

LU position paper – RDIF revision proposal

Luxembourg welcomes the RDIF revision proposal by the European Commission, which is key to ensure a smooth transition from the expiration of the temporary framework. Indeed, new types of aid to encourage innovation and digitalization are necessary to stimulate the economy after the pandemic of Covid-19, to allow Member States to properly implement the RRF and more generally to pave the way toward a greener, more digitalized economy, in line with the Green Deal objectives and the European Union's industrial strategy. To this end, Luxembourg believes that the RDIF rules need to be changed even further to incentivize companies in investing in digitalizing their activities.

1. New or updated definitions

Luxembourg welcomes the introduction of the new definitions for “applied research activities” (encompassing industrial research and experimental development), “digitalisation”, “exclusive development”, “net extra costs” and “secondment”.

a. Reference to digitalization

Several remarks are however worth making in relation with digitalisation:

- ***“Applied research activities” vs “process innovation”***: Luxembourg welcomes that the new definitions of “industrial research”, “experimental development”, “organisational innovation” and “process innovation” now clearly reference digitalisation. Luxembourg however regrets that the legal uncertainty stemming from the qualification of new or improved digital products, services or processes as industrial research/ experimental development or as process innovation is not addressed under the proposal. To give a concrete example, one could think of a software company wanting to develop a new software delivered to the client with the use of a new digital technology – and thus implying an internal process innovation. How should this project be qualified, keeping in mind that there is an aid intensity discrepancy (see point 13 below)? Luxembourg therefore invites the Commission to clarify under which type of aid (such) improved or new digital products fall.

- **“Digitalisation”**: Although this term is the subject of a definition in the proposal, it is nowhere to be found other than under point 124 regarding the compatibility assessment. Luxembourg invites the Commission to introduce the new definition into the definition of “process and organization innovation” as well as under “applied research”.

b. Questions raised by the introduction of the notion of “technology infrastructure”

In addition, Luxembourg believes that the introduction of the definition of “technology infrastructure” raises many questions. What is the difference between a “research infrastructure” and a “technology infrastructure”? According to the Commission, the two definitions differ in their client base and the main purpose of their activities. In this regard, Luxembourg wishes to observe that nothing in the wording of the RDIF indicates that the notion of “scientific community” only encompasses research activities of *public* research organisations, nor that the means to research must be provided exclusively or predominantly to the latter. Indeed, undertakings may clearly be considered to fall within the scope of the “scientific community”.

This conclusion is underpinned by the fact that the very definition of “research infrastructure” is borrowed from the ERIC regulation¹, which unequivocally acknowledges that, alongside research centres and universities, undertakings are part of the European research community:

*“This need has been expressed on numerous occasions both at political level by the Member States and the Community institutions, and **by the various actors within the European research community such as undertakings, research centres and universities and, in particular, the European Strategy Forum on Research Infrastructures (ESFRI)**”².*

As a result, Luxembourg invites the Commission to merge both definitions or to change the reference to the “scientific community” in the definition of “research infrastructure”.

This being said, Luxembourg welcomes the clarification concerning the compatibility assessment of investment aid to technology infrastructure, especially as regards the help to stimulate cross-border innovation and to facilitate access to SMEs.

¹ Council Regulation (EC) n° 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC), article 2 a).

² See recital 4.

c. Inclusion of digital innovation hubs into the definition of innovation cluster

Luxembourg is against the inclusion of digital innovation hubs in the updated definition of innovation clusters. It would lead to significant complications regarding the co-financing of such infrastructures if digital innovation hubs were to be considered as innovation clusters, in contrast to what has been agreed between the Commission and the Member States. In theory, 50% of the funding of digital innovation hubs could come from the EU level, while the remaining 50% could come from the national level. With innovation hubs falling under the innovation cluster aid, the funding is limited to 50% of the eligible costs rather than the remaining funding gap after the contribution from the EU level. This might negatively affect the dynamic of digital innovation hubs. Indeed, regions with a mature digital ecosystem are more likely to cover the remaining 50% of the eligible costs and to become autonomous after 10 years. This is not necessarily the case for less mature or smaller ecosystems. Luxembourg therefore believes that this might contribute to the digital divide in the European Union and invites the Commission to create a separate type of aid for innovation hubs or to increase the aid intensity and duration of operating aid to innovation clusters.

