



COVID-19– Geldards Public Sector Update

Business Emergency Advisory Team

6th May 2020



CVD 19 in Construction – tales from the coalface

Tony Norris, Partner, Infrastructure & Construction

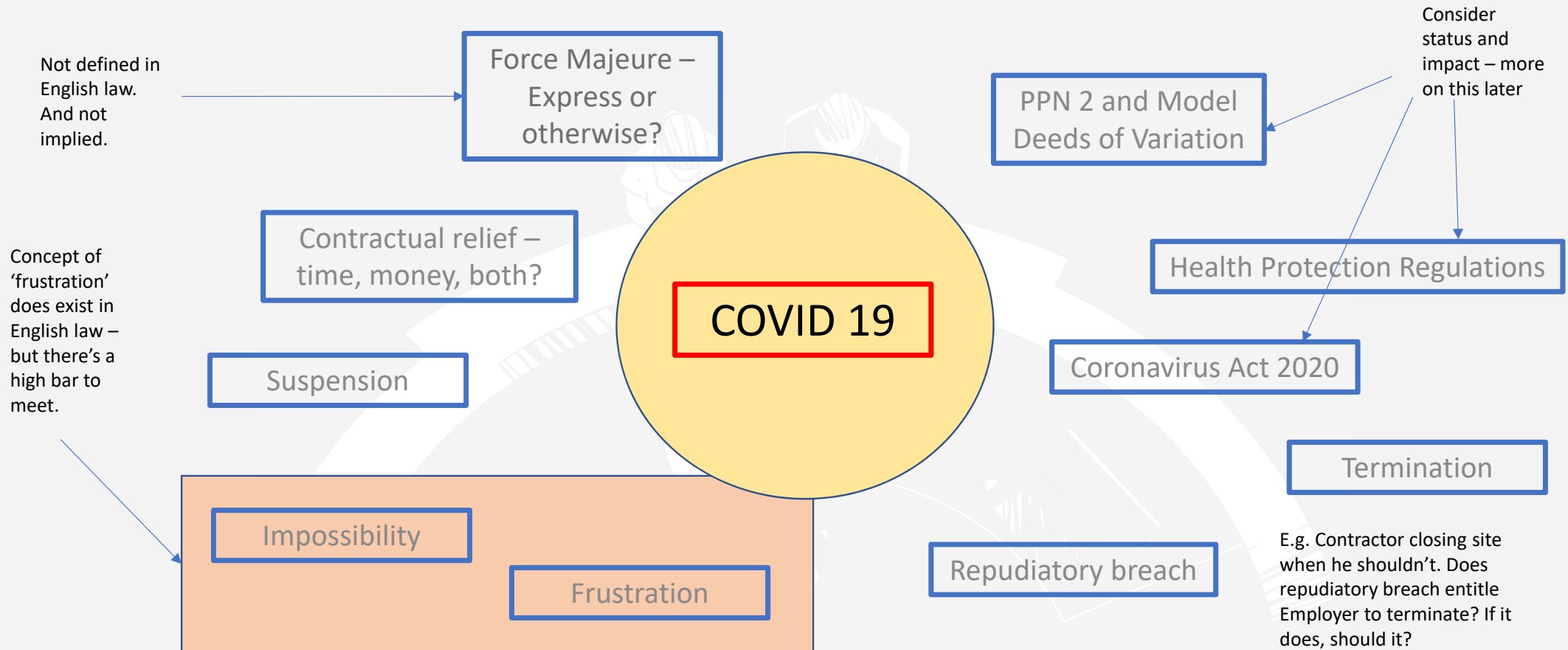
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Introduction

- COVID 19 and Construction – Frequently Heard Phrases
- Contractual impact – a wide spectrum
- Change in law?
- The importance of ‘causation’
- Conclusion – Long term outcomes are key

COVID 19 and Construction - FHPs



Contractual impact – a wide spectrum

Standard forms (Examples)

Modified forms

Bespoke contracts

JCT DB - Consider Relevant Events. Those in red have correlating **Relevant Matters**

2.26.12 (statutory powers), 2.26.7 (statutory undertakers), 2.26.14 (FM), 2.26.2.2 (instructions to postpone), 2.26.6 (Employer impediment), 2.26.1 and 5.1.2 (Change or Variation), 2.26.11 (strike, lockout affecting any trade engaged in the Works or in the prep, transportation / manufacture of goods / materials required for them or of persons engaged in design work)

Notice requirements are key. As is causation – see slide 6.

