

“EU INVEST PROGRAM” - FINANCING UNION MECHANISM OF MEMBER STATES FOR POST-PANDEMIC ECONOMIC RECOVERY

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Abstract

This research material aims to approach from an analytical perspective the implications that the implementation of the InvestEU Program generates at the level of the European Union. The Union framework rule governing this program and its implications at Member State level is Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the "InvestEU Program" and amending Regulation (EU) 2015/1017. Specifically, the InvestEU Program contributes to the achievement of some of the objectives proposed by the Union coordinator in terms of energy effectiveness², in the field of investments in the infrastructure of the European Union, especially in the creation of a unique transport space, in the field of sustainable infrastructure policy, regarding funding for innovation, research and digitization. All these goals are considered essential for achieving the Union's sustainable development goals committed by the European Commission under the leadership of President Ursula von der Leyer in the 2030 Agenda for Sustainable Development. The research methods used in the research are: a) the logical-concretized method by using the union framework norms as well as the internal transposition norms as a source of information and analysis; b) comparative method - in order to carry out a comparative analysis of the main financing mechanisms at Member State level.

Keywords: InvestEU Program, fund, financing, contribution agreement, guarantee agreement, counseling agreement.

JEL Classification: K22, K33

1. Introduction - considerations regarding the InvestEU Program

Due to the Covid-19 pandemic, the entire system of legal investment treatment standards has entered an era of involuntary and persistent contracture. Post-pandemic economic recovery is currently one of the European Union's goals³. The InvestEU Program will play an important role in the sustainable development of the European Union's economies.

What is InvestEU? InvestEU is a Program established at the level of the European Union⁴, in order to support the financing and investment operations⁵ carried out by the implementing partners, thus contributing to the achievement of the objectives of the Union policies. For the purposes of Article 2 of Regulation (EU) 2021/523, the term “InvestEU Program” means the InvestEU Fund, the InvestEU Advisory Platform, the InvestEU Portal and mixed financing operations⁶.

The InvestEU Fund operates through *four policy components*⁷ that target market failures or insufficient investment, as follows:

- i. Sustainable infrastructure policy component,
- ii. Policy component for research, innovation and digitization;
- iii. SME policy component;
- iv. The component for social investment policy.

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² Directive (EU)2018/2001 of the European Parliament and the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (JO L 328, 21.12.2018, p. 82).

³ Cristina Elena Popa (Tache), *Defense or cooperation between states and international investors in times of crisis?*, „Juridical Tribune – Tribuna Juridica”, Volume 11, Special Issue, October 2021, p. 380.

⁴ Ioana Nely Militaru, *European Union Law. Chronology. Springs. Principles. Institutions. The internal market of the European Union. Fundamental Freedoms, 3rd Edition, revised and added*, Universul Juridic, Bucharest, 2017.

⁵ In accordance with the provisions of Article 2 entitled "Definitions", point 10 of Regulation (EU) 2021/523, "financing and investment operations" means operations designed to provide direct or indirect financing, through financial products, to final recipients, carried out by an implementing partner on behalf of himself, provided by it in accordance with its internal rules, policies and procedures and accounted for in its financial statements.

⁶ "Mixed funding operation" means an operation supported by the EU budget that combines forms of non-reimbursable, reimbursable or combined support with reimbursable forms of support from development institutions or other public financial institutions or commercial financial institutions, or EU programs, such as the EU-ETS-funded Innovation Fund.

⁷ See for more details Article 8 (1) (a) to (d) of Regulation (EU) 2021/523.

The term "policy component" means, within the meaning of this Regulation, a specific area in which the EU guarantee provides support.

How are all these goals to be accomplished? The European Union aims to achieve all the objectives mentioned above, taking into account the specifics of each, by:

A. Supporting financing and investment operations related to sustainable infrastructure:

- in the transport sector, including multimodal;
- road safety in order to eliminate fatal road accidents and serious injuries by 2050;
- in the renewal of the railway and road infrastructure;
- in energy, especially in energy from renewable resources, in energy effectiveness in accordance with the energy policy framework for 2030;
- in the renovation projects of buildings focused on energy savings and on the integration of buildings in an energy storage, digital and connected transport system, including in rural areas;
- in waste management in accordance with the waste hierarchy and the circular economy;
- in the implementation of innovative technologies that contribute to the achievement of the Union's environmental objectives related to resilience to climate change or the social sustainability of the Union

B. Supporting financing and investment operations related to research, innovation and digitization involving research activities, product development and innovation, transfer of technologies and research results to the market.

