The General Block Exemption Regulation (GBER): bigger, simpler and more economic

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1. Introduction

One of the main objectives of the reform of state aid policy, as set out in the ‘State Aid Action Plan’ (SAAP) adopted by the Commission in 2005 (2), is to create a simple, user-friendly and coherent set of legislative rules applying to those types of aid which can be considered as passing the compatibility test outlined in Article 87(3) of the EC Treaty. With this in view, the Commission has in the last two years adopted a series of guidelines and frameworks setting out the principles and precise criteria which it applies when assessing, upon notification, aid measures proposed by Member States: most notably the regional aid guidelines (3), the R&D&I framework (2006) (4), the risk capital guidelines (2006) (5) and the environmental guidelines (2008) (6). As part of the SAAP exercise, the Commission also announced that in order to enhance readability and allow for better prioritisation of cases within the Commission, it would simplify the existing block exemption regulations (BERs) (7) and consolidate them into a single instrument: the general block exemption regulation (GBER) (8).

BERs are Commission regulations providing that all state aid measures fulfilling the applicable substantive and procedural conditions are both considered as compatible with Article 87(3) EC Treaty and exempted from the prior notification obligation laid down in Article 88(3) of the Treaty. Such BERs consequently reduce the administrative costs of handling the aid measures in question for the beneficiary of the aid, the Member State concerned and the Commission.

The Commission has in recent years begun to systematically monitor implementation of the BERs. The fact that such monitoring will continue to take place is explicitly stated in Article 10 GBER.

As the GBER constitutes one of the cornerstones of the future state aid architecture, the Commission has sought to strike the right balance between two objectives: the necessity to simplify the assessment of straightforward cases and the need to ensure that effects on competition are reduced to the minimum. A similar balancing act has also been performed in the context of the different guidelines and frameworks adopted under the SAAP and mentioned above. The provisions of the GBER are therefore largely based on the pre-existing horizontal instruments. However, because the GBER is a regulation with ‘direct effect’ — whereas other horizontal instruments are still applied by the Commission when assessing specific aid measures — its provisions must be absolutely straightforward. This explains the differences which appear, here and there, between the GBER and horizontal instruments. The most obvious difference is in the area of environmental investment aid. Here, the GBER provides for a simplified methodology for calculating eligible costs as compared to the more traditional one contained in the environmental guidelines (9). Another example is that only public participation in profit-driven private equity investment funds have been included in the GBER (10), whereas the standard assessment section of the risk capital guidelines covers other types of aid favouring venture capital, such as tax measures.

Beyond achieving simplification, the main policy objective of the GBER is to encourage Member States to redirect existing aid budgets towards those types of aid which are considered essential for realising the revamped Lisbon objectives (11). A first draft of the GBER was presented and discussed with Member States in April 2007. At the same time, this draft was published on the Commission’s website for stakeholder comments.

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(7) For an overview of the BERs predating the GBER, see http://ec.europa.eu/comm/competition/state_aid/legislation/block.cfm.

(8) See point 35 of the State Aid Action Plan.

(9) Article 18(5) GBER.

(10) Article 29(2) GBER.

(11) See IP/08/1110.
In September 2007, the Commission adopted a revised draft which was published in the Official Journal for a second, more formal, stakeholder consultation (12). After a second formal discussion with Member States, the GBER (Regulation No 800/2008 (13)) was adopted on 6 August 2008 and entered into force on 29 August 2008. All comments from stakeholders are available online (14).

2. Overview of the content of the GBER

The GBER is subdivided into three main chapters (15). The first, horizontal, chapter deals largely with procedural matters. It applies to all types of aid covered by the GBER. The second, more substantive, chapter contains the detailed substantive conditions applying to each of the types of aid covered by the GBER. Chapter III essentially contains the transitional provisions. Annex I integrates the formal definition of what is to be considered as an ‘SME’ (16). Annex II contains the forms for providing information to the Commission on large regional and R&D projects. Annex III contains the summary information sheet which has to be sent to the Commission via the Commission SANI system for an aid measure to be covered by the GBER.

The first chapter (Articles 1 to 12) is aimed, in line with the Commission’s ‘Better Regulation’ agenda, at harmonising horizontal and procedural aspects. It provides, for example, common definitions of standard concepts, common requirements for aid being classed as ‘transparent’ aid, common provisions on incentive effect, an overview of the sectoral exclusions applying to the different types of aid, and uniform requirements as regards transparency and monitoring.

