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Paper of the services of Directorate General Competition

containing the draft Union guidelines on State aid to promote risk finance investments

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Disclaimer: The present consultation is carried out in parallel with the consultation on the draft General Block Exemption Regulation, containing specific provisions on aid to SMEs. The evaluation of all comments received during these two consultations will be made jointly at the end of the process.

1. INTRODUCTION

1. On the basis of Article 107(3)(c) of the Treaty on the Functioning of the European Union ("the Treaty"), the Commission may consider compatible with the internal market State aid designed to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. For the reasons set out in these Guidelines, the Commission takes the view that the development of the risk finance market and facilitating access to risk finance for small and medium sized enterprises ("SMEs"), small midcaps and innovative midcaps constitute objectives of common interest.

2. The ability of SMEs' to access finance is of great importance to the Union economy at large. Encouraging the development and expansion of new businesses, especially innovative and high-growth businesses, can have a great potential to create jobs. Therefore, an efficient risk finance market for SMEs is crucial for entrepreneurial companies to be able to access the necessary funding at each stage of their development.

3. Despite their growth prospects, SMEs may face difficulties in gaining access to finance, particularly in their early stages. At the heart of these difficulties lies a problem of *asymmetric information*: SMEs, especially when they are young, are often unable to demonstrate their credit-worthiness or the soundness of their business plans to investors. In such circumstances, the type of active screening that is undertaken by investors for providing financing to larger companies may not be worth the investment in the case of transactions involving those SMEs because the screening costs are too high relative to the value of the investment. Therefore, independently of the quality of their project and growth potential, those SMEs are therefore likely not to be able to access the necessary finance they need, for as long as they lack a proven track record and sufficient collateral. As a result of this lack of information, business finance markets may fail to provide the necessary equity or debt finance to newly-created and potentially high-growth SMEs resulting in a persistent capital market imperfection preventing supply from meeting demand at a price acceptable to both sides, which negatively affects their growth. Small midcaps and innovative midcaps may, in certain circumstances, face the same market failure.

4. The consequences of a company not receiving finance may well go beyond that single entity, due in particular to *growth externalities*. Many successful sectors witness productivity growth not because companies present in the market gain in productivity, but because the more efficient and technologically advanced companies grow at the expense of the less efficient ones (or ones with obsolete products). To the extent that this process is disturbed by potentially successful companies not being able to obtain finance, the wider consequences for productivity growth are likely to be negative. Allowing a wider base of companies to enter the market may then spur growth.

5. Therefore, the existence of a financing gap affecting SMEs, small midcaps and innovative midcaps may justify public support measures including through the grant of State aid in certain limited circumstances. If properly targeted, State aid to support the provision of risk finance to these companies can be an effective means to alleviate the identified market failures and to leverage private capital.

6. SMEs' access to finance is an objective of common interest underpinning the Europe 2020 Strategy[1]. In particular, the "*Innovation Union*" flagship initiative aims to improve framework conditions and access to finance for research and innovation so as to ensure that innovative ideas can be turned into products and services that create growth and jobs. In addition, the "*Industrial policy for the globalisation era*" flagship initiative is designed to enhance the business environment and to support the development of a strong and sustainable industrial base able to compete globally. The Roadmap for a resource-efficient Europe calls for framework conditions to increase investor certainty and better access to finance for companies making green investments that are seen as riskier or that have longer payback times[2]. Moreover, the Small Business Act[3] sets out a number of guiding principles for a comprehensive policy framework to support the development of SMEs. One of these principles is to facilitate SMEs' access to finance. This principle is also reflected in the Single Market Act[4].

7. Within this policy context, the Action plan to improve access to finance for SMEs[5] recognises that while the Union's success depends largely on the growth of SMEs, they often face significant difficulties in obtaining financing. In order to address this challenge, it advocates for various policies, including the use of regulation to make SMEs more visible to investors and markets more attractive and accessible for SMEs.

8. Most recently, two regulations relevant to investments funds were adopted: the Regulation on venture capital funds in the Union[6], which enables venture capital funds in the Union to market their funds and raise capital across the internal market, and the Regulation on European Long-term Investment Funds[7], which has introduced a new form of investment fund whose successful development requires investors' long-term commitment.

9. As regards the protection of investors, the Directive on Undertakings for Collective Investment in Transferable Securities ("UCITS")[8] sets out the rules on the

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[1] In particular, the Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth, (COM(2010) 2020 final, 3.3.2010) sets out a strategy framework for a fresh approach to industrial policy that should put the Union economy on a dynamic growth path strengthening Union competitiveness. It underlines the importance of improving access to finance for businesses, especially for SMEs.

[2] Communication from the Commission, "Roadmap to a Resource Efficient Europe", COM(2011) 571 final, 20.9.2011

[3] Communication from the Commission, "Think Small First", A "Small Business Act" for Europe, COM(2008) 394 final, 25.6.2008.

[4] Communication from the Commission, Single Market Act, Twelve levers to boost growth and strengthen confidence, "Working together to create new growth", COM(2011) 206 final, 13.1.2011.

[5] Communication from the Commission, An action plan to improve access to finance for SMEs, COM(2011) 870 final, 7.12.2011.

[6] Regulation (EU) 345/2013 of the European Parliament and the Council of 17 April 2013 on European venture capital funds, OJ L 115, 25.4.2013, p. 1.

[7] Regulation (EU) xxx/xxxx of the European Parliament and of the Council on Long-term Investment Funds, OJ xxxxxxxxxxx.

[8] Directive 209/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302, 17.11.2009, p. 32.

management and operation of investment funds, complemented by the Directive on Alternative Investment Fund Managers ("AIFMD")[9], which applies to alternative investment funds which are not regulated by the UCITS Directive, such as private equity funds.

10. In line with these policy orientations, the Commission intends to use the Union budget to facilitate access to finance for SMEs to address key market failures that limit the growth of SMEs and, to this end, has made proposals designed to enhance the use of new financial instruments[10] under the 2014-2020 Multiannual Financial Framework (MFF)[11]. In particular, the Union funding programmes COSME[12] and Horizon 2020[13] will endeavour to improve the use of public resources through risk-sharing funding mechanisms to the benefit of SMEs in their start-up, growth and transfer phases, as well as small midcaps and innovative midcaps, with a particular emphasis on actions designed to provide seamless support from innovation to market, including the commercial implementation of research and development ("R&D") results[14].

11. In the field of Cohesion Policy, the new Common Strategic Framework[15] aims to facilitate measures deploying financial instruments by extending the use of equity and debt instruments and by rendering their implementation framework simpler, more flexible and effective[16].

12. In 2012, the Commission launched a public consultation[17] to gather information on the extent of the market failure affecting access to debt and equity financing by SMEs and on the adequacy of the 2006 Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises[18] ("Risk Capital Guidelines"). The outcome of the public consultation revealed that the basic principles enshrined in those guidelines provided a sound basis for channelling Member States' resources to the intended target SMEs while limiting risks of crowding out. However, replies to the public consultation also pointed out that the Risk Capital Guidelines were considered to be too restrictive both in terms of eligible SMEs, forms of financing, aid instruments and funding structures.

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[9] Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, p. 1.

[10] Financial Instruments (FIs) cover non-grant financial instruments, which may take the form of debt instruments (loans, guarantees) or equity instruments (pure equity, quasi-equity investments or other risk-sharing instruments).

