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**COMMISSION STAFF WORKING DOCUMENT**

**UPDATED Guidance on State Aid in European Structural and Investment (ESI) Funds  
Financial instruments in the 2014-2020 programming period**

**DISCLAIMER**

*This is a staff 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 apply the EU rules in this area. The aim of this document is to provide Commission services' explanations 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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## 1. Background

Assessment under State aid rules, and where applicable compliance with State aid rules is of utmost importance for preserving a functioning internal market. The application of State aid rules encourages economic efficiency and avoids public support that unduly distorts competition, which would be to the detriment of the Union as a whole. State aid is an essential instrument for creating and maintaining a level playing field for all companies. It is therefore necessary that Member States ensure compliance with State aid rules when Member States give aid through financial instruments (co-)financed by the European Structural and Investment Funds.

The importance of State aid rules for financial instruments is recalled in several provisions in Title IV of the Common Provisions Regulation (“CPR”)<sup>1</sup>, notably in its Articles 6, 37, 38, 42 and 44. Special attention for State aid issues is needed for the following reasons:

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

**The purpose** of this Staff Working Document (‘SWD’) is to facilitate the application of State aid rules in the field of financial instruments and to point to different possibilities of achieving State aid compliance.

The European Commission has adopted a **Temporary Framework**<sup>2</sup> to enable Member States to use the full flexibility foreseen under State aid rules to support the economy in the context of the **COVID-19 outbreak**. The Temporary Framework will be in place until the end of December 2020. The Commission will assess before that date if it needs to be extended.

The Temporary Framework complements the ample possibilities for Member States to design measures in line with existing EU State aid rules described in this SWD. For FI involving State aid, the Temporary Framework is an additional temporary possibility to render aid compatible with EU State aid rules. Temporary aid measures covered by the

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<sup>1</sup> Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320).

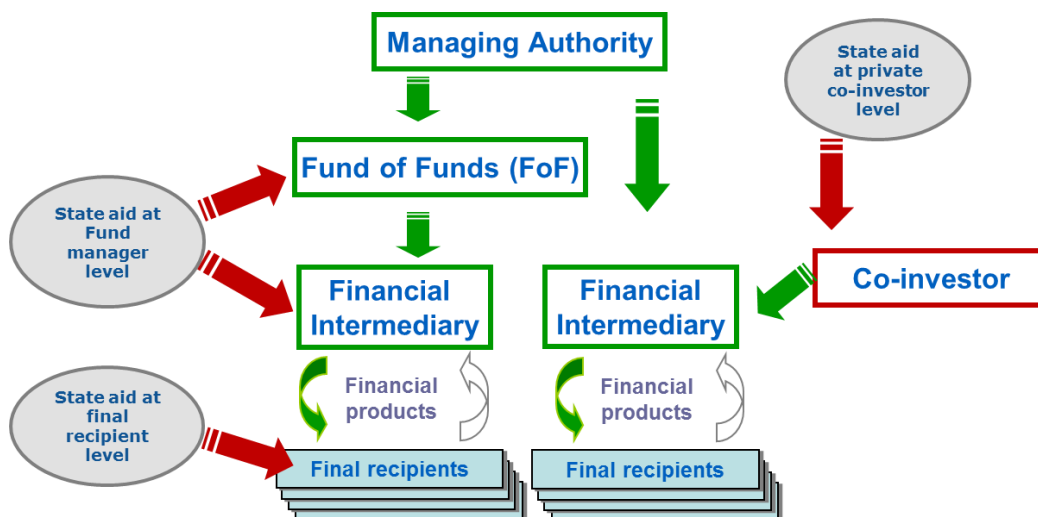
<sup>2</sup> Communication from the Commission of 19 March 2020 - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1), as amended on 3 April, 8 May, 29 June and 13 October 2020, available at: [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html).

Temporary Framework may be cumulated with aid under de minimis Regulations or with aid under Block Exemption Regulations provided the provisions and cumulation rules of those Regulations are respected.

## 2. State aid at different levels of financial instruments

Financial instruments often involve multi-layer structures with the aim to create incentives for economic operators (**investors**) to provide finance to **final recipients**. This may constitute State aid to investors and/or to final recipients and must be compliant with State aid rules. In addition, financial instruments may involve one or more **bodies implementing a financial instrument** (e.g. financial intermediaries) which may also be recipients of State aid and fall under State aid rules.

Depending on the design of the financial instrument, financial support may constitute State aid to undertakings at all three levels mentioned, even if the intention of the Member State authority (*inter alia* a Managing Authority under the CPR) is to provide benefits only to final recipients. Compliance with State aid rules needs to be ensured for all levels involved in the implementation of the financial instrument.



Concerning the presence of State aid, the Commission Notice on the notion of State aid (NOA)<sup>3</sup> provides detailed guidance, which is relevant also for financial instruments. It also includes further general explanations and examples.

## 3. Presence of State aid in the field of financial instruments

Article 107(1) of the Treaty on the Functioning of the European Union (“TFEU”)<sup>4</sup>, 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

<sup>3</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), see in particular point 60.

<sup>4</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 1).

undertakings or the production of certain goods in so far as it affects trade between Member States<sup>5</sup>.

Based on Article 107(1) TFEU, the presence of State aid includes the following requirements (explained in more detail in sub-sections 3.1 - 3.4)<sup>6</sup>:

- 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. All of them need to be fulfilled for the support to constitute State aid. Therefore, 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.

### 3.1. ‘State resources’ and ‘imputability’<sup>7</sup>

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 aid in question.

National public resources of the 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 those resources.

By contrast, if Union resources are managed directly or indirectly by the Union (or by international institutions) with no discretion on the part of national authorities, they do not constitute State resources and are not imputable to the State.

#### 3.1.1. European Structural and Investment Funds

The vast majority of European Structural and Investment Funds (‘ESI Funds’) relevant for cohesion policy are spent in shared management<sup>8</sup>. In shared management, Member States typically<sup>9</sup> have discretion on the use of the funding and can decide who gets the support. Due to that discretion, ESI Funds and the national public (co-)funding 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 another entity to implement them based on contractual agreements.

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<sup>5</sup> 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, 25.5.2014, p. 1) (the EMFF Regulation) and Article 81(2) of Regulation (EU) 1305/2013 (OJ L 347, 20.12.2013, p. 487) (the EAFRD Regulation).

<sup>6</sup> Article 107(1) TFEU has additional requirements, such as ‘selectivity’ of the support measure. The other criteria of Article 107(1) TFEU are typically fulfilled for financial instruments supported with ESI Funds and therefore not dealt with in this guidance note.

<sup>7</sup> For further guidance on State origin, see Section 3 of the NOA.

<sup>8</sup> Article 63 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1) (the ‘Omnibus’ or ‘Financial Regulation’).

<sup>9</sup> For derogations, see point 3.1.3 below.

Therefore, where ESI Funds and the national public (co-)funding are spent in the shared management mode and where the contributing Member States have discretion as to the use of those resources, they are ‘State resources’ that are imputable to the State 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) are subject to State aid rules.

**Example:**

A managing authority uses ERDF<sup>10</sup> resources to set up a fund that will 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.

In the case of financial instruments implemented under Regulation (EU) No 1305/2013 (EAFRD), specific rules apply for **primary agricultural activities** with regard to State aid. By virtue of Article 81(2) of the EAFRD, primary agricultural activities (Annex I products) are exempted from State aid rules, in line with Article 42 TFEU. On the other hand, non-Annex activities supported by EAFRD-funded financial instruments must comply with general State aid rules.

In the case of agricultural activities supported by financial instruments not financed by EAFRD, save as otherwise provided elsewhere, State aid rules apply.

In the case of **fisheries and aquaculture**, the exclusion of certain fishery-related European Maritime and Fisheries Fund (EMFF) funding from the application of State aid rules derives from Article 42 TFEU and Article 8 EMFF. According to Article 8 EMFF, payments made by the Member States as a part of the co-financed funding under the EMFF in conformity with the EMFF Regulation (EU) No 508/2014, are not, in principle considered as State aid.

### 3.1.2. Other EU funds and ESI Funds in direct or indirect Union management<sup>11</sup>

As regards Union funding which is implemented either directly by the Commission or indirectly by any entrusted entity, including the EIB Group (both EIB/ EIF), under a mandate from the Commission (or another Union institution or other Union entity) 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 “not distort competition in the internal market and be consistent with State aid rules”<sup>12</sup>. The legal framework governing Union financial instruments, including the agreements with the entrusted entities, has been designed to ensure consistency with

<sup>10</sup> Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006 (OJ L 347, 20.12.2013, p. 289).

<sup>11</sup> Article 4(7) CPR mentions Union funds not being under shared management with Member States.

<sup>12</sup> Article 209(2)(c) of the Financial Regulation.

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<sup>13</sup>. Horizon 2020 resources are Union resources and EIB will manage this fund in the so-called indirect management mode.

The Horizon 2020 resources are not ‘State resources’. Therefore, a fund financed solely by those resources does not qualify as State aid. Even so, the Financial Regulation (and recital 42 of the Horizon 2020 Regulation) requires that consistency with State aid rules be ensured. The rules laid down by the Commission for setting up and implementing the fund therefore needs to be consistent with State aid rules.

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

If the fund set up from Horizon 2020 resources is financed also from other public resources (national public financing or ESI Funds resources), that part of the financing may qualify as ‘State resources’ that are imputable to the State, only if the contributing Member States have discretion as to the use of those resources. For those parts of the financing, additional State aid verifications are required, if all other conditions for the presence of State aid under Article 107(1) TFEU are also fulfilled.

### 3.1.3. ESI Funds contribution to EU funds in direct or indirect Union management

Under Article 38(1)(a) CPR, Member States may provide ESI Funds’ programme contributions to financial instruments set up at Union level (direct or indirect Union management). Such contributions would not constitute State resources, and their resulting use would not be imputable to the State, if the contributing Member State does not attach any conditions as to the use of these ESI Funds, with the exception of the condition that ESI Funds’ contributions should be invested in the territory of the contributing Member State, specified in the Operational Programme(s). This condition would not make the resources imputable to the Member State since the ESI Funds are allocated to Member States in accordance with Union rules that have already determined in which Member State’s territory those funds should be invested<sup>14</sup>.

