EFTA SURVEILLANCE AUTHORITY

General Block Exemption Regulation
Questions & Answers

Date of Publication
June 2017

The purpose of this Q&A document is to offer guidance to the granting authorities of the EFTA States concerning the implementation of the General Block Exemption Regulation ("GBER"). This document is based on questions received from the national administrations and constitutes a working paper that is not binding on the EFTA Surveillance Authority ("the Authority").

The Q&A follows the structure of the GBER and all references to Articles, Annexes and Recitals relate to the GBER unless otherwise indicated.

The Authority intends to regularly update the document.

Contents

Recitals

Recital 49

1. **How should an infrastructure be delimited and how to calculate the total annual capacity of various types of infrastructure?**

How to calculate the capacity of an infrastructure in order to delimit between economic and non-economic activities falls under the discretion of the national authorities, provided that the method that is selected is reasonable. Depending on the relevant circumstances of the case, it would be possible to rely on indicators such as the time of use or the total value of inputs consumed yearly, etc.

2. **How is the use of a maximum of 20% explained for economic activity?**

If an R&D infrastructure uses less than 20% of its average annual capacity for economic activities, the entity as a whole would be defined as an entity providing non-economic activities. Support to non-economic activities falls outside the scope of the State aid rules.

CHAPTER I – COMMON PROVISIONS

Article 1 - scope

3. **Is Article 1(3)(e) generally applicable to all forms of state aid within the meaning of the GBER, so that the sectors listed under Article 13 would have to be excluded from receiving state aid under Article 21(3)? Alternatively, does Article 1(3)(e) solely concern regional aid under Article 13?**

Article 1(3)(e) solely concerns regional aid. The sectors listed in Article 13 would not be excluded on the basis of Article 1(3)(e) from other provisions of the GBER.

Article 2 (18) - "undertaking in difficulty"

4. **Is there room for leeway when determining the exact meaning of "undertaking in difficulty" when granting aid to relatively young undertakings that incurred losses that are associated with research and development and do not have any revenue at the time of the granting of the aid?**

An undertaking, other than an SME that has been in existence for less than three years, or, for the purposes of risk finance aid, an SME within 7 years from its first commercial sale, is considered to be "in difficulty" if half of its subscribed share capital has disappeared, regardless of when the losses were incurred, based on the financial statements of the latest closed accounting period.

Article 2 (23) - "start of works"

5. **Article 23 (2) refers to "start of works". How to interpret this concept in relation to projects where it is difficult to determine that the timing of "investment" is irreversible?**

The concept "start of works" refers to a binding legal commitment into which the aid beneficiary has entered freely and which he would not be able to cancel unilaterally without suffering some type of damage. Any signature of such a binding agreement in the framework of a R&D project – before applying for the aid – would demonstrate the intention of pursuing that investment even in the absence of aid and would therefore put the incentive effect of that aid into question.

Article 2 (45) – "transport sector"

6. **Are vehicles that are only used within a port or airport considered part of transport infrastructure and would aid for the retrofitting or acquisition consequently fall outside the scope of the GBER? This could e.g. be a shuttle bus, taking passengers from an aircraft to the terminal building. The same question is also relevant for environmental aid to e.g. energy efficiency measures in buildings within ports and airports.**

Transport related infrastructure refers to infrastructure that is needed for and used to provide the transport activities listed in Article 2(45). Thus, vehicles for use within a port or airport to transport passengers, or buildings (e.g. terminals) that are used to provide the transport services, are covered by the definition of "transport sector" or "related infrastructure".

Activities in terms of NACE 52 (warehousing and support activities for transportation) are in principle not part of the transport sector. Therefore, buildings such as warehouses or other establishments that are ancillary to the transport services are not covered by the definition provided in Article 2(45).

Article 36 of the GBER can be used for the acquisition of vehicles, as long as the environmental objective enshrined in the Article is met.

Article 2 (72) – "independent private investor"

7. **Could a state-owned company who is not a shareholder of the eligible undertaking in which it invests and which is acting on a purely commercial basis and bearing the full risk in respect of its investment classify as an independent private investor for the purposes of GBER?**

The definition of "independent private investor" does not distinguish between public or private companies.

Article 2 (90) – "Effective collaboration"

8. **Is there a difference between effective collaboration and research contracts?**

The concept in Article 2(90) of "effective collaboration" means collaboration between at least two independent parties to exchange knowledge or technology, or to achieve a common objective based on the division of labour where the parties jointly define the scope of the collaborative project, contribute to its implementation and share its risks, as well as its results. One or several parties may bear the full costs of the project and thus relieve other parties of its financial risks. Contract research and provision of research services are not considered forms of collaboration.

