

**COMMUNICATION FROM THE COMMISSION****Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak**

(2020/C 164/03)

**1. INTRODUCTION**

1. On 19 March 2020, the Commission adopted its Communication ‘Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak’ <sup>(1)</sup> (the ‘Temporary Framework’). On 3 April 2020, it adopted a first amendment to enable aid to accelerate research, testing and production of COVID-19 relevant products, to protect jobs and to further support the economy during the current crisis <sup>(2)</sup>.
2. A targeted and proportionate application of EU State aid control ensures that national support measures effectively help affected undertakings during the COVID-19 outbreak, whilst limiting undue distortions to the Internal Market, maintaining the integrity of the Internal Market and ensuring a level playing field. This will contribute to the continuity of economic activity during the COVID-19 outbreak and provide the economy with a strong platform to recover from the crisis, keeping in mind the importance of meeting the green and digital transitions, in line with EU law and objectives.
3. The aim of this Communication is to identify additional temporary State aid measures that the Commission considers compatible under Article 107(3)(b) of the Treaty on the Functioning of the European Union (TFEU) in light of the COVID-19 outbreak.
4. First, the Commission considers that otherwise viable non-financial undertakings subject to a temporary liquidity crisis due to the COVID-19 outbreak may face longer-term solvency issues. For a large number of these undertakings, the emergency measures put in place to control the spread of the COVID-19 outbreak have resulted in a decrease or even suspension of their production of goods and/or the provision of services, as well as a significant demand shock. The resulting losses will be reflected in a decrease of undertakings’ equity and will negatively affect their ability to take on loans from financial institutions.
5. Reduced equity for undertakings in markets with low demand and disrupted supply aggravates the risk of a serious economic downturn affecting potentially the whole EU economy for a longer period. Well-targeted public interventions providing equity and/or hybrid capital instruments to undertakings could reduce the risk for the EU economy of a significant number of insolvencies. They could thereby contribute to preserving the continuity of economic activity during the COVID-19 outbreak and to supporting subsequent economic recovery.
6. This Communication therefore sets out the criteria under EU State aid rules, based on which Member States may provide public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak. It aims at ensuring that the disruption of the economy does not result in the unnecessary exit from the market of undertakings that were viable before the COVID-19 outbreak. Recapitalisations must therefore not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak.
7. The Commission underlines that providing national public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak, as part of schemes or in specific individual cases, should only be considered if no other appropriate solution can be found and be subject to stringent conditions. This is because such instruments are highly distortive for competition between undertakings. Such interventions should therefore also be subject to clear conditions as regards the State’s entry, remuneration and exit from the undertakings concerned, governance provisions and appropriate measures to limit distortions of competition.

<sup>(1)</sup> Communication from the Commission of 19 March 2020, C(2020)1863 (OJ C 91 I, 20.3.2020, p. 1).

<sup>(2)</sup> Communication from the Commission of 3 April 2020, C(2020) 2215 (OJ C 112 I, 4.4.2020, p. 1).

8. If support were to be granted at EU level, taking into account the EU common interest, the risk of distortion to the Internal Market could be lower, and may therefore require less stringent conditions to be imposed. The Commission considers that additional EU level support and funds are necessary to make sure that this global symmetric crisis does not transform into an asymmetric shock to the detriment of Member States with less possibility to support their economy and the EU's competitiveness as a whole.
9. The green transition and the digital transformation will play a central and priority role in ensuring a successful recovery. The Commission welcomes steps taken by Member States to take these challenges into account when designing national support measures, and recalls their responsibility in ensuring that such measures do not hinder the achievement of EU climate and digital objectives. Furthermore, the Commission notes that designing national support measures in a way that meets the EU's policy objectives related to green and digital transformation of their economies will allow for a more sustainable long term growth, and promote the transformation to the agreed EU's objective of climate neutrality by 2050. In this context of aid to remedy a serious disturbance in the economy of Member States, it is primarily the responsibility of Member States to design national support measures in a way that meets their policy objectives. For aid under this Communication, large undertakings shall report on how the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation.
10. Furthermore, a number of Member States are considering taking an equity stake in strategic companies, to ensure that their contribution to the proper functioning of the EU economy is not jeopardised. The Commission recalls that the TFEU is neutral as regards public versus private ownership (Article 345 TFEU). If Member States purchase existing shares of undertakings at market price or invest *pari passu* with private shareholders, this normally does not constitute State aid <sup>(3)</sup>. Similarly, if Member States decide to purchase newly issued shares and/or provide undertakings with other types of equity support or hybrid capital instruments on market terms, i.e. under conditions complying with the Market Economy Operator Principle, this also does not constitute State aid.
11. The Commission also recalls that there are a number of additional tools to deal with acquisitions of strategic companies. In its Communication issued on 25 March 2020 <sup>(4)</sup>, the Commission called upon Member States that already have an existing foreign direct investment screening mechanism in place to make full use of such tools to prevent capital flows from non-EU countries that could undermine EU's security or public order. The Commission also called on Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transaction to set up a fully-fledged screening mechanism, in full compliance with Union law, including the FDI Screening Regulation <sup>(5)</sup> and free movement of capital (Article 63 TFEU), and international obligations.
12. Second, the Commission considers that subordinated debt can also be an appropriate means to support undertakings facing financial difficulties due to the COVID-19 outbreak. In particular, it is a less distortive instrument than equity or hybrid capital, given that it cannot be converted into equity when the company is a going concern. This Communication therefore introduces the possibility for Member States to grant aid in this additional form in section 3.3 of the Temporary Framework, which concerns debt instruments, subject to additional safeguards to protect the level playing field in the Internal Market. However, if subordinated debt goes beyond the ceilings set out in section 3.3, such subordinated debt measure should be assessed in line with the conditions for COVID-19 recapitalisation measures set out in section 3.11 to ensure equal treatment.

