

EIB Group reply to the public consultation HT.5224 on the targeted review of the General Block Exemption Regulation (State aid): extension to national funds combined with certain Union programmes

EIB Group highly appreciates the possibility to provide its contribution in the process of these public consultations. EIB Group is of the opinion that this is a positive step towards simplification of combination of national resources and certain Union programmes, with a notable importance of InvestEU Programme. Based on the experience gained under EFSI and especially when it comes to ESIF-EFSI combination, transparent and simple rules are of utmost importance for the efficient implementation of the combination. Therefore, based on the past experience and building on the ideas how InvestEU Programme could be implemented, EIB Group is happy to provide some suggestions and recommendations how the proposed rules could be streamlined even further and where additional clarifications would be very welcome and useful.

Since the objective of the proposal is to facilitate combination of various funds, EIB Group is of the understanding that State aid compatibility rules do not apply where there is no pooling of national funds with EIB Group own resources - or resources of any other International financial institutions (IFIs) - provided under InvestEU. Therefore, where support from the EIB Group provided under InvestEU is identifiable and distinguishable economically and legally from the national funds provided under InvestEU, State aid rules, including GBER, should not apply. This is also supported by Article 1(1)(a)(xv) of the revised draft Enabling Regulation 2015/1588 which provides that "*financing channelled through or supported by EU centrally managed financial instruments or budgetary guarantees, where the aid consists in the form of additional funding provided through State resources;*" may be block-exempted. Furthermore, according to the Explanatory Note to the Regulation amending the Enabling Regulation, GBER would apply to the national funds where national financing is combined with InvestEU Fund's instrument – or the involvement of national promotional banks/institutions (NPBIs) as implementing partners or financial intermediaries.¹ In any case, it should also be understood that the responsibility for ensuring State aid compliance remains with the respective Member State, including taking the necessary procedural steps vis-à-vis the Commission where necessary. Since the wording of the GBER proposal leaves room for interpretation with respect to its scope of applicability, we provide drafting suggestions to better clarify that.

In order to facilitate review of this document by the European Commission, EIB Group listed the relevant items chronologically based on the GBER articles and not by order of importance for the EIB Group. We also remain fully at the Commission's disposal for any additional explanation or discussion that may be deemed useful.

¹ See Explanatory Note: "*Member States will have a possibility to contribute their resources to the EU guarantee under the Member State compartment and/or to finance financial products via national promotional banks or other public finance institutions under the support of the InvestEU Fund.*"

1. Clarification of when GBER and State aid rules do not apply - Recitals

For the sake of clarity for stakeholders, we suggest including in the recitals of the GBER the cases where the GBER or State aid rules in general do not apply in the context of InvestEU. Below we propose text taken verbatim or inspired by the Explanatory Note to the GBER modification proposal, of the draft Regulation modifying the GBER (e.g. recitals 7-9), sections 3.1.3 to 3.1.5 of the Staff Working Document No. SWD(2017) 156 final of 2.5.2017, the Notice on the Notion of Aid, and section 3.2 of the Commission Proposal for a Regulation on the financial rules applicable to the general budget of the Union (COM(2016) 605 final 2016/0282 (COD), i.e. the Commission proposal for the so-called Omnibus Regulation):

Proposed wording:

“International Financial Institutions – 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 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 EIB Group or other IFIs without any additional condition than the geographic allocation. This geographic condition would not make the resources imputable to the Member State.

Where national funds are provided at market terms, they do not confer an advantage on their counterpart, and therefore do not constitute aid.

2. Clarification on the concept of “nominal amount of total financing under the support of the InvestEU Fund” to the non-state aid funds - Recitals

In case the thresholds in Articles 56e and 56f will apply to the “nominal amount of total financing under the support of the InvestEU Fund”, we would suggest the introduction of a recital that explains this novel concept, as well as clarifies that EIB Group own resources covered by the InvestEU Guarantee remain outside the scope of State aid laws and therefore the application of the GBER thresholds. We see no legal base to applying the GBER to investments by the EIB Group as Implementing Partner under the EU Compartment where it is identifiable and distinguishable from the national investments. This is the case for instance where in year 1, a project benefits of an investment from the Member State Compartment, and in year 3, it benefits of an investment from the EU Compartment implemented by the EIB Group. Equally, where the same project benefits of legally and economically distinguishable investments from an NPBI Implementing Partner and the EIB Group as Implementing Partner, the GBER should not apply to the EIB Group Investment.

