

Vienna, 17 August 2022

Secretariat's Note on Assessment of measures undertaken in the Contracting Parties to tackle the impacts of the energy price surge

The picking up of global energy demand due to increased economic activity necessary for economic recovery from the COVID-19 pandemic, combined with the direct and indirect consequences of the military conflict between Russia and Ukraine, has resulted in a surge in energy commodity prices. Contracting Parties have taken measure to tackle the impact of the energy price surge.

The following checklist shall serve the assessment of whether a measure adopted by a Contracting Party to tackle the impact of the energy price surge is compliant with the Energy Community acquis: It will assess whether any such measure complies with the legal framework for public service obligations as well as whether it constitutes State aid and if yes, whether it is compatible.

This can be used by the relevant national authorities of the Energy Community Contracting Parties in order to help them identify key questions and guide their assessment as well as by the Energy Community Secretariat to assess compliance of measures with the acquis. It focuses on the most relevant issues in this particular context.

I. Assessment of Public Service Obligations

In order to address the energy crisis, the Contracting Parties can take measures intervening in the electricity market functioning at **retail** and **wholesale** level. Examples at retail level include measures for direct support (price caps, vouchers or subsidies), safeguards to avoid disconnections from the energy grid or reduced rates of taxes for vulnerable customers, as well as state aid to undertakings.¹ Measures at wholesale level could include cap price on fuel price for fossil generators, cap on the electricity market or fixe price for generators.²

The objective of the Directive (EU) 2019/944 (Electricity Directive)³ is using the advantage of an integrated market to ensure affordable, transparent energy prices and costs for consumers, a high degree of security of supply and a fair transition towards a sustainable low-carbon energy system. The rule stipulated in Article 5 is that suppliers shall be free to determine the price at which they supply electricity to customers, thus aiming for effective competition to the benefit of consumers, but at the same time ensuring protection for the energy poor and vulnerable household customers. In accordance with this provision, price regulation at retail

¹ European Commission, Communication: Tackling rising energy prices: a toolbox for action and support, COM(2021) 660 final, 13.10.2021.

² European Commission, Communication: Security of supply and affordable energy prices: Options for immediate measures and preparing for next winter, COM(2022) 138 final, 23.03.2022.

³ Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity, incorporated in the Energy Community by Ministerial Council Decision No 2021/13/MC-EnC of 30 November 2021.

level is allowed in exceptional circumstances. There is no similar provision mentioning explicitly price regulation or other intervention at wholesale level.

A. Types of Public Service Obligations related to price regulation under the Electricity Directive

1. Universal service supply

According to Article 27 of the Electricity Directive, the Contracting Parties are obliged to ensure provision of universal service to all household customers, and (if the Contracting Parties deem appropriate) small enterprises. This means enjoying the right to be supplied with “*electricity of a specified quality within their territory at competitive, easily and clearly comparable, transparent and non-discriminatory prices*”. Unlike under the Third Energy Package, there is no requirement for ensuring “reasonable” prices for universal service. Supplier of last resort can also be appointed for provision of universal service to these customers. This means that such supplier should only be available for households and small undertakings, and not for large industry.

The requirement for ensuring universal service does not constitute a requirement for price regulation. Nevertheless, if prices with such characteristics could not be achieved by the market itself, price regulation could be an option under Article 5(6) of the Electricity Directive, and only for the categories of customers defined in this provision, households and micro enterprises, provided that the criteria from Article 5 and the principle of proportionality is satisfied.

2. Price of supply PSO

Article 9 of the Electricity Directive governs the public service obligations (PSO), and the Contracting Parties may impose on undertakings, in general economic interest, PSOs which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. When it comes to the PSOs which concern the price setting for the supply of electricity, those shall comply with the requirements set out in Article 5.

While Article 9 provides a possibility to impose PSOs for different reasons, it also might concern different beneficiaries than those that could benefit from universal service provision. The Court of Justice held that the Directive “*does not in principle exclude the possibility*” that the “*undertakings irrespective of their size*”, as final consumers of gas, “*benefit from the Public Service Obligations which Member States may adopt in the context of Article 3(2) of that directive.*”⁴ The important requirement that the Court of Justice sets nevertheless, is that it would be necessary “*to take account, in assessing the proportionality of the national measure in question, of the fact that the situation of undertakings is different from that of domestic consumers, the objectives pursued and the interests present being not necessarily the same and also of objective differences between the undertakings themselves, according to their size,*” and it would be disproportionate only if these two types of customers “*were to benefit in an identical manner.*”⁵

⁴ *Federutility* case, para. 41. Article 3(2) corresponds to Article 9(2) of the Electricity Directive.

⁵ *Federutility* case, paras. 42-43.

