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STATE AID MEASURES IN THE EUROPEAN ENERGY SECTOR, TODAY

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INTRODUCTION

The European energy sector has been playing a pivotal role in the European Union's ("EU") overall efforts to achieve its ambitious environmental and sustainability goals. As a sector strictly intertwined with the environmental and climate ones, it has been at the heart of the EU's agenda at least since the 1990s. Although the recent event of Russia's invasion of Ukraine has overwhelmingly brought to light, *inter alia*, serious energy-related issues – above all that of the EU's dependence only on one source, Russia indeed – the EU's concrete interventions in the field can be traced back to the last decade. Indeed, in 2015 the Energy Union package has been introduced. This is the most important policy initiative to reform the European energy governance the EU has so far adopted. Considering the latter as a starting point in the most recent period of the EU's interest in the environmental and energy transition, it was soon followed by the Clean energy for all Europeans package, a set of legislative measures which defines the parameters and requirements for a widespread implementation of the Energy Union strategy. However, that is not all. Indeed, at the end of 2019 the EU introduced the European Green Deal, a set of policy initiatives with the objective of making Europe the first climate-neutral continent by 2050. This instrument, whose goals are made legally binding for Member States by the European Climate law, together with the Energy Union strategy provide the framework for the EU's current and future activity in the environmental and energy fields.

In this context, it must be taken into account that Member States intervene, with more or less interference, in the economy to achieve international and European objectives. Therefore, State aids play a fundamental role in the discipline of the single market. The purpose of the Treaty on the Functioning of the European Union ("Treaty" or "TFEU") can be summarised as the desire to prevent States from intervening in the functioning of the market and distorting free competition through the granting of aid. In some respects, it can be considered that State aid is the last field in which national governments still have a margin for manoeuvre, albeit a narrow one. Ultimately, this dichotomy appears clearly in the Treaty: while the latter introduced a clear prohibition for States to grant aid to undertakings, it also tempered this prohibition with various exceptions, so as to allow Member States to control their own economic policy and to stimulate the efficiency of their production system, in a manner compatible with the functioning of the single market. As can be easily understood, State aid is thus closely related to competition policy. This emerges, first of all, from the structure of the Treaty, which places the regulation of State aid immediately after that of antitrust policy, within the same chapter, dedicated precisely to the regulation of competition. Second, this also emerges from the fact that the State aid discipline has, like that of competition law in the strict sense, undergone a process of "modernisation". This process of modernisation, generally considered less incisive than that of competition law, pursued the objective of better directing public resources towards public interest objectives, such as aid in the social field or aid for the environment.

There are various economic and legislative reasons underlying the need for regulation and control of State aid at the European level. From an economic perspective, State aid constitutes a classic tool of intervention and/or counteraction in cases where market failures occur, requiring public intervention to stimulate the restoration of market efficiency. With the aim of protecting free competition and to ensure a level playing field, the European rules allow and introduce the possibility for Member States to resort to State aid only to the extent that this tool does not distort free competition in the single market. Allowing State aid to restore the efficiency of the single market without distorting competition is indeed one of the main economic reasons justifying the need for control over such aid at the European level. This is linked to a second reason, of a legislative nature, underlying State aid control: the harmonisation of Member States' legislation and practices on State aid, with the consequent harmonisation of the competition regime within the single market. Finally, there is another economic reason that cannot be disregarded and which, in the current socio-economic period, which saw at least two major international crises, clearly represents a significant opportunity: State aid can stimulate growth. In accordance with Article 107(3)(c) TFEU, State aid intended to facilitate the development of certain economic activities within the EU can be considered compatible with the single market, provided that they do not distort conditions of trade to the detriment of the common interest. The process of modernising State aid rules initiated by the Commission has, among its declared objectives, the promotion of growth as well as the facilitation of the transition to a resource-efficient economy with low CO_2 emissions, which simultaneously improves economic performance, innovation, and the competitiveness of the EU.

In the context of the EU's transition towards a carbon-neutral economy, the role of State aids in the energy sector becomes of paramount importance. For this reason, the Commission has been updating what are now called "Guidelines on State Aid for Climate, Environmental Protection and Energy" ("CEEAG") to ensure the best framework and guidance is provided to Member States for their required accomplishment of European and international objectives. These guidelines, indeed, offer direction on the way in which the Commission will evaluate the compatibility with the Treaty's rules on competition of State aids for environmental protection and energy.

The purpose of this thesis, without any claim to exhaustiveness, is to assess if and how the European energy sector has been impacted by the two recent international crises, namely the COVID-19 pandemic and the Russia-Ukraine war. Moreover, the EU's response to such impact will be assessed by making reference to the role played by State aids and to the various approaches undertaken by the Commission, especially the Temporary Framework, which confirms its nature of key tool in times of crisis.

As concerns the structure of the thesis, it is divided into four chapters. The first aims at providing an explanation of the elements of the notion of State aid under the Treaty, as well as of the application of these aids in the context of energy and environmental policies. The second chapter, like the first, serves the purpose of giving the tools to better understand how the EU responded to the crises analysed in the following chapters. In particular, it focuses on the EU's energy and environmental policy: first, it deals with the Energy Union and the Clean Energy for All Europeans Package, then with the European Green Deal and the connected European Climate Law, and, finally, it gets into the primary subject of interest, the CEEAG. After these first two introductory chapters, the third one, after exploring the various aid tools available to Member States to face the Coronavirus outbreak, aims at answering to the question of whether the pandemic had a significant impact on the energy sector, in addition to the severely affected health sector. Finally, the fourth and last chapter has an opposite structure to the previous one. This for the obvious reason that just as the pandemic undoubtedly impacted the health sector, the Russia-Ukraine war undoubtedly had significant consequences on the energy sector. Therefore, once analysed the gravity of such consequences, the chapter goes on providing an overview of the Commission's response to tackle the effects of the war on the European energy sector.

CHAPTER I

THE NOTION OF STATE AID AND THE SCOPE OF APPLICABILITY

SUMMARY: 1. The elements of the notion of state aid under Article 107(1) TFEU – 1.1. Undertakings as beneficiaries – 1.2. State origin of the aid – 1.2.1. State resources – 1.2.1.1. State involvement in redistribution between private entities – 1.2.1.2. Aids directly or indirectly granted through state resources – 1.2.2. Imputability – 1.3. Aid consisting in economic advantage – 1.3.1. Economic advantage – 1.3.2. Market Economy Operator Principle (MEOP) – 1.3.2.1. MEOP's application in the energy sector – 1.3.2.2. Introductory remarks to the MEO test – 1.3.2.3. Relevant criteria for applying the MEO test – 1.4. Selectivity – 1.4.1. Selective measures versus general measures – 1.4.2. Material selectivity – 1.4.2.1. *De jure* and *de facto* selectivity – 1.4.2.2. Three-step analysis – 1.4.2.3. Regional or geographical selectivity – 1.5. Effect on trade and competition – 1.5.1. Distortion of competition – 1.5.2. Effects on trade – 2. State aids in the energy sector – 2.1. Application in the context of energy and environmental policies – 2.2. How is the energy sector regulated?

1. The Elements of the Notion of State Aid under Article 107(1) TFEU

State aids play a crucial role in the European single market. Considerations of an economic and competition law nature, among others, come into play and are inevitably intertwined. Therefore, a preliminary assessment must necessarily focus on the notion of State aid under the Treaty. This constitutes, indeed, the focus of the first part of this chapter, which will then turn on a more specific evaluation of the application of State aids in the European energy sector. This first chapter serves the purpose of introducing the subject of State aids so as to better comprehend their role in the internal energy market,[1] as well as their application as response tools to face crises, especially those related to COVID-19[2] and the Russia-Ukraine war.[3]

[1] *See infra* Chapter II.
[2] *See infra* Chapter III.
[3] *See infra* Chapter IV.

Coming to the first part of this analysis, the notion of State aid is defined in Article 107(1) TFEU.[4] It provides for a general incompatibility with the single market of State aids which distort competition. Since the legal concept of State aid is an objective one,[5] only a limited margin of discretion is left in the case-by-case assessment of a measure as falling within the scope of Article 107(1).[6]

As a general principle, it must be understood that an undertaking receiving government support may gain a distortive advantage over its competitors. Since one of the foundational principles of the single market is that of ensuring competition between countries, State aid control becomes necessary especially to counter negative cross-country externalities, namely the negative effects State aids have on undertakings of Member States other than the one granting it.[7] Indeed, as a general rule, State aids are prohibited because of their potential of significantly distorting competition in the single market. Nevertheless, in some instances, interventions of Member States are essential for ensuring a fair and efficient European economy. For this reason, the Treaty provides leeway for various policy goals for which State aids can be deemed compatible.[8]

The notion of State aid is a broad concept: it does not apply only to subsidies, i.e., direct financial contribution, but to any form of aid. In an early case, the European Court of Justice ("ECJ") clarified that the concept of "aid" is wider than that of "subsidy", because while a subsidy involves only direct grants in cash or any other form in support of an undertaking, the concept of aid not only encompasses benefits such as subsidies themselves, but also indirect financial measures mitigating the charges normally born by undertakings.[9] This entails that frequent

[4] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ 326/12 (TFEU), art 107(1): "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."
[5] Case C-452/10 P *BNP Paribas v Commission* [2012] EU:C:2012:366, para 100.
[6] Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, para 111.
[7] D Spector, 'State Aids: Economic Analysis and Practice in the European Union' in X Vives (ed.) *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 180.
[8] European Commission, 'State Aid Overview' <https://competition-policy.ec.europa.eu/state-aid/state-aid-overview_en> last accessed 1 February 2023.
[9] Case C-30/59 *Steenkolenmijnen v High Authority* [1961] EU:C:1961:2, 19 (regarding Art 4(c) of the European Coal and Steel Community Treaty).

measures such as exemptions from obligations to pay fines or waivers of public debts certainly do fall under the notion of State aid.[10]

According to the definition of Article 107(1) TFEU, a measure must have the following elements to qualify as a State aid: (*i*) one or more undertakings as beneficiaries; (*ii*) the advantage must be granted directly or indirectly through State resources and must be imputable to the State; (*iii*) undertakings need to receive an aid consisting in an economic advantage; (*iv*) the advantage must favour only certain specific undertakings or the production of certain goods (the "selectivity" criterion); (*v*) the measure must distort or threaten to distort competition and affect trade between Member States.

In order to condemn a State action as incompatible with Article 107(1) TFEU, the European Commission ("Commission") bears the burden of proving that a measure falls under the notion of State aid,[11] i.e., that all of its *cumulative* elements are present.[12]

1.1. Undertakings as Beneficiaries

State aid rules only apply where the beneficiary of a measure is an "undertaking."[13] Consistent case law has defined an undertaking as any entity which is engaged in economic activity, regardless of its legal status and of the way in which it is financed.[14] Economic activity is understood as any activity consisting in offering goods and services on a market.[15] Several aspects of the definition of undertaking shall be clarified.

First, being the concept of undertaking one of EU law, the status of the entity under national law is not decisive.[16] The public or private nature of the beneficiary

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[10] Case C-200/97 *Ecotrade v Altiforni e Ferriere di Servola* [1998] ECR I-7907, para 43.
[11] L Hancher, A de Hauteclocque and FM Salerno *State Aid and the Energy Sector* (Hart Publishing Oxford 2018) 7.
[12] Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group SA and Others* [2016] ECLI:EU:C:2016:981, para 53.
[13] European Commission, 'Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union' [2016] OJ C262/1 (Commission Notice on the notion of State aid), para 6.
[14] Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-2010, para 21.
[15] Case C-35/96 *Commission v Italy* [1998] ECR I-3851, para 36.
[16] Commission Notice on the notion of State aid (n 13), para 8.

will also be considered irrelevant, due to an extensive reading of Article 345 TFEU.[17]

Second, State aid rules apply regardless of whether the entity seeks to generate profits. The fact that the offer of goods or services is made without profit motive does not prevent such entity from being considered an undertaking, since its activity can be carried out in competition with that of other operators which do aim at making a profit.[18] Non-profit entities could thus still fall under the scope of competition rules.

Third, the classification of an entity as an undertaking is always relative to a specific activity.[19] An entity which is engaged in both economic and non-economic activities is to be considered as an undertaking only with regard to the former.[20] On the other hand, where the activities of several entities amount to an economic activity only if taken together, those entities form one economic unit and, thus, constitute an undertaking.[21]

Last, Article 107(1) does not apply to those entities which are entitled by the relevant Member State to exercise public powers, namely to act in their "capacity as public authorities."[22] This kind of activity is considered part of the essential functions of the State or is connected with those functions by its "nature, [its] aim and the rules to which [it is] subject."[23] There would be an exception to this rule only in those cases where the entity also carries out other economic activities that can be distinguished from its exercise of public powers. If that is the case, it could be considered an undertaking only regarding the performance of such private activities.[24]

It might be worth mentioning a few examples of economic activities in the energy sector which have been discussed in the past years.[25] These include activities

[17] G Contaldi, 'La Nozione di Aiuto di Stato' (2019) 3 Eurojus 107, 109-110; TFEU, art 345: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."
[18] Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paras 122 and 123.
[19] Commission Notice on the notion of State aid (n 13), para 10.
[20] Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, para 108.
[21] Commission Notice on the notion of State aid (n 13), para 11.
[22] Case C-30/87 *Bodson v Pompes funèbres des régions libérées* [1988] ECR I-2479, para 18.
[23] Case C-364/92 *SAT/Eurocontrol* [1994] ECR I-43, para 30.
[24] Case C-138/11 *Compass-Datenbank GmbH* [2012] ECLI:EU:C:2012:449, para 38.
[25] Hancher (n 11) 8.

of a private company established by a Member State government to mitigate climate change by accelerating the transition to a low-carbon economy;[26] the participation in investment projects contributing to the production of bio-energy;[27] research activities by energy companies which, under certain conditions, may be considered economic activities.[28]

1.2. State Origin of the Aid

When dealing with the requirement of State origin of the aid, two assessments are usually conducted together. Indeed, there are two cumulative but separate conditions which shall be satisfied under Article 107(1): the granting of an advantage directly or indirectly through State resources, and the imputability of such measure to the State.[29] In other words, the ECJ held that the term "State resources" must necessarily entail a financial burden.[30]

1.2.1. State Resources

Only advantages granted, directly or indirectly, through State resources can fall under the definition of State aid provided for in Article 107(1) TFEU.[31]

State resources include all resources of the public sector.[32] Additionally, also resources of public undertakings can be relevant under Article 107(1) because the State is capable of directing the use of these resources.[33]

The attribution of State resources may take a variety of forms. These include, on the one hand, positive transfers of benefits such as direct grants, loans, guarantees,

[26] European Commission, 'Authorisation for State aid pursuant to Articles 107 and 108 of the TFEU: Cases where the Commission raises no objections', Case No SA.24895 on Public investment in wind power development projects [2013] OJ C279/1, 1 (among other activities, the entity was providing expert advice to the industrial commercial sector).
[27] European Commission, 'Authorisation for State aid pursuant to Articles 107 and 108 of the TFEU: Cases where the Commission raises no objections', Case No SA.35458 on Aid for investments to produce bio-energy [2013] OJ C144/1, 4.
[28] Commission Notice on the notion of State aid (n 13), paras 32 and 33; European Commission, Communication from the Commission 'Framework for State aid for research and development and innovation' [2014] OJ C198/1, para 19.
[29] Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, para 24.
[30] JJ Piernas López *The Concept of State Aid Under EU Law: From internal market to competition and beyond* (Oxford University Press 2015) 169.
[31] Case 82/77 *Van Tiggele* [1978] ECR I-25, para 25.
[32] Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para 56.
[33] *France v Commission (Stardust)* (n 29), para 38.

direct investment in the capital of companies, and, on the other, waivers of revenue which would otherwise have been due to the State.[34]

In any event, there is a typical case of transfer of State resources where public authorities do not charge the normal amount under their general system for access to the public domain or natural resources, or for granting certain special or exclusive rights.[35]

Since the early 2000s, there have been several cases addressing the issue of whether renewable energy support schemes are financed through State resources. Without going into details, it is worth mentioning here that, from the analysis of European case law, it is possible to identify three distinct approaches to this subject.[36] At first, in the landmark *PreussenElektra* judgment, the ECJ provided a strict interpretation of the notion of state resources and, consequently, found that the German renewable energy support scheme was not financed through State resources.[37] In a second wave of judgments (*Essent Netwerk*, *Iride*, *Vent de Colère*) the ECJ changed its orientation: schemes providing energy support were considered to be financed through State resources, specifically through public or private bodies designated or established by the State.[38] Finally, in the third and most recent period, the ECJ, in the *ENEA* and *EEG 2012* cases, opened again to the possibility that in some circumstances the *PreussenElektra* reasoning could still apply to renewable energy support schemes, and thus that these schemes are not always to be found to involve State resources.[39]

1.2.1.1. State Involvement in Redistribution between Private Entities

It is relevant to mention that a State regulation leading to financial redistribution from one private entity to another without any further involvement of the State does

[34] Commission Notice on the notion of State aid (n 13), para 51.
[35] ibid, para 55.
[36] K Bourgeois, L Hancher and DI Lolin, 'State Aid for Energy and Environmental Protection' in L Hancher, T Ottervanger and PJ Slot (eds.) *EU State aids* (6th edn Sweet & Maxwell London 2021) 862.
[37] Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099.
[38] Case C-206/06 *Essent Netwerk Noord BV v Aluminium Delfzijl BV* [2008] ECR I-5497; Case T-25/07 *Iride SpA and Iride Energia SpA v Commission* [2009] ECR II-245; Case C-262/12 *Association Vent De Colère! and others v Ministre de l'Écologie and others* [2013] ECLI:EU:C:2013:851; Bourgeois (n 36) 863.
[39] Case C-329/15 *ENEA S.A. v Prezes Urzędu Regulacji Energetyki* [2017] ECLI:EU:C:2017:671; Case C-405/16 P *Federal Republic of Germany v Commission* [2019] ECLI:EU:C:2019:268.

not, *per se*, entail a transfer of State resources. Indeed, if the State did not entrust any public or private body with the administration of the transfer, or, even in such case, if the money flows directly from one private entity to another without passing through such bodies, then there will be an allocation of State resources.[40]

The above-mentioned *PreussenElektra* case is illustrative in this sense.[41] The ECJ found that the imposition by a Member State of an obligation on private electricity suppliers to purchase electricity produced from renewable energy sources at State-fixed minimum prices *does* constitute an advantage,[42] but *does not* involve a direct or indirect transfer of State resources to undertakings which produce that type of electricity.[43] The Member State's advantage alone was considered insufficient because it lacked direct or indirect financing through public resources.[44]

1.2.1.2. Aids Directly or Indirectly Granted through State Resources

In order to identify which measures fall under Article 107(1)'s definition, the concept of "State", granting the advantage, has to be broadly interpreted. Indeed, not only does it include central or federal State authorities, but also regional and local bodies, regardless of their legal status and qualification.[45] Paramount importance, thus, has to be attributed "to the effects of the aid on the undertakings or producers favoured" and not to the status of the institutions distributing such advantage.[46] The fact that the measure is financed by a public or private body established or entrusted by a Member State and not by the State itself, does not automatically entail that the measure is not financed through State resources.[47]

1.2.2. Imputability

As to the second condition, a measure can be considered as a State aid only if it is also imputable to the State. This clearly occurs when the advantage is granted by

[40] *Van Tiggele* (n 31), paras 25 and 26.
[41] *PreussenElektra* (n 37).
[42] Hancher (n 11) 17.
[43] Commission Notice on the notion of State aid (n 13), para 62.
[44] *PreussenElektra* (n 37), para 58.
[45] Case C-284/84 *Germany v Commission* [1987] ECR I-4013, para 17.
[46] Case 78/76 *Steinike & Weinlig* [1977] ECR I-595, para 21.
[47] ibid.

a public authority, even if the latter has legal autonomy or if it entrusts another body to implement the act conferring the advantage.[48] For instance, aids resulting from legislative measures are almost always imputable to the State[49] even if the Member State could adopt alternative legislation not affecting competition.[50]

If the advantage is granted through the resources of a public or publicly owned undertaking, it must be assessed whether public authorities were involved in the adoption of the measure.[51] However, because of the privileged relationship existing between public authorities and the public undertakings which cause difficulties for a third party to demonstrate that the measure was adopted following public authorities' instructions, a set of indicators have been developed to establish if a measure is imputable to the State.[52] Among these indicators: (*i*) the fact that the public undertaking was expected to comply with the requirements of the public authorities to take the contested decision;[53] (*ii*) the fact that the undertaking, through which aid was granted, had to consider the directives issued by governmental authorities;[54] (*iii*) the public undertaking's integration into the structure of the public administration;[55] (*iv*) the nature of the activities carried out by the undertaking in normal conditions of competition with private operators;[56] (*v*) the legal status of the undertaking (as being subject to either public or corporate law);[57] (*vi*) the extent to which the undertaking is supervised and managed by public authorities.[58]

1.3. Aid Consisting in Economic Advantage

1.3.1. Economic Advantage

Under Article 107(1) TFEU, an advantage is any economic benefit which an

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48 Commission Notice on the notion of State aid (n 13), para 39.
49 HCH Hofmann and C Micheau (eds.) *State Aid Law of the European Union* (Oxford University Press 2016) 71.
50 Case T-351/02 *Deutsche Bahn AG v Commission* [2006] ECR II-1047, para 102.
51 *France v Commission (Stardust)* (n 29), para 52.
52 ibid, para 54, 55.
53 ibid, para 55.
54 ibid.
55 ibid, para 56.
56 ibid.
57 ibid.
58 ibid.

undertaking could not have obtained under normal market conditions, i.e., without State intervention.[59] On the contrary, no aid is considered to be involved if the recipient undertaking could have obtained the same advantage as that obtained through state resources.[60]

To determine whether an advantage is present, only the *effect* the measure has on the undertaking must be assessed. In particular, the economic or financial situation of the (alleged) beneficiary undertaking must have been improved.

Another approach to determine the existence of an advantage is to look at any measure which relieves a company from the charges which are normally included in the budget of the company.[61]

More generally, since State aid can have an impact that goes beyond the mere effect on a single recipient, the notion of advantage on the recipient would be best understood, rather than as a mere "advantage on the recipient", as "advantage to the activity", namely to shareholders but also to suppliers, employees and customers.[62] This broad interpretation would seem to best fit the purpose of article 107(1), which, indeed, refers not only to favouring "certain undertakings" but also to favouring "the production of certain goods."[63]

1.3.2. Market Economy Operator Principle (MEOP)

In many cases, the process of identifying the advantage conferred by a State measure to the (direct) recipient is rather clear. However, in many other situations, especially when governments invest in companies, buy or sell assets, or provide loans or guarantees, it is much less straightforward.[64] In such cases, the "Market Economy Operator Principle" ("MEOP") comes into play. This concept has various, more specific configurations:[65] the "market economy investor principle"

[59] Case C-39/94 *SFEI and Others* [1996] ECR I-3547, para 60.
[60] F Dascalescu and M Houtman, 'Practical Considerations on the Notion of 'Advantage' and the Application of Market Economy Operator Test in the Context of Financial Instruments' (2022) 45(3) World Competition 387, 388.
[61] Case C-387/92 *Banco Exteriorde España v Ayuntamiento de Valencia* [1994] ECR I-877, para 13.
[62] P Werner and V Verouden (eds) *EU State Aid Control: Law and Economics* (Kluwer Law International B.V. The Netherlands 2016) 18.
[63] TFEU, art 107(1) reads "[...] by favouring certain undertakings *or* the production of certain goods [...]."
[64] Werner (n 62) 18.
[65] Commission Notice on the notion of State aid (n 13), paras 74 and 75.

("MEIP") to identify the presence of State aid in cases of public investment;[66] the "private creditor test" to assess whether debt renegotiations by public creditors involve State aid;[67] the "private vendor test" to examine whether a sale performed by a public body can be considered as State aid.[68]

The MEOP aims to address the fact that States act both as a public authorities and as entrepreneurs.[69] This also results from Article 345 TFEU providing for the principle of neutrality and equality of undertakings.[70] While, Member States have the right to act as economic operators, when public authorities engage in economic transactions, EU State aid rules might be triggered.[71] It will be precisely an analysis under the MEOP to determine whether such rules will apply. Indeed, the idea underlying the MEOP is that if a public authority invests in an enterprise, or more generally carries out an economic transaction, under terms which can be deemed comparable to that of a private entity operating under normal market conditions, then the State intervention would not create any economic advantage for the enterprise. [72] Consequently, that measure would not qualify as State aid. The objective of the entire discipline is to have the public and private sectors treated equally.[73]

1.3.2.1. MEOP's Application in the Energy Sector

Case law can come to the aid of showing the application of the MEOP to the energy sector.

The General Court's ("GC") decisions in *Budapesti Erömü Zrt v Commission*[74] and *Dunamenti Erömü Zrt v Commission*[75] and the underlying Commission

[66] See, for instance, Case C-305/89 *Italy v Commission ('ALFA Romeo')* [1991] ECR I-1603, para 18.
[67] See, for instance, Case C-73/11 P *Frucona Košice v Commission* [2013] ECLI:EU:C:2013:32, para 71.
[68] See, for instance, Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012] ECLI:EU:T:2012:90, para 20.
[69] M Cyndecka *The Market Economy Investor Test in EU State Aid Law: Applicability and Application* (Wolters Kluwer The Netherlands 2016) 15.
[70] TFEU, art 345; ibid.
[71] Commission Notice on the notion of State aid (n 13), para 73.
[72] Werner (n 62) 19; *SFEI and Others* (n 59), para 60.
[73] Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission* [1999] ECR II-17, para 105.
[74] Joined Cases T-80/06 and T-182/09 *Budapesti Erömü Zrt v Commission* [2012] EU:T:2012:65.
[75] Case T-179/09 *Dunamenti Erömü Zrt v Commission* [2014] EU:T:2014:236.

decision[76] discuss long-term power purchase agreements ("PPAs") between a Hungarian State-owned public undertaking and Hungarian electricity generators. The PPAs provided for the purchase of a specific amount of electricity at a fixed price, to ensure security of supply.[77] The Commission's benchmark in its analysis was a market operator, in the same legal and economic conditions as those existing in Hungary in that period, which had the same obligations and opportunities as the Hungarian State-owned public company.[78] The Commission concluded that PPAs provide power generators with better conditions than that provided under standard commercial contracts.[79] The GC, by applying the MEOP to assess the accuracy of the Commission's decision concerning the PPAs, came to its same conclusion.[80]

Object of the Commission's attention were also situations in which State-owned electricity suppliers provided electricity to large industrial purchasers. A case is worth mentioning in this regard: a company named *Electricité de France* ("EDF"), wholly controlled by the French State, granted preferential terms on the sale of electricity to some paper mills which used a specific kind of paper drying equipment. The Commission found that EDF's conduct conformed with the MEOP as it was justified on commercial grounds.[81] More specifically, the Commission concluded that EDF acted in compliance with the private investor principle, because, considering the French market conditions, any rational private operator would have acted the same way as EDF.[82] Neither the preferential electricity tariffs nor the loan granted by EDF were, thus, considered as State aids.[83]

Finally, in 2010, and again in 2012, the Commission found that an Italian regulation which compensated companies which consented to the "instant interruptibility services" in Sardinia and Sicily did not constitute aid.[84] These

[76] Commission Decision 2009/609/EC of 4 June 2008 on the State Aid C41/05 Awarded by Hungary through Power Purchase Agreements [2009] OJ L225/53.
[77] Hancher (n 11) 11.
[78] ibid.
[79] *Budapesti Erömü Zrt v Commission* (n 74) para 79; *Dunamenti Erömü Zrt v Commission* (n 75) para 92.
[80] ibid.
[81] Commission Decision 2001/274/EC of 11 April 2000 on the Measure Implemented by EDF for Certain Firms in the Paper Industry [2001] OJ L95/18, para 89.
[82] ibid.
[83] ibid.
[84] European Commission, 'Authorisation for State aid pursuant to Articles 107 and 108 TFEU: Cases where the Commission raises no objections', Case No NN 24/10 on *Garanzia di sicurezza del sistema elettrico nazionale nelle isole maggiori* [2010] OJ C205/1, 2.

services, consisting in the acceptance by large electricity consumers of sudden cuts in their electricity supply, are valuable resources for the transmission system operator ("TSO") to ensure the stability of the network. In particular, the Commission found this scheme not to constitute a State aid mainly because the price formation mechanism was truly competitive and specifically made for certain companies.[85] The Commission, after an initial period of open tendering method of procurement, in its 2012 Decision[86] observed that the supply of services was not fully covering demand. Therefore, it accepted this outcome to attract more supply, prolonging the duration of the scheme for other three years.[87]

As a final consideration, since many Member States currently have, and are expected to continue having, significant public interests in energy companies or in other profitable, strategic assets, the MEOP will probably continue to be largely applied in this area. It is likely that, under the MEOP, many State interventions in the energetic and environmental sector will be considered as State aids as being significantly policy-driven.[88]

1.3.2.2. Introductory Remarks to the MEO Test

As said, the purpose of the MEO test is to examine whether the State has conferred an aid to an undertaking by acting in a manner different from that of a market economy operator.[89] Indeed, if the public bodies do not act as a market economy operator would do in a similar situation, the beneficiary undertaking will find itself in a more favourable position compared to that of its competitors[90] thanks to the economic advantage which it would not have obtained under normal market conditions.[91] In other words, if the State's action, based on the information reasonably foreseeable when the measure is implemented, confers a greater benefit

[85] Werner (n 62) 691.
[86] European Commission, 'Authorisation for State aid pursuant to Articles 107 and 108 TFEU: Cases where the Commission raises no objections', Case No SA.35119 (12/N) on *Misure urgenti per garantire la sicurezza di approvvigionamento di energia elettrica nelle isole maggiori* [2012] OJ C2/1, 3.
[87] Werner (n 62) 691.
[88] ibid.
[89] Commission Notice on the notion of State aid (n 13), para 76.
[90] Case C-124/10 P *Commission v EDF* [2012] ECLI:EU:C:2012:318, para 90.
[91] Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, para 208.

to the beneficiary than the one obtainable from a private investor, there is an advantage and, thus, State aid.[92]

In the performance of the MEO test, only the benefits and obligations of the State as economic operator shall be taken into consideration.[93] Indeed, any consideration related to the Member State's role as public authority, such as social or regional policy considerations, is not relevant under the MEO test. This because the private market operator normally acts only in its own interests.[94]

The ECJ found that the MEO test does not apply upon request of the Member State, but rather the initiative lies on the Commission.[95] The latter, indeed, has a duty to collect all the relevant information required to verify whether the test applies.[96] In particular, the Commission must carry out an *ex ante* assessment to verify whether State intervention is in line with market conditions.[97] This means that the Commission can only take into account the information that was available and developments that were foreseeable at the time the State intervention was decided upon.[98] In this process, the relevant Member State might be requested by the Commission to provide evidence showing that the decision to perform the transaction was based on economic evaluations which would have brought a rational economic operator, in conditions similar to that existing at the time of the State's decision, to carry out the transaction because of its expected profitability.[99]

1.3.2.3. Relevant Criteria for Applying the MEO Test

When applying the MEO test to establish the transaction's compliance with market conditions, different set of criteria will be used depending on whether transaction-specific market data are available to directly establish such compliance.[100]

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[92] S Cornella, 'The 'Market Economy Investor Principle' to Evaluate State Aid: Latest Developments and New Perspectives' (2015) 22(4) Maastricht J Eur and Comparative L 553, 556.
[93] *Commission v EDF* (n 90) para 79.
[94] Hancher (n 11) 11.
[95] *Commission v EDF* (n 90), paras 103 and 104.
[96] ibid.
[97] Commission Notice on the notion of State aid (n 13), para 78.
[98] *Commission v EDF* (n 90), paras 83-85 and 105.
[99] ibid, para 84.
[100] Commission Notice on the notion of State aid (n 13), para 83.

If transaction-specific market information is present, a transaction's compliance with market conditions can be directly established in two circumstances: (*i*) in case of a *pari passu* transaction; or (*ii*) in case of sale or purchase of assets, goods, services through a competitive, transparent, non-discriminatory and unconditional tender.

A *pari passu* transaction can be defined as a transaction carried out by the State as well as by a private operator under the same terms and conditions (with particular reference to risks and rewards) and at the same point in time. If these elements are met, there is a presumption that the State intervention has fulfilled the MEOP and, thus, that the transaction complies with market conditions.[101] On the other hand, if the State and the private operator perform the same transaction at the same point in time, but the public body does so under less favourable terms, the conclusion will be that the State's intervention was not in line with market conditions.[102]

The second circumstance in which transaction-specific data can be used to determine market compliance is related to the sale and purchase of assets, goods and services through a tender. There are several requirements[103] which the contracting authorities should meet to presume that the transaction is in line with market conditions.[104] First, the sale or purchase must be competitive to ensure all interested and qualified bidders have the possibility of participating.[105] It is relevant to mention that while case law often refers to "open" tender procedures,[106] this is not a specific procedure provided for in the relevant EU discipline of public procurement.[107] For this reason, it seems more appropriate to refer to "competitive" tender procedure. Second, the procedure has to be transparent. This entails that the tender must be largely publicised, ensuring to all interested tenderers sufficient time, accessibility of information, and clarity of the selection and award criteria.[108] Third, the contracting authorities must apply a non-discriminatory treatment to all

[101] Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, para 81.
[102] Commission Notice on the notion of State aid (n 13), para 86; Werner (n 62) 19.
[103] Case C-324/98 *Telaustria* [2000] ECR I-10745, para 62.
[104] Case C-59/00 *Bent Mousten Vestergaard* [2001] ECR I-9505, para 20.
[105] Commission Notice on the notion of State aid (n 13), para 90.
[106] See, for instance, Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) v Commission* [2003] ECR II-2957, para 118.
[107] European Parliament and Council Directive 2014/24/EU of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC [2014] OJ L94/65.
[108] Commission Notice on the notion of State aid (n 13), para 91.

bidders during the whole procedure.[109] In particular, no discrimination on the ground of nationality is admissible.[110] Finally, in order for a tender for sale of assets, goods or services to be unconditional the potential buyer must be free from special obligations, that a private seller would not have demanded, to use the purchased assets, goods or services in specific businesses.[111]

The two foregoing criteria are not the only applicable ones.[112] If a transaction has not been carried out through a tender, or if the transaction was not realised on *pari passu* terms, compliance with market conditions can still be assessed through "benchmarking." Unlike the case of a *pari passu* transaction, in the scenario at hand there is no private operator. Therefore, the State's transaction has to be evaluated in comparison to either hypothetical or past private operators carrying out a similar transaction in similar circumstances.[113] The identification of the correct benchmark becomes, thus, critical. In principle, for the identification of the correct benchmark, attention should be paid to the kind of operator concerned, the type of transaction, and the relevant market.[114] However, this is often not an easy task. There are, indeed, significant differences between the State's position and that of private operators, such as that the State can choose among a much wider variety of forms of intervention due to its larger funds and powers.[115] Additionally, private operators will usually enter into a transaction not only with the aim of not suffering losses or producing limited profits, but rather seeking "to achieve the maximum reasonable return on his investment."[116] This increases the standard the State has to reach to have a comparable behaviour under the MEOP.[117] The result of the benchmarking method will not often be precise market reference values, but rather the establishment of a range of possible values by assessing a set of comparable transactions.[118]

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[109] ibid, para 92.
[110] *Telaustria* (n 103), para 60.
[111] Commission Notice on the notion of State aid (n 13), para 94.
[112] Case C-239/09 *Seydaland Vereinigte Agrarbetriebe* [2010] ECR I-13083, para 39.
[113] Commission Notice on the notion of State aid (n 13), para 98.
[114] ibid, para 99.
[115] Werner (n 62) 19.
[116] *Westdeutsche Landesbank Girozentrale v Commission* (n 91) para 314.
[117] Werner (n 62) 20.
[118] ibid.

