

Luxembourg contribution to the first draft proposal for the GBER revision

1. Introduction

As the GBER has been prolonged until the end 2023, Luxembourg has been surprised by the Commission's proposal to change the GBER. Nonetheless, Luxembourg welcomes the revision to make the state aid rules more suitable to allow for the twin transition. While the proposed revision for the environmental and energy chapter goes in the right direction, **little change has been proposed as regards digital aspects**. Indeed, to allow Member States **to help companies in their digital transition, specific changes, in particular to the aid for procedural and organisation innovation, have to be made**. Such types of aid can also play a key part in the environmental and climate transition. Before going into the substance, it is important to provide the Commission with some general remarks.

2. General remarks

Transition period: For how long can Member States still apply the rules applicable under the current GBER? In other words, by when do Member States have to adapt their national legal basis for the different schemes? Six months are clearly too short and will create legal uncertainty as the national legislative procedure takes longer than 6 months. Existing schemes should thus be allowed to exist until end of 2023, i.e. the expiration date of the GBER.

Notion of undertaking: Based on our recent experience and exchange with other Member States, many granting authorities have difficulties in determining the notion of “undertaking”. This is not only due to different terms being used in different regulations and communications, such as “undertaking, enterprise, business, company, single economic entity, single undertaking, beneficiary, etc.”, but also due to incoherencies regarding the scope of these notions. When it comes to the SME analysis, partner undertakings are taken into account. Yet, when looking at the undertaking in difficulty criteria, one has to look at the single economic entity (including links via natural persons). The single undertaking notion from the *de minimis* regulation ignores the natural person dimension however (although case law of the EUCJ included them¹). Last but not least, it is not always clear at what level one has to verify whether the conditions are fulfilled. For example, does one check the Deggendorf principle at the level of the aid applicant, the single undertaking or the single economic entity? The same goes, for instance, for the age limit for start-ups, which should not be higher than five years.

SME Definition: Luxembourg stresses that it has already contributed to the public consultation on the SME definition (12 page paper) and that it is important that the DG Competition takes these consideration into account. The analysis of the SME definition puts immense administrative burden on the granting authority without guaranteeing a legal certainty, due to numerous doubts when it comes to its application.

¹ C-222/04 Cassa di Risparmio di Firenze, in particular para. 112

Transparency threshold: Luxembourg strongly disagrees with the lowering of the transparency threshold to 100.000 euros in art. 9, para. 1, point (c) of the GBER, as this is too burdensome and resource-intensive and not underpinned by the fitness checks realised by the Commission in the context of the SAM reforms. Indeed, a vast majority of respondents in the public consultation have voiced that the 500.000 euros transparency threshold is appropriate (or even too low)². In light of these findings, Luxembourg believes that there is no sufficient ground to depart from the current 500.000 euros threshold, especially if this goes hand in hand with an increased administrative and financial burden for aid granting authorities.

Definition of “undertaking in difficulty”: The definition is based on a 50% equity to share capital threshold ratio that needs to be met before any government support can be given. This rule sometimes causes serious obstacles for granting authorities. For example, an R&D intensive enterprise, with limited or no sales (so-called “cash burner”), regularly encounters a situation where more than half of its equity has disappeared because of accumulated losses. As a result, the company will no longer meet the required equity to share capital ratio and must therefore be qualified as an “undertaking in difficulty” (see *TAFTIE ad hoc group – final report – 16.01.2019*). Luxembourg fully supports the exclusion of economic unhealthy enterprises from state aid. However, the stringent conditions sometimes exclude promising young R&D-intensive enterprises, despite having a sound business plan. This is also an obstacle preventing Member States from supporting the digital transformation of the economy.

To overcome this problem, Luxembourg suggests the following changes:

- i. **Exemption:** To widen the scope of exemption from the “undertaking in difficulty” criterion to any R&D aid (art. 25), innovation aid for SMEs (art. 28) as well as aid for organisational and process innovation (art. 29). In addition, a general age limit of 7 years should be introduced for any undertaking, in particular because the age limit has to be looked at the level of the single economic unit.
- ii. **Conditional aid award:** When the aid applicant is qualified as an “undertaking in difficulty”, but the single economic unit isn’t, it should be possible to grant an aid to the applicant under the condition that a capital injection into the aid applicant takes place prior to the payment of any aid. This practice of “conditional aid awards” has already been accepted by the Commission, but should be formalized in the GBER (and the guidelines).
- iii. **Definition of own funds:** An undertaking is “in difficulty” when more than half of its subscribed share capital has disappeared because of accumulated losses. This is the case when the deduction of accumulated losses from reserves and all other elements considered to be part of the own funds of the company leads to a cumulative amount that exceeds half of the subscribed share capital. The notion of “own funds” has a major

² SWD/2020/0258 final. See in particular the Synopsis Report of the Public Consultation in Annex 2, p. 17.

impact on the outcome of the calculation. Several liabilities that are taken into account in common financial practice as durable funding pillars of a company are however being ignored in this criteria. Luxembourg therefore recommends to take specific long-term loans that qualify as quasi-equity and specific short-term shareholder loans into account as “own funds” when calculating the ratio.