B. Type of measures at retail level

By way of derogation (from free determination of price), price regulation is possible for:⁶

1. Energy poor or vulnerable household customers (Article 5(3)) subject to specific conditions from Article 5(4):

- be clearly defined, transparent, non-discriminatory and verifiable

A legislative or regulatory act should outline the measure, its objectives, scope and justification.

The undertaking that are entrusted with performing Public Service Obligations (PSO) as well as the scope *ratione personae* of the measure and its beneficiaries must be clearly defined.⁷

- guarantee equal access for Energy Community electricity undertakings to customers

The measure should not prevent suppliers from other Parties to the Treaty to have access to customers in the Contracting Party adopting a PSO measure. Such restriction besides encroaching upon the PSO provision of the Electricity Directive, could also amount to a barrier to trade and fall under the prohibition of Article 41 of the Energy Community Treaty.

- be limited in time and proportionate as regards their beneficiaries

Compliance with the principle of proportionality allows imposing PSOs only in so far as it is suitable and necessary to achieve their objectives in the general economic interest and, consequently, for a period that is necessarily limited in time.⁸

- *Firstly*, the measure in question must be appropriate for securing the objective of general economic interest which it pursues⁹ and the PSO imposed must be the least onerous means realistically conceivable in pursuing the objectives. In other words, the necessity of the imposition of the PSO in question needs to be established in a situation where the market alone cannot guarantee the achievement of an acceptable level of services of general economic interest. Intervention in the end-user price “*constitutes an obstacle to the realization of an operational internal market.*”¹⁰ However, the Contracting Parties have broad discretion in defining the general economic interest they need to ensure.
- *Secondly*, a PSO must be limited in duration to what is strictly necessary in order to achieve its objective so as not to render permanent a measure which, by its very nature, constitutes an obstacle to the realization of an operational internal electricity market.¹¹ The measure shall be subject to “*periodic re-examination, at close intervals, of the need for it to intervene in the [electricity] sector and the manner of its doing so, having regard to the development of that sector.*”¹²

⁶ European Commission, Communication: REPowerEU: Joint European Action for more affordable, secure and sustainable energy, ANNEX 1: Guidance on Application of Article 5 of the Electricity Directive during current situation.

⁷ *Federutility* case, para. 39; *ANODE* case, para. 67.

⁸ Para. 33 *Federutility* case; Para. 54-55 *ANODE* case

⁹ Case C-121/15, *ANODE* case, para. 55; Case C-242/10, *Enel Produzione SpA v Autorità per l'energia elettrica e il gas*, [2011] ECR I-13665, para. 55.

¹⁰ *Federutility* case, para 35.

¹¹ Para. 35 *Federutility* case, para. 53; *ANODE* case.

¹² *Federutility* case, para. 35.

- *Thirdly*, when price regulation is implemented, the prices could be regulated *in order to limit the impact of the increase in the price of fuel that – in the absence of intervention – would have had a major impact on the sale price offered to final customers, in cases where the competition, in particular on the wholesale market, was not fully developed.*¹³ The regulation however, “*should be limited only to the price component influenced by the specific circumstances*”.¹⁴
 - not result in additional costs for market participants in a discriminatory way.

Compensation for provision of a PSO has to comply with the requirements enshrined in Article 9(3) of the Electricity Directive that “[w]here financial compensation, other forms of compensation and exclusive rights which a Contracting Party grants for the fulfilment of the obligations set out in paragraphs 2 [PSO] or for the provision of universal service [...] are provided, this shall be done in a non-discriminatory and transparent way.” Such compensation shall comply with the State aid rules also.

2. Households and micro-enterprises, subject to specific conditions from Article 5(4) explained above and Article 5(7):

- be accompanied by a set of measures to achieve effective competition and a methodology for assessing progress with regard to those measures.
- Measures to achieve effective competition should include:
 - Measures to empower consumers:
 - a. measures to enable self-consumption and production;
 - b. energy efficiency measures to reduce energy demand, increase energy efficiency and make consumers less exposed to the impact of price volatility and
 - c. tapping into the potential of demand-side flexibility to respond to fluctuations in demand and supply notably to ensure customers can participate in demand response measures through aggregation.
 - Measures to ensure that all suppliers operate in a prudential way, protecting consumer interests;
 - Measures to ensure suppliers are able to make offers on the market that meet consumer needs:
 - a. suppliers are able to access long term contracts on an equal basis;
 - b. measures to support effective access for new suppliers to wholesale markets;
 - c. measures on dominant producers to make forward contracts available on a fair basis (e.g. on same terms as to their supply arm). If generators have already sold forward energy through long-term power purchase agreements or bilateral contracts, this energy should be excluded; and
 - d. removal of barriers to entry of new participants.