1.4. Selectivity

For a State aid to fall under the scope of Article 107(1) TFEU, and thus to be incompatible with the single market, it must have negative effects on competition by "favouring certain undertakings or the production of certain goods."[119] This can be referred to as the selectivity criterion. Selectivity is defined as the "differential treatment for specific goods/products to the detriment of others" resulting from State intervention.[120] A measure can, therefore, be considered selective if it is capable of affecting the competitive relationship between the recipient undertaking and its competitors in the Member State concerned.[121] This requires identifying the correct comparison group so as to properly carry out such assessment.[122] The selectivity analysis is one of the most difficult tasks in the identification of State aids.[123]

1.4.1. Selective Measures versus General Measures

A *selective* measure, which can potentially be a State aid, can be opposed to a *general* measure, which instead applies in an automatic way to all undertakings, in all economic sectors, in a given Member State.[124] This distinction is highly relevant in EU law, because, had general measures been defined with more precision, it would be much easier to identify measures – the selective ones – which qualify as State aids.[125] Unfortunately, however, neither the Commission nor European courts have provided relevant guidance in this regard.

If measures are not of general application, they can be either materially or regionally selective.[126]

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[119] TFEU, art 107(1).
[120] P Nicolaides and IE Rusu, 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11(4) Eur St Aid L Q 791, 791.
[121] Werner (n 62) 21.
[122] Hancher (n 11) 23.
[123] M Segura, M Clayton and L Manuel, 'State aid rules for environmental purposes: an effective instrument for implementing EU policy priorities?' (2020) 21 ERA Forum 667, 672.
[124] C Romariz, 'Revisiting Material Selectivity in EU State Aid Law – Or "The Ghost of Yet-To-Come"' (2014) 13 Eur St Aid L Q 39, 40.
[125] ibid.
[126] B Kurcz and D Vallindas, 'Can General Measures Be … Selective? Some Thoughts on the Interpretation of a State Aid Definition' (2008) 45 Common Market L Rev 159, 161.

1.4.2. Material Selectivity

1.4.2.1. *De Jure* and *De Facto* Selectivity

The material selectivity of a measure refers to the fact that the measure applies only to specific undertakings or specific sectors of the economy in a given Member State.[127]

Material selectivity can be established either *de jure* or *de facto*. *De jure* selectivity is the consequence of specific legal criteria for granting an aid that is explicitly reserved to certain undertakings.[128] These undertakings could be selected for various reasons, such as ailing companies;[129] export undertakings;[130] companies of a certain size, active in certain sectors or having a certain legal form.[131] Instead, *de facto* selectivity comes into play when, despite the generic formulation of the criteria for the measure's application, it is the structure of the measure itself to determine that only some of the undertakings will be favoured.[132]

1.4.2.2. Three-Step Analysis

It is quite straightforward to conclude, and indeed it can be presumed, that an aid is selective when it is an *ad hoc* measure benefitting one or more identified undertakings.[133] On the other hand, when the measure is generally applicable to a wider spectrum of firms fulfilling certain criteria, the identification of such measure as a selective State aid is usually more complex.[134] In these cases, the selectivity of the measure has to be assessed through a three-step analysis.[135]

The first step is to establish a benchmark or reference system for undertakings which are in comparable legal and factual situations in the light of the objective

[127] Commission Notice on the notion of State aid (n 13), para 120.
[128] ibid, para 121.
[129] Case T-287/11 *Heitkamp Bauholding v Commission* [2016] ECLI:EU:T:2016:60.
[130] Case C-501/00 *Spain v Commission* [2004] ECR I-6717.
[131] Joined Cases C-78/08, C-79/08 and C-80/08 *Paint Graphos and others* [2011] ECR I-7611.
[132] Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECLI:EU:C:2011:732.
[133] Case C-15/14 P *Commission v MOL* [2015] ECLI:EU:C:2015:362, para 60.
[134] Commission Notice on the notion of State aid (n 13), para 127.
[135] Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365; Case C-279/08 P *Commission v Netherlands* [2011] ECR I-7671, para 62.

pursued.[136] The reference system is composed of a set of rules that apply to all firms falling within its scope as defined by its objective.[137]

The second step consists in the determination of whether the measure in question derogates from the reference system,[138] namely if it favours certain undertakings in comparison to those in a similar situation.[139] If this is the case, the measure can be considered *prima facie* selective.[140] As to the mentioned comparability of the situations at stake, the elements to be taken into account are the "subject-matter and the purpose of the Community act" as well as "[t]he principles and objectives of the field to which the act relates."[141] It shall be borne in mind that external policy objectives, such as regional or environmental ones, cannot be relied upon by the Member State to justify the preferential treatment granted only to some undertakings.[142] In particular, the ECJ clarified this principle when reacting vigorously to a novel approach adopted by the GC in the *British Aggregates*[143] and *Dutch NOx*[144] cases. The main argument for annulment was that the objective pursued by State measures is not alone sufficient to exclude those measures from classification as "aid" and that rather than to the objective, a State aid should be defined solely in relation to its effects.[145] However, despite the declared preference for an effect-based rather than objective-based approach, it seemed that the ECJ was actually sanctioning the State's failure to properly take into account the EU competence in regulating environmental protection – the subject-matter of both judgements – and the need to properly pursue an EU interest.[146]

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[136] Romariz (n 124) at 41.
[137] Commission Notice on the notion of State aid (n 13), para 133.
[138] Nicolaides (n 120) at 792.
[139] J Kociubiński, 'Selectivity Criterion in State Aid Control' (2014) 2 Wroclaw Rev L, Administration & Economics 1, 12.
[140] Commission Notice on the notion of State aid (n 13), para 128.
[141] Case C-127/07 *Société Arcelor Atlantique et Lorraine and others v Premier ministre and others* [2008] ECR I-9895, para 26.
[142] Case C-6/12 *P Oy* [2013] ECLI:EU:C:2013:525, para 29.
[143] Case T-210/02 *British Aggregates* [2006] ECR II-2789, rev'd *British Aggregates* (n 6).
[144] Case T-233/04 *Netherlands v Commission* [2008] ECR II-591, rev'd *Commission v Netherlands* (n 135).
[145] A Biondi, 'State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid' (2013) 50 Common Market L Rev 1719, 1731.
[146] ibid, at 1732.

In the third and final step, which is for the Member State to demonstrate,[147] it has to be assessed whether the measure may be justified by the nature or the structure of the reference system.[148] If a *prima facie* selective measure can be so justified, it will not be considered selective and will thus fall outside the scope of Article 107(1) TFEU.[149]

The above three-step analysis was developed in relation to fiscal and para-fiscal measures, such as tax exemptions.[150] However, the Court of Justice of the EU has extended the same principles and test also in relation to non-fiscal measures.[151] When looking at European case law, the result which can be derived is that the notion of material selectivity is fairly a broad one.[152] Member States' actions will then be guided by the awareness that only a limited range of measures will be able to fall outside the State aid ban of the Treaty.[153]

1.4.2.3. Regional or Geographical Selectivity

Unlike the material selectivity's situation, this second aspect of the notion of selectivity has been largely resolved by EU case law. In principle, only measures whose scope extends to the entire territory of the Member State escape the regional selectivity criterion laid down in Article 107(1) TFEU.[154] However, the reference system does not necessarily have to be defined as the entire Member State, "so that a measure conferring an advantage in only one part of the national territory is not selective on that ground alone."[155]

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[147] M Prek and S Lefèvre, 'The Requirement of Selectivity in the Recent Case-Law of the Court of Justice' (2012) 11(2) Eur St Aid L Q 335, 336.
[148] J Bousin and J Piernas, 'Developments in the Notion of Selectivity' (2008) 7(4) Eur St Aid L Q 634, 640.
[149] *Paint Graphos and others* (n 131), para 49 et seq.
[150] Werner (n 62) 122.
[151] See, for instance, *Commission v Netherlands* (n 135), para 62; Case C-403/10 P *Mediaset v Commission* [2011] ECR I-117, para 36; Case T-461/12 *Hansestadt Lübeck v Commission* [2014] ECLI:EU:T:2014:758, paras 45 and 46.
[152] A Bartosch, 'Is There a Need for a Rule of Reason in European State Aid Law? Or How to Arrive at a Coherent Concept of Material Selectivity?' (2010) 47 Common Market L Rev 729, 731.
[153] ibid.
[154] Commission Notice on the notion of State aid (n 13), para 142.
[155] Case C-88/03 *Portugal v. Commission ("Azores")* [2006] ECR I-7115, para 52; Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja and others* [2008] ECR I-6747, para 47.

The ECJ, following its Advocate General, developed a set of criteria to examine whether a given measure was adopted by an infra-State body in the exercise of powers which were sufficiently autonomous as compared to the central government's ones.[156] In its decision, the Court merely replaced the notion of "true autonomy" by "sufficient autonomy", but it did not significantly change the substance of the test.[157]

Therefore, there are three main requirements for the measure to be "truly" or "sufficiently" autonomous. First, the measure shall be taken by a local authority with a political and administrative status separate from that of the central government ("institutional autonomy").[158] This assessment usually includes a detailed examination of a given Member State's constitution and laws to verify such independence.[159] Second, the content of the measure shall fall outside the scope of direct intervention of the central government ("procedural autonomy").[160] The correct analysis of the existence of procedural autonomy turns, rather than merely to the assessment of that body's extent of competence, to the capability of an infra-State body, in view of its competence, to adopt a decision on a tax measure independently, i.e., without the central government being able to directly intervene in the determination of its content.[161] Third, the measure's financial effects must not be offset by aid or subsidies from other regions or from the central government ("economic autonomy").[162] This requires the infra-State body to assume responsibility for the political and financial consequences of the measure in question, since it has control of both revenue and expenditure.[163]

1.5. Effect on Trade and Competition

State support to undertakings amounts to State aid only if it "distorts or threatens

[156] JL Da Cruz Vilaça, 'Material and Geographic Selectivity in State Aid – Recent Developments' (2009) 8(4) Eur St Aid L Q 443, 448.
[157] B Kurcz, 'How Selective is Selectivity? A Few Thoughts on Regional Selectivity' (2007) 66(2) CLJ 313, 322.
[158] Case C-88/03 *Portugal v. Commission ("Azores")* [2006] ECR I-7115, Opinion of AG Geelhoed, para 54.
[159] Commission Notice on the notion of State aid (n 13), para 146.
[160] *Azores*, Opinion of AG Geelhoed (n 158).
[161] Commission Notice on the notion of State aid (n 13), para 148.
[162] *Azores*, Opinion of AG Geelhoed (n 158).
[163] Commission Notice on the notion of State aid (n 13), para 152.

to distort competition by favouring certain undertakings or the production of certain goods" and only insofar as it "affects trade between Member States."[164] While these are two distinct required elements, in practice, they are assessed together because considered inextricably linked.[165] Nonetheless, there still may be a measure affecting competition but remaining purely internal, thus not affecting trade between Member States.[166] In turn, there may be an evident impact on an intra-EU trade market but the actual or potential distortion of competition may not be adequately demonstrated.[167]

1.5.1. Distortion of Competition

There is a distortion of competition whenever the financial aid granted by the State strengthens the position of the recipient undertaking improving its competitiveness compared to other undertakings.[168] The concept of distortion of competition is given a broad interpretation in case law.[169] This reflects the fact that State aids are presumed distortive because they consist in an external intervention of the State in the normal functioning of the markets,[170] in particular in a liberalised sector where there is, or there could be, competition.[171]

There is no requirement for the distortion to be particularly significant since EU case law has not provided for a specific threshold below which the State aid is not considered to affect trade between Member States.[172] Therefore, even a small amount of State support or the relatively small size of the recipient undertaking can be considered liable to distort competition,[173] provided however that the likelihood

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[164] TFEU, art 107(1).
[165] Joined Cases T-298/97, T-312/97 etc. *Alzetta and others v Commission* [2000] ECR II-2319, para 81.
[166] I Herrera Anchustegui and C Bergqvist, 'The Role of State Aid Law in Energy' in T Hunter and others (eds.) *Routledge Handbook of Energy Law* (Routledge Abingdon and New York 2020).
[167] E Stuart and I Roginska-Green *Sixty Years of EU State Aid Law and Policy: Analysis and Assessment* (Kluwer Law International B.V. The Netherlands 2018) 42.
[168] Case 730/7 *Philip Morris* [1980] ECR 2671, para 11; Case 259/85 *France v Commission* [1987] ECR 4393, para 24.
[169] N Pesaresi and others (eds) *EU Competition Law, Volume 4: State Aid* (Claeys & Casteels Law Publishers The Netherlands 2016) 355.
[170] ibid, at 356.
[171] *Alzetta* (n 165), paras 141-147
[172] A Biondi and E Righini, 'An Evolutionary Theory of EU State Aid Control' in D Chalmers and A Arnull (eds.) *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 682.
[173] Case C-280/00 *Altmark Trans* [2003] ECR I-7747, para 82.

of such a distortion is not merely hypothetical.[174] Despite this approach, clearly explained by the GC affirming that "[w]here the benefit is limited, competition is distorted to a lesser extent, but it is still distorted",[175] the Commission took the view that very small amounts of State support, in practice, do not have consequences on intra-Union competition and trade, thus considering this kind of aids as falling outside the scope of Article 107(1) TFEU.[176] The ECJ confirmed that the long-standing practice of the Commission was justified by the latter's discretion in the evaluation of the possible economic effects of the aid.[177]

1.5.2. Effects on Trade

The element of the aid's effect on trade between Member States constitutes the dividing line between the jurisdiction of the Commission and of the Member States.[178] Indeed, if the measure does not have effect on intra-Union trade, there would be no risk of negatively affecting the single market.[179]

The Commission does not have to define the market or to investigate in detail the impact of the measure on the competitive position of the beneficiary and its competitors.[180] Indeed, an *actual* effect on trade between Member States is not required, but a *potential* effect is deemed sufficient,[181] provided however that the Commission establishes why the aid distorts (or threatens to distort) competition and is liable to have an effect on intra-Union trade, based on the foreseeable effects of the measure.[182]

The requirement is presumed to be met when an aid measure strengthens the position of an undertaking that competes in intra-Union trade.[183] Undoubtedly, the requirement is satisfied if the alleged beneficiary is active in cross-border trade or

[174] ibid, para 79.
[175] Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717, para 46.
[176] Pesaresi (n 169) 356.
[177] Case C-351/98 *Spain v Commission* [2002] ECR I-8031, para 52.
[178] Case T-93/02 *Confédération nationale du Crédit Mutuel v Commission* [2005] ECR II-143, para 82.
[179] Hancher (n 11) 27.
[180] Stuart (n 167) 50; *Philip Morris* (n 168).
[181] Case C-518/13 *Eventech Ltd v The Parking Adjudicator* [2015] ECLI:EU:C:2015:9, para 65; Joined Cases C-197/11 and C-203/11 *Libert and others* [2013] ECLI:EU:C:2013:288, para 76.
[182] Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and others v Commission* [1995] ECR II-1971, para 141.
[183] *Eventech* (n 181), para 66.

if there is a fairly large level of trade in the specific sector.[184] This is the case of the energy sector. Indeed, in the EU energy markets, measures favouring undertakings in one Member State should always qualify as affecting intra-Union trade, since they hinder the ability of undertakings from other Member States to significantly compete in the market.[185] On the other hand, State support can still be considered capable of affecting trade between Member States even if the recipient undertaking is not directly involved in cross-border trade, but operates only on a local or regional level.[186] For instance, the subsidy may have the effect of maintaining or increasing local supply, thereby reducing the possibilities for operators in other Member States to enter the market.[187]

Although in the past years the Commission has tried to limit the scope of the "effect on trade" requirement (where certain beneficiaries had a purely local impact), the notion of aid still remains quite broad.[188] The debate around the appropriateness of this approach seems to focus both on substance, namely whether it makes sense for the EU to get involved in purely local measures, and on administrability, i.e., whether the Commission and the national Courts have the means to deal with a significant number of cases associated with such a broad notion of aid.[189]

2. State Aids in the Energy Sector

2.1. Application in the Context of Energy and Environmental Policies

State aid rules are a fundamental component of energy regulation in the EU. They establish the conditions for the provision of State support to undertakings which generate, transmit and/or distribute energy in the single market. In particular, Articles 107 and 108 TFEU aim at avoiding that Member States, by granting some

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[184] Hancher (n 11) 28.
[185] Case T-468/08 *Tisza Erömü kft v Commission* [2014] EU:T:2014:235, para 186 (for the electricity sector); European Commission, 'Communication on State Aid SA.39050 (2015/N) - Poland Individual Aid Measure for Gas Infrastructure in Poland', C(2015)5027, 17 July 2015, recital 38.
[186] Pesaresi (n 169) 357.
[187] *Eventech* (n 181), para 67.
[188] Commission Notice on the notion of State aid (n 13), para 196.
[189] Werner (n 62) 25.

advantage, may favour certain undertakings. This unless several conditions have been met: the benefit is compatible with the single market; competition is not distorted; and the measure has been both notified to and approved by the Commission.[190] In this context, while the primary objective of EU competition policy is to protect the EU single market and free competition, it must also enable State intervention for the ecological transformation of the economy, with particular regard to renewables and energy efficiency.[191]

The importance of State aid rules for the energy sector is pivotal because, inevitably, market forces alone are not able to deal with all the issues present in the energy sector.[192] Some examples of areas in which State intervention is necessary are that of phasing out of coal, compensation for stranded costs, aid given for environmental purposes, and services of general economic interest.[193] There are several reasons why State aid rules have such an active role in the energy sector. First, the energy sector requires large financial investment for huge infrastructural and industrial projects.[194] Second, Member States have a political interest and legal duty to help meet their energy security and environmental law targets, in accordance with the EU rules on renewable energy and national policies.[195]

Moreover, also the cases of inefficient energy subsidies need to be addressed. Indeed, inefficient subsidy schemes can determine market distortions and send wrong signals to investors, thus hampering the development of new technologies such as renewables.[196]

It is worth mentioning that State aids can take various forms depending also on the market failure they aim to address. In this regard, States have intervened, for example, by granting aids to foster the generation of electricity from renewable energy sources; aids for generation adequacy; aids for energy intensive users.[197]

[190] Herrera Anchustegui (n 166).
[191] M Villar Ezcurra, 'EU State Aid and Energy Policies as an Instrument of Environmental Protection: Current Stage and New Trends' (2014) 13(4) Eur St Aid L Q 665, 666.
[192] K Tulus *Introduction to EU Energy Law* (Oxford University Press 2016) 110.
[193] ibid, at 110 and 111.
[194] Hancher (n 11) 4.
[195] ibid.
[196] Enerdata and Trinomics, 'Final Report: Study on energy subsidies and other government interventions in the European Union' (Publications Office of the European Union Luxembourg 2021) 14.
[197] E Righini and G Catti De Gasperi, 'Survey – The Application of EU State Aid Law in the Energy Sector' (2019) 10 J Eur Competition L & Practice 53, 54-66.

Another relevant form of State intervention is that on price regulation in the energy sector. Indeed, Member States interfere with the price formation mechanism during the whole energy supply and consumption chain to distort prices for renewable energy, nuclear and back-up capacities.[198] Interestingly, in terms of aid instruments adopted by the States to grant subsidies for environmental protection, notified aid are mainly in the form of direct grants or interest rate subsidies, while block-exempted aid takes mostly the form of tax advantage.[199] Regarding notifications, the amount of aid granted under notified measures is nearly four times the amount granted under the block-exempted ones in 2020.[200]

The general rule in the field of environmental aid, including the energy sector, is that State aid can only be granted for projects which go beyond EU environmental standards or, in the absence of such standards, go beyond national requirements. Otherwise, the aid would not serve its purpose of having incentive effects because the undertakings would have to abide by the legally required standards in any event.[201]

Finally, the significance of State aids in the energy sector can be seen also from a statistical point of view. In line with previous years, also in 2020 environmental protection and energy savings have been the non-crisis-related policy objectives on which Member States significantly spent the most.[202]

2.2. How is the Energy Sector Regulated?

As a conclusion of this first chapter, it might be worth exploring the evolution of the European environmental policy and the way in which it has been regulated.[203] Some of the legal instruments mentioned in this section will be object of further analysis in the following chapters.

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[198] Hancher (n 11) 64.
[199] European Commission, 'State aid Scoreboard 2021' (6 September 2022) 73.
[200] ibid, at 72.
[201] P Staviczky and P Nicolaides, 'State aid rules in the coal sector and linked energy sector under the Energy Community Treaty and European Law' (2015) CEE Bankwatch Network 1, 13.
[202] European Commission, 'State aid: 2021 Scoreboard shows that COVID-19 State aid measures allowed for unprecedented levels of support while preserving the level-playing field' (8 September 2022) Press Release IP/22/5369.
[203] Stuart (n 167) 260.

Prior to the Lisbon Treaty in 2007,[204] which recognised the importance of solidarity in matters of energy supply and changes to energy policies within the EU, energy policy was largely viewed in terms of common market rules and from the standpoint of environmental policy. Environmental policy, in turn, only emerged as an official EU policy area in 1987 under the Single European Act.[205]

In 1973, the concept that the "polluter pays" was first introduced, i.e., those who cause environmental damage should be forced to bear the costs which would otherwise be imposed on the rest of the society. By the late 1980s, changes to the Treaty were made as a consequence of a revitalised interest for EU environmental policy. This led to the environmental policy being declared a joint responsibility of the EU and its Member States[206] and provided for the specifics of EU environmental policy aimed at a high standard of environmental protection.[207]

In 1994, the Commission adopted the Community Guidelines on State aid for environmental protection.[208] After that, environmental policy action has evolved significantly not only at a national level, but also at the EU and global level. Indeed, in 1998 the EU Member States and the EU itself signed the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[209] In parallel, Member States began granting State aids more frequently in the energy sector, and at the same time also granted aids in forms which had not previously been used, such as tax reliefs and exemptions.

Updated versions of the Environmental Aid Guidelines were adopted in 2001 and 2008.[210] As mentioned before, for all forms of environmental aid, the idea underlying the Guidelines was that the aid must be strictly limited to the extra investment costs borne by undertakings to achieve the environmental policy result. The 2008 Guidelines, compared to their predecessor, allowed higher aid levels and

[204] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1 (Treaty of Lisbon).
[205] Single European Act [1987] OJ L169/1.
[206] TFEU, art 4.
[207] TFEU, arts 191 et seq.
[208] European Commission, Notice on 'Community guidelines on State aid for environmental protection' [1994] OJ C72/3.
[209] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.
[210] European Commission, Notice on 'Community guidelines on State aid for environmental protection' [2001] OJ C37/3; European Commission, Notice on 'Community guidelines on State aid for environmental protection' [2008] OJ C82/1.

broadened the scope of the Guidelines, thereby increasing the possibilities for States to provide support. In 2008, the Commission also adopted the General Block Exemption Regulation, which allows certain measures to provide lawful State aid without going through the normal notification and approval processes.[211]

In 2014, the Commission adopted a new set of Guidelines on State aid for Environmental Protection and Energy[212] together with a revised version of the GBER.[213] While the connection to energy issues was clear in earlier guidelines, the title of the new Guidelines fully established that link. These Guidelines focused, in particular, on investments in sustainable energy in order to achieve the EU 2020 targets: the shift towards a low-carbon economy as well as an increased attention towards renewable energy and energy efficiency. This resulted in almost a doubling of investment amounts in sustainable energy between 2014 and 2020. These objectives were further developed in the current 2022 Guidelines.[214]

What emerges from this brief review on the evolution of the European environmental policy and its regulation is that a serious effort was made to incorporate environmental protection and energy policy in the State aid rules as a matter of EU policy. As concerns the regulatory aspect of the discipline, the following are some of the important EU Strategies of common interest adopted throughout the years: Commission's criteria for the analysis of the compatibility with the single market of State aids;[215] the Energy Strategy for Europe;[216] the 2030 framework for climate and energy policies;[217] the European Energy Security

[211] Commission Regulation (EC) No 800/2008 of 6 August 2008 Declaring Certain Categories of Aid Compatible with the Common Market in Application of Articles 87 and 88 of the Treaty [2008] OJ L214/3.
[212] European Commission, Communication from the Commission 'Guidelines on State aid for environmental protection and energy 2014-2020' [2014] OJ C200/1 (EEAG).
[213] 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 [2014] OJ L187/1 (General Block Exemption Regulation or GBER).
[214] European Commission, Communication from the Commission 'Guidelines on State aid for climate, environmental protection and energy 2022' [2022] OJ C80/1 (CEEAG).
[215] European Commission, Communication from the Commission 'Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest' [2014] OJ C188/4.
[216] European Commission, Communication from the Commission 'Energy 2020 A strategy for competitive, sustainable and secure energy', COM(2010)639, 10 November 2010.
[217] European Commission, Communication from the Commission 'A policy framework for climate and energy in the period from 2020 to 2030', COM(2014)15, 22 January 2014.

Strategy;[218] the Resource Efficient Europe;[219] the EU Seventh Environment Action Programme to 2020;[220] the Energy Roadmap 2050.[221]

[218] European Commission, Communication from the Commission 'European Energy Security Strategy', COM(2014)330, 28 May 2014 (European Energy Security Strategy).
[219] European Commission, Communication from the Commission 'A resource-efficient Europe – Flagship initiative under the Europe 2020 Strategy', COM(2011)21, 26 January 2011.
[220] European Parliament and Council Decision 1386/2013/EU of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L354/171.
[221] European Commission, Communication from the Commission 'Energy Roadmap 2050', COM(2011)885, 15 December 2011.

CHAPTER II

THE ROAD TOWARDS AN ENERGY UNION AND CLIMATE NEUTRALITY, ALSO BY MEANS OF THE "CEEAG"

1. The Energy Union and Clean Energy for All Europeans Package

In the past years, as mentioned in the previous chapter, environmental and energy policies became of paramount importance in the EU. In this regard, there are many objectives which have been assumed by the EU as commitments. In particular, steps are being taken towards the creation of an Energy Union, consisting in a strategy presented in 2015 by the Commission to make the EU truly cooperative and independent in the production and delivery of energy. In order to reach this objective, a new energy rulebook known as "Clean energy for all Europeans package" was proposed by the Commission in 2016, and later adopted as legislative acts in 2019 following the political agreement between the Council of the EU and the European Parliament.

1.1. Energy Union Package

The 2015 Energy Union strategy can be considered the most important policy initiative to reform European energy governance, policy, and regional cooperation.[222] It aims at providing EU consumers, both households and businesses, with secure, affordable, sustainable and competitive energy.[223] It is worth mentioning that the achievement of this goal is inevitably conditioned by the differences between individual Member States, which unfortunately have increased over the last decade.[224]

1.1.1. Objectives and Plan of Action

The creation of the Energy Union requires a fundamental transformation of Europe's energy system. This discussion must begin by recalling the reasons behind the need of an Energy Union. The Commission aims to achieve "an integrated continent-wide energy system where energy flows freely across borders", where Member States develop a strong sense of cooperation, solidarity and trust to securely deliver energy to their citizens.[225] The goal is to reach an Energy Union as a sustainable, low-carbon and climate-friendly economy and to ensure policy

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[222] K Szulecki and others, 'Shaping the 'Energy Union': between national positions and governance innovation in EU energy and climate policy' (2016) 16(5) Climate Policy 548, 548.
[223] European Commission, Communication from the Commission 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy', COM(2015)80, 25 February 2015 (Strategy for a Resilient Energy Union).
[224] R Vavrek and J Chovancová, 'Energy Performance of the European Union Countries in Terms of Reaching the European Energy Union Objectives' (2020) 13(20) Energies 1, 13.
[225] ibid, at 2.

coherence across the five dimensions which will be soon discussed.[226] "Coherence" can be defined as the utilisation of synergies and the avoidance of conflicts among policy domains, but the possibility that the low-carbon transition could intensify rather than eliminate conflicts, unfortunately, cannot be excluded.[227] All these objectives have to be met having in mind a general assumption: citizens are at the core of the Energy Union, as they are the one who must actively take ownership of the energy transition to benefit from its effects.

In order to fully bring into being the Energy Union, the first step is to implement and strictly enforce the EU energy legislative measures and the Treaty's competition rules.[228] Additionally, the EU needs to diversify its supply of gas and reduce dependencies on individual suppliers. This need, unfortunately, became even more evident in the last months since the beginning of the Russia-Ukraine war.[229]

Being the citizens at the heart of this project, the Commission highlighted the importance of increasing transparency on energy costs and prices, by producing reports on the matter as well as by analysing the role of taxes, levies and subsidies.[230]

Two further areas require specific attention: buildings and transportation. As to the former, modernisation of buildings to make them energy efficient and to use in a more sustainable way space heating and cooling might bring huge benefits, for both households and businesses, in energy costs and security. Likewise, the transport sector requires European, national and regional intervention. The goal is to create the market conditions for a rapid decarbonisation, a progressive switch to alternative fuels, and to further promote procurement of clean vehicles. In this regard, it is worth mentioning that the European Parliament has recently formally

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[226] C Strambo and M Nilsson, 'The Energy Union: a coherent policy package?' in A Goldthau, MF Keating and C Kuzemko (eds.), *Handbook of the International Political Economy of Energy and Natural Resources* (Edward Elgar Publishing Cheltenham 2017) 107-122.
[227] G Bellantuono and K Huhta, 'The Energy Union in the Next Decade' (2019) 3 Oil, Gas and Energy Law.
[228] Vavrek (n 224), at 19.
[229] *See infra* Chapter IV.
[230] Strategy for a Resilient Energy Union (n 223), at 20.

approved new vehicle emissions rules that virtually ban the sale of combustion engine vehicles by 2035.[231]

Finally, the EU needs to invest in research and innovation ("R&I") in the energy and climate fields. The Commission has been developing strategies in R&I as it was recognised to be among the most powerful European policies to boost EU's economy and global competitiveness.[232]

1.1.2. Structure

The Energy Union strategy provides five intertwined dimensions which fully reflect the content of Article 194(1) TFEU:[233] (*i*) energy security, solidarity and trust; (*ii*) a fully integrated European energy market; (*iii*) energy efficiency contributing to moderation of demand; (*iv*) decarbonising the economy; and (*v*) research, innovation and competitiveness. A brief assessment of each of these dimensions seems necessary to fully comprehend the objectives of the EU in the energy market.

1.1.2.1. Energy Security, Solidarity and Trust

The Energy Union is built upon the Energy Security Strategy set forth by the Commission.[234] In the first place, this strategy clarifies that energy security is strictly related to the ability of the EU to reduce its dependency on specific fuels or energy supplier. Additionally, the creation of an internal energy market necessarily passes through a stronger cooperation between Member States, which requires more transparency as well as more solidarity and trust.[235]

The EU's prosperity and security largely depend on a stable availability of energy. The EU and its Member States are succeeding in this sense, given that

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[231] European Parliament, 'Fit for 55: zero CO2 emissions for new cars and vans in 2035' (14 February 2023) Press Release 20230210IPR74715.

[232] European Commission, 'Strategic Plan 2020-2024: DG Research and Innovation' (27 October 2020).

[233] TFEU, art 194(1): "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks."

[234] European Energy Security Strategy (n 218).

[235] OG Austvik, 'The Energy Union and security-of-gas supply' (2016) 96 Energy Policy 372, 377.

citizens have generally not experienced any lasting disruption of their energy supply.[236] Nevertheless, just to mention a few exceptions, eastern Member States have been hit by temporary disruptions during the winters of 2006, 2009[237] and 2014,[238] and, as discussed in the next two chapters, there has been a dramatic energy shortage caused by the COVID-19 pandemic and the 2022 Russia-Ukraine war. This explains once again the reasons behind EU's aim to set up an Energy Union.