Proposed wording:

“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 novel concept is a technical tool aiming 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.”

3. Clarification on applicability of other state aid regimes and parts of GBER when implementing InvestEU Programme - Recitals

With respect to the scope of Section 16, we suggest introducing in the recitals the clarification that Member States are free to use other articles of the GBER than Articles 56e and 56f, or other State aid regulations (e.g. De minimis Regulation). Furthermore, we also suggest clarifying how / which State aid rules apply to national / NPBI investments made outside the scope of InvestEU into a project that also benefits of investment under InvestEU. We understand that in such a case, section 16 of the GBER does not apply to the national investment made outside of the InvestEU.

Proposed wording:

“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.”

4. Scope – Fisheries and aquaculture sectors - Article 1(3)(a) and (b)

In order to ensure a level playing field and avoiding unnecessary mismatch between a) the fishery and aquaculture, and b) the primary agricultural production sector, we propose to modify Article 1(3)(a) and (b). We also suggest adding ‘and aid involved in financial products supported by the InvestEU Fund’ at the end of point (a):

Proposed wording:

- (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;*

5. .Scope - Undertakings and financial intermediaries in difficulty – Article 1(4)(c)

We understand that it is the Commission's intention to allow SMEs in difficulty to benefit of support from the InvestEU Fund. However, it is not fully consistent with the exclusion criteria in the InvestEU Investment Guidelines, which excludes notably SMEs that are subject to collective insolvency proceedings (see section 3.3.2.3). Therefore, we suggest inserting "without prejudice to the exclusion criteria in the InvestEU Investment Guidelines" before aid to SMEs under Article 56e.

We also understand that the intention is to allow that financial intermediaries in difficulty are eligible to implement InvestEU. However, it appears that this is not fully consistent with Article 136(1)(a) of the Financial Regulation that excludes certain financial intermediaries from the eligibility of EU Financial Instruments, notably those where the intermediary is "*bankrupt, subject to insolvency or winding-up procedures, its assets are being administered by a liquidator or by a court, it is in an arrangement with creditors, its business activities are suspended, or it is in any analogous situation arising from a similar procedure provided for under Union or national law;*" Therefore, with the view to ensuring alignment with Article 136(1)(a) of the Financial Regulation that lists the exclusion criteria, we would suggest inserting a reference to the Financial Regulation.

Proposed wording:

"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, ~~and~~ without prejudice to the provisions in the InvestEU Investment Guidelines, aid to SMEs under Article 56e and without prejudice to Article 136(1)(a) of Regulation 2018/1046, aid to financial intermediaries under Section 16 of Chapter III, provided those schemes do not treat undertakings in difficulty more favourably than other undertakings."

6. Clarifications in the section for definitions (Article 2)

For the sake of increasing the clarity and consistency, we would like to suggest for the Commission's consideration a number of clarifications in Article 2, referring to the definitions. Notably:

- With respect to the term "beneficiary", it would be useful to clarify in the recitals the different meanings of "beneficiary" under State aid laws, the Common Provisions Regulation and the Financial Regulation, as they all differ, which may be confusing to stakeholders.
- There are certain definitions under "Definitions for aid for access to finance for SMEs" that are equally used in the new Section 16, notably Article 2(67) 'guarantee'; Article 2(74) 'equity investment'; and Article 2(82) 'loan'. With the view that they also apply to Section 16 as well, we suggest that they are moved up in the definition list in Article 2 to the list of general definitions so that they apply universally across the GBER.

- Definition of 'financial intermediary': The Commission proposes to introduce the definition of 'financial intermediary' in Article 2(170). However, there is already a definition of 'financial intermediary' in Article 2(34) which is not proposed to be deleted. Furthermore, the two definitions are not exactly the same, which may create confusion and legal uncertainty. We disagree with applying different definitions for the same term for the purposes of different sections of the GBER. There should be one definition that applies across the GBER.

