CORONAVIRUS: STATE AID, THE EU FRAMEWORK AND THE ITALIAN DECREE

The Coronavirus outbreak raises questions on the application of the EU state aid rules to financial supports offered by Member States to mitigate heavy economic repercussions. Among others, Italy has recently intervened to relieve affected Italian companies. Against this backdrop, the European Commission has showed willingness to relax the EU state aid rules and has moved fast to adopted new rules to assist the economy of its Member States.

INTRODUCTION

The EU rules prohibits Member States from granting to undertakings on a selective basis aids that distort competition. However, exceptions can be invoked.

The Coronavirus Disease 2019 (“**COVID-19**”) has raised unprecedented issues for the economy of the European Union ("**EU**") and its Member States. Such serious economic disruption requires a coordinated reaction by the Member States and EU institutions.

As a response, the European Commission ("**Commission**") adopted the Communication on a temporary framework for state aid measures to support the economy in the current COVID-19 outbreak on 19 March 2020 ("**Communication**") in which it sets forth the **Temporary State Aid Framework** ("**Framework**"), clarifying the perimeter of the EU state aid rules in the view of the COVID-19 outbreak. Especially, the Communication boosts a flexible and swift application of EU state aid rules to steer Member States toward implementing all the financial measures they need to support their economies.

On 17 March 2020, Italy has approved Italian Law Decree no. 18, which includesmeasures to mitigate the severe adverse impact of the COVID-19 outbreak on Italian companies ("**Decree**").

This briefing note discusses whether and to what extent these measures comply with EU state aid rules and the Framework.

THE ITALIAN AID MEASURES

For the sake of simplicity, we categorised these measures in three groups:

1. State aid measures complying with the EU State Aid rules

Some measures, including the following, are justifiable under the EU state aid rules and the Framework.

(i) Incentives to produce and supply medical devices (Art. 5)

A funding of €50 million will be disbursed to companies producing and supplying medical devices (i.e., ventilators) and personal protective equipment (i.e., masks, goggles and safety suits). The Commission has already cleared this aid scheme under the Framework in 48 hours. As envisaged under the Framework, the support will not exceed €800,000 per undertaking.

(ii) Provisions for non-scheduled public transport (Art. 93)

A contribution will be paid to undertakings carrying out non-scheduled public transport that equip their service vehicles with partitions designed to separate the driver's seat from the passenger seats . A public fund of € 2 million has been established to fund this measure. These contributions are very likely to be deemed as justified under the Framework, which allows aids in form of direct grants related to COVID-19.

(iii) Financial support measures for small and medium-sized enterprises ("SMEs") affected by COVID-19 (Art. 56)

In relation to debt exposures to banks and other credit and financial intermediaries, SMEs can receive financial supports as follows:

- amounts granted under revocable credit openings and for loans granted against credit advances cannot be revoked until 30 September 2020;
- contracts for non-instalment loans expiring before 30 September 2020 are extended until 30 September 2020;
- for loans, financial leases and other instalment lending, the payment of instalments or leasing payments due before 30 September 2020 are suspended until 30 September 2020, and the repayment plan is deferred as a whole, deferring the instalments suspended and all those thereafter.

The Decree explicitly justifies this measure based on the fact that the COVID-19 qualifies as an exceptional event and as a severe disturbance in the economy.

The Framework allows aid measures to meet companies' temporary insufficient liquidity caused by the COVID-19 outbreak. Given that a direct causal link between COVID-19 and the lack of liquidity seems to be an essential condition of this measure, it is likely to be justified under the Framework. Notification to the Commission must be submitted.

(iv) State guarantees to support the liquidity of companies affected by COVID-19 (Art. 57)

The exposures taken by *Cassa Depositi e Prestiti S.p.A*. in favor of banks and other credit entities granting loans to companies suffering a turnover reduction due to COVID-19 – operating in certain sectors to be identified by a subsequent ministerial decree – can be assisted by the state guarantee.

These measures are likely to be justified state aids under the Framework. Indeed, on the one hand, they allow public guarantees on loans to support liquidity of companies economically affected by COVID-19. On the other hand, they recognize the key role of banks and other intermediaries to mitigate the sudden shortage of liquidity. However, it remains to be seen whether they will actually meet the conditions for public guarantees provided in the Framework. Notification to the Commission must be submitted.

2. Measures that can be justified if certain conditions are fulfilled

Moreover, the compliance of certain financial measures with the EU state aid rules and the Framework is to be verified by an analysis of the actual terms of each measure.

(i) The Central Guarantee Fund for the SMEs ("Fund") (Art. 49)

For nine months the Fund can grant guarantees to SMEs under exceptional circumstances (e.g., free of charge and for a maximum guaranteed amount of € 5 million per undertaking).

