**AECM Position regarding the**
**European Commission's Draft for *De Minimis* Regulation**

**Brussels, 15th May 2013**

## A/Introductory remarks

In the context of the ongoing review of EU State Aid Regulation by the European Commission, which has been initiated with the Consultation in the Context of the *State Aid Modernization* Initiative (SAM), and following a first consultation launched on 26th July 2012, the Commission has published on 20th March 2013 a first draft for the new *De Minimis* Regulation, for which stakeholders are invited to provide comments.

Given the importance of the *De Minimis* Regulation as an exemption instrument for SME finance, the European Association of Mutual Guarantee Societies (AECM, see annex) is pleased to provide the Commission services with its feed-back to the proposal. Indeed, most AECM members are either public or private non-profit guarantee institutions providing loan default guarantees for SMEs benefiting from a public counter-guarantee.

However, AECM has to express a caveat to its position. Indeed, at this point, the draft proposal for the new *General Block Exemption Regulation* (GBER) has been recently published and is still under analysis. The GBER, along with the *De Minimis* Regulation, is the key State Aid Regulation used by AECM members for their SME guarantee activity. While they are not perfectly interchangeable with regard to effect and limitation, they are however to some extent alternative choices for SME guarantee providers.

As a consequence, naturally, the position regarding the De minimis Draft Regulation will be conditioned by AECM's position on the proposal for the Draft GBER. AECM may review its judgement on some of the aspects of the *De Minimis* Draft Regulation on the occasion of its position on the Draft *GBER* and on the occasion of the second consultation on *De Minimis*. AECM will clearly motivate any change of position at that stage.

## B/Detailed positions

### Recital 4: Definition of undertaking

Recital 4 of the Preamble of the Regulation stipulates that *"the Court of Justice has ruled that entities which are controlled (on a legal or on a de facto basis) by the same entity should be considered as one undertaking. For this reason a company, a group of companies or an association can be considered to constitute one undertaking for the purposes of applying the de minimis rule".*

It is not yet clear from this Preamble what *"entities which are controlled by the same entity"*, *"a group of companies"* and *"an association"* mean. The said provision of the Preamble of the Draft Regulation creates legal ambiguity as it is not clear whether these terms also cover linked enterprises within the meaning of Annex I to 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 (*OJ* 2008 L 214, p. 3) (hereinafter the "General block exemption Regulation") and Commission Recommendation No 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

We agree that, in providing aid to undertakings that do not have separate legal personality and are controlled by other undertakings (branches or subunits of undertakings), not only the undertaking benefitting from aid but also the undertaking that controls the beneficiary should be evaluated, as noted in case C-382/99 of the European Court of Justice. However, where *de minimis* aid is received by a legal entity that has more than 50 per cent of the shares owned by another legal entity **operating in a different economic sector** than the undertaking receiving *de minimis* aid, these two separate legal entities should not be considered as one undertaking. The *de minimis* aid ceiling is considered to be a ceiling where aid measures that do not exceed that ceiling are not considered State aid as they do not effect on competition and trade in the internal market. Undertakings operating in completely different sectors do not compete among themselves, and the fact that they are considered linked companies within the meaning of the General block exemption Regulation should not affect the determination of the *de minimis* ceiling and should prevent both linked undertakings from using insignificant aid within the limit of *de minimis* aid.

The *de minimis* ceiling is not increased in the Draft Regulation, compared to the *de minimis* aid ceiling set out in Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (hereinafter "Regulation No 1998/2006"). However, having in mind that linked undertakings can be considered as one undertaking, the *de minimis* aid ceiling is even lowered as Regulation No 1998/2006 that is currently in force does not limit the granting of aid to linked undertakings. Also, the proposal made by the Commission may cause a lot of complication and uncertainty in practice given that within the critical period of 3 fiscal years, the links between the entities could change many times. In view of these elements, we propose deleting the sentences *"the Court of Justice has ruled that entities which are controlled (on a legal or on a de facto basis) by the same entity should be considered as one undertaking. For this reason a company, a group of companies or an association can be considered to constitute one undertaking for the purposes of applying the de minimis rule"* from Recital 4 of the Preamble of the Draft Regulation or explaining what criteria should be used to determine whether an undertaking is *"an entity which is controlled by the same entity"*, *"a group of companies"* and *"an association"*.

In fact, in our view, the application of the currently valid EU SME Definition, which contains a provision regarding control by other entities, should be sufficient to this end.

