

AMICE's Reply to EIOPA's Request for Clarification on AMICE's Comments to EIOPA's Consultation Paper on Infrastructure Assets

Dear Mrs. Herms,

Many thanks for your comments.

May I ask you for additional clarification on the following points?

1. You suggest the inclusion of corporates. Should only rated corporates be included? Could you elaborate how the criteria for corporates should look like? In particular, how can the challenges that EIOPA outlined in the consultation paper (delineation, restriction of activities) be solved? How can a strong position of creditors be ensured? How would the definitions and criteria from the consultation paper have to be modified?

We welcome the possibility foreseen in Annex I of the Consultation Paper to include corporates in the scope of qualifying investments eligible to the specific infrastructure treatment. In our view, it should apply to both rated and non-rated investments provided such investments comply with the eligibility criteria described in the EIOPA consultation paper.

Such criteria shall however not exclude corporates and it was the purpose of our comments to ensure that corporates displaying infrastructure characteristics are encompassed within the scope of the definition of infrastructure. In particular it is key to make sure that the definition of infrastructure assets is not limited to pure SPVs outsourcing their obligations to external providers but that it also includes entities which are developing, operating and maintaining infrastructure assets.

“Special purpose entity” is often used by infrastructure actors to qualify an empty shell company set up specifically to build and operate a unique infrastructure asset pursuant to a concession/PPP agreement and which outsources all of its obligations to an EPC contractor and potentially to an operator. We strongly believe that the definition of infrastructure assets shall not be limited to this specific type of assets as other types of assets display the same characteristics in terms of stability and predictability of the cash flows.

Examples of such type of infrastructures (list is not comprehensive):

- Brownfield motorways/airports operated by an infrastructure company itself having the appropriate staff to perform internally such activities
- Portfolio of renewable energy plants (in the wind, PV, hydro sectors) developed, maintained and operated internally

- Regulated utilities having internal resources to improve and maintain the network (electricity, gas, water etc...)

Instead of opposing infrastructure “*special purpose entity*” against infrastructure “*corporate*”, we would suggest EIOPA makes sure that the definition of “*special purpose entity*” encompasses as well this type of infrastructure entities which are not pure shell companies.

Although not specifically indicated in our comments, we would like to suggest the following amendments to be included in the consultation paper:

3.3.1 Definitions

We would suggest replacing “*special purpose entity*” by “*infrastructure purpose entity*”

The aim of the amendment is to avoid confusion with pure shell companies set up as a project company to build a Greenfield infrastructure

3.3.4.2 – Structural requirements

- 1.96 “it is important that the project entity does not engage in activities unrelated to the infrastructure projects”
- Advice
 - “2. [...] any material function other than developing, owning and operating the infrastructure assets” The aim is to leave room for ancillary commercial activities (motorway services areas, duty frees for airports...)
 - Requirements in 3. And 4. shall be limited to *greenfield* assets

The aim of the amendments is to ensure that portfolios of infrastructure assets/projects and infrastructure entities which have internal capabilities to develop, maintain and operate infrastructure are included in the definition of “*infrastructure*”.

3.3.4.4 Construction risk

- We would suggest limiting these requirements to *Greenfield* type of projects (initial building phase of the infrastructure during which no revenues is received by the infrastructure asset company). In brownfield assets, refurbishment or maintenance CAPEX could be performed internally or outsource to providers which do not comply with the requirements listed in 3.3.4.4.

The aim of the amendment is to ensure that infrastructure entities which have internal capabilities to develop, maintain and operate the infrastructure are included in the definition of “*infrastructure*”.

3.3.4.5 Operating risk

- We would suggest limiting these requirements to pure project companies which are not able to demonstrate that they have the internal resources and technical capacities to operate the infrastructure.

The aim of the amendment is to ensure that infrastructure entities which have internal capabilities to develop, maintain and operate the infrastructure are included in the definition of “*infrastructure*”.

2. You commented: "The sponsor concept is commonly used in projects where the sponsor is the EPC contractor who designs and builds the infrastructure. This structural requirement should only be applied to those projects. The way the structural requirements are drafted exclude de facto brownfield assets. We strongly believe that Greenfield financing may only exist if brownfield investments are also encouraged.

Could you elaborate further on why the concept is only relevant in the specific situation you mention? Why should there be no requirements on the initiator of the project? Why is a minimum degree of competence and alignment of interests not necessary?

We would be very glad if you could provide further clarification. Given the tight timeline we are operating under we would appreciate if you could come back to us as soon as possible. Would until Tuesday next week perhaps be possible? The most urgent question is question 1.

Concept of sponsor

We believe that the concept of "initiator"/"sponsor" is not relevant for most infrastructure type of assets. Who shall be the sponsoring entity in existing transportation assets, in utilities, etc...?

Sponsors are commonly the EPC in charge of building the asset. Whereas such concept may be used during the construction phase for *Greenfield* assets, it is not applicable during the operating phase (when the infrastructure assets generate revenues provided the infrastructure company is not a pure shell company outsourcing all the operation and maintenance) - see examples about transportation assets, utilities, conventional or energy assets. Systematically applying this criteria to qualify infrastructure assets would imply such requirement is kept over the whole life of the project whereas the EPC is no longer involved in the project (which may create misalignment of interests).

In certain cases having the sponsor as shareholder may create an alignment of interests with the financial investor; the best protection for the financial investor is however the contract with the EPC and the related security package put in place (return for the EPC on the construction is far much higher than the expected return on the equity invested). Having the EPC as major shareholder may create conflicting situations where the EPC uses its position as shareholder not to apply its contractual obligations. Rather than requiring a strong sponsor, we believe it would be more appropriate to request a balanced governance of the infrastructure company to manage conflict of interests if they arise and to manage the construction/operating risks as detailed in the consultation paper.

Regarding the minimum degree of competence, this shall be managed by the employees of the SPV which shall be appointed by the shareholders to monitor the performance of external providers or people representing the investors to the Board. We suggest to delete the sponsor criteria to leave room to the financial investors to determine the best structure necessary to protect their interests depending on the nature and size of the project, the industrial partners, the public procurement authority requirements, the phase of the project (Greenfield vs. Brownfield) among others.

If the concept of sponsor is retained, we propose the text related to structural requirements is amended as follows:

- 3.3.4.2 – *Structural requirements - Advice*
 - Requirements in 3. and 4. shall be limited to *greenfield* assets during the construction period
 - “4. *The infrastructure sponsor shall be considered as strong if the following condition are met*
 - a) *The sponsor has in relation with the infrastructure type to be built a very strong track record and the relevant country and/or sector experience [Note: flexibility required, an EPC may have a strong sector experience and not the relevant country experience]*
 - b) *The sponsor has ~~high~~the financial standing necessary to comply with its contractual obligations [Note: depending on the size of the projects, smaller EPC may sponsored infrastructure projects, the financial standing shall be in reference to the contractual obligations]*
 - c) [to be deleted] [Note: as indicated above, ownership requirements by the sponsor is not necessary]
 - c) above may be replaced by a structural requirement “the project is monitored at least by one person having the appropriate skills and experience appointed by the shareholders or member(s) of the board of the infrastructure company representing the investors who has(have) the appropriate skills and experience to exercise their mandate” [Note: to cover the competence issue you mention in your e-mail]

The aim of the amendment is to provide flexibility to infrastructure investors to structure the governance of the project as they believe it is the most appropriate way depending on the specific situation.

XX