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European Bank
for Reconstruction and Development

EBRD's comments on the draft proposal for GBER for InvestEU
First public consultation June-September 2019

Introduction

We welcome the European Commission's (EC) intention to simplify current state aid regulation in order to facilitate the implementation of the InvestEU programme. We note several simplifications in relation to the existing GBER, such as the eradication of the need to quantify the aid amount, as well as some expansions with regards to scope of projects. However, we believe that the current simplifications vis-à-vis the existing GBER could go further to address the objective of the current proposed revisions, in order to further improve efficiency in comparison with existing regulation. Broadly, we believe that there is a trade-off between the need to enforce the principles of state aid rules, and the ability to relieve certain projects, which one would reasonably expect to be found compatible with state aid rules, of the notification requirement. We believe that by lifting thresholds and/or relieving criteria, which are in addition to the extensive list of criteria already defined in the investment guidelines, there could be a greater impact of the GBER proposal to facilitate the implementation of InvestEU.

Additionally, we would like to raise a concern, arising from information shared with us separately from the consultation documents and seminar, relating to a risk of confusion on the scope of this GBER Regulation for InvestEU: We are concerned that the proposed text is not specific enough to ensure that this list of criteria and thresholds is ring-fenced only to the screening of specific transactions or products under InvestEU, where Member States (MS) have some level of discretion on part of the financing. Typically, we would not want to see this list of criteria and thresholds used for the policy check run by the EC in advance of each submission for approval to the InvestEU Investment Committee, including for EBRD standalone operations.

The following sections elaborate on these comments.

Explanatory Note & Guidance

The EC announced the publication of further guidance in the explanatory note (page 3, first paragraph). This is welcomed by the EBRD, as such guidance will facilitate a better understanding of the scope of the proposed amendments to GBER. We propose that the Explanatory note is turned into the introductory part of such guidance document, or is converted into a formal communication of the EC for future reference. Ideally the flowchart in Annex II, updated as per the DG COMP – DG ECFIN seminar from 5th September should be included in such a guidance document to ensure it is made available in a formal way as well. In summary, we would propose the clarifications made in the explanatory note and the flowchart to be incorporated in the guidance document the EC plans to publish. We would also appreciate further guidance on the procedural aspects and responsibilities of different parties, including the EBRD, in state aid notifications under the outlined scenarios.

Direct and indirect applicability of regulation to EBRD

As per the guidance document provided by the EC, the EBRD would be directly concerned by the proposed regulation only in the cases of (i) appointment as an implementing partner under the

Member State compartment (where Member States exercise discretion of the use of the guarantee beyond its geographic allocation) and (ii) cooperation with NPBIs, for example as financial intermediary, under either the EU or Member State compartment of InvestEU. Our comments regarding the regulation in these cases of direct applicability are noted below in the sections to follow.

However, we would like to note that we are concerned with the potential for the regulation to apply to us where we act as an implementing partner under the EU compartment of InvestEU. As clarified in Article 2 (173) of the GBER proposal, EBRD funding is considered to be "market funds", if its funds are not supported by a public guarantee: this leaves us unclear on the status of our funds when supported by the EU guarantee under the EU compartment under InvestEU. We are nevertheless assuming that EBRD investments under InvestEU, i.e. where supported by an EU guarantee, are not considered to be state aid, on the basis of the decision-making process employed by the EBRD: individual Members States do not have discretion, and we follow a market-based pricing practice, which would still apply under InvestEU. EBRD has its own set of rigorous policy check run in-house, where the Bank ensures that all transactions are additional, and markets, competition and trade are not distorted by its intervention, or in fact that existing distortions are reduced. As a result, the EBRD would like to ask the EC to please confirm that the EBRD's standalone investments under InvestEU under the EU compartment will not be subject to any state aid rules.

Additionally, there is some concern that these state aid provisions are relied upon as relevant criteria at the time of policy check of the EC prior to Investment Committee approvals, irrespective of the fact that EBRD investments should not be considered state aid. In this case, if various provisions under the proposed Article 56d, e and f, such as maximum investment thresholds, are considered to be relevant benchmarks or comparators to EBRD investments, this would raise a major concern for EBRD. This is especially true for those provisions further elaborated on below. For the reasons outlined above, the EBRD should not be subjected to state aid rules in the case of standalone investments under the EU compartment, neither directly nor indirectly. Beyond introducing an indirect link to the GBER regulation, while this should not be the case given the EBRD's exemption from state aid considerations, there is also a risk that referring to these criteria and thresholds as part of the investment approval process would make the InvestEU approval process even more complex than anticipated.

