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CLIENT BRIEFING

EC amends Temporary Crisis Framework for State Aid in the context of the invasion of Ukraine

EC's stance on State aid heats up before winter cooldown

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Introduction

On 20 July 2022, the European Commission (the EC) amended its recently approved Temporary Crisis Framework for State Aid measures to support the economy following Russia's invasion of Ukraine (the Temporary Crisis Framework).[1] The main aim of this instrument is to support the EC's objective of phasing out Member States' traditional reliance on fossil fuels.[2]

The amendment expands the original Temporary Crisis Framework (published on 23 March 2022), which enabled Member States to use State aid rules more flexibly to support the economy in the context of the crisis. The amendment also complements the EC's Winter Preparedness Package, a proposed set of rules aimed at reducing consumer gas demand by 15% by spring 2023, while ensuring energy security.[3]

Notably, the amendment introduces two new categories of aid to accelerate the rollout of renewable energy and the decarbonisation of industrial processes, which can benefit investments in a wide range of industries.

The Temporary Crisis Framework remains in effect until 31 December 2022.

Amendments to the original text

Types of aid under Articles 107(3)(b) and 107(2)(b) TFEU

Following its proposal for the Winter Preparedness Package and the REPowerEU plan, the EC has now included in the Temporary Crisis Framework explicit references to certain types of aid that would be directly assessed under Article 107(3)(b) TFEU. These are State aid measures aimed at:

- Incentivising the voluntary reduction of natural gas consumption
- Incentivising the filling of gas storage facilities
- Refurbishing facilities that will contribute to temporarily replace gas with another more polluting carbon fuel, when the measure aims at reducing gas consumption (either preemptively or as a result of an already imposed obligation)
- Insuring and/or reinsuring the transport of goods to and from Ukraine

In addition, the amended Temporary Crisis Framework expands the possibility of granting State aid aimed at mitigating damage directly caused by the exceptional occurrences of the crisis. This aid would cover damage caused by mandatory reductions in natural gas consumption that Member States might be required to impose following the Winter Preparedness Package. Such cases will be assessed under Article 107(2)(b) TFEU.

Increased State aid to undertakings affected by the crisis

To address the continued economic disturbance and aggravating macroeconomic effects of the crisis, as well as the direct and indirect effects of the sanctions adopted by the European Union and its international partners, the maximum amounts of aid to undertakings affected by the crisis or the subsequent sanctions and countersanctions are increased as follows:

- Up to €500,000 per beneficiary for undertakings active in any economic sector other than primary production of agricultural products or fishery and aquaculture (previously up to €400,000)
- Up to €62,000 per beneficiary for undertakings active in the primary production of agricultural products (previously up to €35,000)
- Up to €75,000 per beneficiary for undertakings active in the fishery and aquaculture sectors (previously up to €35,000)

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

Although the maximum amounts for State aid in this particular context have not been modified and thus remain as adopted in March 2022, the EC has made some adjustments to the Temporary Crisis Framework in the context of its Winter Preparedness Package.

The EC recognises the conflict between subsidising undertakings affected by the electricity and natural gas price hikes and its aim to reduce gas demand during the winter. The EC considers that support granted to undertakings affected by price hikes should avoid incentivising increased energy and gas usage, as this would only aggravate gas scarcity.

As a result, the EC has set a limit on the costs that are eligible for this type of aid. Undertakings affected by the price hikes will only be compensated for natural gas and electricity consumption amounting to 70% of their consumption during the previous year (instead of 100% as previously envisaged). Accordingly, if consumption remains unaltered, 30% will have to be paid at the current higher prices.

Furthermore, State aid for energy-intensive consumers affected by the price hikes, which can go up to €50 million per beneficiary, is now granted more flexibly to compensate the particular harm that the above-mentioned adjustment might have on certain companies that have to rely more on electricity and/or natural gas.

New categories of State Aid

The EC considers that, in the context of the crisis and to support the Winter Preparedness Package proposal, it is necessary to accelerate the rollout of renewable energy, storage, and renewable heat, and to decarbonise industrial production processes. To this end, the amended Temporary Crisis Framework introduces the below two categories of aid that can be considered compatible with the internal market under Article 107(3)(c) TFEU.

Aid for accelerating the rollout of renewable energy, storage, and renewable heat relevant for REPowerEU

This category of aid aims to quickly reduce dependency on Russian fossil fuel imports and to accelerate the energy transition. In this regard, aid to accelerate the deployment of solar and wind power capacity, geothermal energy capacity, electricity and thermal energy storage, and renewable heat, as well as the production of renewable hydrogen, biogas, and biomethane from waste and residues (even if limited to a particular technology) will be considered compatible with the internal market, provided that the aid is granted in a competitive bidding process that is open, clear, transparent, and non-discriminatory, based on objective criteria that are defined *ex ante*.

