

#3 State aid in the COVID-19 context 14 April 2020 – Quarantine Webinar Series

Nicolas Charbit

Good afternoon to everyone. I'm very pleased to welcome you today to this third webinar of Concurrences Quarantine Webinar Series. My name is Nicolas Charbit. I'm the Chief Editor of Concurrences. This webinar is a follow-up of the inaugural webinar we had on April 7, with DG COMP State aid Director, Karl Soukup. In order to answer the legal crisis raised by the health and economic situation, Concurrences has launched five initiatives. We first opened in free access to all e-Competitions Bulletin special issue on the COVID-19 crisis. You can browse this special issue from the home page of Concurrences, and we have reported there over 100 articles [inaudible]. That 70 articles which are only dedicated to state aid, which is the topic of today.

The other initiative we have launched for the subscribers, we have granted unlimited access to all our four databases which provide access to 28,000 documents [inaudible] contact proposing to give access to a document in each section, the bulletin, the journal, books, other Concurrences documents. We received a lot of requests from people asking for us to open this part of this database. We tape this journal on this Friday and then Monday, you receive inter-access more documents of Concurrences. That's for the week.

We are also launching today a special offer for non-subscribers, in order for them to join Concurrences + offer for a limited duration. Hopefully, the duration will be limited to the confinement and the short posit de-confinement period. We launched these initiatives because we see overall, as a legal publisher, to share our knowledge but also to connect and to trust experts. We are a network of over 37,000 subscribers and followers on social media. The purpose of this webinar is not only to share knowledge but also to connect lawyers, economists, enforcers, academics, and students.

Today, we offer in free access for all this 3rd issue of Concurrences Quarantine Webinar Series with the support of our partners and 50% of the proceeds we receive for these webinar series will be donated to Doctors Without Borders, in charge of helping people affected by the COVID-19 crisis. As mentioned, today webinar is a debriefing session of the first webinar we had last week with Karl Soukup from DG COMP. Speakers will attempt today to analyse and assess DG COMP reaction to the crisis, for getting State aid only.

Discussions should last around one hour. The panel will be 45 minutes and we expect around 50 minutes of Q&A. This being said, it turned out last time that we had many more question, more than we could answers. I remember the first webinar with Karl Soukup, there were 71 questions only on State aids. For the last one, on mergers, it was like something 55 questions. It's very much possible that there will be more questions than the time allocated, but we will ask the speakers if they're available to extend the time if they have more time to answer sent in questions.

To ask a question is very easy and straightforward. The one who joined processions already knows it. You can see at the bottom of your screen there is a Q&A function box. You just click on this box and you type your question there. You can shoot a question at each of the speakers during his/her presentation without having to wait for her or for him to finish his part. If you want a question to be

asked to a given speaker, just clearly mention it at the beginning of your question, so we know if it is with Nicole, or François-Charles, or Jacques.

In addition, instead of typing your own question, you can vote for questions already asked by other participants just by clicking on the thumb up. This will make the question go up to the list and then speakers will start from there, from top to bottom. The mic, or your mic, participant mics and videos are turned off during the webinar. However, we made a slight change with regard to this first webinar with Karl Soukup, our technical host Yasemin, will open the mic of the selected question so that the participant can state his/her question and everyone can hear it. The mic will be put back in off position after the question will have been asked. It is going to be very most useful for all participants who join us only by phone.

As you can see, most of you are with the video and audio presentation, but we understand too that internet connection is not as good as it should be in regular time. Myself losing connection from time to time, and I'm swiping between the video and the audio. There was also a chat box at the bottom of your screen next to the Q&A. You're welcome to use this to say hello to speakers or to the attendees, but please make sure that your question is asked in the Q&A box, not in the chatbox, as speakers may not see them. Finally, let me briefly introduce today's speakers. We have Jacques Derenne. Jacques is a partner, Sheppard Mullin, Brussels. Jacques is also an associate professor at Liège University, and at Brussels School of Competition. Jacques has been writing in Concurrences since in the inception during the fall in the stated Chronicle Author Journal.

François-Charles Laprévôte is a partner at Cleary Gottlieb in Brussels, an expert in State aid and mergers also. And Nicole Robins, economist, partner at Oxera in Brussels, also with a deep knowledge of State aid. Finally, Georges Siotis is an associate professor at Madrid University, University Carlos, and is also a consultant at Compass Lexecon in Madrid.

We are thankful for them, to have accepted to join this panel and to have accepted also to answer your questions. Without further ado, I now give the floor to the first speaker, Jacques.

Introduction

Jacques Derenne

Thank you, Nicolas. Good afternoon. Good morning to some of us. As a matter of introduction, I thought it's important just to remind ourselves of some general principles and what we will be talking about. I think it's important to remind ourselves that the EU could not and would not exist without the objective of EU market integration. Part of the main and most important tools to achieve this integration is the EU stated control, which is quite unique in the world.

We have to manage competition between the Member States. The Member States are competing against each other to get their investors. As I'm used to sharing my passion for ancient Greek with my students, my course in Liège in Brussels, I would like to ask you to understand that the word crisis means much more than a very serious disease in Latin or in Greek, or in French, or in English.

In Greek, in ancient Greek “Krisis” or “Krino” the verb, have multiple meanings. It means the ability to discern, to distinguish the action of choosing and struggle, the action of deciding, ie., the decision, and then finally to judge and to decide to do something in order to reach an outcome. All of that means crisis in Greek. The Greeks like gameplays on words and, crisis means chaos. Here, you have like in the financial crisis, the need to understand what happened, what to do, how to discern what to do, and then

execute. That's the crisis.

What is in the toolbox of the European Commission? The EU is not new. It's always been the case for the last 60 years. We have four different types of measures that can be done and executed in order to struggle against the economic impact of the COVID-19. First, you have no stated measures, economic measures, which are taken by the Member States, which have been taking a lot of non-selective measures which are accessible to all. We will not be talking about that, but I think François-Charles will mention it a bit as well and I think Member State budget has tackled a lot of that, IE to report, postpone, tax, or open postponement of payment, etc. That's if it's accessible to all, it's not State aid.

Then, we have three main State aid tools which are, and we will detail that all around this seminar. We have what we call 107(2) b), which is the State aid to compensate the damage which came from the exceptional occurrence, the disaster. Then, we have the 107(3) b), which is the aid to remedy a sales disturbance in an economic state, which is the legal basis, which are used more than 400 times since 2008 in the financial crisis. Only three times before 2008. Then, finally, we have the normal tool, which is the 107 (3) c), which is selective aid for regions, for sectors, and including rescue and restructuring aid.

Without further ado, what will we talk about? In two steps, first, François-Charles and Georges Siotis will explain the legal and economic aspects of the extraordinary new Temporary Framework tool set up by the Commission, the 107(3) b), IE to remedy a disturbance of the economy. Then with Nicole, I will explain the exceptional occurrence tool on the basis of 107(2) b) and the other measures which can be taken. Then we have the Q&A. I give the floor to François-Charles to start with the first section.

Panel 1: Temporary Framework - Legal issues

François-Charles Lapr vot

Thank you, Jacques. I will indeed start with a legal description of the so-called Temporary Framework under COVID-19 circumstances that the Commission has adopted on March 19th. Indeed, things really started on March 16th with first communication that dealt with many things. Not just State aid, but also internal market, the possibility for the EU budget also to act and help Member States face this crisis. It was very clear that as we all know, the EU budget only accounts for 1% of the continent's economies. The bulk of the public interventions to shore up the economy is going to be made through national budgets, and that means potentially State aid issues.

This is the structure of what I will try to cover. I will pass quickly on some of the slides which are more descriptive, but I think you will have access to the presentation after. If we look at the structure of the Temporary Framework and we compare it with the framework that was adopted in 2008 when the financial crisis struck, we can see a lot of similarities obviously, and this explains for instance, why this Temporary Framework 2020 version was adopted very quickly in two days. The Commission had the experience of this kind of a very wide and broad action, so it took them two days to adopt this Framework.

Within two weeks, the Framework already was amended on April 3rd and we know that it is going to be amended further probably in the very next few days, if not hours, in order to then launch the possibilities for the Member States to act in a form of recapitalizations. If you look at the details of the measures, you see that all the measures that are envisioned in the current Temporary Framework, we are already envisioned and applied back in 2008. Generally speaking, the 2020 Framework provides for higher ceilings and broader possibilities to intervene.

Obviously, for the timing, this Framework is supposed to apply until the end of the year. We know that in 2008 actually, this so-called Temporary Framework lasted for more than three years, and so that will be obviously a question mark and the answer to which obviously no one has as of today because this will depend obviously on how long and what will be the final impact of the COVID crisis on the economy.

If we look at the detail of the measures that are providing for under the Framework, we have first a series of measures that are geared, I would say towards SMEs, which include direct grants, selective tax advantages, advanced payments, and on April 3rd the Commission even extended this category of measures to, in particular, guarantees and possibly equity injections. The key characteristic of this first series of measure is that it is capped at 800,000 euros per company with lower ceilings, in particular the agricultural sector.