In that light, we suggest having one definition of financial intermediary in Article 2(34), containing the definition proposed in Article 2(170). We also propose inserting "where applicable" after "national promotional banks and institutions". This insertion is necessary because besides being financial intermediaries, national promotional banks and institutions may also act as Implementing Partner under InvestEU, or as Entrusted Entity under Article 21 GBER:

Proposed wording:

Article 2(34): "financial intermediary" means any financial institution regardless of its form and ownership, ~~including fund of funds, private equity investment funds, public investment funds, banks, which may include, amongst others, banks, non-banking credit institutions, investment funds,~~ micro-finance institutions, guarantee societies, ~~leasing companies and national promotional banks or institutions~~ *where applicable*;

- We suggest inserting the definition of the EIB Group amongst the definitions for "Aid involved in financial products supported by the InvestEU Fund". The proposed definition is also included in Article 2(1b) of the draft InvestEU Regulation:

Proposed wording:

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

- We suggest the following changes to the proposed definition of "market funds" in Article 2(173) GBER:
 - 1) The deletion of "and which are independent from the beneficiaries" reflects the fact that in equity financial instruments, the implementing fund buys shares in target final beneficiary companies. However, the wording should reflect the standard practice that the investment fund invests in several rounds, i.e. the "independence" criterion as defined does not apply to follow-on investments.
 - 2) The replacement of 'multilateral development banks' with international financial institutions reflects the wording used in paragraph 60 of the Notion of Aid Notice.
 - 3) The deletion of "and at full own risk" reflects is because this qualification is meaningless in the context of commercial financial intermediaries. This is a term that is used in State aid laws in the context of development banks that may or may not have a State guarantee covering their activities.

Proposed wording:

*"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;"*

- The Commission proposes introducing a definition of “innovative SME” and “innovative mid-cap” in the new Articles 2(183) and 2(184). However, Article 2(80) already contains the definition of “innovative enterprise”. In order to increase legal certainty, we would suggest that there is one definition only for “innovative enterprise” that would apply to all sizes of undertakings, and have a separate definition of mid-cap enterprise. Since the newly proposed Article 2(80) contains a simpler definition, we would suggest that this is used for the retained definition and is moved in the first general part of the definitions, so that it is of universal application across the GBER.

7. Cumulation rules – Articles 8(3)(b) and 8(4):

In general, we note that the proposed revised cumulation rules are not entirely clear with respect to how to cumulate aid without identifiable eligible costs (such as aid under InvestEU) with other aid without identifiable eligible costs or with aid with identifiable eligible costs. It is also not clear how subparagraphs (3) and (4) interact with each other. Therefore, it would be useful if the Commission could provide practical illustrative examples for the different scenarios of cumulation in an interpretative guidance note.

With respect to the specific provision, we understand on the basis of the proposed Articles 5(2)(l) and 8(4), that aid involved in financial products supported by the InvestEU Fund is an aid type without identifiable eligible costs. The first sentence of Article 8(4) regulate the cumulation of aid without identifiable eligible costs with aid with identifiable eligible costs. In that light, the last two paragraphs in Article 8(3)(b) seem to be a detailed rule of the first sentence in Article 8(4), and therefore should follow that sentence.

Proposed wording:

Article 8(3) “Aid with identifiable eligible costs exempted by this Regulation may be cumulated with

(b) any other State aid, in relation to the same eligible costs, partly or fully overlapping, only if such cumulation does not result in exceeding the highest aid intensity or aid amount applicable to this aid under this Regulation.

~~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. This is achieved 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. The nominal amount of financing provided to the final beneficiaries under the support of the InvestEU Fund shall also not be considered for determining whether the notification threshold under this Regulation is respected.~~

~~Alternatively, for senior loans or guarantees on senior loans supported by the InvestEU Fund under Section 16 of Chapter III, the aid entailed in senior loans or guarantees on senior loans provided to the final beneficiaries can be calculated on the basis of the reference rate prevailing at the time of the granting of the aid and can be used for ensuring that cumulation with any other aid for the same identifiable eligible costs does not result in exceeding the highest aid intensity or aid amount applicable to the aid or the notification threshold under this Regulation or another block exemption regulation or decision adopted by the Commission.~~

~~Aid without identifiable eligible costs exempted under Articles 20a, 21, 22, 23, and Section 16 of Chapter III may be cumulated with any other State aid with identifiable eligible costs.~~

In the Commission's proposed Article 8(3) (which would be Article 8(4) according to our proposal), we propose to delete "and the cost covered by it" and "for the same identifiable eligible costs" because they contradict the principle that aid in InvestEU is considered an aid type without identifiable eligible costs. In the same light, the addition two times of "the other aid with identifiable eligible costs" clarifies that that the concept of eligible costs relates to the other, non-InvestEU aid in the cumulation.

