

Overview of the State aid rules and Public Service rules applicable to the maritime sector during the COVID-19 pandemic – Update March 2021

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1. Introduction

1.1. General

The COVID-19 outbreak continues to have a major impact on European transport and mobility. It has caused massive negative demand shocks due to the necessary containment measures along with the voluntary efforts to practice social distancing, minimize commuting and avoid travel. These have led to supply chain disruptions, steep decrease in foreign and domestic tourism, and overall reduced mobility. EU State aid rules and transport legislation enable Member States to support undertakings affected by the outbreak, including those in the transport sector. The aim is to safeguard and restore the connectivity underpinning the free movement of persons and goods while keeping in mind that a competitive internal market is our best asset to bounce back strongly afterwards. The present note aims at providing guidance on support to maritime operators and infrastructure in the exceptional context of the COVID-19 pandemic and the related obligations under State aid and transport rules.

From September 2020 onwards, the resurgent COVID-19 pandemic has led Member States to prolong or introduce new containment measures. These vary in scope and timing. However, they all have the effect of limiting, directly or indirectly, the movement of the general public. Therefore, the Commission services find that the conditions for providing Covid-19-related emergency support to the maritime transport sector may continue to be present beyond 31 December 2020. To this end, the Commission services update the guidance document issued in May 2020, based on the experience gained with the support measures put in place by Member States since the pandemic outbreak. It is important to stress that it is the Member States that remain responsible to ensure that the conditions of public support to maritime transport remain in compliance with all applicable provisions of the Treaty on the Functioning of the European Union (“TFEU”), and secondary legislation as interpreted by the Union courts. In particular, experience gained during the first wave of the COVID-19 pandemic confirms that measures described in this note may only be used – and should not go beyond what is necessary – to address disruptions directly caused by COVID-19 exceptional circumstances. The compatibility of such interventions with EU law must always be assessed in the light of the situation in the market before the outbreak of the pandemic and the economic forecast.

Any public intervention in the transport sector should be designed to avoid undue distortions of competition during and after the crisis, to preserve the efficient and operational transport ecosystems and thus enable the transport sector to exit the crisis as quickly as possible. To this end, all undertakings, including transport operators, related service providers and infrastructure managers, should have access to the necessary support to protect and restore connectivity for European citizens and businesses – including the integrity and good functioning of the supply chains. In the interest of the EU economy and consumers, Member States should design their measures on a non-discriminatory

basis to the greatest extent possible and in a manner which preserves the pre-crisis market structures and paves the way for economic recovery. A reduction in the number of economic actors in the internal market post-crisis may have a negative impact on competition in the transport markets, on connectivity, quality of service and prices.

1.2. Maritime transport

Several Member States indicate that the sudden and severe decrease in the sea transport of passengers in case of new restrictions to the movements of persons may give rise to difficulties in guaranteeing the flows of products transported through Roll-On-Roll-Off-Passenger ships (“RO-PAX”) and/or ferry vessels, whose traffic is heavily dependent on the revenues derived from passenger services. The Commission recognises that the severe decrease in passenger traffic, and the subsequent loss of income, may render the freight transport business no longer economically viable.

In order to avoid the disruption of essential maritime transport services and safeguard their operations for the future, Member States may use different instruments to support maritime operators (shipping companies and port operators). The intervention measures may consist in, *inter alia*, the support of maritime and/or port operators through grants, loans, public guarantees, tax rebates or deferrals, and rebates or deferrals of concession fees or land-lease fees. Member States may also still need to urgently put in place temporary public service obligations (“PSO”) and/or public service contracts (“PSC”) to replace or support commercial offers that become unavailable due to the resurgent COVID-19 outbreak and related containment measures.

In the field of maritime transport, these public services could aim at ensuring basic connectivity needs across the territory of the EU (e.g. islands, remote areas, etc.). Member States could request and – where necessary – give compensation for maritime services that fill the gap between the public service need of transporting a minimum amount of freight and passengers and what maritime operators are capable to provide on market terms under the present circumstances. Member States remain responsible for defining the public service needs, subject to the Commission's control of manifest error of assessment.

