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Mr. Karl Soukup
Deputy Director-General State aid
Directorate-General for Competition
European Commission

HT.5967 – Review of the Communication on the Framework for State aid for research and development and innovation

Dear Mr. Soukup,

Following the public consultation on ***the draft Communication from the Commission - Framework for State aid for research and development and innovation*** (hereinafter: the draft Communication), I would like to present the Polish position.

The Polish authorities very much welcome the adjustments to the Communication targeted specifically at the following:

1. **improving and updating the existing definitions** of research and innovation activities eligible for support under the RDI Framework, in particular to clarify their applicability with respect to digital technologies and activities related to digitalisation;
2. **introducing new provisions to enable public support for technology infrastructures** (e.g. facilities, equipment, capabilities and support services required to develop, test and upscale technology, such as testing labs) with a view to incentivise RDI investments in this type of infrastructures;

3. **simplifying certain rules**, for example by introducing a simplified indirect cost calculation methodology for determining the eligible costs, in order to facilitate the practical application of the RDI Framework, where the evaluation has identified possible excessive administrative burden for companies and managing authorities.

Nevertheless, in order to provide that the proposed regulations are an effective tool allowing for the State aid rules to be correctly applied, in the opinion of the Polish authorities the draft Communication should be amended, supplemented or clarified in accordance with the comments presented below.

Comment 1 concerning monitoring period

In the Explanatory note to the draft Communication in point 3(b), the Commission explains that the monitoring period of the ancillary character of the economic activity referred to in point 22 of the draft Communication shall apply for a 10 year period as it is needed to be coherent with the 10 year prescription period laid down in the Procedural Regulation, i.e. the period beyond which the Commission has no legal means to request recovery of aid granted. The Commission also clarifies that this solution is being introduced to reduce the administrative burden.

On the other hand, in point 22 of the draft Communication it reads: "*The monitoring of the ancillary character of the economic activity shall apply for at least 10 years from the start of operations of the research organisation or the research infrastructure.*".

First of all, it needs to be pointed out that the abovementioned points are inconsistent - in the draft Communication the monitoring period is defined as "*at least 10 years*" whereas in the Explanatory note – as "*for a 10 year period*".

Moreover, the position of the Polish authorities is that **the monitoring period should correspond to the depreciation period of the subsidized assets** but in no case exceed **10 years.** Then conducting monitoring for a 10 year period would not be necessary where justified. The proposed obligation - in case of costs settled with depreciation write-offs, is inadequate. A suitable approach in relation to the principles of monitoring the economic / non-economic use of the project (results of R&D works, infrastructure, equipment) should introduce the rule described above - the monitoring period should be related to the depreciation period (this obligation should be maintained for the depreciation period but not for a 10 year period when it is unnecessary) and maximum for 10 years (even if the depreciation period is longer).

Therefore, the wording of both the draft Communication and the Explanatory note should be corrected.

Comment 2 concerning aid intensities

Maximum aid intensities (presented in Annex II to the draft Communication) are left at the current level. **The Polish authorities take the position that they should be increased** by at least 10 percentage points.

The challenges that Europe is facing, including challenges of digitization and greening the economy, and the need to catch up with the developing world in terms of R&D and innovations (USA, China, Korea and others) should result in an increase in R&D&I spending. However, the economies of the EU member states and their enterprises are in a state of "post-covid trauma", manifested by recession (national economies) and a slowdown in investment, including R&D-related investment.

Increased intensity would help to boost the investment impulse and generate more resources for this purpose, especially among SMEs.

