EUROPEAN COMMISSION

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PUBLIC VERSION

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Subject: State Aid SA. 104606 (2022/N) – Germany
TCF: Temporary cost containment of natural gas, heat and electricity price increases

Excellency,

1. PROCEDURE

(1) Following pre-notification contacts, the Federal Republic of Germany (Germany) notified by electronic notification of 12 December 2022 aid for additional costs due to exceptionally severe increases in electricity, natural gas and heat prices (the 'measure') under the Temporary Crisis Framework for State aid measures to support the economy following the aggression against Ukraine by Russia (the 'Temporary Crisis Framework') ([1]).

(2) On 13, 14, 16, 19 and 20 December 2022, Germany provided further information by email, in reply to queries from the Commission of 12 and 13, 16, 19, and 20 December 2022.

([1]) Communication from the Commission on the Temporary Crisis Framework for State aid measures to support the economy following the aggression against Ukraine by Russia (OJ C 426, 9.11.2022, p.1) This Temporary Crisis Framework replaces the Temporary Crisis Framework adopted on 23 March 2022 (OJ 131 I, 24.3.2022, p. 1) as amended on 20 July 2022 (OJ C 280, 21.7.2022, p. 1) ('previous Temporary Crisis Framework'). The previous Temporary Crisis Framework was withdrawn with effect from 27 October 2022.

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(3) Germany exceptionally agrees to waive its rights deriving from Article 342 of the Treaty on the Functioning of the European Union ("TFEU"), in conjunction with Article 3 of Regulation 1/1958 ([2]) and to have this Decision adopted and notified in English.

2. DESCRIPTION OF THE MEASURE

(4) Germany considers that the Russian aggression against Ukraine, the sanctions imposed by the European Union (EU) and its international partners and the counter-measures taken for example by Russia (the 'current crisis') so far affects the real economy.

(5) In particular, the current crisis affects the German economy in several ways: (i) a sharp rise in the price of main energy carriers, which affects virtually every economic activity, and raw materials; (ii) disruptions to value chains and the shock to world trade; and (iii) uncertainty leading to lost investment or causing financial stress.

(6) For many large undertakings across economic sectors in Germany, natural gas and electricity are the main source of energy and represent a substantial expense in the current environment. Their prices also influence the price of heat supplied to them. The sharp rise in gas and electricity prices, exacerbated by a complete halt of Russian gas deliveries to Germany, represents an enormous social and economic challenge and threatens the country's industrial core, supply chains and the overall welfare.

(7) The German government has already taken several countermeasures to alleviate the impact of the current crisis on undertakings. For instance, it is implementing a scheme providing partial compensation for increases in natural gas and electricity prices to energy-intensive and trade intensive undertakings, covering costs incurred from February 2022 to December 2022. ([3]) Additionally, the German government has accelerated plans to deploy new renewable energy generating capacities and supported the building of several terminals for importing liquefied natural gas. In spite of those measures, prices for electricity, natural gas and heat in Germany and the resulting burdens on the economy remain at a very high level.

(8) Germany explained that natural gas prices have risen considerably in the wake of the current crisis. The price of a January 2023 contract on the TTF ([4]) hub reached 135 EUR/MWh ([5]) on 5 December 2022, approximately six times the long-term average gas price ([6]) and nearly double the value in the month before the start of Russia's military aggression against Ukraine ([7]). The spot-market

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([2]) Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

([3]) See SA.103348 (2022/N) approved by the Commission on 14 July 2022 as amended by SA.104587 (2022/N)..

([4]) The Title Transfer Facility, more commonly known as TTF, is a virtual trading point for natural gas in the Netherlands.

([5]) https://www.theice.com/products/27996665/Dutch-TTF-Gas-Futures/data?marketId=5396828, quoted on on 5 December 2022.

([6]) Measured between 2008 and 2021.

([7]) Interactive dataset: EU Power and Fuel Prices, BloombergNEF.

price for gas in the German market area Trading Hub Europe, reached 139 EUR/MWh on 5 December 2022 ([8]). For the sector of heat, German authorities explained that due to the localised and closed-off nature of distribution networks no organised market with transparent prices exists. However, data gathered by an association of heat suppliers suggest that between April 2021 and April 2022 the price of heat produced with natural gas increased by 50 % for mid-sized consumers and by around 40 % large consumers. Heat prices are expected to increase even more at the end of 2022 since many contracts will expire and will have to be renewed with updated commodity prices.

(9) Wholesale electricity prices in Germany have also increased considerably. An exchange-based futures contract for baseload delivery in 2023 reached 362 EUR/MWh on 5 December 2022 compared to an average price of 97 EUR/MWh for baseload delivery registered in all hours of 2021 ([9]). This means that wholesale prices are expected to more than triple next year, which is expected to substantially increase retail prices.

(10) Germany explained that against this background further measures are necessary to provide relief for commercial and industrial consumers of electricity, natural gas and heat.

(11) Germany argues that the measure is designed to mitigate the impact of the rapidly rising electricity, natural gas and heat prices on undertakings, help stabilise their operations and give them time to adjust to the new reality of high energy prices, while maintaining incentives to save scarce energy.

(12) The measure is part of a larger package of interventions aimed at protecting the wider economy, including households and small and medium-sized enterprises, from the worst consequences of the crisis. For example, the Federal Framework "Small amounts of aid 2022" approved by the Commission under section 2.1 of the Temporary Crisis Framework can be used by all granting authorities at the federal, Länder or local levels to provide limited amounts of aid for undertakings affected by the current crisis.([10])

(13) Germany confirms that the aid under the measure is not conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the European Economic Area (the "EEA") to the territory of the Member State granting the aid.

(14) The compatibility assessment of the measure is based on Article 107(3)(b) TFEU, in light of sections 1 and 2.4 of the Temporary Crisis Framework, as it is in force since 28 October 2022 ([11]).

([8]) https://www.powernext.com/spot-market-data, quoted on 5 December 2022.

([9]) EEX exchange, electricity futures products available at https://www.eex.com/de/marktdaten/strom/futures#%7B%22snippetpicker%22%3A%2228%22%7D.

([10]) See SA.102542 (2022/N) 'TCF: Federal Framework 'Small amounts of aid 2022' as modified by SA.104756 (2022/N) – Germany TCF: Modifications to SA.102542, SA.102631, SA.104019.

([11]) In line with recital (82) of the Temporary Crisis Framework.

2.1. The nature and form of aid

(15) The measure provides aid in the form of direct grants for additional costs due to exceptionally severe increases in electricity, natural gas and heat prices under section 2.4 of the Temporary Crisis Framework. The direct grants will be paid out in advance in monthly instalments which will be used to offset part of the monthly energy costs of the beneficiaries in 2023.

2.2. Legal basis

(16) The legal basis for the measure (the 'national legal basis'), is comprised of:

a. the Federal Law on the Introduction of Price Brakes for Pipeline Natural Gas and Heat and on the amendment of other laws (*Bundesgesetz zur Einführung von Preisbremsen für leitungsgebundenes Erdgas und Wärme und zur Änderung weiterer Vorschriften*; the 'Gas and Heat Price Brake Law').

b. the Federal Law on the Introduction of Electricity Price Brake and on the amendment of other laws (*Bundesgesetz zur Einführung einer Strompreisbremse und zur Änderung weiterer Vorschriften*; the 'Electricity Price Brake Law').