<sup>(3)</sup> See section 4.2.3 of 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, C/2016/2946 (OJ C 262, 19.7.2016, p. 1).

<sup>(4)</sup> Communication from the Commission – Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), C(2020) 1981 final of 25.3.2020.

<sup>(5)</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79 I, 21.3.2019, p. 1).

13. Third, the application of the Temporary Framework has shown the need to introduce clerical modifications as well as additional clarifications and amendments as regards certain provisions in section 3.1, section 3.2, section 3.3, section 3.4, section 3.7, section 4 and section 5.
14. Finally, the Commission recognises that to ensure a successful recovery, additional large-scale private and public investments will be needed to meet the challenges and seize the opportunities of the green and digital twin transitions. In this context, the Commission recalls that this amendment to the Temporary Framework complements rather than replaces existing possibilities under EU State aid rules for Member States to provide support. For example, as regards capital support, in particular to innovative companies, the Commission's Risk Finance Guidelines <sup>(6)</sup> and the General Block Exemption Regulation <sup>(7)</sup> provide ample possibilities for Member States.
15. Similarly, Member States can decide to grant State aid to support green and digital innovation and investment, and increase the level of environmental protection in line with existing State aid rules <sup>(8)</sup>. As already announced in the Commission's Communication of 14 January 2020, relevant State aid rules, in particular the Environmental and Energy State aid guidelines, will be revised by 2021 in light of the policy objectives of the European Green Deal and support a cost-effective and socially-inclusive transition to climate neutrality by 2050. This will contribute to a recovery strategy for the European economy that meets the important green and digital twin transitions in line with EU and national objectives.

## 2. AMENDMENTS TO THE TEMPORARY FRAMEWORK

16. The following amendments to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak will take effect as of 8 May 2020.
17. Point 7 is replaced by the following:
  - '7. If due to the COVID-19 outbreak, banks would need extraordinary public financial support (see Article 2(1) (28) BRRD and Article 3(1)(29) SRMR) in the form of liquidity, recapitalisation or impaired asset measure, it will have to be assessed whether the measure meets the conditions of Article 32(4)(d)(i), (ii) or (iii) of the BRRD and Article 18(4)(d)(i), (ii) or (iii) of the SRMR. Where the latter conditions are fulfilled, the bank receiving such extraordinary public financial support would not be deemed to be failing-or-likely-to-fail. To the extent such measures address problems linked to the COVID-19 outbreak, they would be deemed to fall under point 45 of the 2013 Banking Communication <sup>(9)</sup>, which sets out an exception to the requirement of burden-sharing by shareholders and subordinated creditors.'
18. Point 9 is replaced by the following:
  - '9. The COVID-19 outbreak poses the risk of a serious downturn affecting the whole economy of the EU, hitting businesses, jobs and households. Well-targeted public support is needed to ensure that sufficient liquidity remains available in the markets, to counter the damage inflicted on healthy undertakings and to preserve the continuity of economic activity during and after the COVID-19 outbreak. Furthermore, Member States can decide support to operators in the travel and tourism industry to ensure that reimbursement claims caused by the COVID-19 outbreak are satisfied with a view to ensuring the protection of passenger and consumer rights, and equal treatment of passengers and travellers. Given the limited size of the EU budget, the main response

<sup>(6)</sup> Communication from the Commission – Guidelines on State aid to promote risk finance investments (OJ C 19, 22.1.2014, p. 4).

<sup>(7)</sup> 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).

