LATHAM&WATKINS

ANTITRUST CLIENT BRIEFING

EU State aid temporary crisis framework in the context of the invasion of Ukraine

4 April 2022

Introduction

On 23 March 2022, the European Commission (the Commission) adopted a Temporary Crisis Framework for State aid measures to support the economy following the invasion of Ukraine by Russia (the Temporary Crisis Framework), after a quick consultation with EU Member States.[1] The Commission recognises that the current situation in Ukraine will have economic repercussions on the internal market that might affect undertakings in the EU, both directly and indirectly. In particular, undertakings in the EU might be affected by the disruption of trade flows and supply chains for EU imports from — and exports to — Ukraine, as well as unexpected price increases in the EU, particularly in natural gas and electricity.

The Temporary Crisis Framework aims at ensuring liquidity and access to public funds for undertakings of all sizes that have been negatively affected by this context. Through the Temporary Crisis Framework, the Commission sets out the criteria for the assessment of compatibility with the internal market of State aid measures that EU Member States might adopt in this context, not only to remedy the direct economic effects following the invasion of Ukraine, but also the sanctions and counter-sanctions adopted by the EU and Russia, and other countries. Compatibility of State aid granted under the Temporary Crisis Framework is determined on the basis of Article 107(3)(b) of the Treaty of Functioning of the European Union (the TFEU), which deems compatible with the internal market "aid to remedy a serious disturbance in the economy of a Member State". As such, the document further develops this legal basis for EU Member States to grant State aid.

The Temporary Crisis Framework is applicable from 1 February 2022 until 31 December 2022, although a potential extension in light of international developments is not excluded.

Compatibility Criteria

The Commission structures the Temporary Crisis Framework in three different sets of compatibility criteria, applicable to three types of aid:

- A general set applicable to State aid granted to all undertakings affected by the crisis;
- A specific set applicable to State aid granted to undertakings affected by the severe increases in natural gas and electricity prices; and
- A specific set applicable to liquidity support in the form of public guarantees and subsidised loans.

Whatever the type of State aid hereby presented, the Temporary Crisis Framework does not exempt EU Member States from their duty to notify the Commission the different schemes that they decide to adopt before granting the aid to the beneficiaries.

General State aid to undertakings affected by the crisis

This set of criteria is applicable to State aid granted no later than 31 December 2022 to undertakings of all sizes and active in all industries affected by the crisis, as long as they are not targeted by the above-mentioned sanctions and counter-sanctions. This exception refers to EU sanctions exclusively, and includes not only undertakings (including their controlling persons, entities, or bodies) targeted by them, but also those active in targeted industries insofar as State aid to those undertakings would undermine their objectives. Undertakings targeted by the Russian sanctions are in principle eligible to receive State aid under the Temporary Crisis Framework.

State aid allowed under this section is limited to €400,000 per undertaking and can take any form (e.g., direct grants, tax and payment advantages, guarantees, loans, amongst others) as long as the quantity threshold is not exceeded. By way of derogation, the maximum aid allowed is reduced to €35,000 per undertaking when granted to undertakings active in the primary production of agricultural products, fishery, and aquaculture sectors.

In addition, the aid has to be granted on the basis of a scheme with an estimated budget. This means the grant of individual or *ad hoc* aid to undertakings outside an already approved scheme is not envisaged under the Temporary Crisis Framework.

State aid to undertakings affected by the severe increases in natural gas and electricity prices

The Commission also recognises the need for temporary support to alleviate the impact of the exceptionally severe increases in natural gas and electricity prices as a result of the invasion of Ukraine, particularly in the case of energy-intensive undertakings. As a result, the Commission sets out specific compatibility criteria for State aid granted no later than 31 December 2022 to undertakings affected by these severe price increases.

Similarly to the general compatibility criteria presented above, State aid to undertakings affected by the severe increases in natural gas and electricity prices can take any form (e.g., direct grants, tax and payment advantages, guarantees, loans, amongst others) and has to be granted on the basis of a scheme with an estimated budget (i.e., no individual or *ad hoc* aid outside an already approved scheme is allowed).

However, the allowed amounts of aid to these undertakings are higher — up to €2 million — and capped at 30% of the "eligible costs". Eligible costs are the resulting product of the number of units of natural gas and electricity procured by the potential beneficiary as a final consumer (i.e., sales and own production are excluded) during a period between 1 February and 31 December 2022 (the eligible period), and the increase in natural gas and electricity prices determined by the difference between the price per unit paid in a given month during the eligible period and twice the price per unit paid on average for the period 1 January 2021 – 31 December 2021.

