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IMPACT ASSESMENT REPORT

ADDENDUM

Accompanying the document

Communication from the Commission — Guidelines for the examination of State aid to the fishery and aquaculture sector

Commission Regulation (EU) .../... of XXX declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union

and

Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector

1. INTRODUCTION AND CONTEXT

The State aid framework in the fisheries and aquaculture sector is governed by three instruments: (i) a sector-specific block exemption regulation, known as FIBER; (ii) a set of guidelines for the examination of State aid in the sector; and (iii) a sectoral *de minimis* regulation.

In 2019, the Commission launched a review of the performance of those instruments since their adoption in 2014-2015, with a view to amending or replacing them for the period 2021-2027. On 14 December 2022, the Commission put forward a new package of rules regarding the fisheries and aquaculture sector¹:

- ▶ First, it published a Staff Working Document ('SWD') containing the Impact Assessment ('IA') accompanying the revision of the sectoral State aid instruments, as well as an evaluation of those instruments that ran back-to-back with the IA².
- ▶ Second, it adopted a new sector specific block exemption regulation, i.e., Commission Regulation (EU) 2022/2473 of 14 December 2022 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union³. That Regulation entered into force on 1 January 2023 and applies from the same date until 31 December 2029.
- ▶ Third, it endorsed a new set of guidelines, i.e., the Communication from the Commission Guidelines for State aid in the fishery and aquaculture sector. The new guidelines were later adopted on 17 March 2023 and apply as of 1 April 2023⁴.
- ▶ Fourth, it adopted Commission Regulation (EU) 2022/2514 of 14 December 2022 amending Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector⁵ (the 'fisheries *de minimis* regulation' or 'Regulation (EU) No 717/2014') as regards its period of application⁶. Through that Regulation, the Commission prolonged by one year the period of application of the fisheries *de minimis* regulation.

In the context of the revision of the sectoral State aid instruments, based on the submissions and feedback received, it has been considered to transfer the processing and marketing of fishery and aquaculture products to Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid⁷ (the 'general *de minimis* regulation' or 'Regulation (EU) No 1407/2013'). In Annex 2 to the IA, it was acknowledged

¹ IP/22/7670.

² Commission Staff Working Document, SWD(2022) 408 final of 14.12.2022, Impact Assessment Report accompanying Communication from the Commission - Guidelines for the examination of State aid to the fishery and aquaculture sector, Commission Regulation (EU) .../... of XXX declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union and Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector.

³ OJ L 327, 21.12.2022, p. 82.

⁴ OJ C 107, 23.3.2023, p. 1.

⁵ OJ L 190 28.6.2014, p. 45.

⁶ OJ L 326, 21.12.2022, p. 8.

⁷ OJ L 352 24.12.2013, p. 1.

that, following the observations received from Member States on the matter, there was a need to analyse the question further and reconsult the Advisory Committee on State aid in that regard. For this reason, and to form a final view on the matter, the Commission prolonged the fisheries *de minimis* regulation by one year as described above.

On 5 May 2023, the Commission consulted the Member States through a third Advisory Committee on State aid. There was consensus among Member States regarding the transfer, stressing that it was appropriate to treat the processing and marketing of fishery and aquaculture products in the same manner as the processing and marketing of agricultural products. The Member States also emphasised the need to clearly distinguish the processing and marketing of fishery and aquaculture products from the primary production of those products for a proper application of the fisheries *de minimis* regulation in the future.

This document sets out the reasons as to why a deviation from the preferred options retained by the IA appears appropriate in this case.

2. PROBLEM DEFINITION: OPTION 2 OF THE IA

As noted in Section 2.1.2. of the IA, the processing and marketing of fishery and aquaculture products has to date fallen in the scope of the fisheries *de minimis* regulation. Put differently, the fisheries *de minimis* regulation sets out a single individual ceiling for all undertakings in the sector. In practice, that means that undertakings active in primary production (e.g., catching) and undertakings active in the processing sector have been subject to the very same individual ceiling, i.e., up to EUR 30 000 over three fiscal years in the past.