[11] Add reference to final MFF regulation

[12] add reference to adopted COSME regulation and work programme

[13] add reference to final Horizon 2020 regulation and work programme

[14] Furthermore, in order to provide better access to loan finance, a specific Risk Sharing Instrument (RSI) has been created jointly by the Commission, the European Investment Fund and the European Investment Bank, under the Seventh Framework Programme for Research (FP7). See http://www.eif.org/what_we_do/guarantees/RSI/index.htm. The RSI provides partial guarantees to financial intermediaries through a risk-sharing mechanism, thus reducing their financial risks and encouraging them to provide lending to SMEs undertaking R&D or innovation activities.

[15] Add reference to final text

[16] It should be noted that numerous Member States have also set up measures deploying similar financial instruments but financed exclusively from national resources.

[17] The questionnaire was published at: http://ec.europa.eu/competition/consultations/2012_risk_capital/questionnaire_en.pdf

[18] OJ C 194, 18.8.2006, p. 2.

13. In the Communication on State aid modernisation of 8 May 2012[19], the Commission set out an ambitious State aid modernisation program based on three main objectives:

(a) fostering sustainable, smart and inclusive growth in a competitive internal market;

(b) focusing the Commission's ex ante scrutiny on cases with the biggest impact on the internal market while strengthening the cooperation with Member States in State aid enforcement; and

(c) streamlining the rules to ensure a faster decision making.

14. In the light of the foregoing, it has been deemed appropriate to substantially review the applicable State aid regime to equity and debt financing to SMEs so as to promote a more efficient and effective access to various forms of risk finance. In that spirit, the scope of the General Block Exemption Regulation[20] has been extended so as to cater for a wider set of eligible SMEs and aid instruments. For those measures, no notification is necessary because they are presumed to address a market failure, be appropriate and proportionate, have an incentive effect as well as limit any distortions to the minimum.

2. SCOPE OF THE GUIDELINES AND DEFINITIONS

15. The Commission will apply the principles set out in these Guidelines to risk finance measures which do not satisfy all the conditions laid down in the General Block Exemption Regulation. For these cases, the Member State shall notify the measure in accordance with Article 108(3) of the Treaty and the Commission will carry out a substantive compatibility assessment as set out in Section 3 of these Guidelines.

16. However, Member States may choose to design risk finance measures in such a manner that they do not entail State aid under Article 107(1) of the Treaty, for instance because they comply with the market economy operator test or because they fulfil the conditions of the *de minimis* Regulation[21], and therefore that they do not need to be notified to the Commission.

17. Nothing in these Guidelines should be taken to call into question the compatibility of State aid measures which meet the criteria laid down in any other guidelines, frameworks or regulations. The Commission will pay particular attention to the need to prevent the use of these Guidelines to circumvent the principles laid down in existing frameworks, guidelines and regulations.

2.1. The market economy operator test

18. Risk finance measures often involve complex constructions creating incentives for one set of economic operators (investors) to provide risk finance to another set of operators (eligible undertakings). Depending on the design of the measure, and even if the intention of the public authorities may be only to provide benefits to the latter group, undertakings at either or both levels may benefit from State aid. Moreover, risk finance measures involve one or more financial intermediaries which have a status separate from that of the investors and the final beneficiaries in

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[19] Communication on EU State Aid Modernisation (SAM), COM(2012) 209 final, 8.5.2012.

[20] Add reference to new General Block Exemption Regulation

[21] Add reference to new de minimis regulation

which investments are made. In such cases it is also necessary to consider whether the financial intermediary can be considered to be benefiting from State aid.

19. The Commission notice on the notion of aid[22] sets out the general principles whereby public intervention is not considered to constitute State aid, for instance because it is in line with the market economy operator test. According to that test, economic transactions carried out by public bodies or undertakings do not give rise to an advantage to their counterpart, and therefore do not constitute State aid, if they are carried out in line with normal market conditions. This section provides additional guidance on the application of the market economy operator (MEO) test in the area of risk finance.

2.1.1. Aid to investors

20. In general, the Commission will consider an investment to be in line with the market economy operator test, and thus not to constitute State aid, if it is effected *pari passu* between public and private investors. An investment is considered *pari passu* when it is made under the same terms and conditions by public and private investors, where both categories of operators intervene simultaneously and where the intervention of the private investor is of real economic significance.

21. In the area of risk finance, transactions by public and private investors will be considered to be made simultaneously if the private and public investors co-invest into the final beneficiaries via the same investment transaction. In the case of investments through public-private financial intermediaries, investments by the public and private investors will be presumed to be made simultaneously.

22. Moreover, the transaction is presumed to be made under the same terms and conditions if public and private investors share the same risks and rewards and hold the same level of subordination in relation to the same risk class. If the public investor is in a better position than the private investor, for instance because it receives a priority return in time compared to the private investors, the measure may also be considered to be in line with normal market conditions. An additional condition is that the funding provided by private investors independent from the companies in which they invest, is economically significant[23] in light of the overall volume of the investment and the exposure of each investor.

23. Where a measure allows private investors to carry out risk finance 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 (non *pari passu* investments). Such an advantage may take different forms, such as preferential returns or reduced exposure to losses in the event of underperformance of the underlying transaction compared to the public investors.

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[22] [reference to Notice on Notion of Aid]

[23] For instance, in the Citynet Amsterdam case, the Commission considered that two private operators taking up one third of the total equity investments in a company (considering also the overall shareholding structure and that their shares are sufficient to form a blocking minority regarding any strategic decision of the company) could be considered economically significant (see Commission Decision in case of C53/2006 Citynet Amsterdam, the Netherlands. OJ L 247, 16.09.2008, p. 27 paragraphs 96-100). By contrast, in case N429/2010 Agricultural Bank of Greece (ATE), OJ C 317, 29.10.2011, p. 5, the private participation only reached 10% of the investment, as opposed to 90% by the State, so that the Commission concluded that *pari passu* conditions were not met, since the capital injected by the State was neither accompanied by a comparable participation of a private shareholder nor was it proportionate to the number of shares held by the State.

2.1.2. *Aid to a financial intermediary and/or its manager*

24. In general, the Commission considers that a financial intermediary is an intermediary vehicle for the transfer of aid to investors and/or enterprises in which the investment is made, rather than a beneficiary of aid in its own right. Where the financial intermediary does not have legal personality but is merely a mass of assets managed by an independent management company, the intermediary is presumed to be a mere vehicle without itself being a beneficiary of aid. However, measures involving direct transfers in favour of a financial intermediary, or requiring the beneficiary to co-invest, may constitute aid unless such transfers or co-investments are made on terms which would be acceptable to a normal economic operator in a market economy.

25. Where the managers of the financial intermediary or the management company are chosen through an open, transparent, non-discriminatory and objective selection procedure or if the manager's remuneration fully reflects the current market levels in comparable situations, it will be presumed that those managers do not receive State aid.

26. Where the financial intermediary and its managers or the management company are public entities and were not chosen through an open, transparent, non-discriminatory and objective selection procedure, they will not considered to be recipients of aid if they operate at arm's-length from the State and their remuneration reflects normal market conditions and is linked to performance. In addition, the financial intermediaries shall be managed commercially and its managers shall take investment decisions in a profit-oriented manner.

