CLEARY GOTTLIEB

ALERT MEMORANDUM

Fifth Amendment to the State Aid Temporary Framework to Support the Economy in the Context of the COVID-19 Outbreak

February 4, 2021

On January 28, the Commission extended and expanded for the fifth time the scope of the State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak (the "TF").[1]

Based on the January 28 amendment (the "Amendment"), all TF provisions, including recapitalization measures, are extended until December 31, 2021.

Further to these extensions, the Amendment more than doubles the aid ceilings for limited amounts of aid granted under the TF and for aid to companies with uncovered fixed costs. The Amendment also introduces the possibility for Member States to convert repayable instruments granted under the TF into other forms of aid, such as direct grants, and provides for some additional amendments and clarifications.

Finally, the Amendment provides for an extension until December 31, 2021 of the temporary removal of all countries from the list of "marketable risk" countries for the purpose of State export credit insurance.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

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[1] See Cleary Gottlieb alert memos "State Aid Temporary Framework to Support the Economy in the Context of the COVID-19 Outbreak" and "The European Commission Relaxes State Aid Rules for COVID-19-related Recapitalizations".

1. TF Extended Until December 2021

The TF initially allowed exceptional State aid related to the COVID-19 outbreak until the end of 2020. Furthermore, recapitalization measures were available until June 30, 2021. An amendment adopted by the Commission on October 13, 2020 had already extended these dates to June 30, 2021 and September 30, 2021, respectively. The new Amendment further extends both these dates to December 31, 2021.

The extension of the TF follows a questionnaire from the Commission to Member States on the impact and the effectiveness of the TF. The Amendment takes into account the positive feedback of the Member States, who expressed the view that the TF constitutes a useful additional instrument to support the economy during the crisis, and the persistence and evolution of the COVID-19 outbreak.

With a view to ensuring legal certainty, the Commission commits to assess before December 31, 2021 whether the TF needs to be further extended and/or adapted.

2. Increased Aid Ceilings

The Amendment considerably increases the ceilings set out in the TF for certain support measures mostly aimed at SMEs.

First, with regard to limited amounts of aid granted under the TF, the Amendment more than doubles the previous ceilings per company. The aid ceilings per company change as follows:

— From EUR 100,000 to EUR 225,000 per company active in the primary production of agricultural products;

— From EUR 120,000 to EUR 270,000 per undertaking active in the fishery and aquaculture sector;

— From EUR 800,000 to EUR 1.8 million per company active in all other sectors.

As before, these can be combined with de minimis aid of up to EUR 200,000 per company (up to EUR 30,000 per company operating in the fishery and aquaculture sector and up to EUR 25,000 per company operating in the agriculture sector) over a period of three financial years, subject to complying with the requirements of the relevant de minimis threshold.

Second, the Amendment increases from EUR 3 million to EUR 10 million per undertaking the maximum amount of aid that can be granted to support undertakings that were not in difficulty on December 31, 2019 for their "uncovered fixed costs" (in effect, their losses) and that experienced a turnover decline of at least 30% in the period between March 1, 2020 and December 31, 2021 or during part of this period compared to the same period of 2019.

This increase of the aid ceilings (which apply throughout the application of the TF) is the logical result of the TF's extension. The need for higher aid ceilings also emerged from the responses submitted by Member States to the Commission's questionnaire on the application of the TF, which indicated that the respective ceilings have been or are about to be exhausted in certain sectors or appear to be insufficient in light of the second wave of the outbreak.

3. Conversion of Repayable Instruments into Direct Grants

The Amendment enables Member States to convert until 31 December 2022 repayable instruments (e.g. guarantees, loans, repayable advances) granted under the TF into other forms of aid, such as direct grants, provided the relevant conditions of the TF are met. Such conversion must be notified to the Commission prior to the expiry of the TF, must take place by December 31, 2022 at the latest and may not exceed the new ceilings for limited amounts of aid mentioned in section 2 of the present alert memo.

The declared goal of this measure is to provide incentives for Member States to choose, in the first place, aid in the form of repayable instruments.

4. Other Amendments and Clarifications

The Amendment provides for some additional amendments and clarifications on the TF.

Compensation of Damages Directly Caused by the COVID-19 Outbreak

The Amendment extends the scope for the compensation of damages directly caused by the COVID-19 outbreak under Article 107(2)(b) TFEU. In particular, it now allows aid for damage caused by measures precluding the beneficiary de jure or de facto from operating its economic activity or a specific and severable part of it. The Amendment mentions some examples of relevant restrictive measures, such as measures capping attendance for specific sectors or measures excluding certain highly material categories of customers.

the Amendment also states, consistent with applicable case law, that the possibility to compensate damages under Article 107(2)(b) TFEU requires that there is no overcompensation and that Member States quantify rigorously the compensated damage.

Guarantees on Newly Issued Debt Instruments

The Amendment introduces the possibility for Member States to grant aid in the form of guarantees at reduced premiums on newly issued subordinated debt instruments.

The amount of the guaranteed subordinated debt should not exceed the following ceilings, which are consistent with the ceilings applied for subordinated loans granted directly by the States:

- two-thirds of the annual wage bill of the beneficiary for large enterprises and the annual wage bill of the beneficiary for SMEs, and
- 8.4% of the total turnover of the beneficiary in 2019 for large enterprises and 12.5% of the total turnover of the beneficiary in 2019 for SMEs.

Moreover, the Amendment clarifies that public guarantees on loans can also cover certain factoring products, namely guarantees on recourse and reverse factoring where the factor has the right of recourse to the factoree. Eligible reverse factoring products shall be limited to products that are used only after the seller has already provided its part of the transaction, i.e. after the product or service has been delivered.

Wage Subsidies

Another clarification in the Amendment concerns aid in the form of wage subsidies for employees. In principle, the monthly wage subsidy may not exceed 80% of the monthly gross salary of the benefitting personnel (or 80% of the average monthly wage equivalent income of the self-employed individual). The Amendment clarifies that Member States may also notify alternative methods for calculating the aid intensity, in particular for low wage categories. These alternative methods may relate to the national wage average or minimum wage, as well as to the monthly gross wage cost of the employees concerned (or the monthly wage equivalent income of self-employed individuals) before the COVID-19 outbreak.

Modifications to the Measures Already Approved Under the TF

Finally, the Amendment clarifies that Member States may prolong until December 31, 2021 the period of application of the existing aid measures approved by the Commission under the TF, increase their budget or otherwise modify them for alignment with the amended TF.

The Commission invites Member States which plan to do so to make a single notification with a list of all existing aid measures they envisage modifying using a form provided in an annex to the Amendment. This will allow the Commission to adopt a single decision covering the entire list of notified measures.

5. Extension of the Temporary Removal of All Countries from the List of "Marketable Risk" Countries Under the Short-Term Export-Credit Insurance Communication

The TF initially provided for the temporary removal of all countries from the list of "marketable risk" countries under the Short-term export-credit insurance Communication ("STEC") until December 31, 2020, later extended to June 30, 2021. The Amendment further extends the temporary measure to December 31, 2021, in light of the persisting general lack of sufficient private capacity to cover all economically justifiable risks for exports to countries from the list of marketable risk countries.

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In sum, the Amendment further expands the already very broad (and unprecedented) flexibility allowed by the Commission under State aid rules. The amount of total aid granted since the beginning of the outbreak has already exceeded EUR 3 trillion. Given the continued sanitary restrictions and the contraction of the European economy following the COVID-19 outbreak, the Member states will likely make abundant use of the extensions in scope and duration of the aid toolbox provided by the Amendment to support their economy.

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