Treatment of combination projects

Aside from considering collaborations with NPBIs under InvestEU in the cases described above, the EBRD is also considering collaborations where EBRD benefits from InvestEU, but NPBIs choose to invest their own resources (i.e. outside of the InvestEU programme). We understand from the seminar on 5th September, that in these cases the proposed amendments to GBER do not apply, and instead a state aid notification will need to be made, unless the funding from NPBIs does not constitute state aid or the existing provisions in GBER or the de minimis regulation apply. We would strongly encourage the EC to include such "combination" in the example scenarios in its upcoming guidance on InvestEU related to state aid rules. Specifically it would be important to include this scenario in the flowchart. Additionally, it would be important to clarify what obligations of the EBRD as implementing partner would be (if any), if NPBI funds are considered state aid, while EBRD's own intervention under this scenario of InvestEU would not be considered state aid.

General comments on Article 56 e, d, and f

Overall, we see that there is some scope to relax the set of criteria and thresholds on the grounds that both projects which are either larger in size and subject to the same criteria, or projects which stay below the described thresholds but are subject to relaxed criteria, would still likely be found to be compatible. Relaxing the criteria and/or thresholds would therefore likely increase the efficiency of investments under InvestEU. These efficiency improvements could be substantial, since some of the features of projects (including thresholds) described under Section 16 may be complex to verify, and if they are verified, it is possible that these will apply to only a limited universe of projects. In combination with the low thresholds for maximum project sizes defined in Article 56d, there is a risk that the list of criteria proposed defines a limited set of projects, that may not make economic sense to pursue under the InvestEU programme.

Some of the current provisions/criteria may be not be suitable, especially for small projects
In general, the criteria described in the existing GBER regulation are intended to relieve traditional state aid projects, such as government grants, from the notification requirement when complying with certain criteria. Such projects are generally of a large size, as they are relevant to an entire region or even a Member State. This warrants a thorough consideration and means that detailed exemption criteria are proportional. However, in the proposed amendments to GBER, the same or similar criteria presented are applying to investment projects, where borrowers are expected to repay any funds provided, and which are selected/ agreed upon in a manner different to grant projects. This may mean that from an operational perspective, the criteria are difficult to apply and/or that they are not fully proportional to the potential risk of distortion resulting from an investment project benefitting from a guarantee (e.g. see specific comments on Paragraph 3 below).

Additionally, the project sizes which are specified in the current GBER consultation are of a relatively small nature in comparison with other investment projects in the respective sectors (e.g. EUR70m financing for next generation networks and EUR30m for renewable energy). As a result, the EC should consider revisiting some of the criteria as currently outlined in the context of these factors, both from a perspective of proportionality/efficiency, as well as operational applicability. It is important to note that InvestEU will be used only for projects that can make economic sense (ie. “pre-bankable” and/or “bankable” with the support of the EU guarantee), and it is likely that the requirements on smaller projects may be perceived as too costly or too complex by project promoters if these are required in addition to the application to InvestEU, which is also expected to be onerous. In fact, it is possible that if the exemption remains as currently proposed, promoters of the relevant projects would consider the InvestEU requirements as an additional burden to the state aid requirements that have to be met in any event, and as a result decide to use grants for the full project costs rather than part finance their projects through InvestEU.

The current provisions/criteria offer competitive safeguards which warrant larger threshold sizes
In the view of the EBRD, the current criteria outlined in Article d and f are considered restrictive enough to ensure that financing is only provided to projects which would likely be deemed compatible if a state aid notification was made, even if larger and more complex in nature. Specifically, investment funding would still be subject to market terms and thus be unlikely to present an economic advantage. Additionally, it is likely directed towards sectors which are of general economic interest and subject to market failures, especially if selected by EBRD as an implementing partner. The use of aid in the form of a remunerated guarantee applying only to part of the project costs means that it is likely to be proportionate (i.e. an efficient use of aid), and be an appropriate policy instrument for alleviating risks associated with otherwise “bankable” investments that are currently not taking place as result of market failures. Distortions to trade are likely to be limited, since the criteria would limit eligible projects to mostly locally provided services only, such as broadband infrastructure, local energy generation, social & cultural institutions, local transport infrastructures, and waste water infrastructure. Even if projects resulted in some distortions, the benefit from those transactions is likely to outweigh any negative effects.

