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 (Text with EEA relevance)

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

(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 aid[(1)], and in particular Article 2(1) thereof,

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

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* aid[(3)], 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 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

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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 interest[(4)].

(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 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 established[(5)] 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 difficulty[(6)] 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.

(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* judgment[(7)], 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

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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 rates[9].

(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 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 enterprises[10] 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

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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 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.