

State aid – exemptions for small amounts of aid (de minimis aid)

ClientEarth response to consultation

Background

ClientEarth is a not-for-profit environmental law organisation comprising legal, policy, scientific and communications experts working to shape and enforce the law to tackle environmental challenges. For several years, we have been advocating for State aid rules to align with environment and climate protection objectives laid down in the European Green Deal, and for an effective internalisation of pollution costs.

We welcome the opportunity to provide a response to the consultation on the draft for a Commission Regulation on the application of Articles 107 and 108 TFEU to *de minimis* aid (“**Draft Regulation**”), as published by the Commission on 15 November 2022.

ClientEarth responded to the call for evidence on the revision of the *de minimis* regulation, in July 2022. Our response focussed on two aspects of the initiative, namely: (i) the amount of the *de minimis* threshold and (ii) the need to increase transparency of *de minimis* aid.

With respect to the Draft Regulation, **ClientEarth welcomes that the increase of the *de minimis* threshold is limited to reflect the inflation** in the period 2014-2030. We support the Draft Regulation on this point and will not further elaborate on this in the present response.

Furthermore, the Commission’s efforts to increase the **transparency** of *de minimis* aid is certainly also a positive development. Nevertheless, ClientEarth is concerned that the obligations laid down in Article 6 of the Draft Regulation are still insufficient to reach effective transparency.

Below, we first identify general flaws of the current State aid transparency rules and practice (Section 1). Recognition of these flaws is paramount for achieving a robust and effective transparency for *de minimis* aid. Subsequently, we comment on the Draft Regulation and we make several suggestions (Section 2).

1 Current rules and practice regarding State aid transparency

1.1 Longstanding experience with transparency obligations

In State aid law, transparency and reporting obligations for Member States are not new. These obligations are consistently implemented in State aid instruments since the 2014 State aid Modernisation programme (“SAM”).

The Member State’s transparency obligation is included in the General Block Exemption Regulation (“GBER”)¹ and in the various relevant guidelines. The technical implementation of the transparency obligation differs, depending on the relevant instrument. Whereas the GBER² requires Member States to ensure publication of certain information on a comprehensive national or regional State aid website, guidelines, such as the *Climate, Environmental protection and Energy Guidelines* (“CEEAG”),³ leave the choice between publication at the national (or regional) level or publication at the European level via the Commission’s Transparency Award Module.⁴

Despite the longstanding experience with transparency obligations in State aid law, we identify the following shortcomings in terms of compliance and enforcement.

1.2 Non-compliance with existing transparency obligations

Member States too often do not comply with the applicable transparency obligations.

By way of example, contrary to Article 9 GBER, not all Member States have implemented an accessible and comprehensive regional or national website on which they publish the mandatory information. The fundamental and widespread non-compliance of Member States with State aid transparency obligations strongly resonates in the 2020 final report on the fact-finding study on the implementation of the transparency requirements under the GBER and relevant guidelines, prepared by the European Policies Research Centre.⁵ The report finds, amongst others, that “*a very significant data gap concerns awards that have not been reported at all*”.⁶ Moreover, it identified that 17 Member States did not have a national

¹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

² Article 9, GBER.

³ Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, OJ C 80, 18.2.2022, p. 1-89.

⁴ [State Aid Transparency Public Search \(europa.eu\)](https://ec.europa.eu/eas/state-aid-transparency-public-search/)

⁵ European Commission, prepared by European Policies Research Centre, Fact-finding study on the implementation of the transparency requirements under the GBER and relevant guidelines, Final Report, 2020. See: [kd0120640enn.pdf \(europa.eu\)](https://ec.europa.eu/eas/state-aid-transparency-public-search/)

⁶ The consequence of these findings is that the study had to be limited to considering the timeliness of the reporting that has been done. The report underlines that “*It can hardly be overemphasized that this is a major limitation to the scope to assess the effectiveness of different compliance approaches. The scale of awards that have not been reported at all is unknown and, with the data currently available, unknowable.*” See page vii of the report.

state aid register, and that of the nine Member States that actually did have national registers two were not accessible to the public. In addition, the report identified that 13,7% of the 329 assessed measures did not comply with the applicable transparency obligations,⁷ and that 40% of the measures were reported late.⁸ Finally, some Member States, including Romania, Slovenia, Poland and Spain, have not reported any measure in the Commission's Transparency Award Module.