Luxembourg would also like to direct the Commission's attention to the fact that the 10-year maximum period for operating aid in favour of innovation clusters is missing in annexe I and II.

d. Missing definition of “business model innovation”

Last but not least, Luxembourg stresses the importance of introducing a new definition of “business model innovation”, which can be covered by innovation aid for SMEs, experimental development aid and organisation innovation aid, depending on the nature of the project. This is all the more important if the European Union wants to achieve its twin transition and incentivise companies to shift towards a circular economy model.

2. Public funding of non-economic activities and ancillarity principle

While Luxembourg welcomes the clarifications introduced to the notion of non-economic activities in the realm of R&D&I activities, it must be acknowledged that legal uncertainty persists.

For example, Luxembourg would like to know whether a technology infrastructure could be part of a research organisation and/or research infrastructure? Luxembourg also wishes to know

whether a research organisation/infrastructure having a technology infrastructure, such as a high-performance-computer, could be used by companies in the context of an effective collaboration, thus competing (in a distortive manner) with commercially exploited technology infrastructures?

Luxembourg also welcomes the clarification as regards the ancillary economic activities of research organisations and infrastructures. However, the 10-year threshold as regards the monitoring of economic activities is problematic for tangible assets, which are depreciated over a shorter period, or for research organisations, which are set up for a shorter period once the technology is mature.

Additionally, the Commission should clarify even further how to determine the “relevant entity” within a research organisation. Last but not least, Luxembourg invites the Commission to explain distinctly the legal consequences of exceeding the 20% threshold and to clarify that there is no retroactive effect.

3. Public funding of economic activities and aid passed on to undertakings

Luxembourg welcomes the clarification as regards research organisations and research infrastructures being “mere intermediaries” for passing the aid on to the final recipients. Luxembourg however wonders if point 24 would also apply to technology infrastructures that are part of a research infrastructure or research organisation. If so, the reduced price charged to companies for using the infrastructure, for example SMEs, would then qualify as state aid for the latter (innovation aid for SMEs). Would this imply that the company would not have to actually incur full costs? Usually, the company itself has to bear the true costs and ask for a refund of the aid thereafter.

4. Effective collaboration with undertakings

Luxembourg welcomes the clarifications foreseen in point 2.2.2. of the proposal, but kindly invites the Commission to clarify the following points:

First, that the collaboration agreement must be signed before the start of the project, but after the aid application by the company in order to avoid jeopardizing the incentive effect of any likely aid.

Second, and to avoid any misunderstanding already included in the current legal frameworks (GBER and RDIF), that even if an entity bears 100% of the financial costs, it nevertheless can benefit from the top-up foreseen in the GBER for effective collaboration.

5. Incentive effect and counterfactual

Luxembourg invites the Commission to clarify if (i) the entire costs of the project are eligible or if (ii) only the extra costs needed to change the manner or location of the project are eligible in a case where, thanks to the aid, the company does not carry out the project in a restricted or different manner or location.

Luxembourg however welcomes the clarification that if a company can demonstrate that the project would not or only partially be carried out in the European Union, this alternative project can be used to determine the counterfactual.

6. Scope of the aid to technology infrastructures

Luxembourg is of the opinion that it should be possible to award operating aid to technology infrastructure during a limited period of time, in line with the approach adopted regarding aid for innovation clusters, where operating costs can be covered for no longer than 10 years. This would also be in line with the new HPC regulation, which allows the Commission and Member States to cover 50% of the operating costs (See interinstitutional file number: 2020/0260(NLE)).