Another section that I'm tackling right now is one on export credit insurance. This is a category that has been impacted particularly hard with a reduction of the private supply of credit export insurance, and so the Commission has taken the exceptional step of considering that even so-called marketable risks, in particular, exports to EU or OECD countries were no longer correctly covered by the market and could basically be covered by additional state support.

Another category, very important category that is provided for in the Temporary Framework is guarantees and subsidized loans. The key conditions for these two instruments are very much aligned. They basically are aimed at all sorts of loans. The maximum loan duration is a maximum of six years. Undertakings that were in financial difficulties before the COVID crisis. By that, the Commission means before December the 31st, are excluded from this category. The amount of the loan principal is capped based on either the wage bill or the total turnover of the beneficiary, but there is no cap in absolute terms, which means that in principle, these loans can reach extremely large amounts for very large companies.

The maximum amount of the guarantee is a cap that 90% of the underlying loan, which means that basically the bank that provides the loan in the first place has to take at least 10% of the risk and there are pretty generous, minimal guarantee fee or credit risk premiums, which are not based on the intrinsic risk of the company, which are not based on the Member States, which are the same basically for all Member States and only vary depending on the size of the company and the duration of the loan.

On April 3rd, the Commission added new categories to the Temporary Framework of aid that would be generally approved. These are basically eight measures that are aimed at combating directly the COVID-19 outbreak, through relevant research and development, or testing and upscaling infrastructures, or relevant products such as equipment, protection equipment, ventilators and the like, and these categories of aid. I'm not going to go into the specifics of each one, but the basic idea is basically that the amount of the activity pretty generous for research and development. It can cover up to 100% of the eligible costs.

There is an emphasis that is laid on first completing the project on time. There are basically premiums in terms of aid if you complete the project very quickly. There are penalties if the project is basically late because obviously to fight COVID-19 time is of the essence. There is also a premium for cooperation among the Member States, with the possibility to get more aid for projects involving the several Member States.

Finally, the last category of aid that again, has been added to the Framework on April 3rd is a sectoral

aid that is aimed at essentially preserving employment. Also maintaining the liquidity of companies in the form of deferrals, of tax in particular, or social security contributions and wage subsidy schemes. To go back on a point that was made by Jacques in his introduction, some of these schemes and of these measures do not constitute State aid to the extent they are not selective, they are basically available to all companies. This is in particular on the case for the number of wage subsidy schemes. Here, what the Commission is providing for is the possibility basically to reserve these measures to specific companies, types of companies, or specific sectors that are particularly hit by the crisis, that makes these measures selective and therefore State aid.

You can see that the Framework provides for again, the possibility generally to grant these aids. Interestingly enough, while companies in financial difficulties pre-COVID crisis are generally excluded from all the measures that are described in the Temporary Framework, here for these two categories, there is no specific exclusion for companies in financial difficulties.

One important element of the Framework is the articulation between various aid measures. Aid measures that are granted on the Temporary Framework can obviously be combined with measures that do not constitute stated and there is no limitation obviously on this. They can also be combined with each other, generally. There are only two exceptions, which are basically sections 3.2 and 3.3, so aid in the form of guarantees and loans under these sections, which cannot be cumulated for the same underlying loan or if basically the overall amount received of the loans that are covered by these measures for the same undertaking exceed the relevant thresholds in terms of wage bill or a turnover. The other exception to this general principle of a combination, which is a pretty straightforward one, is that obviously you cannot combine aid related to combating COVID-19 if basically you are trying to cover the same cost. You cannot get refunded twice for the same cost.

In addition, the aid measures that are granted on the Temporary Framework may in principle be complemented with other public support tools. The Framework is more or less detailed on these rules. It is pretty clear and that is explicitly provided that eight measures under the Framework can be in principle complemented with de minimis aids, so that's aid up to 200,000 euros per beneficiary over three years. That means that if you take the measures under section 3-1, you know that the cap is 800,000. You add to it 100,000. That means that in particular, for SMEs, in principle it is possible to have measures that are pretty generous without many strings attached, in principle, up to 1 million euros per company. Another possibility that is not expressly provided for in the framework but that is there is the possibility also to get compensation aid for direct damages caused by the COVID-19 and that will be covered later.

Finally, a possibility also, but that is more going on going forward in the future could be to have also aid in a form of rescue or restructuring aid companies in difficulties. In particular, if the difficulties stem from the COVID crisis and require more than simply aid to basically preserve liquidity, which is generally the objective of the temporary framework, but more structural aid.

If we look at the implementation of the framework, you can see that obviously these figures are to be taken with a pinch of salt. The total budget notified per Member State is really a conservative estimate. If you take Germany, there are estimates that are much higher than the 400 billion, with put out here because there is, strictly speaking, no limit to the budget, as notified by Germany, but you can see quite a variety of amounts depending on the Member States. You can see that some Member States have already received several clearance measures under the framework. You can see that again, these figures are to be taken with a pinch of salt. But by and large, guarantees represent a very significant amount of the budgets, that are notified. That is quite similar, I would say, I've not done the exact calculation, but to what we saw in the financial crisis.

As you see also, the Commission has been very swift so far in clearing aid measures. The average time for clearance is 48 hours. Again, not a very scientific measurement but nevertheless, it gives you an idea. One specific consideration that has also been raised in the decisions is the prevention of the spillover of the aid, in particular to banks. Why banks? Because if you look in particular, at loans and at guarantees mostly, obviously to have a guarantee, a public guarantee on the loan, you need a loan in the first place, and you need a bank that basically lends to the borrower. The framework provides for provisions to avoid that the bank basically keeps the aid. This is in particular, relevant when the guarantee is basically a guarantee not on a new loan but on an existing loan, where basically the bank has already decided to take the risk before the guarantee was granted. You have a number of decisions that provide for specific conditions, for instance, to make sure that the bank maintains at least or increases the level of loans, pre-guarantee and post-guarantee, so that the guarantee is really an incentive to maintain the funding.

A few open issues. First, interaction with article 107(2) b), we are going to discuss this a little bit more, but a question is, you know, you can see that there are a lot of decisions that are taken under the temporary framework. Much fewer under article 107(2) b). We had this discussion in a webinar with Karl Soukup. Why is that? Maybe the rules under 107(2) b) are pretty stringent. You can wonder whether to some extent, that the Temporary Framework is a complement or even a substitute. If you look at some very recent decisions of the Commission over the Easter weekend regarding, for instance, when France or Swedish airlines, these are decisions that relate to sectors that obviously have been directly hit by COVID-19, that obviously need some aid as a result. Nevertheless, these decisions have been granted under the Temporary Framework in Article 107(3) d) and not article 107(2) b). By contrast, for instance, France had a similar decision adopted under Article 107(2) b). That's the first question.

Another question is that there are a number of conditions that are imposed by the Member States on top of the Temporary Framework and obviously for instance, regarding the prohibition of dividends, the use of proceeds, a lot of these conditions make sense. Obviously, the question is to what extent these should be covered or to what extent these are going to add a new layer of conditions. Obviously, there is an overarching question about the different level of support among the Member States. The Commission can only clear aid, not force the Member States to provide aid. You've seen that the level of support varies widely among the Member States.

Finally, what about the next step? Obviously, the Temporary Framework is basically targeted at providing liquidity or allowing the Member States to provide liquidity to companies. Obviously, if the crisis lasts longer it might require additional structural measures. The Commission is consulting, as we speak, the Member States, to extend further the Temporary Framework, to recapitalizations, equity injections.

That's all for me at this stage and I pass the floor to Georges Siotis on the economic analysis.

Panel 2: Temporary Framework - Economics

Georges Siotis

Good afternoon. Thank you. François-Charles has made an extensive comparison and summary of the 2009 and 2020 Temporary Framework. I will really focus on the economics of the 2020 Temporary Framework and try to identify where it really differs from previous intervention. The first point to note is that the starting point is quite different in 2009, and it was the end of a very long expansion, where there were clear signs of overheating getting end of a period. As a consequence, you had inflation

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pressures and initially, interest rates were high. Central bank rates but also commercial rates.

They were drastically cut afterwards and the main problems at the time in 2009-2010 were huge credit spreads that you had for corporates, particularly corporates that enjoyed low ratings at the time. It was sometimes necessary to borrow at 10-12% or not borrow at all because that was not affordable. That was the context of the first temporary framework. Here, we are starting with a very different situation. Growth has been muted. Interest rates, central banks, and commercial rates were very low by historical standards but also a debt to GDP ratios are much higher, at least for some in the States now as they were then.

Now the shock is clearly common, exogenous shock, probably completely unanticipated until recently. It's common that the impact differs across the Member States for all sorts of reasons, but one of them has been the speed and the type of public health policy intervention. That has led to different incidents. As I eluded to a second ago, in terms of initial conditions, the fiscal headroom between the Member States is very different. You have countries like Denmark that's not from a very favourable position in terms of physical acquisitions, and the other Member States that are obviously in more difficult fiscal situation, what it's like.