There is an important different between effective collaboration and research contracts. If one party (client) concludes a contract with another (research entity) for carrying out research services and the client assumes all the risks of the project, this type of contract cannot be defined as effective collaboration, but a mere R&D services contract.

Risks have to be shared in order to establish the existence of an "effective collaboration". One single party can bear all the financial risk but the second party has to assume some other type of risks (e.g. business or technology risks).

Article 2 (142) - "reasonable profit"

9. **What are the appropriate principles to be applied for determining what a "reasonable profit" is? Currently, the GBER only defines the term "reasonable profit" in Article 2(142) in relation to aid for culture and heritage conservation. Should the same principles be applied for the understanding of the term "reasonable profit" in relation to the amended Article 2(39) which states that "*discounting revenues and operating costs using an appropriate discount rate allows a reasonable profit to be made*"?**

The reference to "reasonable profit to be made" in amended Article 2(39) reflects the definition of "reasonable profit" in Article 2 (142).

10. **Reference is made to the European Commission's (the "Commission") GBER FAQ, question 255, which states that the Commission accepts a discount rate of 4 % for the purposes of calculating the operating profit for the purpose of Article 56. At the same time, the Authority's own discount profit for 2016 is set at 2,16 %. We assume that the discount rate set by the Commission implements a reasonable profit for the aid recipient. Our understanding is that a discount rate of 4 % may be applied in the present case. At the same time, the high risk characterizing this particular sector and service might, in our opinion, suggest that even a higher discount rate than 4 % might be appropriate. Is it in some particular circumstances and sectors justified to apply a higher discount rate than 4 %?**

In principle, the rate to be used is indicated in the Authority's Guidelines on reference and discount rates. However, the Authority can accept the 4% rate, as a proxy, for the purposes of Article 56 in order to calculate the reasonable profit. In addition, where appropriate, a higher discount rate can be used, which shall correspond to the "opportunity cost of capital" (or the WACC) of the investor.

Article 5 – transparency of aid

11. **A municipality provides a loan, which is to be paid back with interest only if the project generates profits. For example, if the project becomes profitable after 1 year, the aid amount from the loan would be 0. If the project however never becomes profitable, the aid amount from the loan would be 1 million €. There is, thus, a clear maximum and minimum thresholds, but the exact aid amount is uncertain. Would such an arrangement be compatible with Article 5?**

The GBER only applies to aid in respect of which it is possible to calculate precisely the gross grant equivalent (GGE) of the aid ex ante without any need to undertake a risk assessment. Aid comprised in loans, where the GGE has been calculated on the basis of the reference rate prevailing at the time of the grant, will be considered to be transparent aid and therefore fulfil the requirements of Article 5.

Given that it is possible to calculate the GGE of the loan, it would be possible to only specify the minimum and the maximum amount of the aid to be awarded to the undertaking given that the maximum amount does not exceed the applicable thresholds under the GBER.

The same would apply to aid in the form of a grant as it is considered to be transparent aid pursuant to Article 5.

Article 6 – incentive effect

12. **If an application for funding does not meet all the requirements set forth in Article 6, but these requirements are, at a later stage, all met, can the initial date of the application be considered the application date?**

The application can only be considered when all the information set out in Article 6(2) have been provided.

Article 8 – cumulation

13. **Does aid granted by other EEA States affect the cumulation criteria of Article 8?**

Aid granted by other EEA States has to be taken into account to check that the conditions set out in Article 8 are met.

Article 9 – publication and information

14. **If aid is awarded under the same granting act, but on the basis of different legal objectives and for different eligible costs, do the principles of cumulation still apply?**

    For example a municipality decides to grant aid to a company, on the basis of a GBER aid scheme. In the decision, €250.000 is granted to the company on the basis of Article 38, while €275.000 is granted to the company on the basis of Article 25(b). The aid under Article 38 covers different eligible costs than the aid under Article 25(b). Has the registration threshold of €500.000 been exceeded in this case?

Under the scheme in this example, the beneficiary receives a total of €525.000. Article 9 is not meant to take account only of aid measures with same eligible costs, if they are granted under the same scheme. Individual aid awards subject to publication are defined therefore in relation to a particular scheme irrespective of the different legal objectives pursued.

15. **Some undertakings receiving aid are part of a multinational group with headquarters outside of the EFTA State. In these cases, should they be treated as a part of a group? If so, how should the transparency obligations be monitored if the multinational group is not registered in the EFTA State and it is unknown what other aid the group is receiving?**

The concept of an undertaking applies and all conditions of the GBER need to be met at the level of the group. Aid awards could, for example, be identified either through the consolidated accounts of the group or with the use of declarations.

