

## **Reply of the European Investment Bank Group to the 2<sup>nd</sup> public consultation concerning the targeted revision of the General Block Exemption Regulation - HT.5224**

The European Investment Bank (“EIB”) and the European Investment Fund (together “EIB Group” or “EIBG”) welcomes the opportunity to participate in the second round of public consultation with regard to the targeted revision of the General Block Exemption Regulation (“GBER”), with the specific view to accommodate for aid involved in the InvestEU Programme.

EIB Group welcomes the simplifications and clarifications introduced by the European Commission, following the first round of public consultation to which EIB Group also participated. EIB Group is convinced that the proposed amendments contribute to the greater effectiveness of the proposal and increased legal certainty.

This said, there are still a number of points that EIB Group would like to make or reiterate from the first round of public consultation. Key points for EIB include request for the following issues to be reflected:

- i) institutional position of the EIBG as the main implementing partner and clarification as to when State aid rules do not apply in InvestEU context;
- ii) association of EIBG to the drafting process of any future guidance notes;
- iii) clarification of cumulation rules in Article 8
- iv) appropriate covering of equity instruments under Article 56f

The first point of utmost importance for the EIB Group refers to the clarification of the scope of GBER. EIB Group welcomes very much the proposed clarification that the GBER applies to the aid under InvestEU, rather than to the InvestEU in general. However, the EIB Group is of the view that some provisions of the current draft GBER remain unclear.

We believe that notably the provisions on the scope, the language used in the recitals, the cumulation rules and section 16 would benefit from further clarifications, as some of them leave room to interpretation and may lead to contradictory interpretations.

This could create legal uncertainty for stakeholders that will be involved in implementing InvestEU or may receive financing from the InvestEU. Therefore, EIB Group would still ask for the introduction of clarifications with an aim to better explain the scope of GBER and in particular when it does not apply, e.g. by an introduction of a number of recitals, as per the below EIB Group drafting suggestions. This is notably relevant in the light of the proposed deletion of market funds definition, which would have clarified that IFIs’ funds, including EIBG’s, are considered market funds. These important clarifications are essential in the specific context of the InvestEU Programme and would not be sufficiently covered by a simple reference to the Notion of Aid Notice.

Consequently, we suggest that the followings elements/points are clarified in the recitals:

- International Financial Institutions (“IFI”) – including the EIB Group - investing own resources at own risk is considered private financing in nature under State aid rules and does not constitute State aid in the meaning of Article 107(1) of the Treaty.
- Where IFI – including the EIB Group - own resources covered by the InvestEU Guarantee do not involve any national sources imputable to Member States, they should not be taken into account in the application of the thresholds.
- Where it is possible to separate the IFI funds - including the EIB Group own resources - covered by the InvestEU Guarantee from national funds under InvestEU that support the same project or final beneficiary, the IFI own resources covered by the InvestEU Guarantee should not be taken into account for the purposes of the application of GBER.
- There is no state aid in the case of ESI Fund contribution through the Member States Compartment to a standard product implemented entirely by EIB Group or other IFIs without any additional condition than the geographic allocation.

The inclusion of statements above would help better clarify how the rules apply in the following main scenarios:

- Implementation of InvestEU Programme by an IFI, including EIB Group, which by the InvestEU Regulation is the main and privileged implementing partner;
- Combination in one project of IFI's lending supported by InvestEU budgetary guarantee with NPBIs lending supported by InvestEU budgetary guarantee; as well as combination of support from the EU Compartment with MS Compartment;
- Contribution of ESI Funds via the Member State Compartment to a standard product with no other restrictions or requirements than geographic allocation;

EIB Group welcomes the intention of the European Commission to provide further guidance on the typical scenarios supported under the InvestEU Regulation. EIB Group, as the main implementing partner under InvestEU, would very much welcome being associated to that process, given its experience with various potential structures and scenarios, including combinations of EU Compartment and MS Compartment.

For the other technical points, of which most were clarified in the revised draft, we would very much welcome if the Commission reexamines its proposal for the cumulation rules. EIB Group deems that, as they are currently drafted, they do not provide sufficient legal certainty to how the cumulation rules apply. Furthermore, EIB Group is anticipating that the current drafting of the cumulation rules expands the scope of GBER and State aid rules to financing and situations that should otherwise be excluded from GBER's scope because they do not constitute State aid. In fact, while it is stated that InvestEU financing should not count towards the notification thresholds, the way cumulation rules are drafted, appear to achieve exactly that result. The way cumulation rules are drafted could be read in a way that InvestEU financing that does not involve any national funds (either through the Member State Compartment or a national promotional bank), would need to be taken into account and deducted from the maximum aid amount otherwise allowed under GBER. That is why it is deemed of utmost importance to better clarify and limit the scope of GBER in the recitals, so that they can serve as interpretative text for provisions in the GBER, including the cumulation rules.

