Alert | Antitrust Litigation & Competition Regulation/ Ukraine Conflict

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EU Temporary Framework for State Aid Measures in Response to Ukraine Conflict and to Support Banking Sector

This GT Alert covers the following:

- Legal basis and types of measures under the Ukraine Temporary Framework
- Previous cases of Temporary Framework on State aid
- The banking sector in the Ukraine Temporary Framework and the revision of State aid banking rules
- Notification of aid under the Ukraine Temporary Framework

Following Russia's invasion of Ukraine, the European Union (EU) has adopted a wide range of sanctions against Russian and Belarusian individuals and companies, including restrictions on export and access to financial markets. Similar measures have also been adopted by the EU's international partners, including the United States, the United Kingdom and Japan. Whilst the Russian economy will suffer a substantial recoil due to the sanctions, a significant slowdown of the European GDP is also expected in the coming months, especially due to the increase in energy costs and difficulties in the supply of certain raw materials, such as grain, oilseeds and fertilizers.

In this context, the European Commission (Commission) adopted on March 23, 2022, a Communication concerning a Temporary Crisis Framework for State Aid measures (Ukraine Temporary Framework) to support severely impacted companies and sectors of EU member states.[1]

I. Legal Basis and Types of Measures Under Ukraine Temporary Framework

The Commission has based its proposal on Article 107(3)(b) of the Treaty on the Functioning of the European Union (TFEU), which allows aid to be granted to remedy "*a serious disturbance in the economy of a Member State*". Therefore, State measures adopted under the Ukraine Temporary Framework shall be **notified to the Commission**, which will assess, **by means of an accelerated procedure**, the compatibility of the aid with the specific criteria described below and with the rules of the EU Treaties. In any case, the aid **cannot be granted to persons and entities targeted by EU sanctions**.

This would **complement existing instruments of EU State aid law** (e.g. *de minimis regulation*[2], Block exemption regulation[3]), as well as the possibility under Article 107(2)(b) TFEU for Member States to mitigate the damage directly caused by Russian military aggression or by the following economic sanctions.

In particular, the Temporary Framework provides for **several types of aid**:

1. **limited amounts of aid**: Member States can provide up to 35,000 Euros for companies active in the agriculture, fisheries and aquaculture sectors and up to 400,000 Euros per company for all other sectors (thresholds are expressed in gross values). Such measures can be granted to undertakings affected by the crisis, in any form, including repayable advances, guarantees, loans and equity;

2. **liquidity support**: this could be granted either as:

   (i) **loan guarantees**. Premiums shall not be below 25 bps - 100 bps for SMEs and 50 bps - 200 bps for large enterprises, gradually increasing in relation with the duration of the guaranteed loan.[4] The guarantee duration is limited to six years and can amount to maximum 90% of the underlying loan or 35% for first-loss guarantees;[5]

   (ii) **subsidized interest rates** on investment and/or working capital loans to undertakings. Reduced interest rates shall not be inferior to the risk-free base rate (one-year IBOR) plus the above-mentioned minimum premium.

In both cases, the maximum amount of loans to be guaranteed or subsidized per beneficiary is set as follows: (a) 15% of average total annual turnover over the last three closed accounting periods; (b) 50% of the energy cost in the preceding 12 months; or (c) the total amount of liquidity needed for the next 12 months for SMEs and six months for large enterprises. Reduced interest rates and public guarantees

[1] Communication by the Commission, Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, Brussels, 23.3.2022 C (2022) 1890 final.
[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. 1–8.
[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, OJ L 187, 26.6.2014, p. 1–78.
[4] In particular, minimum premium levels double each time after the first and third year.
[5] When losses are first attributed to the State and only after to the credit institutions.

cannot be granted for the same underlying loan, but might be cumulated for different loans (if not exceeding the limits on the overall amount of loans per beneficiary);

3. **aid for additional costs due to the rise of energy prices**: temporary support can be granted in every form (direct grants, tax advantages, guarantees, loans etc.) to alleviate exceptionally severe increases in prices of natural gas and electricity. The aid cannot exceed 30% of the eligible costs for each beneficiary, up to a maximum of two million Euros. Eligible costs are calculated as the difference between (a) the unit price of electricity and natural gas paid by the beneficiary (as a final consumer) in a given month in the period between Feb. 1 and Dec. 31, 2022, and (b) the double (200%) of the unit price paid by the undertaking on average for the reference period between Jan. 1 and Dec. 31, 2021. Further aid may be granted when necessary to ensure the continuation of the economic activity of "energy-intensive businesses" (as defined in Article 17(1)(a) of the Energy Taxation Directive)[6], up to 25 million Euros, and companies active in specific sectors, such aluminum and metal production glass fibers, pulp, fertilizes, hydrogen and other chemicals, up to 50 million Euros. Aid can be granted in advance, before the eligible costs have been incurred, provided that Member States verify the relevant thresholds *ex post* (within six months) and reclaim any exceeding amount.

In addition, Member States are invited to consider the **introduction of environmental protection requirements** for the granting of aid. This could be done, for example, through the imposition on beneficiaries of minimum thresholds for the use of renewable energy sources or investments requirements for increased energy efficiency and reduced use of natural gas, such as electrification measures or circular solutions using renewable energy or waste gases.