- iv. ***New ratio***: Luxembourg suggests to abandon the idea of working with a ratio based on subscribed capital. As an alternative, it is suggested to work with the absolute figure of the sum of equity and quasi-equity. As long as the sum of equity and quasi-equity is positive, a company should not be considered as an “undertaking in difficulty”.

Last but not least, the Commission should state clearly in the GBER that the criterion has to be respected both at the level of the legal entity applying for aid and the group it may belong to. Currently the notion of undertaking only refers to the group, which is not in line with the Commission’s interpretation.

3. Definitions (art. 2)

➤ *Innovative enterprise (point 80)*

Luxembourg believes that, besides the Seal of Excellence of Horizon 2020 (point (c)), the notion of innovative enterprise should also include undertakings which have been awarded the Seal of Excellence under Horizon Europe in the framework of the European Innovation Council. The new functioning of the Seal of Excellence is that it is awarded to companies with an excellent project and low financial risk. Therefore, it works as well as a positive selection criterion for innovative enterprises.

➤ *Experimental development (point 86)*

It is not clear to Luxembourg what is meant by “*activities aiming at the conceptual definition, planning and documentation of new products, processes or services*”. If these activities are included into the scope of experimental development, could the Commission elaborate on the difference between industrial research and experimental development?

Could the Commission also clarify what falls under sub-para. 2?

➤ *Delimitation industrial research / experimental development in light of the reference to digitalisation*

With its proposal, the Commission clarifies that R&D activities, in particular industrial research (point 85) and experimental development (point 86), include digitalization, which Luxembourg approves of.

Nonetheless, the difference between its application under these two categories (i.e. industrial research and experimental development) is not clear to Luxembourg. It could be understood that industrial research is the planned research and critical investigation aimed at the acquisition of new knowledge (...) for developing/significantly improved new digital products, processes or services, whereas experimental development would be the external acquisition or combination of already existing knowledge in new/improved digital products, processes or services. Is that so?

➤ ***Delimitation product/process innovation in light of the reference to digitalisation***

The definitions of industrial research (point 85), experimental development (point 86), organisational innovation (point 96) as well as process innovation (para. 97) have *inter alia* been updated to include precisions concerning digitalisation. Even though this is welcome, Luxembourg believes that these changes are not ambitious enough to bring about the transition towards a digitalised economy (cf. *supra*) and result in increasing legal certainty when it comes to the categorization of new or improved digital products as process innovation or industrial research/experimental development.

To give a concrete example, one could think of a software company wanting to develop a new software delivered to the client with the use of a new digital technology – and thus implying an internal process innovation. How should this project be qualified, keeping in mind that there is an aid intensity discrepancy? Luxembourg therefore invites the Commission to clarify under which type of aid such a project would fall.

➤ ***Delimitation experimental development/first industrial deployment (point 86)***

According to point 86, sub-para. 2, experimental development « *may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes* ». Luxembourg fails to see the difference to the first industrial deployment as it is defined in the new communication of the Commission on the criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest. Could the Commission elaborate on this point?

➤ ***Suppression of the definition of arm's length***

Why does the Commission suppress the definition of arm's length (current art. 2, point 89)?

➤ ***Adding a new definition of ESCO***

Luxembourg invites the Commission to define what is meant by an ESCO (Energy Supplier Company) and how these can be considered as an intermediate who can pass through any aid to a final beneficiary.

➤ ***Environmental protection (point 101)***

Luxembourg welcomes the modification of the definition. Nevertheless Luxembourg opposes the inclusion of nuclear energy, which should be excluded from any aid of the GBER. As a result, the last part of the definition should be deleted: “~~and the use of renewable sources of energy and other techniques to reduce greenhouse gas emissions~~”.

➤ ***Renewable hydrogen (point 102 quater)***

Luxembourg has not seen any draft of this coming delegated act, needed according to Art28 REDII(III). Does the definition cover fatal³ hydrogen derived from waste treatment?

