**RDI FRAMEWORK PUBLIC CONSULTATION**

**BELGIAN COORDINATED CONTRIBUTION – JUNE 2021**

1. **Introduction**

Belgium thanks the Commission for its continuing efforts to streamline and update the state aid rules in order to make them more efficient and user friendly.

The discussion regarding the RDI Framework must be seen together with the corresponding amendments of the RDI articles of the GBER, which is in most of the cases used as a legal basis to grant aid. Belgium would like to see the proposed amendments to the GBER as soon as possible in order to make a fruitful discussion possible.

This contribution will focus on 3 main issues:

- RDI Framework

- GBER corresponding articles on RDI

- Undertakings in Difficulties, related to start ups and scale ups

1. **RDI Framework – general remarks, legal certainty and examples**

In our experience, the RDI framework is very rarely used in the context of actual notifications of RDI aid schemes.

However, the Framework is used quite often in an indirect way, by using the chapter 2.1 on research organisations (hereafter “RO”), and more specifically, the description of their non-economic activities, as a ground to justify the financing of those research organisations outside the scope of state aid.

We do need to stress the importance of legal certainty and the availability of clear and easy to interpret rules. The E-Wiki questions and answers do not give enough legal certainty because they are formulated via a secure legal or “political correct” channel, often merely referring to the text of the Framework without really going into the details which initiated the question in the first place. In an innovation context there obviously are always some grey areas, but regarding state aid it is very important to grant as much legal certainty as possible in order not to jeopardise the research and the later implementation.

Those provisions are really useful but are not always 100% clear. The uncertainty regarding the applicability of the state aid rules on some sorts of collaborations between RO and undertakings sometimes leads to the fact that a potential very useful project is not continued and thus further increases the innovation gap and the market failure on cooperation. This qualification could also differ depending on the nature of the collaboration and whereas the undertaking is an actual research partner with its own funding. The solution ‘to choose for the state aid status’ is not a sustainable solution in a way it ignores the specific role and quality of a RO which primary goals of independent research and knowledge transfer activities have a non-economic character.

We think it would be extremely useful to have more cases and recommendations from the Commission regarding the no-aid conditions which are essential to guarantee meaningful independent research. There are a lot of possible ways of cooperation between RO’s and undertakings and some insights to the acceptability of those different options would be a great tool to tackle the innovation paradox. If there are ex ante “safe models” which could be promoted by the member states and the granting authorities, more means and time would become available to actually work on innovation and the partners would also be able to cooperate with more certainty and confidence.

Further clarifications would be much appreciated, especially in the grey areas where economic and non-economic activities nearly converge. We think more guidance would be useful in following situations.

* 1. **The definition of research organisations: point 21 (b) – the old point 19 b) – knowledge transfer activities**

It is not always clear how long this kind of open access sharing of knowledge remains “non-economic”, especially in situations or regimes where the member state (in line with EU efforts to minimize the valley of death between research and businesses) wishes to promote actual collaboration between RO and undertakings, and where the line between general sharing of information becomes thin compared to an actual individual advantage to an undertaking, which would have to pay a market price for those services.

How far can a general, first line advisory service go and when does it become tailor made and thus an individual advantage for an undertaking?

* 1. **“Effective collaboration” and point 30 c (point 28 c in the current Framework)**

These principles would benefit from some further explanations. It is foreseen that the effective collaboration of the RO with companies is possible under certain conditions. But some of those provision stay rather abstract or unclear.

We understand the logic of an “adequate reflection of their work packages, contributions and respective interests”, but we would be very grateful for some concrete examples or descriptions of cases the Commission had in mind when drafting this text.

Basically point 28c refers to the modalities to which the collaboration and the later knowledge transfer between the RO and the enterprises must comply in order to avoid indirect state aid while making IP negotiations.

We would prefer some positive formulations of allowed IP agreements, giving examples of market conformity, fair and reasonable or royalty free prises,… including the mandatory rules to prove this. Are there some other documents or guidance text useable in this context? E.g. articles 45… of the FP Horizon 2020 Regulation 1290/2013?