<sup>(8)</sup> For example, Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1), Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks (OJ C 25, 26.1.2013, p. 1), Guidelines on regional State aid for 2014-2020 (OJ C 209, 23.7.2013, p. 1), Framework for State aid for research and development and innovation (OJ C 198, 27.6.2014, p. 1) and Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (OJ C 188, 20.6.2014, p. 4).

<sup>(9)</sup> Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 216, 30.7.2013, p. 1).

will come from Member States' national budgets. EU State aid rules enable Member States to take swift and effective action to support citizens and undertakings, in particular SMEs, facing economic difficulties due to the COVID-19 outbreak.'

19. Point 13 is replaced by the following:

'13. Member States may also design support measures in line with Block Exemption Regulations <sup>(10)</sup> without the involvement of the Commission.'

20. Point 20 is replaced by the following:

'20. Temporary aid measures covered by this Communication may be cumulated with one another in line with the provisions in the specific sections of this Communication. Temporary aid measures covered by this Communication may be cumulated with aid under de minimis Regulations <sup>(11)</sup> or with aid under Block Exemption Regulations <sup>(12)</sup> provided the provisions and cumulation rules of those Regulations are respected.'

21. Point 20bis is introduced:

'20bis. Aid to credit and financial institutions is not to be assessed under this Communication except for: (i) indirect advantages to credit or financial institutions channelling aid in the form of loans or guarantees under sections 3.1 to 3.3 pursuant to the safeguards of section 3.4, and (ii) aid under section 3.10 provided the scheme is not targeting exclusively employees from the financial sector.'

22. The title of section 3.1 is replaced by the following:

'3.1. Limited amounts of aid'

23. In point 22, footnote 16 is replaced by the following:

'If the aid is granted in the form of a tax advantage, the tax liability in relation to which that advantage is granted must have arisen no later than 31 December 2020.'

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<sup>(10)</sup> 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), Commission Regulation (EC) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 193, 1.7.2014, p. 1) and Commission Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 369, 24.12.2014, p. 37).

<sup>(11)</sup> 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), Commission Regulation (EU) No 1408/2013 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 in the agriculture sector (OJ L 352, 24.12.2013, p. 9), Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45) and Commission Regulation (EU) No 360/2012 of 25 April 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).

<sup>(12)</sup> 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 (General Block Exemption Regulation), Commission Regulation (EC) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 193, 1.7.2014, p. 1) and Commission Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 369, 24.12.2014, p. 37).

24. Point 23bis is replaced by the following:

'23bis. Where an undertaking is active in several sectors to which different maximum amounts apply in accordance with points 22(a) and 23(a), the Member State concerned shall ensure, by appropriate means, such as separation of accounts, that the relevant ceiling is respected for each of those activities and that the overall maximum amount of EUR 800 000 is not exceeded per undertaking. Where an undertaking is active in the sectors covered by point 23(a), the overall maximum amount of EUR 120 000 should not be exceeded per undertaking.'

25. Point 24bis is introduced:

'24bis. Aid granted under section 3.2 shall not be cumulated with aid granted for the same underlying loan principal under section 3.3 and vice versa. Aid granted under section 3.2 and section 3.3 may be cumulated for different loans provided the overall amount of loans per beneficiary does not exceed the ceilings set out in point 25(d) or in point 27(d). A beneficiary may benefit in parallel from multiple measures under section 3.2 provided the overall amount of loans per beneficiary does not exceed the ceilings set out in point 25(d) and (e).'

26. Letter (iii) in point 25(d) is replaced by the following:

'iii. with appropriate justification provided by the Member State to the Commission (for example in connection with the characteristics of certain type of undertakings), the amount of the loan may be increased to cover the liquidity needs from the moment of granting for the coming 18 months for SMEs <sup>(13)</sup> and for the coming 12 months for large enterprises. The liquidity needs should be established through self-certification by the beneficiary <sup>(14)</sup>.'

27. Point 25(e) is replaced by the following:

'e. For loans with a maturity until 31 December 2020, the amount of the loan principal may be higher than under point 25(d) with appropriate justification provided by the Member State to the Commission, and provided that the proportionality of the aid remains assured and is demonstrated by the Member State to the Commission.'

28. Point 26 is replaced by the following:

'26. In order to ensure access to liquidity to undertakings facing a sudden shortage, subsidized interest rates for a limited period and loan amount may be an appropriate, necessary and targeted solution during the current circumstances. In addition, subordinated debt, which is subordinated to ordinary senior creditors in the case of insolvency proceedings, may also be an appropriate, necessary and targeted solution during the current circumstances. Such debt is a less distortive instrument than equity or hybrid capital, since it cannot be converted automatically into equity when the company is a going concern. Therefore, aid in form of subordinated debt <sup>(15)</sup> must fulfil the respective conditions under section 3.3, which concerns debt instruments. However, as it increases the ability of companies to take on senior debt in a way similar to capital support, a credit risk mark-up and a further limitation as to the amount compared to senior debt (one third for large enterprises and half the amount for SMEs, as defined in point 27(d) (i) or (ii)), shall apply in addition. Beyond these ceilings, subordinated debt should be assessed in line with the conditions for COVID-19 recapitalisation measures set out in section 3.11 to ensure equal treatment.'