27. Where the investment by the State into the financial intermediary is in the form of loans or guarantees, in order to exclude that the financial intermediary receives State aid, the conditions set out in the Communication on the reference rate[24] and the Notice on the guarantees[25] have to be fulfilled respectively.

28. Where the financial intermediary passes on all the advantage it receives from the State to the final beneficiary undertakings, the financial intermediary will not be considered to receive State aid. In order to ensure full pass on, the advantage transferred to the financial intermediary shall be quantified. Furthermore, an adequate monitoring mechanism shall ensure that such pass on can be verified.

29. The fact that financial intermediaries may increase their assets and their managers may achieve a larger turnover through their commissions as a consequence of the risk finance measure, is considered to constitute only a secondary economic effect of the aid measure and not aid to the financial intermediaries and/or their managers. However, if the risk finance measure is designed in a way so as to channel its secondary effects towards financial intermediaries identified in advance, those financial intermediaries will be considered to receive indirect aid.

2.1.3. *Aid to the undertakings in which the investment is made*

30. Where aid is present at the level of the investors, the financial intermediary or its managers, the Commission will generally consider that it is at least partly passed on to the target enterprises, without prejudice to *de minimis* aid[26]. This is the case even

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24 Communication from the Commission on the revision of the method for setting the reference and discount rates, OJ C 14, 19.1.2008, p. 6.

25 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.6.2008, p. 10.

26 reference to new de minimis Regulation

where investment decisions are being taken by the managers of the financial intermediary with a purely commercial logic.

2.2. Notifiable risk finance aid

31. Member States must notify pursuant to Article 108(3) of the Treaty risk finance measures which do not comply with the market economy operator test, do not fulfil the conditions of the *de minimis* Regulation, do not satisfy all the conditions laid down in the General Block Exemption Regulation or otherwise do not constitute State aid. The Commission will assess the compatibility of those measures with the internal market under Article 107(3)(c) of the Treaty. These Guidelines focus on those risk finance measures which are most likely to be found compatible with Article 107(3)(c) of the Treaty, subject to a number of conditions which will be explained in greater detail in Section 3 of these Guidelines. Such measures fall into the following three categories.

32. The first category covers risk finance measures which target undertakings that do not fulfil all the eligibility requirements provided for by the General Block Exemption Regulation. For these measures, the Commission will require the Member State to conduct an in-depth *ex ante* assessment, since the market failure affecting the eligible undertakings as defined by the General Block Exemption Regulation, can no longer be presumed. This category encompasses in particular the following undertakings:

    (a) undertakings of a size which, following the initial risk finance investment, exceed the thresholds set by the Union SME definition[27] and become small midcaps;

    (b) innovative mid-caps carrying out R&D and innovation activities;

    (c) undertakings receiving the initial risk finance investment more than five-years after their first commercial sale;

    (d) undertakings requiring higher amount of risk finance investment than [€10 million];

    (e) alternative trading platforms not fulfilling the conditions of the General Block Exemption Regulation.

33. The second category consists of those measures which have different design parameters as set out in the General Block Exemption Regulation. For these measures, the existence of a market failure can still be presumed, while the assessment of the design of the measure will need to be carefully assessed. This category encompasses in particular the following cases:

    (a) measures with private investor participation below the ratios provided for in the General Block Exemption Regulation;

    (b) measures with financial design parameters above the ceilings provided for in the General Block Exemption Regulation;

    (c) measures selecting investors, financial intermediaries and their managers by giving preference to protection against the potential losses (downside protection) over prioritised returns from the profits (upside incentives);

[27] add reference to Annex II to new GBER

(d) fiscal incentives to corporate investors, including financial intermediaries or their managers acting as co-investors.

34. The third category concerns large schemes which although satisfying the conditions of the General Block Exemption Regulation, fall outside of its scope by virtue of their large budget. The notification of these schemes is required, in particular, to enable the Commission to carry out an in-depth assessment of the potential negative effects that such schemes could have on the affected markets. When carrying out this assessment, the Commission will also verify whether the conditions laid down in the General Block Exemption Regulation are satisfied.

35. The different categories of notifiable measures described in paragraphs 32 and 33 may be combined within one measure.

2.3. Definitions

36. For the purposes of these Guidelines:

(a) 'alternative trading platform' means a stock market or investment vehicle specialised in the exchange of SME shares by facilitating the matching between investors and target SMEs;

(b) 'arm's-length' means that the conditions of the investment transaction between the contracting parties do not differ from those conditions which would be made between independent enterprises and contain no element of influence of the State;

(c) 'debt or loan instrument' means an agreement which obliges the lender to make available to the borrower an agreed amount of money for an agreed period of time and under which the borrower is obliged to repay the amount within the agreed period and may take the form of loans and other funding instruments which provide the lender with a predominant component of minimum yield;

(d) 'eligible undertaking' means SMEs, small midcaps and innovative midcaps, as defined by the conditions of these Guidelines;

(e) 'entrusted entity' means a financial institution, such as the European Investment Bank ("EIB") and the European Investment Fund ("EIF"), international financial institution, public law body or private law body with a public service mission, entrusted by a Member State to implement a risk finance measure;

(f) 'equity investment' means the provision of capital to an undertaking, invested directly or indirectly in return for total or partial ownership of that undertaking and where the equity investor may assume some management control of the undertaking and may share the undertaking's profits;

(g) 'exit' means the liquidation of holdings by a financial intermediary or investor, including trade sale, write-offs, repayment of shares/loans, sale to another financial intermediary or another investor, sale to a financial institution and sale by public offering, including an initial public offering (IPO);

(h) 'final beneficiary' means an eligible undertaking that has received investment under a risk finance State aid measure;

(i) 'financial intermediary' means any financial intermediary, regardless of its form and ownership, including entrusted entities fund of funds, private investment funds, public investment funds, banks, micro-finance institutions and guarantee societies;

(j) 'first commercial sale' means the first sale by an undertaking on a product or service market, excluding limited sales to test the market;

(k) 'follow-on investment' means additional investment in a company subsequent to one or more previous investment rounds;

(l) 'guarantee' means a written commitment to assume responsibility for all or part of a third party's newly originated risk finance loan transactions such as debt or lease instruments, as well as quasi-equity instruments;

(m) 'guarantee rate' means percentage loss coverage of each and every transaction of the guaranteed portfolio;

(n) 'independent private investor' means a private investor who is independent from the SME in which it invests, including financial institutions, irrespective of their ownership, to the extent that they bear the full risk in respect of their investment; upon the creation of a new company, private investors are considered to be independent from the company;

(o) 'innovative mid-cap' means a mid-cap:

 (i) that can demonstrate, by means of an evaluation carried out by an external expert that it will in the foreseeable future develop products, services or processes which are new or substantially improved compared to the state of the art in its industry, and which carry a risk of technological or industrial failure, or

 (ii) whose R&D costs represent at least 15% of its total operating costs in at least one of the three years preceding the first investment under the risk finance State aid measure or, in the case of a start-up enterprise without any financial history, in the audit of its current fiscal period, as certified by an external auditor;

(p) 'investment' means one or more investment rounds in a company;

