Competition / State Aid

Comments on the draft Union Framework

for State Aid for Research and Development and Innovation

MEDEF – ID Number 43763731235-75
Rules applicable to aid for RDI are of paramount importance for companies. They have a
direct influence on the EU’s ability to innovate and remain competitive on the worldwide
market.

In this regard, MEDEF appreciates the opportunity to contribute to this consultation on the
Union Framework for State aid for Research, Development and Innovation ("RDI"), which
forms part of the larger State aid reform programme.

I. General comments

Companies urge for a swifter notification and clearance process

Currently, the clearance process of notified aid lasts over 9 to 10 months on average.
Focusing, as of the pre-notification contacts, on the assessment of the proposed measure’s
impact on competition, in close cooperation with other Commission Directorates with
experience in the activities and markets concerned, would enable the Commission and
Member States to accelerate the clearance of cases raising manageable competition
concerns.

The Commission should initiate the process of improvement of the Code of Best Practice as
well as seek (together with Member States) to apply more systematically the Mutually
Agreed Process. Avoiding undue extra complexity of analysis and focusing from the outset of
the assessment on the impact on competition of the measures will undoubtedly contribute to
reducing the process duration.

Comments on the General Block Exemption Regulation (GBER) with regard to RDI

➢ Exclusion from the exemption of aid schemes

Aid schemes annually exceeding 0.01% of the annual GDP or €100 million would be
excluded from the benefit of exemption.

This proposal should be clarified, notably as regards the purpose of evaluation which is
considered. In any event, excluding aid schemes from the exemption, and therefore requiring
a filing process in order to perform such evaluation, seems disproportionate. Alternative
possibilities could be found to allow the Commission to have additional visibility on such aid
schemes without inducing cumbersome processes. Simplification and acceleration of
procedures is key to achieving an effective regulation in a business-relevant timeframe.

Besides, the proposed criterion [% of GDP] might prove discriminatory, as it will
mechanically concern small Member States with a strong industrial specialization.

➢ Innovation aid to large companies

Innovation aid would only appear to be exempted for SMEs, and there only up to €5 million.
MEDEF considers that a possibility for large companies to benefit from a similar
exemption should be introduced in order to avoid that all innovation aid, even for limited
amounts, require a burdensome notification process.
II. Specific comments on the draft Framework

➢ Article 1.3 (cc): Definition of an “R&D project”

A definition of an R&D project is introduced, setting out the elements that allow characterizing it.

This newly introduced definition should be amended. Indeed, whether or not projects should be assessed together or separately under the State aid rules should be determined based on a sufficiently wide and pragmatic span of concordant evidence, and not primarily by focusing on whether they do, or do not, have independent probabilities of technological success.

Focusing the analysis on the comparison of likelihood of technological success reduces the assessment to a single parameter, which is not accurate. It would be much more relevant:

- either to remove the reference to the “independent probabilities of technological success”, which would allow the Commission to keep flexibility and adaptability;
- or to base the analysis on a wider span of concordant evidence, which would allow catching accurately the specificities of the various projects.

➢ Net extra Cost: a key concern for MEDEF [see paragraph 87]

With respect to proportionality, the Commission proposes to introduce a new cap to the aid, in addition to the limits which already exist on intensities. This new cap would amount to the difference between the net present value (NPV) of the aided project and the counterfactual project, taking into account the probabilities of the two business scenarios [hereafter “NPV comparison method”].

Introducing an NPV comparison method would not be adapted to RDI aid. As a matter of fact, it raises a number of serious concerns:

- It would contradict the key objectives of the Commission’s simplification initiative as well as business needs. The net extra cost calculated as a difference in NPVs would mean an additional (and newly introduced) cap to the aid amount. Given the complexities and uncertainties in the calculation method proposed by the Commission, there is a serious risk that applying such additional cap results in legal uncertainty and a reduction in the allowed funding. This might impact the ability EU firms to innovate and to remain competitive vis-à-vis their non-EU competitors (bearing in mind that the suspensory clearance requirement already is a hurdle for EU companies in the first place).

