

Update State aid

April 2020

Dear reader,

with our Update State aid we like to inform you on current topics and principal issues in State aid law. This newsletter deals with selected decisions of the European courts as well as with aid granted by the BMVI for developing computer games. With the ubiquitous corona pandemic, we venture a look at measures taken by the Member States that Germany has not yet implemented from the EU Commission's toolbox. [You can find more information about Corona state aid on our Corona topic page.](#)

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Support for computer games through *de minimis* aid

The Federal Ministry of Transport and Digital Infrastructure (BMVI) is providing EUR 50 million annually until 2023 to promote computer games in order to strengthen Germany as a location for developers. In the first phase, *de minimis* funding will be provided with grants of up to EUR 200,000. In a second phase larger-scale funding will also be possible.

The funding, which the German games industry has long been waiting for, serves the purpose of promoting this part of the digital creative industry and thus its innovative power. The BMVI expects spill-over effects into other economic sectors (e.g. architecture and construction, mobility, education, health and care). This type of support for the games industry is being offered for the first time in Germany, so that many of the companies concerned are not yet familiar with the funding modalities or the correct application procedure.

The object of the funding is the development or production of an interactive digital game or the development of a prototype of an interactive digital game. Eligible for funding are personnel costs, project-related costs of the development studio, marketing in relation to the product by the producer including tests prior to market launch (max. 15 percent of total costs), costs for naming rights and licenses as well as costs for the publisher pitch. Not eligible are costs incurred by the publisher, start-up costs, costs in connection with relocation and costs incurred before or during the application process. Funding is provided in the form of a non-repayable grant.

Applications may be submitted by companies with their registered office, permanent establishment or branch in Germany. This requirement applies for the entire duration of the grant, i.e. from the first to the last payment of the grant amount. The companies must be listed in the commercial register – companies under civil law (GbR) cannot submit applications. For-

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First-time support for the games industry

What is being funded?

Who will be funded?

Other cooperation partners must finance their expenses themselves. Likewise, companies in difficulty or companies which have not complied with the recovery of aid are not eligible for funding.

No prerequisite for funding is the status of an SME (small or medium-sized enterprise). Large companies can also be eligible for funding. However, SMEs can receive a higher percentage of funding:

- Funding quota for small enterprises: 70 percent,
- Funding quota for medium enterprises: 60 percent,
- Funding quota for large enterprises: 50 percent,

An application for funding must be submitted within the set deadline via the federal electronic application system ("easy-Online"). The project must first be outlined; a concrete description of the project must be submitted during the further application process. The application must contain a financing plan that includes a detailed cost calculation and proof of overall financing. If funding is granted, a copy of the product must be made available to the BMVI for archiving purposes.

The maximum amount of *de minimis* aid is EUR 200,000 per group of companies. This is particularly relevant in the games industry due to the small-scale structure of companies, which are often linked to each other under company law. A group of companies is thus regarded as a single enterprise from the point of view of state aid law, irrespective of its corporate law structure and the number of its subsidiaries or sister companies. The decisive factor is that all units are legally or factually controlled by one and the same unit (affiliated companies).

Participations in other companies are also relevant for the SME status and thus the funding quota:

- No addition of employees, turnover or annual balance sheet totals if a venture capital company, a university, an institutional investor or a small autonomous local authority holds up to 50 percent of the shares.
- A pro-rata addition of the data (number of employees and turnover or annual balance sheet total) is carried out for partner enterprises, i.e. enterprises which hold 25 percent

How to obtain a grant?

Maximum amount of aid applies per group of companies

SME status depends on participations

to 50 percent in another enterprise or in which shares of 25 percent to 50 percent are held by other enterprises.

- A complete addition of the data is carried out for affiliated undertakings.

The data relevant for the SME status are derived from the latest approved annual report. If such an annual report is not yet available, the company can estimate the figures on the basis of a business plan. An enterprise loses or gains SME status if, on the closing date for the accounts, the figures are exceeded or fallen short of in two consecutive financial years. If the SME status is lost during an aid period, this is only relevant if a higher funding quota than admissible for the size of the company has been granted. The status is without prejudice to the grant of 50 percent of eligible costs.

