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ALERT MEMORANDUM

State Aid EU response to the energy crisis through State aid measures

November 9, 2022

On March 23, 2022, two years after the adoption of the State aid Temporary Framework in the context of the COVID-19 outbreak[1], the European Commission (the "**Commission**") adopted a new State aid temporary framework, this time to address the hardships and global energy market disruption caused by Russia's invasion of Ukraine (the "**Temporary Crisis Framework**")[2]. The Temporary Crisis framework allows Member States to grant different forms of aid to support undertakings affected by the economic consequences of the crisis, in particular to intensive energy user companies which are suffering the full force of the exceptional gas and electricity price increases[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 2 287 2184
fclaprevote@cgsh.com

Inés Pérez Fernández
+32 2 287 2024
iperezfernandez@cgsh.com

Camilla Cozzani
+32 2 287 2035
ccozzani@cgsh.com

[1] 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.
[2] See Communication from the Commission of March 24, 2022, Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, available here. See also Cleary Gottlieb's previous Alert Memorandum here.
[3] Through its State aid policy, the Commission seeks to effectively address the economic consequences of Russia's aggression against Ukraine and its impact on the energy situation, promoting the green transition to end EU's dependence on Russian fossil fuels. The Temporary Crisis Framework is being widely used by the Member States, as a total amount of approx. €251 billion of State aid has already been authorized by the Commission since its implementation.

Since its initial adoption, the Temporary Crisis framework was amended on July 20, 2022[4], as a complement to the Winter Preparedness Package[5], to provide for two additional types of aid measures (i) to accelerate the rollout of renewable energy and (ii) to facilitate the decarbonization of industrial processes, in line with the REPowerEU Plan objectives[6].

The Temporary Crisis Framework, as currently in force, is applicable through:

— December 31, 2022 for the limited amounts of aid, liquidity support measures and measures covering increased energy costs (see below);

— June 30, 2023 for aid measures supporting the roll-out of renewable energies and the decarbonization of the industry (see below).

On October 5, 2022, the Commission started consultation with the Member States over a draft proposal to prolong and amend the Temporary Crisis Framework[7].

The draft proposal aims in particular: (i) to further facilitate access to liquidity support to energy companies in order to cover the financial collaterals for their trading activities; (ii) to simplify the criteria that enable Member States to support companies affected by high energy prices; and (iii) to adopt additional measures aimed at supporting electricity demand reduction, in line with the Commission's proposal on an emergency market intervention[8], on which a political agreement has been reached in the Council of the European Union on September 30, 2022[9].

Forms of aid allowed under the Temporary Crisis Framework

As it currently stands, the Temporary Crisis Framework allows Member States to grant aid (subject to prior notification and clearance by the Commission) in five different forms, namely: (i) limited amounts of aid; (ii) liquidity support in the form of State guarantees and subsidized loans; (iii) aid to cover additional costs arising from exceptionally severe increases in the prices of natural gas and electricity; (iv) aid to accelerate the rollout of renewable energy, storage, and renewable heat; and (v) aid to facilitate the decarbonization of industrial production processes. The measures may be cumulated, as long as they do not cover the same eligible costs. Sanctioned Russian-controlled entities are excluded from the scope of the Temporary Crisis Framework.

Limited amounts of aid. The Temporary Crisis Framework enables Member States to set up schemes granting each individual undertaking active in the EU that are affected by the crisis or the subsequent sanctions (the "**affected undertakings**") up to €500,000 in any form of aid (direct grants, tax advantages, repayable advantages, guarantees, loans or equity). The aid amount will be calculated in gross terms, *i.e.*, before any tax deductions or surcharge. Specific thresholds and rules apply to aid granted to undertakings active in the agriculture (€62,000 per

[4] See Communication from the Commission of July 21, 2022, Amendment to the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, available here.
[5] See Press release from the Commission of July 20, 2022, Save Gas for a Safe Winter: Commission proposes gas demand reduction plan to prepare EU for supply cuts, available here.
[6] See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of May 18, 2022, available here.
[7] See Press release from the Commission of October 6, 2022, State aid: Commission consults Member States on proposal to prolong and amend Temporary Crisis Framework, available here.
[8] See Proposal from the Commission of September 30, 2022 for a Council Regulation on an emergency intervention to address high energy prices, available here.
[9] See Press release from the Commission of September 30, 2022, Council agrees on emergency measures to reduce energy prices, available here.

undertaking) and fisheries and aquaculture sectors (€75,000 per undertaking).

