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**COMMENTS BY THE GERMAN GOVERNMENT  
SUBMITTED AS PART OF THE PUBLIC CONSULTATION  
ON THE 'FITNESS CHECK' FOR EU STATE AID LAW**

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The European Commission (COM) has launched a public consultation designed to ascertain the ‘fitness’ of EU State aid law, complete with several targeted questionnaires. The results are to be fed into the discussions on a potential review of EU State aid law for the post-2022 period. The German government welcomes the fact that the Member States have been invited to be part of this process. The German government has therefore initiated broad participation from Germany (across the federal and state level and from stakeholders), and would like to use the ‘fitness check’ as an opportunity to submit the following comments:

**I. Introduction**

The German government holds the view that, in principle, the provisions of the modernised State aid rules have proven their worth. We should continue on this course. The modernisation process has also achieved a great deal in terms of clarifying previously unanswered questions around State aid. Considering the manifold and major new challenges arising from the changes happening in the global economy and the climate targets, however, the ‘fitness check’ has also shown that there is room for further improvements of the State aid rules.

The Important Project of Common European Interest (IPCEI) on Microelectronics and other IPCEIs that are still in the planning stages are good examples of how State aid law can act as an important tool for raising our competitiveness and for providing a level playing field. At the same time, our goal must be to ensure that the notification procedures for IPCEIs can be brought to a successful conclusion within a fairly short period of time – despite the complex requirements of the notification and the large numbers of players involved in several different Member States. Good progress on this has already been achieved in the IPCEI case on battery cells.

Beyond this point, it is also important that the future State aid rules give Member States more scope for implementing ambitious energy, environmental and climate policies. With its ambitious EU climate and energy targets for 2030, Europe is now about to take the next step towards decarbonisation. This notably entails ending coal-fired electricity and heat generation, ensuring an even more flexible electricity system, continuing the work to decarbonise the transport,

heating/cooling sectors and the industrial sector, further expanding and developing renewables capacity and technology, improving energy efficiency, and putting in place sector coupling. The EU State aid rules ought to give Member States sufficient scope for them to successfully deliver this structural change in way that is socially compatible. To carry out this structural change, a new instrument should be created that allows for targeted measures to be taken to avoid an economic collapse that could otherwise only be countered using funds made available under regional aid law.

Both existing State aid law and any reforms ought to always be designed to be proportionate in substance, lean in terms of the associated administrative burden, and solid in terms of legal certainty. Another important aspect to be considered is the need for European companies to be able to compete internationally, including against companies from third countries, some of which are recipients of considerable subsidies by the state.

## **II. Summary**

The following is a summarised account of the comments issued on individual parts of the legal framework, which are to be explained in greater detail in Chapter III:

- **GBER**

There is no doubt that the widening of the scope of the General Block Exemption Regulation (GBER) has simplified the grant process and sped up the relevant proceedings. The principle underlying the 2014 modernisation (lean procedures for small-scale cases) has proven its worth and ought to be upheld. The modernisation process has also achieved a great deal in terms of clarifying previously unanswered questions around State aid. In particular, the clarifications with regard to infrastructure financing, which were issued by the Commission in its Notice on the Notion of State Aid (NoA), the relevant provisions of the GBER rules, the specific information on the exemption from the State aid rules of financing provided within the R&D&I Framework and the Guidelines on State aid to promote risk finance investments, have all been helpful. That said, there are still some indeterminate legal concepts not yet sufficiently specified to be found in both GBER and the Commission Guidelines, which are continuing to cause a lack of legal certainty in certain cases.

Major difficulties arise from the fact that the Commission holds the view that the practice of charging a flat rate for overheads is not in line with Art. 7 GBER. It is not helpful that Art. 7 (1) (calculation of eligible costs in accordance with the simplified cost options set out in Regulation 1303/2013) applies only to projects financed through a Union fund.

The provision of possibilities to use flat-rate funding is seen as a considerable lever, particularly for supporting SMEs' innovative strength in an international market context and without too much bureaucracy.

The revised GBER also needs to take better account of technological progress, the increasing importance of the energy sector, and the necessary efforts for mitigating climate change. The current version of the GBER does not sufficiently address the issues of eMobility, sustainable and innovative types of energy (including hydrogen), or energy efficiency.

The overall administrative work required has changed following the reforms, but it has not been reduced by any significant margin. Its main activity is to ensure compliance with the requirements of the GBER. It is advocated that the requirements be simplified with regard to the practical implementation of the GBER, and that the possibility of electronic applications and documentation be provided. In our experience, it is mainly the publication and reporting provisions of Art. 9 and Art. 11 GBER that tend to have a 'deterrent' effect on smaller granting authorities. Furthermore, matters could be greatly simplified if the exemption were to extend to the users in their capacity as indirect recipients of aid – without the need for further exemptions or de minimis support for users; this is especially important in the field of infrastructure, e.g. for research institutions, cluster organisations, start-up centres, educational establishments. In fact, the users of this kind of infrastructure are the real target group.

- **de minimis Regulation**

The German government speaks out in favour of raising the total threshold for de minimis aid to EUR 500,000. The current EUR 200,000 threshold is no longer in tune with market conditions. Similarly, the thresholds for commercial road haulage, guarantees and loans should also be raised. The strict funding periods also ought to be adjusted.

Furthermore, a provision equivalent to the de minimis threshold is also needed for 'mezzanine' types of financing, such as subordinated loans and investments on a silent-partner basis. These ought to be considered transparent if the amount does not exceed EUR 750,000 or if the gross grant equivalent was calculated using the base rate as specified in the Communication on setting the reference and discount rates, plus a surcharge that would be one category lower than the one associated with the recipient's rating score, to account for the lack of collateral for the financing.

Aid provided to micro enterprises ought not to be considered aid within the meaning of Article 107 (1) TFEU, without the need for any additional conditions to be met (with

regard to the aid amount). Moreover, very small grants provided to SMEs, say of a maximum of EUR 5,000, also ought to be exempt from the scope of the Regulation or be subject to simplified notification obligations.

The German government continues to oppose the introduction of mandatory centralised registers of all de minimis aid provided in a Member State as this would cause a considerable administrative burden for the Länder. We hold the view that the retention period as per Art. 6 (4) Sentence 4 should be shortened. In this context, it should also be possible to introduce electronic documents stating the amount of aid provided, similar to those used to declare de minimis aid granted.

It is furthermore proposed that the SGEI de minimis Regulation should also be extended until 31 December 2022.

- **Guidelines for regional aid**

To avoid any confusion among the regional players, the Commission should define parameters within which regional business promotion is clearly considered aid-free. This would include such fields of action as information, advisory services, networking, site marketing, coordination between the public and private sector, and network management.

The restrictions pertaining to funding for large companies in C areas have proven to be unfavourable for economic development, particularly in the former GDR Länder in Germany, and are making it difficult for these regions to catch up. Despite the positive developments seen on the job market and with regard to income, including in the former GDR Länder, there continue to be major differences in economic performance within Germany. Overall, eastern Germany's per-capita GDP stood at 74.7% of the equivalent figure for western Germany in 2018. The main reasons cited for this are fragmented economic structures in eastern Germany as well as the lack of large companies and headquarters, resulting in comparatively low levels of innovation. This issue was raised both in the 2018 Annual Report on the Status of German Unity and in the final report issued by the Working Group for 'Business and Innovation' of the Commission tasked with establishing equivalent living conditions across the country.

- **Framework for State aid for research, development and innovation**

The Framework for State aid for research and development and innovation uses some definitions that are different from those used in the Frascati Manual. If the EU were to use the Frascati definitions, this could help better implement the State aid rules in the field of research and development. At present, the different definitions are resulting in a

lack of clarity. Also, the definitions used do not sufficiently take account of market developments.

At the lower R&D&I levels (Technology Readiness Levels (TRLs) 1-5/6), the R&D framework for SMEs can be considered to be sufficient. At the higher TRLs (TRLs 6-9), however, there is less scope for the public sector to foster innovation within SMEs. It is true that there are understandable reasons under State aid law that explain the existence of this 'death valley'. Nevertheless, this is a crucial point where changes to the State aid tool box available for research-driven and highly innovative SMEs could deliver overall competitive gains for the internal market as a whole.

The (different) ways in which the State aid rules are applied are sometimes seen as an obstacle preventing the R&D&I programmes from being more accessible and able to generate greater synergies in the field of research and innovation.

Whilst projects receiving funding under Horizon 2020 are, in principle, exempt from State aid reviews (Regulation (EU) 2018/1911 of the Council; Regulation (EU) No. 651/2014 of the Commission; Art. 107, 108 TFEU), the ESIFs are subject to national State aid reviews. This differentiated treatment of funding provided between Horizon Europe on the one hand and the ESIFs on the other has remained unchanged in the proposal for the post-2020 regulation tabled by the COM (in line with the relevant R&I classification distinguishing between 'experimental development', 'industrial research' etc.; or the TRL classification (technological maturity)).

This differentiated treatment is a source of confusion and uncertainty among applicants who cite it as one of the main reasons for the lack of synergies. It is made more difficult for applicants to make use of the desired effective and smart combinations (synergies) of the two programmes (ESIFs and Horizon 2020), as the differences between the two are causing them to be rarely combined at all.

It would be helpful if the application of the State aid rules could be streamlined and the complexity and intensity of the audits could be reduced (for instance by introducing ex-ante checks or issuing blanket certification for certain programme lines for R&I funding at the planning stage).

- **Communication on Important Projects of Common European Interest**

The Commission's Communication on IPCEIs is undoubtedly an important instrument for strengthening the innovativeness and competitiveness of European industry. The goal needs to be to ensure that the notification procedures for IPCEIs can be brought to a successful conclusion within a fairly short period of time – despite the complex nature and substance of the notification and the large numbers of players involved in several



different Member States. The rules for a project being designated an “integrated project” are very strict and should be reviewed or adapted. Practice shows that flexibility is also needed for IPCEIs.

- **Guidelines on State aid to airports and airlines**

The amount, to be fixed in advance, of maximum possible operating aid that can be awarded during the 10-year transitional period up to and including 2024 depends on the funding gap at the start. It is not possible to amend this amount if external circumstances change significantly and make it necessary for the business strategy to be altered so that airport infrastructure can be maintained and, if necessary, adapted in the public interest. Furthermore, in view of the lengthy approval processes and high construction investments, it ought to remain possible for air traffic infrastructure to be maintained and developed even once the transitional period has ended.

In principle, it should be assumed that an incentive effect is produced when a funding gap has occurred. The administrative effort involved, including the counterfactual analysis currently required – which is very complex to conduct and difficult to undertake in a rational manner – is not practicable. The same applies to the Commission’s limiting of investment support to the funding gap. Long-term prognoses, which are required in certain instances, are often difficult to make in practice. In addition, generating such prognoses makes the project more expensive overall, which in turn leads to an increase in the level of funding required. Overall, the levels of demand determined under aviation law should be sufficient.

Furthermore, it ought to be reconsidered whether small airfields on which only non-commercial general aviation or no commercial passenger and freight transport takes place, should be classed in the Guidelines on State aid to airports and airlines as being not relevant for the purposes of State aid assessment. Such small airports are not in any way important for competition within the European Union.

The concept of non-economic activities with implications for national sovereignty should be specified in greater detail. The scope of the term ‘local infrastructure’ should also be more clearly defined.

The criterion that the infrastructure serves the catchment area is only suitable to a very limited extent for ensuring that no excess capacities arise. No consideration is made of the different business models that the various airports can have or on which airports can focus in particular.

- **Guidelines on State aid for environmental protection and energy**

The German government sees State aid for energy, environmental protection and climate change mitigation as an effective and essential political instrument to create incentives for raising environmental protection and climate action efforts and thus for meeting EU targets. It takes the view that EU State aid rules should be further optimised based on experience with the existing rules to enable the Member States to implement ambitious energy, environmental and climate policies that are in Europe's interest, as doing so requires greater public investment to be made.

In addition, EU State aid rules should in future prioritise support for promoting renewable energy and energy efficiency as well as other safe and sustainable climate change mitigation measures, including information and advisory services that are relevant for purposes of State aid assessment. It should also take account of current developments in order to help lead the energy transition in Europe to success, enable the EU climate and energy targets for 2030 to be met and ensure that the EU long-term climate strategy (still to be developed) is adhered to. This also includes greater consideration of decarbonisation, eMobility and a stronger focus on innovative energy sources such as hydrogen. When it comes to revising State aid rules for energy, it is therefore very important to ensure coherence between the GBER, as well as the Guidelines on State aid for environmental protection and energy, and the "Clean Energy for all Europeans" legislative package.

With its EU climate and energy targets for 2030, Europe is now about to take the next step towards decarbonisation, which presents us with new challenges. This notably entails ending coal-fired electricity and heat generation, ensuring an even more flexible electricity system, continuing the work to decarbonise the transport, heating/cooling sectors and the industrial sector, further expanding and developing renewables capacity and technology, improving energy efficiency, and putting in place sector coupling. The EU State aid rules ought to give Member States sufficient scope for them to deliver this structural change in way that is socially compatible. This should be achieved not least through the granting of decommissioning premiums. In order to provide the Member States with legal certainty and create political visibility around such premiums, the Guidelines on State aid for environmental protection and energy should set out transparent and clear rules for the granting of State aid for the phasing out of coal-fired power generation and the use of coal for heat generation. In addition, funding provision needs to be improved in this area since the required investments are high. This should be done by setting higher aid intensities and providing operating aid.

The decarbonisation of the energy system and of industry can only succeed by working with industry, not against it. In order to help create acceptance for the energy transition and to protect the competitiveness of European industry, it is therefore crucial that energy-intensive companies can be granted exemptions from, or reductions in, taxes and levies used to finance the energy system. It is also particularly important to significantly improve long-term planning security for industry. In view of this, it is suggested that the Commission looks at extending the maximum period in which exemptions from, or reductions in, taxes and levies used to finance the energy system are permitted.

The interests of the EU Member States who want to phase out or have already phased out nuclear energy should also be taken more fully into account in the upcoming revision of EU State aid rules.

- **New instrument for managing structural change**

Germany's decision to end coal-fired power generation will make an important contribution towards combating climate change, adhering to the Paris Agreement, and meeting EU climate targets. To make sure this phase-out is successful, it is essential that it is made possible for measures to be introduced to manage the resulting structural change and establish economic structures which are sustainable in terms of their economic, environmental and social impact, in addition to the funding that can be granted under existing State aid instruments. This will enable an economic decline in the affected region to be prevented which in turn would have to be offset by regional aid resources. The new measures for coping with structural change should be based on the idea of compensation for the potential profit that is lost due to the implementation of the new overriding political objectives. What is needed is targeted and precisely dimensioned investment and start-up aid that is independent from regional aid rules in order to lead companies to set up operations in the areas which are initially less attractive due to the breaking down of value chains associated with lignite mining and coal-fired power generation. This could take the form of investment aid at a certain funding rate percentage (if necessary with extra funding for SMEs) and additional operating aid to compensate for the marketing disadvantages of locations undergoing a transformation towards establishing a sustainable structure.

- **Guidelines on State aid for rescuing and restructuring**

Territorial authorities and their dependent enterprises should be excluded from the scope of application as it is not possible to verify the "undertaking in difficulty" criteria, as set out in the definition, for these entities.

The definition of ‘undertaking in difficulty’ should be extended to include the point that although the formal criteria may be met, an undertaking may nevertheless not be considered as an ‘undertaking in difficulty’ if there is another private investor, independent of the undertaking, who would like to provide a significant amount of co-financing for the undertaking at the same time.

In addition, the ‘undertaking in difficulty’ definition of business development should be extended to include the reintroduction of an appropriate and meaningful observation period.

In future, the guidelines should also take account of the fact that there is the special feature in the technology sector, especially in venture capital financing in the early years, that financial resources can be ‘used up’ even past the end of the three years – meaning that, in a formal sense, more than half of the subscribed share capital can have been lost through losses, without the undertaking being classed as an ‘undertaking in difficulty’ in the primary sense.

There is still a lack of clarity with regard to letters of comfort, the treatment of loss carry forwards or the contribution of share capital in order to avoid the undertaking gaining ‘undertaking in difficulty’ status.

- **Guidelines on State aid for railway undertakings**

The stipulations set out in the Guidelines on State aid for railway undertakings, such as the definitions, have proven their worth and help the State aid rules to be adhered to. However, the current State aid rules for the railway sector have only partially achieved the objective of promoting this sector. In contrast, the competitiveness of the internal market has been maintained at a high level. Practice shows that rules on permissible State aid for innovation and investments are, however, too narrow. One option would be to include in the Guidelines on State aid for railway undertakings a separate rule on State aid for acquisition, renewal and refitting of rolling stock (locomotives and wagons) and for innovation funding for small, medium-sized and large railway undertakings for rail freight transport.

- **Communication on short-term export-credit insurance**

The Communication on short-term export-credit insurance works well in principle. Exemptions for marketable risks during the financial crisis and, in the wake of this, for Greece were established in the interest of the export market. The aim of “maintaining the competitiveness of the internal market” is, however, only partially fulfilled: when it comes to competition between exporters, there is increasing competition with exporters from outside the EU (particularly from Asia). Non-EU exporters can take advantage of support

from ECAs (export-credit agencies) that are not subject to the EU rules, i.e. ECAs that can offer support not only for countries that are classified as non-marketable risks but also for marketable risks.

The ECAs can generally provide short-term export-credit insurance cover for countries classified as non-marketable risks (provided that the risk is justifiable and the export merits support), while the private credit insurance market usually covers the so-called marketable risks. Outside of the EU, exporters can, however, usually receive cover from ECAs for all types of risk, which can lead to a competitive disadvantage for European exporters.

- **International competition**

European companies increasingly have to compete with non-European companies that gain benefit from low-cost government funding solutions in their home countries. In order to counter this distortion in international competition, the Commission should consider extending the matching clause to other areas and adding an external dimension to the legal framework, such as the *lex loci* solutions.

### **III. Specific comments on the individual legal frameworks**

#### **1. General Block Exemption Regulation (GBER)**

There is no doubt that the widening of the exemptions of the GBER has simplified the grant process and sped up the relevant proceedings. The principle underlying the 2014 modernisation of State aid law (lean procedures for small-scale cases) has proven its worth and ought to be upheld. The modernisation process has also achieved a great deal in terms of clarifying previously unanswered questions around State aid law. In particular, the clarifications with regard to infrastructure financing, which were issued by the Commission in its Notice on the Notion of State Aid (NoA), the relevant provisions of the GBER rules, the specific information on the exemption from the State aid rules of financing provided within the R&D&I Framework and the Guidelines on State aid to promote risk finance investments, have all been helpful. That said, there are still some poorly defined legal concepts to be found in both the GBER and the Commission Guidelines, which are continuing to cause a lack of legal certainty in certain cases. Feedback has shown that the large number of explanatory documents from the Commission (such as Notion of Aid, FAQ on the GBER) are appreciated in principle but a current need for updating is also seen to exist.

Major difficulties arise from the fact that the Commission holds the view that the practice of charging a flat rate for overheads is not in line with Art. 7 GBER. It is not helpful that Art. 7 (1) (calculation of eligible costs in accordance with the simplified cost options set out in Regulation 1303/2013) only applies to projects financed through a Union fund. We would argue that providing for possibilities to use flat-rate funding would serve as a considerable lever, particularly for supporting SMEs' innovative strength in an international market context and without too much bureaucracy.

The overall administrative work required has changed following the reforms, but it has not been reduced by any significant margin. The largest chunk of this work is required to ensure compliance with the provisions of the GBER and adherence to the transparency duties contained in the GBER.