- Applying an NPV comparison method to RDI projects would deviate from the positions taken by the Commission in other types of aid. Positions already taken by the Commission are consistent in showing that for RDI aid (i.e. for investment aid aimed at an efficiency objective), net extra costs should be calculated by comparing the internal rate of return of the aided scenario to the minimum profitability that would be required for the given project (hereafter the “Project Profitability Method”) rather than by applying an NPV comparison method. In this sense:

3 « hurdle rate ».
The Communication on “Common principles for an economic assessment of the compatibility of State aid under article 87.3” (2009) supports the assessment of net extra costs in a different manner, with respect to aid with an efficiency objective and aid with an equity objective. In this Communication, RDI projects aim at an efficiency objective.

In its recent “Guidelines on regional State aid for 2014-2020” (July 2013), the Commission applies a consistent approach by distinguishing between investment decisions and location decisions, and accordingly by defining different net extra cost calculation methods for these two types of decisions. Concerning relocation decisions, the Commission opts for the difference in net present values: it precisely rules out such method with respect to investment decisions and calculates, in this respect, net extra costs based on a Project Profitability Method. It is clear that RDI aid falls within this category of investment aid.

If follows that, in line with the Commission’s past practice, the next extra cost for RDI projects should be calculated based upon a Project Profitability Method. Yet, such method should not be applied as a “one-size-fits all”. The specificities of RDI projects, such as the specific levels of complexity and risk (technological and commercial), should be taken in account.

- Paragraphs 17/22: Research and knowledge dissemination organizations and research infrastructures as recipients of state aid

Specific guidance is missing with respect to university spin-offs whose IPR can be acquired by undertakings. Pursuant to paragraph 19 b), knowledge transfers (including spin-offs, according to definition) are treated as non-economic activities.

MEDEF suggests to clarify that spin-offs’ IPR licensing and sale activities are considered economic activities.

- Paragraph 25: research on behalf of undertakings (contract research or research services)

In paragraph 25 b), it is considered that covering the marginal cost (2nd alinea) is sufficient if there is no market price. In this regard, footnote n°29 may be confusing.

MEDEF proposes to clarify that research services are assumed to be unique in most cases and that, accordingly, no market price can be determined in these cases.

- Paragraphs 27-28-29: Collaboration with undertakings

(a) Paragraph 27

The requirement that “[...] and allocation of IPR must be concluded prior to the start of the project” could be read to require that individual works, inventions, be identified and allocated ex ante.
MEDEF proposed an amendment so as to read: “...and rules for the allocation of IPR must be concluded prior to the start of the project”.

(b) **Paragraph 28**

The application of the ambiguous (b) to joint inventions yields no sensible results, entails difficult negotiations and delay in industry-university collaborations with universities asserting the framework forbids free use and licensing by undertakings of jointly owned inventions.

It would make sense to clarify (even in a footnote) that joint ownership terms satisfy the second leg of b) (“fully allocated”) if all joint owners, including the research organization, enjoy right to exploit the jointly-owned IPR free of consent and compensation requirements.

(c) **Paragraph 29**

The condition d) provides that the collaborating undertaking having negotiated a right of first refusal has to match third parties offers – this may not be practicable, would certainly entail massive delays and could even be prone to abuse.

It is advised to delete (d), or substitute the third party offer with independent expert valuation (similar to (b)).

- **Paragraphs 46 and 67: Collaborations between partners which would have never happened in absence of the funded programme**

Among the indicators that aid contributes to an increased level of RDI activities, an important consideration is missing, namely the fact that public funding allows collaborations between partners which would have never happened in absence of the funded programme.

Therefore, MEDEF suggests adding the following text to paragraph 46, as {e}, and a corresponding alinea to paragraph 67: “the collaboration project would not have taken place but for the aid”.

- **Article 68: Incentive effect**

The Commission considers among the additional conditions for individual aid a counterfactual scenario consisting also in an alternative project carried out outside the Union. This is welcome as it implies the recognition that some economic sectors have a global dimension, also with competition between EU and extra-EU. As a matter of fact, any reference to incentives should take into account the global market.