NEC 3 ECC - Consider

19.1 and 60.1(9) (Acts of Prevention)
Optional Clause X2 (Change in Law) (more on this later)
Other Compensation Events such as 60.1(1) (Change in Scope), 60.1(2) (Access), 60.1(3) (No instructions) and 60.1(4) (instructions to stop / not start)

Notice requirements are key. As is causation – see slide 6.

Some contracts may have adjusted the 'standard' positions and/or deleted some of these potentially relevant provisions.

Some contracts and/or frameworks may expressly provide for what is to happen in the event of issues arising from an epidemic and/or pandemic. Parties have then 'put their pen' to this, which may make matters a little clearer. Contractual provisions must still be followed closely – **including any notice requirements.**

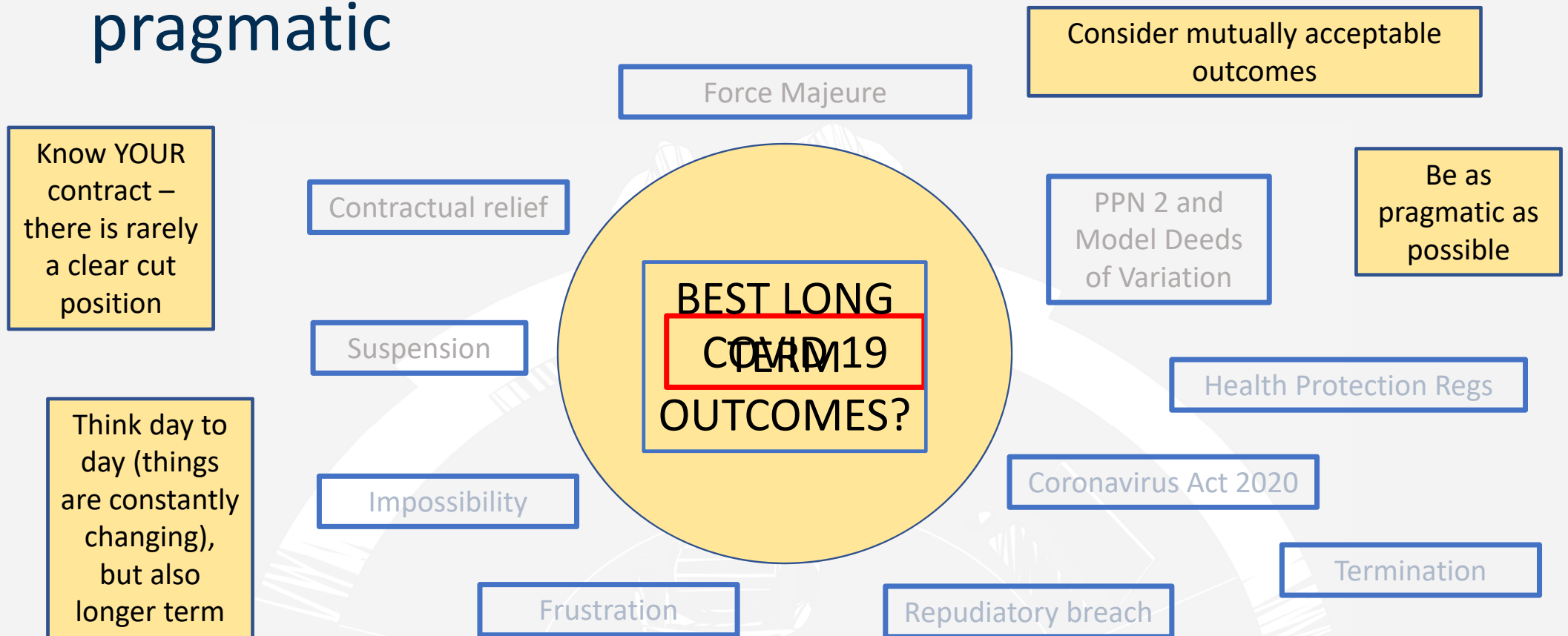
Change in Law?

