



State Aid Reform Draft General Block Exemption Regulation (3rd version)

Position paper by Workability Europe

March 2008

Who are we?

Workability Europe is the largest employer body representing providers of work and employment services to people with disabilities in Europe. The growing membership provides work programmes for about 1,250,000 disabled people. Today, Workability Europe has nearly 40 members located in over 20 countries. Our members include both umbrella as well as single organisations.

Workability Europe's **Vision** is for a European society in which equal employment opportunities are a reality for people with disabilities.

Its **Mission** is to be recognised as the European leader in promoting and providing employment and work participation for people with disabilities.

Introduction

Workability Europe (WE) believes that this third Draft of the General Block Exemption Regulation (GBER) represents a marked improvement in comparison with the First Draft published by the European Commission (EC) in April 2007 and in comparison with the Second Draft published in September 2007.

Workability Europe congratulates the Commission for its open and thorough attitude of consultation around the preparation of the State Aid dossier. The EC has engaged in successive rounds of consultation with stakeholders and has duly listened to, evaluated and taken into account a number of their critical concerns. Workability Europe believes that this approach increases the chances of achieving adequate framework legislation safeguarding the best interests of workers with disabilities, the EU Institutions, public authorities in the Member States and employers.

In this position paper Workability Europe sets out its position in relation to specific Articles and issues of concern in the latest Draft General Block Exemption Regulation.

I. Positive changes

WE is especially pleased to note the following positive changes made:

1 st Draft State Aid General Block Exemption Regulation <i>April 2007</i>	3 rd Draft State Aid General Block Exemption Regulation <i>February 2008</i>
DEFINITIONS	
<p>Article 2(17) stated: "disabled worker" means any person: (a) recognised as disabled under national law, or (b) having a recognised limitation which results from physical, mental or psychological impairment in respect of whom a competent authority of a Member States has indicated the precise level of disability as compared to a particular job position"</p>	<p>Article 2(19) now states: "disabled worker" means any person: (a) recognised as disabled under national law, or (b) having a recognised limitation which results from physical, mental or psychological impairment"</p>
<p>Article 2(18) stated: "sheltered employment means employment in an establishment where at least 75% of workers are disabled to <u>a degree of at least 50%</u>"</p>	<p>Article 2(20) now states: "sheltered employment means employment in an establishment where at least <u>50%</u> of workers are disabled."</p>
<p>Article 2(19) stated: "supported employment means employment of disabled workers in need of personal assistance or support at work in an establishment which does not offer sheltered employment."</p>	<p>Article 2(21) now states: "supported employment means employment of disabled workers in an establishment which offers personal assistance or support, but is not a 'sheltered employment' environment"</p>
INDIVIDUAL NOTIFICATION THRESHOLDS	
<p>Article 6(1) stated: "This Regulation shall not apply to any individual aid, whether granted ad hoc or on the basis of a scheme, the grant equivalent of which exceeds the following thresholds: (h) aid for the employment of disabled workers in the form of wage costs and aid for the employment of disabled workers compensating for additional expenses: <u>EUR 10 million</u> per undertaking per year".</p>	<p>Article 6(1) now states: In the new version, the definition has been split into two parts: "This Regulation shall not apply to any individual aid, whether granted ad hoc or on the basis of a scheme, the grant equivalent of which exceeds the following thresholds: (h) aid for the employment of disabled workers in the form of wage costs: <u>EUR 10 million</u> per undertaking per year; (i) aid for the employment of disabled workers compensating for additional expenses: <u>EUR 10 million</u> per undertaking per year".</p>
AID FOR THE EMPLOYMENT OF DISABLED WORKERS IN THE FORM OF WAGE SUBSIDIES	
<p>Article 32(2) stated: "The aid intensity shall not exceed <u>60%</u> of the eligible costs."</p>	<p>Article 36(2) now states: "The aid intensity shall not exceed <u>75%</u> of the eligible costs."</p>
<p>Article 32(5) stated: "Except in the case of lawful dismissal for misconduct the disabled workers shall be entitled to continuous employment for a minimum period of 12 months."</p>	<p>Article 36(5) now states: "Except in the case of lawful dismissal for misconduct the workers shall be entitled to continuous employment <u>for a minimum period consistent with their national legislation governing employment contracts</u>. In case the period of employment is shorter than 12 months, the aid shall be reduced pro rata accordingly".</p>

Several **additional improvements in comparison to Regulation 2204/2002** have been adopted in the third Draft GBER:

- The reference to "reduced productivity" of disabled workers has been deleted (Art. 6.2. in Regulation 2204/2002).
- Art. 36.5 allows for more flexible working contracts doing away with the obligation for continuous employment of 12 months.
- The aid intensity for compensating additional costs of employing disabled workers (Art. 37.2) is eligible up to 100%.
- Under Art. 37.3.c the provision for aid for eligible costs other than wage costs for employing disabled workers has been expanded.
- New provision for funding eligible costs other than wage costs for "supported employment" has been introduced (Art. 37.3.e). The third Draft GBER for the first time introduces the term of "supported employment" which is very much in line with current employment patterns of persons with disabilities.
- "*De minimis*" rule increased. Aid of 200,000 EUR granted to an undertaking over 3 years does not constitute State Aid and does not need to be notified. (Previous "*de minimis*" amount was 100,000 EUR)
- Positive terminology has been used: sheltered workshops/enterprises referred to as "undertakings" which corresponds to their market role today.