In order to implement the Energy Union, in 2016 the Commission presented an Energy Security Package[239] setting out measures designed to strengthen EU's resilience to gas supply disruptions.[240] The aims of these measures include an increase in energy production, especially from renewables; the development and improvement of a fully integrated internal energy market; the reduction of energy demand; and the diversification of energy sources, suppliers and routes.[241]

Additionally, the idea underlying this first dimension of the Energy Union is that, through the establishment of a strong sense of trust and solidarity, Member States have the assurance that, particularly in times of crisis, when facing situations of tight supply, they can rely on the support of neighbouring States.[242] For this reason, it is important to ensure that energy interconnections between Member States are constantly improved, especially with and among former Soviet Union

[236] European Energy Security Strategy (n 218), at 2.
[237] Reuters Staff, 'Timeline: Gas crisis between Russia and Ukraine' (*Reuters* 11 January 2009) <https://www.reuters.com/article/us-russia-ukraine-gas-timeline-sb-idUSTRE50A1A720090111> last accessed 22 February 2023.
[238] D Koranyi, 'Transatlantic energy security and the Ukraine-crisis: A blessing in disguise?' (*NATO Review* 9 May 2014) <https://www.nato.int/docu/review/articles/2014/05/09/transatlantic-energy-security-and-the-ukraine-crisis-a-blessing-in-disguise/index.html> last accessed 22 February 2023.
[239] The Energy Security Package consists of: European Parliament and Council Regulation (EU) 2017/1938 of 25 October 2017 Concerning Measures to Safeguard the Security of Gas Supply and Repealing Regulation (EU) No 994/2010 [2017] OJ L280/1; European Parliament and Council Decision (EU) 2017/684 of 5 April 2017 on Establishing an Information Exchange Mechanism with regard to Intergovernmental Agreements and Non-Binding Instruments between Member States and Third Countries in the Field of Energy, and Repealing Decision No 994/2012/EU [2017] OJ L99/1; European Commission, Communication from the Commission 'on an EU Strategy for Liquefied Natural Gas and Gas Storage', COM(2016)49, 16 February 2016; European Commission, Communication from the Commission 'An EU Strategy on Heating and Cooling', COM(2016)51, 16 February 2016.
[240] European Commission, 'The Commission presents sustainable energy security package' (16 February 2016) Press Release AC/16/2094.
[241] ibid.
[242] NA Georgiou and A Rocco, 'The Energy Union as an Instrument of Global Governance in EU-Russia Energy Relations: from Fragmentation to Coherence and Solidarity' (2017) 9(1) Geopolitics, History, and Intl Relations 241, 251.

countries.[243] The ultimate objective of the Energy Union has been to transform the EU energy system, comprising 28 (now 27) national regulatory frameworks, into a single EU-level framework.[244]

It might be relevant mentioning data concerning the origin of energy supply, to fully comprehend why an EU-wide approach is needed and why this dimension has been placed as the first of the Energy Union. Indeed, in 2020, the EU imported 58% of the energy it consumed,[245] and petroleum products was the main imported energy product (around 68% of energy imports into the EU), followed by natural gas and solid fossil fuels.[246] Russia is the country from where the EU imports most of these energy products,[247] and this is the most pressing energy security of supply issue. This concern unfortunately has turned into reality after Russia's invasion of Ukraine, moment from which most Member States had to diversify their energy – in particular gas – supply.[248]

Finally, more transparency on gas supply is required to ensure energy – and in particular gas – security. This entails an exchange of information between Member States and the Commission in relation to the conclusion of intergovernmental agreements concerning the purchase of energy or the construction of energy infrastructures.[249]

1.1.2.2. A Fully Integrated European Energy Market

This dimension of the Energy Union requires improved infrastructure, particularly cross-border connections and interconnections to improve security of supply and better connect energy markets.[250] In this regard, it should be recalled that the EU has established a specific minimum interconnection target for electricity, to be achieved by 2020, set at 10% of the installed electricity generation

[243] ibid, at 250.
[244] V Lehotay, 'Road to the European Energy Union: Energy, Energy Policy, Energy Law in the European Union' (2020) 15(28) J Agricultural and Environmental L 260, 269.
[245] Eurostat, 'Shedding light on energy in the EU 2022: Interactive Edition' (April 2022), at 5 <https://ec.europa.eu/eurostat/cache/infographs/energy/img/pdf/shedding-light-in-the-EU-2022_en.pdf?lang=en> last accessed 3 March 2023.
[246] ibid, at 7.
[247] ibid.
[248] This issue will be further addressed *infra* in Chapter IV.
[249] Decision (EU) 2017/684 (n 239).
[250] Strategy for a Resilient Energy Union (n 223), at 7 and 8.

capacity of Member States,[251] currently increased at 15% to be reached by 2030.[252] In other words, the mentioned percentages of electricity must be able to cross borders. To make this happen, the Commission has projected that it will be necessary to invest around EUR 200 billion a year for the next ten years in large infrastructure projects.[253] It will then be necessary to ensure the full implementation of existing legislation, in particular the so-called Third Energy Package,[254] and to pay targeted attention to consumers, who should in the future be able to enjoy greater choice by purchasing energy also from companies based in other Member States.[255]

Work on infrastructure projects has accelerated in the past decade. Every two years since 2013, the Commission draws up a new list of Projects of Common Interest ("PCIs"). These are key cross border infrastructure projects that link the energy systems of EU countries. The Commission submits the list of projects to the

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[251] European Commission, Communication from the Commission 'Achieving the 10% electricity interconnection target Making Europe's electricity grid fit for 2020', COM(2015)82, 25 February 2015.

[252] European Parliament and Council Regulation (EU) 2018/1999 of 11 December 2018 on the Governance of the Energy Union and Climate Action, Amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and Repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council [2018] OJ L328/1(Governance Regulation).

[253] European Commission, Communication from the Commission 'An Investment Plan for Europe', COM(2014)903, 26 November 2014.

[254] The Third Energy Package is a legislative package for an internal gas and electricity market in the EU. Only the gas part of this package (from 2009) is still in force, while the current electricity market rules were adopted as part of the Clean energy for all Europeans package in 2019. The Third Energy Package consist of two Directives and three Regulations: Directive 2009/72/EC repealed by European Parliament and Council Directive (EU) 2019/944 of 5 June 2019 on Common Rules for the Internal Market for Electricity and Amending Directive 2012/27/EU [2019] OJ L158/125 (Electricity Directive); European Parliament and Council Directive 2009/73/EC of 13 July 2009 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 2003/55/EC [2009] OJ L211/94; Regulation (EC) No 714/2009 repealed by European Parliament and Council Regulation (EU) 2019/943 of 5 June 2019 on the Internal Market for Electricity [2019] OJ L158/54 (Electricity Regulation); European Parliament and Council Regulation (EC) No 715/2009 of 13 July 2009 on Conditions for Access to the Natural Gas Transmission Networks and Repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36; Regulation (EC) No 713/2009 repealed by European Parliament and Council Regulation (EU) 2019/942 of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators [2019] OJ L158/22 (ACER Regulation).

[255] XVII Legislatura, Dossier europeo No. 13/DE 'Audizione del Vicepresidente della Commissione europea e Commissario europeo per l'Unione dell'energia Maroš Šefčovič' (2015) 12.

European Parliament and to the Council which have the power to oppose the list.[256] On 19 November 2021, the Commission adopted the fifth PCI list which entered into force in April 2022. The list identified 98 projects: 67 electricity transmission and storage, 5 smart grid deployment, 20 gas, and 6 cross-border carbon dioxide network projects.[257]

1.1.2.3. Energy Efficiency Contributing to Moderation of Demand

Improved energy efficiency will reduce dependence on energy imports, decrease emissions, preserve domestic energy sources and drive jobs and growth. Increased energy efficiency should be considered an energy source in its own right.[258] However, the definition itself of energy efficiency might be a complex one given the conceptual ambiguity in the literature. Energy efficiency can be understood as a ratio of energy input, such as kWh of electricity, to the output of useful energy services, like lighting or heating. Therefore, the aim of improving energy efficiency implies using less energy for the same level of output, thus resulting in energy savings.[259]

The Commission set forth a 2020 target on energy efficiency of 20% which was then amended to a 2030 target of 32,5%.[260] These ambitious targets reflect EU's commitment to use energy more efficiently in order to reach various objectives: contribution to environmental protection and mitigation of climate change; enhancement of citizens' quality of life; reduction of consumers' energy bills; decrease in EU's reliance on third oil and gas suppliers; and promotion of EU economy's long-term growth.[261] These goals, however, require improvements

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[256] European Commission, 'Key cross border infrastructure projects' <https://energy.ec.europa.eu/topics/infrastructure/projects-common-interest/key-cross-border-infrastructure-projects_en> last accessed 26 February 2023.

[257] Commission Delegated Regulation (EU) 2022/564 of 19 November 2021 Amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union List of Projects of Common Interest [2022] OJ L109/14 (Fifth list of PCIs).

[258] Austvik (n 235), at 377.

[259] T Dunlop and T Völker, 'The politics of measurement and the case of energy efficiency policy in the European Union' (2023) 96(5) Energy Research & Social Science 1, 2.

[260] European Parliament and Council Directive (EU) 2018/2002 of 11 December 2018 Amending Directive 2012/27/EU on Energy Efficiency [2018] OJ L328/210 (Energy Efficiency Directive), art 1.

[261] European Commission, 'Energy efficiency targets' <https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficiency-targets-directive-and-rules/energy-efficiency-targets_en#:~:text=The%202030%20targets,-

throughout the entire energy chain, from production to final consumption. The Commission has the duty of creating the framework for progress in this direction, but it will be only through national, regional and local initiatives in giving energy efficiency primary consideration that a real change can be achieved.[262]

As mentioned above,[263] an important sector which requires a more efficient consumption of energy is that of buildings. Indeed, heating and cooling is the largest source of energy demand in Europe and the majority of EU's gas imports is used for these purposes.[264] Large investments are needed, and EU funds and European Investment Bank's intervention would make a great difference. Similarly, the Energy Union strategy urges an intervention in the transport sector through measures aimed at reducing CO_2 emissions by improving vehicles efficiency, increasing the use of alternative fuels, bettering road infrastructure, and encouraging public procurement of clean vehicles.[265]

1.1.2.4. Decarbonisation of the Economy

The fourth dimension of the Energy Union aims at defining an EU's ambitious climate policy and to establish EU's leadership in the area of renewable energy. As to the former objective, the 2030 climate and energy framework agreement established a binding target for the EU to reduce domestic greenhouse gas emissions by at least 40% by 2030 compared to 1990 levels.[266] This objective reflects international efforts for climate change, materialised in the conclusion of the Paris Agreement in late 2015.[267]

According to the Energy Union strategy, the cornerstone of Europe's climate policy is a well-functioning EU Emissions Trading System ("EU ETS").[268] The EU ETS, set up in 2005, is the world's first international Emissions Trading System.[269]

In%20December%202018&text=Above%20all%2C%20it%20established%20a,possible%20upwards%20revision%20by%202023.> last accessed 26 February 2023.

262 Strategy for a Resilient Energy Union (n 223), at 12.

263 *See supra* Chapter II, section 1.1.1.

264 Strategy for a Resilient Energy Union (n 223), at 12.

265 Georgiou (n 242), at 252.

266 European Council, 'Conclusions – 23/24 October 2014', EUCO 169/14, 24 October 2014, at 1.

267 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS.

268 Strategy for a Resilient Energy Union (n 223), at 14.

269 European Parliament and Council Directive 2003/87/EC of 13 October 2003 Establishing a System for Greenhouse Gas Emission Allowance Trading within the Union and Amending Council Directive 96/61/EC [2003] OJ L275/32 (ETS Directive).

The EU ETS will deliver a meaningful price on carbon emissions and drive cost-effective greenhouse gas emission reductions as a result of the Market Stability Reserve and the steps required to satisfy the greater ambition specified in the 2030 framework.[270] According to the Commission, the EU ETS is expected to realise its potential as a technology-neutral, cost-effective, and EU-wide driver of low-carbon investments. Indeed, by setting prices at EU level, it can strengthen the functioning of the internal energy market and encourage the adoption of renewables and other low-carbon and energy-efficient technologies.[271] So far, the EU ETS has succeeded in promoting cost-effective emissions reductions: between 2005 and 2019, ETS-covered installations lowered emissions by around 35%.[272]

The EU ETS covers only specific sectors and gases on the basis of emissions which can be accurately measured, reported and verified, such as CO_2 from electricity and heat generation, commercial aviation or energy-intensive industry sectors.[273]

The second objective of this fourth dimension of the Energy Union is making the EU the world leader in renewable energy, through the development of cutting-edge and competitive renewable energies.[274] In this sense, after a figure of 27% was agreed by EU leaders in 2014, the EU has set a new binding renewable energy target for 2030 of at least 32%.[275] In order to meet the higher climate ambitions translated into the European Green Deal,[276] further revisions of the Renewable Energy Directive are needed. For this reason, in 2021, the Commission presented the EU's new 2030 climate targets, seeking to increase the current target to at least 40%,[277]

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[270] E Brosset and S Maljean-Dubois, 'The Paris Agreement, EU Climate Law and the Energy Union' in M Peeters and M Eliantonio (eds.) *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Cheltenham 2020) 412, 420.

[271] Strategy for a Resilient Energy Union (n 223), at 14.

[272] European Commission, 'EU Emissions Trading System (EU ETS)' <https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en> last accessed 28 February 2023.

[273] ETS Directive (n 269), Annex I.

[274] Georgiou (n 242), at 253.

[275] European Parliament and Council Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L328/82 (Renewable Energy Directive), art 3.

[276] For a detailed analysis of the European Green Deal *see infra* Chapter II, section 2.1.

[277] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the Promotion of Energy from Renewable Sources, and repealing Council Directive (EU) 2015/652, COM(2021)557, 14 July 2021.

and, in 2022, it further proposed to increase the target at 45% as part of the REPowerEU Plan.[278] Therefore, to maintain the technical and economic leadership while still meeting climate change goals, the EU must invest in sophisticated, sustainable alternative fuels, including biofuel production methods, as well as in the bio-economy in general.[279]

1.1.2.5. Research, Innovation and Competitiveness

The goal of the fifth dimension of the Energy Union is to encourage breakthroughs in low-carbon and clean energy technologies. Research and innovation can, indeed, lead the energy transition and improve competitiveness.[280]

Another positive aspect is that there would be higher chances for growth and employment after a transition to a low-carbon economy driven by innovation. There will be an emergence of new business sectors, company models, and employment profiles. Therefore, technological leadership will require a consequent growth of industrial production capacities or the development of technology supply chains across Europe. This calls for the collaboration of the public sector, industry, finance, and research.[281]

This dimension of the Energy Union is built around four key priorities: (*i*) acquiring the leadership in the development of the next generation of renewable energy technologies, including energy storage and environmentally friendly methods of producing and using biomass and biofuels; (*ii*) increased participation and involvement of consumers in the energy transition through, for example, smart grids, smart cities, home automation systems and smart home appliances; (*iii*) providing efficient energy systems, and making the building stock energy neutral through the employment of technology; and (*iv*) incentivising sustainable transport systems that develop and deploy at large scale innovative technologies and services to increase energy efficiency and reduce greenhouse gas emissions.[282]

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[278] European Commission, Communication from the Commission 'REPowerEU Plan', COM(2022)230, 18 May 2022, at 10.
[279] Strategy for a Resilient Energy Union (n 223), at 15.
[280] European Commission, 'Energy union' <https://energy.ec.europa.eu/topics/energy-strategy/energy-union_en> last accessed 28 February 2023.
[281] Georgiou (n 242), at 253.
[282] Strategy for a Resilient Energy Union (n 223), at 16.

As a conclusion of the five-dimensions analysis, it can be deduced that dimensions (*ii*) to (*v*) of the Energy Union strategy ultimately improve the security of supply element (i.e., dimension (*i*)). However, while the realisation of an single market, focused on the improvement of energy efficiency and on the diffusion of sustainable energy, implicitly increases the security of the energy supply, it is not the same the other way around.[283] Therefore, in the reciprocal relations with the other four dimensions, security of supply is an objective, not a mean.[284] "Completion of the internal energy market is a pre-requisite to achieve, in the most cost-effective way, the main objectives of the EU energy policy: sustainability, competitiveness and security of energy supply"[285] – the Council of the EU held – as confirmation of the deduction that the security of supply is an objective and not a mean, and as further testimony of the involvement of all European institutions in the realisation of the Energy Union.

1.2. Clean Energy for All Europeans Package

1.2.1. Introductory Remarks and Packaging Strategy

As announced in the Energy Union strategy, the Commission published the "Clean Energy for all Europeans" proposal on 30 November 2016, with the aim of granting consumers secure, sustainable, competitive and affordable energy.[286] Based on such proposal, in 2019 the Commission took a step forward in its energy policy framework to help the EU achieve its commitments – in particular those coming from the Paris Agreement – related to cleaner energy and to the reduction of greenhouse gas emissions.[287] Indeed, the Commission came up with the Clean energy for all Europeans package, a new energy rulebook[288] consisting of eight

[283] Georgiou (n 242), at 253.
[284] ibid.
[285] Council of the European Union, 'Annex: Draft Council Conclusions on the Completion of the Internal Energy Market', 16037/14 ENER483, 26 November 2014, at 4.
[286] European Commission, Communication from the Commission 'Clean Energy For All Europeans', COM(2016)860, 30 November 2016; European Parliament, 'Internal Energy Market' (2022) Fact Sheets on the European Union, at 2.
[287] Lehotay (n 244); European Commission, 'Clean energy for all Europeans package' <https://energy.ec.europa.eu/topics/energy-strategy/clean-energy-all-europeans-package_en> last accessed 10 March 2023.
[288] Directorate-General for Energy, 'Clean energy for all Europeans' (Publications Office of the European Union Luxembourg 2019).

legislative measures which, by defining the parameters for the coming years, marks a significant step towards the implementation of the 2015 Energy Union strategy.[289]

The Commission made a strategic decision of combining different and complex measures into a single package. Policy packaging is a deliberate strategy to "exploit synergistic relationships between multiple policy instruments" and "promote enhanced policy integration".[290] For this reason, these "package deals" have a long history in pushing forward EU energy and climate integration.[291]

Despite being an ambitious and unprecedented endeavour both for the EU and the national jurisdictions, the policy package was envisaged feasible from both an economic and technical point of view.[292]

1.2.2. The Legislative Measures

The eight main legislative measures of the Clean Energy for all Europeans package are the following: (*i*) Energy Performance of Buildings Directive;[293] (*ii*) Renewable Energy Directive;[294] (*iii*) Energy Efficiency Directive;[295] (*iv*) Governance of the Energy Union and Climate Action Regulation;[296] (*v*) Electricity Regulation;[297] (*vi*) Electricity Directive;[298] (*vii*) Regulation on Risk-Preparedness in the Electricity Sector;[299] and (*viii*) Regulation on the European Union Agency

[289] AZ Morch and others, 'Implementing the Clean Energy Package: Best Practices in Overcoming Barriers' (2021) CIRED 2021 Conference 1, 1.
[290] M Howlett and J Rayner, 'Patching vs Packaging in Policy Formulation: Complementary Effects, Goodness of Fit, Degrees of Freedom, and Feasibility in Policy Portfolio Design' (2013) 1(1) Annual Review of Policy Design 1, 13.
[291] FW Scharpf, 'The joint-decision trap: lessons from German federalism and European integration' (1988) 66(3) Public Administration 239, 264.
[292] P Capros and others, 'Outlook of the EU energy system up to 2050: The case of scenarios prepared for European Commission's "clean energy for all Europeans" package using the PRIMES model' (2018) 22 Energy Strategy Revs 255, 263.
[293] European Parliament and Council Directive (EU) 2018/844 of 30 May 2018 Amending Directive 2010/31/EU on the Energy Performance of Buildings and Directive 2012/27/EU on Energy Efficiency [2018] OJ L156/75 (Energy Performance of Buildings Directive).
[294] Renewable Energy Directive (n 275).
[295] Energy Efficiency Directive (n 260).
[296] Governance Regulation (n 252).
[297] Electricity Regulation (n 254).
[298] Electricity Directive (n 254).
[299] European Parliament and Council Regulation (EU) 2019/941 of 5 June 2019 on Risk-Preparedness in the Electricity Sector and Repealing Directive 2005/89/EC [2019] OJ L158/1 (Risk-Preparedness Regulation).

for the Cooperation of Energy Regulators ("ACER").[300] To better understand the relevance of this package, a brief overview of each measure is needed.

(*i*) *Energy Performance of Buildings Directive*

The Energy Performance of Buildings Directive intends to achieve a highly energy efficient and decarbonised building stock by 2050, as well as to ensure stable investment conditions to encourage building renovation investments. The Directive supports the installation of automation and control systems in buildings to improve efficiency, as well as the installation of charging stations for electric cars.[301] Buildings are the single largest energy consumer in Europe: they consume around 40% of energy and are responsible for 36% of CO_2 emissions in the EU. This Directive aims at helping the EU to achieve in a faster way its energy and climate goals by making buildings more energy efficient.[302]

(*ii*) *Renewable Energy Directive*

Given the EU's intent of becoming the global leader on renewables, the Renewable Energy Directive imposes an ambitious and binding target of 32% for renewable energy sources to be reached by 2030.[303] As mentioned before, however, as a confirmation of the importance of the matter,[304] in 2021 the Commission proposed a revision of the Directive with an increased 40% target and, in its 2022 REPowerEU plan Communication, the Commission again proposed to further increase this target to 45% by 2030.[305] The new Directive also updates the targets for the use of renewable energy in the heating and cooling as well as in the transport sector. Additionally, given that one of the Clean Energy package's main goals is to place consumers at the centre of the energy transition, the new Directive grants

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[300] ACER Regulation (n 254).
[301] Bird & Bird, 'Clean energy for all Europeans - An overview' (22 August 2019) <https://www.twobirds.com/en/insights/2019/global/clean-energy-for-all-europeans---an-overview> last accessed 5 March 2023.
[302] Clean energy for all Europeans package (n 287).
[303] European Commission, 'Renewable energy directive' <https://energy.ec.europa.eu/topics/renewable-energy/renewable-energy-directive-targets-and-rules/renewable-energy-directive_en> last accessed 8 March 2023.
[304] M Dekanozishvili *Dynamics of EU Renewable Energy Policy Integration* (Palgrave Macmillan Switzerland 2023) 7.
[305] *See supra* Chapter II, section 1.1.2.4.

citizens who create their own renewable energy a right to use, store, or sell the energy they produce, including through PPAs.[306] Moreover, involvement in the so-called "renewable energy communities" is permitted under the Directive. These communities are self-governing legal companies founded on open and voluntary participation, with the goal of giving environmental, economic, or social community benefits to its shareholders or members rather than financial profits.[307]

(*iii*) *Energy Efficiency Directive*

Since energy savings can be considered the easiest way of reducing greenhouse emissions as well as of saving consumers money, it can be soon understood why energy efficiency is one of the key objectives of the package. This reflects the concerns of the Commission which included the improvement of energy efficiency as the third dimension of the Energy Union. The revised Energy Efficiency Directive has therefore set binding targets of increasing energy efficiency over current levels by at least 32.5% by 2030.[308] One additional concern of the Directive is to ensure more transparency for consumers in particular on the allocation of costs of heating, cooling and hot water consumption.[309] Finally, it needs to be mentioned that in 2021 the Commission already put forward a proposal for a recast directive on energy efficiency,[310] and, even more recently, the Commission has reached a provisional agreement with the European Parliament and the Council to reform the Directive.[311]

(*iv*) *Governance of the Energy Union and Climate Action Regulation*

The Governance Regulation can be considered a product of the Energy Union as

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306 J Lowitzsch, CE Hoicka and FJ van Tulder, 'Renewable energy communities under the 2019 European Clean Energy Package – Governance model for the energy clusters of the future?' (2020) 122 Renewable and Sustainable Energy Revs 1, 2.
307 Bird & Bird (n 301).
308 European Commission, 'Energy efficiency directive' <https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficiency-targets-directive-and-rules/energy-efficiency-directive_en> last accessed 8 March 2023.
309 Energy Efficiency Directive (n 260).
310 European Commission, Proposal for a Directive of the European Parliament and of the Council on Energy Efficiency, COM(2021)558, 14 July 2021.
311 European Commission, 'European Green Deal: EU agrees stronger rules to boost energy efficiency' (10 March 2023) Press Release IP/23/1581 (Energy Efficiency Press Release).

it integrates climate and energy policy while emphasising transition quality.[312] Under this strategy, each Member State is required to establish 10-year national energy and climate plans ("NECPs") for 2021-30. This governance mechanism, indeed, takes into account that each Member State can contribute to the goals of the Energy Union in different ways.[313] The NECPs outline how Member States will meet their specific commitment across all five components of the Energy Union, including a longer-term view for 2050.[314]

Another important objective of the Governance Regulation is to encourage cooperation between all the actors involved in EU's energy and climate policy, namely the Member States, the Commission, the European Environment Agency,[315] the Climate Change Committee[316] and the Energy Union Committee.[317]

(*v*) *Electricity Regulation*

The Electricity Regulation is the first element of the new electricity market design. The recast Electricity Regulation establishes broad principles for the functioning of the electricity market, such as market-based prices, more flexibility, customer involvement and cross-border electricity flows.[318] The Regulation establishes that generally all market participants are responsible for imbalances in the system and that dispatching priority is given to renewable energy sources and high-efficiency cogeneration facilities. Finally, it sets out new rules on capacity mechanisms[319] to ensure resource adequacy by remunerating resources for their availability.

Capacity mechanisms must be considered by Member States only as last resort measures when eliminating regulatory distortions and price caps, enabling scarcity

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312 Q Genard, 'Proper Energy Union Governance is essential to delivering the EU's Paris Agreement promises' (14 June 2017) Euractiv <https://www.euractiv.com/section/energy/opinion/proper-energy-union-governance-is-essential-to-delivering-the-eus-paris-agreement-promises/> last accessed 6 March 2023.

313 Energy union (n 280).

314 Bird & Bird (n 301).

315 The European Environment Agency ("EEA") is an agency of the EU, *see* <https://www.eea.europa.eu/> last accessed 8 March 2023.

316 Governance Regulation (n 252), art 44(1)(a).

317 ibid, art 44(1)(b).

318 Bird & Bird (n 301).

319 Capacity mechanisms are temporary support measures that EU countries can introduce to remunerate power plants for medium and long-term security of electricity supply.

pricing, energy storage or demand side measures. Before introducing a capacity mechanism, Member States also have to consult with directly interconnected Member States, and, when introduced, these mechanisms shall be temporary, non-distortive, non-discriminatory and open to all types of resources, including storage and demand side management.[320]

(*vi*) *Electricity Directive*

The recast Electricity Directive, the second element of the new electricity market design, aims at completing the internal electricity market and to address new market challenges. To facilitate the completion of the internal electricity market and thus to benefit from cross-border trade and competition, Member States must remove barriers to cross-border electricity trade and consumer participation as well as to allow electricity to move freely to where it is most needed.[321] In order to achieve integration in the electricity market, Member States have to focus on improved investments in low-carbon technologies and flexible solutions, and more specific market-based governmental support.[322]

Prices will be set on market-based criteria, and Member States shall facilitate flexibility and ensure third-party access in a non-discriminatory manner. The empowerment of consumers to actively engage in the market, either directly or through aggregation, is a critical component of the new electricity market design. Consequently, Member States need to put in place measures to this end, such as the possibility of establishing the so-called "citizen energy communities" based on open and voluntary participation.[323]

(*vii*) *Regulation on Risk-Preparedness in the Electricity Sector*

The Risk-Preparedness Regulation compels Member States to set up strategies to cope with potential future electricity crises, at national and regional levels, and to put in place the proper measures to prevent, prepare for and manage these

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[320] European Commission, 'Electricity market design' <https://energy.ec.europa.eu/topics/markets-and-consumers/market-legislation/electricity-market-design_en> last accessed 7 March 2023.
[321] Electricity Directive (n 254), art 3.
[322] G Fulli and others, 'A Change is Coming: How Regulation and Innovation Are Reshaping the European Union's Electricity Markets' (2019) 17(1) IEEE Power and Energy Magazine 53, 58.
[323] Electricity Directive (n 254), art 16.

situations.[324] The preparation of this risk-preparedness plans requires Member States to cooperate with neighbouring States in a spirit of solidarity. Should an electricity crisis occur, Member States must notify the Commission and the competent authority of the neighbouring Member States.

Additionally, the Regulation also intends to establish an effective monitoring system for the EU's security of supply via the Electricity Coordination Group.[325]

Finally, it is worth mentioning that this Regulation came as a result of an independent report from May 2015,[326] which highlighted previous experience showing that Member State responses to potential crises tended to focus on the national context only, ignoring cross-border effects and thereby occasionally even exacerbating the issues, undermining the operation of the market and increasing energy prices.[327]

(*viii*) *ACER Regulation*

ACER's initial responsibility only included coordination, advising and monitoring.[328] With the new electricity market design of the Clean Energy package and the subsequent increase in cross-border cooperation, ACER has been given additional competences in the areas where uncoordinated national decisions with cross-border implications could affect the operation of the internal electricity market.[329]

1.2.3. The Two Parts of the Package

The eight legislative measures just described can be grouped into two categories. On the one hand, the Energy and Climate Governance ("ECG") measures consist of the Energy Performance of Buildings Directive, the Renewable Energy

[324] Risk-Preparedness Regulation (n 299), art 1.
[325] The Electricity Coordination Group is a forum for the exchange of information and coordination of electricity policy measures having a cross-border impact. It also shares experiences, best practices and expertise on security of supply in electricity, including risk-preparedness, generation adequacy and cross-border grid stability, and assists the Commission in designing its policy initiatives.
[326] Directorate-General for Mobility and Transport, Spark Legal Network and VVA Europe, 'Review of current national rules and practices relating to risk preparedness in the area of security of electricity supply: final report' (Publications Office of the European Union Luxembourg 2016).
[327] Electricity market design (n 320).
[328] Bird & Bird (n 301).
[329] ACER Regulation (n 254), arts. 3-12.

Directive, the Energy Efficiency Directive, and the Governance Regulation. These have been adopted in late 2018. On the other hand, the New Electricity Market Design ("NEMD"), which constitutes legislation in force since 2019, is made up of the Electricity Directive, the Electricity Regulation, the Risk-Preparedness Regulation and the ACER Regulation. It might be worth recalling some of the differences between the two categories. First, there has been a different degree of involvement of EU institutions in the negotiations: while for the ECG measures EU's supranational bodies played a significant role, the outcome of the NEMD files' negotiations was largely determined by compromises reached between Member States. Second, the ECG files advocate for a new type of supranational authority, while the NEMD does not seem to be aiming at bringing about more integration and liberalisation, mainly due to Member State's protectionist attitudes for their domestic energy markets. Finally, the extent of participation of non-state actors varied between the two sets of legislative files. Environmental non-governmental organizations were naturally more interested in the ECG files, whilst energy businesses and industrial groups concentrated their lobbying efforts on the NEMD files.[330]

2. The Green Deal and the European Climate Law

On 11 December 2019, the Commission introduced the European Green Deal, a set of policy initiatives with the objective of making Europe the first climate-neutral continent by 2050. To make these objectives legally binding, the European Climate Law was then passed to turn into binding legislation the EU's pledge to climate neutrality and the intermediate aim of reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. During the shift to a net-zero economy, Europe's competitiveness will be heavily dependent on its ability to create and produce the eco-friendly technologies required for this transformation.

[330] M Cătuți, 'The Governance of EU Energy and Climate Policy in the New Intergovernmentalism Era: Lessons from the Clean Energy for all Europeans Package' (2022) PhD Thesis University of York 1, 102-106.

After analysing the EU's approach towards the implementation of an Energy Union, also by means of a transition to climate neutrality through policies like the European Green Deal, the focus will shift on the main topic of this chapter, namely the role played by State aids in the achievement of these objectives.[331]

2.1. European Green Deal

Europe and the world face an existential danger from climate change and environmental damage.[332] The European Green Deal[333] aims to address these challenges by converting the EU into a modern, resource-efficient, and competitive economy that achieves zero greenhouse gas emissions by 2050, that promotes economic growth without consuming more resources, and that guarantees that no individual or area is excluded or left behind.[334] It further promises to safeguard individuals from environmental harms and impacts while ensuring fairness and inclusivity.[335]

To understand the role that the energy sector plays in the environmental transition, it must be highlighted that more than 75% of the EU's greenhouse gas emissions come from energy production and usage, making it crucial to decarbonise the EU's energy system in order to achieve the 2030 climate goals and reach carbon neutrality by 2050.[336] The European Green Deal emphasises three key principles for transitioning to clean energy, which will decrease greenhouse gas emissions and improve the quality of life for citizens: (*i*) ensuring secure and affordable energy supplies; (*ii*) establishing an integrated, interconnected, and digitalised EU energy market; and (*iii*) prioritising energy efficiency, developing renewable power

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[331] *See infra* Chapter II, section 3.
[332] E Chiti, 'Managing the Ecological Transition of the EU: the European Green Deal as a Regulatory Process' (2022) 59 Common Market L Rev 19, 21.
[333] European Commission, Communication from the Commission 'The European Green Deal', COM(2019)640, 11 December 2019 (The European Green Deal).
[334] E Eckert and O Kovalevska, 'Sustainability in the European Union: Analyzing the Discourse of the European Green Deal' (2021) 14(2) J Risk Financial Management 1, 5; European Commission, 'A European Green Deal: Striving to be the first climate-neutral continent' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en> last accessed 30 March 2023.
[335] C Fetting, 'The European Green Deal' (2020) ESDN Report 1, 5.
[336] European Commission, 'Energy and the Green Deal' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/energy-and-green-deal_en> last accessed 30 March 2023.

sources, and improving building energy performance.[337] The Commission aims to achieve these goals by building integrated and interconnected energy systems, promoting innovation and modern infrastructure, improving energy efficiency and eco-design. At the same time this strategy includes decarbonising the gas sector, empowering consumers, promoting EU energy standards and technologies globally, and developing Europe's offshore wind energy.[338]

While a detailed analysis of the role of State aids in the implementation of the Green Deal will be later conducted when assessing the 2022 Guidelines on State aid for climate, environmental protection and energy,[339] the following sections will go through the various objectives and aspects of the Green Deal.

2.1.1. Clean, Affordable and Secure Energy

To meet climate targets in 2030 and 2050, it is crucial to continue reducing carbon emissions in the energy sector. As previously stated, over 75% of the EU's greenhouse gas emissions come from the production and use of energy in different economic sectors. It is important to prioritise energy efficiency by developing a power sector that primarily uses renewable sources while phasing out coal and decarbonising gas.[340] At the same time, it is equally necessary to ensure that the EU's energy supply remains affordable and secure for consumers and businesses. The achievement of these goals requires a fully integrated, interconnected, and digitalised European energy market, while maintaining technological neutrality.[341]

It is paramount to remember that the transition towards cleaner energy should involve and benefit consumers. In this regard, renewable energy sources as well as an increasing offshore wind production are crucial objectives to be achieved by encouraging regional cooperation between Member States. To accomplish

[337] R Rybski, 'Energy in the European Green Deal: impacts and recommendations for MENA countries' (2022) J World Energy L and Business 1, 4.
[338] A Sikora, 'European Green Deal – legal and financial challenges of the climate change' (2021) 21 ERA Forum 681, 683.
[339] *See infra* Chapter II, section 3.
[340] European Parliament, European Parliament Resolution of 15 January 2020 on the European Green Deal [2021] OJ C270/2 (European Green Deal Resolution), para 24.
[341] The European Green Deal (n 333), at 6.

decarbonisation at the lowest possible cost, sustainable solutions like energy efficiency and renewables must be integrated intelligently across sectors.[342]

Testifying to the ongoing commitment of the EU to improving the energy sector and in particular energy efficiency, the EU's institutions have recently agreed to reform and strengthen the Energy Efficiency Directive.[343] For the first time, the EU has given legal force to the energy efficiency first principle, requiring Member States to take energy efficiency into account when making policy, planning, and major investment decisions in the energy sector and beyond. The following are among the proposed novelties of the Directive. The agreement sets an EU energy efficiency target of 11.7% by 2030, alongside a nearly doubled annual energy savings obligation. The agreement also strengthens provisions on energy efficiency financing to facilitate the mobilisation of investments. In addition, the agreement requires Member States to prioritise energy efficiency improvement measures for those affected by energy poverty, for which a definition has been given for the first time, as well as for vulnerable customers, low-income households, and people living in social housing.

