EARTO Response to the EC Consultation on the Revised General Block Exemption Regulation (GBER)

8 December 2021

To answer the European Commission's public consultation on the review of the General Block Exemption Regulation (GBER), EARTO has analysed the draft revised GBER Regulation (consultation document), and would like to bring forward the following comments and recommendations:

1. **EARTO welcomes the proposed continuity with the current GBER Regulation.** As already stated in EARTO's response to the EC Consultation on the revised Framework for State Aid RD&I: **the rules to distinguish economic from non-economic activities are efficient. However, their national/regional interpretation needs to be improved**, to ensure that they do not hamper Europe's innovation capacity. In addition, Research and Technology Organisations (RTOs) should be considered by default as Research and Knowledge Dissemination Organisations (RKDOs), and not as "undertakings" under the RD&I Framework and GBER definitions. RTOs should be able to have their 100% full costs covered in national/regional RD&I competitive programmes funded by national public bodies, and in any case the State Aid rules cannot be used to justify lower funding rates for RTOs at national and regional level.

2. **The new concept of "testing and experimentation infrastructures" (TEIs) is welcome. However:**
   - **TEIs need to be clearly dissociated from what is commonly called "technology infrastructures" (TIs) in the definition proposed.** The EC proposed definition and concept for TEIs addresses infrastructures used predominantly for economic activities and, more specifically, for the provision of services to industry (point (2) of the GBER consultation document). However, TIs are managed and used by not-for-profit research organisations mainly in "effective collaboration" with other RKDOs and/or private companies, including SMEs (i.e. predominently non-economic activities including ancillary economic activities). In addition, including TIs in the scope of TEIs as defined in the draft GBER would create a gap between Research Infrastructures (RIs) and TIs, whereas a continuum is required.
   - **The State Aid rules (GBER and RD&I Framework) should rather differentiate infrastructures as to their type of activities: predominant economic activities should be the key criteria to define TEIs, and predominant non-economic activities (including ancillary economic activities) should be the key criteria to define RIs.** TIs should continue to be clearly included into the current scope of the RI definition, as it is the case in the current version of the GBER and RD&I Framework for State Aid.
   - To better align the TEI's provision with the reality of the RD&I ecosystems and enable its sound implementation, the notification threshold should be raised to 20 million euros (as for RIs); and preferential access or more favourable access conditions should be given to all undertakings contributing to at least 5% to the TEIs' investment costs.

   Implementing such changes would ensure a better alignment with the realities of the RD&I ecosystem, and foster a sound and non-disruptive implementation of these new state aid rules. This would also considerably limit the risk of different interpretations of those rules at national and regional levels, which would inevitably create distortions and harm the European level playing field.

3. **The proposed addition of a simplified cost approach in the form of a 15% flat rate to cover the indirect project costs in RD&I projects should be removed,** as this would in no case be a financially sustainable alternative for the coverage of real indirect costs in these projects. This is especially the case for RKDOs who also provide the use of their RIs during those projects, which can lead to very high indirect cost levels (see EARTO paper on Internal Invoices). RKDOs should be entitled to compensation for actual costs. If this is not the case, this could create major difficulties for RKDOs to participate in those competitively funded programmes.

More details on EARTO's position on these key points, along with detailed text changes suggestions, are outlined below to feed into the discussion on this revision.

EARTO - European Association of Research and Technology Organisations AISBL
Rue Joseph II 36-38, 1000 Brussels | +32-2 502 86 98 | earto@earto.eu | www.earto.eu | BE0465567732 - RPM Brussels

1. Economic and non-economic activities: the rules are efficient, their national/regional interpretation needs to be improved.

EARTO welcomes the proposed continuity with the provision of the current version of the GBER. In case of RD&I partnerships between Research and Knowledge Dissemination Organisations (RKDOs) and private companies where RKDOs' part of the partnership is funded or co-funded by private companies, the distinction made between "effective collaboration" (non-economic activities) and "research on behalf of undertakings" (economic activities) under the RD&I Framework definitions, enables a sound interpretation of the rules. Applying such distinction at the level of an organisation requires a steep learning curve and heavy internal processes to be put in place, which is why ensuring the stability of these rules is crucial.