➤ ***Energy Efficiency Fund (point 105)***

As pointed out in the respective type of aid below, Luxembourg believes that energy performance contracting should not only cover housing but also industrial processes. As a consequence, the definition should be adapted accordingly.

➤ ***Energy infrastructure (point 130)***

As regards point (b), i) (gas), Luxembourg proposes the following modification: “gas pipelines for transport and distribution... which are part of one network guaranteeing national and cross-border supply of gas with identical gas quality, with the exception of”

Luxembourg also welcomes part c) on hydrogen, as it is in line with a recent political declaration of the pentilateral energy forum (co)-signed by Luxembourg.

➤ ***Missing definition of “business model innovation”***

Last but not least, Luxembourg stresses the importance of introducing a new definition of “business model innovation” which could go hand in hand with an enlargement of the scope of art. 47 (investment aid for resource efficiency and for supporting the transition towards a circular economy) so as to include aid, including operating aid, to incentivize companies to change their entire business model in line with the circular economy principles (cf. *infra*).

4. Regional aid chapter

➤ **Article 13 – Scope of regional aid**

New assets (para. 6):

Could the Commission explain why the assets that are acquired must in principle be new?

5. SME chapter

➤ **Article 17 – Investment aid to SMEs**

Eligible costs:

³ unavoidable hydrogen from incineration or waste treatment plants for example.

As in art. 13, para. 6a b), costs related to the lease of a plant or machinery shall be eligible, provided that the lease must take the form of financial leasing and an obligation for the aid beneficiary to purchase the asset at the expiry of the term of the lease.

Eligible investments under art. 17 (para. 3):

Luxembourg has several questions as regards para. 3 point a).

- According to the latter, investments in tangible and intangible assets related to the extension of the capacity of an existing establishment are eligible. Luxembourg kindly asks the Commission to clarify what is covered by this notion. Is an increase in the production capacity required? If yes, is an increase in the production capacity of an already produced product sufficient or must a new product be produced? How is this notion applied in the presence of a service?

Investments in tangible and intangible assets related to the diversification of the output of an establishment into products not previously produced in the establishment are also covered. Does the term “diversification” implies that the production of current products has to be maintained or is it required to produce new products? Do only new products fall into the definition of “products not previously produced in the establishment” or could this also concern existing products that are optimised?

➤ **Article 21 – Risk finance aid**

Beneficiaries:

Luxembourg welcomes the new definition of eligible undertakings, i.e. unlisted SMEs that have been operating in any market for less than 10 years following their registration and/or, in the case of innovative enterprises, seven years after their first commercial sale.

However, could the Commission confirm which of the two criteria apply to undertakings that qualify as innovative enterprises?

Clarification of the requirement in para. 11:

Could the Commission clarify the meaning of the requirement of para. 11 that addresses the situation where the public contribution provided to the financial intermediary takes the form of equity and quasi-equity?

➤ **Article 21a – Risk finance aid in the form of tax incentives for private investors**

Risk finance directly provided to eligible undertakings (para. 4):

Why does the Commission consider it necessary to set additional details and limits as to the legal modalities through which the tax advantage is granted (e.g. tax exemption, tax deductibility of losses)? Art. 21 a, para. 4, could be interpreted as limiting Member States’ flexibility in the field of taxation when it comes to designing such a tax regime. At least some of the limitations provided

for in para. 4 do not seem to be fully necessary, as the amount of admissible state aid granted through the tax measure is already limited by paras 2 and 5. Luxembourg pleads in favor of an omission of those limitations, as the objective of art. 21a would still be achieved.

Maximum tax relief (para. 5):

Could the Commission provide more details and analysis as to the percentages that are set out in para. 5? Why is 50% considered as adequate and not a higher percentage?

➤ **Article 22 – Aid for start-ups**

Age of eligible undertakings:

Luxembourg would welcome a reconsideration of the age requirement in para. 2 (i.e. 5 years following registration) as this is often a blocking point for start-ups with long development cycles such as healthtech start-ups. The maximum age threshold should be raised to 10 years.

Additional aid in the form of a transfer of IPR:

In general, Luxembourg welcomes that, according to para. 6, additional aid in the form of a transfer of intellectual property rights. It is particularly welcome that the additional aid that can be provided under this paragraph can amount up to 800.000 euros. Luxembourg however wonders what meaning should be attributed to the following sentence: “*The additional aid amount refers to the value of the IPR (...) that is not covered by own funds and/or other means*”. Does it signify that the start-up must not have the means to finance the acquisition of the IPR and that start-ups, especially innovative enterprises, that do possess own funds cannot benefit from the additional aid?