**Recital 5: Road transport**

In the context of the review of the review of the Regulation, road passenger transport will benefit fully from the € 200.000 state aid threshold. However, road freight transport continues to be discriminated with a lower threshold amount of €100.000. In addition, *"aid for the acquisition of road freight transport vehicles by undertakings performing road freight transport for hire and reward"* would be excluded from the scope of the Regulation. AECM fails to see the objective justification for the different treatment of this specific economic activity and plead for the uniform application of the € 200.000 threshold, including for investments for transport vehicles.

**Article 1: Scope**

The scope expressed by Article 1 has remained unchanged with regard to the currently valid *De Minimis* Regulation. As expressed in our answer to the previous consultation questionnaire on the *De Minimis Regulation*, we suggest to generally exempt micro-companies (EU SME definition, 2003/361/EC) entirely from EU State Aid Regulation. In our perception, the small size and economic activity, typically limited to national local markets, of these businesses are not significant enough to distort trade between the Member States. Such a general exemption for micro- and small businesses should also apply to other exemption regulations notably to the *GBER*.

Paragraph b of Article 1(1) of the Draft Regulation stipulates that de minimis aid may not be granted to undertakings active in the primary production of agricultural products. The same provision is also contained in Regulation No 1998/2006 that is currently in force. As neither Regulation No 1998/2006 that is currently in force nor the Draft Regulation define the activities that involve the production of agricultural products, in practice it is very difficult to differentiate what activities should be considered the production of agricultural products and what activities should be seen as the processing of agricultural products. For example, should the production of cheese conducted by a dairy processing undertaking be considered the production of agricultural products or the processing of agricultural products, because both milk from which cheese is made and cheese itself (a dairy product) are to be considered agricultural products. In view of this, we propose defining in the Draft Regulation what activities are to be considered the primary production of agricultural products.

Paragraph c of Article 1(1) of the Draft Regulation sets forth the sectors where de minimis aid may not be granted to undertakings active in such sectors and the conditions under which such aid may not be granted. The circumstances referred to in the said paragraph are not clear. For this reason, it is necessary to explain what should be considered *"the determination of the amount of the aid fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned"*. Nor is it clear what is meant by *"the passing of the aid on to primary producers"*.

**Article 2. : Definitions**

In the context of the modernization of State Aid Regulation, AECM welcomes a simplified definition for "undertakings in difficulty". We suggest focusing on the definition provided under the *Guidelines on State Aid for rescuing and restructuring firms in difficulty*, Article 10. (c), that considers that a firm is regarded as being in difficulty "whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings". This would allow migrating towards the simplified definition under the GBER, without having to focus on the company age or SME-statute in the context of the *De Minimis* Regulation.

Paragraph c of Article 2 of the Draft Regulation gives the definition of *"marketing of agricultural products"*. The said paragraph states that *"a sale by a primary producer to final consumers shall be considered as marketing if it takes place in separate premises reserved for that purpose"*. Under Paragraph c of Article 1(1) of the Draft Regulation, aid may not be granted to undertakings active in the marketing of agricultural products when the aid is

conditional on being partly or entirely passed on to primary producers. Therefore, the sentence in Paragraph c of Article 2 of the Draft Regulation is misleading as aid may not be granted to such an undertaking in any case, because in this case aid would be received by a primary producer, irrespective of the place of marketing of the products. In view of this, we propose deleting the sentence *"a sale by a primary producer to final consumers shall be considered as marketing if it takes place in separate premises reserved for that purpose"* from Paragraph c of Article 2 of the Draft Regulation.

**Article 3 Para. 2: *De Minimis* Aid**

Currently, SMEs in Europe are exposed to a drastic change in conditions regarding access to finance, which are widely documented, among other via data provided by the European Central Bank (ECB). Indeed, the lingering effects of the financial and economic crises over the last years (subprime, sovereign debt) have exposed them to more restrictive loan terms and diminishing credit supply. This is in large part due to effort by banks to de-leverage and to prepare themselves to the implementation of Basel III and CRD IV prudential regulations. At the same time, financing needs and projects are becoming increasingly complex, as European companies face global competition. In addition, value chains are becoming longer and more complex, leading to an increased need for pre-financing. In this context, credit default guarantees are an essential instrument for SMEs, who do not dispose of sufficient collateral, to be able to raise adequate finance to face these challenges.