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<sup>13</sup> Horizon 2020 is based on Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC (Text with EEA relevance - OJ L 347, 20.12.2013, p. 104) (the ‘Horizon 2020 Regulation’).

<sup>14</sup> Article 70 CPR requires Member States to support operations in a given programme area. The breakdown of the funds made available by Member State is determined by a methodology contained in Annex VII of the CPR and set out in Commission Implementing Decision (2014/190/EU): Commission Implementing Decision of 3 April 2014 setting out the annual breakdown by Member State of global resources for the European Regional Development Fund, the European Social Fund and the Cohesion Fund under the Investment for growth and jobs goal and the European territorial cooperation goal, the annual breakdown by Member State of resources from the specific allocation for the Youth Employment Initiative together with the list of eligible regions, and the amounts to be transferred from each Member State’s Cohesion Fund and Structural Funds allocations to the Connecting Europe Facility and to aid for the most deprived for the period 2014-2020 [notified under document number C(2014) 2082] (OJ L 104, 8.4.2014).



In so far as the ESI Funds contributions meet the above-mentioned conditions, they do not constitute State aid in the meaning of Article 107(1) TFEU. Consequently, such contributions do not need to comply with State aid rules. Instead, considering that the EU-level financial instruments must be consistent with State aid rules as explained in point 3.1.2, this means that, for both Union resources and for the ESI Funds added to them, State aid consistency is ensured by the Commission when designing the instrument.

#### 3.1.4. EIB Group own resources

When the EIB Group (both EIB/EIF) invests own resources at own risk, they are considered private financing in nature under State aid rules and they do 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:**

Scenario a) The EIB sets up a fund from own resources without any support (e.g. guarantees) from Member States or Union resources. The EIB resources are considered private resources. Therefore, State aid rules do not apply.

Scenario b) The EIB receives national public and/or ESI Funds support, for instance a guarantee to cover (part of) EIB's risk on newly generated loans. In such case, the EIB investment is not considered 'private' for the purpose of State aid control. If all other conditions for the presence of State aid are also fulfilled, the public guarantee needs to be State aid compliant (it is funded from State resources and is imputable to the State).

#### 3.1.5. EIB Group own resources covered by EFSI guarantee (European Fund for Strategic Investments)<sup>15</sup>

The budgetary guarantee provided by the EU under the EFSI Regulation and the guaranteed EIB financial or investment operation do not qualify as 'State resources' and are thus not State aid. 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, the financing that is additional to EFSI is subject to State aid rules, as explained under section 3.1.1.

Following the entering into force of the so-called Omnibus Regulation<sup>16</sup>, on 2 August 2018, Article 39a CPR allows a Managing Authority to contribute ESI Funds resources to a financial instrument combining such a contribution with EIB financial products

<sup>15</sup> Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 - the European Fund for Strategic Investments (OJ L 169, 1.7.2015, p. 1).

<sup>16</sup> See footnote 8.

under EFSI as a new implementation option under Article 38(1)(c) CPR. Article 39a(6) CPR reiterates that compliance with applicable law, including State aid law, has to be ensured for any ESIF programme contribution, as explained in this guidance and on the guidance note on ESI Funds/EFSI combination, which includes guidance on State aid<sup>17</sup>.

**Example:**

The EIB sets up a fund with own resources, which are backed by an EFSI-guarantee. The setting-up and implementation of the fund do not involve ‘State resources’ and are therefore not subject to State aid control.

If however the fund receives further resources from the 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 also fulfilled.

It should be noted that EIB Group resources backed by an EFSI-guarantee are not invested at the EIB’s full own risk. Therefore, in that case an EIB Group investment cannot be considered as private investment in the sense of an ‘own contribution’ from the EIB Group that is free of any public support or a private investor contribution, as required by State aid rules.

3.1.6. Overview of the required State aid assessment of the 'State resources' criterion by types of resources

Types of resources				
ESI Funds resources (in shared management)	National public resources	Directly/indirectly managed Union Funds  (e.g. Horizon 2020, COSME <sup>18</sup> or ESI Funds in direct/indirect management, or unconditionally transferred ESI-Funds, see point 3.1.3)	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: yes  Need for compliance with State aid rules <sup>19</sup>	State resources: yes  Need for compliance with State aid rules	State resources: no  Consistency with State aid rules ensured by the Commission at	State resources: no  No State aid requirements	State resources: no  No State aid requirements (see also point 3.1.5)

<sup>17</sup> <https://www.fi-compass.eu/publication/ec-regulatory-guidance/new-guidelines-combining-european-structural-and-investment-funds>

<sup>18</sup> Regulation (EU) No 1287/2013 of the European Parliament and of the Council of 11 December 2013 establishing a Programme for the Competitiveness of Enterprises and small and medium-sized enterprises (COSME) (2014 - 2020) and repealing Decision No 1639/2006/EC (Text with EEA relevance - OJ L 347, 20.12.2013, p. 33).

<sup>19</sup> Specific State aid rules apply to EARDF and EMFF.

		the level of the instrument		
If different resources-types are combined the application of State aid rules needs to be verified separately for each part				

### 3.2. ‘Undertakings’ involved in financial instruments<sup>20</sup>

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<sup>21</sup>. ‘Economic activity’ is an activity consisting in offering goods and services on a market<sup>22</sup>.

The definition of ‘undertaking’ implies that:

- the status of the entity is not decisive (for example, an entity that is part of the public administration may be an undertaking),
- 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),
- 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), in which case it is subject to State aid rules as regards its 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<sup>23</sup>. 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 not considered as economic in nature.

### 3.3. Advantage<sup>24</sup>

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<sup>25</sup>. Therefore, an advantage (and therefore State aid) can be excluded if economic transactions carried out by public

<sup>20</sup> For further guidance on the notion of undertaking, see Section 2 of the NOA.

<sup>21</sup> Joined Cases C-180/98 to C-184/98, ECR I-6451, paragraph 74.

<sup>22</sup> Case 118/85, ECR 2599, paragraph 7.

<sup>23</sup> To the extent that a fund manager is only managing and not co-investing, such fund manager may qualify as a mere ‘vehicle’ and therefore falls outside the notion of an ‘undertaking’ of Article 107(1) TFEU. See case SA.37824:

[http://ec.europa.eu/competition/state\\_aid/cases/254119/254119\\_1608806\\_109\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/254119/254119_1608806_109_2.pdf);

See also the decision in case SA.36904, paragraph 71(b):

[http://ec.europa.eu/competition/state\\_aid/cases/256075/256075\\_1711610\\_153\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/256075/256075_1711610_153_2.pdf)

<sup>24</sup> For further guidance on the notion of advantage, see Section 4 of the NOA.

<sup>25</sup> Case C-39/94 ECR I-3547, paragraph 60.

authorities are in line with normal market conditions. In such case, the public authority is considered to behave like a comparable ‘market economy operator’.

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

- a) **For (co-)investors** there is no advantage (and therefore no State aid) if investment is made *pari passu* between public and private investors or public investment is in line with market terms as established on the basis of benchmarking or other assessment methods.

An investment is considered *pari passu*<sup>26</sup> 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 (RFG<sup>27</sup> 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 MEO test, there is no need to check further whether there is 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 different terms (more favourable) than public investors investing in the same company, then those private investors may receive, through such differentiated treatment, an advantage. 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). Compatibility of such aid to investors needs to be ensured, either based on meeting the conditions of GBER Articles 16, 21, 39 or based on prior notification and approval by the Commission. Note that in ESIF-financed financial instruments, differentiated treatment towards co-investment financed by EFSI is allowed according to Article 43a of the CPR. Even so, differentiated treatment of investors operating under the market economy principle shall be without prejudice to the Union State aid rules.

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 not, however, necessarily mean that the public transaction is not in line with market conditions. In such cases, compliance with market terms can be assessed on the basis of benchmarks or other assessment methods (e.g. to establish the net profit value (NPV) of investment to a level that would have been acceptable for a private operator in a market economy). Where a transaction is found to be in line with market conditions, it is not State aid<sup>28</sup>.

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<sup>26</sup> For further guidance on *pari passu* transactions see Section 4.2.3.1(i) of the NOA.

<sup>27</sup> Communication from the Commission - Guidelines on State aid to promote risk finance investments (OJ C 19, 22.1.2014, p. 4).

<sup>28</sup> For further guidance on the application of the market economy test, see Section 4.2.3.2.

- b) **Bodies implementing financial instruments (i.e. financial intermediaries, fund of funds/fund managers)** 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 a competitive, transparent, non-discriminatory and unconditional selection procedure, its remuneration can be considered to be in line with market rates. This is a requirement for all financial instruments which are subject to State aid rules<sup>29</sup>.

The Omnibus Regulation clarified when Member States supporting financial instruments are able to award directly to a publicly-owned bank or institution the service contracts for the implementation of the financial instruments.

The wording of Article 38(4)(b)(iii) CPR is drafted so as to exclude the possibility for a Member State to confer to such a bank or institution an undue advantage over competitors or enable a distortion of the market.

If there is no competitive, transparent, non-discriminatory and unconditional 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, described in Section 5, ensure that the remuneration did not raise State aid concerns<sup>30</sup>.

For remunerations/reimbursements non-compliant with CPR rules, i.e. outside the scope of the off-the-shelf instruments, market conformity should be assessed on a case-by-case basis.

- c) **At the level of final recipients:**

Where a loan or guarantee fulfils the conditions set out in the Reference Rate Communication<sup>31</sup> or section 3 of the Notice on guarantees<sup>32</sup>, it is considered to be market-conform and therefore not to constitute State aid to the final recipients. In addition, for other types of support it may be possible to show that they are market-conform<sup>33</sup>.

However, the overall purpose of a Cohesion policy-funded financial instrument is to respond to market failures. It is in the nature of such instrument therefore that an advantage may exist at the level of the final recipients, who could not have obtained it on the market.

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<sup>29</sup> For further guidance, see Section 4.2.3.1(ii) of the NOA.

<sup>30</sup> This statement applies to the programming period for 2014-2020.

<sup>31</sup> 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).

<sup>32</sup> EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, 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, 25.9.2008, p. 32).

<sup>33</sup> See points 2.2 and 2.3 of the Annex for examples.