2.1.2. Mobilisation of Industry Towards a Clean and Circular Economy

Climate change has to be seen not only as the biggest challenge of the present time, but also as a great opportunity to build a new economic model. In this sense, by committing to turn the EU in the first climate-neutral continent, the Member States have agreed to create fresh prospects for innovation, investment, and employment while concurrently reducing emissions, addressing energy poverty, lessening reliance on foreign energy, and enhancing health and well-being.[344]

To attain a circular economy that is climate neutral, it is necessary to carry out a full mobilisation of industry. The EU's industry is currently overly reliant on a "linear" model that involves the extraction and trade of new materials, which are then processed into goods and which eventually end up as waste or emissions. It is

[342] European Commission, 'Delivering the European Green Deal' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en> last accessed 31 March 2023.
[343] Energy Efficiency Press Release (n 311).
[344] Delivering the European Green Deal (n 342).

sadly surprising that in 2021 only 12% of material resources used in the EU came from recycled waste materials.[345]

For this reason, the shift towards sustainability presents an opportunity to expand job-intensive economic activities. Low-carbon technologies, sustainable products, and services have a considerable potential in global markets. Similarly, the circular economy offers ample opportunities for new activities and employment. Unfortunately, however, the transformation is advancing slowly, with limited and uneven progress. In this context, the European Green Deal will offer support and guidance to expedite the EU's industrial transition towards an inclusive and sustainable model.[346]

For this reason, the Commission unveiled the new Circular Economy Action Plan in 2020,[347] which includes a range of measures spanning the entire life cycle of products. The plan aims to influence product design, promote circular economy processes, foster sustainable consumption, and minimise waste while keeping resources within the EU economy for as long as possible.[348] Although the plan provides guidance for all industries, it places greater emphasis on resource-intensive sectors, such as textiles, construction, electronics, and plastics.[349] The plan also incorporates initiatives to encourage businesses to offer and enable consumers to choose reusable, long-lasting, and repairable products.

Finally, Europe's ability to deliver the Green Deal also depends on the strategic security issue of resource accessibility. To make the transition possible, it is essential to guarantee a supply of sustainable raw materials, in particular of those required for clean technologies, digital, space, and defence applications.

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345 Eurostat, 'EU's circular material use rate decreased in 2021' (13 December 2022) <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20221213-1#:~:text=This%20means%20that%20almost%2012,rate%20published%20by%20Eurostat%20today.> last accessed 31 March 2023.

346 The European Green Deal (n 333), at 7.

347 European Commission, Communication from the Commission 'A new Circular Economy Action Plan: For a cleaner and more competitive Europe', COM(2020)98, 11 March 2020 (Circular Economy Action Plan).

348 European Commission, 'Circular economy action plan' <https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en> last accessed 30 March 2023.

349 European Green Deal Resolution (n 340), para 37.

Diversifying the sources of supply from both primary and secondary sources is therefore a prerequisite.[350]

It seems now worth mentioning the most recent evolution of this area of the Green Deal. Indeed, in February 2023, the Commission introduced a Green Deal Industrial Plan with the goal of improving the competitiveness of Europe's net-zero industry and of facilitating a rapid shift towards climate neutrality.[351] The plan seeks to create a more favourable environment for the expansion of the EU's manufacturing capability for net-zero technologies and products, which are necessary to achieve Europe's ambitious climate objectives. This plan, as part of the European Green Deal, will empower Europe to take the lead in the worldwide transition to a net-zero industrial era.[352] "The next decades will see the greatest industrial transformation of our times – maybe of any times" – says Commission President Ursula von der Leyen – and Member States must uniformly act to "secure the EU's industrial lead in the fast-growing net-zero technology sector".[353]

2.1.3. Renovation of Buildings

Significant amounts of energy and mineral resources are required for the construction, use, and renovation of buildings. There are two main concerns when it comes to renovating buildings: increasing the annual renovation rate of the building stock and, on the other hand, addressing energy poverty, which affects nearly 34 million Europeans who cannot afford to properly heat their homes.[354]

To tackle the challenges of energy efficiency and affordability, the Commission has published a strategy called "A Renovation Wave for Europe – Greening our buildings, creating jobs, improving lives".[355] While increasing renovation rates may be difficult, on the other hand it can lower energy bills and reduce energy poverty. The goal is to double annual energy renovation rates within the next decade, which

[350] The European Green Deal (n 333), at 8.
[351] European Commission, 'The Green Deal Industrial Plan: putting Europe's net-zero industry in the lead' (1 February 2023) Press Release IP/23/510.
[352] European Commission, Communication from the Commission 'A Green Deal Industrial Plan for the Net-Zero Age', COM(2023)62, 1 February 2023 (Green Deal Industrial Plan), at 3.
[353] U von der Leyen, 'Special Address by President von der Leyen at the World Economic Forum' (Davos, 17 January 2023) Speech SPEECH/23/232.
[354] The European Green Deal (n 333), at 9.
[355] European Commission, Communication from the Commission 'A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives', COM(2020)662, 14 October 2020.

will not only reduce emissions but also improve the quality of life for people using and living in the buildings as well as create more green jobs in the construction sector. The Renovation Wave focuses on three main areas: tackling energy poverty and poorly performing buildings, improving public buildings and social infrastructure, and decarbonising heating and cooling.[356]

The Commission is responsible for ensuring that new and renovated buildings are designed in a way that aligns with the circular economy and promotes increased digitalisation and climate resilience in the building stock.[357]

2.1.4. Greener Mobility

Clean, accessible and affordable transport must be available to everyone. As mentioned above,[358] the Commission has indeed proposed ambitious targets for a greener mobility which consist in a 55% reduction of emissions from cars by 2030; 50% reduction of emissions from vans by 2030; and a zeroing of emissions from new cars by 2035.

At the end of 2020, the Commission put forth a strategy for a sustainable and smart mobility,[359] which serves as the basis for transforming the transport system of the EU in a green and digital manner, as well as for making it more resilient to potential future crises.[360]

The Commission plans to make transport more sustainable by intervening in the various transport systems. In particular, it advocates for the expansion of the market for vehicles that produce low or zero emissions, especially by guaranteeing that people have access to the necessary infrastructure for charging such vehicles, whether for long or short journeys.[361]

Additionally, as concerns the aviation sector, the Commission proposes to apply carbon pricing to this sector, which had previously been exempted, and to promote

[356] European Commission, 'Renovation wave' <https://energy.ec.europa.eu/topics/energy-efficiency/energy-efficient-buildings/renovation-wave_en> last accessed 31 March 2023.
[357] European Green Deal Resolution (n 340), para 27.
[358] *See supra* Chapter II, section 1.1.1.
[359] European Commission, Communication from the Commission 'Sustainable and Smart Mobility Strategy – putting European transport on track for the future', COM(2020)789, 9 December 2020 (Sustainable and Smart Mobility Strategy).
[360] European Commission, 'Mobility Strategy' <https://transport.ec.europa.eu/transport-themes/mobility-strategy_en> last accessed 31 March 2023.
[361] Delivering the European Green Deal (n 342).

the use of sustainable aviation fuels, with an obligation for planes to employ blended fuels that are sustainable for all takeoffs from EU airports.[362]

Finally, to ensure all sectors contribute equitably to the efforts of decarbonising the economy, the Commission proposes to extend carbon pricing to the maritime sector and to establish targets for significant ports to provide vessels with onshore power, which will reduce the usage of polluting fuels that have negative effects on local air quality.[363]

2.1.5. Fair, Healthy and Environmentally Friendly Food System

European food must become the global standard for sustainability. Providing food for the fast-growing global population is challenging because current methods still result in air, water and soil pollution; contribute to the loss of biodiversity and climate change; and use excessive natural resources. Additionally, a significant portion of food is wasted.[364]

The "A Farm to Fork Strategy" aims to address these issues by making food systems fair, healthy, and eco-friendly.[365] It also presents new opportunities for the food value chain by utilising new technologies and scientific discoveries, and responding to increasing public demand for sustainable food. Furthermore, the strategy strives to significantly decrease the use and danger of chemical pesticides, fertilisers, and antibiotics. Finally, the strategy aims to achieve a circular economy by reducing the environmental impact of the food processing and retail sectors, through measures affecting transportation, storage, packaging, and food waste reduction.[366]

2.1.6. Preservation and Restoration of Ecosystems and Biodiversity

Restoring natural habitats and promoting biodiversity can quickly and inexpensively help in the absorption and storage of carbon. Ecosystems provide

[362] The European Green Deal (n 333), at 10 and 11.
[363] European Green Deal Resolution (n 340), para 43.
[364] European Commission, 'Farm to Fork strategy' <https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy_en> last accessed 31 March 2023.
[365] European Commission, Communication from the Commission 'A Farm to Fork Strategy: for a fair, healthy and environmentally-friendly food system', COM(2020)381, 20 May 2020.
[366] The European Green Deal (n 333), at 11 and 12.

vital services such as clean air, fresh water, food, and shelter, as well as help regulate the climate, mitigate natural disasters and diseases, and combat pests.[367]

For this reason, in order to protect nature and reverse ecosystem degradation, the Commission has proposed a far-reaching, comprehensive, and long-term plan known as "EU Biodiversity Strategy for 2030".[368] The plan aims to restore Europe's forests, wetlands, soils, and peatlands, thereby increasing CO_2 absorption and enhancing the environment's resilience to climate change. By sustainably managing these resources, the EU can improve living conditions, create sustainable energy resources, and provide quality jobs.[369]

The Commission looks with particular attention to forest ecosystems which are, indeed, under increasing vulnerability due to climate change. The EU must improve the quality and quantity of its forested areas,[370] and, to this end, European institutions have and are still acting to provide instruments and guidance for this crucial aspect in the fight against climate change.[371]

One last element to consider is that, as part of the Biodiversity Strategy, the Commission also proposed a new legal instrument to restore ecosystems, habitats, and species across the EU's land and sea areas which is known as "Nature Restoration Law".[372] The proposed legislation's goals include enabling the long-term and sustained recovery of biodiverse and resilient nature, contributing to the EU's climate mitigation and adaptation objectives, and fulfilling international commitments.[373]

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[367] ibid, at 13.
[368] European Commission, Communication from the Commission 'EU Biodiversity Strategy for 2030: Bringing nature back into our lives', COM(2020)380, 20 May 2020 (Biodiversity Strategy for 2030).
[369] Delivering the European Green Deal (n 342).
[370] The European Green Deal (n 333), at 13.
[371] European Commission, 'Commission Guidelines for Defining, Mapping, Monitoring and Strictly Protecting EU Primary and Old-Growth Forests', SWD(2023)62, 20 March 2023; European Commission, 'Guidelines on Biodiversity-Friendly Afforestation, Reforestation and Tree Planting', SWD(2023)61, 17 March 2023; European Parliament, European Parliament Resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing Nature Back into Our Lives [2022] OJ C67/25; European Commission, Communication from the Commission 'New EU Forest Strategy for 2030', COM(2021)572, 16 July 2021.
[372] European Commission, Proposal for a Regulation of the European Parliament and of the Council on Nature Restoration, COM(2022)304, 22 June 2022.
[373] European Commission, 'Nature restoration law' <https://environment.ec.europa.eu/topics/nature-and-biodiversity/nature-restoration-law_en> last accessed 31 March 2023.

2.1.7. A Zero Pollution Ambition

The harmful effects of pollution on both our health and the environment are significant. It is the leading environmental cause of multiple physical and mental diseases as well as of premature deaths. Additionally, pollution also contributes to the loss of biodiversity and reduces the ability of ecosystems to provide essential services such as carbon sequestration and decontamination.[374]

Creating a toxic-free environment requires a combination of measures to prevent pollution from being generated and then to remedy it in case it occurs. To protect ecosystems and citizens' health, the EU needs to monitor, report, prevent, and remedy pollution from air, water, soil, and consumer products more effectively. The zero pollution action plan for air, water, and soil, adopted by the Commission in 2021, aims to reduce pollution to levels that are no longer harmful to human health and to the environment, thereby creating a toxic-free environment.[375]

The EU is also concerned with industrial pollution: despite its paramount role in the economy, its negative environmental impacts cannot be neglected. Large industrial installations are responsible for a considerable proportion of total key atmospheric pollutant emissions. Indeed, they generate waste, consume vast amounts of energy, harm ecosystems, and affect water and soil.[376]

Finally, to ensure a toxic-free environment, the Commission also presented the EU's chemicals strategy for sustainability.[377] This strategy aims to better protect citizens and the environment against hazardous chemicals. It will also encourage innovation in the development of safe and sustainable alternatives, particularly given the expected doubling of global chemicals' production by 2030.[378]

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[374] European Commission, 'Zero pollution action plan' <https://environment.ec.europa.eu/strategy/zero-pollution-action-plan_en> last accessed 31 March 2023.

[375] European Commission, Communication from the Commission 'Pathway to a Healthy Planet for All - EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil'', COM(2021)400, 12 May 2021.

[376] European Commission, 'Industrial emissions and accidents' <https://environment.ec.europa.eu/topics/industrial-emissions-and-accidents_en> last accessed 31 March 2023.

[377] European Commission, Communication from the Commission 'Chemicals Strategy for Sustainability: Towards a Toxic-Free Environment', COM(2020)667, 14 October 2020.

[378] European Commission, 'Chemicals strategy' <https://environment.ec.europa.eu/strategy/chemicals-strategy_en> last accessed 31 March 2023.

2.2. European Climate Law

The European Climate Law, proposed by the Commission in March 2020 and later adopted by the European Parliament in April 2021, is an important legislative measure providing a well-defined and comprehensive framework for the EU to attain climate neutrality by 2050. In order to ensure that EU policies are consistent with this climate framework, the Commission also presented the "Fit for 55" package, a recent set of proposals aimed at revising and modernising EU legislation as well as at introducing new initiatives.

2.2.1. Framework for Achieving Climate Neutrality

The European Climate Law enshrines as a legal obligation the objective of the European Green Deal to make Europe's economy and society climate-neutral by 2050.[379] Indeed, it sets a legally binding target of net zero greenhouse gas emissions by 2050, in line with the Paris Agreement's long-term temperature goal.[380] The law also establishes an intermediate target of reducing by 2030 net greenhouse gas emissions by at least 55%, compared to 1990 levels.[381]

To track progress, the European Climate Law includes provisions to monitor both EU and national measures and to adjust actions accordingly. This will be done through existing systems such as the governance process for Member States' national energy and climate plans, regular reports by the European Environment Agency, and the latest scientific evidence on climate change and its impacts. The advancement will be assessed and examined every five years, in accordance with the global stocktake exercise under the Paris Agreement.[382]

A relevant aspect of the European Climate Law Regulation worth mentioning is that of granting significant authority to the Commission, empowering it to adopt legislative proposals and take necessary measures to modify the Regulation to accomplish the climate-neutrality goal.[383] For example, the Regulation requires the

[379] European Parliament and Council Regulation (EU) 2021/1119 of 30 June 2021 Establishing the Framework for Achieving Climate Neutrality and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 [2021] OJ L243/1 (European Climate Law).
[380] ibid, art 1.
[381] ibid, art 4.
[382] ibid, art 6 and 7.
[383] B Perez de las Heras, 'European Climate Law(s): Assessing the Legal Path to Climate Neutrality' (2021) 21(2) Romanian J European Affairs 19, 28-29.

establishment of another intermediate objective: an EU-wide climate target for 2040 has to be soon set through a Commission legislative proposal.[384]

Another interesting element to be examined is how the European Climate Law modifies the Governance Regulation[385] by inserting into the latter the climate neutrality objective as an additional foundation for reporting and evaluation.[386] Instead, the same does not apply to the 55% greenhouse gas emissions reduction target. Indeed, this objective is not inserted in the same manner as the general climate neutrality one because the Governance Regulation's definition of "the Union's 2030 targets for energy and climate" remains unchanged.[387]

In conclusion, to achieve climate neutrality by 2050, the EU will need to reduce emissions, invest in green technologies, and protect the natural environment. The law aims to ensure that all EU policies contribute to this goal, and that all sectors of the economy and society play their part. Both EU institutions and Member States are required to take the necessary actions to achieve this target, while also promoting fairness and solidarity among Member States.[388]

2.2.2. "Fit for 55" Package

In July 2021, the Commission proposed a comprehensive legislative package, "Fit for 55", with the goal of introducing policies to achieve the 55% binding target imposed by the European Climate Law,[389] having in mind the project designed by the European Green Deal to address the more general need for a transformational change across EU's economy, society and industry.

The Fit for 55 package confirms the EU's global leadership in the fight against climate change. It is the most comprehensive set of interconnected climate and energy proposals the Commission has ever presented, and it establishes the

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[384] European Climate Law (n 379), art 4(3).
[385] Governance Regulation (n 252).
[386] European Climate Law (n 379), art 13; S Schlacke and others, 'Implementing the EU Climate Law via the 'Fit for 55' package' (2022) 1 Oxford Open Energy 1, 3.
[387] Governance Regulation (n 252), art 2 No 11.
[388] European Commission, 'European Climate Law' <https://climate.ec.europa.eu/eu-action/european-green-deal/european-climate-law_en> last accessed 1 April 2023.
[389] K Bäckstrand, 'Towards a Climate-Neutral Union by 2050? The European Green Deal, Climate Law, and Green Recovery' in A Bakardjieva Engelbrekt and others (eds.) *Routes to a Resilient European Union: Interdisciplinary European Studies* (Palgrave Macmillan Cham Switzerland 2022), at 51.

groundwork for new employment opportunities and a robust and sustainable European economy in the future. The package sets forth the regulatory framework to achieve EU's targets in a fair, cost-efficient and competitive way.[390]

As to its content, the package reinforces eight existing legislative measures and introduces five novel initiatives, spanning various policy and economic sectors, such as climate, energy and fuels, transportation, buildings, land use, and forestry.[391] Among others, the package includes amendments to the ETS Directive;[392] the Energy Efficiency Directive;[393] the Renewable Energy Directive;[394] the Effort Sharing Regulation;[395] the Energy Tax Directive;[396] Regulation on Land Use, Land Use Change and Forestry.[397] On the other hand, just to mention some of the new initiatives: the new "Social Climate Fund" allocates specific funds to Member States for assisting European citizens who are either vulnerable to or greatly impacted by energy or mobility poverty;[398] the new "Carbon Border Adjustment Mechanism" sets a price on imports of specific high-polluting goods based on their carbon content;[399] the "Alternative Fuels Infrastructure Regulation" is introduced to ensure the adequate establishment of interoperable and user-friendly infrastructure for recharging and refuelling green vehicles throughout the EU.[400]

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[390] European Commission, Communication from the Commission ''Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality', COM(2021)550, 14 July 2021 (Fit for 55 Communication) at 1 and 2.
[391] ibid, at 3.
[392] ETS Directive (n 269).
[393] Energy Efficiency Directive (n 260).
[394] Renewable Energy Directive (n 275).
[395] European Parliament and Council Regulation (EU) 2018/842 of 30 May 2018 on Binding Annual Greenhouse Gas Emission Reductions by Member States from 2021 to 2030 Contributing to Climate Action to Meet Commitments under the Paris Agreement and Amending Regulation (EU) No 525/2013 [2018] OJ L156/26.
[396] Council Directive 2003/96/EC of 27 October 2003 Restructuring the Community Framework for the Taxation of Energy Products and Electricity [2003] OJ L283/51 (Energy Taxation Directive).
[397] European Parliament and Council Regulation (EU) 2018/841 of 30 May 2018 on the Inclusion of Greenhouse Gas Emissions and Removals from Land Use, Land Use Change and Forestry in the 2030 Climate and Energy Framework, and Amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018] OJ L156/1.
[398] Fit for 55 Communication (n 390), at 4.
[399] ibid, at 7.
[400] ibid, at 8; European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Deployment of Alternative Fuels Infrastructure, and Repealing Directive 2014/94/EU of the European Parliament and of the Council, COM(2021)559, 14 July 2021.

3. Guidelines on State Aid for Climate, Environmental Protection and Energy 2022 (CEEAG)

3.1. Revised Guidelines

The Guidelines on State aid for climate, environmental protection and energy, legally binding upon the Commission alone,[401] offer direction for how the Commission will evaluate whether aid measures relating to environmental protection, including climate protection, and energy are compatible with the competition rules of the Treaty.[402] As mentioned in the first chapter, they were first adopted in 1994 and, after some revision, they reached their current version.[403] Indeed, starting from January 2022, the updated Guidelines, CEEAG, aim to create a flexible framework that is suitable for helping Member States provide the necessary support to achieve, in a focused and cost-efficient manner, the key targets and objectives of the European Green Deal and other relevant EU legislation and policies in the environmental and energy sectors.[404]

As to the novelties introduced in 2022, the updated guidelines offer a wider range of investments and technologies that Member States are allowed to support, and they also enhance flexibility, simplify existing rules, and include new safeguards.[405] The guidelines are designed to align with the pertinent EU legislation and policies in the fields of environment and energy.[406]

To better understand how the CEEAG will contribute to the Green Deal and the Fit for 55 package, it might be interesting examining some of their features, which will be assessed in more detail in the following sections. The CEEAG have adopted a technology neutral approach towards all technologies that can help to reduce or eliminate greenhouse gas emissions, including renewable energy and energy

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[401] C Banet, 'Legal Status and Legal Effects of the Commission's State Aid Guidelines: The Case of the Guidelines on State Aid for Environmental Protection and Energy (EEAG) (2014-2020)' (2020) 19(2) Eur St Aid L Q 172, 175.
[402] European Commission, 'Legislation (Energy & Environment)' <https://competition-policy.ec.europa.eu/sectors/energy-environment/legislation_en> last accessed 2 April 2023.
[403] *See supra* Chapter I, section 2.2.
[404] CEEAG (n 214).
[405] N Spadaro, 'Considerazioni sugli ultimi orientamenti della Commissione europea in tema di aiuti di Stato nel settore ambientale ed energetico' (2021) 2 Rivista della Regolazione dei mercati 341, 355.
[406] European Commission, 'Guidelines on State aid for climate, environmental protection and energy 2022' (27 January 2022) Questions and Answers QANDA/22/566.

efficiency. Additionally, for the first time a dedicated section has been introduced to address the energy and environmental performance of buildings in the implementation of the Renovation Wave. The Guidelines also outline clear rules for supporting clean mobility and for developing a more circular economy, respectively in line with the Sustainable and Smart Mobility Strategy and the Circular Economy Action Plan. Finally, the CEEAG provide guidance for Member States to support the protection and restoration of biodiversity and the rehabilitation of natural ecosystems, which had never been covered by any previous State aid guidance.[407]

A last remark worth mentioning. The 2022 CEEAG, are mainly intended to cover larger aid measures, but they also include some rules specific to small projects. They operate alongside the GBER,[408] which permits certain smaller schemes to be executed without prior approval by the Commission.[409] Interestingly, the GBER has recently undergone a similar revision process aimed at granting more flexibility for support measures in crucial sectors for the transition to climate neutrality and a net-zero emissions industry.[410]

3.2. Compatibility Assessment under Article 107(3)(c) TFEU

The CEEAG establish the criteria to evaluate whether environmental protection and energy aids can be considered consistent with the single market in accordance with Article 107(3)(c) TFEU.[411] According to this provision, the Commission may approve, for a maximum period of 10 years,[412] a State aid that promotes certain economic activities within the EU (positive condition), as long as it does not adversely affect trading conditions to an extent contrary to the common interest (negative condition).[413]

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[407] ibid.
[408] GBER (n 213).
[409] Questions and Answers QANDA/22/566 (n 406).
[410] European Commission, 'State aid: Commission amends General Block Exemption rules to further facilitate and speed up green and digital transition' (9 March 2023) Press Release IP/23/1523.
[411] TFEU, art 107(3)(c): "The following may be considered to be compatible with the internal market: […] (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest."
[412] CEEAG (n 214), para 70.
[413] ibid, paras 20 and 21.

3.2.1. Positive Condition

The positive condition enshrined in Article 107(3)(c) TFEU requires the aid, which must be in all aspects compliant with EU law,[414] "to facilitate the development of an economic activity".[415] In order to satisfy such condition, Member States notifying the aid to the Commission must specify the particular economic activities that will receive assistance and explain how the aid will support the development of those activities. Additionally, the Member State must detail whether and how the aid will help attain the objectives of the EU's climate, environmental, and energy policies, and indicate the anticipated advantages of the aid.[416]

The second aspect of the positive condition is that an environmental and energy aid is considered to support an economic activity, and is thus compatible with the single market, only if it has an "incentive effect".[417] The latter notion refers to the necessity for the aid to stimulate a behavioural change by the beneficiary that will result in an increase in environmental protection.[418] In other words, the aid cannot be granted merely to cover the regular operating costs of a business, even if that business' decisions already have a positive impact on the environment.[419] To prove an incentive effect, it is necessary to identify both the actual scenario and the likely counterfactual scenario that would occur without the aid.[420] Consequently, for example, if a project has already begun before applying for the aid, it will generally not be considered to have an incentive effect.[421]

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[414] ibid, para 33.
[415] TFEU, art 107(3)(c).
[416] CEEAG (n 214), paras 23 and 24.
[417] ibid, para 26.
[418] S Verschuur and C Sbrolli, 'The European Green Deal and State Aid: The Guidelines on State Aid for Environmental Protection and Energy Towards the Future' (2020) 19(3) Eur St Aid L Q 284, 287.
[419] Cases C-630/11 P to C-633/11 P *HGA Srl and Others v European Commission* [2013] ECLI:EU:C:2013:387, para 104.
[420] CEEAG (n 214), para 28.
[421] ibid, para 29.

3.2.2. Negative Condition

3.2.2.1. Minimisation of Distortions of Competition and Trade

The CEEAG provide for several requirements for the aids to be compatible with the single market.

First, the proposed State aid must be *necessary* so as to create a substantial development that the market cannot achieve on its own, mainly by addressing market failures.[422] The Member State concerned, when notifying the aid, should identify the market failures that hinder the attainment of an acceptable level of environmental protection or an efficient internal energy market and must prove that the project for which the aid is awarded cannot be executed without such intervention, even after considering other policies and measures already in place to tackle the failures.[423]

Second, the proposed aid measure must be an *appropriate* policy instrument to achieve the intended objective of the aid. The appropriateness of the aid entails that there must not be a less distortive policy or aid instrument that can reach the same outcomes.[424]

Third, the aid must be *proportionate*, and it will be so if the aid amount given to each recipient is the minimum required to execute the aided project or activity. In general, an aid will be considered proportionate if it covers only the so-called "funding gap", namely the net extra cost needed to achieve its objective. The funding gap is calculated by the difference between the economic revenues and costs (including investment and operation) of the aided project and those of a hypothetical alternative project that the recipient would undertake without the aid. However, a comprehensive evaluation of the funding gap is not necessary if the aid amounts are established through a competitive bidding process (i.e., a bidding process which is open, clear, transparent and non-discriminatory, based on objective criteria defined *ex ante*), because the latter provides a reliable estimate of the minimum aid needed by potential beneficiaries.[425]

[422] T Buettner and others, 'Recent Developments at DG Competition: 2021/2022' (2022) 61 Rev of Industrial Organization 449, 463.
[423] CEEAG (n 214), paras 35-38.
[424] ibid, paras 39-46.
[425] ibid, paras 37-49.

Finally, to mitigate adverse impacts and to ensure fair competition, Member States must guarantee the *transparency* of the whole process by ensuring that competitors have access to pertinent information regarding the aided activities. This requires the publication of the full text of the approved aids, with particular attention to those exceeding EUR 100,000.[426]

3.2.2.2. Avoidance of Undue Negative Effects on Competition and Trade

Article 107(3)(c) specifically provides also for a negative condition: the aid must not unduly "affect trading conditions to an extent contrary to the common interest".[427] The following are some of the ways in which aids could potentially affect competition and trade according to the Commission.

In theory, any form of aid will naturally create or potentially create distortions of competition and impact trade between Member States. For example, aids granted for environmental objectives will inevitably support eco-friendly products and technologies over more pollutant ones. Nevertheless, this is not seen as an undue distortion of competition as it aims to address market failures that require a State intervention.[428]

Providing State aids for environmental and energy objectives may have the unintentional consequences of undermining the market incentives for the most efficient and innovative producers, while also discouraging the least efficient ones from improving, restructuring, or leaving the market. Over time, such imbalances can hinder progress in innovation, efficiency, and the adoption of cleaner technologies. These effects can be particularly significant when the aid is granted to projects that offer only a limited and temporary benefit but prevent the use of cleaner technologies in the long run, including those essential for reaching the medium and long-term climate targets mandated under the European Climate Law. All other things being equal, the closer the aid investment is to the relevant target date, the higher the likelihood that its short-term benefits may be outweighed by the potential disincentives for cleaner technologies.[429]

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[426] ibid, para 58.
[427] TFEU, art 107(3)(c).
[428] CEEAG (n 214), paras 64 and 65.
[429] ibid, para 67.

State aids can also cause competition imbalances by reinforcing or preserving the significant market power of the beneficiary. Even when the aid does not directly increase substantial market power, it may do so indirectly by deterring existing competitors from expanding, by prompting them to exit, or by discouraging new competitors from entering the market.[430]

In addition to creating distortions on product markets, State aids may also affect trade and location decisions. These imbalances may arise within the EU when businesses compete across borders or consider different investment locations. For example, an aid designed to maintain the economic activity in one region or attract it away from other regions within the single market may cause activities or investments to shift from one region to another, without any positive environmental impact. The Commission has to ensure that the aid does not have any manifestly negative consequences for competition and trade.[431]

3.3. Categories of Aid

The following sections focus on the categories of State aids covered by the CEEAG which are the most relevant for our purposes. Each of the sections will replicate the structure of the Commission's analysis in the CEEAG: for each category of aid the guidelines provide a description, the rationale, the scope and activities supported as well as instructions to minimise the distortion of the competition and trade by ensuring the aid is necessary, appropriate and proportional.[432]

3.3.1. Aid for the Reduction and Removal of Greenhouse Gas Emissions

This category pertains to aid measures intended to promote the use of renewable energy sources, which may include support for generating renewable energy or creating synthetic fuels using renewable energy sources. Additionally, this category

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[430] ibid, para 68.
[431] ibid, para 69.
[432] *See supra* Chapter II, section 3.2; G Van Hulle and P Demoulin, 'New European rules supporting businesses to achieve Green Deal objectives' (7 March 2022) Intl Tax Rev <https://www.internationaltaxreview.com/article/2a6aaqgdb5cor53hi1wcg/new-european-rules-supporting-businesses-to-achieve-green-deal-objectives> last accessed 4 April 2023.

encompasses various other technological methods designed primarily to decrease greenhouse gas emissions.[433]

As to the necessity of the aid, the rules mentioned earlier[434] do not apply to actions that aim to decrease greenhouse gas emissions since other policies are already in place to tackle the issue. Therefore, Member States must demonstrate that there is still a necessity for the measure by considering the counterfactual scenario where the aid is not available and evaluating relevant costs and revenues. This would cause the Commission to assume that there still is a market failure, which can be resolved by providing aid for decarbonisation.[435]

Not even the section of the CEEAG pertaining to the requirement of appropriateness[436] will be applicable to this type of aid. The Commission, indeed, assumes that State aid can generally be a suitable means of achieving decarbonisation objectives, as other policy tools are often insufficient to attain such targets, as long as all other compatibility criteria are satisfied.[437]

Generally, assistance intended for the reduction of greenhouse gas emissions should be awarded through a competitive bidding procedure, allowing for the measure's aims to be achieved in a proportionate way that minimises both competition and trade distortions.[438]

As far as the avoidance of undue negative effects on competition and trade is concerned, the aid provided must be structured to avoid any undue disruption to the efficient operation of markets, and specifically, to maintain efficient incentives and price signals. In particular, beneficiaries must not be incentivised to offer their output below marginal costs, and aid must not be granted for a certain production during periods when the market value of that production is negative.[439] Moreover, aids for decarbonisation have the potential of unfairly distorting competition when they replace investments in cleaner alternatives that are already available in the market, or when they lock in certain technologies, thereby hindering the

[433] CEEAG (n 214), para 78.
[434] *See supra* Chapter II, section 3.2.2.1.
[435] CEEAG (n 214), paras 89-91.
[436] ibid, paras 39-46.
[437] ibid, para 93.
[438] ibid, para 103.
[439] ibid, para 123.

development of a market and adoption of cleaner solutions. The Commission will, therefore, verify that the aid measure does not encourage or prolong the consumption of fossil fuels and energy.[440] In addition, the Commission deems some aid measures to have adverse effects on competition and trade that are improbable to be offset. For example, measures that offer incentives for new investments in energy or industrial production based on the most polluting fossil fuels, such as coal or diesel, heighten the negative environmental impacts in the market and, therefore, will not be considered to have any positive environmental effects.[441] Similarly, measures that provide incentives for new investments in energy or industrial production based on natural gas may, in the short run, decrease greenhouse gas emissions and other pollutants, but, in the longer term, may increase negative environmental impacts when compared to alternative investments.[442]

Following this careful evaluation and provided that all other compatibility criteria are met, the Commission typically concludes that the advantages of decarbonisation measures outweigh any potential distortion to the single market considering their contribution towards mitigating climate change and achieving the EU's energy and climate goals.[443]

3.3.2. Aid for the Improvement of the Energy and Environmental Performance of Buildings

Measures adopted to enhance the energy and environmental efficiency of buildings aim at countering negative externalities by causing individual incentives to meet targets for energy savings and for the reduction of emissions of greenhouse gases and air pollutants. In addition to the general market failures that apply to all forms of aid, specific market failures may emerge in the sector of building energy and environmental performance. For instance, when building renovations are carried out, the advantages in terms of energy and environmental performance usually benefit not just the building owner, who typically bears the renovation expenses, but also the tenant. Consequently, the Commission believes that State

[440] ibid, para 127.
[441] ibid, para 128.
[442] ibid, para 129.
[443] ibid, para 134.

aids may be necessary to encourage investments aimed at improving the energy and environmental efficiency of buildings.[444]

This category covers aids granted for the improvement of the energy efficiency of buildings, for the costs associated to the renovation of the buildings as well as for improvement of the energy performance of the heating or cooling equipment inside the building.[445]

In addition to the general considerations related to the incentive effect made above,[446] which still apply here, two interesting points must be analysed. First, if a project has a payback period[447] of less than five years, a Member State can overcome the presumption that it does not have an incentive effect by demonstrating that the aid is still necessary to encourage a change in behaviour.[448] Second, if EU law requires undertakings to meet certain minimum energy performance standards, any aid given to help them comply with these standards will be considered to have an incentive effect, as long as it is granted before the standards become mandatory for the concerned undertaking.[449]

Regarding the requirement of proportionality, the Commission has issued a comprehensive guidance on the permissible amount of aid that can be provided. The authorised aid intensities will vary depending on the type and extent of building renovation made possible by the State aid, and it will be proportional to the percentage of eligible costs for specific measures.[450] Furthermore, also in this category, if the aid is awarded through a competitive bidding process, the amount of aid is regarded as proportionate.[451]

When evaluating the potential negative impact on competition and trade, it is important to consider that while providing aid for equipment using natural gas to enhance the energy efficiency of buildings could lead to short-term reduction in

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[444] ibid, para 135.
[445] ibid, paras 136-138.
[446] *See supra* Chapter II, section 3.2.1.
[447] The payback period is the amount of time needed to recover the cost of an investment (without aid).
[448] CEEAG (n 214), para 142.
[449] ibid, para 143.
[450] ibid, paras 146-153; for a definition of "eligible costs" *see* CEEAG (n 214), para 146: "The eligible costs are the investment costs directly linked to the achievement of a higher level of energy or environmental performance."
[451] CEEAG (n 214), para 152.

energy demand, it may, however, have adverse environmental effects in the long term compared to other investment alternatives. In particular, offering aid for natural gas equipment installation could unduly distort competition if it displaces investment in cleaner alternatives that are already accessible in the market or if it locks in certain technologies, which could impede the progress of a cleaner technology market. The drawbacks of such displacement or technology lock-in are likely to outweigh any positive effects on competition.[452]

3.3.3. Aid for Clean Mobility

This category encompasses State aids to support specific investments aimed at decreasing or preventing the discharge of CO_2 and other contaminants from various transportation sectors, including air, road, rail, waterborne, and maritime. These aids can promote the growth of eco-friendly economic activities while also ensuring that trading conditions are not impacted in a negative way against the common interests of the EU.[453]

3.3.3.1. Aid for the Acquisition and Leasing of Clean Vehicles and Clean Mobile Service Equipment

In order to meet the 2050 climate neutrality binding target, the European Green Deal has set a goal to decrease transport emissions by a minimum of 90% by 2050, when compared to the levels in 1990.[454] The Sustainable and Smart Mobility Strategy[455] outlines a roadmap to attain this target by reducing the carbon footprint of the various transportation modes and the entire transportation network.[456]

Although there are policies already in place, there might be some market barriers and failures that have not been tackled yet, such as the high cost of clean vehicles when compared to traditional vehicles, the lack of easily accessible charging or refuelling infrastructure, and the existence of environmental externalities. As a result, Member States are authorised to provide financial assistance to deal with these remaining market failures and support the growth of the clean transportation

[452] ibid, paras 155 and 156.
[453] ibid, para 158.
[454] The European Green Deal (n 333), at 10.
[455] Sustainable and Smart Mobility Strategy (n 359).
[456] CEEAG (n 214), para 160.

industry.[457] For example, Member States can provide assistance for obtaining and leasing both new and second-hand environmentally friendly vehicles, as well as for acquiring and leasing clean mobile service equipment. Additionally, aid can be granted for retrofitting, refitting, and adapting vehicles or mobile service equipment to make them more sustainable.[458]

As concerns the incentive effect requirement, Member States must present a credible counterfactual scenario in the absence of the aid. If the investment involves procuring or leasing clean vehicles or clean mobile service equipment, the counterfactual scenario usually involves obtaining or leasing vehicles or mobile service equipment of the same type and capacity without the aid.[459]

When examining the appropriateness of the various policy tools by comparing their expected impact, it is important to consider the possibility of other interventions beyond State aid, such as ecological bonus schemes, scrappage schemes, or the establishment of low-emission zones, which could help encourage the growth of the clean transportation sector.[460]

Finally, while evaluating the proportionality of the measure, Member States should bear in mind that the proposed aid must not exceed the expenses needed to make the shift from traditional to environmentally friendly vehicles and the adoption of clean mobile service equipment, when compared to the counterfactual scenario without aid. To meet this requirement, as a general practice, the aid should be granted via a competitive bidding process.[461]

3.3.3.2. Aid for the Deployment of Recharging or Refuelling Infrastructure

For the widespread adoption of clean vehicles and the transition to zero-emission transportation, it is essential to have a well-developed network of recharging and refuelling stations. However, the limited availability of such infrastructure and its uneven distribution throughout the EU is a major obstacle to the market uptake of

[457] ibid, para 161.
[458] ibid, paras 162 and 163.
[459] ibid, para 165.
[460] ibid, para 171.
[461] ibid, para 173.

clean vehicles.[462] Therefore, aids may be provided to support the construction, installation, upgrade, or expansion of recharging and refuelling infrastructure.[463]

Member States are required to verify the necessity of aids by conducting an open and public consultation before the project begins, or by conducting an independent market study. This is done to demonstrate that there is a shortage of similar recharging or refuelling infrastructure that is not expected to be solved through commercial means in the near future.[464]

When evaluating different policy options, it is important to consider whether new regulations can be implemented to encourage the transition to clean transportation and how effective they would be compared to the proposed aid. This analysis is necessary to determine that the proposed State aid is the most appropriate policy instrument for achieving the desired outcome.[465]

To ensure that the aid is proportionate, it should not exceed the amount required to facilitate the development of the relevant economic activity while simultaneously increasing environmental protection. For this reason, it is again generally necessary to award the aid through a competitive bidding process.[466]

Finally, aids in this category may have a detrimental impact on competition if they discourage investment in cleaner alternatives that are already available in the market, or if they lock in certain technologies. In such cases, the Commission believes that aids for refuelling infrastructure supplying natural gas-based fuels are unlikely to have a positive impact on competition.[467] It is important to note that zero-emission vehicles are already a practical option, particularly for light-duty vehicles in the road transport sector, whereas it is anticipated that heavy-duty vehicles are soon to become more readily available in the market.[468]

[462] ibid, para 190.
[463] ibid, para 192.
[464] ibid, para 194.
[465] ibid, para 197.
[466] ibid, paras 198 and 199.
[467] ibid, para 208.
[468] ibid, para 210.