Furthermore, we would also suggest the deletion of the terms "supported by" with the aim of improving the clarity of the wording, as well as the insertion of "with respect to the other aid", which aims to clarify the wording of the sentence. Without this addition, the sentence would contradict the proposed Article 1(gg) GBER, whereby the GBER exempts aid involved in InvestEU up to the thresholds defined in GBER.

With respect to Article 8(4), where an SME has already benefited of aid without identifiable eligible costs - for instance risk finance aid under Article 21 - we suggest introducing a time period that interrupts this cumulation rule, for instance 10 years, which corresponds to the general prescription period for State aids. This is proposed because aids without identifiable eligible costs are essentially providing working capital. It would be overly restrictive if an SME that has already benefited of risk finance aid in the past to support it at a certain stage of its development would be eligible to receive only limited support from InvestEU.

We note that the meaning of the sentence in Article 8(4) "*The nominal amount of financing provided to the final beneficiaries under the support of the InvestEU Fund shall also not be considered for determining whether the notification threshold with respect to the other aid under this Regulation is respected.*" in Article 8(3) is unclear. Contrary to what this sentence says, it appears to us that, the nominal amount of financing under InvestEU does count with respect to whether the notification thresholds for the other aid are respected, since it requires the deduction of such amount from the total eligible project costs (when the other aid has identifiable eligible costs) or from the highest relevant financing threshold (in case of aid without identifiable eligible costs). We have provided wording that we believe reflects Commission's intention.

Proposed wording for the revised Article 8(4):

"Aid without identifiable eligible costs exempted under Articles 20a, 21, 22, 23, and Section 16 of Chapter III received 10 years before the granting of new aid may be cumulated with any other State aid without identifiable eligible costs, up to the highest relevant total financing threshold fixed in the specific circumstances of each case by this or another block exemption regulation or decision adopted by the Commission.

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. This is achieved by first deducting the nominal amount of the financing supported by from the InvestEU Fund from the total eligible project costs for the purposes of the other aid with identifiable eligible costs, and subsequently calculating the highest aid intensity or aid amount applicable to the other aid with identifiable eligible costs under this Regulation only on the basis of the total remaining eligible costs. The nominal amount of financing provided to the final beneficiaries under the support of the InvestEU Fund shall also not be considered for determining whether the notification threshold with respect to the other aid under this Regulation is respected.

Alternatively, for senior loans or guarantees on senior loans supported by the InvestEU Fund under Section 16 of Chapter III, the aid entailed in senior loans or guarantees on senior loans provided to the final beneficiaries can be calculated on the basis of the reference rate prevailing at the time of the granting of the aid and can be used for ensuring that cumulation with any other aid ~~for the same identifiable eligible costs~~ does not result in exceeding the highest aid intensity or aid amount applicable to the aid or the notification threshold under this Regulation or another block exemption regulation or decision adopted by the Commission.”

8. Publication and information – Article 9

We note that under Article 9(1)(c), the information referred to in Annex III has to be published on each individual aid award exceeding EUR 500 000, or EUR 60 000 for beneficiaries active in primary agricultural production.

It is unclear how the notion of “each individual aid award exceeding EUR 500 000” should be interpreted in the context of Articles 56e and 56f, which cover the nominal amount of financing under InvestEU, and not individual aid award. In fact, it would appear to us that Articles 56e and 56f should rather fall under the publication requirements in Article 9(2), similar to other aid types without identifiable eligible costs, such as risk finance aid (Article 21). With respect to Article 9(2), we would like to take the opportunity to mention that it refers to “individual aid amounts”, which is difficult to interpret in the context of aid types that are without eligible costs and which require for their compatibility significant amount of private investment. Consequently, one cannot equate financing received under InvestEU or as a matter of fact risk finance aid with “individual aid amount”.