Finally, we note that following drafting changes introduced in the draft GBER published in the 2<sup>nd</sup> public consultation, equity instruments do not seem to be covered by Article 56f anymore. We trust that this is an oversight that could be reformulated/addressed in the text (see EIBG drafting proposals), rather than an intentional exclusion of equity instruments from the scope.

Concrete drafting proposition of the EIB Group to accommodate for the suggestions presented above, as well as for other technical points which are deemed important by the EIB Group, have been proposed. We also stand ready to provide further technical explanations should they be considered useful.

## EIBG drafting suggestions highlighted in yellow:

- **New Recitals**

EIB Group would like to reiterate its proposal made in the 1<sup>st</sup> public consultation and ask for the introduction of the following paragraphs in the recitals:

“International Financial Institutions (“IFI”) – including the EIB Group - investing own resources at own risk is considered private financing in nature under State aid rules and does not constitute State aid in the meaning of Article 107(1) of the Treaty. This also implies that EIB Group own resources invested at own risk for the EIB Group should not be taken into account for the calculation of the notification thresholds or calculating maximum aid intensities or aid amounts.

Support from the InvestEU Fund that does not involve national resources is not State aid. There should thus be no State aid control required for the deployment of IFI – including the EIB Group - own resources covered by the InvestEU Guarantee, for instance where the IFI – including the EIB Group - is Implementing Partner under the EU Compartment.

There is no State aid in the case of ESI Fund contribution through the Member States Compartment to a standard product implemented entirely by the EIB Group without any additional condition than the geographic allocation. This geographic condition would not make the resources imputable to the Member State.

With respect to aid involved in financial products supported by the InvestEU Fund, the thresholds apply to the nominal amount of estimated total financing provided to any final beneficiary or project under the support of the InvestEU Fund. The introduction of this concept aims at facilitating the combination of national funds - including resources of national promotional banks and institutions - to which State aid rules apply, with funds that are not subject to State aid rules, such as EIB Group own resources under the InvestEU Guarantee. It facilitates such combination because there is no requirement to calculate the aid element in the combined funds, as long as the thresholds for the nominal amount of total financing from the InvestEU Fund are respected. However, the Commission acknowledges that the real aid element of such combined support is much smaller because it relates only to the national funds.

Where IFI – including the EIB Group - own resources covered by the InvestEU Guarantee do not involve any national sources imputable to Member States, they should not be taken into account in the application of the thresholds.

Where it is possible to distinguish the IFI funds - including the EIB Group own resources - covered by the InvestEU Guarantee from national funds that support the same project or final beneficiary, the IFI own resources covered by the InvestEU Guarantee should not be taken into account for the purposes of the application of GBER. This is the case for instance where EIB Group as Implementing Partner under the EU Compartment of InvestEU provides an investment loan to an infrastructure project and a national development bank as Implementing Partner provides a separate investment to the same project.

Where national support provided under InvestEU contains aid that needs to be compatible with State aid laws, Member States may choose to comply with other articles of the GBER than those in Section 16, or other State aid rules, including the de minimis Regulation. Where national support is provided to a project that benefits of support under InvestEU, and the national support is not provided under InvestEU, Section 16 does not apply to that national support.”

- **Recital (8) – Innovation activities at TRL 9 level**

EIBG drafting proposal:

According to recital (8), “... ~~The Commission points out that State aid for research and development activities at TRL 9 level is considered to go beyond the scope of the definition of experimental development and would consequently be excluded from the scope of this Regulation.~~”

EIBG is of the view that in order to facilitate investment in R&D and innovation, as well as ensure consistency with the Commission’s flagship Horizon 2020 and Horizon Framework programmes, innovation activities at TRL 9 level should be eligible for aid under the GBER.

- **Recital 10**

EIBG drafting proposal:

“Conversely, when Member States have no discretion as to the use of the resources or act in line with normal market conditions, the use of those funds ~~does~~ ~~may~~ not ~~constitute~~ State aid.”