Liquidity support in the form of State guarantees and subsidized loans. The Temporary Crisis Framework enables Member States to provide subsidized State guarantees on bank loans, either through individual measures or schemes, to affected undertakings. 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). The Temporary Crisis Framework also allows Member States to grant public loans with subsidized interest rates, either through individual measures or schemes, at similar conditions to those for loan guarantees, *i.e.*: (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, 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.

Aid to cover additional costs arising from exceptionally severe increases in the prices of natural gas and electricity. The Temporary Crisis Framework allows Member States to provide any form of aid (direct grants, tax advantages, repayable advances, guarantees, loans and equity, either through individual measures or schemes) to affected undertakings to cover additional costs arising from exceptionally severe increases in the price of natural gas and electricity. The overall aid per beneficiary may not exceed 30% of the eligible costs and – in order to incentivize energy saving – should relate to no more than 70% of its gas and electricity consumption during the same period of the previous year, up to a maximum of €2 million. 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. 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 excess thereof.

However, Member States will be able to grant aid in excess of the abovementioned values to affected undertakings qualifying as an "energy-intensive business" under Article 17(1)(a) of the Energy Taxation Directive[10], to the extent that (i) the undertaking incurs operating losses (*i.e.*, its EBITDA for the eligible period is negative), whereby the increase in the eligible cost amounts to at least 50% of the operating loss in the eligible period, and (ii) the overall aid does not exceed: (a) 50% of the eligible costs (or 70% for the sectors listed in Annex I) and up to 80% operating losses; and (b) €25 million per undertaking (or €50 million for the sectors listed in Annex I). In addition, the Commission invites Member States to consider setting requirements to achieve objectives relating to environmental protection and security of supply.

[10] *I.e.*, where the purchase of energy products (including energy products other than natural gas and electricity) amount to at least 3.0% of the production value, based on financial accounting reports for the calendar year 2021 or the latest available annual accounts. *See* 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.

Aid to accelerate the rollout of renewable energy, storage, and renewable heat. The Temporary Crisis Framework enables Member States to set up schemes with an estimated volume and budget providing direct grants, repayable advances, loans, guarantees or tax advantages, for the promotion of electricity from renewable sources, renewable hydrogen, biogas and biomethane from waste and residues, electricity and thermal energy storage and renewable heat. The installations must be completed and in operation within 24 months after the date of granting (30 months for aid to offshore wind, renewable hydrogen installations). Where this deadline is not met, unless due to a *force majeure*, 5% of the amount of the aid must be reimbursed or reduced per month after the first 3 months of delay, increasing to 10% per month of delay after the 6th month. In the case of aid granted in the form of contracts for ongoing aid payments, the duration of such contract may not exceed 15 years after the aided installation starts operations. The aid must be 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, defined as (i) electricity generation, electricity or thermal storage projects below or equal to 1 MW of installed capacity; (ii) heat generation and gas production technology projects below or equal to 1 MW of installed capacity or equivalent; (iii) renewable hydrogen production projects below or equal to 3 MW of installed capacity or equivalent; (iv) biogas and biomethane from waste and residue production projects below or equal to 25,000 tons/year of installed capacity; (v) projects 100% owned by SMEs or renewable energy communities below or equal to 6 MW installed capacity; (vi) 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 for small projects granted outside a competitive bidding process cannot exceed 45% of the total investment cost (the aid intensity may be increased by 20% if the beneficiary is a small enterprise, and by 10% if it is an SME).

Aid to facilitate the decarbonization of industrial production processes. The Temporary Crisis Framework enables Member States to set up schemes with an estimated budget providing direct grants, repayable advances, loans, guarantees or tax advantages, for investments leading to (i) a reduction of at least 40% in greenhouse gas emissions from industrial activities currently relying on fossil fuels as an energy source or feedstock, or (ii) a reduction of at least 20% of energy consumption in industrial activities and processes. Unless appropriate justification provided by the Member State, the maximum individual aid amount per undertaking cannot exceed 10% of the scheme's total budget. The aid cannot be used to finance an increase of the beneficiary's overall production capacity. The installation or equipment to be financed by the investment must be completed and in full operation within 24 months after the date of granting (30 months for investments involving the use of renewable hydrogen). Where this deadline is not met, unless due to a *force majeure*, 5% of the amount of the aid must be reimbursed or reduced per month after the first 3 months of delay, increasing to 10% per month of delay after the 6th month. The aid must be 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 if the aid granted does not exceed 40% of the eligible costs (defined as the difference between the costs of the aided project and the cost savings or additional revenues, compared to what would have been the case in the absence of the aid, during the period of the investment). The aid intensity outside a competitive bidding process may be increased by 20% if the beneficiary is a small enterprise, by 10% if it is an SME, and by 15% for investments resulting in a reduction of direct greenhouse gas emissions of at least 55% or of energy consumption of at least 25% compared to the situation prior to the investment.

