Comments

by the German Banking Industry Committee[1] on the revised draft regulation declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (General Block Exemption Regulation)

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Berlin, 10 February 2014

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,000 banks.

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[1] Enrolled in EU transparency register unter the register number 52646912360-95.

I. Preliminary comments

As part of its state aid modernisation initiative (SAM), the EU Commission has launched a review of the Commission Regulation EC 800/2008 (initially due to expire on 31 December 2013) of 6 August 2008 declaring certain categories of State aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation). The goal of the Regulation consists in simplification and strengthening of the EU State aid regulation [which exempts certain categories of State aid from the obligation of prior notification to the Commission].

Based on the foregoing, on 20 June 2012 the EU Commission published its amended draft of the General Block Exemption Regulation (GBER) thus ushering in a public consultation round on the experience with the existing Regulation. To this end, it published a questionnaire. On 8 May 2013, the EU Commission used this as a basis for a consultation on the first draft of the revised General Block Exemption Regulation. On 28 June 2013, the German Banking Industry submitted its respective comments. On 18 December 2013, as part of the current consultation round, the EU Commission published a revised draft of the General Block Exemption Regulation.

The apex associations of the German banking industry cooperating under the umbrella of the German Banking Industry Committee (Bundesverband der Deutschen Volksbanken und Raiffeisenbanken, Bundesverband deutscher Banken, Bundesverband Öffentlicher Banken Deutschlands, Deutscher Sparkassen- und Giroverband und Verband deutscher Pfandbriefbanken) appreciate this opportunity to submit their comments on the revised draft Regulation.

II. General Comments

The German Banking Industry Committee welcomes the Commission's objective of improving the prioritisation during the implementation of the State aid legislation as well as greater simplification and better compliance with the rules by means of an amendment of the General Block Exemption Regulation. However, whilst the second draft of the new General Block Exemption Regulation contains slight improvements over the first draft (such as the deletion of Article X regulating subsequent SME status changes) in our view it still fails to facilitate any material simplification. This is at odds with the key objective of modernising State aid legislation. Compared to the current General Block Exemption Regulation, the scope of the proposed amended GBER has seen a clear increase: This creates greater complexity in the field of compliance audits regarding the block exemption provisions and thus also greater legal risks due to the more complex regulatory framework. For banks and savings banks, this would lead to an inflation of the pass-through costs for promotional loans extended under State aid schemes.

III. Specific comments

1. Exclusion of large-scale aid schemes (Article 1)

According to Article 1(2)(a), the 'effective annual budget' for exempted aid schemes shall be subject to a new upper limit of EUR 100 million or 0.01% of GDP for the Member State concerned. At this point, it is unclear which year shall be used as the basis for calculating the GDP cap.

2. Examination of the incentive effect (Article 6)

The proposed new incentive effect rules are stricter than the present rules. The German Banking Industry Committee objects to the list of minimum criteria included in Article 6, paragraph 2, second sentence which the beneficiary has to establish in the documentation submitted to the respective Member State prior to beginning the work on the project or the activity. Our reservations are particularly owed to the high price which companies would have to pay for such communicable information. Based on the foregoing, the German Banking Industry Committee advocates in favour of keeping the GBER's existing regime for all companies, i.e. aid granted "shall be considered to have an incentive effect if, before work on the project or activity has started, the beneficiary has submitted an application for the aid to the Member State concerned".

3. Sanction (Article 10)

In cases of non-compliance with the provisions of the General Block Exemption Regulation, Article 10 proposes a sanction under which the legal benefit of the block exemption may be withdrawn meaning that future aid requires completing and submitting a notification form. This sanction is too excessive. Furthermore, it fails to specify the degree of the violation that triggers sanctions. This means that already the first violation could lead to a complete withdrawal of the eligibility for the general block exemption under the Regulation and that notifications would have to be submitted for each and any aid received. It is highly unlikely that the Commission seeks to impose such far-reaching legal consequences already upon a first-time non-compliance or minor infringements. It would appear preferable to impose such comprehensive consequences only in cases of repeated or fraudulent non-compliance.

4. Aid for SMEs (Articles 17-22)

Article 17(3) lit. b) of the current draft stipulates that the acquisition of assets linked to a permanent establishment shall only be eligible for State aid if the establishment has closed or would have closed had it not been purchased. In our view, this additional criterion is excessively restrictive. Our reservations are owed to the fact that this hinders the incorporation of new undertakings – despite the fact that from the EU Commission's point of view, start-ups are particularly worthy of promotion.

From the point of view of aid policy it makes no difference whether the acquisition is directly linked to a closure of the establishment. Rather, what really matters is that the takeover will lead to the establishment of a new undertaking, the market entry of which shall be substantially facilitated by means of the aid. Hence, the Regulation should focus on the new undertaking and not on the old undertaking.