EIBG is of the view that using the word “does not” instead of “may not” more appropriately reflects the rules with respect to the non-existence of State aid, as also explained in the Communication on the Notice of Aid. Using the word “may” creates uncertainty, and undermines the general principles of State aid law that market-conform public investments, as well as where there is no discretion left to Member States, does not constitute State aid.

- **Article 1(2)(a) – Scope**

EIBG drafting proposal:

“For aid under Section 16 of Chapter III of this Regulation, only contributions by a Member State to the Member State compartment of the EU guarantee, referred to in point (b) of Article 8(1) of the [InvestEU Programme] Regulation, which are earmarked **by the Member State** for a **specific non-standard financial product under InvestEU** shall be taken into account for assessing whether the average annual State aid budget of that Member State related to the financial product exceeds EUR 150 million.”

- **Article 1(3) – Scope**

EIBG drafting proposal:

“This Regulation shall not apply to:

(a) aid granted in the fishery and aquaculture sector, as covered by Regulation (EU) No 1379/2013 of the European Parliament and of the Council (\*) with the exception of training aid, aid for SMEs' access to finance, aid **for in the field of** research and development, innovation aid for SMEs, aid for disadvantaged workers and workers with disabilities, regional investment aid in outermost regions, regional operating aid schemes, ~~and~~ aid to European Territorial Cooperation projects **and aid involved in financial products supported by the InvestEU Fund**;

(b) aid granted in the primary agricultural production sector, with the exception of regional investment aid in outermost regions, regional operating aid schemes, aid for consultancy in favour of SMEs, **aid for SMEs' access to finance** ~~risk finance aid~~, aid for research and development, innovation aid for SMEs, environmental aid, training aid, aid for disadvantaged workers and workers with disabilities, aid to European Territorial Cooperation projects and aid involved in financial products supported by the InvestEU Fund”

EIBG is of the view that it is important to ensure the consistent application of these rules across sectors, including to the fisheries and aquaculture sector.

- **Article 1(4)(c) – Scope**

EIBG drafting proposal:

“4. This Regulation shall not apply to:

(c) aid to undertakings in difficulty, with the exception of aid schemes to make good the damage caused by certain natural disasters, start-up aid schemes, regional operating aid schemes, aid to SMEs under **Article 56e(9)**, Article 56f and aid to financial intermediaries under Section 16 of Chapter III, provided undertakings in difficulty are not treated more favourably than other undertakings.”

EIBG is of the view that the exception from the exclusion of undertakings in difficulty from GBER's scope should apply also to Article 56e(9), which is very similar to Article 56f.

In the alternative, the exclusion could be limited to **“Article 56e(9) where implemented via an intermediated structure”**, which would ensure the logic of the exclusion: where the selection of final beneficiaries is carried out by financial intermediaries that contribute their own resources and hence share the risk in the investment, on the one hand, they have the adequate know-how to assess whether the beneficiary is economically viable, and on the other, they are incentivised to invest only in viable companies that will be able to repay the financing.

Equally, we invite the Commission to align the exceptions to the exclusion of undertakings in difficulty from GBER's scope to the exceptions introduced by the third amendment of the Temporary Framework.

- **Articles 2(133), (138), (138a), (138b) – definitions related to broadband**

EIBG suggests deleting the definitions of “basic broadband networks” (133) and “Next Generation Access (NGA) networks” (138) as they are not relevant any more from a technical point of view.

Instead, EIBG suggests inserting the following definitions, which are more pertinent from a forward-looking technology point of view:

(138) “very high capacity (VHC) networks” means advanced networks which have at least the following characteristics:

(i) they deliver services reliably at a very high speed per subscriber through optical (or equivalent technology) backhaul sufficiently close to user premises to guarantee the actual delivery of at least 100 Mbit/s, upgradeable to 1Gbit/s;

(ii) they support a variety of advanced digital services including converged all-IP services.

Eligible technologies are in line with Berec guidelines of 12 June 2020, such as FTTH/B and 5G enabling infrastructures;

(138a) “next generation backhaul networks (NGN)” means advanced backhaul networks that can support the deployment of NGA networks through optical fibre (or equivalent technology);

(138b) “very high capacity backhaul networks” means advanced backhaul networks that can support the deployment of VHC networks through optical fibre (or equivalent technology);”

- **Former Article 2(173) – Definition of market funds**

We understand that the Commission has deleted, in the 2<sup>nd</sup> draft GBER, the definition of market funds that was put forward by the Commission in the 1<sup>st</sup> draft GBER. EIBG is of the view that this is a very useful definition and therefore suggests re-introducing it, with the modifications proposals as made by EIBG in the 1<sup>st</sup> public consultation.