### 3.4. Distortion of competition & effect on trade between Member States/*de minimis* aid

State aid is present only if it distorts competition and affects trade between Member States. Further, support, which complies with the applicable *de minimis* Regulation, is 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<sup>34</sup> which is relevant setting the *de minimis* threshold per single undertaking at EUR 200 000 over a three-year period. In addition to the threshold, also all other requirements of the applicable *de minimis* Regulation need to be fulfilled.

Although under EAFRD **primary agricultural activities** are exempted from State aid rules, non-Annex activities supported by EAFRD financial instruments must comply with general State aid rules. Similarly, in the case of agricultural activities supported by financial instruments not financed by EAFRD, State aid rules apply, i.e. agricultural *de minimis* ceiling (EUR 25 000 of aid per Member State to a single undertaking over any period of 3 fiscal years), as well as other rules set out in Commission Regulation (EU) No 1408/2013<sup>35</sup>.

**For fisheries and aquaculture products covered by Annex I to the TFEU**, payments made by the Member States as a part of co-financed EMFF funding, in conformity with EMFF rules, are not in principle considered as State aid (cf. Article 8(2) EMFF). For non-fishery-related projects or programmes (i.e. Integrated Maritime Policy issues), the State aid regime applies. Commission Regulation (EU) No 717/2014 (replacing Commission Regulation (EC) No 875/2007)<sup>36</sup> applies to aid granted to undertakings in the fishery and aquaculture sector, with the exception of cases referred to in Article 1 of this Regulation, and sets the ceiling at 30 000 EUR per beneficiary over any period of three years (*Fisheries de minimis* Regulation). In addition, each Member State has to respect the maximum cumulative amount set out in the annex to *Fisheries de minimis* Regulation (the so-called national cap) while granting aid to the undertakings active in the fishery and aquaculture sector. In addition to other rules set out in the Commission *Fisheries de minimis* Regulation, *de minimis* aid granted to all undertakings in the fishery and aquaculture sector over three-year period cannot exceed 2.5 % of the annual catching, processing and aquaculture turnover per Member State.

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 not receive any State aid, including *de minimis* aid, for the implementation as this would not be in line with the purpose of the ESI Funds' objectives for the financial instrument,

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<sup>34</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (Text with EEA relevance - OJ L 352, 24.12.2013, p. 1).

<sup>35</sup> Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector, as amended by Commission Regulation (EU) 2019/316 of 21 February 2019 (OJ L 51I, 22.2.2019, p. 1).

<sup>36</sup> Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45).

which is to channel resources to the final recipients<sup>37</sup>. 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 the 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, or where the so-called safe harbour conditions of the *de minimis* Regulation are fulfilled. Further, all other conditions required under the *de minimis* Regulation apply, including the transparency requirement.

## 4. 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, the possibilities to avoid a State aid notification procedure increased greatly as a result of the extension of the scope of the General Block Exemption Regulation<sup>38</sup> (‘GBER 2014’).

For cohesion policy financial instruments the following 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).

In addition to the five GBER provisions, 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 to financial instruments in assisted regions.

The Commission services provided further guidance as to the interpretation of the GBER 2014 in a ‘Practical Guide’/Question-and-Answer document<sup>39</sup>.

In addition, sector-specific block exemption regulations exist, such as Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union.

Similarly, as regards fisheries and aquaculture, a sector-specific Regulation exists as well, Commission Regulation (EU) No 1388/2014, which is the block exemption

<sup>37</sup> This is without prejudice to the fact that an implementing body may receive support from ESI Funds for other purposes, e.g. training aid for workers.

<sup>38</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (Text with EEA relevance - OJ L 187, 26.6.2014, p. 1).

<sup>39</sup> [http://ec.europa.eu/competition/state\\_aid/legislation/block.html](http://ec.europa.eu/competition/state_aid/legislation/block.html)

Regulation applicable to the sector, adopted on 16 December 2014 and entered into force on 1 January 2015.

## 5. ‘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 of the off-the-shelf instruments by Member States is voluntary.

So far, the Commission has adopted five different ‘off-the-shelf instruments’<sup>40</sup>, namely:

- **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 and full pass-on of the 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 intermediaries managing the guarantee fund and financial institutions building up the 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.

- **Urban development Fund**

The Urban Development Fund takes the form of a loan fund for urban development projects in assisted areas and it is designed as an instrument exempted from State aid notification under Article 16 GBER 2014.

- **Equity co-investment facility**

The co-investment facility takes the form of an equity fund for SMEs. It is designed as an instrument exempted from State aid notification under Article 21 GBER 2014.

Further guidance on off-the-shelf instruments can be found at the following link:

<https://www.fi-compass.eu/publication/event-material/presentation-financial-instruments-under-esif-standard-terms-and>

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<sup>40</sup> Commission Implementing Regulation (EU) No 964/2014 of 11 September 2014 laying down rules for the application of Regulation (EU) No 1303/2013 of the European Parliament and of the Council as regards standard terms and conditions for financial instruments (OJ L 271, 12.9.2014, p. 16).



## 6. Instances when State aid notifications are required

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

National authorities seeking advice for State aid notifications can contact their main national contact point for State aid. In addition, the Commission's Directorate General for Competition (DG Competition) offers guidance to Member States for the preparation of State aid notifications. Further information can also be found on DG Competition's website<sup>41</sup>.

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<sup>41</sup> [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)

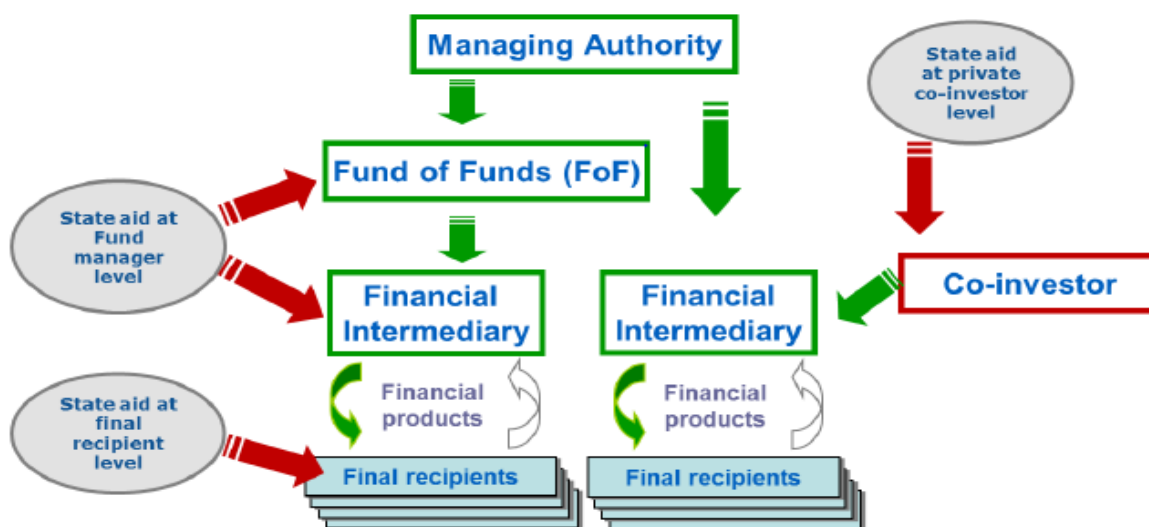
## ANNEX

### Practical explanations and examples on the application of State aid rules to financial instruments funded by the European Structural and Investment Funds

#### 1. Introduction

Considering the questions raised by various stakeholders following the publication of the original SWD<sup>42</sup> providing guidance<sup>43</sup> on the application of State aid rules in the field of FIs funded by the ESI Funds this Annex **complements** that SWD. The Annex provides **additional** practical guidance, in particular on the many situations that **do not raise** State aid concerns and on the fact that State aid may be present at different levels. Compliance with the State aid rules only at the final recipient level, in the context of financial instruments, is not enough (see Figure 1).

Figure 1: State aid might be involved at different levels



Source: European Social Fund financial instruments and State aid, fi-compass paper

In its first section, the Annex highlights the typical situations when FI would not involve State aid and would not be subject to State aid control, notably when there is compliance with market conditions at each level of the FI.

For FI which are not market conform, the paper gives general guidance on situations under which State aid can still be excluded both at the level of the bodies implementing FI<sup>44</sup> (the full pass on of the aid to the final recipients) and at the final recipient level (non-economic activities, no effect on trade and competition and *de minimis* aid). For FI

<sup>42</sup> See SWD(2017) 156 final - Guidance on State aid in European Structural and Investment (ESI) Funds - Financial instruments in the 2014-2020 programming period, available at: [https://ec.europa.eu/regional\\_policy/en/information/publications/guidelines/2017/guidance-on-state-aid-in-european-structural-and-investment-esi-funds-financial-instruments-in-the-2014-2020-programming-period](https://ec.europa.eu/regional_policy/en/information/publications/guidelines/2017/guidance-on-state-aid-in-european-structural-and-investment-esi-funds-financial-instruments-in-the-2014-2020-programming-period)

<sup>43</sup> This is without prejudice to the interpretation of the Court of Justice and the General Court, or decisions of the Commission.

<sup>44</sup> In this Annex, the term “financial intermediaries” may be used to refer to the bodies implementing the FI.

involving State aid, the paper provides further guidance on how to ensure that the aid is compatible with EU State aid rules and thus the internal market.

The second section of this Annex provides three specific examples of different types of FIs to illustrate the application of State aid rules' assessment logic to concrete FIs.

## 2. Typical situations where FI do not involve State aid

The fundamental principles constituting the notion of State aid are explained in detail in the Commission Notice on the Notion of State aid<sup>45</sup>. The SWD provides further specific clarification with respect to the State aid qualification of transactions in the context of FI. In cases of doubt, Member States can also contact the Commission for pre-notification discussion<sup>46</sup> in view of notifying FI for legal certainty.

As indicated in the SWD, each type of transaction involved in FI must be assessed at the level of the bodies implementing the FI (Fund of Fund manager and/or financial intermediary), at the level of the co-investors and at the level of the final recipients, to verify whether it meets the cumulative criteria for the presence of State aid. Practically, if one of the cumulative criteria is not met<sup>47</sup>, there would be no State aid. In the context of FI, in many cases the most relevant criterion relates to the question of whether an economic advantage is granted, which is excluded when the transaction in question is carried out in line with market conditions.

