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EIBG's position on the Commission's consultation on the Revision of the Guidelines on State aid to promote risk finance investments

1. Introduction

- 1.1. The EIBG welcomes the possibility to comment on the draft revised Guidelines on State aid to promote risk finance investments (the draft guidelines/the 2022 RFG) proposed by the Commission.
- 1.2. As a preliminary remark, EIBG notes that the proposed draft guidelines, which detail the criteria for the assessment of risk finance aid measures notified by the Member States (MSs), contain a number of appreciable improvements. In particular:
- the consolidation of all requirements linked to the *ex-ante* assessment in a dedicated section (Section 4.1 of the draft guidelines);
 - the limitation of the funding gap quantification only to schemes that allow amounts above €15 million per individual beneficiary (paragraph 63 of the draft guidelines);
 - the alignment of the definition of 'innovative mid-caps' under the draft guidelines with the definition of 'innovative enterprises' under the GBER (paragraph 30(19) of the draft guidelines);
 - the extension of the reference period for the undertaking in difficulty exception from seven to ten years (paragraph 27(a) of the draft guidelines) and the replacement of the "first commercial sale" date by "registration" date as the starting date for the period during which enterprises can generally receive risk finance aid (subject to the conditions in footnote 33 of the draft guidelines). The EIBG would also suggest to align this definition in the future version of the GBER.
- 1.3. Nevertheless, the EIBG is concerned that some of the proposed changes may result in a loss of clarity and legal certainty compared to previous versions of the RFG (2006, 2014), especially in the context of the implementation of financial instruments. The need for legal certainty and clarity is particularly relevant now, in the context of the investments required for the digital transformation, the green transition and the recovery of SMEs from the negative economic effects of the health crisis. The State aid field is a rather technical one and all stakeholders involved appreciate clear and detailed implementation rules from the Commission, which should also be the case for the present draft guidelines. In the absence of detailed explanations providing legal certainty, the deployment of risk finance measures aimed at facilitating access to finance for SMEs may be adversely impacted or delayed. In EIBG's opinion, the following changes in the draft guidelines are particularly problematic as, going forward, they may generate more ambiguity than

bringing clarity: (i) the deletion of the Market Economy Operator Test (MEOT) section (current Section 2.1 from the 2014 RFG), as well as the (ii) elimination of the express list of typical private investors, including a clarification that EIBG investing own resources at own risk shall be considered a typical private investor (footnote 25 of the 2014 RFG).

2. Reinstating Section 2.1 (MEOT) and footnote 25 of the 2014 RFG in the draft guidelines

2.1. While the EIBG understands the Commission's objective to avoid matters overlapping in its guidance, the MEOT section in the 2014 RFG (Section 2.1) constitutes, in EIBG's opinion, a case of complementary guidance rather than redundancy. In our experience, both the EIBG and the MSs with whom the EIBG developed financial instruments to facilitate access to finance for SMEs, take great comfort from the more detailed provisions regarding the MEOT, as explained in the 2014 RFG. That is mainly because the 2014 RFG provide a more comprehensive picture on the MEOT requirements. In particular:

- ***The pari passu transactions.*** In the previous versions of the guidelines (2006 RFG; 2014 RFG), the general threshold for the participation of private investors had been expressly spelled out: 50% in the 2006 RFG and then lowered to 30% in the 2014 RFG. The fact that this clarification is proposed to be eliminated from the 2022 version of the RFG and replaced with the rather vague concept of "economic significance" from the 2016 Commission Notice on the notion of State aid (NoA guidance) is not an optimal solution in EIBG's opinion. In fact, the clarifications in footnote 142 of the 2016 NoA guidance do not ensure the same degree of legal certainty equivalent to the 30% presumption and associated explanations, included in paragraph 34 of the 2014 RFG. Where the 2014 RFG provide a clear and easy to work with threshold, the footnote 142 of the 2016 NoA guidance only provides a number of examples that are circumscribed to the factual and legal background of the specific court cases quoted in that footnote. Such examples and background would remain most likely very abstract for the majority of the stakeholders involved. As such, it is difficult to extract a guiding principle that is as operational as the 30% threshold in the 2014 RFG. In EIBG's opinion it would be more judicious to further develop the "economic significance" criterion in a dedicated MEOT section/sub-section in the 2022 RFG in the same manner as in the 2014 RFG, rather than relying on a mere footnote in the 2016 NoA guidance. When designing risk finance measures together with the MS, experience showed that it is less time-consuming and more comfort-giving to refer to specific, express rules on applying in practice the MEOT via the *pari passu* test, than to only refer in an abstract manner to the market conformity concept.
- ***The private investor concept.*** EIBG investing own resources at own risk is private financing in nature under State aid rules and does not constitute State aid in the meaning of Article 107(1) TFEU. The MEOT section of the 2014 RFG (footnote 25) contains an express acknowledgement of that principle "*[p]rivate investors will typically include the EIF and the EIB investing at own risk and from own resources, banks investing at own risk and from own resources, private endowments and foundations, family offices and corporate investors, insurance companies, pension funds, private individuals, and academic institutions*". EIBG strongly believes that such express reference is of high importance for activities in the context of the implementation of financial instruments, as it provides specialized guidance, allows for a streamlined deployment of risk finance measures and significantly reduces red tape. The MSs and the Fund Managers with whom EIBG worked in the past have relied on this express mention when designing and implementing financial instruments. Therefore, the EIBG strongly encourages the Commission to maintain such clarification in the proposed 2022 RFG

and suggests reinserting the above footnote in a dedicated MEOT Section of the draft guidelines or, alternatively, in the paragraph 30(18);

- In addition, EIBG considers that it would be useful to incorporate in the new Guidelines the fact that in the context of follow-on investments, the relevant point in time for assessing the fulfilment of the requirement of ‘independent private investor’ relates to the time of the initial investment. In other words, the private investor making the follow-on investment should be the same as the investor who made the initial investment, as already indicated by the Commission in the context of the GBER Q&A (see response to Q 101).

2.2. Finally, while examining the results of the fitness-check of the State aid rules, it appears that none of the stakeholders raised the need of eliminating the MEOT section of the 2014 RFG. In fact, the vast majority of them appears to indicate that the 2014 RFG functioned rather well and that, going forward, the RFG would benefit from adding additional clarifications and examples of designing risk finance measures that are market-conform rather than removing the existing ones.

2.3. For these reasons, the EIBG strongly encourages the Commission to maintain the MEOT section in the 2022 RFG rather than to eliminate it altogether, as such detailed explanations regarding the MEOT are a valuable source of legal certainty.

3. Other clarifications

3.1. Finally, the EIBG would also welcome additional clarity with respect to the following two points:

- Regarding paragraph 30(29), the EIBG would like to understand whether the omission of the reference to Art. 3(3) of Annex I GBER for the purpose of these draft guidelines is voluntary (for instance, paragraph 30(22), which refers to a very similar concept explicitly includes that reference);
- Regarding paragraph 161, the EIBG suggests to include a more detailed explanation as to how exactly the “do no significant harm” (DNSH) principle will be assessed in the context of the 2022 RFG (compliance/consistency with Article 3 of Regulation (EU) 2020/852?) as well as a few examples of what the Commission deems to be acceptable “other comparable methodologies”.

4. Conclusion

The EIBG welcomes the consultation process on the third revision of the RFG and hopes that the process will result in the facilitation of the implementation of financial instruments. EIBG will continue to advise on the implementation of financial instruments in line with the previous models, with a particular emphasis on the fact that EIBG’s own resources invested at own risk are private in nature under State aid rules and do not constitute State aid in the meaning of Article 107(1) TFEU.

In this context, EIBG is strongly in favour of reinstating the detailed Section 2.1 on the MEOT application, as well as the footnote 25 of the 2014 RFG, in the final form of the 2022 RFG. In the contrary, the legal certainty necessary for a timely implementation of financial instruments would be endangered. In addition, clarifications as regards paragraphs 30(29) and 161 of the draft guidelines would also be welcomed.