16. **Does an EFTA State have to register aid to undertakings outside the EU in the register?**

Yes, if it fulfils all the criteria of Article 61(1) of the EEA Agreement.

17. **If aid is granted to an undertaking that is not registered in the EFTA State, should it be registered in the EFTA State's national register, or should/could the undertaking in question be required to report it to its own tax authorities for registration in that country's register?**

The aid awards should be registered in the awarding country's register.

18. **The obligation to register state aid arises when an undertaking receive €500.000 or more. However, what if the same public authority awards aid to the same company multiple times, but each individual aid award is below €500.000? Should the aid be cumulated?**

    For instance: A public authority administers a state aid scheme and awards to one undertaking €450.000 in February, and €400.000 in August. Should these two individual aid awards be cumulated?

If one should cumulate aid to one undertaking, the question is for what time frame? Is it for instance every year or for the duration of the aid scheme?

The legal basis regarding publication of state aid information refers to "aid award per beneficiary under a scheme". The term "aid award" refers to the amount a granting authority grants as aid to a particular beneficiary under the applicable aid measure. Moreover, an "aid measure" is the legal basis through which a State gives state aid.

Thus, when the aid that is granted to a beneficiary under the same legal basis, for example a state aid scheme, exceeds €500.000 then the publication requirements apply and consequently the aid award has to be registered in the transparency register, irrespective of whether the aid is awarded by one or two separate granting authorities. This requirement should apply for the duration of the scheme (the aid measure). However, if a beneficiary receives aid awards from two different schemes, which collectively, but not individually, exceed €500.000, then the publication requirements do not apply.

The rules should not be used to circumvent the application of the transparency obligation. If it is clear from the beginning that the aid under one scheme for the beneficiary would be €800.000 based on eligible costs, this should not be artificially split between different payment moments to avoid transparency publication. Also in such a scenario, the second application (and therefore granting of aid) for the same project and under the same scheme is unlikely to have an incentive effect.

19. **An SME receives tax-incentivised investments under Article 21(3). The aid amount does not exceed the threshold of €500.000 until year 3. If the State limits the allowed amount of tax-incentivised investments to €150.000 per year per undertaking, so that it would never be "clear" either in year 1 or 2 that the €500.000 threshold will be exceeded in a later year, does that mean that the publication requirement cannot be triggered?**

If, at the time of the granting of the aid the aid amount does not exceed the publication threshold and the State does not expect it to do so during the duration of the scheme, the publication requirement is not triggered. It is the State´s responsibility to provide the information in question in accordance with its knowledge at each time and not to artificially split up the granting of the aid (between time periods or schemes) in order to circumvent the transparency obligation.

20. **Is the State obliged to publish information about all state aid an undertaking has received under the scheme if and when the undertaking altogether has received more than €500.000?**

When an EFTA State grants aid under GBER to an undertaking, which, together with previous aid granted under the same scheme, exceeds €500.000, the publication requirement is triggered.

21. If the publication obligation is triggered and the undertaking continues to receive investments in the following years, is the State required to update the published information on the amount of aid granted?

Article 9(2) provides that schemes in the form of tax advantages, as well as for schemes covered by Articles 16 and 21, the conditions set out in paragraph 1(c) shall be considered fulfilled if EFTA States publish the required information on individual aid amounts in certain ranges. Accordingly, in year four the State can publish the most appropriate range provided for in Article 9(2) based on the information available at the time.

22. What is considered "the same undertaking" for the purpose of the Article 9(1)(c) threshold? Should the rules in the GBER Annex I concerning the SME definition apply, i.e. should aid given to "partner enterprises" or "linked enterprises" under the same scheme be cumulated?

There is no obligation to cumulate with different legal entities that belong to the same group or are partner or linked enterprises as defined in Annex I.

23. Tax measures shall be reported in intervals. Several of the tax measures are measures where the beneficiaries report the aid elements to the tax authorities for registration. Can the beneficiaries report the aid received in intervals to the tax authorities, or is it necessary that they report the exact amount? Can the intervals be provided in the national currency?

The transparency obligation allows the publication by the national authorities of tax measures in intervals. How the information is sent to the national tax authority, however, is not an issue regulated by GBER or in the transparency communication. It is therefore left to the discretion of the EFTA States. The data can be collected and published in national currency.

24. The GBER summary information sheets are published on the Authority's website. Does the publication on the Authority's website fulfil the obligations in Article 9(1)(a) and (b), or must the same information be published in the EFTA States' state aid registry? Would it be acceptable to provide links from the EFTA State's registry to the summary information sheet on the Authority's website?

