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CRITERIA FOR THE COMPATIBILITY ANALYSIS OF STATE AID TO DISADVANTAGED AND DISABLED WORKERS SUBJECT TO INDIVIDUAL NOTIFICATION

1. INTRODUCTION

1. The promotion of employment and social cohesion is a central aim for the economic and social policies of the Community and of its Member States. Unemployment and, in particular, structural unemployment, remains a significant problem in some parts of the Community, and certain categories of workers still find difficulty in entering the labour market. State aid in the form of wage subsidies¹ can provide additional incentives to enterprises to increase their levels of employment of disadvantaged and disabled workers. The objective of the aid is thus to raise the demand for labour of the targeted categories of workers.
2. Below the Commission presents guidance as to the kind of information it may require and the methodology it would follow for the assessment of state aid in the form of wage subsidies that needs to be notified individually pursuant to Article 6.1 (h) – (i) of the Regulation (EC) 800/2008². This guidance is intended to make the Commission's decisions and their reasoning transparent and to create predictability and legal certainty.
3. This guidance applies to measures on recruitment of the categories of workers considered to be disadvantaged or disabled as defined in Article 2.18 to 20 of the Regulation (EC) 800/2008³. Any individual measure will be subject to this guidance when its grant equivalent exceeds EUR 5 million per undertaking per year for employment of disadvantaged workers and EUR 10 million per undertaking per year for employment of disabled workers.⁴
4. The criteria set out in the guidance will not be applied mechanically. The level of the Commission's assessment will be proportional to the risk of distortion of competition, and the scope of the analysis will depend on the nature of the case.

¹ Subsidies to wage costs where wage cost means the total amount actually payable by the beneficiary of the aid in respect of the employment concerned, comprising: (a) the gross wage, before tax, and (b) the compulsory contributions, such as social security charges; and (c) child care and parent care costs.

² Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3–47.

³ All definitions contained in the Regulation (EC) 800/2008 to which this text refers are to be found in the annex to this document.

⁴ Due to their specific nature, individual measures applying to the compensation for additional cost of employing disabled workers and additional costs incurred by social enterprises of which the grant equivalent exceeds EUR 10 million per undertaking per year will be assessed on the basis of Art. 87(3)(c) of the EC Treaty.

2. POSITIVE EFFECTS OF THE AID

2.1. Existence of an equity objective of common interest

5. Certain categories of worker experience particular difficulty in finding jobs, because employers consider them to be less productive or have prejudices against them. This perceived or real lower productivity may be due either to lack of recent experience of employment (for example, young workers or long-term unemployed) or to a permanent handicap. The lower productivity of these workers reduces the financial advantage accruing to the firm and the workers are likely to be excluded from the labour market unless employers are offered compensation for their employment.
6. It is socially desirable that all categories of workers are integrated in the labour market. This means that a share of the domestic income may be redistributed to targeted groups of workers in order to enhance equity in the society. State aid may help disadvantaged workers to enter the labour market or disabled workers to integrate or stay in the labour market by covering the extra-costs induced by their perceived or real lower productivity.
7. Member States must demonstrate that the aid will address the equity objective in question. In its analysis, the Commission will in particular consider the following elements:
 - Number and the categories of workers concerned by the measure;
 - Employment rates of the categories of workers concerned by the measure on the national and/or regional level and in the undertaking(s) concerned;
 - Unemployment rates for the categories of workers concerned by the measure on the national and/or regional level.

2.2. State aid as an appropriate policy instrument

8. State aid in the form of wage subsidies is not the only policy instrument available to Member States to foster employment of disadvantaged and disabled workers. In fact, Member States can use general measures such as reduction of the taxation of labour and social costs, boosting investment in education and training, measures to provide guidance and counselling, assistance and training for the unemployed and improvements in labour law.
9. Measures for which the Member State considered other policy options, and for which the advantages of using a selective instrument such as State aid for a specific company are established, are considered to constitute an appropriate instrument. The Commission will in particular take account of any impact assessment of the proposed measure the Member State may have made.

