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European Structural and Investment Funds

Guidance on State aid in ESI Funds financial instruments

**DISCLAIMER**

*This is a working document prepared by the Commission services. On the basis of applicable EU law, it provides technical guidance for colleagues and bodies involved in the monitoring, control or implementation of the European Structural and Investment Funds on how to interpret and apply the EU rules in this area. The aim of this document is to provide Commission services' explanations and interpretations of the said rules in order to facilitate the programme implementation and to encourage good practice(s). This guidance is without prejudice to the interpretation of the Court of Justice and the General Court or decisions of the Commission.*

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# Main regulatory references

Regulation (EU) 1303/2013 (CPR)

Commission Implementing Regulation (EU) 964/2014 (IR)

Articles 107 and 108 of the Treaty of the Functioning of the European Union (TFEU)

Commission Regulation (EU) 651/2014 (GBER 2014)

Commission Regulation (EU) 1407/2013 (de minimis regulation)

Guidelines on State aid to promote risk finance, OJ C 19 of 22.1.2014, p.4 (RFG)

Guidelines on regional State aid for 2014-2020, OJ C 209 of 23.7.2013, p.1 (RAG)

# Background

Member States have to ensure compliance with State aid rules. The importance of State aid rules for financial instruments is recalled in several places in title IV of the CPR. Special attention for State aid issues is needed for the following reasons:

1. The State aid legal framework has considerably changed in 2013/2014 offering additional possibilities to ensure compatibility of State aid.
2. State aid may exist at different levels of financial instruments, including fund managers and co-investors. Not all relevant stakeholders are aware of the potential presence of State aid at different levels and the need to ensure State aid compliance for all of them.
3. Fund managers and investors (financial institutions, commercial banks) are often not particularly familiar with State aid rules.
4. The CPR allows for the possibility to use financial instruments for all thematic objectives. In certain areas the Commission offers so-called ‘off-the shelf’ financial instruments for which State aid compliance has already been verified.

**The purpose** of this guidance note is to raise awareness of all stakeholders about possible State aid in the field of financial instruments and to point to different possibilities of achieving State aid compliance.

# State aid at different levels of financial instruments

Financial instruments often involve multi-layer constructions with the aim to create incentives for economic operators (**investors**) to provide finance to **final recipients**. Investors and final recipients may be State aid beneficiaries. In addition, financial instruments may involve one or more **bodies implementing financial instrument** (e.g. financial intermediaries) which may also be recipients of State aid.

Depending on the design of the financial instrument, it may constitute State aid to undertakings at all three levels mentioned above, even if the intention of the Managing Authority is to provide benefits only to final recipients.

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# Presence of State aid in the field of financial instruments

Article 107(1) TFEU defines State aid as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States[[1]](#footnote-1).

Based on Article 107(1) TFEU the presence of State aid includes the following requirements[[2]](#footnote-2):

* The support comes from ‘State resources’ and is ‘imputable’ to the State
* The recipient is an ‘undertaking’
* The support ‘favours’ an undertaking, that is to say: confers an ‘advantage’
* The support distorts competition and affects trade between Member States

The criteria for the presence of State aid under Article 107(1) TFEU are cumulative. This means that all of them need to be fulfilled for support to constitute State aid. If any of the criteria is not fulfilled, the public support does not constitute State aid. That test has to be carried out at all three levels mentioned above. Further details on the mentioned criteria for the presence of State aid are explained in the following sections of this guidance.

## ‘State resources’ and ‘imputability’

Support granted directly or indirectly through State resources and the imputability of such support to the State are conditions for the presence of State aid within the meaning of Article 107(1) TFEU. They are often considered together when assessing a measure under Article 107(1) TFEU, as they both relate to the public origin of the measure in question.

National public resources of the EU Member States are State resources in the meaning of Article 107(1) TFEU. Resources coming from the Union budget are also considered as ‘State resources’ (and imputable to the State) if national authorities have discretion about the use of these resources. By contrast, if Union resources are managed directly or indirectly by the Union (or international institutions) with no discretion on the part of national authorities, they do not constitute State resources and are not imputable to the State.

### ESI Funds[[3]](#footnote-3)

The vast majority of ESI Funds are spent in shared management[[4]](#footnote-4). In shared management Member States have discretion on the use of the funding and can decide who gets the support. Due to that discretion, ESI Funds resources are considered as ‘State resources’ and are imputable to the State under Article 107(1) TFEU. This is the case even where national authorities entrust financial instruments to the EIB Group or any other entity to implement them on their behalf.