The same information must be published in the EFTA State's state aid registry. However, it would be acceptable to provide links from the EFTA State's website to the information sheet published on the Authority's website.

25. Is there an obligation to create a separate registry that shows all schemes or individual aid awards (not only those which have been published in the registry) that are subject to recovery?

There is no obligation to create a registry of aid measures subject to recovery.

26. What constitutes as "individual aid award" within the meaning of Article 9? Is "each individual aid award" to be understood as each individual investment made in an

eligible undertaking, or is it the total amount of investments an eligible undertaking has received through tax-incentivised investments for example under Article 21(3) GBER, either calculated per year, or across several years?

"Individual aid" is defined in Article 2(14) as:

i) ad hoc aid; and
ii) awards of aid to individual beneficiaries on the basis of an aid scheme.

As regards tax-incentivised investments under Article 21(3), "individual aid award" should be considered as the tax-incentivised investments into each undertaking, when granted under the same scheme, for the duration of the scheme.

27. **According to Article 9(1)(a) and (b), providing links from the national state aid registry to the summary information sheet on the Authority's website would fulfil the publication obligations. The information about notified aid schemes to be published in the register should be the information that is contained in the notification information sheet. Would it fulfil the publication obligation to instead provide a link to ESA decisions on the compatibility of the notified scheme?**

According to the different guidelines imposing the transparency obligations on notified schemes and individual aid measures, the EFTA States shall publish the decision granting the aid, this means the full text of the legal act granting the aid adopted by the EFTA State. For instance, a new law approved by Parliament, a decision from a public agency granting an individual aid, etc. Therefore, the provisions on the transparency obligations are not fulfilled if, instead of a link to the definitive act granting state aid, the registry includes solely a link to the subsequent and potential ESA decision on the compatibility of the notified scheme.

CHAPTER II - MONITORING

Article 11 - reporting

28. **Is it necessary to provide a link to an online version of the national legal basis, or is it sufficient to write what the legal basis is when filling out the GBER information sheet if there is confidential information included in the national legal basis, for example a board decision?**

Article 11 requires that a link to the national legal basis is provided. However, when there are confidentiality concerns, the Authority would advise including a link to the extract of a board decision that specifically concerns this point, without providing all the minutes of the meeting.

Article 12 - monitoring

29. **Should "tax declarations" be interpreted to encompass all situations where fiscal aid is awarded based on a declaration by the beneficiary of the aid? Alternatively, does the wording refer to a specific document?**

The term "tax declarations" should be understood in a broad sense. Only the aid beneficiaries must submit tax declarations. Intermediaries are not considered as aid beneficiaries.

CHAPTER III – SPECIFIC PROVISIONS FOR DIFFERENT CATEGORIES OF AID

Article 13 – scope of regional aid

30. According to Article 13, support for energy production, distribution and infrastructure is not covered by regional aid. How should this rule be interpreted in light of Articles 36-49 of the GBER?

GBER does not allow aid in favour of energy and environmental measures under the regional state aid rules, but rather under the sections devoted to energy and environmental aid.

The same rule applies for the Authority's Guidelines on regional aid. Those guidelines are not applicable to environmental and energy measures. Instead, the Authority's Guidelines on environmental and energy state aid would be applicable.

Article 14 – regional investment aid

31. What is meant by "in the area concerned"? Does it refer to the NUTS level 3 or NUTS level 5?

The concept "area concerned" refers to the NUTS levels and to an assisted area fulfilling the conditions of Article 61(3)(c) of the EEA Agreement as defined in the regional aid map. As mentioned in the Authority's Guidelines on regional aid, both Norway and Iceland have regions only at NUTS level 3. Lichtenstein has no region eligible for regional aid.

Article 20 - aid for cooperation costs incurred by SMEs participating in European Territorial Cooperation projects

32. The GBER allows for registration of schemes of ETC Programmes by the country hosting the Managing Authority (MA). Is a MA from an EU Member State allowed to register a separate GBER scheme for the EFTA State at the Authority?

The Authority receives summary information sheets only from the EFTA States. The MA from an EU Member State would therefore need to send the summary information sheet to the Commission. In addition, the EFTA State concerned would need to send an information sheet to the Authority even if the MA is not present in the EFTA State, as the Authority would like to keep track of how GBER is applied.