We speak out in favour of simplifying the requirements with regard to the practical implementation of the GBER, and to provide for the possibility of electronic applications and documentation. In our experience, it is mainly the publication and reporting provisions of Art. 9 and Art. 11 GBER that tend to have a 'deterrent' effect on smaller granting authorities. Furthermore, matters could be greatly simplified if the exemptions were to extend to the users in their capacity as indirect recipients of aid – without the need for further exemptions or de minimis support for users; this is especially important in the field of infrastructure, e.g. for research institutions, cluster organisations, start-up centres, educational establishments. In fact, the users of this kind of infrastructure are the real target group.

The ban on granting State aid in Art. 107 TFEU firstly comprises State aid in all economic sectors. The GBER sets out conditions here under which certain groups of State aid may be viewed as compatible with the internal market per se. The requirements set out in the GBER are very high in the main – irrespective of whether they refer to an economic sector that is particularly vulnerable to competition distortions. This presents considerable hurdles to energy-efficient building assistance (e.g. low aid intensities, more efforts due to the necessity to provide evidence of additional investment costs) although it indisputably serves the purposes of achieving European climate goals, and substantial distorted competition or impairment of the European internal market is not to be expected. Therefore, the German government would like to see provisions in the GBER that take greater account of the intensity of competition distortions or of impacts on the internal market (weighing them up with EU objectives in other political areas, particularly in the energy and climate sectors).

In general, a suitable and system-compliant extension of aid elements or the creation of further exemptions (where applicable in harmony with the necessary extensions to the Enabling Regulation) is seen to be helpful. This applies particularly to cases in which assistance is

provided using intermediaries with the corresponding support structures or networks where applicable, e.g. economic development agencies, tourism organisations and Chambers of Commerce, because these cases are not covered or are covered only inadequately by the current exemptions.

## 1.1 Comments on the individual articles

- **Art. 1 – Scope**

Helpful additions to the scope:

- **Art. 1 (2 a) GBER**

The provision in Art. 1 (2) lit. a, in which the threshold of EUR 150 million in annual State aid budget for GBER exemptions without evaluation plan was introduced, should be examined in terms of the following aspects:

- Art. 1 (2) lit. a means that the GBER initially applies to State aid that is in line with the goals of the GBER only conditionally for six months if it exceeds a specific threshold. It is not only difficult to precisely determine when the threshold is reached here (e.g. in the case of State aid aimed both at businesses and consumers) but, once an evaluation plan has been submitted, a degree of legal uncertainty arises until a decision is made on the continuation of the GBER exemption.
- The constellation of the so-called indirect State aid should be explicitly included: if support is to be extended to the use of a product that so far is manufactured by only a few companies, the support, even if benefiting private persons (if they purchase a certain product, for example) is already viewed as (indirect) State aid in favour of the manufacturer. The GBER has so far not been aimed at this constellation so that in cases such as these a traditional notification procedure will usually be necessary even if the product for which the State aid is to be granted serves the objectives privileged by the GBER. This makes it difficult to fund innovative technologies in particular, in the energy sector for example, because new technologies of this nature are initially placed on the market by only a few manufacturers. At the same time, these technologies are usually considerably more expensive than conventional technologies precisely at the start of their market launch. If funding is made difficult, this will frequently also make the market launch of these innovative technologies difficult.

- **Art. 2 – Definition of terms**

- Art. 2 (18): Definition of ‘undertaking in difficulty’: in the new wording of the definition for ‘undertaking in difficulty’ in the SAM process, the following addition

from Article 1 (7) lit. a) and b) of the old GBER (EU) No. 800/2008 has no longer been taken into consideration: “[...], and more than one quarter of that capital has been lost over the preceding twelve months”. The development of an undertaking in the most recent past is highly significant for a correct assessment of the current financial situation of that undertaking as well as its prospective development in the short or medium term. Against this background, it is suggested that in the next adjustment of the GBER a similar addition be taken back into the ‘undertaking in difficulty’ definition according to which the financial situation of the undertaking is to be taken into consideration, making reference to the most current available data and substantiating documents.

- Art. 2 (33): In Article 2 (33), the term of ‘dedicated infrastructure’ is defined as “infrastructure that is built for ex-ante identifiable undertaking(s) and tailored to their needs”. This definition is very restrictive and is not in line with the assessment made by the Commission in its individual decisions. Problems arise particularly when extending infrastructures from which the already settled undertakings benefit. It cannot be ruled out that the definition applies in these cases. Exemption via the GBER would be associated with risks in this case. However, in decisions of the EU Commission, for example on Pro-Papier (State aid case SA.36147), the dedicated infrastructure is always only assessed for a single undertaking, whereby, according to the above definition, a dedicated infrastructure would appear to be also possible for several undertakings. Furthermore, another important criterion from the Pro-Papier decision was not taken into consideration in the above definition. The extended use for other users/undertakings not determinable at the time of construction is an important criterion which should be included. It is suggested that Article 2 (33) is adjusted along the following lines: ‘dedicated infrastructure’ means infrastructure that is built for ex-ante identifiable undertaking(s) and tailored to their individually determined needs.
- Art. 2 (39): Operating profit – appropriate profit: In principle, it is useful to supplement Art. 2 (39) GBER by the addition of the following wording: “Discounting revenues and operating costs using an appropriate discount rate allows a reasonable profit to be made.” However, the Commission should permit a ‘suitable’ discount rate as a safe harbour directly in the rules (not only in the FAQ, paragraph 255 to Art. 56 GBER), as in the case for structural fund rules. The discount rate of 4% for structural funds referred to and accepted by the Commission in paragraph 255 of the FAQ to the GBER originates from the Commission Delegated Regulation



(EU) No. 480/2014 of 3 March 2014. In the section on the method of calculating discounted net revenue of projects generating net revenue, the following is determined in Article 19 of this Regulation: “1) Cash flows are discounted back to the present using a discount rate of 4% in real terms as an indicative benchmark for public investment operations co-financed by the ESI Funds. 2) Member States may use a discount rate other than 4% if they provide a justification for that benchmark and ensure it is used consistently across similar operations in the same sector. 3) Values other than 4% may be justified on the grounds of: a) the nature of the sector concerned. ...”. According to the requirements in structural fund rules, discount rates usual in the industry and differing upwards of 4% which are used in all the Länder should ideally be uniform. How is this supposed to be ensured? The respective discount rates would also only be able to be used for a certain period (annually?). This would not appear to be a practicable provision and should not be included in the GBER or its Annexes. It must be possible for the respective granting authority to determine appropriateness in an individual case. There is no reason that discounting shall be declared to be the only possible method of determining appropriate profit. The Commission has so far accepted in the FAQ that, for example, the return on sales can be taken as a basis for cultural organisations; see answer on paragraph 235: “For example, for museums and other cultural institutions, rate of return on sales may be easier to use.” It is correct that the return on sales is generally easier to handle for small givers and recipients of grants than the discounting of the operating profit. Therefore, this method should also be continued to be allowed as an alternative. The deduction of operating profits from the investment is anchored in several articles of the GBER. We see very large parallels here to the provisions on the deduction of net revenues after conclusion of a project where ESIF resources have been used in application of Article 61 of Regulation (EU) No. 1303/2013. In connection of the use of ESIF funds, a de minimis limit of EUR 1 million applies to the deduction of the co-financeable expenses with respect to the fundable expenditure. Below this de minimis level, there need be no deduction. Furthermore, the methods are described by several implementation and delegated legal acts. A simultaneous application of both methods is ruled out where ESIF funds are used because the net revenues are only to be taken into consideration for funding with no relevance for the purposes of State aid assessment. Nevertheless, where ESIF funds are used both methods should be designed in the same way. Therefore, the following wording is suggested for a new paragraph 8 in Article 56: “8. Where funds are deployed from the

European Structural and Investment Fund, the provisions in Art. 61 of Regulation (EU) No. 1303/2013 may be applied to take account of the operating profit of the investment.” Additions of the same wording are proposed for Article 55 new paragraph 13 and for Article 53 new paragraph 8(a). Similarly, the definition of ‘Operating profit from the investment’ in Article 2 (39) ought to be extended. A further aspect refers to the possibility of a flat-rate deduction of the operating profit from the investment in Article 56 where ESIF funds are not used, as provided for in Articles 53 and 55 (‘safe harbour’). For the purposes of simplification, this should also be possible in the scope of Article 56. Proposed wording: “In the case of State aid not exceeding EUR 2 million, the maximum State aid amount shall be set at 80% of the eligible costs in derogation of the method described in paragraph 6.”

- Art. 2 (44): In Art. 2 (44), the word ‘Herstellung’ in the German version should be replaced by the word ‘Extrusion’ as in the English version. The synthetic fibres sector has long been subject to a ban on the granting of State aid with respect to regional State aid. In the German version of the GBER, the synthetic fibres sector is defined as “Herstellung/Texturierung aller Arten von Fasern und Garnen auf der Basis von Polyester, Polyamid,...” (see Art. 2 (44) a)). The English version reads “Extrusion/texturisation...”. The word ‘Herstellung’ in German, which is translated as ‘production’ in English, goes beyond the term ‘extrusion’ which is also normal German language usage. Under “production”, textile businesses also fall under the aid exclusion that produce yarns from staple fibres.
- Art. 2 (51) b: The requirement of the ‘new activity’ is not useful for the acquisition of the assets belonging to an establishment that has closed or would have closed had it not been purchased. Such takeovers of establishments are basically only of interest if the existing inventory (e.g. machinery) can also be used. An undertaking that carries out a quite different activity has no interest in these machines. Why should it then purchase the establishment? It may then at best be interested in the building (building shell). The same applies to the corresponding provision in the Guidelines for regional aid (see paragraph 20 i) b) Guidelines for regional aid).
- Art. 2 (91): In Art. 2 (91), the definition of ‘research infrastructure’ should be adjusted such that, in contrast to the building or the facilities of a research organisation, research infrastructure is characterised by the fact that third parties are granted open, transparent and non-discriminatory access.
- Art. 2 (109): Replacement of the term ‘electricity’ by ‘energy’, i.e. inclusion of energy and heat. Introduction of the term ‘output’ so that electricity, heat, hydrogen

and other chemical substances can be included as storage media. Deletion of the restriction (“but excludes electricity produced as a result of storage systems”), which means that stored green electricity is no longer viewed to be green when further used and therefore also not the products generated with it.

Proposed wording for Art. 2 (109) ‘energy from renewable energy sources’: means energy produced by plants using only renewable energy sources, as well as the share in terms of the calorific value of energy produced from renewable energy sources in hybrid plants which also use conventional energy sources. It includes energy from renewable energy sources used for filling storage systems, and their output.

- Energy efficient district heating and cooling are defined in Art. 2 (124) GBER and Section 1.3., paragraph 19 (14) of the Guidelines on State aid for environmental protection and energy 2014-2020 as “district heating and cooling systems which satisfy the definition of efficient district heating and cooling systems set out in Art. 2 (41) and (42) of Directive 2012/27/EU” (Energy Efficiency Directive). The provision in Art. 2 (42) of the Energy Efficiency Directive is, however, worded too imprecisely for a sensible and practical application of State aid law and should therefore be examined and specified in greater detail for these purposes. The pertinent provisions for smaller heat networks and smaller district heating projects also appear to be impracticable.
- Art. 2 (130), definition of ‘energy infrastructure’: The definition of ‘energy infrastructure’ appears to be too narrow in the area of electricity storage systems. Accordingly, electricity storage systems fall exclusively within the definition of energy infrastructure which are directly connected to the high-voltage transmission lines. Rather, the definition should be provided independently of the connected voltage level. It is therefore suggested that this restriction be deleted without replacement, i.e. the following passage should be deleted in Art. 2 (130) a) iii): “provided they are directly connected to high-voltage transmission lines designed for a voltage of 110 kV or more”, and replaced by the following wording “provided they are directly connected to high-voltage transmission lines”.

- **Art. 4 – Notification thresholds**

It is proposed that the notification thresholds for inland harbours of relevance to trans-European networks be doubled to EUR 100 million. This would appear to be consistent with the system of Art. 4, because the notification thresholds for research projects which,

as Eureka projects, are of European importance (or Community undertakings) are similarly twice as high as in the basic constellations (see Article 4 (1) lit. i) and iv).

In connection with energy efficient district heating and cooling, the definition of the term 'aid projects' within the meaning of Art. 4 (2) GBER or of the term 'investment projects' in Art. 4 (1) w) GBER should take into account the practical and technical circumstances of long-term transformation projects. The legal linking of several transformation steps - particularly in the structural optimisation of larger existing heating networks in several steps – is not a suitable foundation, because it does not take into account the higher investment expense for larger networks which must be transformed step by step via subnetworks.

- **Art. 5 – Transparency of aid**

- Art. 5 (2) lit b:

The funding of subordinated capital is currently viewed to be intransparent aid, the gross grant equivalent of which cannot be precisely calculated ex ante. Provisions or individual State aid which do not satisfy these requirements must be reported to the EU Commission.

It is proposed that the Commission stipulates general criteria for the determination of the gross grant equivalent State aid – based on the experience collected with notifications in this area – with the objective of recognising the funding of subordinated capital as a transparent form of State aid.

- Art. 5 (2) lit. k:

The transparency provision is useful but the limitation to expert evaluation is not helpful: for many small cases in the municipal area, the costs associated with an expert evaluation are disproportionately high. It would be helpful in terms of legal certainty to include a note/clarification in the Regulation that regional rent references also fall under the alternatively funded market benchmarks, which are in the public domain, regularly updated and generally acknowledged. However, a minimum requirement should be a safe harbour for small cases – such as up to EUR 1 million total volume of the contract over the term or a specific period (this would be approximately in line with the old threshold for safe harbour provisions in the area of infrastructure). A method is required for these cases, which is simple to use and does not produce additional costs, e.g. in accordance with Art. 25 b R&D&I Framework (i.e. total costs of the landlord/lessor so that they reach a breakeven point plus an appropriate profit margin – the possibility

should then similarly be provided for a flat rate for ease of handling, e.g. 1% of turnover).

- **Art. 6 – Incentive effect**

- Art. 6 (2), written form: In accordance with the GBER, the application for State aid must be submitted in writing. By contrast, it is regulated in the de minimis Regulation (Article 6 (1)) that a de minimis declaration can be made in writing or electronically. When revising the GBER, it should be clarified that the funding procedure can be handled not only in writing but also electronically depending on the rules in the Member State.

- Art 6 (4): The reference to tax advantages should be deleted here and instead reference be made to all possible forms of State aid:

*“By way of derogation from paragraphs 2 and 3, measures [~~in the form of tax advantages~~] shall be deemed to have an incentive effect if the following conditions are fulfilled:*

*a) the measure establishes a right to aid in accordance with objective criteria and without further exercise of discretion by the Member State; and*

*b) the measure has been adopted and is in force before work on the aided project or activity has started, except in the case of [~~fiscal~~] successor schemes, where the activity was already covered by the previous schemes [~~in the form of tax advantages~~].”*

- **Art. 7 – Aid intensity and eligible costs**

- Art. 7 (1): Simplified cost options, as currently provided for in Article 7 GBER in connection with the Structural Fund funding, should generally be accepted as costs under State aid law. The very restrictive admissibility of flat-rate approaches in cost settlement leads to difficulties and considerable bureaucratic work in practice.

- Art. 7 (3) currently reads as follows: “Aid payable in the future, including aid payable in several instalments, shall be discounted to its value at the moment it is granted. The eligible costs shall be discounted to their value at the moment the aid is granted. The interest rate to be used for discounting purposes shall be the discount rate applicable at the moment the aid is granted.” The provision should be extended to revenues. Currently, Art. 2 (39) provides for a discounting of revenues for infrastructures only. It cannot be understood why revenues should not be

discounted outside the area of infrastructures. This could lead to an unjustifiable reduction in the maximum aid intensity.

- **Art. 9 – Publication and information**

The Transparency Database (TAM) was introduced with the objective *inter alia* of providing citizens with better access to information on state funding measures and creating equal competitive conditions in the internal market. At the same time, an attempt was made to reduce reporting duties in order to cut the enormous administrative work. We continue to welcome this objective. However, it has emerged that the current reporting procedure leads to considerable work in individual cases particularly if a large number of aid givers are involved and/or the aid is phased. Simplifications in practical handling should be examined.

Furthermore, double publications as part of the satisfaction of transparency requirements on publication and information should be avoided. According to Article 10 of the Agricultural Block Exemption Regulation and paragraph 130 of the Agricultural Framework, the possibility exists even now to avoid double publications due to the parallel transparency obligations in Regulation (EU) No. 1306/2013. A corresponding provision is not currently provided in the GBER. However in practice, for EAFRD measures which do not fall within Article 42 TFEU, both an exemption according to the Agricultural Block Exemption Regulation and the GBER come into consideration in addition to an approval of the measure. A typical application refers, for example, to broadband expansion activities which fall within the GBER. A provision comparable to that in Article 10 of Regulation (EU) No. 702/2014 is therefore desirable here.

- **Art. 13 – Scope of regional aid**

It is suggested that regional funding be opened to existing undertakings in the strategically important size range above the former SME threshold (so-called mid-caps). The special importance of assisting such undertakings which have already exceeded the threshold of 250 employees is also emphasised in the current strategies of the EU institutions (InvestEU for example). Preferential assistance for small mid-caps would be justified because it is aimed predominantly at regional family undertakings.

- **Art. 14 – Regional investment aid**

- Art. 14 (6) – Acquisition of the assets of an establishment

Under Art. 14 (6), the requirement of acquisition by an independent investor is waived in the case of takeovers of small undertakings. The restriction of the waiver to exclusively small undertakings is not sufficient. In many cases, mid-caps are family

undertakings in which a change in generation and the implementation of corresponding successor regulations are directly imminent. In terms of company succession, these undertakings face the same funding problems as small undertakings and should therefore be subject to the same conditions.

- Art. 14 (7) – Basic changes in the production process: Art. 14 (7) sentence 1 regulates the amount of eligible costs in State aid for fundamental changes in the production process. It should be clarified here that limiting the amount of the eligible costs refers to “the depreciation of the assets linked to the activity to be modernised in the course of the preceding three fiscal years”.

The second sentence of Art. 14 (7) regulates the amount of State aid for the diversification of the production of an existing establishment. There are interpretation difficulties with the definition of assets that are reused.

It is not clear, for example, whether these also include the land and buildings necessary for the business even if they are not affected by the diversification. If the book values of assets which are not affected were also to be considered, there would be a very high threshold for using this provision.

Therefore, clarification would be helpful, which could be worded as follows:

“For aid granted for a diversification of production of an existing establishment, the eligible costs must exceed by at least 200% the book value of the assets that are reused, as registered in the fiscal year preceding the start of works and which have been posted on a pro rata basis for the assets included in the diversification”. With this wording, it is clear that the 200% application threshold only refers to that part of the assets which are actually affected by the investment project.

It is suggested that the scope of the book value criterion for State aid for the diversification of the production of an existing establishment (with such State aid, the eligible costs must exceed by at least 200% the book value of the assets that are reused, as registered in the fiscal year preceding the start of the works, Art. 14 (7) Sentence 2 GBER) be provided only for large undertakings, and therefore that SMEs are also to be excluded from this condition. The advantage would be that the verification and auditing concerning the subject of “reused assets” would no longer apply in an individual case.

- For further explanations, see Section 3.

- **Art. 17 – Investment aid to SMEs**

The possibilities of assisting corporate succession are greatly restricted by Art. 17. On the other hand, there is considerable interest in a practical exemption because currently there is a significant number of companies where an economically desirable arrangement as to succession is soon to be made.

The acquisition of assets associated with an establishment pursuant to Art. 17 GBER is only possible if the condition is satisfied that “the establishment has closed or would have closed had it not been purchased”. The criterion of “closure of the establishment” is too restrictive and not economically helpful.

A privilege is only applied to the takeover of a small undertaking by family members of the original owner or by former employees because the condition no longer applies that the assets of third parties who are not related to the buyer must be acquired. It would be helpful to also include medium-sized undertakings as well as customers and suppliers in the privilege.