In any case, the Contracting Parties should ensure full and effective implementation of the provisions of the Electricity Directive to ensure consumer empowerment.

- Roadmap with milestones for removing regulated prices

The Contracting Parties shall accompany the measures adopted by a clear verifiable roadmap containing:

¹³ *Federutility* case, para 37

¹⁴ *Federutility* case, para. 38.

- milestones associated with mitigation of the impact of exceptional supply and demand conditions, without expecting their return to pre-crisis levels. This would mean that full competition to resume on the basis of new wholesale price level is to be expected;
 - sufficiently clear steps as to enable market participants to plan ahead.
- be set using a methodology that ensures non-discriminatory treatment of suppliers

Price regulation should also enable that:

- suppliers should be free to develop other offers, not based on regulated prices;
 - dynamic price contracts should not be affected, and consumers should continue to be able to choose dynamic tariffs;
 - the methodology should ensure it does not “cement” the position of dominant players;
 - the regulated price should not be based on a single particular operator’s generation fleet. However, where the generation fleet of a particular operator was in the past made available to all suppliers on non-discriminatory terms, this could be taken into account;
 - there should be transparency in the selection of the supplier subject to the regulated price and the selection process should be based on non-discriminatory selection criteria;
 - if compensation is provided to the supplier for providing the offers at regulated cost, two options are available:
 - all suppliers should be eligible to provide offers at the regulated price on the same basis. The timing of compensation should take into account the different financial impact on small suppliers to protect them against disproportionate burdens that might arise from the obligation to offer electricity at regulated prices;
 - the supplier should be chosen through an open process such as a tender.
- be set at a price that is above cost, at a level where effective price competition can occur

Even though there is an intervention in the price, or end-user prices are regulated for a certain period of time:

- the regulated price setting methodology should be fully auditable;
- for the calculation process, the authority implementing the regulated prices should have access to the necessary information the cost structure of the industry;
- the regulated price needs to be able to cover reasonably incurred costs of suppliers and to be assessed on the basis of objective economic criteria, including regulated or administrative costs;
- identifying the appropriate reference price for suppliers’ costs when procuring electricity is particularly difficult during a period of high and volatile prices.

It is however important that even if regulated prices might be below what is needed to cover wholesale market costs during specific short-term period, they must be cost-reflective taking into account a duly justified longer period. This could for example be based on the normal forward procurement of energy by suppliers in the relevant Contracting Party. It is important however, that costs are compensated to the energy

undertakings and that the price regulation is not putting the undertakings entrusted with provision of PSOs in a financial difficulty.

- be designed to minimise any negative impact on the wholesale electricity market

This requires that the Contracting Parties duly justify the necessary intervention, linking it with the effect of addressing the impact of high volatile prices. At the same time, they shall take into account that intervention in the wholesale electricity market, and in particular in the price setting there, is limited.

- ensure that all beneficiaries of such public interventions have the possibility to choose competitive market offers and are directly informed at least every quarter of the availability of offers and savings in the competitive market, in particular of dynamic electricity price contracts, and shall ensure that they are provided with assistance to switch to a market-based offer

Even if price regulation is introduced, all customers' categories including households, should still have access to market offers and shall not be prevented from exercising their eligibility right.

- ensure that all beneficiaries of such public interventions are entitled to, and are offered to, smart meters installed at no extra upfront cost to the customer, are directly informed of the possibility of installing smart meters and are provided with necessary assistance

It is important that the Contracting Parties step up the efforts in providing smart meters to their customers.

- not lead to direct cross-subsidisation between customers supplied at free market prices and those supplied at regulated supply prices

Cross-subsidisation between different customers' categories is prohibited, and the national regulatory authorities should pay particular attention to not allowing such cross-subsidisation by which all the impact of price regulation for households and small businesses affects the large industry in the country.

C. Type of measures at wholesale level

The principle enshrined clearly in the Clean Energy Package is that the electricity prices are to be formed based on demand and supply.¹⁵ Interventions at wholesale level separately are not envisaged. The only possibility for interventions in the market functioning at any level remains the public service obligations governed by Article 9 of the Electricity Directive.

During the extreme conditions of energy crisis, several measures intervening at wholesale level could be taken as “*concrete, exceptional short-term options to temper price spikes.*”¹⁶

Such options should aim at reducing the negative impact of very high gas prices in the wholesale electricity market. Their main drawbacks relate to their fiscal cost, potential distortion of competition, risks to cross-border trade and hence security of electricity supply, the extent of which depends on the design of such options.

¹⁵ Article 5(1) Electricity Directive; Article 3 Electricity Regulation (EU) 2019/943.