(17) Pursuant to both the Electricity Price Brake Law and the Gas and Heat Price Brake Law, the relevant provisions will enter into force and aid will be granted only after the notification of the Commission's decision approving the notified measure to the German authorities.

2.3. Administration of the measure

(18) The Federal Ministry for Economic Affairs and Climate Action (Bundesministerium für Wirtschaft und Klimaschutz) is the granting authority responsible for administering the measure.

(19) Energy suppliers act as intermediaries that channel aid to beneficiaries in the form of monthly reductions on their energy bills (see recitals (44) to (54)). Energy suppliers of natural gas and heat are reimbursed by the German federal state for the aid channelled to beneficiaries (see recitals (59) to (63)).

(20) Germany explained that the granting authority will also appoint a designated private legal entity that will assist with the task of reimbursing the gas and heat suppliers for the aid channelled to the beneficiaries in the gas and heat segment of the measure (the 'designated legal entity'). The granting authority will appoint an equivalent legal entity assisting with the same task in the electricity segment.

(21) Transmission system operators (the 'TSOs') will assist with the task of reimbursing the electricity suppliers for the aid channelled to the beneficiaries in the electricity segment of the measure.

(22) The German authorities explained that a verifying authority (or public control unit), which will assist with the ex-post verification of beneficiaries' eligibility and maximum aid amount under the measure, will be appointed by a delegated act at a later stage (the 'verifying authority').

2.4. Budget and duration of the measure

(23) The German authorities explained that the measure is part of a wider package of consumer support interventions in the energy sector targeting both households and undertakings, which are estimated to cost EUR 99 billion in total. It is however possible to only roughly separately estimate their fiscal impact. Under these restrictions, the estimated budget of the measure is EUR 28 billion in total for the gas and heat segments and EUR 21 billion for the electricity segment.

(24) The measure in the gas and heat segment will be financed from resources from the German Economic Stabilisation Fund. In the electricity segment, the budget will be primarily financed from the cap on market revenues of certain electricity generators that Germany introduced in the national legal basis specified in recital (16)b. If the resources derived from the cap on market revenues of certain electricity generators do not prove to be sufficient to cover the budget in the electricity segment, the shortfall will be financed from the resources of the Economic Stabilisation Fund. Germany explained that the Economic Stabilisation Fund will also be used to finance the electricity segment in the interim, i.e. from the start of the measure and until the proceeds from the cap on the market revenues are collected.

2.5. Beneficiaries

(25) The beneficiaries of the measure are legal entities who are final consumers of pipeline-based natural gas or electricity or heat produced from natural gas or electricity but only insofar as the total amount of aid (or the total amount of relief) they are granted before 1 January 2024 under the measure and any other measures implemented under section 2.1 and 2.4 of the Temporary Crisis Framework exceeds EUR 2 million at the level of the undertaking at any given point in time. Germany clarified that undertakings whose total amount of relief as defined above does not exceed EUR 2 million at any given point in time should not be considered as beneficiaries under the measure as they will be covered by Federal Framework 'Small amounts of aid 2022' ([12]), to which different conditions apply.

(26) Germany also explained that households are eligible for support under the measure, but should not be considered as beneficiaries for the purpose of State aid rules as they do not qualify as undertakings.

(27) Germany confirms that the aid under the measure is not granted to undertakings under sanctions adopted by the EU, including but not limited to: (i) persons, entities or bodies specifically named in the legal acts imposing those sanctions; (ii) undertakings owned or controlled by persons, entities or bodies targeted by sanctions adopted by the EU; or (iii) undertakings active in industries targeted by sanctions adopted by the EU, insofar as the aid would undermine the objectives of the relevant sanctions.

([12]) See State aid decision SA.102542 (2022/N) – Germany – TCF: Federal Framework 'Small amounts of aid 2022' as amended by the State aid decision SA.104756 (2022/N) – Germany – TCF: Modifications to SA.102542, SA.102631, SA.104019.

(28) Germany confirms that the measure will not in any way be used to undermine the intended effects of sanctions imposed by the EU or its international partners and will be in full compliance with the anti-circumvention rules of the applicable regulations ([13]). In particular, natural persons or entities subject to the sanctions will not benefit directly or indirectly from the measure.

(29) Germany estimates that more than 25 000 beneficiaries will be eligible for aid under the measure.

2.6. Sectoral and regional scope of the measure

(30) The measure is open to all sectors of the economy, except those specified in recitals ((31) and (32)).The measure applies to the whole territory of Germany.

(31) The aid under the measure will not be granted to consumers of natural gas that use it for the production of electricity or heat sold to third parties. The aid will also not be granted to consumers of electricity that use it to produce, transform or distribute energy.

(32) The sector of rail transport insofar as it consumes electricity is excluded from the scope of the measure.

(33) Credit institutions or other financial institutions are eligible as final beneficiaries insofar as they are final consumers of electricity, natural gas and heat. Germany confirms that any aid to those institutions does not have the objective to preserve or restore their viability, liquidity or solvency.

2.7. Basic elements of the measure

(34) The measure provides aid for additional costs due to exceptionally severe increases in electricity, natural gas and heat prices.

(35) The measure covers eligible costs incurred from 1 February 2022 until 31 December 2023 (the ‘eligible period’).

(36) The eligible costs under the measure (‘the crisis-related additional energy costs as defined in Appendix 1 to the Gas and Heat Price Brake Law and the Electricity Price Brake Law’) are determined on a monthly basis by comparing the average price per unit consumed of natural gas, electricity and heating produced from natural gas or electricity by the beneficiary in the eligible period and the average price per unit consumed of natural gas, electricity and heating produced from natural gas or electricity by the beneficiary over a period which runs from 1 January 2021 until 31 December 2021 (the ‘reference period’).

(37) The eligible costs are the product of a certain quantity of natural gas, electricity and heat produced from natural gas or electricity consumed by the beneficiary (‘q(ref)’) and the difference between the average unit price of the beneficiary in the eligible period and 150 % of the average unit price of the beneficiary in the reference period. The German authorities explained that in order to preserve

([13]) For example, Article 12 of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 229, 31.7.2014, p. 1).

maximum incentives to save energy, the quantity of energy used to calculate eligible costs is set by reference to the historical consumption of the beneficiary, and as from 1 September 2022 will be limited to 70 % of the consumption of the beneficiary for the same period in 2021.

(38) The eligible costs are calculated for each month of the eligible period according to the following formula:

(p (t) — p (ref) * 1.5) * q (ref)

Where:

t is a given month, or a period of several consecutive months, between 1 February 2022 and 31 December 2023 at the latest

ref is the period from 1 January 2021 to 31 December 2021

p(t) is the average price per unit consumed by the beneficiary in the relevant month of the eligible period (for example, in EUR/MWh)

p(ref) is the average price per unit consumed by the beneficiary in the relevant month of reference period (for example, in EUR/MWh)

q(ref) is the quantity procured from external suppliers and consumed by the beneficiary as a final consumer during the respective month in 2021. As from 1 September 2022, the quantity will be limited to 70 % of the consumption of the beneficiary for the same period in 2021

(39) Germany explained that aid under the measure can be granted to different categories of beneficiaries under different conditions and ceilings as follows:

(40) Beneficiaries in **Category 1** must fulfil the following conditions:

a. The overall aid cannot exceed EUR 4 million per undertaking at any point in time.

b. The aid intensity cannot exceed 50% of the eligible costs per beneficiary.