Furthermore, it is unclear why the threshold is EUR 60 000 for beneficiaries active in primary agricultural production. In the context of InvestEU, if financing was provided in an intermediated manner or via a platform to a wide variety of final beneficiaries, including those active in primary agricultural production, this rule would create discrepancies and would be challenging to implement for the participating financial intermediaries.

9. Limited amounts of aid to undertakings for participation in European Territorial Cooperation projects - Article 20a

We believe it would be useful if the Commission clarified whether the financing provided to the final recipients/undertakings under a financial instrument supported by the ETC qualify in the sense of this new article. It appears to us that the current wording is not clear whether this could be also applicable in the situation where an ETC supported financial instrument provides financing to final recipients/undertakings.

10. Scope and common conditions of aid involved in financial products supported by the InvestEU Fund - Article 56d

As explained above, we find it important to clarify that Articles 56(d)-(f) do not apply to the extent EIB Group financing is distinguishable from the national support provided under InvestEU. We provided wording that would cater for that. Besides that, we also propose a number of clarifications:

- The rewording of the first sentence in Article 56d(1) is suggested with the view of making clearer the intended meaning of when the GBER applies.

- We would also like to propose to the Commission to consider a number deletions in Article 56d(1) in order to avoid confusion and the legally unnecessary requirement to explain what aid is comprised in.
- With respect to Article 56d(4), we suggest 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.
- With respect to Article 56d(4), we also suggest excluding from the application of the GBER thresholds EIB Group own resources covered by the InvestEU Guarantee where they clearly do not involve any national sources. This would be the case where EIB Group support under InvestEU is distinguishable from national support provided under InvestEU. We would also propose to clarify that additional EIB own resources at own risk are also not included in the GBER thresholds. This seems necessary for the following reasons: First, the Investment Guidelines do not contain maximum amount of InvestEU support to the same project. Instead, in its section 2.3.1, the Investment Guidelines set maximum % of the total project costs / fund size that may be supported by the InvestEU Fund. Therefore, the proposed thresholds in GBER introduce an additional strict cap on top of the % cap. In order to compromise both the InvestEU % cap and the GBER amount cap, we would suggest to discount from the application of the GBER amount caps the InvestEU support that clearly does not involve any national funds, such as support from the EU Compartment whereby the Implementing Partner is the EIB Group. Such an approach would allow that while the amount caps in GBER are respected, if there is financing need that surpasses the GBER amount caps, it may still be covered by InvestEU funds, up to the % caps defined by the Investment Guidelines.
- With respect to Article 56d(5), 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.

Proposed wording:

“1. “This Section shall apply **only to the extent that there is any national support that qualifies as State aid within the meaning of Article 107(1) of the Treaty in the financial product supported by the InvestEU Fund.** ~~to the extent that such aid exists comprised in the context of any of the following:~~

- ~~(a) the EU guarantee from the Member State compartment of the InvestEU Fund;~~
- ~~(b) financial products supported by the InvestEU Fund;~~
- ~~(c) aid under points (a) and (b) passed on to financial intermediaries and final beneficiaries.~~

2. The aid referred to shall be compatible with the internal market within the meaning of 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 Chapter I, this Article as well as either Article 56e or Article 56f are fulfilled.

3. The financing and/or investment operations in which the aid arises shall have been found by the InvestEU Investment Committee to comply with all applicable conditions laid down in the [InvestEU Fund] Regulation [reference] and the InvestEU Investment Guidelines [reference].

