

Invest Europe’s response to the Open Public Consultation on the Rescue and Restructuring Guidelines

This document addresses only the consultation questions for which answers have been provided

2. Material Scope of the Rescue and Restructuring Guidelines

6. In your experience, is the current exemption for SMEs that have been in existence for less than three years sufficient to allow start-ups to benefit from other forms of aid?

	Answer
Yes	
No	X
Don’t know	

Please justify your answer:

Answer:

First, there is a misalignment between the Guidelines and the GBER. The GBER already provides a longer exemption (“for the purposes of eligibility for risk finance aid, an SME within seven years from its first commercial sale that qualifies for risk finance investments following due diligence by the selected financial intermediary”), acknowledging that such companies often have longer development cycles and are validated by professional investors. The Guidelines, however, stop at three years and do not reflect this logic. While it is understandable that the Guidelines do not directly refer to risk finance aid, there remains a need for consistency in how the UID concept is interpreted and applied across State aid frameworks. The GBER acknowledges that early- and growth-stage equity-financed firms have longer development cycles, while the Guidelines ignore that nuance, while they should do the same.

Second, while the extended timeframe and “first commercial sale” additions under the GBER are welcome, they still create eligibility hurdles for PE/VC-backed companies, which should be kept in consideration for the Guidelines, if implemented. Both the three- and seven-year limits fail to reflect the growth cycles of capital-intensive or innovation-driven firms that often take longer to reach profitability. Once beyond these thresholds, such companies are often still in an investment phase and may still show losses while remaining solvent and well-capitalised. Even successful companies in fast-moving sectors took several years to grow, even after their first commercial sale and after VC investment. To enhance clarity and alignment, the Commission could consider setting a turnover threshold (i.e., EUR 250,000) to determine when the “first commercial sale” occurs.

7. If your answer to Question 6 was “no”, which of the following options would be sufficient to address the shortcomings:

	Yes	No	I do not know / no opinion
Extend the exemption period to five years		X	
Exempt all undertakings that fulfil the definition of start-up laid down in Article 22(2) of the GBER		X	
Extend the exemption period to ten years	X		

If the proposed extension period is not relevant, please provide a proposition and specify your industrial sector:

Answer:

A ten-year exemption would better reflect the growth cycles and reinvestment horizons of many European companies, particularly those backed by PE/VC funds, as discussed under question 6, and bring the Guidelines closer to the same economic logic already recognized under the GBER.

However, while a longer exemption would provide some relief, it would not address the structural issue within the current UID definition: the need for better recognition of the financing structures of viable undertakings backed by long-term, risk-bearing private capital. What matters most is ensuring that the UID definition captures genuine financial distress rather than normal reinvestment patterns typical of equity-financed growth companies. PE/VC-backed undertakings have already passed a market-based viability test through professional due diligence and should not automatically be considered in difficulty based on accounting losses alone. PE/VC-financed companies reinvest cash flow to scale operations and build value over time, their temporary losses or leverage are part of a planned growth strategy, not signs of insolvency. Recognizing this distinction would align State aid rules with the EU's objectives of supporting innovation, competitiveness, and access to long-term financing.

Articles 20(a) and 20(b), which are typical to businesses receiving bank loans, are not relevant for PE/VC-owned companies. Due to their financing structures, such undertakings will often meet these criteria technically but not economically. It should therefore be clarified that for PE/VC-owned undertakings, a narrower set of UID criteria should apply in light of their ownership. Articles 20(c) and 20(d) are more appropriate. For the purposes of this definition, only points (c) and (d) of Article 20 should apply where 25% or more of the company's capital is held by a closed-ended investment fund, subject to compliance with the Interest Limitation Rule of Article 4 of Directive 2016/1164.

Others (please specify):

Answer:

Relying on the GBER definition of "startup" under Article 22(2) would not solve the core issue raised in the Guidelines. That definition captures only small, unlisted enterprises that meet a strict five-year limit and a series of narrow conditions. In practice it excludes the very companies Europe says it wants to keep: those backed by venture and growth capital that are already creating jobs, scaling innovation, and proving their market value.

Treating "startups" as a fixed label tied to age or size also misses how real businesses evolve. Growth is not linear. Many PE/VC-backed companies spend years developing new products or expanding. The reality is that innovation and scaling require time, iteration, and space to change. A definition based on rigid timelines risks boxing these firms into categories that do not reflect how they actually grow.