(q) 'large scheme' means an aid scheme with a large budget (planned or effective yearly expenditure exceeds 0,01% of the Member State's GDP and an absolute value of EUR 100 million), which fulfills the conditions of the General Block Exemption Regulation but which is excluded from its scope by virtue of its Article 1(2)(a);

(r) 'leverage' means the required level of private investment, additional to the public investment. It is to be noted that leverage for the purposes of these Guidelines is not synonym to "leverage effect" as defined by Article 140(2)(d) of the Financial Regulation and Article 32(2)(c) of the Common Provisions Regulation;

(s) 'mid cap' for the purposes of these Guidelines means an undertaking whose number of employees does not exceeded 1 500, including small midcaps. For the purpose of the application of these Guidelines, entities shall be considered as one undertaking if any of the conditions listed in Article 3(3) of Annex II to the General Block Exemption Regulation is fulfilled ('linked enterprises');

(t) 'natural person' means a person who is not an undertaking for the purposes of Article 107(1) of the Treaty;

(u) 'new loan' means a newly initiated loan transaction for making new investments, to the exclusion of refinancing of existing loans;

(v) 'risk finance investment' means equity and quasi-equity investments, risk finance loans including leases, guarantees, or a mix thereof, to eligible undertakings;

(w) 'risk finance loans' means loans or leases provided by a financial intermediary to the eligible undertakings on the condition that it contributes to the financing of such loans with its own resources in accordance with the ratios set out in Article 19(10) of the General Block Exemption Regulation and that the financial intermediary is able to demonstrate that the loan portfolio supported under the risk finance measure includes a significant number of undertakings which, in the light of its credit policy, would not have been financed without the measure;

(x) 'small and medium-size enterprise (SME)' means an undertaking as defined in Annex II to the General Block Exemption Regulation. For the purpose of the application of these Guidelines, entities shall be considered as one undertaking if any of the conditions listed in Article 3(3) of Annex II to the General Block Exemption Regulation is fulfilled ('linked enterprises');

(y) 'small midcap' means an undertaking whose number of employees does not exceeded 499, and whose annual turnover does not exceed EUR 100 million or whose annual balance sheet does not exceed EUR 86 million. For the purpose of the application of these Guidelines, entities shall be considered as one undertaking if any of the conditions listed in Article 3(3) of Annex II to the General Block Exemption Regulation is fulfilled ('linked enterprises');

(z) 'total amount of risk finance' means the maximum overall investment amount made into an eligible undertaking via one or more financing rounds, including follow-on investments, under any risk finance State aid measure;

(aa) 'quasi-equity investment' means a type of financing that ranks between equity and debt, having a higher risk than senior debt and a lower risk than common equity and whose return for the holder is predominantly based on the profits or losses of the underlying target undertaking and which are unsecured in the event of default. It may be structured as debt, unsecured and subordinated and in some cases convertible into equity, or as preferred equity;

(bb) 'replacement capital' means the purchase of existing shares in a company from an earlier investor or shareholder;

(cc) 'unlisted SME' means an SME which is not listed on the official list of a stock exchange. An SME listed on an alternative trading platform is considered unlisted.

3. COMPATIBILITY ASSESSMENT OF RISK FINANCE AID

3.1. Common assessment principles

37. To assess whether a notified aid measure can be considered compatible with the internal market, the Commission generally analyses whether the design of the aid measure ensures that the positive impact of the aid towards an objective of common interest exceeds its potential negative effects on trade between Member States and competition.

38. The Communication on State aid modernisation of 8 May 2012 called for the identification and definition of common principles applicable to the assessment of compatibility of all the aid measures carried out by the Commission. For this purpose, the Commission will consider an aid measure compatible with the Treaty only if it satisfies each of the following criteria:

(a) contribution to a well-defined objective of common interest: a State aid measure must aim at an objective of common interest in accordance with Article 107(3) of the Treaty (section 3.2);

(b) need for State intervention: a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself by remedying a market failure (section 3.3);

(c) appropriateness of the aid measure: the proposed aid measure must be an appropriate policy instrument to address the objective of common interest (section 3.4);

(d) incentive effect: the aid must change the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity which it would not carry out without the aid or would carry out in a restricted or different manner (section 3.5)[28];

(e) proportionality of aid (aid limited to the minimum): the aid must be limited to the minimum needed to induce the additional investment or activity by the undertaking(s) concerned (section 3.6);

(f) avoidance of undue negative effects on competition and trade between Member States: the negative effects of aid must be sufficiently limited, so that the overall balance of the measure is positive (section 3.7);

(g) transparency of aid: Member States, the Commission, economic operators, and the public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder (section 3.8).

39. The overall balance of certain categories of schemes may further be made subject to a requirement of ex post evaluation as described in Section 4 of these Guidelines. In such cases, the Commission may limit the duration of those schemes, with a possibility to notify their prolongation.

40. If a state aid measure or the conditions attached to it (including its financing method when it forms an integral part of the measure) entail a non-severable violation of EU law, the aid cannot be declared compatible with the internal market[29].

41. In assessing the compatibility of any individual aid with the internal market, the Commission will take account of any proceedings concerning infringement to Articles 101 or 102 of the Treaty which may concern the beneficiary of the aid and which may be relevant for its assessment under Article 107(3) of the Treaty[30].

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[28] Incentive effect encompasses the principle of additionality as defined by Article 140(2)(b) of the Financial Regulation, according to which financial instruments shall not be aimed at replacing those of a Member State, private funding or other Union financial intervention.

[29] See for instance Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 78 and Case C-333/07 *Régie Networks v Rhone Alpes Bourgogne* [2008] ECR I-10807, paragraphs 94-116.

[30] See Case C-225/91 Matra v Commission, [1993] ECR I-3203, paragraph 42.

3.2. Contribution to a common objective

42. State aid should contribute to the achievement of one or more of the objectives of common interest as defined by Article 107(3) of the Treaty. For risk finance aid, the general policy objectives are to improve the provision of finance to potentially viable SMEs from their early-development up to their growth stages and in certain circumstances, small midcaps and innovative midcaps, in the longer run, to develop a competitive SME finance market in the Union, which should contribute to overall economic growth. The Commission will consider a risk finance measure to contribute to the achievement of a common Union policy objective if it complies with the conditions set out in paragraphs 43 to 47 below.

3.2.1. Specific policy objectives pursued by the measure

43. The measure must define specific policy objectives in view of the general policy objectives as set out in paragraph 42 above. To that end, the Member State must carry out an *ex-ante* assessment in order to identify the policy targets and define the relevant performance indicators. The size and duration of the measure should be adequate for the policy targets. In principle, the performance indicators should include:

    (a) the required or envisaged private sector investment (leverage effect);

    (b) the expected number of final beneficiaries invested in, including the number of start-up SMEs;

    (c) the estimated number of new undertakings created during the implementation of the risk finance measure and as a result of the risk finance investments;

    (d) the number of jobs created in the final beneficiary undertakings between the date of the first risk finance investment under the risk finance measure and the exit;

    (e) where appropriate, the proportion of investments made in conformity with the market economy operator test;

    (f) milestones and deadlines within which certain predefined amounts or percentage of the budget are to be invested;

    (g) returns/yield expected to be generated from the investments;

    (h) where appropriate, patent applications made by the final beneficiaries, during the implementation of the risk finance measure.

