Luxembourg, December 2021

EIB Group Reply to the Commission's Consultation on the
<u>General Block Exemption Regulation revision of 6 October 2021</u>

The European Investment Bank Group ("EIBG") welcomes the public consultation launched by the European Commission ("Commission") on the targeted revision of the General Block Exemption Regulation ("GBER").

The EIBG notes that the proposed changes contain a number of noticeable improvements, in particular with respect to the following:

- The restructuring of the current Article 21 into two articles: the original one dedicated to risk finance aid via financial intermediaries (Article 21), and a new one dedicated to risk finance in the form of tax incentives to natural persons investing in eligible undertakings (Article 21a).
- The modification of the eligibility criterion that allows companies to receive risk finance aid from "seven years after their first commercial sale" to "10 years after their registration and/or, in the case of innovative enterprises, seven years after their first commercial sale".
- The clarification that for the calculation of the maximum aided risk finance investment per beneficiary it is the outstanding amount at the moment of granting the aid that is to be taken into account.
- The inclusion of a 'bonus' for environmental aid, as well as the other positive developments related to Regional and R&D&I aid.

Nevertheless, the EIBG would like to submit several proposals, including some points that have been raised on several previous occasions (namely, within the context of a comprehensive policy evaluation in the area of State aid (the so called Fitness Check), and within the revision of the Risk Finance Guidelines, as well as previous GBER revisions).

I. <u>Definition of "Independent Private Investor" Would Unduly Exclude EIB and EIF</u>

The GBER public consultation document proposes an amendment of the definition of "independent private investor" which, if adopted, would state that EIB and EIF (amongst others) "*will not be considered private investors for the purposes of this definition*." EIB Group respectfully disagrees with this proposed amendment.

It is a well-established State aid principle that EIB Group deploying own resources under its own risk does not constitute State aid, and as such falls outside the scope of State aid rules.[1] The ramifications of this principle are manifold and are documented in the Commission's decisional practice.

Union rules on State aid have long confirmed that EIB Group financing qualifies as investments from a genuine private investor. By way of example, the Guidance on State Aid in European Structural and Investment Funds Financial instruments in the 2014-2020 programming period, recently re-confirmed in March 2021, states: "When the EIB Group (both EIB/EIF) invests own resources at own risk, they are considered private financing in nature under State aid rules and they do not constitute State aid."[2] Similarly, the currently applicable version of the Risk Finance Guidelines, explicitly recognizes EIB and EIF being private investors: "Private investors will typically include the EIF and the EIB investing at own risk and from own resources."[3]

The notion of "own resources" should be read in light of EIB and EIF statutory provisions on the sources of funding. Article 20 of EIB Statute provides that the EIB "shall borrow on the capital markets the funds necessary for the performance of its tasks". The EIF is a profit-driven institution, Article 8 of EIF Statute referring on "the sharing of net profit" as a right attaching to the shares, while Article 24 refers to an appropriate level of remuneration, activities being required "to generate an appropriate return on its resources". These statutory provisions point to EIB/EIF being private investors in nature, when they invest from own resources at their own risk.

There have been no changes in the fundamental principles behind the existing recognition of EIBG as private investor that would justify a departure from this principle. Indeed, such as position does not appear to be endorsed by data or other evidence that would suggest EIBG financing cannot be equated to financing from an independent private investor. As a result, EIB Group fails to understand the basis on which the European Commission would change its position on such a critical point. In addition, the introduction of such change would bring about considerable uncertainty, including legal uncertainty, particularly as it contradicts, without justification, the prevailing State aid legal framework.

Against this background, EIB Group strongly considers that the Commission should refrain from incorporating this amendment, and stands available to provide any additional information.