### 2.1. Body implementing FI (financial intermediary/fund manager) without co-investing in the FI

It may be that the financial intermediary does not co-invest or put own balance sheet resources at risk.—There is no State aid to the body implementing FI (through remuneration for the management services) in the following situations:

Where the implementation of FI is entrusted to a national promotional institution<sup>48</sup> like national development banks acting exclusively within the public remit<sup>49</sup> or to the EIB and EIF or to an international financial institution (IFI) like the EBRD, without that entity co-investing or providing funding, such financial intermediary is not considered a direct beneficiary of aid. This is irrespective of whether the financial intermediary is remunerated or not for its management services, while over-compensation must be avoided. However, if such national promotional institutions also act outside the public remit and carry out commercial activities on the market, in order to exclude State aid,

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<sup>45</sup> See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), available at:

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)&from=SL](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)&from=SL)

<sup>46</sup> As set out in the Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, available at:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2018.253.01.0014.01.ENG&toc=OJ:C:2018:253:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2018.253.01.0014.01.ENG&toc=OJ:C:2018:253:TOC)

<sup>47</sup> State aid is an objective and legal concept defined directly by the Treaty. In a nutshell, State aid within the meaning of Article 107(1) TFEU is present only when the following commutative criteria are met: the involvement of State resources and the imputability of the measure to the State, the qualification of the beneficiary as being an undertaking (i.e. carrying out an economic activity), the granting of a selective advantage, and its effect on competition and trade between Member States.

<sup>48</sup> These are legal entities carrying out financial activities on a professional basis, which are given a mandate by a Member State or a Member States' entity at central, regional or local level, to carry out development, or promotional activities.

<sup>49</sup> The public remit of the development bank defines in which area it can operate. The definition of the public remit is based on the identification of market failures.

they must ensure that the remuneration for the management services does not spill over to their commercial activities (see point below).

Where the implementation of FI is delegated to a financial intermediary referred to in Article 38(4)(c) CPR, there is no State aid if the financial intermediary receives a market conform remuneration. Market conform remuneration can be established in three direct ways:

- The intermediary has been selected through a competitive, transparent, non-discriminatory and unconditional procedure (e.g. selection procedure in line with the Public Procurement Directives<sup>50</sup>). In such a case, its remuneration is presumed to be in line with market rates;

or

- The intermediary receives market-level remuneration, established either on the basis of comparable transactions carried out by comparable private operators in comparable situations or using other methods (e.g. cost covering plus a reasonable profit<sup>51</sup>);

or

- The intermediary receives remuneration aligned with the CPR and the Commission Delegated Regulation (CDR) (EU) No 480/2014<sup>52</sup> that reflects market remuneration in comparable situations.

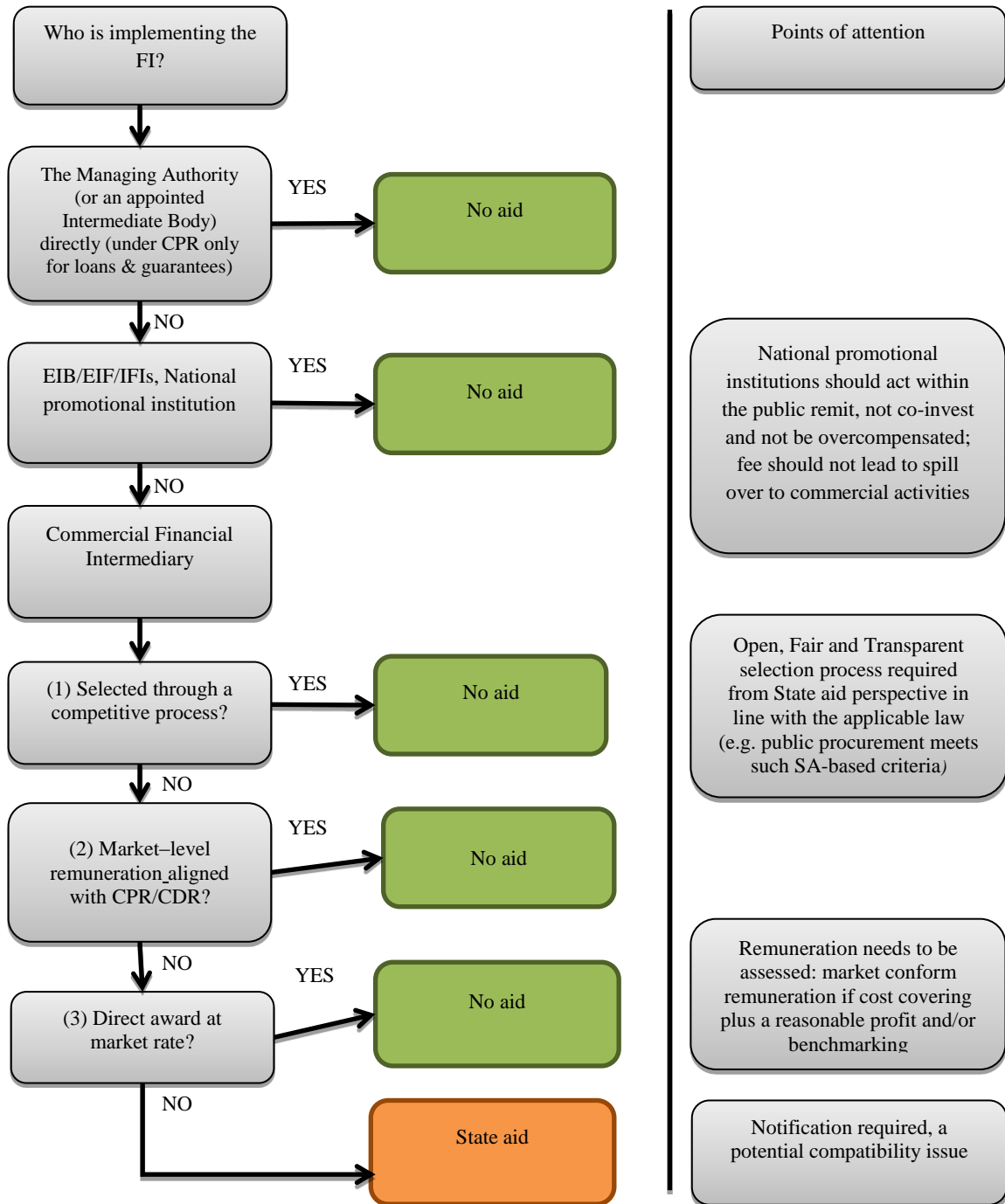
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<sup>50</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance - OJ L 94, 28.3.2014); Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Text with EEA relevance - OJ L 94, 28.3.2014).

<sup>51</sup> A reasonable profit shall be determined with respect to the typical profit for the sector concerned.

<sup>52</sup> The remuneration for the financial intermediary is aligned with Article 13 of Delegated Regulation (EU) No 480/2014 and no other advantages are granted by the State. See Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0480>.

Figure 2: Decision tree to assess State aid (through remuneration for management services) to a body (financial intermediary) implementing FI (Source: Commission Services)



## **2.2.2 Bodies implementing FI investing in the FI own balance sheet resources<sup>53</sup> in line with market conditions**

In the context of ESI Fund-financed FIs, Managing Authorities may co-invest and/or share risk with bodies implementing FI (financial intermediaries/fund managers) in order to provide incentives and encourage the provision of additional finance to the final recipients. In such a situation, the financial intermediaries put their own balance sheet resources at risk.

As a general principle, if co-investment or risk sharing (e.g. in the context of a guarantee fund) with the financial intermediary under FI is in line with market conditions, there is no State aid and this financing provided to the final recipients is also market conform. Equally, there is no advantage within the meaning of Article 107(1) of the Treaty, and hence no State aid, if the financial intermediary receives overall a lower return than it would receive should it had invested its own resources in a similar risk instrument outside the FI.

Depending on the type of FI, different considerations apply when assessing whether the FI is in line with market conditions.

As also elaborated on in the Notice on the Notion of State aid and further explained in this SWD, market conformity can be directly established (on a "pari passu" basis or using a competitive, transparent, non-discriminatory and unconditional procedure) or assessed based on benchmarking or other methods (see further Sections 2.2.1. and 2.2.2.).

However, as the purpose of financial instruments is to leverage additional finance to support the target investments, market conform FI may not be suitable to address market failures and achieve certain policy objectives.

Where FI contained an advantage, if the advantage was fully passed on to the final recipients, financial intermediaries would not be State aid recipients (as they would not receive any advantage themselves).

Since the full pass on requires a quantification of the aid that is contained in FI and then passed on to the final recipients via sub-commercial financing terms (such as an interest rate below the market rate), by definition it can only be done for FI containing transparent aid<sup>54</sup>. Such quantification is possible for any debt instrument, as well as guarantees or repayable advances, for which a methodology<sup>55</sup>, previously notified and approved by the Commission, exists.

### ***2.2.1. Equity/quasi-equity instruments in line with market conditions***

An equity/quasi-equity instrument is considered market conform and there is no aid at the level of the co-investors and at the level of the financial intermediaries in the following two scenarios:

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<sup>53</sup> Financial intermediaries may invest own balance sheet resources (e.g. banks) or third party investors, not involved in the implementation of the FI, may invest resources (e.g. investment in equity funds).

<sup>54</sup> Aid is transparent when it is granted in the form of loans and guarantees for which the aid element contained in the instrument can be precisely calculated ex-ante without any need to undertake a risk assessment.

<sup>55</sup> An example of an approved calculation methodology is SA.37256 Germany - Amendments to the methods to calculate the aid element of guarantees (N 197/2007, amended by N 541/2007 and N 762/2007).