Therefore, where ESI Funds are spent in the shared management mode with Member States, the ESI Funds and the national public (co-)funding jointly are ‘State resources’ for the purposes of State aid rules. This also means that financial instruments managed by or under the responsibility of the managing authority (Article 38(1)(b) CPR) as well as programme contributions to EU level instruments (Article 38(1)(a) CPR) are subject to State aid rules.

**Example:** A managing authority uses ERDF resources for setting up a fund to promote SME start-ups. The ERDF resources are under shared management.

 The ERDF resources in shared management qualify as ‘State resources’. Provided that all other elements of the notion of aid of Article 107(1) TFEU are fulfilled, the operation has to comply with State aid rules. Compliance needs to be checked at the level of the management of the fund, at the level of the investors and at the level of the final recipients.

### Other EU funds and ESI Funds[[5]](#footnote-5) in direct or indirect Union management

As regards Union funding which is implemented by the EIB Group or any other entrusted entity under a mandate from the European Commission (or another EU institution or other EU entity) in direct or indirect management and where therefore national authorities do not decide about the use of the resources*,* such Union funding does not qualify as State resources. It is not imputable to the State and therefore does not constitute State aid.

It should, however, be noted that , the Financial Regulation provides that Union financial instruments must “comply with non-distortion of competition and consistency with State aid rules”[[6]](#footnote-6). The legal framework governing Union financial instruments, including the agreements with the entrusted entities has been designed with a view to ensuring consistency with State aid law. The different financial instruments have to be designed to be State aid consistent.

**Example:** On request of the Commission, the EIB sets up a fund with resources from Horizon 2020[[7]](#footnote-7). Horizon 2020 resources are Union resources in indirect management.

 The Horizon 2020 resources are not ‘State resources’. Therefore a fund financed solely by those resources does not qualify as State aid. Still, the Financial Regulation (and recital 42 of the Horizon 2020 Regulation) provides that consistency with State aid rules has to be ensured. The setting up of the fund and implementation of the funding therefore needs to be consistent with State aid rules.

 For Horizon 2020 the Commission designed the regulation and the implementing rules, in particular the delegation agreement and term sheets, in a way to achieve the consistency goal. Proposals for setting up a Horizon 2020 fund are therefore checked for compliance with the Horizon 2020 rules.

If the fund set up from Horizon 2020 resources is financed from other public resources (national public financing or ESI Funds resources), that part of the financing qualifies as ‘State resources’. For those parts of the financing additional State aid verifications may be required.

### EIB Group own resources

EIB Group investing own resources at own risk is considered private in nature under State aid law and does not constitute State aid in the meaning of Article 107(1) TFEU. This also implies that EIB/EIF own resources, invested at full own risk for the EIB/EIF, are not taken into account for the calculation of the *de minimis* threshold, for notification thresholds, or for calculating aid intensities.

If however Member States provide guarantees or any other support to the EIB Group, the EIB Group is not investing at full own risk. In those circumstances, EIB Group investments therefore cannot be considered private in nature for the purpose of State aid policy. Moreover, since such a guarantee involves State resources and is imputable to the State, it must comply with State aid rules.

**Example**: The EIB is setting up a fund from own resources without any support (for example guarantees) from Member States or Union resources.

 The EIB resources are considered private resources. Therefore State aid rules do not apply.

 If the EIB receives any Union or public support, for instance guarantees to cover risks (e.g. EIB loan with sovereign guarantee) the EIB resources are not considered private resources. Depending on the source of the support, the creation of the fund and its activities may need to ensure compliance with State aid rules.

### EIB Group own resources covered by EFSI guarantee (European Fund for Strategic Investment)

EFSI financing does not qualify as ‘State resources’ and is thus not State aid. In addition, EFSI resources are outside the scope of the Financial Regulation. Therefore the consistency requirement of Article 140(2)(c) FR does not apply. There is thus no State aid control required for the deployment of EIB Group own resources covered by an EFSI guarantee.

Projects or investment platforms supported by EFSI may be combined with financial support (co-financing) from ESI Funds or with national public resources. In such cases that additional financing is subject to State aid rules, as explained under 4.1.1 above. There is also a separate guidance note on ESI Funds/EFSI combination including guidance on State aid[[8]](#footnote-8).

**Example:** The EIB sets up a fund with own resources which are backed by an EFSI-guarantee.

 The setting-up of the fund and the implementation does not involve ‘State resources’ and is therefore not subject to State aid control. If however the fund receives further resources from ESI Funds or from national public resources, the support for that part qualifies as ‘State resources’. It would need to comply with State aid rules if the other conditions of the notion of aid are fulfilled.