The FAQ through E-wiki can in some cases be interesting, but we are inclined to think that the views expressed still remain rather vague or even slightly in contradiction with other replies… We would prefer a solid Commission text explaining the rationale, the boundaries and the possible acceptable forms of collaborations in some concrete examples.

* 1. **Specific situation of Hospitals**

According to the case law of the Courts, hospitals perform economic activities and are thus undertakings under state aid law.

However, a lot of hospitals also perform research and training or educational services (with or without close cooperation with academic institutions active in the field of medicine), which could be seen as a non-economic activity and which would also qualify the hospital as a research organization which would thus be able to receive financing for its non-economic activities outside the state aid rules.

We think that with a system of separate accounts, this could be achieved. But there are doubts as to the specific circumstances and set up. Some universities and hospitals operate under the same legal entity, others as a daughter or linked undertaking, and others still as a completely separate entity.

* 1. **The financing of research infrastructure**

This is also a point where a lot of practical issues can be raised. In a lot of cases the member states wish to finance the building of research infrastructure as part of the non-economic activities of a RO. However it is also a common goal to stimulate – further up the timeline – some economic activities, testing, demo or pilot projects,… with this infrastructure.

We understand that the financing can be made state aid proof with the **ancillary activities principle of 20%** and with a combination with aid under article 26 GBER. But it is extremely difficult to monitor or calculate the actual 20% threshold. This often leads to the recommendation from a granting authority not to use the 20% rule, as it is considered to be too risky.

Also we like to stress that these kind of projects or cases, are typically used with the structural fund schemes, probably even more so in the new programming period. But the cases applying for aid e.g. in an ERDF case tend to focus on the building of new research infrastructure and not yet on the actual use of operation of those infrastructure. That kind of infrastructure would then be funded as a non-economic infrastructure outside the state aid rules. But the contractual relation with the owner/builder of the research infrastructure would than end after some years, whilst the potential economic use of that infrastructure could for instance only occur after a lot of years. It is then very difficult to obtain further information on the economic or non-economic use of the infrastructure further in time and it is also almost impossible to install a pragmatic and workable model for monitoring and claw back. We would thus also appreciate some further guidance and models from the side of the Commission.

Point 22 of the draft also indicates that the 10 year period for monitoring starts from the “operation”. As mentioned before, some (ERDF) cases focus on the building and not the operating of the infrastructure. So it is not clear how the rules in point 22 would then have to be complied with.

Some provisions on research infrastructure in the RDI Framework and not only in the GBER, would be advisable in our view. It is confusing that for the assessment of financing research infrastructure, one would have to look at the state aid rules in the GBER, whilst the state aid rules might not apply in case of non-economic use of that infrastructure. A clear text should be included on research infrastructure, providing the conditions under which the use of that infrastructure is considered to be non-economic, comparable to what is foreseen in the definition of RO.

* 1. **Rules on monitoring**

The rules on monitoring and control are not coherent.

- Point 148 of the draft RDI Framework mentions that the records must be kept for 10 years after the granting of the aid.

- The GBER however foresees that the records must be kept for 10 years after the last aid granting based upon a scheme, which would be a considerably longer period.

- And the specific rules on monitoring in the ERDF rules and structural funds regulations include yet again some other provisions.

That way it is very difficult for granting authorities to know which rules they have to follow or this will lead to a different model or treatment of cases which where decided based upon the Framework, compared to the GBER.

* 1. **Clusters (both in the RDI Framework as in the GBER – see chapter 3)**

We would ask the commission to broaden the scope of cluster organisations. We agree with the fact that an assessment is not made on the level of the organisation, but indeed on the level of the activities.

It is thus acceptable that a cluster organisation (as is also the case with other organisations) can both be active as an economic actor under the state aid rules of article 27 GBER, but likewise it is possible that a cluster organisation is also partly active as a research organisation, working with research infrastructure, or promoting pilots and demo’s, which would be a non-economic activity. Provided they keep a clear separation of accounts, that would in our view be possible. The fact that the slightly amended definition of cluster organization now refers also to research infrastructure and to technology infrastructure and innovation hubs, seems to confirm that approach.