3.3.4. Aid for Resource Efficiency and for Supporting the Transition towards a Circular Economy

The Circular Economy Action Plan[469] is a forward-looking strategy that seeks to speed up the EU's shift towards a circular economy as part of the transformative change advocated by the European Green Deal. The plan promotes circular economy practices, advocates for sustainable consumption and production, and strives to minimise waste while maximising resource utilisation within the EU economy.[470]

Financial assistance from Member States, along with well-defined and uniform regulations, can have a significant impact in promoting circularity in manufacturing processes. This is an essential aspect of transforming the European industry in a climate neutral and long-term competitive industry.[471]

The types of aids that fall under this category include investments that aim to enhance resource efficiency as well as those that focus on reducing, preventing, reusing, decontaminating and recycling waste, both if generated by the aid recipient or by third parties.[472]

To assess the incentive effect of an aid included in this category, as a general rule, the evaluation will be made comparing the environmentally-friendly investment with an investment which has equivalent capacity, lifespan, and other technical features. The Commission also provides for certain cases to be scrutinised in a more specific way.[473]

A particular case in the analysis of the necessity of the aid is that of aids granted for the separate collection and sorting of waste or other products, materials or substances. In such instance, to justify the need for an intervention, the Member State must prove that such separate collection and sorting of waste is not sufficiently developed in that Member State.[474]

[469] Circular Economy Action Plan (n 347).
[470] CEEAG (n 214), para 217.
[471] ibid, para 218.
[472] ibid, para 220.
[473] ibid, para 226.
[474] ibid, para 236.

When it comes to the appropriateness of the aid, following the "polluter pays" principle,[475] companies responsible for creating waste should bear the expenses associated with waste management. Therefore, any aid provided should not exempt such companies from their legal obligations or costs related to waste treatment under EU or national laws. Additionally, the aid should not cover expenses that are considered normal operating costs for a company.[476]

Regarding the proportionality of the aid, the Commission established a standard rule stating that the aid intensity should not exceed 40% of the eligible costs, but it also provided for several exceptions for particular cases that may require a higher amount.[477]

Finally, in order to avoid undue negative effects on competition and trade, the aid provided must not merely increase the demand for waste or other materials and resources intended to be reused, recycled, or recovered without, at the same time, improving the collection of such materials.[478] When evaluating the impact of the aid on the market, the Commission will consider its potential effects on the functioning of the markets for primary and secondary materials related to the products in question.[479] More specifically, when analysing the impact of the aid for operating expenses related to the separate collection and sorting of waste or other substances as a preparation for reuse or recycling, the Commission will also consider how this might interact with extended producer responsibility schemes in the Member State concerned.[480]

3.3.5. Aid for the Prevention or the Reduction of Pollution other than from Greenhouse Gases

The European Green Deal aims for a toxic-free environment and a zero pollution ambition by 2050, where pollution levels are no longer detrimental to humans and

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[475] *See supra* Chapter I, section 2.2.; *see* also definition in CEEAG (n 214), para 19(58): "the costs of measures to deal with pollution should be borne by the polluter who causes the pollution".
[476] CEEAG (n 214), para 238.
[477] ibid, paras 241-245; for a definition of "eligible costs" *see* CEEAG (n 214), para 239: "The eligible costs are the extra investment costs determined by comparing the total investment costs of the project with those of a less environmentally-friendly project or activity".
[478] CEEAG (n 214), para 250.
[479] ibid, para 251.
[480] ibid, para 252.

natural ecosystems.[481] State aids in this sector can significantly contribute to the environmental objective of minimising pollution types other than greenhouse gas emissions.[482] In particular, the aid must specifically address the prevention or reduction of pollution connected directly to the beneficiary's activities. Additionally, the aid should not simply transfer pollution from one sector or environmental medium to another, but should achieve a comprehensive reduction of pollution.[483]

The concession of aid is deemed to have an incentive effect when it empowers an entity to reduce or prevent pollution in the absence of existing EU standards or beyond the thresholds mandated by already existing EU standards. Alternatively, the aid would also be considered to have an incentive effect when it supports, in the prevention or reduction of pollution, an entity in conforming to mandatory national standards that are more rigorous than EU standards or that are created in the absence of EU standards.[484]

As to the Commission's guidance to minimise distortions on competition and trade, it is worth mentioning that, also in this category, aids intensity cannot generally exceed 40% of the eligible costs. The latter refer to the supplementary investment expenses that are specifically associated with attaining a higher degree of environmental protection.[485]

Finally, the Commission will ensure that the distribution of resources, especially if the aid consisted in tradable permits,[486] occurred in a fair, transparent and competitive manner. This means that beneficiaries were selected based on clear and unbiased criteria, and new companies were not given more favourable conditions than existing ones.[487]

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[481] *See supra* Chapter II, section 2.1.7.
[482] CEEAG (n 214), paras 253 and 254.
[483] ibid, paras 257 and 258.
[484] ibid, para 261.
[485] ibid, paras 265 and 267.
[486] A tradable permit is defined as "an economic policy instrument under which rights to discharge pollution or exploit resources can be exchanged through either a free or a controlled permit-market. Examples include individual transferable quotas in fisheries, tradable depletion rights to mineral concessions and marketable discharge permits for water-borne effluents" <https://www.eea.europa.eu/help/glossary/eea-glossary/tradable-permits>.
[487] CEEAG (n 214), para 275.

3.3.6. Aid for the Remediation of Environmental Damage, the Rehabilitation of Ecosystems, the Protection or Restoration of Biodiversity

The objective of the Biodiversity Strategy for 2030, as part of the European Green Deal, is to safeguard the environment, counteract the degradation of ecosystems, and ensure that the EU's biodiversity is on the road to recovery by 2030.[488] State aids could, therefore, play a significant role in achieving this environmental objective by providing incentives to repair polluted sites, restore damaged natural habitats and ecosystems, and invest in ecosystem protection.[489]

Within this category, aids may be authorised for the following activities: (*i*) rectifying environmental harm, including harm caused to the quality of soil, surface water or groundwater, or the marine environment; (*ii*) reinstating degraded natural habitats and ecosystems; (*iii*) conserving or regenerating biodiversity to support the achievement of ecosystems' good condition or to preserve those ecosystems that are already in good condition; (*iv*) carrying out nature-based solutions to adapt and mitigate climate change.[490] These types of aids are considered to have an incentive effect only when the entity or undertaking responsible for the environmental harm cannot be identified or held legally accountable in line with the "polluter pays" principle.[491] The Member State concerned must prove that all necessary measures, including legal actions, have been taken to identify the accountable entity or undertaking responsible for the environmental harm and make it bear the relevant expenses. If this entity cannot be identified or cannot be made to bear the expenses, State aids may be provided to support the repair of the environmental damage and they would be considered as having an incentive effect.[492]

As to the aid proportionality, the aid intensity in this category can be as high as 100% of the eligible costs.[493] Specific indications are given by the Commission for the calculation of eligible costs.[494]

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[488] *See supra* Chapter II, section 2.1.6.; Biodiversity Strategy for 2030 (n 368).
[489] CEEAG (n 214), para 277.
[490] ibid, para 281.
[491] ibid, para 284.
[492] ibid, para 285.
[493] ibid, para 291.
[494] ibid, paras 288 and 289.

3.3.7. Aid for the Security of Electricity Supply

The electricity sector's substantial changes resulting from technological advancements and climate-related concerns present new obstacles in guaranteeing a secure supply of electricity. Despite an electricity market that is progressively more unified and that permits cross-border electricity exchange across the EU, which may alleviate national security of supply issues, there can still be cases where even such markets cannot ensure security of supply in certain regions. Therefore, Member States may evaluate the adoption of measures to guarantee specific levels of electricity supply security.[495]

This category pertains to aid measures that aim at enhancing electricity supply security. This includes capacity mechanisms and any other methods for addressing long and short-term supply security issues caused by market failures. In particular, as part of their notification, Member States must specify the economic activities that will emerge as a consequence of the aid. Indeed, aids intended to improve electricity supply security directly promote the growth of economic activities connected to electricity generation, storage, and demand response. At the same time, they may also indirectly support an extensive array of economic activities that rely on electricity as an input, such as the electrification of heat and transportation.[496]

The general rules governing the evaluation of aid necessity do not apply in this context. To be allowed to provide aids, Member States must assess and quantify the type and origin of the electricity supply security issue, and hence the need for State aid to guarantee electricity supply security.[497] At the same time, Member States must identify any regulatory or market failures, as well as other obstacles that would hinder the attainment of an adequate level of security of electricity supply if there was no intervention, and any measures that have already been implemented to tackle such failures.[498] Member States must primarily examine other ways for ensuring security of electricity supply, such as more effective electricity market structures. Aids may be deemed appropriate for security of supply measures if,

[495] ibid, para 325.
[496] ibid, para 328.
[497] ibid, paras 330 and 331.
[498] ibid, paras 336 and 337.

notwithstanding appropriate and proportional enhancements to market design and investments in network assets, a concern over electricity supply security persists.[499]

The aid measure should be available to all recipients or initiatives that are technically equipped to contribute effectively to the accomplishment of the security of supply objective. Member States are urged to incorporate further transparent, objective, and non-discriminatory criteria in their security of supply measures to encourage the participation of more environmentally friendly technologies.[500]

In terms of aid proportionality, the Commission has stipulated that the aid should be distributed, and the aid amount established, through a competitive bidding process.[501]

Finally, the aid must be structured to ensure that markets continue to function efficiently and that efficient operating incentives and price signals are maintained. Incentives must not be given for energy generation that would replace less polluting forms of energy.[502] Measures for ensuring security of electricity supply should not cause undue market distortions or restrict cross-border trade; diminish incentives to invest in interconnection capacity; or compromise investment decisions on capacity that predated the measure.[503]

3.3.8. Aid for Energy Infrastructure

Significant investment and improvement in energy infrastructure will be essential to achieve an integrated energy market that satisfies the EU's climate objectives while ensuring a secure energy supply. An adequate energy infrastructure improves system stability, resource availability, integration of various energy sources, and energy supply in underdeveloped networks. If market operators are unable to provide the necessary infrastructure, State aids may be required to overcome market failures and to ensure that the EU's infrastructure requirements are met. One possible market failure related to energy infrastructure concerns coordination issues, which may arise due to conflicting investor interests,

[499] ibid, para 341.
[500] ibid, paras 343 and 345.
[501] ibid, para 355.
[502] ibid, paras 359 and 360.
[503] ibid, para 366.

uncertainties about collaborative outcomes, and network effects that might prevent project development or effective design.[504]

Support given to energy infrastructure under a legal monopoly does not fall under State aid rules.[505] Similarly, the Commission believes that investments in energy infrastructure managed under a "natural monopoly" do not constitute State aid. A natural monopoly arises when the infrastructure has no direct competition and is not intended to favour a particular company or industry, but rather benefits the society as a whole. Furthermore, for a natural monopoly to exist, also the following requirements must be concurrently met: alternative financing options for network infrastructure must be minimal in the relevant sector and Member State, and the funding provided for the construction and/or operation of the energy network infrastructure should not indirectly subsidise other economic activities.[506]

The usual way of financing energy infrastructure is through user tariffs. However, State aids can be used to address market failures that cannot be adequately resolved by mandatory user tariffs.[507] In such cases, the funding gap principle will be used to evaluate proportionality. When assessing infrastructure aid, the presumed counterfactual scenario is one in which the project would not occur.[508]

Finally, when assessing the competitive effects of State aid on energy infrastructure, the Commission will typically presume that aids given to infrastructure subject to full regulation in the single market do not create significant distortions. However, for infrastructure projects that are partially or entirely exempt from internal energy market regulations, the Commission will conduct a case-by-case evaluation to determine any such distortive effects.[509]

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[504] ibid, paras 371 and 372.
[505] ibid, para 373; a legal monopoly exists where a given service is reserved by law or regulatory measures to an exclusive provider in a determined geographic area, with a clear prohibition for any other operator to provide such service.
[506] CEEAG (n 214), para 375.
[507] ibid, paras 379 and 380.
[508] ibid, para 381.
[509] ibid, para 382.

CHAPTER III

STATE AIDS AND THE COVID-19 PANDEMIC: POSSIBLE IMPACTS ON THE EUROPEAN ENERGY SECTOR?

1. State Aid Tools to Face the COVID-19 Pandemic

Due to the outbreak of COVID-19, Member States found themselves compelled to implement containment measures to support various sectors of the economy in addition to those aimed at addressing the health crisis. The Commission expressed its intention to resort to all available measures at its disposal to mitigate the socio-economic consequences of the pandemic. Nevertheless, the Commission conceded that, given the EU's limited budget, most of the financial assistance to businesses would have to come from Member States. Consequently, it quickly became apparent that the health crisis posed specific concerns also in terms of State aids.[510] This is confirmed by arguably the most intense wave of State aid notifications by Member States and corresponding decisions by the Commission in the EU's history. Just to put it into numbers, between 12 March and 26 October 2020, the Commission adopted 435 decisions on COVID-19 related State aid measures.[511]

[510] JL Buendia and A Dovalo, 'State Aid Versus COVID-19: The Commission Adopts a Temporary Framework' (2020) 19(1) Eur St Aid L Q 3, 3.
[511] A Bouchagiar, 'State Aid in the Context of the COVID-19 Outbreak, Including the Temporary Framework 2020' in L Hancher, T Ottervanger and PJ Slot (eds.) *EU State aids* (6th edn Sweet & Maxwell London 2021) 1200.

In this context, the Commission approved the "Temporary Framework for State aid measures to support the economy during the current COVID-19 outbreak" ("COVID-19 Temporary Framework") underpinned by Article 107(3)(b) TFEU[512] to provide greater flexibility and expeditiousness in the validation of State aids aimed at addressing issues related to liquidity and access to financial resources which numerous enterprises may encounter as a result of the COVID-19 outbreak.[513] Additionally, the Commission demonstrated its willingness to relax the necessary procedural rules in order to accelerate the authorisation process for notified State aids. This resulted in record time approvals for certain decisions, some of which were processed and approved within a mere 24-hour window from the time of their notification.[514]

Although the COVID-19 Temporary Framework was crucial in the rapid implementation of State aids during the COVID-19 outbreak, it was not the sole method available to Member States for mitigating the pandemic's socio-economic impact. Indeed, the Commission highlighted in an early Communication that Member States have several options within the existing State aid regulations, which the COVID-19 Temporary Framework merely complements.[515]

First, Member States may adopt *general* measures that fall outside the scope of EU State aid regulations, such as wage subsidies, suspension of corporate and value added taxes, and social contributions that are available to all undertakings. Direct financial support to consumers, for example for cancelled services not reimbursed by the provider, is also exempt from State aid control.[516]

Second, subject to the prior approval of the Commission, Member States can compensate businesses for damages caused by extraordinary events, such as the

[512] TFEU, 107(3)(b): "The following may be considered to be compatible with the internal market: […] (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State".
[513] European Commission, Communication from the Commission 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' [2020] OJ C91 I/1 (COVID-19 Temporary Framework).
[514] *See*, for example, European Commission, 'Authorisation for State aid pursuant to Articles 107 and 108 TFEU: Cases where the Commission raises no objections', Case No SA.56685 (2020/N) – DK – on State aid notification on compensation scheme cancellation of events related to COVID-19 [2020] OJ C125/1 (Case No SA.56685).
[515] European Commission, Communication from the Commission 'Coordinated economic response to the COVID-19 Outbreak', COM(2020)112, 13 March 2020 (Coordinated economic response), at 9.
[516] ibid; COVID-19 Temporary Framework (n 513), para 12.

COVID-19 outbreak, under Article 107(2)(b) TFEU.[517] This option allows Member States to support companies heavily impacted by the pandemic, including those in the transport, tourism, hospitality, and retail sectors.[518] Article 107(2) TFEU specifies instances where State aid is permissible (*de jure* derogations) and, by redressing the damages incurred by economic operators, has proven to be the primary method of addressing the economic risks related to the lockdown measures to which certain sectors were particularly exposed.[519]

Third, since it was clear that compensation measures alone were not sufficient to address the economic risks posed by the pandemic, Article 107(3)(b) TFEU was soon invoked.[520] This provision permits the Commission to approve State aid intended to remedy a serious disturbance in the economy of a Member State, such as the COVID-19 outbreak.[521] Therefore, to ensure a consistent application of Article 107(3)(b) TFEU, the COVID-19 Temporary Framework was almost immediately enacted.

Last, State aid measures can be implemented without prior authorisation from the Commission[522] under the GBER[523] and the *de minimis* Regulation.[524] More specifically, the General Block Exemption Regulation exempts certain categories of State aid from the obligation of prior notification to the Commission if the benefits to society outweigh any potential harm to EU competition.[525] As a result,

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[517] TFEU, art 107(2)(b): "The following shall be compatible with the internal market: […] (b) aid to make good the damage caused by natural disasters or exceptional occurrences"; COVID-19 Temporary Framework (n 513), para 15.

[518] A Puksas, R Moisejevas and A Novikovas, 'COVID-19 Affected State Aid Provision in the EU' (2022) 15(1) Baltic J L & Politics 98, 107.

[519] D Ferri, 'The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis' (2021) 12(1) Eur J Risk Regulation 176, 180 and 182.

[520] ibid, at 183.

[521] Coordinated economic response (n 515), at 9, COVID-19 Temporary Framework (n 513), paras 17-19.

[522] Under Article 108(3) TFEU ("The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision"), Member States have a general obligation of notifying the Commission about the intention to provide a support that qualifies as State aid according to art 107(1) TFEU.

[523] GBER (n 213).

[524] 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 [2013] OJ L352/1 (*De minimis* Regulation).

[525] A Rosanò, 'Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law' (2020) 5(1) Eur Papers 621, 628.

more than 96% of new State aid measures implemented by Member States are exempted. The criteria established in the GBER mainly relate to eligible expenses, maximum aid intensities and eligible beneficiaries. The most recent version of the GBER was issued in 2021 and included, *inter alia*, rules for recovering from the economic effects of the Coronavirus pandemic.[526] Instead, as far as the *de minimis* Regulation is concerned, it regulates small amounts of State aid ("de minimis" aid) that are exempted from State aid control due to their negligible impact on competition and trade within the single market. In particular, grants up to EUR 200,000 over a span of three years are not considered State aid. However, in the road freight transport industry, the limit is reduced to EUR 100,000 over the same 3-year period.[527]

Interestingly, most of the Commission's decisions were approved through Article 107(3)(b) TFEU and the COVID-19 Temporary Framework, whereas only a small number of decisions were approved through Article 107(2)(b) TFEU. This is due to the fact that Article 107(3)(b) TFEU can be employed by Member States without having to demonstrate that a particular sector or company has been affected more severely than others. Additionally, State aid approved under Article 107(3)(b) TFEU covers indirect damages and provides greater legal certainty for Member States that adhere to the conditions established by the Commission in the COVID-19 Temporary Framework while still complying with State aid rules. In contrast, under Article 107(2)(b) TFEU, Member States must carry out more detailed and complex financial or economic analyses to demonstrate the presence of "exceptional occurrences".[528]

The overall framework for Member State's intervention in the economy, comprising the Temporary Framework and the mentioned alternative options, proved to be adequate to tackle the effects of the pandemic. This can be inferred by the large number of State aid measures approved by the Commission, in an extremely short time especially at the beginning of the emergency, and by the

[526] European Commission, 'State aid: Commission widens scope of General Block Exemption Regulation – frequently asked questions' (23 July 2021) Questions and Answers QANDA/21/3805.
[527] *De minimis* Regulation (n 524), art 3.
[528] J Derenne, C Barbu-O'Connor and C Romagnuolo, 'EU State Aid Control during Covid-19' (2020) 16(1) Competition L Intl 21, 26 and 27.

attention the Commission has put into the periodic revision of the framework to ensure Member States always were in the best position to support their economies.

1.1. State Aid Tools to Tackle Undertakings' Short-Term Liquidity Needs

1.1.1. The COVID-19 Temporary Framework

In March 2020, on the basis of Article 107(3)(b) TFEU, the Commission issued the COVID-19 Temporary Framework's Communication setting out the available State aid measures to support the economy during the pandemic.[529] The response is similar to that of 2008, when the Commission adopted the first Temporary Framework regulating State aids to face a crisis, in that case it was a financial crisis heavily impacting on the EU banking sector.[530]

As it could be easily predicted, the health emergency had a significant impact on the global and European economies, requiring a coordinated response to mitigate the resulting effects.[531] It is thus important to examine the specific economic consequences of the COVID-19 pandemic.[532] In particular, the implementation of various containment measures by Member States, such as social distancing, travel restrictions, quarantines and lockdowns had an immediate impact on demand and supply, on mobility and trade, affecting businesses across all sectors, including small and medium-sized enterprises ("SMEs") as well as larger businesses.[533] In these challenging circumstances, all types of businesses, especially SMEs, were expected to experience a severe lack of liquidity.[534] To address this issue, the Commission called for public support to ensure that sufficient liquidity was available in the markets, to maintain businesses active during and after the COVID-19 outbreak and to counter the harm inflicted on healthy companies.[535]

[529] COVID-19 Temporary Framework (n 513).
[530] M Campo, 'The new State aid temporary framework' (2009) Competition Policy Newsletter 1, 1.
[531] COVID-19 Temporary Framework (n 513), para 1.
[532] A Biondi, 'Governing the Interregnum: State Aid Rules and the COVID-19 Crisis' (2020) 4(2) Market and Competition L Rev 17, 18 and 19.
[533] COVID-19 Temporary Framework (n 513), para 3.
[534] ibid, para 4.
[535] ibid, para 9.

1.1.1.1. Temporary State Aid Measures

The core of the COVID-19 Temporary Framework consists in the illustration of the liquidity measures that Member States could adopt to address the immediate, short-term liquidity needs of businesses of all kinds.[536] The goal of these measures is to prevent otherwise viable businesses from being pushed into bankruptcy due to liquidity issues caused by the pandemic. In particular, the measures aim to safeguard SMEs, which often have limited access to capital markets[537] and to which banks may be hesitant to lend given the economic uncertainty and the risk of a decline in their financial position.[538]

After recalling the various options that Member States have at their disposal, which do not fall within the scope of EU State aid control and do not require the Commission's involvement,[539] the Commission outlines the permitted temporary State aid measures.

The COVID-19 Temporary Framework permits various forms of aid to provide undertakings with adequate liquidity. This includes direct grants, repayable advances, and tax advantages, with thresholds originally set at EUR 800,000 per undertaking, EUR 120,000 per undertaking in the fishery and aquaculture sector, and EUR 100,000 per undertaking in the primary production of agricultural products.[540] Subject to certain criteria,[541] public guarantees on loans can also be

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[536] N Robins, L Puglisi and L Yang, 'State Aid Tools to Tackle the Impact of COVID-19: What Is the Role of Economic and Financial Analysis?' (2020) 19(2) Eur St Aid L Q 137, 138.

[537] I Zachariadis, 'Enabling SMEs' access to capital markets' (April 2019) Briefing European Parliament EU Legislation in Progress 1, 2.

[538] A Verity, 'Banks under fire for coronavirus loan tactics' (30 March 2020) BBC <https://www.bbc.com/news/business-52043896> last accessed 13 April 2023; L de Guindos and I Schnabel, 'Improving funding conditions for the real economy during the COVID-19 crisis: the ECB's collateral easing measures' (22 April 2020) THE ECB BLOG <https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200422~244d933f86.en.html> last accessed 13 April 2023.

[539] *See supra* Chapter III, section 1.

[540] COVID-19 Temporary Framework (n 513), para 22; the figures have later been increased up to EUR 1,800,000 per undertaking, EUR 270,000 per undertaking active in the fishery and aquaculture sector, and EUR 225,000 per undertaking active in the primary production of agricultural products by the European Commission, Communication from the Commission 'Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance' [2021] OJ C34/6 (Fifth Amendment to Covid-19 Temporary Framework), paras 20 and 23.

[541] I Agnolucci, 'Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures' (2022) 13(1) J Eur Competition L & Practice

provided for a limited period,[542] and subsidies can be given to public loans.[543] Credit institutions and other financial intermediaries can provide aid in the form of public guarantees and reduced interest rates.[544] The COVID-19 Temporary Framework also allows for flexibility on short-term export credit insurance and permits Member States to support such insurance as needed.[545] In addition, aid measures that involve temporary deferrals of taxes or of social security contributions for greatly affected undertakings can be considered compatible with the single market on the basis of Article 107(3)(b) TFEU.[546] Finally, the COVID-19 Temporary Framework addresses the social impact of the economic downturn caused by COVID-19 and permits Member States to provide specific aid measures in certain sectors or for particular businesses to cover the wage costs of these businesses, including self-employed individuals.[547] These wage subsidies must be granted for no more than twelve months and cannot exceed 80% of the monthly gross salary of the relevant personnel.[548]

It is important to note that Member States can implement the allowed measures only subject to a specific condition:[549] undertakings that were in financial difficulties before 31 December 2019 cannot receive aid under the COVID-19 Temporary Framework.[550] However, there are two exceptions to this rule. First, micro and small enterprises are exempt from this requirement.[551] Second, aid in the

3, 3 and 4; K Széles, 'New Challenges of EU State Aid Law: the Impact of the Pandemic on Competition between Member States' (2022) 25(1) Juridical Current 49, 53.

[542] COVID-19 Temporary Framework (n 513), paras 24 et seq.

[543] ibid, paras 26 et seq.

[544] ibid, para 28.

[545] ibid, para 32.

[546] ibid, paras 40 and 41 as introduced by European Commission, Communication from the Commission 'Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' [2020] OJ C112 I/1 (First Amendment to Covid-19 Temporary Framework), para 21.

[547] COVID-19 Temporary Framework (n 513), para 42 as introduced by First Amendment to COVID-19 Temporary Framework (n 546), para 22.

[548] COVID-19 Temporary Framework (n 513), para 43 as introduced by First Amendment to COVID-19 Temporary Framework (n 546), para 22.

[549] A Bouchagiar, 'State aid in the context of the COVID-19 outbreak, including the Temporary Framework 2020' (2021) Eur U Institute Working Paper RSC 2021/03 1, 7.

[550] COVID-19 Temporary Framework (n 513), para 22(c) referring to the meaning of "undertaking in difficulty" contained in GBER, art 2(18).

[551] COVID-19 Temporary Framework (n 513), paras 22(c)bis, 25(h)bis, 27(g)bis, 35(h)bis, 37(k)bis, 39(i)bis and 49(d)bis as introduced by European Commission, Communication from the Commission 'Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' [2020] OJ C218/3 (Third Amendment to Covid-19 Temporary Framework), para 15; COVID-19 Temporary Framework (n 513), para 87(f) as

form of tax deferrals, social security contributions deferrals, and wage subsidies to prevent layoffs during the pandemic are also exempt.[552] The aim of this rule is to make sure that the aid only supports healthy businesses that suffered financial difficulties due to the pandemic, not businesses that were already in financial trouble.[553] The latter kind of undertakings are, instead, eligible for aid under the Rescue and Restructuring Guidelines.[554] As a clarification, an undertaking can be considered in difficulty when it is expected to become insolvent in the short or medium term if the State does not intervene with aid measures.[555] Undoubtedly, it is difficult to assess whether a company is in difficulty or not, especially since financial accounts may not have been finalised by the end of 2019.[556]

It is by now clear that, to ensure that national aid measures are proportional and do not unnecessarily distort competition, aid ceilings and clear criteria have been established in the COVID-19 Temporary Framework. Although the Commission has determined the proportionality of State aid *ex ante* based on its past experience and practices, including those gained in 2008, and although State aid rules have prioritised reducing vulnerability and supporting the economy during the crisis, the Commission foresaw the need to revise the Framework periodically and return to stricter scrutiny after the economic storm in order to ensure the proportionality of State measures.[557]

Now that the worst of the crisis is over, it can be said that the Commission's State aid toolbox has effectively acted as a "risk management tool".[558]

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introduced by European Commission, Communication from the Commission '4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance' [2020] OJ C340 I/1 (Fourth Amendment to Covid-19 Temporary Framework), para 41; for a definition of "micro enterprises" and "small enterprises" *see* GBER, Annex I.

[552] COVID-19 Temporary Framework (n 513), sections 3.9 and 3.10 as introduced by First Amendment to COVID-19 Temporary Framework (n 546), paras 21 and 22.

[553] Bouchagiar (n 511) 1206 and 1207.

[554] European Commission, Communication from the Commission 'Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty' [2014] OJ C249/1 (Rescue and Restructuring Guidelines).

[555] ibid, para 20.

[556] Robins (n 536), at 378 and 379.

[557] Ferri (n 519), at 185.

[558] ibid, at 180.

1.1.1.2. Amendments to the COVID-19 Temporary Framework

It seems now useful to briefly address the amendments that the Commission made to the COVID-19 Temporary Framework.[559] These became, indeed, necessary due to the temporary nature of the Framework, which was originally designed to last until 31 December 2020, and to the important competition policy and economic considerations that called for its review multiple times.[560]

In summary, the first amendment aimed to allow the use of State aids to accelerate research, experimentation, and production of products related to COVID-19, as well as to protect jobs threatened by the pandemic.[561] The second amendment's goal was to facilitate access to capital and liquidity for undertakings affected by the crisis,[562] while the third intervention focused specifically on supporting startups, micro and small businesses, and promoting private investments.[563] As the pandemic crisis continued, in October 2020, the Commission adopted a fourth amendment aimed at extending the provisions of the COVID-19 Temporary Framework until 30 June 2021, with the exception of recapitalisation measures, which were extended for an additional three months until 30 September 2021.[564] With this intervention, the types of admissible State aids were also further extended. In January 2021, with a new Communication, the Commission increased the ceilings for limited amounts of aid and uncovered fixed costs, and allowed the conversion of reimbursable instruments granted under the COVID-19 Temporary Framework (guarantees, concessional loans, reimbursable advances) into other forms of aid, such as direct subsidies, provided that the conditions imposed by the same were met.[565] Last, in November 2021, the sixth extension was approved, and a path towards the gradual elimination of crisis-related aids was also defined in light

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[559] European Commission, 'Amendments to the State Aid Temporary Framework' <https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework/amendments_en> last accessed 18 April 2023.
[560] COVID-19 Temporary Framework (n 513), para 39.
[561] First Amendment to COVID-19 Temporary Framework (n 546).
[562] European Commission, Communication from the Commission 'Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' [2020] OJ C164/3 (Second Amendment to Covid-19 Temporary Framework).
[563] Third Amendment to COVID-19 Temporary Framework (n 551).
[564] Fourth Amendment to COVID-19 Temporary Framework (n 551).
[565] Fifth Amendment to COVID-19 Temporary Framework (n 540).

of the ongoing recovery of the European economy.[566] To this end, the Commission introduced two new measures to support undertakings: direct incentives for private investments, eligible until the end of 2022, and solvency support measures eligible until 31 December 2023.[567]

In May 2022, Executive Vice-President Margrethe Vestager, in charge of competition policy, announced that the COVID-19 Temporary Framework would not be extended beyond the established expiry date, which is 30 June 2022. The phase-out was designed to be gradual and organised in a way that prevents sudden discontinuation of essential support to affected businesses. Interestingly, to have an idea of the significance the Framework had in the response to the COVID-19 outbreak, as of 12 May 2022 (i.e., less than one year and a half after the outbreak), the Commission adopted more than 1300 decisions, approving nearly 950 national measures for an estimate total State aid amount approved of nearly EUR 3,2 trillion.[568]

That being said, while the EU was look forwarding to leaving behind the disruptive pandemic, it was already confronted with another crisis. The effects of the Russia-Ukraine war are overshadowing the positive signals of recovery in Europe.

