TAFTIE’s comments on the first draft of the Framework for state aid for research and development and innovation (published 20th of December 2013)

This document contains TAFTIE’s comments on the first draft of the Framework for state aid for research, development and innovation.

This document represents the views of TAFTIE, i.e. key organisations in Europe responsible for implementing R&D&I policies, especially those related to public funding and thereby State aid. TAFTIE agencies have collectively a unique and comprehensive view of the practical challenges and experiences related to implementing the framework for state aid for R&D&I.

TAFTIE submitted its comments to the consultation on the first draft of the General Block Exemption Regulation (hereafter the GBER) in June 2013 as well as on the second draft in February 2014. Certain comments presented in this paper are similar to the ones presented to comment the drafts of the GBER.

**Introduction**

The first draft of the Framework for state aid for research, development and innovation (hereafter the R&D&I Framework) is a clear step forward. The provisions are now much clearer compared to the existing framework. The provisions are also more flexible, thus better allowing planning of new types of aid measures. Furthermore, we have noticed that several comments that we presented in our earlier papers have been taken into account.

**The GBER and the R&D&I Framework**

The first draft of the R&D&I Framework was published at the same time with the second draft of the GBER. Both documents contain many similar articles and are well in line with each other. However, we would like to ask the Commission to ensure the consistency of wording of the provisions in both documents. Provisions concerning the same issue should have the same wording in both documents unless there is a specific reason to phrase the provisions differently. Inconsistent wording of provisions with identical themes causes unnecessary uncertainty and should thus be avoided.

We noticed inconsistent provisions for example in

- Article 6 (2) of the GBER and paragraph 63 and 64 of the R&D&I Framework on incentive effect
- Article 7 (5) of the GBER and paragraph 80 of the R&D&I Framework on repayable advances
- Article 8 (2) of the GBER and paragraph 9 and 83 of the R&D&I Framework on cumulation of Union funding with other state aid;
- Article 9 (1) of the GBER and paragraph 117 of the R&D&I Framework on publication/transparency
- Article 24 (3) of the GBER and Annex I of the R&D&I Framework on eligible costs of R&D projects.
- Definitions of “aid intensity”, “aid scheme”, “date of award/granting of aid”, “individual aid”, “organizational innovation”
• Recital 49 of the GBER and paragraph 20 of the R&D&I Framework on ancillary economic activities of research infrastructures.

Comments on Articles

1.1 Scope of application

According to paragraph 8, the framework applies to state aid in all sectors. It is good that all sectors are covered by the same rules and several different rules are not needed. This is well in accordance with the objective to streamline the rules and simplify the state aid legislation.

In paragraph 9, it is stated that union funding centrally managed by the Commission, does not constitute state aid. It is very good that this is explicitly stated in the rules as this has previously lead to unclear situations especially relating to cumulation of Community and national aid. However, we hope the Commission could use the same wording in this provision as in Article 8(2) of the GBER for consistency of the rules.

1.2 Aid measures covered by the framework

Paragraph 12 (c) aid for the construction and upgrade of research infrastructures

It is important that the aid for the construction and upgrade of research infrastructures is added to Framework. This is in line with the provisions in the GBER.

Paragraph 12 (d) aid for innovation activities

In our comment to the first draft of the GBER in June 2013, we proposed modifications to the draft provisions on innovation aid. We repeat this proposal of wider and more flexible rules.

We propose that the innovation aid can be granted to three types of slightly broader class of activities related to innovation: 1) to obtaining, validating and defending patents and other intangible assets as well as standardisation; 2) to activities to enhance the innovation capabilities of an organization, including secondment of highly-qualified personnel and process or organizational innovation; 3) to activities preparing for commercial launch such as advisory and support services, including market research, knowledge transfer, agreements, testing and certification, as well as participation in a fair or exhibition.

Furthermore, it is suggested that these are based on two new definitions, which partly replace the definitions of innovation advisory and support services as well as complement the other related definitions. These two new definitions would allow additional flexibility between and beyond previously rather limited innovation aids. The suggested formulation would also ensure that all current forms of innovation aid are in the new Framework. We also propose that eligible costs cover the same costs as in R&D project.

As regards to obtaining intangible assets, we suggest that also costs of standardisation are defined eligible. While standardisation can significantly enhance innovation, competition and market efficiency, it can also offer large (multinational) enterprises the possibility to safeguard specific technologies and ensure their market position. It is therefore important to encourage innovative SMEs to participate in standardisation.
Suggested new formulation

“Aid for innovation activities may granted for:

(a) obtaining, validating and defending patents and other industrial property rights as well as standardisation;
(b) developing the innovation capability of the organisation;
(c) preparing for commercial launch of a new or significantly improved product or service, excluding marketing, investments or any other direct commercial costs.