This being said, the categories of documents which the Commission expects to be made available for the purposes of a counterfactual scenario often do not exist for the typical R&D project. To create such documents for every R&D project, most of which are modest, would be very burdensome, even for a large company.
As a result, MEDEF suggests adding the following text to paragraph 68: “However, for advanced research activities, where documents such as business plans and financial forecasts are not available due to the early stage of the investigations and the uncertainty of applications, the following may be considered to demonstrate incentive effect: International state of the art; scientific and technological risk assessment.”

- Repayable advances

(a) Paragraph 80

The proposed rules make it possible to request repayment even in cases where technical success has been achieved, but commercial success is absent.

MEDEF believes that, for the purposes of the repayment rules, technical success without commercial success should be treated as a failure.

(b) Paragraph 82 – Fiscal aid measures

The Commission indicates that, in case of an aid granted in the form of a fiscal measure, the aid “may apply without distinction to all eligible activities [i.e. fundamental research, industrial research and experimental development], but must not exceed the applicable aid intensity for experimental development”, which is the lowest among the three.

This restriction is questionable, as it amounts to creating an aid intensity which would be lower for fiscal aid measures than for other types of aid. However, the fact that the aid be granted under the fiscal form does not prevent a distinction, in a R&D project, between each category of R&D for the purposes of calculating the global maximum amount of eligible aid and, therefore, the amount of the fiscal aid measure.

(c) Paragraph 90 – Additional conditions for individual aid

The Commission stresses that “insofar as the identified need for aid relates mainly to difficulties in attracting debt finance from the market, rather than a lack of profitability, a particularly apt way to ensure that the aid is kept to the minimum may be to provide the aid in the form of a loan, guarantee or repayable advance instead of a non-repayable form, such as a grant”.

This shows that there would be no need to perform an additional test to verify that such aid is kept proportionate. Even if applying a net extra cost approach for repayable advances was considered, this should not be based on the NPV comparison method, but rather on the project profitability method – see above.

Thus, in no circumstances a Net Extra Cost approach may be applied to repayable advances.
Paragraph 92: Proportionality of the aid – ”Matching clause”

With respect to its wording, the “matching clause” should not be less favourable than the one originally contained in the 2006 RDI Framework.

We therefore suggest to amend paragraph 92 of the draft framework as follows:

"In order to address actual or potential direct or indirect distortions of international trade and under the condition that aid is kept to the minimum necessary, higher intensities than generally permissible under this framework may be authorised if, directly or indirectly, competitors located outside the Union have received in the last three years or are going to receive aid of an equivalent intensity for similar projects. However, where distortions of international trade are likely to occur after more than three years, given the particular nature of the sector in question, the reference period may be extended accordingly. Where possible, the Member State concerned will provide the Commission with sufficient information to enable it to assess the situation, in particular the need to take account of the competitive advantage enjoyed by a third country competitor. […]"

Another specific situation needs to be dealt with. Sometimes, it is not known at the time when the EU company obtains the Commission’s clearance that a non-EU competitor will in the future receive aid exceeding the allowed EU intensities.

In this case, for “calendar reasons” the EU company cannot benefit from the matching clause. In order to avoid such situation and to discourage potential strategies from third countries to only grant massive aid after the EU company has obtained clearance, the IPCEI Communication and RDI Framework shall allow for the EU company to revert to the Commission once sufficient information can be found on the fact that the non-EU competitor is financed above the normal intensities, with a view to request an increased aid amount matching the intensity obtained by the non-EU competitor. Since the Commission’s review would then be limited to assessing the non-EU situation and adapting the aid support accordingly, a formal notification should not be required.

Annex II: Aid for process and organisational innovation

Regarding aid for process and organisational innovation, the maximum aid intensity is 50 % for SMEs and only 15 % for large companies. MEDEF questions this difference in treatment and contends that the cap for large companies should be raised, to reach at least 25 % - as for experimental development.

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2 A similar provision should also be inserted in the IPCEI Communication that is currently subject to consultation.