Comment 3 concerning Digital Innovation Hubs (DIH)

DIH, including also European DIH, have been added by definition to innovation clusters, thus using an oversimplification, because it is difficult to agree that DIH are clusters. In this way, potential support for DIH will not differ from support for clusters, which are, after all, different institutions, established for different purposes. Thus, in the opinion of the Polish authorities **DIH and all their derivatives should have a separate definition and consequently separate state aid instruments assigned to them.**

Comment 4 concerning Technology Readiness Level (TRL)

It should be noted that in the definition section the Commission does not assign R&D categories to fundamental research, industrial research and experimental development with TRL (points 17(k), 17(n), 17(r) of the draft Communication). However, in footnote 52 to point 80 of the draft Communication the Commission indicates: "*When classifying different activities according to the relevant category (footnote 52*: "For practical purposes and unless it is shown that a different scale should be used in individual cases, the different R&D categories can also be considered to correspond to Technology Readiness Levels 1 (fundamental research), 2-4 (industrial research) and 5-8 (experimental development) – see Communication from the Commission, 'A European strategy for Key Enabling Technologies – A bridge to growth and jobs", COM(2012) 341 final, 26.6.2012*"), *the Commission will refer to its own practice as well as to the specific examples and explanations provided in the OECD Frascati Manual".*

The Polish authorities are of the opinion that the proposed assignment of TRL (5-8 for experimental development) is not appropriate and that leaving the footnote worded in this way may lead to the interpretation that the above has become a principle adopted by the Commission. **Therefore the Polish authorities take the position that footnote 52 should be deleted or supplemented as follows**: "*For practical purposes and unless it is shown that a different scale should be used in individual cases, the different R&D categories can also be considered to correspond to Technology Readiness Levels 1 (fundamental research), 2-4 (industrial research) and 5-**9** (experimental development) – see Communication from the Commission, 'A European strategy for Key Enabling Technologies – A bridge to growth and jobs", COM(2012) 341 final, 26.6.2012"), the Commission will refer to its own practice as well as to the specific examples and explanations provided in the OECD Frascati Manual".*

It should be noted that enterprises from the EU-15 countries have greater resources that enable them to finance the implementation of research results or the acquisition of ready-made technologies. Polish enterprises do not have such resources. Adopting a solution that eliminates TRL9 would lead to a situation where new technologies and research results, instead of being commercialised through implementation in one's own production, would be sold to another enterprise. Basically, the enterprise would receive funds for the realisation of research works up to TRL8, and then, due to the lack of further financing of technology transfer, it would sell the results of the works (license) to a large company or a foreign company (not necessarily European one), which would implement the solution on its own or could purchase IP only to keep the innovation off the market as a competitive solution to its own product. The above would have a negative impact on the level of competitiveness of both the Polish SME sector and in general the SME sector in the EU if the sale of licenses would take place outside the EEA.

The legal, substantive and scientific arguments, as well as strategic and economic arguments, support the inclusion of TRL9 in the scope of experimental development.

In the legal context:

In accordance with Article 179(1) of the TFEU: "*The Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area (…), and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other Chapters of the Treaties.*". Research activities that contribute to increasing competitiveness by commercialising the results of R&D projects are considered essential. Excluding the possibility to support works which leads directly to increased competitiveness is against

the law of the EU treaties. The narrowing of the scope of the support may constitute a violation of applicable EU law, especially in the context of Article 179(3) of the TFEU, according to which: *"All Union activities under the Treaties in the area of research and technological development, including demonstration projects, shall be decided on and implemented in accordance with the provisions of this Title*.". The EU Treaties do not specify the possibility of imposing restrictions on the use of Technology Readiness Levels and the Commission has no competence to narrow the provisions of the EU Treaties.

In the above context, it is significant to apply Article 180(c) of the TFEU, according to which the UE shall carry out the following activities, complementing the activities carried out in the Member States: "*dissemination and optimisation of the results of activities in Union research, technological development and demonstration*". Removal of TRL9 from the supported activities is in breach of Treaty provision that directly indicates the need to optimize research results (optimization works are the core of TRL9) and their demonstration (demonstration in a real-world environment is the core of TRL9). At the same time, the removal of TRL9 will generate a gap in the possibility of supporting technological development.

Similarly, such a wording is in breach of Article 180(d) of the TFEU, according to which the EU shall carry out the following activities, complementing the activities carried out in the Member States: "*stimulation of the training and mobility of researchers in the Union*". Full training of researchers is not possible without conducting a full range of research works – that is, from at least TRL2 up to and including TRL9. The core and purpose of the training process, especially in applied research, is to verify the results of scientific work in a real-world environment, thus conducted at TRL9.