Regulation / Guidance	Status	Change of law? (In our view)	Implication / Considerations
Coronavirus Act 2020	Primary legislation	Yes	For construction industry, limited
Health Protection Regulations	Secondary legislation	Yes	Can sites operate safely within these parameters? Interaction with CDM – currently limited Government guidance on this. Impact on time and money if contract compensates for change in law (e.g. NEC X2). Consider whether contract has explicitly removed ‘change in law’ provisions.
PPN 2, associated guidance and Model Deeds of Variation	Guidance	No	<i>PPN 02/20: Additional guidance, FAQs and model terms for construction</i> gives construction specific guidance to accompany PPN 02/20. The documents provide guidance on how authorities can support affected suppliers in the face of COVID – e.g. accelerating the payment of invoices, certifying future interim payments where work has not been done based on previous valuations, increasing the frequency or order of payments, and making advance payments. If model deeds of variation are implemented, they should override existing contractual terms in short term (contractors cannot claim double relief). Consider this option against likely outcomes of other forms of contractual relief.

The importance of 'causation'

- Contractually, COVID 19 will likely be the backdrop to, rather than the 'cause' of, issues arising.
- Consider the very specific facts as this will impact contract interpretation and next steps.
- What are the detailed 'causes' of any delay or increase in costs? Why has there been suspension?
 - Supply chain issues?
 - Health and safety issues?
 - Labour issues?
 - Government guidance?
 - No one cause will fit all contracts
- Mitigation is critical – on both sides

Conclusion – Decentralise COVID and be pragmatic





Litigation in the time of Coronavirus

Mark Hacking, Partner, Property Litigation

6th May 2020

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Landlord & Tenant (commercial): Coronavirus Act 2020

- s.82(1) – L cannot forfeit for non-payment of rent
- s.82(2) – no waiver by L unless expressly in writing
- Now extended to prohibit aggressive debt collection, so no:
 - Statutory demand in bankruptcy
 - Winding up petition
 - CRAR where rent arrears = fewer than 90 days

Landlord & Tenant (commercial): So what can you do if you are L?

- Forfeit for other breach
 - Still need s.146 Notice; and do you really want the property back?
- CRAR if debt is ancient
 - But will take ages to sell anything
- County Court debt claim
- Surrender

Landlord & Tenant (commercial): So what can you do if you are T?

- You can claim the benefit of s.82(1) even if you can still afford the rent
- But the rent will have to be paid eventually
- Talk to your Landlord

Landlord & Tenant (commercial): What if L & T agree changes to the lease?

- Document it!
 - Deed
 - Side letter?
 - What about guarantors?