3.2.2. Financial intermediaries delivering the policy objectives

44. To ensure that financial intermediaries involved in the risk finance measure deliver the relevant policy objectives, they must comply with the conditions set out in particular in paragraphs 45 to 47 below.

45. The investment strategy of the financial intermediary must be aligned with the policy objectives of the measure. As part of the selection process, financial intermediaries must demonstrate how their proposed investment strategy may contribute to the achievement of the policy objectives and targets.

46. The management fee of the financial intermediaries or their managers must contain performance-based incentives linked both to the financial results and the successful achievement of the policy targets. Policy-related incentives must be balanced with the financial performance incentives which are required to ensure an efficient

selection of eligible undertakings in which investments will be made. In addition, the Commission will take into account possible penalties if the defined policy targets are not met.

47. The Member State may ensure that the investment strategy of the intermediaries remain at all times in compliance with the agreed policy targets, for instance via representation in the investor representation bodies of the financial intermediary, such as the supervisory board or the advisory board. An appropriate governance structure must ensure that changes to the investment strategy require the prior consent of the Member State. For the avoidance of doubt, the Member State may not participate directly in individual investment and divestment decisions.

3.3. Need for State intervention

48. State aid may only be justified if it is targeted at specific market failures affecting the delivery of the common objective. The Commission considers that there is no general market failure as regards SME access to finance, but only a failure related to certain groups of SMEs, particularly those in their early stages which, despite their growth prospects, are unable to demonstrate their credit-worthiness or the soundness of their business plans to investors. The scope of such market failure, both in terms of the affected companies and their capital requirement, may vary depending on the sector in which they operate. Due to information asymmetries, the market finds it difficult to assess the risk/return profile of such SMEs and their ability to generate risk-adjusted returns. The difficulties those SMEs experience in sharing information about the quality of their project, their perceived riskiness and weak creditworthiness, lead to high transaction and agency costs and may exacerbate investor risk-aversion. Small midcaps and innovative midcaps may, in certain circumstances, face the same market failure.

49. Therefore, the risk finance measure must be established on the basis of an *ex-ante* assessment demonstrating the existence of a funding gap affecting eligible undertakings in the target area concerned. The risk finance measure must be designed so as to address the market failures proven in the *ex-ante* assessment.

50. Both the structural and cyclical (i.e. crisis-related) problems leading to sub-optimal levels of private funding must be analysed. In particular, the assessment must provide a comprehensive analysis of the sources of financing available to the eligible undertakings, taking into account the number of existing financial intermediaries in the target area, their public or private nature, the investment volumes targeted to the relevant market segment, the number of potentially eligible undertakings and average values of individual transactions. This analysis should be based on data covering the [5-10] years preceding the notification of the risk finance measure and, on this basis, it should estimate the nature and size of the funding gap, that is to say, the level of unmet demand for finance from eligible undertakings.

51. The *ex-ante* assessment should preferably be conducted by an independent entity based on objective and up-to-date evidence. Alternatively, Member States may also use internal experts or submit an Access to Finance Market Assessment (AFMA) carried out by the European Investment Fund, provided it dates from less than three years preceding the notification of the risk finance measure. In case the risk finance measure is financed partially from the European Structural and Investment Funds, the Member State may submit the *ex ante* assessment prepared in line with Article

32(2) of the Common Provisions Regulation[31], which will be considered to meet the requirements set by these Guidelines. When examining the findings of the *ex-ante* assessment, the Commission reserves the right to question the validity of the data in view of the evidence available.

52. To ensure that the financial intermediaries involved in the measure target the identified market failures, their proposed investment strategy must respect the defined eligibility requirements and funding restrictions. In particular, Member States must select financial intermediaries which, on the basis of due diligence, can demonstrate that their proposed investment strategy is commercially sound and includes an appropriate risk diversification policy aimed at achieving economic viability and efficient scale in terms of size and territorial scope of the investments.

53. Moreover, having regard to the types of measures mentioned in Section 2.2 above, the *ex-ante* assessment must take account of the specific market failures faced by eligible target undertakings based on the additional guidance set out in paragraphs 54 to 79.

3.3.1. Measures targeted at categories of undertakings outside the scope of the General Block Exemption Regulation

(a) Undertakings becoming small midcaps following the first investment round

54. Although the scope of the General Block Exemption Regulation is restricted to SMEs, SMEs whose growth plans imply an increase in their employment levels following the first investment round under the risk finance measure could exceed the headcount and financial thresholds set by the definition of SME. In certain circumstances, such companies could face financing constraints comparable to those affecting SMEs.

55. Therefore, it may be necessary to incentivise private investment in these companies even following the first investment round made under the risk finance measure and to support them into later stages of their growth, until they have a sufficient track record and collateral to be able to attract private investment without State aid. This may also encourage earlier private investments and investors, since they might have a higher probability to successfully exit the company at a later development stage. In its assessment, the Commission will take into account the labour- and/or capital-intensity of the targeted undertakings, as well as other criteria reflecting specific financing constraints affecting them (for example, sufficient collateral for a large loan).

56. In light of the above and provided the *ex-ante* assessment contains adequate economic evidence to this effect it may be justified to continue to support undertakings which become small mid-caps following the first investment round under the risk finance measure.

(b) Innovative mid-caps

57. Mid-caps, in certain circumstances, could also face financing constraints comparable to those affecting SMEs. Such may be the case for those mid-caps carrying out R&D and innovation activities alongside initial investment in production facilities, including market replication, whose track record does not enable potential investors to make relevant assumptions as regards the future market prospects of the results of such activities. In such a case, access to risk

[31] Add reference to final Common Provisions Regulation.

finance may be necessary for these innovative mid-caps to increase their production capacities to a sustainable scale.

58. For the purpose of evaluating measures targeting this group of undertakings, the *ex ante* assessment shall demonstrate the nature and size of the market failure.

(c) Undertakings receiving the initial investment more than five-years after their first commercial sale

59. In principle, the General Block Exemption Regulation is restricted to SMEs which receive the initial investment under the measure before the first commercial sale on a market or within five years following their first commercial sale. Only follow-on investments are covered by the block exemption beyond this five year period. However, certain types of undertakings may be regarded as still being in their expansion/early growth stages if, even after this five-year period, they have not yet sufficiently proven their potential to generate returns and/or do not have a sufficiently robust track record and appropriate collateral. This is especially the case of high-risk sectors with no proven technologies, innovative companies or certain sectors, such as biotech, cultural and creative industries. Moreover, undertakings that have sufficient internal equity to finance their initial activities may require external financing only at a later stage, for instance to increase their capacities where they have no prior experience in bringing small-scale business to a larger scale. This may require a higher amount of investment than they can meet from their own resources.

60. Therefore, it may be possible to allow measures whereby the initial investment is carried out more than five years after the first commercial sale of the target undertaking. In such circumstances, the Commission may require that the measure clearly defines the eligible undertakings, in light of evidence provided in the *ex-ante* assessment regarding the existence of a specific market failure affecting such undertakings, and contains adequate restrictions whether in terms of time limits (for example, 10 years instead of 5) or other objective criteria of a qualitative nature, including the use of commonly accepted definitions of SME development stages.