- When the equity/quasi-equity investment is carried out on a *pari passu* basis between the State and the private investors, respecting the criteria set out at recital 86-87 of the Notice on the Notion of State aid<sup>56</sup>, the public equity/quasi-equity investment is presumed to be in line with market conditions. As referred to also in Section 3.3 (a) of this guidance, the following key conditions must be taken into account for an investment to be carried out on a *pari-passu* basis:
  - Intervention of public bodies and private investors have same timing.
  - Public bodies and private investors have same terms and conditions (i.e. risk and remuneration should be the same).
  - Starting position of public bodies and private investors are the same.
  - The funding of the private investors is economically significant. According to the Risk Finance Guidelines (RFG), a minimum of 30% private investment is considered economically significant<sup>57</sup>.
  - Private investors are private economic operators acting under normal market conditions.
- In the absence of private co-investors (i. e. only public funds) or if the share of private co-investment is not significant (i.e. < 30%), market conformity of the equity/quasi-equity instrument can be established on the basis of benchmarking or other assessment methods as clarified in recitals 98-105 of the Notice on the Notion of State aid. Practically, a reliable business plan should demonstrate that the expected return on the public investment is comparable to or below the normal expected market returns.

### 2.2.2. *Debt instruments in line with market conditions*

**For loan instruments** - where the State provides ESI Funds and national public resources to the financial intermediary aiming to co-finance a portfolio of loans to the target recipients:

- the loan can be considered market conform and there is no State aid to the co-financing financial intermediaries
  - if the ESI Funds and national public resources are *pari passu* with the private investors;
  - or,
  - if the applicable interest rates are in line with market proxies provided in the Reference Rate Communication (“RRC”)<sup>58</sup>.

<sup>56</sup> See Section 4.2.3.1 (i), points 86-88, Notice on the Notion of State aid, as referred to in footnotes 3 and 26.

<sup>57</sup> Point 34 of the Commission Communication on Guidelines on State aid to promote risk finance investments (OJ C 19, 22.1.2014, p. 4), available at: [https://ec.europa.eu/competition/state\\_aid/modernisation/risk\\_finance\\_guidelines\\_en.pdf](https://ec.europa.eu/competition/state_aid/modernisation/risk_finance_guidelines_en.pdf)

<sup>58</sup> Communication from the Commission on the revision of the method for setting the reference and discount rate (OJ C 14, 19.1.2008, p. 6), available at: [https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52008XC0119\(01\)](https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52008XC0119(01)).

Please note that the RRC only provides proxies for market rates in situations where comparable market transactions are not easy to identify. This is more likely to apply to transactions involving limited amounts and/or transactions involving SMEs.

**For guarantee instruments** - where the State provides a guarantee (or a counter-guarantee) to the financial intermediary to partially cover the risk of the underlying loan portfolio, it can be considered market conform and there is no State aid to financial intermediaries if the guarantee is granted in line with the Guarantee Notice (GN)<sup>59</sup>:

- The GN outlines which conditions need to be fulfilled to rule out the presence of State aid for both individual guarantees and guarantee schemes. This is the case when the intermediary retains at least 20% of the risk on a *pari passu* basis in each transaction and pays a market-oriented price for the guarantee reflecting both the characteristics of the guarantee and of the underlying loan.
- In the case of guarantees for SMEs, the GN provides safe-harbour premiums based on the rating of the borrower, considered as minimum market proxies.
- For guarantee schemes, the premiums charged have to cover the normal risks associated with granting the guarantee, the administrative costs of the scheme, and a yearly remuneration of an adequate capital<sup>60</sup>, even if the latter is not at all or only partially constituted.
- Market level guarantee premiums are in line with methodologies already approved by the Commission following their notification, provided that the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake.

### ***2.2.3. Debt instruments not in line with market conditions, but the financial advantage is fully passed on to the final recipients***

Even when FI is not market conform, financial intermediaries are not considered to be State aid recipients if the aid is fully passed on to the final recipients. By definition, this is only possible for FI containing transparent aid (loans and guarantees) for which the aid element contained in the instrument can be precisely calculated. To ensure a full pass on, the financial advantage provided to the final recipients must be reduced accordingly (for more detailed guidance, see the box below).

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<sup>59</sup> 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, 20.6.2008, p. 10) and Corrigendum to Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 244, 25.9.2008, p. 32).

<sup>60</sup> Section 3.4 of the GN offers more guidance on adequate capital.



Figure 3: General guidance on a mechanism for fully passing on aid to final recipients

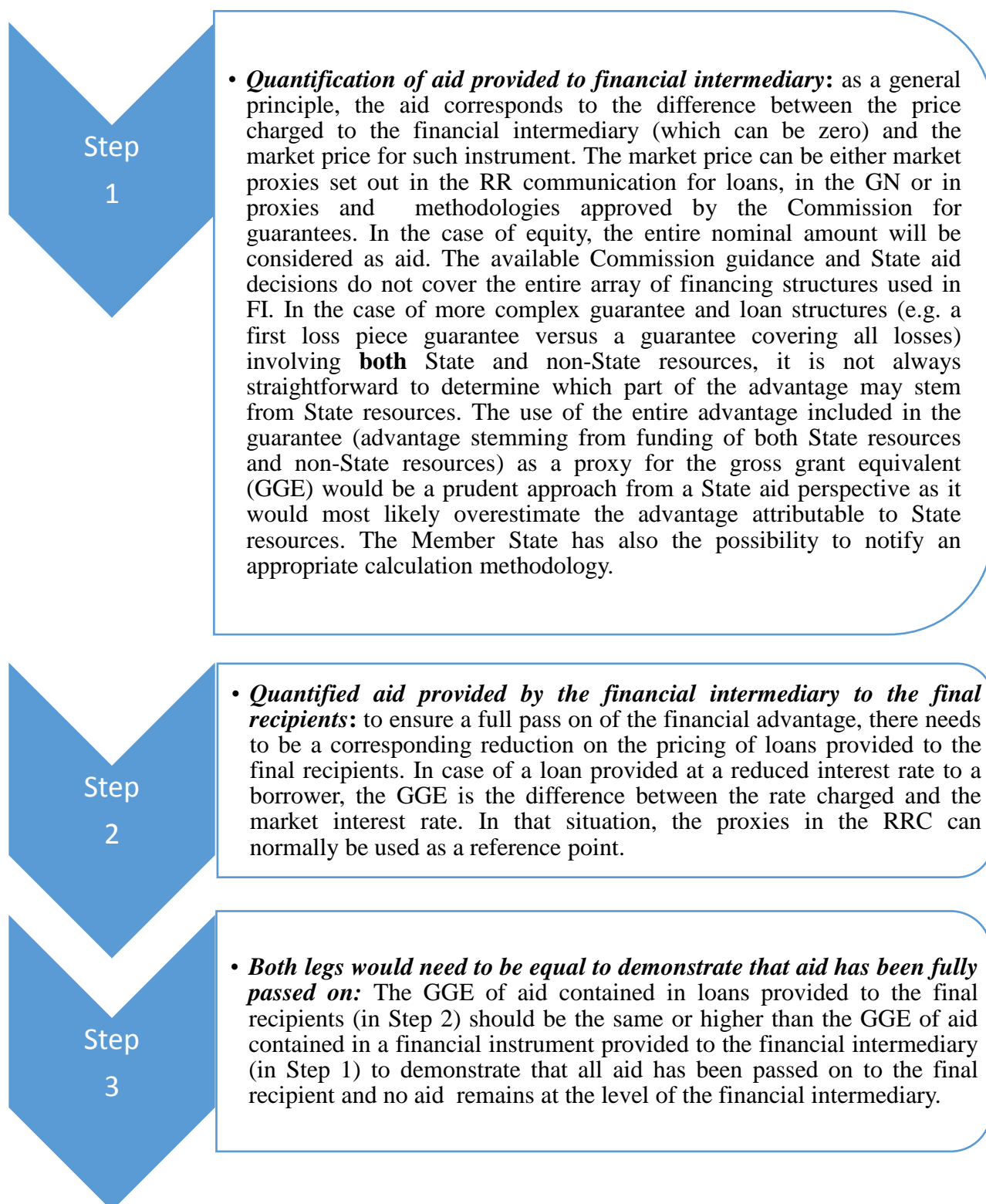
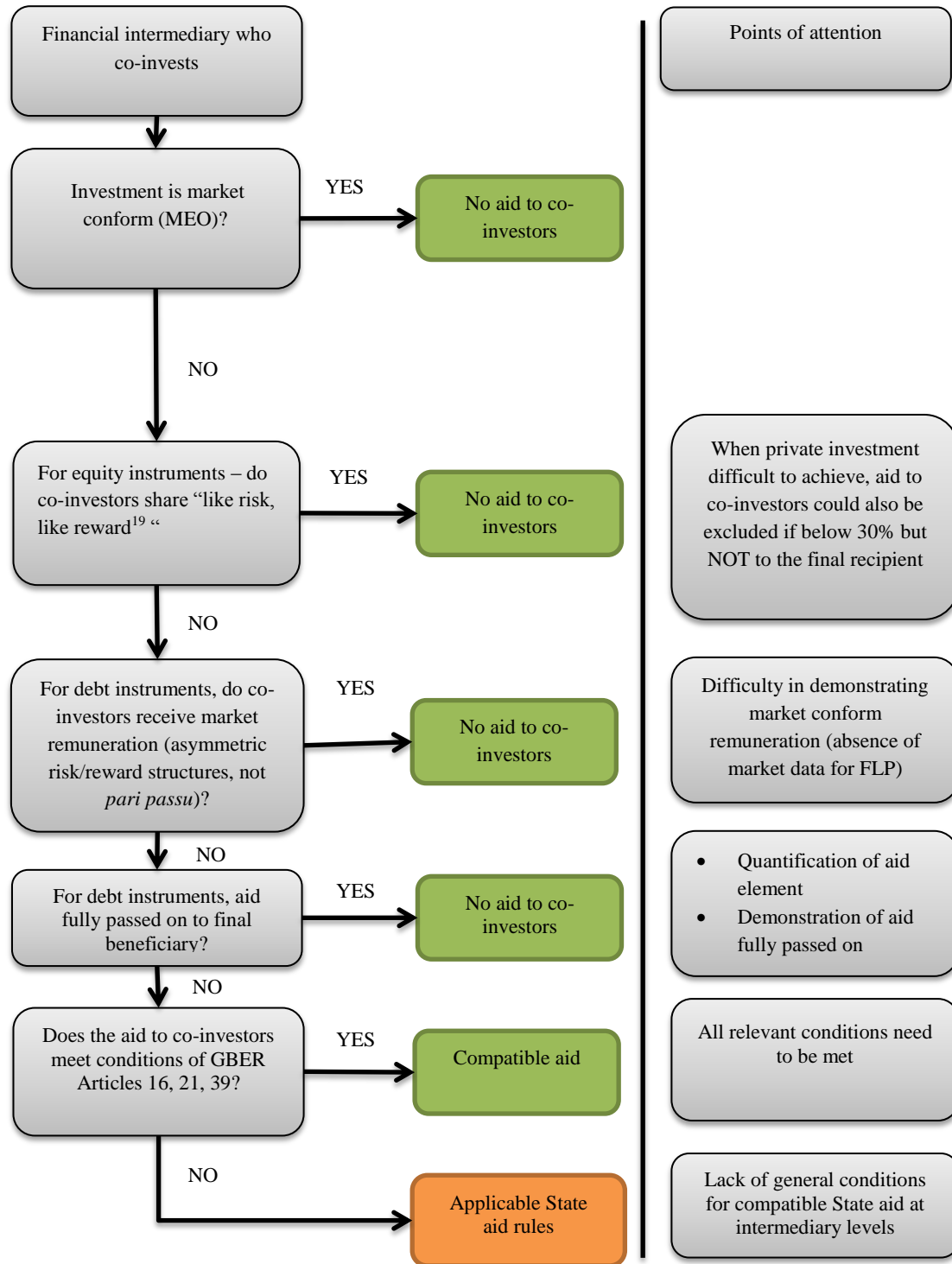