The undertakings providing such public services may include both the service providers (e.g. a maritime company), and the underlying necessary infrastructure (e.g. a port remaining open to traffic in order to ensure basic servicing).

Section 2 will describe the measures that do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (the “TFEU”) and do not need to be notified to the Commission. *Section 3* will describe the measures that constitute State aid but may be exempted from notification to the Commission if they fulfil some requirements. *Section 4* will describe the measures that constitute State aid and need to be notified to the Commission.

This document does not deal with the exit plans and post-crisis recovery.

2. Measures that do not constitute State aid

2.1. General measures

Member States may wish to adopt measures applying to all economic actors in order to stabilise the economy, in order to prevent an unemployment wave and to provide immediate relief across all sectors. General measures applicable to all economic sectors such as wage subsidies, suspension of

corporate tax and VAT or social contribution payments do not constitute State aid and therefore do not need to be notified to the Commission.¹

Moreover, such measures of general application would allow ensuring an equitable support to the economy as a whole.

2.2. Public remit

Some of the services that Member States want to safeguard fall within the definition of public remit (e.g. operating special crossings for the purpose of repatriation of nationals, transporting people for medical reasons, military activities), the funding of which does not normally fall within the ambit of State aid control². As regards the infrastructure, public remit activities concern activities that the State normally performs in the exercise of its public power: for example traffic control; protection and resilience against extreme weather conditions, longshore drift, waves/tides, flooding and coastal erosion; police; customs; antipollution; surveillance; control and security of navigation (including light houses).

If the beneficiary does not perform any economic activity at all, State aid rules do not impose a control of the level of funding that it receives for public remit operations (e.g. in case the army or the police performs such operations without any involvement of undertakings). However, if the beneficiary does not only perform public remit operations but also economic activities, the public funding must not exceed what is necessary to compensate the costs related to the public remit activities. In case a Member State requires public remit activities from several undertakings (e.g. several ports or several maritime companies), the compensation should be calculated in a non-discriminatory way (i.e. the compensation should cover the same types of cost, the same methodology for the calculation of the compensation should be used).

2.3. Public service compensation constituting no-aid³

Some of the above-mentioned essential activities that Member States want to safeguard constitute economic activities (e.g. providing connectivity across territories), and should therefore qualify as service of general economic interest (“SGEI”). Public service compensation granted for the execution of SGEI can either be qualified as (i) no aid, (ii) State aid exempted from notification to the Commission or (iii) State aid to be notified to the Commission.

This section highlights the conditions under which public service compensation does not constitute State aid under the exceptional circumstances created by the COVID-19 outbreak.

¹ See points 40 and 42 of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 911, 20.3.2020, p. 1-9), as amended from time to time (the “Temporary Framework”). For latest courtesy consolidated version, see https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html.

² The public funding of public remit activities can however constitute State aid, when it is normal under a given legal order that ports have to bear certain costs inherent to their operation, whereas other ports do not. In that case, the latter might be granted an advantage, regardless of whether or not those costs relate to an activity, which in general is considered to be of a non-economic nature. In that case, there is State aid that is notifiable to the Commission.

³ For further guidance related to no aid classifications under the State aid rules, please see the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50.

In the maritime transport sector, public service compensation is generally granted to EU shipowners entrusted with the provision of maritime transport services under general PSO or specific PSC, or to port operators for the management of port infrastructures qualified as SGEI.

The existence of a public service can predate the COVID-19 outbreak, but may have to be adjusted to take into account the new circumstances determined by the pandemic. Alternatively, as indicated above, the need for public service can result from the observed or foreseeable disruption of services provided so far on a commercial basis without any public intervention. These public services typically concern freight and/or passengers transport and are provided either within the territory of a Member State (*maritime cabotage*) or between two Member States or between a Member State and a third country (*international connections*).