Former (173) ““market funds” means funds of commercial financial intermediaries and of other market investors, irrespective of their ownership, which operate on a for profit basis and at full own risk, without a public guarantee, and which are independent from the final beneficiaries. This includes funds of business angels, of the EIB Group, of the EBRD and of other multilateral development banks international financial institutions, and excludes funds of national promotional banks or institutions;”

- **Article 2(175) – Definition of new entrant**

EIBG is concerned that the definition of new entrant does not support increasing competition in the EU, as an operator from one EU country entering a market in another EU country would not be considered a new entrant. According to the current definition, in practical terms only operators from outside EU or newly created companies would be considered “new entrants”. In order to promote existing new EU operators to enter new markets and increase competition, the definition should refer to whether the company has run operations on a particular market (country, region, line – depending on the project), and not on whether they were at all registered in the EU.

- **NEW definition - Definition of EIB Group**

In line with our comments made in the 1<sup>st</sup> public consultation, EIBG suggests introducing the definition of EIB Group, which is used in the recitals proposed to be introduced by EIBG.

“EIB Group’ means the European Investment Bank, and its subsidiaries or other entities as defined in Article 28(1) of the EIB Statute.”

- **Article 8 – Cumulation**

EIBG is of the view that the way it is drafted, there could be misinterpretations on the way cumulation rules apply. For the sake of legal certainty, it is important that the cumulation rules are drafted in a way that they are easily assessable by all relevant stakeholders.

As we have proposed in the 1<sup>st</sup> public consultation, the article should clearly separate the rules in different paragraphs applicable to the very distinct scenarios of:

- a) cumulation of aid with identifiable eligible costs and aid with identifiable eligible costs. Rule and treatment of financing provided under InvestEU Fund (Section 16 of Chapter III).
- b) cumulation of aid without identifiable eligible costs (e.g. aid under Section 16) and any other aid with identifiable cost. Rule and treatment of financing provided under InvestEU Fund
- c) cumulation of aid without identifiable eligible costs and aid without identifiable eligible costs. Rule and treatment of financing provided under InvestEU Fund

Furthermore, there seems to be a sentence that contradicts two other sentences within the same article: According to Article 8(3)(b): “Instead, the amount relevant for such compliance shall be calculated by first deducting the nominal amount of the financing supported by the InvestEU Fund from the total eligible project costs and subsequently calculating the highest aid intensity

or aid amount applicable to the aid under this Regulation only on the basis of the total remaining eligible costs.”

This sentence seems to contradict two other sentences in the same paragraph:

- “Financing provided to the final beneficiaries under the support of the InvestEU Fund under Section 16 of Chapter III and the cost covered by it shall not be considered for determining compliance with the cumulation provisions of paragraph 3.” Contrary to this latter sentence, the sentence starting with “Instead, the amount relevant ...” de facto requires the deduction of the financing under InvestEU from the total eligible project costs, and applying the highest aid intensity or aid amount to such reduced amount. So contrary to what the first sentence says, the support under InvestEU is considered for determining compliance with the cumulation rules.
- “The nominal amount of financing provided to the final beneficiaries under the support of the InvestEU Fund shall, in cases of Articles for which the notification threshold is expressed as a maximum aid amount, also not be considered for determining whether the notification threshold under this Regulation is thresholds in Article 4 are respected.” This sentence is also contradicted by the sentence starting with “Instead, the amount relevant ...”, since it does require limiting the aid by first deducting the support under InvestEU. On the contrary, the sentence starting with “Instead, the amount relevant ...” seems to bring in the scope of GBER InvestEU funding even where it does not contain any national funds, either through the Member State Compartment or participation by a national promotional bank. Consequently, an InvestEU EU Compartment investment implemented exclusively by EIB Group as Implementing Partner would seem to be captured by the cumulation rule and therefore the scope of GBER.

