CLEARY GOTTLIEB

ALERT MEMORANDUM

Temporary Framework for the Implementation of State Aid Rules to Support the Economy Following the Conflict in Ukraine

March 31, 2022

On March 23, 2022, the Commission adopted a Communication setting out a temporary framework for the implementation of State aid rules to support the economy following the conflict in Ukraine (the "Temporary Crisis Framework"),[1] shortly after consulting with the Member States. The Temporary Crisis Framework is based on Article 107(3)(b) TFEU, which allows the Commission to authorize "*to remedy a serious disturbance in the economy of a Member State*".[2] The Temporary Crisis Framework follows the adoption of a similar framework to support the economy in the context of the COVID-19 outbreak on March 20, 2020 (the "COVID-19 Temporary Framework").[3]

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

BRUSSELS

François-Charles Laprévote
+32 22872184
fclaprevote@cgsh.com

David Pérez de Lamo
+32 2 287 2067
dperezdelamo@cgsh.com

ROME

Giulio Cesare Rizza
+39 06 6952 2237
crizza@cgsh.com

[1] *See* Commission Press Release of March 23, 2022, Commission adopts Temporary Crisis Framework to support the economy in context of Russia's invasion of Ukraine, available here.

[2] *See* Communication from the Commission of March 23, 2022, Temporary Crisis Framework, available here.

[3] *See* Communication from the Commission of March 20, 2020, Temporary Framework for State Aid measures to support the economy in the current COVID-19 outbreak (amended five times), available here. *See also* Cleary Gottlieb's previous Alert Memoranda (i) here, (ii) here, (iii) here, (iv) here and (v) here.

Rationale and objectives

The Temporary Crisis Framework aims (i) to mitigate the impact on businesses caused by the conflict and the subsequent sanctions;[4] and (ii) to provide a coordinated economic response in order to avoid the fragmentation of the EU internal market and subsidy races.[5] To this end, the Commission will automatically authorize certain forms of aid, so long as they comply with a series of conditions, which are summarized in Section 2 below. Furthermore, the aid cannot benefit, directly or indirectly, natural persons or undertakings subject to sanctions.[6]

The Temporary Crisis Framework complements other public support tools under other legal bases that are already at the Member States' disposal, namely: (i) measures that do not qualify as aid due to their general or non-commercial character (such as wage subsidies, suspension of payments of corporate and value added taxes or social welfare contributions that benefit all undertakings);[7] (ii) measures that aim to compensate damage directly caused by the crisis pursuant to Article 107(2)(b) TFEU;[8] and (iii) rescue or restructuring aid to companies in financial difficulties under Article 107(3)(c) TFEU.[9]

Forms of aid allowed under the Temporary Framework

The Temporary Crisis Framework allows Member States to grant aid (subject to prior notification and clearance by the Commission) in four different forms, which can be cumulated, namely: (i) direct grants, tax advantages, repayable advantages, guarantees, loans or equity; (ii) loan guarantees; (iii) subsidized loans; and (iv) aid to cover additional costs arising from exceptionally severe increases in the prices of natural gas and electricity.

Direct grants, tax advantages, repayable advantages, guarantees, loans or equity

The Temporary Crisis Framework enables Member States to set up schemes granting to each individual undertaking up to €400,000 in direct grants, tax advantages, repayable advantages, guarantees, loans or equity.[10] The aid amount will be calculated in gross terms, *i.e.*, before any tax deductions or surcharge.[11] Specific thresholds and rules apply to aid granted to undertakings active in the primary production of agricultural, fishery and acquaculture sectors (€35,000 per undertaking).[12]

Loan guarantees

The Temporary Crisis Framework enables Member States to provide subsidized State guarantees on bank loans, either through individual measures or schemes.[13] The main conditions are: (i) minimum guarantee premiums ranging from 25 bps to 200 bps depending on the company's size and the loan maturity; (ii) amount of the loan capped to 15% of the beneficiary's average total annual turnover over the last three closed accounting periods, or 50% of energy costs in the preceding 12 months, or the total amount of its liquidity needs for the next 6 months for large enterprises and 12 months for SMEs; (iii) guarantee duration limited to 6 years; and (iv) guarantee amount limited to 90% of the underlying loan (or 35% in case of a first-loss guarantee).[14]

Subsidized loans

The Temporary Crisis Framework allows Member States to grant public loans with subsidized interest rates, either through individual measures or schemes.[15] The main conditions are similar to those for loan guarantees and include: (i) minimum interest rate of 1-year IBOR plus a credit margin ranging from 25 bps to 200 bps depending on the company's size and the loan maturity; (ii) amount of the loan capped to 15% of the beneficiary's average total annual turnover over the last three closed accounting periods,

[4] Temporary Crisis Framework, paragraphs 1-15, and 36.

[5] Temporary Crisis Framework, paragraphs 7 and 20.

[6] Temporary Crisis Framework, paragraphs 33 and 38.

[7] Temporary Crisis Framework, paragraphs 22-23.

[8] Temporary Crisis Framework, paragraphs 25-26.

[9] Temporary Crisis Framework, paragraphs 40 and 51.

[10] Temporary Crisis Framework, paragraph 41(a).

[11] *Ibid.*

[12] Temporary Crisis Framework, paragraph 42(a).

[13] Temporary Crisis Framework, Section 2.2.