¹⁶ European Commission, Communication: Security of supply and affordable energy prices: Options for immediate measures and preparing for next winter, COM(2022) 138 final, 23.03.2022.

Intervention at wholesale level could take the following options and should be strictly limited in time.

1. Setting up an aggregator model

Under such model, an undertaking would be tasked to buy electricity on favourable commercial terms and make it available to certain consumer categories below market price passing onwards the advantages to the consumers, essentially subsidising the difference between lower retail prices and higher wholesale ones.

This model directly targets consumers, and it would be up to the Contracting Party to decide on categories of consumers to be supported, as well as to the volumes sold. However, such intervention would limit competition so it should be coupled with measures ensuring fair and non-discriminatory treatment of all suppliers. Besides difficulties in the design, this option depends on the budgetary means of the Contracting Parties, as the costs to the single buyer would need to be compensated (or socialized) and not become financial burden of the company entrusted to act as aggregator.

2. Wholesale Intervention on the fuel price for fossil generators

This option would entail introducing compensation on the price which fossil electricity generators pay for their fuel (coal, gas, oil, diesel) and would require paying electricity generators the difference between their actual sourcing costs for fuel (gas, coal) and a pre-established reference price for these commodities. In this manner, they would be able to offer their electricity cheaper without however having the financial burden on the generators.

Such measure should be designed not to affect the merit order of the generation power plans, and not to interfere with market functioning. If only the fuel price is capped, the fossil fuel generators (that are usually setting the price) will bid within that cap, thus lowering the marginal price even though the other technologies will bid as without such cap. Such measure could be financed through contributions from electricity consumers as not much infra-marginal profits will be available.

3. Introducing a price cap on the wholesale electricity market

By implementing this measure, financial compensation would be required to cover the difference between the market price for the generated electricity and the pre-established cap. Strong regulation may be required to ensure that electricity generation offers above the cap (which set the entitlement to financial compensation) are reasonable.

This measure should lead to lower retail prices and lower infra-marginal rents by those generators that are not directly affected by the cap. But again, funding is necessary to compensate the difference between the market price and the price cap and would depend on the Contracting Parties financial ability.

4. Regulatory intervention on the electricity market: limiting returns of certain market players

The Contracting Parties could introduce taxation measure to capture the high profits of some market participants, or they can do that by temporarily setting a strike price or a clawback mechanism limiting excessive returns of generators. The relevant strike price may need to vary to reflect the characteristics of different market participants and would have to be set by national regulatory authorities.

Separate mechanism would be needed to redistribute the revenues from such a regulatory intervention to consumers. Such mechanism should be transparent, subject to regular reviews and verification on whether such measures are still necessary.

In order to define what are “excessive profits” detailed information about the generators’ costs will be necessary, information that the regulatory authorities do not always have. Compliance with State aid rules would also need to be ensured and targeting windfall profits might undermine investors’ certainty.

D. Obligation for notification

Under Article 9(4), the Contracting Parties have an obligation to notify the PSO measures to the Secretariat upon implementation as well as every two years.

When assessing compatibility of the measures adopted by the Contracting Parties with Energy Community law, the Secretariat will have to ensure that the measures reduce wholesale electricity market prices for companies and consumers, and they do not affect trading conditions to an extent contrary to the common interest. In making this assessment, the temporary nature of the measures and the level of electricity interconnectivity will be taken into account.

II. Assessment under the State aid regime

The measures adopted by Contracting Parties to be assessed under the State aid regime can be grouped into the following two categories:

- (i) tax exemptions or reductions (VAT and excise duties) and
- (ii) direct support to undertakings in the form of sovereign guarantees or direct grants.

A. Existence of State aid:

1. Undertaking as beneficiary

State aid rules only apply where the beneficiary of a measure is an undertaking, defined as entities in an economic activity, regardless of their legal status and the way in which they are financed.

- The beneficiary carries out an economic activity, defined as offering goods and services on a market.

2. State Origin

The public origin of a measure encompasses two separate and cumulative conditions for State aid to exist: the granting of an advantage directly or indirectly through State resources and the imputability of such a measure to the State.

A measure is imputable to the State if:

- a public authority grants an advantage to a beneficiary (even if the authority enjoys legal autonomy from other public authorities); **or**

- a public authority designates a private or public body to administer a measure conferring an advantage; **or**
- a public undertaking grants an advantage to a beneficiary and public authorities can be regarded as having been involved in adopting the measure through a set of indicators arising from the circumstances of the case and the context in which the measure was taken.¹⁷

State resources include:

- resources of the public sector, including resources of intra-State entities;
- resources of public undertakings because the State is capable of directing the use of these resources;
- resources of private bodies if they come under public control before being directly or indirectly transferred to the beneficiaries and are therefore available to the national authorities (even if the resources do not become the property of the public authority);
- parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of public rules (even if not administered by the public authorities);
- resources coming from the EU, the EIB, the EIF or from international financial institutions (IMF or EBRD), if national authorities have discretion as to the use of the resources (in particular the selection of beneficiaries).