At the same time, undertakings active in the processing sector at large fall in the scope of the general *de minimis* regulation and are therefore subject to a higher ceiling, i.e., currently up to EUR 200 000. This is also true for undertakings active in the processing and marketing of agricultural products. This latter sector was brought under the general *de minimis* regulation by Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid⁸, which explained in Recital (4):

“Considering the similarities between the processing and marketing of agricultural products, on the one hand, and of non-agricultural products, on the other hand, this Regulation should apply to the processing and marketing of agricultural products, provided that certain conditions are met. [...]”

Today, this position is still reflected in Recital (5) of Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector⁹.

Against that background, the question is whether the inclusion of the processing and marketing of fishery and aquaculture products in the fisheries *de minimis* regulation, as opposed to the general *de minimis* regulation, is still justified.

Based on recent sectoral data¹⁰, in 2019 the overall number of enterprises carrying out fish processing as a main activity was equal to around 3 200 firms. The degree of specialisation of the EU fish processing

⁸ OJ L 379, 28.12.2006, p. 5.

⁹ OJ L 352 24.12.2013, p. 9.

¹⁰ Joint Research Centre, Scientific, Technical and Economic Committee for Fisheries (STECF) - Economic report on the fish processing industry (STECF-21-14), pages 15, 16 and 19.

enterprises is around 83%, a bit lower than observed for other food manufacturing sectors, as the meat (NACE 10.10) and vegetable and fruit (NACE 10.30) processing, showing a degree of specialisation of around 85%. The overall turnover produced by the sector was estimated at EUR 28.5 billion. At EU average, the great bulk of enterprises (98%) of the sector are SMEs (less than 250 employees), 85% are small-sized (less than 50 employees) and more than a half are micro-enterprise. Employment level, in terms of number of persons employed and in terms of full-time equivalent units, was in 2019 around 111 thousand job positions equivalent to 100 thousand full time positions.

As set out in Section 5.2.2. of the IA, in the past the Commission discarded this option because (i) it did not find particular problems or barriers to investment in a setting characterised by high levels of public support; (ii) it considered that the risk of undermining the objectives of the Common Fishery Policy was high; and (iii) it was concerned with an unequal treatment of the primary sector and potential discrimination claims. That said, the IA considered that those reasons did not constitute sufficient grounds for an outright dismissal of the option, qualified in that context as ‘Option 2’.

In Section 6.2., the IA analyses in more detail the merits of transferring the processing and marketing of fishery and aquaculture products under the general *de minimis* regulation. Following a short economic review of the main characteristics of the sector, the IA presents the concerns and risks that would call into question the appropriateness of this option. Those concerns and risks can be summarised as follows.

Risk of cross-subsidisation of primary production. The IA found indications of a risk of indirect subsidisation of the local fishing sectors following from the strong links between fishing activities and the processing and marketing sector. That risk would occur in particular where undertakings are active in both sectors or carry out on-board processing.

Additional pressure on fish stocks. Given that processing in the fisheries sector relies on fish stocks, which constitute a finite resource, further subsidisation through a higher ceiling could increase demand for fish and ultimately pressure on fish stocks. This could in turn foster unsustainable fishing practices, undermining a sustainable management of fish stocks.

Negative effects on intra-EU competition and trade. The IA found an element of intra-EU competition between fish processors, and a higher ceiling may increase the risk of distortive effects in a market that already features high levels of public support.

Lessening of control over aid. A higher ceiling would translate in a lower level of control by subjecting a potentially higher volume of public aid – which previously had to be exempted or notified – to limited reporting requirements.

Against that background, the IA did not retain this option, noting however that the introduction of safeguards may help addressing or at least reducing the scope of the above concerns.

