



EUROPEAN COMMISSION

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DRAFT COMMISSION REGULATION (EU) No .../..

of 20.12.2011

**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**

(Text with EEA relevance)

DRAFT COMMISSION REGULATION (EU) No .../..

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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

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid¹, and in particular Article 2(1) thereof,

Having published a draft of this Regulation²,

After consulting the Advisory Committee on State Aid,

Whereas:

- (1) Regulation (EC) No 994/98 empowers the Commission to set out in a Regulation a threshold below which aid measures are considered not to meet all the criteria laid down in Article 107(1) of the Treaty and therefore do not fall under the notification procedure provided for in Article 108(3) of the Treaty.
- (2) On the basis of that Regulation, the Commission adopted, in particular, Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid³, which sets a general *de minimis* ceiling of EUR 200 000 per beneficiary over a period of three fiscal years.
- (3) The Commission's experience in applying the State aid rules to undertakings providing services of general economic interest within the meaning of Article 106(2) of the Treaty has shown that the ceiling below which advantages granted to such undertakings may be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition can in some cases differ from the general *de minimis* ceiling established in Regulation (EC) No 1998/2006. Indeed, at least some of

¹ OJ L 142, 14.5.1998, p. 1.

² [...].

³ OJ L 379, 28.12.2006, p. 5.

those advantages are likely to constitute compensation for additional costs linked to the provision of services of general economic interest. Moreover, many activities qualifying as the provision of services of general economic interest have a limited territorial scope. It is therefore appropriate to introduce, alongside Regulation (EC) No 1998/2006, a Regulation containing specific *de minimis* rules for undertakings providing services of general economic interest.

- (4) In the light of the Commission's experience, aid granted to undertakings providing a service of general economic interest should be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition provided that the total amount of aid granted for the provision of services of general economic interest received by the beneficiary undertaking does not exceed EUR 500000 over any period of three fiscal years.
- (5) In view of the special rules which apply in the sectors of primary production of agricultural products, fisheries and aquaculture and of the risk that smaller amounts of aid than those set out in this Regulation could fulfil the criteria of Article 107(1) of the Treaty in those sectors, this Regulation should not apply to those sectors. This is without prejudice to measures granted to undertakings active in the fisheries sector providing a service of general economic interest not linked to fisheries products, such as for instance the collection of litter at sea. In order to take account of the small average size of undertakings active in the road freight and passenger transport sector and in view of the overcapacity of that sector and the objectives of transport policy as regards road congestion and freight transport, aid for the acquisition of road freight transport vehicles by undertakings performing road freight transport for hire and reward should be excluded. This does not call into question the Commission's favourable approach with regard to State aid for cleaner and more environmentally friendly vehicles in Union instruments other than this Regulation. In view of Council Decision 2010/787/EU of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines⁴, this Regulation should not apply to the coal sector.
- (6) Considering the similarities between the processing and marketing of agricultural products, on the one hand, and of non-agricultural products, on the other, this Regulation should apply to the processing and marketing of agricultural products, provided that certain conditions are met. Neither on-farm activities necessary for preparing a product for the first sale, such as harvesting, cutting and threshing of cereals, or packing of eggs, nor the first sale to resellers or processors should be considered as processing or marketing in this respect.
- (7) The Court of Justice has established that, once the Union has legislated for the establishment of a common organisation of the market in a given sector of agriculture, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. For this reason, this Regulation should not apply to aid the amount of which is set on the basis of the price or quantity of products purchased or put on the market. Nor should it apply to *de minimis* support which is linked to an obligation to share the aid with primary producers.

⁴ OJ L 336, 21.12.2010, p. 24.

