19 crisis. First, the 'Coronavirus Business Interruption Loan Scheme', which guarantees 80% of loan facilities for SMEs with a turnover of up to £45 million and will be provided by the British Business Bank.<sup>26</sup> Second, the provision of grants to support SMEs, of up to €800,000 (approximately £734,000).<sup>27</sup>
52. On 6 April 2020, the Commission approved a £50 billion 'umbrella' scheme to support the UK economy during the coronavirus outbreak.<sup>28</sup> The key elements of this scheme are:
- it will apply until 31 December 2020 and will be used to support both SMEs and large corporates, throughout the UK;

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<sup>25</sup> A full list of decisions is available at: [https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_sa\\_by\\_date](https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_sa_by_date).

<sup>26</sup> Case SA.56792 *United Kingdom, UK COVID 19 measure CBILS Guarantee* (25 March 2020). See Commission press release, *State aid: Commission approves UK schemes to support SMEs affected by coronavirus outbreak* (IP/20/527, 25 March 2020). The decision is not yet publicly available.

<sup>27</sup> Case SA.56794 *United Kingdom, Coronavirus Business Interruption Loan Scheme (CBILS) Grant - COVID-19* (25 March 2020). The decision is available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202014/285210\\_2143912\\_38\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202014/285210_2143912_38_2.pdf).

<sup>28</sup> Case SA.56841 *COVID-19 Temporary Framework for UK authorities* (6 April 2020). The decision is available at: [https://ec.europa.eu/competition/state\\_aid/cases1/202015/285283\\_2146683\\_71\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202015/285283_2146683_71_2.pdf). See Commission press release, *State aid: Commission approves £50 billion UK "umbrella" scheme to support the economy in the coronavirus outbreak* (IP/20/603, 6 April 2020).

- aid may be provided through direct grants, equity injections, selective tax advantages, repayable advances, guarantees for commercial lending (to 'channel' state aid to 'the real economy') and subsidised loans;
- aid may be provided by central government, devolved governments, local authorities and other public bodies or other bodies administering schemes funded from state resources (which, presumably includes Local Enterprise Partnerships and public/private bodies that disburse funds under the Regional Growth Fund and similar schemes);
- aid may not be granted to undertakings in difficulty (other than as a result of the crisis);
- aid of up to €800,000 per undertaking can be provided either directly to beneficiaries or by guaranteeing loans made by banks and other financial institutions. This is in line with the Temporary Framework;
- specific rules apply to aid granted through loan guarantees, subsidised loans and aid that will be 'channelled' through banks to the 'real economy', in the latter case to ensure that banks do not benefit and that aid is 'passed through' to the end beneficiary through lower interest rates. This is also in line with the Temporary Framework; and
- aid may also be given to support R&D into COVID-19 and other antiviral relevant research and for testing and upscaling, and production of COVID-19 relevant products. Again, this is in line with the Amended Temporary Framework.

53. It will clearly be necessary for public authorities (including local authorities) and other bodies that distribute state funds (such as LEPs) to ensure that the requirements of the Temporary Framework and the Commission's approval decisions are met.

**MATTHEW O'REGAN**

St John's Chambers

15 April 2020