

The *de minimis* Rule from the point of view of the European Commission

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Subsidy Policy on Non-Profit Organisations
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Overview

I. Introduction

II. The concept of State Aid and its application to NGO

Art. 107(1) TFEU

III. The current *de minimis* rules

Regulation 1998/2006; Regulation 360/2012

IV. The draft *de minimis* Regulation

Consultation process ongoing

V. Alternatives: GBER, SGEI, notification

II. The Concept of State Aid ?

Article 107(1) TFEU :

"Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market."

- Granted by a Member State or through State resources
- Advantage: "favouring"
- Selectivity: "certain undertakings or the production of certain goods"
- Effect on trade between Member States
- Distortion or risk of distortion of competition

II. The Concept of State Aid ?

Competition rules only apply to undertakings

“Any entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed” (Höffner, C-41/90)

- Economic activity: offering goods or services on a market
- Non-economic activity:
 - state prerogatives (police, security)
 - basic social security systems based on solidarity can qualify under certain conditions as non-economic (compulsory affiliation, based on solidarity, social purpose, supervised by the State, benefits not necessarily proportionate to contribution, non-profit, ...);
 - Public education organised within the national educational system, funded and supervised by the State can be non-economic (offered for free or without remuneration for the service, ...)

II. The Concept of State Aid ?

- Non-economic activity: very limited scope !
- Example: nature protection organisations (Case T-347/09, 12.9.2013)
 - Nature protection as such is not an economic activity
 - But if these organisations carry out other activities, which can be detached from the non-economic activities, and are in competition with other undertakings, they qualify as undertakings for the other activities (e.g. sale of wood, granting hunting rights, tourism activities)
 - Legal status of the nature protection organisations (public interest activity recognized under national law) is not relevant
 - Profit-seeking is not relevant if they operate in a market in competition with other economic operators seeking profit
 - The fact that the other activities are loss-making and that the organisations are mainly financed by gifts and contributions is not relevant
 - The obligation to use any profit from the other activities for the non-economic activities is not relevant

II. The Concept of State Aid

Effect on trade and distortion of competition

Art. 107(1) TFEU: *"which distorts or threatens to distort competition ..., in so far as it affects trade between Member States"*

- Effect on trade and distortion of competition are often linked (e.g. Friuli-Venezia Giulia T-288/87: « ... the two conditions (...), are as a general rule inextricably linked. In particular, where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid. »)
- Very broad interpretation
 - It is sufficient that a product or service is subject to trade between Member States,
 - ... even if the beneficiary does not export
 - ... or exports virtually all of its production outside EU

II. The Concept of State Aid

Effect on trade and distortion of competition

- No need to define the market or make a detailed economic analysis (*Alzetta C-298/97; EPAC T-204/97*)
- No need to demonstrate real effect on trade; sufficient that aid is liable to affect trade and distort competition (*EPAC T-204/97, WAM C-494/06P*)
- Consequence: this criterion is almost always met
 - Local transport ? (*Altmark C-280/00*)
 - Low amounts, small beneficiaries ? (*Heiser C-172/03*)
 - Example of no aid: Dorsten swimmingpool; local museum

III. The current *de minimis* rules

1. General *de minimis*: Commission Regulation No 1998/2006

- **Concept:** *de minimis* aid does not constitute State aid: it is deemed too small to affect trade or distort competition and thus not fulfilling all the criteria of Article 107(1) TFEU
- **Conditions:**
 1. Scope: exclusions of
 - Certain sectors: fisheries, agriculture, coal, acquisition of road freight transport vehicles granted to undertakings performing road freight transport for hire or reward
 - Export aid (directly linked to quantities exported, establishment and operation of a distribution network or other current expenditure linked to export)
 - Aid contingent upon the use of domestic over imported goods
 - Undertakings in difficulty

III. The current *de minimis* rules

- **Conditions:**
 2. Ceiling: the total *de minimis* aid per undertaking does not exceed EUR 200 000 over any period of three fiscal years (road transport: EUR 100 000)
 - rolling period (current and previous two fiscal years before the date of granting)
 - date of granting: moment the legal right to receive the aid is conferred on the undertaking under national law (\neq payment)
 - if the ceiling is exceeded the whole amount cannot benefit from the Regulation, not even the fraction below the ceiling
 - per undertaking: economic unit (not legal entity)

III. The current *de minimis* rules

- **Conditions:**

3. Transparent aid: forms of aid which allow to calculate precisely the gross grant equivalent, without need to undertake a risk assessment
 - Loans if GGE is calculated on the basis of market interest rates
 - Guarantees: safe harbour EUR 1 500 000 (road transport 750 000); guarantee shall not exceed 80% of the underlying loan; possibility to use notified methodology
 - Capital injections: no, unless the total amount is below the ceiling
 - Risk capital: no, unless the capital provided per target undertaking is below the ceiling
4. Cumulation: no cumulation with aid for the same eligible costs if maximum aid intensities would thereby be exceeded

III. The current *de minimis* rules

- **Conditions:**
 - 5. Monitoring: central register or system of declarations
 - Central register: includes all *de minimis* aid per undertaking for the relevant three year period
 - Declaration system: granting authority has to inform the undertaking in writing of the *de minimis* amount, with reference to the Regulation; undertaking has to declare any other *de minimis* aid received during the relevant 3 year period
 - Member States have to keep records for 10 years

III. The current *de minimis* rules

2. SGEI *de minimis*: Commission Regulation No 360/2012

- **Conditions:**

1. Scope: largely the same as general *de minimis*, i.e. exclusions of
 - Certain sectors: fisheries, agriculture, coal, undertakings performing road freight transport for hire or reward
 - Export aid
 - Aid contingent upon the use of domestic over imported goods
 - Undertakings in difficulty

III. The current *de minimis* rules

- **Conditions:**
 2. Ceiling: the total *de minimis* aid per undertaking providing SGEI does not exceed EUR 500 000 over any period of three fiscal years
 - SGEI ('light' entrustment)
 - EUR 500 000
 - Otherwise the same as general *de minimis*
 3. Transparent aid: same as for general *de minimis* (with adapted safe harbour: EUR 3 750 000)

III. The current *de minimis* rules

- **Conditions:**

- 4. Cumulation:

- Cumulation with general de minimis up to the ceiling of the SGEI Regulation
 - No cumulation with State aid for the same eligible costs
 - No cumulation with other compensation (aid or not) for the same SGEI

- 5. Monitoring: the same

IV. The draft *de minimis* Regulation

- Ceiling: maintain EUR 200 000 ?
 - Legal constraints: no aid under Art. 107(1) TFEU
 - Lack of data
 - Existing data show that the average amounts are very low and the ceiling is not exhausted
 - Inflation cannot justify a substantial increase
 - More risk of distortion in times of crisis and very different budgetary situations in Member States
- Clarification and simplification
 - Notion of undertaking; mergers and splits of undertakings
 - Definition of undertakings in difficulty based on 'hard criteria' only
 - Safe harbour for loans and guarantees
 - Monitoring: compulsory central register ?

V. Alternatives

- If a measures constitutes State aid under Art. 107(1) TFEU, it can be
 - block exempted under the General Block Exemption Regulation (GBER): no need for notification; conditions are defined in the GBER for e.g. regional aid, environmental aid, aid for R&D&I, training aid, ...
 - block exempted under the SGEI Decision: no need for notification; conditions: SGEI, no overcompensation, maximum EUR 15 mio per SGEI per year, but no limitation for social SGEI
 - Notified (either individually or under a scheme)

→ **There is often no need to use de minimis**

Thank you for your attention!