Communication from the Commission "*A European strategy for Key Enabling Technologies – A bridge to growth and jobs"* does not specify the level of technological development up to which aid may be granted. Furthermore, it indicates that State aid: "*may be authorised up to the level that proves necessary to overcome the pronounced market failures and risks that hinder the deployment of large-scale, cross-border projects*" (page 12 of the above-mentioned Communication from the Commission). It also provides a table indicating the possibility of co-financing KETs within the scope of EU instruments under TRL1-TRL9, where TRL9 is in the all-important 'Competitive manufacturing' pillar. In this context, the proposal would constitute a restriction compared to the law already in force and the guidelines of the Commission itself.

Such explanation also applies to state support for the development of skills (qualifications and professional competences). According to the above document: "*The rapidly growing*

markets in KETs-related sectors require an increasing number of professionals at all technical levels and in different disciplines" (page 14 of the above-mentioned Communication from the Commission). Restriction to TRL 1-8 would be detrimental to the possibility of professional development of R&D staff and the possibility of lifelong learning for adults. It would also be in contradiction with all EU documents of a political and coordinating (strategic) nature that refer to building and improving the quality of human capital.

In the substantive and scientific context:

Definition of TRL 9: Technology readiness level, meaning that the demonstration of the final form of the technology has been completed and, most importantly, that it has been tested under real-world conditions. The essence of a research project in the field of applied sciences is the possibility of implementing the results of work in a real-world environment. Without carrying out works consisting in verification of the assumptions and correctness of functioning of the project result in a real-world environment, it is not possible to implement them. Restricting the possibility of conducting research works – no possibility to check and prove that the demonstrated technology is already in its final form and can be implemented in the target system, contradicts the sense of implementation of the project. In this regard, the question is: what is the point of carrying out a research project if it is not possible to verify the correct functioning of its results in a real-world environment, without which its commercialization is impossible?

Frascati Manual: According to Frascati Manual, R&D activity must meet five basic criteria: it must be innovative, creative, unpredictable, methodical, transferable or reproducible. The possibility of reproducing the technology, understood as the result of research work, is possible only after its verification in real-world conditions, which takes place within the framework of work at TRL9. In other words, without verifying the results of the work in a real-world environment, it cannot be determined that it is transferable or reproducible, and whether they meet the definition of R&D activity.

In addition, as defined in Frascati Manual, an R&D activity is "*the sum of actions deliberately undertaken by R&D performers in order to generate new knowledge*" (page 46 of Frascati Manual). The primary purpose of these activities is to implement a specific product (product or service). Without testing the product in a real-world environment, its implementation is not possible and therefore it contradicts the nature of the R&D activity. Also, the definition of applied research used in Frascati Manual - "*Applied research is either to determine possible uses for the findings of basic research or to determine new methods or ways of achieving specific and predetermined objectives. It involves*

considering the available knowledge and its extension in order to solve actual problems" (page 51 of Frascati Manual), points to a practical goal corresponding to the necessity of solving "specific problems" and therefore referring to the concept of changing the elements of reality that causes difficulties, are a challenge or a serious issue that requires a (scientific) solution. Reality cannot be changed by techniques and instruments not verified in practice and in a real-world environment. This contradicts the very definition of research, as well as the basic principles of research processes carried out in applied research - research is not "applied" if the possibility of "application" is not set out.

Research relevance: As mentioned above, the essence of R&D projects and applied sciences is the prospect of practical application. A research project that does not or cannot be verified in real-world conditions should not be qualified as an applied research. The inability to include works at TRL9 within the project, contradicts the essence of this type of activity. It should also be mentioned that implementation into business practice is associated not only with the development of an innovative product, but also with the necessity to solve a number of technological problems related to increasing the scale of production. In this respect, verification under real-world conditions is an indispensable element.

Strategic and economic relevance:

The EU aim is to achieve a combined level of public and private investments in R&D of at least 3% of GDP (European Council, Conclusions of 25-26 March 2010 - CO EUR 4 CONCL 1; Europe 2020: regarding *"Europe 2020: a strategy for smart, sustainable and inclusive growth"*). Excluding the possibility of co-financing projects at TRL9 moves away from the prospect of achieving this indicator, as the possibility of financing a significant part of R&D activities would be reduced.