1.1.2. Rescue Aid

In order to provide short term liquidity to companies, alongside the COVID-19 Temporary Framework, Member States can resort to rescue aid, in the form of public loans or loan guarantees. The goal of rescue aid is to keep struggling companies afloat when faced with a serious deterioration of their financial situation

[566] European Commission, Communication from the Commission ‘Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance’ [2021] OJ C473/1 (Sixth Amendment to Covid-19 Temporary Framework).
[567] F Marconi, ‘Aiuti di Stato nell’emergenza pandemica: il caso delle compagnie aeree tra circostanze eccezionali e grave turbamento dell’economia’ (2022) 2 Eurojus 147, 150 and 151; S Mezzacapo, ‘Lo speciale regime giuridico temporaneo UE applicabile agli aiuti di Stato in risposta all’emergenza economico-sanitaria causata dalla pandemia di Covid-19 (2020) Diritto & Conti 2 Rivista Giuridica Semestrale 99, 110 and 111.
[568] European Commission, ‘State aid: Commission will phase out State aid COVID Temporary Framework’ (12 May 2022) Statement STATEMENT/22/2980.

due to acute liquidity crisis or technical insolvency, for a maximum period of six months while they work out a restructuring or liquidation plan.[569] Often, restructuring aid[570] is also notified for the company in question after applying for rescue aid. The COVID-19 pandemic has led the Commission to waive the "one time, last time" principle,[571] allowing companies that have received rescue aid within the last ten years to be eligible for further rescue aid.[572] Even companies that were not yet facing financial difficulties could receive rescue aid if they faced acute liquidity needs due to COVID-19.[573]

However, to be eligible for rescue aid, undertakings that are part of a larger business group must show that their financial difficulties are not the result of an arbitrary allocation of costs within the group.[574]

In addition, companies must provide robust financial evidence to determine the amount and the time period over which rescue aid is needed, including the period over which liquidity support is required and the amount of support required to cover their unavoidable costs, as well as the current and expected damage caused by liquidity issues related to the pandemic.

The maximum amount of rescue aid allowed is 50% of the beneficiary's operating cash flows in the year preceding the aid application over a six-month period.[575] Furthermore, the compatibility of the aid with the common interest objectives of the aid and the appropriateness criterion must be assessed. For these reasons, the provisions for rescue aid result to be more restrictive than those under the COVID-19 Temporary Framework[576] and it is soon explained why Member States have relied on the latter instrument, rather than on rescue aid, to establish liquidity support schemes.

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[569] Rescue and Restructuring Guidelines (n 554), para 26.
[570] *See infra* Chapter III, section 1.2.2.
[571] Rescue and Restructuring Guidelines (n 554), para 70: "In order to reduce moral hazard, excessive risk-taking incentives and potential competitive distortions, aid should be granted to undertakings in difficulty in respect of only one restructuring operation. This is referred to as the 'one time, last time' principle. […]"
[572] Coordinated economic response (n 515), Annex III.
[573] ibid, Annex I.
[574] Rescue and Restructuring Guidelines (n 554), para 22.
[575] Robins (n 536), at 140.
[576] ibid.

1.2. State Aid Tools to Tackle the Medium and Longer-Term Impact of the Health Crisis

The crisis, however, may require more than just short-term liquidity support, and Member States have access to three main State aid tools beyond such support to tackle the longer-term effects of the pandemic. These include aid for compensating damages directly caused by the Coronavirus outbreak, aid for restructuring as well as recapitalisation aid measures. In particular, the Commission permits Member States to provide aid to compensate for COVID-19-related damages, recognising the pandemic as an "exceptional occurrence" under Article 107(2)(b) TFEU, and taking into account that such aid might exceed the limits allowed under the COVID-19 Temporary Framework. Alternatively, Member States could provide restructuring aid to financially struggling undertakings, especially those experiencing structural changes due to the pandemic, with the aim of restoring their long-term viability.[577]

1.2.1. Compensation for Damages Caused by COVID-19

As mentioned above,[578] Article 107(2)(b) TFEU allows Member States to provide compensation to undertakings in industries that have been severely impacted by the pandemic, such as transportation, tourism, culture, hospitality, and retail, as well as to organisers of events cancelled due to the pandemic.[579] Aid "to make good the damage caused by natural disasters or exceptional occurrences"[580] or "to remedy a serious disturbance"[581] can be State aid if it fulfils Article 107(1) TFEU criteria.[582] Although the terms "natural disaster" and "exceptional occurrence" are neither defined by the Treaty nor by the GBER, whose Article 50 refers only to natural disaster, the Commission itself has declared that the COVID-19 pandemic qualifies as an exceptional occurrence for the purpose of Article

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[577] ibid, at 140 and 141.
[578] *See supra* Chapter III, section 1.
[579] COVID-19 Temporary Framework (n 513), para 15.
[580] TFEU, art 107(2)(b).
[581] TFEU, art 107(3)(b).
[582] Commission Decision (EU) 2020/394 of 7 October 2019 Concerning the Measures SA.39119 (2016/C) (ex 2015/NN) (ex 2014/CP) Implemented by the Hellenic Republic in the Form of Interest Subsidies and Guarantees Linked to the Fires of 2007 (the present decision covers only the agricultural sector) [2020] OJ L76/4, recital 110.

107(2)(b) TFEU.[583]

However, according to the Commission's decisional practice, aid granted under Article 107(2)(b) TFEU to compensate affected businesses must satisfy three criteria: exceptionality, causality, and proportionality.[584]

Regarding the first requirement, an unforeseen or unpredictable event with a significant impact beyond what is considered normal must occur for a Member State to claim that they have been affected by an exceptional occurrence.[585] However, they must provide evidence to demonstrate that it is, in fact, outside the range of ordinary or expected events.

Second, the Member State concerned must establish a direct causal link between the extraordinary event and the damage suffered. While establishing causality may be straightforward in some cases, such as the loss of revenue suffered by airlines and airports due to cancelled flights, it may be more complicated in others, such as when the decrease in demand is caused by factors which predated the pandemic. In such cases, economic analysis may help untangle the various factors that contribute to financial difficulties or decreased demand.[586]

Third, in order for the aid to be proportional, it can cover up to 100% of the damage or loss but cannot exceed the total cost of the damage. Additionally, the amount of compensation should be calculated on an individual beneficiary basis and should be net of any insurance payouts.[587]

However, if Member States intend to compensate affected undertakings, they must fulfil further requirements. Specifically, in the notification submitted to the Commission for approval they need to specify a methodology for calculating the damages that the aid will cover, to ensure that the aid amount does not exceed the actual damages suffered. Generally, the damages suffered by undertakings can be

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583 *See* the template for notification of state aid under Article 107(2)(b) accessible at <https://competition-policy.ec.europa.eu/system/files/2021-05/template_TF_notification_107_2_b_0.pdf>.

584 P Nicolaides, 'State Aid to Combat Covid-19' (2020) Policy Brief 13/2020, Luiss School of European Political Economy 1, 4 and 5.

585 Examples of cases that have been found to be exceptional: war, terrorist attack, civil strife, strikes, major nuclear, maritime or industrial accidents, large fires and epidemics.

586 Robins (n 536), at 141.

587 P Nicolaides, 'Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence' (2020) 11(5-6) J Eur Competition L & Practice 238, 239 and 240.

calculated by comparing the counterfactual scenario, namely the expected financial situation of these companies in the absence of the pandemic, with the factual scenario during the COVID-19 outbreak.[588]

Then, once approved, aid applicants must provide relevant evidence to the granting authority, which includes a detailed description of the damages, assessment of the lost income, and any additional costs or avoided costs resulting from the pandemic. Independent experts should verify this evidence to support the approval process. In some instances, the Commission may request Member States to submit a report a year after the aid's approval to demonstrate that there was no overcompensation.[589] This kind of analysis was required in the first instance of compensation for COVID-19 damages approved by the Commission, which pertained to a Danish aid scheme designed to compensate event organisers.[590]

1.2.2. Restructuring Aid

Another way for Member States to provide ongoing support to undertakings affected by the COVID-19 pandemic is through restructuring aid.[591] Financial analysis is required to demonstrate the compatibility of this kind of aid in two specific areas. First, an appropriate restructuring plan must be developed to prove that the aid will enable the beneficiary to achieve long-term financial viability without further assistance. Second, it must be demonstrated that the aid is limited to the minimum amount necessary.

As to the first area, Member States who wish to apply for aid must submit a detailed restructuring plan that outlines how, within a reasonable timeframe, the company will realistically achieve long-term viability without aid.[592] The appropriateness of the assumptions on which the plan is based, such as forecast operating profit trends and drivers of profitability, should be supported by robust evidence. In this context, economic modelling may be used to estimate core input parameters, while elements which would normally be taken into account might not

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588 Robins (n 536), at 141.
589 ibid.
590 Case No SA.56685 (n 514).
591 For a definition of "restructuring aid" and "temporary restructuring aid" *see* Rescue and Restructuring Guidelines (n 554), respectively paras 27 and 28.
592 Rescue and Restructuring Guidelines (n 554), section 3.1.2.

be useful in the evaluation of an undertaking in the exceptional circumstances of the pandemic.[593] In addition to assessing the reasonableness of the financial projections presented in the restructuring plan, the Commission also evaluates whether the undertaking can be expected to return to viability without further State intervention.[594] This evaluation will involve comparing the company's projected medium to long-term profitability with a benchmark profitability established looking at similar undertakings operating in the same market prior to the pandemic.

A second area where financial analysis can be used to demonstrate the appropriateness of restructuring aid is the proportionality assessment. In order to ensure that only the minimum amount of aid necessary is given for the restructuring, the Commission mandates the so-called "own contribution", namely that the beneficiary undertaking, along with its shareholders and/or new private investors, must contribute to the restructuring costs. Additionally, wherever possible, the State and the beneficiary's creditors should share the burden in a fair way.[595] Financial valuation or accounting analysis can be used to prove that the beneficiary's own contribution is substantial (usually at least 50% of the restructuring costs).

Apart from providing help in the legal assessment of restructuring plans and the proportionality of restructuring aid, financial analysis can also be useful in assessing the need for aid and its incentive effects. Moreover, economic analysis can help in designing measures to limit distortions of competition, which are typically required by the Commission in the context of restructuring aid, as well as in demonstrating the effectiveness of compensatory measures. While compensatory measures aim to mitigate any significant distortions to competition and trade caused by the aid, they may delay the beneficiary's return to viability if they result in lower expected profits.[596] Finally, to be proportionate, measures to limit distortions should take into account the aid's context, such as its size and nature, as well as the beneficiary's relative importance in the market. This analysis can be based on an

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[593] ibid.
[594] ibid.
[595] ibid, section 3.5.2.1.
[596] Robins (n 536), at 145.

assessment of the capacity, concentration and expected growth of the market, as well as of the existence of barriers to entry and exit.[597]

1.2.3. State Recapitalisation of Undertakings Facing Financial Difficulties and the Role of the MEOP

In an effort to prevent viable businesses from exiting the market due to financial difficulties caused by the COVID-19 pandemic,[598] the Commission broadened the COVID-19 Temporary Framework's range of aid to include subordinated loans and recapitalisation measures for both large businesses and SMEs, as well as for group of undertakings or individual ones.[599] Recapitalisation aid, which is the most "heavyweight" category of aid covered in the Framework, involves providing equity or hybrid capital instruments[600] or both.[601]

The Commission clarified that recapitalisation aid should only be used as a last resort, and those applying for aid must demonstrate that all other alternatives for obtaining financing at market terms have failed.[602] This is because such aid not only provides liquidity support but also substantially reinforces the solvency of the beneficiary undertakings.[603] Additionally, Member States are also responsible of designing national support measures that meet their digital and environmental policy objectives.

That being said, recapitalisation aid has effects which can be significantly harmful for competition, and as such, it has to fulfil several precise conditions established by the Commission. These include the undertaking in question being expected to go out of business without the aid; State intervention being in the public interest; and the beneficiary not having been in difficulty before 31 December

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[597] For further information *see* Oxera, 'Ex post assessment of the impact of state aid on competition' (November 2017) Final Report.
[598] Second Amendment to COVID-19 Temporary Framework (n 562), paras 6 and 52-53.
[599] ibid, para 37.
[600] For a definition of "hybrid capital instruments" *see* Second Amendment to COVID-19 Temporary Framework (n 562), footnote 24: "Hybrid capital instruments are instruments that have characteristics of debt as well as of equity. For instance, convertible bonds are remunerated like bonds until they are converted into equity. The assessment of the overall remuneration of hybrid capital instruments thus depends on the one hand on their remuneration while they are debt-like instruments and on the other hand on the conditions for conversion into equity-like instruments."
[601] Bouchagiar (n 511) 1238.
[602] COVID-19 Temporary Framework (n 513) para 45 as introduced by Second Amendment to COVID-19 Temporary Framework (n 562), para 37.
[603] Bouchagiar (n 511) 1239.

2020.[604] Furthermore, the Commission also requires, as it does for restructuring aid, that the expected profitability of the undertaking in the medium to long term must be assessed against the benchmark profitability of comparable firms in the market before the pandemic.[605]

As to the proportionality of recapitalisation aid, the Commission stipulates that aid should only be provided to the minimum extent necessary to ensure the viability of the beneficiary, without exceeding the pre-COVID-19 capital structure.[606]

Member States must also be sufficiently compensated for the risks associated with the aid instruments, with the Commission setting minimum levels of remuneration for each instrument. For equity injections and hybrid capital instruments, the Commission requires that the State's ownership share or remuneration be progressively increased through a "step-up mechanism" to encourage the beneficiary to repurchase State capital as soon as possible.[607] In addition, when Member States provide recapitalisation exceeding 25% of a large company's equity, they must submit a credible exit strategy.[608] Behavioural and structural measures are also required, with recapitalisation aid recipients being prohibited from paying dividends, repurchasing shares, or awarding bonuses to management.[609] Large companies thus face specific restrictions. A further example is a limitation on mergers that prevents them from acquiring more than a 10% stake in competitors or operators in the same line of business, upstream or downstream.[610] However, the Commission may grant an exception if the acquisition is necessary to maintain the viability of the beneficiary.[611]

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[604] COVID-19 Temporary Framework (n 513) para 49 as introduced by Second Amendment to COVID-19 Temporary Framework (n 562), para 37.

[605] Robins (n 536), at 146.

[606] COVID-19 Temporary Framework (n 513) para 54 as introduced by Second Amendment to COVID-19 Temporary Framework (n 562), para 37.

[607] COVID-19 Temporary Framework (n 513) paras 61 and 68 as introduced by Second Amendment to COVID-19 Temporary Framework (n 562), para 37.

[608] COVID-19 Temporary Framework (n 513) para 79 as introduced by Second Amendment to COVID-19 Temporary Framework (n 562), para 37.

[609] COVID-19 Temporary Framework (n 513) para 77 as introduced by Second Amendment to COVID-19 Temporary Framework (n 562), para 37.

[610] COVID-19 Temporary Framework (n 513) para 74 as introduced by Second Amendment to COVID-19 Temporary Framework (n 562), para 37.

[611] COVID-19 Temporary Framework (n 513) para 75 as introduced by Second Amendment to COVID-19 Temporary Framework (n 562), para 37.

Considering these rigorous requirements, aid recipients may wish to structure their measures in compliance with the MEOP.[612] When a State provides funding to a company on terms similar to that a private investor would have adopted, there is no "advantage" conferred by the State intervention. To establish MEOP compliance, a benchmarking or profitability analysis can be conducted to determine if the terms offered to the recipient would be acceptable to a private investor.[613]

Finally, another scenario worth mentioning is that of the State having already invested in an undertaking that began facing difficulties due to COVID-19. In this case, it should be assessed whether the private creditor test could be applied.[614] Indeed, this test could be useful since a private creditor could well write off parts of the outstanding debt if the recoverable amount is larger than what could be recovered if the undertaking were forced into bankruptcy.

2. Commission's Novel Approach in the Authorisation Process of State Aids in the Energy Sector

As said before, the COVID-19 crisis posed significant concerns in terms of State intervention. In the aftermath of the outbreak, the highest number of notifications ever sent by Member States was registered and, consequently, the largest number of Commission's decision were adopted. More in detail, as far as the energy sector is concerned, in the relatively short period that goes from the outbreak of the Coronavirus to the beginning of Russia's invasion of Ukraine – between February 2020 and December 2021 – the Commission adopted 35 decisions for State aids in the fields of energy efficiency, energy infrastructure, energy saving and renewable energy. Of these, only five interrelated measures concerning district heating network in Poland were not found compatible with the single market on the basis of Article 107(3)(c) TFEU.[615] In reference to these, indeed, the Commission started

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[612] For a detailed analysis of MEOP *see supra* Chapter I, section 1.3.2.
[613] Robins (n 536), at 147.
[614] *See supra* Chapter I, section 1.3.2.
[615] European Commission, 'State Aid SA.51987 (2018/N) – District heating network – Tarnobrzeg; SA.52084 (2018/N) – District heating network – Ropczyce; SA.52238 (2018/N) – District heating

the formal investigation procedure, which eventually led to the withdrawal of the notification by Poland. None of these 35 Commission cases has reached a court.

This high number of Commission's decisions not to raise objections is extremely illustrative of the shift in the Commission's approach in the authorisations of State aid measures. Indeed, suffice it to say that in the two decades preceding the COVID-19 outbreak, from the beginning of 2000 until February 2020, the Commission adopted only 99 decisions concerning the same energy-related topics. In particular, the Commission seems to have adopted a more flexible approach, after the beginning of the pandemic, when Member States declared to pursue trough public interventions one of the mentioned primary objectives. Of these, renewable energy is the most common one as 23 of the 30 authorised measures aimed at either increasing the production of renewable energy, or supporting investment in renewable electricity, gas and heat production.

Therefore, from measures of a true exceptional nature as required by the Treaty, State aids have become almost daily measures, adopted at a high pace by the Commission, since the beginning of the pandemic. The importance of State aids in the field of energy sector, made clear by the increased flexibility in the authorisation process, is justified by the more general relevance that environmental and energy policy have been acquiring at the European level. Indeed, the Commission is fully aware that the recovery from the pandemic cannot disregard environmental concerns. The recovery of the economy must be sustainable, reason for which the Commission also authorised schemes compatible with the Guidelines for on State aid for Environmental Protection and Energy,[616] those preceding the CEEAG which at the time had not yet been published. But this is also confirmed precisely by the adoption of the new version of the Guidelines – the CEEAG – at the end of 2021, thereby signalling the great importance the Commission attaches to environmental and energy issues, even in times where they might have been overlooked, namely during a major international health crisis.

In conclusion, as will be seen in the following chapter, the Commission's trend of granting with more ease authorisation of State aids has been confirmed also in

network – Lesko; SA.54236 (2019/N) – District heating network – Dębica; and SA.55273 (2019/N) – District heating network – Ustrzyki Dolne', C(2019)7563, 25 October 2019.

[616] EEAG (n 212).

response to the Russia-Ukraine crisis, in that case with particular reference to the energy field. What is concerning, and must be addressed at the supranational level, is the duration of this new approach in time: whether it is employed by the Commission just as an effective and exceptional tool to tackle serious and international crises, or whether it has now opened a new era in the field of State aids which is arguably not so in line with the original idea behind the Treaty. It is true that the first time this increased flexibility was witnessed was in the period following the 2008 economic crisis, but it also true that as soon as the worse part of it was over the Commission established again the strict rules provided by the Treaty. With a view to the maintenance of a competitive playing field, it is desirable that when the needs connected to the Russia-Ukraine war are overcome, the Commission returns to the more rigid approach in the authorisation of State aid measures.

3. Examples of Member States' Response to Energy Poverty Emergency

Before getting into an analysis of the effects of the pandemic on the European energy sector, it might be interesting providing a brief overview of the main measures adopted by two Member States – Italy and Spain – to address the impact of the COVID-19 outbreak on energy poverty. Indeed, while surely the energy sector has not been the primary concern of the authorities in the aftermath of the pandemic outbreak, it soon became clear that significant and serious effects might have also been felt in the energy sector. As it will be later described in more detail, the EU registered an overall reduction in total energy demand, mainly driven by the industrial and commercial sectors. On the other side, residential demand was correctly expected to grow as a result of the lockdown measures.

In this context, Italy and Spain have been among the countries which suffered the most the initial phase of the pandemic. To respond to the crisis, alongside confinement measures, they intervened to guarantee residential energy supplies, despite not in the form of direct grants.[617]

In particular, both countries prevented disconnections of electricity and gas supply to non-paying residential customers during the emergency period. They accomplished this by delaying the regulatory process from the first unpaid bill to the actual disconnection. Additionally, first, they extended the deadlines for the renewal of social tariffs, which are renewed annually in Italy and every other year in Spain and, second, they granted to all registered customers an automatic renewal of their social tariffs until the end of the emergency.

Furthermore, at the initial stage of the outbreak, Italy and Spain also adopted different approaches. Italy, indeed, decided to postpone all energy bills, including those for water and waste management, for the eleven municipalities that were first isolated in the early stages of the outbreak. The arrears for these bills had to be paid in instalments after the emergency. However, this measure was not expanded to the rest of the country when the epidemic spread. As far as Spain is concerned, instead, the authorities widened the range of customers eligible for the electricity social tariff to include self-employed individuals who, due to the COVID-19 outbreak, either had to cease their activity or experienced a reduction of over 75% in their invoicing compared to the average of the preceding six months. One last remark, to ensure the financial stability of energy retail companies affected by the emergency measures (especially those related to unpaid bills), Italy established a "COVID account" worth EUR 1,5 billion. Retailers could apply for advanced payments from this fund to cover imbalances in their accounts that exceed 3% of the regular billing for that time of the year.[618]

4. Effects of the Pandemic on the European Energy Sector

4.1. How was the Energy Sector Impacted?

As mentioned above, the COVID-19 pandemic has had an indirect impact on the

[617] *See generally* for Italy <https://www.arera.it/it/elenchi.htm?type=stampa-20#> and for Spain <https://www.miteco.gob.es/es/ministerio/medidas-covid19/> last accessed 19 April 2022.

[618] P Mastropietro, P Rodilla and C Batlle, 'Measures to Tackle the Covid-19 Outbreak Impact on Energy Poverty: Preliminary Analysis Based on the Italian and Spanish Experiences' (2020) Repositorio de la Universidad Pontificia Comillas 1, 6 and 7.

energy sector, as with most other sectors. After having seen how two Member States reacted to the risks the pandemic posed on the energy sector, it might be worth analysing in more detail the significant effects suffered in fact by the operators in this field.

One area that has been heavily affected is the renewable energy sector. Economic downturns have indeed caused significant delays in the supply chains of renewable energy, and concerns have been raised about the lack of financing, available from both the market and the government, for renewable energy investment.[619]

In response to Coronavirus outbreak, many governments have implemented strict restrictions on public life, resulting in a decline in almost all economic activities. In the energy sector, this decline has led to a significant decrease in demand, which in turn caused changes in electricity prices and CO_2 emissions.[620] It is therefore important to understand how lockdown measures have had a relevant impact on electricity demand and generation mix. Drastic reductions in industrial, commercial, and tertiary activities have been registered and these led to a drop in demand in these sectors.[621] This, instead, led to an increase in energy demand and consumption in the household sector.[622] Elements that must be considered when assessing the mentioned demand drop are the type of measures adopted and their severity and duration.

Interestingly, the pandemic caused an increase in energy trade between countries.[623] Additionally, in the aftermath of the outbreak, the production of renewables increased, while the fossil generation fell down. This testifies that intermittent renewables can be deemed a reliable resource in critical times.[624]

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[619] CL Karmaker and others, 'Improving supply chain sustainability in the context of COVID-19 pandemic in an emerging economy: exploring drivers using an integrated model' (2021) 26 Sustainable Production and Consumption 411, 417.
[620] P Hauser and others, 'Covid-19's Impact on European Power Sectors: An Econometric Analysis' (2021) 14(6) Energies 1, 13.
[621] E Bompard and others, 'The Immediate Impacts of COVID-19 on European Electricity Systems: A First Assessment and Lessons Learned' (2021) 14(1) Energies 1, 3.
[622] I Siksnelyte-Butkiene, 'Impact of the COVID-19 Pandemic to the Sustainability of the Energy Sector' (2021) 13(23) Sustainability 1, 12.
[623] I Cazcarro, 'Energy-socio-economic-environmental modelling for the EU energy and post-COVID-19 transitions' (2022) 805 Science of The Total Environment 1, 2.
[624] A Werth, P Gravino and G Prevedello, 'Impact analysis of COVID-19 responses on energy grid dynamics in Europe' (2021) 281 Applied Energy 1, 6.

As far as the impact on electricity is concerned, two types of effects resulting from the pandemic can be identified. The first relates to the direct and measurable impact on electricity systems, as displayed by the evolution of the electricity demand. Both the power profile and energy consumption can be used to measure the changes in demand. A set of metrics is employed to quantitatively capture the variation by comparing current power profiles with corresponding periods in the past, before the pandemic. The second type of effect is the immediate indirect impact on the technical operation of electricity systems and electricity markets.[625]

Additionally, it is worth examining how Member States responded to the immediate impacts of the pandemic, which primarily affected power consumption levels, the structure of the generation mix, and electricity market prices. Indeed, European countries adopted different mitigation and protection strategies, with some countries implementing stricter containment measures, such as Italy, France, and Germany, while others, like Sweden and Switzerland, adopted lighter approaches. In the former group of countries, which adopted measures like the closure of factories and changes in social habits, electrical energy consumption decreased by approximately 15% compared to previous years, resulting in changes in the load profile. On the other hand, there were no significant changes in consumption in countries with lighter measures.[626]

However, there are also some features common to various Member States. Indeed, soon after the pandemic began, it became evident that a reorganisation of the economy was necessary across all Member States to reduce the risk of contagion. This reorganisation could also affect the level of energy consumption and the energy mix. It remains unclear whether this rapid change could be compatible with a zero-emissions economy, also considering the risk of reverting to polluting technologies. However, the pandemic may have hastened the transition to electrification, which is the optimal energy carrier for decarbonising the economy.[627] In this new low-contact economy, the primary objective is to minimise

[625] Bompard (n 621), at 3.
[626] ibid, at 14.
[627] R Fuentes, 'A Climate-Change Approach to Covid-19 and its Implications for the Energy Transition' (2020) 123 Oxford Energy Forum 18, 19 and 20.

the risk of infection and, therefore, activities that require less physical interaction, or which are otherwise considered safer, are expected to thrive.[628]

Analysing data can help to better understand the impact of the pandemic. In April 2020, countries with full lockdowns experienced a weekly average of 25% drop in energy demand, whereas countries with partial lockdowns had an 18% decline on average. According to the Global Energy Review, global electricity demand decreased by 2.5% in the first quarter of 2020 due to the initial lockdowns in many countries, while demand for gas and oil fell by 2% and 9% respectively.[629] Countries which were hit the hardest by the virus, and which implemented full lockdowns, namely Italy, France, Spain and the UK, experienced at least a 15% reduction in electricity demand.[630] Additionally, there was a remarkable decline in global mobility during the pandemic, resulting in a 57% decrease in global oil demand.[631]

In environmental terms, air quality significantly improved, in the short term, in many urban areas during the COVID-19 lockdowns. Indeed, economic activities and the fulfilment of human physical needs are closely related to air pollution, and thus, the restrictions imposed during lockdowns certainly had an impact on air quality. However, short-term improvements in air pollution experienced during the pandemic do not necessarily have long-lasting effects on the environment and air pollution.[632]

As a conclusive remark, COVID-19 has had a predominantly negative impact on the energy transition. In particular, it led to reduced consumption and investments and to a decline in fossil fuel prices, and together with geopolitical dynamics, this surely has delayed any efficient energy transition. However, the Coronavirus crisis may at least have had the positive effect of increasing awareness of the long-term

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[628] ibid.

[629] International Energy Agency, 'The Covid-19 crisis is causing the biggest fall in global energy investment in history' (27 May 2020) <https://www.iea.org/news/the-covid-19-crisis-is-causing-the-biggest-fall-in-global-energy-investment-in-history> last accessed 21 April 2023.

[630] C Karakosta and others, 'Tackling covid-19 crisis through energy efficiency investments: Decision support tools for economic recovery' (2021) 38 Energy Strategy Reviews 1, 2.

[631] International Energy Agency, 'Oil Market Report - April 2020' (April 2020) <https://www.iea.org/reports/oil-market-report-april-2020> last accessed 19 April 2023.

[632] Siksnelyte-Butkiene (n 622), at 13.

need to reduce greenhouse gas emissions.[633] More generally, economic uncertainty and negative effects on the energy sector caused by the pandemic should not change the path towards low-carbon energy. EU's ambitious goal of significantly reducing CO_2 emissions in the coming years can be achieved by combining renewable energy development and energy efficiency measures.[634]

Finally, the following is a brief consideration on the impact of the pandemic on two relevant areas: sustainability and changes in social behaviour.

The analysis of the impact of COVID-19 on the energy sector for achieving sustainability goals shows that changes in markets, investments, and policies play a significant role in progress towards sustainability. Tax policy can be crucial to counteract the negative effects of the pandemic on renewable energy projects' profitability and to promote investments in renewables.[635] Additionally, the EU has proposed a EUR 750 billion fund for recovery from the economic crisis caused by the pandemic, urging a green recovery and climate action intervention. In particular, 25% of this amount must be directed towards climate investments and additional funding for Horizon Europe.[636] Indeed, investment in renewable energy can have positive economic benefits and support crucial industries by driving renewable energy demand, promoting new project development, increasing employment opportunities in the clean energy sector, and addressing energy poverty as part of the pandemic recovery phase.[637]

The post-pandemic "new normal" will be shaped by changes in work and leisure organisation, as well as in commuting behaviour. For instance, office space usage

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[633] PA Merino Garcia, 'COVID-19 and the Energy Transition' (2020) 123 Oxford Energy Forum 20, 23.
[634] Siksnelyte-Butkiene (n 622), at 13.
[635] R Madurai Elavarasan, 'Envisioning the UN Sustainable Development Goals (SDGs) through the lens of energy sustainability (SDG 7) in the post-COVID-19 world' (2021) 292 Applied Energy 1, 6.
[636] European Commission, Communication from the Commission 'Europe's moment: Repair and Prepare for the Next Generation', COM(2020)456, 27 May 2020, at 6; Horizon Europe is the EU's key funding programme for research and innovation which, with a budget of EUR 95,5 billion, tackles climate change, helps to achieve the UN's Sustainable Development Goals and boosts the EU's competitiveness and growth (*see* <https://research-and-innovation.ec.europa.eu/funding/funding-opportunities/funding-programmes-and-open-calls/horizon-europe_en>).
[637] AT Hoang and others, 'Impacts of COVID-19 pandemic on the global energy system and the shift progress to renewable energy: Opportunities, challenges, and policy implications' (2021) 154 Energy Policy 1, 5.

seems now inefficient given that office work can be accomplished, at least in part, without commuting time and transport emissions. If these temporary adjustments persist even after the lockdowns are lifted, as it currently seems to be happening, they could affect domestic electricity loads, oil demand, and emissions. Indeed, longer periods spent at home affect both electricity and transport demand. In turn, the reduced need for travel decreases the incentives to own a car and consequently demand for oil products. However, this reduction in travel also diminishes the prospects for electric vehicles. On the other hand, a decline in incentives to purchase cars would incentivise ridesharing which could become more energy efficient. If this were to happen, overall energy consumption would decrease. Nonetheless, driving one's own car may seem safer than sharing a car, even with careful disinfection between passengers. This may partially counterbalance the weaker incentives to buy new cars. Therefore, the overall impact on oil demand driven by transport is not clear without government policies that can push the transition in one direction or the other.[638]

4.2. Increase in Energy Prices

As a consequence of to the pandemic, the world has been affected by a significant energy crisis, especially in the second half of 2021. Energy prices have risen considerably due to the increased global demand for energy – gas in particular – which is linked to the economic recovery.[639] The current surge in electricity prices is closely associated with the worldwide rise in gas demand as the economy starts to recover. Moreover, during the peak of the pandemic, a shortage of gas from Russia has been observed, leading to a tightening of the market even before the onset of the heating season. Also the European carbon price has seen a sharp increase in 2021, although not as high as the gas price.[640] The escalation in gas and electricity prices could have far-reaching consequences for industries, SMEs, and global and European supply chains, resulting in impacts on production,

[638] Fuentes (n 627), at 19 and 20.
[639] European Commission, Communication from the Commission 'Tackling rising energy prices: a toolbox for action and support', COM(2021)660, 13 October 2021 (Toolbox for high energy prices), at 1.
[640] ibid, at 2.

employment and prices.[641]

For this reason, in October 2021, the Commission revealed a set of measures to tackle the negative impact of the pandemic on energy prices and prevent households and businesses from suffering from increasing energy prices and energy poverty.[642] The energy price hikes affect all Europeans, but low and lower-middle-income households and the energy poor are the most severely affected as they are forced to spend a greater portion of their income on energy.[643]

The Commission's toolbox consists of two categories of measures: immediate response and medium response measures. The Commission gives priority to measures that quickly and effectively mitigate the price increases for vulnerable groups of people. Moreover, the Commission emphasises that the measures applied should be easily adjustable, and interference in market dynamics should be avoided. Additionally, the applied measures should not hinder the transition to a low-carbon economy.[644] The immediate response measures include direct support for low-income households via tax reduction, assistance with energy bills, a ban on energy grid disconnections, temporary payment deferrals, and the introduction of new renewable energy support schemes. Instead, as far as the medium term is concerned, the measures focus on increasing storage capacity, on investments in renewable energy and energy efficiency, and on the reduction of dependency on fossil fuels. These medium-term measures have been a cornerstone of EU energy policy for several years.[645]

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[641] ibid, at 5.
[642] I Siksnelyte-Butkiene, 'Combating Energy Poverty in the Face of the COVID-19 Pandemic and the Global Economic Uncertainty' (2022) 15 Energies 1, 7 and 8.
[643] Toolbox for high energy prices (n 639), at 4.
[644] Siksnelyte-Butkiene (n 642), at 7 and 8.
[645] Toolbox for high energy prices (n 639), at 7-19.