In principle, this measure may be considered a justified state aid under the Framework, which allows public measures – including public guarantees – aimed at supporting liquidity through the banking system. However, it remains to be seen whether the measure's scope will be limited only to undertakings in financial difficulties due to the COVID-19.

(ii) Measures for the containment of costs for SMEs concerning *consortia* pursuant to article 112 of the Consolidated Banking Act (Art. 51)

Annual contributions and other sums paid by loan guarantee consortia (*confidi*) to the official body (*Organismo per la tenuta dell'elenco dei confidi*) referred to in article 112-bis of Legislative Decree 385 of 1 September 1993 ("Consolidated Banking Act", can be deducted from the contributions to be paid.

This measure can be considered compatible state aid only if it is granted in favor of companies that have been economically adversely affected by COVID-19.

(iii) Measures in favor of specific sectors (Articles 89, 92, 95, 98)

The Decree also provides for financial support to certain specific sectors, including;

- € 130 million emergency fund for the theatre, cinema and audiovisual sectors;
- measures for the road transport and public passenger transport sector, in the form of: (i) deferral of the payments of customs duties; (ii) suspension of the payment of the anchorage fee, fees for port operations (e.g., loading, storage etc.) and for the use of port public areas;
- suspension of payments of rental fees and concessions of public sport facilities for the sport sector until 31 May 2020;
- extraordinary measures to support the press regarding tax credits.

These measures may be deemed state aids that are justified under the Framework, which allows aid schemes to sectors damaged by the COVID-19 outbreak or to meet liquidity needs of the affected companies. However, a causal link between these measures and the COVID-19 must be proven.

3. Measures whose justification under EU State Aid rules may be debated

Finally, it is debatable whether the following three economic measures may be deemed to be compliant with the EU state aid rules.

(i) Measures for export-credit (Art. 53)

To support export-credit for some affected sectors, Italy can issue state guarantees in favor of SACE S.p.a.[1] for transactions in the cruise sector, for up to € 2.6 billion.

In principle, this measure may be justified under Framework. Indeed, it introduces an exception to the ban for the Member State's support to cover marketable risks subject to export-credit insurance. However, according to the Framework, Italy must prove that the private insurance market has been unavailable to cover the risk. Thus, compliance with the EU state aid rules must be verified.

In addition, this measure lacks clarity with regard to its scope, because it generally refers to the cruise sector without specifying whether the definition also includes the shipbuilding sector. This may result in a lack of evidence of a causal link between the measure and COVID-19 as requested by the Framework.

(ii) Measures to internationalise the country system (Art. 72(1)(d))

The Decree provides for co-financing measures of up to 50% of loans on concessional terms for exporting companies based on commercial penetration plans in non-EU countries.

These measures will be granted in compliance with the state aids *de minimis* rules. If so, these aids need not to be notified to the Commission. Otherwise, their coherence with the Framework must be verified, and could be debatable given the measures' vague scope. Indeed, this funding is generally aimed at internationalising the country system, and accordingly seems to lack a direct link with the COVID-19 outbreak.

(iii) Urgent measures for the aviation sector and Alitalia (Art. 79)

The Decree introduces two financial measures for the aviation sector to be services by a fund of € 500 million.

Firstly, to allow the continuation of their activity, air passenger license holders are compensated for the direct damages they have suffered due to COVID-19.

Secondly, the Decree authorises – in view of the effects of the COVID-19 outbreak on the activities carried out by **Alitalia** S.p.A. and Alitalia Cityliner S.p.A. (both in extraordinary administration) – the creation of a new company fully controlled by the Ministry of Economy and Finance ("**MEF**") or controlled by a company with large public participation. The MEF is authorised to own share capital or to strengthen the assets of the new company.

The Decree explicitly justifies these aids based on the fact that the COVID-19 pandemic is a natural disaster or an exceptional occurrence in the economy. However, it is dubiouw whether the measure concerning Alitalia complies with EU state aid rules and the Framework . Indeed, the Commission is currently investigating whether Italy's € 900 million bridge loan granted to Alitalia constitutes state aid in violation of the EU rules for aid to companies in difficulty.[2] Likewise, it cannot be excluded that any additional funding to Alitalia would be perceived as a further attempt to cover the heavy financial losses accrued by Alitalia before the health emergency.

[1] SACE S.p.a. is the Italian Export Credit Agency offering a broad range of insurance and financial products and services to support the competitiveness of Italian companies.
[2] Commission, case SA.48171. The formal investigation is still pending.

4. Other provisions

Finally, supports to all companies in the health sector, to the Public Health Service and to consumers do not constitute state aids. Moreover, compensation measures to the agricultural and fishing sector for the damages due to the COVID-19 comply with the EU state aids *de minimis* rules. No notification to the Commission is needed for these measures.

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C H A N C E

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