II. <u>Promoting Financial Instruments under GBER</u>

In its reply to the Commission public consultations on the post-2020 State aid rules "fitness check" and *de minimis* Regulation (HT.5647), the EIBG recommended that the GBER, the *de minimis* aid Regulation and

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1 *See*, amongst others, Joint statement by Joaquín Almunia, European Union Commissioner for Competition, and Werner Hoyer, President of the European Investment Bank, on State aid matters in relation to the activities of the EIB Group, dated 21 January 2014. *See* also Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU, paragraph 60: "*Resources coming from the Union (for example from structural funds), from the European Investment Bank or the European Investment Fund, or from international financial institutions, such as the International Monetary Fund or the European Bank for Reconstruction and Development, are considered as State resources if national authorities have discretion as to the use of these resources (in particular the selection of beneficiaries). By contrast, if such resources are awarded directly by the Union, by the European Investment Bank or by the European Investment Fund, with no discretion on the part of the national authorities, they do not constitute State resources.*"

2 *See* Updated Guidance on State Aid in European Structural and Investment (ESI) Funds Financial instruments in the 2014-2020 programming period, dated 25 March 2021.

3 *See* Guidelines on State aid to promote risk finance investments, footnote 25. These guidelines are subject to a parallel revision procedure. Whilst the Commission services proposed to delete this footnote in an amended version of the guidelines, the principle on substance is not challenged, and various stakeholders have requested the re-insertion of this footnote.

Risk Finance Guidelines, are further developed to clarify and improve the implementation of financial instruments. The EIBG acknowledges and welcomes the introduction of an InvestEU specific section in the GBER adopted earlier this year. Unfortunately, the Commission's current proposal seems to lack additional ambition to codify and streamline separate State aid rules applicable to financial instruments, irrespective of the source of funding.

The use of financial instruments plays an important role in delivering EU policy objectives and in addressing market failures. Among many other considerations, it is important to highlight that due to their revolving nature, financial instruments have a less distortive effect on the market than, for instance, grants. Therefore, the EIBG reiterates the need that the GBER contains clearer, separate rules on financial instruments. This could be achieved by grouping the relevant rules into one chapter on financial instruments within GBER, or allowing any form of aid to be provided via a financial instrument structure, i.e. involving financial intermediaries. Alternatively, a codification of all the relevant State rules applicable to financial instruments could also be envisaged, so as to facilitate the implementation of financial instruments by stakeholders.

The EIBG suggests that the delivery structure via financial instruments can be used for any objective at final beneficiary level. At present, GBER provides for compatible unquantifiable 'non-transparent' aid at the level of financial intermediary in its Articles 16, 21 and 39 only. The conditions for application of these rules are unduly restrictive. The EIBG suggests that the same rules at intermediary level are expanded. While the implementation method via financial instruments and the use of financial intermediaries could be based on the same rules, aid at the level of the final beneficiaries could rely on a wide variety of GBER articles and/or objectives and this should be explicitly acknowledged.

III. Broadening Scope of Article 16

With respect to Article 16 GBER, regional urban development aid, the EIBG suggests deleting paragraph 2(b), i.e. the condition that one of the eligibility requirements is that the instrument is co-financed by European Structural and Investment Funds (ESIF).

The EIBG proposes that the scope of Article 16 be extended for similar instruments funded by non-ESIF national and RRF resources. From a State aid law point of view, ESIF, RRF and national resources are considered equally to be subject to State aid law, so such an extension would be in line with existing law and jurisprudence. Furthermore, in the EIBG's experience, some Member States, regions or cities do not have (sufficient) ESIF resources but are still interested in setting up financial instruments for urban development from their other resources. Finally, the EIBG notes that under the 2021-2027 MFF the term 'ESIF' has been replaced with the term 'Funds under shared management' and thus keeping reference to ESIF may generate confusion.

IV. Combination of Grants and Financial Instruments

The EIBG suggests to explore if the scope of all financial instrument specific articles (e.g. Articles 16, 21 and 39) may be extended to allow for part of the public financing to be provided in the form of grants, i.e. by introducing a grant as a form of aid (up to certain threshold from the total investment). Financial instruments financed by national resources are set up to address market failures (e.g. energy efficiency) that are identified through the ex-ante assessment process and in the EIBG's experience, such instruments are often combined with grant support to final beneficiaries. Therefore, with the view to decrease that administrative burden associated with relying on different State aid schemes on national authorities, GBER financial instrument related articles could also cover grant financing, and thus the various support measures aiming at the same project could be covered by the same State aid legal base.