The eligible costs shall be the following:

(a) personnel costs;
(b) costs of instruments, equipment, buildings and land to the extent and for the period used for the innovation project;
(c) costs of consultancy, training and equivalent services used exclusively for the innovation activity;
(d) additional overheads and other operating costs, including costs of materials, supplies and similar products, incurred directly as a result of the innovation project;”

Suggested new definitions

“’innovation capability’ means the organisation’s ability to identify market needs and opportunities, come up with novel ideas and develop them into new or significantly improved products and services, including but not limited to organisational arrangements (including organisational innovation), innovation and business processes (including process innovation), access to networks and other relevant collaborative arrangements, skilled staff and access to other qualified human resources (including training, consultancy, and secondment of highly qualified personnel), and ability to acquire, manage, transfer and protect (including trade in intellectual property rights and licensing agreements) relevant knowledge;

’preparing for commercial launch’ means preparatory activities necessary for launching a new or significantly improved product or service to the market, including but not limited to access to office space, data banks, libraries and laboratories, market research, quality labelling, testing and certification, and participation in a fair or exhibition presenting new or significantly improved products and/or services;”

In case it is not possible to modify innovation aid as we propose, we ask the Commission to clarify in Annex I that also the costs of the beneficiary’s own activities are eligible, including personnel costs of the beneficiary, provided that they are directly linked to activities eligible for innovation aid. This is how we would now apply the provision but this interpretation could be more clearly supported by the wording.

1.3 Definitions

(i) effective collaboration

In a collaboration project, both parties contribute to the implementation of the project, unlike in contract research. This is also described in point 27 on collaboration with undertakings. Thus we propose that the definition is modified to reflect this aspect too.
Suggested formulation

(i) 'effective collaboration' means collaboration to exchange knowledge or technology, or to achieve a common objective based on the division of labour where the parties jointly define the scope of the collaborative project, contribute to its implementation and share its risks and outputs. Subcontracting is not considered to be effective collaboration;

(j) experimental development

We propose that the word technical is abandoned from the definition as this word unnecessarily leaves outside this definition innovative solutions that are not primarily technical but to which it is necessary to demonstrate their functioning in large scale and in real life context prior to commercial exploitation.

Suggested formulation

(j) ... Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements on products, processes or services that are not substantially set.

As regards to the commercial use of prototypes, we notice that there is no provision on deduction of the revenues of such commercial use from the eligible costs of the project, while such provision is in the GBER Article 24 (4). In case the intention is that in notified aid, revenues need not be deducted, we hope that the Commission could clarify the reasons for this and provide examples on types of aid where revenues need not be taken into account. Otherwise, we suggest that revenues are treated in the same way both in the GBER and in the Framework.

(p) individual aid

We propose that definitions of ‘individual aid’ and ‘notifiable individual aid’ are clearly separated. To our understanding the provisions on individual aid in this Framework apply only to notifiable aid. Thus, references to individual aid which, according to the present definition, may be understood to be either notifiable individual aid or smaller aid granted under an aid scheme, are very confusing. For better understanding of the rules, it would be clearer if individual aid would cover all types of aid awards to a certain beneficiary, whether under a scheme or ad hoc and whether exempted or under notification obligation.

Suggested formulation

‘individual aid’ means:

(a) ad hoc aid; and
(b) aid awarded on the basis of an aid scheme.

‘notifiable individual aid’ means individual subject to the notification obligation.

(q) industrial research

We suggest that the proposed references to manufacturing and technical products are removed to better cover also research aiming at new services.
Suggested formulation

(q) ‘industrial research’ means the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts to complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of small scale pilot lines to test and validate the manufacturing method performance, when necessary for the industrial research and notably for generic technology validation;

(u) intangible assets

We suggest that the proposed references to technology are replaced with knowledge for the sake of consistency and to better cover all relevant intangible assets.

Suggested formulation

“intangible assets’ means assets acquired through a knowledge transfer of technology such as patent rights, licences, know-how or other intellectual property. ”

(cc) repayable advance

We propose that the definition of repayable advance is extended to include other repayable instruments such as redeemable shares with a fixed dividend and not convertible into ordinary shares.

Suggested new formulation

‘repayable advance’ means a loan or another repayable instrument, which cannot be converted into ordinary shares or grants, for a project which is paid in one or more instalments and the conditions for the reimbursement of which depend on the outcome of the project.

(ee) research and knowledge-dissemination organisation

We are pleased with this definition and believe it ensures that research organisations can engage in different types of activities, even economic.