Article 21 – risk finance aid

33. Would a natural person investing indirectly through his/her holding company be within the scope of this Article?

The question refers to the second sentence of Article 21(3) "[..] *or be in the form of tax incentives to private investors who are natural persons providing risk finance directly or indirectly to eligible undertakings*". The scope of the tax incentives provided for in the Article is targeted at investors who are natural persons. Natural person, for the purposes of Article 21, means a person other than a legal entity, provided that this person is not an undertaking. An undertaking is defined as an entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Such an entity can be a natural or a legal person, but it has to be engaged in an economic activity, i.e. offering goods or services on a market. The answer therefore depends on the nature of the ownership of the holding company in question, i.e. whether the natural person carries out an economic activity and thus qualifies as an undertaking or not. A mere shareholding by a natural person would normally not be considered as an economic activity.

According to the Authority's Guidelines on state aid to promote risk finance investments (see paragraph 120), which can be read together with the relevant rules contained in the GBER, finance "provided indirectly" is meant to cover situations where finance is provided to undertakings through investment vehicles, for example, through the acquisition of shares in a dedicated fund or other types of investment vehicles that invest into such undertakings.

Therefore, if the holding company acts as an investment vehicle on behalf of the natural person, which does not carry out an economic activity, that would seem to fall within the scope of Article 21(3).

34. Natural persons A, B and C own a holding company by 1/3 each. They make a deposit of €10.000 each into the holding company, which then invests into an eligible undertaking within the meaning of Article 21(3). The holding company thereby acts as an intermediary/investment vehicle through which the investors channel their funds into eligible undertakings.

a) Would a national tax rule granting tax relief on the personal tax returns of A, B and C due to their investments into eligible undertakings through the holding company, be in accordance with Article 21(3)? Alternatively, does Article 21(3) require the investors to make their investments directly into eligible undertakings, thereby barring the option of investing through an intermediary holding company, which is owned by the same investor(s)?

Risk finance aid may be in the form of tax incentives to private investors who are natural persons providing risk finance directly or indirectly to eligible undertakings. The natural person can therefore invest indirectly in the eligible undertaking. The question is whether, in the circumstances described, i.e. where a holding company is owned by A, B and C (or more natural persons), they would be carrying out an economic activity through the ownership of the holding company and thereby qualify as undertakings. In such a case, the investment would not fall within the scope of Article 21(3).

b) In the same example, would it matter if the intermediary holding company also owns shares/makes investments into other non-eligible undertakings (the

investors do not, of course, receive any tax relief based on the non-eligible investments under Article 21(3))?

In principle, as long as a natural person invests in eligible undertakings through an intermediary, it does not matter if the intermediary additionally invests in other non-eligible undertakings. It is the responsibility of the EFTA State to check that the natural person does not carry out an economic activity, for Article 21(3) to be applicable.

35. **Under Article 21(3) there is no specified notification threshold at the "level of independent private investors". The notification threshold in Article 21(9) (15 million € per eligible undertaking) refers to Article 21(4) "*at the level of eligible undertakings*", but not paragraph 3. Would this mean that there is no relevant notification threshold at the level of independent private investors when granting risk finance aid in the form of tax incentives under Article 21(3)?**

    Alternatively, as SMEs are the objects of risk finance aid at all levels mentioned in Article 21, could the provision be interpreted to mean that the relevant notification threshold is the same for both private investors and eligible undertakings, i.e. €15 million?

The private investors take on risk and can invest as much as they want in different companies. In the case of tax incentives, as these are granted to natural persons, they do not constitute aid to those private investors (but they constitute indirect aid to the eligible undertaking). The aid in this case is therefore assessed at the level of the eligible undertaking and the maximum amount of €15 million per eligible undertaking, set out in Article 21(9) GBER, applies.

36. **With reference to Article 8(4) first sentence, aid "without" identifiable eligible costs exempted under Article 21, may be cumulated with any other state aid "with" identifiable eligible costs. Can aid in the form of tax incentives under Article 21(3) be understood as aid "without" identifiable eligible costs, which may therefore be cumulated with any other form of state aid with identifiable costs without there being any relevant notification threshold?**

The aid needs to be assessed at the level of the eligible undertaking. The aid to the eligible undertaking would be considered aid without identifiable eligible costs. This amount can be cumulated with any other state aid "with" or "without" identifiable eligible costs. Each type of aid could then be granted up to the respective maximum amounts/intensities.

37. **Under Article 9(1)(c), Member States are required to publish information referred to in Annex III on each individual aid award exceeding €500.000. For schemes in the form of tax advantages and schemes covered by Article 21, the condition set out in (c) shall be considered fulfilled if the States publish the required information on individual aid amounts in some specified ranges. Do the publication requirement apply in the case of tax incentives granted to private investors that are natural persons?**

The information published concern the aid at the level of the eligible undertakings only. The aid amount to be specified and published is the nominal value of the investments into each undertaking.