The second chapter (Articles 13 to 42) contains the substantive conditions applying to the different types of aid. This chapter covers certain horizontal types of aid already contained in the pre-existing block exemption regulations: investment aid to SMEs (17), research and development aid for SMEs (18), aid for hiring disadvantaged and disabled workers (19), training aid (20) and regional aid (21). It also comprises types of aid not previously included in any existing BER: R&D aid for large enterprises, environmental aid, aid for the creation of new small enterprises in assisted regions, aid for the creation of new small enterprises by women entrepreneurs, innovation aid and aid in the form of risk capital.

The present article will focus on the main (new) features of Chapter I of the GBER, as Chapter II is largely based on pre-existing horizontal instruments which have already been described in earlier articles (22).

3. Main horizontal characteristics of the GBER

Sectoral and other ‘per se’ exclusions

All the pre-existing BERs and existing guidelines and frameworks contain specific provisions regarding sectoral scope. They exclude aid for activities related to some industrial sectors from their scope of application, either because more specific provisions are included in sectoral regulations or because there is overcapacity in the industry concerned or because that sector is subject to a common organisation of the market (23).

Article 1(3) contains a consolidation and simplification of all these sectoral exceptions. Furthermore, as compared to the pre-existing texts, the exclusions are ‘self-standing’ in the sense that the reader does not need to consult any other Community instrument to determine their scope.

The GBER also excludes from its scope aid to undertakings which are subject to an outstanding ‘Deggendorf’ (24) recovery order from the Commission to recover incompatible state aid already granted. This approach continues the

(12) [OJ C 210, 8.9.2007, p. 14].
(14) [http://ec.europa.eu/comm/competition/state_aid/reform/reform.html].
(15) [For a Commission explanatory document regarding the GBER (more particularly its second draft), see http://ec.europa.eu/comm/competition/state_aid/reform/revised_final_memorandum_gerber.pdf].
(16) [Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.5.2003, p. 36].
(17) [See BER 70/2001].
(19) [See BER 2204/2002].
(20) [See BER 68/2001].
(21) [See BER 1628/2006].
(23) [See, as regards the agricultural sector, recital 12 of the GBER].
line taken already in the regional BER (34) and in the de minimis regulation (35). It excludes both a) individual ad hoc aid to such beneficiaries and b) the full scheme if it does not explicitly exclude such beneficiaries from its national scope of application. This approach is designed to avoid the GBER resulting in the circumvention of state aid rules (36).

Neither does the GBER apply to ‘enterprises in difficulty’ (37). This is in line with the Commission’s long-standing policy concerning enterprises in difficulty, as defined in the rescue and restructuring guidelines (38). However, in order to avoid serious administrative difficulties in implementing this exclusion, the conditions have been simplified for SMEs, as compared to the complete set of conditions laid down in points 10 and 11 of the rescue and restructuring guidelines. This simplification is made purely for the purposes of the GBER and for SMEs and does not affect the classification of aid granted outside the scope of the GBER.

Finally, the GBER excludes all ad hoc aid to large enterprises. This is due to the fact that the incentive effect of these types of measures is often difficult to establish, as a series of training aid cases have shown (39). The Commission thus considers that it must be in a position to examine the presence of such incentive effect upon notification.

The ‘transparent’ aid requirement

The GBER expands the ‘transparent aid’ requirement (30) already adopted in the regional BER and the de minimis regulation. This condition is justified by the fact that, in the context of a regulation with direct effect, it is only possible to calculate a gross grant equivalent easily with respect to transparent aid.

The discussions preceding the adoption of the GBER were, as regards this condition, largely centred on guarantees. Guarantees are essentially considered transparent if the methodology has been notified to and approved by the Commission under the GBER itself or under its predecessor, the regional BER. This approach is in line with the approach already decided in the context of the de minimis regulation. However, the GBER also explicitly stipulates that the ‘safe harbour’ provisions contained in sections 3.3 and 3.5 of the Commission Notice on guarantees may also be used as a basis to calculate the GGE in the context of the application of the GBER (31).