CHAPTER IV

THE EU'S RESPONSE TO THE EFFECTS OF THE RUSSIA-UKRAINE WAR ON THE EUROPEAN ENERGY SECTOR

SUMMARY: 1. A novel international crisis: Russia's invasion of Ukraine – 2. Effects of the war on the European energy sector – 3. Commission's Response to tackle the effects of the Russia-Ukraine war – 3.1. REPowerEU Plan – 3.1.1. Energy saving – 3.1.2. Diversifying energy imports – 3.1.3. Substituting fossil fuels and accelerating Europe's clean energy transition – 3.1.4. Smart investment – 3.2. Winter Preparedness Package – 3.2.1. Coordinated Gas Demand Reduction Regulation – 3.2.2. European Gas Demand Reduction Plan – 3.3. The Russia-Ukraine Temporary Framework – 3.3.1. Temporary state aid measures – 3.3.2. Amendments to the Temporary Framework – 4. Europe's energy dilemma.

1. A Novel International Crisis: Russia's Invasion of Ukraine

On 22 February 2022, Russia unlawfully acknowledged Ukrainian regions of Donetsk and Luhansk as independent territories. Two days later, Russia initiated an unjustified military attack against Ukraine. The EU and international allies promptly responded to this major infringement of Ukraine's territorial sovereignty and independence by imposing sanctions in the form of restrictive measures.[646] In response, Russia began enforcing certain economic countermeasures of its own.[647]

This military attack, along with the sanctions and countermeasures taken, has had economic effects on the entire single market. EU businesses have experienced direct or indirect repercussions, such as reduced demand or cancellation of existing contracts and projects. This inevitably resulted in loss of revenue, interruptions in supply chains, particularly for raw materials and inputs that are no longer available or affordable.[648]

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[646] For a detailed analysis of the sanctions imposed by the EU and international partners *see* European Commission, Communication from the Commission 'Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia' [2022] OJ C131 I/1 (Russia-Ukraine Temporary Framework), paras 8-15.
[647] ibid, para 1; Y Hasan, 'Russia-Ukraine Crisis and Energy Insecurity: Is energy transition a sustainable alternate?' (2022) 3(1) J Peace and Diplomacy 30, 39.
[648] Russia-Ukraine Temporary Framework (n 646), para 2.

More specifically, Ukraine's military aggression by Russia immediately caused disruptions in the supply chains for certain products, including cereals and vegetable oils, both for EU imports from Ukraine and for EU exports to Ukraine. More importantly for our purposes, the energy market has also been significantly affected, with increased electricity and gas prices in the EU. This will be the main object of this chapter, which will first evaluate the impact of the war on the European energy sector, and, second, assess how the EU responded to this energy crisis. Even before the physical attack, the likelihood of a Russian military attack on Ukraine had already impacted the energy market. High energy prices have affected various economic sectors – including those that had already been hit hard by the COVID-19 pandemic, such as transport and tourism – and have led to a significant increase in production and agricultural costs. The financial markets have also been impacted, with concerns about liquidity and market volatility in commodity trade. Finally, additional effects took the form of massive displacement of Ukrainian citizens, both within the country and in neighbouring nations, with an unprecedented influx of refugees into the EU, causing also significant humanitarian and economic consequences.[649]

For the foregoing reason, the Commission has decided to present various Communications to address the crisis. The first of these is the "REPowerEU Plan", which serves as the EU's response to the global energy market disruptions caused by Russia's invasion of Ukraine. Another response was the "Winter Preparedness Package", which aimed at reducing gas usage until spring 2023 to ensure enough gas is stored for the winter of 2022. Finally, the "Temporary crisis framework for State aid measures to support the economy following the aggression against Ukraine by Russia" ("Russia-Ukraine Temporary Framework") has the goal of defining the standards for assessing the compatibility with the single market of State aid measures that have been implemented to remedy the economic effects resulting from the Russian aggression, from the ensuing sanctions imposed by the EU and international partners, as well as from the countermeasures taken by Russia. One remark on the Commission's decisions on State aids. It is worth mentioning that, as evidence of the Commission's more flexible approach in the authorisation process,

[649] ibid, para 3.

just like it happened in the aftermath of the pandemic, in the period between the beginning of the Russian invasion and the end of May 2023, the Commission has already adopted 16 decisions on State aids in the areas of energy efficiency, energy infrastructure, energy saving and renewable energy.

Finally, a coordinated economic response from EU institutions and Member States is vital to alleviate the negative social and economic effects in the EU, to safeguard economic activities and jobs, and to support structural adjustments required to respond to the new economic situation.[650]

2. Effects of the War on the European Energy Sector

The EU's reliance on Russian energy has been severely tested by the war in Ukraine. Member States' efforts to find alternative gas supplies, coupled with low demand due to mild weather, resulted in a significant increase in European gas stocks, leading to lower prices. However, in response to the EU's refusal to pay in roubles, Russia stopped gas deliveries to Poland, Bulgaria, Finland, Denmark, and the Netherlands in April and May 2022,[651] resulting in warnings of economic recession and an increase in energy prices that has pushed a significant number of households into poverty.[652]

The war in Ukraine has caused considerable volatility in energy markets and a sharp increase in energy prices. Natural gas prices rose from 20 to 80 EUR/MWh between February 2021 and 2022, with surges as high as 180 EUR/MWh, causing a corresponding increase in electricity prices.[653] Energy supplies have been at risk due to the potential for disruptions and the imposition of strict sanctions on Russia, leading to fluctuating prices given markets attempt to anticipate the potential impact

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[650] ibid, para 7.

[651] M Hudec, 'Gazprom did not reserve gas transit capacity for June via Slovakia, Poland' (17 May 2022) Euractive <https://www.euractiv.com/section/energy-environment/news/gazprom-did-not-reserve-gas-transit-capacity-for-june-via-slovakia-poland/> last accessed 14 May 2023.

[652] V Jack, 'Ukraine war heats up energy poverty debate' (17 May 2022) Politico <https://www.politico.eu/article/ukraine-war-heats-up-energy-poverty-debate/> last accessed 14 May 2023; J Osička and F Černoch, 'European energy politics after Ukraine: The road ahead' (2022) 91 Energy Research & Social Science 1, 1.

[653] P Heather, 'A Series of Unfortunate Events: Explaining European Gas Prices in 2021' (2022) The Oxford Institute for Energy Studies 1, 7.

on global energy supplies. The euro area energy markets have been particularly affected due to the EU's proximity to Russia and its historical dependence on Russian supplies. More in particular, the immediate aftermath of the Russian invasion of Ukraine saw significant price increases for oil, coal, and gas, with energy commodity prices becoming increasingly volatile from December 2021, when reports of a potential Russian invasion began circulating. In the first two weeks after the invasion, oil, coal, and gas prices rose by around 40%, 130%, and 180% respectively, driving up wholesale electricity prices in the EU. While energy commodity prices have since moderated somewhat, with oil and coal prices remaining, respectively, 27% and 50% higher than before the invasion, gas prices have fallen by 11%. However, oil prices have begun to rise again due to the EU's embargo on most Russian oil imports and increased global demand following China's easing of COVID-19 restrictions. Therefore, months after the beginning of the war, wholesale electricity prices remain 8% higher than before the invasion, and policy measures taken in response to price increases continue to impact their volatility.[654]

It is worth also considering the broader impact of the Russian invasion of Ukraine. The invasion has caused significant financial losses in global markets, but companies that promote and adopt renewable energy sources have seen an increase in investment as investors soon began seeking alternative energy sources. The EU's dependence on Russian energy exports, coupled with western sanctions on the Russian economy, has disrupted the EU and the global economy. As a result, investors have begun to explore alternative energy resources and governments to explore alternative materials. Generally, investors are able to anticipate these changes and move their investments to safer options such as gold and silver. Thus, it can be concluded that the clean energy market saw the greatest price changes, followed by conventional energy and metals markets.[655]

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[654] JF Adolfsen and others, 'The impact of the war in Ukraine on euro area energy markets' (2022) European Central Bank <https://www.ecb.europa.eu/pub/economic-bulletin/focus/2022/html/ecb.ebbox202204_01~68ef3c3dc6.en.html> last accessed 14 May 2023.

[655] M Umar, Y Riaz and I Yousaf, 'Impact of Russian-Ukraine war on clean energy, conventional energy, and metal markets: Evidence from event study approach' (2022) 79 Resources Policy 1, 3 and 4.

After presenting some specific data, it is important to reflect on the EU's energy policy. It appears that the war in Ukraine has created an opportunity for new climate and energy policies in Europe, with a focus on the increased use of renewable energy technologies and the phasing out of fossil fuels. These changes would address the perceived risk associated with energy imports from Russia. However, it is uncertain whether these changes will in fact occur. Indeed, the war could be a catalyst for major policy shifts, but this would depend on how the event is interpreted: it is still unclear whether a narrative that emphasises the clean energy transition will be adopted. This ambiguity inevitably poses a challenge for energy policymakers who may need to make significant policy changes at short notice.[656] That being said, it is clear that energy security has been somewhat overlooked in recent years in favour of green policies and combating greenhouse effects. However, the ongoing war in Ukraine has highlighted the EU's significant vulnerability in the area of energy security due to its heavy reliance on hydrocarbon imports from Russia. As a result, it is likely that energy security will become a top priority for EU authorities.[657]

In conclusion, the ongoing war in Ukraine, coupled with the long-lasting effects of the COVID-19 pandemic, is expected to continue shaping the global discourse and influencing economic and political agendas around various areas including sustainability, environmental justice, supply chain management and energy reliability. These developments may have serious consequences on the achievement of the sustainable development goals set for 2030. Therefore, it is necessary to reassess the strategies and approaches used to achieve EU's objectives, mainly through legislation and fiscal mechanisms, as well as by formulating policies that would guide regional and national-scale development.[658] The following section explores the Commission's approach to the discussed issues, analysing first the

[656] B Steffen and A Patt, 'A historical turning point? Early evidence on how the Russia-Ukraine war changes public support for clean energy policies' (2022) 91 Energy Research & Social Science 1, 2.
[657] P Prisecaru, 'The War in Ukraine and the Overhaul of EU Energy Security' (2022) 10 European Studies Center, Institute for World Economy Romanian Academy 16, 16.
[658] Z Allam, SE Bibri and SA Sharpe, 'The Rising Impacts of the COVID-19 Pandemic and the Russia–Ukraine War: Energy Transition, Climate Justice, Global Inequality, and Supply Chain Disruption' (2022) 11(11) Resources 1, 13.

REPowerEU Plan and the Winter Preparedness Package, and then the framework for Member States to intervene in support of their undertakings.

3. Commission's Response to Tackle the Effects of the Russia-Ukraine War

3.1. REPowerEU Plan

On 8 March 2022, the Commission proposed a plan to render Europe independent from Russian fossil fuels well before 2030 due to Russia's attack on Ukraine.[659] Two weeks later, EU leaders agreed on this goal at the European Council and requested the Commission to present a detailed plan. The decision was further influenced by recent gas supply disruptions to Bulgaria and Poland, highlighting the need to address the unreliability of Russian energy supplies.[660] In response, alongside five (currently ten) wide-ranging packages of sanctions against Russia,[661] the Commission presented the plan on May 18 and named it REPowerEU Plan.[662] The plan has two main goals, namely to end Europe's reliance on Russian fossil fuels, which cost taxpayers nearly EUR 100 billion per year, and to combat the climate crisis.[663] This is perfectly synthetised in the words of the Commission in the REPowerEU Plan, which affirmed that the goal of the latter is to reduce "our dependence on Russian fossil fuels by fast forwarding the clean transition and joining forces to achieve a more resilient energy system and a true Energy Union".[664] The EU population largely supports this plan, with 85% of Europeans believing that the EU should reduce its dependency on Russian gas and oil to aid

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[659] European Commission, Communication from the Commission 'REPowerEU: Joint European Action for more affordable, secure and sustainable energy', COM(2022)108, 8 March 2022.
[660] U Von der Leyen, 'Press statement by President von der Leyen following the announcement by Gazprom on the disruption of gas deliveries to certain EU Member States' (27 April 2022) Statement STATEMENT/22/2685.
[661] For more detailed information *see* European Commission, 'EU sanctions against Russia following the invasion of Ukraine' <https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en> last accessed 30 April 2023.
[662] REPowerEU Plan (n 278).
[663] European Commission, 'REPowerEU: A plan to rapidly reduce dependence on Russian fossil fuels and fast forward the green transition' (18 May 2022) Press Release IP/22/3131.
[664] REPowerEU Plan (n 278), at 2.

Ukraine.[665]

To achieve this objective, the REPowerEU Plan proposes a set of actions, which will be analysed in the following sections, and which include energy savings, diversification of energy supplies, accelerated implementation of renewable energy to replace fossil fuels in homes, industry, and power generation, and finally smart investments.[666]

In conclusion, as concerns the REPowerEU Plan's relationship with other pillars of EU's energy policy, the plan builds on the implementation of the Fit for 55 package objective to achieve a reduction of at least 55% net greenhouse gas emissions by 2030 and climate neutrality by 2050, in line with the European Green Deal.[667] However, phasing out fossil fuel imports from Russia will undoubtedly reduce emissions over this decade, but it could modify the way of reaching the climate target compared to previous assumptions.[668]

3.1.1. Energy Saving

The quickest and most cost-effective way to tackle the present energy crisis is through energy savings. This would result in reduced energy bills for households and companies, as well as in a decline in the importation of Russian fossil fuels. Indeed, it should be by now evident that the reduction of energy consumption through improved efficiency is a vital part of the transition to clean energy. To this end, the Commission proposes expanding long-term energy efficiency measures, including raising the binding energy efficiency target from 9% to 13% under the Fit for 55 package.[669] Furthermore, the Commission urges Member States to attain additional energy savings and efficiency gains by employing the various instruments available under the EU's energy and environmental policies, along with supporting measures to promote energy savings. An example of the latter is reducing VAT rates on energy-efficient heating systems, insulation for buildings,

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665 European Commission, 'Eurobarometer: Europeans approve EU's response to the war in Ukraine' (5 May 2022) Press Release IP/22/2784.
666 REPowerEU Plan (n 278), at 2; for a complete list of actions *see* REPowerEU Plan (n 278), Annex 1.
667 *See supra* Chapter II, section 2.2.2.
668 REPowerEU Plan (n 278), at 3.
669 ibid, at 4.

and energy-saving appliances and products.[670] The objective of this Communication, in the short-term, was to save as much energy as possible to be better equipped to cope with potential challenges in the coming winter.

For this reason, the Commission also published the EU Save Energy Communication, which adopts a two-pronged strategy: achieving prompt energy savings through voluntary choices, and accelerating and reinforcing structural, medium- to long-term energy efficiency measures.[671] In particular, the EU Save Energy initiative specifies short-term behavioural alterations that could result in a 5% reduction in demand for gas and oil, and it also urges Member States to initiate specific communication campaigns targeting households and industries.

Finally, as part of this action to save energy, the Commission demands that Member States expedite the implementation and revision of the NECPs[672] since they play a critical role in successfully achieving the objectives of the REPowerEU Plan. NECPs, indeed, serve as a valuable framework for devising and advocating for a decrease in the consumption of fossil fuels.[673] Consequently, in December 2022, the Commission issued instructions for Member States to definitively update their NECPs by June 2024.[674]

3.1.2. Diversifying Energy Imports

The EU has been collaborating with its international partners to diversify supply,[675] and has successfully secured higher levels of liquefied natural gas ("LNG") imports and gas deliveries through pipelines, while taking steps to curb the increase in energy prices.[676]

To support common purchase of gas, a new EU Energy Platform has been created with the backing of regional task forces, which will fulfil three main

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670 ibid.
671 European Commission, Communication from the Commission 'EU 'Save Energy'', COM(2022)240, 18 May 2022.
672 *See supra* Chapter II, section 1.2.2(iv).
673 REPowerEU Plan (n 278), at 4.
674 European Commission, 'Commission Notice on the Guidance to Member States for the update of the 2021-2030 national energy and climate plans' [2022] OJ C495/24.
675 For example, *see* the EU-US LNG Trade at <https://energy.ec.europa.eu/system/files/2022-02/EU-US_LNG_2022_2.pdf> last accessed 30 April 2023.
676 REPowerEU Plan (n 278), at 4.

functions.[677] In particular, it will enable voluntary joint purchases of gas, LNG, and hydrogen in three ways: by pooling demand, optimising infrastructure use, and coordinating international outreach to suppliers. The Commission is also considering developing a "joint purchasing mechanism", which would negotiate and contract gas purchases on behalf of participating Member States, as well as facilitate joint purchasing of renewable hydrogen.[678] This mechanism could take the form of a joint venture or a business-owned entity, leveraging the power of the European market. Furthermore, an Advisory Group will provide information on LNG trade, financing, hedging, and other aspects along the value chain, ensuring compliance with antitrust rules. Finally, to support EU countries in the preparation for winter 2023/24, the Council has adopted a Regulation providing a legal framework for the EU Energy Platform, mainly focused on the filling of their gas storage facilities.[679]

The EU expects gas demand to decrease more rapidly than foreseen under the Fit for 55 package, if the REPowerEU plan is fully implemented, alongside measures focused on energy efficiency and the deployment of renewables and gas alternatives like sustainable biomethane and renewable hydrogen.[680] To be able to achieve this, the EU intends to work closely with its international partners and build long-term relationships with suppliers, focusing on diversification and green technologies, as set out in the External Energy Engagement Strategy.[681] In line with the Global Gateway,[682] this strategy will ensure the EU fulfils its commitment concerning the climate and energy transition, especially through an increase in

[677] European Commission, 'EU Energy Platform' <https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform_en> last accessed 30 April 2023.
[678] REPowerEU Plan (n 278), at 4 and 5.
[679] Council Regulation (EU) 2022/2576 of 19 December 2022 Enhancing Solidarity through Better Coordination of Gas Purchases, Reliable Price Benchmarks and Exchanges of Gas across Borders [2022] OJ L335/1.
[680] REPowerEU Plan (n 278), at 5.
[681] European Commission, Joint Communication from the Commission 'EU external energy engagement in a changing world', JOIN(2022)23, 18 May 2022.
[682] European Commission, Joint Communication from the Commission 'The Global Gateway', JOIN(2021)30, 1 December 2021 (which sets forth a strategy to boost smart, clean and secure links in digital, energy and transport sectors and to strengthen health, education and research systems across the world).

energy savings and energy efficiency, as well as through a strong development of renewables and hydrogen.[683]

As far as Ukraine is concerned, the EU undertakes to continue the collaboration to ensure energy security and a well-functioning energy sector. At the same time, the EU aims to promote future trade in electricity and renewable hydrogen and to rebuild Ukraine's energy system through the "REPowerUkraine" program.[684] This initiative seeks to provide financial and technical assistance to Ukraine to reduce its carbon emissions, to strengthen its energy independence and to create opportunities for the country to become a significant exporter of renewable energy.[685]

3.1.3. Substituting Fossil Fuels and Accelerating Europe's Clean Energy Transition

In order to reduce dependence on Russia, promote the green transition, and eventually lower energy prices, it is essential to rapidly increase the use of renewable energy in power generation, buildings, industry, and transportation.

The Commission's main priority is to accelerate the use of renewable energy sources. To achieve this goal, the Commission proposes to increase the 2030 target for renewable energy, provided in the Renewable Energy Directive, from 40% to 45%,[686] based on a study on feasibility and impact.[687] To support this objective, the Commission has also introduced the EU Solar Strategy,[688] which includes three key initiatives: increasing, by at least doubling, the presence of solar photovoltaics; accelerating the use of rooftops to produce solar energy, a fundamental and potentially widespread source which has been so far scarcely used; and establishing an EU large-scale partnership to address the skills gap in the solar energy sector. The Commission has also called upon Member States to double the rate of

683 European Commission, 'Strategy for an EU external energy engagement'<https://energy.ec.europa.eu/topics/energy-strategy/strategy-eu-external-energy-engagement_en> last accessed 30 April 2023.
684 Press Release IP/22/3131 (n 663).
685 European Commission, 'Questions and Answers on the REPowerEU Communication' (18 May 2022) Questions and Answers QANDA/22/3132.
686 REPowerEU Plan (n 278), at 6.
687 European Commission, Commission Staff Working Document 'Implementing the Repower EU Action Plan: Investment Needs, Hydrogen Accelerator And Achieving The Bio-Methane Targets', SWD(2022)230, 18 May 2022 (REPowerEU Staff Working Document).
688 European Commission, Communication from the Commission 'EU Solar Energy Strategy', COM(2022)221, 18 May 2022.

deployment of heat pumps and incorporate geothermal and solar thermal energy into modernised district and communal heating systems.[689]

A second area which the Commission wishes to strengthen is the development of renewable hydrogen as it is a crucial element in replacing natural gas, coal, and oil in industries and transport sectors that are difficult to decarbonise. Therefore, it has set a target of producing 10 million tonnes of domestic renewable hydrogen and importing another 10 million tonnes by 2030. The Commission also urged the European Parliament and the Council to agree on increased sub-targets for specific sectors[690] and it published two Delegated Acts to ensure that the production of renewable hydrogen leads to net decarbonisation.[691] Finally, to carry out these objectives and to accelerate hydrogen projects, the Commission has set aside an additional EUR 200 million for research.[692]

The Commission has also identified boosting sustainable biomethane production as a third cost-efficient path to achieving the EU's ambition to reduce imports of natural gas from Russia.[693] The Commission estimated that an investment of EUR 37 billion is needed to increase the capacity of biogas production in the EU and to promote its conversion into biomethane by 2030.

The Commission is also focusing on reducing fossil fuel consumption, mainly by substituting coal, oil and natural gas in industrial activities, in order to lower greenhouse gas emissions and improve security and competitiveness. Implementing energy-saving measures, increasing efficiency, substituting fuels, electrifying industrial processes, and promoting the use of renewable hydrogen, biogas and biomethane in industry could reduce natural gas consumption by up to 35 billion cubic meters ("bcm") by 2030, beyond what is already expected under the Fit for

[689] REPowerEU Plan (n 278), at 6.
[690] ibid, at 7.
[691] European Commission, Commission Delegated Regulation of 10 February 2023 Supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council by Establishing a Minimum Threshold for Greenhouse Gas Emissions Savings of Recycled Carbon Fuels and by Specifying a Methodology for Assessing Greenhouse Gas Emissions Savings from Renewable Liquid and Gaseous Transport Fuels of Non-Biological Origin and from Recycled Carbon Fuels, C(2023)1086, 10 February 2023; European Commission, Commission Delegated Regulation of 10 February 2023 Supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council by Establishing a Union Methodology Setting Out Detailed Rules for the Production of Renewable Liquid and Gaseous Transport Fuels of Non-Biological Origin, C(2023)1087, 10 February 2023.
[692] Press Release IP/22/3131 (n 663).
[693] REPowerEU Staff Working Document (n 687), at 3.

55 proposals.[694] To support the uptake of green hydrogen by industry, the Commission will roll out carbon contracts for difference and provide specific financing for REPowerEU through the Innovation Fund, which will be funded by emission trading revenues. The Commission is also offering guidance on renewable energy and PPAs, and providing technical advice through the European Investment Bank. Finally, the Commission is introducing a Greening of Freight Package to improve energy efficiency in the transport sector and considering legislation to increase the number of zero-emission vehicles in public and corporate car fleets above a certain size.[695]

To conclude, the Commission acknowledges that slow and complicated permitting procedures are a major barrier to unlocking the potential of renewables and to maintaining the competitiveness of the renewable energy sector.[696] Therefore, the Commission has put forward a Recommendation on permitting to accelerate the process for renewable energy projects and to make it easier to enter into PPAs.[697]

3.1.4. Smart Investment

To achieve the REPowerEU objectives, an investment of EUR 210 billion, additional to that needed for the Fit for 55 objectives, is required by 2027. These investments must come from both the private and public sector at the national, cross-border, and EU levels. While undoubtedly burdensome, the Commission believes the said investment is necessary for achieving the EU’s independence and security. Indeed, the reduction of Russian fossil fuel imports could save nearly EUR 100 billion per year. Similarly, the implementation of the Fit for 55 framework and REPowerEU plan could result in annual savings of around EUR 80 billion in gas import expenditures, EUR 12 billion in oil import expenditures, and EUR 1,7 billion in coal import expenditures by 2030.[698]

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[694] Press Release IP/22/3131 (n 663).
[695] REPowerEU Plan (n 278), at 9.
[696] ibid, at 11.
[697] European Commission, Commission Recommendation of 18 May 2022 on Speeding up Permit-Granting Procedures for Renewable Energy Projects and Facilitating Power Purchase Agreements, C/2022/3219, 18 May 2022.
[698] REPowerEU Plan (n 278), at 11.

As a preliminary remark, it is important noting that State aid rules apply to the reforms and investments included in the REPowerEU plan. Each Member State is responsible for ensuring that such measures comply with EU State aid rules and procedures. The Commission has the duty of exploring ways to facilitate State aid control for REPowerEU measures and of providing guidance on how measures can be properly designed, while limiting distortions to competition in light of the urgent need to reduce dependence on Russian fossil fuels. The Commission also assists Member States in developing measures that can be exempted from notification under the GBER. Finally, it will continuously review the Russia-Ukraine Temporary Framework to ensure that it enables Member States to address the effects of the current geopolitical situation, including in the energy field, and that the State aid framework is generally suitable.[699]

The REPowerEU plan inevitably marks a significant shift in the energy system in terms of the quantities and directions of energy flows. Therefore, in this context, the Trans-European Energy Networks ("TEN-E") has a key role to play in the implementation of long-awaited projects, with a specific focus on cross-border infrastructures to create an integrated energy market that ensures supply with solidarity. To this end, the Commission has identified eleven priority corridors that fall into three categories, namely electricity, offshore grid, and hydrogen corridors, as well as three thematic priority areas: smart electricity grids, smart gas grids, and cross-border carbon dioxide networks. The EU provides support for countries in these priority corridors and thematic areas to develop better-connected energy networks, and at the same time it gives funds for new energy infrastructure projects.[700] The Commission constantly encourages the development of PCIs,[701] especially those in priority corridors which are indeed given preference during the selection process as PCIs.

To achieve the REPowerEU goals, the Commission's regional assessment indicates that it is feasible to compensate for the same amount of gas imports from Russia by implementing several measures including reducing demand of gas,

[699] ibid, at 18.
[700] European Commission, 'Trans-European Networks for Energy' <https://energy.ec.europa.eu/topics/infrastructure/trans-european-networks-energy_en> last accessed 1 May 2023.
[701] *See supra* Chapter II, section 1.1.2.2.

increasing domestic production of biogas/biomethane and hydrogen, and making limited additions to gas infrastructure. The primary infrastructure needs are to satisfy the demand in Central and Eastern Europe, the northern region of Germany, and to strengthen the Southern gas corridor.[702] Additionally, storage is a critical aspect of ensuring a secure supply. Therefore, to enhance the readiness and response to any gas supply risks, it is essential to offer appropriate support, including financial aid, to the projects aimed at expanding the storage and withdrawal capacities.[703]

Furthermore, to ensure that the power grid can accommodate the increased production and use of electricity, an additional investment of EUR 29 billion is required by 2030. All relevant projects are already included in the current fifth PCIs list.[704]

It is then worth noting that although most of these objectives are set at the European level, implementing many measures is a responsibility of the Member States and requires targeted reforms and investments. In this regard, the Recovery and Resilience Plans ("RRPs")[705] have proven to be effective in implementing urgent priorities in a joint EU framework by providing a set of ambitious reforms and investments. To diversify energy supplies and reduce dependence on fossil fuels, the Commission urges Member States to add to their existing RRPs a dedicated chapter with new actions to deliver on the REPowerEU objectives.[706]

In terms of financing, the Recovery and Resilience Facility ("RRF")[707] offers loans worth EUR 225 billion to support the REPowerEU plan. The Commission also suggests increasing the financial envelope of the RRF with grants of EUR 20 billion. These grants will be financed through the sale of EU ETS allowances held

[702] REPowerEU Plan (n 278), at 13.
[703] ibid.
[704] Fifth list of PCIs (n 257).
[705] National Recovery and Resilience Plans ("RRPs") outline a comprehensive package of reforms and investments to access the financial resources made available by the EU through the Recovery and Resilience Facility.
[706] REPowerEU Plan (n 278), at 16.
[707] The Recovery and Resilience Facility ("RRF") is a temporary recovery instrument which allows the Commission to raise funds to help Member States implement reforms and investments that are in line with the EU's priorities and that address the specific challenges identified by the Commission, such as its climate neutrality target. For further information *see* European Commission, 'The Recovery and Resilience Facility' <https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en> last accessed 1 May 2023.

in the Market Stability Reserve, and the auction will be conducted in a manner that does not disrupt the market. Therefore, the trading system not only helps reducing emissions and fossil fuel usage, but also generates funds that can be used to attain energy independence.[708]

In accordance with the Multiannual Financial Framework,[709] up to EUR 100 billion will be provided by cohesion policy[710] to support decarbonisation and green transition projects through investments in renewable energy, hydrogen and infrastructure. Cohesion funds may also contribute an additional amount of EUR 26,9 billion through voluntary transfers to the RRF.

3.2. Winter Preparedness Package

It is now worth briefly mentioning the tool devised by the Commission to respond to the risk of further gas supply cuts from Russia, for many years EU's main gas supplier. The concern, indeed, was for the 2022 winter, and the Commission had for this reason proposed a plan for gas demand reduction. Europe was working towards REPowerEU Plan's goal of achieving independence from Russia, while being guided by the European Green Deal objectives. However, in light of potential further disruptions, including a complete cut-off of Russian gas supplies, the EU needed to speed up its preparations to avoid serious consequences. The EU, as mentioned above, had been securing alternative supplies, but the Commission decided to issue a new Communication focusing on reducing gas demand to further address this issue.[711]

In July 2022, therefore, the Commission proposed a European Gas Demand Reduction Plan which was followed by a Council's Regulation providing a legal

[708] REPowerEU Plan (n 278), at 17.
[709] The Multiannual Financial Framework ("MFF"), currently in its sixth version (2021-2027), ensures, for periods of at least five years, that the EU's expenditure develops in an orderly manner and within the limits of its own resources. It sets out expenditure ceilings and provisions with which the annual budget of the EU must comply, ensuring financial discipline. For further information *see* European Parliament, 'Multiannual financial framework' (2023) Fact Sheets on the European Union.
[710] Cohesion policy is the EU's main investment policy which aims at support in job creation, business competitiveness, economic growth, sustainable development, and improve citizens' quality of life. For further information *see* European Commission, 'The EU's main investment policy' <https://ec.europa.eu/regional_policy/policy/what/investment-policy_en> last accessed 1 May 2023.
[711] European Commission, Communication from the Commission 'Save gas for a safe winter', COM(2022)360, 20 July 2022.

framework addressing the same matter.[712] EU's institutions set a target to avoid a gas gap in the following months: the gas demand should be reduced by 15% between 1 August 2022 and 31 March 2023.[713] Ahead of the then approaching winter season, it was imperative for all gas consumers, including public institutions, households, power providers and industries, to adopt and implement measures to save gas.[714]

3.2.1. Coordinated Gas Demand Reduction Regulation

To lower the risk of shortages during the winter of 2022, a joint effort from all Member States was required to meet the collective goal set by the EU. It is, indeed, not possible for a single Member State to effectively address the potential economic impact caused by price increases or supply disruptions. Therefore, a coordinated and rapid action was necessary for the EU's preparation to be successful, and an effective regulatory framework had to be in place to provide guidance. For this reason, the Commission proposed the Coordinated Gas Demand Reduction Regulation, which was subsequently adopted by the Council, on the basis of Article 122(1) TFEU.[715]

As a first step, Member States have the option to implement reductions of at least 15% on gas demand on a voluntary basis ("voluntary demand reduction").[716] However, if the situation worsens, i.e., in the case of a significantly high gas demand or risk of a severe gas shortage, the Regulation enables the Commission to declare a "Union Alert" on security of supply. This would require all Member States to implement a binding gas demand reduction ("mandatory demand reduction" consisting in a consumption of gas 15% lower compared to its reference figures)

[712] Council Regulation (EU) 2022/1369 of 5 August 2022 on Coordinated Demand-Reduction Measures for Gas [2022] OJ L206/1 (Coordinated Gas Demand Reduction Regulation).
[713] Save gas for a safe winter (n 711), at 9; Coordinated Gas Demand Reduction Regulation (n 712), art 3.
[714] European Commission, 'Save Gas for a Safe Winter: Commission proposes gas demand reduction plan to prepare EU for supply cuts' (20 July 2022) Press Release IP/22/4608.
[715] Save gas for a safe winter (n 711), at 16; TFEU, art 122(1): "Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy".
[716] Coordinated Gas Demand Reduction Regulation (n 712), art 3.

and each Member State would collaborate with its neighbouring countries to determine measures for reducing demand.[717]

The Regulation also mandates that Member States update their national emergency plans to explain how they intend to achieve the reduction target, and report on their progress every two months to the Commission.[718] Finally, any Member States requesting solidarity gas supplies will have to demonstrate their efforts to reduce domestic demand.

3.2.2. European Gas Demand Reduction Plan

The abovementioned gas demand reduction of 15% could be accomplished only by taking action quickly, implementing the Energy Savings Plan[719] and the European Gas Demand Reduction Plan.[720] The latter plan, indeed, outlines the best practices, principles and smart prioritisation criteria for the adoption of additional gas and energy saving measures in non-protected sectors and for coordinated demand reduction, with a focus on substituting gas with other fuels. The objective of the European Gas Demand Reduction Plan is to ensure a supply of gas to households, to essential users, such as hospitals, as well as to industries critical to providing essential products and services to the economy and to EU supply chains and competitiveness. The plan also provides guidelines for Member States to consider when planning curtailment.[721]

The plan is based on the premise that by substituting gas with other fuels and saving energy during the summer and autumn of 2022, more gas could be stored for the following winter. The Commission thus called for immediate action so as to mitigate the negative impact on GDP, to spread out the efforts over time, easing market concerns and price volatility, and allowing for a better design of targeted, cost-effective measures to protect industry.[722]

The Commission then outlines three key principles of the plan: substitution, solidarity, and savings.

[717] ibid, arts 4 and 5.
[718] ibid, arts 7 and 8.
[719] EU 'Save Energy' (n 671).
[720] Save gas for a safe winter (n 711), Annex.
[721] Press Release IP/22/4608 (n 714).
[722] ibid.