Changes among the shareholders or a change of control at the subsidised company can render a subsidy redundant, as can a transfer of the registered office or the merger of the subsidised company with another company.

The effort required for a grant application is manageable, especially if it is included in the project planning right from the start. In return, grants of up to 70 percent are available, which are non-repayable if the project is completed properly. Due to the structure of the companies in the games industry, questions could arise above all about the attribution of company participations, which can have a great influence on the eligibility and amount of funding.

The notification of the second stage of games funding to the EU Commission was recently completed. We expect that the BMVI will publish the corresponding guidelines for the funding of large-volume projects in early summer and will then report on the specifications for applications.

Changes in company law may make funding redundant

Conclusion

Further information



Coronavirus pandemic: Actions by EU Member States

The EU Commission has implemented a Temporary Framework for State aid measures and provided the Member States with a toolbox of instruments to support their companies in the crisis. Germany has implemented some of these instruments. The following article takes a look at instruments that have been notified by other Member States and are also of interest to Germany.

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On 19 March 2020, the European Commission adopted the Temporary Framework for State aid to support the economy in view of the current COVID-19 outbreak ([Communication C\(2020\) 1863](#)). During the financial crisis, the EU Commission has worked with a Temporary Framework as well to allow Member States to support the real economy. The Temporary Framework is not legally binding, but a communication from the EU Commission on how it applies and interprets the rules of EU law when deciding on state aid notifications by Member States.

Temporary Framework

The EU Commission bases its toolbox on Art. 107 (3) b) TFEU ("aid [...] to remedy a serious disturbance in the economy of a Member State"). In addition, the Temporary Framework allows compensation payments to certain companies or industry sectors affected by the COVID-19 pandemic on the basis of Art. 107 (2) (b) TFEU ("aid to make good the damage caused by [...] exceptional occurrences").

On 3 April 2020, the EU Commission extended the Temporary Framework ([Communication C\(2020\) 2215](#)). Now the Member States can also support the following activities:

Extension of the Temporary Framework

- Research and development in connection with coronavirus,
- Construction and expansion of test laboratories,
- Manufacture of products relevant for combatting coronavirus.

On the basis of the Temporary Framework, the EU Commission has already approved numerous aid schemes notified by the Member States as compatible with EU state aid law. Some of these notifications are presented below.

On 12 March, 2020, the EU Commission approved a Danish state aid scheme ([SA.56685](#)) that allows organisers of public events with more than 1,000 participants to receive compensation for the cancellation of the event. Organisers of events with less than 1,000 participants aimed at risk groups can also receive compensation. It is irrelevant whether or not the events were subject to a charge. Public bodies are excluded from compensation in principle. Eligible for compensation are loss of income and additional costs due to cancellation, postponement or change in the conditions of the event organisation. Compensation of up to 100 percent of eligible costs is possible. This aid scheme is based on Article 107 (2) (b) TFEU.

Denmark

Sweden has notified two new schemes: By means of measure [SA.57501](#) (released on 22 April 2020), the state compensates organisers of cultural events on the basis of Art. 107 (2) (b) TFEU. Up to 75 percent of the lost turn-over for events in the period from 12 March to 31 May 2020 can be compensated. By means of measure [SA.56972](#) (released on 15 April 2020), Sweden supports companies in paying rent. The prerequisite is that the tenant and landlord agree on a rent reduction. The state pays up to 50 percent of the reduced rent for three months. This aid scheme was adopted on the basis of Art. 107 (3) (b) TFEU.

Sweden

A newly introduced scheme by the Netherlands ([SA.56915](#)), approved by the EU Commission on 3 April 2020, aims to enable companies to acquire, lease, license and implement e-health applications. Applications for funding can be submitted by social support services, health care services and youth care services. The funding will mobilise providers to distribute e-health applications that enable continuous support and remote care for patients who are to stay at home during the coronavirus pandemic. Treatments not related to coronavirus should be carried out at home rather than in hospitals, if possible. The sudden increase in demand for these services requires investment in expanding the availa-

The Netherlands

bility of such applications. The funding is intended to minimise liquidity bottlenecks in the expansion of these services.