In addition, EARTO believes that such provisions can indeed be effective and facilitate investments in the field of RD&I, provided that the sound interpretation of those rules is ensured at national level. **EARTO reiterates its call to the EC to put mechanisms in place to make sure that Member-States do not impose a risk-adverse implementation of those rules, which could create unwanted barriers, hamper the European innovation capacity and delay public and private RD&I investments in Europe.** In that context, EARTO very much welcomes the EC JRC Decision Tree[1], and very much encourages the EC to further promote it and the Member States to make good use of this key document. This includes the "array of proof" to distinguish between economic and non-economic activities for RKDOs' RD&I partnerships (co-)funded or sponsored by private companies, in order to ensure the proper application of the EU State Aid rules for RKDOs. The definitions of economic ("research on behalf of undertakings") and non-economic ("effective collaboration") activities under the EU State Aid rules' definitions should be acknowledged by Member States, especially for RD&I partnerships between RKDOs and private companies where RKDOs' part of the partnership is (co-)funded by private companies. These definitions should also clearly be differentiated from similar but not identical definitions in other national/regional rules, such as taxable and non-taxable activities in taxation law for instance.

Moreover, it is also important to reiterate that **Research and Technology Organisations (RTOs) should be considered by default as "Research and Knowledge Dissemination Organisations" under the EU State Aid rules' definitions, and not as "undertakings" as it is the case today in several EU Member States.** Indeed, regardless of their legal status (organised under public or private law) or financing model, RTOs are entities whose primary goal is to independently conduct research and to widely disseminate the results of such research activities, including by way of technology transfer (often being a public mission given to them by their State). **RTOs should therefore be able to have their 100% full costs covered in national/regional RD&I competitive programmes funded by national public bodies** (ministries and public agencies) where each partner is funded by the public body even at high TRL, including the programmes with and those without collaboration with industry. The EU State Aid rules cannot be used as an argument from Member States to finance RTOs like undertaking and to justify a funding rate below 100% for RTOs or with reimbursable advances in national/regional competitive publicly funded RD&I programmes. RTOs are not-for-profit organisations and any earnings from technology transfer are reinvested in the primary RD&I activities of the research organisation/infrastructure. RTOs are not "undertakings" and should not be treated on par with undertakings regarding costs reimbursement in those programmes. While RTOs' accounting allows them to distinguish economic and non-economic activities, they cannot provide for reimbursements nor fund such refunds in their accounts (see EARTO Background Note on Repayable Advances).

In general, RTOs are not direct recipients of State Aid, but they have RD&I partnership agreements with industry which can be of an economic nature (even though limited in capacity), alongside with their RD&I partnership agreements that are of a non-economic nature (which represent the predominant part in capacity). **RTOs monitor their (ancillary) economic activities closely to make sure that they do not unlawfully transfer indirect state aid to undertakings**. These RD&I partnership agreements with industry, both those considered as "non-economic" and those considered as "economic" under the EU State Aid rules' definitions, are an integral part of RTOs' public mission to turn promising basic research results into technologies with industrial maturity, lowering the risks of private RD&I investments to ensure industry's uptake of innovation, with high impact for society and the economy in Europe. Even though they remain limited in capacity, economic activities are needed for RTOs to be able to fulfil their public mission.

[1] State Aid Rules in Research, Development & Innovation - Addressing Knowledge and Awareness Gaps among Research and Knowledge Dissemination Organisations, EC DG JRC, November 2020

EARTO - European Association of Research and Technology Organisations AISBL
Rue Joseph II 36-38, 1000 Brussels | +32-2 502 86 98 | earto@earto.eu | www.earto.eu | BE0465567732 - RPM Brussels

2. The new concept of testing and experimentation infrastructures needs to be clearly dissociated from the one of Technology Infrastructures

The EC proposed definition and concept for testing and experimentation infrastructures (TEIs) addresses infrastructures "used predominantly for economic activities and, more specifically, for the provision of services to undertakings" (GBER consultation document). The current proposal for a definition of TEIs in the draft revised GBER also creates a parallel between TEIs and Technology Infrastructures (TIs), by stating that "Testing and experimentation infrastructures are also known as technology infrastructures". However, the two concepts should be clearly dissociated as they do not refer to the same type of infrastructures, as explained below:

- **TRLs:** TIs' main activities focus on the development of technology addressing intermediary TRLs; whereas TEIs' main activities focus on testing, demonstrating and experimentation activities which are much closer to market and at higher TRL.
- **Type of activities:** TI's activities are predominantly non-economic, and economic activities are ancillary and needed to perform the primary non-economic activities; whereas TEIs' activities are predominently economic in nature.
- **Users:** TIs are used by RKDOs to develop technology, both within their own individual research projects and in "effective collaboration" with other RKDOs and industry, including SMEs; whereas TEIs are mainly used by industrial users.

In addition, this proposal to include TIs under the TEIs' definition would create a gap between RIs and TIs where a continuum is required. In many cases RIs and TIs are operated in the same facility by the same research organisation. Collaboration between the different types of infrastructures and between the organisations managing them is essential to ensure the well-functioning of RD&I ecosystems.