Proposed approach

We therefore suggest revising the current approach. A more optimal approach could be, for instance, to make the set of criteria less complex for small projects (as defined by the current proposed thresholds), and by increasing thresholds for projects to be subjected to the current proposed criteria. Some specific sector related comments are made below. In the way the proposed regulation is designed now, we would not see many projects under these specific scenarios benefitting from exemption of the notification requirement.

Specific comment on Article 56e Para 3. & 10. (ICT & innovation)

We would like to provide the following specific comments on these sections:

- We would like to note that the provisions laid out in Paragraph 3 are virtually identical to those already provided by existing GBER provisions, such as Article 52, and Chapter I (especially Article 4). As a result, the proposed amendments do not offer additional relief over existing provisions.
- Additionally, the outlined criteria now apply to investment projects, rather than grants. In this context, it would be helpful to clarify how specifically the criterion described in Paragraph 3. (b) (i), related to a “transparent and non-discriminatory selection process respecting technology neutrality” would be conducted. Specifically, it would be important to understand if, in the case of EBRD making use of a Member State guarantee, this applies at the stage of designing the guarantee product by the member state or at the stage of project selection by EBRD. The EC may want to consider instead adopting wording similar to Paragraph 5 (a).
- The maximum project size threshold of EUR 70 million outlined in Paragraph 3 (a) may limit the universe of potential investment projects, especially if also subjected to the current set of criteria. Specifically, the criterion related to ensuring third party access (especially Paragraph 3. (b) (i)) essentially ensures that there is no economic advantage at the level of the user, meaning that the transaction does not constitute state aid. We therefore believe that an increase in the threshold level could be considered.
- Furthermore, we believe that for projects with total financing of less than EUR 70 million, the restrictive criteria beyond the geographical restriction to white and grey areas could be relaxed. For example, it may not be reasonable to expect that full physical unbundling is possible in the context of a small investment project in NGN infrastructure of less than EUR 70 million. More generally, some NGA fibre technologies (e.g. GPON) are commonly unbundled using virtual unbundling technologies, rather than physical unbundling.

Specific comment on Article 56e, paragraph 11 (SMEs)

We would like to provide the following specific comments on these sections:

- In general we welcome the provisions made in 11(a) which reflect sensible selection criteria in combination with a threshold of EUR 30 million. We would, however, like to clarify what the criteria for innovative mid-caps are in relation to annual turnover and assets / balance sheet in Article 2 f. (184), given that there is a turnover and balance sheet threshold for small mid-caps in Article 2 f. (185).
- We believe that the thresholds specified in 11. (b) are restrictively low to define realistic investment projects for the EBRD. If the EC intended for the EBRD to make use of these, this would require a significant increase in thresholds, by at least a factor of 4. Additionally, we would suggest for the EC to adopt wording that makes it clear that it is not merely 5 or 10 year loans/ loan guarantees that can be invested in, but also any tenor adequate to the end-beneficiaries in between these thresholds. We would appreciate if the EC could clarify why the allowed size of longer tenor loans is smaller.

- Furthermore, we would like to note a drafting inconsistency: In the sectoral list of aid under Article 56e, all paragraph start by "Aid" but not the para 11. regarding SMEs. Taken out of context, the paragraph therefore reads as if all SME Financing under InvestEU has to comply with the requirements outlined there, including financing provided by EBRD and other IFIs.

Comments on Article 56f

We would like to ask the EC to clarify further what is meant by a selection made in an "open, transparent and non-discriminatory way, based on objective criteria" (Paragraph 1). Specifically, we would be interested in whether this implies an open tender/ bidding process, or whether an approach where beneficiaries are approached directly (though in an open, transparent and non-discriminatory way), with final selection being based on objective criteria, would also satisfy this provision.

While we understand that EBRD investments are in general considered to be market funds, we would like to ask the EC to clarify if EBRD investments would still be considered market funds for the purposes of paragraph 2 (a) (ii) if benefitting from the EU guarantee under the EU compartment – we are assuming that the EBRD funds would not be considered market funds if benefitting from a guarantee under the Member state compartment.

If the commercial financial intermediary has been selected in an objective and transparent way (under 1.) and some minimum market funding is retained in the venture (under 2.) then we do not see why there is an additional restriction on the size of underlying investments.