C. Increasing the access to finance for SMEs⁸ and for small enterprises with medium capitalization⁹ as well as for increasing their competitiveness on the market.

D. Financing of social enterprises¹⁰, measures to promote gender equality, skills, education, social infrastructure (social and student housing), health care and long-term care, integration of vulnerable people, including third-country nationals.

The following activities are excluded¹¹ from financing through the InvestEU Program:

- a) Activities that limit individual rights and freedoms or that violate human rights;
- b) In the fields of defense, manufacturing or development of products and technologies that are prohibited by applicable international law;
- c) Activities excluded from funding under the relevant provisions of the Europe Horizon Regulation: research on human cloning for reproductive purposes, human embryo creation activities exclusively for research or for obtaining stem cells;
- d) Gambling;
- e) Activities using live animals for experimental and scientific purposes, in so far as compliance with the European Convention on the Protection of Vertebrate Animals Used for Experimental or Other Scientific Purposes cannot be guaranteed;
- f) Real estate development activities whose sole purpose is to renovate and rent or sell existing buildings as well as to build new projects;
- g) Financial activities such as the acquisition or trading of financial instruments, etc.

According to Article 14 of Regulation (EU) 2021/523, *eligible financing and investment operations* are those operations which:

- consider market dysfunctions;
- consider insufficient investment situations;
- contribute to the achievement of the policy objectives of the European Union and fall within the scope of the eligible areas identified in Annex II of this Regulation;
- are in line with the investment guidelines;

⁸ "SME" means a micro, small or medium-sized enterprise within the meaning of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L124, 20.5.2003, p. 36).

⁹ "Small enterprise with a medium capitalization" means an entity that is not an SME and has up to 499 employees.

¹⁰ "Social enterprise" means an entity an enterprise as defined in the relevant provisions of the ESF + Regulation for the period 2021-2027.

¹¹ See for more details Annex V - "Market dysfunctions, insufficient investment situations, additionality and excluded activities" - of Regulation (EU) 2021/523 establishing the "InvestEU Program".

- target projects involving entities located in a Member State and one or more third countries, including acceding countries, candidate and potential candidate countries or countries covered by the European Neighborhood Policy, European Economic Area countries or European Free Trade Association.

With regard to the types of *financing considered eligible* under this Regulation, Article 16 identifies in an exhaustive list the following categories whose risks can be covered by the use of the EU guarantee:

- Loans, guarantees, counter-guarantees, capital market instruments, any other form of financing or improvement of credit quality;
- Financing or guarantees granted by an implementing partner to a financial institution to enable it to undertake financing activities from those mentioned above.

2. Main issues regarding the InvestEU Program regulated by Regulation (EU) 2021/523

2.1. The compartment for the Union and the compartment for the member states - components of the union policy

The four policy components mentioned above, which fall within the competence of the InvestEU Fund, consist of *a compartment for the Union* and *a compartment for each Member State*.

In accordance with the provisions of Article 2 of the Regulation, "compartment" means a part of the EU guarantee defined in terms of the origin of the resources that support it.

Having regard to the provisions of Article 9 (1) of the Regulation:

1. The Union compartment covers any of the following situations:

- (i) Market failures or insufficient investment situations related to the Union's policy priorities;
- (ii) Specific market failures or specific situations affecting the Union as a whole or the Member States.

2. The Member States sub-fund shall address specific market dysfunctions or specific investment situations in one or more regions or Member States in order to meet the policy objectives of the funds from which contributions are allocated and which are subject to shared management.

2.2. EU guarantee

"*EU guarantee*" means an irrevocable, unconditional and on-demand general budget guarantee provided by the Union budget, whereby the budgetary guarantees granted in accordance with Article 219 (1) of the Financial Regulation take effect by the entry into force of individual guarantee agreements with implementing partners¹².

The EU guarantee for the Union compartment is EUR 26 152 310 073.

It is provided at a rate of 40% with the statement that the indicative allocation of the EU guarantee for the purpose of the Union compartment is set out in Annex I to Regulation (EU) 2021/523 establishing the "InvestEU Program", which may be amended by the European Commission. up to 15% for each of the objectives maintained with the obligation to inform the European Parliament and the Council. An additional amount of the EU guarantee may also be provided in the form of cash or guarantee by the Member States for the purpose of the Member States compartment.