3. ASSESSMENT OF OPTION 2 AND REASONS FOR A DEVIATION

The prolongation by one year of the fisheries *de minimis* regulation has allowed the Commission services to further reflect on the merits of Option 2 and reconsider some of the arguments and claims previously put forward.

At the outset, it must be noted that the same considerations that led the Commission to include the processing and marketing of agricultural products under the general *de minimis* regulation would lead to the same conclusion in the fisheries sector. As noted in the IA, there are no major differences in terms of the size of businesses compared to other undertakings in the food industry as a whole. Moreover, fish

processing activities are industrial in nature and certainly similar to processing activities in general. For example, fish processors purchase the same packaging materials as processors in the agricultural sector, sometimes from the very same suppliers.

A practical example may demonstrate the present baseline effectively. Currently, a Member State may consider a general *de minimis* scheme to facilitate the digital and/or green transition of certain processing activities. However, the processing and marketing of fishery and aquaculture products is subject to a different *de minimis* regulation and a different individual ceiling, remaining excluded from the scope of that measure, irrespective of whether it would be logical for the sector to be included. That outcome is particularly questionable where agricultural processors – marketing, for example, canned meat – access that very scheme.

It is certainly true, as remarked on several occasions in the IA, that the fisheries sector is characterised by a specific feature: unlike other sectors, the fisheries sector relies on a finite resource, i.e., fish stocks. Nevertheless, this feature does not confute that fish processing has similarities to other processing activities. It does warrant a reflection on the impacts that changes in one sector may have on the other, and on the type of safeguards that can be adopted to minimise any concretely identified negative spill-over effects.

Regarding the concern about cross-subsidisation of primary production, it can be concluded that such a risk is manageable under the following conditions.

In the first place, a transfer of the processing and marketing of fishery and aquaculture products to the general *de minimis* regulation should be associated with an obligation for the Member States to ensure that primary production does not benefit from the higher ceiling set out under the general *de minimis* regulation. That is, however, customary under *de minimis* regulations. For example, primary agricultural production should not benefit from the higher ceiling available to the processing of agricultural products. That objective is achieved through the imposition on the Member State of an obligation to ensure, by appropriate means such as separation of activities or distinction of costs, that the activities in sectors excluded from the general *de minimis* regulation do not benefit from it (see Article 1(2) of Regulation (EU) No 1407/2013).

In the second place, any risks associated with on-board processing can be simply addressed by relegating vessel investments under the fisheries *de minimis* regulation. It is understood that on-board processing typically involves a first treatment of the catch (e.g., cutting, filleting, freezing), the actual transformation and marketing taking place following landing. In this light, the relegation of vessel investments under the fisheries *de minimis* regulation appears an appropriate safeguard. For this reason, the fisheries *de minimis* regulation should clarify that on-board activities necessary for preparing fish for the first sale, as well as the first sale to resellers or processors, should, in this context, not be considered as processing or marketing of fishery and aquaculture products.

Regarding the additional pressure on fish stocks, it can be concluded that this risk may ultimately be lower than initially estimated for the following reasons.

In the first place, as acknowledged by the IA the fisheries sector is characterised by a high level of public support through fund-specific regulations and State aid, and that support includes fish processing. For example, in the context of the European Maritime and Fisheries Fund, EUR 715.5 million were committed for fish processing and public commitments under the European Fisheries Fund amounted to EUR 890 million. The current fund-specific regulation, i.e., the European Maritime, Fisheries and Aquaculture Fund, continues to support fish processing, further suggesting that the past considerable level of support has not produced observable negative impacts on fisheries. Likewise, there is no reason to consider that such assessment would differ in case of purely national funds because State aid in the sector is consistent and

coherent with the Common Fisheries Policy. Therefore, it does not necessarily follow that higher support to fish processing translates into increased fishing pressure on stocks.

