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EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

COMMISSION REGULATION (EU) No.../..

**on the application of Articles 107 and 108 of the Treaty on the Functioning of the
European Union to de minimis aid**

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1. PROBLEM DEFINITION

1.1. Policy context

On 8 May 2012, the Commission adopted a State Aid Modernisation (SAM) Communication, which sets out the objectives of an ambitious reform of State aid control and seeks to contribute to the EU's broader growth agenda. State aid policy should facilitate well-designed aid targeting market failures and objectives of common European interest. The Commission aims to:

- focus its enforcement efforts on cases with the biggest impact on the internal market;
- streamline rules; and
- take faster decisions.

The review of the *de minimis* Regulation is directly linked to the prioritisation objective and therefore represents an important element of the SAM initiative.

Under the *de minimis* Regulation, aid measures below a certain ceiling are deemed not to have an impact on competition and/or not to affect trade in the internal market; therefore they do not have to be notified under Article 108(3) TFEU. As from its entry into force on 1 January 2007 and in view of experience applying the previous Regulation, developments in inflation and gross domestic product between 2000 and 2006 and likely developments going forward, the current Regulation raised this *de minimis ceiling* from EUR 100 000 to EUR 200 000 per undertaking over any period of three fiscal years. Given the small average size of road transport undertakings (previously excluded from the scope of the Regulation), a ceiling of EUR 100 000 was set for that sector.

The Regulation also:

- excludes from its scope certain sectors and activities¹ and firms in difficulty;
- lays down rules on permissible aid instruments²;
- contains 'safe harbour' rules enabling easier calculation of the gross grant equivalent for guarantees;
- rules out 'cumulation' with State aid if the aggregate amount in respect of the same eligible costs exceeds an aid intensity fixed by the relevant block exemption Regulation or Commission Decision; and
- allows Member States to choose to monitor compliance with the ceiling by means of:
 - (a) a system of declarations by companies on *de minimis* aid received during the current and the two preceding years; or
 - (b) a central register containing complete information on all *de minimis* aid granted by any authority within the Member State.

¹ See Article 1 of the Regulation; exclusions cover aid in the fisheries and aquaculture sectors, for primary agricultural production (where specific *de minimis* Regulations with lower ceilings apply), export aid and aid for the acquisition of road freight vehicles.

² 'Transparent aid', i.e. aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid *ex ante*, without the need for a risk assessment.

1.2. Key issues

The *de minimis* Regulation aims to strike a balance between simplification on the one hand and not distorting competition in the internal market on the other. Enforcement practice and public consultation have identified the following issues:

- as regards **simplification**: many Member States and stakeholders requested a higher ceiling, clearer and simpler definitions, and safe harbour provisions beyond the current rule for guarantees; and
- as regards **not distorting competition**: most Member States have been unable to provide the Commission with aggregate data on the use of the Regulation, which makes it very difficult to assess effects on trade and competition and to set an appropriate ceiling. Also, analysis is needed as to whether the current monitoring system is sufficient to ensure compliance with the ceiling.

The answer to the key question – ‘what is the right ceiling?’ – has to ascertain which aid measures can be deemed not to have any effect on trade and competition and are therefore not subject to State aid rules.

The Regulation is designed to allow a small amount of aid to be granted under minimum conditions ensuring that its use is simple and legally certain. It should therefore contain definitions and conditions which are easily applicable.

Many Member States and stakeholders highlighted other problems with the application of the Regulation, of which the most common can be grouped and summarised as follows:

- (1) Uncertainty as to the interpretation of ‘undertaking’ (particularly important as the ceiling applies per undertaking). The current definition follows the general definition in competition law, which uses economic rather than legal criteria and thus considers different entities as a single undertaking in cases of common control;
- (2) Uncertainty as to the interpretation of ‘undertakings in difficulty’ excluded from the scope of the regulation and to the question whether this exclusion is still justified;
- (3) Uncertainty as to what constitutes the ‘road transport sector’ and doubts as to the justification for a lower ceiling;
- (4) Uncertainty as to how to apply the cumulation rules;
- (5) Requesting further guidance on the distinction between transparent³ and non-transparent aid. (e.g. lack of safe harbour for certain forms of aid); and
- (6) Questions over how best to ensure monitoring and transparency⁴.