On 22 March 2020, the EU Commission approved an Italian state aid scheme ([SA.56786](#)), which provides for direct grants and repayable advances to companies that

Italy

- set up factories for the production of medical appliances and personal protective equipment,
- expand production for the manufacture of such equipment or
- convert their production line for this purpose.

The aid is granted for medical equipment such as respirators and personal protective equipment such as masks, glasses, gowns and protective suits. The products will be remunerated according to the market prices applicable in December 2019.

On 8 April 2020, the EU Commission approved a scheme designed by Luxembourg ([SA.56954](#)) under which the state grants non-repayable subsidies to companies of all sizes for R&D activities for products relevant to the COVID-19 pandemic. The government is providing a total of EUR 30 million. The scheme covers basic research, industrial research and experimental research projects. In addition to funding research, the government will cover up to 80 percent of the eligible costs in order to create the necessary production capacity.

Luxembourg

The United Kingdom – which is still subject to EU regulations until the end of the year – has, among other measures, made use of the opportunity to support research and development in connection with the coronavirus pandemic. The British government intends to support the following projects with grants:

United Kingdom

- Projects for research and development on coronavirus,
- Construction and expansion of test facilities for the development, testing and manufacture of medical products needed to combat coronavirus.

With its decision [SA.56841](#), the EU Commission approved this state aid scheme on 6 April, 2020.

Due to the dynamic development, further companies have notified R&D schemes with the EU Commission. Hungary ([SA.57007](#), approval dated 17 April 2020) supports R&D activities with wage subsidies to companies that would otherwise have laid off employees. Malta ([SA.57075](#), approval of 22 April 2020) also supports R&D activities with direct grants of between 80 and 100 percent of eligible costs. Portugal ([SA.57035](#), approval of 17 April 2020) supports R&D activities with direct grants as well. The Czech Republic ([SA.56961](#), approved on 14 April 2020) supports SMEs producing medical products to combat the COVID 19 pandemic.

The examples presented from other Member States show that Germany has further instruments at its disposal to support the real economy. As far as can be seen, the Federal Government has not yet notified any regulation providing for compensation payments to event organisers. The Federal Government seems to adopt the "voucher solution" (i.e. converting a ticket into a voucher for a future event) in order to help the affected companies. With regard to e-health applications, R&D activities and the production of medical equipment, no notifications from Germany have been published so far. However, the situation is dynamic and decisions are made daily by the EU Commission. It is therefore possible that Germany will take further measures to support the economy. It would be desirable to have aid schemes that promote digitisation in the health sector and develop solutions that can also be used after the coronavirus pandemic.

Further states granting R&D aid

Conclusion



Overview of European Court Cases

In recent months, the European courts have again decided numerous cases on state aid law. The following cases deal with antitrust law claims for damages for granting authorities, the effects of changes to the legal basis in state aid proceedings and the access to files in accordance with Regulation (EC) No. 1049/2001 in state aid proceedings.

The decision of the ECJ in Case [C-435/18](#) of 12 December 2019 highlights the connections between cartel and state aid law. The procedure is based on a submission by the Austrian Supreme Court. It is a follow-on claim for damages brought by the State of Upper Austria against the participants in the elevator cartel. The State of Upper Austria did not claim damages as a direct or indirect customer, but in its capacity as an institution awarding subsidies. Upper Austria subsidises the construction costs of certain housing construction projects to a certain percentage. The State argued that the construction costs were excessive due to the cartel, which led to higher state loans than necessary. The damage was due to the lower interest percentage of these loans compared to an investment of the funds in federal bonds.

The ECJ takes the view that a connection between the cartel infringement and the damage is sufficient to affirm a claim; a connection between the damage and the protective purpose of Art. 101 TFEU (prohibition of cartels) is not necessary, however. This is because the protection of competition pursued by Art. 101 TFEU does not require that the injured party suffers damage only by market participation. Therefore, the claimant for damages does not have to be active in the market affected by the cartel as a supplier or buyer. Whether the State of Upper Austria has actually suffered a damage and whether the necessary proof of a causal connection between the cartel and the damage has been provided, must now be

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ECJ, Case C-435/18 - Cartel damages claim for "anyone" - including funding bodies

examined by the Austrian Supreme Court.