As it was mentioned before, really what is being notified and then swiftly approved by the DG COMP is really the tip of the iceberg. Most of the public support will come in the form of general measures and the general fiscal angles.

Now focusing on I think three aspects that are worth noting, comparing 2009 to 2020 Temporary Framework, the first things to note is that already now we witnessed another launch of a credit rating downgrade. Moody's a few days ago was saying that more than 300 firms had form interest that we level of investment-grade and then you had fallen below investment grade. There has been a scramble for liquidity. Companies have drawn heavily on their credit lines and the expectation is that default rates will shoot up very sharply in the years to come, well above 10%. To have a point of comparison, over the last decade, default rates were below 5%. More like 2-3% average over the decade.

Now this matters because the Temporary Framework, the 2020 Temporary Framework as François-Charles also mentioned, you have very generous conditions for guarantees in loans, so for margin it's small, but, and I think it's very important; it's not conditioned on the credit rating of the companies. In the 2009 Temporary Framework, which was also very generous, you had margins that were conditioned on credit rating. That basically means that right now, Member States can really offer very large amounts at very fair conditions, even to companies that represent very substantial creditors.

The second aspect that was already mentioned, it's the grants, so their aid grants are more generous in 2020 than they were in 2009. This measure was very popular back then, and I expect it will be also very popular now. Although, most Member States had schemes for their aid grants, the actual disbursement, varied across the Member States. Some Member States disclosed very large amounts, some others disclosed very little, although both may have had very similar schemes.

And finally, one question for which we don't have the answer is the issue of equity participation or recapitalization with public money. That happened also in 2009 but it was by and large limited to financial institutions. If this is generalized during this crisis, I think it will raise many thorny technical issues. Back then the issue of entry conditions, the price, for example, the remuneration, hybrid instruments and exits, led to a fairly complex and complicated technical discussion. So, if we've got [inaudible] are going to be with public money, are going to be widespread in this crisis, I again expect quite some technical issues that need to be resolved. Overall, my reading is that the 2020 temporary

framework is much more generous and much more flexible than the 2009 version and expect it to become even more in the future.

Okay, so given the scale of public intervention, the natural question that arises, is a question of sustainability. Is it possible to sustain such an effort in order to counteract the effect of the pandemic? That will entirely depend on the shape of the contraction and the subsequent recovery. Best case scenario, we have a V shape recession with very sharp contraction, and very deep. Also, very sharp bounce-back. Coming soon after, and that is a scenario which is plausible, which is at least what the German Council of Economic Advisers think will happen to Germany, so deep contraction but a quick recovery, and might, well, happen. This is what happened with Germany in 2009. Under that benign scenario, which may be the same, or this type of scenario across the Member States, then what we're doing is the right thing. The State steps into a contract with abrupt fall in aggregate demand, the borrowing costs for more indebted Member States will remain perfectly manageable. The Temporary Framework, which is very flexible, very generous, is really part of the social. It really contributes to a solution. And in that scenario, as pointed out by Francois-Charles, guarantees, we will more have generally contingent liabilities that will not have to be executed. And they will present a huge proportion of support.

Unfortunately, there is another scenario which does not carry a zero probability, is a very sharp contraction and a rather long period of stagnation before growth resumes, but it's not really bounce-back. Under these scenarios, declines in GDP would be more than 10%; bond spreads for highly indebted Member States may increase, despite what the ECB is doing, and we may have a permanent disruption of productive capacity, a reduction in supply. That case we may enter a cycle of creeping stagnation. That is to say inflation pressures and very weak growth. That scenario, it's not difficult to imagine that both public and private debt levels may start being perceived as being unsustainable.

And just to illustrate how these downside risks will materialize, or where they would be concentrated; Spain and Italy are among the worst hit, so far, with the pandemic. The economic costs so far are estimated to be very large. We may well end up with a situation whereby Spain's debt to GDP ratio, in one year or possibly two years, may look like Italy's debt to GDP ratio, but Italy's ratio today; that is to say, 2019. Close to 140%. And Italy may find itself in the situation where Greece is today, that is to say, with a debt to GDP ratio of about 190%.

In addition, these countries rely very heavily on the sector that is very hard hit, namely tourism. One source of growth was the export industry. Again, the industry that will be a hard hit. for tourism here in Spain, this year has been basically written off. At most, we'll see some recovering domestic tourism during the summer, in the best of cases, and that may generate second-round effects. Banks are heavily exposed to these sectors. So, under this circumstance, it's not very difficult to imagine that what looks like a liquidity shortage today, and will remain a liquidity shortage, if we have a short contraction and bounce-back, these liquidity shortages may turn into servicing problems, if the contraction is longer.

In that context, if the contraction is deep and protracted, it's not difficult to imagine a situation where you have willingly a kind of economic attrition war, economic attrition game, whereby some Member States that have the ability to keep the industrial fabric with their head above the water and have the ability to do so, while other Member States try, but do not have the ability to do so. And you could see just the erosion, the disintegration of a very large part of the supply in the Member States that do not have the ability to sustain their industry, and service industries. And there's not much that can be done, because this can be done perfectly through general measures that do not fall under the state aid control, and therefore it will be much less room to maintain the level playing field, in some sense.

Two considerations, with respect to the medium term. It seems clear to me at least, that this pandemic will lead to permanent shifts in supply and demand, permanent changes. Aggregate demand will simply not materialize again, once this is over. Some supply capacity will also either have been destroyed or will not have a demand for it. And I don't have the answer; in that context, there is a dilemma. On the one hand, you want to be very generous and across the board to counteract the fall in aggregate demand, but at the same time in the context of scarce public resources, there's the dilemma of whether it's worth trying to save part of an economic fabric that has more future because supply and aggregate demand patterns have changed forever.

And finally, the fiscal burden will increase. I think there's no doubt about it, but the real question would be how it is shared among participants. That is an issue that arose after the financial crisis, and I believe that would be an issue that will form part of the public policy debate in the months, if not years to come. That's it for me. Thank you very much.

Panel 3: “Exceptional occurrences”, “Ordinary” measures and next steps - Legal issues

Jacques Derenne

Thank you, Georges. Let's move now on what the future may be, not really the current situation since there are not that many decisions under this provision, but it's interesting to see the difference and to remind ourselves about the specific conditions, and the quite dramatic difference in the conditions and the eligibility of those provisions and those state aid under 107(2)(b) notably, which is a twofold, as you will see. Just to mention that there is only, I think, four decision; three in Denmark and one in France. In France for the deferral of tax payment by airlines, which was a big effort probably tax-wise, but not cash sent directly. And in Denmark, as mentioned by Georges, apparently, they have a lot of cash in Denmark with the positive fiscal situation, but they spent it, according to these three decisions, to cover cancellation of events, self-employed, et cetera.

So, 107(2) b) is twofold, as I said. It's to compensate damages caused by a natural disaster or an exceptional occurrence. Natural disaster, it's 90% of the cases. There is a myriad of cases on forests, floods, storms, some on volcanic eruptions (I remember the Icelandic Vulcan in May 2010, which blocked the airports and the sky, etc). So that's a natural disaster. So, you need to know what a natural disaster is, and to get the figure of the damage. And there are fewer cases, but it's still the same type of mechanic, on exceptional occurrences, which is the war, internal disturbance, the 9/11 of course, a strike and accident, et cetera and COVID-19 is that. And I think we may lead to a number of cases on the basis of COVID-19, as except in occurrences. The Commission confirmed that of course, COVID-19 is an exceptional occurrence and extraordinary event, which qualified perfectly for the eligibility of that type of measure.

The peculiarities of Article 107(2) b) is that the Commission has nothing to say about the comparability of this exception. It is granted by law. So, you will require it, you ask it, you will get it if you have the good evidence. There is no assessment, no discussion of the Commission; it's an automatic exception, which is provided for 60 years already. You have the case law mentioned, which confirmed that there are a few important cases by the Commission and the European Court of Justice.

So, what is an exceptional occurrence? The Temporary Framework will confirm it. From the outset, even before, of course, the Commission adopted the decisions and only two Member States took the initiative to notify those type of measures, which are certainly best distinct to specific sectors, mentioned by the Commission to transport. They've lost their tool, airport closed, you have seen the ramp where

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aircraft are parked, so it's an extraordinary situation. The tourist, the hostels are closed, culture, hospitality, not to mention it. The non-food retail, it's closed as well, and all those events have been cancelled. So, all those sectors are specifically hit, and specifically well suited to get and aid from that perspective. And as I will mention later, those sectors, they prefer to have cash now to pay the damages, instead to have a possibility to have a loan. They don't need to have a loan, they need to have the cash to pay the damage of the past.

A notification template has been published, which is quite exceptional by the Commission, which is not very long but very instructive, and I will not follow it, because it is at your disposition, but I will follow the case law, concerning the conditions of that provision. But it's only one page, which contains notably an annexe, Annexe 1, for the transport sector, which is quite a specific interest by the Commission.

