EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 15th January 2013
sj.c(2012)1798426

PER FAX AND REGISTERED SENDING

Administrative Court of Kuopio
Puijonkatu 29 A, 2 krs., PL 1744,
70101 LETTER 5942/12
KUPIO, FINLAND

SUBJECT: REPLY FROM THE COMMISSION TO THE REQUEST FOR AN OPINION FROM THE FINISH ADMINISTRATIVE COURT OF KUPIO

Dear Madam, Dear Sir,

I have the honour to give you the following reply to your request for opinion on the application of state aid rules, pursuant to Section 3.2 of the Commission notice on the enforcement of state aid law by national courts (2009/C85/01). Beforehand, I must recall you that only the European Court of Justice of the European Union is entitled to give a binding interpretation on European law. The following advice from the Commission is therefore not legally binding for the national judge (cf. point 93 of the above-mentioned Communication).

Your question concerns the application of the *de minimis* rule to a situation in which two companies have merged and the question of economic continuity between this new company (Anaika Wood Ltd. Oy) and the two former legal entities (Anaika Wood Ltd. Oy and Anaika Components Ltd. Oy) arises for the purpose of calculating the maximum amount of aid that the company has already received.

1. Is state aid received by companies that have merged counted as state aid received by the new company, or is the amount of state aid allowed re-calculated after the merger ?

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If two separate undertakings merge and become one undertaking, this new undertaking is subject to the de minimis ceiling of EUR 200.000 over three fiscal years. All *de minimis* measures granted to either of the previous two separate undertakings have to be taken into account for this calculation. If the new undertaking continues the activity of both former undertakings, the full amount of aid granted to both has to be taken into account. The principle set out above may imply that no new *de minimis* aid can be granted if the ceiling is reached when combining the *de minimis* amounts of the merged companies. However, in case the combined *de minimis* aid of the two merged companies exceeds the ceiling, no recovery of *de minimis aid* granted in the past is in principle required because at the time the measures were granted they were legally complying with all the conditions of the *de minimis* Regulation.

It should be noted, however, that it is also possible that the two distinct legal entities that merge already constitute one undertaking in the sense of EU competition law before the merger. In the case at hand, the names of the merging companies (Anaika Wood Ltd. Oy and Anaika Components Ltd. Oy) suggest that there might have been links between both companies, which may require considering them as one economic entity even before the merger. Then the merger has clearly also no influence on the amount available as *de minimis* aid. In order to determine whether this is the case here, one would have to examine the links between both companies, in particular whether one company can exercise control over the other or whether they can operate independently on the market[1].

2. Is the interpretation always the same or can it vary in different situations, for example depending on whether the undertaking formed from the merger continues exactly the same business operations as the merged undertakings used to conduct ?

The interpretation given under point 1 does not depend on whether the new undertaking continues exactly the same operations. Indeed, the *de minimis* concept applies to an undertaking, irrespective of the activities it carries out. A company could, for example, not claim EUR 400.000 with the argument that it has two completely distinct fields of activity and that it receives only EUR 200.000 per activity. The threshold is clearly established per undertaking. Since also in the absence of a merger, a company cannot argue that it has changed its field of activity and therefore cannot be granted again the full amount of *de minimis* aid, a merger, even if it leads to completely different activities

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[1] See in that respect Opinion of AG Kokott in Case C-440/11 P, *Stichting Administratiekantoor Portieelje and Gosselin Group NV*, paragraphs 28 and 42 and the quoted case-law.

being carried out, cannot change anything to the principle that the maximum amount applies per undertaking.

It should be noted, however, that there is one situation in which the activities of the company may play a role. That is if the activities concerned fall under a different *de minimis* ceiling, which is the case in particular for undertakings active in the road transport sector, to which a ceiling of EUR 100.000 over any period of three fiscal years applies, or in the fields of primary production of agricultural goods or fisheries, to which a ceiling of 7.500 EUR and 30.000 EUR applies respectively (by virtue of Regulation 1535/2007 and Regulation 875/2007). Different scenarios would then be possible, but in any event the new undertaking would have to respect the ceiling applicable to its sector of activity (if it is active in the road transport sector, it would only be able to benefit from EUR 100.000).

3. How is the notion of 'undertaking' to be understood? Is it to be examined on the formal basis of company law, or more broadly according to the actual situation, applying the single economic entity concept ?

The notion of Undertaking is to be understood as referring to an economic unit. According to settled case-law "the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed"[2]. The legal status of an entity is irrelevant for its classification as an undertaking. For this reason a company, a group of companies or an association can be considered to constitute an undertaking in the sense of the EU State aid law. In its judgment of 13 June 2002 for example[3], the Court considered that entities which are controlled (on a legal or on a de facto basis) by the same entity should be considered as a single recipient undertaking.

4. What other factors does the Commission consider essential to the interpretation of the calculation of de minimis aid in the current case ?

The Commission has no further comments and shares the principles applied by the Ministry of Employment and Economy in its Opinion.

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2 See, for instance, judgment of the ECJ of 10 January 2006, *Cassa di Risparmio di Firenze*, C-222/04, para. 107.

3 Case C-382/99, *Netherlands v Commission* [2002] ECR I-5163, paragraphs 37 to 40.

With best regards,

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(DG COMP).

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