When designing support mechanisms aimed at ensuring the provision of maritime services under exceptional circumstances, such as the COVID-19 outbreak, Member States should assess such measures against the following relevant rules (i) maritime transport sectorial rules, (ii) State aid rules, and (iii) public procurement rules, as applicable.

Sectorial rules are defined in Regulation (EC) N°3577/92⁴ (“Regulation 3577/92”) for maritime cabotage and in Regulation (EC) N° 4055/86⁵ (“Regulation 4055/86”) for international maritime transport services. Both Regulations ensure, within their respective scope of application, the freedom to provide maritime cabotage and/or international maritime transport services. These two Regulations do not preclude the imposition of PSO and/or the conclusion of one or several PSC, but lay down certain requirements to that effect (see Article 4 of Regulation 3577/92).

As regards **State aid rules**, the rules applicable to public service compensation are the rules relating to SGEI.⁶ They build on the so-called *Altmark* judgment⁷, which sets out four cumulative conditions under which the existence of an advantage, and therefore of State aid within the meaning of Article 107(1) TFEU, can be excluded.

The manner in which Member States may impose a PSO or award a PSC during the COVID-19 outbreak differs depending on whether the route in question had a PSO or one or several PSC(s) in place prior to the outbreak or whether such route was previously operated on a commercial basis.

- For new public service contracts

For maritime links which were operated on a commercial basis prior to the outbreak, the following text provides guidance on how the four *Altmark* criteria could be fulfilled, given the exceptional circumstances. As the proposed public service compensation would then not constitute State aid, no formal notification to the Commission services (Directorate General for Competition) under State aid

⁴ Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ L 364 , 12.12.1992, p. 7-10.

⁵ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L 378, 31.12.1986, p. 1–3.

⁶ SGEI rules are available at : https://ec.europa.eu/competition/state_aid/legislation/sgei.html

⁷ Judgment of the Court of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (*Altmark* judgment), C-280/00, EU:C:2003:415, par. 88 to 93.

rules would be required.⁸ It is up to the Member States to self-assess whether the planned measure would comply with the Altmark conditions.

First Altmark criterion: definition of the scope of the public service

1. Member States need to clearly define:
 - i. The **essential route(s)** to be maintained active (or in the case of port infrastructure, the essential port services). The public service obligation can only relate to the safeguard of the transport service, not to the protection of specific operators *per se*;
 - ii. The respective minimum required **frequency** (in terms of connections) and **volumes** (in terms of passenger numbers, linear meters or other) (or in the case of port infrastructure, the quantity and quality of services to be safeguarded).
2. The **necessity** of the measure could be demonstrated by showing that:
 - i. Since the outbreak of the COVID-19 pandemic, there has been a severe and unforeseeable *decrease in passenger and/or freight demand*; and
 - ii. *Subsequent losses of passenger and/or freight revenue* make the provision of the service *no longer economically viable*.

The description of the scope needs to be sufficiently clear in terms of qualitative elements, and when needed, quantified, so that the undertaking has a clear SGEI obligation to discharge. In case the service is provided by vessels transporting both passengers and goods, it is crucial that the scope of the measure clearly distinguishes the scope of the new public service obligations for these two different market segments. For the transport of goods, it is indeed important to justify why the COVID-19 pandemic has caused a market failure, as the restrictions put in place by Member States mostly relate to restrictions on the freedom of persons (and very rarely on the movements of goods).

When several operators were active on the same route on a commercial basis before the COVID-19 outbreak, Member States should endeavour to design a PSC that is least distortive for competition. For example, Member States could define the scope of the public service entrusted to the selected operator in each PSC as the proportion of the overall transport capacity (deemed necessary for the connectivity of the said Member State) provided by that operator before the COVID-19 outbreak. That proportion could be determined on the basis of the market share held by that operator before the beginning of the outbreak. To the extent that the definition and calculation of the market share rely on observable and commonly agreed market information, the definition of such PSO could correspond to a genuine public service need.