<sup>(13)</sup> As defined in Annex I of 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 (General Block Exemption Regulation).

<sup>(14)</sup> The liquidity plan may include both working capital and investment costs.

<sup>(15)</sup> Except if such aid complies with the conditions of section 3.1 of this Communication.

29. A new point 26bis is introduced as follows:

'26bis. Aid granted under section 3.3 shall not be cumulated with aid granted for the same underlying loan principal under section 3.2 and vice versa. Aid granted under section 3.2 and section 3.3 may be cumulated for different loans provided the overall amount of loans per beneficiary does not exceed the thresholds set out in point 25(d) or in point 27(d). A beneficiary may benefit in parallel from multiple measures under section 3.3 provided the overall amount of loans per beneficiary does not exceed the ceilings set out in points 27(d) and (e).'

30. Letter (iii) in point 27(d) is replaced by the following:

'iii. with appropriate justification provided by the Member State to the Commission (for example in connection with the characteristics of certain type of undertakings), the amount of the loan may be increased to cover the liquidity needs from the moment of granting for the coming 18 months for SMEs <sup>(16)</sup> and for the coming 12 months for large enterprises. The liquidity needs should be established through self-certification by the beneficiary <sup>(17)</sup>.'

31. Point 27(e) is replaced by the following:

'e. For loans with a maturity until 31 December 2020, the amount of the loan principal may be higher than under point 27(d) with appropriate justification provided by the Member State to the Commission, and provided that the proportionality of the aid remains assured and is demonstrated by the Member State to the Commission.'

32. Point 27bis is introduced as follows:

'27bis Debt instruments, which are subordinated to ordinary senior creditors in the case of insolvency proceedings may be granted at reduced interest rates, which are at least equal to the base rate and the credit risk margins referred to in the table of point 27(a) plus 200 bps for large enterprises and 150 bps for SMEs. The alternative possibility of point 27(b) applies to such debt instruments. Points 27(c), 27 (f) and 27 (g) shall also be complied with. If the amount of subordinated debt exceeds both of the following ceilings <sup>(18)</sup>, the compatibility of the instrument with the Internal Market is determined pursuant to section 3.11:

- i. Two thirds of the annual wage bill of the beneficiary for large enterprises and the annual wage bill of the beneficiary for SMEs, as defined in point 27(d)(i), and
- ii. 8,4 % of the beneficiary's total turnover in 2019 for large enterprise and 12,5 % of the beneficiary's total turnover in 2019 for SMEs.'

33. Point 28 is replaced by the following:

'28. Aid in the form of guarantees and loans pursuant to section 3.1, section 3.2 and section 3.3 of this Communication may be provided to undertakings facing a sudden liquidity shortage directly or through credit institutions and other financial institutions as financial intermediaries. In the latter case, the conditions set out below must be complied with.'

34. Point 31 is replaced by the following:

'31. The credit institutions or other financial institutions should, to the largest extent possible, pass on the advantages of the public guarantee or subsidised interest rates on loans to the final beneficiaries. The financial intermediary must be able to demonstrate that it operates a mechanism that ensures that the advantages are passed on to the largest extent possible to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or lower interest rates than without such public guarantees or loans.'

<sup>(16)</sup> As defined in Annex I of the General Block Exemption Regulation.

<sup>(17)</sup> The liquidity plan may include both working capital and investment costs.

<sup>(18)</sup> If coupon payments are capitalised this must be taken into account when determining these ceilings, provided that such capitalisation was planned or foreseeable at the time of notification of the measure. Also any other State aid measure in the form of subordinated debt granted in the context of the COVID-19 outbreak, even outside this Communication, must be included in such calculation. However, subordinated debt granted in compliance with section 3.1 of this Communication does not count for these ceilings.

35. Letter (j) in point 37 is replaced by the following:

- j. The testing and upscaling infrastructures shall be open to several users and access shall be granted on a transparent and non-discriminatory basis. Undertakings, which have financed at least 10 % of the investment costs may be granted preferential access under more favourable conditions.'

36. Point 43bis is introduced:

- '43bis. To the extent that such a scheme includes also employees of credit or financial institutions, any aid to those institutions does not have the objective to preserve or restore their viability, liquidity or solvency, given the predominantly social objective of such aid <sup>(19)</sup>. As a result, the Commission considers that such aid should not be qualified as extraordinary public financial support according to Article 2(1) (28) BRRD and Article 3(1) (29) SRMR, and should not be assessed under the State aid rules applicable to the banking sector <sup>(20)</sup>.'