For the purposes of company succession, the acquisition of shares via so-called share deals should also be permitted if the buyer assumes a managerial position in the undertaking and/or actively shapes business policy. The acquisition purely for purposes of maximising yield would therefore still be excluded.

- **Art. 20 – Aid for cooperation costs incurred by SMEs participating in European Territorial Cooperation projects**

State aid for cooperation costs incurred by SMEs participating in European Territorial Cooperation projects are exempted as State aid under certain circumstances under Art. 20 of the GBER.

The limitation of the exemption to cases of cooperation within the framework of the European Territorial Cooperation should be deleted. Art. 20 should be extended to those programmes of the EU Structural Fund that facilitate cooperation by SMEs across borders.

- **Art. 21 – Risk finance aid and Art. 22 – Aid for start-ups**

The provisions on SME funding in the GBER are welcomed with respect to Art. 22 because they are suitable for providing start-ups with easier access to public funding. However, the provisions on risk finance aid in Art. 21 only benefit certain fund constructions and do not take account of the fact that funding banks have been established for the task of fund management in many Member States. Funding tasks can therefore be transferred in the in-house procedure. The provisions from the European



Structural Fund were further specified in this respect as part of the so-called Omnibus Regulation. Furthermore, different tasks, such as that of fund management and financial intermediary, can be assumed by one organisation. A harmonisation of the GBER with these developments would appear expedient for the next funding period.

– Art. 21 (2) and (3):

In Art. 21: Paragraphs 2 and 3 set out the admissible forms of risk finance aid (equity, quasi equity investments or financial endowments, loans and guarantees). However, direct grants to private investors should also be included in the GBER as admissible risk finance aid.

– Art. 21 (13) lit. b:

The requirement in paragraph 13 b.) is problematical for financial intermediaries such as the national/regional funding banks. Once the investment period of a fund has expired, the management of the successor fund under paragraph 13 b.) must in principle be the subject of a new call. This leads to several problems, the main one being that the development of an efficient organisation is made difficult. The management of the financial intermediary which divests only the first fund but no longer engages in any new investments has little motivation; the best managers will leave the fund prematurely for this reason in the short or long term. Private investors at the level of the financial intermediary are deterred due to the lack of continuity. It is therefore suggested that - at least with the financial intermediaries on whose boards private investors are on the same level as public investors and have veto rights - a new call to select the entire fund management is waived and that instead it is ensured that investment managers are hired based on invitations to tender on the market.

– Art. 21 (17):

It should be made clear in paragraph 17 (as in Art. 16 (11)) that 'entrusting' an entity replaces the selection decision by way of a 'call' (Art. 21 (13) lit. b) or Art. 16 (8) lit. a), b)).

- ***State aid for research and development and innovation in the GBER (Section 4)***

The definitions used in the GBER for research and development are not in line with EU Regulation 995/2012. In the 'Europe 2020' strategy, the core objective stipulated by the Commission was that 3% of the gross domestic product of the Union was to be invested in R&D by the year 2020. State aid policy should be structured such that it contributes to the achievement of the 3% goal. The measurement of the 3% goal is based on EU Regulation 995/2012, which is founded on the definitions in the OECD's Frascati Manual. Attention

should therefore be paid to ensuring that the terms used in the Union Framework for Research, Development and Innovation are compliant with the measurement of the 3% goal. Accordingly, the definitions for research and development, basic research, applied research and experimental development should be adjusted to the Frascati definition.

For SMEs, the rules are still too complicated in some cases, leading to a high demand for advice and to the perception of an impediment in part. Example: in obtaining patents (in accordance with Art. 28 GBER), other State aid maximum intensities arise than for the remainder of the project – if it is to be assigned to the area of experimental development. A uniform funding quota cannot therefore be determined for the entire project. Consequently, separate application procedures are currently necessary.

- The existing funding possibilities in the GBER and the Union Framework are too small for the transition of activities of the research institutions to the market. R&D is not an end in itself. The aim is to be able to use the knowledge generated from it. There is currently a gap in the transition from non-commercial work and research to the start of economic exploitation. More possibilities are required on how R&D results can be made marketable, e.g. in the preparation of spin-offs to primarily non-economic research institutions - something that can be funded better.

See statements under 8.4 by way of supplement.

- ***Art. 26 – Investment aid for research infrastructures***

The exemption in Art. 26 is restricted to research infrastructures. This means that research institutes which are to be viewed as a building or facility of a research entity may not be viewed separately and exempted, even if the aid is institute-related. Instead, it is proposed that an option be granted in Art. 26 as to whether the granting authority is to determine the admissible funding for the individual research institute based on the overall financing of the research entity or is to determine such for the individual research institute which is to receive the funding. In the latter case, the exemption in Art. 26 should apply.

The option could be integrated into Art. 26 as follows. Addition to paragraph 1 by Sentence 2: “The provisions of this article shall apply mutatis mutandis to buildings or facilities of research entities where the admissible amount of aid is calculated for the individual building or the individual facility.”

- ***Art. 27 – Aid for innovation clusters***

- Art. 27 (4) – Fees for use

It is suggested that the requirement of fees for use corresponding to the market price be deleted and that the exemption is therefore extended to the indirect recipients of State aid. The provision means that minor de minimis State aid is handed out en masse. This is associated with considerable bureaucracy without the cluster activities being company-specific measures as a rule (for which it is necessary to record the advantage on the part of the user).

– Art. 27 (6) – Aid intensity of investment aid

The maximum admissible aid intensity of 50% for clusters and cooperation networks presents a considerable impediment to the development of sustainable hub structures, particularly in the initial phase. Exceptions should be created which permit higher aid intensities if a special interest exists (e.g. in the area of climate change mitigation).

– Art. 27 (7) – Granting of operating aid

The limitation on operating aid for the operation of innovation clusters to a maximum of 10 years should be deleted without replacement or at least extended. From our point of view, the market fails continually when it comes to the networking of R&D activities, particularly between different SMEs, and with research entities and universities so that lasting pro rata funding of the operating costs of ‘innovation clusters’ that support such networking appears to be justified.

All innovation clusters initiated by economic policy have substantial coordination problems caused by the approach adopted: their task is to interlink small, medium-sized and large undertakings and other stakeholders along their thematic value added chains. The enterprises concerned are frequently either in direct competition or are so far from each other in terms of content and/or geographical position that they will not find each other without the assistance of a cluster organisation operating on a long-term basis.

The temporal restriction of operating aid to 10 years puts into question the development funding so far provided and the ongoing economic efficiency.

– Art. 27 (9) – Aid intensity of operating aid

In Art. 27 (9), the admissible aid intensity of operating aid should be increased from 50% to 85% of the eligible overall costs.

Like the Commission, Germany also believes that the creation and activities of clusters represent an important instrument of economic, structural and innovation policy to generate new growth. The promotion of clusters is made on the recognition that

external effects do not ensure adequate private funding – especially if the cluster organisations must contend with additional political objectives such as those imposed by Smart Specialisation Strategies. An aid-free funding share of 50% does not permit adequate funding of the cluster organisations, particularly in the phase of building trust and developing a strategy, meaning that the regional and innovation policy objectives cannot be reached.

Furthermore, the aid quota of 50% up to now presents a high hurdle, particularly for SMEs. In practice, this means that clusters frequently also actively address and incorporate (solvent) major undertakings. However, the financial predominance of large enterprises runs the risk of weakening the orientation to SMEs and their strengthening.

See supplementary statements under 8.4.

- **Art. 30 – Aid for research and development in the fishery and aquaculture sector**

Art. 30 regulates research and development aid in the fishery and aquaculture sector. However, in the German version, the second half-sentence in paragraph 5 contains a reference to *agricultural* products ('landwirtschaftliche Erzeugnisse'). This is evidently a translation error in the German version and should be corrected ('Erzeugnisse der Fischerei und Aquakultur' instead of 'landwirtschaftliche Erzeugnisse'). The English version refers here to "an undertaking producing, processing or marketing fishery or aquaculture products".

- **Section 7 GBER – Aid for environmental protection**

- Targeted inclusion of alternative fuels: The development of infrastructure for alternative fuels (and the support of alternative vehicle technologies and renewable energies) is a declared objective of the EU. Accordingly, the GBER should be extended to include an independent exemption (Art. 48a) or alternatively be supplemented (Art. 48). Currently, facilities to produce hydrogen, for example, are not adequately included in the GBER.

- Simplification of the rules and increasing aid intensity:

The German government advocates a simplification of the rules (not only eligibility of extra costs) and an increase in aid intensity, where applicable (possibly jointly with the introduction of a maximum amount for individual projects).

- Additional investment costs: Under Art. 36, 37, 38, 40, 41 and 46 GBER (and the Guidelines on State aid for environmental protection and energy) only those additional investment costs are eligible which are necessary to improve environmental protection,

energy efficiency or to promote the generation of renewable energy (e.g. Art. 36 (5) or Art. 38 (3) GBER). The calculation of these eligible costs is extremely complex, including *inter alia* the creation of a reference investment scenario, and raises many questions. In this way, the rules produce legal uncertainty, cause high administrative cost and lead to delays in the approval of projects. Complex exemption regulations represent an impediment to investments not only for SMEs. Therefore, exceptions should be introduced, at least for projects with only low aid intensities and for those for which no reference investment scenario can be determined.

In addition to the problem of the calculation method, the use of additional investment costs leads to a very low funding intensity with respect to the overall investment costs. In order to effectively provide an incentive for additional investments (and not only raise upcoming investments to a better level), the aid intensities for exempted aid should be raised significantly.

See also statements under 8.4 a) here.

- Aid intensity of up to 100% of the eligible costs through request for calls: The German government therefore believes that it would also be useful to request calls in the area of energy efficiency and heating/cooling in which the aid intensity can amount to 100% of the eligible costs (similar to Art. 41 (10) GBER). This would provide greater incentive to grant investment aid in the heating/cooling area to promote renewable energies and energy efficiency as part of the call procedure. The introduction in the GBER would mean that individual notification for such programmes would no longer be necessary, thereby relieving the Commission of work and accelerating the procedure.
- **Art. 39 – Investment aid for energy efficiency projects in buildings**

Article 39 is based on a rather impractical concept for the advancement of efficiency measures in buildings, which is why the provision ultimately does not hit its mark; not a single case of application is known. This is inadequate in view of the energy efficiency goals in the most relevant building sector. The requirement to use an energy efficiency fund and the specific requirements placed on financial intermediaries should therefore be deleted. The assumption that the conducting of a funded project under Art. 39 GBER must be put out to call in every individual case also appears to be inexpedient (see Art. 39 (8) lit. b GBER), and should similarly be deleted. Requesting calls for each project represents considerable administrative work on the part of the Member States and undertakings and ultimately has a prohibitive effect. Art. 39 does therefore not contribute to increasing the number of refurbishments in particular.

Furthermore, the provision in Article 39 (6) GBER should be revised: it actually “forbids” repayment subsidies. However, in a low interest rate environment, sufficient incentive cannot be offered with cheaper interest rates alone. It would therefore be better to waive this provision and to resort to a different instrument for the assessment of the total aid amount.

- **Art. 41 – Investment aid for the promotion of energy from renewable sources**

- The term ‘promotion’ should be replaced by ‘generation’ in order to clarify that the issue is to generate renewable energy. Furthermore, the ‘storage’ of energy from renewable sources should be included in the exemption in order to simplify the funding of storage of renewable energy (electricity and heat, physical and chemical storage, for example also via hydrogen). Accordingly, the definition of renewable energies in Art. 2 (109) GBER should be adjusted (see above).

Proposed wording for Article 41 (1) – Investment aid for the generation of energy from renewable sources:

“1. Investment aid for the generation and storage of energy from renewable energy sources shall be compatible with the internal market within the meaning of Article 107 (3) of the Treaty and shall be exempted from the notification requirement of Article 108 (3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.”

- Moreover, the use of energy from renewable sources in the areas of heating/cooling should be given special consideration in the investment aid rules. So far a general rule has existed in Art. 41 GBER for investment aid to promote energy from renewable sources. However, the generation of electricity or fuels from renewable sources seems to have been the focus of the formulation in the main. It should therefore be considered that particularly the area of building/heating/cooling represents a substantial proportion of final energy consumption and that there is still enormous potential to use renewable energies here. At the same time, whether and which options exist to use energy from renewable sources depends greatly on the individual case in the area of buildings. Therefore, the possibility of providing an incentive for a corresponding development with national aid is of special importance, because it would probably be very difficult to address this area with the funding on a larger (European) scale.
- It should therefore be investigated whether it would be possible to separately address, and possibly give preferential treatment to the promotion of energy from renewable sources in the areas of buildings/heating/cooling, for example by a special rule. A privilege could be not only declaring the additional investment costs as eligible but, by

way of exception, the investment costs themselves, in order to increase the incentive for undertakings to install more environmentally friendly but more cost intensive facilities.

- The maximum aid intensity for investment promotion in the area of renewable heating (Art. 41 GBER) is also usually inadequate to facilitate a realisation of projects in the area of solar energy and ground source heat pumps. The main reason for this is the low operating costs for alternative heat generation using fossil fuels.

- **Art. 44 – Aid in the form of reductions in environmental taxes under Directive 2003/96/EC**

Art. 44 GBER determines the conditions under which aid may be admissible in the form of environmental tax reductions according to Directive 2003/96/EC (Energy Tax Directive).

Art. 44 (2) GBER in particular states that beneficiaries may receive a tax reduction if they pay at least the minimum level of Union taxation set out in the Energy Tax Directive. Art. 2 (120) GBER defines the term ‘Union minimum tax level’ and refers in particular to the amounts in Annex I of the Energy Tax Directive that provides for specific minimum tax levels for individual fuels and heating materials as well as electrical current in three tables. The Energy Tax Directive not only permits the granting of the tax reductions mentioned in the GBER but also provides the Member States with the possibility to grant “unrestricted or restricted tax exemptions” (see for example Art. 15 (1) Energy Tax Directive).

Whether Art. 44 (2) GBER also permits (complete) tax exemptions if they satisfy the other requirements of Art. 44 GBER is not clear from the wording of the provision. Reference is only explicitly made in the heading of Art. 44, in Art. 44 (2) itself and elsewhere in the GBER to “tax reductions” but not explicitly to “tax exemptions”. The Guidelines on State aid for environmental protection and energy explicitly refer to both versions (e.g. in No. 3.7.1: “Aid in the form of reductions in or exemptions from environmental taxes”). In order to clarify that aid in the form of exemptions from environmental taxes within the meaning of the Energy Tax Directive are also admissible under the GBER, there should be a supplementary clarification in the heading of Art. 44 and in particular in Art. 44 (2) GBER. It should be expressed here that in addition to reductions in environmental taxes, unrestricted or restricted tax exemptions can be granted (in particular to support energy and climate objectives). This would facilitate a parallel and coherent application of the Energy Tax Directive and the GBER and prevent a situation in which a preferential instrument explicitly provided for by the Energy Tax Directive cannot be applied. Finally, the declaration given as part of the Energy Tax Directive for the Council Protocol No. 1 of 7 October 2003 (13253/03 ADD 1) explicitly provides for the Commission doing its utmost “to ensure that measures taken by Member States in accordance with the exemptions and

tax reductions laid down in the Directive will be considered compatible with State aid rules.”.

- **Art. 48 – Investment aid for energy infrastructures:**

Art. 48 (6) GBER rules out an exemption of aid for investments in energy storage projects. The German government believes that it would be useful here to extend the wording to include a special provision for energy storage (for example in the form of a re-exemption).

- **Art. 53 – Aid for culture and heritage conservation**

With respect to “aid for culture and heritage conservation”, it can be established that the Commission’s ‘Notion of Aid’ from 2016 led to dismantling unnecessary bureaucracy and to simplifications for cultural organisations, which have proven their worth. This successful practice should be maintained and could be given greater emphasis, where applicable.

- **Art. 54 – Aid schemes for audiovisual works**

For the area of audiovisual media, particularly the introduction of exemptions in the GBER has led to a significant simplification of procedures with more efficient administrative processes. The Cinema Communication continues to be highly relevant for all aid above the thresholds in the GBER and forms the benchmark for the interpretation of Art. 54 GBER.

Also in view of strong competition on the film market from outside of Europe, State aid in the audiovisual area is important for the maintenance of audiovisual productions and therefore the richness of European culture and diversity.

- Art. 54 (4) GBER – Increase of the 80% threshold for aid with the obligation for territorialisation

Art. 54 (4) GBER provides for expenditure subject to territorial spending obligations not being above 80% of the entire production budget under any circumstances. The Commission believed that this provision was appropriate at the time in order on the one hand to adequately take account of the requirements of the EU internal market and on the other to give the Member States the scope to satisfy their cultural policies. The basis for assessment to calculate the respective grant is reduced by the current requirement in the case of aid instruments with territorial reference as soon as over 80% of the production costs are allocated nationally. This disadvantages purely national productions. From our point of view it curtails the scope afforded to Member States by the Commission to realise their cultural policy in the area of film promotion to an untenable extent.



Audiovisual content, above all cinema films and series, contributes directly more than any other media to a mutual cultural understanding within the European Union. It is precisely those projects which are realised exclusively in a Member State that transport through language, history and images the cultural setting and traditions of a country and which are indispensable if a varied cultural landscape is to be maintained in the EU.

We therefore suggest that the 80% threshold set out in Art. 54 (4) GBER be revised and thought given to raising it. Raising the threshold to 100% would completely remedy the current disadvantage to national productions.

Cross-border coproductions are not at risk here in our opinion. Coproductions are not realised solely for financial reasons but also due to artistic creativity and access to a foreign market. This view is also supported by the results of the “Study on the economic and cultural impact, notably on co-productions, of territorialisation clauses of State aid schemes for films and audiovisual productions” (<https://publications.europa.eu/en/publication-detail/-/publication/23dfbbfb-8e05-4df6-a554-988b3c5e69ea/language-en>) commissioned by the COM. The study comes to the conclusion in paragraph 10.2 that the territorialisation obligation does not constitute an impediment to coproductions but rather makes productions, including coproductions, possible in the first place.

– Art. 54 (9) GBER: Applicability of the GBER also to individual parts of production (VFX) and to artificial intelligence

The audiovisual area is subject to changes as a result of digitalisation to a special extent. European film makers are faced with tighter competition with global, usually non-European productions. This applies especially to studio capacities and providers of digital image editing (VFX) because visual effects can be created globally and independently of the respective production location. At the same time, the significance of these techniques for the content of films is increasing. The production of films as a cultural product is now very difficult to conceive without digital image editing that has a significant creative value of its own.

The GBER and the Cinema Communication still fail to give adequate consideration to these noticeable developments on the market for audiovisual productions. Rather, Art. 54 (9) rules out State aid for specific production activities and film studio infrastructures.

According to the Cinema Communication, there is a need for State aid for audiovisual productions because they are investment-intensive and associated with high financial

risks, which also have an impact on their profitability. However, the arguments provided in favour of promoting audiovisual production apply equally to VFX productions. The VFX area is associated with high fixed and investment costs. What is more, the frequently high risks associated with film projects also present VFX undertakings with difficulties in procuring financial means.

Against the background of the increasing significance of digital image editing, the current assessment of promoting these industries under State aid law should therefore be revised and possibilities of providing exceptions for such funding from the ban on granting State aid investigated.

When examining individual areas to be exempted, new areas, such as the development of Artificial Intelligence (AI), should also be taken into consideration. AI has reached a new phase of maturity in recent years and is developing into a driver of digitalisation in all areas of life and work. This also applies to the cultural and audiovisual area in particular.

AI is not only an important economic factor for the Union. AI can also extend the cultural spectrum, offer inspiration in the creative process, create new forms of works and facilitate new paths of cultural education, thereby contributing to artistic and cultural diversity. The State aid rules should also make a contribution to ensuring that this potential of AI is suitably tapped. The incorporation of AI into the scope of the GBER would constitute such an approach.