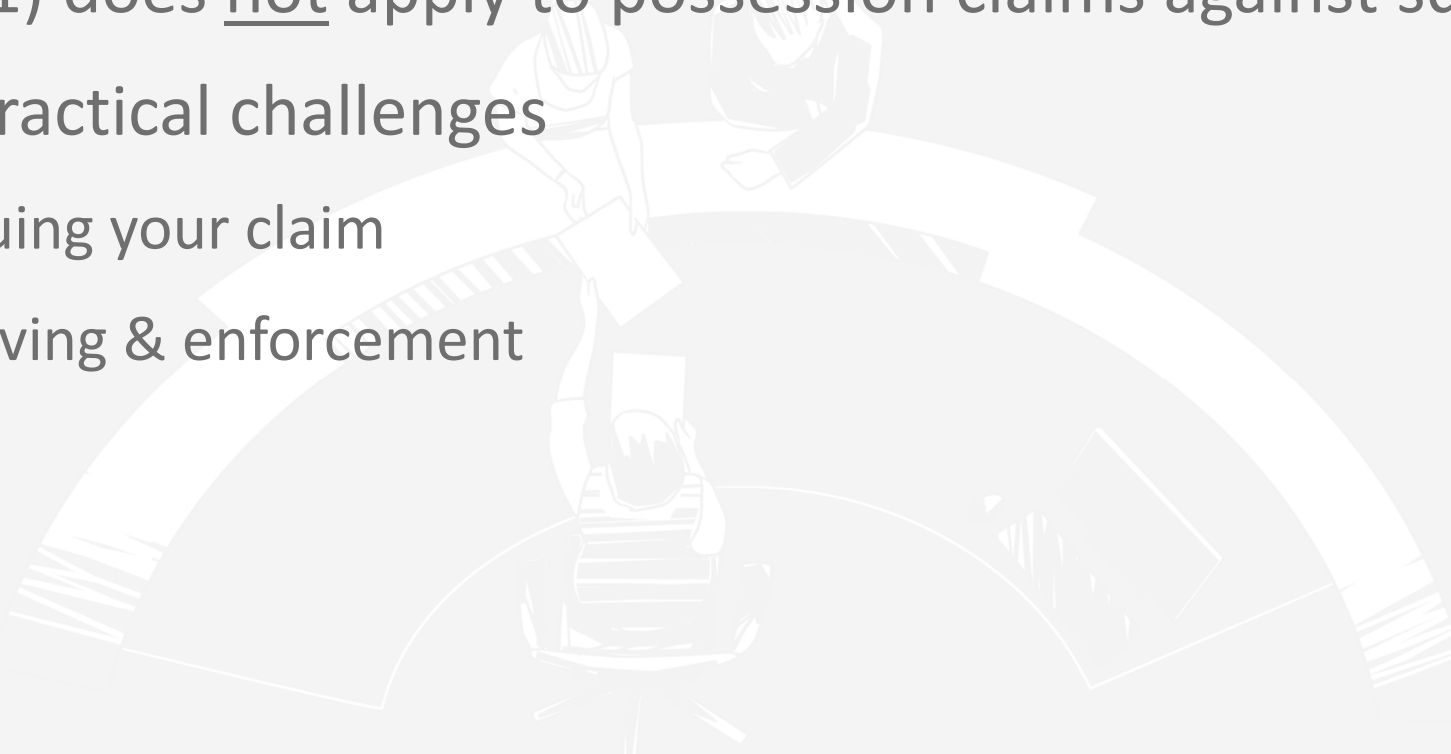


What's going on in the courts?

- Most courts are shut to the public (but some have staff in)
 - huge procedural delays
 - and practical problems getting claims issued
- Face to face (civil) trials are gone
- More hearings by phone
- Trial by Skype

Freehold land: trespassers

- S.82(1) does not apply to possession claims against squatters
- But practical challenges
 - Issuing your claim
 - Serving & enforcement



Trespassers: the pro-active solution

Pre-emptive injunction

- Against “persons unknown”
- Before infiltration
- Interim Order
 - Usually at least 3 months
- Final Order
 - Up to 3 years – and can renew

Trespassers: the pro-active solution

Pre-emptive injunction

- They work!
 - Trespassers can be removed within a few hours
 - Breach = contempt of court
 - Less than cost of eviction & clean-up for just one bad infiltration
- If you want one, see me later...



State aid

Clare Hardy, Senior Associate

State aid

- Article 107(1) Treaty on the Functioning of the European Union

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”

