PSIK Polskie Stowarzyszenie Inwestorów Kapitałowych

December 8, 2021

Response to EC Consultation of GBER

Comments by PSIK, the Polish Private Equity and Venture Capital Association

PSIK, the Polish Private Equity and Venture Capital Association is an industry association that represents the voice of PE/VC companies active in the Polish market.
PSIK welcomes the Commission´s initiative to review General Block Exemption Rules so that they could be better adapted to the needs of companies, in particular start-ups and scale-ups, and to promoting green and digital transition. The proposed document includes a lot of positive changes. There are some issues, however, that in our view, need further consideration.

Undertaking in difficulty

The proposed definition of "undertakings in difficulty" still excludes some businesses, such as start-ups and scale-ups, from being eligible to state aid. Of particular concern are businesses backed by private equity and venture capital funds which fall under criteria defined in Article 2, point (18) point (c): "*where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors*". We fully agree with the principle that state aid should not be granted to businesses that are at risk of being insolvent. Unfortunately, majority of start-ups may "*fulfil the criteria under domestic law for being placed in collective insolvency proceedings*" because their liabilities permanently exceed the value of their assets. Start-ups are often financed with quasi-equity which constitutes a liability on the balance sheet of the company, hence they meet the formal criteria of insolvency.
Accordingly, we propose that the wording used in point (a) and (b) be extended to subpoint (c) so that the same exclusion could be also made under item (c): "*other than an SME that has been in existence for less than three years or, for the purposes of eligibility for risk finance aid, an SME within seven years from its first commercial sale that qualifies for risk finance investments following due diligence by the selected financial intermediary.*"

First loss

The term "first loss" in the current wording of Article 21, point (13) point (c) is commonly misunderstood. The relevant piece of text says:
(c) in the case of asymmetric loss-sharing between public and private investors,
***the first loss** assumed by the public investor shall be capped at 25 % of the total investment.* "The first loss" is understood and translated into official language versions of the regulation according to its plain English meaning, as a loss experienced for the first time upon exit from an investment. We have come across interpretations of this article which proved misunderstanding of the meaning and intention of point (c). The term "first loss" is not commonly used in equity investments. It comes from the insurance world and it means "a subordinate tranche that takes the loss first". Risk Finance Guidelines use a clearer term, namely "first loss piece" as defined in Art 2.3, point 52, point xii: ***'first loss piece'** means the most junior risk tranche that carries the highest risk of losses, comprising the expected losses of the target portfolio*.
The existing definition used in the RFG is more appropriate to the specificities of VC-backed firms than the one currently used in the GBER and it does not cause unintended mistakes related to translation. We advise the European Commission to modify the GBER definition so that it mirrors the RFG one.
Art. 21 item 13, point (c) of GBER should be amended as follows:
(c) *in the case of asymmetric loss-sharing between public and private investors,* ***the first loss piece*** *of the public investor shall not exceed 25% of the total investment.*

Aid to export-related activities

Article 1 point (2) point (c) excludes *aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current costs linked to the export activity*. This exclusion is problematic for start-ups and scale-ups. Most of them get risk finance to grow internationally which inevitably means establishment and operation of a distribution network. One of the goals of Capital Market Union is to build strong companies that could compete successfully in global markets. The exclusion of Export-related activities is in sharp contract with this goal. Therefore, we propose to amend Article 1(2)(c) so that it read "*the above shall not apply to expenditure on so-called "international expansion of SMEs" that qualifies for risk finance investments".*