4. The maximum thresholds laid down in Articles 56e and 56f shall apply to the total ~~outstanding nominal amount of~~ financing provided to the final beneficiary under any financial product supported by the InvestEU Fund, ~~excluding IFI own resources provided at full own risk or covered by the InvestEU Guarantee which do not involve any national funds subject to State aid rules or which are distinguishable from national support provided under InvestEU.~~"

5. 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."~~

11. Conditions for aid involved in financial products supported by the InvestEU Fund - Article 56e(1)

When it comes to the proposed Article 56e(1), EIB Group suggests deleting subparagraph 1(a). This is because it is the InvestEU Regulation and the Investment Guidelines that determine the type of financial products that may be provided to final beneficiaries or projects, as well as how those products should be priced (see in particular the general sections 2.3.2 and 2.4 of the Investment Guidelines as well as the product specific sections, such as section 3.3.2.3), and those rules should prevail. First, we 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 sub-paragraphs (a) to (d), it is unclear what the additional conditions on pricing required by GBER would be. For instance, there seems to be no legal reason to state that the guarantee fee shall be zero or greater, as it merely means that the GBER imposes no conditions with respect to the pricing of the guarantee.

Furthermore, we suggest clarifying whether Article 56e applies only in direct financing mode or also in intermediated financing mode. In case it applies to intermediated financing, the rules for the selection of financial intermediaries – as included in Article 56f - appear to be missing. In order to ensure consistency between intermediated interventions under Articles 56e and 56f, it would be necessary to harmonize the selection rules for both articles, either by including the same in both articles, or by deleting it from both articles.

Proposed wording:

"1. The financing provided to the final beneficiaries under the financial product supported by the InvestEU Fund shall ~~be priced fulfil one of the~~ following requirements ~~of the InvestEU Regulation and the Investment Guidelines.~~

- ~~(a) — for loans with fixed interest rate, the interest rate shall be at least the generic mid- swap rate for the corresponding maturity and currency in which the loan is denominated. If this rate is not available, the interest rate shall be at least the interest rate of government bonds issued by the country which issues the currency in which the loan is denominated in.;~~
- ~~(b) — for loans with floating interest rate, the interest rate shall be at least the EURIBOR or the corresponding IBOR rate for the corresponding maturity;~~
- ~~(c) for guarantees, the guarantee fee shall be zero or greater;~~
- ~~(d) for equity, the acquired equity stake shall correspond to the amount invested.”~~

12. Thresholds and sectoral eligibilities for project finance – Articles 56e(3)-(10)

Articles 56e(3)-(10) contain thresholds for the total nominal amount of financing under InvestEU. When comparing those thresholds with investment amounts for typical similar projects financed from EIB own resources, including when under the EFSI Guarantee, they appear relatively low. As mentioned before, the EIBG would appreciate the clarification that GBER, or State aid rules for that matter, should not apply to EIB Group investments, either from own resources or under the EU Compartment, where they are legally and economically identifiable and distinguishable from national funds. Without having clarity as to how the final GBER will apply, it is difficult at this stage for the EIB Group to comment on the sectoral eligibility rules. Therefore, the EIB Group retains the right to comment on that at a later stage of the legislative process.

With respect to the sectoral eligibilities in Article 56e, we also note that it is unclear how to deal with projects that are not limited only to one of the listed sectors in GBER. In certain instances, it may be difficult to determine under which subparagraph a project may fall. For instance, “aid for climate and environment protection” (subparagraph 9) are rarely stand-alone projects. Instead, such projects are normally activities within other sectors.

13. SMEs, small or innovative midcaps - Article 56e(11)

With respect to Article 56e(11), we understand that subparagraphs (a) and (b) are not cumulative but alternative to each other. Therefore, for the sake of clarity, we would propose to introduce the word “or” at the very end of subparagraph (a).

Furthermore, we understand that while subparagraph (b) applies to SMEs, small or innovative mid-caps, as such, subparagraph (a) applies to SMEs, small and innovative midcaps where they fulfil any of the additional conditions enumerated in subparagraphs (i) to (vi). With the view to increase the readability of this article, we would propose to change the order between subparagraphs (a) and (b), so that paragraph (11) starts with the general rule in subparagraph (a), and continues with the specific rules in subparagraph (b).

We further note that the thresholds appear to be more restrictive than the thresholds in the De minimis Regulation. Furthermore, the De minimis Regulation allows the granting of de minimis aid to the same undertaking per three fiscal years, GBER Article 56e(11) does not have such a three-year cycle, and thus appears to apply to the lifetime of the final beneficiary, which is much more restrictive than the de minimis Regulation. From a legal point of view, GBER should provide for more flexible rules compared to the De minimis Regulation which contains the conditions so that the public support does not constitute State aid. In order that GBER is indeed more flexible and therefore attractive than the De minimis Regulation, the amounts in Article 56e(11)(b) GBER should be higher.