It should be noted that EIB Group resources backed by an EFSI-guarantee are not invested at own risk. Therefore, in this case an EIB Group investment cannot be considered as private investment for the purpose of meeting State aid rules or EU regulation requirements.

**Overview of the required State aid assessment by types of resources**

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| Types of resources |
| ESI Funds resources(in shared management) | National public resources | Directly/indirectly managed Union Funds (e.g. Horizon 2020, COSME or ESI Funds in direct/indirect management) | EIB group own resources (without any risk coverage or other support from Union or national public resources) | EIB group own resources covered by EFSI guarantee |
| State resources: yesNeed for full compliance with State aid rules[[9]](#footnote-9) | State resources: yesNeed for full compliance with State aid rules | State resources: noNeed to ensure consistency with State aid rules | State resources: noNo State aid requirements | State resources: noNo State aid requirements |
| If different resources-types are combinedthe application of State aid rules is assessed separately for each part |

## ‘Undertakings’ involved in financial instruments

The notion of aid under Article 107(1) TFEU requires that support is granted to an ‘undertaking’. The Court of Justice has consistently defined ‘undertakings’ as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed[[10]](#footnote-10). ‘Economic activity’ is an activity consisting in offering goods and services on a market[[11]](#footnote-11).

The above definition of ‘undertaking’ implies that:

1. the status of the entity is not decisive (for example, an entity that is part of public administration may be an undertaking),
2. it does not matter whether the entity is set up to generate profits (a non-profit entity can offer goods and services on a market too),
3. the classification of any entity as an undertaking is always relative to a specific activity (an entity may have both economic and non-economic activities).

The presence of State aid must be verified for all actors involved in financial instruments. It should therefore be checked for all actors whether they qualify as ‘undertaking’, unless the presence of State aid can be excluded on the basis of other requirements of Article 107(1) TFEU.

Fund managers and investors involved in a financial instrument normally qualify as ‘undertakings’ because they carry out an economic activity. For final recipients the situation may be different, in particular when the recipients are individuals who are not engaged in an economic activity or are involved in activities which are not considered as economic in nature.

## Advantage

Another cumulative requirement for the presence of State aid is that the measure entails an advantage. An advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say in the absence of State intervention[[12]](#footnote-12). Therefore, an advantage (and therefore State aid) can be excluded if economic transactions carried out by public authorities are in line with normal market conditions.

The following elements are particularly relevant when applying the market economy operator (MEO) test to financial instruments:

1. **For (co-)investors** there is no advantage (and therefore no State aid) if investment is effected *pari passu* between public and private investors.

An investment is considered pari-passu when:

* it is made under the same terms and conditions by public and private investors (public and private investors share the same risks and rewards and hold the same level of subordination in the same risk class in case of a layered funding structure), and
* both categories of operators intervene simultaneously (the investment of public and private investor is made by way of the same investment transaction), and
* the intervention of the private investor is of real economic significance (risk finance guidelines (“RFG”) set the minimum at 30%)

Based on point 35 of the RFG, to the extent that the investment conditions (at the level of both the investors and the financial intermediary) are in line with the market economy operator test, there is no need to further check potential aid at the level of final recipient.

Where financial instruments allow private co-investors to carry out financial investments into a company or set of companies on terms more favourable than public investors investing in the same companies, then those private investors may receive an advantage (non *pari passu* investments). Such an advantage may take the form of preferential returns (upside-incentive) or reduced exposure to losses in the event of underperformance of the underlying transaction compared to the public investors (downside protection). It is not a priori excluded that investments implying an advantage to private investors comply with State aid rules. However, provided that all requirements of the notion of aid are fulfilled, it is necessary to ensure compatibility of the aid to the private investors.

In some cases (e. g. guarantees or in the absence of private investors) market conditions cannot be directly established via the pari passu test. This does however not necessarily mean that the transaction is not in line with market conditions. In such cases compliance with market terms can still be assessed on the basis of benchmarks or other assessment methods (e. g. to establish the NPV of investment to a level that would have been acceptable for a private operator in a market economy). These cases therefore need to be verified for market compliance. Where a transaction is found to be in line with market conditions, it is not State aid.

1. **Bodies implementing financial instruments/fund managers/financial intermediaries/funds of funds** may also be recipients of State aid if the remuneration for the services or reimbursements to implement the financial instrument exceeds market rates.