Aids so far approved

To date, the Commission has approved more than 100 different State aids schemes under the Temporary Crisis Framework, for a total amount of approximately €253 billion. Most of this support (approximately €200 billion) has taken the form of liquidity support through State guarantees and subsidized loans.

Three Member States account for most of the aid cleared so far: France (around €160 billion), [11] Germany (around €36 billion) and Italy (around €22 billion).[12]

The largest scheme cleared so far under the Temporary Framework is a €155 billion French guarantee scheme.[13] Germany also notified an important scheme under the Temporary Crisis Framework for an amount of €20 billion to support companies of all sizes and active in all sectors.[14] Both Italy and Spain notified a €10 billion loan guarantee scheme covering all sectors.[15] Also noteworthy are the respective €5 billion French and German schemes to support energy intensive companies.[16]

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[11] SA.102395, *Guaranteed State Loans 'Resilience'*, France, 7 April 2022 ; €155 billion ; SA.102784; *Exceptional scheme to cover the additional animal feed costs of farms and fish farms*, 10 May 2022, €400 million; SA.102783, *Exceptional scheme for the reduction of social security contributions*, 17 May 2022, € 152.5 million; SA.102839, *Support scheme for fishing companies to cope with the increase in price prices of raw materials*, 18 May 2022, € 25 million ; SA.103240, *Support scheme to support farm and fish farms*, 17 June 2022, €6.7 million ; SA.103280, *Support to energy-intensive undertakings*, 1st July 2022, €5 billion; for an approximative total amount of € 160,584,200,000.

[12] For Germany : SA.102542, *Federal Framework- Small amounts of aids*, Germany, 19 April 2022, €20 billion; SA.102631, *Umbrella schemes for guarantees on loans and subsidised loans*, 4 May 2022, approx. €11 billion; and SA.103348, *Temporary cost containment of natural gas and electricity price increases*, 14 July 2022, €5 billion.
For Italy, SA.102522, *Umbrella scheme for agricultural, forestry, fisheries and aquaculture sectors*, 24 April 2022, € 50 million; SA.102896, *Umbrella scheme for the measures to support undertakings active in the agricultural, forestry, fisheries and aquaculture sectors*, 18 May 2022, €1.2 billion; SA.103166, 22 June 2022, €180 million; SA.103289 24 June 2022, €2.8 billion; SA. 103480, *Emergency support scheme for haulage operators*, 14 July 2022, €526.5 million; SA.103464, *Direct grants to companies with commercial relationships in Ukraine, Russia and Belarus*, 19 July 2022, €700 million; SA.103286, *SACE guarantee scheme*, 19 July 2022, €10 billion; SA.103403, *Support to liquidity needs of SME and Midcaps*, 29 July 2022, €2.9 billion; SA. 103316, Aid scheme support investments in the areas affected by seismic events, 4 August 2022, €407 million; SA. 102721, *Framework scheme Friuli Venezia Giulia*, 22 August 2022, €260 million; SA.103947, *Scheme to support undertakings active in Lombardy affected by Russian aggression against Ukraine*, 22 September 2022, €96 million; SA.102542, *Direct grants to companies relying on supply from Ukraine, Russia and Belarus affected by the current crisis*, 28 September 2022, €700 million; SA. 103757, *State guarantee for reinsurance of natural gas and electricity trade credit risk*, 30 September 2022, €2 billion.

[13] SA.102395, *Guaranteed State Loans 'Resilience'*, France, 7 April 2022 ; €155 billion.

[14] SA.102542, *Federal Framework- Small amounts of aids*, Germany, 19 April 2022, €20 billion.

[15] SA.103286, *SACE guarantee scheme*, Italy, 19 April 2022, €10 billion ; SA.102711, *National Guarantee Scheme*, Spain, 2 June 2022, € 10 billion.

[16] SA.103280, *Support to energy-intensive undertakings*, France, 30 June 2022, € 5 billion ; SA.103348, *Temporary cost containment of natural gas and electricity price increases*, Germany, 14 July 2022, € 5 billion.