However, Luxembourg is concerned that the proposed methods of the valuation of intellectual property rights in para. 6 c) might be too costly, especially for start-ups. This being said, the possibility to have recourse to an independent expert is welcome.

In the last sub-paragraph of para. 6, it is stated that “*the absolute amount of the value of any contribution, both financial and non-financial, of the start-up to the costs of the research organization’s activities that resulted in the IPR concerned may be deducted from the market price*”. Could the Commission clarify which cases are covered? In principle, a start-up that collaborates in the development of an intellectual property right already acquires a share of it.

6. RDI chapter

➤ **Article 25 - Aid for research and development projects**

Flat-rate of 15% for overhead costs and other operating expenses:

The simplified cost approach in the form of a flat-rate is highly welcome. This being said, Luxembourg believes that the way of calculating the indirect R&D project costs over the global project cost, instead of over the staff costs only, is less incentive on the internalization of R&D

activities by the own personnel of the eligible undertaking. The threshold should be raised to 20% in our opinion.

Aid intensities for SMEs:

While the maximum aid intensity for innovation activities of SMEs is up to 50% in most cases (in particular innovation aid for SMEs (art. 28 – internal costs) and aid for process and organisational innovation (art. 29 – internal and external costs), in contrast, the maximum aid intensity for experimental development is capped at 45% for small undertakings and 35% for medium sized undertakings. Luxembourg is of the opinion that this aid intensity discrepancy is counterintuitive. Indeed, experimental development projects, targeting product or service organization for the market, triggers – in most cases – a higher level of technological challenge, complexity and risk than projects underlying innovation aid for SMEs or process and organizational innovation. One would therefore expect at least the same aid intensity, if not higher.

Dissemination commitments:

In order to get a top-up, under para. 6 b) iii), the aid beneficiary can commit to widely disseminate the research results, including where the beneficiary commits to, on a timely basis, make available licenses for research results of aided R&D projects, which are protected by intellectual property rights, at a market price and on non-exclusive and non-discriminatory basis for use by interested parties in the EEA. For how long?

➤ **Article 26a – Investment aid for testing and experimental infrastructures**

Aid intensity:

The aid intensity provided for in para. 5 (25%) is too low and should be raised to 50%.

➤ **Article 27 – Aid for innovation clusters**

Beneficiaries

A new para. 2 has been introduced, stating inter alia that the cluster operator might also be the owner of the cluster or a user of the cluster, or both. Can it be deducted that there is no need for a separate legal entity to carry out an innovation cluster project anymore? Luxembourg is favor of the absence of a separate legal entity requirement.

Participation of research and testing and experimentation infrastructures

Will a research or a testing and experimentation infrastructure be able to be funded under art. 26 or 26a and then participate as an active member of an innovation cluster?

➤ **Article 28 – Innovation aid for SMEs**

Aid intensity:

Innovation support services are co-funded with the same maximum aid intensity of 50% as any other innovation advisory support or non-recurrent external services for SMEs. Luxembourg pleads to increase the maximum aid intensity to 100%, capped to a maximum of 200.000 euros per 3 years (as it is currently foreseen in the RDIF). This could be helpful to encourage SMEs to use services of digital innovation hubs or other infrastructures.

Article 29 – process and organizational innovation

It should be possible to award aid to large undertakings to This should include virtual implementation of industrial processes and testing and development of new technologies in virtual environments for validation and demonstration purposes (e.g. AI-based technologies, digital twins, etc.). The promotion of virtual testing and the introduction of digital testing infrastructures is a prerequisite for supporting companies in their transition to smart manufacturing and Industry 4.0.

7. Environment and energy chapter

➤ Article 36 – Investment aid for environmental protection, including climate protection

In general, Luxembourg welcomes the changes made to article 36, but wishes to comment or question the following points:

Hydrogen-based technologies:

Para. 1 and 1a should be understood as allowing Member States to invest in current or future technologies that do not (solely) rely on hydrogen (for instance in the electrification of equipment, machines or processes). Luxembourg also wants to underline that it has strong reservations regarding the addition of low-carbon hydrogen in para. 1a.

Public support should however have a neutral approach to other parts of the hydrogen value chain. Transport infrastructure, hydrogen consuming processes or R&D projects should for instance be allowed to benefit from public support. Where renewable hydrogen is not available or not competitive after support, the use of other sources of hydrogen could be supported for a limited period of time provided that the technology allows for a switch to renewable hydrogen as soon as it is available and competitive.

Increase of environmental protection at the level of third parties' activities:

Para. 2 states that the investment “*shall enable the beneficiary or another entity to increase the level of environmental protection resulting from its activities*”. Could the Commission provide the Member States with an example where the increase of the level of environmental protection takes place at the level of third party activities?