2.3. Incentive effect and necessity of the aid

10. State aid for employment of disadvantaged and disabled workers must result in the aid beneficiary changing its behaviour so that it provides a net increase in the number of disadvantaged or disabled employees in the undertaking concerned. Newly recruited disadvantaged or disabled employees should only fill newly created posts

or posts that have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct. Posts resulting from redundancy are not to be filled with subsidised disadvantaged or disabled workers. Thus state aid cannot be used to replace subsidised workers whose subsidies have ended and have consequently been dismissed.

11. Member States should demonstrate to the Commission the existence of the incentive effect and necessity of the aid. First, the beneficiary must have submitted an application for the aid to the Member State concerned before the targeted groups are employed. Second, the Member State must demonstrate that the wage subsidy is paid for a disadvantaged or disabled worker in a firm, where the recruitment would have not occurred without the aid.
12. In its analysis, the Commission will consider the following elements:
 - (1) Internal documents of the aid beneficiary on employment costs and targeted workers for two scenarios: with aid and without aid;
 - (2) Existing or past wage subsidies in the undertaking concerned: categories and number of workers subject to subsidies;
 - (3) Annual turnover of categories of workers concerned by the measure.

2.4. Proportionality of the aid

13. The Member State should provide evidence that the aid is necessary and the amount is kept to the minimum in order to achieve the aid objective. In its analysis the Commission will consider the following elements:
 - (1) Aid limited to the minimum: Member States should provide evidence that the aid amount does not exceed net additional costs of employing the targeted categories of disadvantaged or disabled workers compared to the costs of employing not disadvantaged or not disabled workers.⁵
 - (2) In addition, aid intensities must never exceed those defined in Article 40⁶ and 41⁷ of the Regulation (EC) 800/2008. Eligible costs, to which aid intensities are to be applied, must be calculated following Articles 40⁸, 41⁹ of the Regulation (EC) 800/2008.

⁵ Net additional costs take into account the costs corresponding to the employment of the targeted categories of disadvantaged or disabled workers (e.g. due to lower productivity) and benefits, which the aid recipient extracts from this employment (e.g. due to an improvement of the image of the company).

⁶ The aid intensity for disadvantaged workers shall not exceed 50 % of the eligible costs.

⁷ The aid intensity for disabled workers shall not exceed 75 % of the eligible costs.

⁸ For employment of disadvantaged workers eligible costs shall be the wage costs over a maximum period of 12 months following recruitment. However, where the worker concerned is a severely disadvantaged worker, eligible costs shall be the wage costs over a maximum period of 24 months following recruitment.

⁹ For employment of disabled workers eligible costs shall be the wage costs over any given duration during which the disabled worker is being employed.

3. NEGATIVE EFFECTS OF THE AID

14. If the aid is proportionate to achieve the aid objective, the negative effects of the aid are likely to be limited and the analysis of the negative effects may not be necessary. However, in some cases, even where the aid is necessary and proportionate for a specific undertaking to increase the amount of net employment of targeted workers, the aid may result in a change in behaviour of the beneficiary which significantly distorts competition. In these cases the Commission will conduct an analysis of distortions of competition. The extent of the distortion of the aid can vary depending on the aid design and of the characteristic of the markets affected.¹⁰
15. The aid characteristics that may affect the likelihood and the size of the distortion are:
- selectivity and asymmetry;
 - size of aid;
 - repetition and duration of aid;
 - effect of the aid on firm's costs.
16. For example, a scheme of subsidised wages used to encourage all firms to employ more disadvantaged or disabled workers is likely to have a different effect on the market than a large amount of aid given ad hoc to a single firm to enable it to increase its employment of a certain category of workers. The latter is likely to distort competition more significantly as the aid recipient's competitors become less able to compete. The distortion will be even greater if the labour costs in the beneficiary's business represent a high share of the total costs.
17. In assessing the market characteristics, which can give a much more accurate picture of the likely impact of an aid, the Commission will among others consider:
- structure of the market;
 - sector or industry characteristics;
 - situation on the national/regional labour market.
18. The structure of the market will be assessed through the concentration of the market, the size of firms¹¹, importance of product differentiation¹², and barriers to entry and exit. Market shares and concentration ratios will be calculated once the relevant market has been defined. In general, the fewer the firms, the larger their share of the

¹⁰ A number of markets can be affected by the aid, because the impact of the aid may not be restricted to the markets where the aid beneficiary is active but it can extend to other markets, for example input markets.