The Union Sub-Fund of the InvestEU Fund may also receive contributions from third countries wishing to participate in certain financial products¹³, which may be:

- Member States of the European Free Trade Association (EFTA) that are members of the EEA under the Agreement on the European Economic Area;

¹² See for more details Article 15 of Regulation (EU) 2021/523.

¹³ "Financial product" means a mechanism or financial arrangement whereby the implementing partner provides direct or intermediate funding to final recipients using any of the types of funding referred to in Article 16 of Regulation (EU) 2021/523; see also for more details Article 218 paragraph (2) of the Financial Regulation.

- Acceding countries, candidate and potential candidate countries in accordance with the general principles and the terms and conditions of participation of the respective countries in Union programs established by the Framework Agreements;
- The countries of the European Neighborhood Policy¹⁴, in accordance with the general principles respectively with the terms and conditions of participation of the respective countries in the Union programs established by the Framework Agreements¹⁵.

The EU guarantee under the Union compartment is granted as follows:

a) 75% is granted to the EIB Group;

b) 25% is granted to other implementing partners who provide a financial contribution to be established through guarantee agreements.

Establishment of part of the EU guarantee in the Member States compartment

Amounts allocated by a Member State voluntarily in accordance with Union provisions on making available to the ERDF, the ESF+, the Cohesion Fund and FEAMAPA through the InvestEU Program established by the Regulation on common provisions for the period 2021-2027 or applicable to the provision of EAFRD through the InvestEU Program set out in the CAP Strategic Plan Regulation, shall be used to provide part of the EU guarantee under the sub-fund for Member States covering financing and investment operations in the Member State concerned or for a possible contribution to the InvestEU Advisory Platform.

The establishment of part of the EU guarantee in the Member States' sub-fund is conditional on the conclusion of a contribution agreement between a Member State and the Commission or an amendment to it within four months of the Commission's decision approving the partnership agreement. In all cases, the partnership agreements shall be concluded in accordance with the provisions on the approval of the partnership agreement provided for in the Regulation on the common provisions for the period 2021-2027 or in the CAP Strategic Plan under the Regulation on the CAP Strategic Plans.

In accordance with the provisions of Article 10 of the Regulation, the provisioning rate of the EU guarantee under the sub-fund for Member States is set at 40% and may be adjusted for reduction or increase under each contribution agreement taking into account the risks of the financial products to be used.

What are the elements considered when concluding a contribution agreement?

i. The total amount of the part of the EU guarantee in the Member States sub-fund corresponding to the Member State concerned, its provisioning rate and the provisioning phase, the amount of the resulting contingent debt to be covered by a mutual guarantee (back-to-back) set up by the Member State concerned;

ii. Member State strategy with identification of the following indicators: financial products and their minimum leverage effect, geographical coverage, types of projects, investment period, categories of final recipients and eligible intermediaries;

iii. Potential implementation partners, etc.

Contribution agreements are implemented by the European Commission through *guarantee agreements concluded with implementing partners* and through *advisory agreements concluded with advisory partners*. Thus, on the other hand, if no guarantee agreement is concluded within nine months of the conclusion of the contribution agreement, the former shall be terminated.

2.3. Categories of partners in the implementation of the InvestEU Program

What is meant by an implementation partner? In accordance with Article 2 “Definitions” point

¹⁴ The legal basis of the European Neighborhood Policy (ENP) is Article 8 of the TEU, respectively Articles 206-207 (trade) and 216-219 (international agreements) of the TFEU. ENP applies to the following countries: Algeria, Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, Palestine, Syria, Tunisia, Ukraine. It represents a bilateral policy between the EU and each partner country, accompanied by regional cooperation initiatives, such as Eastern Partnership (EPA) and the Union for the Mediterranean.

¹⁵ By agreement, the European Union ensures that all signatory countries of the InvestEU Program guarantee the rights of the Union, see in this sense Article 5 paragraph (1) letter d of Regulation (EU) 2021/52.

13, "implementing partner" means an eligible counterparty, such as a financial institution or other financial intermediary with which the European Commission has concluded a guarantee agreement.

EIB Group. The EIB Group and the European Commission form a partnership whose main objective is to support Member States in implementing the InvestEU Program.

Specifically, in accordance with Article 11 of the Regulation, the EIB Group:

(a) implements the 75% parts of the EU guarantee for the Union sub-fund amounting to EUR 19 614 232 554. The EIB Group provides a financial contribution of EUR 4 903 558 139.