So, what is the scope of application? What are the conditions? It is an exception of course, to the prohibition of state aid, and even more so, that the exception is by law, it should be construed very narrowly. Only the damage caused by the exceptional event may be compensated, so needed to show the damage, and Nicole will explain how to show that etc. There should be a direct link between the damage and the occupants. That's not that easy to do all the time, but you have to evidence that, and the notification template is very requiring on that. And the assessment of the damage should be very accurate and precise, as much as possible. These sentences are from the Court. I just copy-paste from the Court of Justice case law, which I mentioned, not from the notification templates, so it's not new. It's known to everybody for 40-50 years.

What is the reference period? You have to compensate the damage, but as compared to what? The case law said the period for the companies could be compensated, are the period where they could not operate normally. That's the sentence of the court. The court said, "If you cannot operate normally, in the normal market conditions, then you have damages during that period." And you'll have to check what is the income that you get during that reference period. The income that you lost, and income which was recorded prior to that, or according to the same payment in the past. Nicole will discuss that. And it can include costs, and that's the case law, which says it. It is the Slovenian case I mentioned below, which was concerning these volcano ashes in April 2010. In that decision in August '11, for Slovenia, the Commission accepted that the cost of the damage could be related to events which are far beyond the strict reference period because you have a start-up situation where you have to catch up focus evenly and to restore the situation. This is taken into account, that means that you don't have to compensate the losses that you are making at X, but also X plus one and two, you would have to catch up even though the COVID-19 will indeed progressively disappear hopefully, but at a certain time, once it has disappeared completely, the effects of the damage of the COVID-19 will not have disappeared completely, you can include that in the damage.

Nicol will explain that a bit more, but the case law or the decision practice of the Commission, express that the counterfactual is based on that methodology. The average value added to the previous rate. You see what is the previous rate, you compare the counterfactual, and you put an average on that, and you have a certain accurate estimate of the foregone revenues due to the closure or the activity, proves the cost that you have to suffer during this closure. And you reduce, of course, deduct the operation costs that you have over the bulk cost. During the closure, you do not pay for the fuel, you do not pay for the electricity, your machine that closes etc, but you have still to pay other things et cetera. And then it gives you the actual damage difference between what actually occurred, what should have happened, it's the counterfactual scenario which is well known to the economist.

Some indicators from the decisional practice, notably from that Slovenian decision, you have some indicators where you pinpoint the revenue or the cost items, you list them which are affected by the

event. You see those cost items which could not be affected probably, under the counterfactual scenario compared to the actual, so you do not include these cost items, that would not be considered for compensation. And you have safeguards which are also mentioned in the notification template of the Commission, you have to verify in the application for the aid, by the Member State and by the applicant of course, that they will be independent experts about the damage, appointed bodies to judge [inaudible] that verification, documentary evidence, and prosecution for, of course, false application and deterioration and recovery with an interest of those damages that you could get an invasion of the law.

So, coming a bit down on the conditions. These aids cannot be granted to an undertaking which is in difficulty at the time of the event. Now due to different of course, it is meant to make good damage which put the enterprise into difficulty because of COVID-19. But if the company was in difficulty at the time of the event, it is the same type of reference to the notion of undertaking in difficulty in the Temporary Framework, with some exceptions, as you've seen.

I have listed here the three main conditions to how to recognize an undertaking in difficulty. Now we have better objective criteria which are repeated in the General Block Exemption Regulation and are copied from the guidelines on rescue and restructuring. So, you should have an economic death of the company, without the state intervention, that would be an ineluctable death of the company. Companies, depending on the corporation, they should have lost half of their capital, or share capital, or be subject to insolvency proceedings, then there is a presumption of difficulty. And for large undertakings, their formula, the debt to equity ratio more than 7.5, and EBIT interest coverage ratio of less than one. With this formula, you'll have the objective calculation of the difficulty of the undertaking, which is helpful of course, it was no longer a soft criterion as in the previous rescue, restructuring guidelines.

The aid should be granted in a non-discriminate manner of course. There should be no set convention of the principal's rescue or restructuring aid. You cannot remedy difficulties of a company which was not eligible for rescue, restructuring, or that not executed obligation and commitment to that. And get damages from the [inaudible]. But the one-time last time we changed the principle in rescue, restructuring guidelines which says that you can have only one restructuring aid every 10 years, is not applicable here, because the aid granted under 107(2) b) is not a restructuring aid. So, you can accumulate the restructuring aid in the past, and still have it, but no longer be in difficulty, which means as I said in the bottom, you should have escaped the restructuring plan. You should be autonomous on the market, and no longer be in difficulty. An enterprise in difficulty, it will still be in difficulty for some time, two or three years after the granting of restructuring aid, because they have to complete the restructuring plan. This could be argued, but there is a certain margin there. But still, for those companies which had received a restructuring aid or rescue aid, they can cumulate that aid with the aid from the damage, under 107(2) b).

Then I shift, before some comments on the last slide, to the next step and the ordinary provision, which in times in crisis, is not that suitable. As we have seen in the financial crisis, the 107(3) c), which is the normal legal basis to grant aid to regions, to certain sectors, certain individual companies who could be in difficulty or not in difficulty; it's a rescue/restructuring aid based on that 107(3) c). It is not appropriate in times of crisis, of urgent situation where you have to be quick and not wait for a decision, which will take in Phase II, one, two, three, four days to be decided, and granted, and approved.

So except indeed a certain aid, I think section 789 of the Temporary Framework, which is an aid to combat the COVID-19 and recent development etc., which is still based on 107(3) c), all of the other aid now granted for the timing, are based on 107(3) b), and probably as well, then full decision, 107(2) b).

Then what about rescue and restructuring aid? Yes, it's possible to have it, if you are in difficulty before the end of last year. That means that your difficulty does not stem from the COVID-19 and then you have damages, etc. But if you were in difficulty before, you cannot get the aid, because it's incompatible. Accumulate the difficulty of your situation, plus COVID-19 aid, which are not destined to save companies which should not be saved. But you still have the safety net, which is a rescue and restructuring aid, I will not come back to the conditions. It's the same conditions for many years, adjusted in the financial crisis in 2009, which shaped the new guidelines in 2014, for the real economies. So you have this inference between one crisis to the real economy and we might see, probably new guidelines for the COVID-19 restructuring guidelines, where you will have to be creative and bit more flexible, in order to address the specific issues of restructuring situation in the COVID-19 situation. For the time being, it's not the case. We have to do a restructuring aid or rescue aid according to guidelines which are not totally appropriate to the situation.

Then [inaudible], in the financial crisis, we shifted at the end of it after the sovereign debt and the resolution directive, from a bail-out to a bail-in. Instead of putting cash in banks, we asked the shareholders to get the first loss and then to ask the debtor to pay the loss until the bank can be resolved, and then the bailout the cash ID from the state will come later or they will not come. That is a question to see how the bail-in or bail-out could apply in a situation of rescue, restructuring for COVID-19 situation.

I would finish with some general comments and maybe anticipate to responses to some questions which had been already sent. This dichotomy between 107(2) b) and 107(3) b), you know what that means now. There is an issue, 107(2) b), there is no discretion for the Commission to accept, so the Member States were on the good side. Indeed, we have seen that in the Temporary Framework, the discussion with the Commission was quite large, and the motivation of the decision are copy-paste, and there's not been very much difficulty for the Commission to approve it, because they put different ropes for approving. So, at the end of the day, it doesn't change much. But still, you see the 107(2) b) is more for what happened in the past and to compensate the damage for the future. While the 107(3) b) are more geared to the future, and how the company could get more cash or could get a loan or guarantee to continue to survive in order to get out of the crisis.

So, the two are complementary, can be accumulated, as we said, and that's important. And I do not have a clear response why the Member State did not use it. I think there is a problem of easiness. Not laziness. Let's say that it's very difficult to have a file under 107(2) b), you have to put a lot of documentary evidence. It takes times, and you don't have the time, and Members State did not take the time for the time being, but they should probably. The Danes did it, and the French they did once.

So, one comment on the Temporary Framework, which is very generous and flexible, not that targeted, it launches guarantees for the Member States of billions and some small cash grants limited. What about the moral has that? They asked some safeguards, there are some verifications, they are some issues. There is some situation where companies who should not get aid, who are inefficient, the question is: would the Temporary Framework be able to allow the Member State to save the "Zombie" firms and not have the [inaudible] effects of a crisis? That's a question, we have to be careful about that, because a crisis is also an opportunity, and to leave room to the companies who really deserve to survive, and to show that they have the vitality to survive on that end.

The damages offered by 107(2) b) are probably more appropriate, notably, for even big companies, some of the companies may have some cash now, and maybe a loan guarantee could be useful to bridge, et cetera. But some of them are very tense in liquidity. And small or big companies, their program is to pay the cost now or to pay the people they are of course the furlough situation, and the temporary

redundancies, etc, non-aid measures. But still, the instinctive response to the situation is to make good the damage and pay cash to allow the people to survive for one to three months. Giving them a loan guarantee or loan, well, it's not the first instinctive rescue for those people who just need cash. So, there is a dichotomy on that, and the loan guarantee we will have to reimburse the loan, and it's probably not easy for those companies to reinforce all that in the future. Of course, there were guarantees of the Member State, but it's postponing the situation.

