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The new text of the Temporary Crisis and Transition Framework: more flexibility in State aid control

1. Introduction

On 9 March 2023, the European Commission ("**Commission**") published the new text of the Temporary Crisis and Transition Framework ("**Temporary Framework**"). The new text of the framework aims to make EU State aid rules simpler and more flexible so that EU policy objectives can be more easily achieved in these times of crisis and ecological transition.

The changes to the Temporary Framework – which was introduced last March to cope with the economic consequences of Russia's aggression against Ukraine and the ensuing geopolitical crisis – are in line with the climate policies first set out in the Green Deal presented on 11 December 2019 and subsequently updated with the recent Green Deal Industrial Plan (published on 1 February 2023). The new text of the Temporary Framework aims to reduce the EU's dependence on fossil fuels by accelerating the rollout of renewable energy, the decarbonisation of industry, and the increase of production capacity in strategic sectors, with the ultimate aim of transitioning to a zero-emission economy.

Below is a brief analysis of the main aspects of the Green Deal Industrial Plan and the changes introduced by the new text of the Temporary Framework.

2. The Green Deal Industrial Plan

The Green Deal Industrial Plan ("**Plan**") is set against a complex and varied economic/political backdrop, characterised by the EU's very ambitious green transition goals, the ongoing major energy crisis linked to Russia's aggression against Ukraine, and the massive use of subsidies and public funds for the green transition in the US. The Plan – which aims to increase the EU's attractiveness for investments in green technologies and net-zero emission products – is based on four key pillars:

- The first entails a predictable and simplified regulatory environment – one which clearly identifies industrial objectives and provides a suitable regulatory framework for their rapid achievement;

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- The second is faster access to investment and financing for the production of clean technologies in the EU. This entails: (a) reducing constraints and controls when it comes to access to public financing, and (b) creating a European sovereignty fund as part of the revision of the multiannual financial framework;
- The third is the development of skills needed for quality jobs in well-paid strategic industries. This is to be achieved by rolling out up-skilling and re-skilling programmes in those industries;
- The fourth is global cooperation and making trade work for the green transition.

3. Sections 2.5 and 2.6 of the new text of the Temporary Framework: more incentives for the rollout of renewable energy, energy storage and decarbonisation

The new text of the Temporary Framework, which modifies sections 2.5 and 2.6 (and introduces entirely new rules under section 2.8 – see section 4 below), is part of the complex backdrop that the Plan is set against.

The changes to section 2.5, which regulates **aid for accelerating the rollout of renewable energy**, are intended to make public support even more effective, flexible and rapid. To that end, a distinction between investment aid and operating aid has been introduced, with less stringent conditions now applying to the former.

More specifically, with reference to investment aid:

- aid amounts may no longer be determined only through competitive bidding processes (including public tenders); now Member States may determine aid amounts directly based on the investment cost data for each subsidised project;[1]
- aid intensity may cover up to 100% of the total investment costs when the aid amount is determined through a competitive bidding process and up to 45% when the aid is determined directly by a Member State;
- aid intensity may be increased by 20 percentage points to favour direct investment in small enterprises and 10 percentage points to favour direct investment in medium-sized enterprises; and
- aid granted under this section may be cumulated with other State aid or centrally managed funds on condition that the aid: (a) does not cover the same eligible costs; or (b) covers the same eligible costs, but the eligible costs are subject to compliance with the above aid intensity percentages.

[1] However, in the case of investment aid allocated to solar power plants, photovoltaic plants, on-shore and offshore wind farms, and hydroelectric plants, public tendering is mandatory unless the financial support concerned is less than EUR 30 million and the plants have a capacity below certain thresholds set out in the new text of the Temporary Framework.

As to operating aid, much of the new text of the Temporary Framework's wording reflects the previous version. The most significant change concerns the possibility of dispensing with a competitive bidding process to determine aid amounts under certain conditions.

As to section 2.6, which regulates **aid for the decarbonisation of industrial production processes**, the Commission has introduced several changes to again make public support even more effective, flexible and rapid. More specifically, the new text of the Temporary Framework stipulates the following:

- An alternative aid ceiling now applies to individual aid amounts: the maximum can either be 10% of the total budget available for the aid scheme concerned or EUR 200 million;
- Aid may be granted also in the form of tax credits;
- Investment costs for equipment, machinery and plants necessary to achieve decarbonisation objectives may be used as an alternative parameter to determine aid intensity and eligible costs.[2] In this case, the aid intensity must not exceed: (a) 60% of the investment costs for investment projects that aim to substantially reduce greenhouse gas emissions from industrial activities that currently rely on fossil fuels as an energy source or raw material (other than electrification projects); and (b) 30% of the investment costs for electrification projects that aim to substantially reduce greenhouse gas emissions from industrial activities or energy consumption in industrial activities and processes;
- Aid granted under this section may be cumulated with other State aid or with centrally managed funds on condition that the aid: (a) does not cover the same eligible costs; or (b) covers the same eligible costs, but the total eligible costs are not exceeded.