(41) Beneficiaries in **Category 2** must fulfil the following conditions:

a. The overall aid cannot exceed EUR 100 million per undertaking at any point in time.

b. The aid intensity cannot exceed 40% of the eligible costs per beneficiary.

c. The beneficiary's EBITDA ([14]) in the eligible period, including the overall aid, may not exceed 70 % of its EBITDA in the reference period. In cases where the EBITDA was negative in the reference period, the aid may not lead to an increase in EBITDA in the eligible period above 0.

([14]) EBITDA means earnings before interest, taxes, depreciation, and amortisation, excluding one off impairments

(42) Beneficiaries in **Category 3** must fulfil the following conditions:

a. Beneficiaries must qualify as 'energy-intensive businesses' ([15]) and the overall aid per beneficiary may not exceed 65 % of the eligible costs and the overall aid per undertaking may not exceed EUR 50 million at any given point in time.

b. The beneficiary must show that it has either a reduction in EBITDA (excluding aid) of at least 40 % in the eligible period compared to the reference period, or a negative EBITDA (excluding aid) in the eligible period.

c. The beneficiary's EBITDA in the eligible period, including the overall aid, may not exceed 70 % of its EBITDA in the reference period. In cases where the EBITDA was negative in the reference period, the aid may not lead to an increase of EBITDA in the eligible period above 0.

(43) Beneficiaries in **Category 4** must fulfil the following conditions:

a. Beneficiaries must qualify as 'energy-intensive businesses' active in one or more sectors or sub-sectors listed in Annex I of the Temporary Crisis Framework, and the overall aid per beneficiary may not exceed 80 % of the eligible costs and the overall aid per undertaking may not exceed EUR 150 million at any given point in time.

b. The beneficiary must also show that it has either a reduction in EBITDA (excluding aid) of at least 40 % in the eligible period compared to the reference period, or a negative EBITDA (excluding aid) in the eligible period.

c. The beneficiary's EBITDA in the eligible period, including the overall aid, may not exceed 70 % of its EBITDA in the reference period. In cases where the EBITDA was negative in the reference period, the aid may not lead to an increase of EBITDA in the eligible period above 0.

(44) Germany confirms that all figures used are gross, that is, before any deduction of tax or other charges. Aid will be granted until no later than 31 December 2023.

(45) The German authorities explained that aid under the measure will be channelled through energy suppliers and will be paid out in advance, on the basis of the beneficiaries' estimations of the eligibility criteria applicable to them under the measure, in monthly instalments from 1 January 2023 until 31 December 2023 in the form of reductions on beneficiaries' monthly bills for electricity, natural gas or heat (the 'monthly reduction'). The sum of all monthly reductions of all energy bills per undertaking will be verified by the verifying authority at the end of the eligibility period against the maximum amount of aid allowable for each undertaking under the measure, calculated on the basis of data from their 2021,

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([15]) An energy-intensive business shall mean a legal entity, where the purchases of energy products (including energy products other than natural gas and electricity) amount to at least 3.0 % of the turnover or production value, based on data from financial accounting reports for the calendar year 2021. Alternatively, data for the first semester of 2022 may be used, in which case the beneficiary may qualify as 'energy-intensive business' if the purchases of energy products (including energy products other than natural gas and electricity) amount to at least 6.0 % of the production value or turnover.

2022, and 2023 verified financial annual accounts, and taking into account aid cumulation rules.

(46) Beneficiaries who receive advance payments of aid under the measure have the legal obligation to provide to their energy suppliers a declaration containing estimations of the eligibility criteria and maximum aid amount under the measure at the level of the undertaking, taking into account any other aid received before 1 January 2024 under sections 2.1 and 2.4 of the Temporary Crisis Framework. In their declarations, beneficiaries must also indicate how that maximum amount of aid should be distributed among their connection or offtake points for electricity, natural gas, and heat deliveries. Depending on the category of beneficiaries they estimate to belong to, that maximum aid amount cannot exceed the maximum absolute aid ceilings specified in recitals (40)a, (41)a, (42)a, and (43)a, i.e. EUR 4 million, 100 million, 50 million and 150 million.

(47) On the basis of the declarations referred to in recital (46) the energy suppliers will provide the monthly reductions of the respective energy bills per energy connection point until the limits indicated by beneficiaries in their declarations have been exhausted. Germany explained that the suppliers will be required by law to withhold the monthly reduction in the bill if and as long the beneficiary does not submit the required declarations and the monthly reduction exceeds EUR 150 000 per connection or offtake point[16].

(48) The monthly reduction for each connection or offtake point of the beneficiary is calculated as one twelfth of the product of a fixed quantity of energy ('the consumption quota') and the difference between the individual price for a unit of consumption of the beneficiary in each respective month of the year 2023 (i.e. the price the beneficiary would pay for the unit of energy under the agreement it has with the energy supplier absent the aid) and a reference price, which depends on the type of the energy carrier and the consumption profile of the beneficiary.

(49) The consumption quota for each connection or offtake point of the beneficiary is calculated by the energy supplier as:

a. 70 % of the consumption measured at that point in 2021 for annual consumption exceeding 30 MWh in the electricity segment, 1500 MWh in the gas segment and 1500 MWh in the heat segment ('large consumers').

b. 80 % of the consumption measured at that point in 2021 for annual consumption that is equal or below the thresholds in recital (49)a ('small consumers').

[16] The withholding of the reduction is designed to act as an additional incentive to ensure that the self-declarations are made in time. The obligation to submit the self-declarations is not dependent on the monthly reduction per connection of offtake point exceeding a particular sum, and the beneficiary is subject to fines of up to 4% of its annual turnover for a failure to provide the required declarations. Moreover, all beneficiaries are subject to the ex-post verification and claw back described in section 2.9.

(50) As an exception from the rule in recital (49), in the case of electricity connection points with standard load profiles ([17]) the current projection of 2023 consumption, which the energy supplier has at its disposal, is used instead of the 2021 electricity consumption ([18]). In the case of gas and heat connection points of small consumers or those with standard load profiles, the annual consumption projection for the year 2023 from September 2022 is used instead of the 2021 annual electricity consumption ([19]).

(51) Germany explained that linking the monthly reduction with the energy consumption from 2021 (or, where necessary, to the current projection of future consumption) ensures that beneficiaries have a strong incentive to save energy since consumption above the quota is not compensated at all. Additionally, the fact that the monthly reduction is not dependent on current consumption serves to keep the incentives for energy savings intact even if the beneficiary's current consumption falls below the quota.

(52) The reference prices for large consumers are defined as follows:

a. 130 EUR/MWh for electricity;

b. 70 EUR/MWh for natural gas;

c. 75 EUR/MWh for heat and 90 EUR/MWh for heat in the form of steam ([20]).

(53) The reference prices for small consumers are defined as follows:

a. 400 EUR/MWh for electricity;

b. 120 EUR/MWh for natural gas;

c. 95 EUR/MWh for heat ([21]).