- **Article 14(10) – Regional aid – broadband**

In light of EIBG suggestions made with respect to Article 52, the following corresponding amendment are suggested with respect to Article 14(10):

“Regional aid for ~~broadband-electronic communications~~ network development shall fulfil the following conditions:

(a) aid shall be granted only in areas where there is no network of the same category (~~either basic broadband or NGA/VHC~~) and where no such network is likely to be developed on commercial terms within three years from the decision to grant the aid; and

(b) the subsidised network operator must offer active and passive wholesale access under fair and non-discriminatory conditions ~~including physical unbundling in the case of NGA networks;~~”

- **Article 25(a)(2) – Aid for projects awarded a Seal of Excellence quality label**

EIBG drafting suggestion:

“The eligible activities of the aided research and development project or feasibility study shall be those defined as eligible under the Horizon 2020 or the Horizon Europe programme rules, ~~excluding activities going beyond experimental development activities.~~”

As mentioned above with respect to recital (8), EIBG is of the view that innovation activities at TRL 9 level should be eligible for aid under GBER. This is necessary to encourage R&D and innovation activities, as well as to ensure consistency with the Commission’s flagship Horizon 2020 and Horizon Europe Framework programmes.

- **Article 25(c)(2) – Aid involved in co-funded research and development projects**

EIBG drafting suggestion:

“The eligible activities of the aided research and development project or feasibility study shall be those defined as eligible under the Horizon 2020 or the Horizon Europe programme rules, ~~excluding activities going beyond experimental development activities.~~”

As mentioned above with respect to recital (8) and Article 25(a)(2), EIBG is of the view that innovation activities at TRL 9 level should be eligible for aid under GBER. This is necessary to encourage R&D and innovation activities, as well as to ensure consistency with the Commission’s flagship Horizon 2020 and Horizon Europe Framework programmes.



- **Article 25(d)(2) – Aid for Teaming actions**

EIBG drafting suggestion:

“The eligible activities of the co-funded Teaming action shall be those defined as eligible under the Horizon 2020 or the Horizon Europe programme rules, ~~excluding activities going beyond experimental development activities.~~”

As mentioned above with respect to recital (8) and Articles 25(a)(2) and 25(c)(2), EIBG is of the view that innovation activities at TRL 9 level should be eligible for aid under GBER. This is necessary to encourage R&D and innovation activities, as well as to ensure consistency with the Commission’s flagship Horizon 2020 and Horizon Europe Framework programmes.

- **Article 52 – Aid for broadband infrastructures**

EIBG suggests using the term “electronic communications” instead of broadband which more adequately fits with recent regulatory evolution, in particular the Electronic Communication Code of 2018. This would accordingly require similar rewording from “broadband” to “electronic communications” in Article 4(1)(y) as well as Article 14(10).

Furthermore, in light of the EIBG suggestions with respect to the definitions in Article (133), (138), (138a) and (138b), as well as to better align the GBER to the 2018 Electronic Communication Code, EIBG would make the following drafting suggestions to Article 52:

“SECTION 10

Aid for ~~broadband~~ **electronic communication** infrastructures

Article 52

Aid for ~~broadband~~ **electronic communication** infrastructures

1. Investment aid for ~~broadband~~ **electronic communication** network development shall be compatible with the internal market pursuant to Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.

2. The eligible costs shall be the following:

(a) investment costs for the deployment of a passive broadband infrastructure;

(b) investment costs of broadband-related civil engineering works;

(c) investment costs for the deployment of ~~basic broadband~~ **VHC backbone and access networks**;

~~(d) investment costs for the deployment of next generation access (NGA) networks.~~

3. The investment shall be located in areas where there is no infrastructure of the same category ~~(either basic broadband or NGA network)~~ **(VHC network)** and where no such infrastructure is likely to be developed on commercial terms within three years from the moment of publication of the planned aid measure, which shall also be verified through an open public consultation.

5. The network operator shall offer the widest possible active and passive wholesale access, according to Article 2, point 139 of this Regulation, under fair and non-discriminatory conditions, ~~including physical unbundling in the case of NGA networks.~~ Such wholesale access shall be granted for at least seven years and the right of access to ducts or poles shall not be limited in time. In the case of aid for the construction of ducts, the ducts shall be large enough to cater for several cable networks and different network topologies.”

- **Article 56d(4) – Maximum thresholds**

EIBG drafting proposal:

“The maximum thresholds laid down in Articles 56e and 56f shall apply to the total ~~outstanding nominal amount of~~ **outstanding nominal amount of** financing provided to the final beneficiary under any financial product supported by the InvestEU Fund **in case State aid rules apply.**”

EIBG suggests replacing “total outstanding financing” with “nominal amount of financing”. This is because the notion of “total outstanding financing” is used only in this paragraph in the entire GBER, so it is challenging to understand how it fits within the context of section 16. Furthermore, it is difficult to understand to what “outstanding” refers to: outstanding from the total project costs (i.e. the yet non-financed part of the project costs), or outstanding from the maximal nominal amount of InvestEU support (i.e. the thresholds)? Furthermore, semantically, outstanding financing cannot be provided to the final beneficiary.