* 1. **Definition of technology infrastructure**

The additional definition of technology infrastructure is welcomed. We do believe that these kind of activities were already eligible under the current rules within the definitions of industrial research or experimental development, but it is certainly useful to foresee a separate category. We would like to see the same text occurring in the GBER as well.

* 1. **Transparancy obligation**

Belgium, as many other member states, strongly disagrees with the lowering of the **TAM threshold** from 500.000 euro to 100.000 euro. This is considered to be too low and creates a lot of red tape and administrative burden on the granting authorities. We prefer to keep the current threshold of 500.000 euro.

1. **GBER RDI articles** 
   1. **article 27 on clusters**
2. **cluster aid can only be given to the legal entity operating the cluster**

Article 27, 2 of the GBER now states that cluster aid can only be given to the legal entity operating the cluster. We believe that the ratio legis for this provision is to target the aid at the operator of the cluster and not to the users/members.

Clusters are defined as “organised groups of independent parties”. So, in practice there are a lot of clusters operated by several independent partners, each with its own expertise. Clusters are often temporary co-operations in order to start a certain dynamic of co-operation in some (cross) sectors. These operating parties work together, share risks and do not work in a normal client/supplier relation. They all contribute to the goal of the cluster by performing administrative and personnel related costs.

We believe that the mandatory establishment of a new legal entity is not useful nor desirable and goes against our policy aim to simplify the innovation landscape and avoid the creation of new entities.

The collaboration of different parties, remaining independent, but working together to share expertise in operating a cluster, should be possible. **All organisations operating the cluster should be eligible** for cluster aid based upon article 27 of the GBER.

As a pragmatic solution we propose following reasoning:

* if more than one entity fulfils the conditions to be accepted as a cluster organisation, and they have the means and competences to operate the activities of the innovation cluster, they all can make eligible costs. In order to guarantee a smooth handling of the project, there is one cluster organisation that acts as coordinator and receives the payment if the aid in that capacity;
* all of the involved entities qualify as cluster organisations and are thus eligible to cluster aid and can make eligible costs. The mere fact that the aid is paid to one of the cluster organisations is a payment formality and does not change the legal capacity of the underlying entities;
* there is always an agreement between the partners stipulating the different tasks, risks, responsibilities and contributions;
* the ratio legis that the cluster aid goes only to the operators and not to the members of the cluster is respected.

We would propose to adapt the wording of the future article 27 of the GBER towards the **“legal entities” (plural)** operating the cluster.

1. **Qualification of the cluster organisation as a research organisation (RO)**

In our institutional set up of clusters, it is possible that a cluster is operated by an entity that could not only perform tasks as a cluster organisation, but could also carry out activities of knowledge dissemination (most of time non IP linked results) which could qualify them as a research organisation (RO) for the latter activities.

The aid for cluster activities can thus be based upon article 27 GBER, and the non-economic activities can be based upon § 19a of the RDI Framework. But this division is not always easy to make and could lead to legal uncertainty.

Also, the definition of a RO implies that the RO’s primary goal has to be “*to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer*”. As the “cluster” activities based upon article 27 GBER are considered to be “economic”, it could pose problems for the qualification of the cluster organization as RO if those activities cause the entity no longer to achieve non-economic activities as a primary goal.

We would like to invite the Commission to **apply a more flexible approach as to the use of article 27**.

It is not our intention to qualify all RO as cluster organisations, but it should be possible for a cluster organisation to have a second qualification as RO, for the activities they carry out regarding knowledge dissemination of results coming from independent research, whereby the organisation acts according the 3 criteria to qualify as a RO. The disseminated results would of course relate to results, insights, knowledge coming from independent research (and thus contrary to pure contract research or the follow up of individual interests), also respecting the principles on non-preferential offers.

1. **Combination of article 27 with 26 GBER**

Another problematic area is the link between articles 26 and 27 of the GBER. The Commission indicated in some seminars and FAQ’s that normally there could not be an overlap between article 26 and 27 as an innovation cluster would not perform research activities.

We do not agree and think that a lot of innovation clusters could also be involved in research activities, **knowledge dissemination** or active in **demonstration and pilot projects**, which could be very innovative and have a great potential for the cluster members.