To ensure clarity, the Guidelines should avoid relying on restrictive "startup" definitions and instead focus on economic substance, distinguishing financial distress, regardless of company age, from normal reinvestment and growth phases typical of investor-backed companies.

8. Under the current rules, scale-ups fall under the definition of an Undertaking in Difficulty which prevents them from receiving aid under other State aid rules. In your view, is this specific scale-ups situation justified?

	Answer
Yes	
No	X
Don't know	

Please justify your answer:

Answer:

Scaleups are not explicitly addressed under the Guidelines, nor under the GBER, yet they are often caught by the UID definition because of how they are financed, not because they are in difficulty – just like many other viable businesses. Please see our answer to question 7.

9. In your view, what would be the impact of an exemption of start-ups and/or scale-ups from the definition of Undertaking in Difficulty on the administrative burden and costs for authorities?

	Yes	No	I do not know / no opinion
It would decrease the administrative burden with respect to start-ups		X	
It would decrease the administrative burden with respect to scale-ups		X	
It would not decrease the administrative burden	X		

Please justify your answer:

Answer:

Just like for startups, as highlighted under question 7, introducing a new “scaleup” definition would not solve the main problem of the UID definition. Growth is not a legal status. Introducing a separate exemption for startups and/or scaleups would not meaningfully reduce the administrative burden – the issue is not administrative complexity, but conceptual clarity.

Introducing new exemptions for “startups” or “scaleups” would also risk creating overlapping categories and inconsistent interpretations between the Guidelines, the GBER, and other frameworks. This would increase, not reduce, the compliance and assessment burden.

The emphasis should therefore shift from definitional clarity, which is complex, to financial relevance, such as ensuring that the UID assessment reflects whether a company is genuinely distressed, not merely showing accounting losses due to reinvestment and long-term growth financing. A consistent UID test would be far easier for authorities to apply than multiple exemptions or size-based carveouts.

10. In your view, what would be the impact of exempting start-ups and/or scale-ups from the definition of Undertaking in Difficulty on competition between undertakings within the internal market and the competitiveness of the EU economy in a global context?

	Yes	No	I do not know / no opinion
Increase competition within the EU		X	
Increase competitiveness of the EU		X	
Increase both		X	
Decrease competition within the EU	X		
Decrease competitiveness of the EU	X		

Decrease both	X		
---------------	---	--	--

Please justify your answer:

Answer:

Introducing exemptions based on rigid criteria would risk arbitrary outcomes. The new exemptions would create different layers of exclusion: firms included in the “startup” and “scaleup” definitions and excluded from the UID definition, regardless of whether they are in distress or not; firms wrongly excluded from the “startup” and “scaleup” definitions, and, therefore, potentially still misclassified as in difficulty because of outdated UID criteria. The result is uneven treatment between comparable firms, distorting both competition and financing incentives. And this misalignment would spill over beyond the UID context, especially across different sectors.

Exempting “startups” and “scaleups” from the UID definition does not address the underlying issue: the UID criteria themselves fail to capture the financial reality of many viable, growth-oriented companies. The real way to enhance competition and competitiveness is to amend the current UID definition through a coherent, principle-based definition applicable across frameworks, which would deliver far greater clarity and fairness than introducing new exemptions for loosely defined categories.

Europe’s competitiveness depends not on more labels, but on rules that reflect how innovation-driven businesses actually grow and finance themselves. Without that coherence, exemptions alone will not level the playing field – they will simply shift the inconsistencies elsewhere.

The definition of “own funds”

The term “own funds” (which represents a literal translation of the French term “fonds propres” into English) is used in the definition of Undertaking in Difficulty and serves as a benchmark against which accumulated losses of a limited liability company must be evaluated, in order to establish whether such a company is in difficulty. That term is not defined in the Rescue and Restructuring Guidelines, which may create in some language versions of the Guidelines confusion as to which parts of a company’s equity and which financial instruments are covered by the term “own funds”.

