REPUBLIC OF ESTONIA
MINISTRY OF FINANCE

Ms Andrea Bomhoff
European Commission
Directorate-General for Competition
stateaidgreffe@ec.europa.eu

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The concept of the same eligible costs for the purpose of cumulation of State aid and de minimis aid

Dear Ms Andrea Bomhoff

The Ministry of Finance of Estonia as a coordinating body of State aid topics in Estonia is kindly requesting clarification regarding the interpretation of "the same eligible costs" in Article 14 of Commission Regulation (EU) No 651/2014 (GBER). In particular, we are seeking for clarification whether design (engineering) costs and construction costs must be considered as the same eligible costs for the purposes of cumulation under Article 8(5) of GBER and *de minimis* aid.

The Commission has provided interpretations on e-State Aid Wiki suggesting that design costs may be eligible under Article 14 of GBER where such costs are capitalised together with the investment (e.g. Commission answer to Estonia on 28 Febr, 2024). The Commission has also explained in Wiki that if two aid measures have identifiable costs and these eligible costs are the same by reference to a specific GBER provision (e.g. Article 14) then cumulation of aid is possible to the highest relevant aid intensity under the relevant GBER provision (e.g. Commission answer to Poland on 8 July, 2024).
However, in the view of one of our aid grantors, design and construction costs cannot be considered the same eligible costs for the purposes of cumulation under Article 8(5) of GBER and *de minimis* aid, where such an interpretation would result in recovery of State aid on the grounds of a breach of the cumulation rules for the following reasons:

1. **Wording of the GBER**

Article 14 of GBER refers to eligible costs as "investment costs in tangible and intangible assets".
According to Article 2(29) of GBER "tangible assets" are exhaustively defined as physical assets (land, buildings, plant, machinery and equipment).
Design activities, by their nature, do not constitute physical assets and are therefore not clearly encompassed by this definition.

Also, the GBER does not expressly provide that capitalisation determines whether a cost constitutes an eligible cost under Article 14 of GBER or whether it is "the same eligible cost" for cumulation purposes.
Therefore, interpreting design costs as "the same eligible costs" as construction costs solely because they are capitalised together with construction costs appears not to be grounded in the wording of the regulation.

2. **Legal certainty**

EU regulations are binding in their entirety and must be applied uniformly across all Member States without the need for national implementation measures. According to the case-law, provisions of EU law must be clear, precise and unconditional, so that their legal effects can be determined directly from their wording enabling individuals to understand their rights and obligations and to plan their conduct accordingly.
It is not clear from the wording of Article 14 of GBER whether design and engineering costs, where separately identifiable and not themselves assets within Article 2(29) or 2(30) of GBER, should be treated as „the same eligible costs" merely because they are capitalised together with the resulting construction asset.

3. **Strict interpretation of block exemptions and limited discretion of Member States**

As confirmed by the Court of Justice (including Case C-349/17 Eesti Pagar), provisions granting exemptions from the notification obligation must be interpreted narrowly, and their conditions must be clear and easily applicable by Member States.
Under Article 108 TFEU, only the European Commission has exclusive competence to assess compatibility of State aid. Member States are required to apply the GBER strictly and do not have wide discretion to rely on expanded or informal interpretations that are not clearly reflected in the legal text. Furthermore, EU law must ensure uniform application throughout the Union, meaning that Member States do not have discretion to reinterpret or expand the scope of directly applicable provisions.
As a result, provisions of directly applicable EU law must be interpreted strictly in accordance with their wording, and interpretations that extend beyond the text of the provision risk undermining both legal certainty and the uniform application of EU law.

To illustrate the problem, we give the following theoretical example:
According to the aid scheme regional aid for initial investment (Article 14 of GBER) to large company can be granted up to 25% of eligible costs[1]. The engineering/design costs can be supported under *de minimis* aid rules up to 80% of these costs (but not more than 300 000 euros per undertaking). The engineering/design costs cannot be supported under regional aid rules.

In light of the above, we would therefore be grateful for the Commission's clarification on the following:

1. Whether the Commission considers that design/engineering costs and construction costs should always be considered as „the same eligible costs" for the purposes of cumulation under Article 8(5) of GBER and *de minimis* aid?

2. If the answer to question 1 is „No", then can the design/engineering costs - if separately invoiced and procured separately from construction and excluded from Article 14 of GBER eligible cost base, but according to the accounting

[1] According to the regional aid map of Estonia 25% is the maximum aid intensity for regional aid for large companies.

rules still capitalised with the investment - be supported under *de minimis* aid rules without being treated as the same eligible costs as the construction costs supported under Article 14 of GBER. In this case could the design/engineering costs and construction costs be cumulated?

We have also sent the shorter version of the question via Wiki but would very much appreciate if you could answer our questions by letter.

Yours sincerely,

(signed digitally)
Tarmo Porgand
Head of State Stakeholding and Public Procurement Department

Maris Kalda
maris.kalda@fin.ee
+372 5885 1434