It is also incompatible with the concept of development of enterprises, in particular SME sector (cf. Article 179(2) of the TFEU: "*For this purpose the Union shall, throughout the Union, encourage undertakings, including small and medium-sized undertakings, research centers and universities in their research and technological development activities of high quality*").

First of all, enterprises from the SME sector in many cases are not financially ready to invest in venture capital in order to move from experimental development to the phase of verification of project results in a real-world environment and finally to competitive production.

Secondly, the above violates the EU rules of the so-called additionality and concentration in the implementation of the structural policy, according to which co-financing from the EU is to supplement funds from the national budget to the extent necessary and indispensable for the realization of EU objectives (additionality), and the funds should be allocated to these regions and focus on these activities that need support to the greatest extent (concentration).

The identified problem in terms of socio-economic development of the EU is the weakness of the SME sector, especially in the field of implementation of R&D projects and possibilities of their commercialization. Removal of the possibility of support under TRL9 within the projects means it will be impossible to grant funds enabling the correct commercialization, possible only thanks to the verification of the product in real-world conditions.

Thirdly, it significantly reduces the competitiveness of all European enterprises in relation to enterprises that receive direct support from third countries (outside the EEA). It should be noted that non-European companies are subsidized by their countries of origin particularly at the stage of foreign expansion and implementation of results in real market conditions - *de facto* from TRL9 and up. The European Commission should be aware of this and respond appropriately.

Fourthly, it also clearly reduces the competitiveness of SMEs in relation to large enterprises that have the capital to carry out pre-implementation work in order to verify the product result in real-world conditions and the final implementation and commercialization.

Fifthly, this will have a negative impact on the already observed situation in which the European enterprises after the completion of research works, sell their results to large, international corporations, that either commercialize them on their own on international markets or reserve intellectual property rights / patents, blocking further development of technologies. This is in clear contradiction with the EU innovation policy, which is supposed to lead to the development of this sector and the commercialization of work results by European companies.

No.	Point of draft	Comment

1.	**14**	In general, the draft Communication is based on the current guidelines, leaving the current wording in many places. Consideration should be given to extending the scope of the Framework so that the criteria for the definition of "innovation" also include the transition from the production of prototypes to the market launch of a new product. Experience shows that this is a critical phase, as it is usually not covered by any support and for an innovative enterprise it entails a number of risks and costs that are very difficult to manage, especially for SMEs.
2.	**14(d)**	In the position of the Polish authorities, the introduction of the **aid for technological infrastructure** consequently requires regulation in the Framework as to what kind of aid may be granted to users of this infrastructure. It should be clarified whether the Commission in this respect envisages aid for experimental development, under which the costs of testing and validation of new or improved products, processes or services may be financed in an environment which is a model of real-life condition, or whether a new aid category will be dedicated to this. The wording of the Explanatory note to the draft Communication suggests that the Commission plans to introduce a new type of support in this regard, by explanation in point 2(iii) that "*the Member States will no longer be forced to allocate investment aid for each experimental development project carried out by specific users of a technology infrastructure (causing important administrative burden), but instead will be able to support investment into a technology infrastructure in one go*". The Polish authorities are of the opinion that this should be regulated in the Framework and/or in the GBER.
3.	**17**	There is no definition for "digital transformation". In this context the Polish authorities indicate that in general "digital transformation" is defined as integration of digital technology with all the fields of the business activity. Thanks to it, it is possible to use the collected data to create innovative services and to expand the existing offer. The digital transformation includes activity connected to modifying business and organisation processes. Its aim is to take full advantage of the