1.3. Baseline scenario

The baseline scenario involves extending the current Regulation until 2020, i.e. maintaining *de minimis* ceilings (EUR 200 000 in general and EUR 100 000 for the road transport sector) and all other provisions as they stand.

³ The *de minimis* Regulation is only applied to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid ex ante without any need to undertake a risk assessment (‘transparent aid’)

⁴ Most Member States operate a declaration system. Only nine (CZ, EE, EL, HR, LT, PL, PT, SK and SL) currently have a central register. Cyprus replaced its register with a declaration system in 2009: the main problem was designing a register of undertakings that could be easily updated if the structure of the beneficiaries changed. Bulgaria and Hungary operate both systems in tandem.

The problems of legal certainty referred to in section 1.2 above would not be resolved. The current uncertainty as to the interpretation of ‘undertaking’ and ‘undertakings in difficulty’, in particular, and as to application of the cumulation rules can lead a public authority erroneously to:

- grant more *de minimis* aid than is provided for in the Regulation;
- deny aid to undertakings which are eligible; or
- grant aid to undertakings which are not eligible.

1.4. Is EU action justified? (subsidiarity principle)

State funding meeting the criteria in Article 107(1) TFEU constitutes State aid and the Commission must be notified of it pursuant to Article 108(3). Pursuant to Article 109, however, the Council authorised the Commission⁵ to establish a ceiling below which aid measures are deemed not to meet all the criteria and are therefore exempted from the notification procedure. As the State aid rules on *de minimis* aid thus fall under the competence of the Commission and the EU enjoys exclusive competence in this field⁶, the present initiative is not subject to a subsidiarity test⁷.

2. OBJECTIVES

The overall objective of the review is directly linked to the SAM objectives of fostering growth in a strengthened, dynamic and competitive internal market, focusing enforcement on cases with the biggest impact on the internal market, streamlining and clarifying rules and taking faster decisions.

This can be achieved by focusing on the following specific goals:

- (a) **Simplification:** are the ceiling and the conditions for its application as simple as possible without affecting trade and competition in the internal market or is there scope for further simplification or clarification?
- (b) **Legal certainty:** clear rules are key to legal certainty as to the criteria whereby measures are deemed not to constitute State aid;
- (c) **Preventing distortion in the internal market:** not only the effect of individual measures is relevant but also the aggregate effects of small measures within a sector; and
- (d) **Ensuring compliance:** the Regulation should contain an effective and efficient monitoring **mechanism** and clear and simple rules to ensure compliance, in particular with the ceiling.

3. POLICY OPTIONS

The various policy options⁸ concern:

- (i) the ceiling;
- (ii) other application provisions; and

⁵ See Regulation (EC) No 994/98, as amended by Council Regulation (EU) No 733/2013 (OJ L 142, 14.5.1998, p. 1).

⁶ See Article 3(1)(b) TFEU.

⁷ See Article 5(3) TEU.

⁸ Allowing the *de minimis* Regulation to lapse on expiry was immediately discarded as an option, as this would clearly go against the objectives of simplification and legal certainty.

- (iii) monitoring.

3.1. Ceiling

Apart from the option of no policy change, four options have been analysed in more detail:

- adjusting the ceiling to take into account future inflation;
- substantial increase of the current ceiling;
- further differentiation of the current ceiling; and
- introducing a cap or other mechanisms to cater for the cumulative impact of *de minimis* aid.

The following options have been analysed for the road transport sector, currently subject to a lower ceiling (EUR 100 000):

- a differentiated approach, with the general ceiling applied to passenger transport and half the amount applied to freight transport; and
- applying the general ceiling to the whole sector.

3.2. Further clarification and simplification

Other conditions for the application of the Regulation can give rise to practical difficulties. The review seeks to address these and simplify the rules as much as possible. These concern:

- the definition of ‘undertaking’;
- the definition of ‘undertakings in difficulty’;
- cumulation rules; and
- transparent aid.

3.3. Enhancing compliance through monitoring

Monitoring requirements should also be clarified and simplified, whilst ensuring compliance with the provisions of the Regulation, in particular the ceiling. The options discussed here are:

- no policy change;
- maintaining the current rule (choice between a central register and a declaration system) but with stricter systematic monitoring and enforcement; and
- introducing a mandatory *de minimis* register.

