



Deloitte Legal Newsflash

EU Competition and EU Regulatory

The COVID-19 effect on competition law

The coronavirus pandemic is affecting people and businesses on a large and global scale, bringing major challenges for governments and companies, all of whom are trying to respond in the most responsible way possible. Although COVID-19 is a black swan for 2020, competition law continues to apply. EU Member States need to be particularly mindful of EU state aid rules, and undertakings need to maintain compliance with the applicable competition rules.

State aid

EU Member States have imposed measures to contain the spread of COVID-19, such as closing restaurants, restricting travel and cancelling major (cultural and sporting) events. These measures affect businesses and the economy as a whole. Consequently, EU Member State governments have announced that they will put a range of (financial) support measures in place. Depending on how such measures are structured, they may constitute state aid, thereby requiring approval by the Commission. Companies will have to assess whether any state support received in the wake of COVID-19 constitutes legal state aid. If a company receives illegal state aid, it will subsequently need to refund the state aid and related interest when 'normal service' resumes.

The European Commission is doing its utmost to accelerate and facilitate the approval of various state aid measures regarding COVID-19. It opened a 24/7 hotline for public authorities to raise questions or request advice, which will enable them to provide aid more effectively to help cope with the effects of the COVID-19 outbreak. The Executive Vice-President of the Commission, Margrethe Vestager, issued a statement [on State aid measures to address the economic impact of COVID-19](#). In its statement, Mrs Vestager clearly stipulates that it is the Commission's goal to make sure "*that businesses have the liquidity they need to keep operating and to make sure the support reaches the companies that need it*".

On 12 March 2020, the Commission approved the first state aid scheme related to COVID-19 within 24 hours of notification (SA.56685). The scheme concerned a compensation mechanism by Denmark for organisers of major events, providing a reimbursement for loss of income and additional costs due to cancellation, deferral or change in the event organisation's conditions. In its decision, the Commission acknowledged that COVID-19 can be considered as an 'exceptional occurrence' within the meaning of Article 107(2)(b) TFEU.

On 13 March 2020, the Commission published a "[Coordinated economic response to the COVID-19 Outbreak](#)" communication, in which it (*i.a.*) sets out how it will respond to support measures implemented by EU Member States. It announced the application of State Aid Framework Flexibility, recognising that the current COVID-19 situation in Italy may allow the use of Article 107(3)(b) TFEU, which means that state aid measures can be declared compatible to remedy a serious disturbance in a Member State's economy. In this context, the Commission will also assess the economic situation in other Member States. Moreover, it is currently preparing a special legal framework under Article 107(3)(b) TFEU. The Commission also developed such a specific framework during the financial crisis of 2008.

Member States may also fall back on Article 107(3)(c) TFEU and the Commission's Rescue and Restructuring Guidelines to provide aid to companies in difficulty. Whereas undertakings are only eligible for such aid when they have not yet received such rescue aid in the last 10 years, the Commission seems willing to accept exceptions to that rule, given the exceptional circumstances of the COVID-19 outbreak.

General competition law

Competition law continues to apply, even during the COVID-19 pandemic. Companies will be required to meet (virtually) to discuss their operations, guarantee supply chain continuity, etc. Especially when these discussions occur among competitors, it must be ensured that they do not amount to anti-competitive agreements or illegal information exchanges, which are considered to be akin to pure cartels. To avoid heavy fines, a competition compliance check should be part of any proposed initiative.

A number of companies consider COVID-19 an opportunity to raise prices, terminate contracts and re-negotiate better terms. Under certain circumstances, this may be an

infringement of competition law, and a number of national competition authorities in Europe have issued statements or launched investigations to counter such conduct. Companies in this situation are strongly advised to have their intended practice reviewed for competition compliance before engaging in such maneuvers.

Finally, the COVID-19 pandemic may be a time where the government will also want to impose certain co-operation between competitors, which in normal circumstances would be considered anti-competitive. This can pass the competition law compliance test, but is subjected to stringent conditions. Companies should be ready to help their government and country, while appropriately preventing infringement of competition law. Trusted competition law advisors can review such initiatives.

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