- ***Art. 55 – Aid for sport and multifunctional recreational infrastructures***

Undertakings in difficulty: This exclusion from the scope of the GBER should be removed for cases of operating losses (for example, as in Art. 55 (11) GBER), where balancing out the operating loss was reason for the insolvency.

- ***Art. 56 – Investment aid for local infrastructures***

The absence of an exemption for operating aid leads in practice to expense and raises questions such as on the operation of municipal halls where such measures are categorised by the Commission as being ineligible as SGEIs. The exemption should therefore extend both to investment aid and to operating aid for local infrastructures.

According to the Commission, Art. 56 GBER does not offer a foundation for network infrastructures which are not broadband infrastructures. There is no foundation for networks which can be used as part of initiatives to develop Smart Cities (e.g. communication networks/intelligent electricity networks e.g. in industrial parks).

- **Art. 56a – Aid for regional airports**

The airports falling within the scope of the GBER are clearly defined. The administrative burden for these airports has reduced. The rules on operating and investment aid for airports in the scope of the GBER are appropriate.

With the inclusion of State aid for regional airports in Regulation (EU) 2017/1084 (Art. 56 a), investment aid for airports with up to 3 million passengers a year (as long as no other airport with scheduled traffic is located within a radius of 100km or 60 minutes driving) was declared to be compatible with the internal market. Operating aid is compatible in the case of airports whose average annual passenger volume in the last two years has not exceeded 200,000 people.

These regulations have led to a substantial simplification and clarification of the State aid rules. The administrative work and costs for the requisite notifications have also been reduced in this way.

Irrespective of this, the provisions appear to be open to improvement. The passenger threshold of 200,000 should be set higher. The Commission itself established in paragraph 118 b) of the Guidelines that airports with 200,000 to 700,000 passengers per year are not in a position to cover a significant share of their operating costs. These airports should therefore also be included in the GBER. This is also to be seen particularly against the background that a notification procedure usually costs between EUR 300,000 and EUR 1 million due to the advisory costs incurred. These high preparatory costs are sustained irrespective of whether an investment or funding follows or not. Furthermore, these advisory costs are usually not covered by funding under German law.

What is more, the administrative burden on the public authority and the State aid recipient to register operating aid on the basis of airport guidelines is disproportionately high for small regional airports (over 200,000 passengers). For those airports not in a position to cover their operating costs, the economic situation is worsened further by the bureaucracy involved and the costs for notification. In view of the low competitive significance of these airports, the costs for the notification procedure appear to be disproportionately high.

- **Art. 56b – Aid for maritime ports/ Art. 56c – Aid for inland ports**

In our assessment, the amended GBER has led to more clarity in some cases. The new Articles 56b (Aid for maritime ports) and 56c (Aid for inland ports) contribute to legal clarity. The changes made in the amendment at the time (e.g. exemption of initial and maintenance dredging) are also to be assessed positively. The clarifying and flanking effect of the “Analytical Grids for Port Infrastructure” published by the

Commission is to be emphasised in this respect. However, not all concerns expressed by the German side were taken into consideration in the amendment (for example, suprastructures are excluded from the provisions of the GBER).

– **Aid for the construction and operation of shoreside electricity facilities:** Since shoreside electricity facilities are to be viewed as port infrastructure in accordance with Art. 2 (157), (161) GBER, public investments in their construction, replacement or modernisation can basically be exempted from notification under the conditions set out in Art. 56b (1), (2a) GBER. In practice, however, individual notifications for public investments will still usually be required because the admissible aid intensities are usually too low (complete state funding only for eligible overall costs of EUR 20 million; see Art. 56b (5) GBER) and shoreside electricity facilities can be (co)-financed privately only in very rare cases. In addition, shoreside electricity facilities cannot currently be operated in a cost-effective manner because the offer of procuring shoreside electricity is not used due to the high tax burdens. Rather, it is more economical for shipping companies to let the climate-polluting diesel machines of ships run whilst in port instead of making use of the shoreside power supply. Against this background, it would be helpful for exemptions to be created for shoreside electricity facilities, facilitating higher aid intensities for the development of the infrastructure and making aid to balance out the operating deficit possible.

## 1.2 Extension of the GBER to include new exemptions

– **Inclusion of a new aid element: “Aid for test facilities”:** Test facilities or demonstration equipment serve the upscaling of functioning processes developed on a laboratory scale. Through scaling, these innovative processes can demonstrate their advantages over conventional processes. They are therefore an important requirement for the use of the new technology on the market. Scaling processes are therefore particularly important and indispensable for the further development of Europe as a technological centre and for innovations in the area of sustainability in order to prevail in international competition against states such as China and the USA. Facilities that are available to all users without discrimination increase the chances of success of the projects - particularly for smaller undertakings and start-ups - because they work in the facilities with professional support and the economic risk of incorrect investment is reduced. As far as the provision of demonstration facilities with non-discriminatory accessibility is concerned, the market has failed, because experience has shown that there are no

private investors in this area. This makes the public funding of demonstration facilities for close-to-market scaling indispensable.

- **Inclusion of a new aid element for measures with a development policy objective:** This would enable moderate funding also above the threshold in the de minimis Regulation; at the same time undertakings would be relieved of the administrative burden arising from de minimis declarations. The application thresholds could be differentiated: if measures benefited undertakings from the entire EU internal market, higher application thresholds could be stipulated.
- **Inclusion of an exemption for computer and video game funding** in view of the fact that audiovisual works - in the same way as films - may also represent admissible cultural promotion within the framework of Art. 1 (1) lit. j).
- **Inclusion of an exemption for aid for nature conservation measures and other climate change mitigation measures** in order to cover in particular measures to maintain biodiversity and the natural heritage; information and advisory services for environmental protection and climate action; measures on energy saving, and for the adjustment to the consequences of climate change as completely as possible, and to facilitate the application of GBER. See here supplementary statements under 8.
- **Inclusion of an exemption for tenant electricity projects.** The German government advocates a new article in Section 7 of the GBER with the objective of selectively including investment aid for tenant electricity projects. This would cover an exemption for investments for tenant electricity projects in existing buildings and quarters that do not belong to the installation of photovoltaic systems or tenant electricity aid (such as changes in wiring, relocation of meter cabinets, merging of house installation boxes, additional necessary converter cabinets for collective meters including converters).
- **Inclusion of an exemption for eco-innovations.** It would appear to be helpful to introduce the concept of eco-innovations also in the GBER. Since this area is in a constant state of flux and needs to react quickly to new developments, the application of the GBER should also be facilitated by an explicit regulation of this area.
- **Inclusion of a new exemption (with prior extension of the Enabling Regulation) for aid to address demographic change:** Demographic change is one of the major political challenges of the coming years and decades in Europe

and will have a considerable impact in many areas of life. Examples include the health and care system, the state and municipal infrastructure and the housing situation. Measures to adapt to these needs should be the subject of an exemption. At all events, however, the creation of accessibility in the building sector, especially in residential buildings, would have to be covered by the exemption. The living situation of many people will be improved particularly if these measures are taken by housing companies. This concern leads to the further demand to extend the Enabling Regulation accordingly at this point.

– **Creation of a new exemption for CLLD projects in accordance with Art. 32 -35 of Regulation (EU) No. 1303/2013 or its planned successor regulation (with prior adjustment of the Enabling Regulation)**

Legal background: Provisions on CLLD (“Community-led local development”) can be found in Art. 32-35 of Regulation (EU) No. 1303/2013 (“Umbrella Regulation”). In Germany, the measures are essentially implemented via the EAFRD as LEADER approach. In Saxony Anhalt, CLLD is also funded by the ESF and the ERDF. In the future funding period, CLLD will also be offered in the Umbrella Regulation. For measures which are funded in the EAFRD but which cannot be assigned to primary agricultural production according to Annex I of the TFEU, a foundation under State aid law is also required in the coming funding period in accordance with the general provisions. This applies especially to LEADER projects.

Description of the CLLD measures: CLLD projects are similar in structure to European Territorial Cooperation (ETC) projects. CLLD promotes local development through intra-territorial or transnational cooperation projects. The prerequisite for support is that the measures are conducted by the local population and concentrated in specific sub-regions. The projects are therefore always of a local nature and have a locally limited impact from the outset. CLLD is implemented in cooperation between public and private stakeholders and must be developed across all sectors.

CLLD projects are characterised by a very high degree of heterogeneity, as the projects are not centrally defined but developed regionally as part of local development strategies. The objectives exclusively serve to develop the region. The funded projects are therefore generally small in scale. Classification under State aid law: Experience from the implementation of CLLD as LEADER in EAFRD funding shows that the examination of projects for aid relevance represents a very

large expense for the granting authorities in the context of the application process. In some cases, there is already a lack of economic activity on the part of the grant recipient, which means that there is no advantage for an undertaking. Moreover, due to the local orientation of the projects, the risk of influencing international trade or distorting competition is frequently absent so that in these cases there is no State aid within the meaning of Art. 107 TFEU. However, this must always be examined on a case by case basis and State aid cannot always be ruled out. The CLLD projects do not usually serve a specific objective, but address several priorities of the local development strategies. This multi-dimensionality usually complicates the classification under State aid law. Particular difficulties also arise from the assessment of whether an indirect advantage exists. For example, in many cases funding is granted to local municipalities for the purpose of tourism development, whose projects can then have an indirect influence on the tourism infrastructure supported by private companies. As a rule, CLLD (LEADER) concerns smaller projects. If relevance for purposes of State aid assessment is found to exist, the de minimis Regulation (EU) No. 1407/2013 will be applied in cases of doubt. In practice, however, this has its administrative limits.

CLLD (LEADER) projects often include knowledge transfer and information measures which can benefit a large number of participants. This leads to corresponding certification obligations for small funding amounts in the double digit euro range.

In the area of regional provision of basic public services, regional offshoots of welfare organisations are promoted, again in a narrow local context. Here, the individual upper limit of EUR 200,000/three years has a limiting effect as such organisations also operate nationwide.

Existing exemptions (e.g. SGEI, cultural funding) can only ever cover a part of the projects under State aid law and often only certain aspects due to the multidimensional objective of a project, as mentioned above.

In addition, it is difficult to integrate small enterprises (medium-sized enterprises are not excluded, but do not usually arise) in CLLD projects because of the problems associated with State aid. If it becomes known that even small amounts of funding could cause problems due to a possible distortion of the internal market, CLLD is no longer attractive for them and the objective of local development is missed.

Overall, the assessment of State aid is one of the most extensive and labour intensive aspects of the implementation of CLLD and thus leads to disproportionately high administrative work given the positive objectives for the local population, the fragmented structure and the estimated low impact on competition. An exemption for CLLD would thus correspond to the objectives of SAM. The expected competition-distorting effects could be further limited by a maximum aid amount of up to EUR 200,000 grant amount per project. This would already lead to an enormous simplification in funding practice and at the same time ensure that conceivable CLLD projects actually affecting competition would be subject to an intensive examination under State aid law.

– **Creation of an exemption for the initiation of bilateral, trilateral and multilateral cooperation in the field of R&D&I**

An elementary feature of this “getting to know each other” for the purpose of sounding out common interests and any initial planning agreements for the submission of applications is that as a rule no specific project outlines exist at this point in time and therefore no classification into the existing categories of Article 25 GBER is possible. In practice, the possibility of de minimis funding does not exist especially for active and strongly networked stakeholders, since the limit of EUR 200,000 is often already exhausted in three calendar years.

– **Creation of an exemption for innovations of outstanding importance**

New exemptions or exceptions would be helpful for innovations of outstanding importance, in particular for ‘cutting-edge technologies’ such as AI, quantum technology and battery innovation. Since short-term approval for IPCEI funding still seems difficult at the present and the GBER thresholds in combination with the aid intensities do not meet the need for funding, it is to be feared that the EU and its Member States could fall behind the most important international competitors in global innovation competition.

– **Inclusion of a new aid element for certain measures to promote innovation in the rail freight sector:** This would make it easier and quicker to promote innovation in the rail freight sector, which is also supported at a European level.

– **Inclusion of a new aid element to promote climate-neutral technologies:** In order to achieve active decarbonisation of other sectors (mobility, heat, industry, etc.) in addition to energy generation (‘energy transition’), the fossil fuels used to date in these sectors must be replaced by direct electrification (e.g. electric



heating, heat pumps, electric cars) or by lower carbon, electricity-based fuels (e.g. artificial natural gas or diesel, e.g. based on green hydrogen from eco-electricity electrolysis). As these are not (yet) competitive with fossil fuels due to high electricity prices, these areas require not only investment aid but also – even if only for the market launch phase – the possibility of operating aid.

## 2. de minimis Regulation

The German government advocates raising the total threshold for de minimis aid to EUR 500,000. The current EUR 200,000 threshold is no longer in tune with market conditions. The thresholds for commercial road haulage, guarantees and loans should also be raised.

- **Art. 1:** In future, the Regulation should be supplemented by a provision stating that State aid to micro enterprises within the meaning of Annex I to the GBER or the Commission Recommendation concerning the definition of micro enterprises and small and medium-sized enterprises (2003/361/EC) does not in fact represent aid within the meaning of Article 107 (1) TFEU, without the need for any additional conditions to be met (with regard to the aid amount). In view of the size of such enterprises and their regional activities, it can be assumed that aid to such enterprises does not affect trade between Member States.
- **Art. 1:** Moreover, very small grants provided to micro enterprises, say of a maximum of EUR 5,000, ought to be exempted from the scope of the Regulation or be subject to simplified notification obligations. This would greatly contribute to achieving the goal of dismantling bureaucracy.
- **Art. 1 (1) Letter (a):** With the Guidelines for the examination of State aid to the fishery and aquaculture sector (2008/C 84/06) and Regulation 1198/2006 (EFF Regulation) and Regulations 875/2007 and 736/2008, the Commission has created a sector-specific legal framework with which State aid with Community participation (EFF) and any national State aid is conclusively regulated for the fisheries sector. Accordingly, the exclusion from the scope is to refer not to Regulation (EC) No. 104/2000 but to the fisheries sector. Specifically, the word ‘undertakings’ should be replaced by the word ‘producers’ in Article 1 (1) Letter (a).
- **Art. 1 (1) Letter (e) ‘Contingent’:** We request that examples be included in the recitals or for a more detailed explanation of the reason for exclusion. The granting authorities frequently find it difficult to assess when the feature of ‘contingent’ has been satisfied.

- **Art. 2 Letter (d):** Despite the existing definition, the definition of an undertaking proves to be difficult and should be further simplified for the purposes of the de minimis Regulation.
- **Art. 3 (2):** At EUR 200,000, the total amount for de minimis aid is no longer in line with current market conditions. Since this ceiling has been in force since 2006 and is to apply until the end of 2022 under the de minimis Regulation, it must be raised to EUR 500,000 - also under consideration of the general price trend and inflation. This approach was also adopted by the Commission in 2006 when the de minimis threshold was raised. It corresponds to the Commission's 'more economic approach'. Experience with the Temporary Framework and the de minimis Regulation for the SGEI sector has also shown that even a threshold of EUR 500,000 has at best little effect on trade and competition between Member States. The threshold for commercial road haulage must be raised accordingly to EUR 250,000. Alternatively, if an increase in the threshold is not capable of winning a majority, the exception for commercial road haulage should be deleted, so that the same threshold applies as to the other sectors.
- The thresholds for guarantees and loans should be increased accordingly.
- **Art. 4 (3) Letter (b):** The restriction to EUR 1 million and a term of five to ten years is too strict. The German government also requests the Commission to extend the provision to loans which are "secured in line with normal market practice" and not to require collateral amounting to at least 50% of the loan amount.
- **Art. (4):** A provision equivalent to the de minimis threshold is also needed for 'mezzanine' types of financing, such as subordinated loans and investments on a silent-partner basis. These ought to be considered transparent if the amount does not exceed EUR 750,000 or if the gross grant equivalent was calculated using the base rate in accordance with the Communication on setting the reference and discount rates plus a surcharge that would be one category lower than the one associated with the recipient's rating score, to account for the lack of collateral for the financing.
- **Art. 4 (6):** The German government continues to reject the restriction of the term to five or ten years. It further worsens the already difficult financing situation of SMEs, as investment financing often has a much longer term than five or even ten years. Long-term financing for long-lived assets would be impossible on the basis of the flat-rate method. Shortening the terms would frequently lead to non-congruent financing (i.e. investment period > financing period), which would not only be questionable from an economic point of view, but would also result in higher debt service burdens, through to an existential threat. Working capital

financing often also has a longer term than five or ten years, because at least one deposit base of working capital must be financed on a long-term basis.

- **Art. 6:** The German government continues to oppose the introduction of a mandatory centralised register for de minimis aid provided in the Member States. The establishment of the register and the collection of the corresponding data would lead to a disproportionately high bureaucratic burden.
- **Art. 6 (1):** According to Art. 6 of the de minimis Regulation it is possible for undertakings to submit their declaration on de minimis aid that has been granted in written or electronic form. By contrast, the certificate on the amount of aid must be provided in written form. In principle, it should be possible to handle State aid also electronically. A harmonisation would be necessary to reduce administrative processes.
- **Art. 6 (4) Sentence 4, retention duty:** With regard to the 10-year retention period for records set out here, it should be critically noted that this period is longer than for other documents in connection with the implementation under EU structural funds regulations (“...at least until 31 December of the sixth year following the year in which the last payment is made to the beneficiary”). In our view, harmonisation would be expedient here.
- In the case of aid granted to financial intermediaries, there are scenarios where it is not possible to determine ex ante the de minimis amount at the level of the final beneficiary (e.g. funding for an event with an uncertain number of participants). In this case, it should be possible to consider the financial intermediary as the sole beneficiary of the aid. In our view, this interpretation is in line with the Commission’s reply to Lithuania’s question in the ECN-ET.
- It is furthermore proposed that the SGEI de minimis Regulation should also be extended until 31 December 2022.

### **3. Guidelines for regional aid**

The Commission ought to seek to avoid any confusion among the regional players by defining parameters within which regional business promotion is clearly considered no aid. This would include such fields of action as information, advisory services, networking, site marketing, coordination between the public and private sector, and network management.

### **3.1 Regional investment aid – Restrictions for large undertakings**

The restrictions pertaining to funding for large companies have proven to be particularly unfavourable for economic development, especially in the former GDR Länder in Germany. Due to the specific economic structure of these former GDR Länder, which is characterised among other things by a comparatively small number of large enterprises, the process of the new Länder catching up with the western ones is made more difficult for large companies as a result of these State aid restrictions. Despite the positive developments seen on the job market and the income situation, including in the former GDR Länder, there continue to be major differences in regional economic performance within Germany. Overall, eastern Germany's per capita GDP amounted to 74.7% of the equivalent figure for western Germany in 2017. This was also due to the fragmented economic structures in eastern Germany.

### **3.2 Answers to the Commission's Targeted Questionnaire on Regional Aid**

Reference is made to the comments on the Commission's Targeted Questionnaire on Regional Aid.

#### **1. In your opinion, following the State aid modernisation in 2013/2014, have Member States and granting authorities shifted from granting regional aid to granting other categories of aid, infrastructure measures, or other non State aid measures?**

The assessment of the measures to improve the regional economic structure (GRW) for the years 2014 to 2018 by the Federal Office for Economic Affairs and Export Control (BAFA) and information from the Länder have revealed the following changes:

- There has been a significant shift away from funding of trade and industry towards infrastructure measures. In 2014, 76% of GRW funds still went to funding of trade and industry and only 24% to infrastructure measures. In 2018, on the other hand, only 49% of the funds were used for the promotion of trade and industry. Infrastructure measures were financed with 51% of the funds.
- The promotion of large undertakings is also based on the de minimis Regulation.
- The cost-benefit ratio for the granting of regional aid is perceived as rather unfavourable compared to other forms of aid (higher justification and documentation costs, complex eligibility conditions, additional complexity if co-financing from ESI funds).