And then the last point, very typical but will not be long on that. It's the beneficiaries: who is the beneficiary? And that's I will do an analogy with the rescue and restructuring principle, where there is an acceptance in the principle which says that only the group of companies could receive a restructuring aid. Exceptionally, a subsidiary of a group could receive aid, if there are, indeed, difficulties which are intrinsic to those companies, or the difficulties are not the result of an arbitrary allocation. Of course, within the group, you leave the company [inaudible], and it's not saved, and then you ask money for the state to pay it. And if the difficulties are too serious to be dealt with by the group itself, there is no indication in the decision or practice about granting approval of aid 107(2) b) or 107(3) c). All of that is explaining the recovery phase, and recovery litigation. Then the Commission has to prove to the court why it chose to get the money from that sub and not from the group.

So, there is some indication in that case law, and I could refer you to that, but it will be important to be careful about that. And it's one of the questions, I've seen, I think: what about the sub? with the group, are you allowed to grant an aid to the sub? Or the group while the sub is not in difficulty, and it's full of money in one country, and not in the other one.

So, there are things which had to be clarified by the Commission. I'll stop there and we thought for the do, move on, take the floor to Nicole, please.

Panel 4: Exceptional occurrences “Ordinary” measures and next steps, Economics

Nicole Robins

Okay, thank you. If you move to the next slide. So, what I need to talk about briefly is how financial analysis can help. So, I'll first start by talking about compensation for damages, and then I'll say a few words about the role of financial analysis for rescue and restructuring aid cases. So, if we move onto the next slide, as Jacques highlighted, there needs to be a detailed description of the approach that's used to calculate the damages. And it's particularly important to be able to show there's a direct link between the difficulties and the damage suffered by the company, and the COVID-19 pandemic. And indeed, that the amount of aid does not exceed the damages suffered.

Now, the requirements from the European Commission are that one year after the Commission's decision, a report must be produced demonstrating the absence of any overcompensation. Now, one of the challenges in this concept is the uncertainty about how long the pandemic will last.

In this context, it's the uncertainty about how long the pandemic will last. So, in order to potentially limit the amount of aid, ensure that the amount of aid does not exceed the damages suffered, one option

could be to include a clawback mechanism. And I know that something similar was implied by the Danish authorities, one of the decisions that Jacques referred to earlier, whereby at the end of the COVID-19 pandemic, the damages suffered by the company are assessed, and if the amount of aid exceeds those damages, the excess aid will be clawed back.

If we turn to look at specifics for the transport sector, so if we move on to the next slide, please, in order to estimate the damages, there are two key aspects required. The first is looking at what we refer to as the counterfactual scenario. So, looking at, in the case taken, an illustrative example of an airport, what would have been the airport's expected level of profitability over the period of the pandemic in the absence of that outbreak occurring. So, this would be a case of obviously looking at the higher revenues as a result of the traffic compared to the corresponding cost space. And that counterfactual scenario in contrast to other state aid cases where it's normally more difficult to estimate the counterfactual scenario, in this case, it's actually easier to estimate the counterfactual scenario than the factual scenario. In this case, you can look at projections that the airport may have drawn up prior to the pandemic to estimate what would have been the expected level of profitability, and it's important for you to be able to cross-check and illustrate the appropriateness of those assumptions, perhaps using past data from the airport or industry studies available at the time prior to the pandemic.

So that's the first aspect. The second aspect is then looking at the scenario with the pandemic, so obviously taking into account the low revenues and quite importantly, as Jack mentioned, it's important to only take into account those costs that are unavoidable, so those costs that can't be reduced to reflect the lower demands. Now, the damages are effectively the difference of the two over the reference period. Now, the reference period is obviously key for influencing the size of the damages, and in light of the uncertainty around the length of the period of the pandemic, it's important to follow a number of different sensitivity checks. So, if you look at the available forecast, if you look at for example comparing this pandemic to others such as the impact of the SARS, in Asia as a result of the SARS outbreak, traffic recovered quite quickly, but then in the region for about six months. Of course, the COVID-19 pandemic is far more widespread than that, and it's also, as Georges mentioned, will be accompanied by the recession. But currently, forecasters predict, so if you look at forecasters such as the International Air Transport Association, they suggest a full recovery, so including the period of the ramp-up, would take in the region of about two years. So, the reference period can be estimated looking at appropriate forecasts. So that's just very much an overview of how to calculate the damages. I'll just say a few words briefly about rescue and restructuring.

So, in the case of, I'll just start firstly with rescue aid. I mean, typically there's limited financial analysis in rescue aid cases. However, in light of the COVID-19 pandemic, as Jacques was saying, companies that are not yet in financial difficulty can receive rescue aid if they face acute liquidity needs as a result of the pandemic. So, in this context, there are two particular areas where financial analysis can help. The first is quantifying the extent to which the company is already suffering or may be likely to suffer from liquidity issues due to the pandemic, and the other aspect is determining the period over which the company needs the liquidity support, taking into account any other sort of financing support that's available to the company, such as undrawn credit facilities, for example.

And so financial analysis can help by looking at both and defining both the counterfactual and the factual scenarios. So, the company's latest financial data prior to the impact of the pandemic can be used, analysed by these base various liquidity metrics to assess the company's ability to meet its short-term obligations prior to the impact of COVID-19. We can do that by looking at metrics such as current assets, current liabilities to assess the company's liquidity needs. And this can be contrasted against any short-term cash flow forecasts from the company that may indicate liquidity shortage to assess the need for the rescue aid and to show that the aid is required as a result of the liquidity issues caused by the

pandemic.

However, there is far more of a role for financial analysis in the restructuring cases, and in particular where financial analysis can be used to demonstrate the compatibility of the restructuring aid. The first, the key area is in terms of being able to show the appropriateness of the restructuring plan that's drawn up to look at the restoration of the long-term viability. So here, as required by the Commission, it's important that the restructuring plan includes a number of different scenarios, so having a central case scenario as well as a downside scenario as well as an upside scenario. And here, there is a wealth of financial analysis in terms of looking at the suitability of those projections, particularly in terms of the central case assumptions, and here for example, what I mean by that is looking at the trends and forecast net income or operating profits in the restructuring plan and comparing that to the past growth rates and evidence from competitors, industry studies to show the robustness and the appropriateness of those projections.

The other key element is looking at the level of forecast and profitability in the restructuring plans, be able to demonstrate that the plan predicts that the company will return to a sufficient level of profitability such that it would be able to survive without aid, and here, for example, the analysis mainly would focus on looking at the projected. So, for an example, return on capital projected in the restructuring plan compared to the appropriate benchmark to assess whether it's at the suitable level of profitability such that the company can survive in the absence of aid.

So, in this case, your favourite benchmark will be an estimate of the company's cost to capital, and it's important that benchmark is estimated abstracting from the impact of the pandemic and that the results are shown to be rebutted to various stress tests. The other area where financial analysis can help in restructuring cases is in terms of demonstrating proportionality of the aid. So, for aid to be limited to what is necessary, the aid beneficiary itself or its shareholders' creditors must contribute towards the restructuring cost, which could be in the form of, for example, equity injections or loan facilities, for example. And here accounting analysis can be used to quantify the amount of these so-called contributions to a check that they amount to a significant part, typically in the region of 50% of the total restructuring costs. So those are just really the two main areas where financial analysis can help. I mean, there are other areas where the economic analysis can help support the legal analysis, which is particularly in relation to demonstrating and looking at the impact of the aid on competition.

So, if I turn onto the last slide and to conclude, so, as set out, a number of the different routes to obtaining aid require there be shown that there's a direct relationship between the financial difficulties suffered by the company and the impacts of the pandemic. Whilst in the example of airlines and airports, that may be relatively straightforward. For other cases particularly in the retail sector, that may not be so clear cut, and for example, online sales have increased over this period.

Now the analysis that I've talked about from the damages and also the rescue and restructuring aid is just one part of a wider toolbox of measures that could be used. In particular, one aspect that we've only touched upon briefly in this webinar is the potential for market forming approaches that could potentially be used. So for example, if the state [inaudible] provided, say, for example, a loan to a company, measures such as waiving, say, the debt repayment for a temporary period, it may be possible to justify on a no aid basis if the results of financial analysis were to show that the costs of waiving any debt repayments and interest payments for a temporary period are less than the costs of forcing that company to meet those payments and potentially allowing the company to enter into bankruptcy. So that could be one potential route for a no aid route.

So, thank you, thank you very much for your attention. We look forward to the questions.