There are different ways to establish whether the remuneration for bodies implementing financial instruments/fund managers is in line with market rates. For example, if a fund manager is chosen through an open, transparent, non-discriminatory and objective selection procedure its remuneration can be considered to be in line with market rates.

If there is no open, transparent and non-discriminatory selection procedure, the market conformity of the remuneration/reimbursements may be shown by other means. For remunerations/reimbursements that are in line with the CPR-rules, the off-the-shelf instruments which are described in Section 6 assume that the remuneration is market conform.

1. **Level of final recipients:** The overall purpose of a financial instrument is to provide support to final recipients. Therefore, it is in the nature of the instrument that final recipients receive an advantage they would not obtain under normal market conditions.

However, where a loan or guarantee fulfils the conditions set out in the Reference Rate Communication[[13]](#footnote-13) or section 3 of the Notice on guarantees[[14]](#footnote-14), it is considered to be market-conform and therefore not to constitute State aid to the final recipients.

## Distortion of competition and effect on trade between Member States / *de minimis* aid

State aid is present only if it distorts competition and affects trade between Member States. Support which complies with the applicable *de minimis* Regulation is therefore deemed not to meet all the criteria laid down in Article 107(1) TFEU. Such aid is therefore not subject to a State aid notification. For the funding period 2014-2020, it is mainly Commission Regulation (EU) No 1407/2013[[15]](#footnote-15) which is relevant[[16]](#footnote-16) setting the *de minimis* threshold per single undertaking at EUR 200 000 over a 3-year period. In addition to the threshold, also all other requirements of the applicable de minimis Regulation need to be fulfilled.

The *de minimis* Regulation may be applied for each of the different actors involved in financial instruments. However, all requirements of the Regulation have to be met.

Particular attention needs to be paid to the following points:

**Under ESI Funds rules Bodies implementing** the financial instruments should normally not receive any State aid including *de minimis* aid as this is not in line with the purpose of the ESI Funds objectives for the financial instrument which is supposed to channel resources to the final recipients. Therefore, even if it may be possible to achieve State aid compliance for the bodies implementing the financial instruments, it should be noted that support to these bodies from ESI Funds is normally not in line with ESI Funds rules.

**For final recipients** particular attention needs to be paid if the final recipient belongs to a group of companies. The *de minimis* threshold applies per ‘single undertaking’. Aid therefore should only be granted up to the three-year common threshold of EUR 200 000 for all companies of the group that are considered as one single undertaking.

In addition, Member States must pay particular attention to the fact that aid comprised in equity, quasi-equity and capital injections cannot benefit from the *de minimis* Regulation unless the capital or total amount of public injection does not exceed the *de minimis* ceiling.

# Notification exemptions

When State aid is present, Article 108(3) TFEU provides that in general the Member State concerned must make a State aid notification. However, by extending the scope of the General Block Exemption Regulation[[17]](#footnote-17) (“GBER 2014”) the possibilities to avoid a State aid notification procedure were much increased.

For financial instruments four provisions of the GBER 2014 are particularly relevant:

* Article 16 GBER 2014 (regional urban development aid)
* Article 21 GBER 2014 (risk finance aid)
* Article 22 GBER 2014 (aid for start-ups)
* Article 39 GBER 2014 (investment aid for energy efficiency projects in buildings)

Concerning Article 21 GBER 2014 it should be noted that it concerns all possible levels of financial instruments (investors, financial intermediary/fund manager, final recipients). Compliance with Article 21 GBER 2014 therefore means that all levels of the financial instrument benefit from the block exemption. As a result no State aid notification is necessary. Concerning the other GBER 2014 provisions a need for notification needs to be verified on the basis of the facts of the case.

In addition to the four GBER provisions above-mentioned, aid beneficiaries at different levels of financial instruments may also benefit from other GBER 2014 provisions. In particular, the provision for regional investment aid in Article 14 GBER 2014 may apply. Specific block exemption regulations apply in the fishery and aquaculture and the agriculture sectors.

# ‘Off-the-shelf” instruments

The Commission has developed standard terms and conditions for certain types of financial instruments. The standard terms and conditions ensure compliance with State aid rules and thus facilitate delivery of Union financial support to final recipients. The use by Member States of the off-the-shelf instruments is voluntary.

So far three different ‘off the shelf instruments’ have been adopted by the Commission[[18]](#footnote-18):

* **Risk sharing loan** for support to SMEs

The ‘risk sharing loan off the shelf instrument’ is designed as a State aid free instrument, i.e. market-conform remuneration for the financial intermediary, full pass-on of financial advantage by the financial intermediary to the final recipients. The financing provided to the final recipients is covered by the applicable *de minimis* Regulation.