(b) support the implementation of the Union compartment of the InvestEU Fund and, where appropriate, of the Member States compartment, in particular by:

(c) the provision of services to a bank, in connection with the implementation of financial products supported by the EU guarantee, at the latter's request;

(d) in connection with the InvestEU Advisory Platform:

- is given an amount of up to EUR 300 000 000 from the financial envelope for counseling initiatives;;
- advises the European Commission on the development, establishment and operation of the InvestEU Advisory Platform.

Other partners for the implementation of the InvestEU program. In order to identify other implementing partners for the program other than the EIB Group, the European Commission shall make its selection in accordance with Article 154 of the Financial Regulation.

Implementing partners can form a group. An implementation partner can be a member of one or more groups.

Where a partner is a Member State, it may propose one or more counterparties as implementing partners among the counterparties that have expressed interest.

Each implementing partner agrees to a "financial contribution" which means its actual contribution in the form of its risk-taking capacity, provided on an equal footing (*pari passu*) with the EU guarantee or in another form that allows the proper implementation of the InvestEU Program.

The Member State concerned may also propose the EIB Group as an implementing partner and may contract, at its own expense, the EIB Group for the provision of services.

If the Member State concerned does not propose an implementing partner, the Commission shall select as implementing partners eligible counterparties that may cover financing and investment operations in those geographical areas.

When selecting implementing partners, the Commission shall:

a) take into account the ability of the implementing partner to implement the provisions of Article 155 (2) and (3) of the Financial Regulation on the avoidance of tax obligations, tax evasion, money laundering, terrorist financing;

b) ensure that the portfolio of financial products within the InvestEU Fund fulfills the following objectives:

- Maximizing the impact of the EU guarantee through its own resources committed by the implementing partner;
- Maximizing, as appropriate, private investments;
- Promoting innovative financial and risk management solutions to address market failures

How is the EU guarantee granted to implementing partners? In order to provide an EU guarantee to an implementing partner, the European Commission has concluded a *guarantee agreement* stating the amount set by the Commission. If the implementing partners form a group, a *single guarantee agreement* is concluded between each partner and the Commission, or the Commission signs the same single guarantee agreement with a single implementing partner, the latter representing the group.

The guarantee agreement inserts clauses that contain defining elements regarding:

- The amount allocated and the conditions of the financial contribution to be provided by the implementing partner;
- Financing conditions;

- Guarantees to be provided by the implementing partner;
- Detailed rules on the provision of the EU guarantee, including how the portfolios of instruments of specific types will be covered as well as the events that trigger possible requests for the execution of the EU guarantee;
- Payment terms;
- Financial and operational reporting as well as monitoring of financing and investment operations within the EU guarantee;

According to Article 18 of the Regulation, "the granting of the EU guarantee is conditional on the entry into force of the guarantee agreement with the relevant implementing partner". Moreover, the content of the same article stipulates that the European Commission does not owe to the implementing partner any administrative costs or commissions related, as the case may be, to the implementation of financing or investment operations within the EU guarantee.

The remuneration for risk-taking is allocated between the European Union and the implementing partner, in proportion to the share of participation in risk-taking in the portfolio of financing and investment operations, taking into account that each implementing partner has an adequate exposure, at his/her own risk. This can be reduced by taking into account the risk profile of financial products.

What does the EU guarantee cover?

1. In the case of warranty products, such as loans, capital market instruments, any form of credit improvement, etc. the guarantee covers: a) the principal and all interest due to the implementing partner, b) losses from restructuring; c) losses generated by fluctuations in currencies other than the euro on markets where the possibilities for long-term risk hedging are limited;

2. In the case of capital or quasi-capital investments, the EU guarantee shall cover the amounts invested and the related financing costs and losses arising from fluctuations in currencies other than the euro.

2.4. Invest EU advisory platform

The InvestEU advisory platform is created by the European Commission with the main objective of providing advice in order to identify, prepare and contract through public procurement as well as to implement investment projects at any stage of their life cycle¹⁶.

In order to provide this service, the European Commission concludes *advisory agreements* with the EIB Group and other potential partners. Specifically, the Commission together with the EIB Group and other advisory partners:

- i. Establish a central access point to the Advisory Platform managed and hosted by the European Commission, for public authorities and project promoters;
- ii. Disseminate to public authorities and project promoters information on investment guidelines, including assistance in meeting the eligibility criteria for their projects;
- iii. Cooperate with each other for the geographical coverage of support throughout the Union, in the sense that they support actions and capitalize on local knowledge;
- iv. Facilitate the establishment of collaboration platforms for *inter partes* exchanges by sharing good practices;
- v. Provide proactive advice on establishing cross-border and macro-regional investment platforms as well as investment platforms that group projects from several states.
- vi. The advisory platform is available to all promoters of public or private projects, including SMEs and start-ups¹⁷, banks or financial intermediary institutions.