An exclusive emergency PSO in favour of a single operator should not be used in situations where there are other operators on the market already, and where the flexibilities offered by EU public procurement rules in case of emergency (see below) are manifestly sufficient and adequate to enable the award of a PSC through a competitive procedure.

⁸ Member States are however bound by the requirement of Article 10 of Regulation 4055/86 and Article 9 of Regulation 3577/92 to consult or inform the Commission “*before adopting laws, regulations or administrative provisions in implementation of this Regulation*”. The same provisions require communicating the measures to the Commission, once adopted.

Recent experience has shown that Member States may strike a right balance between the need to preserve the free movement of goods, persons and services and the need to put in place a PSO by designing “contingency mechanisms”. Those mechanisms consist in awarding a PSC in the form of a framework contract, and to activating it through specific contracts when Member States adapt new restrictions to the freedom of movement of persons and/or goods. The framework contract establishes the terms governing specific contracts under it to be awarded during the period covered by the new restrictions, in particular with regard to price and quantity envisaged that should correspond to the identified market failure.

The contract should be temporary, with a **limited duration in months**. Any such emergency Covid-19 contract may be prolonged once for a subsequent period of three months only, provided that such extension is duly justified by the evolution of the COVID-19 outbreak and in line with the principle of proportionality.

In any case, the duration and scope of any PSC should not prevent the restart of normal commercial operations. A gradually rising passenger demand can be an indication that the PSC in favour of a single operator ceases to be justified. Similarly, a plan of commercial operators to enter the route or increase frequencies can be such an indication. The Member States are invited to submit regular information to the competent Commission services (Directorate General for Mobility and Transport and Directorate General for Competition) every three months about the emergency PSC put in place, with data on the actual traffic developments.

Second and third Altmark criteria: ex ante financial parameters and control of overcompensation

When the services in question were so far operated on a commercially viable basis before the COVID-19 outbreak, it is sufficient to base the compensation parameters for each route on the observed profit and loss accounts calculated for the following periods. In particular, Member States should select the last two months before the outbreak of the COVID-19 pandemic (in principle January and February 2020) and/or the months of 2019 covering the corresponding period contemplated for the PSCs in 2020 (e.g. April to September 2019 if the PSCs was to be put in place from April to September 2020).

As the COVID-19 outbreak mainly affects the level of revenues, there is an assumption that the cost structure should be identified as the average (or close to the average) of the amounts reported monthly in the above-mentioned profit and loss accounts and that this cost structure should in principle constitute the ceiling to determine the eligible costs. The compensation should therefore not exceed the difference between the average revenues observed during the selected months and such cost structure. The compensation may be adjusted to take into account the variation of frequencies and any variable costs. Prior public information to the operators on how the Member State intends to determine the compensation (in particular as regards the scope and intensity of eligible costs) is advisable.

The Commission services observe that a number of Member States are not contemplating the inclusion of any profit in the amount of compensation during the COVID-19 outbreak. Such approach is in line with State aid rules. In other cases, Member States may decide to award a reasonable profit to the maritime transport operator discharging the PSC in question. In such case, the following methodology may be used to benchmark the level of profit. As the subsidised undertakings should not be overcompensated, the level of profit could be benchmarked to the level of profit of maritime undertakings commercially active on similar maritime routes from/to the Member States before the COVID-19 outbreak. The choice of the financial metrics is left to the discretion of the Member States' authorities. It should correspond to generally accepted standards in the financial industry (return on equity, return on capital employed or similar). The benchmark should help Member States identify a

suitable range of values and determine a maximum level of compensation (abnormally high records should be excluded from that range). Last, the set up should include a claw-back mechanism which would allow Member States' authorities to check for overcompensation ex post and have any overcompensation monies returned.

Fourth Altmark criterion: least cost to the community

The aim of the fourth Altmark criterion is to ensure that any compensation paid corresponds to the least cost to the community. In order to fulfil the fourth Altmark criterion, Member States must either (i) choose the maritime operator pursuant to a public procurement procedure, or (ii) directly award the PSC while determining the level of compensation on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred⁹.

