



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 30 April 2012

9364/12

**RC 10
COMPET 224
ETS 13
MI 275**

COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 26 April 2012

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

No Cion doc.: C(2011) 9381 final

Subject: COMMISSION REGULATION (EU) No .../.. of 25.4.2012 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

Delegations will find attached Commission document C(2011) 9381 final.

Encl.: C(2011) 9381 final



EUROPEAN COMMISSION

Brussels, 25.4.2012
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COMMISSION REGULATION (EU) No .../..

of 25.4.2012

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

(Text with EEA relevance)

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

of 25.4.2012

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

(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 has 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 those advantages are likely to constitute compensation for additional costs linked to

¹ OJ L 142, 14.5.1998, p. 1.

² OJ C 8, 11.1.2012, p. 23.

³ OJ L 379, 28.12.2006, p. 5.

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. A ceiling should be established for the amount of *de minimis* aid each undertaking may receive over a specific period of time.

- (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 500 000 over any period of three fiscal years. In view of the development of the road passenger transport sector and of the mostly local nature of services of general economic interest in this field, it is not appropriate to apply a lower ceiling to this sector and the ceiling of EUR 500 000 should apply.
- (5) The years to be taken into account for the purpose of determining whether that ceiling is met should be the fiscal years as used for fiscal purposes by the undertaking in the Member State concerned. The relevant period of three years should be assessed on a rolling basis so that, for each new grant of *de minimis* aid, the total amount of *de minimis* aid granted in the fiscal year concerned, as well as during the previous two fiscal years, needs to be determined. Aid granted by a Member State should be taken into account for this purpose even when financed entirely or partly by resources of Union origin. It should not be possible for 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.
- (6) This Regulation should apply only to aid granted for the provision of a service of general economic interest. The beneficiary undertaking should therefore be entrusted in writing with the service of general economic interest in respect of which the aid is granted. While the entrustment act should inform the undertaking of the service of general economic interest in respect of which it is granted, it must not necessarily contain all the detailed information as set out in Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest⁴.
- (7) In view of the special rules which apply in the sectors of primary production of agricultural products, fisheries, aquaculture and road freight transport, of the fact that undertakings in those sectors are rarely entrusted with services of general economic interest, and of the risk that amounts of aid below the ceiling 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. However, if undertakings are active in the sectors of primary production of agricultural products, fisheries, aquaculture or road freight

⁴ OJ L 7, 11.1.2012, p. 3.

transport as well as in other sectors or activities, this Regulation should apply to those other sectors or activities (such as for example collection of litter at sea) provided that Member States ensure that the activities in the excluded sectors do not benefit from the *de minimis* aid under this Regulation, by appropriate means such as separation of activities or distinction of costs. Member States can fulfill this obligation, in particular, by limiting the amount of *de minimis* aid to the compensation of the costs of the provision of the service, including a reasonable profit. This Regulation should not apply to the coal sector, in view of its special characteristics and of fact that undertakings in those sectors are rarely entrusted with services of general economic interest.

- (8) 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.
- (9) The Court of Justice has established⁵ 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.
- (10) This Regulation should not apply to *de minimis* export aid or *de minimis* aid favouring domestic over imported products.
- (11) 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 difficulty⁶ since it is not appropriate to grant operating aid to firms in difficulty outside of a restructuring concept and there are difficulties linked to determining the gross grant equivalent of aid granted to undertakings of this type.
- (12) 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.
- (13) 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 specified in the particular circumstances of each case by a block exemption regulation or decision adopted by the Commission.

⁵ Case C-456/00 *French Republic v Commission of the European Communities* [2002] I-11949.

⁶ OJ C 244, 1.10.2004, p. 2.