The transfer of State resources may take many **forms**:

- direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind;
- a firm and concrete commitment or a concrete risk to make State resources available at a later point in time;
- a positive transfer of funds;
- foregoing/waiving State revenue, unless a negative indirect effect on State revenues stemming from regulatory measures is an inherent feature of the measure (e.g. national regulation which sets a minimum price for certain goods).

¹⁷ Possible indicators include:

- (a) the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;
- (b) the presence of factors of an organic nature which link the public undertaking to the State;
- (c) the fact that the undertaking through which aid was granted had to take account of directives issued by governmental bodies;
- (d) the integration of the public undertaking into the structures of the public administration;
- (e) the nature of the public undertaking's activities and their exercise on the market in normal conditions of competition with private operators;
- (f) the legal status of the undertaking (whether it is subject to public law or ordinary company law), although the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot be regarded as sufficient reason to exclude imputability, having regard to the autonomy which that legal form confers on it;
- (g) the degree of supervision that the public authorities exercise over the management of the undertaking;
- (h) any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

3. Advantage

The measure must confer an advantage to the beneficiary, i.e. an economic benefit which an undertaking could not have obtained under normal market conditions,¹⁸ that is to say in the absence of State intervention. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage. The latter is a broad category which comprises any mitigation of charges normally included in the budget of an undertaking. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities.

- The financial situation of an undertaking is improved as a result of State intervention on terms differing from normal market conditions.

However, compensation for costs incurred to provide a service of general economic interest **does not confer an advantage if:**

- the recipient undertaking actually has public service obligations to discharge, and the obligations is clearly defined;
- the parameters on the basis of which the compensation is calculated are established in advance in an objective and transparent manner;
- the compensation does not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit; and
- where the undertaking that is to discharge public service obligations is not chosen following a public procurement procedure to select a tenderer capable of providing these services at the least cost to the community, the level of compensation needed is determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means to meet the public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

4. Selectivity

A measure must favour “*certain undertakings or the production of certain goods [energy sources]*”; thus, only measures which grant an advantage in a selective way to certain undertakings or certain energy sources fall under the notion of State aid.

When a country adopts ad hoc positive measures benefiting one or more identified undertakings, it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.

The situation is usually less clear when a country adopts broader measures applicable to all undertakings fulfilling certain criteria, which mitigate the charges that those undertakings would normally have to bear. Such a scheme can be materially or regionally selective.

¹⁸ The Union courts have developed the market economy investor principle, the private creditor test and the private vendor test, all variations of the same basic concept that the behaviour of public bodies should be compared to that of similar private economic operators under normal market conditions to determine whether the economic transactions carried out by such bodies grant an advantage to their counterparts (market economy operator test).

An individual measure is selective if:

- it is addressed to a specific undertaking or several specific undertakings which is/are individually identified; **and**
- it is not based on a scheme that provides for the issuing of a guarantee in specific cases, but is an ad hoc measure.

A scheme is materially selective if:

- the legal criteria for granting a measure formally reserve the measure for certain undertakings only; **or**
- the formal criteria for the application of the measure are formulated in general and objective terms, but the structure of the measure is such that its effects significantly favour a particular group of undertakings; **or**
- conditions or barriers imposed by countries prevent certain undertakings from benefiting from the measure; **or**
- although the measure prima facie applies to all undertakings, it is limited by the discretionary power of the public administration.

A scheme is regionally selective if:

- the measure applies only to certain parts of the territory of the country; **and**
- there is no institutional, procedural, economic and financial autonomy of the infra-State body.

5. Effect on competition and trade

Public support to undertakings only constitutes State aid if it “*distorts or threatens to distort competition*” and only insofar as it “*may affect trade of Network Energy between the Contracting Parties*”.

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. For all practical purposes, a distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. It is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations.

A distortion of competition is excluded only if:

- the service rendered by the aid recipient is subject to a legal monopoly, i.e. the service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not the mere fact that the provision of a public service is entrusted to a specific undertaking); **and**
- the legal monopoly not only excludes competition on the market, but also for the market, in that it excludes any possible competition to become the exclusive provider of the service in question; **and**
- the service is not in competition with other services; **and**

- if the service provider is active in another (geographical or product) market that is open to competition, cross-subsidiarisation has to be excluded (i.e. separate accounts, costs and revenues allocated in an appropriate way).

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade. Trade is affected if the aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade. This is the case even if the aid recipient is not directly involved in cross-border trade, but it is made more difficult for operators in other Contracting Parties to enter the market.