¹¹ Size of the firm can be expressed in the terms of market shares as well as turnover and/or employment.

¹² The lower the degree of product differentiation, the greater the effect of the aid on competitors' profits will be.

market, and the less competition one would expect to observe.¹³ If the affected market is concentrated with high barriers to entry¹⁴ and the aid recipient is a major player on it then it is more likely that competitors will have to alter their behaviour in response to the aid, for example postpone or abandon the introduction of a new product or technology or exit the market all together.

19. The Commission will also look at the sector features, like overcapacity, growing¹⁵, mature or declining industries. For example, the presence of overcapacity or of mature markets in an industry may increase the risk of an aid leading to inefficiency and displacement of output among firms who do not have subsidised workers.
20. Finally, the case at hand will be placed in the context of the situation on the labour market, i.e. unemployment and employment rates, wage levels, and labour law.

21. Wage subsidies will most typically lead to the following distortions of competition:

Substitution and displacement effect

22. The substitution effect relates to the situation where jobs given to a certain category of workers simply replace jobs for other categories. The wage subsidy which targets a specific subgroup of workers splits labour force into subsidised workers and unsubsidised workers, and may induce firms to replace unsubsidised workers with subsidised workers. This occurs because relative wage costs for subsidised and unsubsidised workers are changed.¹⁶
23. Since both types of firms, with subsidised and with unsubsidised workers compete in the same markets for goods or services, wage subsidies can contribute to the possible reduction of jobs elsewhere in the economy. Such situation occurs when a firm with subsidised workers increases output, but displaces output among firms who do not have subsidised workers and, as a result, the aid crowds-out unsubsidised employment.

Entry and exit decisions

24. Employment costs form part of the normal operating costs of any enterprise. It is therefore particularly important that aid should have a positive effect on employment and should not merely enable enterprises to reduce costs which they would otherwise bear. For example, wage subsidies that would reduce the ongoing costs of production such as employment costs would make entry more appealing and enable firms with otherwise poor commercial prospects to enter a market or introduce new products to the detriment of its more efficient rivals.

¹³ It is important to note, however, that some markets are competitive despite there being few firms present.

¹⁴ It should be noted, however, that sometimes granting of an aid helps to overcome entry barriers and allows new firms to enter a market.

¹⁵ The existence of growing markets will usually lead to a less pronounced effect of the aid on competitors.

¹⁶ Such substitution effect depends on the elasticity of demand for labour, both for subsidised and unsubsidised workers.

25. The availability of State aid will also affect a firm's decision to leave a market where it is already operating. Subsidised wages could reduce the size of losses and enable a firm to stay in the market for longer – which may mean that other, more efficient firms that do not receive aid would be forced to exit instead.

Investment incentives

26. In the markets where wage subsidies are granted firms are discouraged from competing and may reduce their investments and attempts to increase efficiency and innovation. One can observe a delay in the introduction of new less labour intensive technologies by the aid recipient due to the change of relative costs for labour intensive and for technology intensive production methods. Rivals of competing or complementary products can decrease or delay their investment as well. As a consequence, overall investment level in the industry concerned will decline.

Change of location

27. Widespread or indiscriminate wage subsidies within a particular region may result in some territories benefiting from more favourable production conditions, namely due to a cheaper workforce as a result of the aid. Wage subsidies could be used to attract investment in non assisted areas or to increase the amount of overall aid (e.g. if employment aid is cumulated with regional aid) received by companies in assisted areas. This may result in companies re-locating to the territories where such aid is given, or to displacement of trade flows towards these areas.

