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| **FROM** | **MS comments** | **EC replies** |
| **LT****Annex V** | The financial intermediary in this FI is private entity. What specific aspects should be assessed additionally if similar scheme would be implemented by a public body?*Investment policy, a) <…> according to the amount needed in terms of investments and management costs and fees. The transfer shall be be in tranches”.*There is no indication of the volume of tranches. Could it be assumed that the trances may exceed 25% of the funding agreement value?*Fund Contribution to financial instrument: amount and rate (product details)* *Preferential remuneration of private investors aiming solely at asymmetric profit-sharing shall be set in line with Article 44(1) of Regulation (EU) No 1303/2013 of December 2013 and Article 21 (13)(b) of the Commission Regulation (EU) No 651/2014 of 17 June 2014.*Please provide details of actual remuneration scheme as general references to legal acts provide little clarity on how the specific FI is structured.*„Eligible Financial Intermediary and Co-investors“**The co-investors shall be long term private investors <...>.*Could you please define how the „long term“ should be understood and assessed.*„Eligible Financial Intermediary and Co-investors“* *Co-investors shall be independent from the final recipients invested except in case of follow on investment <…>.*According to the Commission Regulation (EU) N°651/2014 of 17 June 2014 (GBER) art. 2 paragraph 72 “<…> Upon the creation of a new company, private investors, including the founders, are considered to be independent from that company;“. To our opinion GBER defines it more broadly, so we suggest to apply GBER here as well. | This is out of the scope of the OSI (Off The Shelf Instrument). The State aid considerations would have to be revalidated again.Please refer to the question 5 of the Annex 2 of the guidance note on payments. The preferential remuneration treatment is part of the possibilities offered by the CPR. The Co-Investment facility allows for it based on the ex-ante assessment content and the selection of the financial intermediary (see eligible FI and co-investors term sheet). Specific risk-sharing arrangement will result from the ex-ante assessment, which takes into account the market situation.Long Term could refer to any relevant reference (national law or market) ensuring the interest of the investors for a period allowing the development of the company it invests in. The definition is the same as in the GBER with the exception for the follow on investment. |
| **LT****Annex VI** | Structure of the financial instrument Could Urban development fund be managed by Fund of Funds manager not only by a financial intermediary.Aim of the instrument1. *Clause no 1.* Body implementing financial instruments could also combine not only own resources, but also attracted private investors resources.
2. *Clause no 2*. *“Provide urban development projects located in assisted areas as designated in an approved regional aid map for the period 1.7.2014 - 31.12.2020 in application of Articles 107(3)(a) and (c) of the Treaty with easier access to finance offering projects funds at preferential conditions in terms of interest rate reduction and/or collateral reduction.”* Preferential terms include not only indicated here (could be other means like risk reduction or extension of loan terms, etc.), so list must be updated or not exhaustive.
3. *Other part*:
	* 1. Investments can be made not only *“in the limit of the scope of the Commission Regulation (EU) N°651/2014 of 17 June 2014”*. It also could be made when there is no State aid identified at all, e.g. public sector implementing public services, when savings are achieved. Additional question – is it possible to extend this to: a) non state aid activities, b) scope of GBER and, c) additionally – activities, which would not exceed de minimis?
		2. The condition “*In the case of fund of funds structure, the fund of funds shall transfer the contribution from the ESIF programme to the financial intermediary”*, should not apply when financial instrument is implemented by the manager of fund of funds and this manager is able to participate with own funds, or attract private funding.

Urban Development projectIt is indicated that “*The projects shall have an internal rate of return (IRR) which may not be sufficient to attract financing on purely commercial basis”*. What benchmarks should be used to in order to evaluate if IRR is sufficient or not? (depending on country IRR could vary).State aid implication 1. It is indicated that *“The UDF is managed on a commercial basis and shall ensure profit-driven financing decisions”*. Could you specify what the basis for profit calculation: a) financial returns, or b) economic returns?
2. In the cases when this instrument is combined with other forms of support does that mean that for the same object will be applied different articles of GBER.