(d) Undertakings requiring a higher amount of total risk finance investment than [€10 million]

61. Article 19(9) of the General Block Exemption Regulation sets the total amount of risk finance at maximum EUR [10 million] per SME, including follow-on investments. However, in certain industries where the upfront research or investment costs are relatively high, this amount may not be sufficient to achieve the necessary initial investments and set the company on a sustainable growth path. It may therefore be justified, under certain conditions, to allow for a higher amount of overall investment to eligible undertakings.

62. Hence, risk finance measures may support access to risk finance above the maximum overall amount of EUR [10] million per undertaking, provided the envisaged amount of funding per undertaking under the risk finance measure reflects the size and nature of the funding gap identified in the *ex-ante* assessment. The Commission will take into account the capital-intensive nature of the targeted sectors, for example life sciences or green energy investments.

(e) Alternative trading platforms not fulfilling the conditions of the General Block Exemption Regulation

63. The Commission recognises that alternative trading platforms are an important part of the SME financing market because they attract fresh capital into SMEs on the

one hand and facilitate the exit of earlier investors on the other[32]. The General Block Exemption Regulation recognises their importance by facilitating their activity either through fiscal incentives targeted at private investors investing in unlisted companies via these platforms, or by allowing for start-up aid to the platforms themselves, subject to the condition that the platforms qualify as SMEs and up to the thresholds laid down in Article 20 of the General Block Exemption Regulation.

64. However, operators of alternative trading platforms may not necessarily be SMEs when they are established. Equally, the maximum amount of aid permissible as start-up aid under the General Block Exemption Regulation may not be sufficient to support the establishment and initial five years of operation of the platform. Finally, the platform may not only list SMEs within the meaning of the definition of SME, but also undertakings which exceed the thresholds set in the definition of SME.

65. Therefore, it may be justified, under certain conditions, to support platforms that are not SMEs, to allow for a higher amount of investments for the establishment of alternative trading platforms than foreseen in the General Block Exemption Regulation, or to allow aid to alternative trading platforms which predominantly trade in SME shares. Such specialised exchanges not only attract new private investment into the undertakings but also facilitate the successful exit of earlier investors. This is in line with the policy objective of supporting SMEs' access to finance through a seamless funding chain.

66. The *ex-ante* assessment must demonstrate the existence of a specific market failure affecting such platforms in the relevant geographic market. In addition, the proposed business strategy of the platform must show that due to a persistent shortage of listings on such platforms and therefore a shortage of liquidity, the platform concerned needs to be supported in the short-term, despite its long-term viability.

3.3.2. *Measures with design parameters not complying with the General Block Exemption Regulation*

(a) Measures with private investors' participation below the ratios provided for in the General Block Exemption Regulation

67. The market failures affecting enterprises in particular regions or Member States may be more pronounced due to the relative underdevelopment of the SME finance market within such areas in comparison to other regions in the same Member State or other Member States. This may particularly be the case in Member States without a well-established presence of formal venture capital investors or business angels. Therefore, the objective of encouraging the development of an efficient SME finance market in these regions and overcoming the structural barriers which may prevent SMEs operating in these regions from having effective access to risk finance, may justify a more favourable stance of the Commission towards measures allowing for private investors' participation below the ratios provided for in Article 19(10) of the General Block Exemption Regulation.

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[32] The Commission recognises the growing importance of crowd funding platforms in attracting funding for start-up companies. Therefore, if there is an established market failure and in cases a crowd-funding platform has an operator which is a separate legal entity, the Commission may apply, by analogy, the rules applicable to alternative trading platforms. This applies equally to fiscal incentives to invest via such crowd-funding platforms. In light of the recent appearance of crowd funding in the Union, risk finance measures involving crowd funding are likely to be subject to an evaluation as mentioned in Section 4 of these Guidelines.

68. In case of measures targeting specifically SMEs before their first commercial sales, the Commission may accept that the required level of private participation is of non-independent nature. This is the case where the private participation is provided for instance by the owner of the beneficiary undertaking.

69. In the case of financial intermediaries targeting eligible undertakings in different stages of development for which the required level of private investor participation is different, as provided for by Article 19(10) of the General Block Exemption Regulation, Member States may calculate an average leverage rate, taking into account the business strategy of the financial intermediary and the projected portfolio, as defined by Article 19(10) of the General Block Exemption Regulation. Member States shall monitor and ensure on a continuous basis that the average leverage rate so calculated is complied with.

(b) <u>Measures with financial design parameters above the ceilings provided for in the General Block Exemption Regulation</u>

70. Pursuant to Articles 19(11)(a) and (b) of the General Block Exemption Regulation, the benefit of the block exemption is reserved to measures whereby non-*pari passu* loss sharing between public and private investors is so designed as to limit the first loss assumed by the former to [20%] of the total investment. Similarly, in the case of guarantees, the block exemption applies only if the guarantee rate is limited to [50%] and total losses assumed by the public investor are capped at [20%] of the underlying guaranteed portfolio.

71. However, in certain circumstances, by taking a riskier financing position, public funding may allow private investors or lenders to provide additional financing. In assessing measures with financial design parameters exceeding the ceilings as mentioned in paragraph 70 above, the Commission will take into account a number of factors.

72. Firstly, the level of the funding structure at which the measure aims to leverage private capital is of importance. At the level of the fund of funds, the ability to attract private funding, in particular from institutional investors, may depend on a more extensive use of downside protection mechanisms. Conversely, an excessive reliance on such mechanisms may distort the selection of eligible undertakings and lead to inefficient outcomes, in particular where private investors intervene at the level of the investment into the undertakings and on a transaction-by-transaction basis.

73. Secondly, to prove the necessity of the specific conditions underpinning the design of the measure, Member States may be required to produce evidence demonstrating that in the process of selecting private investors, all participants to the process were demanding conditions going beyond those set out in the General Block Exemption Regulation, or in case the tender was inconclusive.

74. Thirdly, in assessing the necessity of the specific design of the measure, the Commission may take into account the importance of the residual risk retained by the selected private investors relative to the expected and unexpected losses assumed by the public investor, as well as the balance of expected returns between the latter and the former. Thus, a different risk/reward profile could be accepted, provided it maximises the leverage effect, without undermining the genuine profit-driven character of the investment decisions.

(c) Measures selecting investors, financial intermediaries and their managers by giving preference to downside protection over asymmetric profit sharing

75. In accordance with Article 19(11)(a) of the General Block Exemption Regulation, the selection of investors, financial intermediaries and their managers must be based on an open, transparent and non-discriminatory call setting out clearly the policy objectives pursued by the measure and the type of financial parameters designed to achieve such objectives. The selection in this context must be understood in a way that the financial intermediaries and their managers have to be selected via an open, transparent and non-discriminatory selection procedure, and they are expected to attract the investors with the minimum State aid possible, or the minimum divergence from the *pari passu* principle. In order to achieve that, they shall engage in a real competitive dialogue with those ready to commit resources to the risk finance measure, so as to identify what would be the most appropriate types of incentive (downside protection and upside incentives) and the intensity of such incentives. As a result of this competitive dialogue, the manager would then be able to present a realistic business strategy for being selected.

76. Member States are required to publish, amongst the applicable evaluation criteria for managers, the requirement whereby "profit-sharing shall be given preference over downside protection" in order to limit a bias to excessive risk-taking by the manager selecting the undertakings in which the investment is made. This is meant to ensure that whatever the form of the financial instrument foreseen by the measure, any preferential treatment granted to private investors or lenders has to be weighed against the public interest which consists in ensuring the revolving nature of the public capital committed and the long term financial sustainability of the measure.