A competitive bidding process is not mandatory in the case of aid granted in the form of tax advantages, or aid that does not exceed €20 million per undertaking per project, and the beneficiaries are small projects, as defined below:

- Electricity generation, electricity, or thermal storage projects below or equal to 1 MW of installed capacity
- Heat generation and gas production technology projects below or equal to 1 MW of installed capacity or equivalent
- Renewable hydrogen production projects below or equal to 3 MW of installed capacity or equivalent
- Biogas and biomethane from waste and residue production projects below or equal to 25,000 tonnes/year of installed capacity

- Projects 100% owned by SMEs or renewable energy communities below or equal to 6 MW installed capacity
- Projects 100% owned by small and microenterprises or by renewable energy communities for wind generation only below or equal to 18 MW of installed capacity

Aid to small projects outside a competitive bidding process will not exceed 45% of the total investment cost. This may be increased by 20% if the beneficiary is a small enterprise, and by 10% if it is an SME.

Aid for the decarbonisation of industrial production processes

This category of aid intends to reduce dependency on Russian fossil fuels by facilitating investments in the decarbonisation of industrial activities, notably through electrification and technologies using renewable and electricity-based hydrogen.

The EC will consider State aid for investments leading to (i) a reduction of at least 40% of greenhouse gas emissions from industrial activities currently relying on fossil fuels as energy source or feedstock, or (ii) a reduction of at least 20% energy consumption in industrial activities and processes, compatible with the internal market, provided that:

- The maximum individual aid amount to be granted per undertaking does not exceed 10% of the scheme's total budget (unless otherwise justified by the Member State).
- If aid is granted for industrial decarbonisation investments involving the use of renewable hydrogen, the Member State ensures that the hydrogen used is produced from renewable energy sources. Aid for an industrial decarbonisation investment involving the use of hydrogen produced from electricity — not considered renewable — will only be allowed in limited circumstances clearly established in the Temporary Crisis Framework.
- Aid is not used to finance an increase of the beneficiary's overall production capacity.
- Aid is granted in a competitive bidding process that is open, clear, transparent, and non-discriminatory. Otherwise, the aid is limited to 40% of the eligible costs (understood as the difference between the costs of the subsidised project and the cost savings or additional income, compared to the situation in the absence of aid, during the period of the investment). The maximum aid intensity outside a competitive bidding process may be increased by 20% if the beneficiary is a small enterprise, or 10% if it is an SME. Aid intensities may also be increased by 15% for investments that result in a reduction of direct greenhouse gas emissions of at least 55% or energy consumption of at least 25% compared to the situation prior to the investment.

In addition to the above-mentioned criteria, both categories of aid share a set of common requirements to determine their compatibility with the internal market (in addition to certain criteria originally envisaged by the Temporary Crisis Framework, such as (i) the need for a scheme with an estimated volume and budget, (ii) the existence of a clear incentive effect, or (iii) the impossibility to combine aid for the same eligible costs, amongst others).

These requirements are the following:

- The aid must be granted by 30 June 2023 at the latest, and the installations must be operational within 24-30 months, depending on the technology. If these deadlines are not respected, a penalty proportional to the aid received will be applied, unless the delay is due to factors outside the control of the aid beneficiary and could not reasonably have been foreseen. The value of these penalties will increase based on the length of the delay.

- The aid must be granted for investments in works started on or after 20 July 2022. For earlier projects, aid may be granted if it is necessary to significantly accelerate or widen the scope of the investment. In such cases, only the additional costs related to the acceleration or extension of the scope of the project will be eligible.
- The aid must be designed in a way so as to address any potential windfall profits.

Conclusion

Through the amended Temporary Crisis Framework, the EC has expanded the ways in which Member States can support companies affected by the crisis by (i) increasing the maximum amounts of aid that these companies are allowed to received, and (ii) including new types of State aid that can be deemed compatible with the internal market.

Furthermore, in connection with the Winter Preparedness Package, the EC is seizing the opportunity to redirect the objective and results of the Temporary Crisis Framework towards phasing out fossil fuels on which the EU has traditionally relied (which are in many instances imported from Russia).

As a result, the amended Temporary Crisis Framework narrows an arguably existing legal gap between the ambitions of the Winter Preparedness Package and the already existing financial instruments to help the economy endure 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

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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 Communication from the Commission of 20 July 2022: Amendment to the 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/IP_22_4622.

3 Communication from the Commission of 20 July 2022: 'Save Gas for a Safe Winter Plan', *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4608.

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