State aid in this context can be granted before incurring the eligible costs, as long as (i) the amount of aid does not exceed the above-mentioned thresholds; and (ii) the granting authority verifies ex-post the estimated eligible costs based on the actual costs incurred.

State aid to energy-intensive undertakings affected by the severe increases in natural gas and electricity prices

The Temporary Crisis Framework provides a particular set of compatibility criteria for the grant of State aid to undertakings affected by the severe increases in natural gas and electricity prices when two cumulative conditions are met:

- The potential beneficiary is considered an energy-intensive business (i.e., its demand of energy products amounts to at least 3% of the production value); and
- The potential beneficiary is incurring operating losses (i.e., negative EBITDA for the eligible period), as long as at least 50% of such losses are a direct consequence of the increase in eligible costs.

In these cases, State aid can amount to €25 million insofar as it does not exceed 50% of the eligible costs — as defined above — and 80% of the operating losses. This maximum amount is increased to €50 million in the case of aid granted to undertakings active in particularly affected sectors, insofar as it does not exceed 70% of the eligible costs and 80% of the operating losses. A list of particularly affected sectors is provided below:

- Manufacture of leather clothes
- Aluminium production
- Manufacture of other inorganic basic chemicals
- Lead, zinc and tin production
- Manufacture of plastics in primary forms
- Preparation and spinning of textile fibres
- Other non-ferrous metal production
- Manufacture of ceramic tiles and flags

- Manufacture of pulp
- Mining of other non-ferreus metal ores
- Manufacture of paper and paperboard
- Manufacture of basic iron and steel and ferro-alloys
- Manufacture of synthetic rubber in primary forms
- Casting of iron
- Manufacture of man-made fibres
- Manufacture of refined petroleum products
- Copper production
- Manufacture of non-wovens and articles made from non-wovens, except apparel
- Manufacture of glass fibres
- Manufacture of fertilisers and nitrogen compounds
- Manufacture of veneer sheets and wood-based panels
- Manufacture of flat glass
- Manufacture of hollow glasses
- Specific subsectors within the industrial gases sector (incl. hydrogen)
- Specific subsectors within the manufacture of other organic basic chemicals sector
- Specific subsectors within the manufacture of other non-metallic mineral products n.e.c. sector

The following compatibility criteria applicable to State aid for any undertaking affected by the severe increase in natural gas and electricity prices equally apply to aid for energy-intensive undertakings, whether active in any particularly affected (sub)sector or not:

- The aid needs to be granted no later than 31 December 2022;
- The aid needs to be granted on the basis of a scheme with an estimated budget; and
- The aid can take any form (e.g., direct grants, tax and payment advantages, guarantees, loans, amongst others), as long as the quantity thresholds are not exceeded.

Liquidity support in the form of guarantees and subsidised loans

The Commission also envisages the possibility of granting State aid to undertakings affected by the crisis in the form of public guarantees on loans and subsidised interest rates, insofar as they are signed by 31 December 2022 at the latest and limited to a maximum duration of six years. With these provisions, the Commission aims at ensuring that banks and credit institutions keep lending to undertakings affected by the crisis.

In addition, in order to limit the aid to the minimum necessary, the overall amount of loans per beneficiary — either covered by a public guarantee or subsidised — cannot exceed 15% of the beneficiary's average total annual turnover over the last three closed accounting periods, or 50% of energy costs over the 12 months preceding the month when the application for aid is submitted. These limits could be waived upon appropriate justification by the Member State.

The Commission also provides a series of specific criteria that potential beneficiaries need to comply with depending on whether State aid is granted in the form of public guarantee loans or subsidised interest rates:

- Public guarantee loans need to be provided on new individual loans and related to investment and/or working capital loans.

  Additionally, public guarantees are limited to the following amounts:

  - 90% of the loan principal when losses are sustained proportionally and under same conditions by the credit institution and the Member State; or

    - 35% of the loan principal, when losses are first attributed to the Member State and only then to the credit institutions.

- As regards subsidised interest rates, loans to credit institutions or other financial institutions are not eligible to receive State aid in such form.

Finally, whether in the form of public guarantee loans or subsidised interest rates, State aid under this section of the Temporary Crisis Framework will be subject to some minimum guarantee premiums and interest rates, respectively, depending on the size of the potential beneficiary and loan maturity.