Against this background, AECM considers that it is essential and justified to raise the *De Minimis* threshold to € 500.000:

- Past operations have shown that economically useful and sound investment projects, for which a combination of different support instruments was used, were limited by the current ceiling
- Aside from the need for an increase in real terms of the threshold, we also have to take into consideration the fact that the *De Minimis* Regulation did not foresee an inflation adjustment mechanism. This is a significant, as the currently valid *De Minimis* Regulation dates from 2006. The new Regulation would be applicable until the year 2020. Freezing the threshold amount dating back to 2006 for 14 years would lead to a de facto reduction of the threshold in real terms, when adjusted to inflation. If we assume an annual inflation rate of 3%, the threshold would be devaluated by over 40% over a 14 year period. Thus, part of the threshold increase to €500.000 would actually account for the need of adjusting to inflation.
- The Threshold of € 500.000 has shown its adequacy in the context of the Temporary State Aid Framework during the crisis years.
- The same Threshold of € 500.000 has been applied to the *De Minimis* Regulation for Services of General Economic Interest. We do not see a reason for discriminating between these two regulations as regards the threshold.

Given the Commission's expressed priority to focus on state aid that would lead to a substantial distortion of competition within the Internal Market, we are of the opinion that this threshold increase should not cause significant problems.

**Article 4 Para. 5 (a) and (c) Calculation of the State Aid Equivalent**

The Commission draft Regulation text proposes drastic changes to the current *De Minimis* framework by introducing a duration requirement and eliminating both the 80% coverage ratio and the proxy net default rate of 13%, which currently allows for an easy calculation of the state aid equivalent for guarantees.

State aid in form of guarantees is generally only considered as being transparent, if the conditions of one of the three proposed calculation methods are fulfilled. Bullet a.) stipulates that the guaranteed amount of the underlying loan may not exceed €1.500.000 and whose duration may not be longer than 5 years. While we can understand that the Commission may not allow potential abuse in form of a perpetual loan, this limitation of the duration is to 5 years is extremely short and quite problematic from a number of perspectives:

- Typical loan durations may differ widely according to national lending practices. Introducing such a limitation discriminates between Member States, whose markets predominantly practice short lending durations, and other, where the duration often exceeds 5 years.
- According to market practice, the loan duration is adapted to the underlying investment and accounting practices, i.e. an investment loan will be scheduled over a longer term horizon, corresponding to the useful life, amortization and acquisition cost of the equipment or real estate. Fixing a short duration would discourage this type of operation, in our perception for no apparent reason.
- If the duration of underlying loans were to be shortened to less than 5 years, this would lead to an additional worsening of SME access to finance. Indeed, if long-term investment projects would have to be financed over abnormally short periods, leading to very high reimbursement installments. In many cases, businesses would not be able to shoulder such atypical high reimbursement rates.

To illustrate, we would like to provide some examples, of the proportion of the SME loan guarantees issued by our member organizations that exceed a duration of 5 years:

- Agricultural Credit Guarantee Fund, Lithuania:
  - 50,37 % of all issued guarantees have a duration exceeding 5 years
  - 14,5 % of all issued guarantees have a duration exceeding 7 years
  - 2,8 % of all issued guarantees have a duration exceeding 10 years
- Rural Loan Guarantee Fund, Romania: 44,35% (2007 – 2013 under RNDP)
- SOCAMUT, Wallonia, Belgium: 27,53% (2010), 34,76% (2011), 28,72% (2012)
- Aws, Austria: For 2012:
  - 17,4% (46 out of 265 guarantees) for business start-ups
  - 29,6% (81 out of 273 guarantees)
- CMZRB, Czech Republic : 23 % (for the period of 2007- 2012)
- CESGAR, Spain:
  - 14,1% of all issued guarantees have a duration of 5 – 8 years
  - 61,9% of all issued guarantees have a duration of more than 8 years
- PMV Waarborgbeheer, Flanders, Belgium: 19,29% (2011), 18,32% (2012)

This new provision also appears to be in open contradiction with the Commission's concern to promote long term financing, as expressed in the recent Green Paper. The short duration

proposed by the Draft Regulation would make the utilization of the *De Minimis* Regulation in practice impossible for a considerable number of operations.

It is also unclear, how the guarantee ceiling of € 1.500.000 is to be handled in the context of the 5 years duration. What happens if the duration of the loan is inferior to 5 years, would it be possible to have a higher effective guarantee ceiling, if the e.g. the loan were only to last for 2 or 3 years? Alternatively, can the duration last longer than 5 years, if the guarantee amount is inferior to € 1.500.000? This creates a high level of interpretative? and thus legal, uncertainty.