Increased and simplified notification ceilings

In the SAAP, the Commission announced that it wanted to concentrate its resources on the most distortive cases (32) and simplify the administrative treatment of aid which is clearly compatible with Article 87(3) of the EC Treaty. In this context, individual aid covered by the GBER should be subject to an individual notification obligation (33) only if, in the light of the large amount of the aid, it is considered that notification remains necessary to check whether the positive effects of the aid indeed outweigh the negative impact on competition.

With a view to simplification, only one reference figure applies, in general, for each category of aid: pre-existing BERs often contained several cumulative notification criteria, taking account of a number of factors, such as the amount of eligible costs and or the possible application of bonuses (34). In the GBER, and with the exception of regional investment aid and R&D project aid, the notification ceilings are all based purely on a single aid amount. The ceilings have also been substantially raised as compared to the existing ones, meaning that larger amounts of individual aid may be provided without advance notification to the Commission.

Individual aid cases exceeding these ceilings should as a matter of principle lead, upon notification, to a detailed economic analysis (35) of the positive and negative effects of the aid measure in question by the Commission. Such detailed economic analysis will however be undertaken by the Commission under a ‘rule of reason’.

It is finally to be noted that, where Article 6 does not lay down any notification ceiling with respect

(25) Article 7(g) of Regulation 1628/2006.
(27) See SAAP, points 53 et seq. See also the Notice from the Commission ‘Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible state aid’, OJ C 272, 15.11.2007, p. 4.
(28) Article 6(6)(c) GBER.
(29) Communication from the Commission — Community guidelines on state aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2, as referred to in recital 15 GBER.
(30) See A. Garcia Bermudez and C. Galand, ‘Recent training cases in the car industry’, CPN, No 1, Spring 2007, p. 104.
(31) Article 5 GBER.
(32) See recital 21 GBER.
(33) See, inter alia, IP/06/1765.
(34) Article 6 GBER.
(36) See, as regards the distinction between ‘standard economic assessment’ and ‘detailed economic assessment’, section 5 of the risk capital guidelines, section 7 of the R&D&I framework and section 5 of the environmental guidelines.
to a given category of aid — e.g. as regards aid in the form of environmental tax reductions (47) or aid for the loan of highly qualified personnel (48) — any amount of individual aid can be granted under the GBER.

The ‘incentive effect’ condition

Most pre-existing BERs stipulated, as a minimum requirement, that a beneficiary of aid granted under those instruments had to apply to the granting authority before initiating the subsidised project/activity concerned. The GBER (49) essentially maintains this condition as regards all aid granted to SMEs (50).

The GBER however imposes a new ‘positive’ requirement to demonstrate the incentive effect for all types of aid granted to large enterprises. Demonstration of an ‘incentive effect’ is one of the cornerstones of the refined economic analysis (45). The key to analysing the economic impact of a particular problem will often lie in understanding the motivations of the stakeholders concerned. More precisely, if a grant of aid does not change the behaviour of the recipient, then that aid cannot help to reduce the market failure which it is supposed to address. This means that if the aid does not change the behaviour of the aided companies, then the aid cannot contribute to the furthering of Community objectives, as set out in Article 87(3) of the Treaty. In such a case, the aid should be considered incompatible with the common market (46).

The incentive effect principle is expressed as follows in the recitals of the GBER (45): ‘In order to ensure that the aid is necessary and acts as an incentive to develop further activities or projects, this Regulation should not apply to aid for activities in which the beneficiary would already engage under market conditions alone’. As regards aid to large enterprises, this condition is deemed to be fulfilled if business documentation prepared by the beneficiary and verified by the Member States establishes at least one of four things: a material increase in the size/scope/total amount spent/speed of the project or activity due to the aid.

Under Article 8(3) of the GBER, large enterprises will typically have to produce a business plan indicating how they fulfil one of the four criteria mentioned above. This type of document should, in practice, not involve any substantial increase in workload for the large undertakings concerned, as they can be presumed to carry out this type of analysis anyhow for their own financial purposes. It is important for beneficiaries and Member States to maintain records of the presence of an incentive effect, especially in cases involving large enterprises (46).

The GBER finally makes a number of simplifications of the incentive effect criterion as regards tax aid in general, as well as regarding aid in favour of disabled workers, aid in favour of disadvantaged workers, aid in the form of risk capital and environmental aid in the form of tax reductions.