Intra-Community trade is affected if:

- the position of the recipient is strengthened compared with other undertakings (i.e. distortion of competition); **and**
- the recipient and/or the other undertakings compete in intra-Community trade.

Only if the aid recipient supplies goods or services to a limited area within a Contracting Party and is unlikely to attract customers from other Contracting Parties as well as affect conditions of cross-border investment or establishment, the aid is considered not to affect intra-Community trade.

Network Energy encompasses:

- the electricity sector
- the gas sector
- the oil sector (i.e. supply, trade, processing and transmission of crude oil and petroleum products)

Only measures fulfilling these cumulative criteria constitute State aid and must be assessed as to their compatibility. This excludes measures benefitting only consumers (see point 1 above), price regulation (without compensation by the State) and supply obligations (see point 2 above).

B. Compatibility of State aid:

Damage directly caused by mandatory reductions in gas consumption can be assessed under Article 107(2)(b) TFEU, if there is no overcompensation.

Incentives for voluntary reductions in gas demand can be assessed directly under Article 107(3)(b) TFEU on a case-by-case basis.

Incentives for the filling of gas storage facilities are assessed directly under Article 107(3)(b) TFEU on a case-by-case basis.

- Aid is not granted to undertakings under sanctions adopted by the EU;¹⁹ and
- aid does not benefit directly or indirectly any natural persons or entities subject to sanctions adopted by the EU.

¹⁹ Including but not limited to: (a) persons, entities or bodies specifically named in the legal acts imposing those sanction; (b) undertakings owned or controlled by persons, entities or bodies targeted by sanctions adopted by the EU; or (c) undertakings active in industries targeted by sanctions adopted by the EU, insofar as the aid would undermined the objectives of the relevant sanctions.

- Aid is not granted later than 31 December 2022.²⁰

Limited amounts of aid are compatible if:

- the overall aid does not exceed EUR 500.000 per undertaking; the aid may be granted in the form of direct grants, tax and payment advantages or other forms such as repayable advances, guarantees,²¹ loans²² and equity provided the total nominal value of such measures does not exceed the above cap (gross);
- it is granted on the basis of a scheme with an estimated budget; and
- it is granted to undertakings affected by the crisis.²³

Liquidity support in the form of a public guarantee is compatible if:

- it is provided on new individual loans made to undertakings;
- guarantee premiums are set per individual loans at a minimum level, which shall increase progressively as the duration of the guaranteed loan increases;²⁴ or alternatively, schemes may use the same values as a basis, but guarantee duration, premiums and coverage are modulated for each underlying individual loan principal;
- the overall amount of loans per beneficiary, for which a guarantee is granted under this section, shall not exceed:
 - i. 15% of the beneficiary's average total annual turnover over the last 3 closed accounting periods; or
 - ii. 50% of energy costs over the 12 months preceding the month when the application for aid is submitted;
 - iii. upon appropriate justification²⁵ the amount of the loan may be increased to cover the liquidity needs²⁶ from the moment of granting for the coming 12 months for SMEs and for the coming 6 months for large enterprises;
- the duration of the guarantee is limited to max. 6 years (unless modulated as above) and the guarantee does not exceed:
 - i. 90% of the loan principal where losses are sustained proportionally and under same conditions by the credit institution and the State; or
 - ii. 35% of the loan principal where losses are first attributed to the State and only then to the credit institution (i.e. a first-loss guarantee); and

²⁰ If aid for additional costs due to exceptionally severe price increases is only granted after an ex post verification of the supporting documentation of the beneficiary and there is no possibility to grant advance payments, aid may be granted until 31 March 2023 provided the eligibility period is respected.

²¹ Guarantee may be provided directly to final beneficiaries or to credit institutions and other financial institutions as financial intermediaries which should to the largest extent possible pass on the advantages of the public guarantees to the final beneficiaries.

²² Loans may be provided directly to final beneficiaries or through credit institutions and other financial institutions as financial intermediaries which should to the largest extent possible pass on the advantages of the subsidized interest rates on loans to the final beneficiaries.

²³ Further conditions apply to aid granted to undertakings active in the processing and marketing of agricultural products as well as in the primary production of agricultural products, fishery and aquaculture sectors.

²⁴ Recipient SME: for 1st year 25bps, 2nd-3rd year 50 bps, 4th-6th years 100 bps; recipient large enterprise: for 1st year 50 bps, 2nd-3rd year 100 bps, 4th-6th years 200 bps.