With this decision, the ECJ continues its case law that "everybody" suffering a damage by cartels can claim compensation. It extends the right to compensation for damages to granting authorities which were neither directly nor indirectly customers of the cartel. The ECJ has thus considerably extended the group of persons entitled to claim damages.

It remains to be seen whether the State of Upper Austria will actually be awarded damages following this decision. While in many cases of private enforcement in Germany courts have decided that a claim for damages is given in principle, many questions of the amount of damages are still unresolved. Due to the financial expense of private enforcement, the damage suffered by the funding body must be considerable in order to justify the expense and risk of a follow-on action.

By its decision of 11 March 2020 (Case [C-56/18](#)), the ECJ annulled a decision of the General Court (Case [T-263/15](#)) concerning state aid granted to Gdynia-Kosakovo airport. In the decision to open the procedure in 2012 and in a decision in 2014, which has since been revoked and replaced, the European Commission had referred to the Guidelines on National Regional Aid for 2007-2013 ([2006/C 54/08](#)) and to Article 107 (3) (a) TFEU as a legal basis. In the decision concluding the proceedings in 2015, the European Commission referred to the Guidelines on State aid for airports and airlines ([2104/C 99/03](#)) and to Article 107(3) (c) TFEU. As an interested party – only the EU Commission and the Member State are parties to the legal dispute – the company concerned was not invited to provide a statement on the amended legal basis in the proceedings.

The ECJ considers the omission of a hearing of the company concerned – which is required by Article 108 (2) TFEU – to be a procedural error. However, such a procedural error only leads to the full or partial annulment of the decision if the contested decision could have had a different meaning without the infringement. The existence of differences between the legal rules on which the parties were heard and those on which the decision is ultimately based does not in principle

ECJ, Case C-56/18 - Change of legal basis does not automatically render a decision void

lead to the annulment of the decision. Contrary to the opinion of the General Court, the amendment must – with regard to the provisions in dispute in each case – have affected the meaning of that decision. If, also on the basis of the new regulation, the same result as the previously annulled decision is reached – in this case the incompatibility of a state aid with European state aid law – failure to request a statement by the company concerned does not lead to the annulment of the decision. The same applies if the decision is based on an autonomous legal basis which is unchanged and which alone bears the contested decision.

With this decision, the ECJ makes clear that failure to hold a hearing does not automatically result in the (complete or at least partial) annulment of a decision of the EU Commission. This case law is based on a feature of EU state aid law that the party to the dispute is the Member State as the body providing the aid, while the company receiving aid is not a party. The company concerned may thus be restricted in an efficient defence, as it is only entitled to rights of participation and the Member State may also pursue interests other than those of the company concerned.

In its decision of 30 January 2020 (Case [T-168/17](#)), the General Court decided that documents of a state aid procedure are confidential and need not be made accessible in the context of a claim of access to files without an overriding public interest.

The claimant has initiated state aid proceedings against a competitor and – when the EU Commission expressed the intention to discontinue the proceedings – requested access to the file based on [Regulation No. 1049/2001](#), which the EU Commission rejected. The ECJ confirmed a presumption of confidentiality of documents in state aid proceedings. This presumption applies at least until the formal conclusion of the proceedings (as well as afterwards if an action against the decision on the merits is pending). The intention of an action for damages – based on an infringement of competition law – is not sufficient to affirm an overriding public interest. The applicant had to explain the necessity of the access to files in detail so that it could be weighed against the general assumption confidentiality. Also, Art. 42 of the Charter of Fun-

General Court, Case T-168/17 - Access to file under Regulation 1049/2001 in State aid proceedings

damental Rights of the EU does not grant unrestricted access to the files.

The provisions of Regulation No. 1049/2001 are regularly relevant in European competition law. For potential claimants, the access to files is an important tool for a better assessment of the enforceability of a claim for damages. The EU Commission still handles requests for access to files very restrictively and makes it difficult for potential claimants to assess their case.

This Newsletter Update State aid does not constitute legal advice. While the information contained in this Newsletter has been carefully researched, it only offers a partial reflection of the law and its developments. It can be no substitute for individual advice appropriate to the facts of an individual case.



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