

# Impact of COVID-19 on State aid and public procurement

EMEA UPDATE CALL – 10 JUNE 2020



# 1 EU State aid

## EU State aid rules still apply ...

- Economic advantage from State prohibited unless
  - general (e.g. tax deferrals; wage compensation...)
  - exempted (*de minimis*, GBER ...)
  - individually notified and cleared
  - falls under national scheme that has been notified and cleared
- No aid if no advantage (MEO test; *Altmark*)

.... But lots of novelty

- "exceptional circumstance" (unlocks article 107(2)(b))
- "serious disturbance" (unlocks article 107(3)(b))
- flexibility

# Aid to cover the damage caused by Covid-19

## ARTICLE 107(2)(B)

- Covid-19 outbreak recognised as a “*exceptional circumstances*”
- The aid must be:
  - directly linked to the damage caused by the Covid-19 outbreak;
  - proportionate, i.e. the compensation should not exceed what is necessary to make good the damage.
- Commission has no discretion
- Examples of national measures approved on this basis:
  - Danish scheme to compensate damages caused by cancellations of large events
  - Danish public guarantee to compensate airline SAS
- Difficulty: calculation to determine compensation

# Temporary Framework for State aid

## ARTICLE 107(3)(B)

- “Serious disturbance” unlocks aid under 107(3)(b)
- Temporary Framework currently allows for schemes:
  - Liquidity aid (incl. direct grant, guarantee and subsidised loans)
  - Aid to combat Covid-19 (e.g. R&D)
  - Sectoral aid to preserve employment (e.g. wage subsidies)
  - Long term solvency issues (e.g. capital injection, subordinated debt) for non-financial undertakings
- Undertakings in difficulty from 31.12.2019 are excluded (but 2014 rescue and restructuring aid guidelines still apply)
- Combination with other aid instruments is possible
- TF to expire on 31/12/2020; could be extended in an amended form

# Commission's activity during the crisis

## OVERVIEW OF THE COMMISSION'S DECISIONAL PRACTICE AS AT 5 JUNE 2020

Legal basis	Nr of decisions
107 (2) (b)	19
107 (3) (b) - Temp. Fram.	148
107 (3) (b) - Outside Temp. Fram.	7
<b>TOTAL</b>	<b>174</b>

# Engagement with the Commission - flexibility

## KEY TAKEAWAYS

- Procedural facilitations:
  - Dedicated contact point
  - Language waiver
  - Templates for notification under the TF or Article 107(2)(b))
- Commission is very reactive/ swift:
  - Approvals within 24/48 hours from notification
  - Case teams working over the week-end



# What now?

## KEY TAKEAWAYS

- Fall off of measures
- Oversight/monitoring
- Legal challenges
- Taking stock/learning lessons
- 31/12/20 and beyond



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# Public procurement

# Procuring urgent contracts during the COVID-19 crisis

## EU, UK AND OTHER EU MEMBER STATES GUIDANCE

- Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis
  - Accelerated timescales available in cases of urgency
  - Direct awards due to extreme urgency
- UK: PPN 01/20: Responding to COVID-19
- France
  - Ordinance No. 2020-319 of 25 March 2020 providing interim measures in relation to the tendering and performance of public contracts (procurements/concessions)
  - French Ministry of Economy and Finance's guidance (Q&A, *fiche technique*, etc.)
- Other EU member States (e.g., Germany, Spain) have also issued guidance

# Supplier relief due to the COVID-19 crisis

PPN 02/20

- **Objective:** continuing payment of suppliers to maintain cash flow and protect jobs
- **Core requirement:** authorities to inform “at risk” suppliers that they will continue to be paid as normal, even if services are not delivered,
- **Other measures contemplated:**
  - Put in place the most appropriate payment measures to support supplier cash flow (accelerated payment, forward ordering, payment in advance, interim payments, payment on order)
  - Relaxation of supplier obligations and contractual terms (e.g., via express clauses, contract variations)
  - Waive/delay exercise of contractual rights and remedies

# Supplier relief due to the COVID-19 crisis

## FRENCH ORDINANCE 2020-319

- **Objective:** allow continued performance of contracts and protect suppliers
- **Impact:** relaxation of the rules applicable to the performance of contracts
- **Conditions:**
  - Temporary: contracts in force or concluded between 12 March and 23 July 2020
  - Mandatory: applies where necessary to cope with the consequences of the epidemic
  - Operator oriented: covers measures which are more favourable to the operator
- **Key aspects:**
  - Possible extension of the term of contracts expiring during relevant period
  - Advanced payment to support supplier cash flow, immediate payment for lump-sum contracts in case of suspension, suspension of payment(s) owed to contracting authority, compensation in case of major amendments to the performance of contracts which are not suspended)
  - Relaxation of supplier obligations (e.g., no penalties/liability in case of non-performance or delayed performance, extension to duration of contracts, indemnification in case of cancellation or termination of contracts due to Covid-19 measures)

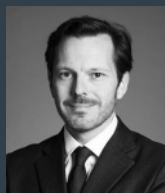
# Supplier relief due to the COVID-19 crisis

## PRACTICAL ISSUES

- **During Covid-19 crisis:**
  - Combination of administrative case law protective mechanisms principles (force majeure events, unforeseeability, change in law) and specific interim measures provided for in ordinance 2020-319?
    - Administrative case law protecting mechanisms subject to stringent conditions
    - Specific interim measures subject to untested conditions
  - Compensation/indemnification in case of contracts suspension and/or modification (e.g., fixed costs coverage)
- **Post Covid-19 crisis:**
  - Negotiation of amendments reflecting the measures taken by the parties during the Covid-19 crisis (contracts suspension and impact on delivery timetable, payments made in advance, etc.)
  - Contract renegotiation in the new context
    - Cost increases (e.g., health protection equipment, social distancing measures)
    - Margin reduction
    - Performance delays
  - Pre-litigation discussion

# Key contacts

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