37. The following section is inserted:

### '3.11. **Recapitalisation measures**

44. This Temporary Framework sets out the criteria under EU State aid rules, based on which Member States may provide public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak <sup>(21)</sup>. It aims at ensuring that the disruption of the economy does not result in the unnecessary exit from the market of undertakings that were viable before the COVID-19 outbreak. Recapitalisations must therefore not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak. Large undertakings must report on how the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050.

45. At the same time, the Commission underlines that providing national public support in the form of equity and/or hybrid capital instruments, as part of schemes or in individual cases, should only be considered if no other appropriate solution can be found. Moreover, the issuing of such instruments should be subject to stringent conditions because they are highly distortive for competition between undertakings. Such interventions must therefore be subject to clear conditions as regards the State's entry, remuneration and exit from the equity of the undertakings concerned, governance provisions and appropriate measures to limit distortions of competition. Against this background, the Commission notes that designing national support measures in a way that meets the EU's policy objectives related to green and digital transformation of their economies will allow for a more sustainable long-term growth, and promote the transformation to the agreed EU objective of climate neutrality by 2050.

#### 3.11.1. *Applicability*

46. The following conditions shall apply to recapitalisation schemes and individual recapitalisation measures of Member States for non-financial undertakings (collectively referred to as 'COVID-19 recapitalisation' measures) under this Communication, which are not covered by section 3.1 of this Communication. They apply to COVID-19 recapitalisation measures for large undertakings and SMEs <sup>(22)</sup>.

47. The following conditions shall also apply to subordinated debt instruments that exceed both of the ceilings referred to in point 27bis (i) and (ii) in section 3.3 of this Communication.

<sup>(19)</sup> See by analogy Commission decision SA.49554-CY- Cypriot scheme for non-performing loans collateralized with primary residences (Estia), recital 73 and Commission decision SA.53520-EL- Primary Residence Protection Scheme, recital 71.

<sup>(20)</sup> See point 6 of this Communication.

<sup>(21)</sup> The possibility of offering aid in the form of equity and/or hybrid capital instruments, but for much lower nominal amounts, is already provided under the conditions of section 3.1 of this Communication.

<sup>(22)</sup> As set out in point 16 of the Communication, notification of alternative approaches remains possible in line with Article 107(3)(b) TFEU.

48. COVID-19 recapitalisation measures shall not be granted later than 30 June 2021.

### 3.11.2. Eligibility and entry conditions

49. The COVID-19 recapitalisation measure must fulfil the following conditions:

- (a) without the State intervention the beneficiary would go out of business or would face serious difficulties to maintain its operations. Such difficulties may be shown by the deterioration of, in particular, the beneficiary's debt to equity ratio or similar indicators;
- (b) it is in the common interest to intervene. This may relate to avoiding social hardship and market failure due to significant loss of employment, the exit of an innovative company, the exit of a systemically important company, the risk of disruption to an important service, or similar situations duly substantiated by the Member State concerned;
- (c) the beneficiary is not able to find financing on the markets at affordable terms and the horizontal measures existing in the Member State concerned to cover liquidity needs are insufficient to ensure its viability; and
- (d) the beneficiary is not an undertaking that was already in difficulty on 31 December 2019 (within the meaning of the General Block Exemption Regulation <sup>(23)</sup>).

50. Member States shall grant COVID-19 recapitalisation measures under an aid scheme approved by the Commission only following a written request for such aid by the prospective beneficiary undertakings. As regards individually notifiable aid, Member States shall provide evidence of such a written request as part of the notification of the individual aid measure to the Commission.

51. The requirements of this section and sections 3.11.4, 3.11.5, 3.11.6 and 3.11.7 apply to both COVID-19 recapitalisation schemes and individual aid measures. When approving a scheme, the Commission will request the separate notification of individual aid above the threshold of EUR 250 million. In relation to such notifications the Commission will assess whether existing financing in the market or horizontal measures to cover liquidity needs are insufficient to ensure the viability of the beneficiary; that the selected recapitalisation instruments and the conditions attached to them are appropriate to address the beneficiary's serious difficulties; that the aid is proportionate; and that the conditions in this section and sections 3.11.4, 3.11.5, 3.11.6 and 3.11.7 are complied with.

### 3.11.3. Types of recapitalisation measures

52. Member States can provide COVID-19 recapitalisation measures using two distinct sets of recapitalisation instruments:

- (a) equity instruments, in particular, the issuance of new common or preferred shares; and/or
- (b) instruments with an equity component (referred to as 'hybrid capital instruments') <sup>(24)</sup>, in particular profit participation rights, silent participations and convertible secured or unsecured bonds.