1.3 No enforcement despite available enforcement instrument

Although the GBER and relevant guidelines provide for specific enforcement mechanisms in addition to the available infringement procedure pursuant to the EU treaties, there seemingly is little enforcement of transparency obligations. For instance, according to article 10 GBER, the Commission could withdraw the benefit of GBER exemptions. However, as far we are aware, the Commission has never made use of this power, despite the obvious non-compliance of certain Member States as pointed out above.

For completeness, we note that the Commission has so far failed to fulfil its commitment pursuant to article 9(5) GBER and various guidelines⁹ to publish on its website the links to the relevant national/regional State aid websites of Member States. We encourage the Commission to fulfil this commitment on the shortest possible term.

1.4 Need for consistent transparency requirements and enforcement

Without consistent transparency requirements and enforcement, both generally as well as specifically with respect to *de minimis* aid, it is likely that the Commission and the general public will not become aware of a lot of the aid granted by Member States. This prevents the Commission from exercising its powers, whilst preventing the general public entirely from exerting control on public spendings and from exercising their rights under State aid law (provided that they qualify as interested parties).

The lacking transparency also makes collecting evidence extremely difficult, in particular on the costs of the projects and on the aid amounts (e.g. to assess if the aid is proportional, or if a loan/grant is an aid at all). This is even more so, considering that granting authorities or the aid beneficiaries generally refuse to disclose any information, on the questionable grounds that it constitutes confidential business information.

More generally and albeit in the context of the CEEAG, the European Parliament recently shared our concern on the lack of transparency around the State aid procedure and called upon the Commission to address this issue at different levels.¹⁰

Below, in Section 2, we elaborate on the implications of the above for the Draft Regulation.

⁷ European Commission, prepared by European Policies Research Centre, Fact-finding study on the implementation of the transparency requirements under the GBER and relevant guidelines, Final Report, 2020, pages 10, 11 and 14.

⁸ As emphasized by the study, these numbers are based on incomplete data which, amongst others, excludes measures that were not reported at all.

⁹ For instance, see point 62 of the CEEAG.

¹⁰ European Parliament resolution of 21 October 2021 on the CEEAG (2021/2923(RSP)), para. 29.

2 Transparency on *de minimis* aid in the Draft Regulation

2.1 More clarity needed on the design of the Union level register

Article 6(2) of the Draft Regulation refers to a Union level register. As indicated above, we welcome this proposal. Nevertheless, we encourage the Commission to clarify whether this register will be a dedicated *de minimis* Union level register in addition to the existing Commission's Transparency Award Module, to prevent any possible confusion.

2.2 Need for dedicated enforcement instrument

We note that Article 3(1) of the Draft Regulation provides that only measures that comply with the conditions of the Regulation are exempted from the notification requirement in Article 108(3) TFEU. Nevertheless, in light of the lacking compliance of Member States as evidenced by the long standing experience with transparency obligations in State aid (see Section 1 above), we insist that a more explicit and dedicated enforcement instrument be introduced.

ClientEarth suggests introducing an enforcement instrument that is comparable to the instrument implemented in the GBER, which emphasises that Member States may lose the advantage provided by the Regulation i.e. the "exemption" from the notification obligation in case any of the transparency obligations are not fulfilled. For completeness we note that Member States should neither be able to profit from the Draft Regulation if their central national register does not comply with the conditions provided by Article 6(2) of the Draft Regulation.

Finally, ClientEarth insists that this enforcement instrument be effectively applied by the Commission in case Member States do not comply with their transparency obligations pursuant to the *de minimis* regulation.

2.3 Time-limit for publishing information in national or EU register

The Draft Regulation does not provide a time-limit for publishing information about *de minimis* aid in the national or EU level register. Providing a clear and enforceable time-limit is essential in light of various objectives. First, an adequate time-limit ensures that different national authorities within one Member State can effectively rely on the information in the register when checking against the *de minimis* threshold in a particular situation. Second, an adequate time-limit allows the Commission to effectively perform its monitoring responsibilities. Third, timely publication is essential in enabling the public to effectively monitor *de minimis* aid.

Therefore, we strongly suggest that:

- (i) Member States be required to report and publish on the national or EU level register their **commitment to grant *de minimis* aid before** it is granted and to confirm it in due form once the *de minimis* aid is granted;
- (ii) Member States be required to publish the information on the national or EU-level *de minimis* register **within 20 working days following the entry into force of the *de minimis* aid measure.**

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