For the above reasons, we call for eliminating the 5 year duration limit.

In general, we strongly plead in favour of maintaining the proxy value of 13% (default cap rate) as expressed in Recital 15 of the existing *De Minimis* Regulation to calculate the state aid equivalent for guarantees, alongside with the other options (safe-harbour rates and notification). This methodology is very easy to use for many of the very small guarantee intermediaries, who may not dispose of sufficiently sophisticated IT-systems or manpower to undertake the notification of their calculation method. But even for those guarantee institutions which are better equipped, the new rules will cause complication. They will be forced either to set up a complicate system of communication with commercial banks to have the ability to issue guarantees with the maturity longer than 5 years or to reject applications for guarantees in case of guarantees for working capital.

Furthermore, the Commission does no longer seem to want to apply a maximum coverage rate of 80% for guarantees to be admissible under *De Minimis*. From the guarantee sector, there is no particular demand for this deletion.

Finally, we would like to suggest that in the future, it should also be possible to sue the standard calculation method (recital 18) for mezzanine finance operations. This type of financing tools have gaining importance in the recent past and therefore it would be a considerable simplification if there was no need for a notification procedure for a calculation method. The same reasoning applies to other alternative financing forms, e.g. leasing. In our view, the exclusive focus on conventional loans no longer reflects market realities and leads to a discrimination of these products.

To resume, AECM would prefer for the current set-up to be maintained, i.e. 80% coverage rate in conjunction with no duration requirement and a 13% conversion proxy, parallel to the other options of calculating the state aid equivalent.

**Article 5: Cumulation**

The rules with regard to cumulation have remained unchanged. We call on the Commission to abolish the cumulation requirement of *De Minimis* aid with other types of exempted or notified aid. According to Article 107 of the EU Treaty, *De Minimis* Aid is not to be considered as aid, since their low amounts exclude de facto a distortion of competition wihtin the Internal Market. This logic should consequently also apply to the cumulation requirements. In practice, the cumulation requirement for *De Minimis* operations lead to an excessive administrative effort and complex calculations, which are in disproportion to the aid amounts involved. Doing away with the cumulation requirement would be coherent with the simplification of the State Aid Framework and the shortening of the decisional process.

**Article 6: Monitoring and reporting**

Article 6(5) of the Draft Regulation stipulates that, where transparent aid financed from the EU budget is provided by a Member State through a mandate to international organisations, the entity granting the aid shall establish, on a yearly basis, a list of beneficiaries of aid and of the gross grant equivalent received by each of them. The list shall be sent to the Member State. In this case, a situation may occur in practice where the ceiling of *de minimis* aid granted to the final beneficiary will exceed the permissible aid ceiling. For example, the beneficiary receives *de minimis* aid under measures managed by international organisations and the aid provider submits information about such aid to a Member State not immediately but once a year, and the beneficiary also receives additional *de minimis* aid under other measures managed by national authorities, which grant *de minimis* aid by using data from the State aid register. After the Member State receives information from international institutions and enters it into the register, it may appear that a respective beneficiary is not (was not) eligible for such aid due to the exceeded *de minimis* aid ceiling. In the case under consideration it is not clear which aid should be deemed illegal and which aid should be recovered from the beneficiary.

**Annex/ About AECM**

AECM has 38 member organisations operating in 20 EU Member States as well as in Russia, Montenegro and Turkey. Its members are mutual, private sector guarantee schemes as well as public institutions, which are either guarantee funds or Development banks with a guarantee division. They all have in common the mission of providing loan guarantees for SME who have an economically sound project but cannot provide sufficient bankable collateral. In 2012, AECM member organizations had a total guarantee volume in portfolio of € 79,7 billion and issued a total of € 28 billion in new guarantees.

AECM represents the political interest of its member organisations both towards the European Institutions, such as the European Commission, the European Parliament and Council, as well as towards other, multilateral bodies, among which the European Investment Bank (EIB), the European Investment Fund (EIF), the Bank for International Settlement (BIS), the World Bank, etc. It deals primarily with issues related to state aid regulation relevant for guarantee schemes within the internal market, to European support programmes and to prudential supervision.

More information is available on the AECM web-site at: www.aecm.be

**AECM** International non-profit Association 40, rue Washington, 1050 Bruxelles
Tél, Fax : 32. (0)2 640 51 77 / E-mail : info@aecm.be / WEB : www.aecm.be