Commission adopts Regulation exempting State aid for employment from notification under Article 88(1)

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On 12 December 2002, the Commission adopted a further Regulation exempting state aid from notification, following those adopted in January 2001. While those first three regulations had dealt with training aid, so-called de minimis aid and aid to small and medium-sized enterprises, the new regulation, under the same legal base of Regulation (EC) 994/98, covered state aid for employment.

The aim of the regulation is to facilitate Member States’ employment initiatives by relieving them of the burden of notifying, and the Commission of examining, certain state aid with employment objectives. It provides this exemption, under specified conditions, to aid for the creation of new jobs, to aid for the recruitment of disadvantaged and disabled workers and also to aid to cover continuing costs of employing disabled workers. It is thus in line with the conclusions of various European Councils, which call for a shift in emphasis from supporting individual companies or sectors towards tackling horizontal objectives of common interest.

All provisions covering employment have an obvious political importance, given stubbornly high unemployment levels and the employment targets set at the Lisbon European Council in 2000. This remained the case for the state aid regulation even though, according to figures published by the Commission on the basis of data provided by Member States, state aid for employment represents a much smaller proportion of state aid than aid for research and development, for the environment or for training. In addition two particular features of state aid for employment meant that this regulation needed very careful consideration both within the Commission and in the advisory committee on state aid, which discussed drafts of the regulation on two occasions. These two features also serve to explain why a regulation covering employment aid was not included in the ‘first wave’ of regulations adopted in 2001.

The first feature is the sheer variety of employment measures which Member States have devised, depending on the particular objectives being pursued and the labour market context with which they are confronted. No regulation could hope to cover or provide an exemption for measures of every kind, so there was a need to decide what the scope of the regulation should be. A further consideration was that in order to avoid a multiplicity of texts the regulation was intended to replace and not merely complement the 1995 employment aid guidelines, which had wide scope even if they did not lay down criteria precise enough for a regulation. The text therefore needed to make some provision for measures which were not exempted.

The second feature is the fact that the distinction between state aid and general measures (which fall outside the definition of state aid in Article 87(1) of the Treaty) is particularly difficult to draw in the employment sphere. The Commission has previously taken a number of decisions that employment measures notified to it do not, in fact, constitute state aid at all, for example because they apply without distinction to all employers in a particular Member State. The definition of state aid covers only selective measures, for example those which apply only in certain regions or to certain sectors. Again, the aim being to replace both the 1995 guidelines and 1996 notice on state aid and the reduction of labour costs, both of which treated the aid/general measure distinction, the Commission needed to ensure that a regulation in this area did not appear to disturb the scope of Article 87(1). At the same time, it is clear that the regulation could not solve long-running issues over the state aid definition arising from the handling of certain policy areas, including employment policy, at sub-national level in certain Member States. Text covering this issue was included in recital 6 of the regulation as adopted.

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(1) OJ L 337, 13.12.2002, p. 3. Note that the Commission announced the adoption on 6 November 2002: the discrepancy in dates is due simply to the linguistic revision of the adopted text after the decision of principle.
(4) It should be noted that while much state aid has an ultimate objective of promoting employment, ‘state aid for employment’ is understood in this article to mean state aid whose granting is linked directly to the employment of certain workers or the creation of a specified number of jobs.
The remainder of this article describes the operative text of the regulation.

Scope, definitions, conditions for exemption (Articles 1 to 3)

As noted above, the outcome on scope (Article 1) was that the regulation exempts the types of employment aid that the Commission has encountered most frequently in recent years, in particular aid to create new jobs and aid to promote the recruitment of disadvantaged and disabled people. Article 2 provides definitions of which most are standard from other state aid texts: the definitions of disadvantaged and disabled people (see below) are however different from those in the training aid regulation, for various reasons of which the main one is that while workers being trained are by definition already employed, those being recruited may frequently not be. Article 3 provides that the exemption is subject to conditions: in practice these are expressed in terms of certain ceilings, which are meant to preserve an appropriate balance between the need to provide incentives to employment and the risk of deadweight effects (subsidies paid to employers who would recruit anyway) and substitution effects (subsidies paid to beneficiaries at the expense of non-beneficiaries).