4. ADMINISTRATIVE BURDEN

The *de minimis* Regulation is designed to enable small amounts of aid to be granted subject to minimal conditions and therefore involving a minimal administrative burden in comparison with other State aid instruments.

Under the current Regulation, the main administrative burden on the granting authority is ensuring that an undertaking does not receive aid above the *de minimis* ceiling. This can be done either by:

- (a) obtaining *ex ante* declarations from undertakings of other *de minimis* aid received; or

- (b) setting up, maintaining, entering data in and checking a central registry.

In principle, the Regulation does not impose direct administrative burdens on undertakings, including SMEs and micro-enterprises. In practice, however, it appears that there are some burdens for undertakings, particularly with the declaration system. Correct declarations can be made only if the granting authorities always fulfil their obligation to inform beneficiaries of:

- the fact that the amount received constitutes *de minimis* aid;
- its exact grant equivalent; and
- the date of granting.

Aid to micro-enterprises should not be exempt from the ceiling since:

- Article 107(1) TFEU applies to all undertakings; and
- competition and trade can be distorted by the aggregate effects of *de minimis* aid in sectors with many smaller undertakings.

5. ENVIRONMENTAL AND SOCIAL IMPACT

The environmental impacts are minimal, first because *de minimis* aid must remain low (EUR 200 000 over three years) and secondly because it is generally used in a very wide range of sectors, with no particular pattern, and for a broad range of objectives, or none at all. In most cases, there are no specific eligible costs or objectives attached to the granting decision. Therefore, no particular environmental impact can be measured and changes to the *de minimis* Regulation are not expected to cause such impacts.

Social impacts are also minimal or not measurable for the same reasons. As *de minimis* aid can be granted for a wide range of objectives which may or may not be ‘social’, it is not the right instrument for promoting employment and social protection (Article 9 TFEU). Undertakings in the ‘social economy’ often fall under the rules for Services of General Economic Interest (SGEI), for which a higher *de minimis* ceiling applies, and are therefore not particularly affected by the general *de minimis* rule.

As the initiative has no significant environmental or social impact, these factors will not be further addressed in this report.

6. COMPARING THE OPTIONS

The policy options can be compared by assessing how effective they are likely to be in achieving the objectives of (a) simplification, (b) legal certainty, (c) not distorting competition and (d) ensuring compliance.

The impact of the options against the baseline scenario (no policy change) is summarised in the tables below using the following scoring system:

- ++ / -- very positive / negative impact
- + / -- positive / negative impact
- +/- both positive and negative impact, neutral
- 0 no impact

NB: with State aid instruments, it is impossible to quantify impact and to aggregate scores, as neither the distance between the scores nor the weightings of the objectives are equal.

6.1. Ceiling

Table 1: General ceiling

Options	Simplification	Legal certainty	Preventing distortions	Ensuring compliance
1. No policy change	0	0	0	0
2. Adjusting the ceiling to take into account future inflation	+/-	0	0	0
3. Substantial increase of the current ceiling	+	--	--	0
4. Further differentiation of the current ceiling	--	--	+/-	0
5. Introducing a cap or other mechanism	--	--	+/-	0

The preferred option is not to propose a policy change on the general ceiling, as the Commission sees no convincing reason for raising the ceiling and only risks in doing so. Options 4 and 5 are not favoured as they would considerably increase the administrative burden.

Table 2: Ceiling for the road transport sector

Options	Simplification	Legal certainty	Preventing distortions	Ensuring compliance
1. No policy change	0	0	0	0
2. Differentiate between passenger and freight road transport	+	+	+	0
3. Applying general ceiling to all road transport	+	--	--	0

The second option is preferred, as it means that the ceiling for road passenger transport can be aligned with the general ceiling to meet the simplification objective as there is no longer a reason to deviate from the general ceiling in this sector. This option further allows maintaining the lower ceiling for freight transport which is still characterised by the very small average size of undertakings.

