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EAPB answer to public consultation and comments on the Revision of the Guidelines on State aid to promote risk finance investments

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The EAPB welcomes the opportunity to comment on the public consultation on the revision of the Guidelines on State aid to promote risk finance investments. In principle, we welcome the changes envisaged by the European Commission, in particular the merging of the existing requirements for the ex-ante assessment and the adaptation to the definition of the General Block Exemption Regulation (GBER) with regard to the definition of an innovative enterprise of medium capitalisation and the focus on the registration date as the relevant point in time for the receipt of risk finance aid. It is also positive that the requirement to quantify the funding gap will in future only be retained for aid schemes with the highest aid amounts for individual companies (greater than €15 million) and that the period eligible for aid will be extended from 7 to 10 years. We assume that this will speed up and simplify handling in practice.

However, the new draft guidelines contain some critical points which we would welcome to see addressed as follows:

- Market Economy Investor Principle

The current guidelines contain detailed criteria for the aid-free design of risk capital programmes (Section 2.1). Many promotional banks have used these as a guideline for pari-passu financing. In the new guidelines, reference is made at this point only to the notice on the concept of state aid, in which the term "State aid" is interpreted in an overarching manner. Unfortunately, the notice on the concept of State aid is less specific on pari passu financing than the risk financing guidelines currently in force.

Therefore, deleting the explanations in Section 2.1 without replacement would have clear disadvantages in practice. The passages on the market economy investor principle in the current Risk Financing Guidelines are clear and unambiguous. Of particular importance for the promotional banks in this context is paragraph 34 of the current guidelines:

"*An additional condition is that the funding provided by private investors that are independent from the companies in which they invest, is economically significant (26) in the light of the overall volume of the investment. The Commission considers that, in the case of risk finance measures, 30 % independent private investment can be considered economically significant.*"

A corresponding statement is not found in the notice on the concept of aid. Although reference is made to the identical decisions of the EU Commission in the corresponding footnotes 26 (Risk Financing Guidelines) and 142 (Notice on the concept of state aid), the corresponding assessment of the Commission is missing in the Notice on the concept of State aid. Without more detailed knowledge, a layman in terms of State aid law could thus incorrectly understand these statements to mean that a private share of 33% is required in each case in order to be considered economically significant (since the cited decisions of the Commission speak of one third). For some programmes of the promotional banks, a 3% additional requirement for private capital would be a clearly noticeable challenge and complication.

Against this background, we consider it necessary to explicitly include the 30% participation of private investors as a minimum quota in the new Risk Financing Guidelines, as this value is also reflected in various Commission

documents, such as the current version of the State Aid Guidelines for the financial instruments of the European Structural and Investment Funds (ESI Funds) of 25 March 2021.

Alternatively, corresponding explanations could be included in the Notice on the concept of State aid.

- Proof of market failure (Section 4.2.1)

The existence of a market failure in the risk capital sector in Europe is well known and the Commission also underlined the lack of an efficient risk capital sector, most recently in the consultation 2020/21 where the Commission stressed that the fitness check had shown that this market failure currently persists.

Against this background, the efforts required to prove market failure in the notification procedures of public risk capital funds seem unreasonably high. In this context it would be worth considering shifting the burden of proof from the Member States to the Commission. In the view of our members, if a Member State comes to the conclusion that there is a market failure with regard to a planned risk financing measure, taking into account certain standards which would have to be agreed between the Commission and the Member States, then the burden of proof for the non-existence of a market failure should lie with the Commission.

- Cumulation (point 158)

Point 158 states: "*Union funding centrally managed by the institutions, agencies, joint undertakings or other bodies of the Union that is not directly or indirectly under the control of the Member States does not constitute State aid. Where such Union funding is combined with State aid, only the latter will be considered for determining whether notification thresholds and maximum aid amounts are respected, provided that the total amount of public funding granted in relation to the same eligible costs does not exceed the most favourable funding rate laid down in the applicable rules of Union law*."

In our view, this requirement is not consistent. It is undisputed that the financing provided by the Commission or by way of mandates, e.g. by the European Investment Bank and the European Investment Fund, lacks the element of state resources under State aid law. The constituent elements of the concept of State aid ultimately serve the purpose of protecting intra-European competition between companies from State intervention. However, competition can undoubtedly also be hindered by non-(Member) state intervention.

The EU and the Member States are committed to a system that protects competition within the internal market from distortions. This is provided for in Protocol No. 27 of the Treaty on the Functioning of the European Union (TFEU). According to Article 119 (1) TFEU, the Member States and the European Community are committed to the principle of an open market economy with free competition. Accordingly, the European authorities must also observe the protection of intra-Community competition in the course of their promotional policy.

If the Commission or the bodies commissioned by it determine that European funding (e.g. within the framework of InvestEU) of a project does not impair intra-Community competition, then funding provided by the Member State for the same project must also be considered to be in line with competition. If the subsidies provided by the Member State were in breach of State aid law and thus affected intra-Community competition, then funds made available by the European Union for the same project could not leave competition unaffected.

Accordingly, we propose that if EU funds are made available for a project, the funds made available by the Member State should be deemed to be granted in conformity with State aid law/free of State aid, provided that the competition-relevant eligibility requirements of the EU funding are also observed for the Member State funding.

- Fund management (point. 84)

In accordance with the GBER, the selection of fund managers must take place within the framework of an open, transparent and non-discriminatory tendering procedure. This provision is comprehensible and justified for newly launched funds, as it determines conditions in line with the market. The tendering procedure is intended to ensure that the fund management is professionally positioned, acts exclusively according to return criteria, has implicit and explicit optimisation incentives, can also be sanctioned in the event of failure, and is not subject to political influence in its decisions. However, if the investment phase of the first fund has expired and a follow-up fund is to be launched,

a tender procedure to identify a new management is not always sensible. Valuable synergy effects in the management of the old and new funds would be called into question. The "forced" termination of the cooperation with the fund management fuels uncertainty among the investment managers and leads to an exodus of good staff. Therefore, the provision for follow-on funds should be limited to only recruiting new staff through an open, transparent and non-discriminatory tendering process.

** **The European Association of Public Banks (EAPB)** gathers over 30 member organisations which include promotional banks such as national or regional public development banks and local funding agencies, public financial institutions, associations of public banks and banks with similar interests from 17 European Member States and countries, representing directly and indirectly the interests of over 90 financial institutions towards the EU and other European stakeholders.*

Avenue de la Joyeuse Entrée 1-5, B–1040 Brussels

phone: +32 / 2 / 286 90 71 • fax: +32 / 2 / 231 03 47 • e-mail: info@eapb.eu • website: www.eapb.eu