Failing to dissociate the two concepts of TEIs and TIs under the definition proposed by the EC in the draft revised GBER would inevitably create implementation and compliance issues. This needs to be avoided in order to preserve Europe's capacity to efficiently invest in RD&I infrastructures, which is essential for Europe to deliver on the green and digital transitions, and to remain competitive at the global level. It is therefore very important to make sure that the RD&I Framework and the EU State Aid rules match the reality of the RD&I ecosystem.

The State Aid rules (GBER and RD&I Framework) should differentiate infrastructures as to their type of activities: predominant economic activities should be the key criteria to define TEIs, and predominant non-economic activities (including ancillary economic activities) should be the key criteria to define RIs[2]. The rest of the respective TEIs and RIs' definitions can then easily be derived from there. Making this distinction clearly based on such tangible criteria is the only way to ensure a sound and non-disruptive implementation of these new state aid rules, and to limit the risk of different interpretation of those rules which would create distortions and harm the level playing field.

This entails that:

- **The definition proposed for testing and experimentation infrastructures refers to infrastructures mainly used by industry, and whose activities are predominently economic in nature, as stated in the preamble of the GBER revision document in point (2). This is not the case for TIs** (predominently non-economic activities including ancillary economic activities) **which should be clearly excluded from the scope of the TEI definition.**
- **TIs should continue to be included into the definition of Research Infrastructures (RIs) as it is the case currently.** Indeed, TIs are managed and used by research performing organisations mainly in "effective collaboration" with other RKDOs and private companies, including SMEs. TIs' activities are predominently non-economic, and there is a continuum between RIs and TIs in RD&I ecosystems that needs to be preserved.

Accordingly, EARTO therefore strongly recommends the EC to:

a. Amend the proposed preamble clause 2 (page 2 of draft revised GBER) **by removing the mention to technology infrastructures in the definition of Test and Experimentation Infrastructures**, as follows:

[2] The concept of "Testing and Experimentation facilities" used under the Digital Europe programme can either fall under the TEIs or RIs state aid definition, depending on the predominant economic or non-economic activity use.

EARTO - European Association of Research and Technology Organisations AISBL
Rue Joseph II 36-38, 1000 Brussels | +32-2 502 86 98 | earto@earto.eu | www.earto.eu | BE0465567732 - RPM Brussels

Preamble (2) Aid for the construction or upgrade of testing and experimentation infrastructures mainly addresses the market failure stemming from imperfect and asymmetric information or coordination failures. Contrary to research infrastructures, testing and experimentation infrastructures are used predominantly for economic activities and, more specifically, for the provision of services to undertakings. Constructing or upgrading a state-of-the-art testing and experimentation infrastructure involves high up-front investment costs, which together with an uncertain client base, can render access to private financing difficult. Access to publicly funded testing and experimentation infrastructures must be granted on a transparent and non-discriminatory basis and on market terms to multiple users. To facilitate users' access to testing and experimentation infrastructures, their user fees can be reduced in compliance with other provisions of Regulation (EU) No 651/2014 or the de minis Regulation. If those conditions are not respected, then the measure may entail State aid to the users of the infrastructure. In such situations, aid to the users or for the construction or upgrade is only exempted from the notification requirement, if the aid to the users is granted in compliance with the applicable State aid rules. Multiple parties may also own and operate a given testing and experimentation infrastructure, and public entities and undertakings may also use the infrastructure collaboratively. ~~Testing and experimentation infrastructures are also known as technology infrastructures.~~

b. Amend the proposed definition of testing and experimentation infrastructures in Article 2 (w) (page 11 of draft revised GBER) **by clearly dissociating technology infrastructures from the scope of the TEIs' definition,** as follows:

(1) Article 2 is amended as follows:

(w) the following point (98a) is inserted:

"(98a) 'testing and experimentation infrastructures' means facilities, equipment, capabilities and related support services required to ~~develop,~~ test and upscale technology to advance through ~~industrial research and~~ experimental development activities ~~from validation in a laboratory to a~~ like validation representative of the operational environment, and that are used predominantly for economic activities (services to undertakings), and the users of which are mainly industrial players, including SMEs, which seek support to ~~develop and~~ integrate innovative technologies for the development of new products, processes and services, whilst ensuring feasibility and regulatory compliance*. ~~Testing and experimentation infrastructures are sometimes also known as technology infrastructures;~~

~~* See Commission Staff Working Document, 'Technology Infrastructures', SWD(2019)~~

c. Amend the proposed additional point in Article 4 (page 20 of draft revised GBER) **by raising the notification threshold for test and experimentation infrastructures at €20 million in alignment with the threshold for Research Infrastructures,** as investments in this type of infrastructures are very high in any case.