3. Who would be the final beneficiary (investor, or the manager of the building) in PPP projects when the project is implemented by the ESCO company?

Lending policy (d) Loss recoveries.How the recovered amounts are allocated between the financial intermediary and the managing authority and the fund of funds?Pricing policy 1. What is “*eligibility period”* in the context of this annex? Is it 2023 (then it means if project is implement in August of 2023, then pricing policy shall remain constant during 4 month only)? Please see a comment on “Duration” as well.

2 *“This reduction shall take into account the fees that the managing authority might charge on the programme contribution.”* – could you please clarify, what “fees” are meant here?Programme contribution to financial instrument (activities)1. It is indicated, that *“A viability test must demonstrate that the project would not proceed without UDF investment”*. In some cases financial instruments can focus just on long maturity loans. So viability test (even with the commercial pricing), could show, that loan can “proceed without UDF investment”, but banks do not provide such maturity loans, so there is no access in the market for them.
2. How to demonstrate that *“the best possible leverage of private resources is achieved”*. Ex-ante assessment is indicating only average/recommended leverage ratio, but in different projects it can be different.
3. It is indicated “Recommend and manage appropriate exit strategies from urban development project investments”. As UDF is described as loan financial instrument, so exit strategy is – loan repayment. Is something else meant by this indication?

DurationIt is indicated, that “The lending period of the financial instrument shall be set in order to ensure that the programme contribution as referred in Article 42 of Regulation (EU) No 1303/2013 is used for loans disbursed to final recipients no later than the 31 December 2023.” Financial instruments has to be long term, the funds paid from ESIF has to be distributed to final beneficiaries until 2023, but repayment should be used not less than 8 years after 2023 (Article 44 of Regulation (EU) No 1303/2013). So the lending from resources paid back to financial instruments can be made (actually is preferred to be made) after 2023 as well.Lending and risk-sharing at financial intermediary level (alignment of interest)If the private investments by a financial intermediary could be assessed as national co-financing in the case of PPP Project or when the Project is implemented by ESCO?Eligible Financial Intermediaries1. It is indicated that “The financial intermediary should be appropriately regulated by the relevant national financial services regulatory body and it must follow professional fund management best practice.” We agree that financial intermediaries should follow professional fund best practice however the requirement for financial intermediary to be regulated by the relevant national financial services regulatory body is excessive and unnecessary. This requirement prohibits certain national and supranational development funds, national promotional institutions and many other fund managers that are perfectly capable of fulfilling duties of financial intermediaries form participating in competitive tender of financial intermediary selection. This requirement effectively reduces number of possible candidates for financial intermediary function thus increasing chances of selecting less efficient financial intermediary, while not achieving any material benefits to the scheme. This requirement is relevant only in the case if such regulation is foreseen by local laws.
2. It is indicated, that “The UDF may be established as: joint stock companies, limited liability companies, investment funds, separate blocks of finance within financial institutions or as other **acceptable organisational forms**. The legal structure of the UDF should allow for additional funding to leverage programme contribution from other public investors into urban development projects.” Who or what is determining acceptable organisational forms?

Final recipients eligibility1. Could you please clarify who is the final recipient in the case of ESCO takes a loan.