Aid under the Ukraine Temporary Framework has **to be granted (and disbursed) by Dec. 31, 2022**, when this instrument is scheduled to end. The Commission will subsequently consider whether to extend its duration.

II. Previous Cases of Temporary Framework on State aid

This is **not the first time** that the Commission has resorted to **exceptional State aid schemes** to address a serious crisis. **During the financial crisis of 2008**. the Commission adopted a series of communications on aid to the financial sector,[7] as well as a communication for a Temporary Framework of State aid aimed at supporting the access to financing by businesses and SMEs (2009 Temporary Framework).[8]

In addition, already on March 20, 2020, at the start of the **COVID-19 pandemic**, the Commission set up a **Temporary Framework for State aid measures** for companies affected by the economic

[6] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31.10.2003, p. 51–70.
[7] Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8–14; Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.1.2009, p. 2–10; Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.3.2009, p. 1–22; Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.8.2009, p. 9–20.
[8] Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, OJ C 83, 7.4.2009, p. 1–15. Among the various measures, *de minimis* thresholds and limits to capital injections were raised, while interest rates for State guarantees were reduced. In this case, the Commission's intervention allowed, indeed, a wider use of public financing, with almost 300 compatibility decisions adopted under the 2009 Temporary Framework.

consequences (COVID-19 Temporary Framework).[9] The COVID-19 Temporary Framework, originally due to expire Dec. 31, 2020, was subsequently **extended until June 30, 2022**, and proved a powerful tool to support the European economy. In fact, between March 2020 and September 2021, the Commission adopted **more than 650 clearance decisions**, for a total of **over 3 trillion Euros of potential aid**.[10] Germany granted the largest amount of aid, corresponding to more than half of the total approved amounts, followed by Italy and France, both slightly below 15% of the total approved aid.[11]

It is worth noting that under the COVID-19 Temporary Framework, aid could be granted only to undertakings that were not already in financial distress before the start of the pandemic, while no limitation regarding the beneficiary's viability seems to be foreseen for the Ukraine Temporary Framework.

The Commission specifies that aid measures adopted under the **Ukraine Temporary Framework can be combined with** those already approved under the **COVID-19 Temporary Framework**, provided the respective conditions are met. However, Member States must avoid the overlapping of different aid measures for the same liquidity need of the beneficiaries.

III. The Banking Sector in the Ukraine Temporary Framework and the Revision of State Aid Banking Rules

The Ukraine Temporary Framework focuses on **credit institution acting as intermediaries of State aid measures**, such as loans and guarantees, to final beneficiaries and specifies that these measures cannot be intended directly at maintaining or restoring the liquidity of the banks.

On the other hand, aid granted directly to banks and financial institutions to address the consequences of the Russian invasion and the related sanctions will **not be considered "extraordinary public financial support**" under the Bank Recovery and the Resolution Directive (BRRD)[12] or the Single Resolution Mechanism (SRM) Regulation,[13] which would otherwise determine the placement in resolution of the bank. Moreover, recapitalizations or impaired asset measures would **not lead to the designation** of a credit institution **as a "failing or likely to fail" nor** it would trigger procedures for burden-sharing by shareholders and subordinated creditors.[14]

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[9] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01, C/2020/1863, OJ C 91I, 20.3.2020, p. 1–9. Also, in this case, States could grant aid on the basis of Article 107(2)(b) TFEU or Article 107(3)(b) TFEU. The measures envisaged included, *inter alia*, direct subsidies, tax concessions, loan guarantees and reduced interest rates.

[10] European Commission press release, Commission Statement on consulting Member States on proposal on the future of the State aid Temporary Framework, Sept. 30, 2021. The most common measures were grants and guarantees, while loans and capital injections appear to be less used. Among the most benefited sectors are, tourism and leisure, transport and agriculture. See VAN HOVE J., *Impact of state aid on competition and competitiveness during the COVID-19 pandemic: an early assessment*, European Parliament, December 2020.

[11] DE FRANCLIEU D., HERMET E., *State aid in the Covid-19 crisis: a European dilemma*, Bulletin de la Banque de France 238/3 – November – December 2021.

[12] Article 2(1)(28), Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190–348.

[13] Article 3(1)(29), Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 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 and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1–90.

[14] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, 2013/C 216/01, OJ C 216, 30.7.2013, p. 1–15.

In addition, the Commission, on March 17, 2022, launched a **public consultation on the State aid rules for banks in difficulty**, in order to gather feedback from the various stakeholders.[15] In this context, the Commission will evaluate whether current State aid banking rules are still fit for purpose. The consultation will be concluded June 9, 2022, and the results of the Commission's review are expected to be published in the second half of 2023.

IV. Notification of Aid Under Ukraine Temporary Framework

The Ukraine Temporary Framework **applies** retroactively from **Feb. 1, 2022**. As it was the case with the COVID-19 Temporary Framework, additional support measures may be added in the next weeks or months, based on the future development of the war and its economic impact in the EU.

The Commission has ensured a swift assessment of measures granted under the Ukraine Temporary Framework upon receiving clear and complete notifications.

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