Q&A session

Nicolas Charbit

Thank you, Nicole. Thank you to all of you. That was very detailed and deep. I think we already been over the time allocated, but there are over 27 questions, so we need to take some time to answer these. Jacques, there is a question that you put in answered

Question

It was much more a question about the future and the recognition of recovery funds that the Member States will try to put and to set up in the future, and we have a lot of discussion within industries to know if article 107(2) would be a relevant legal basis for the Member States to grant stated measures within recovery plans? For a lot of us, it would be much more interesting to work on article 107 (3)(c), which is a more usual legal basis. So, my question was for Jacques and François-Charles to have their point of view on this, because as I think Jacques said, article 107(2) includes also the future effects of the crisis. So, which would you recommend for the Member States to notify? Thank you.

Jacques Derenne

Yeah, I can start to. Julian, I think both are complementary and could be accumulated. As I said, 107(2) b) is more for the past action and the effects of the past and the future probably, but the damage which you can identify for the past, the losses. Then the most appropriate one is just to make good the damage. But for that you need cash, and the Member States do not have cash. That's the reason, probably, and the difficulty, and it takes to time to get the evidence, and it's more a case by case basis, it's difficult to have a scheme even if there is a scheme with article 107(2) b) but it's for agriculture, etc. and a bit more difficult to manage. For the future, as I said, 107(3) b) is still good for the national recovery, because you can plan the recovery plan and have actions to incite people to invest or to make recovery actions by getting bridge loan from the bank thanks to state-guarantee etc. But obviously it's more in a phase where the people can still act while not really dead, more or less. People who are nearly dead because of the crisis, if we ask them to go to the bank and get the loan, well, they say, "Well, I will never reimburse it probably. I need just cash now in the next 10 days," and without being obliged to reimburse it.

So, 107(3) c) is certainly a good legal basis but probably not appropriate for the crisis time. For the crisis time, Member State should use 107(3) b), which allowed them to get more flexibility assessment by the Commission, a quicker procedure by the Commission, attention, and I will never use the 107(3) c) for the recovery plan in times of crisis. François-Charles?

François-Charles Lapr vot

If I may add, I completely agree with Jacques. On 107(2) b), I think there is, if you look at the current situation, there is still some margin for the Member States to use in order to tap this as a legal source. We only have four decisions. And clearly, the amount of damages that are suffered by a number of sectors is not yet compensated by the measures that have been allowed so far in all Member States clearly. At the same time, I understand, Julian, where you are coming from, and it's true that, so, to answer your question, I think that 107(2) b) can contribute, to some extent, to these recovery plans. The difficulty, obviously, is that to have 107(2) b), you need first to have an exceptional occurrence. Okay, we know that COVID-19 is an exceptional occurrence, but until when? Until the end of the lockdown?

Until we probably know now that the confinement, the end of the lockdown is going to be a gradual process.

So, until when will this exceptional occurrence last, because that determines of course until when it will continue to produce its effect. And then you need effect, a direct link. And again, you probably have quite a lot of damage that has been suffered as from now and that could be considered as having a direct link, but in the future obviously this demonstration will become harder. And so, on the one hand, I think there is some margin. On the other hand, I can understand to some extent Member States and the Commission who want maximum legal certainty. Obviously, the Commission has some discretion under 107(3) b), and so can use this discretion have a decision that will be in a way less liable to become tested afterwards under 107(2) b), where it doesn't have discretion, so that's good in a way for the Member States, but obviously the Commission has to get its right because you cannot allow overcompensation.

Question

What about third countries and how are they going to react to these massive public interventions, in particular under WTO rules.

François-Charles Lapr votte

This is a very interesting question. I understand that the head if I'm not mistaken of the Korean Commission authority has made also allusions to the possibility to use more duties in the current period, so to protect local companies from the effect of subsidies granted by our countries. It's true that conceptually this can be envisaged. I would nevertheless number one say that yes, Europe has granted or is going to grant a number of subsidies. I think it's not alone in doing this. I would look maybe also after what is being done on the other side of the pond, of the Atlantic, and in many other countries around the world.

The second point is to which extent really these subsidies can be considered as actionable subsidies, so subsidies that would fall under WTO rules and to which extent they really apply on trade, because we are just talking here about addressing an exceptional situation. So, to answer your question to which extent the Commission has taken this risk into account when drafting its temporary framework, I could really not answer this question, because I was not there. I would suspect that this has not played a very significant role in the current situation. That's just my gut feeling.

Jacques Derenne

To follow-up Fran ois-Charles' statement here, a bit lower centre, the same type of issue, which is EU versus non-EU, and I just had to comment on that. You know that the EU has moved for the last 15 years to the export of EU stated rules, EU stated control within the free trade agreements, within the multi laterality of those agreements now, and Brexit. So, now it would be the reverse if you want, but I think certainly EU is not unique in granting aid but is unique in putting control to the grant of aid indeed, except in those free trade agreements which are bilateral. You need to have enforcement as well, of course, but it could give rise to an interesting dialogue at an international level, where some people less affected could give, take some advantage of the free trade agreements which put emphasis on them on behalf of the EU, and that it would be the reverse. But the future will say about that.

Question

So, my question is on section 3.10 of the Temporary Framework as amended and goes to the head in the form of wage subsidies for employees to avoid layoffs. My question is, how do we understand employees that would otherwise have been laid off as a consequence of the suspension or reduction of business activities? Well, this reference might lead to some controversy, I guess, since the decision to lay off involves some discretion of the employer, and this is quite problematic, for instance, because in Portugal we have now a simplified lay off that has been approved to deal with the COVID situation. So, what kind of lay off are we talking about when we say to avoid the layoff, that it's a matter of interpretation and burden of proof, I guess?

Jacques Derenne

Yeah, I can take it quickly, before that, the employees should not prove themselves. The aid is not to the employee, the aid is to the employers who do not pay the employees, and here we take a selective measure, probably, which is a sector which has been helped. So, the employees should not have any burden and they are not, they are indeed the ultimate recipient of the assistance. But it is the employer who gets the advantage not to pay the employee.

So the employers would have to show the conditions and why they've been doing that, and most of the time it will be because of the lockdown directed by the government, and then they can show the decree saying I have to close my company, and I took the benefit of a regime which says that the people will get temporary layoff. I don't think that employees should bother about that at all, which is a good regime, be it aid or not. It's quite efficient because we have seen that a lot of companies, probably small and medium but even the big ones, I think they got a lot of relief from not having to pay all those people who are not working. I mean, they are, I think in Belgium only, I think it's one or one million and a half people, or eight million probably in France, who are just not working, redundant, provisionally of course, but the state is paying them. So that's a good relief for the companies who have fewer difficulties at short term for that.

Nicolas Charbit

Okay. Thank you, thank you, Jacques. Let's move to the next question.

Question

Yes, thank you very much. I hear you very well. Congratulations on your presentation. My question is about the room that the Commission may still have at this stage to consider that certain interventions by the state, by the Member States, could nevertheless not be regarded as state aids because they are made under a private investor principle, because as we all know, circumstances have changed a lot, and so I guess my question is because the Commission is still saying that it may even consider that certain interventions may not be deemed as state aid, would that in practice happen, or is it likely to happen, and if so, what should be the correct benchmark?

Nicolas Charbit

I see that François-Charles has noted the questions. François, would you like to answer this one?

François-Charles Lapr votte

Yes, I'll give it a try. Thanks a lot for the question. I mean, if you take a comparison with the financial crisis, we had the same question, right, in the middle of a financial crisis maelstrom, can any form of

equity intervention in favour of the thing be considered as basically an intervention under the private investor principle. And obviously, the general answer was, in principle, yes, but in practice, very, very unlikely, and as you know, at the time there were still a couple of decisions, a few, including one in Portugal, where the regime did consider that the state acted as a private investor. And here, the Commission since March the 16th, since its first communication on the Temporary Framework, has left this possibility open.

And I think that it makes sense to leave it, to have left it open, because if you look really at the economic data that are not yet complete, obviously, but not all sectors are hit exactly in the same manner by this crisis, as you could conceivably imagine some interventions that are made under the private investor principle, but what I would expect is that a Commission would apply on this one would, because they have no other choice obviously, would apply the private investor principle in the same manner as it would, I mean, it's not effective in itself by the crisis. Obviously, perspectives, profitability perspectives, in particular, would have the demonstrating criteria... I would say exhaustive manner and take into account the current situation and how companies are going to recover from the economy. But in principle, the possibility for me, it's still there.

Jacques Derenne

I would like to add that I would be less optimistic about that. It depends on the situation and on the sector, you're right, François. There are sectors which are not affected that much, and then we can run the MEOP test. But in principle in the times of crisis, things have changed, and even though you would say, ah, the state will make a profit, but yes, the state will make a profit, but nobody will dare to try to make a profit. So, nobody would guarantee. It depends on the situation. We have seen in the crisis, the *ING* case, for instance, with the decision of the Commission was challenged and there was a difficulty on the second time of intervention by the state where the Commission was put in difficulty in that situation, impossible that they may be depending on the situation very analytically analysed, and then you would be tested. But in principle, if you are in a sector hit by the crisis, when we have a low guarantee by the state, why the states have to put a guarantee on that loan, why the bank doesn't do it, so. It's the signature of the state aid in most of the situation.