Figure 4: Decision tree to assess State aid to a co-investing financial intermediary



Source: Commission Services<sup>61</sup>

<sup>61</sup> Figure 3 covers State aid to a co-investing intermediary. A *pari passu* investment (as defined in Commission Notice on the notion of State aid) between private resources and State resources renders the contribution by the State market conform. The private co-investor and the State can however invest on “like risks, like rewards” and not meeting the other *pari passu* conditions (e.g. the significant contribution criteria). This “like risks, like rewards” investment does not render the

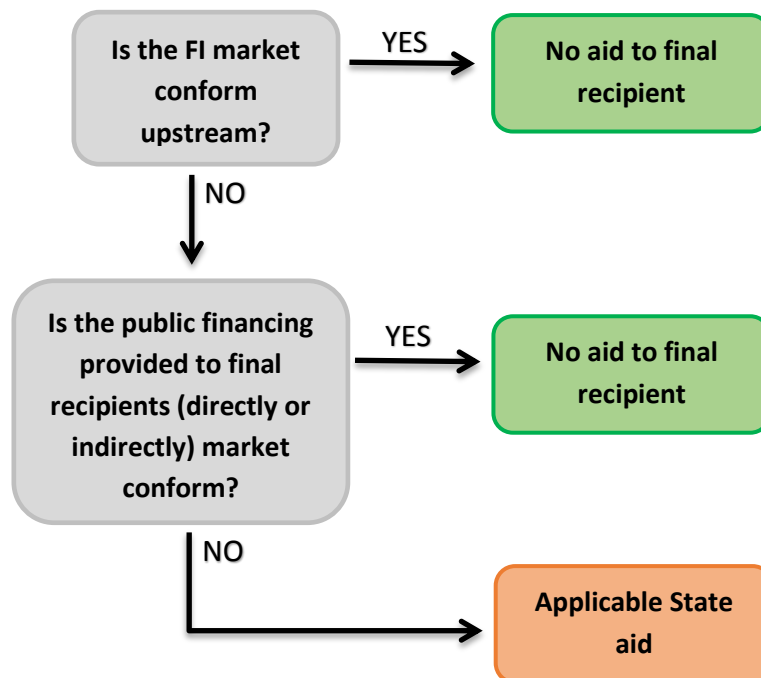
### 2.3. Financing provided to the final recipients

#### a. Market-conform financing

Financing provided by financial intermediaries to the final recipients is considered market conform and, therefore, does not involve State aid:

- If the FI is considered market conform upstream, it is automatically market conform at the final recipient level. There is no need to assess separately State aid at the level of the final recipient.
- If the FI is not market conform upstream, the market conformity of the financing provided to the final recipients needs to be demonstrated (e.g. on the basis of the GN or RRC).
- If there are other public funds downstream, i.e. providing financing only at the level of final recipient directly, market conformity of those funds need to be assessed separately.

Figure 5: Decision tree to assess market conformity at final recipient level



Source: Commission Services

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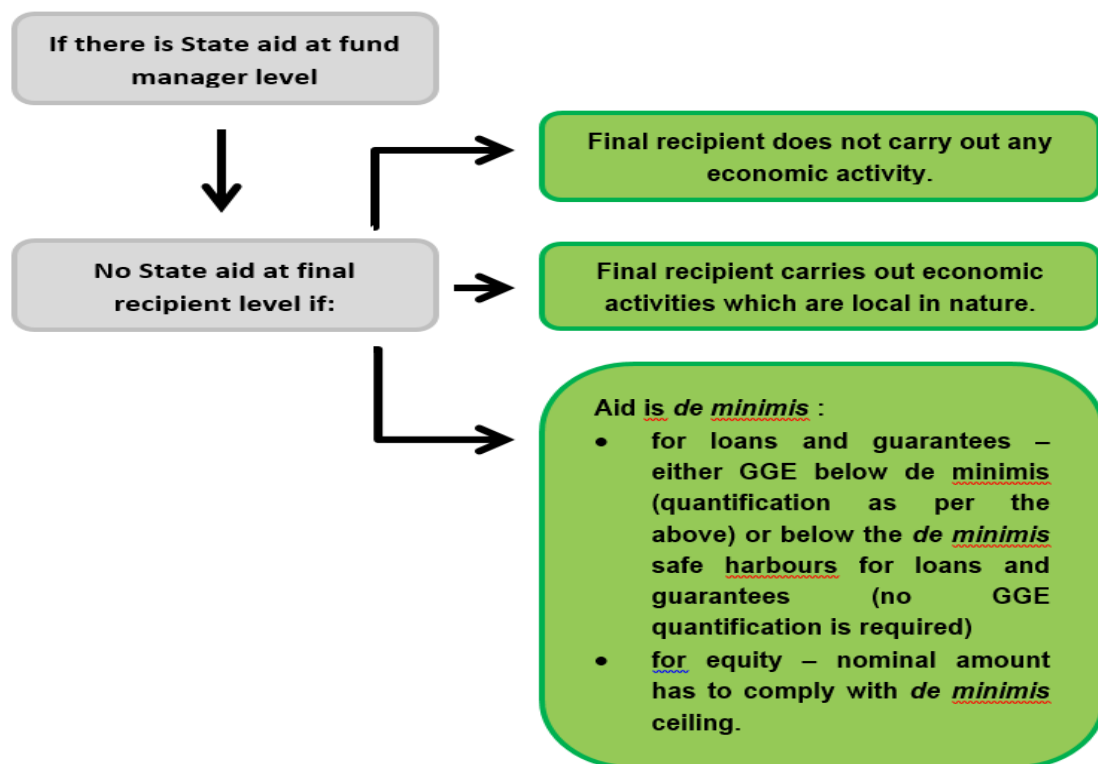
contribution by the State market conform but is sufficient to exclude aid to the private co-investor investing at the same level.

## b. Not market-conform financing, but not involving State aid at the final recipient level

When the FI is not in line with market conditions and there is an advantage at the level of financial intermediaries, the advantage is considered at least partially or fully passed on to the final recipients in the form of better financing conditions. Such sub-commercial financing does not constitute State aid to the final recipients if:

- They do not carry out any economic activity; this is not straightforward for a portfolio of mixed economic and non-economic recipients; or,
- They only carry out economic activities that are purely local in nature so that the measure does not affect trade between Member States<sup>62</sup>, or
- the aid is *de minimis*<sup>63</sup>:
  - for loans and guarantees - either GGE below the *de minimis* ceiling (quantification as per the above) or below the *de minimis* safe harbours for loans and guarantees (no GGE quantification is required)
  - for equity – nominal amount has to comply with the *de minimis* ceiling.

Figure 6: Decision tree to assess presence of State aid in case not market conform financing



Source: Commission Services

<sup>62</sup> [Case T-728/17 Marinvest & Porting v Commission](#)

<sup>63</sup> See Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (Text with EEA relevance - OJ L 352, 24.12.2013).

### **3. Compatibility of State aid involved in FI**

#### **3.1. Typical situations of State aid involved in FI**

Typically, there would be State aid at financial intermediary level (or for third party investors in case the intermediary is a fund) when FI are not market conform and the financial advantage is not fully passed on to the final recipients:

- For equity/quasi-equity instruments: In case of asymmetric risk/return-sharing between public and private investors in the same risk class, the private investors could be protected from risk (e.g. first loss piece is taken by public investor, priority return in case of insolvency, seniority compared to public investor) or benefit from more attractive returns (e.g. priority return in time, better than pro rata share of profit) compared to the Member State. Such asymmetric treatment could be required by private investors if, in the absence of Member State resources, the expected returns on the public equity/quasi-equity investment would be below market level.
- For loan and guarantee instruments: In case the loan or guarantee instrument is not priced at market level; and, only in case of guarantees, the financial intermediary retains less than 20% of risk.

Under not market conform FI, the advantage is considered to be at least partially passed on to the final recipients (in the absence of FI the final recipients would not have been able to receive the financing under the same conditions or no such financing would be available at all).

#### **3.2. Possibilities under the GBER – no notification**

In general, FI, which contain State aid only at the level of the final recipients, can be implemented under the GBER. For the majority of GBER articles, aid must be transparent and must be present only at the final recipient level, effectively excluding FI containing aid at financial intermediary level (i.e. when the aid cannot be fully passed on). This means that non-market conform FIs involving financial intermediaries can be implemented under the majority of GBER articles, but the economic advantage of the aid has to be fully passed on to the final recipients (for the full pass-on of the economic advantage of the aid, see above).

However, the GBER covers a few policy areas (risk finance, regional urban development, energy efficiency projects in buildings) under which FI containing State aid at both the financial intermediary and final recipient level could be considered compatible with the internal market. If FI fulfils all the conditions included in these dedicated articles, there is no need to quantify the aid element<sup>64</sup>. All relevant provisions of Chapter I of the GBER need to be taken into account. The main conditions of each of these three Articles are as follows (these lists are not exhaustive):

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<sup>64</sup> With the exception of Article 39 of the GBER for which full pass on is required.