4. BALANCING AND DECISION

28. The last step in the analysis is to evaluate to what extent the positive effects of the aid outweigh its negative effects. This exercise will be done on a case-by-case basis for all individual measures. In order to balance positive and negative effects, the Commission will measure them and make an overall assessment of their impact on producers and consumers in each of the markets affected. Unless quantitative information is readily available the Commission will use qualitative information for assessment purposes.
29. The Commission is likely to take a more positive stance and therefore accept a higher degree of competition distortion if the aid is necessary and well targeted to achieve the aid objective and is limited to the net extra costs to compensate for lower productivity of the targeted groups of workers.
30. The balancing exercise can lead to three possible outcomes:
- (1) The Commission may raise no objections to the notified aid measure without initiating the formal investigation procedure or, following the formal investigation procedure laid down in Article 6 of Regulation (EC) No 659/1999¹⁷, decide to close the procedure with a decision in accordance with Article 7 of the Regulation, if

¹⁷ Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the Treaty (OJ L 83, 27.3.1999, p.1).

- a) the aid is found to have positive effects and limited distortion to competition; or
 - b) the aid is likely to give rise to serious distortions to competition but the total positive effects outweigh the negatives ones.
- (2) The Commission may take, following a formal investigation procedure, a conditional decision within the meaning of Article 7(4) of the Regulation, if the aid is likely to seriously distort competition but can be redesigned to reduce these. For example, when the negative effects of the aid outweigh the positive ones, the Commission can consider lower aid intensities than those proposed by the Member State, in order to offset the resulting distortions of competition and trade.
- (3) Finally, the Commission may consider, following a formal investigation procedure, the notified aid measure incompatible with the common market if the aid is likely to give rise to serious distortions of competition such that the total negative effects outweighs the positive effects of the aid.

Annex

Article 2

Definitions

18. 'disadvantaged worker' means any person who:

- (a) has not been in regular paid employment for the previous 6 months; or
- (b) has not attained an upper secondary educational or vocational qualification (ISCED 3); or
- (c) is over the age of 50 years; or
- (d) lives as a single adult with one or more dependents; or
- (e) works in a sector or profession in a Member State where the gender imbalance is at least 25 % higher than the average gender imbalance across all economic sectors in that Member State, and belongs to that underrepresented gender group; or
- (f) is a member of an ethnic minority within a Member State and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment;

19. 'severely disadvantaged worker' means any person who has been unemployed for 24 months or more;

20. 'disabled worker' means any person:

- (a) recognised as disabled under national law; or
- (b) having a recognised limitation which results from physical, mental or psychological impairment;

Article 40

Aid for the recruitment of disadvantaged workers in the form of wage subsidies

1. Aid schemes for the recruitment of disadvantaged workers in the form of wage subsidies shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.

2. The aid intensity shall not exceed 50 % of the eligible costs.

3. Eligible costs shall be the wage costs over a maximum period of 12 months following recruitment.

However, where the worker concerned is a severely disadvantaged worker, eligible costs shall be the wage costs over a maximum period of 24 months following recruitment.

4. Where the recruitment does not represent a net increase, compared with the average over the previous twelve months, in the number of employees in the undertaking concerned, the post or posts shall have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy.

5. Except in the case of lawful dismissal for misconduct, the disadvantaged worker shall be entitled to continuous employment for a minimum period consistent with the national legislation concerned or any collective agreements governing employment contracts.

If the period of employment is shorter than 12 months or, as the case may be 24 months, the aid shall be reduced pro rata accordingly.

Article 41

Aid for the employment of disabled workers in the form of wage subsidies

1. Aid for the employment of disabled workers in the form of wage subsidies shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.

2. The aid intensity shall not exceed 75 % of the eligible costs.

3. Eligible costs shall be the wage costs over any given period during which the disabled worker is being employed.

4. Where the recruitment does not represent a net increase, compared with the average over the previous twelve months, in the number of employees in the undertaking concerned, the post or posts shall have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy.

5. Except in the case of lawful dismissal for misconduct the workers shall be entitled to continuous employment for a minimum period consistent with the national legislation concerned or any collective agreements governing employment contracts.

If the period of employment is shorter than 12 months, the aid shall be reduced pro rata accordingly.