7. Transparency

Given the administrative burden and the incoherence with the *de minimis* regulation (1407/2013), Luxembourg strongly militates against the lowering of the transparency threshold from 500,000 euros to 100,000 euros.

8. Circular economy

In light of the twin transition objectives, Luxembourg strongly invites the Commission to introduce a definition of the concept “circular economy” in the new text. In the present context, a specific type of aid should be introduced to allow companies, especially SMEs, to come up with innovative solutions and business models in line with the circular economy principle. Alternatively, to demonstrate the importance of this new concept for the European Union, a top-up of 10% should be awarded to each R&D&I project contributing to the transition to a circular economy.

9. Simplified cost approach for indirect R&D project costs

The extension of the simplified cost approach in the form of a flat-rate is highly welcomed. However, Luxembourg thinks that, the Commission should define the notion of “indirect costs” for the sake of clarity and legal certainty, and raise the maximum intensity from 15% to 25%.

10. Notion of “equivalent services” under Annex I

Luxembourg invites the Commission to explain what is covered by the notion of “equivalent services” under the eligible costs for R&D projects (point (d)). To be more precise, Luxembourg wonders whether the term “equivalent” refers to the consultancy costs and/or to the costs of contractual research.

11. Maximum aid intensities under Annex II

Process and organisational innovation aid as well as innovation aid for SMEs is subject to a maximum 50% intensity. In contrast, the aid intensity for experiment development is capped at 45% for small undertakings and at 35% for medium sized undertakings. Luxembourg is of the opinion that this difference in aid intensities is counterintuitive, as the latter usually requires a higher technological challenge and risk compared to the former types of aid. Some projects can entail elements of three types of aid covered by the RDIF. This is for example the case of a project aiming at developing new products involving process innovation (therefore falling under the category of experimental development) but also facing challenges involving internal process innovation (therefore also falling under the category of process innovation and innovation activities of SMEs). In such a case, the company would clearly be inclined to frame its project in such a way as to fall under the highest aid intensity category. As a result, Luxembourg suggests aligning both aid intensities to avoid any distortive effects.

“Innovation support services” are now funded with the same maximum aid intensity of 50% as any other innovation advisory support or non-recurrent external service for SMEs. In contrast, the current RDIF allows Member States to provide a specific incentive by going up to 100% aid intensity, capped to a maximum of 200,000 euros over a 3-year period. This possibility is crucial to encourage SMEs to use services of digital innovation hubs or other infrastructures. Luxembourg therefore pleads to raise the aid intensity for innovation aid for SMEs to 100%, be it limited to a certain threshold.

12. Maximum aid intensities under point 95

Luxembourg welcomes the increase in the maximum aid intensities in point 95, especially for experimental development resulting from the new “applied research” definition. In practice, this will allow Member States to avoid lengthy discussions about the qualification of different work packages as an experimental development or industrial research project. Nonetheless, Luxembourg would appreciate if the Commission could clarify even further in which case these higher aid intensities can be used in contrast to those foreseen under annex II. In addition, could the Commission explain why no single aid intensity could be used for applied research projects involving work packages of experimental development and industrial research?

Luxembourg however believes that the maximum aid intensity foreseen for the construction and upgrade of technology infrastructures in point 95 should be raised to 50%. Furthermore, the share of the capacity which technology infrastructures have to allocated to providing services for SMEs in order to benefit from the higher aid intensity should be lowered from 80% to 50%. In addition, the 5% top-up should be increased to 10%.

13. *Ex post* evaluation of “large budget” aid schemes

The Commission should clarify the notion of “aid schemes with large budgets” which are subject to the *ex post* evaluation mechanism provided for in point 142. To this end, Luxembourg believes that a quantifiable threshold should be introduced.