¹⁶ See for more details, Article 25 of Regulation (EU) 2021/523.

¹⁷ See in this sense the Program for stimulating the establishment of small and medium enterprises "Start-up Nation - Romania" according to which one considers - eligible beneficiaries - micro, small and medium enterprises that meet the following eligibility criteria: i) are registered according to the Law no. 31/91 regarding the companies, republished, with the subsequent modifications and completions, or based on the Law no.1 / 2005 regarding the organization and functioning of the cooperation or based on the Government Emergency Ordinance no. 6/2011 regarding the stimulation of the establishment and development of microenterprises by start-up

To create such a platform, the European Commission concludes an advisory agreement with each advisory partner on the implementation of an advisory initiative, which includes a cost-sharing mechanism, including fees¹⁸ for advisory services between the Commission and partners.

The implementing partners may propose to the project promoters, especially in the case of small projects, which are eligible for funding, to request the support of the InvestEU Advisory Platform, in order to improve the preparation of those projects, while informing them that they have the opportunity to register their projects on the InvestEU Portal.

2.5. What is and what is the purpose of creating the InvestEU Portal?

The InvestEU portal is a database considered easy to access, which contains relevant data about each project started within the InvestEU Union Program. Moreover, through this portal, project promoters can make visible the projects of potential investors.

Specifically, once these projects have been submitted by the project promoters, the European Commission, in turn, forwards them to the relevant implementing partners, and if there is an advisory initiative, it also forwards them to the Invest EU Advisory Platform.

3. Conclusions

Given the measures taken at the level of the European Union¹⁹ to limit the spread of the Covid-19 epidemic, economic activity at the level of the "Supranational Governance" has decreased significantly, requiring a strong recovery by injecting capital backed by guarantees to remedy dysfunction of the single market, in areas such as investment, innovation, climate change, technology, infrastructure, etc.

The Union's current efforts are part of a comprehensive and ambitious plan aimed at completing the internal market, so that the main competence of the InvestEU Program is to capitalize on the synergies between the strategies adopted during the Union, among which we exemplify: "The European Data Strategy" of 14 January 2020, and the White Paper on "Artificial Intelligence - A European Approach to Excellence and Trust" of 19 February 2020, "A New Industrial Strategy for Europe" of 10 March 2020 and "Strategy for SMEs for a sustainable and digital Europe" of 10 March 2020.

The InvestEU Program also aims to contribute to the development of a sustainable financing system in the Union to support the redirection of private equity to sustainable investment, in line with the objectives set out in the Commission Communication of 8 March 2018 entitled "Action Plan: Financing Sustainable Growth". and in the Commission Communication of 14 January 2020 on the European Green Pact Investment Plan.

Last but not least, the goals of the InvestEU Program, especially in the field of sustainable development, are in line with the objectives assumed by the EU, in the 2030 Agenda for sustainable development of the UN.

entrepreneurs in business, with subsequent amendments and completions; ii) are SMEs according to the provisions of art. 2 and of art. 4 para. (1) lit. a), b) or c) of Law no. 346/2004 on stimulating the establishment and development of small and medium-sized enterprises, with subsequent amendments and completions, which transposes into national legislation EC Recommendation no. 361 of 6 May 2003, published in the Official Journal of the EU no. L124 dated May 20, 2003 (they have up to 249 employees and have a net annual turnover of up to 50 million euros or have total assets of up to 43 million euros, equivalent in lei); iii) have fully private share capital; iv) are established by natural persons starting with January 1, 2020, inclusive; v) did not exceed the de minimis ceiling of EUR 200,000 during three consecutive financial years for a single undertaking, as defined by EU Regulation no. Commission Regulation (EC) 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 and EUR 100,000 for three financial years for beneficiaries carrying out freight transport activities on behalf of third parties or against payment. The ceilings apply regardless of the form of the de minimis aid or the objective pursued and regardless of whether the aid is granted from funds from the state budget or from Union funds.

¹⁸ Fees charged to SMEs for counseling services are limited to one-third of the cost of providing services. See for more details, Article 25 (4) of Regulation (EU) 2021/523.

¹⁹ Ioana Nely Militaru, *European Union Law, Chronology. Springs. Principles. Institutions*, second edition, revised and added, Universul Juridic, Bucharest, 2011.

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