

EARTO Answer to EC Consultation on GBER

11th February 2014

Following the EC Consultation on the draft Commission Regulation declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, the EARTO Working Group Legal Experts reviewed this draft regulation and would like to hereby comment on some aspects of the document.

First, EARTO would like to mention its appreciation for the large improvement of this draft compared to its previous versions of 2013 as it clearly takes into account specificities of the research community.

Secondly, in order to complete the efforts on this draft, EARTO would like to point out the following key issues:

1. Definition of "Research and knowledge-dissemination organization"

EARTO very much welcomes the modified definition of "Research and Knowledge-dissemination organization" in Annex II. This was a key issue for Research & Technology Organisations (RTOs) in the last consultation process. This modification is very important and helps avoiding any uncertainty with regards to the future status of RTOs.

Accordingly, the modified wording does not consider any longer the amount of economic activities within the total activities. According to the competition regulation, this was not necessary. The amended regulation leaves it at the usual requirement of a separate accounting and the proof of a non-cross-subsidization offering the possibility to continue with the well-proven practice of the last years. This shows a well understanding and good appreciation of RTOs functioning.

Finally, there is only one remaining issue in this definition linked to its final sentence: "*Undertakings that can exert influence upon such an entity, in the quality of, for example, shareholders or members, may not enjoy a preferential access to its research capacities or to the results generated by it*". One may understand that, even while safeguarding their independence, RTOs can never fully rule out any third party influence on their organizations, not even from "undertakings". RTOs aim for a maximum of societal impact which requires close contacts with societal stakeholders including government and industry. In this context and understanding the need to separate true R&D organizations (RTOs) from corporate R&D departments, we would like to offer to maintain similar wording in the definition only slightly adapting to RTOs' reality of today. **Accordingly, EARTO would advise to amend the present criterion to: "*undertakings that can exert decisive influence upon such an entity*".** This would avoid confusion and issues when implementing this regulation later on. The resulting obligation would not be to preclude RTOs from listening to their stakeholders, but merely to preclude them from providing preferential access in case decisive influence of undertakings exists.

2. Financial aid for research infrastructures, Art. 25, consideration 49

Any threshold - as foreseen in "Whereas 49" of the GBER - for determining that it concerns secondary economic activities ("a purely ancillary economic activity") may contradict national law and is therefore not suitable.

First, the main focus of research organisations or research infrastructure is to conduct research (see definitions of "research organisation" and "research infrastructure"). In addition, both research organisations and research infrastructures, to achieve their primary mission of research and development activities, carry out ancillary economic activities. Accordingly, ancillary economic activities are not prohibited under applicable national laws: national laws do not provide any presumption regarding a "lower than 15% of the overall annual budget" for such ancillary economic activities. National laws recognise that ancillary economic activities are part of the usual business models of RTOs.

Secondly, a state aid notification procedure must lead to serious administrative burden and a seriously delay of necessary R&D investments to the disadvantage of the RTOs and their clients, being often small and medium enterprises.

EARTO would strongly prefer a legal situation where state aid for investments in research infrastructure is no state aid at all, if and so long as two preconditions are met:

- **First, the recipient is a "Research and Knowledge-dissemination organization" and,**
- **Second, the recipient must comply with a separated cost accounting procedure and charge market prices towards its clients if the research infrastructure is used for the contract research.**

Under these two preconditions, EARTO would not see any state aid issue. Accordingly, there would be no need for a notification process costing large amounts of time and expenses for both grantee and grantor.

Furthermore, EARTO sees the necessity not to limit the aid for research and knowledge dissemination organisations to a 50 % aid intensity: no limitation should be made up to a 100 % level. Indeed, if the wording would be adapted in accordance to the previous suggestion (i.e. financing of infrastructures to the benefit of an RTO is no state aid), this last sentence would not be necessary anymore. If there is no state aid, there is no limit in terms of aid intensities necessary. However, should this change not be accepted, the maximum aid intensity must be increased up to 100 %, at least the Research and knowledge dissemination organizations grantees.

3. State aid for start-up companies, Art. 21.2

The word "merger" in Article 21.2 is not sufficiently clear and is opened for interpretation being too close and in contradiction with the original intention to exempt in particular mergers of small entities (i.e. start-ups).

In particular, it is not specified whether this definition is based on the respective national laws or on the European Merger Control Regulation. Only mergers with a European dimension or concentration within the scope of the merger regulation should lead to a state aid procedure. The application of the European Merger Control Regulation would not take into consideration the size of the companies involved (Article 3). However, the turnover would be included in the evaluation since Article 1 deals with the application range of turnover related to mergers of EU-wide importance and for this purpose the turnover of the companies involved is of relevance.

If the draft of the General Block Exemption Regulation is based on the size categories of the Merger Control Regulation only the "merger of EU-wide importance", "merger within the scope of application of the Merger Control Regulation" or "notifiable merger subject to Merger Control Regulation" should lead to the exclusion from the exemption.

Therefore, **EARTO would like to see the term "merger" of this article further clarified taking the comments above into account in order to avoid undermining the desired exemption of aid for start-ups.**

4. Definitions

EARTO would like to point out that in the Article 24.4, the wording "commercially usable prototypes or pilots" is still unclear when looking at European demonstration activities being discussed under EU Funding programme Horizon2020 in which EARTO members are currently involved.

Finally, the definitions provided in annex I and in the draft Framework for state aid for R&D&I should be harmonised: ie. Definitions of "aid intensity", "industrial research", "research and knowledge dissemination organisation".



EARTO is a non-profit international association established in Brussels, where it maintains a permanent secretariat. The Association represents the interests of about 350 RTOs from across the European Union and "FP-associated" countries.

EARTO Vision: a European research and innovation system without borders in which RTOs occupy nodal positions and possess the necessary resources and independence to make a major contribution to a competitive European economy and high quality of life through beneficial cooperation with all stakeholders.

EARTO Mission: to promote and defend the interests of RTOs in Europe by reinforcing their profile and position as a key player in the minds of EU decision-makers and by seeking to ensure that European R&D and innovation programmes are best attuned to their interests; to provide added-value services to EARTO members to help them to improve their operational practices and business performance as well as to provide them with information and advice to help them make the best use of European R&D and innovation programme funding opportunities.

EARTO Working Group Legal Experts: is composed of 25 corporate legal advisers working within our membership. Established autumn 2013, this Working Group has also produced an answer to the EC Consultation on the RDI framework. Our experts are also involved in the definition of the new DESCA Consortium Agreement model for Horizon2020.

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