6.2. Further clarification and simplification

Table 3: Definition of ‘undertaking’

Options	Simplification	Legal certainty	Preventing distortions	Ensuring compliance
1. No policy change	0	0	0	0
2. Replace ‘undertaking’ by ‘legal entity’	++	--	--	-
3. Clarification and simplification	++	+	++	++

Option 3 is preferred. Simplification, legal certainty and better compliance can be ensured by using a simplified definition based on the main criteria of the existing definition of linked enterprises in the SME communication. The second option does not seem to be a valid option as it would be neither legally possible nor economically justified.

Table 4: Exclusion of ‘undertakings in difficulty’

Options	Simplification	Legal certainty	Preventing distortions	Ensuring compliance
1. No policy change	0	0	0	0
2. Clarification and simplification	+	+	+	+
3. Remove the exclusion	++	+/-	-	+

The second option is preferred. It still seems necessary to exclude undertakings in difficulty as aid to such undertakings shall be granted in accordance with the rescue and restructuring Guidelines. Furthermore, the safe harbours are calculated for undertakings not in difficulty. Clarification and simplification can be best achieved by using only the ‘hard’ criteria of the current definition, as in the current General Block Exemption Regulation because these are easy to apply.

Table 5: Cumulation rules

Options	Simplification	Legal certainty	Preventing distortions	Ensuring compliance
1. No policy change	0	0	0	0
2. Clarification and simplification	+	+	+/-	+
3. Free cumulation	++	+	-	-

The preferred option is to introduce further clarification while retaining the principles of the cumulation rule to limit the risk of other State aid instruments being circumvented.

Table 6: Provisions on transparent aid

Options	Simplification	Legal certainty	Preventing distortions	Ensuring compliance
1. No policy change	0	0	0	0
2. Adapt the rules for loans and guarantees	+	+	+	+
3. Widen the range of aid instruments	-	-	-	-

The second option is preferred. It will mainly involve introducing a safe harbour for loans, while maintaining and clarifying that for guarantees.

6.3. Enhancing compliance through monitoring

Table 7: Monitoring

Options	Simplification	Legal certainty	Preventing distortions	Ensuring compliance
1. No policy change	0	0	0	0
2. Current system but stricter systematic monitoring and enforcement	-	0	+	+
3. Mandatory <i>de minimis</i> register	--	++	++	++

The first option is preferred as the second option would not introduce simplifications but create an additional administrative burden for MS without a central register. While a mandatory register (third option) could ensure better compliance with the rules and therefore have a positive effect as regards legal certainty and preventing competition distortions; it would however entail a significant administrative burden in particular during the set-up of the register. It is therefore considered more prudent and appropriate first to study its feasibility in more detail.

7. MONITORING AND EVALUATION

Currently, Member States are only obliged to record and compile all information relating to *de minimis* aid and need not send reports to the Commission. These records, which are to be kept for ten years, enable them to send information to the Commission on request.

Monitoring and evaluation have been covered in this impact assessment and options have been considered for improving the relevant provisions in the new Regulation. However, on balance it is preferred that the monitoring system not be changed at this stage, mainly for reasons of proportionality, in view of the considerable administrative burden this would entail for very small amounts of aid.

Rather, it is suggested that monitoring within the current system be enhanced by more detailed checks where reference is made to the *de minimis* Regulation in cases or where there are doubts. A study will be carried out during the Regulation's period of application (2014-20) to prepare the ground for the next policy review. The study could include data and analysis on the feasibility of, and detailed arrangements for, introducing a mandatory register at Member State or EU level. It could also look at further data collection, in particular for Member States without a central register.

It is also envisaged that an evaluation will be launched about two years before the end of the period, starting with a public consultation based on a detailed questionnaire on the application of the various rules.

8. CONCLUSION

In conclusion, on the basis of its impact assessment, the Commission would prefer the following options:

- maintaining current ***de minimis* aid ceilings**, except in the case of road passenger transport, where the general ceiling would apply;
- introducing further simplification and clarification as regards the notions of '**undertaking**' and '**undertakings in difficulty**';
- clarifying the **cumulation** rules;
- adapting the rules for **transparent aid instruments** (loans and guarantees) so as *inter alia* to introduce an additional safe harbour for loans; and
- as regards **monitoring**, maintaining the current choice between a central register and a system of declarations.