Transparency and monitoring provisions

Articles 9 to 11 of the GBER consolidate and update the transparency and monitoring provisions already contained in the pre-existing BERs. It is worth noting that these BERs generally included in a single provision the rules relating to transparency to be observed by aid granting authorities vis-à-vis the Commission and the outside world, the rules relating to the Commission’s monitoring obligations, and the rules relating to the annual reports compiled each year by Member States. For reasons of clarity, these three categories of rules have now been subdivided into three different articles.

The most substantial change relates to the fact that all aid measures implemented under the GBER should contain an explicit reference to the relevant provision in Chapter II (45). This means that an aid measure that does not contain an explicit reference to the applicable provision in Chapter II of the GBER (for instance to Article 29 GBER for aid in the form of risk capital) would be unlawful. An unspecific, general referral to the GBER in its entirety would not be sufficient. This condition is intended to make both Member States and beneficiaries aware of the particular substantive conditions applying to the aid being granted and increase transparency for other stakeholders, including national courts that might be faced with litigation concerning these aid measures.

(47) Article 25 GBER.
(48) Article 37 GBER.
(49) Article 8(2) GBER.
(50) This includes all types of aid, e.g. training aid (Article 39 GBER), which can also be granted to large enterprises, as long as they are granted to SMEs.
(45) See points 20 to 25 of the State Aid Action Plan.
(45) Recital 28 GBER.

(50) Article 10(2) GBER provides that ‘Member States shall maintain detailed records regarding any individual aid or aid scheme exempted under this Regulation. Such records shall contain all information necessary to establish that the conditions laid down in this Regulation are fulfilled, including ... information on the incentive effect of the aid ...’. 
(50) See Articles 9(3) and 3 GBER.
4. Main features of the substantive rules (Chapter II) (46)

- Aid to small and medium-sized enterprises (SMEs). Small and medium-sized businesses are one of the main driving forces in the economy, but they often face specific difficulties, such as problems of access to finance. The GBER therefore allows, in addition to the categories of aid available for all enterprises, different types of aid to SMEs to help them overcome ‘market failures’ (47): aid for setting up new companies, aid for investments in machines or for hiring additional workers, aid in the form of risk capital, innovation aid, aid contributing to intellectual property rights costs, aid for adapting to new environmental Community standards or aid for environmental studies.

This should allow Member States to assist SMEs in the different stages of their development. Furthermore, all of the 26 categories of aid referred to in the Regulation can be provided to SMEs. To the extent such categories are also available to large companies, SMEs will benefit from a special top-up (10% for medium-sized companies and 20% for small companies).

In this area, the major change as compared to the pre-existing SME BER No 70/2001 lies in the increase in the applicable basic aid intensity from up to 15% for small and 7.5% for medium-sized enterprises to 20% for small and 10% for medium-sized enterprises. The notification ceiling has also been substantially raised, now allowing Member States to grant aid up to €7.5 million. The Regulation also contains a large number of simplifications for SMEs regarding, for instance, the incentive effect condition and the definition of ‘undertakings in difficulty’, which are in line with the ‘Think Small First Principle’ promoted by the Small Business Act.

- Social aid. In addition to aid to subsidise employees working on new investments in SMEs (see point above), the GBER covers aid that encourages companies to hire disabled or otherwise disadvantaged workers (48). It also allows payments — to the extent they constitute state aid — to compensate for additional costs (special facilities for employees with wheelchairs, or information technology for visually impaired workers) incurred by companies when hiring disabled workers (49). The Regulation also favours aid for training workers. Last but not least, in order to ensure a better work life/family life balance, the GBER now covers the possibility to subsidise employers, more specifically as regards child care and parent care costs incurred by their employees (50).

The GBER provisions relating to training aid largely build on the provisions of the pre-existing training aid BER (51). However, the new text allows a higher basic aid intensity to be provided in favour of general training for employees (increase from 50% to 60%). The applicable notification threshold has also been doubled to €2 million, allowing higher aid amounts to be granted.

The existing rules concerning employment aid, previously contained in the so-called employment BER (52), have been clarified and simplified in the GBER. The Regulation includes substantially increased aid possibilities in favour [notes and references omitted for brevity]
There are only a limited number of minor changes as compared to the pre-existing regional BER. These changes relate essentially to the incentive effect condition and the inclusion of child care and parent care costs in the eligible costs basis. Schemes put into place by Member States before the entry into force of the GBER, in line with BER 1628/2006, will be allowed to be implemented unaffected until 2013 (56).

