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COMMISSION STAFF WORKING DOCUMENT

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 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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1. BACKGROUND

Compliance with State aid rules is of utmost importance for preserving a functioning internal market. It is the application of State aid rules which encourages economic efficiency and avoids that public support 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'),[1] 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 has 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 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 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.

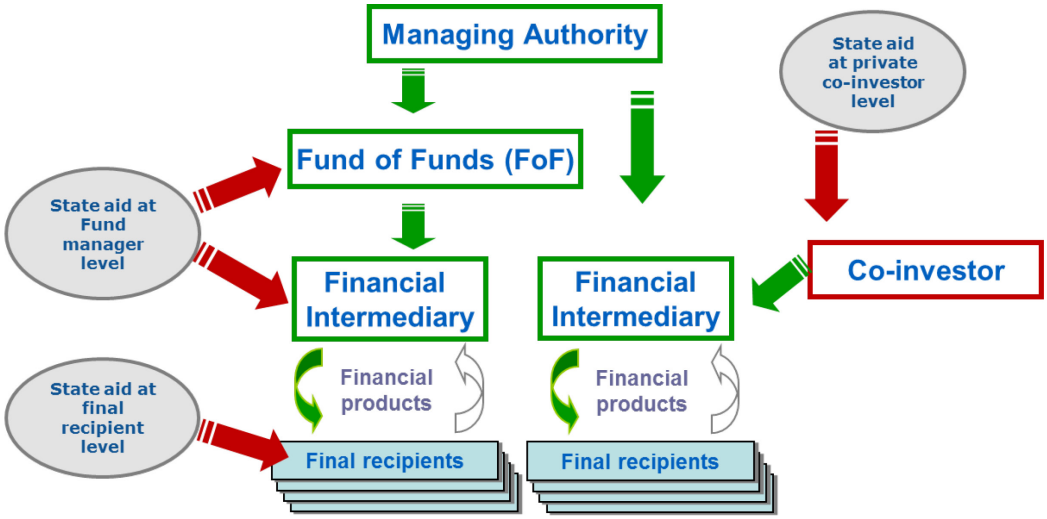
The purpose of this Staff Working Document is to facilitate the application of State aid rules in the field of financial instruments and to point to different possibilities of achieving State aid compliance.

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.

[1] Regulation (EU) No 1303/2013, OJ L 347 of 20.12.2013, page 320.



Concerning the presence of State aid, the Commission Notice on the notion of State aid (NOA)[2] 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') 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.[3]

Based on Article 107(1) TFEU, the presence of State aid includes the following requirements:[4]

- 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 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. Further details on the mentioned criteria for the presence of State aid are explained in the following sections of this guidance.

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2 Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (the 'NOA'), OJ C 262 of 19.7. 2016, page 1, see in particular paragraph 60.

3 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 of 25.05.2014, page 1 (EMFF Regulation) and Article 81(2) of Regulation (EU) 1305/2013, OJ L 347 of 20.12.2013, page 487 (EAFRD Regulation).

4 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.

3.1. 'State resources' and 'imputability'[5]

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 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 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. ESI Funds[6]

The vast majority of ESI Funds relevant for cohesion policy are spent in shared management.[7] In shared management, Member States typically[8] 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 any other entity to implement them based on contractual agreements.

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[9] 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.

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5 For further guidance on State origin, see Section 3 of the NOA.

6 European Structural and Investment Funds, see Article 1(1) CPR.

7 Article 59 of Regulation (EU, EURATOM) No 966/2012, OJ L 298 of 26.10.2012, page 1 ('Financial Regulation').

8 For derogations, see point 3.1.3 below.

9 Regulation (EU) No 1301/2013, OJ L 347 of 20.12.2013, page 289.

In the case of financial instruments implemented under Regulation (EU) 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[10]

As regards Union funding which is implemented by any entrusted entity, including the EIB Group (both EIB/ EIF), 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 (EU, EURATOM) 966/2012 ('FR') provides that Union financial instruments must "comply with non-distortion of competition and consistency with State aid rules".[11] The legal framework governing Union financial instruments, including the agreements with the entrusted entities, has been designed by the Commission 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.[12] 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. Still, the Financial Regulation (and recital 42 of the Horizon 2020 Regulation) provides that consistency with State aid rules has to be ensured. The rules laid down by the Commission for setting up of the fund and the implementation 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 State aid

10 Article 4(7) CPR mentions Union funds not being under shared management with Member States.

11 Article 140(2)(c) Financial Regulation.

12 Horizon 2020 is based on Regulation (EU) No 1291/2013, OJ L 347 of 20.12.2013, page 104 ('Horizon 2020 Regulation').

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[13].

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 shall be consistent with State aid rules as explained in point 3.1.2 above, 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

EIB Group (both EIB/EIF) investing own resources at own risk is considered private financing in nature under State aid rules 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.

[13] Article 70 CPR imposes on 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 the Commission Implementing Decision 2014/190/EU.