Cumulation of State aid under the Temporary Crisis Framework

State aid granted under the Temporary Crisis Framework can be cumulated with one another subject to compliance of the different compatibility criteria envisaged by its sections and presented above. By way of derogation, State aid in the form of public guarantee loans cannot be cumulated with State aid in the form of subsidised interest rates for the same underlying loan principal. Cumulation for different loans is allowed as long as the above-mentioned compatibility criteria are fulfilled.

In addition, State aid granted under the Temporary Crisis Framework can be cumulated with State aid exempted from notification to the Commission under the *de minimis* Regulations[2] or the General Block Exemption Regulations,[3] as long as the provisions and cumulation rules of these Regulations (and not those of the Temporary Crisis Framework) are respected. The same applies to cumulation with State aid granted under the COVID-19 Temporary Framework.[4]

Finally, State aid granted under the Temporary Crisis Framework can be cumulated with State aid granted directly under Article 107(3)(b) TFEU insofar as it does not to overcompensation of the damage suffered by the potential beneficiary.

Conclusion

This is not the first time that the European Commission has adopted a temporary State aid framework to ease the economic consequences of international events. Indeed, in March 2020 the Commission adopted a temporary framework to face the consequences of the COVID-19 outbreak, which was then amended no less than six times. Whether the present Temporary Crisis Framework will be subject to amendments and extended in time is nonetheless unclear and will largely depend on the duration of the invasion of Ukraine and its consequences.

In addition, given that EU and Russian sanctions and counter-sanctions target particular (groups of) undertakings or industries, it could be expected that the use of the general section of the Temporary Crisis Framework will be less pronounced than that of the COVID-19 Temporary Framework. In fact, the Commission does not miss the opportunity to remind the reader about the existence of other means to grant State aid that might be better placed to justify its compatibility with the internal market, such as the *de minimis* Regulations, the General Block Exemption Regulations, the different State aid Guidelines, or even the Treaty provisions directly. The case might be slightly different for State aid to undertakings affected by the severe increases in natural gas and electricity prices, as the Temporary Crisis Framework applies across all industries as long as the compatibility criteria are met.

In any case, the Temporary Crisis Framework remains a solid and legitimate legal basis for undertakings to claim State aid when adversely affected, either directly or indirectly, by the consequences of the invasion Ukraine and the severe increases in natural gas and electricity prices for amounts per undertaking of up to:

- €35,000 in the case of undertakings affected by the crisis and active in the primary production of agricultural products, fishery, and aquaculture sectors.

- €400,000 in the case of undertakings affected by the crisis;

- €2 million in the case of undertakings affected by the severe increases in natural gas and electricity prices resulting from the crisis;

- €25 million in the case of energy-intensive undertakings affected by the severe increases in natural gas and electricity prices resulting from the crisis; and

- €50 million in the case of energy-intensive undertakings affected by the severe increases in natural gas and electricity prices resulting from the crisis and active in the above-mentioned particularly affected sectors.

In addition, just as it has been true for the COVID-19 Temporary Framework, quick clearances for State aid granted under this Temporary Crisis Framework can be expected.

Interestingly, and not for the first time as such considerations were noted in the COVID-19 Temporary Framework, the Commission leaves the door open for Member States to introduce requirements related to environmental protection or security of supply for granting aid under the Temporary Crisis Framework.

Finally, as opposed to the COVID-19 Temporary Framework, State aid under the Temporary Crisis Framework can be granted to undertakings that were already in difficulty before the crisis.

Contacts

If you have questions about this briefing, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Carles Esteva Mosso
carles.estevamosso@lw.com
+32.2.788.6266
Brussels

Elisabetta Righini
elisabetta.righini@lw.com
+32.2.788.6238
Brussels

Alvaro López Usatorre
alvaro.lopezusatorre@lw.com
+32.2.788.6222
Brussels

Endnotes

1 Communication from the Commission of 23 March 2022: Temporary Crisis Framework for State aid measures to support the economy following the aggression against Ukraine by Russia, *available at* https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1949.

2 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).

3 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 (EU) 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).

4 Communication from the Commission - Temporary Crisis Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 3), C(2020) 4509 (OJ C 218, 2.7.2020, p. 3), C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1), C(2021) 564 (OJ C 34, 1.2.2021, p. 6), and C(2021) 8442 (OJ C 473, 24.11.2021, p. 1).