Positive is also to see that in Recitals 54 and 57 the Commission again reaffirms the importance of supporting disabled and disadvantaged individuals into work through the provision of fair and transparent State Aid.

II. Further areas for improvement

Nevertheless, WE in consultation with its members have noted several areas where the Third Draft GBER can be further improved and wish to bring them to the Commission's attention.

II.1 Specific provisions in the GBER

- **Article 2.19.b – Definitions:** Apart from physical, mental and psychological disabilities, a significant number of workers employed in WE's member organisations actually have *intellectual (learning), psychiatric and sensory (hearing and visual impairments)* disabilities. These conditions are not mentioned in this Article. In this context, WE recommends expanding the scope of the definition to provide for these disabilities too.
- **Article 2.20 – Definitions:** WE agrees with the definition of "*sheltered employment*" in this Article as "employment in an establishment where at least 50% of workers are disabled." The 50% threshold represents adequately the reality of sheltered enterprises in Europe today. WE would advise against revising this threshold downwards as this would bring the concept of "sheltered enterprise" closer to what is known as "social firm" – an entity with altogether different structure, mission and statute.
- **Recital 27 and Article 8.3.e – Incentive effect:** WE is sceptical about the following two provisions:
 - "*As regards aid for disadvantaged or disabled workers in favour of large enterprises, an incentive effect shall be considered to be present by the fact that the aid measure concerned leads to a net increase in the number of disadvantaged or disabled workers hired by the undertaking concerned...*" (Recital 27)
 - "*As regards aid for the recruitment of disadvantaged workers in the form of wage subsidies and aid for the employment of disabled workers in the form of wage subsidies, as laid down in articles 35 or 36, that there is a net increase in the number of disadvantaged/disabled workers employed....*" (Article 8.3.e)

First of all, it is doubtful whether the number of disabled workers in sheltered workshops should be continuously increasing when the overriding social objective today is for inclusion and

mainstreaming into the open labour market whenever and as far as possible. Secondly, directly after the entry into force of the new aid schemes based on GBER, it will not be clear whether it is possible to grant the aid for the employment of disabled workers, who have been already employed. There is no available analysis whether such employment means the real increase of the number of employees, and whether the transitional period, when the aid is granted on the basis of the previous rules is deemed as exempted, shall terminate in 31 December 2008 according to the Article 39.1. The efficient monitoring of this provision is expected to become the source of arguments and doubts in practice, especially in the case of large undertakings with several divisions and factories.

- **Article 37.3 – Aid for compensating the additional costs of employing disabled workers:** The wording of this Article (“shall”) suggests that the list of costs provided is a closed list. WE urges the EC to expand this list as there exist additional costs of employing disabled workers which are not included in the list provided, for example breaks from work, costs of health and rehabilitation treatments, costs of higher sickness absence rate which are not covered by social security schemes. Failure to take into consideration this point may result in employers hiring only candidates in good physical or mental condition, whose employment is not likely to cause additional costs to the employer during their work life.
- **Article 39.2 – Transitional provisions:** WE understands that this Regulation is a piece of Community legislation which is directly applicable in Member States and does not require transposition into national legislation. However, WE wishes to remind the Commission that many national procedures and documents still need to be adapted in order to comply with the provisions of the new GBER. Therefore, WE asks the EC to consider extending the period for aid granted under Regulation 2204/2002 being compatible with the common market beyond the deadline of 31 December 2008.

II.2 Additional points

- **Aid during periods of employee transition:** WE would like the Commission to consider allowing the GBER to permit aid to be provided to individuals during periods of transition from ‘sheltered employment’ to ‘supported employment’, or during their transition to employment in the open labour market. Employees moving from one form of employment to another should be encouraged and investment should be allowed during these periods of transition in order to ensure that employees do not incur any additional costs.
- **Translation:** a number of WE’s members have raised concerns about certain discrepancies in translation between the English text and their national languages which give rise to different and possibly confusing interpretations. In this respect, WE urges the EC: (1) to pay close attention to the correct translation of the GBER final text into the various languages of the Member States and (2) to state in case of conflict which language should be considered for legal reference.
- **Interpretation and application of the GBER by Member States:** WE members have pointed out that as in the case of public procurement legislation, very often the problems that they experience are not with the provisions of Community legislation per se. Rather, they are faced with incorrect/incomplete interpretation and application of the rules and regulations by the public authorities in the different Member States. Thereafter, WE proposes that DG Competition launches an interactive *Question & Answer* service where stakeholders can receive clarifications on the GBER and its application. Even though such service will probably not have legally binding power it would still represent a very useful guidance tool for public authorities and employers alike. Such service is already operated by the Commission with regard to the applicability of State Aid rules to (S)SGI¹. In any case, WE trusts that the Commission will respond promptly to ad-hoc stakeholders’ requests for clarification and further explanation of the GBER throughout its lifetime.

¹ http://ec.europa.eu/services_general_interest/faq_en.htm

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