We would welcome some insight in the logic of the Commission regarding the strict separation between cluster aid on the one hand, and research activities and/or infrastructure on the other hand.

If the Commission would be of the opinion that the activities mentioned above would not be compatible to be combined by the same IC, we would welcome other suggestions and solutions in the drafting of the new rules as to allow this kind of combined activities which could prove to be very rewarding in our view.

1. **Enlarging the scope of the eligible costs of article 27**

We believe that the wording of article 27 is rather strict and the accepted eligible costs too narrow. Next to the investment costs, and the personnel and operating costs, it should also be possible to allow some other “**contracted services**” made by the operator of the cluster, such as the hiring of external expertise, consultants, market research, access to databases,…

Moreover we are strongly convinced that it would be extremely useful for a cluster to be able to have access to **infrastructure for demonstrations, scale-ups or proof of concept activities**. We would thus plead for the extension of the eligible costs in article 27 towards research infrastructure to run these demonstrations, pilots and testing.

In order to find a solution for this problem, state aid granting authorities now have to be very creative and search for combinations of aid to be granted based upon different GBER articles, or even based upon the RDI Framework. The latter solution is not always the most desired way to go, as it often implies that the research infrastructure is placed with a (semi) public partner or research organisation, whereas we believe that it would be equally or even more justified to have this kind of infrastructure within the cluster or within the participating undertakings themselves. An effective cooperation between undertakings on an actual demo of pilot (TRL 6-7) would be very useful.

1. **Threshold of 7,5 million**

This threshold can be considered as rather low for some large clusters which operate for (more then) 10 years.

1. **Aid intensity: 50% on average**

The wording of the 2014 GBER is different from the 2006 RDI Framework, where it was explicitly foreseen that the aid intensity of 50% could also be maintained through a digressive aid intensity (from 100% to 0%) if the average stays below the 50% threshold over the years.

While we believe that the current 2014 GBER still allows the same reasoning as the aid intensity of 50% would on average not be breached, we would suggest to make this clearer and return to the old formulation, mentioning also the possibility of digressive funding.

1. **Indirect benefit to the users**

Cluster organisations find it very difficult to quantify the correct market price for the members participating to an event, infosession,…

The use of other GBER articles or de-minimis for the “second level” is complicated and creates a large administrative burden.

* 1. **Art 22 Start-ups**

See below (chapter 4) on Undertakings in Difficulties (UID). We would suggest to extend the exemption for UID to 7 years.

* 1. **Art 25 RDI**

The requested lenient interpretation of UID (see chapter 4) should also be applicable towards RDI aid.

* 1. **Art 29 Process- and organisational innovation**

This is a good article but the more stringent rules for large undertakings can limit the scope of the proposed projects.

1. **Definition of undertakings in difficulties, especially for start-ups and scale-ups**

We fully support the idea to exclude economic unhealthy enterprises from state aid but are concerned that the translation of this principle into practical conditions in the general block exemption regulation has a negative side effect on start-ups and scale-ups.

The definition based on 50% equity to share capital threshold ratio poses serious granting constraints to start-ups and scale-ups. In particular, at the moment that an R&D/cost-intensive enterprise with limited or no sales faces the situation that more than half of the equity has disappeared as a result of accumulated losses, it will be classified as an ‘undertaking in difficulty’ (UID) as a consequence of non-compliance to the equity to share capital ratio requirement of 50%. Yet such situation is not unusual for a young R&D-intensive or scale-up company and does not necessarily imply that the enterprise is in difficulties.

The disadvantage for young R&D-intensive and scale-up enterprises is a contradiction with the mission of innovation agencies to stimulate R&D and to provide subsidies to encourage companies to engage in market failure associated high risk activities. It also contradicts the Commission’s policy to remove barriers for scaling up in the single market (Start-up and Scale-up initiative).

A survey with agencies in the TAFTIE working group revealed that most agencies experience very similar restrictions and share our concerns.

Based on the results of a TAFTIE technical working group involving 10 agencies, we present six proposals for a way forward to address the problems encountered with the UID topic by several agencies. The six proposal are briefly outlined below.