Furthermore, the difference in eligibility conditions between 56e.11.a and 56e.11.b seem to be rather marginal. By contrast, the gap between the thresholds proposed in sub-paragraphs (a) and (b) is very

large (e.g. for equity products, EUR 200 000 vs EUR 30 million). Therefore, we are of the opinion that this provision shall reflect higher thresholds.

As a potential solution for equity products, one may consider at least aligning the thresholds in Article 56e.11.b with Article 22 GBER (Start-up aid), in particular with Article 22.3.c GBER – threshold of EUR 400 000 or, more appropriately, with Article 22.5 GBER – threshold of EUR 800 000 (focusing on small and innovative enterprises).

Finally, in our view, for debt instruments (loans and guarantees) the thresholds shall not be linked to the actual maturities because linking the thresholds to a certain maturity period may complicate the process of treating/classifying instruments under different maturities not indicated in the initial proposal (e.g. 3, 7, 20 years). In the alternative, the article should foresee explicitly the possibility of providing investments also for longer maturities, e.g. 20 years. In certain sectors, such as energy efficiency investments, the typical maturity would be 20 years.

Proposed wording:

(11) SMEs, small or innovative mid-caps may receive financing supported by the InvestEU Fund provided that:

(a) the nominal amount of total financing provided per final beneficiary under the support of the InvestEU Fund does not exceed:

- (i) EUR [X] 4 million for 5-year loans;
- (ii) EUR [X] 500 000 for 10-year loans;
- (iii) EUR [X] 1.5 million for loan guarantees up to 5 years;
- (iv) EUR [X] 750 000 for loan guarantees up to 10 years;
- (v) EUR [X] 200 000 for equity; or

(b) the nominal amount of total financing provided per final beneficiary under the support of the InvestEU Fund does not exceed EUR [30] million and is provided to:

- (i) microenterprises;
- (ii) SMEs operating for less than 7 years following their first commercial sale;
- (iii) SMEs 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;
- (iv) innovative SMEs or innovative mid-caps;
- (v) SMEs or small mid-caps in assisted areas provided that the financing is not used for relocation of activities;
- (vi) SMEs for cultural purposes and activities set out in Article 53 (2);

~~(b) the nominal amount of total financing provided per final beneficiary under the support of the InvestEU Fund does not exceed:~~

- ~~(i) EUR 1 million for 5-year loans;~~
- ~~(ii) EUR 500 000 for 10-year loans;~~
- ~~(iii) EUR 1.5 million for loan guarantees up to 5 years;~~
- ~~(iv) EUR 750 000 for loan guarantees up to 10 years;~~
- ~~(v) EUR 200 000 for equity.~~

14. Commercially-driven financial products supported by InvestEU – Article 56f

With respect to the Article 56f, we would like to draw the Commission's attention to the fact that a number of clarifications would be greatly beneficial, notably:

- We note that the title of this article is not entirely appropriate since investments under InvestEU, including in the Member State Compartment, will need to be always commercially driven and economically viable under the InvestEU Investment Guidelines.
- We generally note that it is not clear how and to which financial products Article 56f(2) refers to (i.e. equity / quasi-equity, guarantee, loans).
- We also note that the proposal is not clear as to whether it refers to the minimum private co-investment at financial instrument level or final recipient level, or both levels, or the minimum alignment of interest required so that the fund manager takes investment decisions that are aligned with the interests of the investors. We are of the view that 30% market funds should be met at an aggregate level, similar to the approach of Articles 16 and 21 GBER. For certain financial products or financial intermediaries, a different type of alignment of interest can be more relevant than the traditional 20%, e.g.: transactions involving crowd lending platforms, or equity investments. For instance, under the EFSI SME Window equity product, 5% is applied. Furthermore, under other EU legislation (e.g. Capital Requirement Regulation, general securitization framework) 5% is considered a “*material net economic interest*” to ensure alignment of interest between the originator and investors.
- We also note that the utilisation of the term “*pari passu*” is ambiguous in the draft proposal. Under the Notice on the Notion of Aid, where a risk sharing arrangement is *pari passu*, the public investment is considered market conform, and hence State aid compatibility rules do not apply. In that light, it is unclear why GBER requires *pari passu* risk-sharing or what the aid is in the described structure.