Under the provisions of 17(3) lit. b) and 17(4) lit. c) tangible and intangible assets of third parties who are not linked to the buyer can be acquired under market conditions. The rule that there shall be no relation between buyer and seller is highly restrictive and, in terms of the underlying economics, not constructive. For instance, if there is a takeover by former employees, there will inevitably be a relationship between the buyer and the seller meaning that a takeover within the meaning of No. 3 lit. b) or, moreover, the acquisition of intangible assets pursuant to No. 4 lit. c) will not be an option. Such a restrictive approach would prevent the continuation as a going concern of undertakings firmly established in the market meaning that in many cases the only option left will be asset stripping. Particularly in the SME sector, takeovers play an important role. Hence, the current proposal would be counterproductive

with regard to the underlying rationale of targeted SME promotion. Therefore, the current proposal should be deleted.

To date, under the provisions of Article 26 GBER, aid for consultancy services was exempted from the notification requirement. From now on, this exemption shall only apply to cooperation costs of SMEs participating in European Territorial Cooperation projects subsumed under the scope of the ERDF/ETC Regulation (Article 19(2) lit. b) and item 3). However, for SMEs, the funding and promotion of consultancy services is of pivotal importance in general; hence, the exemption should not only be limited to ETC projects.

5. Aid for environmental protection (Section 7)

Calculation of the extra investment costs

In practice, determining the extra investment costs is frequently difficult. This is due to the fact that there are many cases where the reference investment cannot be determined or its determination results very difficult. Frequently, the determination will only be possible in a highly onerous manner and has to be made based on assumptions on the part of the aid recipient This is due to the fact that, more often than not, investment projects tend to be very specific, occasionally featuring unique characteristics (e.g. special pieces of equipment, complex, integrated production processes). More often than not, reference investments are absent from the market.

Whilst not limited to, this problem occurs particularly in the field of highly innovative projects. Especially SMEs frequently lack the necessary expertise for calculating the extra investment costs. This is due to the fact that as far as their own operations are concerned e.g. the purchase of a certain piece of equipment or of an energy generation plant is often a one-off decision. Frequently, for SMEs, the costs for calculating the extra investments costs tend to be often too high. As opposed to large market participants one potential consequence specifically for SMEs might consist in (continued) use of more environmentally harmful technologies thus eroding the SME’s competitiveness.

Furthermore, legal uncertainties result from the interpretation and calculation of the extra investment costs in practice. This regularly also translates into major additional administrative costs, extra costs under the provisions of State aid legislation and thus, in the final analysis time delays during the approval processes (e.g. due to the commissioning of additional legal expert opinions). These issues obstruct or rather prevent investments and are at odds with the EU Commission's aforementioned objective of promoting a “greener economy" as well as its official aspirations in the field of environmental protection / climate protection.

By way of an additional alternative, in order to facilitate the determination of the extra investment costs in practice, we therefore suggest introducing general values expressed as a fixed percentage of the investment sum. Provided that its dimensions are correct, this generic approach does not have any adverse effects on the appropriateness and volume of aid; at the same time, it offers uncomplicated and effective promotion in this important area. This option was already included in the first draft of the new GBER (e.g. Article 30, GBER first draft); it should be upheld for each and any aid in favour of environmental protection under the GEBR.

Hence, in view of the serious problems in determining the additional costs, we should welcome it if the aforementioned generic approach was included again as an alternative and equivalent method for calculating extra investment costs in the Regulation; we also suggest assigning its own aid intensity to said generic approach].

6. Definitions (Annex I)

The definitions should become less ambiguous. Hence, for instance the scope of application of the definitions for SME aid remains unclear. An application exclusively to Chapter III Section 2 – Aid for smaller and medium-sized enterprises – seems an unfortunate choice. Our reservations are owed to the fact that individual terms are also used outside of this section in the regulatory text (for instance in section 3 and 7). However, also a potential applicability of the definitions to each and any SME aids (i.e. for instance also to regional aid) appears unwarranted. As a result, it is not sufficiently transparent which definitions shall apply in which sections and articles of the Regulation.

Indent 32 – Aid to undertakings in difficulty

We caution against using the definition of "undertakings in difficulty" by way of analogy to the definition for the purposes of the new rescue and restructuring aid guidelines. As far as the new GBER is concerned, we suggest using the currently applicable "hard" criteria without any reference to the new rescue and restructuring aid guidelines. Furthermore, an undertaking which has been incorporated for less than three years shall not be considered to be in difficulty unless it meets the conditions for being the subject of insolvency proceedings (cf. Article 1(7) of the current GBER).