Is the reference to “another entity” to be interpreted as a third party independent of the aid beneficiary?

Incentive effect in presence of stricter mandatory national standards:

In essence, para. 2 a) provides that the increase in the level of environmental protection of the beneficiaries or a third party’s activities must be measured by reference to the applicable Union standards, and this “*irrespective of the presence of mandatory national standards that are more stringent than the Union standards*”. Luxembourg wonders how this sentence can be reconciled with the requirement regarding the incentive effect of the aid (cf. also art. 36, para. 3 in this respect). In the presence of stricter mandatory national standards, it seems difficult to consider that the aid results in a change of behavior.

Luxembourg would welcome a reference to a list of the Union standards to allow a uniform and effective implementation of this article.

Investments in CCUS:

Luxembourg wonders how the implementation would look like here? More particularly if the conditions under 2a are cumulative, how can countries without geological assets to store CO₂ (such as LU) still transport and store (or allow other to make use of) their emissions in other countries that are better equipped, while still being able to receive aid for their element in the value chain (i.e. capture and transport)?

No increase of indirect emissions in para. 2b:

Luxembourg would like the Commission to specify how the verification that the investment whose goal it is to cut back direct emissions does not lead to an increase of indirect emissions has to be carried out in practice.

Compliance with a Union standard not yet in force:

Para. 3 addresses situations in which the investment is done to comply to Union standards that are not yet in force. Luxembourg believes that the condition requiring that the Union standard and the investment has to be finalized 18 month before its entry into force is too strict and should therefore be lowered to 12 months. Finalizing an investment as far back as one and a half years before the adoption of a Union standard seems excessive.

Counterfactual scenario:

According to para. 5, the counterfactual scenario should *inter alia* be credible in the light of incentives generated by the EU ETS system. Could the Commission specify how this requirement has to be understood?

Where, pursuant to para. 5 b), the counterfactual scenario consists in the same investment being undertaken at a later point in time, Luxembourg believes that taking into account the NPV of the

costs of the counterfactual investment “*discounted to the point in time when the aid investment should be undertaken*” does not sufficiently take into account the risk of (sometimes substantial) cost increase related to rising costs within the differed investment timeline (e.g. raw materials, labor or energy utilized during the build phase of the investment).

Where the counterfactual scenario consists of the maintenance of the existing installations and equipment in operation in the sense of para. 5 c), Luxembourg wonders:

- over which period of time the NPV of the counterfactual investment has to be calculated? Could one always apply a flat-rate of 5 years, or would one have to assess each case individually? Are there any examples?
- whether the maintenance costs (CAPEX) of this counterfactual investment also include the operational expenditures (personnel costs, etc.).

Luxembourg would like to know if the last subparagraph of para. 5 would for instance cover a situation in which a roof would need to be replaced to accommodate a new oven increasing the level of environmental protection. Would the costs related to the roof adjustments also be eligible?

Finally, Luxembourg would welcome further guidance on the application of the NPV, in particular on the time horizon to consider and the discount rate to apply.

Aid intensity:

Could the Commission clarify how one should determine whether the investment at stake results in zero direct emissions in the sense of para. 6? Which emissions and perimeter have to be taken into account?

Competitive bidding process:

Luxembourg has doubts about the competitive bidding process foreseen in para. 6b allowing to cover up to 100% of the eligible costs. Indeed, decarbonization projects for different sectors are often not comparable (in technology and/or costs) and it is thus difficult to make them compete against each other. Could the Commission please explain what the notion of technological selection criteria in para. 6b c) covers?

➤ Article 36a - Investment aid for recharging or refuelling infrastructure

The scope of article 36a should be restricted to recharging and refueling stations powered with renewable electricity and hydrogen:

Luxembourg pleads for a requirement for recharging infrastructures to be powered exclusively with renewable electricity. In order to drive forward the decarbonisation of the transport sector in an efficient way, it is critical that the additional electricity demand created by electric vehicles is met with additional renewable generation capacity, in line with article 27 of the renewable energy directive (directive n° 2018/2001).

If State aid schemes do not include a mandate for beneficiaries to use renewable electricity, charging point operators who do source renewable electricity will be facing a competitive disadvantage due to the additional cost of such electricity. Luxembourg therefore believes that such a mandate would be a reasonable requirement for State aid beneficiaries.

In respect to refueling infrastructure for hydrogen vehicles, Luxembourg cannot support article 36a in its current form. Indeed, low carbon hydrogen includes hydrogen produced with CCUS and nuclear energy.