(2) in Article 4, paragraph 1 is amended as follows:

(b) the following point (ja) is inserted:

(*ja*) for investment aid for testing and experimentation infrastructures: EUR ~~15~~ 20 million per infrastructures;";

d. Amend the proposed additional point 3 in the new Article 26a (page 34 of draft revised GBER) **by lowering the share of investment costs from undertakings that could enable them to get preferential access to the TEI under more favourable conditions.** Given the high overall investment costs needed for these infrastructures, lowering this share to 5% will be key to foster private investments in TEIs and would increase the number of undertakings having access to the infrastructures.

(18) the following Article 26a is inserted:

Article 26a Investment aid for testing and experimentation infrastructures

3. Access to the infrastructure shall be open to several users and be granted on a transparent and non-discriminatory basis. Undertakings which have financed at least ~~10 %~~ 5 % of the investment costs of the infrastructure may be granted preferential access under more favourable conditions. In order to

EARTO - European Association of Research and Technology Organisations AISBL
Rue Joseph II 36-38, 1000 Brussels | +32-2 502 86 98 | earto@earto.eu | www.earto.eu | BE0465567732 - RPM Brussels

avoid overcompensation, such access shall be proportional to the undertaking's contribution to the investment costs and these conditions shall be made publicly available.

e. **Amend the revised Framework for State Aid RD&I accordingly to ensure a coherent approach between the revised GBER and the revised RD&I Framework for State Aid, by removing any mention to technology infrastructures and clearly differentiating infrastructures as to their type of activities:** (1) a Research Infrastructures' definition encompassing all the infrastructures whose activities are predominently non-economic nature; and (2) a Testing and Experimentation Infrastructures' definition as proposed in our point (b) above which address all the infrastructures whose activities are predominently economic in nature.

f. **Amend the proposed addition to Article 25 (e)** (page 33 of draft revised GBER) by deleting the mention of a simplified cost approach in the form of a 15% flat rate to cover the indirect project costs in RD&I projects. This would in no case be a financially sustainable alternative for the coverage of real indirect costs in these projects, especially for RKDO who also manage provide the use of their RIs during those projects which can lead to very high indirect cost levels (see EARTO paper on Internal Invoices). RKDOs should be entitled to compensation for actual costs. Even though the proposed wording indicates the use of such approach on a voluntary basis, its implementation by research funding agencies might defer as they tend to consider these options and incorporate them in their (possibly mandatory) general conditions. In the undesirable case when the EC would introduce such a flat rate anyhow, it should be set to a minimum of 30% of the eligible direct costs, but even then this could create major difficulties for RKDOs to participate in those competitively funded programmes.

(17) Article 25 is amended as follows:

in paragraph 3, point (e) is replaced by the following:

"(e) additional overheads and other operating expenses, including costs of materials, supplies and similar products, incurred directly as a result of the project; without prejudice to Article 7(1) third sentence, indirect R&D project costs ~~may also be calculated on the basis of a simplified cost approach in the form of a flat rate of up to [15 %],~~ applied to total eligible direct R&D project costs, are also eligible. In this case, both categories of direct and indirect costs shall be established on the basis of normal accounting practices, shall comprise only eligible R&D project costs listed above in points (a) to (d), and shall be duly justified.";

EARTO remains at the disposal of the EU Institutions to further discuss these recommendations and support the EC in its work to revise the European State Aid RD&I rules.

RTOs - Research and Technology Organisations: *From the lab to your everyday life. RTOs innovate to improve your health and well-being, your safety and security, your mobility and connectivity. RTOs' technologies cover all scientific fields. Their work ranges from basic research to new products and services development. RTOs are not-for-profit organisations with public missions to support society. To do so, they closely collaborate with industries, large and small, as well as a wide array of public actors.*

EARTO - European Association of Research and Technology Organisations: *Founded in 1999, EARTO promotes RTOs and represents their interest in Europe. EARTO network counts over 350 RTOs in more than 20 countries. EARTO members represent 150.000 highly-skilled researchers and engineers managing a wide range of technology infrastructures.*

Read more on EARTO's previous papers linked to this topic:

- *EARTO Response to the EC Consultation on the Revised Framework for State Aid RD&I, 2021*
- *EARTO Report on State Aid on R&D&I: The Right Way, 2021*
- *EARTO Recommendations for EU RD&I Policy Post 2020 (chapter 4), 2019*
- *EARTO Note on EU State Aid Rules for R&I, 2018*
- *EARTO Answer to the EC Consultation on the RD&I Framework, 2014*

EARTO - European Association of Research and Technology Organisations AISBL
Rue Joseph II 36-38, 1000 Brussels | +32-2 502 86 98 | earto@earto.eu | www.earto.eu | BE0465567732 - RPM Brussels