#### **2. On the basis of Article 107(3) (a) and (c) of the Treaty on the Functioning of the European Union (TFEU), regional State aid may be considered compatible with the internal market in order to promote the economic development of certain disadvantaged areas within the European Union. The regional aid framework 2014-**

**2020 establishes the methodology and criteria for the determination of regions eligible for regional State aid in the Member States. To what extent do you agree that the indicators and method for the definition of the maps related to the regional aid framework 2014-2020 allow an effective coverage of those areas in the EU?**

The overall population ceiling for A and C areas is viewed critically by the GRW sub-committee in which the German government and the Länder are represented. It is suggested that a separate ceiling for C areas (approx. 25% of the total population) be introduced. This would avoid a situation in which the possibilities of supporting development and catching-up processes in comparatively less disadvantaged areas are determined too much in terms of the status of convergence at EU level, i.e. the designation of the structurally weakest regions, which has so far been the first step. It would ensure that Member States would have sufficient scope to address the different problems and needs of their structurally weak regions. It is also proposed that the two indicators of “per capita GDP” and “unemployment quota” (paragraph 5.3.2.1 and Annex II No. 2 of the Guidelines on regional aid) should be calculated solely on the basis of national figures rather than on the basis of EU averages. This is because, from the point of view of a single Member State, it is the national disparities that are decisive in the need for national regional policy action and not the situation of the regions concerned in relation to the EU average.

When recalculating the population of assisted areas after the United Kingdom’s departure from the EU, attention must be paid to avoiding the exclusion of a large number of structurally weak regions from funding solely on the basis of a statistical effect.

**3. To what extent do you agree that the eligibility conditions to grant aid in ‘a’ and ‘c’ areas to large enterprises (LEs) and small and medium-sized enterprises (SMEs), as specified under article 14 (3) of the GBER, are appropriate to allow for the development of disadvantaged areas in the EU, while maintaining a competitive internal market?**

It is recommended to also open regional funding to “small mid-caps” in the size segment of 250 to 500 employees (see German government’s comments of 23 May 2018 on the public consultation on micro, small and medium-sized enterprises (SMEs) pursuant to Recommendation 2003/361/EC of 6 May 2003). They compromise in particular the catching-up process of the new Länder (see comments in 3.1.).

**4. The GBER sets out conditions on eligibility and compatibility that have to be met to benefit from the provisions of the GBER and to be exempted from the**

**obligation to notify the aid to the Commission. To what extent do you agree with the following statements on those eligibility and compatibility conditions? [...]**

Article 14 GBER with the corresponding definition of terms in Article 2 GBER is extremely complex and therefore not easily understandable. This is also evidenced by the fact that the Commission has already given numerous interpretations on questions from all Member States. We therefore suggest to revise the wording based on this experience.

We also suggest that the Commission's interpretation notes – insofar as they are still valid after revision – should also be published in German (or in all EU languages) (updating of the FAQs).

The eligibility of investment projects of large undertakings for diversification purposes depends on the new activity not falling within the same class of the NACE classification of economic activities. However, the NACE code does not constitute an appropriate and sufficiently differentiated nomenclature for each economic activity for the purposes of regional aid. The criterion should therefore be reviewed.

**5. The Commission does not support the grant of State aid that would encourage or facilitate the relocation of services or production to another Member State. To what extent do you agree with the following statements on the anti-relocation provisions as modified in 2017, compared to the anti-relocation provisions introduced in 2014? [...]**

It would be helpful to clarify how many jobs have been lost before relocation can be assumed.

**6. The regional aid framework applies, in principle, to all sectors of economic activity. However, the following activities are currently excluded (with some exceptions for operating aid and outermost regions):**

We suggest that activities for which funding is ruled out are not only described but also that the NACE code that is appropriate for the activity in question be named throughout. A proposed classification is provided in the following:

Question 7

NACE Rev. 2 Class / Section  
resp. classification of the economic sector, edition 2008

	Classification according to	
	EU COM Questionnaire on regional aid	BAFA <i>(Federal Office for Economic Affairs and Export Control)</i>
*Steel industry (incompatible)	→	24/25
*Synthetic fibre industry (incompatible)	→	20.60
*Fisheries and aquaculture (specific aid rules)	→	03
*Agriculture (specific aid rules)	→	01
*Energy (specific aid rules)	→	D
*Transport (specific aid rules)	→	H
*Airports (specific aid rules)	→	52.23
*Operating aid in favour of undertakings with main activities in the areas of 'provision of financial and insurance services', 'administration and management of undertakings and establishments' or 'business consulting'	→	K
	→	70.10
	→	70.22
*Hard coal mining	→	05.1
*Shipbuilding	→	30.1 (oder 30.11)

We furthermore point out that in the German version, the exclusion for the synthetic fibre industry in Art. 13a) in conjunction with Art. 2 No. 44 GBER is inadvertently broader than in the English version. In the German version of the GBER, the synthetic fibre industry is described as “Herstellung/Texturierung all Arten von Fasern und Garnen auf der Basis von Polyester, Polyamid,...” whilst in the English version the wording is “Extrusion/texturisation..”

The word ‘Herstellung’ in German, which is ‘production’ in English, goes beyond the term ‘extrusion’ which is also normal German language usage. Under “production”, textile businesses also fall under the aid exclusion that produce yarns from staple fibres.

Despite corresponding remarks to the Commission (2008 and 2014), the translation error is still used in the German version of the GBER.

It is therefore necessary in the German version on 'Kunstfaserindustrie' for the word "Herstellung" to be replaced by the word "Extrusion".

**The provisions on operating aid are suitable to address the difficulties of assisted areas:**

The provisions are very restrictive. Consideration should be given to allowing operating aid to a limited extent independently of regional aid rules for regions undergoing acute structural change. It could be used to compensate for the marketing handicaps of the locations undergoing transformation, such as to recruit skilled labour, or to compensate for additional transport costs and other disadvantages resulting from the inadequate infrastructure for the new orientation of the economic regions (see also comments under 13.).

**Further details**

Currently, Art. 14 (8) GBER and Art. 17 (4) regulate that intangible assets must be taken into account in the calculation of investment costs if – among other conditions – they are acquired at market conditions from third parties who have no relationship with the buyer.

It is suggested that the condition of acquisition be lifted and also that costs of self-generated intangible assets are recognised as eligible. In view of the digitalisation of the economy and the importance of computer-assisted production, it would seem appropriate to treat software produced in house in particular as tangible investments.

## **4. Framework for State aid for research, development and innovation**

### **4.1 General remarks and terminology**

The Framework for State aid for research, development and innovation uses some definitions that are different from those used in the Frascati Manual. If the EU were to use the Frascati definitions in the Framework, this could help better implement the State aid rules in the field of research and development. In 2015, a revised version of the OECD Frascati Manual was published with the agreement of Eurostat. The Frascati Manual contains guidelines and examples for the definition and measurement of R&D. They are the basis for the uniform use of research and development terms and thus enable international comparisons to be made. These different definitions lead to ambiguities in the implementation of State aid law. For example, research and development expenditure used to calculate the 3% target of the Europe 2020 strategy is collected from undertakings according to the Frascati definition. Aid-relevant research funding based on the definitions of the Framework for State aid for research, development and innovation leads to different notifications by the undertakings. The evaluation



of research funding is made more difficult by different notifications. The definitions used for research and development do not take sufficient account of market developments.

#### **4.2 General remarks on the framework conditions of R&D funding in favour of SMEs**

At the lower R&D&I levels (Technology Readiness Levels (TRLs) 1-5/6), the R&D framework for SMEs can be considered to be sufficient. At the higher TRLs (TRLs 6-9), however, there is less scope for the public sector to foster innovation within SMEs. It is true that there are understandable reasons under State aid law that explain the existence of this 'death valley'. Nevertheless, this is a crucial point where changes to the State aid tool box available for research-driven and highly innovative SMEs could deliver overall competitive gains for the internal market as a whole.

The (different) ways in which the State aid rules are applied are sometimes seen as an obstacle, preventing the R&D&I programmes from being more accessible and able to generate greater synergies in the field of research and innovation.

Whilst projects receiving funding under Horizon 2020 are, in principle, exempt from State aid reviews (Regulation (EU) 2018/1911 of the Council; Regulation (EU) No. 651/2014 of the Commission; Art. 107, 108 TFEU), the ESIFs are subject to national State aid reviews. This differentiated treatment of funding provided between Horizon Europe on the one hand and the ESIFs on the other has remained unchanged in the proposal for the post-2020 Regulation tabled by the COM (in line with the relevant R&I classification distinguishing between 'experimental development', 'industrial research' etc.; or the TRL classification (technological maturity)). The consequences are as follows:

- Lengthy process delays in ESIFs due to aid reviews
- Legal uncertainty in the regions and Member States about aid relevance when designing and promoting a programme (lengthy review procedure)
- Unequal treatment of R&I funding items in Horizon2020 and ESIFs
- Difficulties in promoting synergy projects from direct and indirect management of funds (inappropriate funding opportunities in the regions, no flexible budget or programme, delays in notification etc.).
- Complexity and audit intensity

It would therefore be helpful if the application of the State aid rules could be streamlined and the complexity and intensity of the reviews could be reduced (for instance by introducing preliminary

checks or issuing blanket certification for certain programme lines for R&I funding at the planning stage).

The existing EU aid regimen is highly complex and time intensive.

The aid rules were reformed in 2014, which brought simplifications for R&I funding. Nevertheless, the rules are highly complex and opaque with 31 and 25 different thresholds in State aid law and the GBER respectively. Procedures for assessing aid relevance in European R&D measures and the launch of R&D programmes are delayed by several months. Preliminary reviews are not legally binding, so that State aid relevance can be established retrospectively, challenged in court and repayments threatened. In addition, the GBER does not apply to the majority of research, development and innovation (RDI) aid. The system of notification thresholds in the area of RDI also makes little sense, since the costs vary greatly in the various research disciplines: EUR 50 million in the area of nuclear research ought not to trigger any distortions under competition law whilst in textile research it may do so.

The different treatment mentioned above leads to confusion and uncertainty among applicants and is often cited as one of the main reasons for the lack of functioning synergies. For applicants, the required effective and intelligent combination (synergies) of the two programme areas ESIF and Horizon 2020 is hampered by the differences between them so that they are used only very rarely in practice. Different intervention logics, funding instruments, application and accounting procedures in particular require applicants to engage in a resource-intensive process that often exceeds capacity limits and thus prevents SMEs in particular from exploiting synergies. The ESIF administrative authorities also see the State aid rules as an obstacle to pursuing an R&I policy that could provide regional stakeholders with the best opportunities to participate in Horizon 2020 consortia or to exploit Horizon 2020 results in their region. It is also particularly difficult to launch ESIF programmes to complement calls in the Horizon 2020 work programme or to provide alternative funding for excellent Horizon 2020 applicants (envisaged in the current Horizon Europe proposal). Progress will be delayed by several months if it is possible that projects are relevant for purposes of State aid assessment. Despite preliminary examination, there is no legal certainty that a project is actually exempted from the State aid rules due to different interpretations of the rules by the auditors. In this context, the high frequency of audits - caused by the aid rules – which runs counter to the principle of proportionality (e.g. in terms of the funding volume, the frequency of errors) and the principle of a single audit should also be mentioned.

If State aid rules are fundamentally revised, simplified and designed in such a way as to create a synergy-enhancing framework, the innovation gap within Europe can be tackled more effectively. Many Member States and regions need to be able to target structural funds for

research, development and innovation as easily as possible. For the next funding period from 2021 onwards, some useful synergies for Horizon Europe, for example with the ESIF, are planned, e.g. transfer of up to 5% of the programme budget or simplification of the seal of excellence. The simplifications proposed within the framework of the targeted revision of the GBER are also to be welcomed.

The Council conclusions of 15 November 2017 on cohesion policy suggest that a compact common European set of core rules should be envisaged, regardless of how the funds are managed. Harmonisation of the rules would reduce administrative burdens and create a level playing field for comparable projects.

The ENIRI study (see [https://ec.europa.eu/programmes/horizon2020/sites/horizon2020/files/full\\_einri\\_final\\_study\\_report.pdf](https://ec.europa.eu/programmes/horizon2020/sites/horizon2020/files/full_einri_final_study_report.pdf)) recommends that the aid framework should become more flexible and ensure that EU innovation policy is on an equal footing with competition policy. Notification procedures should be limited to the most important cases. The study suggests harmonising and streamlining the GBER. The analysis under competition law should be limited to the area of product markets for the funded research. The principles of RDI should also be taken into consideration for State aid, e.g. the distinction between research and innovation activities (RIA) and innovation activities (IA) as in Horizon 2020.

### **4.3 Specifically (on the Framework for State aid for research, development and innovation)**

- ***Paragraph 15 lit. j – Experimental development***

The extension of R&D&I eligibility in the field of experimental development has been a useful step. It is suggested that further facilitations be explored for the construction and testing of prototypes outside the laboratory environment.

- ***Paragraph 19 – Non-economic activities***

Non-economic activities are described in paragraph 19 as, inter alia, primary activities of research organisations and research infrastructures, in particular “education for more and better skilled human resources”. Further education in the form of master courses and continuing education are not mentioned here. Both further education and continuing education are becoming increasingly important at higher education institutions. If public education within the national education system is predominantly (over 50%) or completely financed and supervised by the state, then this constitutes non-economic activities. This is set out in the “Commission Notice on the Notion of State Aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01)” and in the SGEI

Communication. This aspect has been included accordingly in the “Guidelines on the distinction between economic and non-economic activities of higher education institutions”. It would be helpful to supplement paragraph 19 accordingly.

- ***Paragraph 20 – Economic activity as a minor activity***

The interpretation of this paragraph encounters difficulties of interpretation, which the Commission has already addressed in part within the framework of the ‘State aid Wiki’. It is suggested that these statements be included in the paragraph for the purpose of clarification (including reference value and calculation of the 20% minor activity threshold).

- ***Paragraph 25 – Research on behalf of undertakings***

The application of paragraph 25 also gives rise to interpretation difficulties, particularly with regard to the documentation of the market price and whether it must correspond to the total costs if no market exists. There is also the problem that there are higher education institutions that conduct commercial accounting (expenses and income) and others that conduct cameralistic accounting (revenue and expenditure). For universities using the cameralistic system, it is difficult to calculate imputed costs or expenses that do not correspond to any expenditure. It should be discussed whether certain surcharge rates are sufficient or whether another method can be applied.

The ‘arm's-length principle’ for measuring conditions in line with market conditions has proved to be impractical, as information on arm's length comparison is often not available / cannot be determined. In practice, there is a lack of alternative calculation models to exclude indirect aid in these constellations.

## **5. Communication on Important Projects of Common European Interest (IPCEI Communication)**

The Commission's IPCEI Communication is undoubtedly an important instrument for strengthening the innovativeness and competitiveness of European industry. IPCEI projects can make a lot of political sense, e.g. to bundle and coherently coordinate critical masses in Europe in order to achieve pan-European research and innovation goals.

While this instrument was initially used only hesitantly in the first years after the IPCEI Communication came into force, it is now becoming increasingly relevant in practice. As a result, the ‘fitness check’ offers a welcome opportunity to examine the extent to which the requirements of the IPCEI Communication can be clarified and also simplified, thus making the overall process more efficient.

Attention must be paid to the manageability and successful application of the Communication in practice. Last but not least, this means that it must be possible to bring notification procedures on IPCEIs to a successful conclusion within a relatively short period of time - despite the high substantive requirements of the Communication and the large number of stakeholders involved from several Member States.

Experience from the first cases of use should be discussed with the stakeholders (from industry and Member States) and included in the revision of the Communication for the period after 2022.

The 'integrated project' benchmark set out in the Communication is very strict and should be reviewed or further developed. It should not be disputed here that the requirement to present a clearly defined project with a close connection between the individual contributions and the division of labour of the consulting members in terms of content is legitimate and must be taken into account – also in order to ensure the necessary differentiation from a funding programme. However, if every component must be a necessary contribution and *conditio sine qua non* for a major international project, complex consortia with content that may have to adapt to market demand or technological developments during the term of the project are very difficult to present. This standard is much stricter than the one applied to collaborative projects, also within the framework of European funding. Here too, of course, the project core must remain untouched, but there will certainly be changes in the approval and funding procedures up to the exit or new admission of individual partners. Practice shows that a minimum degree of flexibility must also be possible with the IPCEIs.

In addition, the requirements for the dissemination of results should be clarified in order to ensure the best possible, manageable and reasonable dissemination of results in the EU while allowing for a rapid notification procedure.

## **6. Guidelines for State aid to promote risk finance investments/access to finance for SMEs**

Reference is made below to the comments on the Commission's Targeted Questionnaire on "Access of SMEs to finance".

- 1. Please briefly explain the State aid measures to support access to finance for SMEs (and potentially also small or innovative mid-caps) that are currently in place in your country and identify if they fall under Section 3 of the GBER or the Risk Finance Guidelines.**

The following State aid measures to promote access to finance for SMEs covered by Section 3 of the GBER or the Risk Finance Guidelines exist in Germany:

- Counter-guaranteed guarantees for equity investments issued by private medium-sized capital equity companies to undertakings of industry (notified method (N 365/2009) which can continue to be used under Regulation (EU) No. 651/2014 of 17 June 2014).
- INVEST: – Grant for venture capital (notified aid according to Risk Capital Guidelines SA.46308, approval of 12.12.2016).
- Counter-indemnified guarantees of guarantee banks (SA.39134), notified method N 365/2009, which can continue to be used under Regulation (EU) No. 651/2014 of 17 June 2014).
- Guarantee programme of the German government including parallel Länder guarantees (former GDR states) SA. 39140.
- Risk finance aid of the High-Tech Start-up Fund I (HTGF I) and of the High-Tech Start-up Fund II (HTGF II) fall within Section 3 of the GBER.

Germany also has a number of aid-free national funding instruments (e.g. also together with the European Investment Fund), which – within the meaning of the Risk Capital Guidelines – enter into public-private co-investments in the so-called pari-passu model. With the help of these funding instruments, the offer on the German equity capital market ought to be broadened and more private investors ought to be attracted for equity financing.

- According to Section 3, the guarantee programmes of the guarantee banks can be used to secure financing for start-ups if adequate collaterals usual for banks are insufficient (“aid for business start-ups”).

Germany also has a number of instruments in the form of de minimis aid or investment aid for small and medium-sized enterprises (Art. 17 GBER), in particular low interest SME loans granted via the KfW. Examples include the ERP start-up loan –start-up money, ERP start-up loan ‘Universell’ or the ERP innovation and digitalisation loan. The same goes for the micro mezzanine fund (de minimis aid).

## **Relevance**

- 2. Please explain to what extent there are specific difficulties, barriers, or other issues (i.e. situations of "market failures") for SMEs and small or innovative mid-caps in your country to get appropriate access to finance. In particular, please specify any issues related to financing that prevent SMEs, small mid-caps or**

**innovative mid-caps from growth and expansion. Please also specify on what basis you have identified any such difficulties.**

- The bulk of SME financing is provided through bank loans. Although access to bank credit is generally good at present, there are areas where small and medium-sized enterprises have difficulties in obtaining finance. This is particularly the case for start-ups, innovations and innovative start-ups. For example, start-ups generally have no credit history and rarely have the usual bank collaterals. As a result, they often have very limited access to bank loans. Therefore, they often lack the means to exploit their growth and innovation potential. SMEs are often structurally disadvantaged in terms of their financing situation compared to large undertakings.
- The German venture capital market is relatively small – also by international comparison – (see, for example: OECD Entrepreneurship at a Glance – Highlights 2018, page 15). In the area of early-stage financing (pre-seed, seed), the capital supply for young companies is now quite good, especially due to the large number of public investors. However, there is a supply gap in Germany in the start-up and early growth phase when start-ups grow rapidly and require larger amounts of capital. Young undertakings often do not get the necessary financing from investors in Germany during this phase. In 2017, the Kreditanstalt für Wiederaufbau (KfW) estimated this supply gap at around EUR 500 to EUR 600 million per year. Market participants report that private investors are very cautious, particularly because of their inexperience in this investment segment. Fund managers report that public investors often take on the role of “anchor investors”, thereby attracting additional private capital.
- A further aspect is that German venture capital funds are quite small in terms of volume compared with US or Asian funds, for example, which also has a dampening effect on the financing of opportunities for start-ups in their growth phase. In recent years, however, there has been a positive development in the market, i.e. an increase in venture capital funds with a volume of over EUR 300 million.