Eligible costs:

Luxembourg understands that eligible costs may include the investment costs for renewable electricity production connected to the electrolyzer and the renewable hydrogen refueling station. This could be more explicitly clarified in the text.

In addition, could the Commission please clarify that the costs of feasibility and planning studies are not eligible under art. 36a, para.3, the reason being that they fall under art. 49?

Competitive bidding process:

Luxembourg welcomes an allocation of aid based on a competitive bidding process as a means to ensure that the aid is proportionate and the aid intensity is set at an efficient level. While this principle is appropriate for large projects and large developers, however, the relative complexity of such aid schemes might not be appropriate for the development of smaller projects by smaller players.

In particular, the inherent uncertainty and administrative overhead of a competitive bidding process may deter SMEs looking to deploy charging or refueling infrastructure in the context of their business activities (e.g. fleet charging or charge at work infrastructures). Such infrastructure, however, is an important part of the future e-mobility ecosystem, as it is crucial to a large-scale electrification of fleets. Luxembourg considers that an aid for early movers in this area is justified, given the considerable investments that they require in an area that is often not the core business of SMEs.

Therefore, Luxembourg would be in favor of an opening towards non-competitive schemes with a fixed aid intensity aimed specifically at SMEs to deploy non-publicly accessible infrastructure in the context of their business activities.

Maximum aid amount:

According to para. 6, a beneficiary cannot receive more than 40% of the total budget of the scheme concerned. Does this mean that the competitive bidding process evoked supra needs to extend to at least three projects (e.g. 40% + 30% + 30% = 100 % of the budget) in order to reach the full total budget? What would be the solution for Member States with a relatively small market size

like Luxembourg that only have the need for few hydrogen refueling stations (1-3 for instance) and the project carrier is the same company?

Publicly accessible infrastructure:

The notion of publicly accessible recharging and refueling infrastructure in para. 7 should be clearly defined, for instance by reference to the future alternative fuels regulation (AFIR). For instance, would an infrastructure that can be used by third parties such as suppliers or sub-contractors in the sole context of the business activities of the aid beneficiary fall under para. 7?

In addition, the requirement to provide a non-discriminatory access to the infrastructure should not be restricted to users but extended to mobility service providers. To this end, art. 5, point 4, of the alternative fuels regulation proposal currently provides that: *“Prices charged by operators of publicly accessible recharging points shall be reasonable, easily and clearly comparable, transparent and non-discriminatory. Operators of publicly accessible recharging points shall not discriminate between the prices charged to end users and prices charged to mobility service providers nor between prices charged to different mobility service providers. Where relevant, the level of prices may only be differentiated in a proportionate manner, according to an objective justification.”* Luxembourg believes that these conditions should also be included in the GBER.

Presumption of the necessity of aid:

Luxembourg believes that the percentage of electric and hydrogen vehicles that must be registered in a Member State to presume the necessity of aid is too low and should be raised to at least 5%.

In addition, Luxembourg kindly asks the Commission to provide guidance on the application of para. 9:

- Does this percentage have to be respected throughout the implementation of the aid scheme?
- Which criteria apply to determine if vehicles belong to the same or to a different category?
- **Article 36b - Investment aid for the acquisition of clean vehicles or zero-emission vehicles and for the retrofitting of vehicles**

Luxembourg highly welcomes the introduction of this new type of aid into the GBER. Together with article 36a, this aid is essential for the decarbonisation of the transportation sector and, therefore, the greening of the economy.

Construction vehicles:

Do construction vehicles qualify as “rolling stock” pursuant to art. 2, para. 102h, point c) as well as vehicles “for road” in the sense of para. 2 and therefore fall into the scope of art. 36b?

Retrofitting of vehicles:

Luxembourg welcomes the possibility to grant aid for the retrofitting of vehicles as it is foreseen in para. 3 c), in particular for special purpose vehicles. We would however invite the Commission to align the wording with the Clean Vehicle Directive and refer to “modernization”.

Aid granted to undertakings having been awarded a public service contract:

Could the Commission explain the *ratio legis* behind the derogation in favor of undertakings that have been awarded a public service contract and clarify how the latter can be reconciled with the incentive effect of the aid?

➤ **Article 38 - Investment aid for energy efficiency measures**

Rain water

Would investments in green roofs and equipment for the recovery of rain water be eligible individually, for instance under article 36?

Counterfactual scenario:

Luxembourg refers to its question on art. 36 regarding art. 38, para. 3 c) and e). Apart from that, it believes that para. 3 f) should not be limited to investments improving energy efficiency in buildings.