38. In the context of aid under Article 21(3), how would the aid element be calculated for the eligible undertakings, to ensure that the €500.000 threshold in Article 9 is respected (and indeed, that the €15 million threshold in Article 21 is respected)?

In the case of aid in the form of tax advantages, an *ex-ante* cap would have to be set to ensure that the aid granted is under the notification threshold. Therefore, the discounted value of the aid at the time it is granted shall be added up until the amount of the benefit reaches the *ex ante* cap. This system ensures that both the notification threshold as well as the discounting methods are complied with when granting aid in the form of tax advantages extending over a certain period of time.

39. Are there any limitations as to what additional sectors may be excluded from state aid under Article 21(3), beyond the sectors explicitly excluded in the GBER? Are EFTA States within the meaning of the GBER free to exclude other sectors from receiving state aid exempt under the GBER?

The EFTA States can apply the GBER provisions to target specific sectors unless otherwise provided. Article 21(3) does not impose any sectoral limitations.

40. Does Article 21(13)(c) allow States to design risk finance measures with a downside protection mechanism other than by way of guarantees? Or does Article 21(13)(b), as well as Article 48(c) of the Authority's Guidelines on risk finance, limit the possibility of downside protection to guarantees?

Article 21(13)(b) requires that, for instruments other than guarantees, the open call aimed at establishing the risk-reward sharing arrangements favours selection criteria based on asymmetric profit sharing over downside protection. However, if the result of the call is that asymmetric profit sharing is not possible, Article 21(13)(b) does not prohibit downside protection.

Article 21(13)(c) does not apply to guarantees, but to all other financial instruments, such as loans and equity. It can for instance be agreed that the public investor will cover the first loss piece, but in that case, this first loss piece must be limited to 25% of the total investment. Please note that the 25% cap does not limit the public investment to 25% of the total investment, but only limits the first loss taken by the public investor.

Paragraph 48 of the Guidelines on risk finance requires, amongst other, that, for instruments other than guarantees, where the public investor would cover a first loss higher than 25% or where the open call favours selection criteria based on downside protection over upside incentives, the risk finance measure needs to be notified and will be assessed under the Guidelines.

41. **Can Article 21(14) apply when the EFTA State provides individual investors in SMEs with tax discounts/incentives without the investment going through financial intermediaries or does Article 21(14) provide that such aid must always be awarded through financial intermediaries?**

Article 21(3) provides that "*at the level of independent private investors, risk finance aid may take the forms mentioned in paragraph 2 of this Article, or be in the form of tax incentives to private investors who are natural persons providing risk finance directly or indirectly to eligible undertakings*". Moreover, Article 21(13) lists certain conditions, which risk finance measures shall fulfil. The first condition listed is that those measures shall be implemented through one or more financial intermediaries. However, an exemption is provided for "*tax incentives to private investors in respect of their direct investments into eligible undertakings*". This entails that the State can provide private investors with tax incentives when they invest directly in SMEs, without going through financial intermediaries, as long as those private investors are natural person. In such a case, Article 21(14) would not apply.

Article 26 – investment aid for research infrastructures

42. **Article 27(4) states that the fees charged for using the cluster's facilities and for participating in the cluster's activities shall correspond to the market price or "*reflect their cost*". This reference is not found in Article 26(3). Are the pricing mechanisms actually allowed different? What if there is no market to find the market price from? Could the cost approach then be allowed?**

Article 26(3) foresees that the price paid for the use of the research infrastructure has to correspond to the market price. The market price can be determined using different methodologies, such as for instance the one provided for in points 87 and 88 of the Authority's Framework on research, development and innovation. If the market price cannot be established, GBER cannot be applied and notification is required.

Article 27 – aid for innovation clusters

43. **Shall Article 27 be interpreted to mean that one may only give out aid to innovation clusters if the cluster organisation operates a physical space and cooperation between the participants takes place in that physical space?**

Article 27 provides for investment and/or operating aid for innovation clusters. GBER foresees that the aid can only be granted to the manager of the cluster based on pre-defined eligible costs in accordance with Article 2(29) and 2(30). In view also of the definition of innovation clusters in Article 2(92) GBER, we understand Article 27 as referring to clusters operating in a physical space, as well as to virtual clusters, as long as the software tools used are capable of performing the tasks assigned to such clusters, e.g. "exchange of knowledge and expertise and by contributing effectively to knowledge transfer, networking, information dissemination and collaboration among the undertakings and other organisations in the cluster".