**3. If relevant: Are the specific difficulties for SME, small or innovative mid-caps with regard to access to finance in your country reflected by the current EU State aid rules? If not, please specify why (please distinguish between SME, small mid-caps and innovative mid-caps).**

- Company succession is gaining in importance not least due to demographic change. At present, there are many companies seeking to achieve an economically desirable succession. By the end of 2020, around 227,000 business owners in Germany are aiming to place their undertaking in the hands of a successor (6% of all SMEs). About

80% of succession planners are micro enterprises. Against this background, there is also a considerable demand for funding in this area.

Financial assistance must be able to provide targeted support here. Unfortunately, under the GBER, such financing is only possible to a very limited extent. In particular, the acquisition of assets associated with a permanent establishment pursuant to Art. 17 GBER is only possible if the following condition is satisfied: "The establishment has closed or would have closed had it not been purchased". It appears to be uneconomical first to close down a business and then revive it. It is difficult to prove whether the permanent establishment would have been closed without the acquisition. The criterion of 'closure of the establishment' is therefore too restrictive in the view of the German government and hampers the financing of economically desirable business successions.

According to Art. 17 (3) GBER, privileges are only granted in the case of a takeover of a small enterprise by family members of the original owners or by former employees. Here, the otherwise applicable condition that the assets must be acquired from third parties who have no relationship with the buyer does not apply. From the point of view of the German government, the question arises as to why medium-sized enterprises should not also benefit from this privilege. It also appears expedient to allow takeovers by customers or suppliers.

For the purpose of facilitating company successions, the German government believes that it would ultimately make sense, contrary to Art. 17 (3) last sentence GBER, to also permit the acquisition of company shares, i.e. share deals, if the acquirer assumes a managerial position in the undertaking and/or actively participates in shaping its business policy.

Restrictive regulations in this area prevent the continuation of well-established companies on the market. In many cases, this results in the break-up of companies and the associated loss of existing jobs.

- From the German government's point of view, a further problem lies in the treatment of loans with an equity-substituting element (subordinated loans/mezzanine loans) under State aid law. With this type of loan, start-ups in particular can be supported very effectively. The offer of subordinated loans not only strengthens a company's liquidity but also its balance sheet capital. This is particularly important for start-ups.

However, the Commission does not consider such loans with an equity-substituting element to be transparent aid. Consequently, in contrast to loans with reduced interest rates, such loans must be calculated as aid in full and not merely in terms of the amount of interest subsidy. This classification causes extensive notification procedures with regard to subordinated loans/mezzanine loans and restricts alternative financing possibilities for SMEs.



In this area, the solution could be to include subordinated loans in the form of a margin mark-up in the calculation table of the Reference Rate Communication (Commission Communication on the revision of the method for setting the reference and discount rates, OJ C 14 of 19 January 2008 (EU Reference Rate Communication)).

### **Coherence**

- 4. Based on your own experience with SME access to finance measures, is the scope of application of Article 21 of the GBER and Section 3 of the GBER in general sufficiently clear to cover the relevant measures you have implemented?**

Yes

- 5. Based on your own experience with SME access to finance measures that are not covered by Section 3 of the GBER, is the scope of application of the Risk Finance Guidelines (or any other State aid rules) sufficiently clear?**

No

- 6. If "No", please explain in which situations you had any issues to identify if a measure would fall under the Risk Finance Guidelines. If relevant, please also explain if you had considered any other State aid guidance under which your measures could have been subsumed. The interpretation of the terms "own funds" within the meaning of Art. 2 (18) GBER is not clear.**

The interpretation of the terms "own funds" within the meaning of Art. 2 (18) GBER is not clear.

In the context of an application for research funding for an enterprise subsidised with State aid pursuant to Article 21 of the GBER, the question raised was whether funds from a shareholder loan can be considered as own funds within the meaning of Art. 2 (18) GBER. This is not clear from the definition.

In order not to jeopardise the EU's objective of promoting the growth of SMEs, the German government believes that the "elements which are generally attributed to the company's own funds" should include all elements which are generally attributed to the company's economic equity. This would include the financial resources from a shareholder loan that can be repaid from other free assets.

- 7. Please explain if and to what extent you perceive EU State aid rules on access to finance for SMEs to be consistent with other applicable EU rules and guidance, such as "De minimis Notice", "Notice on Guarantees", "Reference Rate Communication", etc.?**

From the point of view of the German government, the amendment of the Commission's Communication on the revision of the method for setting the reference and discount rates, OJ C 14 of 19 January 2008 (EU Reference Rate Communication) is urgently necessary. This applies firstly in view of the discontinuation of EURIBOR/IBOR. Secondly, the bank margins listed in the margin grid contained therein - graded according to creditworthiness and collateral security of the borrowers – no longer correspond to market conditions. The margins of the grid serve to determine whether a loan contains aid by forming, together with the EU base rate, the comparative interest rate for a hypothetical market loan. They no longer reflect this market.

The German government furthermore suggests that it should be examined whether the GBER could create a basis for the provision of working capital finance usual for SMEs (not for undertakings in difficulty). So far, this is practically only possible for SMEs under de minimis conditions. We see a gap here in the financing possibilities for SMEs, because corporate financing basically also includes working capital loans (e.g. to finance a warehouse etc.).

Finally, in the view of the German government, it would be helpful if the reform promised in the consultation procedure on the definition of SMEs were to be implemented. In its comments on the consultation, the German government emphasised three points in particular:

- The recommendation should be as legally certain as possible and its application should be simple and understandable. Therefore, for example, qualitative or sector-dependent criteria should be avoided and regulations especially on affiliated companies should be clarified.
- The financial thresholds should be suitably adjusted to take account of inflation.
- The recommendation should be supplemented by the creation of an additional category of "small mid-caps" (250 to 500 employees) in order to enable larger SMEs to be targeted in specific policy areas.

## **Effectiveness**

### **8. Do the State aid measures you have in place effectively address difficulties of SMEs (and potentially small or innovative mid-caps) with regard to access to finance in your country (i.e. do the measures you have in place effectively address a specific "market failure")?**

In recent years, the German venture capital market has developed considerably thanks to the numerous public funding programmes at federal and state level. The High-Tech Start-up Fund (HTGF) broadens the German venture capital market with its activities, thereby contributing to

improving the financing of young and innovative companies. Through its targeted focus, it contributes to addressing the 'market failure' in this segment of the venture capital market.

The 'INVEST – Venture Capital Grant' programme, for example, targets market failure in the area of business angel investments in order to give young innovative companies better access to venture capital. The last evaluation of this measure in 2016 showed that INVEST is effective and capable of addressing market failure in this area and boosting the German business angel market.

The EXIST programme supports scientific spin-offs among others. The EXIST research transfer funding line supports research-based start-up projects with high development risks. The grant in the "funding phase II" helps technology-oriented start-ups to complete product development and to realise market entry. From the perspective of State aid law, this is exempted under the GBER. The market failure consists in the fact that private investors are generally not willing to invest at such an early stage.

#### **9. Please explain why or why not:**

There are numerous support programmes in Germany that provide specific support for SMEs. The German government's funding instruments have a market-widening effect on the German venture capital market and therefore facilitate access to finance for small and young companies. By international standards, the German venture capital market is still relatively small. In other countries, far more venture capital is invested (VC investment volume 2018 in Germany: EUR 3.4 billion; in the USA: USD 130.9 billion, source: PitchBook). Start-ups in Germany lack capital particularly in the 2<sup>nd</sup> and 3<sup>rd</sup> growth phases (funding volumes of EUR 50 to 150 million). It is important that the State aid rules allow SMEs – especially SMEs in the 2<sup>nd</sup> and 3<sup>rd</sup> growth phases – access to venture capital in order to compensate for the market failure described above. To this end, it is suggested that the existing instruments should be extended and made more flexible, or that a separate State aid framework should be created, which could, among other things, extend the possibilities for tax incentives.

#### **10. To what extent have the current EU State aid rules on SME access to finance provided relevant guidance to effectively limit support measures to specific areas of concern (like lack of specific types of financing, limiting the number of applicable beneficiaries, etc.) while minimising any potential negative impact on competition?**

Reports from the market indicate that EU State aid rules are not perceived as guidance or support.

**11. In general, do you perceive the current rules to be appropriate to address specific market gaps identified in your country in relation to access to finance measures, while ensuring to minimise any potential impact on competition?**

Reports from the market indicate that State aid rules severely restrict the scope for flexible arrangements.

**Final comments**

**12. Are there any other issues or experiences in relation to EU State aid rules on SME access to finance that you would like to share?**

EU State aid rules impose strict requirements on undertakings operating under the market economy investor principle in order to provide risk capital from public funds to young tech start-ups in their start-up and growth phase. If there is no private risk capital investor who fully meets the requirements set out in paragraph 31 et seq. of the Guidelines on State aid to promote risk finance investments (2014/C 19/04), it will not be possible to invest in such companies because in specific cases they will not be able to demonstrate that they operate in accordance with the market economy investment principle. The provision of public funds in such cases therefore regularly requires time-consuming and resource-intensive approval by the COM. Without a corresponding exemption under State aid law for individual cases, the provision of risk capital may fail completely or foreign investors from outside the EU, who invest state funds of non-EU Member States and/or private monies, may provide risk capital without having to take EU State aid rules into consideration and without having to rely on cooperation with investors from inside the EU. In this way, it is implicitly accepted that despite the availability of funds in the European Union, investors from the non-EU area can more easily provide funds to the target group (tech start-ups) than domestic companies that have public funds from the Member States at their disposal. If a foreign investor pursues the objective of integrating the value added of the target company in the non-EU area, complying with EU State aid law can ultimately lead to counteracting the overarching political objective of common interest (as, for example, in paragraph 57 of the Guidelines 2014/C 19/04).

Accordingly, the German government requests the EU Commission to examine whether the provisions of EU State aid law go beyond the requirement of WTO law for fair competition, both with regard to the Union as a whole and to the individual Member States, and whether to pursue a WTO-compliant adjustment of the requirements for companies operating in accordance with the principle of a market economy investor in order to be able to provide venture capital to SMEs (tech start-ups) in their start-up and growth phase.

The German government had recourse inter alia to KfW Capital, the subsidiary of Kreditanstalt für Wiederaufbau (KfW), when answering this questionnaire. KfW Capital considers it to be highly expedient to transfer the differentiation according to origin of funds and risk bearing, which is provided for in the Guidelines on State aid to promote risk finance investments for EIF/EIB, to national funding institutions; i.e. national funding banks/institutions which invest their own funds / at their own risk or funds of a private investor at market conditions should be qualified as independent and private in analogous application of EIF/EIB (footnote 25 of the Guidelines on State aid to promote risk finance investments). Furthermore, KfW Capital believes that another ‘category’ should be introduced in the Guidelines on State aid to promote risk finance investments, namely a ‘neutral’ investor. Public investors should therefore be regarded as neutral under State aid law if they invest at market conditions – even if these are public funds.

## **7. Guidelines on State aid to airports and airlines**

The Guidelines on State aid to airports and airlines came into force on 4 April 2014 and provide for a transitional period up to and including 2024 in which operating aid is admissible. The amount, to be fixed in advance, of maximum possible operating aid that can be awarded during the 10-year transitional period depends on the initial funding gap (paragraph 127 of the Guidelines). It is not possible to amend this amount if external circumstances (e.g. insolvencies of airlines, higher expenses as a result of tighter security requirements) change significantly and make it necessary for the business strategy to be altered so that airport infrastructure can be maintained and, if necessary, adapted in the public interest. The most recent airline insolvencies have led to a substantial decline in traffic, particularly at the small airports. Against this background, some smaller airports continue to require operating aid also beyond 2024. Furthermore, in view of the lengthy approval processes and high construction investments, it ought to remain possible for air traffic infrastructure to be maintained and developed even once the transitional period has ended. The strict definition of a transitional period does not take due account of the special situation of the existing approval under air traffic law. Under special circumstances, it should therefore continue to be possible to grant operating aid, and at all events an extension of the transitional period is necessary.

### **7.1 Aid rates for investment and operating aid**

In our opinion, the distinction is economically justified. In particular, investments in airport infrastructure are frequently associated with high costs, which pay for themselves only over a long period of time. The threshold for the airport operator’s willingness to invest is therefore very

high so that aid for modernisation is necessary – also in order to satisfy the mandate to provide public services. Accordingly, the aid rates for investment aid should also be higher than those for operating aid. This distinction is also in line with our national legislation on State aid.

## **7.2 Regulations on aid intensity**

The regulations on aid intensity are clearly defined. It would be desirable to have the possibility to allow different aid intensities beyond the existing exceptions in justified individual cases.

## **7.3 Incentive effects of aid**

The incentive effect or proof of appropriateness of aid required in paragraph 79, letter d) and e) and paragraphs 94 to 96 must usually be determined on the basis of a counterfactual analysis, comparing the likely scope of the planned activity if the aid is granted with the likely scope of the planned activity if the aid is not granted. This requirement significantly increases the administrative effort involved, including the counterfactual analysis required, which is very complex to conduct and difficult to undertake in a rational manner. In principle, it should be assumed that an incentive effect exists if there is a funding gap (i.e. if the investment costs exceed the capital value of the expected operating gain of the investment on the basis of a pre-established business plan).

## **7.4 Calculation of the funding gap**

In addition, the Commission's limiting of investment support to the funding gap is not practicable in every case from the German government's point of view. Long-term prognoses, which are required in certain instances, are often difficult to make in practice. In addition, generating such prognoses makes the project more expensive overall, which in turn leads to an increase in the level of funding required by an airport. Overall, the levels of demand determined under aviation law should be sufficient here. A simplified procedure would be helpful here, also for reasons of transparency.

The use of the EBITDA as a reference figure for determining the operative funding gap, e.g. in the Guidelines on State aid to airports and airlines, does not lead to a meaningful result if loss/eligible activities of an undertaking and non-loss/non-eligible activities are considered together. The non-loss/non-eligible area cannot finance itself and in particular cannot make investments if it needs to transfer its revenues to the loss/eligible area. In the area of services of general economic interest, profits (not EBITDA) from other activities are correctly taken into account (see European Union Framework on State aid in the form of public service compensation (2011), OJ. C 8 of 11.01.2012, page 15, paragraph 45f).

## **7.5 Airport categories**

It ought to be reconsidered whether small airfields on which only non-commercial general aviation and no commercial passenger and freight transport takes place, should be classified in the Guidelines on State aid to airports and airlines as being not relevant for the purposes of State aid assessment. Such small airports are not in any way important for competition with larger regional or (large) airports; neither do they impair competition within the European Union. Even the possibility of exempting them from the Commission's notification or authorisation procedure under Article 56a GBER is disproportionate in view of the administrative burden involved.

## **7.6 Other remarks on calculating eligible operating losses**

According to Art. 56a (16) GBER, the amount of operating aid (for airports with up to 200,000 passengers) may not exceed the amount necessary to cover the operating losses and an appropriate profit for the period in question. The aid will be granted either in the form of regular instalments fixed in advance, which will not be increased during the grant period, or in the form of amounts subsequently fixed on the basis of the operating losses determined.

According to the Guidelines on State aid to airports and airlines (paragraph 21, 23), operating aid may only be granted for the operative funding gap. The operative funding gap is defined as the operative losses of the airport over the relevant period, i.e. the shortfall between airport revenues and operating costs of the airport.

The two sets of rules (Guidelines and GBER) are not consistent in terms of the eligible operating costs.

According to the Guidelines on State aid to airports and airlines, the Commission calculates operating aid on the basis of EBITDA. When calculated on the basis of EBITDA, the smaller regional airports will not be able to cover the costs definitively from 2024 onwards. In order to realistically reflect the necessary financial requirements, a calculation based on operating cash flows should be used. In addition, smaller regional airports should be allowed to use the positive results from the non-aviation business initially for debt servicing and as a 25% equity share for the necessary income-increasing investments. Any remaining earnings are to be used to reduce the operating funding gap.

## **7.7 Definition of non-economic activities in exercise of public power**

The concept of non-economic activities in exercise of public power should be specified in more detail. The scope of the term 'local infrastructure' should also be set out with greater clarity. In the area of airports, a clearer demarcation between non-economic exercise of public powers and economic activities with relevance for State aid law would be desirable.

Since only the economic activities of an airport operator are relevant for purposes of State aid assessment, the question which activities are to be regarded as non-economic is of considerable importance. The Guidelines refer to the case law of the Court of Justice, which states that these include exercise of public power at an airport. The public funding for such activities is not aid if it is limited to compensating the costs that arise and is granted without discrimination in the Member State. In our view, however, the list of examples is not sufficient to give legal certainty for non-economic activities. An exhaustive, detailed catalogue could provide a higher degree of clarity and legal certainty, e.g. costs for aviation security, air traffic control and fire brigade.

A more precise definition of the scope of non-economic tasks could also lead to greater legal clarity. Furthermore, EU-wide consideration and equal treatment would lead to less distortion of competition. Clarity should also be provided on the current issue of defence against drones. Here, not every use of public funds should be qualified as aid from the outset.

### **7.8 Definition of the catchment area of an airport**

Catchment areas may overlap without necessarily leading to overcapacities. The criterion is therefore only suitable to a very limited extent to avoiding excess capacities. Above all, no consideration is made of the different business models that the various airports can have or on which airports can focus in order to be competitive. If capacities are expanded in one business model while capacities are still available in the other, there are precisely no additional excess capacities.

The criterion of 100 km or alternatively 60 minutes driving time is not practicable. Geographical hurdles or hurdles caused by land-based traffic connections as well as differences in the speed of ground-based infrastructure are not taken into account. In view of the increasing density of road traffic and environmental considerations, individual road traffic should not be the measure of all things.

The applicable airport guidelines define the relevant and geographical market on the basis of demand from supranational airlines. This logically picks up on the result of liberalising European aviation, namely the creation of an internal market for air transport services for passengers, freight and mail in the field of scheduled and chartered commercial transport, i.e. 'mass transport'. However, the situation of individual (general) aviation and the necessary transport infrastructure is not regulated in terms of competition. This is also not necessary from a technical point of view. The demand generated by individual aviation only locally, i.e. in a narrowly limited manner, for 'aerodrome round flights', private flights, school/training flights, sports/acrobatic flights and 'working flights' (e.g. spraying services in agriculture), which is brought to small commercial airfields or micro airfields, is clearly not in competition with the



services of network or low-cost airlines. Nor are micro airfields in competition with each other at national or even European level, because the 'demand' results solely from the close vicinity of the facilities.

### **7.9 Regional economic effects**

It is undisputed that airports have direct and indirect effects both on the labour market of a region and on the gross value added of a region. They promote the mobility of citizens and contribute to regional development. In particular, they ensure the necessary mobility for business travellers and favour the tourism sector. These effects must be examined under Article 107 (3), letter a ("clearly defined objective of common interest") in the context of the compatibility of aid. However, it is suggested that these regional economic effects be given greater weight in addition to the assessment of the competitive situation. This could lead to a positive macro-economic development for the region and could offset or even overcompensate the state support.

### **7.10 Coherence of regulations with national and European strategic objectives**

Such coherence is at best seen as conditional. In particular, transport and environmental policy aspects can only be taken into consideration to a very limited extent in the strictly entrepreneurial approach.