Energy efficiency in buildings:

In para. 3a, the requirements for existing and new building should be listed using “or” instead of “and” to avoid any confusion applying this provision. In addition, Luxembourg regrets that industrial buildings are not covered by para. 3a (and consequently by para. 3 b) and pleads for an amendment to this effect.

De-risking through energy performance contracting:

In principle, Luxembourg welcomes the inclusion of aid for ESCOs in art. 38, para. 7 of the draft GBER. This being said, Luxembourg is strongly opposed to its limitation to energy efficiency measures regarding buildings. To decarbonize the economy and implement the twin transition, it is essential to facilitate energy performance contracting also regarding industrial processes. In the same vein, point e) should not be limited to buildings referred to in para. 3a but open to all types of buildings. In addition, the circle of aid beneficiaries should be extended to undertakings that do not qualify as SME or small mid caps (point c)). In Luxembourg, the ESCO market is not yet well developed and, for a large part, the undertakings that act as ESCOs that are not SMEs or small midcaps when it comes to the implementation of bigger projects. Limiting the aid under para. 7 to SMEs and small midcaps would thus constitute a major barrier for the development of the ESCO/EPC market in Luxembourg.

➤ **Article 41 - Investment aid for the promotion of energy from renewable sources, renewable hydrogen and high-efficiency cogeneration**

Renewable hydrogen production:

As a general comment, Luxembourg would like to stress that art. 41 should not only cover renewable hydrogen production from renewable electricity. Luxembourg also wishes to support the production of renewable hydrogen by other means, such as gasification or pyrolysis of sustainable biomass (including biomass). In addition, the current text (para. 3) is not clearly stating whether an electrolyser has to be connected to the grid. In principle, Luxembourg also wished to support renewable hydrogen production facilities where the electrolyser is directly connected to the renewable power generation. In such a constellation, the electrolyser would be a “prosumer” and (only) additional renewable electricity is injected to the grid.

Investment in storage unit:

In para. 1a, second sentence, of the French version of the draft text, Luxembourg suggest to refrain from using the term “investment” to specify that the storage facility must have the same capacity as the production facility. The term “capacity” seems to be more appropriate. Furthermore, is the last sentence to be understood as allowing the funding of a storage unit for an existing production unit if the mentioned conditions are met?

Funding of renewable hydrogen infrastructures and storage facilities:

Concerning para 3, allowing to fund dedicated infrastructures for the transmission or distribution of renewable hydrogen as well as storage facilities for renewable hydrogen (cf. last sentence), could the Commission explain how this relates to article 48 on investment aid for energy infrastructure?

Natural gas fired cogeneration installations:

Luxembourg ask the Commission for practical advice concerning the application of para. 4a that provides for additional conditions for aid for high-efficiency cogeneration. How can Member States demonstrate that natural gas fired cogeneration installations comply with the 2030 and 2050 climate targets is ensured?

Can the Commission confirm that this article also applies to high-efficiency cogeneration which do not rely on renewable energy?

Newly installed or refurbished capacities:

Since para. 5 makes clear that aid can be granted to new as well as to refurbished capacities, it seems redundant to mention it also in para. 4 regarding high-efficiency cogeneration units.

Aid intensities:

Regarding para. 7, it is not clear to Luxembourg which aid intensity applies to a project involving a production and a storage facility. 15% to the whole project or 30% for the production facility and 15% for the storage facility?

In addition, para.9 foresees a top-up of 15% if the investment only uses renewable energy. At the same time, this type of aid is reserved only for renewable energy, except for cogeneration. Does this mean that the top-up is always given and that the aid intensity for investments in favor of renewable energy production is always 45%, rather than 30% as pointed out in para.7 point a?

Competitive bidding process:

While up to 100% of aid intensity may be necessary in order to enable renewable hydrogen production, - at least for project physically connected to renewable electricity production - the competitive bidding process foreseen in para. 10 may be difficult to implement in small EU countries like Luxembourg where the number of projects and actors is, by definition, limited. Luxembourg therefore believes that the competitive bidding process is too restrictive. In particular, condition ii) would be difficult to meet, making the competitive bidding process impossible. Therefore, Luxembourg kindly asks the Commission to provide an exception to condition ii) for renewable hydrogen production, at least for projects physically connected to renewable electricity production. This exception could be limited in time (for instance 2 years) and upheld afterwards only if a public consultation or an independent market study confirms the limited number of actors and projects.

- **Article 43 - Operating aid for the promotion of energy from renewable sources and renewable hydrogen in small scale installations and for the promotion of renewable energy communities**

This article favors renewable electricity and renewable hydrogen. With the exception of the following points concerning the thresholds foreseen in the new para. 2, Luxembourg therefore welcomes the new draft article in its current form, with the exception of the following points.