Member States are invited to self-assess compliance with these criteria, taking into account the context of the ongoing crisis. To that end, as regards the application of urgent or emergency **public procurement procedures**, Member States may consult the recent Commission Communication: *Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis* (the "Communication").¹⁰

When these PSC take the form of service contracts within the meaning of Directive 2014/24/EU,¹¹ their award must comply with this directive. Articles 26 to 32 of this Directive provide for a variety of procedures depending, *inter alia*, on the characteristics of the case, including its urgency. In case of "extreme urgency", national authorities may, under certain pre-conditions, even proceed to a negotiated procedure without prior publication (cf. Article 32(2)(c)). Reference is made more particularly to Section 2 of the Communication. It sheds light on the criteria for choosing and applying the appropriate procedures, including the criteria for determining whether "extreme urgency" justifies recourse to Article 32(2)(c) of the Directive¹². On substance, these procedures provide for reduced deadlines to accelerate open or restricted procedures for the conclusion of a PSC. The *accelerated* time limits for the award of service contracts are at least:

- Open procedure: 15 days;
- Restricted procedure: 15 days (request to participate) + 10 days (submission of tender), i.e. 25 days.

⁹ It is not sufficient to simply rely on the cost-structure commercial operators active on the routes at hand before the outbreak of the COVID-19 pandemic. It must be indeed demonstrated that those operators could then provide the service at the *least cost* to the community.

¹⁰ Communication from the Commission: *Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis*, OJ C 108I, 1.4.2020, p. 1.

¹¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65.

¹² When the PSC takes the form of a *concession* contract, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1) applies. Directive 2014/23 does not contemplate negotiated procedures without prior publication in any circumstances. Therefore, the question of whether, due to emergency situations, it is possible to award concessions contracts falling within the scope of Directive 2014/23 without publication of a concession notice pursuant to Articles 31(1) and 33, raises legal questions. Member States are therefore advised to conclude PSC on the basis of a *service* contract within the meaning of Directive 2014/24/EU.

The Commission services recall that the minimum time limits to award a concession contract (for which there is no accelerated procedure) are:

- Single phase procedure: 30 days (simultaneous receipt of applications and tenders);
- Procedure in successive stages: 30 days (receipt of applications) + 22 days (submission of tenders), i.e. 52 days;
- However, Directive 2014/23 provides (Article 39 (5)) that the specific time limit of 22 days for the submission of tenders, in the case of procedures in successive stages) may be reduced if tenders can be submitted electronically as provided for in Article 29 of the Directive.

(Under certain conditions, a negotiated procedure without publication, including the direct award of a PSC is possible but it must be duly justified by “extreme urgency”. In the Commission services’ experience of situations occurred since the beginning of the outbreak, situations of *real* “extreme urgency” have been extremely rare. Therefore, the Commission invites Member States to carefully evaluate the real need for procedures of “extreme urgency” and encourages to always resort to open tender procedures, even if of shortened duration, both for the award of a service or concession contract.

It results that, if Member States are free to choose among several procedures to award the public service contract, they should retain some minimum transparency and use (even simplified) calls for expressions of interest for the selected public procurement procedure in order to consider the first option of the fourth Altmark criterion to be fulfilled under the exceptional circumstances created by the COVID-19 outbreak.

When the PSC takes the form of a concession contract, Directive 2014/23/EU applies.¹³ Directive 2014/23 does not contemplate negotiated procedures without prior publication in any circumstances. Therefore, the question whether it is possible to award concessions contracts falling within the scope of Directive 2014/23 in emergency situations without publication of a concession notice pursuant to Articles 31(1) and 33, raises legal questions. It is therefore legally safer to conclude PSC on the basis of a service contract within the meaning of Directive 2014/24/EU, all the more as it turns out that the compared duration of award procedures for a service or concession contract are not very different (see above).

If the conditions described above are fulfilled for *new* PSO or PSC, no formal notification to the Commission would be required as the presence of State aid would be excluded.