14. Miscellaneous

Any revision of the current guidelines framing state aid for R&D&I activities should go hand in hand with a revision of the general criteria (for the guidelines and GBER alike). Indeed, if these criteria are not revised in order to better reflect economic reality (technical development, etc), the current revision will only have a limited impact. To this end, Luxembourg invites the Commission to revise and/or clarify also the following notions and criteria:

- ***Notion of undertaking***: Based on our recent experience and exchange with other Member States, it has to be noted that many granting authorities have difficulties in determining the notion of “undertaking”. This is not only due to different terms used in different regulations and communications, such as “undertaking, enterprise, business, company, single

economic entity, single undertaking, beneficiary, etc.”, but also to incoherencies regarding the scope of these notions.

When it comes to the SME analysis, partner undertakings are taken into account. Yet, when examining the undertaking in difficulty criteria, one has to look at the single economic entity (including links via natural persons). The single undertaking notion from the *de minimis* regulation however ignores the natural person dimension (although recent case law questioned this interpretation). Last but not least, it is not always clear at what level one has to verify whether the conditions are fulfilled. For example, does one check the Deggendorf principle at the level of the aid applicant, the enterprises considered for the SME assessment (including partner undertakings) or the single economic entity? The same goes, for instance, for the age limit for start-ups, which cannot be higher than five years.

- **SME definition:** Luxembourg stresses that it has already contributed to the public consultation on the SME definition (*12 page paper*) and that it is important that the DG Competition takes these considerations into account. The analysis of the SME definition puts immense administrative burden on the granting authority without guaranteeing a legal certainty, due to numerous doubts when it comes to its application.
- **Definition of “undertaking in difficulty”:** The definition is based on a 50% equity to share capital threshold ratio that needs to be met before any government support can be given. This rule sometimes causes serious obstacles for granting authorities. For example, an R&D intensive enterprise, with limited or no sales (so-called “cash burner”), regularly encounters a situation where more than half of its equity has disappeared because of accumulated losses. As a result, the company will no longer meet the required equity to share capital ratio and must therefore be qualified as an “undertaking in difficulty” (*see TAFTIE ad hoc group – final report – 16.01.2019*). Luxembourg fully supports the exclusion of economic unhealthy enterprises from state aid. However, the stringent conditions sometimes exclude promising young R&D-intensive enterprises, despite having a sound business plan. This is also an obstacle preventing Member States from supporting the digital transformation of the economy.

To overcome this problem, Luxembourg suggests the following changes:

- i. **Exemption:** To widen the scope of exemption from the “undertaking in difficulty” criterion to any R&D aid (article 25), innovation aid for SMEs (article 28) as well as aid for organisational and process innovation (article 29). In addition, a general age limit of 7 years should be introduced for any undertaking, in particular because the age limit has to be looked at the level of the single economic unit.
- ii. **Conditional aid award:** When the aid applicant is qualified as an “undertaking in difficulty”, but the single economic unit isn’t, it should be possible to grant an aid to the applicant under the condition that a capital injection into the aid applicant takes place prior to the payment of any aid. This practice of “conditional aid awards” has already been accepted by the Commission, but should be formalized in its guidelines and/or in the GBER.
- iii. **Definition of own funds:** An undertaking is “in difficulty” when more than half of its subscribed share capital has disappeared because of accumulated losses. This is the case when the deduction of accumulated losses from reserves and all other elements considered to be part of the own funds of the company leads to a cumulative amount that exceeds half of the subscribed share capital. The notion of “own funds” has a major impact on the outcome of the calculation. Several liabilities that are taken into account in common financial practice as durable funding pillars of a company are however being ignored in this criteria. Luxembourg therefore recommends to take specific long-term loans that qualify as quasi-equity and specific short-term shareholder loans into account as “own funds” when calculating the ratio.
- iv. **New ratio:** Luxembourg suggests to abandon the idea of working with a ratio based on subscribed capital. As an alternative, it is suggested to work with the absolute figure of the sum of equity and quasi-equity. As long as the sum of equity and quasi-equity is positive, a company should not be considered as an “undertaking in difficulty”.