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

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

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(4) thereof,

Having regard to Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid[(1)],

Having published a draft of this Regulation[(2)],

After consulting the Advisory Committee on State Aid,

Whereas:

(1) State funding meeting the criteria in Article 107(1) of the Treaty constitutes State aid and requires notification to the Commission by virtue of Article 108(3) of the Treaty. However, under Article 109 of the Treaty, the Council may determine categories of aid that are exempted from this notification requirement. In accordance with Article 108(4) of the Treaty, the Commission may adopt regulations relating to those categories of State aid. By virtue of Regulation (EC) No 994/98 the Council decided, in accordance with Article 109 of the Treaty, that *de minimis* aid could constitute one such category. On that basis, *de minimis* aid, being aid granted to a single undertaking over a given period of time that does not exceed a certain fixed amount, is deemed not to meet all the criteria laid down in Article 107(1) of the Treaty and is therefore not subject to the notification procedure.

(2) The Commission has, in numerous decisions, clarified the notion of aid within the meaning of Article 107(1) of the Treaty. The Commission has also stated its policy with regard to a *de minimis* ceiling below which Article 107(1) of the Treaty can be considered not to apply, initially in its notice on the *de minimis* rule for State aid[(3)] and subsequently in Commission Regulations (EC) No 69/2001[(4)] and (EC) No 1998/2006[(5)]. In view of the special rules which apply in the agriculture sector and of the risk that even low levels of aid could fulfil the criteria laid down in Article 107(1) of the Treaty, the agriculture sector or parts of it were excluded from the scope of those Regulations. The Commission has already adopted a number of Regulations providing rules on *de minimis* aid granted in the agriculture sector, the latest of which was Regulation (EC) No 1535/2007[(6)]. In the light of the experience gained in applying Regulation (EC)

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No 1535/2007, it is appropriate to revise some of the conditions laid down in that Regulation and to replace it.

(3) In the light of the Commission's experience in applying Regulation (EC) No 1535/2007, the maximum amount of aid to a single undertaking over a period of 3 years should be increased to EUR 15 000 and the national cap increased to 1 % of annual output. Those new ceilings still ensure that any measure falling under this Regulation can be deemed not to have any effect on trade between Member States and not to distort or threaten to distort competition.

(4) For the purposes of the rules on competition laid down in the Treaty an undertaking is any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed[7]. The Court of Justice of the European Union has ruled that all entities which are controlled (on a legal or on a *de facto* basis) by the same entity should be considered as a single undertaking[8]. For the sake of legal certainty and to reduce the administrative burden, this Regulation should provide an exhaustive list of clear criteria for determining when two or more enterprises within the same Member State are to be considered as a single undertaking. The Commission has selected from the well-established criteria for defining'linked enterprises' in the definition of small or medium-sized enterprises (SMEs) in Commission Recommendation 2003/361/EC[9] and in Annex I to Commission Regulation (EC) No 800/2008[10] those criteria that are appropriate for the purposes of this Regulation. The criteria are already familiar to public authorities and should be applicable, given the scope of this Regulation, to both SMEs and large undertakings. Those criteria should ensure that a group of linked enterprises is considered as one single undertaking for the application of the *de minimis* rule, but that enterprises which have no relationship with each other except for the fact that each of them has a direct link to the same public body or bodies are not treated as being linked to each other. The specific situation of enterprises controlled by the same public body or bodies, which may have an independent power of decision, is therefore taken into account. Similarly, those criteria should ensure that individual members of a legal person or group of natural or legal persons are not, for that reason alone, treated as being linked where national law provides for such individual members to assume rights and obligations comparable to those of individual farmers who have the status of head of holding, in particular as regards their economic, social and tax status and where those individual members have contributed to strengthening the agricultural structures of the legal persons or groups concerned.

(5) Considering the similarities between the processing and marketing of agricultural products and of non-agricultural products, processing and marketing of agricultural products are included in the scope of Commission Regulation (EU) No 1407/2013[11].