Even if existing PSCs and framework agreements already complied with the first three Altmark criteria, it is the responsibility of the Member States to ascertain that the scope of the initial contracts cover the services deemed necessary in the context of the COVID-19 outbreak and that the compensation parameters and the mechanism put in place to avoid overcompensation are still applicable to the financing of the new services.

In any case, the situation existing on the market prior to and during the Covid-19 outbreak needs to be taken into account. A direct award of an emergency PSO to an SGEI provider in difficulties, especially if there are other providers on the same market already, is likely to raise concerns as to its compliance with the rules.

¹³ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1.

As regards the fourth Altmark criterion, the Commission considers that, pursuant to Directive 2014/23/EU¹⁴ and Directive 2014/24/EU¹⁵, *existing* contracts and framework agreements may be modified without a new procurement procedure in accordance with these Directives, where all of the following conditions are fulfilled:

- (i) The need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
- (ii) The modification does not alter the overall nature of the contract; and
- (iii) Any increase in price/value is not higher than 50 % of the value of the original contract or framework agreement/concession. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive.¹⁶

Regarding condition (ii), it is to be noticed that:

- a) The *decrease of number of passengers* to be transported or *frequencies* to be operated does not alter the overall nature of the contract if the following conditions are fulfilled:
 - The decrease in passengers or frequencies is a direct consequence of and proportionate to the change in demand due to the exceptional circumstances referred to in point (c)(i) of the Article 72(1) and Article 43(1) respectively;
 - There are no other changes in the type of services to be provided, the way in which they are carried out or the way in which they are remunerated.
- b) Where a concession contract is modified in such a way that the Member States assumes all *commercial risks*, the contract is no longer in the nature of a concession contract. Hence, the concessionaire shall assume – at least to some extent – the operating risk of the concession. Where the change implies that this is no longer the case, the contract turns into a public service contract, which constitutes an alteration of its “overall nature”. Such modification is not covered by Article 43(1)(c) of Directive 2014/23, and a new award procedure is required instead.

The modifications must be **justified to the extent that they are needed to mitigate** the consequences of the crisis in the execution of public contracts and only to that extent.

If one or several of the above-mentioned conditions are not fulfilled, the contract should be terminated in accordance with Article 73 (a) of Directive 2014/24/EU or Article 44 (a) of Directive 2014/23/EU and a new contract can be awarded on the basis of the applicable directive.

3. State aid exempted from notification

3.1. Aid exempted under the General Block Exemption Regulation

¹⁴ Article 43(1) c).

¹⁵ Article 72(1) c).

¹⁶ Article 43 (1) c) of Directive 2014/23/EU does not apply to activities referred to Annex II, which does not cover maritime transport on specific routes.

Member States are exempted from the obligation to notify certain types of State aid in the maritime transport sector, provided that the conditions detailed in the General Block Exemption Regulation (“GBER”)¹⁷ are fulfilled. The GBER covers a wide range of horizontal aid categories and provides also specific provisions for the maritime transport sector, in particular in relation to the training of crew, the acquisition of certain vessels and social aid granted for the transport of residents of remote regions.

The GBER also allows investment aid to port infrastructure up to 100% of the eligible costs shall be the costs, including planning costs, of investments for the construction, replacement or upgrade of port infrastructures (including access infrastructures) as well as dredging, provided that the specific requirements of Article 56(b) of GBER are fulfilled.

3.2. Public service compensation exempted from notification

Public service compensation that qualifies as State aid can be exempted from notification if it complies with the conditions set out the SGEI Decision.¹⁸ For the maritime sector, the SGEI Decision is applicable to public compensation granted for the provision of SGEIs as regards maritime links to islands and ports for which the average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 300 000 passengers.

3.3. De minimis aid

Public funding granted for maritime undertakings not exceeding EUR 200 000 over three fiscal years is not regarded as State aid, provided the other conditions of the *de Minimis* Regulation¹⁹ are also fulfilled.

Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation²⁰ are also fulfilled.

4. Notifiable aid

4.1. The Temporary framework for State aid measures to support the economy in the COVID-19 outbreak

On 19 March 2020, the Commission adopted a Temporary Framework for State aid measures to support the economy in the current crisis based on Article 107(3)(b) TFEU (the “Temporary Framework”). The Temporary Framework has been regularly updated (lastly on 28 January 2021) to reflect the evolution of the pandemic and the EU economy.

¹⁷ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1–78.

¹⁸ Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3–10

¹⁹ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1–8.

²⁰ Commission Regulation No 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

In this last revision, the Commission has decided to prolong and extend the scope of the Temporary Framework. All sections of the Temporary Framework are prolonged until 31 December 2021. The objective is to enable Member States to support businesses in the context of the COVID-19 crisis, especially where the need or ability to use the Temporary Framework has not fully materialised so far, while protecting the level playing field.

The Temporary Framework sets out *inter alia* the compatibility conditions the Commission will apply for the assessment of measures under Article 107(3)(b) TFEU which allows for State aid to remedy a serious disturbance in the economy of a Member State.²¹ The Temporary Framework was amended on 3 April 2020 and 8 May 2020 to cover additional aid measures. The Temporary Framework applies to almost all sectors and undertakings including transport undertakings, mentioning transport as one of the most affected sectors. It aims to remedy the liquidity shortages faced by undertakings by allowing for instance direct grants, tax advantages, State guarantees for loans, subsidised public loans and recapitalisation. To address urgent liquidity needs in a speedy manner, in particular of small and medium-sized enterprises, Member States may give, up to the nominal value of EUR 1 800 000 per undertaking in the form of direct grants, loans, tax and payment advantage, or other forms such as guarantees on loans covering 100% of the risk, under section 3.1 of the Temporary Framework. This State support can be combined also with so-called *de minimis* aid and with other types of aid, provided the cumulation rules are respected. In addition, the Temporary Framework provides for possibilities of aid covering liquidity needs beyond the EUR 1 800 000 per company in the form of guarantees and interest rate subsidies, subject to, *inter alia*, minimum pricing conditions under sections 3.2 and 3.3 of the Temporary Framework. Section 3.9 of the Temporary Framework provides for schemes deferring tax and/or social security contributions, which may also cover undertakings in the maritime sector. The same applies for section 3.10 of the Temporary Framework, which provides for aid in the form of wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak. Section 3.11 of the Temporary Framework enables Member States to provide public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak, including undertakings in the maritime sector. Under section 3.12 of the Temporary Framework, Member States can provide public support to companies facing a decline in turnover during the eligible period of at least 30% compared to the same period of 2019 due to the COVID-19 outbreak. The support will contribute to a part of the beneficiaries' fixed costs that are not covered by their revenues, up to a maximum amount of EUR 10 million per undertaking.

The information that should be provided for notifications of aid under the Temporary Framework is listed in the following documents:

- [Amended notification template for the Temporary Framework after the fourth amendment](#) - This form covers sections 3.1-3.10 and should be annexed to the standard notification form in the electronic notification to the Commission (using the SANI2 platform);
- [Amended notification template for section 3.11 Recapitalisation of non-financial undertakings after the fourth amendment](#) - This form together with [Annex II](#) for equity instruments and [Annex III](#) for hybrid instruments should be annexed to the standard notification form in SANI2.

²¹ The Temporary Framework also includes certain categories of aid for COVID-19 relevant production, research and development and testing and upscaling infrastructures, which are based on Article 107(3)(c) TFEU, but which do not seem relevant regarding aid to the maritime sector.

Clarifications on the application of section 3.12 of the Temporary Framework are provided in the following documents:

- https://ec.europa.eu/competition/state_aid/what_is_new/application_section_3_12_TF.pdf
- https://ec.europa.eu/competition/state_aid/what_is_new/exit_decision_under_TF_graph_2.pdf

The list of decisions approved by the Commission under the Temporary Framework is updated every day, so that Member States can be informed of the Commission decision-making practice in a comprehensive manner and in real time.