(54) As explained in recital (46), if the beneficiary has more connection or offtake points it informs its supplier about how to spread the monthly reduction over those points. For each energy carrier and connection point, the reductions must not exceed the payments for that particular carrier that the supplier charges. This ensures that the cost of procuring electricity, natural gas and heat cannot be negative for the beneficiary in the year 2023.

(55) The granting authority is authorised, in agreement with the Federal Ministry of Finance and the consent of the German Parliament (Bundestag), to adjust the calculation of the difference between the individual price for a unit of

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([17]) Standard load profiles are representative consumption profiles taking into account typical behavioural patterns of specific consumer groups. They are typically approved by regulators and used for market balancing mechanism and network planning purposes.

([18]) For connection points with standard load profiles, the 2021 consumption measurements are not necessarily available to electricity suppliers.

([19]) For small consumers in the gas segment, consumption data is typically not available for specific years.

(20) Both the reference and the individual price for a unit of consumption are calculated without network charges, taxes and levies in this case.

(21) Both the reference and the individual price for a unit of consumption are calculated with network charges, taxes and levies included in this case.

consumption of the beneficiary and the reference price by establishing a maximum amount of the difference. The adjustment can be restricted only to beneficiaries from Category 2, 3 and 4. This maximum differential is an essential element of how the scheme operates as it determines the amount of monthly reduction the beneficiaries receive, and how supply and demand interact on the market. The empowerment to establish a maximum level must be exercised as soon as practical, and no later than on 15 March 2023. It shall be regularly reviewed to ensure the achievement of objectives specified in recital (55). In this case, the adjustments may, in particular, be made in such a way that it better reflects the current development of market prices for electricity, natural gas and heat.

(56) The German authorities explain that the purpose of the provision cited in recital (55) is to ensure effective competition in the retail electricity and gas markets (notably by ensuring that beneficiaries have an incentive to choose the supplier with competitive prices) and prevent abuse of the scheme, while assuring their protection against severe increases in energy costs. In certain situations (for instance if the beneficiary consumes below its consumption quota) higher individual prices in 2023 may lead to higher monthly reductions (as the difference between the individual price and the reference price, which determines the monthly reduction, increases) and may lower effective unit purchasing costs ([22]), which hamper effective competition among suppliers. The institution of a cap above which the difference between the individual price and the reference price is not compensated serves to further ensure the preservation of competition between suppliers by discouraging beneficiaries from intentionally seeking suppliers with high prices.

(57) The German authorities further explain that if a supplier increases its price, it needs to properly justify this based on price and cost developments or based on changes in price components which it cannot influence itself (such as network charges or renewable levies or taxes). This is to further prevent misuse of the measure. The German Federal Competition Authority (Bundeskartellamt) is tasked with oversight in this area and will implement corrective or punitive measures if necessary.

(58) The German authorities confirm that competition between suppliers is preserved and that the aid is passed on to the final beneficiary. In particular, they submit that:

– aid measures will be open to all energy suppliers and will not discriminate among those suppliers, who will remain free in their price-setting capacity and therefore keep competing among themselves for customers;

([22]) An increased individual price in 2023 will have two contradictory effects: On the one hand, the monthly energy bill (without the monthly reduction) will increase since the consumed volume of energy in 2023 is multiplied by a higher individual price. On the other hand, the monthly reduction will also increase as long as it remains within the maximum aid limit) since the difference between the individual price and the reference price increases as well. If the actual consumption of the beneficiary is below its consumption quota, the latter effect is stronger than the former: the increase in the monthly reduction is higher than the increase in the total energy bill. Thus, in certain situations, a higher individual price in 2023 may lead to lower total energy costs (after the deduction of the monthly reduction) and, hence, lower effective unit purchasing costs. For the same reason, if the beneficiary consumes energy in 2023 above its consumption quota, a higher individual price in 2023 will have a stronger impact on its energy bill than on the monthly reduction, which motivates the beneficiary to seek lower individual prices.

– the competition intensity between suppliers will not be affected by these aid measures and the aid will be fully passed on to the final beneficiary.

(59) Beneficiaries of the measure have an obligation to maintain employment until 30 April 2025 at least at 90 % of the level as of 1 January 2023, or alternatively to make investments worth at least 50 % of the aid received under the measure and under the scheme referred to in footnote 3 in accordance with point 33 of the Temporary Crisis Framework or investments that contribute to achieving the goals of Article 9 of the Regulation (EU) 2020/852.([23])

(60) Energy suppliers are reimbursed by the German state for the aid channelled to beneficiaries. The granting authority appoints a designated legal entity that assists with this task. For gas and heat, the reimbursed amounts are transacted by German state-owned investment and development bank Kreditanstalt für Wiederaufbau ('KfW'). For electricity, the reimbursement is channelled by the TSOs.

(61) For the gas and heat segment the energy supplier receives for each calendar quarter an advance payment to cover the cost of the measure and avoid excessive liquidity burden associated with providing monthly reductions to beneficiaries without financial coverage. The quarterly advance for each energy carrier is calculated based on the volume-weighted average of the individual prices charged to the beneficiaries from which the relevant reference price is subtracted. The result is multiplied by the quarter of the sum of the relevant annual consumption quotas of the beneficiaries supplied by the supplier.

(62) When applying for the quarterly advance payment, the gas or heat supplier must provide the data necessary for its calculation, whereby information about beneficiaries and their consumption quotas can be aggregated as long as they receive the same individual price. The gas or heat supplier also provides information about the total number of beneficiaries, annual consumption quotas and annually supplied amounts of natural gas and heat. All the data must be made available separately for each energy carrier. The application has to be submitted electronically by the end of the second month of the relevant calendar quarter. The designated legal entity checks the application and its plausibility and confirms its validity in a report for KfW which, in case of a positive assessment, wires the payment to the gas or heat supplier.

(63) Gas or heat suppliers receiving quarterly advance payments must by 31 May 2025 at the latest submit a final statement to an electronic portal administered by the granting authority, detailing the total amount of aid actually provided to the beneficiaries and the difference between that amount and the sum of the quarterly payments received from KfW. The final statement must be accompanied by an independent auditor's report certifying its correctness. If the total amount of aid actually paid out by the supplier exceeds the sum of quarterly advance payments, KfW reimburses the supplier for the difference. In the opposite case, the supplier must repay the amount received in excess of the total aid actually paid out to the KfW within one month after a request by the designated legal entity.

([23]) Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020, p. 13).

(64) If the gas or heat supplier does not submit the final statement, it has to repay all quarterly advance payments received within three months after being requested to do so by the designated legal entity. The designated legal entity may carry out an audit of the application for quarterly advance payments or the supplier's final statement to ensure the correctness of the information provided in the documents.

(65) For the electricity segment, in which financing should come primarily from the cap on market revenues of certain electricity generators to be collected by the TSOs (see recital (24)), the process of reimbursement of suppliers for the aid provided to beneficiaries will be outlined in detail in a delegated act which will also set the precise details of the controlling mechanism.