2. Could you please provide with examples in part (a) and (b)

Characteristics of the product for the final recipientsIt is indicated, that *“The total investment amount of the UDF for the urban development project shall not exceed EUR 20.000.000 as referred in Article 16 (3) of the Commission regulation (EU) No 651/2014.”* When project is out of the scope of State aid (see comment to “State aid implication”), then project cap can be up to 50.000.000 EUR? | If the FoF is the manager of the UDF, it is the body implementing the FI and should treated as such. Please refer to the guidance note on management costs and fees.1) The contribution of other investors is mentioned.2) OK amended3) i) it can be extended to other similar models outside the scope of the OSI ii) This is a specific case not envisaged by the OSIIn line with art. 16 of the GBER, the fair rate of return for private investors shall be established through an open, transparent and non-discriminatory call. If the private investors are not selected by such a call, the fair rate of return to the private investors shall be established by an independent expert selected via an open, transparent and non-discriminatory call. 1. Please refer to article 16 (9) of the GBER. In this regard, please note that to conclude on the profitability of the investment, UDF fund managers shall carry out investments on the basis of a business plan and proper due-diligence of individual investments following best market practice. 2. We presume that the question is aimed at clarifying whether grants (granted under other articles of the GBER, for instance those pertaining to regional aid) can be combined with financial instruments. Please refer to the Article 8 of GBER on cumulation.3. The reference to ESCO company has been deleted. Please refer to the guidance note on eligibility.It depends on the risk sharing arrangements.(cfr. Ex-ante assessment, selection of the financial intermediary and the fof…)1. As for the other OSI, the eligibility period refers to the ESIF eligibility. If a project is implemented in 08/2023, the loan is signed under the conditions of the pricing set in the FA between the MA and the FI.2. Any fees (interest rate for example) charged by the MA shall be taken into account to calculate the effective advantage to pass on to the FR.1) OK noted2) In line with art 16 (8) (b), terms and conditions of private co-investment (inc. amount of leveraged private investment) need to result from an open, transparent and non-discriminatory call. 3) Indeed it is amendedResources paid back are not considered to be ESIF programme resources anymore. Consequently, as the provisions on the eligibility period do not apply to these resources the investments from resources paid back may take place also beyond 2023.No sufficient information to reply. .1) We don't see how the financial intermediary could provide loan to Urban Development Projects without being appropriately regulated by national financial services regulatory body.2) The sentence has been deleted since the organisational forms are defined in the Article 38 of the CPR.1. See here above reply about eligibility.2. OSI is already a specific case not covering all examples.The OSI is implemented under Article 16 of the GBER. No other possibilities are here presented. |
| **PL****Annex V** | **ANNEX V EQUITY FUND FOR SMES AND START-UP COMPANIES (CO-INVESTMENT FACILITY)** General remark:According to the draft Annex V there is no doubt that the investment of the Co-Investment Facility is implemented as an instrument entailing State aid (*Page 2 – State aid implication*). However, there is a need for further clarifications provided for some State aid issues identified by the Polish authorities.1. Due to the draft Annex V, State aid might be present at different levels (fund of funds, financial intermediary, the private investors and final recipients) and shall be considered compatible with the internal market and not requiring an *ad hoc* notification, provided all conditions for compatibility under Article 21 of Commission Regulation (EU) N°651/2014 of 17 June 2014 are satisfied.

It must be noted however, that it is still not clear, whether in order to grant a State aid a national State aid scheme is required or the State aid will take form of an individual aid granted on the *ad hoc* basis (especially at the level of final recipients).Taking into account general prohibition of granting a Risk finance aid on the *ad hoc* basis stipulated in both: article 21 of Commission Regulation (EU) N°651/2014 and Guidelines on State aid to promote risk finance investments, Polish authorities are of the opinion that a State aid scheme adopted at the level of Member States will be required in order to implement the Co-Investment Facility. In case the position of the Polish authorities will be approved and will be confirmed that in order to implement the Co-Investment Facility a national State aid scheme is required (based on article 21 of Commission Regulation (EU) N°651/2014), the Commission is asked to provide some further clarifications on an added value for introducing an off the shelf instrument (the Co-Investment Facility) containing precise and detailed State aid compatibility criteria.It must be born in mind that any national State aid scheme adopted on the basis of article 21 of Commission Regulation (EU) N°651/2014 will have to be compatible with its provisions, regardless whether the scheme will serve for the implementation of Co-Investment Facility or not. It means that is not necessary to include in the draft Annex V any of the conditions which derive directly from Commission Regulation (EU) N°651/2014. It will be no added value for the Member States (will have to adopt a State aid scheme anyway) on the one hand and it might cause some implementation concerns (difficulties in identification of the proper legal basis for granting State aid) on the other.1. In addition, the Commission is required to provide an explanation for some discrepancies between State aid compatibility criteria laid down in article 21 of Commission Regulation (EU) N°651/2014 and conditions for the structure of the Co-Investment Facility, i.e.:
* article 21 of Commission Regulation (EU) N°651/2014 does not require any financial intermediary own capital participation (there is a certain level of the obligatory private contribution, but it can be done at the level of private investors). In order to implement the Co-Investment Facility there is a need to provide by the financial intermediary a minimum of 1% own contribution,
* article 21 of Commission Regulation (EU) N°651/2014 allows under some circumstances and after satisfying certain conditions for the asymmetric loss-sharing between public and private investors, what is strictly prohibited for the Co-Investment Facility.