Example:

Scenario a) The EIB is setting 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 ESIF 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 to be private for the purpose of State aid control. If the other conditions for a 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)[14]

EFSI support does not qualify as 'State resources' and is thus not State aid. In addition, EFSI resources are outside the scope of the FR. Therefore the State aid 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 3.1.1 above.

There is also a separate guidance note on ESI Funds/EFSI combination, including guidance on State aid.[15]

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 also 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 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.

[14] Regulation (EU) 2015/1017 on the European Fund for Strategic Investments, OJ L 169 of 1.7.2015, page 1 ('EFSI').

[15] https://www.fi-compass.eu/publication/ec-regulatory-guidance/new-guidelines-combining-european-structural-and-investment-funds

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, COSME16 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[17]	State resources: yes Need for compliance with State aid rules	State resources: no Consistency with State aid rules ensured by the Commission at the level of the instrument	State resources: no No State aid requirements	State resources: no No State aid requirements (see also point 3.1.5)
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[18]

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.[19] 'Economic activity' is an activity consisting in offering goods and services on a market.[20]

The above 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),

16 Regulation (EU) No 1287/2013, OJ L 347 of 20.12.2013, page 33 ('COSME').
17 Specific State aid rules apply to EARDF and EMFF.
18 For further guidance on the notion of undertaking, see Section 2 of the NOA.
19 Joined Cases C-180/98 to C-184/98, ECR I-6451, paragraph 74.
20 Case 118/85, ECR 2599, paragraph 7.

- 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).

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.[21] 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.

3.3. Advantage[22]

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.[23] 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:

a) **For (co-)investors** there is no advantage (and therefore no State aid) if investment is effected *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* when:[24]

   - 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

21 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 fall 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); 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 .

22 For further guidance on the notion of advantage, see Section 4 of the NOA.

23 Case C-39/94 ECR I-3547, paragraph 60.

24 For further guidance on *pari passu* transactions. see Section 4.2.3.1(i) of the NOA.

- the intervention of the private investor is of real economic significance (RFG[25] 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 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. 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.

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 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.[26]

b) **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 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. [27]

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 which are described in Section 5 ensure that the remuneration is market conform. For remunerations/reimbursements non-compliant with CPR rules or outside the scope of the off-the-shelf instruments, market conformity should be assessed on a case-by-case basis.

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

26 For further guidance on the application of the market economy test, see Section 4.2.3.2 and 4.2.3.4. of the NOA.

27 For further guidance, see Section 4.2.3.1(ii) of the NOA.

c) **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 may 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[28] or section 3 of the Notice on guarantees,[29] it is considered to be market-conform and therefore not to constitute State aid to the final recipients. Also for other types of support it may be possible to show that they are market-conform. However, as cohesion policy financial instruments respond to market failures, there may be an advantage at the level of the final recipients.

3.4. 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.

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[30] which is relevant 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.

Although, as mentioned earlier, 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 15 000 euro per single undertaking over a 3-year period), as well as other rules set out in Commission Regulation (EU) No 717/2014[31] must be respected.

For fisheries and aquaculture products covered by Annex I 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.

State aid not exceeding a certain ceiling over a period of time is, in principle, deemed not to meet all the criteria laid down in Article 107(1) TFEU. This is the so-called *de minimis*

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28 Communication from the Commission on the revision of the method for setting the reference and discount rates OJ C 14 of 19.1.2008, page 6-9.

29 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 of 20.06.2008 page 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 of 25.09.2008 page 32.

30 Commission Regulation (EU) No 1407/2013, OJ L 352 of 24.12.2013, page 1 (‘*de minimis* Regulation’).

31 Commission Regulation (EU) No 717/2014 of 27 June 2014, OJ L 190, 28.6.2014, p. 45–54.

aid. Commission Regulation (EU) No 717/2014 (replacing Commission Regulation (EC) No 875/2007) 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, which is supposed to channel resources to the final recipients.[32] 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, or where the so-called safe harbour conditions of the de minimis Regulation are fulfilled.

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, by extending the scope of the General Block Exemption Regulation[33] ("GBER 2014"), the possibilities to avoid a State aid notification procedure have increased greatly.

For cohesion policy financial instruments the following provisions of the GBER 2014 are particularly relevant:

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32 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.

33 Commission Regulation 651/2014, OJ L 187 of 26.06.2014.

- 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).
- Article 52 GBER 2014 (aid for broadband infrastructures).

In addition to the five 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 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.[34]

Besides, sector-specific block exemption regulations exist, such as the 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 (so-called ABER).

Similarly, as regards fisheries and aquaculture, a sector-specific Regulation exists as well, Commission Regulation (EU) No 1388/2014, which is the new block exemption Regulation applicable to the sector (so-called FIBER), 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, five different 'off-the-shelf instruments' have been adopted by the Commission:[35]

- **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

[34] http://ec.europa.eu/competition/state_aid/legislation/block.html.

[35] Commission Implementing Regulation (EU) 964/2014, OJ L 271 of 12.9.2014, page 16.

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 on the basis of 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 on the basis of 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

6. 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 from notification, the Member State concerned must make a State aid notification. No aid may be granted before the European 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.[36]

[36] http://ec.europa.eu/competition/index_en.html