## **8. Guidelines on State aid for environmental protection and energy**

The German government sees State aid for energy, environmental protection and climate change mitigation as an effective political instrument to create incentives for raising environmental protection and climate action efforts. In the view of the German government, EU State aid law should be further optimised based on experience with the existing rules to enable the Member States to implement ambitious environmental and climate policies that are in Europe's interest.

In view of the objective of greenhouse gas neutrality under the Paris Convention (see also the COM's vision for an EU long-term climate strategy), EU Member States should also critically review the promotion of fossil technologies and new investments in terms of climate compatibility. To this end, EU State aid law should also support the promotion of renewable energies and energy efficiency as well as other safe and sustainable (!) climate action measures as a matter of priority in future in order to contribute to the success of the European energy transition and to achieve the EU climate and energy targets for 2030 as well as the EU

long-term climate strategy (still to be developed). Notwithstanding the right of every Member State under Article 194 TFEU to decide in a free and sovereign manner on its national energy mix, nuclear energy is not part of this from the German point of view. The interests of the EU Member States wishing to abandon nuclear energy or who have done so should also be taken into account more comprehensively in the upcoming revision of EU State aid rules.

### **8.1 Preliminary remarks on the ECJ ruling of 28 March 2019 on the German Renewable Energy Sources Act of 2012**

On 28 March 2019, the ECJ ruled that the German Renewable Energy Sources Act of 2012 does not constitute State aid. Irrespective of this, the German government intends to use the opportunity to make a constructive contribution to the fitness check of EU State aid law with regard to the funding regulations for the electricity sector - also taking account of any budgetary financing of funding systems in the electricity sector.

### **8.2 Coherence with the ‘Clean Energy for all Europeans’ legislative package**

With the ‘Clean Energy for all Europeans’ legislative package, the European legislator has created a basic framework for shaping the internal electricity market. A very important aspect in the revision of State aid rules in the energy sector is to ensure coherence with this legislative package. The legislative acts of this legislative package contain numerous provisions which overlap with provisions in the GBER and the Guidelines on State aid for environmental protection and energy. A general review of the legislative package in 2025 is foreseen for the further development and adaptation of the Union framework. This review should not be anticipated by the Guidelines on State aid for environmental protection and energy. In particular, the Guidelines on State aid for environmental protection and energy should not indirectly target local price signals in the electricity market, which represent a fundamental paradigm and system change in the internal electricity market and would have far-reaching effects on market players.

In order to avoid uncertainty and contradictions and to preserve the hierarchy of norms, the GBER and Guidelines on State aid for environmental protection and energy should be adapted to the provisions of the legislative package. This applies to the following provisions, in particular:

#### **a) Provisions on capacity mechanisms in Section 3.9 of the Guidelines on State aid for environmental protection and energy**

Section 3.9 of the Guidelines on State aid for environmental protection and energy concerning aid to promote generation adequacy must be adjusted to the rules on capacity mechanisms set out in Chapter IV (Art. 20 et seq.) of the Internal Electricity Market Regulation. Articles 20 et seq. of the Internal Electricity Market Regulation set out detailed conditions for the admissibility

of aid in the form of capacity mechanisms, which do not correspond to the provisions in Section 3.9 of the Guidelines on State aid for environmental protection and energy. This concerns the following points in particular:

- Article 21 (8) of the Internal Electricity Market Regulation requires capacity mechanisms to be only temporary and to be abolished on the basis of the action plan or the capacity tied up in them to be reduced.
- Art. 20 et seq. of the Internal Electricity Market Regulation provide for special provisions for capacity mechanisms in the form of strategic reserves (see, for example, Art. 22 (2) and (3), 23 (5) lit. c of the Internal Electricity Market Regulation) in order to take adequate account of the special features of strategic reserves. This basic decision of the Internal Electricity Market Regulation must be reflected in Section 3.9 of the Guidelines on State aid for environmental protection and energy. For example, it is particularly important that, in accordance with Article 23 (5) lit. c of the Internal Electricity Market Regulation, a separate scenario for strategic reserves is used to demonstrate concerns about the adequacy of resources reflecting the lower probability scale. Strategic reserves cover a special case that cannot be foreseen by the market and therefore cannot be priced in. The CO<sub>2</sub> emission limits for power plants in capacity mechanisms under Article 22 (4) of the Internal Electricity Market Regulation are to be applied consistently.
- Capacity mechanisms that have already been approved need to be adapted to the provisions of Chapter IV of the Internal Electricity Market Regulation in accordance with Article 22 (5) of the Internal Electricity Market Regulation.

#### **b) Provisions for the shaping of support schemes for renewable electricity**

**Section 3.3 of the Guidelines on State aid for environmental protection and energy** concerning aid to promote renewable energies must be adapted to the provisions on the shaping of support systems for renewable electricity in Art. 4 to 6, 21 and 22 of RED II and Art. 5 and 12 of the Internal Electricity Market Regulation. Some non-exhaustive examples are provided below:

- Articles 5 and 12 of the Internal Electricity Market Regulation set 400 kW as the threshold for the granting of market premiums and balance responsibility; the threshold is 500 kW in the Guidelines on State aid for environmental protection and energy.
- According to Article 4 (3) subparagraph 2 of the Renewable Energy Directive, the Member States can use *inter alia* sliding or fixed market premiums. This option should be reflected in the Guidelines on State aid for environmental protection and energy.

- Article 4 (4) subparagraph 1 of the Renewable Energy Directive provides for electricity from renewable sources being funded in an open, transparent, competitive, non-discriminatory and cost-effective manner. In order to implement these requirements, the tried and tested regulations on tenders for renewable energy in the GBER and Guidelines on State aid for environmental protection and energy should be retained. It is important here that Member States should not be forced to reduce the quantities put out to tender if tenders are temporarily under-subscribed. The tenders created a market for renewable energies. Such a market is characterised by an interplay between supply and demand. This means that an interplay of over-subscription and under-subscription is the norm in tenders, sending important market signals for investments in future projects. This interplay may not be interfered with, as otherwise the market signals would be distorted. In order to contribute to the EU renewables target for 2030, Member States need to set very high targets for expansion in some areas. This may lead to a temporary lack of competition in tender procedures, but in the long run they may increase competition as more investors invest in new projects. Member States should be able to set ambitious ceilings in order to prevent overfunding in the case of under-subscription.
- Pursuant to Article 4 (4) subparagraph 2 of the Renewable Energy Directive, the Member States may exempt small-scale installations from tendering procedures. The tried-and-tested exceptions in the applicable GBER and Guidelines on State aid for environmental protection and energy should be retained here. Particularly in the area of PV roof systems, small wind power plants and small biomass systems, which are for the most part erected by non-professional one-time investors, tenders would represent a considerable bureaucratic hurdle that would severely restrict expansion in this important area because they would have a deterrent effect for many investors.
- Under Article 4 (4) of the Renewable Energy Directive, the Member States can consider establishing mechanisms to ensure a regional diversification in the deployment of renewable electricity. This is not currently considered in the Guidelines on State aid for environmental protection and energy.
- Art. 21 of the Renewable Energy Directive contains extensive provisions on the promotion of renewables for self-consumers. When adjusting the Guidelines on State aid for environmental protection and energy to these provisions, a balanced approach should be selected that avoids overfunding.

### **8.3 Adapting EU State aid law to new challenges – achieving EU climate and energy targets for 2030**

Since the 2014 State aid modernisation package, the challenges faced by Member States in meeting the EU's climate and energy targets have changed significantly. In 2014, the market integration of renewable energies and the cost effectiveness of funding were among the key challenges. Great progress has been made in this area in recent years. Renewables are increasingly integrated into the market, react to market price signals and balance their balancing group; it has been possible to massively reduce the funding costs. This development was driven not least by the Guidelines on State aid for environmental protection and energy 2014 – 2020. From the German government's point of view, it is therefore essential to deepen this positive development in the field of renewable energies by revising the Guidelines on State aid for environmental protection and energy and continuing to set the necessary investment incentives even more vigorously than before in order to achieve the agreed energy policy goals whilst complying with Art. 194 (2) subparagraph 2 TFEU.

With the EU climate and energy targets for 2030 and the long-term strategy of the COM to achieve the EU climate targets by 2050, Europe is now about to take the next step towards decarbonisation, which presents us with new challenges. This notably entails ending coal-fired electricity and heat generation, ensuring an even more flexible electricity system, continuing the work to decarbonise the transport, heating/cooling sectors and the industrial sector, further expanding and developing electricity generation from renewable energies, increasing energy efficiency and sector coupling.

Specifically:

#### **a) Decarbonisation of the energy system and of industry, particularly of energy-intensive industry**

- The phasing out of coal-fired power generation and the use of coal for heat generation is the next central step in decarbonisation in the electricity and heat sectors. This is a task for society as a whole that will lead to massive structural changes in the affected regions. The EU State aid rules ought to give Member States sufficient scope for them to deliver this structural change in a way that is socially compatible. In order to provide the Member States with legal certainty and create political visibility, the Guidelines on State aid for environmental protection and energy should set out transparent and clear rules for the granting of State aid for the phasing out of coal-fired power generation and the use of coal for heat generation.

- It should also be made possible to offset possible cost increases for electricity consumers resulting from the Commission's recommendations on 'Growth, structural change and employment'. These instruments must take account of the fact that a precise impact of the cost increase is not known before the implementation of the measure.
- The decarbonisation of the energy system and of industry can only succeed by working *with* industry, not against it. In order to help create acceptance for the energy transition and to protect the competitiveness of European industry, it is therefore crucial that energy-intensive companies can be granted exemptions from, or reductions in, taxes and levies in order to finance the energy system. The provisions in Section 3.7 of the Guidelines on State aid for environmental protection and energy have proved their worth here and should be retained in principle. However, the scope should be extended to include the contributions to the funding of highly efficient co-generation of heat and power and levies to finance energy infrastructure. These can, like environmental taxes and contributions to the promotion of renewable energy sources, represent a particular burden for energy-intensive companies.
- The decarbonisation of the economy and in particular of energy-intensive industry is also part of the COM's long-term strategy to achieve the EU's climate targets by 2050. EU State aid law should address this area more clearly – if necessary via a separate aid element. Two aspects are problematic here:
  - The regulations for environmental protection and energy efficiency aid are currently to be used for concrete investment measures. However, the aid intensities allowed under these schemes are too low to create incentives to implement decarbonisation measures. The allowable aid intensity for such measures should be at least 80%. It is precisely in this area in which innovative process technologies and new combinations of processes must be developed that the limitation of eligibility to additional environmental-related costs poses particular difficulties (see above).
  - In addition, in the context of decarbonisation measures, higher operating costs can also be identified for companies alongside high investment costs, which essentially result from the significantly higher costs for CO<sub>2</sub>-free energy supply. In many cases, these additional costs – even if the additional investment costs are fully covered – do not allow production at lower costs than the market prices existing for these products. Here, operating costs should be eligible at least within a narrowly defined framework. State risk protection in the form of state guarantees for energy prices or CO<sub>2</sub> costs should also be made possible.

Overall, the Commission is called upon to subject the Guidelines on State aid for environmental protection and energy to a systematic examination of how the topic of decarbonisation of industry, with its numerous potential and current fields of action, can be addressed in a targeted manner in the Guidelines. It would also be helpful to consult the Member States on the results of this review.

- In order to decarbonise shipping, the Guidelines on State aid for environmental protection and energy should allow ships anchoring in ports to benefit from exemptions from, or reductions in, charges and levies on electricity to finance the energy system. In this way, incentives can be created to encourage ships to abandon the often cheaper but climate-damaging generation of electricity by diesel-powered generators on board.
- Germany's administrative experience has shown that the restrictions contained in paragraph 16 of the Guidelines on State aid for environmental protection and energy – aid cannot in principle be granted to undertakings in difficulty – are not without their problems, particularly in the area of exemptions from, or reductions in, charges and levies to finance the energy system. The basic idea of this restriction - not to jeopardise public funds and competition - is supported. However, it should be borne in mind that there is a difference between an undertaking in difficulty receiving additional funding for the first time and an undertaking in difficulty being deprived of an exemption or reduction which it trusted it would continue to receive. The German government is therefore in favour of examining this provision in the light of the foregoing.
- Another aspect of special importance is that of greatly strengthening the long-term planning security for industry. Many investments refer to plant with a useful life of several decades. To ensure that investments of this nature (e.g. crackers in the chemicals industry, blast furnaces in the steel industry) can be made, industry needs the certainty that production is possible at internationally competitive costs over the entire useful life. This also includes decisions on a successor arrangement early on (i.e. several years) before approvals under State aid law expire.

In this context, it must also be borne in mind that industry in Germany, but also in the EU as a whole, will face the major challenge in the coming years of setting the right course for long-term decarbonisation. This will require long-term investment decisions. The corresponding investments should be made within the EU.

- Against this background, it is suggested that the Commission consider increasing the maximum permissible period for granting exemptions from, or reductions in, charges and levies to finance the energy system.

- In the electricity sector, recent years have shown that the social acceptance of renewable energies expansion is not only a question of the cost efficiency of funding. The expansion of renewable energies and the necessary energy infrastructure can only succeed if it is supported by local citizens and companies. The State aid rules should enable the Member States to work towards this local acceptance by means of various instruments, such as increased regional control of renewable energy expansion, targeted funding for certain technologies and plant sizes and the funding for local players, such as renewable energy communities.
- In order to continue decarbonisation of the electricity sector, it must be made more flexible. To this end, it is important that limited support for renewable energies is made possible even in times of negative prices. The regulation in the Guidelines on State aid for environmental protection and energy, which does not provide for such support, should be adjusted.
- Highly efficient combined heat and power plays an important role as a partner of renewable energies in the electricity and heating system. To this end, highly efficient combined heat and power should be decarbonised and made more flexible; the Guidelines on State aid for environmental protection and energy should support the efforts of Member States in this respect. For decarbonisation, it is also important that no new coal-fired power plants with highly efficient combined heat and power are funded and that plant operators switch from coal to gas. Member States should have sufficient leeway to support this transformation of highly efficient combined heat and power with funding measures.
- In order to meet increasing climate and renewable energy targets, it seems important to keep existing renewable energy power generation plants on the market even after the original funding expires, at least if they cannot be upgraded at the existing location (e.g. repowering of wind turbines). If, however, the continued operation of such plants should still not be profitable without funding due to the market circumstances, the possibility under state law should at least be provided in the future to enable the Member States to continue funding such plants (to a lesser extent) in order to achieve their expansion targets. To date, the Guidelines on State aid for environmental protection and energy have explicitly provided for such a possibility only for existing biomass plants.



## **b) State aid for energy efficiency measures including the area of buildings**

- Firstly, a strict distinction should be made between the different groups of energy efficiency measures and the requirements applicable to them, each broken down into investment aid and/or operating aid, in order to facilitate the application of the rules.
- It is in this spirit that the rules in the Guidelines on State aid for environmental protection and energy on the appropriateness of aid for energy efficiency measures in buildings should be specified. The compatibility criteria that apply here are those that generally apply to energy efficiency measures. Since energy efficiency measures in buildings are a central building block of the EU's long-term climate strategy, specific criteria should be laid down for this area.
- In the view of the German government, the Guidelines on State aid for environmental protection and energy should also be adjusted to the new Building Efficiency Directive.

In addition, the limitation of operating aid for energy efficiency measures to compensate for the (net) additional production costs linked to the investment, taking into account the benefits of the energy saving, and its time limitation to five years, seems to be too restrictive. Among other things, the rules should become more generous, as otherwise undertakings would have too little incentive to implement such measures.

For the combined heat and power sector, editorial inconsistencies to be found in the currently applicable Guidelines should be avoided for the future Guidelines on State aid for environmental protection and energy:

- Under the requirements for operating aid for high energy efficient cogeneration plants set out in paragraph 151 of the Guidelines on State aid for environmental protection and energy, only Section 3.3.2.1 is referred to for operating aid for electricity from renewable energy sources. However, a similar reference to Section 3.3.2.3 (aid for existing biomass plants after plant depreciation) is absent. Since existing CHP plants also have fuel costs after depreciation, which can lead to higher operating costs than the income generated from market prices, a corresponding application should be possible here. An explicit regulation would provide more legal clarity and user friendliness at this point.
- It is also noticeable that in the context of the requirements for operating aid for highly energy efficient co-generation of heat and power under paragraph 151 of the Guidelines on State aid for environmental protection and energy, there is no reference to Section 3.3.2.4 of the Guidelines on State aid for environmental protection and energy (aid granted by way of certificates).

### c) **Mobility**

For the area of ‘mobility’, a separate section should be introduced in the Guidelines on State aid for environmental protection and energy, accompanied by the introduction of appropriate definitions in Section 1.3.

This is because there is currently no uniform regulatory approach to mobility. The aid framework should be optimised against the background of the politically desired rapid development of transport towards alternative fuels and electric mobility. In order to give the Member States more scope, specific aid elements should be introduced in the GBER, and amendments or additions to the de minimis Regulation should be considered.

In the view of the German government, the following points should be regulated:

- **Standardisation of the requirements for the various alternative fuels**

The concept of ‘alternative fuels’ is not subject to any general definition. In addition to conventional biofuels from cultivated biomass, the Renewable Energy Directive includes biofuels from waste and residual material (Annex IX A and B), recycled carbonaceous fuels and renewable fuels of non-biogenic origin (PtX fuels). Only the terms “biofuel” and “sustainable biofuel” are described in paragraph 19 (7) and (9) of the Guidelines on State aid for environmental protection and energy. Other alternative fuels are not addressed in the Guidelines. The area of alternative fuels should not be construed as a uniform aid measure. The approaches to be included (conventional biofuels, biofuels from waste and residual materials (Annex IX A and B of the Renewable Energy Directive), recycled carbonaceous fuels, and renewable fuels of non-biogenic origin) appear to be heterogeneous in terms of their respective market and technical maturity, but an overarching systematic approach could be helpful here.

In principle, alternative fuels are interchangeable so that a technology-neutral approach could be considered. However, in order not to exclude certain forward-looking but still relatively expensive technologies from the outset, the introduction of exceptions could ensure that technologies that have already been introduced but are not yet cost bearing are funded cost efficiently to a high degree. Sector technologies and demonstration projects could be supported in other funding approaches.

- **Special compatibility criteria in the area of electric mobility**

Government measures to fund electric mobility can include measures to increase the share of alternative drives as well as to further expand the necessary infrastructure and

energy supply networks. In particular, the rapid and extensive market penetration of electric vehicles requires national funding instruments, such as subsidies or preferential tax arrangements as well as state investment or investment aid for the necessary infrastructure. Sections 1.1. and 1.2. of the Guidelines on State aid for environmental protection and energy do not identify such measures as separate aid measures covered by the Guidelines.

The COM therefore follows different audit approaches in individual cases. It examines funding measures for the purchase of electric or hybrid buses as environmental aid using the general compatibility criteria of the Guidelines on State aid for environmental protection and energy, while funding measures for investments in charging infrastructure fall within the direct scope of Art. 107 (3) lit. c) TFEU due to the lack of applicability of the Guidelines on State aid for environmental protection and energy.

Against this background, the field of electric mobility in road transport could be comprehensively regulated in a separate section of the Guidelines on State aid for environmental protection and energy in order to facilitate the application of the State aid framework and provide more legal certainty. This could be based on the previous approval practice of the COM.<sup>1</sup> The elaboration of specific compatibility criteria would make it possible to eliminate any existing shortcomings in a more targeted manner.

Such a new section should also include compatibility criteria for investments in the charging infrastructure. The highly desired electrification of transport not only requires a technically meaningful integration of new charging infrastructure into the general electricity grid infrastructure. It also requires the expansion of customer facilities or electric installations in buildings, since according to current forecasts a large portion of charging processes will take place here. With regard to the financial support for the expansion, only consistency with other measures for the further development of the energy infrastructure can ensure that no false incentives arise, which could be to the detriment of either the general electricity grid infrastructure or the charging infrastructure. At the same time, a technology-neutral approach would also be welcome here.