## GBER ARTICLE 16 – AID FOR REGIONAL URBAN DEVELOPMENT

### Horizontal conditions:

- Notification threshold - EUR 20 million per eligible project.
- Transparency of aid - aid for regional urban development if the conditions laid down in Article 16 are fulfilled.

### Article 16 conditions:

- Implemented in assisted areas and co-financed by the European Structural and Investment Funds.
  - Can take the form of equity, quasi-equity, loans, guarantees or a mix thereof.
  - Urban development fund managers and independent private investors selected through open, transparent and non-discriminatory call.
  - Minimum requirements on additional leverage from private investors (30%).
  - First loss piece taken by Member State may be maximum 25%.
  - Guarantee rate shall be limited to 80 % and total losses assumed by a Member State shall be capped at 25 % of the underlying guaranteed portfolio.
  - Financial intermediary managed on a commercial basis. This can be assumed when a number of conditions are fulfilled e.g. the presence of an investment strategy and remuneration conform to market practice.
- 

## GBER ARTICLE 21 - AID COMPRISED IN RISK FINANCE MEASURES

### Horizontal conditions:

- Notification threshold - EUR 15 million per eligible undertaking.
- Transparency of aid - risk finance aid is considered transparent if it meets all conditions in Article 21.

### Article 21 conditions:

- Eligible SMEs are unlisted SMEs that have not been operating in any market or are within 7 years from first commercial sale or require an initial investment exceeding 50% of average annual turnover to enter new product or geographical market.
- Follow-on investments are possible given a number of conditions are fulfilled.
- Financial intermediaries, as well as investors or fund managers shall be selected through an open, transparent and non-discriminatory call.
- Maximum EUR 15 million per SME. This refers to the entire investment of the equity fund.
- At the level of eligible undertakings, risk finance aid may take the form of equity, quasi-equity investments, loans, guarantees, or a mix thereof.
- Minimum requirements on additional leverage from private investors.
- First loss piece taken by Member State may be maximum 25%.
- Financial intermediary managed on a commercial basis. This can be assumed when a number of conditions are fulfilled e.g. the presence of an investment strategy and alignment of interests with the public investor.
- Financial intermediary shall demonstrate that it operates a mechanism that ensures that all the advantages are passed on to the largest extent to the final recipients.

### Horizontal conditions:

- Notification threshold - EUR 10 million per eligible project.
- Transparency of aid - aid for energy efficiency projects if the conditions laid down in Article 39 are fulfilled.

### Article 39 conditions:

- Granted in the form of an endowment, equity, a guarantee or loan to an energy efficiency fund or other financial intermediary, which shall fully pass it on to the final beneficiaries being the building owners or tenants.
- Repayment not less than the nominal value of the loan.
- Minimum requirements on additional leverage from private investors (30%).
- Financial intermediaries, as well as investors or fund managers shall be selected through an open, transparent and non-discriminatory call.
- First loss piece taken by Member State may be maximum 25%.
- Guarantee rate shall be limited to 80 % and total losses assumed by a Member State shall be capped at 25 % of the underlying guaranteed portfolio.
- Financial intermediary managed on a commercial basis. This can be assumed when a number of conditions are fulfilled e.g. the presence of an investment strategy and remuneration conform to market practice.

### 3.3. Notification and assessment by the Commission

State aid that may be present at any level of a FI, which does not fall under the GBER, has to be notified to the Commission before such FI is implemented.

FI providing finance that contain State aid to financial intermediaries/co-investors but are not meeting the GBER risk finance conditions can be assessed on the basis of the RFG. FIs targeting other policy areas will be assessed directly under the TFEU, applying by analogy, where appropriate, the principles of the RFG as far as aid to financial intermediaries/co-investors is concerned.

In its assessment, the Commission will balance the necessity and the proportionality of the aid measure in achieving a Community objective versus the distortion of competition brought about by it.

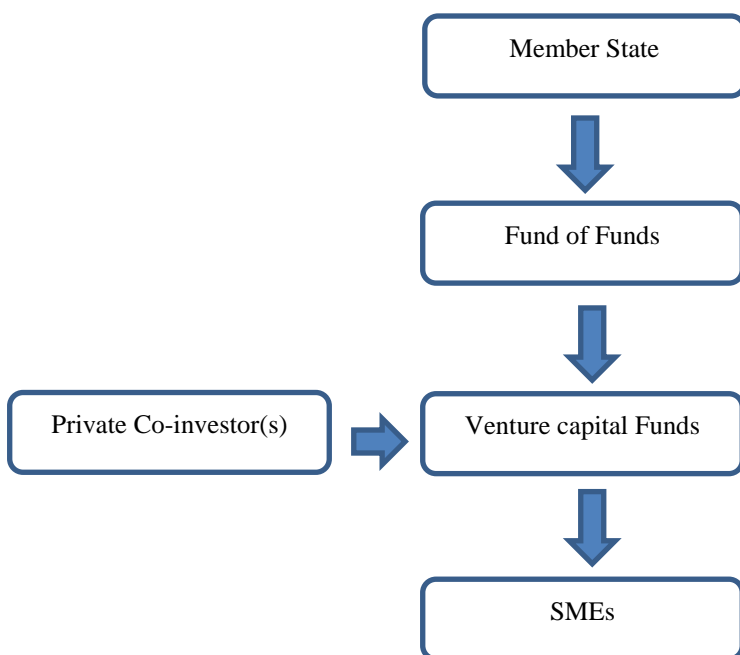
#### 4. Illustrative examples and specific State aid considerations by type of FI

This section contains three case studies to illustrate how the approaches outlined above can be applied in practice.

##### 4.1. Equity instrument for SMEs

The subject of this case study is an equity financial instrument for SMEs: To facilitate SMEs access to finance, a fund of funds (FoF) is set up and managed by the national promotional/development bank (NPB). The FoF invests into different venture capital funds investing in SMEs. Two scenarios will be considered: a *pari passu* investment with private co-investors in the venture capital (VC) funds and a non-*pari passu* investment.

Figure 7: illustration of the equity instrument for SMEs



#### Is State aid involved?

##### Fund of Funds

- Provision of public funding to the FoF. The FoF takes the form of a dedicated account within the FoF manager and is just a vehicle to transfer resources further downstream without carrying out any economic activities.
- Remuneration of the FoF manager. The appointed FoF manager is a NPB.
  - If the NPB acts exclusively within the public remit, it will not be considered as an aid recipient.
  - In all other cases (NPB also active in commercial activities), the market conformity of the remuneration cannot be presumed. In such case, The Member State has done benchmarking and established the remuneration in line with market practice or in line with Article 13 CDR reflecting market



remuneration in comparable situations. Therefore, the remuneration of the FoF is market conform.

### **Scenario 1 - market-conform investment by the FoF and no State aid**

#### **Assessment at financial intermediaries/co-investors (VC funds) level**

- Remuneration of VC fund managers. The fund managers have been selected in an open and competitive selection process, therefore the management fee is presumed to be market conform. Therefore, there is no State aid at the level of the VC fund managers.
- Equity investment by FoF into VC funds. The FoF is investing into VC funds on *pari passu* terms with the other private co-investors and at least 30% of the total investment in the VC funds comes from private co-investors. Therefore, the investment by the FoF is considered to be market-conform and there is no State aid at the level of the private co-investors in the VC funds. A private *pari passu* investment below 30% of the total investment would be sufficient to exclude aid to the private co-investors (as they do not enjoy any more advantageous conditions) but would not be sufficient to establish the FoF investment into VC funds as market conform, and hence there may be aid to the investee companies.

#### **Assessment at final recipients (SMEs) level**

- Equity investments by the VC funds to SMEs. Since the investment by the FoF into VC funds is considered market conform and not involving State aid, there is no State aid element in the equity investments provided by VC funds to SMEs.

### **Scenario 2 - sub-commercial investment by the FoF and State aid**

#### **Assessment at financial intermediaries/co-investors (VC funds) level**

- Equity investment by FoF into VC funds. The FoF invests in VC funds on sub-commercial terms e.g. in case of asymmetric risk/return sharing to the advantage of the private co-investors in the VC funds. Under that scenario, where the expected return would be larger than the expected return by the VC funds in similar risk investments outside the FI, there is State aid at the level of private co-investors in the VC funds.

#### **Assessment at final recipients (SMEs) level**

- Equity investments by the VC funds in SMEs. Since the investment by the FoF into VC funds involves State aid, State aid is considered at least partially passed on to the final recipients, thus there is State aid at the level of SMEs.

#### **Is State aid compatible (for Scenario 2)?**

If State aid is present, it can be deemed compatible under the following conditions:

- a. GBER: Since the FI includes State aid at the level of the private co-investors, only Article 21 can make this State aid compatible with the internal market under GBER. In order to comply with Article 21 of the GBER, all the horizontal conditions of the GBER and the specific ones in Article 21 need to be respected. For example, the instrument can target only early-stage SMEs and needs to attract at least 30% private capital.

- b. RFG: If the FI does not fulfil the conditions of Article 21 of the GBER, it can be notified to the Commission. The Commission then assesses the measure on the basis of the RFG.

#### 4.2. Capped portfolio guarantee instruments for energy efficiency investments

To support energy efficiency investments, the Member State sets up a guarantee fund, managed by a NPB.

The guarantee fund offers capped guarantees to financial intermediaries on a portfolio of newly originated loans for energy efficiency investments by companies, with a guarantee rate of 80% on a loan-by-loan basis and up to an overall cap of 25% of the whole portfolio of loans. The guarantee is issued free of charge (e.g. no guarantee fee is paid by the financial intermediaries).

The final recipients are a mix of natural persons (not carrying out an economic activity) and SMEs.