Elements of State aid

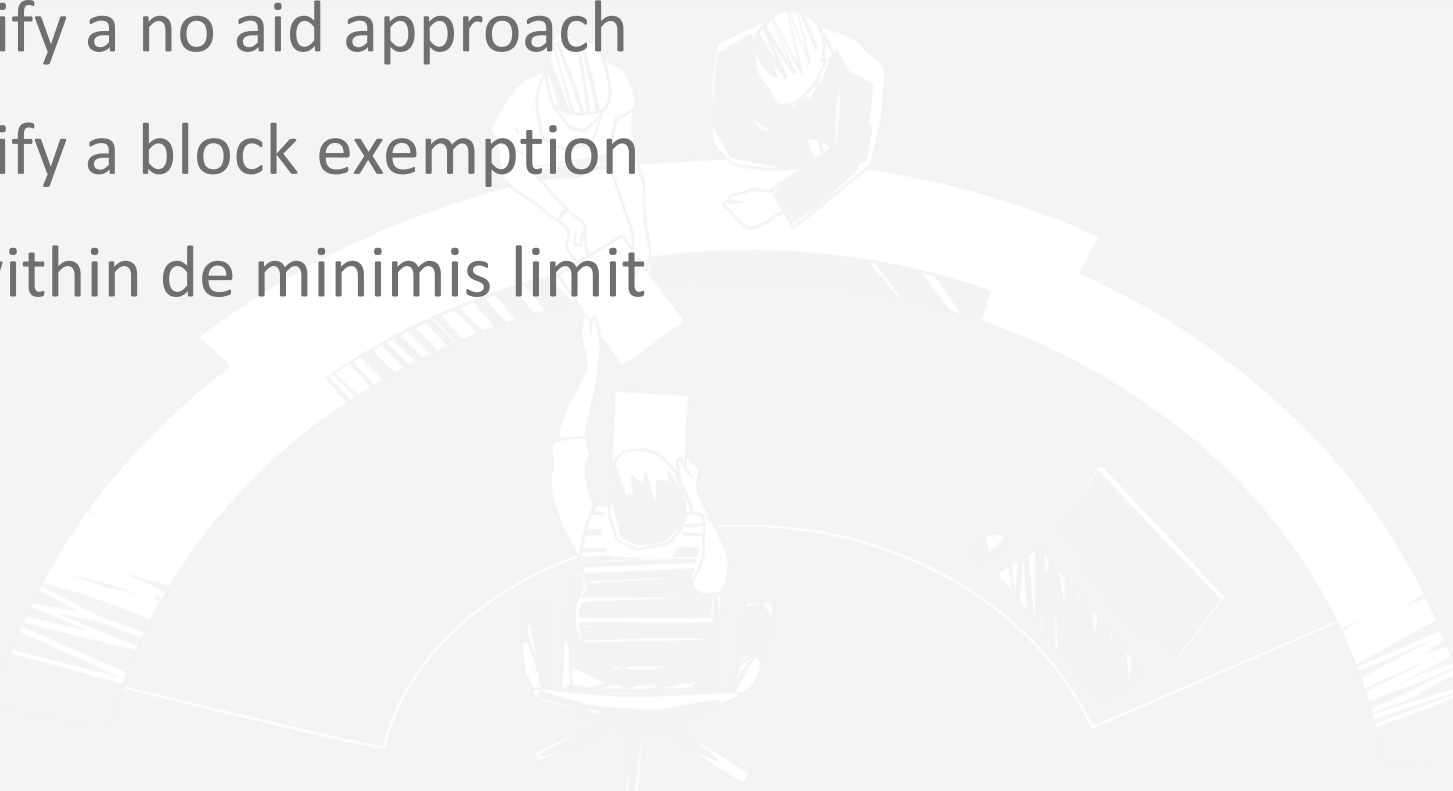
- Aid granted from State resources
- Aid is selective in nature
- Aid favours an undertaking
- Aid distorts or threatens to distort competition
- Aid has effect on trade between Member States

Temporary framework for State aid measures to support the economy

- Measures need to be notified to the Commission
- Approvals are being processed quickly
- Suited to Government level schemes
- UK Government permission needed to notify a scheme

Other ways of addressing State aid issues

- Identify a no aid approach
- Identify a block exemption
- Aid within de minimis limit



No aid

- Aid given to individuals
 - But consider if it relates to their business
- No effect on cross-border trade
 - Local aid
 - Predominantly local customer base
 - Aid will have no more than a marginal effect on the effectiveness of equivalent businesses in EU member states

No aid

- Market economy operator principle
- What terms would a private sector market operator be prepared to offer in the current circumstances?
- Assessment of MEOP should be done in advance of entering into transaction and should be carefully documented

Block Exemptions

- General Block Exemption Regulation
- Aid must be transparent
- Incentive effect
- Subject to limits on intensity

De minimis

- Aid of up to €200,000 per undertaking over three financial years
- De minimis aid is considered not to affect trade or distort competition

Any questions



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