(ii) start of works

We welcome the definition of start of works or start of the project. In our opinion, these principles are clear and sufficient enough to verify that the work on the project has not started and that the incentive effect is real. As it is usually necessary to make preparations and planning before the start of the project, it is very good that such preparatory activities have been allowed in the revised definition. However, it should be explicitly stated that letters of intent or other arrangements conditional on the aid decision are allowed.

Suggested definition

(ii)'start of works or start of the project' means either the start of R&D&I activities, or the first irrevocable agreement between the beneficiary and contractors to conduct the project, whichever comes first. Preparatory works such as obtaining permits and conducting preliminary feasibility
studies as well as making letters of intent or other commitments and arrangements conditional on the aid decision are not considered start of works.

2.1 Research organisations and research infrastructures as recipients of state aid

The modifications and clarifications made to the provisions on state aid for research organisations are very good. The present provisions answer to many questions that have been problems in collaborative activities between undertakings and research organisations during the existence of the previous framework.

In paragraph 19 (b), it is stated that knowledge transfer activities are of a non-economic character where all income from those activities is reinvested in the primary activities of the organization. In our opinion, this should read profits instead of income, as income should be used to cover the costs of the activities. If all the income from the knowledge transfer activities is invested in the primary activities of the organization instead of using them to cover the costs of the knowledge transfer, it is impossible for the organization to develop and maintain its knowledge transfer activities.

Suggested formulation

(b) knowledge transfer activities, where they are conducted either by a department or a subsidiary of the research organisation or research infrastructure or jointly with, or on behalf of other such entities, and where all profits income from those activities is are reinvested in the primary activities of the research organisation or research infrastructure.

As regards to chapter 2.1.2. Public funding of economic activities, we would like to ask the Commission to clarify the following issues:

1) If the infrastructure is owned by a public research organisation who receives the aid of 50 %, can the research organisation use its direct budgetary public funding or public funding from other sources to cover the other half of the investment? Or should the research organisation owning and operating the infrastructure cover the other half of the investment costs ex post by the income received from the users of the infrastructure? If so, is there a monitoring requirement to ensure this?

2) Is the market price requirement sufficient to ensure that the infrastructure does not unfairly compete with private infrastructure services should those exist, or prevent establishing such private services?

3) If the infrastructure is used for both economic and non-economic activities do the eligible costs include the whole investment or only the part of the costs based on the share of the capacity that is planned to be used for economic activities?

4) If the infrastructure is used almost exclusively for a non-economic activity and only for a purely ancillary economic activity not exceeding 15 % of the infrastructure’s overall annual capacity in accordance with paragraph 20, what happens if the threshold of 15 % is exceeded? Should all the economic activity be interpreted non-ancillary or only that exceeding the threshold of 15 %? Would there be a certain transition period of e.g. two consecutive financial years?

5) As regards to the paragraph 20, we would also like to point out that 15 % of overall annual capacity of research infrastructures owned by large universities and research organisations may be comparable to considerable annual business volume of a company. As the definition of research infrastructures is not limited to single infrastructure but infrastructures may be combined,
universities and research organisations might even combine their research infrastructures to avoid exceeding the threshold of 15%. Has the Commission considered if this may lead to unfair competition or market distortion, especially since it is not clear if the requirements concerning separate accounting, market price and reinvesting potential profits back to the infrastructure are valid as regards to economic activities not exceeding the threshold of 15%?

2.2 Indirect state aid to undertakings through public funded research and knowledge dissemination organizations and research infrastructures

In this chapter, we are very pleased with the clarifications the Commission has made to the notion of market price and the conditions on which IPR of research organisations can be transferred to undertakings. It is particularly important that the contributions of the undertakings are acknowledged and taken into account when defining the market price. We believe that these clarifications will simplify the negotiations on collaboration projects which have in many cases been very difficult during the existing R&D&I Framework. This in turn should encourage undertakings to seek and engage in collaborations with research organisations.

In paragraph 25, we would like the Commission to clarify if the requirement of market price is suitable to ensure that providing access to publicly funded research infrastructure does not lead to distortion of competition through too low pricing by the infrastructure.

We propose also that a provision similar to the one in the GBER is added to the Framework stating that undertakings which have financed at least [30] % of the investment costs of a research infrastructure may be granted preferential access with more favourable conditions, provided such access is proportional to the undertaking’s contribution to the investment costs to avoid overcompensation and these conditions are made publicly available.

In point 28 (d), we propose that it is clarified that research organisation or research infrastructure should receive market price for IPR that is either transferred or licensed to the participating undertakings.