53. The State intervention can take the form of any variation of the above instruments, or a combination of equity and hybrid capital instruments. Member States may also underwrite the above instruments in the context of a market offering, under the condition that any resulting State intervention in a beneficiary meets the conditions set out in this section 3.11 of the Communication. The Member State must ensure

<sup>(23)</sup> As defined in Article 2(18) of the 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).

<sup>(24)</sup> Hybrid capital instruments are instruments that have characteristics of debt as well as of equity. For instance, convertible bonds are remunerated like bonds until they are converted into equity. The assessment of the overall remuneration of hybrid capital instruments thus depends on the one hand on their remuneration while they are debt-like instruments and on the other hand on the conditions for conversion into equity-like instruments.

that the selected recapitalisation instruments and the conditions attached thereto are appropriate to address the beneficiary's recapitalisation needs, while at the same time being the least distortive to competition.

#### 3.11.4. *Amount of the recapitalisation*

54. In order to ensure proportionality of the aid, the amount of the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak, i.e. the situation on 31 December 2019. In assessing the proportionality of the aid, State aid received or planned in the context of the COVID-19 outbreak shall be taken into account.

#### 3.11.5. *Remuneration and exit of the State*

##### General principles

55. The State shall receive appropriate remuneration for the investment. The closer the remuneration is to market terms, the lower the potential competition distortion caused by the State intervention.
56. The COVID-19 recapitalisation should be redeemed when the economy stabilises. The Commission considers it appropriate to give the beneficiary sufficient time to redeem the recapitalisation. The Member State must put a mechanism in place to gradually incentivise redemption.
57. The remuneration of the COVID-19 recapitalisation measure should be increased in order to converge with market prices to provide an incentive to the beneficiary and to the other shareholders to redeem the State recapitalisation measure and to minimise the risk of distortions of competition.
58. It follows that COVID-19 recapitalisation measures need to contain appropriate incentives for undertakings to redeem the recapitalisation and look for alternative capital when market conditions permit, by requiring a sufficiently high remuneration for the recapitalisation.
59. As an alternative to the remuneration methodologies set out below, Member States may notify schemes or individual measures where the remuneration methodology is adapted in accordance with the features and seniority of the capital instrument provided they overall lead to a similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration.

##### Remuneration of equity instruments

60. A capital injection by the State, or an equivalent intervention, shall be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection. If the beneficiary is not a publicly listed company, an estimate of its market value should be established by an independent expert or by other proportionate means.
61. Any recapitalisation measure shall include a step-up mechanism increasing the remuneration of the State, to incentivise the beneficiary to buy back the State capital injections. This increase in remuneration can take the form of additional shares <sup>(25)</sup> granted to the State or other mechanisms, and should correspond to a minimum of 10 % increase in the remuneration of the State (for the participation resulting from the State's COVID-19 equity injection that has not been repaid), for each of the step-up steps:
- (a) Four years after the COVID-19 equity injection, if the State has not sold at least 40 percent of its equity participation resulting from the COVID-19 equity injection, the step-up mechanism will be activated.

<sup>(25)</sup> Additional shares can, for instance, be granted via the issuance of convertible bonds at the date of the recapitalisation, which will be converted into equity at the date of trigger of the step-up mechanism.

- (b) Six years after the COVID-19 equity injection, if the State has not sold in full its equity participation resulting from the State's COVID-19 equity injection, the step-up mechanism will again be activated <sup>(26)</sup>.

If the beneficiary is not a publicly listed company, Member States may decide to implement each of the two steps one year later, i.e. five years and seven years after granting of the COVID-19 equity injection, respectively.

62. The Commission may accept alternative mechanisms, provided they overall lead to a similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration.
63. The beneficiary should, have at any time, the possibility to buy back the equity stake that the State has acquired. To ensure that the State receives appropriate remuneration for the investment, the buy-back price should be the higher amount of (i) the nominal investment by the State increased by an annual interest remuneration 200 basis points higher than presented in the table below <sup>(27)</sup>; or (ii) the market price at the moment of the buy-back.
64. As an alternative, the State may sell at any time its equity stake at market prices to purchasers other than the beneficiary. Such a sale requires, in principle, an open and non-discriminatory consultation of potential purchasers or a sale on the stock exchange. The State may give existing shareholders priority rights to buy at the price resulting from the public consultation.

