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LEGAL ALERT

ADDITIONAL STATE AID MEASURES TO COMPANIES IN THE CONTEXT OF THE AGGRESSION UKRAINE

I. Introduction

On **23 March 2022**, the European Commission (**EC**) adopted the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia. The aim of this Temporary Framework was to allow Member States to address and tackle the liquidity shortage faced by companies directly or indirectly affected by the economic repercussions of the military aggression as well as by the measures and sanctions adopted in that context.

After a first amendment on **20 July 2022** – deemed required in view of the maintenance of the aggression and the worsening of its direct and indirect effects on both national and the European Union economies – the **EC** decided on **28 October 2022** to adopt a second amendment, extending all the measures established in the Temporary Crisis Framework **until 31 December 2023**.

In addition to the extension of the Temporary Framework, the following novelties should be highlighted:

II. Increase in State aid amounts per company

The aids in question may be granted by Member States in the form of direct grants, tax and payment advantages or other forms such as repayable advances, guarantees, loans and equity, provided the total nominal value of such measures does not exceed the ceiling of **EUR 2 million** per company.

Hence, the Commission considers such aid compatible with the internal market, provided that the following cumulative requirements are met: *(i)* the beneficiaries are companies affected by the crisis; *(ii)* the aid is granted no later than 31 December 2023; and *(iii)* the aid is granted on the basis of a scheme with a pre-defined budget.

For companies active in the **primary production of agricultural products**, the overall aid is limited to **EUR 250 000** per company, and the cap is **EUR 300 000** for a company active in the **fishery and aquaculture sectors**.

III. More flexibility of liquidity support in the form of State Guarantees

As far as **State Guarantees are concerned**, through this second amendment, the guarantee coverage may now **exceed 90% of the loan value**, on condition that the Member State provides adequate and reasoned justification, including as to: *(i)* the need for said coverage, with a commitment to validate and regularly monitor that final beneficiaries cannot resort to other sources of financing; *(ii)* the amount of the guarantee (which may not exceed the amount necessary to cover the liquidity needs for the coming 12 months that derive from the need to provide financial collaterals for cleared trading activities on energy markets); and *(iii)* the period for which the guarantee is granted, which has to be limited to 31 December 2023, and cannot exceed the period where such guarantees are considered as highly liquid collateral.

Member States which aim to activate this prerogative must also: (i) indicate the premiums that will be applied for such guarantees; and (ii) ensure that the guarantees are granted by 31 December 2023 at the latest. These may be provided directly to final beneficiaries or to credit institutions and other financial institutions as financial intermediaries, but in any event the latter should pass on the advantages of the public guarantees to final beneficiaries.

IV. Aid for additional costs due to exceptionally severe increases in natural gas and electricity prices

The Temporary Framework also increases the flexibility and possibilities for Member States to support companies that are experiencing sharp increases in their costs due to higher natural gas and electricity prices.

Public support measures to be implemented by Member State have to comply with the following criteria: *(i)* Member States may choose to put in place a support scheme based on the **past/historical** (‘**reference period**’: January 01, 2021 to December 31, 2021) **or present/current** (‘**eligible period**’: February 01, 2022 to December 31, 2023) **energy consumption of the beneficiary**; *(ii)* the overall aid per company cannot exceed **50% of the eligible costs**; and *(iii)* **the overall aid is limited to EUR 4 000 000 per company**.

Member States are invited to require beneficiaries to make effective commitments to reduce the carbon footprint of energy consumption and to implement energy efficiency measures.

As regards beneficiaries qualifying as ‘**energy-intensive businesses**’, the Temporary Framework continues to envisage the possibility for Member States to grant aid, now of up to **EUR 150 000 000 per undertaking**, for companies active in the sectors explicitly identified in Annex I of the Temporary Framework. Albeit, provided that they show either a reduction in EBITDA (excluding aid) of at least 40% in the eligible period compared to the reference period, or a negative EBITDA (excluding aid) in the eligible period.

V. Aid for additional reduction of electricity consumption

In line with Council Regulation (EU) 2022/1854, of 6 October 2022 on an emergency intervention to address high energy prices, the Temporary Framework also provides for the compatibility with the internal market of measures designed to reach an electricity consumption reduction target by at least 10% compared to the average gross electricity consumption in the corresponding months of the reference period.

Under this section of the Temporary Framework, aid must be granted in a competitive bidding process that is open, clear, transparent and non-discriminatory, based on objective criteria that are ex ante defined and that minimise the risk of strategic bidding.

COMMENT

The European Commission's amendment to the Temporary Crisis Framework to support the economy in the geopolitical context of Russia's invasion of Ukraine **expands the range of mechanisms and methodologies available to the 27 Member States to finance and mitigate the negative economic and financial impact of the invasion** on companies located in the European Union.

Despite the temporary nature of the specific situation in question, this type of aid may be abstracted and generalised in categories corresponding to aid compatible with the internal market.

Considering the **need to provide more celerity (and legal certainty) as regards the (right of) access to the measures provided for therein**, we deem that the **EC** should have opted for a mechanism closer to an **exemption**, so as **to avoid the need of *i)* prior notification of the** mechanisms to be implemented by the Member States to the **EC**, as well as of ***ii)* a formal approval** by the latter.

Opting for an exemption mechanism – which could be provided for, *inter alia*, in the General Block Exemption Regulation (Comission Regulation (EU) No 651/2014, of 17 June 2014, declaring certain categories of aid compatible with the internal market) through a legislative procedure, subject to a fast track – would allow state aid to be granted to companies without the need to undergo the burdensome (and lengthy) procedure of prior notification to the **EC**.

The repeated adoption of extensions and amendments to the Temporary Framework (instead of including the rules in the General Block Exemption Regulation) places an unnecessary burden on the 27 Member States of the European Union and requires the allocation of the **EC**'s limited resources to decision making matters on which both Member States and the **EC** already have extensive experience (experience that could guide the design of general and abstract legal rules).

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