- (14) 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.
- (15) The Court of Justice, in its *Altmark* judgment⁷, has identified a number of conditions which must be fulfilled in order for compensation for the provision of a service of general economic interest not to constitute State aid. Those conditions ensure that compensation limited to the net costs incurred by efficient undertakings for the provision of a service of general economic interest does not constitute State aid within the meaning of Article 107(1) of the Treaty. Compensation in excess of those net costs constitutes State aid which may be declared compatible on the basis of the applicable Union rules. In order to avoid this Regulation being applied to circumvent the conditions identified in the *Altmark* judgment, and in order to avoid *de minimis* aid granted under this Regulation affecting trade due to its cumulation with other compensation for the same service of general economic interest, *de minimis* aid under this Regulation should not be cumulated with any other compensation in respect of the same service, regardless of whether or not it constitutes State aid under the *Altmark* judgment or compatible State aid under Decision 2012/21/EU or under the Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011)⁸. Therefore, this Regulation should not apply to compensation received for the provision of a service of general economic interest in respect of which other types of compensation are also being granted, except where that other compensation constitutes *de minimis* aid according to other *de minimis* regulations and the cumulation rules set out in this Regulation are complied with.
- (16) For the purposes of transparency, equal treatment and correct application of the *de minimis* ceiling, all Member States should apply the same method of calculation. In order to facilitate such calculation and in accordance with present practice in applying the *de minimis* rule, aid amounts not taking the form of a cash grant should be converted into their gross grant equivalent. Calculation of the grant equivalent of transparent types of aid other than grants and of aid payable in several instalments requires the use of market rates prevailing at the time of granting such aid. With a view to uniform, transparent and simple application of the State aid rules, the market rates for the purposes of this Regulation should be deemed to be the reference rates, as currently set out in the Communication from the Commission on the revision of the method for setting the reference and discount rates⁹.
- (17) For the purposes of transparency, equal treatment and effective monitoring, this Regulation should apply only to *de minimis* aid which is transparent. Transparent aid is aid for which it is possible to calculate precisely the gross grant equivalent *ex ante* without a need to undertake a risk assessment. Such a precise calculation can, for instance, be made for grants, interest rate subsidies and capped tax exemptions. Aid

⁷ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747.

⁸ OJ C 8, 11.1.2012, p. 15.

⁹ OJ C 14, 19.1.2008, p. 6.

comprised in capital injections should not be considered as transparent *de minimis* aid, unless the total amount of the public injection is lower than the *de minimis* ceiling. Aid comprised in risk capital measures as referred to in the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises¹⁰ should not be considered as transparent *de minimis* aid, unless the risk capital scheme concerned provides capital only up to the *de minimis* ceiling to each target undertaking. Aid comprised in loans should be treated as transparent *de minimis* aid when the gross grant equivalent has been calculated on the basis of market interest rates prevailing at the time of grant.

- (18) Legal certainty needs to be provided for guarantee schemes which do not have the potential to affect trade and distort competition and in respect of which sufficient data are available to assess any potential effects reliably. This Regulation should therefore transpose the *de minimis* ceiling of EUR 500 000 into a guarantee-specific ceiling based on the guaranteed amount of the individual loan underlying such guarantee. This specific ceiling should be calculated using a methodology assessing the State aid amount included in guarantee schemes covering loans in favour of viable undertakings. The methodology and the data used to calculate the guarantee-specific ceiling should exclude undertakings in difficulty as referred to in the Community guidelines on State aid for rescuing and restructuring firms in difficulty. This specific ceiling should therefore not apply to individual aid granted outside the scope of a guarantee scheme, to aid granted to undertakings in difficulty, or to guarantees on underlying transactions not constituting a loan, such as guarantees on equity transactions. The specific ceiling should be determined on the basis of the fact that taking account of a cap rate (net default rate) of 13 %, representing a worst case scenario for guarantee schemes in the Union, a guarantee amounting to EUR 3 750 000 can be considered as having a gross grant equivalent identical to the EUR 500 000 *de minimis* ceiling. Only guarantees covering up to 80 % of the underlying loan should be covered by these specific ceilings. A methodology accepted by the Commission following notification of such methodology on the basis of a Commission regulation in the State aid area may also be used by Member States for the purpose of assessing the gross grant equivalent contained in a guarantee, if the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of this Regulation.
- (19) Upon notification by a Member State, the Commission may examine whether an aid measure which does not consist in a grant, loan, guarantee, capital injection, risk capital measure or capped tax exemption leads to a gross grant equivalent that does not exceed the *de minimis* ceiling and could therefore be covered by the provisions of this Regulation.
- (20) 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

¹⁰ OJ C 194, 18.8.2006, p. 2.

interest does not exceed the overall permissible ceiling. To that end and to ensure compliance with the provisions on cumulation with *de minimis* aid under other *de minimis* regulations, when granting *de minimis* aid under this Regulation, Member States should inform the undertaking concerned of the amount of the 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 other *de minimis* regulations 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.