44. Does all costs need to be reflected in the price charged or only operating costs or only investments costs or only those costs which are not supported through the cluster aid?

The users should pay the market price for using the cluster. This can be found by comparing prices used in similar clusters in an EFTA State or abroad. However, when there is no market price or where it is difficult to establish such a market price, then the price users should pay must cover at least the incremental (marginal) costs of using the cluster, by analogy with point 25(b) of the Authority's Framework on research, development and innovation.

Articles 32 and 33 – aid for the recruitment of disadvantaged workers and for the employment of workers with disabilities

45. According to Articles 32 and 33, aid can be given in the form of wage subsidies for the "recruitment" of disadvantaged workers and for the "employment" of workers with disabilities. How should the content of the term "employment" in Article 33 be assessed?

Article 32 and Article 33 protect different groups of workers. The definitions of disadvantaged workers and workers with disabilities can be found in Article 2(3), (4) and (99). The protection provided to workers with disabilities is broader than the one offered to disadvantaged workers because the former are considered more vulnerable.

The objective of Article 32 is to recruit disadvantaged workers with the aim that once they are hired in a company, they will remain in the labour market. Thereafter, they are not considered any longer as disadvantaged workers. In addition, the aid for disadvantaged workers is only provided for a maximum period of 24 months.

However, the situation of disabled workers is different. They need more support since their situation is not temporary but permanent. GBER allows the granting of aid to disabled workers for their entire professional life, but they must first be recruited to be covered by Article 33. Thus, aid for disabled workers can be indefinite but net job creation has to be ensured. Consequently, GBER does not allow for the granting of aid for disabled workers already working in the company for some time before the company requests support. However, if at the time of employment the worker was not disabled but became disabled during the validity of the contract, the company employing him may receive support under Article 33, starting with the moment the worker becomes disabled.

This is why, in view of the above, Article 32 only refers to recruitment and Article 33 to employment.

Article 36 - investment aid enabling undertakings to go beyond Union standards for environmental protection or to increase the level of environmental protection in the absence of Union standards

46. Can Article 36 be used for the acquisition and retrofit of vehicles that are not related to "transport infrastructure" (for instance shuttle busses that transport the passengers from the aircraft to the terminal)?

Article 36 does not apply to the acquisition and retrofit of vehicles that are not related to the transport sector and the related infrastructure as defined in Article 2(45) of the GBER. However, the shuttle busses are considered to be "transport vehicles" and can therefore benefit from funding under Article 36.

Article 41 - investment aid for the promotion of energy from renewable sources

47. Can Article 41 be applied so that financial grants can be given for converting fossil oil heated buildings into buildings able to be heated by renewable fuels? Or does the Article only apply to costs relating to the production of the energy source material (for example pellets or bio-oil)?"

Article 41 refers to production of biofuels. Therefore, Article 41 cannot be applied to this kind of situation.

Article 44 - aid in the form of reductions in environmental taxes under Directive 2003/96/EC

48. Can an EFTA State make use of Article 44 in general or only in cases where the conditions of the Energy Taxation Directive (2003/96/EC) are not fulfilled (thereby only making it possible to fulfil the conditions through an Article 19 of that Directive procedure, which is unavailable for the EFTA States)?

An EFTA State cannot make use of Article 44 if the conditions of the Energy Taxation Directive are not fulfilled. In particular, the EFTA States are precluded from using Article 44 if the procedure of Article 19 of the Directive is required. However, Article 44 can be used by the EFTA States if the provisions of the Directive are satisfied (e.g. on differentiated tax rates).

Article 49 - aid for environmental studies

49. Can aid for environmental studies be linked to the investments to be carried out?

Article 49(1) clarifies that aid for environmental studies can only be granted if it serves the specific purpose for environmentally friendly investments mentioned in sector 7 of the GBER to be carried out. Article 49(1) does not require that the study be linked to an individual investment.

Article 52 - aid for broadband infrastructures

50. Can the granting authority choose between the different procurement procedures under EU law: an open procedure or a competitive dialogue procedure or a competitive procedure with negotiation?

All these procedures can be compatible with the GBER. However, a restricted procedure is not compatible.

51. Is an open procedure or a competitive dialogue procedure with at least two bidders sufficient to fulfil the criteria of a competitive outcome, without an examination by an external auditor? If the granting authority only receives one bid, is it necessary to have the cost calculation by the winning bidder examined by an external auditor, as indicated in the Authority's Guidelines on broadband deployment, so that the aid amount can be adjusted according to the examination?