For both investment aid and operating aid, the original deadline for their granting has been extended by two years – it now stands at **31 December 2025**. An additional 6-month extension – on top of the 30 months already envisaged in the previous Temporary Framework – has been established for the completion and commissioning of installations that benefit from aid, with the sole exception of offshore wind farms. The related aid measures must set out penalties that apply when beneficiaries miss this deadline.

[2] Two methods were already envisaged: the first, set out in para. n., defines eligible costs as the difference between the costs of the aided project and the cost savings or additional revenues, compared to the situation without aid. The second, set out in para. o., establishes the possibility of launching a public tender to grant aid.

4. Section 2.8: Support for investments in the production of strategic equipment necessary for the net-zero transition

In addition to the changes described above, the Commission has introduced an entirely new section: 2.8, entitled “Aid for accelerated investments in sectors strategic for the transition towards a net-zero economy”. The aim is to support private investments in strategic sectors and thereby overcome the current energy crisis and the consequences of incentives used in the US.

Section 2.8 covers only companies that produce equipment relevant to the green transition – especially, batteries, solar panels, wind turbines, heat pumps, electrolysers, and carbon capture usage and storage systems (CCUS) – and the related critical raw materials needed to produce this equipment.

The beneficiary will have to apply for aid before the start of works and will have to provide the Member State with a set of information specifically indicated in the new text of the Temporary Framework.

All tangible (*i.e.* land, buildings, plant etc.) and intangible (*i.e.* patent rights, licences, know-how etc.)[3] investment costs necessary to produce the abovementioned equipment are considered eligible – but aid intensity may not exceed 15% of the eligible costs, and the nominal aid amount may not exceed EUR 150 million per company and per Member State. That said, to encourage investments in “assisted areas”[4], the aid intensity may be increased by 20 or 35 percentage points depending on the type of assisted area, with a corresponding aid ceiling of EUR 200 and EUR 350 million, respectively.

Aid under this section may be granted in various forms, including as tax advantages, grants, subsidised interest rates on loans, and guarantees. In addition to envisaging an increase in aid intensity by 5 percentage points when aid is granted in the form of tax advantages, the new text of the Temporary Framework envisages increases in aid intensity by 20 percentage points for small enterprises and 10 percentage points for medium-sized enterprises. The beneficiary will have to commit to maintaining the investment in the area concerned for at least five years, or three years for SMEs, after completion of the investment.

[3] Intangible assets will have to fulfil a number of conditions, including: 1) remain associated with the area concerned and must not be transferred to other areas; 2) be used primarily in the relevant production facility receiving the aid; 3) they must be amortisable; 4) be purchased under market conditions from third parties unrelated to the buyer; 5) be included in the assets of the undertaking that receives the aid; and 6) must remain associated with the project for which the aid is awarded for at least five years (or three years for SMEs).

[4] This term refers to the disadvantaged areas as designated in the regional aid map applicable to the Member State concerned under Art. 107(3)(c) of the TFEU (‘c’ areas) and Art. 107(3)(a) of the TFEU (‘a’ areas).

Given the new global challenges that threaten to divert investments in these sectors to third countries (*i.e.* outside the European Economic Area), the Commission has envisaged an exception whereby aid amounts may be increased to match the maximum level of support available in a third country for an equivalent investment. This can be awarded only if the following conditions are met:

- The investment must be made in disadvantaged areas. If the investment takes place in a single Member State, it must be located entirely in disadvantaged areas. Alternatively, the investment must be made in at least three Member States and a significant part of the investment must be located in at least two assisted "a" areas;
- The beneficiary must commit to use for the production of goods covered by this section the latest commercially available state-of-the-art production technology from an environmental emission perspective;
- Finally, the beneficiary will have to apply for aid before the start of the activities and provide the Member State with the requested information and supporting documents. The beneficiary will also have to provide solid evidence of subsidies that it would be likely to receive in a country outside the EEA for a similar project and must demonstrate that without the aid the planned investment would not take place in the EEA.

5. Conclusion

Although the Commission's continued relaxation of State aid rules risks loosening competition rules and adversely affecting the functioning of the internal market, it is certainly a huge opportunity for companies, which have a crucial role to play in the energy transition.

The new text of the Temporary Framework will enable companies to access significant funding. However, this requires not only a careful legal assessment of the numerous, detailed conditions envisaged but also expert assistance in liaising with national and EU authorities.