Thresholds for small-scale installations:

The new para. 2 sets thresholds regarding the capacity of small-scale installations. When it comes to the production of renewable electricity (point a)), LU strongly advocates to keep the thresholds as they currently stand (cf. current art. 28, para. 2), that is 500 kW and 3MW/3 production units for wind power. Concerning the production of renewable hydrogen, Luxembourg is in favor of adding the current exception with respect to wind power (threshold of 3MW/3 production units) in point b), at least for projects physically connected to renewable electricity production.

- **Article 45 - Investment aid for the remediation of environmental damage, the rehabilitation of natural habitats and ecosystems, the protection or restoration of biodiversity or the implementation of nature-based solutions for climate change adaptation and mitigation**

Scope of application:

Luxembourg wonders if the new para. 2a excludes aid in favor of natural land damaged caused by a natural disaster from the scope of article 45, which covers mainly buildings and equipment damage?

Eligibility of costs for remediation under para. 3:

Could the Commission provide examples of cases in which there is insufficient financial security to meet the costs of remediation in the sense of draft para. 3?

Aid intensities:

Luxembourg kindly ask the Commission to clarify its reasons for setting different aid intensities depending on the nature of the project and wonders if this is coherent with the goals that the targeted revision of the GBER pursues.

➤ **Article 46 - Investment aid for energy efficient district heating and cooling**

Scope of art. 46:

Could the Commission clarify if para. 1 would allow to grant aid (i) for the extension of an existing energy efficient district heating and cooling system or (ii) for the upgrade of an existing energy efficient district heating and cooling system even though full depreciation has been reached.

Natural gas based generation:

Para. 1b allows granting aid for the construction or upgrade of natural gas based generation only where compliance with the 2030 and 2050 climate targets is ensured. How can this be verified in practice?

Aid intensity:

Para. 3, 4 and para. 5 provide for two alternative methods to ensure proportionality of the aid. Can these two methods co-exist in the sense that the granting authority can apply one of them to determine the maximum aid an undertaking can receive under article 46 or should Member States opt for one of these two methods when they transpose the new GBER in their national law?

➤ **Article 47 - Investment aid for resource efficiency and for supporting the transition towards a circular economy**

Luxembourg highly welcomes the inclusion of aid to support the transition towards a circular economy in the GBER.

Scope:

In light of the twin transition objectives, Luxembourg invites the Commission to widen the scope of this article by covering aid, including operating aid, to incentivize companies to change their entire business model in line with the circular economy principles. Such an aid could be limited to

SMEs. Indeed, the proposed aid focuses too much on waste and recycling, rather than incentivizing companies to offer a service (eg. Light) rather than selling a product (eg. Light bulbs).

Alternatively, to demonstrate the importance of this new concept for the European Union, a top-up of 10% should be awarded to each R&D&I project contributing to the transition to a circular economy.

Existing production process:

Is the existence of an existing production process a precondition to grant aid under art. 48? If not, how would one be able to assess the improvement of resource efficiency in the sense of para. 2, point (a)? In particular, how would one assess whether there is a net reduction in the resources consumed in the production of a given quantity of output?

Investment going beyond profitable or established commercial practice:

Para. 6 provided that “*the investment shall go beyond economically profitable or established commercial practices that are generally applied throughout the Union and across technologies*”. Could the Commission provide examples of practices that are targeted?

Counterfactual scenario – add-on investment:

In the French version of the last sub-paragraph of para. 7, Luxembourg suggests to refer to an add-on investment (*investissement additionnel*) rather to an investment in an existing installation (*investissement dans une installation déjà existante*) to increase the readability of the article.

Investment to ensure compliance with applicable Union standards:

Concerning para. 10 which excludes the provision of aid to investments that are undertaken to ensure compliance with already applicable Union standard, Luxembourg wonders if this also encompasses cases where the relevant Union standards have already been adopted, but are not in force.

➤ ***Article 48 - Investment aid for energy infrastructure***

Luxembourg welcomes article 48 since it is clearly in favor of renewables.

Requirements for gas infrastructures:

What is to be understood under a gas infrastructure used mainly for the transport of hydrogen and renewable gases in the sense of para. 3? Is this requirement met if more than 50% of the energy transported by the gas infrastructure is hydrogen or renewable gases?

➤ ***Article 49 - Aid for studies and consultancy services on environmental protection and energy matters***

Luxembourg welcomes the new article, in particular para. 2a.