(66) Germany explained that the electricity supplier will be required to notify its relevant TSOs responsible for connection points supplied by the supplier of their financing needs associated with providing aid to beneficiaries. The electricity supplier will be entitled to receive advance payments from the TSOs on the basis of such notification once a month. The notification shall include all the relevant information necessary pertaining to the beneficiaries (the amount of their total electricity consumption, their consumption quotas and individual prices). After the end of the eligibility period and by 31 May 2025 at the latest, the electricity supplier will have to submit a final statement to the TSOs certified by an independent auditor containing information about the total amounts of aid actually paid to the beneficiaries. The electricity supplier will have to return to the TSOs any part of the received advanced payments that exceed the aid actually paid to the beneficiaries. The electricity supplier will be also obliged to give information if necessary about each contract to an authority that will supervise the mechanism (see recital (20)). The TSO, for its part, will have to keep a separate account for the collection of resources from the market revenue cap and for channeling these funds to the suppliers. If after the end of the eligibility period and the submission of final statements by the suppliers the sum collected from the market revenue cap exceeds the amount of aid provided to the suppliers, the TSO is obliged to use the excess revenue to decrease transmission network charges by the same amount in the following calendar year. If the amount of the aid provided to the suppliers exceeds the resources collected from the market revenue cap, the TSOs have the right to be compensated for the difference by the German state. Details of the reimbursement process will be specified a public law contract between the government and the TSOs to be signed by 15 February 2023.

(67) Beneficiaries purchasing electricity and natural gas directly on the wholesale market, without an energy supplier acting as an intermediary, will receive advance payments according to the same procedure as described in recitals (60), (61) for gas and heat and recital (66) for electricity whereby the beneficiaries act as if they were energy suppliers. The application for advance payments must contain proof of purchasing costs, contracted volumes as well as delivery times. The beneficiaries must submit a final statement according to the same procedure as described in recitals (62) and (63) for gas and heat and recital (66) for electricity whereby they act as if they were suppliers.

2.8. Cumulation

(68) Germany confirms that aid granted under the measure may be cumulated with any other aid for the same eligible costs under *de minimis* Regulations ([24]) or the General Block Exemption Regulation ([25]) or with aid under the Agricultural Block Exemption Regulation ([26]) or with and under the Fisheries Block Exemption Regulation ([27]), provided the provisions and cumulation rules of those Regulations are respected.

(69) Germany confirms that aid under the measure may be cumulated with other forms of Union financing, provided that the maximum aid intensities indicated in the relevant Guidelines or Regulations are respected.

(70) Germany confirms that aid under the measure may be cumulated with other aid under measures including SA.56790 ([28]), SA.56787 ([29]), SA.59289 ([30]), SA.56863 ([31]). Those measures were approved by the Commission under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak ([32]) (COVID-19 Temporary Framework) and the aid under the notified measure may be cumulated with those measures provided the respective cumulation rules are respected.

(71) Germany confirms that aid granted under the measure may be cumulated with aid granted under other measures approved by the Commission under other sections

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([24]) Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1), Commission Regulation (EU) No 1408/2013 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 in the agriculture sector (OJ L 352, 24.12.2013 p. 9), Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45) and Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

([25]) Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, (OJ L 187 of 26.6.2014, p. 1).

([26]) Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 193 of 1.7.2014, p. 1).

([27]) Commission Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 369, 24.12.2014, p. 37).

([28]) State Aid SA.56790 (2020/N) – DE – Federal Framework "Small amounts of aid 2020" ("Bundesregelung Kleinbeihilfen 2020").

([29]) State Aid SA.56787 – Germany - COVID-19: Bundesregelung Bürgschaften 2020.

([30]) State Aid SA.59289(2020/N) – Germany COVID-19: Rahmenregelung zur Gewährung von Unterstützung für ungedeckte Fixkosten im Geltungsbereich der Bundesrepublik Deutschland im Zusammenhang mit dem Ausbruch von Covid-19.

([31]) State Aid SA.56863(2020/N) – Germany COVID-19: Federal framework for subsidised loans 2022.

([32]) Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 3), C(2020) 4509 (OJ C 218, 2.7.2020, p. 3), C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1), C(2021) 564 (OJ C 34, 1.2.2021, p. 6), and C(2021) 8442 (OJ C 473, 24.11.2021, p. 1).

of the Temporary Crisis Framework provided the provisions in those specific sections are respected.

(72) Aid under the measure may be cumulated with aid under section 2.1 of the Temporary Crisis Framework provided the maximum applicable ceilings per undertaking as described in recitals (40)a, (41)a, (42)a, and (43)a are not exceeded. For the same consumption volume, aid under the measure that is calculated on the basis of historical consumption (q(ref)) may not be cumulated with aid granted under section 2.7 of the Temporary Crisis Framework.

(73) Germany confirms that aid granted under the previous and current Temporary Crisis Framework cannot exceed the aid ceilings provided by the current Temporary Crisis Framework in section 2.4 for the same eligible period.

2.9. Claw back mechanism, monitoring and reporting

(74) As explained in recital (45), aid under the measure will be paid in advance, in monthly instalments during 2023. These payments will be based on self-declarations of the beneficiaries providing their estimation of the total amount of aid they are entitled to receive under the measure for the eligible period, taking into consideration the applicable eligibility criteria and aid ceilings, as well aid cumulation rules.

(75) Germany has put in place an ex-post mechanism at the end of the eligible period, whereby the beneficiary is required to submit to its energy supplier either a certification from the verifying authority (when the total amount of relief exceeds EUR 4 million) or a certification from an independent auditor (if the total amount of relief is between EUR 2 and 4 million) confirming the calculation of the eligible costs, the verification of the eligibility criteria, and of the maximum aid amounts on the basis of the actual costs incurred and of the data from the annual financial accounts of the beneficiary.

(76) If the necessary certifications are not provided by the beneficiary to the energy supplier, all advances of aid will be recovered from the beneficiary. In case of overcompensation, i.e. when the monthly reductions exceed the maximum allowed amounts of aid calculated and verified ex-post per undertaking, the energy suppliers will recover the amount of the overcompensation. In such cases, the energy supplier has a legal responsibility to arrange for the recovery of any undue payments by 30 June 2024 at the latest. For beneficiaries that procured gas or electricity directly on the wholesale market, the designated legal entity has a legal responsibility to arrange for recovery by 30 June 2024 at the latest. The German authorities commit that, in case the recovery of excess advance payments by the energy supplier fails, the authorities will take over the claim from suppliers and ensure recovery of aid.

(77) Germany confirms that it will respect the monitoring and reporting obligations laid down in section 3 of the Temporary Crisis Framework (including the obligation to publish relevant information on each individual aid above EUR 100 000 granted under the measure and EUR 10 000 in the primary agriculture and in the fisheries sectors on the comprehensive national State aid website or Commission's IT tool within 12 months from the moment of

granting ([33])). The beneficiaries have the obligation to provide the necessary information by 30 June 2024 to the relevant Transmission System Operators. ([34])

(78) Beneficiaries receiving aid in excess of EUR 50 million must submit to the verifying authority, by 31 December 2024, a plan that specifies how they will reduce the carbon footprint of their energy consumption or how they will implement any of the requirements related to environmental protection or security of supply described in point 33 of the Temporary Crisis Framework. This includes in particular: investments in electrification under which part of the energy consumption is covered by renewable energy; investments to increase energy efficiency; investments to diversify natural gas consumption; investments in other measures reducing or compensating the carbon footprint of the energy consumption; and investments to facilitate more flexible adaptation of business processes to price signals in energy markets.