²⁵ Relevant justification could relate to beneficiaries active in sectors that are particularly affected by direct or indirect effects of the aggression, including sanctions imposed by the EU, its international partners, as well as counter measures taken, for example by Russia. Those effects may include disruptions of supply chains or outstanding payments from Russia or Ukraine, increased risks of cyber-attacks or rising prices for specific inputs or raw-materials affected by the current crisis.

²⁶ Established through self-certification by the beneficiary.

- iii. in both cases, when the size of the loan decreases over time, the guaranteed amount must decrease proportionally;
- the guarantee relates to investment and/or working capital loans;
- guarantees may be provided directly to final beneficiaries or to credit institutions and other financial institutions as financial intermediaries which should to the largest extent possible pass on the advantages of the public guarantees to the final beneficiaries.

Temporary support to alleviate exceptionally severe increases in the price of natural gas and electricity is compatible if:

- The aid is granted in the form of direct grants, tax and payment advantages or other forms such as repayable advances, guarantees,²⁷ loans²⁸ and equity provided the total nominal value of such measures does not exceed the applicable aid intensity and aid ceilings (gross, i.e. before any deduction of tax or other charge);
- The aid is granted on the basis of a scheme with an estimated budget; may be limited to activities that support specific economic sectors of particular importance to the economy or the security and resilience of the internal market – such limits need to be designed broadly and not lead to an artificial limitation of potential beneficiaries;
- Eligible costs are calculated based on the increase in natural gas and electricity costs linked to the Russian aggression against Ukraine: The maximum eligible cost is the product of the number of units of natural gas and electricity procured by the undertaking from external suppliers as a final consumer between 1 February 2022 and 31 December 2022 at the latest (eligible period) and increase in the price that the undertaking pays per unit consumed, which must be calculated as the difference between the unit price paid by the undertaking in a given month in the eligible period and twice (200%) the unit price paid by the undertaking on average for the reference period from 1 January 2021 until 31 December 2021. As from 1 September 2022, the quantity of natural gas and electricity used to calculate the eligible costs must not exceed 70% of the undertaking's consumption for the same period in 2021;
- The overall aid per undertaking does not exceed 30% of the eligible costs up to a maximum of EUR 2 million (also if cumulated with other aid).

Further aid is compatible if:

- The undertaking is an “energy-intensive business”, i.e. where the purchases of energy products amount to at least 3% of the production value (based on financial accounting reports for 2021 or the latest available annual accounts); upon appropriate justification, the production value may be replaced by turnover;
- The undertaking incurs operating losses on a monthly or quarterly basis (i.e. negative EBITDA), whereby the increase in the eligible cost (see above) amounts to at least 50% of the operating loss in the eligible period (see above);

²⁷ Guarantee may be provided directly to final beneficiaries or to credit institutions and other financial institutions as financial intermediaries which should to the largest extent possible pass on the advantages of the public guarantees to the final beneficiaries

²⁸ Loans may be provided directly to final beneficiaries or through credit institutions and other financial institutions as financial intermediaries which should to the largest extent possible pass on the advantages of the subsidized interest rates on loans to the final beneficiaries

- The overall aid does not exceed 50% of the eligible costs and amounts to a maximum of 80% of the operating losses of the undertaking and does not exceed EUR 25 million per undertaking (also if cumulated with other aid).²⁹

Aid for accelerating the rollout of renewable energy, storage, and renewable heat relevant for REPowerEU

- Aid is granted for (i) photovoltaic or other solar electricity generation; (ii) wind power electricity generation, (iii) geothermal energy generation, (iv) electricity or thermal energy storage, (v) the production of renewable heat, including through heat pumps, (vi) the production of renewable hydrogen, (vii) the production of biogas and biomethane from waste and residues;
- Support schemes may be limited to one or several of the above technologies but must not include any artificial limitation or discrimination, (including in the award of licences, permits or concessions when they are required) such as limitations by size of projects, location or regional aspects or very specific (sub)types of technologies;
- Aid is granted in the form of direct grants, repayable advances, loans, guarantees or tax advantages;
- The aid is granted on the basis of a scheme with an estimated volume and budget;
- The aid is granted by 30 June 2023 at the latest and the installations must be completed and be in operation within 24 months after the date of granting (30 months for offshore wind, renewable hydrogen installations). Where the deadline is not met, 5% of the amount of the aid awarded must be reimbursed or reduced per month after the first 3 months of delay, increasing to 10% per month of delay after the sixth month, unless the delay is due to factors outside the control of the aid beneficiary, and could not reasonably have been foreseen;
- Aid in the form of contracts for ongoing aid payments, those contracts must not have a duration longer than 15 years after the aided installation starts operations;
- The aid is granted in a competitive bidding process that is open, clear, transparent and non-discriminatory, based on objective criteria that are defined ex ante and that minimise the risk of strategic bidding. At least 70% in the total selection criteria used for ranking bids must be defined in terms of aid per unit of environmental protection or aid per unit of energy. Such process is not mandatory when aid is granted in the form of tax advantages, insofar as it is granted in the same way for all eligible undertakings operating in the same sector of economic activity that are in the same or similar factual situation in respect of the aims or objectives of the aid measure or when the aid granted per undertaking per project does not exceed EUR 20 mn and the aid beneficiaries are small projects³⁰ (max aid intensity 45% of the total investment cost);
- The volumes of capacity or production tendered must be set to ensure that the bidding process is effectively competitive;

²⁹ Different ceilings apply for undertakings active in sectors listed in Annex I, e.g. aluminium production, hydrogen.