Polish authorities are not willing to question the introduction of *the facto* stricter conditions for the Co-Investment Facility than for instruments implemented exclusively on the basis of article 21 of Commission Regulation (EU) N°651/2014. This approach will lead to a better management of the public funds and ensure more credible financing decisions. It must be explained however, what is the relation between article 21 of Commission Regulation (EU) N°651/2014 and draft Annex V and which provisions will prevail in case of identification of any discrepancies in terms of State aid compatibility with the internal market. | 1. Common provisions of the GBER need to be respected by the off-the shelf instruments. In line with Article 11 of the GBER, member States shall transmit to the Commission, via the Commission's electronic system, the summary information about each aid measure exempted under the GBER Regulation. Furthermore, the Member State must ensure compliance with Article 9 of the GBER and amongst others ensure the publication on a comprehensive State aid website summary information referred to Article 11 of the GBER.Under Article 21 of the GBER Member States need to implement a scheme, meeting all the relevant provisions of the said article, to grant individual aid to final investees (through a financial intermediary). The Co-investment facility will need to comply with the applicable EU rules. 2. Some provisions of the OSI are indeed more specific than the State aid framework that covers broader scope of interventions.  |
| **PL Annex VI** | **ANNEX VI LOAN FOR SUSTAINABLE URBAN DEVELOPMENT** (**URBAN DEVELOPMENT FUND)**General remark:According to the draft Annex VI there is no doubt that the investment of the Urban Development Fund is implemented as an instrument entailing State aid (*Page 11 – State aid implication*). However, there is a need for further clarifications provided for some State aid issues identified by the Polish authorities.1. Due to the draft Annex VI, State aid might be present at different levels (fund of funds, financial intermediary, the private investors and final recipients) and shall be considered compatible with the internal market and not requiring an *ad hoc* notification, provided all conditions for compatibility under Article 16 of Commission Regulation (EU) N°651/2014 of 17 June 2014 are satisfied.

It must be noted however, that it is still not clear, whether in order to grant a State aid a national State aid scheme is required or the State aid will take form of an individual aid granted on the *ad hoc* basis (especially at the level of final recipients).Taking into account the provisions of Commission Regulation (EU) N°651/2014, Polish authorities are of the opinion that a State aid might be granted in the both forms: on the basis of State aid scheme adopted at the level of Member States or in form of an individual aid granted on the *ad hoc* basis. Nevertheless, in both scenarios as the legal basis for the granting State aid will serve Commission Regulation (EU) N°651/2014 and it will have to be ensured before granting an aid that all conditions laid down in this act are complied with (at all levels).Having that in mind, the Commission is asked to provide some further clarifications on an added value for introducing an off the shelf instrument (the Urban Development Fund) containing precise and detailed State aid compatibility criteria.Polish authorities are of the opinion that is not necessary to include in the draft Annex VI any of the conditions which derive directly from Commission Regulation (EU) N°651/2014. It will be no added value for the Member States, which will have to ensure a compatibility with all the conditions laid down in the EU State aid law anyway, regardless of the form of the aid (State aid scheme or *ad hoc* aid). Besides, adopting draft Annex VI in the proposed structure might cause some implementation concerns (difficulties in identification of the proper legal basis for granting State aid).1. In addition, the Commission is required to provide an explanation for some discrepancies between State aid compatibility criteria laid down in article 16 of Commission Regulation (EU) N°651/2014 and conditions for the structure of the Urban Development Fund, i.e.:
* article 16 of Commission Regulation (EU) N°651/2014 does not require any financial intermediary own capital participation (there is a certain level of the obligatory private contribution, but it can be done at the level of private investors). In order to implement the Urban Development Fund there is a need to provide by the financial intermediary a minimum of 1% own contribution.