#### Remuneration of hybrid capital instruments

65. The overall remuneration of hybrid capital instruments must adequately factor in the following elements:
- (a) the characteristics of the instrument chosen, including its level of subordination, risk and all modalities of payment;
  - (b) built-in incentives for exit (such as step-up and redemption clauses); and
  - (c) an appropriate benchmark interest rate.
66. The minimum remuneration of hybrid capital instruments until they are converted into equity-like instruments shall be at least equal to the base rate (1 year IBOR or equivalent as published by the Commission <sup>(28)</sup>), plus the premium as set out below.

#### Remuneration of hybrid capital instruments: 1-year IBOR +

Type of recipient	1st year	2 <sup>nd</sup> and 3 <sup>rd</sup> year	4 <sup>th</sup> and 5 <sup>th</sup> year	6 <sup>th</sup> and 7 <sup>th</sup> year	8 <sup>th</sup> year and after
SMEs	225 bps	325 bps	450 bps	600 bps	800 bps
Large enterprises	250 bps	350 bps	500 bps	700 bps	950 bps

67. The conversion of hybrid capital instruments into equity shall be conducted at 5 percent or more below TERP (Theoretical Ex-Rights Price) at the time of the conversion.
68. After conversion into equity, a step-up mechanism must be included to increase the remuneration of the State, to incentivise the beneficiaries to buy back the State capital injections. If the equity resulting from the State's COVID-19 intervention is still owned by the State two years after the conversion into equity the State shall receive an additional share of ownership of the beneficiary in addition to its remaining

<sup>(26)</sup> For instance, if the step-up takes the form of the grant to the State of additional shares. If the State's participation in a beneficiary is 40 % as a result of its capital injection, and if the State does not sell its participation before the requested date, the State's participation should increase by at least  $0,1 \times 40 \% = 4 \%$  to reach 44 % four years after the COVID-19 equity injection, and to reach 48 % six years after COVID-19 equity injection, resulting in a corresponding dilution of the stakes of other shareholders.

<sup>(27)</sup> The 200 bps increase does not apply in year 8 and onwards.

<sup>(28)</sup> Base rates calculated in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6), published on the website of DG Competition at [https://ec.europa.eu/competition/state\\_aid/legislation/reference\\_rates.html](https://ec.europa.eu/competition/state_aid/legislation/reference_rates.html)

participation resulting from the State's conversion of the COVID-19 hybrid capital instruments. This additional share of ownership shall be at a minimum 10 percent of the remaining participation resulting from the State's conversion of the COVID-19 hybrid capital instruments. The Commission may accept alternative step-up mechanisms provided they have the same incentive effect and a similar overall impact on the State's remuneration.

69. Member States may choose a pricing formula that includes additional step-up or payback clauses. Such features should be designed so that they encourage an early end to the State's recapitalisation support of the beneficiary. The Commission may also accept alternative pricing methodologies, provided they lead to remunerations that are higher than or similar to those resulting from the above methodology.
70. Since the nature of hybrid instruments varies significantly, the Commission does not provide guidance for all types of instruments. Hybrid instruments shall in any event follow the principles mentioned above, with remuneration reflecting the risk of the particular instruments.

#### 3.11.6. *Governance and prevention of undue distortions of competition*

71. In order to prevent undue distortions of competition beneficiaries must not engage in aggressive commercial expansion financed by State aid or beneficiaries taking excessive risks. As a general principle, the smaller the equity stake of the Member State and the higher the remuneration, the less there is a need for safeguards.
72. If the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with significant market power on at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. In proposing such measures, Member States may in particular offer structural or behavioural commitments foreseen in Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.
73. Beneficiaries receiving a COVID-19 recapitalisation measures are prohibited from advertising it for commercial purposes.
74. As long as at least 75 % of the COVID-19 recapitalisation measures have not been redeemed, beneficiaries other than SMEs shall be prevented from acquiring a more than 10 % stake in competitors or other operators in the same line of business, including upstream and downstream operations.
75. In exceptional circumstances, and without prejudice to merger control, such beneficiaries may acquire a more than 10 % stake in operators upstream or downstream in their area of operation, only if the acquisition is necessary to maintain the beneficiary's viability. The Commission may authorise the acquisition if it is necessary to maintain the beneficiary's viability. The acquisition may not be implemented before the Commission has taken a decision on this issue.
76. State aid shall not be used to cross-subsidise economic activities of integrated undertakings that were in economic difficulties already on 31 December 2019. A clear account separation shall be put in place in integrated companies to ensure that the recapitalisation measure does not benefit those activities.
77. As long as the COVID-19 recapitalisation measures have not been fully redeemed, beneficiaries cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State.