³⁰ Below or equal to 1 MW of installed capacity for electricity generation, electricity or thermal storage, heat generation and gas production technologies, 3 MW for production of renewable hydrogen, 25.000 tonnes/year for production of biogas and biomethane from waste and residues, 6 MW for 100% SME-owned or renewable energy community projects, and 18 MW for projects 100% owned by small and microenterprises or by renewable energy communities for wind generation only.

- The aid must be designed to preserve efficient operating incentives and price signals and to allow addressing windfall profits, such as putting in a claw-back mechanism defined ex-ante or granting aid in the form of two-way contracts for differences;
- Aid under this measure must not be combined with other aid for the same eligible costs;
- Aid may be granted for investments for which works started as of 20 July 2022; for projects started before, aid may be granted if it is necessary to significantly accelerate or widen the scope of investment (and only for these costs);
- The aid must induce the beneficiary to undertake an investment, which it would not undertake, or would carry out in a restricted or different manner, without the aid;
- The Contracting Party must ensure compliance with the “do not significant harm” principle.

Aid for the decarbonisation of industrial production processes through electrification and/or the use of renewable and electricity-based hydrogen fulfilling certain conditions and for energy efficiency measures

- The aid is granted on the basis of a scheme with an estimated volume and budget;
- The maximum individual aid amount per undertaking must in principle not exceed 10% of the total budget available for such scheme;
- Aid is granted in the form of direct grants, repayable advances, loans, guarantees or tax advantages;
- The investment must enable the beneficiary to do one or both of the following:
 - (i) reduce by at least 40% direct greenhouse gas emissions from its industrial installation currently relying on fossil fuels as energy source or feedstock, by means of electrification of the production processes, or the use of renewable and electricity-based hydrogen fulfilling certain conditions to substitute fossil fuels;
 - (ii) reduce by at least 20% energy consumption in industrial installations in relation to the aided activities;
- The aid is not used to finance an increase of the overall production capacity of the beneficiary;
- The aid is granted by 30 June 2023 at the latest and the installation or equipment to be financed must be completed and be in full operation within 24 months after the date of granting (30 months for investments involving the use of renewable and hydrogen). Where the deadline is not met, 5% of the amount of the aid awarded must be reimbursed or reduced per month after the first 3 months of delay, increasing to 10% per month of delay after the sixth month, unless the delay is due to factors outside the control of the aid beneficiary, and could not reasonably have been foreseen. Where the deadline for completion and entry into operation is respected, aid in the form of repayable advances may be transformed into grants; if not, the repayable advance is to be reimbursed in equal annual instalments within five years after the date of granting the aid;
- Aid may be granted for investments for which works started as of 20 July 2022; for projects started before, aid may be granted if it is necessary to significantly accelerate or widen the scope of investment (and only for these costs);

- Aid must not be granted for merely complying with applicable Union standards;
- The aid must induce the beneficiary to undertake an investment, which it would not undertake, or would carry out in a restricted or different manner, without the aid;
- The aid intensity must not exceed 40% of the eligible costs (i.e. the difference between the costs of the aided project and the cost savings or additional revenues, compared to the situation in the absence of the aid, over the lifetime of the investment).³¹ Alternatively, the investment aid may be granted in a competitive bidding process that is open, clear, transparent and non-discriminatory, based on objective criteria that are defined ex-ante and minimising the risk of strategic bidding. At least 70% in the total selection criteria used for ranking bids must be defined in terms of aid per unit of environmental protection (such as EUR per tonne of CO₂ reduced, or EUR per unit of energy saved). The budget related to the bidding process must be a binding constraint in that it can be expected that not all bidders will receive aid;
- The aid must be designed to address windfall profits, such as putting in a claw-back mechanism defined ex-ante;
- Aid under this measure must not be combined with other aid for the same eligible costs;

³¹ Increased by 10 percentage points for aid granted to medium sized undertakings and 20 percentage points for small undertakings; by 15 percentage points for investments delivering a reduction of direct greenhouse gas emissions of at least 55% or of energy consumption of at least 25%.