Environmental aid. No environmental aid was previously included in any BER. The GBER therefore constitutes a first in that it allows Member States to provide environmental aid — including certain environmental tax reductions — without the obligation of prior notification to the Commission. The GBER thus makes it easier for authorities to grant a large number of aid measures favouring environmental protection or tackling climate change, in line with the Commission’s Climate Action Plan adopted in January 2008.

Such measures include investments in energy savings, investments in renewable energy sources and aid in the form of environmental tax reductions. The measures being promoted remain subject to a series of conditions in order to guarantee their positive environmental effect. These conditions are largely inspired by the guidelines on state aid for environmental protection (56).

A notable difference between the guidelines and the GBER is however that the GBER generally provides for a simplified cost calculation methodology: it essentially allows operating benefits to be disregarded when providing environmental investment aid (56). This should help Member States to tackle environmental challenges, including the challenges of climate change.

Aid for research & development & innovation (R&D&I). The GBER includes authorisations for a range of measures including, most prominently, aid for R&D projects and aid for conducting technical feasibility studies, also in favour of large companies. Specific measures allowing SMEs’ costs for industrial property rights (patents) to be reduced have also been included, in line with the R&D&I framework. These initiatives contribute to the Community’s objective of becoming a more knowledge-based economy. Beyond the more traditional categories of R&D aid, the GBER also includes, for the first time, a series of innovation measures whose conditions were considered sufficiently straightforward to be included in a regulation with direct effect: aid for young innovative enterprises, aid for innovation advisory services and for innovation support services, as well as aid for hiring highly qualified personnel. Such aid should allow SMEs to become more competitive in a climate of heightened international competition.

Aid in the form of risk capital. The GBER also includes, for the first time, certain aid in the form of risk capital (56). The conditions for this type of aid are inspired by the risk capital guidelines adopted by the Commission in 2006 (56). This extension is intended to encourage Member States to use aid in the form of risk capital more intensively.

(56) See definition in Article 2(19) GBER.
(58) See Articles 13 and 14 GBER.
(59) See recital 66 GBER.
Aid for promoting women entrepreneurship. The average rates of business start-ups by women are lower than for men (64). This is an obstacle to the EU’s economic development. The Regulation includes therefore, for the first time, measures in favour of child care and parent care costs. This should contribute to employees and entrepreneurs achieving a better work life/family life balance. The GBER also allows Member States to support, in both assisted and non-assisted regions, the creation of small enterprises owned and run by women (65). This will allow women entrepreneurs to overcome specific market failures which they face, especially when setting up a first business, thereby promoting substantive rather than formal equality between men and women in this area (66).

5. Transitional provisions

The validity of the majority of the BERs predating the GBER (67) was extended by Regulation 1976/2006 (68) until 30/6/2008. As from that date, a six-month transition period has started to run, which allows Member States to continue applying existing schemes implemented under those BERs (69). This transition period ends on 31/12/2008, as confirmed by Article 44(2) GBER. This means that between 29/8/2008 (date of entry into force of the GBER) and 31/12/2008, Member States have the choice between continuing to apply existing schemes and setting up new schemes under the GBER. As from 1/1/2009, only schemes complying with the GBER may be validly implemented. Such schemes will need to comply with all substantive and procedural conditions of the GBER, including the transparency obligations laid down in Article 9 GBER. Member States will thus have to provide the Commission with summary information sheets for all measures falling under the GBER, using the IT application established by the Commission (the ‘SANI’ system).

An exception has however been made for regional aid schemes implemented under regional BER 1628/2006: existing schemes may continue to be validly implemented until the end of the so-called structural funds programming period, i.e. until 2013. Any new regional scheme adopted after August 2008 would however need to comply with the provisions of the GBER.

The above-mentioned clarifications all concern scenarios whereby aid measures directly fall under a BER. A different scenario arises however where the Commission has, upon notification, approved an aid scheme, using one of the pre-existing BERs as a benchmark for compatibility. The validity of such individually approved schemes whose validity was linked to the validity of the BERs has been extended, by Commission decision, until 30/9/2008 (70). This means that if Member States want to continue — after 30/9/2008 — fulfilling the objectives pursued by these old schemes, they need to either adapt the schemes in order to make them fulfil the conditions of the GBER (see above), or notify them to the Commission for approval.


(65) See Article 16 GBER.


(69) See, for instance, Article 11(3) of the employment BER (2204/2002).