Further to that, in order to increase the clarity of the text we would propose a number of drafting suggestions:

- With the view to increase clarity of the text, we propose to delete “provided to final beneficiaries by”. We believe it does not take away anything from the intended meaning.
- We propose to add “except where allowed by the InvestEU Investment Guidelines” in subparagraphs 2(a)(i) and (ii). The InvestEU Investment Guidelines contain detailed conditions with respect to risk-sharing arrangement for the SME Window (see section 3.3.2.3(a) of the Investment Guidelines). The proposed GBER criteria in Section 16 appear to represent a tightening of the criteria of the InvestEU Investment Guidelines, which allows non-*pari passu* risk-sharing in certain instances. Since other articles in the GBER for intermediated interventions (notably Articles 16, 21 and 39) allow the aid being given in the form of protection against losses, we are of the view that where the Investment Guidelines allow for such risk-protection, the GBER criteria should be aligned to the Investment Guidelines.
- In subparagraph 2(b), we suggest adding two times “than market funds” in order to clarify to what the “other funds” refer to.

As regards the thresholds proposed in Article 56f.3 (EUR 6 million, with no private co-investment; or EUR 10 million if co-investment of market funds is at least 50%), by comparison with the conditions of the existing Article 21 GBER, they appear as too restrictive.

As an example, for the equity products under Article 56f.2.i: market funds shall account for at least 30% of the financing portfolio, ranking *pari passu* with other funds. Under this model, it appears that there are no or only limited substantive differences for the required conditions as compared to the market economy operator test as described in the Notice on the Notion of Aid or the Guidelines on State aid to

promote risk finance investments.² Where a certain structure is *pari passu* as described therein, it is considered State aid free, and hence, no threshold applies to the financing amount.

The thresholds under Article 56f.3 for nominal amount of total financing provided to each final beneficiary (EUR 6 million and EUR 10 million) are also too restrictive when compared to the threshold of EUR 15 million in Article 21 GBER, where lower or similar co-investment rates are generally applicable (10%, 40%, 60%), with non-*pari passu* models being allowed.

Proposed text:

- “(b) *In case of a financing portfolio with risk tranches:*
- (i) *one risk tranche not exceeding 25% of the financing portfolio may be entirely covered by other funds **than market funds**; and*
 - (ii) *in each remaining risk tranche, market funds shall account for at least 30%, ranking *pari passu* with other funds **than market funds** with regard to risk exposure and reward”*

Proposed text:

- “(2) *In each portfolio of financing ~~provided to the final beneficiaries by of~~ the commercial financial intermediary the following conditions shall be complied with*
- (a) *In case of a financing portfolio without risk tranches:*
- i. *market funds shall account for at least 30% of the financing portfolio on an aggregate level, **except where allowed by the InvestEU Investment Guidelines**; or*
 - ii. *the commercial financial intermediary shall retain at least **20 [5]**% of the risk exposure over the financing portfolio, ranking *pari passu* with other funds with regard to risk exposure, **except where allowed by the InvestEU Investment Guidelines**.”*

15. Information to be provided to the Commission regarding State aid exempted – Annex II

We note that the draft modification Regulation does not propose modifications to Annex II containing the information that Member States need to submit to the Commission with respect to their block-exempted aid measures. We suggest that Annex II is duly amended to cater for the introduction of Articles 56d-56f.

16. Provisions for the publication of information – Annex III

In order to reflect that it is not necessary to calculate the exact aid amount involved in aid through the support of InvestEU because it is an aid type without eligible costs, we suggest a modification to footnote 3.

Proposed wording:

“Gross grant equivalent, or for measures under Article 16, 21, 22 or 39 of this Regulation, the amount of the investment, **or for measures under Articles 56e or 56f of this Regulation, the nominal amount of total financing under the support of the InvestEU Fund.**”

² Guidelines on State aid to promote risk finance investments (2014/C 19/04), see Section 2.1. The market economy operator test.