


Art. 2(18) - Undertaking in difficulty that is not an SME

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Article	Article 2 - Definitions
Key words	<i>undertaking in difficulty, large enterprise, group of undertakings, single legal entity, consolidated financial statements</i>
Member State	HR
Question	<p>We hereby kindly ask for clarification of the provisions of the Block Exemption Regulation for State Aid (GBER), i.e. Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.</p> <p>We hereby kindly ask for interpretation of GBER related to the following issue:</p> <p><u>Clarification of the conditions that need to be fulfilled to consider an undertaking that is not an SME „an undertaking in difficulty“</u></p> <p>Article 1(4)(c) of Regulation 651/2014 prohibits the granting of aid to undertakings in difficulty and Article 2(18) defines such undertakings. Question and answer no. 5 in GBER FAQ from July 2015 and March 2016 clarify partially the definition of an undertaking in difficulty.</p> <p>1.1. In Article 2(18)(e) of Regulation 651/2014 two conditions that have to be fulfilled in order for an undertaking that is not an SME to be considered „an undertaking in difficulty“ are set forth. Please clarify the following questions related to the aforementioned conditions:</p> <p>1.1.1. In case where an undertaking that is not an SME consists of several legal entities, are the two ratios (the undertaking's book debt to equity ratio and EBITDA interest coverage ratio) calculated for each single entity or for the whole undertaking (i.e. the group of legal entities). In case of the latter, the consolidated figures for the whole undertaking should be used. Since the definition of one undertaking as per GBER and as per accounting standards in member states are not the same, most undertakings that contain more than one legal entity do not have consolidated financial statements for the whole undertaking as per GBER definition. How should the applicants calculate the inputs for these ratios? Should they do a separate consolidation for a group of legal entities based on the GBER definition of a single undertaking? If so, should these statements be audited?</p> <p>1.1.2. Do both of the conditions stipulated in Article 2(18)(e) of Regulation 651/2014 have to be fulfilled in order to consider an undertaking “an undertaking in difficulty”?</p>

	<p>1.2. In case where an undertaking that is not an SME contains a large number of legal entities, which are considered a single economic entity, in order to determine whether the undertaking is in difficulty the following is applicable according to GBER FAQ: <i>"the economic situation of all the legal persons part of the group shall be considered when granting aid under the GBER"</i> (Q&A number 5 in GBER FAQ from July 2015 and March 2016). Please clarify:</p> <p>1.2.1. Which indicators will be checked in order to analyse the <i>"economic situation of all the legal persons that are part of the group"</i>?</p> <p>1.2.2. Is the whole undertaking ("the Group") considered an undertaking in difficulty in the following hypothetical situation: single legal entity ("company A"), which is a part of this Group, but not a material part (for example, total assets of company A are less than 5% of the total Group assets, total debt of company A less than 5% of the capital and reserves of Group), has the book debt to equity ratio greater than 7,5 and EBITDA interest coverage ratio below 1 (i.e. the indicators from GBER Article 2(18)(e) within indicating that the company A is an undertaking in difficulty)?</p>
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COMP Reply	<p>1.1.1 There is no obligation to prepare consolidated financial statements if they are not mandatory under the national law. Of course, such statements can be prepared 'ad hoc' or consolidated specifically in order to calculate the financial data of the economic unit for the purposes of assessment of the undertaking status in connection to the aid application. Please note that, according to Annex 1 Article 6 of GBER, the necessary information can be derived and calculated on the basis of the accounts and other data existing for each entity that forms part of the given economic entity as understood under the GBER.</p> <p>1.1.2 Both criteria listed in Article 2 (18) (1) and (2) of GBER must be fulfilled jointly in order for the undertaking to be considered an undertaking in difficulty.</p> <p>1.2.1 The indicators which should be checked are those which allow to establish whether the circumstances described in Article 2 (18) of GBER occur with regard to the given single undertaking.</p> <p>1.2.2 As stated in the reply to Question 5 in the GBER Frequently Asked Questions available at DG COM website: http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf, in accordance with the case law, an undertaking is defined as a single economic entity having a common source of control. Therefore, as long as the group acts as a single economic unit, it shall be considered as one undertaking and the economic situation of all the legal persons part of the group (together) shall be considered in order to assess if the group is in difficulty.</p>

	<p>In a GBER scenario, if the legal entity applying for aid is not in difficulty, a plausibility check shall be conducted at the level of the group to confirm the overall financial situation. If there are no particular reasons to indicate difficulty at the level of the economic unit, it should be possible to grant aid under the GBER. Conversely, if the legal entity applying for aid is in difficulty, a check at the level of the economic unit should either confirm or not this economic situation. If the difficulty is confirmed also at the level of the economic unit, no aid can be granted under the GBER. If the difficulty is not confirmed at undertaking level, the parent -or sister companies of the beneficiary of the planned aid may be able to provide the necessary funding to the beneficiary, after which it can receive aid under the GBER.</p> <p>A practical application of this economic reality check is, for example, the situation of a legal entity going in insolvency, being part of a single undertaking that is not in difficulty. If the entity is left by its parent company to go into insolvency, it can be taken as an indication that the group no longer considers that undertaking to be necessary for its future activities. Therefore, the legal approach that the good financial situation of the single undertaking could compensate for a difficult situation of a legal entity no longer holds to the reality of the group. In such a circumstance, if this legal entity would apply for aid under the GBER, the eligibility criteria would not be met.</p> <p><i>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.</i></p>
COMP Reply date	2016.10.31
COMP Responsible	<input checked="" type="checkbox"/> COMPsupport ESTATE-AID-WIKI

¹ Article numbers & names

- Article 1 - Scope
- Article 2 - Definitions
- Article 3 - Conditions for exemption
- Article 4 - Notification thresholds
- Article 5 - Transparency of aid
- Article 6 - Incentive effect
- Article 7 - Aid intensity and eligible costs
- Article 8 - Cumulation
- Article 9 - Publication and information

² AU, BE, BG, HR, CY, CZ, DK, EE, FI, FR, DE, EL, HU, IE, IT, LV, LT, LU, MT, NL, PL, PT, RO, SK, SI, ES, SE, UK.