- (8) This Regulation should not apply to *de minimis* export aid or *de minimis* aid favouring domestic over imported products.
- (9) This Regulation should not apply to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁵.
- (10) It should not be possible for State aid measures exceeding the *de minimis* ceiling to be broken down into a number of smaller parts in order to bring such parts within the scope of this Regulation.
- (11) In accordance with the principles governing aid falling within Article 107(1) of the Treaty, *de minimis* aid should be considered to be granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime.
- (12) In order to avoid circumvention of maximum aid intensities laid down in different Union instruments, *de minimis* aid should not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that stipulated in the specific circumstances of each case by a block exemption Regulation or Decision adopted by the Commission.
- (13) This Regulation should not restrict the application of Regulation (EC) No 1998/2006 to undertakings providing services of general economic interest. Member States should remain free to rely either on this Regulation or on Regulation (EC) No 1998/2006 as regards aid granted for the provision of services of general economic interest.
- (14) The Court of Justice, in its *Altmark* judgment⁶, has set out criteria to establish when compensation for the provision of a service of general economic interest does not constitute State aid. However, in any case *de minimis* aid under this Regulation shall not be cumulated with any compensation in respect of the same service, regardless of whether it constitutes State aid or not under the *Altmark* judgment. Therefore, aid measures only fall under this Regulation if the entire amount of compensation, whether it constitutes State aid or not, does not exceed the threshold set out in this Regulation.
- (15) For the purposes of transparency and of its correct application, this Regulation should establish a clear threshold also for cases where aid takes forms other than a grant, such as a loan or a capital injection. With a view to uniform, transparent and simple application of the State aid rules, this threshold should be able to be applied independently of the specific characteristics of the measure and should not require any calculation. Therefore, aid granted in other forms than grants should benefit from this Regulation only if the amount paid out to the undertaking does not exceed EUR 500000. Where the aid takes the form of a guarantee, this Regulation should only apply where the guaranteed part of the underlying loan does not exceed EUR 500000.

⁵ OJ C 244, 1.10.2004, p. 2.

⁶ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747.

- (16) The Commission has a duty to ensure that State aid rules are complied with and in particular that aid granted under the *de minimis* rules adheres to the conditions thereof. In accordance with the cooperation principle laid down in Article 4(3) of the Treaty on European Union, Member States should facilitate the fulfilment of this task by establishing the necessary tools in order to ensure that the total amount of *de minimis* aid granted to the same undertaking for the provision of services of general economic interest does not exceed the overall permissible ceiling. To that end and to ensure compliance with the provisions on cumulation with aid under Regulation (EC) No 1998/2006, when granting a *de minimis* aid under this Regulation, Member States shall inform the undertaking concerned of the amount of aid and of its *de minimis* character by referring to this Regulation. Moreover, prior to granting such aid the Member State concerned should obtain from the undertaking a declaration about other *de minimis* aid covered by this Regulation or by Regulation (EC) No 1998/2006 received during the fiscal year concerned and the two previous fiscal years. Alternatively, the Member State should have the possibility to ensure that the ceiling is observed by means of a central register.
- (17) This Regulation applies without prejudice to the requirements of Union law in the area of public procurement or of additional requirements flowing from the Treaty or from sectoral Union legislation.
- (18) This Regulation should apply to aid granted before its entry into force to undertakings providing services of general economic interest.

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. This Regulation applies to aid granted to undertakings providing a service of general economic interest within the meaning of Article 106(2) of the Treaty.
2. This Regulation does not apply to:
 - (a) aid granted to undertakings active in the fishery and aquaculture sectors, as covered by Council Regulation (EC) No 104/2000⁷;
 - (b) aid granted to undertakings active in the primary production of agricultural products as listed in Annex I to the Treaty;
 - (c) aid granted to undertakings active in the processing and marketing of agricultural products as listed in Annex I to the Treaty, in the following cases:
 - (i) when the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned,

⁷ OJ L 17, 21.1.2000, p. 22.

- (ii) when the aid is conditional on being partly or entirely passed on to primary producers;
- (d) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;
- (e) aid contingent upon the use of domestic over imported goods;
- (f) aid granted to undertakings active in the coal sector, as defined in Decision 2010/787/EU;
- (g) aid for the acquisition of road freight transport vehicles granted to undertakings performing road freight transport for hire or reward;
- (h) aid granted to undertakings in difficulty.

3. For the purposes of this Regulation:

- (a) "agricultural products" means products listed in Annex I to the Treaty, with the exception of fishery products;
- (b) "processing of agricultural products" means any operation on an agricultural product resulting in a product which is also an agricultural product, except on-farm activities necessary for preparing an animal or plant product for the first sale;
- (c) "marketing of agricultural products" means holding or display with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale by a primary producer to resellers or processors and any activity preparing a product for such first sale. A sale by a primary producer to final consumers shall be considered as marketing if it takes place in separate premises reserved for that purpose.