*Suggested formulation*

(d) the research organisations or research infrastructures receive a compensation equivalent to the market price for the IPR which result from their activities and which are transferred or licensed to the participating undertakings.

2.3 Public procurement of research services

We welcome the new provisions on public procurement and believe these provisions are very important in clarifying in which cases public procurement does or does not include state aid.

5. Compatibility of aid under Article 107(3)(c) of the Treaty

We hope that the Commission could clarify in this chapter that all the references to individual aid apply only to notifiable individual aid. Now all the headings refer to individual aid even though the actual provision applies to notifiable individual aid. This may cause unnecessary confusion. We propose separate definitions for individual aid and notifiable individual aid to clarify the situation.

5.5 Proportionality of the aid
Paragraph 80 (c) states that the repayable advance does not have to be fully repaid in case the project fails. In case of partial success, the repayment should be proportional to the degree of success achieved. It is left unclear, however, whether the repayment can be waived in full if the project totally fails technically or commercially. We assume that this is the correct interpretation as the aid would not have any negative effect on the market if the project failed.

5.5.1.3 Cumulation of aid

Referring to our comment to paragraph 9 and our wish to use consistent wording in the Framework and the GBER, we ask the Commission to clarify the last sentence of the paragraph 83 that ends “…the total amount of public funding granted under the same eligible costs must however not exceed the maximum funding rate(s) laid down in the applicable European regulations.” It is unclear to us if Union funding is considered public funding in this provision and does ‘the maximum funding rate’ refer to maximum aid intensities as specified in the Framework or other state aid legislation. We would interpret this provision so that if the maximum aid intensity is 50% and an undertaking has received 50 % Union funding to a project, it may not receive any national funding to the same project and costs. However, if the maximum aid intensity is 70%, it may receive 20% national funding to the same project and eligible costs. To our understanding, this is the way this provision should be interpreted but we hope that the wording of the provision could be more precise and consistent with the same provision in the GBER.

5.6 Avoidance of undue negative effect on competition and trade

In paragraph 103, we hope that the Commission could clarify what is meant by predominantly established. It is understandable that the Member States cannot limit the principles of free movement but it must be possible to require at least that the aid recipient is established in the Member State and also that the aided activity or project is carried out in the Member State providing the aid. Furthermore, this should be consistent with the requirement concerning regional aid, where it is required (Article 14 of the GBER paragraph 5) that the aided activity remains in the assisted region at least for five years (or three years in the case of a SME) after the completion of the project.

5.7 Transparency

The aim to publish the information on state aid measures as proposed in paragraph 117 is good as such. However, we hope the Commission could consider again when the information should be published. According to the present paragraph, the information should be published after the granting decision has been taken. In the field of R&D&I, it would be better if the information on each aid decision did not need to be published straight after the grant of aid but a bit later as granting of public funding to R&D&I activities of an undertaking may already as such be considered as a trade secret of this undertaking. This is why we suggest that information on individual aid awards received by a beneficiary in question is published annually by the end of the first quarter of the following year. This would also lessen the administrative burden of the aid authorities.

We also notice that in the GBER, the wording is “a comprehensive State aid website” while in the R&D&I Framework, the wording is “a single website”. These should be consistent with each other.

*Suggested new formulation*
Member States must publish on a single website at least the following information about the notified state aid measures: (i) the full text of the aid scheme and its implementing provisions, or legal basis for individual aid; (ii) the name of the aid granting authority; (iii) the individual beneficiaries; and (iv) the aid amount and aid intensity per beneficiary. That information must be published annually by the end of the first quarter of the year following the grant of the aid after the granting decision has been taken, must be kept for at least 10 years and be available for the general public without restrictions.

Annex I – Eligible costs

Aid for R&D projects

In sub-paragraph (d) we suggest that the reference to technical knowledge and patents is abandoned as too limiting.

Suggested formulation

(d) Cost of contractual research, intangible assets technical knowledge and patents bought or licensed from outside sources at arm’s length conditions, as well as costs of consultancy and equivalent services used exclusively for the project.

Annex II – Maximum aid intensities

In our opinion, the aid intensity of 50 %, applied to feasibility studies also for SMEs, is unjustified. SMEs should be encouraged to make a feasibility study before entering R&D&I projects, which is why we propose that the bonuses listed also apply to feasibility studies. At this moment, it is proposed that the bonuses only apply to industrial research and experimental development.

As the aid intensity of 15 % for aid for process and organizational innovation to large companies is very low, hardly providing any incentive effect to large companies, we propose that the aid intensity is increased to 25 %. If this is not possible we suggest that aid for process and organizational innovation is possible only to SMEs.