With regards to substitution, Member States should focus on finding alternative options that would allow them to move away from using Russian natural gas, while being mindful of the trade-offs such choices may entail, such as the temporary reintroduction of coal into the mix. Wherever technically feasible, Member States' priority is to switch to clean energy sources in a timely and cost-effective manner.[723]

Moving on to the second principle, the EU must act in full solidarity across Member States and different natural gas users in order to tackle the potential consequences of the fact that gas supply shocks affect regions in different ways. Therefore, despite this different impact, all Member States will benefit from joint action and a collective effort, and, obviously, the most affected areas will benefit from this European cooperation and from the consequent reduction in the severity of the impact. In this context, the Commission will closely monitor to protect the single market, prevent any potential restrictions on trade between countries, and ensure that all Member States and social and economic participants do everything in their power to prepare, substitute or reduce gas demand.[724]

Finally, reducing heating and cooling is another crucial element of energy savings. The Commission, indeed, calls on all Member States to initiate public awareness campaigns to encourage such reduction. While having to guarantee the security of electricity supply for households, it is necessary to save energy in order to prevent the need to curtail industrial customers considering their critical importance for society and the economy.[725]

3.3. The Russia-Ukraine Temporary Framework

To help Member States support their economies during Russia's invasion of Ukraine, the Commission approved a Temporary Crisis Framework on 23 March 2022. This framework allows Member States to take advantage of the flexibility provided by State aid rules, while ensuring a fair playing field in the single market is maintained.

As a result of the current crisis, the economy is struggling and EU citizens are losing purchasing power. This is mainly due to the prices of gas and electricity

[723] Save gas for a safe winter (n 711), at 10.
[724] ibid, at 10 and 11.
[725] ibid, at 11.

which have risen significantly above the already high levels observed before the invasion and caused by the pandemic.[726] To tackle these issues, the Commission referred to the toolbox presented in October 2021[727] and the REPowerEU Plan. Likewise, the Council of the EU intervened by adopting a Regulation which aimed at addressing high energy prices by establishing an emergency intervention.[728]

The Russia-Ukraine Temporary Framework outlines how Member States can use State aid rules to provide economic support and access to finance for businesses, especially SMEs which might have suffered the most the economic consequences of Russia's invasion of Ukraine.[729] However, understandably, this Framework prohibits the grant of aid to undertakings that have been sanctioned by the EU.[730] The Communication then clarifies that measures that benefit non-commercial energy consumers do not qualify as State aid, as long as they do not indirectly benefit a specific sector or business.[731] On the other hand, measures aimed at commercial energy consumers must be of a general nature not to be considered State aid.[732] Additionally, the Commission encourages Member States to establish non-discriminatory environmental or supply security requirements when providing State aid, such as to meet a certain share of energy needs with energy coming from renewable sources, or to invest in measures that improve energy efficiency or reduce natural gas consumption.[733]

The Russia-Ukraine Temporary Framework, similarly to the one established for the COVID-19 crisis, is supposed to merely complement the existing State aid toolbox, which includes measures to compensate companies for damages incurred due to "exceptional circumstances" under Article 107(2)(b) TFEU, or aid intended to address a "serious disturbance in the economy of a Member State" under Article 107(3)(b) TFEU.[734] The Commission clarifies that such disturbance requirement

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[726] Russia-Ukraine Temporary Framework (n 646), paras 16 and 17.
[727] Toolbox for high energy prices (n 639).
[728] Council Regulation (EU) 2022/1854 of 6 October 2022 on an Emergency Intervention to Address High Energy Prices [2022] OJ LI261/1 (High Energy Prices Regulation).
[729] Russia-Ukraine Temporary Framework (n 646), para 21.
[730] ibid, para 33.
[731] ibid, para 22.
[732] ibid, para 23.
[733] ibid, para 24.
[734] ibid, paras 25, 26 and 34; European Commission, 'State aid: Commission adopts Temporary Crisis Framework to support the economy in context of Russia's invasion of Ukraine' (23 March 2022) Statement STATEMENT/22/1949.

will be met, and thus the aid will be declared compatible with the single market, in cases of liquidity shortages experienced by companies directly or indirectly affected by the Russia's invasion, by the EU's sanctions, as well as by Russia's economic countermeasures.[735] The Communication finally describes the criteria for the compatibility assessment of State aid granted under Article 107(3)(b) TFEU.

3.3.1. Temporary State Aid Measures

The Russia-Ukraine Temporary Framework identifies three main categories of aids which can be, subject to certain conditions, deemed compatible with Article 107(3)(b) TFEU. These include limited amounts of aid, liquidity support in the form of subsidised loans or guarantees, and aid for additional costs related to significant increases in natural gas and electricity prices.

As to the first category, the Commission states that it would find temporary limited amounts of aid compatible with the single market under Article 107(3)(b) TFEU, subject to specific requirements.[736] Indeed, the aid must be provided to undertakings affected by the crisis, no later than 31 December 2022, and should not exceed EUR 400,000 per undertaking. The aid can be provided in different forms, such as direct grants, tax and payment advantages or repayable advances, guarantees, loans and equity.[737] Additionally, just like it did for the COVID-19 Temporary Framework,[738] the Commission has established specific conditions for aid granted to undertakings in the primary production of agricultural products, fishery and aquaculture sectors. Most importantly, this type of aid must not exceed EUR 35,000 per undertaking.[739]

Member States also have the option to provide liquidity support to affected undertakings in the form of guarantees or subsidised loans. For guarantees, the Commission has set out specific conditions for their admissibility, such as the requirement that they must be granted before 31 December 2022 and on new

[735] Russia-Ukraine Temporary Framework (n 646), para 36.
[736] The conditions described in this section reflect the original version of the Russia-Ukraine Temporary Framework. The updated conditions, introduced by the amendments to the Temporary Framework will be described in Chapter IV, section 3.3.2.
[737] Russia-Ukraine Temporary Framework (n 646), para 41.
[738] COVID-19 Temporary Framework (n 513), paras 22 and 23.
[739] Russia-Ukraine Temporary Framework (n 646), para 42.

individual loans made to affected undertakings. The Commission has also outlined limits for the amount of the loan for which the guarantee is granted and for the guarantee itself. Additionally, the guarantee must not last more than six years, and its premiums, set at a minimum level, must increase progressively as the duration of the guaranteed loan increases.[740] On the other hand, if liquidity support takes the form of subsidised loans, there are different conditions that must be met. In particular, loans must not be granted to financial institutions and the loan contracts must be signed before 31 December 2022 and be limited to a maximum of six years. Furthermore, loans must relate to investment and/or working capital needs, and the Commission has set out the maximum amount of aid per beneficiary.[741]

The last form of State aid allowed is temporary aid granted by Member States to alleviate sudden and severe increases in the prices of natural gas and electricity that undertakings cannot adapt to in the short term. The aid can come in various forms, such as direct grants, tax advantages, or repayable advances, but the total nominal value of such measures must not exceed the applicable aid intensity and aid ceilings.[742] To be compatible with the single market, the overall aid per undertaking must not exceed 30% of the eligible costs, up to a maximum of EUR 2 million. Under this measure, eligible costs are based on the increase in natural gas and electricity costs linked to the Russian aggression against Ukraine, calculated as the product of the number of units of natural gas and electricity procured by the undertaking from external suppliers as a final consumer during the "eligible period" (i.e., 1 February 2022 to 31 December 2022) and a certain increase in the price that the undertaking pays per unit consumed.[743]

Additionally, in case the undertaking is an "energy-intensive business"[744] – defined as undertaking whose energy purchases amount to at least 3% of the production value – and is suffering operating losses,[745] the aid amount is increased

[740] ibid, para 47.
[741] ibid, para 50.
[742] ibid, para 52(b).
[743] ibid, para 52.
[744] Energy Taxation Directive (n 396), art 17(1)(a).
[745] The undertaking is considered to have operating losses when EBITDA (earnings before interest, taxes, depreciation, and amortisation, excluding one off impairments) for the eligible period is negative.

to up to 50% of the eligible costs, not exceeding EUR 25 million per undertaking.[746] Moreover, if the energy-intensive business is active in a sector or sub-sector listed in the Annex to the Communication, the overall aid may be increased to a maximum of 70% of the eligible costs, and the amount must not exceed EUR 50 million per undertaking.[747]

A last remark on the cumulation of the aids. It is possible to combine the aid granted under the new Temporary Framework with the aid under the *de minimis* Regulation or the GBER, as long as the rules and provisions of these regulations are respected. However, combining aid from the COVID-19 Temporary Framework and the Russia-Ukraine Framework is more complicated. Generally, indeed, subsidised loans and guarantees granted under the COVID-19 Temporary Framework cannot be combined with aid in the form of a public guarantee under the new Temporary Framework, except in cases where the aid relates to different loans and the total amount does not exceed the ceilings specified for each type of aid.[748]

In conclusion, the first two forms of State aid allowed under the Russia-Ukraine Temporary Framework are also provided under the COVID-19 Temporary Framework, but the last one is specific to the new Framework and became necessary due to the severe increase in gas and electricity prices.[749]

3.3.2. Amendments to the Temporary Framework

In light of economic considerations and developments of the international situation, the Commission, similarly to what it did in the context of the COVID-19 pandemic, felt the need of updating several provisions of the Russia-Ukraine Temporary Framework. Currently, it has amended it three times.

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746 Russia-Ukraine Temporary Framework (n 646), para 53.
747 ibid, para 53(e).
748 A Poliseno, 'Il nuovo quadro temporaneo di crisi adottato dalla Commissione Europea in materia di aiuti di Stato: presupposti e criteri compatibilità' (2022) 1 Euro-Balkan Law and Economics Review 1, 9 and 10.
749 M Previatello, 'Crisi ucraina e nuovo Quadro temporaneo in materia di aiuti di Stato' (2022) 2 Eurojus 87, 96.

(i) First Amendment

On 20 July 2022, the Commission made the first revision to the Russia-Ukraine Temporary Framework, considering the ongoing conflict and its adverse impacts on the EU economy.[750] Executive Vice-President Vestager stated that the amendment aims to expedite the transition from fossil fuels to renewable energy and the decarbonisation of industries in line with REPowerEU objectives.[751] The amendment complements the Winter Preparedness Package, adopted on the same day,[752] by outlining that specific types of aid may be available on a case-by-case basis subject to certain conditions. These aids include support for companies affected by mandatory or voluntary gas reductions; support for gas storage refilling; temporary support for switching to more polluting fossil fuels with conditions to avoid lock-in effects and energy efficiency efforts; and support for the provision of insurance or reinsurance to companies transporting goods to and from Ukraine.[753]

The amendment then provides for two new types of aid measures additional to the ones provided in the original version of the Temporary Framework: aid for accelerating the rollout of renewable energy, and aid for the decarbonisation of industrial production processes.

As to the first new kind of aid, to promote investment in renewable energy, Member States can establish schemes with simplified tender procedures that ensure a level playing field.[754] However, to be considered compatible with the single market, certain conditions must be met. First of all, aid can only be granted for the generation or storage of renewables and can take various forms such as direct grants, repayable advances, loans, guarantees, or tax advantages.[755] Furthermore, except for projects under EUR 20 million, the aid should be granted through a competitive bidding process that is transparent, non-discriminatory, open, and

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[750] European Commission, Communication from the Commission 'Amendment to the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia' [2022] OJ C280/1 (First Amendment to Russia-Ukraine Temporary Framework).
[751] European Commission, 'State aid: Commission amends the Temporary Crisis Framework' (20 July 2022) Press Release IP/22/4622.
[752] *See supra* Chapter IV, section 3.2.
[753] Press Release IP/22/4622 (n 751).
[754] ibid.
[755] Russia-Ukraine Temporary Framework (n 646), para 53ter(a) and (c) as introduced by First Amendment to Russia-Ukraine Temporary Framework (n 750), para 32.

based on pre-defined objective criteria that minimise the risk of strategic bidding.[756] Finally, the aid must encourage the beneficiary to invest in a way that it would not otherwise do or would do differently in the absence of the aid.[757]

Regarding the second new measure, Member States can provide support for investments to phase out fossil fuels and decarbonise industrial processes through electrification, energy efficiency, and the use of renewable and electricity-based hydrogen, as long as certain conditions are met. The first amendment allows Member States to establish new tender-based schemes or to provide direct limited aid to projects without tenders.[758] However, the Commission has outlined several conditions for this type of aid to be admissible. Among these, the investment must lead to a decrease of at least 40% in direct greenhouse gas emissions, and/or reduce by at least 20% the energy consumption in industrial installations connected to the supported activities.[759] Additionally, the aid must be granted by 30 June 2023 and must not be granted solely to make the beneficiary meet EU standards.[760] Furthermore, like the first category, the aid must encourage the beneficiary to undertake an investment that, without the aid, it would not otherwise undertake, or that it would carry out in a limited or different way.[761] Finally, as a general rule, the aid intensity must not exceed 40% of the eligible costs, which consist in the difference between the costs of the aided project and the cost savings or additional revenues over the investment's lifetime, compared to the scenario with no aid.[762]

To conclude, the amended Russia-Ukraine Temporary Framework has broadened the forms of assistance that Member States can provide to undertakings in need. In particular, Member States can now provide a higher amount of aid to companies that have been impacted by the ongoing crisis or the subsequent

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[756] Russia-Ukraine Temporary Framework (n 646), para 53ter(g) as introduced by First Amendment to Russia-Ukraine Temporary Framework (n 750), para 32.
[757] Russia-Ukraine Temporary Framework (n 646), para 53ter(n) as introduced by First Amendment to Russia-Ukraine Temporary Framework (n 750), para 32.
[758] Press Release IP/22/4622 (n 751).
[759] Russia-Ukraine Temporary Framework (n 646), para 53quinquies(d) as introduced by First Amendment to Russia-Ukraine Temporary Framework (n 750), para 33.
[760] Russia-Ukraine Temporary Framework (n 646), para 53quinquies(i) and (k) as introduced by First Amendment to Russia-Ukraine Temporary Framework (n 750), para 33.
[761] Russia-Ukraine Temporary Framework (n 646), para 53quinquies(l) as introduced by First Amendment to Russia-Ukraine Temporary Framework (n 750), para 33.
[762] Russia-Ukraine Temporary Framework (n 646), para 53quinquies(m) and (n) as introduced by First Amendment to Russia-Ukraine Temporary Framework (n 750), para 33.

sanctions and countersanctions. This aid can be up to EUR 62,000 in the agriculture sector, EUR 75,000 in the fisheries and aquaculture sectors,[763] and up to EUR 500,000 in all other sectors.[764]

(ii) Second Amendment

On 28 October 2022, the Commission published its second amendment to the Russia-Ukraine Temporary Framework to allow Member States to continue providing support, with more flexibility, to the economy in response to Russia's war against Ukraine.[765] This amendment came as a result of a survey and targeted consultations with Member States in October,[766] and in consideration of the recent Regulation on emergency intervention to address high energy prices.[767]

The second amendment introduces new changes that extend all measures outlined in the Russia-Ukraine Temporary Framework until 31 December 2023. Additionally, it raises the ceilings for the admissible limited amounts of aid: it generally allows aid of up to EUR 2 million per undertaking[768] (originally set at EUR 400,000 and later increased to EUR 500,000 with the first amendment), and, more specifically, it increases the maximum amount of aid for undertakings operating in the agriculture, and fisheries and aquaculture sectors to EUR 250,000 and EUR 300,000, respectively.[769]

Moreover, the second amendment introduces more flexibility for energy utilities' liquidity support in their trading activities. Member States may provide public guarantees exceeding 90% coverage in exceptional cases, subject to strict

[763] Russia-Ukraine Temporary Framework (n 646), para 42(a) as amended by First Amendment to Russia-Ukraine Temporary Framework (n 750), para 17.
[764] Russia-Ukraine Temporary Framework (n 646), para 41(a) as amended by First Amendment to Russia-Ukraine Temporary Framework (n 750), para 16.
[765] European Commission, Communication from the Commission 'Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia' [2022] OJ C426/1 (Second Amendment to Russia-Ukraine Temporary Framework).
[766] European Commission, 'State aid: Commission consults Member States on proposal to prolong and amend Temporary Crisis Framework' (6 October 2022) Press Release IP/22/6000; European Commission, 'State aid: Commission further consults Member States on prolongation and adjustment of Temporary Crisis Framework' (26 October 2022) Press Release IP/22/6403.
[767] High Energy Prices Regulation (n 728).
[768] Russia-Ukraine Temporary Framework (n 646), para 41(a) as amended by Second Amendment to Russia-Ukraine Temporary Framework (n 765), para 55(a).
[769] Russia-Ukraine Temporary Framework (n 646), para 42(a) as amended by Second Amendment to Russia-Ukraine Temporary Framework (n 765), para 56(a).

safeguards, where they are used as financial collateral to central counterparties or clearing members.[770] This reflects the idea expressed in the Commission's Delegated Act, which permits the use of uncollateralised bank and public guarantees as eligible collateral for meeting margin calls under specific conditions.[771]

The amendment focuses on further energy-related concerns and, subject to safeguards, provides more flexibility and support for undertakings impacted by rising energy costs. Member States can determine support based on either past or present consumption, while considering the need to maintain market incentives for reducing energy consumption and ensuring the continuity of economic activities.[772] Additionally, the amendment looks at energy-intensive sectors and allows Member States to offer support more flexibly to face particular challenges, provided that overcompensation is avoided.[773] However, companies receiving larger aid amounts are required to commit to reducing their carbon footprint of energy consumption and to implementing energy efficiency measures.[774]

Bearing in mind the issues related to high energy prices and the need to reduce electricity consumption, the second amendment introduces in the Temporary Framework a specific section addressing this matter.[775] Indeed, it permits Member States to grant temporary support to meet the required reduction in electricity consumption under the High Energy Prices Regulation,[776] especially by reducing consumption for more expensive electricity generation technologies which are currently based on gas.

Finally, the amendment provides further details on the conditions for assessing recapitalisation support measures.[777] Specifically, the support measures must be necessary, appropriate, and proportional, and must provide for sufficient

[770] Second Amendment to Russia-Ukraine Temporary Framework (n 765), para 61(g).
[771] European Commission, Commission Delegated Regulation of 21 October 2022 Amending the Regulatory Technical Standards Laid Down in Delegated Regulation (EU) No 153/2013 as Regards Temporary Emergency Measures on Collateral Requirements, C(2022)7536, 21 October 2022.
[772] Second Amendment to Russia-Ukraine Temporary Framework (n 765), para 66.
[773] ibid, para 67.
[774] ibid, para 77.
[775] ibid, section 2.7.
[776] High Energy Prices Regulation (n 728), art 3 and 4.
[777] European Commission, 'State aid: Commission prolongs and amends Temporary Crisis Framework' (28 October 2022) Press Release IP/22/6468.

remuneration for the State. Additionally, the support measures must be accompanied by competition measures that ensure the preservation of effective competition, such as a prohibition on dividends and bonus payments, as well as acquisitions.[778]

(iii) Third Amendment

The Commission has adopted a new Temporary Crisis and Transition Framework on 9 March 2023. The framework aims to promote support measures in sectors crucial for the transition to a net-zero economy, in line with the Green Deal Industrial Plan.[779] It also amends and partially extends the Russia-Ukraine Temporary Framework, allowing Member States to aid their economy during Russia's war against Ukraine.[780] This intervention, along with the amendment to the GBER endorsed on the same day, will help accelerate investment and financing for clean tech production in Europe.[781] According to Executive Vice-President Vestager, these new rules enable Member States to speed up net-zero investments while protecting the single market's level playing field and cohesion objectives.[782]

This third amendment primarily focuses on the transition to climate neutrality, and extends the possibility for Member States to adopt support measures needed for the transition to a net-zero industry. This includes, in particular, State aid for accelerating the rollout of renewable energy and energy storage relevant for REPowerEU: both investment and operating aids directed towards this purpose will be allowed until 31 December 2025.[783] The same temporal extension is also granted for aid for the decarbonisation of industrial production processes and for energy efficiency measures.[784]

[778] Second Amendment to Russia-Ukraine Temporary Framework (n 765), para 32.
[779] Green Deal Industrial Plan (n 352).
[780] European Commission, Communication from the Commission 'Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia' [2023] OJ C101/3 (Third Amendment to Russia-Ukraine Temporary Framework).
[781] Press Release IP/23/1523 (n 410).
[782] European Commission, 'State aid: Commission adopts Temporary Crisis and Transition Framework to further support transition towards net-zero economy' (9 March 2023) Press Release IP/23/1563.
[783] Third Amendment to Russia-Ukraine Temporary Framework (n 780), paras 77(d) and 78(d).
[784] ibid, para 81(j).

The third amendment also alters the scope of State aid measures to simplify and make more effective the creation of schemes supporting renewable energy, energy storage, and decarbonisation of industrial production processes. The changes, *inter alia*, include easing aid requirements for small projects and emerging technologies, like renewable hydrogen, by eliminating the need for a competitive bidding process, with certain safeguards in place.[785] Additional changes provide the expansion of support possibilities for all types of renewable energy sources[786] as well as for the decarbonisation of industrial processes through the use of hydrogen-derived fuels,[787] and, finally, the introduction of higher aid ceilings and simpler aid calculations.

This amendment also introduces a specific section in the Framework that allows new measures, to be adopted until 31 December 2025, to further speed up investments in crucial sectors for transitioning to a net-zero economy.[788] These investments mainly focus on producing strategic equipment such as batteries, solar panels, wind turbines, heat-pumps, electrolysers, carbon capture usage, and storage. They also include the production of essential components and recycling of related critical raw materials.[789] In particular, Member States can create simple and effective schemes providing aid capped at a certain percentage of investment costs and nominal amounts, depending on the investment location and beneficiary size.[790] SMEs and firms situated in disadvantaged regions can receive higher support to ensure that cohesion objectives are adequately considered. Member States may grant higher percentages of investment costs if the aid is provided through tax advantages, loans, or guarantees.[791] Before awarding aid, national authorities must check the actual risks of the productive investment not taking place within the European Economic Area ("EEA") and that there is no risk of relocation within the single market.[792] Moreover, in exceptional circumstances, Member States may offer greater support to specific undertakings where there is a genuine risk of investments

785 ibid, paras 77(h) and 78(h).
786 ibid, section 2.5.
787 ibid, section 2.6.
788 ibid, section 2.8.
789 ibid, para 85(a).
790 ibid, para 85(g).
791 ibid, para 85(h).
792 ibid, paras 85(j) and (k).

being diverted away from Europe. In such cases, Member States may provide either the amount of support the beneficiary could receive for a similar investment in that alternative location (known as "matching aid") or the amount needed to encourage the company to locate the investment in the EEA (so-called "funding gap"), whichever is lower.[793] This possibility has some conditions, though. First, it can only be used for investments taking place in assisted areas as defined in the applicable regional aid map, or for cross-border investments involving projects situated in at least three Member States, with a significant part of the overall investment taking place in at least two assisted areas, one of which is an "a" area.[794] Second, the beneficiary undertaking should use the latest production technology from an environmental emissions perspective.[795] Third, the aid cannot trigger relocation of investments between Member States.[796]

The sections of the Russia-Ukraine Temporary Framework that relate to limited amounts of aid, State guarantees and subsidised loans, aid to compensate undertakings for high energy prices, and measures to help reduce electricity demand, which are more closely tied to the immediate effects of the current crisis, are valid until 31 December 2023.[797] These provisions underwent only minor changes between the second and third amendment.

4. Europe's Energy Dilemma

The EU has been grappling with a long-lasting energy crisis since the latter half of 2021. This crisis has arisen due to a combination of factors, which encompass limited global energy resources during the post-COVID-19 economic recovery, decreased domestic energy production, and diminished supplies of natural gas from Russia (which had been for a long time the EU's primary provider of oil, gas, and coal). In response to this crisis, the EU has implemented a set of policies that, at

[793] ibid, para 86.
[794] ibid, para 86(a); an "a" area refers to outermost regions or regions whose GDP per capita is below or equal to 75% of the EU average.
[795] ibid, para 86(c).
[796] ibid, para 86(f).
[797] Press Release IP/23/1563 (n 782).

times, appear contradictory. These policies are mainly encompassed within the REPowerEU Plan. On the one hand, the EU has outlined measures aimed at energy conservation and expediting the shift towards alternative energy sources, thereby reducing the reliance on fossil fuels, which are currently largely obtained from external suppliers. However, on the other hand, the EU has intensified its efforts to secure new suppliers of fossil fuels and has allocated funds to develop additional infrastructure for importing such sources, like LNG terminals. Member States have also provided subsidies for their citizens' energy bills, but with the result of having inadvertently contributed to the increased profits of fossil fuel exporters, among which Russia.[798]

Although the various elements of the REPowerEU Plan aim at decreasing dependence on Russia, they show inconsistencies regarding the primary objectives of EU energy and climate policies, namely the rapid reduction of greenhouse gas emissions, the promotion of energy transition, and the achievement of climate neutrality by 2050. The EU's commitment to the green agenda was prioritised in 2019 and surprisingly maintained that status despite the pandemic. This was evident from the substantial allocation of EU funds towards the energy transition in national recovery plans following the pandemic. However, in the midst of the crisis with Russia, the EU and its Member States have implemented measures that could potentially impede or even reverse progress in the energy transition in the coming years. This includes reopening coal-fired power plants, substituting pipeline gas imports with more environmentally harmful LNG imports, and issuing additional "pollution permits" in the EU's carbon market, the ETS.

Among the serious effects of the conflict, the EU witnessed an escalation in gas prices which had a ripple effect on the electricity market. Moreover, the war also extended the surge in prices to oil and its by-products, as well as various crucial minerals, for which Russia serves as a major exporter. In addition to existing pandemic-related factors, tensions between the United States and China exacerbated the price hikes for raw materials and caused disruptions in supply chains. In such a complicated context, the energy trade between the EU and Russia

[798] M Siddi, 'Europe's Energy Dilemma: War and the Green Transition' (2023) 122(842) Current History 83, 83.

was not spared from the confrontational dynamics and, instead, became a contributing factor to the conflict. From April to June 2022, the EU imposed an embargo on Russian coal and a partial embargo on oil and certain petroleum products. The coal embargo came into effect in August, while sanctions on crude oil were gradually implemented from June until the end of the year. As a result, Russia was compelled to redirect its oil exports to other markets, particularly China and India, and offer discounted prices. However, despite the energy crisis and the conflict, the substantial increase in prices enabled Russia to generate significant profits from oil sales throughout the summer and autumn of 2022. During this period, China and India heightened their imports of Russian oil, largely compensating the latter's loss of revenue in Western markets. As the EU sought to diminish Russia's energy earnings, also through the introduction of a gas price cap together with the Group of 7 ("G7") in late 2022, its own energy crisis worsened when Russia first reduced and then interrupted gas supplies.[799]

Given the critical situation in Europe, the REPowerEU Plan aimed at solving some of these issues. However, the plan presents some downsides. Indeed, while the REPowerEU Plan's goal is to reduce reliance on Russian gas imports by diversifying sources, this might be the most controversial aspect of the plan in terms of climate policy. In particular, the plan outlines the EU's intention to increase LNG imports by 50 bcm and non-Russian pipeline gas by a minimum of 10 bcm annually. This, however, requires the construction of new gas infrastructure, including LNG import terminals, floating storage regasification units, and interconnectors. While the plan attempts to minimise the costs associated to the maintenance of the EU's green image, it acknowledges that approximately EUR 10 billion will be required for the development of new fossil fuel infrastructure. This approach is controversial as the EU, under its Green Deal agenda, has been advocating for an end to new fossil fuel projects in other parts of the world. Furthermore, the increased LNG would be imported from distant countries like the United States and Qatar, thereby adding to the environmental impact of gas transportation, namely the heightened methane emissions associated with LNG.

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[799] ibid, at 86.

After decades of increasing trade and interdependence, the weaponization of the EU-Russia energy trade has only brought about negative results for the European energy market. Many EU customers no longer perceive Russia as a reliable supplier. Investments in new fossil fuel infrastructure divert resources and policy attention away from renewables and energy efficiency. Additionally, there is a significant risk of allocating public funds to large-scale projects that may become stranded assets within a few years or that may lock the EU into further fossil fuel dependencies.[800]

Another criticism which can be moved to the REPowerEU agenda pertains to the proposed significant increase in biomethane production. This could indeed lead to competition for agricultural resources and potentially jeopardise food security. It is also argued that the plan places an excessive emphasis on hydrogen and, without careful regulation, it could divert limited supplies of renewable electricity towards the production of green hydrogen. In total, the Commission estimates that an additional investment of EUR 210 billion will be required by 2027 to implement the REPowerEU Plan. This funding will primarily come from existing resources, especially the RRF, although originally established to mitigate the economic repercussions of the pandemic.[801]

In conclusion, as the EU endeavoured to reduce its reliance on Russian energy imports, the climate crisis posed limitations on domestic energy production in various regions of Europe. This led in particular to a rise in coal consumption which inevitably represents a setback for climate policy, given the higher emissions associated with burning coal compared to gas or even oil. What has been troubling is that the EU's focus on geopolitical and economic crisis management in 2022 resulted in a *de facto* overshadowing of the climate agenda. The hope, however, is for this to be a mere temporary outcome rather than a long-term trend. The EU has endeavoured to display flexibility and adapt to the altered circumstances brought about by the Russia-Ukraine war and the associated energy crisis. It has even sought to transform the situation into an opportunity to expedite the energy transition. However, it will take several years before most of the goals outlined in the

[800] ibid, at 87.
[801] ibid, at 88.

REPowerEU Plan can be achieved and the energy crisis resolved. Until then, a significant level of solidarity within the EU is required, as Member States cooperate to oppose the common adversary that Russia currently represents.

CONCLUSION

This thesis had a dual purpose, namely the evaluation of the effects the recent two international crises had on the European energy sector, and the role State aids played as an instrument available to Member States to face such effects.

As far as the first goal of this thesis is concerned, what emerged is that significant differences can be registered between the two crises. Indeed, while the COVID-19 pandemic has had an indirect impact on the energy sector, the obvious main concerns were for the health sector. On the other hand, the Russia-Ukraine war, apart from humanitarian consequences that certainly cannot be overlooked, posed serious issues precisely in the energy field.

When speaking about the pandemic, the reference is to an *indirect* effect on the energy sector. This, indeed, relates to the effects created by the various measures adopted by Member States to face the health crisis. Many countries have imposed strict restrictions on public life which resulted in a decline in almost all economic activities. This led to a significant decrease in demand, which in turn caused changes in electricity prices and CO_2 emissions. The stricter the lockdowns implemented, the sharper the drop in energy demand. However, an opposite trend was seen in the energy demand in the household sector. Understandably, since commercial and industrial activities were reduced to the minimum and people were forced to remain home, the energy demand and consumption increased. The pandemic also had a negative impact on the energy transition. In particular, it led to reduced consumption and investments and to a decline in fossil fuel prices, thereby delaying any efficient energy transition.

With regards to the second major international crisis, the Russia-Ukraine war caused serious consequences in the European energy sector. The war, indeed, exposed a long-lasting issue, namely EU's heavy reliance on Russian energy sources. Russia has been for years the largest exporter of oil and natural gas to the EU. Therefore, the political situation that ensued from the conflict became complicated, characterised by sanctions by the EU and the international community, and by Russia who responded by cutting off energy supply to previous customer countries. The EU thus found itself in need of diversifying its energy imports as part of its plan of achieving independence from Russia's fossil fuels. Moreover, since Member States would need to find alternative energy sources, this process would also bring the further benefit of accelerating the road towards carbon neutrality. It is worth concluding by recalling the two most significant effects – even from a consumer perspective – brought about by the Russia-Ukraine conflict, namely a considerable volatility in energy markets and a sharp increase in energy prices. These, indeed, have been among the areas in which the Commission has intervened the most to provide Member States with helpful frameworks to support their economies.

Coming now to the second and connected purpose of this thesis, it can be concluded that State aid rules played a paramount role in the response to the said crises. The European discipline on State aid provided for by the Treaty is, by its nature, elastic and flexible, a circumstance that allows for its application to be adapted to different economic contingencies. It provides the institutions with the necessary tools to balance opposing public interests: on the one hand, economic and financial stability, and on the other hand, the preservation of the integrity of the single market. During times of crisis, the automatic and discretionary exemptions from the general principle of incompatibility allow for a less rigid application of the State aid discipline. The measures provided for in the COVID-19 Temporary Framework, as well as those in the Russia-Ukraine one, undoubtedly move in this direction. As seen, this greater flexibility is pursued through Communications, interpretative tools of the Treaty's provisions on State aid, of a non-binding nature, which the Commission resorts to in order to overcome the difficulties that arise in emergency situations. The use of these soft law instruments has allowed the European legal system to react effectively and promptly to crisis situations. Nevertheless, it is important to bear in mind that the temporary discipline adds to the tools already available to Member States in non-emergency conditions, without replacing them, therefore operating not so much as an open and general derogation from the ordinary discipline, but rather temporarily modifying specific aspects.

The two Temporary Frameworks adopted by the Commission starting from 2020 to address firstly the economic consequences of the pandemic and later those of the war in Ukraine reveal how the European discipline on State aid has undergone a paradigm shift in recent times. Indeed, it no longer appears solely aimed at eliminating distortions of competition among Member States, but Articles 107 and 108 TFEU also seem to serve the protection and/or pursuit of various additional general interests, including non-economic ones, pre-identified at the EU level. Regarding the COVID-19 Temporary Framework, it is interesting to note how considerations related to the protection of health and employment, which are typically of limited relevance in assessing the compatibility of State aid measures, have assumed central importance in the situation of a health emergency, constituting guiding objectives or inspirational principles for the interpretation of State aid rules. The phase after the COVID-19 emergency, that of recovery, has seen an interpretation and application of European rules on State aid informed by the objectives of the Green Deal. In this regard, the emergency discipline on State aid adopted during the pandemic is closely linked to the recovery and resilience package. On the one hand, this discipline promotes environmental and technological transition, which represents the main objective of the recovery and resilience plan. On the other hand, the measures contained in the national plans prepared by Member States to implement the recovery and resilience package must comply with the European discipline on State aid. Similarly, the Russia-Ukraine Temporary Framework also aims, among other things, to pursue general environmental interests, above all tackling exceptionally high energy prices and accelerating the adoption of renewables as well as the decarbonisation of industrial production processes. That being said, and being there no doubts concerning the increased flexibility in the Commission's approach in the authorisation process, what needs to be seen is how long will this shift last. In the long run, this novel approach seems to pose serious issues in terms of sustainability and fairness among Member States. While, undoubtedly, times of crisis require exceptional reactions, this approach might in a sense undermine the original purpose of the competition rules in the Treaty.

Two remarks to conclude. First, while there have been some cases decided by EU courts between 2021 and today concerning the application of the COVID-19 Temporary Framework, especially in the air transport sector, currently there are no cases before EU courts on the application of the Russia-Ukraine Temporary

Framework. Second, the structure of the Temporary Frameworks, their application and amendments testify the significance of the role of State aids in the response to crises. In particular, it was interesting assessing how Member States were concerned about pursuing environmental and energy-related objectives while tackling the effects of the pandemic and of the war. Given the ambitious commitments undertaken by the EU, it will be inevitable in the future to deal at the same time with Member State's intervention in the economy and with their obligations in terms of environmental and energy policy.

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