(79) Beneficiaries that do not submit or that submit incomplete or false or untimely information to the verifying authority as part of the procedure according to recital (75) can be fined up to 4 % of their net annual turnover at undertaking level in the financial year preceding the offense. The fine should be greater than the economic advantage gained from the offense.

(80) Suppliers that commit transgressions pertaining to the rule against excessive price increases referred to in recital (57) can be fined by up to 10 % of their net annual turnover at undertaking level in the financial year preceding the offense. The fine should be greater than the economic advantage gained from the offense.

3. ASSESSMENT

3.1. Lawfulness of the measure

(81) By notifying the measure before putting it into effect, the German authorities have respected their obligations under Article 108(3) TFEU (recitals (15) and (17)).

3.2. Existence of State aid

(82) For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.

(83) The measure is imputable to the State, since it is administered by the Federal Ministry for Economic Affairs and Climate Action, which delegates most of the task to designated entities, and it is based on two federal laws (see recital (16)). It

([33]) Referring to information required in Annex III to Commission Regulation (EU) No 651/2014.

([34]) As the German transmission grid for both gas and electricity is operated by multiple entities, the information is submitted to the system operator to whose regional area the beneficiary belongs.

is financed through State resources, since it is financed by public funds (see section 2.4).

(84) The measure confers an advantage on its beneficiaries, i.e. consumers of electricity, natural gas or heat, by providing them with direct grants in the form of monthly reductions of the natural gas, electricity and heating bill channelled via the energy suppliers (see recitals (15) and (45)), subject to conditions and ex-post checks. The measure thus relieves those beneficiaries of costs which they would have had to bear under normal market conditions. The Commission considers that the energy suppliers are not beneficiaries of the measure because they derive no advantage from participation in the measure. In particular, the measure is open to all suppliers who are authorised to provide energy supplies to energy users in the German market and the measure requires them to pass on the full advantage of the measure to the beneficiaries (see recital (58)). The Commission further notes that the financing mechanism explained in recitals (60) to (66) does not confer any advantage on the energy suppliers and that the measure includes effective safeguards against unjustified price increases by the suppliers (see recitals (55), (56) and (57)).

(85) The advantage granted by the measure is selective, since it is awarded only to certain undertakings, in particular consumers of electricity, natural gas or heat (see recital (25)). A further element of selectivity exists within the measure which differentiates between beneficiaries by applying different conditions for the calculation of the monthly payments in function of the volume of energy consumption in the beneficiary's connection or offtake point (see recitals (49), (52) and (53)).

(86) The measure is liable to distort competition, since it strengthens the competitive position of its beneficiaries. It also affects trade between Member States, since those beneficiaries are active in sectors in which intra-Union trade exists.

(87) Therefore, the Commission concludes that, to the extent to which it benefits undertakings, the measure constitutes aid within the meaning of Article 107(1) TFEU. The German authorities do not contest that conclusion.

3.3. Compatibility

(88) Since the measure involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether that measure is compatible with the internal market.

(89) Pursuant to Article 107(3)(b) TFEU, the Commission may declare compatible with the internal market aid "*to remedy a serious disturbance in the economy of a Member State*".

(90) By adopting the Temporary Crisis Framework, the Commission acknowledged (in section 1) that the military aggression against Ukraine by Russia, the sanctions imposed the EU or its international partners and the counter measures taken, for example by Russia have created significant economic uncertainties, disrupted trade flows and supply chains and led to exceptionally large and unexpected price increases, especially in natural gas and electricity, but also in numerous other input and raw materials and primary goods.

(91) Those effects taken together have caused a serious disturbance of the economy in all Member States, including in the economy of Germany. The Commission concluded that State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU for a limited period if it serves to remedy the liquidity shortage faced by undertakings that are directly or indirectly affected by the serious disturbance of the economy.

(92) The measure has the aim to remedy a serious disturbance in the economy of Germany. The measure seeks to mitigate the consequences for undertakings of the exceptionally severe increases in the price of natural gas and electricity and help them cope with the steep cost increases as a consequence of the current crisis, and also reduce the inflationary pressure from energy price increases.

(93) The measure is one of a series of measures conceived at national level by the German authorities to remedy a serious disturbance in their economy. The importance of the measure to compensate for the severe increase in natural gas, electricity and heat prices is widely accepted by economic commentators and the measure is of a scale which can be reasonably anticipated to produce effects across the entire German economy. Furthermore, the measure has been designed to meet the requirements of a specific category of aid ('*Aid for additional costs due to exceptionally severe increases in natural gas and electricity prices*') described in section 2.4 of the Temporary Crisis Framework.

(94) The Commission accordingly considers that the measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State and meets all the relevant conditions of the Temporary Crisis Framework. In particular:

(95) The measure complies with point (29) of the Temporary Crisis Framework, since the German authorities demonstrated that they operate a mechanism which ensures that the aid is passed on to the final beneficiaries and that competition between suppliers is preserved. In particular, participation in the measure will be open to all energy suppliers in Germany (see recital (58)). Thus, the measure will not discriminate against suppliers who are in a comparable legal and factual situation. Furthermore, the designated legal entity in the gas and heat segment and its equivalent in the electricity segment will ensure that the aid is passed on in full to the final beneficiaries by examining the amounts of aid channelled by suppliers to beneficiaries and approving the reimbursement of the aid (see recitals (62), (63), (65) and (66)). Competition between suppliers is not distorted because beneficiaries receive aid under the same terms from all energy suppliers and they continue to be exposed to market prices when they consume above their consumption quota and remain motivated to seek suppliers with a competitive price (see recitals (47) and (48)). As explained in recital (55) and footnote 22, for certain beneficiaries that consume energy below their quota, the measure can provide an incentive to seek higher individual prices in order to increase the monthly reduction and decrease the final until cost of energy in 2023. In order to address such situations and preserve competition between suppliers, the German authorities will establish a ceiling for the individual market price used to calculate the monthly reduction (see recitals (55) and (56)). Finally, as explained in recital (57), if a supplier increases its price it will be required to justify such increase based on price and cost developments or based on changes in price components

which it cannot influence itself (such as network charges or renewable levies or taxes).

(96) Aid will be granted under the measure no later than 31 December 2023 (see recital (44)). The measure therefore complies with point 66(a) the Temporary Crisis Framework.

(97) The aid takes the form of direct grants (recital (14)); the nominal value of the grants does not exceed the applicable aid intensity and aid ceilings laid down in point 66(f) and in point 67(a), (b) and (c) of the Temporary Crisis Framework (see recitals (40)a, (41)a, (42)a and (43)a). The measure therefore complies with point 66(b) of the Temporary Crisis Framework.

(98) Aid is granted under the measure on the basis of a scheme with an estimated budget as indicated in recital (23). As described in recital (30) the sectoral scope of the measure is designed to cover all sectors of the economy with certain exceptions that stem from the logic of the measure ([35]). The Commission considers that it is designed broadly and does not lead to an artificial limitation of potential beneficiaries. The measure therefore complies with point 66(d) of the Temporary Crisis Framework.

(99) The Commission notes that credit institutions or other financial institutions are eligible as final beneficiaries insofar as they are final consumers of electricity, natural gas and heat (recital (33)). Germany confirms that any aid to those institutions does not have the objective to preserve or restore their viability, liquidity or solvency. As a result, the Commission considers in line with point 43 of the Temporary Crisis Framework, that such aid should not be qualified as extraordinary public financial support according to Article 2(1) (28) Bank Resolution and Recovery Directive ([36]) and Article 3(1) (29) Single Resolution Mechanism Regulation ([37]), and should not be assessed under the State aid rules applicable to the banking sector.