In the second place, even assuming that a higher ceiling generates a larger demand for fish from processors, it cannot be concluded with certainty that such a larger demand will translate into unsustainable fishing practices. This is because the sectoral legal framework applicable to fishers, including any quota system and gear restrictions, will continue to apply, regardless of the higher ceiling. A hypothetical misconduct on the part of primary production cannot be held as a determinative factor to dismiss a higher ceiling for fish processing.

Regarding negative effects on intra-EU competition and trade, the existence of such a risk is not conclusive in this case.

In the first place, any risk of distortive effects must be considered against a counterfactual scenario where fish processing remains under the fisheries *de minimis* regulation, extending in time a differential treatment that may no longer be warranted. In other words, an increased risk of distortive effects cannot alone thwart the transfer of the processing and marketing of fishery and aquaculture products to the general *de minimis* regulation, if that is deemed necessary to establish a level playing field with other processing activities, in particular the processing of agricultural products.

In the second place, experience with the application of the general *de minimis* regulation to processing activities has not identified particular competition problems caused by a ceiling of EUR 200 000. There is no reason to assume that the other sectors covered by that regulation feature less intra-EU competition than fish processing. Moreover, a higher ceiling may also facilitate the granting of aid in those Member States where fish processing has been historically weaker with a view to reinforcing niche productions or stimulate the growth of the local processing sector.

Regarding the lessening of control over *de minimis* aid, this risk can on balance be tolerated.

In the first place, by its own nature, *de minimis* aid – be it granted under the general *de minimis* regulation or the fisheries *de minimis* regulation – is deemed not to meet all the criteria laid down in Article 107(1) of the Treaty. In other words, aid below the *de minimis* ceiling is deemed not to have any effect on trade between Member States and not to distort or threaten to distort competition.

In the second place, as acknowledged in the IA, *de minimis* aid has not been used in the processing and marketing sector for any measures that may give rise to negative environmental, economic or social impacts. There is no reason to expect that a higher ceiling for that sector would cause a significant change in this regard. As noted above, support to fish processing does not alter the legal framework applicable to fishers, irrespective of the ceiling retained. In addition, a higher ceiling in a processing sector mostly populated by SMEs may be used to yield a positive economic and social impact¹¹. Therefore, the reduction of *ex ante* controls would not be detrimental.

Finally, this assessment should also consider the cost of non-action at this crucial juncture when the fishery *de minimis* regulation is being extended until 31 December 2029. More specifically, non-action in this case means that the processing and marketing of fishery and aquaculture products would remain under the fisheries *de minimis* regulation – and the ceiling applicable to primary production – for at least six additional years, and until a further revision of sectoral State aid rules takes place. Therefore, the differential treatment would continue, although the risks associated with a transfer of processing and marketing of fishery and

¹¹ See footnote 10.

aquaculture products to the general *de minimis* regulation appear to be manageable. Conversely, cost structures and economic conditions for processing activities have changed considerably over the years following, not only customary market developments, but successive crises (e.g., the COVID pandemic and the war of aggression against Ukraine). It can be safely assumed that those will continue to evolve in the future, potentially widening the gap between fish processing and other processing activities.

In this regard, the analysis of the Scientific Technical and Economic Committee for Fisheries (‘STECF’) provides further support to the above findings. In its 2022 report, the STECF states: “[...] *the ability of the processing industry to pass on cost increases, whether for raw materials, labour, energy or other costs, depends on the relative price elasticities of demand and supply faced by the individual enterprises concerned. In the unconcentrated industry identified in this report (although some small evidence of progressive concentration emerges from data) a greater part of the incidence (burden) of cost increases could normally be expected to fall on fish processors, meaning that they are not simply able to pass the whole of cost increases on to purchasers. This is exacerbated by the purchasing strength of the large chains of multiple stores.*”¹²

In this light, the cost of non-action at this point in time appears to be high because it perpetuates a differential treatment that is no longer justified.