1. ***Exemption for start-ups****.* In the clauses in Art 2.18 SMEs less than 3 years old are exempted. This is positive, but 3 years is too restricted. Our results demonstrate that mainly young companies are affected: more than half of the decisions affected by Art 2.18 concerns companies younger than 7 years. The Commission has made an additional exemption for enterprises less than 5 years for aid under Art 22. This modification is a positive adjustment. However, this does not apply for R&D subsidies. Shifting to another legal basis for the 3 to 5 years age group is possible but is confusing for enterprises and may appear somehow artificial. To avoid the negative side effects for start-ups, we propose to implement a consistent exemption for start-up aid, R&D aid, aid for SMEs and aid for organization and process innovation and to extend the age limit to 7 years.
2. ***Relation member states-EU****.* The subsidies provided by the Commission in H2020 do not resort under state aid. In the case that aid from the Commission is combined with aid from the member states, this may create a contradiction. In such cases, a specific set of rules different form the overall GBER rules would be more appropriate. In general, state aid rules have been created to prevent state subsidies from distorting competition in the internal market. In the situation that budgets from member states are combined in a network to provide subsidies to consortia at a European level, the situation is different. Therefore, it is recommended to broaden a putative specific set of rules to formalized networks based on national subsidies such as for example Eureka, ERA-net etc..
3. ***Companies in a group****.* For enterprises that are part of a larger (international) group, the conditions outlined in Art 2.18 have to be applied on both the R&D&I aid applicant and the group (= the highest consolidation level in the single economic unit (SEU)). We recommend to limit the UID analysis to the group level together with a financial analysis at the level of the R&D&I aid applicant. Furthermore, this approach would equally imply the possibility to remedy possible financial shortcomings at the level of the R&D&I aid applicant (UID or not) through a guarantee from the parent company, when the latter is not a UID.
4. ***Definition own funds****.* The principle of the definition in Art 2.18 is based on the point that an enterprise is considered as an undertaking in difficulty when more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is calculated as the point reached when the deduction of accumulated losses from reserves and all other elements that are generally considered as part of the own funds of the company leads to a cumulative amount that exceeds half of the subscribed share capital. Irrespective of the concept of the formula, the definition of ‘own funds’ has a major impact on the outcome of the calculation. Several liabilities that are taken into account in common financial practice as durable funding pillars of a company are being ignored in the calculation. We recommend taking specific long-term loans (that qualify as quasi-equity) and specific short-term loans into account as ‘own funds’ when calculating the ratio.
5. ***Principle equity/capital ratio****.* As mentioned above, the principle of the definition is based on an equity/capital ratio. Irrespective of how ‘own funds’ are calculated, we recommend to abandon the idea of working with a ratio in function of subscribed capital. As an alternative, we recommend to work with the absolute number of the sum of equity and quasi-equity. As long as the sum of equity and quasi-equity is positive, companies should not be considered as an undertaking in difficulty. Quasi-equity is commonly used as a global solvency indicator in the banking/investors world. The share capital pay-up obligation is different in different national laws and the share capital concept may be regarded differently in different national laws. Making the definition dependent on this ratio creates an unnecessary complication in the UID status interpretation of a company.
6. ***Exemption for scale-ups****.* The unwanted side effect of the definition of an undertaking in difficulty is most obvious on R&D-intensive young companies. At present, an exemption is foreseen for start-ups until 5 years. It is recommended to provide an age independent exemption for enterprises with a high burn rate as a consequence of a long (R&D&I related) investment phase combined with a long time-to-market horizon. These companies are in a process to become scale-ups. Since the terminology “scale-up” is currently used for different company types, the first step is to develop a clear definition of a (pre)-scale-up company, in combination with an analysis of the impact of the Art 2.18 definition on the different scale-up types. This is expected to be done by the SAM working group in collaboration with the Commission.

If you would have any follow up questions, we remain at your disposal.

Karel De corte

State Aid Coordinator

Government of Flanders

Flanders Innovation & Entrepreneurship (VLAIO)

Koning Albert II-laan 35 bus 12 , 1030 Brussel

T + 32 (0)2 553 37 55

[karel.decorte@vlaio.be](mailto:karel.decorte@vlaio.be)

www.vlaio.be