Article 2

De minimis aid

1. Aid granted to undertakings in connection with the provision of a service of general economic interest shall be deemed not to meet all the criteria of Article 107(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 108(3) of the Treaty if it fulfils the conditions laid down in this Regulation.
2. Aid measures can benefit from this Regulation only if the total amount of aid granted to an undertaking providing services of general economic interest does not exceed EUR 500000 over any period of three fiscal years.
3. Where aid takes forms other than a grant, such as loans or capital injections, it can benefit from this Regulation only if the amount paid out to the undertaking does not exceed the ceiling laid down in paragraph 2. Where aid takes the form of a guarantee, the guaranteed part of the underlying loan shall not exceed that ceiling.
4. Where the overall aid amount granted to an undertaking providing services of general economic interest exceeds the ceiling laid down in paragraph 2, that aid cannot benefit from

this Regulation, even for a fraction not exceeding that ceiling. In such a case, the benefit of this Regulation cannot be claimed for this aid measure.

5. *De minimis* aid shall not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that stipulated in the specific circumstances of each case by a Block Exemption Regulation or Decision adopted by the Commission.

6. *De minimis* aid under this Regulation can be cumulated with *de minimis* aid under Regulation 1998/2006 up to the ceiling set out in Article 2(2) of this Regulation. However, *de minimis* aid under this Regulation shall not be cumulated with any compensation in respect of the same service of general economic interest, regardless of whether it constitutes State aid or not.

Article 3

Monitoring

1. Where a Member State intends to grant *de minimis* aid under this Regulation to an undertaking, it shall inform that undertaking in writing of the prospective amount of the aid expressed as gross grant equivalent, of the service of general economic interest in respect of which it is granted and of its *de minimis* character, making express reference to this Regulation and citing its title and publication reference in the *Official Journal of the European Union*. Where *de minimis* aid under this Regulation is granted to different undertakings on the basis of a scheme and different amounts of individual aid are granted to those undertakings under that scheme, the Member State concerned may choose to fulfil that obligation by informing the undertakings of a fixed sum corresponding to the maximum aid amount to be granted under that scheme. In such case, the fixed sum shall be used for determining whether the ceiling laid down in Article 2(2) is met. Prior to granting the aid, the Member State shall also obtain a declaration from the undertaking providing the service of general economic interest, in written or electronic form, about any other *de minimis* aid granted to the undertaking providing services of general economic interest under this Regulation or under Regulation (EC) No 1998/2006 during the previous two fiscal years and the current fiscal year.

The Member State shall grant the new *de minimis* aid under this Regulation only after having checked that this will not raise the total amount of *de minimis* aid granted to an undertaking providing services of general economic interest under this Regulation to a level above the ceiling laid down in Article 2(2) and that the cumulation rules in Article 2(6) are respected.

2. Where a Member State has set up a central register of *de minimis* aid containing complete information on all *de minimis* aid granted to undertakings providing services of general economic interest by any authority within that Member State, paragraph 1 shall not apply to that Member State.

3. Member States shall record and compile all the information regarding the application of this Regulation. Such records shall contain all information necessary to demonstrate that the conditions of this Regulation have been complied with. Records regarding individual *de minimis* aid shall be maintained for 10 fiscal years from the date on which the aid was granted. Records regarding a *de minimis* aid scheme shall be maintained for 10 years from the

date on which the last individual aid was granted under such a scheme. On written request, the Member State concerned shall provide the Commission, within a period of 20 working days or such longer period as may be fixed in the request, with all the information that the Commission considers necessary for assessing whether the conditions of this Regulation have been complied with, and in particular the total amount of *de minimis* aid under this Regulation and under Regulation (EC) No 1998/2006 received by any undertaking.

Article 4

Transitional provisions

This Regulation shall apply to aid granted for the provision of services of general economic interest before its entry into force, provided that such aid fulfils the conditions laid down in Articles 1 and 2. Any aid for the provision of services of general economic interest which does not fulfil those conditions shall be assessed by the Commission in accordance with the relevant decisions, frameworks, guidelines, communications and notices.

At the end of the period of validity of this Regulation, any *de minimis* aid which fulfils the conditions of this Regulation may be validly implemented for a further period of six months.

Article 5

Entry into force and period of validity

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall apply until 31 December 2018.

The Commission intends to carry out a review of this Regulation five years after its entry into force.

This Regulation shall be binding in its entirety and directly applicable in all Members States.

Done at Brussels, 20.12.2011

For the Commission
The President

José Manuel BARROSO