We also suggest introducing the qualification “in case State aid rules apply” into the sentence. This seems necessary in order to be consistent with the message in the recitals that GBER applies only to the extent there is aid in the InvestEU financing: Where the financing is provided on market terms,

GBER will not apply. Equally, where the Member States have no discretion as to the use of the funds, (because they contribute under the Member State Compartment to a standard product under InvestEU), GBER does not apply. Finally, where EU Compartment financing is separable from MS Compartment financing, GBER will not apply to the EU Compartment financing.

- **Article 56d(5) – Eligibility of refinancing and guarantee on existing loans**

EIBG drafting proposal:

“Aid shall not be granted in the form of refinancing of or guarantees on existing portfolios of financial intermediaries, except if the following conditions are fulfilled:

(a) a market-conform premium is paid for that guarantee, or  
(b) the financial intermediary generates a new portfolio of eligible financing in an amount commensurate to the benefit created by a non-market conform premium. Non-performing loans are not eligible for guarantee.”

With respect to Article 56d(5), EIBG would like to reiterate its proposal made in the first public consultation: we suggest either deleting the non-eligibility of guarantees on existing portfolios, or in the alternative, allowing it where certain conditions are met. We understand that the legal requirement that state aid to have the required incentive effect is the reason for not allowing guarantees on existing portfolios. We also understand that the requirement is linked to concerns about banks using securitisation instruments to get rid of bad loans, or gain capital relief, including in the context of bank restructuring measures. EIB Group points out that these concerns are addressed by the specific implementation modalities of such instruments:

1. Where securitisation instruments provide a guarantee on an existing portfolio, there is a condition to create a new portfolio fitting the relevant policy objectives, and the additional portfolio is not benefiting from any guarantee from EIB Group.
2. Securitisation instruments may not be extended to any financial intermediary that is not in a sound financial situation, to the complete exclusion of any financial intermediary that is subject to bankruptcy or similar situations. In addition, insolvency of the financial intermediary may be an event of default, leading to the termination of the guarantee.
3. Non-performing loans are not eligible.
4. At the level of final recipients, refinancing of existing debts is not allowed. This (together with the other eligibility criteria) ensures that additionality and incentive effect exist at the level where the intervention is targeted.

- **Article 56e(1) – General conditions under Article 56e**

EIBG drafting proposal:

“Aid to the final beneficiary under a financial product supported by the InvestEU Fund shall comply with

(a) the conditions set out in one of paragraphs 2 to 9; and

(b) in case the financing is provided in the form of loans to the final beneficiary, it shall be priced following requirements of the InvestEU Regulation and the Investment Guidelines. have an interest rate that corresponds at least to the base rate of the reference rate applicable at the time of the granting of the loan.

When it comes to the proposed Article 56e(1), EIBG suggests referring to the InvestEU Regulation and the Investment Guidelines to determine how financial products, and in particular loans, have to be priced and those rules should prevail. As mentioned in the EIBG reply to the 1<sup>st</sup> public consultation, EIBG do not agree with the principle that GBER should restrict or overwrite the pricing rules laid down in the InvestEU Regulation and the Investment Guidelines. Second, based on the proposed subparagraph (b), if reference is to be made to a minimum interest rate to be charged, this should refer to the “market risk-free” interest rate (i.e. benchmark IBOR, EURIBOR, etc. for the given maturity) applicable at the time of the granting of the loan, which is a globally accepted definition in financial markets.

EIBG would also like to point out that there seems to be an inconsistent use of the terms “aid” and “nominal amount of financing under InvestEU” across the sectoral paragraphs in Article 56e(2)-(9).

- **Article 56e(2) – Aid for trans-European digital connectivity infrastructure**

In line with previous suggestions relating to broadband, EIBG suggests the following modifications:



"Aid for ~~trans-European digital~~ VHC connectivity infrastructure shall comply with the following requirements..."