Job creation aid (Article 4)

The aid rates for aid for job creation are aligned with those already existing for aid to create employment linked to investment, in the regional and SME aid rules. (It should be noted that the regulation thus largely eliminates the often difficult and rather artificial distinction between employment linked and not linked to an investment project.) In order to stimulate the creation of new jobs, the regulation allows a small company in an assisted area to save, e.g. in eastern Germany, 50% of the new employees’ wage costs over a two-year period. The amount of permissible aid depends on whether the job is created in an assisted area and on the regional aid ceiling applicable to each of these areas.

Member States may also want to encourage job creation in non-assisted, i.e. rich, areas. In view of the higher cost that small firms have to bear in hiring new personnel, these firms will be entitled to more aid than medium-sized firms. As they do not face these extra burdens, no aid is allowed for large companies located outside the assisted areas.

Disadvantaged workers (Article 5)

In order to encourage the hiring of long-term unemployed persons and other disadvantaged workers Member States may compensate companies for up to 50% of one year’s wage costs and compulsory social contributions.

Disadvantaged persons include:

- all persons under 25, or within 2 years of completing full-time education who have not previously obtained a job;
- all persons over 50 who do not have a job, or are in danger of losing it;
- any one who has not obtained an upper secondary educational qualification and who does not have or is in danger of losing his/her job;
- long-term unemployed (defined as 12 months unemployment out of the last 16 months);
- migrant workers and members of ethnic minorities;
- single parents;
- drug addicts and former prisoners;
- others who are returning to the labour-force after an absence of more than two years (for example to bring up a child or to look after a family member);
- women in areas of disproportionately high female unemployment.

A reserve clause in Article 9 (see below) allows the Commission to consider other categories of people as disadvantaged after a notification by the Member State concerned. It should be noted that where a disadvantaged worker is recruited into a newly created job, aid under Article 5 can be given in addition to aid available under Article 4.

Disabled persons (Articles 5 and 6)

In order to foster an increased hiring of disabled persons, the State may also assume up to 60% of one year’s wage cost and social security payments, should a company decide to do so. The definition of disabled persons in Article 2 is subordinated to the national law of Member States. In addition, aid can be granted to compensate for reduced productivity as well as for adaptation of premises and special assistance. In response to comments received during the public consultation period, the Commission also introduced special provisions for so-called ‘sheltered employment’ where the majority

Some comments received suggested that financial support which simply compensates firms for additional costs of employing disabled or even
disadvantaged workers should not be considered state aid at all, on the basis that no advantage is provided to the firm concerned. Readers may note the parallelism between this issue and those raised in the Ferring jurisprudence over public services. In the regulation the Commission did not in any sense prejudice the scope of Article 87(1) but decided that if any measures meeting the conditions set out did constitute aid, it would in any event be manifestly compatible with the common market and could therefore be exempted.

**Necessity and cumulation (Articles 7 and 8)**

These articles aim to ensure that aid has an incentive effect by providing that it cannot be applied for after the event, and set out the rules for different types of employment aid to be cumulated with each other.

**Measures not covered by the exemption (Article 9)**

There are, of course, other types of employment aid, such as aid to maintain people in existing jobs or aid to encourage job-sharing. The regulation does not prohibit these types of aid. They must simply be notified to the Commission in order to assess the effect of the aid on competition. For example, aid to maintain people in existing jobs is sometimes granted to companies in financial difficulty and it is therefore necessary to check that the aid does not harm rival firms.

Article 9 specifies certain types of aid which remain notifiable to the Commission. The text, and in certain cases the recitals, gives some indication of the basis on which the Commission will assess any such notifications.

**Final provisions (Articles 10 and 11)**

These are broadly in line with the existing exemption regulations, though an innovation is the requirement that Member States annual reports to the Commission on the schemes they implement using this regulation must be provided electronically, not simply on paper. The Regulation will expire in 2006, which coincides with the expiry date of the current rules on the European structural funds and with that of the other exemption regulations in existence.