**Question:**

In relation to the two questions in the eState Aid WIKI (of LV (12.04.2016) and EE (17.11.2016)), and in connection to the interpretation of the lecturer in the RDI Training, held on 20.10.2017 in Brussels, Belgium, by DG COMP and DG REGIO, could you please confirm:

We have the following hypothetic case:

A large enterprise received an ad hoc financing for building a RDI infrastructure under the RDI Framework which represents the no aid scenario, meeting the criteria that the infrastructure is used almost exclusively for non-economic activities, since the economic activities does not exceed 20 % of its relevant overall annual capacity. The first two years, the economic activity is below the 20 % threshold. In the third year of the exploitation of the RDI infrastructure the economic activities are 34 % of the infrastructure yearly capacity.

According to the interpretation of the answer to the LV question in the eState Aid WIKI from 12.04.2016, which was answered by the Commission on 25.05.2016, a claw-back mechanism can be used, under the Art. 26 of the GBER.

We would like to be advised the following:

1. Could the measure be accepted as compatible with the GBER conditions, as the “formal incentive effect” is not met and the reporting criteria of Article 11 (a) of the GBER, which says that the measure should be reported in SANI 2 within 20 working days following its entry into force is also not met? Could we still use such a claw-back mechanism under the GBER when in practice it is not possible to meet ex ante all these conditions of the GBER?
2. In case we want to use the claw-back mechanism, under the RDI Framework, could you please confirm whether in the following example from above, the whole financing should be returned back with interest, as it will be considered as incompatible state aid (since it was granting under the condition that the economic activities will not exceed the 20 % threshold and this condition is subsequently not met)?

Or instead, can we claw-back the annual tranche of use of the capital invested only for the year in which the 20 % threshold is exceeded, because it could be considered that the exceed is identified by the controlling body which disbursed the financing and it is part of its public obligations in the context of the claw-back mechanism established? In this case, could you please confirm that the whole amount for this year should be returned with interest?

**Reply:**

As a general remark, when funding is provided to a RO or Research infrastructure that carries out both economic and non economic activities, there needs to be a clear separation of accounts.

ad (1)

MS can apply the claw-back mechanism foreseen by Article 26 of the GBER to an infrastructure which ex-post exceeds the 20% ancilliarity threshold (in your example in the 3ed year of operation) to the extent that the eligible amount of support fulfills the eligibility conditions specified by that article. In this scenario, it is accepted that the incentive effect of support was not assessed at the moment the support was granted due to the assumed at that time non-economic character of the research infrastructure, resulting in initial no-aid qualification of the public support. The general requirements covered by Chapter I of the GBER  - that are applicable to individual aid awards - only come into force in the year where the public support for the research infrastructure is re-qualified from no-aid to State aid. Member States must however also ensure that a national legal basis exists which is implemented in line with the relevant GBER requirements and sets out the conditions of Article 26 of the GBER on the basis of which the claw-back can be carried out.

ad (2)

As already clarified by the Commission the funding has to be clawed back on an annual basis if the monitoring carried out by the granting authority shows that the economic activity exceeds 20% in a given year. It is not necessary to return the whole financing initially granted for the infrastructure. However, in the given year, where the 20% threshold is exceeded, the whole share of the public funding used for economic activity has to be recovered, and not only the share exceeding 20%. It is possible that in the successive years the 20% threshold is again respected and therefore there is no need to apply the claw back mechanism for those years (but just for the year(s) in which the 20% threshold is exceeded).

We confirm that the amount to be clawed back needs to be repaid with interest in line with the requirements set down in Article 9, 10, 22 of the Implementing Regulation 794/2004.

Disclaimer: This reply does not represent a formal and definite position of the European Commission but is only an informal guidance provided by the services of DG Competition to facilitate the application of the GBER. It is therefore not binding and cannot create legal certainty or legitimate expectations.