(a) General cumulative conditions:

(i) The project is a project of common interest in the area of VHC digital connectivity infrastructure under the Regulation XX (CEF2 Regulation);"

"(b) Specific conditions:

(i) The following cumulative specific criteria shall apply for investments in networks capable of providing symmetric download and upload speeds ~~of up to~~ at least 1Gbps:

- The project aims to connect socio-economic drivers as defined in article 8.3.(a) of the Regulation XX (CEF2 Regulation) that are public or private undertakings entrusted with the operation of services of general economic interest in the areas of education, social services including health, public administration, transport, postal services, culture, as referred to in Article 106(2) of the Treaty and in line with the Commission Decision 2012/21/EU or subsequent legal acts replacing said decision;;

- The project is based on an identified market failure ~~in meeting public needs~~ verified ~~by available appropriate mapping or, when such mapping is not available,~~ by a public consultation and policy objectives;

- Eligible socio-economic drivers can only be connected to the project infrastructure if they do not have access to infrastructure existing or credibly planned in the next three years or within the same time frame of the planned supported intervention that is capable of providing symmetric download and upload speeds of at least ~~100 200-Mbps~~ ~~or a download speed of upgradeable to~~ at least ~~500 Gb/s~~ 1 Gbps.

- The project demonstrates ~~that in significant proportion of its territorial footprint it constitutes a step change, in that if i.e.~~ as a result of the subsidised intervention, (i) a significant new investment in the broadband network is undertaken and (ii) the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition compared to infrastructure existing or credibly planned in the next three years or within the same time frame of the planned supported intervention. For a project to be considered to bring significant new investments, these investments must go beyond marginal investments related merely to the upgrade of the active components of the network. With regard to the demonstration of significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition, the subsidised infrastructure shall (i) ensure at least a doubling of download and upload speeds compared to existing and/or planned infrastructure and (ii) be capable of providing symmetric download and upload speeds of at least 1Gbps.

- Aid shall not be granted for projects that include areas where ~~two NGA/NGN networks are present or are credibly planned in the next three years or within the same time frame of the planned supported intervention or that include areas where at it fully overlaps with~~ least one very high-capacity network capable of providing symmetric download and upload speeds of at least 1Gbps is present or is ~~credibly planned within the next three years or within the same time frame of the planned supported intervention~~ already credibly committed to be rolled out during the same time period of the project.

(ii) The following cumulative specific criteria shall apply to cross-border investments in the deployment of 5G corridors along major transport paths ~~or underserved rural areas~~:

- The project ensures uninterrupted cross-border coverage in a 5G corridor along major transport routes, including roads, rail and inland waterways, as defined in the Regulation XX (CEF2 Regulation);

- The project consists of a cross-border section as defined under the Regulation XX (CEF2 Regulation) which (i) involves at least two Member States by crossing the border between two or more

Member States, or (ii) crosses the border of at least one Member State and a European Economic Area country, ~~(iii) served underserved rural areas of at least one of those countries~~;

- The project ensures a significant new investment in the broadband network going beyond marginal investments related merely to the upgrade of the active components of the network.

- The project supports the deployment of new passive infrastructure only if existing passive infrastructure cannot be reused."

EIBG has the following observations and explanations with respect to the Commission proposal and EIBG's drafting suggestions above:

- Article 56e(2): "VHC connectivity infrastructure" appears to be a better definition than "trans-European digital connectivity infrastructure".

- Article 56e(2)(a)(vi): the condition “beyond the requirements relating to any existing legal obligations” creates legal certainty as to what legal requirements are intended.
- Article 56e(2)(b)(i) second indent: The verification proposed by the draft GBER text is far too stringent for this sort of aid. EIBG fears that the result will be that eligibility will be restricted to small and only few projects as a result.
- Article 56e(2)(b)(i) third indent: EIBG observes that the parameters proposed by the Commission appear arbitrary.
- Article 56e(2)(b)(i) fifth indent: EIBG proposes to delete “two NGA/NGN networks are present or are credibly planned in the next three years or within the same time frame of the planned supported intervention or that include areas where at”. Because two NGA networks are not same as one VHC! Furthermore, EIBG also proposes to delete the requirement of “within the next three years or within the same time frame” as this is very often not known and can be used by competitors in a pre-emptive way to destroy business plans of investors.
- Article 56e(2)(b)(ii): EIBG observes that the proposed conditions are very stringent and will likely result in very few eligible projects.

- **Article 56e(7)(d) – Energy efficiency**

EIBG drafting proposal:

“(d) aid for measures that improve the energy efficiency **of buildings** may also relate to the facilitation of energy performance contracts subject to the following conditions:

- (i) the nominal amount of total financing provided per final beneficiary under the support of the InvestEU Fund does not exceed EUR [30] million;
- (ii) the support takes the form of loan or guarantee **including forfeiting**;
- (iii) the support is provided to SMEs or small mid-caps;
- (iv) the support is provided only for energy performance contracting within the meaning of Article 2(27) of Directive 2012/27/EU on energy efficiency\*\*\*\*.”