(6) The Court of Justice of the European Union 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[12]. For that reason, this Regulation should not apply to aid the amount of which is fixed on the basis of the price

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or quantity of products purchased or put on the market. Nor should it apply to support which is linked to an obligation to share the aid with primary producers.

(7) This Regulation should not apply to export aid or aid contingent upon the use of domestic over imported products. In particular, it should not apply to aid financing the establishment and operation of a distribution network in other Member States or in third countries. Aid towards the costs of participating in trade fairs, or of studies or consultancy services needed for the launch of a new or existing product on a new market in another Member State or a third country does not normally constitute export aid.

(8) The period of 3 years to be taken into account for the purposes of this Regulation 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 and during the previous 2 fiscal years needs to be taken into account.

(9) Where an undertaking is active in the primary production of agricultural products and is also active in other sectors or has other activities falling within the scope of Regulation (EU) No 1407/2013, the provisions of that Regulation should apply to aid granted in respect of those other sectors or activities, provided that the Member State concerned ensures, by appropriate means such as separation of activities or distinction of costs, that the primary production of agricultural products does not benefit from *de minimis* aid granted in accordance with that Regulation.

(10) Where an undertaking is active in the primary production of agricultural products as well as in the fishery and aquaculture sector, Commission Regulation (EC) No 875/2007[(13)] should apply to aid granted in respect of the latter sector, provided that the Member State concerned ensures, by appropriate means such as separation of activities or distinction of costs, that the primary production of agricultural products does not benefit from *de minimis* aid granted in accordance with that Regulation.

(11) This Regulation should lay down rules to ensure that it is not possible to circumvent maximum aid intensities laid down in specific regulations or Commission decisions. It should also provide for clear rules on cumulation that are easy to apply.

(12) This Regulation does not exclude the possibility that a measure might be considered not to be State aid within the meaning of Article 107(1) of the Treaty on grounds other than those set out in this Regulation, for instance because the measure complies with the market economy operator principle or because the measure does not involve a transfer of State resources. In particular, Union funding centrally managed by the Commission which is not directly or indirectly under the control of the Member State, does not constitute State aid and should not be taken into account in determining whether the relevant ceiling or the national cap is respected.

(13) For the purposes of transparency, equal treatment and effective monitoring, this Regulation should apply only to *de minimis* aid for which it is possible to calculate precisely the gross grant equivalent *ex ante* without any need to undertake a risk assessment (‘transparent aid’). Such a precise calculation can, for instance, be made for grants, interest rate subsidies, capped tax exemptions or other instruments that provide for a cap ensuring that the relevant ceiling is not exceeded. Providing for a cap means

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that as long as the precise amount of aid is not, or not yet, known, the Member State has to assume that the amount equals the cap in order to ensure that several aid measures together do not exceed the ceiling set out in this Regulation and to apply the rules on cumulation.

(14) For the purposes of transparency, equal treatment and the correct application of the *de minimis* ceiling, all Member States should apply the same method of calculation. In order to facilitate such calculation, aid amounts not taking the form of a cash grant should be converted into their gross grant equivalent. Calculation of the gross grant equivalent of transparent types of aid other than grants and of aid payable in several instalments requires the use of market interest rates prevailing at the time such aid is granted. With a view to uniform, transparent and simple application of the State aid rules, the market rates applicable for the purposes of this Regulation should be the reference rates, as set out in the Communication from the Commission on the revision of the method for setting the reference and discount rates[(14)].