(100) The eligible costs are calculated in line with point 66(e) of the Temporary Crisis Framework on a monthly basis and for the period between 1 February 2022 and 31 December 2023 (see recitals (34) to (38)). The amount of energy that is eligible for aid is set with a reference to historical consumption and is not dependent on current consumption in order maximise incentives to save energy (see recitals (36) and (37)). In addition, as from 1 September 2022, the quantity of

([35]) The exception concerns the use of natural gas for production of electricity and heat that is sold to third parties and the use of electricity for production of other forms of energy for commercial purposes (this concern mainly heat) and is meant to prevent double subsidization since offtakers of heat or consumers of electricity produced with natural gas, or offtakers of heat produced with electricity are eligible for compensation as well. In the case of the exemption of rail transport from the electricity segment of the measure, this is part of a separate notification.

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

([37]) Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.

natural gas and electricity used to calculate the eligible costs will not exceed 70% of the beneficiary's consumption for the same period in 2021 (see recital (38)). The measure therefore complies with point 66(e) of the Temporary Crisis Framework.

(101) For beneficiaries in Category 1, the overall aid per beneficiary will not exceed 50% of the eligible costs and the overall aid per undertaking will not exceed EUR 4 million at any given point in time; all figures used are gross, that is, before any deduction of tax or other charges (see recitals (40)a, (40)b and (44)). The measure therefore complies with point 66(f) of the Temporary Crisis Framework.

(102) For beneficiaries in Category 2, the overall aid per beneficiary will not exceed 40% of the eligible costs and the overall aid per undertaking will not exceed EUR 100 million at any given point in time (recitals (41)a, (41)b and (44)). The measure complies with point 67(a) of the Temporary Crisis Framework.

(103) Aid under the measure will be granted to 'energy-intensive business' defined as legal entities where the purchases of energy products (including energy products other than natural gas and electricity) amount to at least 3.0% of the production value or turnover, based on data from the financial accounting reports for the calendar year 2021. Alternatively, data for the first semester of 2022 may be used, in which case the beneficiary may qualify as 'energy-intensive business' if the purchases of energy products (including energy products other than natural gas and electricity) amount to at least 6.0% of the production value or turnover (recital (42)a). The overall aid for the beneficiaries in Category 3 qualifying as energy-intensive businesses will not exceed 65% of the eligible costs and the overall aid per undertaking will not exceed EUR 50 million at any given point in time (recital (42)a). In addition, beneficiaries are only those that have either a reduction in EBITDA (excluding aid) of at least 40% in the eligible period ([38]) compared to the reference period ([39]), or a negative EBITDA (excluding aid) in the eligible period (recital (42)b). The measure therefore complies with point 67(b) of the Temporary Crisis Framework.

(104) The sectors and subsectors mentioned in recital (43)a are covered by Annex I to the Temporary Crisis Framework. The measure foresees increased aid intensities and amounts for energy-intensive businesses active in those sectors and subsectors. These are the beneficiaries in Category 4. The overall aid intensity for those beneficiaries will not exceed 80% of the eligible costs and the overall aid amount will not exceed EUR 150 million per undertaking at any given point in time (recital (43)a). In addition, beneficiaries are only those that have either a reduction in EBITDA (excluding aid) of at least 40% in the eligible period ([40]) compared to the reference period ([41]), or a negative EBITDA (excluding aid) in the eligible period (recital (43)b). The measure therefore complies with point 67(c) of the Temporary Crisis Framework.

([38]) As defined in recital (34), the eligible period refers to the period from 1 February 2022 until 31 December 2023.

([39]) The reference period refers to 1 January 2021 to 31 December 2021.

([40]) As defined in recital (34), the eligible period refers to the period from 1 February 2022 until 31 December 2023.

([41]) The reference period refers to 1 January 2021 to 31 December 2021.

(105) For beneficiaries of aid under point 67 (a), (b) and (c) of the Temporary Crisis Framework, the EBITDA in the eligible period, including the overall aid, may not exceed 70% of their EBITDA in the reference period. In cases where the EBITDA was negative in the reference period, the aid may not lead to an increase of EBITDA in the eligible period above 0 (see recitals (43)c, (42)c, and (41)c). The measure therefore complies with point 67(d) of the Temporary Crisis Framework.

(106) The measure includes an ex-post mechanism on the basis of actual cost incurred to verify that the advance payments do not exceed the ceilings laid down in points 66(f) and 67(a), (b) and (c) of the Temporary Crisis Framework (recital (75)). In line with point 68 of the Temporary Crisis Framework, the measure includes a claw back mechanism recovering any aid payment that exceeds those ceilings no later than six months after the eligible period has ended (recital (76)).

(107) Aid may be cumulated with aid under section 2.1 of the Temporary Crisis Framework provided the maximum ceilings in point 66 and 67 of the Temporary Crisis Framework are not exceeded. In addition, for the same consumption volume, aid that is calculated on the basis of historical consumption (q(ref)) may not be cumulated with aid granted under section 2.7 of the Temporary Crisis Framework (recital (72)). The measure complies with point 66(g) of the Temporary Crisis Framework.

(108) As of 1 January 2023, for aid amounts exceeding EUR 50 million, the measure requires the beneficiary to submit to the granting authority, within one year from the moment of granting the aid, a plan that specifies how it will reduce the carbon footprint of its energy consumption or how it will implement any of the requirements related to environmental protection or security of supply described in point 33 of the Temporary Crisis Framework (recital (78)). The measure complies with point 77 of the Temporary Crisis Framework.

(109) Germany confirms that, in accordance with point 84 of the Temporary Crisis Framework, aid granted under the previous and the current Temporary Crisis Framework cannot exceed the aid ceilings provided by the current Temporary Crisis Framework for the same eligible period (see recital (73)).

(110) Germany confirms that, pursuant to point 46 of the Temporary Crisis Framework, the aid under the measure is not conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid. This is irrespective of the number of job losses actually occurred in the initial establishment of the beneficiary in the EEA (recital (13)).

(111) Germany confirms that, pursuant to point 47 of the Temporary Crisis Framework, the aid under the measure will not be granted to undertakings under sanctions adopted by the EU, including but not limited to: a) persons, entities or bodies specifically named in the legal acts imposing those sanctions; b) undertakings owned or controlled by persons, entities or bodies targeted by sanctions adopted by the EU; or c) undertakings active in industries targeted by sanctions adopted by the EU, insofar as the aid would undermine the objectives of the relevant sanctions (recital (27), (28)).

(112) Germany confirms that the monitoring and reporting rules laid down in section 3 of the Temporary Crisis Framework will be respected (recital (77)).

(113) Germany further confirms that the aid under the measure may only be cumulated with other aid, provided the specific provisions in the sections of the Temporary Crisis Framework, the COVID-19 Temporary Framework and the cumulation rules of the relevant Regulations are respected (recitals (68) to (73)).

(114) The Commission therefore considers that the measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State pursuant to Article 107(3)(b) TFEU since it meets all the relevant conditions of the Temporary Crisis Framework.