François-Charles Lapr votte

And what is pretty clear I would say is that this, you would not get this type of decision within 48 hours.

Nicolas Charbit

Okay. Thank you. I don't think the next question is specifically for the lawyers, maybe the economists would like to answer this.

Question

With respect to guarantees and loans, is there clarity on the criteria that will be applied to determine whether an undertaking will be considered to have been in financial difficulty pre-crisis? So, Georges or Nicole would like to try this one?

Nicole Robins

Yeah. So that would be based on the criteria that are out in the Commission's rescue and restructuring guidelines, so Jacques mentioned also, which is about six criteria, which the Commission looks at to

determine whether a company meets any of them, and they include, for example, criteria such as various thresholds for debt to equity, and also EBITDA interest cover, and if those thresholds, one of them are met, and together with the other criteria such as their share capital being lost over a certain period of time, then the company is deemed to be in difficulty.

Nicolas Charbit

Okay.

Jacques Derenne

There are no specific criteria for loans guarantee. It's the same for all types of measures.

Question

What if a conglomerate, one subsidiary was in financial difficulty before the end of 2019, and another subsidiary operating different market sector was not? If a subsidiary that is not difficulty [inaudible] Temporary Framework? Any of you, Georges, maybe? Or someone else?

Jacques Derenne

I mentioned that issue, but Georges should comment on it, and it will be for us to comment a bit. I mentioned the difficulty to identify within a group, but Georges, could you please comment on that, from your perspective, or other ones?

Georges Siotis

Yeah. My own reading, my own experience is that there's no general... no general criteria that would allow for a clear answer. As an economist, I would say it very much depends on the relationship within the group. You have subsidiaries that are very much arm's length and independent entities, while others are much more dependent on the mother company. I don't know what, there's any significant case flow that would guide us, but as an economist, I think it would very much depend on the nature of the relationship between, within the conglomerate.

Jacques Derenne

Yeah, I would add that under EU Competition Law, the companies do not exist. What exists is their undertaking the enterprise, and the enterprise is an economic unit. The economic unit is whatever the legal structure, is the group. So, the sub- in this example, both subs depend, apparently are controlled, by the same mother company. And that mother company is the undertaking. Does that undertaking deserve state aid or not? That's to be seen, because there may be one sub in difficulty, another one not, and the group not. So, no aid in principle. It depends on the situation. If you can pinpoint the situation and say, it is intrinsic, as I mentioned, to that sector in the group, then you may argue that the difficulties are specific to that sector, to that part of the group, but it's not guaranteed. The principle is, you take the mother company.

François-Charles Lapr vot

Yeah. Just to complement that, obviously, we are talking about an exception. So, we are leaving aside companies that are in difficulty from the benefit of this Temporary Framework. But nothing prevents

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the Member States to be even more conservative. And so, I would expect, or I could imagine, a Member State that considers that if you have a subsidiary that is in financial difficulty, that's part of a group, that is maybe healthier... But if the subsidiaries, for instance, the borrower, on which basically the guarantee is going to be granted, I could imagine a Member State asking for, and that goes to Georges' point, for some form of reassurance that the group stands behind the subsidiary. So that you can consider that, even if that is not, strictly speaking, part of the exclusion from the framework, in order to benefit from this particular scheme, they ask for this additional condition in order to grant it.

Nicolas Charbit

Okay. Thank you, Francois-Charles. So, the next question is "Do you think that COVID-19 considerations can be taken into account by the Commission for state aids? For example, individual tax [inaudible] that do not fall within the Temporary Framework of 107(2) [inaudible]?"

Jacques or Francois?

Jacques Derenne

Yes. It's not impossible. It's a bit stretched, the situation, of course. If the Temporary Framework takes specifically in consideration the COVID-19 to put more flexibility, that's... You use it. Or the 107(2) b) is there to make good damages from COVID-19, you do it. I do not see a situation where the Member State would complexify the situation by arguing an exemption which is not based on that if it raises issues related to COVID-19. But legally, it's not impossible to explain that the difficulties are coming are from that and are exogenous, etc, which is restructuring. And indeed, restructuring will be probably the only clear legal basis where there would be a justification by... Well, the restructuring I mentioned, that would be 107(3) c), the rules for restructuring for the time being.

François-Charles Lapr votte

Could even, I think, conceive a solution under 107(3) b) which, when you don't formally apply the framework, or you apply it by analogy... There's a recent example, very recent this weekend, with the Belgian federal guarantee. Which, if you look at the decision where the Commission considers that the guarantee... Because it's on a portfolio of loans and not on individual loans, does not really fall within the Temporary Framework. But nevertheless, the Commission basically applies, all things equal, the rules of the framework to clear this under article 107(3). There is the possibility, somehow to... If a measure does not, strictly speaking, fall under what the Commission has hitherto considered, to the extent the principles of necessity, proportionality, and the like, are [inaudible], to go ahead with it.

Question

My question is very simple. I would like to know what is the maximum coverage this create in case of guarantees. So, from your presentation, I understood that it's 90% of a loan principal. And that was also my understanding, on reading the regulation. Yet, to me, it remains unclear what is the link between the amendment and the press release. Because somehow, in the press release it was mentioned that the guarantees on loans cover 100% of the risk. Could you please explain that? Thank you.

Jacques Derenne

I can... You're right that... Francois-Charles can complete and confirm. You're right that a 25F referred to 90 and 35% only, and the 100. And I have the consolidated text in front of me. I do not have the amendment to see if there was a mistake or not. But maybe the press release... Or it's another point?

François-Charles Lapr vot

No, no, no. The explanation, I think, is that the 90% relates to guarantees granted under paragraph 3.2. But the amendment basically relates in particular to paragraph 3.1. So, this aid, which is capped at 800,000, and on this one, on April the 3rd, so through the amendment, that category of aid was open to guarantee. And there, for that category of aid, you don't have a cap on the guarantee coverage. Which makes a lot of sense, because if you can provide a direct grant for 800,000, you can also provide a guarantee for 800,000.

So, the answer to your question, as I understand it, is both. You can have 100% up to 800,000, and then you can have 90% for guarantees under section 3.2. One point, also, to consider is the fact that when we talk about the caps under section 3.2 and 3.3, they are not absolute caps. Huh? You can basically have a discussion with the Commission. Generally, it's less on the guaranteed coverage, but, for instance, on the cap of the loan or the duration of the loan or the remuneration, and to compensate one of the... So, to exceed, sometimes some of the thresholds, and you compensate this with a reduction in other parameters. This has happened in a couple of decisions.

Nicolas Charbit

Okay, Francois. Thank you. Next question.

Question

Thank you very much for the presentation. My question is to Francois-Charles. But if anybody can step in, I'll be glad to hear any anyone's answers. So, it's very straightforward.

It was mentioned during the presentation that de minimis aids can be complemented with measures adopted under the Temporary Framework. But we are having some questions about if there would be a cap as per maybe Article 5.2 of de minimis regulation. So maybe it's easier to understand my question with an example. So, let's imagine that a company gets a subsidy to pay invoices or wages of 200k, subject to the de minimis regulation. And at some, maybe months later, the same company applies for a loan with a public guarantee under the Temporary Framework. So, would that company be allowed to get the maximum amount of the loan warranted by the state as per the Temporary Framework?

François-Charles Lapr vot

Or would you have to basically deduct the 200,000 from that cap? I think that was your question. Right?

Question

Yeah.

François-Charles Lapr vot

Yeah. It's really very good question because when you're reading the Temporary Framework, the answer is not completely explicit. My own reading is that the 200,000 could conceivably come on top. And the reason why I'm saying this is that if you take... So, you have a general principle, which is laid down in the framework, that you can combine with de minimis aid, provided you fulfil the conditions for de minimis aid combination, which are laid down in the de minimis regulation. And the Commission has explicitly said that basically you could combine the aid of section 3.1 with the 200,000, which gives you 1 million. And so, my reasoning is that if you can do this for 3.1, which provides for a cap in absolute

value, you could do it for a 3.2 or 3.3. But I'm not aware of a decision that has been as explicit as that in the decisional practice of the past two or three... I would say it's indeed a possibility. And I would use the case of the combination with aid from section 3.1.

Nicolas Charbit

Thank you, Francois-Charles.

Question

Thank you very much for the very interesting and useful presentations. My question is to both Francois-Charles and Jacques. And it regards the calculation of the maximum thresholds of aid that are defined in the Temporary Framework. In your opinion, shall they be calculated taking into account all the aid measures that a company group may receive in many Member States? Or do the thresholds apply, in your opinion, per a member state? Thank you.

Jacques Derenne

Yeah. Thank you, Francois-Charles. In principle, it applies per member state. The Temporary Framework says per undertaking first. But, here, we are talking about one state aid per state aid. And the Commission will not use and make conditional state aid on a state aid in another Member State. It's per member state, except in restructuring or in recovery, where there is the *Deggendorf Effect*, where there is a slight cross-border effect, where you will not get a new aid until you have recovered an aid in another member state. But in this case, I think it's per Member State because it's a decision concerning one decision in one member state. And the Temporary Framework says 800,000 per undertaking in that member state.