The possibility to combine grants and financial instruments at the level of same article of the GBER as a single State aid scheme would also ensure alignment with the Regulation 2021/1060 (the Common

Provisions Regulation of the Funds under shared management of the 2021-2027 MFF period – CPR) and thus promote wider use of financial instruments by the Member States. In accordance with the CPR, financial instruments may be combined with support in the form of grants in a single financial instrument operation. In such case, the rules applicable to financial instruments shall apply to that single financial instrument operation whereas the support in the form of grants shall be directly linked and necessary for the financial instrument and shall not exceed the value of the investments supported by the financial product.

V. Revision of Article 21 Regarding Risk Finance Aid

The EIBG welcomes the overall revision of Article 21 to provide more clarity and make it more flexible to implement. However, we would like to highlight some of the changes proposed that could be further revised:

- With regards to paragraph 2, the proposal is not to permit Member States nor entrusted entities to invest directly into the eligible undertakings without the involvement of a financial intermediary. In our understanding this exclusion would unduly affect national promotional banks and institutions and potentially the EIBG (i.e. those who are not meeting the definition of financial intermediary) providing financing (being both debt and/or equity) directly to undertakings in situations where the there is a clear market failure (e.g. subordinated debt).

- With regards to paragraph 3(b), we would like to draw the Commission's attention to the fact that the following provision "*For eligible undertakings that have taken over the activities of another enterprise or were formed through a merger, in which case the eligibility period also encompasses the operations of that enterprise or the merged companies*" seems to entail a disproportionate amount of complexity in the case of SME and may generate unwanted results. It is submitted that it is not because an SME is taking over the activity of an established enterprise that it automatically benefits of the financing capacity of the latter. In addition, in many sectors, start-up activity operates through the acquisition of an existing structure. We could, therefore, preliminarily recommend the following wording instead:

  > *"For eligible undertakings that have taken over the activities of another enterprise or were formed through a merger, in which case the ten-year eligibility period also encompasses the operations of that enterprise or the merged companies, except if the two following conditions are fulfilled:*
  >
  > *(i) the purpose of the risk finance is the development/expansion of the SME taken over,*
  >
  > *(ii) at least [50]% of the risk finance amount shall be committed to the development/expansion of the SME taken over, evidenced by any relevant documentation."*

- With regards to paragraph 4 (b), for equity operations, we would like to underline that the provision for follow-on investments is enshrined in the investment strategy of each financial intermediary (i.e. fund manager). Foreseeing at the time of initial investment (i.e. business plan level) which portfolio company will receive a follow-on investment seems counter intuitive and not in line with market practices, as the follow-on depends on the progress of each company, to be determined later in the process. We would, therefore, suggest to either clarify that the concept of "business plan" as referred to in Article 21(4)(b) is to be understood in broad terms or include the following clarification in the new text:

  > *"(b) the possibility of follow-on investments was provided for in the original business plan of the eligible undertaking or in the investment strategy of the financial intermediaries"*

- With regards to paragraph 12, this is applicable to additional finance from independent private investors at the level of the financial intermediaries or the eligible undertakings (10%, 40%, 60%). It would be useful to confirm/clarify that as per earlier interpretations of the GBER, more specifically question 101 in the GBER Q&A of July/March 2015/2016, a follow-on investment can be performed with the existing private investors and the requirement for independent private investors applies to the initial investment.
- With regards to paragraph 16 (a), the new wording may create confusion, as not all fund managers are regulated structures (e.g. investment teams). At the same time, proving that a financial intermediary is acting 'in accordance with best practices' might be challenging. We would, therefore, propose to revert to the previous GBER provision that stated:

  > *"they shall be obliged by law or contract to act with the diligence of a professional manager in good faith and avoiding conflicts of interest; best practices and regulatory supervision shall apply, as necessary ;"*

- With regards to paragraph 18, EIBG proposes to introduce a private participation rate reduction mechanism for investments made in assisted areas designated in an approved regional aid map as is specified in paragraph 12 and/or introduce a similar "green bonus" linked reduction to private participation rate as is in paragraph 3, point (c).

VI. Revision of Article 22 Regarding Aid For Start-Ups

EIBG believes that it is important to open as many State aid compliance options as possible for the implementation of financial instruments. In this context, EIBG would suggest to confirm in the amended GBER that the provisions of Article 22 are also applicable in case of intermediated financing, so that Article 22 finds its application in the field of financial instruments.

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