According to Article 65(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, the minimum number of candidates should be three for a competitive dialogue procedure. For an open procedure, obviously there is no minimum requirement. However, as the Guidelines on broadband deployment put it, there should be a "*sufficient number of bidders*" so as to ensure genuine competition (paragraph 74c and footnote 95). Whether there is genuine competition must be assessed on the basis of the characteristics and the nature of the contract in question. In this context, granting authorities have a margin of appreciation. In principle, it follows therefore that in an open procedure, even a scenario with one or two tenders submitted might reflect the realistic market situation. In such a case, there would be no need for external auditing. Nevertheless, it is advisable that a contracting authority is allowed to withdraw a call for tenders if it realises that there is a market failure problem or not enough tenders. In the latter case, it could use any of the other procedures (e.g. inviting a few of the most promising economic operators and negotiate with them).

52. If a competitive dialogue procedure or a competitive procedure with negotiation results in only one or two bids, would it be possible to continue the process and still reach compatibility under GBER?

If these competitive processes result in only one or two bidders, the result of the winning bidder must be examined by an external auditor for GBER to be applicable.

Article 54 - aid schemes for audiovisual works

53. Can aid for video games be granted under Article 54?

Aid for video games cannot be granted under Article 54.

54. A writer has received pre-production aid to cover all costs for developing a script, in accordance with Article 54(5)(b) and (8). The eligible costs amount to €10.000. The writer then sells this script for €15.000 to a production company that wishes to make a film based on the script. The company applies for production aid in accordance with Article 54(5)(a). Excluding the costs connected to the manuscript, the production company has estimated the overall costs of the production to be €500.000. How should the costs for the manuscript be incorporated into the production company's costs?

According to paragraph 8, pre-production costs shall be taken into account in the overall budget. If the pre-production cost of €10.000 (the cost of developing the script) was not supported with aid, it could be included in the calculation of the eligible cost. However, the production company cannot receive aid for pre-production costs for which aid has already been given, although to a different beneficiary.

Thus, if the writer received pre-production aid, the following option would be the way forward for granting aid to the production company:

The eligible costs for the production company are €500.000 + €15.000 (the cost of buying the script), resulting in total eligible costs of €515.000, and a grant to the production company of €257.500 (aid intensity 50% in accordance with Article 54(6)).

Article 55 - aid for sport and multifunctional recreational infrastructures

55. If only investment aid is granted for the construction or upgrading of sports or multifunctional infrastructure, shall any third party assigned for the operation of the facility be chosen on a non-discriminatory basis under the procurement rules?

According to Article 55(6), if a third party is entrusted with the construction or operation of the infrastructure, this must be done on the basis of the applicable procurement rules. There is no differentiation between investment aid and operating aid, even if only investment aid is granted.

56. How is the word "rent" in Article 55(9) interpreted?

The word "rent" in Article 55(9) is meant to refer to a situation where an entity (e.g. a sports club) rents the infrastructure from someone else. In such a case, the rent costs are considered eligible operating costs. Please note that according to Article 4(1)(bb), for operating aid to sports infrastructure the maximum allowable amount is €2 million per infrastructure per year. If the rent period is less than a year, the amount is adapted pro rata.

Annexes

Annex II – information regarding state aid exempt under the conditions of this regulation

57. Is it necessary that each regional film fund/film center individually sends a notification under GBER or would it be sufficient if one notification was sent on behalf of all of them through the EFTA State National Film Institute (NFI)?

The obligation laid down in Article 11 to transmit to the Authority a summary information sheet for each measure exempted under the GBER, is on the EFTA State. It is therefore up to the EFTA State concerned to decide which entity sends the summary information as long as all the required information is provided therein.

The EFTA States should identify the granting authority in the summary information sheet. If the NFI sends the sheet on behalf of the granting authority/ies, the information on the NFI suffices. If the information sheet concerns a scheme under which several granting authorities can grant aid, all granting authorities should be listed.

58. Is it necessary to send a new summary information sheet if the national legal basis for an aid scheme has changed (the regulation on which the scheme was based is repealed and the scheme is now based on a new regulation) when the material contents of the scheme are the same?

This is a substantial modification of the scheme. It is not just an amendment of the law but a new legal basis. Consequently, a new summary information sheet has to be sent.

Annex III - provisions for the publication of information as laid down in Article 9(1)

59. According to GBER Annex III, the state aid registry should provide information on which region (at NUTS level II) the beneficiary is located in.

a) If the head office of a company is located for example in Oslo, but the project that receives aid is carried out in Trondheim, what should the listed region be?

b) If the group's head office is located in Trondheim, but the company receiving the aid is located in Tromsø, what should the listed region be?

a) The region will be Trondheim
b) The region will be Tromsø.