[14] Temporary Crisis Framework, paragraph 47.

[15] Temporary Crisis Framework, Section 2.3.

or 50% of energy costs in the preceding 12 months, or the total amount of its liquidity needs for the next 6 months for large enterprises and 12 months for SMEs; and (iii) loan duration of up to 6 years.[16]

Aid to cover additional costs due to exceptionally severe increases in natural gas and electricity prices

The Temporary Crisis Framework allows Member States to provide direct grants, tax advantages, repayable advances, guarantees, loans and equity, either through individual measures or schemes, to undertakings to cover additional costs arising from exceptionally severe increases in the price of natural gas and electricity.[17] The overall aid amount may not exceed 30% of the eligible costs up to €2 million per undertaking.[18] The eligible costs are the difference between (i) the unit price of natural gas and electricity paid by the undertaking (as a final consumer) in a given month in the period between February 1 and December 31, 2022, and (ii) the double (200%) of the unit price paid by the undertaking on average for the period between January 1 and December 31, 2021.[19] The aid may be granted before the eligible costs have been incurred, so long as the Member State verifies compliance with the ceilings *ex post* (no later than six months after the eligible period ends) and recovers any aid in access thereof.[20]

However, Member States will be able to grant aid in excess of the abovementioned values to undertakings qualifying as an "*energy-intensive business*" under Article 17(1)(a) of the Energy Taxation Directive,[21] to the extent that the overall aid does not exceed: (i) 50% of the eligible costs (or 70% for the sectors listed in Annex I) and up to 80% operating losses; and (ii) €25 million per undertaking (or €50 million for the sectors listed in Annex I).[22]

In addition, the Commission invites Member States to consider setting requirements to achieve objectives relating to environmental protection and security of supply.[23]

Cumulation with COVID-19 aid

The measures under the Temporary Crisis Framework may be cumulated with aid granted under the COVID-19 Temporary Framework, so long as their respective cumulation rules are respected.[24] These rules typically entail that several aid measures cannot cover the same eligible costs. However, when a Member State grants a loan or guarantee under both the Temporary Crisis Framework and the COVID-19 Temporary Framework, it must ensure that the underlying liquidity needs are only covered once.[25] In addition, the guarantees granted under the Temporary Crisis Framework cannot be cumulated with aid granted under Sections 3.2 (loan guarantees) and 3.3 (subsidized interest rates for loans) of the COVID-19 Temporary Framework for the same underlying loan principal.[26]

Specific provisions on the banking sector

The Temporary Framework recognizes the important role of the banking sector to deal with the economic effects of the COVID-19 outbreak, in particular to channel aid to the final beneficiaries.[27] Banks and other financial institutions acting as financial intermediaries will be required to introduce safeguards to ensure that the benefit is passed on to the final beneficiaries, for instance, through greater lending or lower interest.[28] Any support granted on this basis would not qualify as extraordinary public

[16] Temporary Crisis Framework, paragraph 50.

[17] Temporary Crisis Framework, Section 2.4.

[18] Temporary Crisis Framework, paragraph 52(f).

[19] Temporary Crisis Framework, paragraph 52(e).

[20] Temporary Crisis Framework, paragraph 52(g).

[21] Council Directive 2003/96/EC of October 27, 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31.10.2003, p. 51. "Energy-intensive businesses" include those where the purchases of energy products (other than natural gas and electricity) amount to over 3% of the production value.

[22] Temporary Crisis Framework, paragraph 53 and Annex I.

[23] Temporary Crisis Framework, paragraph 24.

[24] Temporary Crisis Framework, paragraph 39.

[25] Temporary Crisis Framework, paragraphs 39, 47(e)(iii) and 50(e)(iii).

[26] Temporary Crisis Framework, paragraph 46.

[27] Temporary Crisis Framework, paragraph 28.

[28] Temporary Crisis Framework, paragraphs 28, 47(h) and 50(g).

financial support ("EPFS") for the purpose of the Bank Recovery and the Resolution Directive ("BBRD")[29] or under the Single Resolution Mechanisms ("SRM") Regulation,[30] which entails that it would not trigger placement in resolution of the banks.[31] The Commission also envisages the possibility of more structural aid to banks in the form of recapitalizations or impaired asset measures, which would (by exception to the applicable BRRD and State aid rules) not trigger a finding that the bank is "failing or likely to fail",[32] or require "burden sharing" measures aimed at shareholders or subordinated creditors.[33]

*

The Temporary Crisis Framework is very similar to the first version of the COVID-19 Temporary Framework, as adopted in March 20, 2020. The Temporary Crisis Framework, however, provides a novel section concerning aid to cover additional costs arising from exceptionally severe increases in the prices of natural gas and electricity, given the significant impact of the war and the subsequent sanctions. The Temporary Crisis Framework will likely be followed by a series of quick clearances and amendments, depending on the duration and the effects of the current crisis, as it happened with the COVID-19 Temporary Framework.

…

CLEARY GOTTLIEB

[29] *See* Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, Article 2(1)(28).

[30] *See* Regulation (EU) No 806/2014 of the European Parliament and of the Council of July 15, 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, Article 3(1)(29).

[31] Temporary Crisis Framework, paragraph 28.

[32] Temporary Crisis Framework, paragraph 30.

[33] Temporary Crisis Framework, paragraph 31.