#### **8.4 Further comments on aid for environmental protection**

In principle, fundamental changes in the area of aid for environmental protection should also be considered. New models and mechanisms are needed to enable the urgently needed

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<sup>1</sup> SA.45694 (Portugal), SA.42167 (United Kingdom), SA.48190 (Germany)

investments to be made. Central areas of the current EU environmental policy, such as climate change mitigation and biodiversity, should be addressed even more clearly in the legal framework of aid for environmental protection.

The German government sees considerable potential for improvement in the following areas in particular:

**a) Extra environmental costs**

A fundamental point of criticism concerns the calculation of extra environmental costs, which in many cases poses considerable difficulties and is therefore an obstacle to the granting of aid. In particular, the application of the rules in the GBER leads to great legal uncertainty and a high administrative burden.

The determination of extra environmental costs poses particular difficulties particularly in funding environmental and climate innovations in industry. Increasing focus is being placed on this area, which requires the development of innovative process technologies and new process combinations. Here, reference investments are often not available on the market. Furthermore, the use of a counterfactual case constellation leads in some cases to the conclusion that state funding measures cannot provide the investment incentives – especially for the private sector – to achieve the desired environmental protection and climate action results on a broad scale. Ultimately, the high costs that the aid recipient has to incur are often disproportionate to the incentive effect of the aid. For SMEs in particular, the expense is often an obstacle to investment.

In cases in which the application of the extra cost principle creates obstacles, alternatives to the calculation of eligible costs should be considered. Two possible alternatives, which the German government already proposed in its comments of 23 October 2012 but which have not yet been sufficiently taken into account, are listed as examples:

- The introduction of technically justified amounts in the total investment costs should be reconsidered. This might be useful for environmental protection and climate action innovations (eco-innovations), where it is not possible to adequately calculate the additional investment costs. The technically justified amounts in the total investment costs would have to be determined by independent studies or experts.
- In addition to paragraph 75 of the Guidelines on State aid for environmental protection and energy, the case-by-case waiver of the extra investment cost benchmark could be justified by examples of projects for which there is no reference investment. Cases of this type, for which a reference investment does

not exist, are by no means rare. In these cases, the total cost of a project has in principle been considered eligible. In view of the possibility of ever changing situations, the case should not be conclusively formulated. Rather, the words “in particular” could be used to list various groups of cases known from the Commission’s decision-making practice.

- Corresponding alternative calculation methods should also be anchored in the GBER in addition to the Guidelines on State aid for environmental protection and energy. This applies in particular to environmental protection and climate action innovations (eco-innovations), which are particularly affected by the difficulties mentioned above.

#### **b) Information and consulting services for environmental protection and climate action**

Information and consulting services for environmental protection and climate action are addressed by the existing State aid rules to only an insufficient extent and should be covered by new aid elements. The current regulatory gap represents an obstacle to the achievement of ambitious environmental and climate targets (including the 2030 EU climate and energy targets and a long-term EU climate strategy).

Information and consulting services for environmental protection and climate action essentially consist of measures that facilitate knowledge transfer and capacity building, the formation of networks, the exchange of best practice and information campaigns on new technologies. Such projects serve to encourage stakeholders in industry, municipalities, private households or educational institutions to adopt environmentally and climate friendly behaviour and thus contribute to the achievement of medium and long-term climate goals. Here are just a few examples: training measures in the field of energy efficient behaviour for employees, networking and exchange of best practice, e.g. in the field of energy efficient building refurbishment, feasibility studies.

However, information and consulting services for environmental protection and climate action are addressed only peripherally in the relevant State aid rules (GBER, Guidelines on State aid for environmental protection and energy, Union framework for State aid for research, development and innovation). For example, the GBER and the Guidelines on State aid for environmental protection and energy provide for rules on the funding of certain environmental studies. Innovation clusters and innovation advisory services, which can serve as structural models for information and consulting services for environmental protection and climate action, are addressed by the GBER and the Union framework for State aid for research, development and innovation. However, these regulations cover only some areas. Uncertainties in the

interpretation of these regulations (also in the area of potentially indirect aid, see 1.1), also lead to very restrictive funding. New elements in the GBER, the Guidelines on State aid for environmental protection and energy and the R&D Union Framework could therefore build on the existing rules for innovation clusters and innovation consultancies, if necessary, and could also extend existing aid elements – such as those for environmental studies.

As there is a particular need for such advisory and service offers, particularly for small and medium-sized enterprises, special arrangement should also be made for SMEs. They have an important role to play in achieving the 2030 climate and energy targets.

### **c) Nature conservation and biodiversity**

The German government is in favour of extending the GBER and, where appropriate, the Guidelines on State aid for environmental protection and energy to include aid for the conservation of natural heritage and biodiversity. Measures for the conservation of natural heritage and biodiversity in the predominantly public interest are services which as a rule do not produce marketable products or produce them to a limited extent, so that the question of possible distortions of competition is negligible. Potential beneficiaries of aid are mainly landscape conservation associations, municipalities and nature conservation organisations or foundations, but also forest owners and farmers. Irrespective of the applicability of the legal framework for SGEI aid in this area, further aid elements and clarifications in the GBER and, where appropriate, in the Guidelines on State aid for environmental protection and energy are useful in order to create additional funding bases and increase legal certainty. Overall, in the area of nature and biodiversity conservation, EU State aid law should be evaluated and revised in the light of the EU long-term strategy up to 2050 inter alia.

## **8.5 Procedures**

In addition to substantive issues of State aid control, the fitness check should also address procedural issues.

- Aid in the energy sector is usually granted for investments with a considerable lead time. Investors need legal certainty as to which funding instruments will be available to them and to what extent in the coming years. Against this background, one problematical aspect is that approvals under State aid law for funding systems for renewable energies are sometimes only granted for a few years. This is also disproportionate to the term of approvals for capacity mechanisms, which are generally granted for ten years. In order to avoid legal uncertainty and to ensure equal treatment, approvals of funding systems for renewable energies should be granted for a longer period of time, aligned with the duration of approvals for capacity mechanisms.

- Thresholds for not having to carry out the State aid review, for example due to the minor nature of a case, are an important tool for avoiding unnecessary bureaucracy. In this respect, all thresholds contained in the GBER, the Guidelines on State aid for environmental protection and energy and in the further framework of State aid law, should be reviewed in the context of the fitness check with regard to the question of whether adjustments are appropriate in view of the general price development. In the case of the Guidelines on State aid for environmental protection and energy, for example, this concerns the thresholds set out in paragraph 20.
- Electronic recordkeeping/digitalisation: State aid rules should be opened up to electronic administrative procedures in order to give funding agencies the choice of whether to conduct procedures in writing or electronically.
- Finally, for the sake of legal clarity, the Guidelines on State aid for environmental protection and energy should make it clear in the general section that other relevant EU secondary law (e.g. the Electricity Market Regulation, the Electricity Market Directive and the Renewable Energy Directive) must also be observed when examining compliance with State aid law.

## **9. New instrument for managing structural change**

Germany's decision to end coal-fired power generation will make an important contribution towards combating climate change and reaching the Paris climate targets. To ensure this is successful, it is essential that it is made possible for measures to be introduced to manage the resulting structural change and establish sustainable economic structures in terms of their economic, environmental and social impact, in addition to the funding that can be granted under existing State aid instruments. This will enable an economic decline in the affected regions to be prevented, which in turn would have to be offset by regional aid resources. These new measures need to compensate for the value added that is lost due to the implementation of the new overriding political objectives.

What is needed is targeted and precisely dimensioned investment and start-up aid that is independent from regional aid rules in order to cause companies to set up operations in the areas which are initially less attractive because of a breakdown in value chains associated with lignite mining and coal-fired power generation. This could take the form of investment aid at a certain funding rate (if necessary with extra funding for SMEs) and additional operating aid to compensate for the marketing disadvantages of locations moving towards the establishment of a sustainable structure, e.g. the recruitment of qualified labour, or to compensate for additional

transport costs and other disadvantages resulting from the still inadequate infrastructure for the new orientation of the economic regions.

A new guideline based on Art. 107 (3) letter b) or c) could be used by all Member States to support a politically desired and – as in the area of climate change mitigation – sustainable structural change in the interest of Europe by foregoing existing value added. A cumulation with regional aid rates applicable in the respective region would make it possible to take into account the different levels of development of regions in the European Union, so that less developed Member States could benefit even more from the new instrument.

## **10. Guidelines on State aid for rescuing and restructuring**

- Scope: There is no exclusion of application to municipalities and their dependent enterprises. In principle, they can also be regarded as undertakings, but the undertakings in difficulty criteria are not verifiable as per definition. In addition, the definition should be amended so that it does not apply to municipalities and their dependent enterprises.
- Furthermore, the definition of ‘undertakings in difficulty’ in the sense of private investor tests should, in our view, be extended to include the point that although the formal criteria may be met, an undertaking may nevertheless not be considered as an ‘undertaking in difficulty’ if there is another private investor, independent of the undertaking, who would like to provide a significant amount of co-financing for the undertaking at the same time (in analogous application of paragraph 34 of the Guidelines on State aid to fund risk finance investment).
- No. 2.2. of paragraph 20. Definition: For the ‘undertaking in difficulty’ definition of business development, we recommend that an appropriate and meaningful observation period be reintroduced, perhaps 12 months or two years. We consider a time period of the last two business years to be a generally reasonable period to assess whether the undertaking will almost certainly cease operations in the short or medium term if the state does not intervene. The formulation in the annex of the Guidelines on State aid for rescuing and restructuring can also be used as an indication for the two business years, which speaks of the “latest closed accounting periods”, or more precisely “To EBIT must be added back depreciation in the same period plus the changes in working capital over a two-year period (year before the application and preceding year)...”



- In the course of the COM's monitoring procedure for State aid regulations, the high level of bureaucracy entailed become clear once again. A simplification regulation for smaller and possibly medium-sized amounts, depending on the amount of aid granted, would contribute considerably to the goal of reducing bureaucracy/administrative costs.
- A special aspect in the technology sector, especially in venture capital financing in the early years, is that financial resources can be “used up” even past the end of the three years – meaning that, in a formal sense, more than half of the subscribed share capital can have been lost through losses, without the undertaking being classified as an ‘undertaking in difficulty’ in the primary sense. This circumstance could be taken into consideration by extending the period from three to five years, as is already the case in the Risk Capital Guidelines at the present time.
- There is a lack of clarity with regard to letters of intent, for example, the treatment of loss carry forwards or the contribution of share capital to avoid the undertaking gaining undertaking-in-difficulty status. What is more, the causes of crises are not sufficiently taken into account in the balance sheet. Precisely for SMEs in sectors with low earnings or without stable cash flows, the default of a larger customer can already lead to these undertakings being classified as an undertaking in difficulty. For companies that are only active in one market or offer only one product, it is hardly possible to reduce market presence or capacity.
- Paragraph 105: “The maximum total amount ....may not be more than EUR 10 million, including any aid obtained from other sources or under other schemes.” The maximum amount should be limited only to rescuing and restructuring aid in the last 10 years.
- The Guidelines on State aid for rescuing and restructuring should also be brought in line with the “preventive restructuring framework” (Directive on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt – ‘Restructuring Directive’) and inconsistencies eliminated. The Guidelines on State aid for rescuing and restructuring stress (as early as in paragraph 6) the exit of less efficient undertakings from the market. By contrast, even undertakings are to be maintained “in the likelihood of insolvency” by the preventive restructuring framework and in some cases to be restructured against the will of the main creditors. These valuation contradictions will have a considerable impact on funding practice: according to the Guidelines of State aid for rescuing and restructuring, no further funding may be granted or disbursed in certain cases. On the other hand, it may no longer be possible to terminate aid loans in the future due to the requirements of the preventive

restructuring framework. The interpretation of the Guidelines on State aid for rescuing and restructuring in the light of the new preventive restructuring framework will be decisive for funding practice.

## **11. Guidelines on State aid for railway undertakings**

The stipulations set out in the Guidelines on State aid for railway undertakings, such as the definitions, have proven their worth and help the state aid rules to be adhered to. However, the current state aid rules for the railway sector have only partially achieved the objective of promoting this sector. In contrast, the competitiveness of the internal market has been maintained at a high level.

The European framework on State aid for the introduction of innovations takes into account the special features of railway freight transport to only a certain extent. Practice shows that rules on permissible State aid for innovation and investments are too narrow. The competitive situation and the structure of the rail freight market, with its low margins, is a significant factor in counteracting the potential for innovation of small, medium-sized and large railway undertakings. In the field of rail freight transport, the regulatory framework should therefore be adapted in such a way as to take greater account of the specific objectives of the COM, which are set out in its White Paper of 28 March 2011 entitled “Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system”<sup>2</sup> on establishing an innovation strategy for the transport sector and the agenda for improving synergies supporting public financing of innovative products<sup>3</sup>. The granting of aid for the introduction of innovations in the railway sector could be the subject of a specific regulation in this context. One option would be to include in the Guidelines on State aid for railway undertakings a separate rule on State aid for acquisition, renewal and refitting of rolling stock (locomotives and wagons) and for innovation funding for small, medium-sized and large railway undertakings for rail freight transport. The possibility should be provided for granting aid exceeding the currently usual aid intensity for a limited period of time to the first recipients in order to launch innovative technologies on the market or to quickly achieve improved emission limit values.

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<sup>2</sup> COM(2011) 144.

<sup>3</sup> “A renewed European Agenda for Research and Innovation - Europe's chance to shape its future”, The European Commission's contribution to the Informal EU Leaders' meeting on innovation in Sofia on 16 May 2018, COM(2018) 306 final.

With regard to the current provision in paragraph 6.3 of the Guidelines on State aid for railway undertakings, it should be noted that the required reasoned and quantified analysis of the (external) costs of rail transport compared with the (external) costs of other modes of transport<sup>4</sup> is difficult to manage. The various procedures for estimating external costs are very complex in practice.

## **12. Communication on short-term export-credit insurance**

The evaluation is in line with the modernisation of State aid law in principle. A regular review of the provisions in force since 2012 is considered useful. In view of the evaluation of the Short-term Communication that has just begun, no statements can be made on many issues at present.

The Communication on short-term export-credit insurance, which has been in force since 2012, may require less modernisation in order to reflect interim developments in the market.

To a certain extent, the Communication on short-term export-credit insurance has been supplemented by transferring the OECD Consensus to EU law. The OECD Consensus refers to medium to long-term export-credit funding, i.e. a 'credit term' of two years or more; the Short-term Communication refers to a 'risk period', i.e. a risk period of up to two years. The coherence of both rules could be improved, inter alia by using uniform definitions.

The Communication on short-term export-credit insurance works very well in principle. Exceptions for marketable risks during the financial crisis and, in the wake of this, for Greece were established in the interest of the export market. Further exceptions are theoretically possible if there is adequate transparency but are hardly used.

The aim of facilitating "short-term export-credit insurance in non-marketable countries" is fulfilled to a large degree.

The aim of "maintaining the competitiveness of the internal market" is, however, only partially fulfilled. Here, the question seems to be from a somewhat different point of view since reference is made here to the NON-marketable risks/countries. Nevertheless, there is similarity with the point mentioned above. In principle, the Communication on short-term export-credit insurance works very well at the level of competition between credit insurers. Marketable risks in the short-term are usually only assumed by the private credit insurance market. Export Credit Agencies (ECAs) cover non-marketable risks; exemptions to cover marketable risks by ECAs during the

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<sup>4</sup> See paragraph 104, 105

financial crisis or later on for Greece were granted by DG Competition in the interest of the export market. Further exceptions for ECAs are theoretically possible with sufficient transparency in accordance with section 4 of the Short-Term Communication but are hardly used.

At the level of competition between exporters, there is increasing competition with exporters from outside the EU (particularly from Asia). In many cases, non-EU exporters can take advantage of support from ECAs that are not subject to the EU rules, i.e. ECAs that can offer support not only for countries classified as non-marketable risks but also for marketable risks.

The ECAs can generally provide short-term export-credit insurance for countries classified as non-marketable risks (provided that the risk is justifiable and the export merits support), while the private credit insurance market usually covers the so-called marketable risks. Outside of the EU, exporters can, however, usually receive cover from ECAs for all types of risk which can lead to a competitive advantage for European exporters.

Even if the question of the efficiency of government spending on short-term export-credit insurance cannot be answered unequivocally, the Short-Term Communication nevertheless contributes to the basic understanding that government support is subsidiary to the market. This basic understanding ensures the efficient use of state resources only where they are needed.

### **13. International competition**

In international competition, European companies increasingly have to compete with non-European countries whose products are supported by extremely far-reaching state funding solutions. The companies unanimously report that, especially in the case of large volume business abroad, attractive funding solutions are a decisive criterion for customers' purchasing decisions, in addition to the price and quality of the products.

The possibilities available to the European Member States to support their undertakings with financing solutions (e.g. state guarantees, long-term loans) are limited by EU State aid law. In particular, it is generally irrelevant whether a European company is in direct competition with a company from a non-EU country or not in the context of an assessment under State aid law. There is an exception to this in the area of export-credit guarantees, where - within the framework of the OECD Consensus (transposed into secondary law at EU level by Regulation (EU) No. 1233/2011) - deviations from the OECD requirements are permitted under narrow conditions if it is proven that a supplier from a non-OECD country is flanked by more favourable government export-credit guarantee conditions.

The empirical data available on the frequency of such constellations is naturally limited, as European companies generally do not receive any information on the financing conditions of their competitors. General studies show, however, that China in particular supports its companies worldwide with very favourable financing solutions, thereby massively distorting global competition.

These studies all have to struggle with extremely low transparency on the Chinese side and can usually only give examples of individual programmes and projects. China EXIM, for example, offers concessional credit programmes at conditions far below market level and beyond the conditions permitted by the OECD Consensus (2% interest rate, 5-year repayment deferral and 20-year repayment period - Source: COM, "Issues Note – Modernisation of the OECD Arrangement", DG Trade April 2019 - as well as its own studies). It is known from our own findings that China massively undercuts the consensus rules on local costs in a targeted manner. Furthermore, China combines foreign trade financing instruments with development finance into packages that are not compatible with the OECD's restrictions on tied development aid ("Official Finance Practices of the PR China", European International Contractors, November 2018 as well as the Issues Note of the Commission). The analysis of Chinese sources shows that the targeted undercutting of the OECD conditions is one of the guidelines of Chinese financing institutions (confidential information of an OECD partner).

It should therefore be considered whether the 'matching' clause should also be extended to other areas of State aid law so that, in individual cases, improved financing conditions can be offered to European companies if corresponding support is available from non-European countries for competing providers. Apart from the area of export guarantees, comparable regulations can also be found in paragraph 34 of the IPCEI Communication and in the R&D&I framework; see paragraph 92.

Another important point is that non-EU industrial bidders can gain an asymmetrical advantage on the European internal market if they receive State aid in their home country. This is because European State aid law does not take into account aid granted by non-EU countries when awarding EU contracts. EU State aid law thus offers hardly any scope of action against the financial advantages that a third country provides to an industrial bidder who, however, competes in public contracts in the EU on the basis of economic demands. An external dimension should therefore be added to the legal framework. One approach could be the *lex loci* principle, which cannot be implemented quickly but can be implemented in principle. Today, for example, it characterises the EU data protection law in force since 25 May 2018 (Art. 3 EU GDPR (2016/679)). Art. 3 (2) GDPR: "This regulation applies to the processing of personal data

of affected subjects who are in the Union by a controller or processor not established in the Union”.

#### **14. Final remarks**

The Federal Government reserves the right to submit additional comments later on. In addition, the Commission is also requested to examine whether there are other relevant rules that should be included in the consultation process. The Federal Government is of the view that the “EU Guidelines for the application of the State aid rules in relation to the rapid deployment of broadband networks” (2013/C 25/01) also need to be adapted as the current rules are now outdated in terms of the goal of expanding the gigabit network.

– **Germany agrees to the publication of these comments.** –