		opportunities offered by modern technological solutions.
4.	**17**	There is no definition for “digital services”. In this context the Polish authorities indicate that in general “digital services” (e-services)" are services that are provided over the Internet, are automated (may require little human intervention) and work remotely. What distinguishes e-service from a traditional service is the lack of human intervention and the remote manner of provision.
5.	**17**	There is no definition for “digital products”. In this context the Polish authorities indicate that in general “digital products” are products that are only available in electronic form. They include: e-books, guides, podcasts, movies, printable files, templates, graphics, training plans, menus or online courses, to which the buyer gets almost unlimited access from any device.
6.	**17(h)**	The definition of the term “digitalisation” needs clarification. In this context the Polish authorities indicate that in general “digitalisation” means the introduction of innovative digital technologies and / or solutions to improve and / or modernize processes, products or service functionalities. Digitalisation in a broad sense is the entirety of processes leading to the processing of analogue materials (coming from real world objects) into a digital form by scanning or photographing, and further computer processing of the obtained images into a form that allows them to be shared (e.g. in the network).
7.	**17(k)**	It appears that footnote 17 to point 17(k) of the draft Communication, referring to the definition of experimental development, which reads: “*Applicable also to digital industries and technologies, such as super-computing, quantum technologies, block chain technologies, artificial intelligence, cyber security, big data and cloud technologies*“ should be supplemented by adding the following at the end: “*or edge technologies*”.
8.	**17(t)**	With regard to extending the definition of **innovation clusters** by adding the objective of stimulating new ways of cooperation by the cluster through **digital means**, in the opinion of the Polish authorities the scope

		of this support for a cluster and support granted by cluster, should be more precise, indicating at least adequate catalogs of eligible cost.
9.	**17(t)**	The inclusion in the catalog of entities that may constitute innovative clusters, i.e. research infrastructures or technological infrastructures as autonomous entities with legal personality, and thus as potential beneficiaries of state aid, does not seem to be consistent with the definitions of research infrastructure and technological infrastructure from both the Framework and GBER. The mentioned documents define them simply as a set of tangible and intangible assets i.e. facilities, resources and related services. The Polish authorities propose to reformulate the definition of innovation clusters in this respect, or the definitions of technological and research infrastructure so that they are coherent and make it possible to provide aid to such entities as a separate legal entity, including clarification whether these entities (their coordinators managing services they offer as a cluster) can be provided with the state aid for innovative clusters under Article 27 of the GBER.
10.	**17(ll)**	As defined in point 17(ll) of the draft Communication "technology infrastructure" 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 validation representative of the operational environment, and the users of which are mainly industrial players, including SMEs, which seek support to develop and integrate innovative technologies to develop new products, processes and services, whilst ensuring feasibility and regulatory compliance*". In the position of the Polish authorities **this definition of "technology infrastructure" seems to be too general and causes many doubts,** in particular: • what is the difference between "technology infrastructure" and "research infrastructure" under Framework; • what is the difference between "technology infrastructure" and "research infrastructure" which can be supported under Article 14(11) of the GBER (referring to Regional investment aid) and Article

		25 of the GBER (referring to Investment aid for research infrastructures); • who could be an owner of "technology infrastructure" (enterprises or research organizations) and on what conditions; • whether this type of infrastructure may also benefit from support that does not constitute state aid (according to the definition, the users of the technology infrastructure are mainly industrial players, which implies that the infrastructure is used mainly for the purposes of an economic activity - this definition however does not exclude the use of the technology infrastructure for non-economic activities) and whether the monitoring principle should be applied. Moreover, it seems that technology infrastructure is planned to be supported in the same way as research infrastructures, i.e. limiting support to investment costs (it would be an investment project). Pursuant to the draft Communication, the intensity of aid for this infrastructure may not exceed 25% (and 35% or 40% under appropriate conditions). Considering the fact that the scope of the offer to be provided by this infrastructure, i.e. the development, testing of technology improvement in order to move within the framework of industrial research and experimental and development activities from validation in the laboratory to validation representative for the operating environment, it requires financing a project with a significant range of eligible cost, in the opinion of the Polish authorities **the proposed intensity value is not sufficient and may be blocking for the actual implementation of this support**, due to too high own contribution that would be provided by the beneficiary at such a low aid intensity. The Polish authorities propose to increase this aid intensity to the same level as in case of the aid for research infrastructure, i.e. 50%. Alternatively, in relation to aid for the construction and upgrade of technology infrastructures, in the opinion of the Polish authorities, the maximum aid intensity for SMEs could be increased and diversified depending on size of enterprise. In this case the proposed aid intensities are: 45% for small enterprise; 35% for medium-sized enterprise and 25% for large enterprise (without bonuses under appropriate condition).