* **Capped portfolio guarantee**

The capped portfolio guarantee provides risk coverage for new, performing loans to SMEs, designed as a State aid free instrument, i.e. market-conform at the level of financial intermediary managing the guarantee fund and financial institutions building up portfolios of new loans. The aid to the final recipients is covered by the applicable *de minimis* Regulation.

* **Renovation loan** **for energy efficiency and renewable energies in residential buildings**

It is designed as a State aid free instrument, i.e. market-conform remuneration for the financial intermediary, full pass-on of financial advantage by the financial intermediary to the final recipients. The financing provided to the final recipients is covered under the applicable *de minimis* Regulation.

Two additional off the shelf instruments are in the process of being developed: 1) urban development fund and 2) equity co-investment facility. They are going to be designed as containing State aid which is exempted from the obligation to notify based on Articles 16 and 21 of the GBER 2014.

# Instances when State aid notifications are required

If a financial instrument involves the granting of State aid which does not meet the conditions allowing for an exemption of notification, the Member State concerned must make a State aid notification. No aid may be granted before the European Commission has adopted a decision given a State aid approval.

National authorities seeking advice for State aid notifications can contact their main national contact point for State aid. In addition DG Competition offers guidance to Member States for the preparation of State aid notifications. Further information can also be found on the website of the Commission’s Directorate General for Competition[[19]](#footnote-19).

1. For the European Agricultural Fund for Rural Development (EAFRD) and the European Maritime and Fisheries Fund (EMFF) special rules on State aid apply (see Article 8(2) of Regulation (EU) No 508/2014, OJ L 149, 25.05.2014, p. 1 (EMFF Regulation) and Article 81(2) of Regulation (EU) 1305/2013, OJ L 347, 20.12.2013, p.1, (EARDF Regulation). [↑](#footnote-ref-1)
2. Article 107(1) TFEU has additional requirements, such as ‘selectivity’ of the support measure. The other criteria of Article 107(1) TFEU are however typically fulfilled for financial instruments supported with ESI Funds and therefore not dealt with in this guidance note. [↑](#footnote-ref-2)
3. European Structural and Investment Funds, see Article 1(1) CPR. [↑](#footnote-ref-3)
4. Article 59 of the Financial Regulation No. 966/2012 (OJ L 298, 26.10.2012, p.1) (“FR”) [↑](#footnote-ref-4)
5. Article 4(7) CPR mentions Union funds not being under shared management with Member States. [↑](#footnote-ref-5)
6. See Article 140(2)(c) FR. [↑](#footnote-ref-6)
7. Horizon 2020 is based on Regulation (EU) No 1291/2013, OJ L 347, 20.12.2013, p.104 (‘Horizon 2020 Regulation’). [↑](#footnote-ref-7)
8. [link to ESI Funds /EFSI guidance note to be inserted] [↑](#footnote-ref-8)
9. Specific State aid rules apply to EARDF and EMFF. [↑](#footnote-ref-9)
10. Joined Cases C-180/98 to C-184/98, ECR I-6451, paragraph 74.. [↑](#footnote-ref-10)
11. Case 118/85, ECR 2599, paragraph 7. [↑](#footnote-ref-11)
12. Case C-39/94 ECR I-3547, paragraph 60. [↑](#footnote-ref-12)
13. Communication from the Commission on the revision of the method for setting the reference and discount rates OJ C 14, 19.1.2008, p.6-9 [↑](#footnote-ref-13)
14. Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155 20.06.2008 p.10 as amended by the Corrigendum to Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ, C 244, 25.09.2008 p. 32. [↑](#footnote-ref-14)
15. Commission Regulation (EU) No 1407/2013, OJ L 352, 24.12.2013, p.1 (‘de minimis Regulation’) [↑](#footnote-ref-15)
16. There are further *de minimis* Regulations for the field of agriculture and fisheries and for Services of General Economic interest. [↑](#footnote-ref-16)
17. Commission Regulation 651/2014, OJ L 187 of 26.06.2014. See the following link for further guidance on the GBER provided by DG Competition at the following webpage: http://ec.europa.eu/competition/state\_aid/legislation/block.html [↑](#footnote-ref-17)
18. Commission Implementing Regulation (EU) 964/2014 [↑](#footnote-ref-18)
19. http://ec.europa.eu/competition/index\_en.html [↑](#footnote-ref-19)