11. In your opinion, does the term “own funds” need to be further clarified?

	Answer
Yes	X
No	
Don’t know	

Please justify your answer:

Answer:

The term “own funds” should be clarified to ensure that it accurately reflects the financing structures of companies backed by PE/VC. Many late-stage businesses technically fail the “undertaking in difficulty” test because their capital is structured through quasi-equity instruments, even though lenders and investors treat quasi-equity as equivalent to equity in assessing solvency and performance. In practice, the structuring of these deals, combining equity and quasi-equity, has no negative impact on cash flow or financial viability. Yet, the absence of a clear definition of “own funds” under the Guidelines leads to inconsistent interpretations, penalising companies that rely on alternative forms of long-term, risk-bearing capital.

To align with market and banking practice, and to ensure a consistent interpretation across frameworks, quasi-equity investment instruments as defined in Article 2(66) of Commission Regulation (EU) No 651/2014 (GBER) should be explicitly recognised as part of a company’s “own funds,” where relevant. In the context of PE/VC-backed companies, the relevant benchmark for assessing viability might be the sum of equity and quasi-equity, rather than narrow ratios linked to “subscribed capital,” which vary significantly between Member States.

This clarification would not broaden State aid eligibility unjustifiably, but would ensure that viable, PE/VC-backed companies are assessed on their true solvency and financial strength. Where the sum of equity and quasi-equity is positive, such companies should not be considered as UIDs.

12. If your answer to Question 11 was “yes”, what would, in your opinion, be the necessary clarification of the term “own funds”?:

Answer:

Please see our answer to question 11.

13. In your opinion, using “equity” instead of “own funds” would contribute to simplifying the assessment of this criterion, given that a company’s equity is readily available from its balance sheet?

	Answer
Yes	
No	X
Don’t know	

Please justify your answer:

Answer:

Replacing “own funds” with “equity” would not simplify the assessment and could, in fact, make it less accurate and less coherent with market and financing realities. While “equity” may appear more straightforward, it captures a narrower subset of a company’s capital structure and fails to reflect the diversity of financing instruments used in many undertakings.

In financial reporting, “equity” is defined as the residual interest in a company after deducting liabilities (share capital, share premium, retained earnings and other reserves). Quasi-equity instruments, by contrast, are hybrid instruments, such as preference shares, or shareholder loans, that have some equity-like features but are structured as debt. For this reason, even though quasi-equity is often treated as equity from an economic standpoint, it is classified as debt on the balance sheet. If “equity” were to substitute “own funds”, quasi-equity instruments would generally be excluded from the calculation, because they are usually not recorded as equity in accounting terms.

For PE/VC-backed companies, a significant portion of capital is structured through quasi-equity instruments. And although these are recognized by investors and lenders as part of the company’s loss-absorbing base but may not appear under “equity” on the balance sheet. Using “equity” as the reference point would systematically underestimate their solvency and misclassify viable, PE/VC-backed businesses as UIDs.

What is needed is clarification, not substitution: the term “own funds” should be explicitly defined to include quasi-equity, as explained under question 11.

Other comments on the definition of Undertaking in Difficulty

14. Do you have any other comments concerning the definition of Undertaking in Difficulty for the purposes of the Rescue and Restructuring Guidelines or other State aid rules.

	Answer
Yes	X
No	

Please justify your answer:

Answer:

Article 21 (b) of the Guidelines risks compounding a broader, structural issue: the misapplication of the SME definition and control criteria across EU State aid frameworks. These criteria, rooted in Recommendation 2003/361/EC, have long failed to reflect the economic reality of PE/VC ownership structures. As a result, many independently run, PE/VC-backed companies are incorrectly treated as part of a “larger business group,” even when they have no consolidated accounts, no shared services, and no operational or financial integration.

This outdated approach is not limited to these Guidelines, it pervades State aid instruments, and other EU frameworks and tools, creating widespread inconsistencies and unjustified exclusions. It penalizes firms for the type of financing they use. In practice, high-growth companies backed by long-term, risk-bearing capital lose SME status and access to support schemes, despite being viable, high-growth undertakings.

Unless addressed through the potential upcoming SME Recommendation update, as announced in the “Strategy for making the Single Market simple, seamless and strong” (21 May 2025), an amendment across all State aid frameworks should ensure that PE/VC-backed companies remain eligible for support where they maintain separate accounts, and where the fund’s investment includes a clear exit strategy.