François-Charles Lapr vot

I agree. And what I would expect is that some Member States might make sure that obviously the aid that they grant to the subsidiary on their territory does not get diverted to another subsidiary outside their territory. So as to avoid, obviously, all the aid being centralized elsewhere, et cetera. But I agree that, in principle, it's per member state.

Jacques Derenne

It's not economically totally logic. Because you put 800,000 per undertaking here, you multiply 800,000 per 28, 27... It's not impossible. But you need to have 27 different decision by the Member States.

François-Charles Lapr vot

And you need to have a group that is active in the 27 Members States because obviously that is going to be a condition for granting the aid in the first place. So, you know, proacted.

Jacques Derenne

Of course.

Nicolas Charbit

Okay. We can now go to the next question.

Question

My original question has actually been answered, so thank you very much to the panellists for answering it. If I may, I'd like to raise a later question, which relates to private equity and the extent to which the panellists think aid under any of the provisions that we've been speaking about today could be justifiable for a particularly badly affected subsidiary or portfolio company of a private equity house. I'm thinking, in particular, 107(2) b) perhaps... Obviously, to make good the damage from COVID-19 where there's a direct causal effect and the damage can be properly substantiated from a financial perspective. But I'm also interested in other potential measures, too. And the interesting comment made by one of the panellists to do the intrinsic kind of criterium there. Thank you very much.

Nicolas Charbit

Thank you. Jacques or Francois-Charles, you want to have a try?

Jacques Derenne

If we look at the detail of the measures that I'm providing for under the Framework, we have first a series of measures that are geared, I would say towards SMEs, which include direct grants, selective tax advantages, advanced payments, and on April 3rd the Commission even extended this category of measures to, in particular, guarantees and possibly equity injections. The key characteristic of this first series of measure is that it is capped at 800,000 euros per company with lower ceilings, in particular the agricultural sector.

Yeah. I can have a try. Portfolio of private equity is quite specific because you need to see who is really the undertaking working behind. Is the private equity controlling, jointly controlling, or active in the company? Usually, we do not come back easily to the top of the private equity portfolio. And the beneficiary is the company which is acting underground and the beneficiary is not the shareholders. Shareholders are not beneficiaries of state aid granted to undertakings as a principle, as a matter of recovery, etc. So, in this case, I think private equity would not be of relevance to the appreciation of the situation of the company. Francois-Charles?

François-Charles Lapr vot 

I agree. Obviously, I think you're referring to the debate that I think has been going on, in particular, in the U.S. about PE. The one thing, obviously, that you have to always keep in mind is that the Member States can add conditions, can be more conservative, in granting state aid, or more restrictive than what the Commission itself allows. And so, yes. I would agree that in principle, and I do not see anything in the Temporary Framework that would provide for a specific restriction there. Conceivably you could imagine that the Member States may decide to restrict the circle of beneficiaries. They would have to notify that to the Commission. It would have to be part of the scheme that they notify to the Commission of this.

Nicolas Charbit

Thank you, Francois and Jacques. It's already 5:30. I realise that we have gone over the original timeline for an hour, which is quite substantial. However, I see there are still 259 participants online which is quite impressive. But if the speakers agree, I would give you some time, take some of those questions.

Would all of you agree to take more question?

And focus on, maybe, some questions for our friends, the economists. Georges or Nicole, do you see... Because I like to have a more balanced direction in the panel. Do you, Georges or Nicole, see any question directly related to economists that you'd like to take. Georges or Nicole? Scrolling down the questions.

Question

Thank you very much. Yeah. And my question relates to the Temporary Framework. So that allows, for example, a loan guarantee for even six years. So, although the impact, of course, of COVID-19 is at the moment, and one of the speakers spoke about, you have to look at start-up cost after that. But six years sounds like a very long term timeframe in light of this crisis that we're talking about, which is happening now. So, I was wondering, how do we determine the duration of loan guarantees or any of these state aid measures to avoid anything overreaching or overcompensating? Because it takes such a long time and a long, long framework.

Georges Siotis

I think the question is highly relevant. There is no clear cut answer in determining how long. Because I understand your question is really, "You gave these guarantees which are related to the COVID shock, so they should end whenever the effects of the COVID shock fade away". I think there is absolutely no exact science that would be able to provide you with a full, clear, cut answer. I also think that there's so much uncertainty right now, which makes it very difficult to think that six years is short or long. It looks long.

But I think part of the reason why it's six years, and which is longer than the first temporary formwork, is that because whatever was considered in the first Temporary Framework, which was much more short term, it turned out to be a bit short. So, I would say six years is... It gives sufficient room for manoeuvre to be able to provide guarantees that really go beyond the short term.

Now, how long should the guarantee be granted? I think that at this stage, given the uncertainty, it's very difficult to give you an answer.

Nicolas Charbit

Thank you, Georges.

Jacques Derenne

We can add that point 25 shows that the duration is six years maximum and can be modulated according to the risk, as we have seen in the 25A. But also, in 25F, they say that along the years, if the loan starts to be reimbursed, the guaranteed amount will progressively decrease. So probably not the duration, but the size, of the guarantee will decrease. So, there is a modulation which is there. So, it's now granted for, let's say, maximum six years. But if there is a reimbursement at some point, you will not get the same advantage for the six years. So, it's flexible.

Nicolas Charbit

Okay. Maybe let's do five more minutes for the last question

Question

Hello and thank you all for the excellent presentation. My question was really just around the calculation part in relation to the loan guarantees. Is there, I suppose, a working percentage that is used, I suppose it could change from industry to industry, that the Commission might be used to calculate its guarantee as to what amount is the actual aid for the guarantee?

François-Charles Lapr vot

Well, under the framework, you don't really need to assess the subsidy equivalent of the guarantee. And that's one of the things that makes the framework easy to use. You just have gaps basically on the amount of the loan. You don't even look in terms of the remuneration of the risk of the borrower, which obviously would be a very relevant element in order to determine what is subsidy equivalent or the grant equivalent of the guarantee.

And here, to calculate the subsidy equivalent of the guarantee, you would indeed have to look at what basically a private operator would have sold. And when you say 1 to 15%, you have, if you look at the decisions that... For instance, in the financial crisis concerning certain banks, you have some decisions about bank guarantees where the Commission tells you, "Well, actually, no one would have provided this guarantee for that month". And therefore, the aid equivalent of the guarantee is equal, basically, to the nominal amount of the guarantee, or can be as high as the nominal amount of the guarantee. So, in individual cases, the Commission has been able to really... can be, as you say, anywhere between 1% or to, I will not say 15, but 100%. It's not that relevant under the Temporary Framework as it currently stands, to the extent the states just to comply with the parameters.

Nicolas Charbit

Okay. Thank you, Francois. It is now nearly 5:45. We have expanded our time for now 10 minutes, which shows the importance of the questions raised and the topic. I'm thankful to the speakers for having done this great job answering all the questions, provide us with a detailed presentation. Just a few practical details before we leave here. You're going to receive our online survey. It's important, always, that you have a look at the survey. Just takes three minutes. We received for previous online survey more than 250 comments suggesting topics, speakers, ideas for the format, remarks and Q&As. So, it's very helpful, and I can assure you, I debrief these with great detail is the whole conference team, and we learn a lot of things thanks to you. So please do take time to have a look at the survey.

Documentation for this webinar, as I mentioned earlier, will be in free access for all. The e-Competitions Special Issue on COVID-19 and there are over 70 decisions or comments on the Temporary Framework or on decisions taken by the Commission, written by experts. We also released in the Special Issue the official press release by the Commission. So, it's very easy and straightforward, and it's free online.

The next special issue will have a detailed forward by Michel Debroux from DS Avocats, will summarize the decisions taken by the Commission. For the materials of this webinar, this will be accessible for Concurrences + subscribers. This will include the panel video that we are going to release, hopefully, tonight, the PowerPoint drafted by the speakers, and the podcast if you want to join only with the sound and the transcript, and finally, the synthesis. That is going to be published by today for the video and after tomorrow for the podcast, and later on for the transcript and the synthesis.

For the next webinar, I just received an email from Maria Jaspers. Maria is the Head of the antitrust case

support and policy unit at DG COMP. Maria will speak this Friday, at 3:30 Brussels time on the DG COMP action on antitrust. She will be joined by Rainer Becker, Head of the pharma antitrust unit with Maria. So please register online. The Zoom link is already active, so feel free to join. It's going to be free for all, this will during an hour and with two DG COMP representatives.

And then a week after, we will have a debriefing webinar on the antitrust webinar by DG COMP with John Davies from Compass, Jérôme Philippe from and Freshfields and another speaker. So please stay tuned. Go to www.concurrences.com and follow us on our social media. You will be able to know the details for this next webinar.

Again, thanks for the partners and we are thankful also to partner, with them and Doctors Without Borders to make possible this quarantine webinar series. It is now the end of this webinar. Be safe and keep going. Thank you.