- (21) This Regulation should apply 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.
- (22) This Regulation should apply to aid granted before its entry into force to undertakings providing services of general economic interest.
- (23) The Commission intends to carry out a review of this Regulation five years after its entry into force,

HAS ADOPTED THIS REGULATION:

Article 1

Scope and definitions

- 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 104/2000¹¹;
 - (b) aid granted to undertakings active in the primary production of agricultural products;
 - (c) aid granted to undertakings active in the processing and marketing of agricultural products, 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,
 - (ii) when the aid is conditional on being partly or entirely passed on to primary producers;

¹¹ OJ L 17, 21.1.2000, p. 22.

- (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 Council Decision 2010/787/EU¹²;
- (g) aid granted to undertakings performing road freight transport for hire or reward;
- (h) aid granted to undertakings in difficulty.

If undertakings are active in the sectors referred to in points (a), (b), (c) or (g) of the first subparagraph as well as in sectors not excluded from the scope of application of this Regulation, this Regulation applies only to aid granted in respect of those other sectors or activities, provided that Member States ensure that the activities in the excluded sectors do not benefit from the *de minimis* aid under this Regulation, by appropriate means such as separation of activities or distinction of costs.

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 for 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 paragraphs 2 to 8 of this Article.

¹² OJ L 336, 21.12.2010, p. 24.

2. The total amount of *de minimis* aid granted to any one undertaking providing services of general economic interest shall not exceed EUR 500 000 over any period of three fiscal years.

This ceiling shall apply irrespective of the form of the *de minimis* aid and regardless of whether the aid granted by the Member State is financed entirely or partly by resources of Union origin. The period shall be determined by reference to the fiscal years used by the undertaking in the Member State concerned.

3. The ceiling laid down in paragraph 2 shall be expressed as a cash grant. All figures used shall be gross, that is, before any deduction of tax or other charges. Where aid is awarded in a form other than a grant, the aid amount shall be the gross grant equivalent of the aid.

Aid payable in several instalments shall be discounted to its value at the moment of it being granted. The interest rate to be used for discounting purposes shall be the discount rate applicable at the time of grant.

4. This Regulation shall apply only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid *ex ante* without need to undertake a risk assessment ('transparent aid'). In particular:

- (a) aid comprised in loans shall be considered as transparent *de minimis* aid when the gross grant equivalent has been calculated on the basis of the reference rate applicable at the time of the grant;
- (b) aid comprised in capital injections shall not be considered as transparent *de minimis* aid, unless the total amount of the public injection does not exceed the *de minimis* ceiling;
- (c) aid comprised in risk capital measures shall not be considered as transparent *de minimis* aid, unless the risk capital scheme concerned provides capital only up to the *de minimis* ceiling to each target undertaking;
- (d) individual aid provided under a guarantee scheme to undertakings which are not undertakings in difficulty shall be treated as transparent *de minimis* aid when the guaranteed part of the underlying loan provided under such scheme does not exceed EUR 3 750 000 per undertaking. If the guaranteed part of the underlying loan only accounts for a given proportion of this ceiling, the gross grant equivalent of that guarantee shall be deemed to correspond to the same proportion of the ceiling laid down in paragraph 2. The guarantee shall not exceed 80 % of the underlying loan. Guarantee schemes shall also be considered as transparent if:
 - (i) before the implementation of the scheme, the methodology to calculate the gross grant equivalent of the guarantees has been accepted following notification of this methodology to the Commission under a regulation adopted by the Commission in the State aid area, and
 - (ii) the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of this Regulation.

5. Where the overall amount of *de minimis* aid under this Regulation granted to an undertaking for the provision of services of general economic interest exceeds the ceiling laid down in paragraph 2, that amount may not benefit from this Regulation, even for a fraction not exceeding that ceiling. In such a case, the benefit of this Regulation may not be claimed for this aid measure.
6. *De minimis* aid under this Regulation 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.
7. *De minimis* aid under this Regulation may be cumulated with *de minimis* aid under other *de minimis* regulations up to the ceiling laid down in paragraph 2.
8. *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 or not it constitutes State aid.

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 the *de minimis* character of the aid, 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 received under this Regulation or under other *de minimis* regulations 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 the undertaking concerned to a level above the ceiling laid down in Article 2(2) and that the cumulation rules in Article 2(6), (7) and (8) are complied with.

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, the first subparagraph of paragraph 1 shall cease to apply from the moment the register covers a period of three years.

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 other *de minimis* regulations received by any undertaking.

Article 4

Transitional provisions

This Regulation shall apply to *de minimis* 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 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 third day following that of its publication in the *Official Journal of the European Union*.

It shall apply until 31 December 2018.

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

Done at Brussels, 25.4.2012

For the Commission
The President
Jose Manuel BARROSO