77. In certain cases, however, it may prove necessary to give preference for downside protection, namely when the measure targets certain sectors in which the default rate of young SMEs is high and/or equity returns are uncertain. This may be the case for instance for measures targeting start-up SMEs, sectors faced with important technological barriers, or sectors where the companies have a high dependence on single projects requiring large upfront investment and entailing high risk-exposure, such as the cultural and creative industries. A preference for downside protection mechanisms may also be justified for measures operating via a fund of funds and aiming at attracting private investors at this level.

(d) Fiscal incentives to corporate investors including financial intermediaries or their managers acting as co-investors

78. While the General Block Exemption Regulation covers fiscal incentives granted to independent private investors that are natural persons providing risk finance directly or indirectly to eligible SMEs, Member States may find it appropriate to put in place measures applying similar incentives to corporate investors. The difference lies in the fact that the latter are undertakings within the meaning of Article 107 of the Treaty and must therefore be subject to specific restrictions in order to ensure that aid at their level remains proportionate and has an effective incentive effect. However, given the prerogatives that Member States enjoy in the area of direct taxation, such measures may vary considerably between Member States. Therefore, they cannot be covered by the automatic compatibility rules of the General Block Exemption Regulation and are subject to individual notification.

79. Financial intermediaries and their managers may benefit from a fiscal incentive only insofar as they act as co-investors or co-lenders. No fiscal incentive can be

granted in respect of the services rendered by the financial intermediary or their managers for the implementation of the measure.

3.4. Appropriateness of the aid measure

3.4.1. Appropriateness compared to other policy instruments and other aid instruments

80. In order to address the identified market failures and to contribute to the achievement of the policy objectives pursued by the measure, the proposed risk finance measure must be an appropriate instrument compared to policy instruments other than State aid or other types of State aid instruments, while at the same time being the least distortive to competition. The choice of the specific measure compared to other policy instruments must be duly justified by the *ex-ante* assessment.

81. As a first step, the Commission will consider whether and to what extent the risk finance measure can be considered as an appropriate instrument compared to other policy instruments aimed at encouraging risk finance provision to the eligible undertakings. State aid is not the only policy instrument available to Member States to facilitate the provision of risk finance to eligible undertakings. Member States can use other complementary policy tools both on the supply and demand side, such as regulatory measures to facilitate the functioning of financial markets, measures to improve the business environment and advisory services for investment-readiness or public investments in line with the market economy operator test.

82. The *ex-ante* assessment must analyse the existing and, if possible, the envisaged national and European policy actions, targeting the same identified market failures, taking into account the effectiveness and efficiency of other policy tools, economies of scale and other policy effects. The findings of the *ex-ante* assessment must demonstrate that the identified market failures cannot be adequately addressed by other policy tools. The proposed risk finance measure must be consistent with the overall SME access to finance policy of the Member State concerned and be complementary to other policy instruments addressing the same market needs.

83. As a second step, the Commission will consider whether the proposed measure is more appropriate than alternative State aid instruments addressing the same market failure. State aid to facilitate the provision of risk finance can be granted in various forms, such as selective fiscal instruments, sub-commercial financial instruments or direct grants. In this respect, there is a general presumption that financial instruments are less distortive than direct grants and therefore constitute a more appropriate instrument. However, there is a range of possible equity or debt instruments or guarantees with different risk-return characteristics as well as various delivery modes and funding structures, the appropriateness of which depends on the nature of the addressed funding gap.

84. For instance, the Member States should justify why fiscal incentives to investors are more appropriate to tackle the identified market failures than financial instruments. By the same token, the Member States should justify why the setting up of a regional fund is more appropriate than setting up a national fund or a fund of funds.

85. The Commission will assess whether the design of the measure provides for an efficient funding structure, taking into account the investment strategy of the fund, to ensure the ability to achieve efficient operations. In that regard, the Commission

will look positively at measures which involve fund of funds investing in several underlying funds, provided that the overall management costs resulting from the duplication of the financial intermediaries are offset by substantial efficiency gains. In general, such a funding structure may be more efficient in terms of size, scale of investments and diversification of the portfolio, and thereby be more attractive for private investors, compared to smaller and/or regional funds.

86. Fund of funds or alternative trading platforms may be particularly efficient and attractive to private investors if they operate across several Member States. Therefore, the Commission will look favourably at fund of funds and alternative trading platforms set up by several Member States.

3.4.2. Conditions for financial instruments

87. State aid in the form of financial instruments must mobilise additional funding from market participants and share losses and gains arising from the provision of risk finance among public and private participants according to predetermined criteria. The *ex-ante* assessment must reasonably estimate the leverage sought in light of the market failures targeted by the measure, that is to say the estimated potential to raise additional private funds on a portfolio or deal-by-deal basis.

88. Minimum leverage ratios below those set out in Article 19(10) of the General Block Exemption Regulation may only be justified in light of more pronounced market failures established in the *ex-ante* assessment.

89. In the case of equity instruments, an incentive effect cannot be assumed just because the measure attracts funding from the market. Instead, it must be shown that the measure leverages additional private funding that would not have been provided otherwise or would have been provided in different forms or amounts or on different terms.

90. In the case of debt instruments, this could mean lending to SMEs without a track record, or lending to more SMEs in comparison to the intermediary's standard loan portfolio. To ensure that debt instruments do not replace commercial financial products, the advantage must be passed on to the final beneficiaries, for example in the form of lower interest rates or better terms and conditions than those otherwise applied by the intermediaries.

91. The ability of the measure to achieve the leverage effect ultimately depends on the design of the measure as regards the balance of risks and rewards between public and private finance providers. The exact nature of incentives must be determined through an open and non-discriminatory process of selecting investors and financial intermediaries. Fund-of-fund managers should be required to legally commit as part of their investment mandate to determine preferential conditions in a competitive process of selecting eligible funds and investors.

92. The financial intermediary or its manager may co-invest alongside the Member State an amount that is significant in terms of the financial base of the manager, so long as it avoids any potential conflict of interests. Such co-investment could incentivise the manager to take sound investment decisions in alignment with the set policy targets. The ability of the manager to provide investment from its own resources must be one of the selection criteria.

93. Member States can deploy a range of financial instruments, such as equity instruments (equity or quasi-equity investments) or debt instruments (loans, including subordinated loans and leases) or guarantees on a non-*pari passu* basis. Where lending carries risks comparable to equity such funding should be

considered as equity or a quasi-equity investment instrument, irrespective of its legal form (for example convertible bonds or loans, or loans with warrants).

(a) Equity investments

94. Equity investment instruments may take the form of equity or quasi-equity investments into an undertaking, by which the investor buys ownership of a part of that undertaking.

95. Equity instruments can have various asymmetric features, providing a differentiated treatment of investors as some may participate in a larger part of risk or reward than others. To mitigate private investor risks, the measure may offer upside protection (the public investor giving up a part of the return) or protection against a part of the losses (limiting the losses for the private investor), or a combination of those.