78. As long as at least 75 % of the COVID-19 recapitalisation measures has not been redeemed, the remuneration of each member of the beneficiaries' management must not go beyond the fixed part of his/her remuneration on 31 December 2019. For persons becoming members of the management on or after the recapitalisation, the applicable limit is the lowest fixed remuneration of any of the members of the management on 31 December 2019. Under no circumstances, bonuses, other variable or comparable remuneration elements shall be paid.
- 3.11.7. *Exit strategy of the State from the participation resulting from the recapitalisation and reporting obligations*
79. Beneficiaries other than SMEs that have received a COVID-19 recapitalisation of more than 25 % of equity at the moment of intervention must demonstrate a credible exit strategy for the participation of the Member State, unless the State's intervention is reduced below the level of 25 % of equity within 12 months from the date of the granting of the aid <sup>(29)</sup>.
80. The exit strategy shall lay out:
- (a) the plan of the beneficiary on the continuation of its activity and the use of the funds invested by the State, including a payment schedule of the remuneration and of the redemption of the State investment (together 'the repayment schedule'); and
  - (b) the measures that the beneficiary and the State will take to abide by the repayment schedule.
81. The exit strategy should be prepared and submitted to the Member State within 12 months after aid is granted and must to be endorsed by the Member State.
82. Beyond the obligation set out in points 79 to 81, beneficiaries must report to the Member State on the progress in the implementation of the repayment schedule and the compliance with the conditions in section 3.11.6 within 12 months of the schedule's presentation, and thereafter periodically every 12 months.
83. As long as the COVID-19 recapitalisation measures has not been fully redeemed, beneficiaries of a COVID-19 recapitalisation, other than SMEs, shall, within 12 months from the date of the granting of the aid and thereafter periodically every 12 months, publish information on the use of the aid received. In particular, this should include information on how their use of the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050.
84. The Member State should report to the Commission annually on the implementation of the repayment schedule and compliance with the conditions in section 3.11.6. Where the beneficiary received a COVID-19 recapitalisation above EUR 250 million, the report shall include information on compliance with the conditions set in point 54.
85. If six years after the COVID-19 recapitalisation the State's intervention has not been reduced below 15 % of beneficiary's equity, a restructuring plan in accordance with the Rescue and Restructuring Guidelines must be notified to the Commission for approval. The Commission will assess whether the actions contemplated in the restructuring plan ensure the beneficiary's viability, also with a view of EU objectives and national obligations linked to the green and digital transformation, and the exit of the State without adversely affecting trade to an extent contrary to the common interest. If the beneficiary is not a publicly listed company, or is an SME, the Member State may decide to notify a restructuring plan only if the State's intervention has not been reduced below the level of 15 % of equity seven years after the COVID-19 recapitalisation.'

<sup>(29)</sup> For the purpose of this subsection 3.11.7, hybrid instruments granted by the State should be counted as equity.

38. Point 44 is renumbered as point 86 and is amended as follows:
- ‘86. Except aid granted under sections 3.9, 3.10 and 3.11, Member States must publish relevant information <sup>(30)</sup> on each individual aid granted under this Communication on the comprehensive State aid website or Commission’s IT tool <sup>(31)</sup> within 12 months from the moment of granting. Member States must publish relevant information <sup>(32)</sup> on each individual recapitalisation granted under section 3.11 on the comprehensive State aid website or Commission’s IT tool within 3 months from the moment of the recapitalisation. The nominal value of the recapitalisation shall be included per beneficiary.’
39. Points 45-52 are renumbered as points 87-94.
40. Point 49 is renumbered as point 91 and is replaced by the following:
- ‘91. The Commission applies this Communication from 19 March 2020, having regard to the economic impact of the COVID-19 outbreak, which required immediate action. This Communication is justified by the current exceptional circumstances and will not be applied after 31 December 2020, except for section 3.11, which will be applied until 1 July 2021. The Commission may review this Communication before 31 December 2020 on the basis of important competition policy or economic considerations. Where helpful, the Commission may also provide further clarifications on its approach to particular issues.’
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<sup>(30)</sup> Referring to information required in Annex III of the Commission Regulation (EU) No 651/2014 of 17 June 2014 and of Annex III of the Commission Regulation (EU) No 702/2014 and Annex III of the Commission Regulation (EU) No 1388/2014 of 16 December 2014. For repayable advances, guarantees, loans, subordinated loans and other forms the nominal value of the underlying instrument shall be inserted per beneficiary. For tax and payment advantages, the aid amount of the individual aid may be indicated in ranges.

<sup>(31)</sup> The state aid transparency public search gives access to state aid individual award data provided by Member States in compliance with the European transparency requirements for state aid and can be found at <https://webgate.ec.europa.eu/competition/transparency/public?lang=en>.

<sup>(32)</sup> Referring to information required in Annex III of the Commission Regulation (EU) No 651/2014 of 17 June 2014 and of Annex III of the Commission Regulation (EU) No 702/2014 and Annex III of the Commission Regulation (EU) No 1388/2014 of 16 December 2014.