11.	**22**	According to the well-established rules the monitoring and consequently the claw-back mechanism should be introduced whenever public funding is allocated to the construction or upgrade of research infrastructure where: • the economic activity carried out is purely ancillary (not exceeding 20% of the total annual capacity of the infrastructure), so the public funding does not constitute state aid; • the economic activity carried out covers more than 20% of the total annual capacity of the infrastructure, so public funding of this activity constitutes state aid; • there is no economic activity, so the public funding of this activity does not constitute state aid (this applies to situations where, at the time the public aid is granted, there is no economic activity but such an activity is in practice possible and permitted by the relevant national authorities). Point 22 of the draft Communication indicates: "*The monitoring of the ancillary character of the economic activity (…). In case the research infrastructure or the research organisation increases its economic activity so that it cannot be considered as ancillary, the public funding of the whole economic activity will fall under State aid rules*". The provision imposes the monitoring obligation only if the economic use of infrastructure is initially of ancillary nature and then, possibly, increases. The provision does not indicate an obligation to monitor the infrastructure in other situation. This raises questions whether it is necessary to monitor the economic use of infrastructure when it exceeds 20% from the beginning, i.e. in case of dual used infrastructure with economic activity at scope of 40% of its capacity, and non-economic at the level of 60%? In the opinion of the Polish authorities this issue should be addressed more precisely in the draft Communication.
12.	**31**	It should read: "For the purpose of point 30(d)...".
13.	**32**	It should read: "If none of the conditions in point 30…".

14.	**42-46**	There is a need to clarify whether the incentive effect exists in a specific but very common situation described herein. The eligible costs of the R&D project may include the costs of instruments and equipment to the extent and for the period used for the project. If such instruments and equipment are not used for their full life of the project, only the depreciation costs corresponding to the life of the project, as calculated on the basis of good accounting practice, are considered eligible. The problem arises when a beneficiary declares as eligible in such project a part of the depreciation cost of an instrument that he/she had acquired before the application for aid was made. In the context of the R&D projects it is usually considered that that works on a project start as soon as the assets' use has been reoriented towards R&D activities. Once this decision is taken and the application is submitted afterwards, aid for the project would not be considered to have an incentive effect anymore. It is a sound and reasonable interpretation. However, there are some interpretations published by the Commission on the E-State Aid Wiki which take different approach. Therefore, in the opinion of the Polish authorities, for the purpose of legal certainty, there is a need to clarify this issue in the Framework (for instance in a footnote).
15.	**81**	The proposed wording of point 81 indicates that indirect costs in R&D projects can be determined on the basis of a 15% flat rate related to the direct eligible costs of an R&D project, while the draft Common Provisions Regulation for the 2021-2027 in para. 54 provides for different rates of indirect costs: "Where a flat rate is used to cover indirect costs of an operation, it may be based on one of the following: (a) a flat rate of up to 7 % of eligible direct costs, in which case the Member State shall not be required to perform a calculation to determine the applicable rate; (b) a flat rate of up to 15 % of eligible direct staff costs, in which case the Member State shall not be required to perform a calculation to determine the applicable rate; (c) a flat rate of up to 25 % of eligible direct costs, provided that the

		rate is calculated in accordance with point (a) of Article 53(23)(a). In addition, where a Member State has calculated a flat rate in accordance with point (a) of Article 67(5) of Regulation (EU) No 1303/2013, that flat rate may be used for a similar operation for the purposes of point (c) of this Article.". Having in mind the levels of the present flat rates, as well as the new ones, the Polish authorities suggest that RDI Framework should also provide for a higher flat rate for indirect costs, i. e. of up to 25%.

Yours sincerely,

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Pomocy Publicznej
/podpisano elektronicznie/