More information on the possibilities for State support under the Temporary Framework are contained under the following link:

https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html

4.2. Aid granted under Article 107.2.b TFEU

According to Article 107(2)(b) TFEU, aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the internal market.

In its Communication of 13 March 2020, “Coordinated economic response to the Covid-19 outbreak”,²² the Commission concluded that the COVID-19 outbreak qualifies as an “exceptional occurrence” for the purpose of Article 107(2)(b) TFEU. Pursuant to the case-law, only damage having a direct causal link with the exceptional occurrence, here the COVID-19 outbreak, can be compensated by State aid under Article 107(2)(b) TFEU.²³ In the Temporary Framework, the Commission has explained how it will apply aid notified under Article 107(2)(b) TFEU²⁴. Certain exceptional occurrences may not directly cause an economic damage to undertakings. In such circumstances, the Courts have accepted that the damage suffered by undertakings actually results from restrictive measures taken by the competent public authorities in reaction to the exceptional occurrence. Therefore, the Commission, during the COVID-19 outbreak, has assessed under Article 107(2)(b) TFEU compensation granted by Member States to companies to the extent that these companies were prevented by the competent authorities from carrying out their business activity (including companies in financial difficulties). Upon approval by the Commission, Member States have compensated companies for damage caused by the COVID-19 outbreak. Evidence of the damage suffered, of the direct causal link between the exceptional occurrence and the damage and of the absence of overcompensation, must in any event be provided by the relevant authorities. The information that should be provided for notifications of aid under Article 107(2)(b) TFEU is included in the following document.

https://ec.europa.eu/competition/state_aid/what_is_new/Notification_template_107_2_b_PUBLICATION.pdf.

²² Communication from the European Commission of 13 March 2020, COM(2020) 112 final, p.6.

²³ Judgment in Case C-73/03 *Spain v Commission* EU:C:2004:711, paras 36-37. Judgment in Case C-346/03 *Atzeni* EU:C:2006:130, para. 79. Judgment in Case C-278/00 *Greece v Commission* EU:C:2004:239, paras 81-82. Judgment in Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* EU:T:2008:222, para. 49.

²⁴ Par. 15, 15 *bis* and 15 *ter*.

The list of decisions approved by the Commission under Article 107(2)(b) TFEU is updated every day, so that Member States can be informed of the Commission decision-making practice in a comprehensive manner and in real time.

More information on the possibilities for State support under Article 107(2)(b) TFEU are contained under the following link:

https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html

[State aid decisions in the transport sector can be found using the search box, by choosing the relevant scroll-down NACE code and desired time period.]

4.3. Public service compensation

Public service compensation that qualifies as State aid and does not fall within the scope of the SGEI Decision or the SGEI de minimis Regulation needs to be notified to the Commission, which will assess its compatibility under the SGEI Framework²⁵.

4.4. Other applicable rules

Aid measures other than public service compensation should be notified and their compatibility could be assessed under the State aid maritime Guidelines²⁶ (as complemented by the Communications providing guidance on State aid to ship-management companies²⁷ and to State aid for the launching of motorway of the sea²⁸), or under the applicable State aid guidelines for horizontal support measures not specific to the maritime sectors, such as the Rescue and Restructuring Guidelines. The currently applicable rules are available on the following link:

https://ec.europa.eu/competition/state_aid/legislation/legislation.html

The list of Commission decisions in the field of State aid, notably to the maritime sector, can be retrieved through the case search engine available on the following link:

<https://ec.europa.eu/competition/eojade/isef/index.cfm?pa=2>

²⁵ Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15–22.

²⁶ Community guidelines on State aid to maritime transport, OJ C 013, 17.01.2004, p. 3-12.

²⁷ Communication from the Commission providing guidance on State aid to ship management companies, OJ C 132, 11.6.2009, p. 6–9.

²⁸ Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea, OJ C 317, 12.12.2008, p. 10–12.