3.4. Compliance with other provisions of Union law

(115) State aid that contravenes provisions or general principles of Union law cannot be declared compatible ([42]).

(116) For all three energy carriers concerned the aid is distributed to customers by setting a reference price (see recitals (52) and (53)) which should reflect the end cost for the consumer for the qualifying volume of electricity, natural gas or heat as the case may be. Therefore the measure must be compatible with Union legislation applicable to electricity, and in particular Directive (EU) 2019/944 and Union legislation applicable to natural gas, and in particular Directive 2009/73/EC. There is no specific union regulatory framework applicable to heat.

(117) Regarding electricity, Article 3 Directive (EU) 2019/944 requires that Member States shall ensure that electricity prices reflect actual demand and supply. Article 4 Directive (EU) 2019/944 requires that all customers are free to purchase electricity from the supplier of their choice. Article 5(1) of Directive (EU) 2019/944 requires that suppliers are free to determine the price at which they supply customers. Public interventions in the price setting for the supply of electricity are allowed under specific derogations in accordance with Article 5 and Articles 12 and 13 of Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices.

(118) In respect of gas, this principle is reflected in Article 3(1) of Directive 2009/73/EC, requiring Member States to ensure that natural gas undertakings are operated with a view to achieving a competitive, secure and environmentally sustainable market in natural gas, and shall not discriminate between those undertakings as regards their rights and obligations.

(119) Recital 12 of Directive (EU) 2019/944 sets out that '*(p)romoting fair competition and easy access for different suppliers is of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalised internal market for electricity*'. Recital 22 of Directive (EU) 2019/944 then sets out that '*….public service obligations in the form of price setting for the supply of electricity constitute a fundamentally distortive measure*' and concludes

([42]) Judgment of 22 September 2020, Austria v Commission, C-594/18 P, EU:C:2020:742, paragraph 44.

that *'(a) fully liberalised, well-functioning retail electricity market would stimulate price and non-price competition among existing suppliers and provide incentives to new market entrants, thereby improving consumer choice and satisfaction.'*

(120) In order to assess whether this measure is a public intervention in setting the price of supply of electricity and gas, it is necessary to assess whether by setting a reference price, the measures undermines the objective that electricity and gas prices reflect actual demand and supply and - as a consequence - prevent price and non-price competition between suppliers. If this is the case, the measure would need to be assessed against the criteria governing public interventions in price setting for the supply of electricity and gas, namely Article 5 of Directive (EU) 2019/944 and Article 3(2) of Directive 2009/73/EC. If the measure does not undermine this objective, and allows effective price and non-price competition between suppliers, then it is not necessary to assess against these criteria.

(121) It follows from the wording of Article 5 of Directive (EU) 2019/944 and Article 3(2) of Directive 2009/72, that the concept of price regulation, for the purpose of these Directives, corresponds to public intervention measures in the functioning of those markets, which require undertakings operating in the electricity or gas sectors, pursuing a general economic interest, to act on that market on the basis of criteria imposed by the public authorities determining the price of supply. The freedom of those undertakings to act on the electricity and gas markets is thus limited in the case of price regulation, in that, having regard solely to their own commercial interest, they would not have supplied gas or electricity, or would not have supplied them to the same extent or under the same conditions and for the same price.

(122) Not every public measure which affects the end price paid by customers constitutes a public intervention in price setting for the supply of electricity. At the most obvious, taxes and levies clearly affect the costs faced by customers but are not set by the supplier. Similarly, levies to support the development of electricity from renewable energy sources affect the effective end costs faced by customers, normally by increasing them, or where schemes operate on the basis of two way contracts for difference, by potentially decreasing the effective costs of electricity for the customer. In the latter, the levy becomes in effect a rebate for the customer.

(123) Based on the information provided by the German authorities, the measure acts as a rebate, passing on a discount directly to its beneficiaries, without however affecting the freedom of suppliers to act on the market. This is because – although it sets a reference price for specified quantities of electricity – the measure does not prescribe the actual price paid by beneficiaries. The reference price operates in conjunction with the maximum amount of the difference established in line with the mechanism described at recitals (55) and (56) of the present decision. In this regard, two points are particularly relevant – firstly that the German authorities are obliged to establish and keep up to date the maximum price. It is thus an integral part of the measure. Secondly, the German authorities are obliged to establish a maximum difference between the individual price for a unit of consumption of the beneficiary and the reference price, which ensures that customers are incentivised to purchase from suppliers who offer competitive prices. As a result, electricity and gas prices continue to be set on the basis of

supply and demand and final customers retain the incentive to find the best offers on the market.

(124) As noted in recital (55) the applicability of the maximum difference between the individual price for a unit of consumption of the beneficiary and the reference price can be restricted to certain beneficiaries. If the German authorities exercise this possibility, they will need to ensure that the measure as implemented meets the requirements of the derogations referred to in Recital 122, according to which public interventions in the price setting for the supply of electricity are allowed under specific derogations in accordance with Article 5 and Articles 12 and 13 of Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices.

(125) Nevertheless, the measure should remain compatible with the general principles outlined in Article 3 of Directive (EU) 2019/944 and Article 3(1) of Directive 2009/73/EC, ensuring that prices reflect actual demand and supply, that competition between suppliers are not distorted and that undertakings are not discriminated as regards their rights and obligations. It follows from the general principles of these Directives that their purpose is to pursue the achievement of internal markets in electricity and gas which are entirely and effectively open and competitive, in which all consumers may freely choose their suppliers and in which all suppliers may freely supply their products to their customers ([43]).

(126) As explained in the recitals (123) to (125), the measure does not restrict the freedom of setting the prices for the supply of electricity and gas. The aim of the measure is to provide support to final energy consumers, without requiring energy suppliers to adjust their behaviour on the market or to bear the costs of the support mechanism. Furthermore, the beneficiaries of the measure are legal entities who are final consumers of pipeline-based natural gas or electricity or heat produced from natural gas or electricity. The measure does not impose additional costs or obligations on market participants in a discriminatory way, compensating all suppliers on the same basis, as set out in recitals (60) to (66) allowing beneficiaries to purchase directly from the wholesale market, as described in recital (67) and, as set out above in recitals (30) and applies to the entire German territory. As regards suppliers who will implement the measure, they are compensated in advance for the estimated cost of the measure, under the same conditions.

(127) Based on the information provided by the German authorities, the measure does not unduly distort competition in that it minimises possible distortions of the level playing field. In particular, the measure does not provide for preferential treatment to any energy supplier, because energy suppliers only act as intermediaries. While all suppliers will be able to participate in the measure, no supplier will receive any advantage, because all suppliers will be obliged to pass on the aid to the beneficiaries.

(128) Moreover, according to the information at hand, the rules under which the measure will operate will be transparent. In particular, the rules will be publicly

([43]) See judgment of 17 October 2019, Elektrorazpredelenie Yug, C-31/18, EU:C:2019:868, paragraph 39.

available when the law will be published. Subsequent adjustments of the calculation method by way of ordinance will also be made public.

(129) Finally, as described in recital (51), beneficiaries have a strong incentive to save electricity and gas, contributing to the security of energy supply of the Union. This is in line with the objectives of Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, and Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas – both adopted in accordance with Article 122 TFEU.

4. CONCLUSION

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union.

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President