*Figure 8: illustration of the portfolio guarantee instrument for energy efficiency*

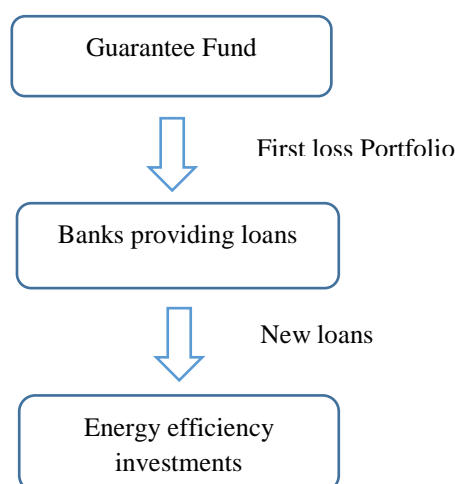
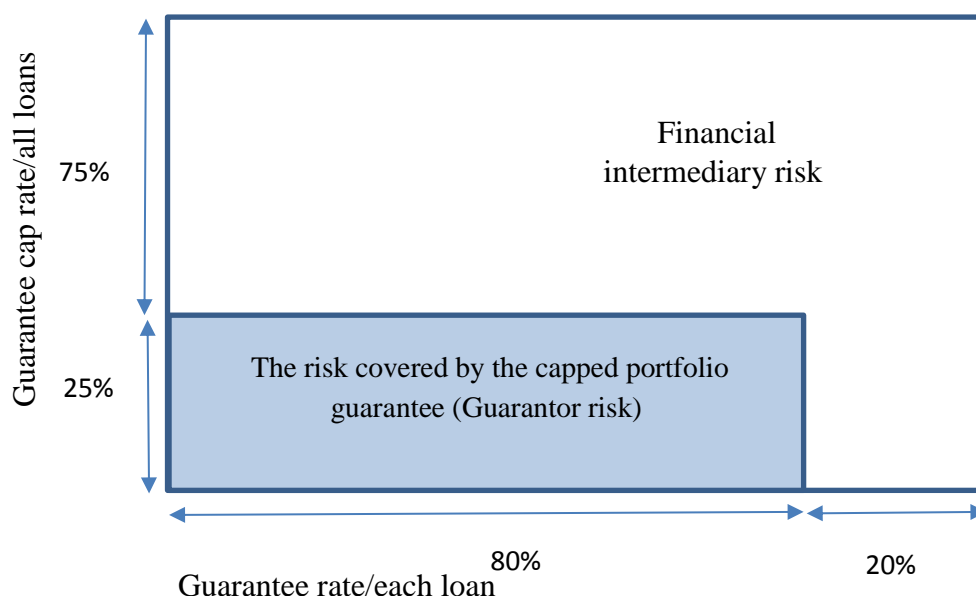


Figure 9: Graphic illustration of the capped portfolio guarantee



### **Is State aid involved?**

#### **Assessment at the level of the body implementing the guarantee fund (guarantee fund)**

- Remuneration of the body implementing the guarantee fund. Since the NPB that manages the guarantee fund will be appointed (no competitive selection) through a direct award of the contract and it performs an economic activity, the market conformity of its remuneration cannot be presumed. In such case, the Member State needs to undertake benchmarking and establish the remuneration in line with market practice, or set the remuneration in line with the CPR and the relevant State aid rules. If this is the case, there is no State aid at this level.
- Contribution of ESI Funds' resources (capital provision) to the guarantee fund. The guarantee fund is set up as a separate legal entity, a fiduciary account, or a separate block of finance and is merely a vehicle to transfer resources further downstream. Consequently, it is not a recipient of State aid.

#### **Assessment at the level of the financial intermediaries (banks) providing the commercial loans**

- Provision of the capped portfolio guarantee to the banks providing the commercial loans. At least 20% of the risk is retained by the banks, which is in line with the GN. However, since the guarantee is provided free of charge, it cannot be considered in line with market conditions. Therefore, it could in principle constitute State aid to financial intermediaries.
- However, if the banks fully pass on the aid to the final recipients, there is no State aid that remains at their level. For such full pass on mechanism to be established, the aid element in the capped portfolio guarantee received by the bank needs to be quantified (as the difference between the zero guarantee fee charged by the NPB and the market fee) and the corresponding reduction of the lending rates (by the same amount of aid received by the bank) is applied to the final recipients. If both

elements cancel each other out, a full pass on of the aid to the final recipients is demonstrated.

- It is challenging to calculate the aid element stemming from the lack of a guarantee fee as this only covers part of the aid that the banks may receive. The GN does not give concrete guidance on market proxies for portfolio guarantees (capped or uncapped) but it lays down the general principle, which is that the guarantee must be self-financing and the fee should reflect the risk of the underlying portfolio.
- In case of doubt, for more complex structures of FI, Member States must notify a quantification methodology addressing the type of guarantees and the type of underlying transactions at stake.

#### **Assessment at the level of the final recipients**

- The aid is passed on *via* reduced lending rates compared to market rates. To the extent that the final recipients are undertakings and in case the aid amount exceeds the *de minimis* threshold, the loans provided by the financial intermediaries contain State aid.

#### **Is State aid compatible?**

- If aid is transparent and fully passed on, it can be deemed compatible in accordance with the conditions of Article 39 GBER.

#### **4.3. Micro-credit facility for new businesses**

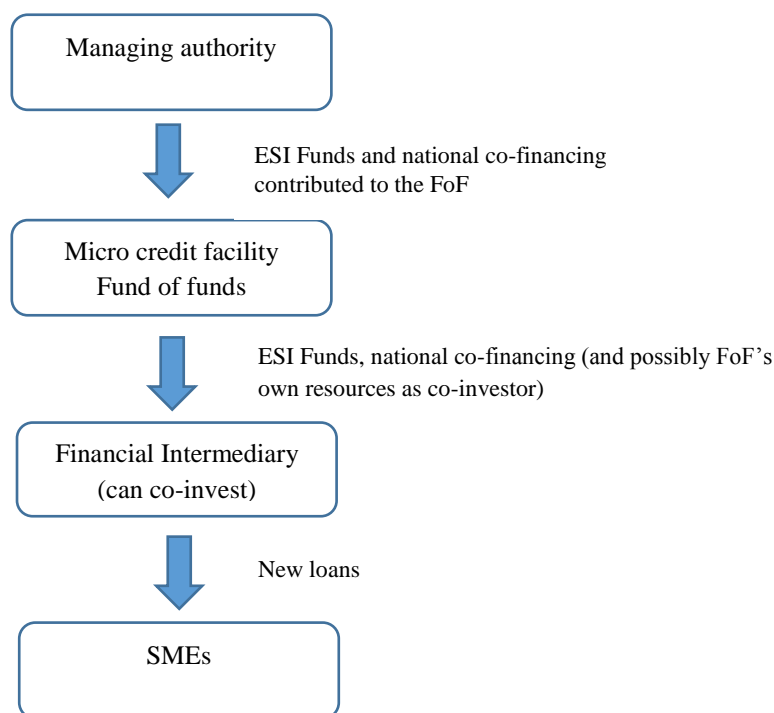
The micro-credit facility addresses the lack of loans on the micro and SME finance market by lending to such companies at reduced interest rates. Most of the final recipients are small businesses, which have difficult access to financing because of the limited size of their operations and/or the lack of credit history. The micro-credit facility intends to support specifically the creation of businesses by the young and unemployed people. The managing authority provides funding to a FoF, which selects the financial intermediaries (banks) that further select the final recipients. The FoF and the financial intermediaries may choose to co-invest in this micro-credit facility.

#### **Is State aid involved?**

##### **Assessment at the level of the FoF**

- The FoF manager is a private entity. There is no State aid provided through the remuneration of the FoF manager, if it is established that the remuneration of the manager is in line with market practice (e.g. if it is comparable to what is charged by private funds active in the same domain) or it has been set in line with the CPR that reflect market remuneration in comparable situations.

Figure 10: illustration of the micro credit facility for SMEs



#### Assessment at the level of the financial intermediary

- If the banks do not co-invest on *pari passu* terms, the interest rates of the banks will serve as a market benchmark against which the aid is quantified. Alternatively, the market rate will be established as per the RRC. In order to quantify the GGE, the actual rate charged for the funding from the ESI Funds needs to be compared with either the market rate based on the practice of the banks or the market proxies in the RRC.
- However, even if the interest rate is not market conform, there is no State aid at the level of financial intermediaries provided that the aid element is fully passed on to the final recipients. To ensure this, the aid has to be quantified (tranching or non-tranching structure) and the passing on mechanism should be demonstrated (e.g. the final recipient's lending interest rates should be reduced by the same amount of aid received by the financial intermediary).

#### Assessment at the level of the final recipients

- If there is aid at the level of the financial intermediary, there is aid at the level of the final recipient.
- When aid is passed on, for example via reduced interest rates compared to market rates, the measure will not constitute State aid if the final recipient does not exercise an economic activity, or if the activity is purely local so that the measure does not affect trade between Member States or if the aid is *de minimis*. In the example above, the final recipients (businesses created by unemployed youth) are undertakings but the microcredit, which is below market rates, constitutes *de minimis* aid (either the GGE amount or the entire microcredit complies with the safe harbour of the *de minimis* ceilings) and, therefore, such support is deemed not to constitute State aid.

## Table of Abbreviations

CDR	Commission Delegated Regulation
COSME	Competitiveness Of Small And Medium-Sized Enterprises
CPR	Common Provisions Regulation
EAFRD	European Agricultural Fund For Rural Development
EBRD	European Bank For Reconstruction And Development
EFSI	European Fund For Strategic Investments
EIB GROUP	European Investment Bank Group
EIF	European Investment Fund
ERDF	European Regional Development Fund
ESIF	European Structural And Investment Funds
EU	European Union
MS	Member States
EURATOM	European Atomic Energy Community

FI	Financial Instruments
FLP	Family Limited Partnership
FOF	Fund Of Funds
FR	Financial Regulation
GBER	General Block Exemption Regulation
GGE	Gross Grant Equivalent
GN	Guarantee Notice
IFI	International Financial Institution
MEO	Market Economy Operator
NOA	Notion Of Aid Notice
NPB	National Promotional/Development Bank
NPV	Net Present Value
RFG	Risk Finance Guidelines
RRC	Reference Rate Communication

SMES	Small And Medium-Sized Enterprises
SWD	Staff Working Document
TFEU	Treaty On The Functioning Of The European Union
VC	Venture Capital



## Table of Legislation

*with pages references*

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