Polish authorities are not willing to question the introduction of *the facto* stricter conditions for the Urban Development Fund than for instruments implemented exclusively on the basis of article 16 of Commission Regulation (EU) N°651/2014. This approach will lead to a better management of the public funds and ensure more credible financing decisions. It must be explained however, what is the relation between article 16 of Commission Regulation (EU) N°651/2014 and draft Annex VI and which provisions will prevail in case of identification of any discrepancies in terms of State aid compatibility with the internal market. | 1. Common provisions of the GBER need to be respected by the off-the shelf instruments. In line with Article 11 of the GBER, Member States shall transmit to the Commission, via the Commission's electronic system, the summary information about each aid measure exempted under the GBER Regulation. Furthermore, the Member State must ensure compliance with Article 9 of the GBER and amongst others ensure the publication on a comprehensive State aid website summary information referred to Article 11 of the GBER. Under article 16 of the GBER Member States need to implement a scheme, meeting all the relevant provisions of the said article, to grant individual aid to final investees (through a financial intermediary). The UDF will need to comply with the applicable EU rules, including State Aid rules. 2. Some provisions of the OSI are indeed more specific than the State aid framework that covers broader scope of interventions. |
| **SE** | **“Annex V Equity fund for SMEs and Start-up companies (Co-investment facility)” – Off the shelf products**Top of page 3, Section regarding **State aid implication**: *“The costs aiming at the development of the investment projects, the due diligence or accompanying the final recipients shall be integrated in the management costs and fees of the financial intermediary managing the Co-Investment Facility.”* Could you please clarify what is to be understood by the costs “accompanying the final recipients”, the meaning by this is not clear to us.Page 4, Section regarding **Investment policy**:*“Potential co-investments in final recipients will be identified, screened and assessed by the financial intermediary along with the co-investors (if any).”* Why is there an opening for co-investments being identified, screened and assessed by the financial intermediary without co-investors, as follows from the words “if any” put in parenthesis?As a consequence of the minimum thresholds stipulated in Article 21 of the General Block Exemption Regulation, presence of co-investors seems to be presumed under all circumstances. Page 5, Section regarding **Investment and risk-sharing at financial intermediary level (alignment of interest), second bullet point:***“The remuneration of the financial intermediary that shall reflect the current market remuneration in comparable situations, which shall be the case when the financial intermediary has been selected through a competitive tender and no other advantages granted by the State.”* The text drafted here deviates from existing off-the-shelf products according to Implementing Regulation no 964/2014 by not mentioning the alternative option to make use of articles 12 and 13 as a way to establish market reflecting remuneration of a financial intermediary. We would like to know the reason for this. To us it seems motivated to include also the optional use of articles 12 and 13 of Regulation 480/2014 in this context, not least in view of Article 21 of the General Block Exemption Regulation, subparagraph 17 which stipulates that “A Member State may assign the implementation of a risk finance measure to an entrusted entity.” | The cost here mentioned concerns for example the role of shareholder of a company following the activities and monitoring the performance, ensuring compliance with the investment strategy and the legal framework…The principle of co-investment by private investors is not discussed indeed but the chronology can be that there are no other investors (not yet) at the time the financial intermediary identify, screen and asses some investments in final recipients.The principle is here that the financial intermediary is selected through open transparent and non-discriminatory call (see eligible financial intermediary part), as required by Article 21 of the GBER. It is the case when the financial intermediary is selected through a competitive tender. In this case, following the Article 13 (6) of the Delegate Regulation 480/2014, the thresholds do not apply. |
| **SK** | **Notes for SME co-investment facility:**1. In this instrument private contribution is foreseen only at the level of project (except for financial intermediary contribution). Based on GBER art. 21 it is however possible also to acquire additional private funding at level of fund of funds or financial intermediaries. Is it possible to use this OTS instrument also in case that co-financing is anticipated at these levels?