4. CONSEQUENCES FOR THE CALCULATION OF THE NATIONAL CAPS

The transfer of the processing and marketing of fishery and aquaculture products to the general *de minimis* regulation entails a further recalculation of the maximum cumulative amounts of *de minimis* aid that can be granted per Member State (‘national caps’). In the context of the revision of the sectoral State aid instruments, the Commission services had originally decided to update the national caps based on more recent sectoral data and a more sophisticated methodology. In particular, the new national caps would be based on a three-year average of the annual turnover of catching, aquaculture and processing activities in each Member State, obtained by excluding the highest and lowest entries across the five-year period 2014-2018. However, the transfer at hand means that data relating to fish processing would have to be removed from the calculation because that sector will move to the general *de minimis* regulation.

Upon recalculation, it has become evident that certain national caps would fall very significantly, decreasing on average by 50 % and even reaching peaks of more than 70-80 %. The Commission services consider that such a reduction in national caps is neither desirable nor appropriate.

First, while *de minimis* regulations are not designed as tools to tackle the effects of the recent successive crises in the market, other tools being deployed for that purpose, it is undeniable that they can help Member States to address temporary liquidity issues affecting otherwise healthy undertakings. Therefore, a new national cap should provide Member States with sufficient scope to intervene through *de minimis* aid in the sector.

Second, a sudden and significant shift in national caps may also be problematic particularly where Member States have planned on a certain distribution of *de minimis* aid or the creation of certain schemes for the sector. For example, it is reasonable to expect that a decrease by 50 % or more in a national cap from 2024 may lead a Member State to reconsider its plans to grant *de minimis* aid, irrespective of whether the national fisheries sector may need that intervention.

¹² Joint Research Centre, Scientific, Technical and Economic Committee for Fisheries (STECF) - Economic report on the fish processing industry (STECF-21-14), page 33.

Third, although the processing and marketing of fishery and aquaculture products would move to the general *de minimis* regulation, activities relating to the preparation of fish for the first sale, as well as the first sale to resellers or processors, would remain in the scope of the fisheries *de minimis* regulation. For this reason, a certain additional margin of manoeuvre should be included in the national caps.

In light of the above, the Commission services consider that, to ensure continuity in the planning and distribution of *de minimis* aid to the primary production of fishery and aquaculture products and a sufficient scope of action for all Member States, a general safeguard should be applied to all national caps. More specifically, it is considered that no Member State should lose more than 60 % of the national cap previously set out in Annex to Regulation (EU) No 717/2014. In other words, in a setting characterised by an average decrease by 50 %, Member States losing more than 60 % of their original national cap would be entitled to retain less than half, i.e., 40 %. The Commission services consider that this constitutes a balanced approach towards the introduction of the revised national caps.

5. CONCLUSION

In light of the above, a transfer of the processing and marketing of fishery and aquaculture products from the fisheries *de minimis* regulation to the general *de minimis* regulation seems appropriate.

Through that transfer, all processing undertakings will be subject to the same ceiling, currently up to EUR 200 000 over three years, creating a true level playing field in the processing sector as a whole. As noted in the IA, this will also lead to a lighter burden for national administrations and faster access to *de minimis* aid for fish processors, mostly SMEs. The concerns and risks associated with the transfer can be managed through the application of stringent safeguards, among which the exclusion of on-board processing from the scope of the general *de minimis* regulation. The transfer should be reflected in the calculation of the national caps by excluding processing activities. To ensure continuity in the planning and distribution of *de minimis* aid to the primary production of fishery and aquaculture products and a sufficient scope of action for all Member States, a general safeguard of 40 % should be applied to all national caps.

On balance, those changes are expected to bring about material benefits compared to the *status quo*, without introducing risks that are not manageable. Against that background, and in order to ensure consistency across *de minimis* regulations, Commission Regulation (EU) No 360/2012 should also follow the same approach regarding the treatment of processing and marketing of fishery and aquaculture products¹³.

¹³ Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).