(15) Aid comprised in loans, including *de minimis* risk finance aid taking the form of loans, should be considered transparent *de minimis* aid if the gross grant equivalent has been calculated on the basis of market interest rates prevailing at the time the aid is granted. In order to simplify the treatment of small loans of short duration, this Regulation should provide for a clear rule that is easy to apply and takes into account both the amount of the loan and its duration. Based on the Commission's experience, loans that are secured by collateral covering at least 50 % of the loan and that do not exceed either EUR 75 000 and a duration of 5 years or EUR 37 500 and a duration of 10 years can be considered as having a gross grant equivalent not exceeding the *de minimis* ceiling. Given the difficulties linked to determining the gross grant equivalent of aid granted to undertakings that may not be able to repay the loan, this rule should not apply to such undertakings.

(16) Aid comprised in capital injections should not be considered as transparent *de minimis* aid, unless the total amount of the public injection does not exceed the *de minimis* ceiling. Aid comprised in risk finance measures taking the form of equity or quasi-equity investments, as referred to in the risk finance guidelines[(15)], should not be considered as transparent *de minimis* aid unless the measure concerned provides capital not exceeding the *de minimis* ceiling.

(17) Aid comprised in guarantees, including *de minimis* risk finance aid taking the form of guarantees, should be considered as transparent if the gross grant equivalent has been calculated on the basis of safe-harbour premiums laid down in a Commission notice for the type of undertaking concerned[(16)]. In order to simplify the treatment of guarantees of short duration securing up to 80 % of a relatively small loan, this Regulation should provide for a clear rule that is easy to apply and takes into account both the amount of the underlying loan and the duration of the guarantee. This rule should not apply to guarantees on underlying transactions not constituting a loan, such as guarantees on equity transactions. Where the guarantee does not exceed 80 % of the underlying loan, the amount guaranteed does not exceed EUR 112 500 and the duration of the guarantee does not exceed 5 years the guarantee can be considered as having a gross

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grant equivalent not exceeding the *de minimis* ceiling. The same applies where the guarantee does not exceed 80 % of the underlying loan, the amount guaranteed does not exceed EUR 56 250 and the duration of the guarantee does not exceed 10 years. In addition, Member States can use a methodology to calculate the gross grant equivalent of guarantees which has been notified to the Commission under another Commission Regulation in the State aid area applicable at that time and which has been accepted by the Commission as being in line with the Guarantee Notice, or any successor notice, provided that the accepted methodology explicitly addresses the type of guarantee and the type of underlying transaction at stake in the context of the application of this Regulation. Given the difficulties linked to determining the gross grant equivalent of aid granted to undertakings that may not be able to repay the loan, this rule should not apply to such undertakings.

(18) Where a *de minimis* aid scheme is implemented through financial intermediaries, it should be ensured that the latter do not receive any State aid. This can be done, for example by requiring financial intermediaries that benefit from a State guarantee to pay a market-conform premium or to fully pass on any advantage to the final beneficiaries, or by respecting the *de minimis* ceiling and other conditions of this Regulation also at the level of the intermediaries.

(19) Upon notification by a Member State, the Commission may examine whether a measure which does not consist of a grant, loan, guarantee, capital injection or risk finance measure taking the form of an equity or quasi-equity investment, leads to a gross grant equivalent that does not exceed the *de minimis* ceiling and could therefore fall within the scope of this Regulation.

(20) The Commission has a duty to ensure that State aid rules are complied with and 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 a single undertaking under the *de minimis* rule does not exceed the overall permissible ceiling. To that end, when granting a *de minimis* aid, Member States should inform the undertaking concerned of the amount of *de minimis* aid granted and of its *de minimis* character and should make express reference to this Regulation. Member States should be required to monitor aid granted to ensure the relevant ceilings are not exceeded and the cumulation rules are complied with. To comply with that obligation, before 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 previous 2 fiscal years. Alternatively it should be possible for Member States to set up a central register with complete information on *de minimis* aid granted and check that any new grant of aid does not exceed the relevant ceiling.

(21) Before granting any new *de minimis* aid each Member State should verify that neither the *de minimis* ceiling nor the national cap will be exceeded in that Member State by the new *de minimis* aid and that the other conditions of this Regulation are complied with.