2. In relation to the previous point, we understand that GBER in art. 21/11 allows for private contribution to be achieved not on case-by-case basis but also on portfolio aggregate level based on weighted average of SMEs included. Does this OTS instrument also include such possibility in its design? If not, what changes would be necessary in the instrument in order to utilize this possibility of GBER?
3. In the sections on state aid of the instrument in fourth paragraph it is mentioned that „there is allowable aid at the level of the final recipients when there is allowable aid to private co-investors“. What are the conditions for co-investors for aid to be deemed allowable?
4. Is it possible to design this OTS instrument the way that also contribution from financial intermediary will benefit from asymmetric profit sharing?
5. GBER in its art. 21/13c allows also for downside risk protection for private co-investors. Can this be included in this OTS instrument?
6. GBER in its art. 21/7 allows also for capital replacement (under certain circumstances). OTS instrument however in its section „final recipients’ eligibility“ specifically forbids for funds to be used for this purpose. Is it to be understand that capital replacement has to be made under tailor-made instrument rather than under OTS instruments?
 | 1. The OSI model can be a base for the development of another instrument allowing such participation of private co-investors at le level of the fund.2. This is another instrument to be developed.3. These conditions are set out in the Article 21 of the GBER and included in the OSI term-sheet. 4. This case is not set in the current proposal for State aid and alignment of interest reasons.5. This case is not possible in the current proposal for policy reason.6. Yes  |
| **UK** | Pages 2 and 11 – state aid implication - During the meeting the UK asked for clarification on state aid treatment. The document states – “The investment of the Co-Investment Facility is implemented as an instrument entailing State aid. It shall be considered compatible with the internal market and not requiring an ad hoc notification, provided all conditions for compatibility under Article 21 of Commission Regulation (EU) N°651/2014 of 17 June 2014 are satisfied.” The UK asked whether action under the Commission State Aid notification interactive system (SANI2) was still required? Commission representatives clarified that the requirement was to inform the Commission that a scheme was being developed that would be in conformity with the General Block Exemption Regulation. However, formal notification was not required. I am recording this exchange for completeness.Page 6-7 – Financial Recipient Eligibility, section g – “investment shall not be capital replacement (including management buyout or buy-in).” UK representatives had a brief exchange in the margins during which Commission representative indicated that the phrase ‘capital replacement’ above did not have the same meaning as ‘replacement capital’ in the General Block Exemption Regulation (i.e. Commission Regulation (EU) N°651/2014 of 17 June 2014)? In the GBER, Article 2(78) defines ‘replacement capital’ as meaning ‘the purchase of existing shares in a company from an earlier investor or shareholder.’ This appears to conflict with paragraph ‘g’, as a management buyout or buy-in would necessarily involve the purchase or sale of existing shares in a company. In practice this means that some aid providers will find this off-the-shelf instrument less attractive because management buyouts and buy-ins are not allowed.I should be grateful if you could add some additional drafting at this section to clarify the difference between the two situations. | Common provisions of the GBER need to be respected by the off-the shelf instruments. In line with Article 11 of the GBER, Member States shall transmit to the Commission, via the Commission's electronic system, the summary information about each aid measure exempted under the GBER Regulation.Under the GBER "replacement capital" means the purchase of existing shares in a company from an earlier investor or shareholder. In line with art 21 (7) of the GBER a risk finance measure may provide support for replacement capital only if the latter is combined with new capital representing at least 50% of each investment round into the eligible undertaking. However in line with RFG replacement investments may not support buy-outs. The OSI are more restrictive and as a policy objective, the capital replacement is not allowed. |