EIBG welcomes the introduction of the provision that will make the implementation of energy performance contracting (EPC) much easier. That being said, we believe the provisions introduced could be further improved and thereby EIBG makes the following comments:

- It is not entirely clear what is meant with “final beneficiary”. Whether it is the EPC provider or the building owner or tenant that should have the economic advantage of the investment? If it is the EPC provider than it makes sense to limit it to SMEs and small mid-caps. However, if it is for the building owner or tenant, it does not make sense, as this includes the public and residential sector.
- We advise to extend the scope beyond energy efficiency in buildings and keep it asset neutral in order to be able to support for example also other types of public infrastructure.
- It is not clear whether storage and small scale renewable energy is eligible similarly to the Article 56e(7)(b)(i-ii). This would align it with the approach taken by Eurostat that allows for revenues from on-site renewable energy and also with the policy objective of sector integration.
- It is important to clarify if guarantees or loans includes also forfeiting (true sale of receivables) or guarantees to forfeiting. EIBG suggests that GBER takes the same approach as DG REGIO did with the concept of “forfeiting loans”, please see in the *fi-compass* brochure: <https://www.fi-compass.eu/publication/factsheets/european-structural-and-investment-funds-esif-and-energy-performance>.

- In case the final beneficiary is considered to be the EPC provider, the proposed amount of EUR 30 million is at the lower end for smaller mid-caps. That is about the size of 20-40 projects over 7 years, meaning 3-6 projects per year. Therefore, we suggest increasing the amount.

- **Article 56e(8)(a) – Research and development**

EIBG drafting proposal:

“Aid for research, development, innovation and digitalisation shall comply with the following requirements:

- (a) aid may be granted for:
  - (i) fundamental research;
  - (ii) industrial research;
  - (iii) experimental development;
  - (iv) process or organisational innovation for SMEs and small mid-caps;
  - (v) innovation advisory services and innovation support services for SMEs and small mid-caps;
  - (vi) digitalisation for SMEs and small mid-caps;“

It is important that large undertakings, or at least small midcaps are also eligible to receive aid for R&D and innovation as otherwise they could be incentivised not to grow and hire employees.

- **Article 56e(9)(b)(iii) – SMEs and small mid-caps**

EIBG drafting proposal:

“(a) the nominal amount of total financing provided per final beneficiary under the support of the InvestEU Fund does not exceed EUR 15-30 million and is provided to:”

“(iii) SMEs and small mid-caps entering a new product or geographical market, where the initial investment for entering into a new product or geographical market must be higher than 50% of the average annual turnover in the preceding 5 years;”

The Commission proposal in the 1<sup>st</sup> public consultation indicated that the threshold may be up to EUR [30] million. Compared to 30 million, the 15 million indicated in the 2<sup>nd</sup> Commission proposal represents a very significant decrease in possible financing amount that does not seem to be justified. It is also in stark contrast to other sectoral provisions of Article 56e where the maximum amounts have been either maintained or increased compared to the draft in the 1<sup>st</sup> consultation.

- **Article 56f – Commercially-driven financial products**

EIBG drafting proposal in order to cover equity instruments under Article 56f:

**Option 1:** “For equity investments, independent private investors shall account for at least [10-20]% of the financing portfolio, ranking pari passu with other investors [profit-sharing/ risk exposure] in the same investment round.”

OR

**Option 2:** “For equity investments, independent private investors shall account for at least 30% of the financing portfolio, within an asymmetric profit-sharing model, while ranking pari passu with other investors as regards risk exposure, either on fund level, or deal-by-deal level or a combination thereof.”

The current wording of Article 56f does not allow for the implementation of equity products. EIBG is of the view that Article 56f should cover all types of financial instruments, including equity products, based on a co-investment model with independent private investors (market funds). In the case of equity funds managed by a fund manager, the fund manager would typically not invest more than a few % in order to have “skin in the game”. It is rather the investors that are investing in the fund and which is managed by the fund manager who provide the private investment that ensures the level of private investment required by State aid laws. In light of the foregoing, in order to cover equity instruments under Article 56f, EIBG would suggest:

- (i) In order to align with Article 21 GBER, and in line also with the market practice, it makes more sense using a threshold of 10%-20% of market funds ranking pari passu; or
- (ii) reinstating the Commission wording in the 1<sup>st</sup> public consultation relating to the 30% private co-investments, subject to an asymmetric model (different reward, same exposure to risks).

Luxembourg, 10 July 2020