96. As a general principle, the Commission will give preference to asymmetric upside profit-sharing combined with same exposure to losses because it provides more incentives for the private investor to make profitable investments. This creates a better alignment of interests between public and private investors. Conversely, downside protection whereby the public investor may be exposed to the risk of poor performance may lead to misalignment of interests and adverse selection by financial intermediaries or investors. However, downside protection might be necessary for very risky categories of target beneficiaries.

97. The Commission considers that equity instruments with capped return[33], call option[34] and asymmetric income cash split[35] offer good incentives, especially in situations with less severe market failure.

98. Equity instruments with non-*pari passu* loss sharing features going beyond the limits set out in the General Block Exemption Regulation may only be justified for measures addressing severe market failures identified in the *ex-ante* assessment, such as measures targeting predominantly start-ups. To prevent extensive downside risk protection, first loss exposure[36] by the public investor must be capped. To ensure alignment of interest with the State and the investors, the financial intermediaries shall invest at least [10%] in the same first loss piece tranche as the Member State. The Member State may invest in more senior tranches only on *pari passu* conditions.

(b) Funded debt instruments: loans

99. A risk finance measure may provide for the provision of loans at the level of either the financial intermediaries or the final beneficiaries.

100. Funded debt instruments may take different forms, including subordinated loans and portfolio risk-sharing loans. Subordinated loans may be granted to financial intermediaries to strengthen their capital structure, with a view to providing additional financing to eligible undertakings. Portfolio risk sharing loans are designed to provide loans to financial intermediaries who commit to co-finance a

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[33] Capped return for the public investor at a certain pre-defined hurdle rate: if the pre-defined rate of return is exceeded, all returns above are distributed to the private investors only.

[34] Call options on public shares: private investors are given the right to exercise a call option to buy out the public investment share at a pre-agreed strike price.

[35] Asymmetric income cash split: cash is drawn from both public and private investors on a *pari passu* basis, but returns are shared whenever they arise in an asymmetric way. Private investors receive a larger share of the distribution proceeds than they should receive pro rata their respective holdings, up to the pre-defined hurdle rate.

[36] First loss piece: the most junior risk tranche comprising the expected losses of the target portfolio.

portfolio of new loans or leases to eligible undertakings up to a certain co-financing rate in combination with credit risk-sharing of the portfolio on a loan-by-loan (or lease–by-lease) basis. In both cases, the financial intermediary acts as a co-investor in the eligible undertakings but enjoys preferential treatment compared to the public investor/lender as the instrument mitigates its own exposure to credit risks resulting from the underlying loan portfolio.

101. In general, if the risk mitigation characteristics of the instrument lead the public investor/lender to assume a first loss position exceeding 20% of the underlying loan portfolio as required by Article 19(11)(c) of the General Block Exemption Regulation, then the measure may only be justified in the event of a severe market failure which must be clearly identified in the *ex-ante* assessment. In most cases, the Commission will consider positively measures which provide for an explicit cap on the first losses assumed by the public investor, notably where such a cap does not exceed [30%]. Moreover, portfolio risk sharing loan instruments should ensure a substantial co-investment rate by the selected financial intermediary. This is presumed to be the case if such a rate is not lower than 40% of the value of the underlying loan portfolio.

102. If funded debt instruments are used to refinance existing loans, they are not considered to generate an incentive effect and any aid element embedded in such instruments cannot be regarded as compatible with the Treaty.

(c) Unfunded debt instruments: guarantees

103. A risk finance measure may provide for the provision of guarantees either to the financial intermediaries or to the final beneficiaries. Outside the safe-harbour of the General Block Exemption Regulation, guarantee instruments complying with the conditions set out in paragraphs 104 to 107 will be generally assessed positively by the Commission.

104. Guarantees should be provided on a portfolio basis. In duly justified cases guarantees may be provided on a line-by-line debt instrument basis. Eligible transactions covered by the guarantee must be newly originated eligible risk finance loan transactions such as debt or lease instruments, as well as quasi-equity investment instruments. Financial intermediaries may select the transactions they wish to include in the portfolio covered by the guarantee, so long as the included transactions are in compliance with the eligibility criteria as defined by the risk finance measure. Guarantees should be offered at a rate ensuring an appropriate level of risk-sharing with financial intermediaries.

105. In general, guarantee instruments may not cover more than [80%] of the losses from individual transactions covered by the guarantee (maximum guarantee rate). In duly justified cases, subject to the results of the *ex-ante* assessment, the guarantee rate may be higher. This could be the case of guarantees on loans or quasi-equity investments in SMEs before their first commercial sale.

106. Only capped guarantees with a maximum payment ceiling (cap rate) on the guaranteed part of the portfolio will be declared compatible by the Commission. The cap rate should cover only the expected losses and only in duly justified cases may it cover unexpected losses as well. A cap rate covering also the unexpected losses should be priced to reflect the additional risk coverage. The cap rate should not exceed 30%. Uncapped guarantees (guarantees with a guarantee rate, but with no cap rate) may be provided in duly justified cases and be priced to reflect the additional risk coverage provided by the guarantee.

107. The duration of the guarantee should be limited in time to a maximum of [10] years, without prejudice to the maturity of individual debt instruments covered by the guarantee, which can be longer. The guarantee may be reduced if the financial intermediary does not include a minimum amount of investments in the portfolio during a specific period. Commitment fees may be required for unused amounts. Methods, such as commitment fees, trigger events or milestones should be used in order to incentivise the intermediaries to achieve the agreed volumes.

3.4.3. Conditions for fiscal instruments

108. As pointed out in Section 4.2.2(d), the scope of the General Block Exemption Regulation is limited to fiscal incentives targeted at natural person investors. Therefore, measures using tax incentives to encourage corporate investors to provide finance to eligible undertakings, either directly or indirectly through the acquisition of shares in a dedicated fund or other types of collective investment vehicle that invests into such undertakings, are subject to notification to the Commission.

109. As a general rule, Member States have to ground their fiscal measures on the findings of market failure in the *ex-ante* assessment and target therefore their instrument towards a well-defined category of eligible companies.

110. Tax incentives to corporate investors may take the form of income tax reliefs and/or tax reliefs on capital gain and dividends, including tax credits and deferrals. In previous decisions, the Commission has generally considered compatible income tax reliefs that are designed in such a way so as to contain specific limits as to the maximum percentage of the invested amount that the investor can claim for the purposes of the tax relief, as well as a maximum tax break amount which can be deducted from the investor's tax liabilities. Moreover, capital gains tax liability on disposal of existing shares can be deferred if reinvested in qualifying investments within a certain period, while losses arising on disposal of such shares may be deducted from profits accruing from other shares subject to the same tax.

111. In general, the Commission considers that such types of fiscal measures are appropriate and therefore have an incentive effect if the Member State can produce evidence demonstrating that the selection of the eligible undertakings is based on a well-structured set of investment requirements, made public through appropriate publicity, setting out the characteristics of the eligible undertakings which are subject to a proven market failure.

112. Without prejudice to the possibility of prolonging a measure, fiscal schemes must be limited to ten years. If, after ten years, the scheme is prolonged, the Member State must carry out a new *ex-ante* assessment together with the evaluation of its effectiveness in the period of its implementation.

113. In its analysis, the Commission will take account of the specific characteristics of the relevant national fiscal system; the objectives of the Action Plan to strengthen the fight against tax fraud and evasion[37]; and the two Commission Recommendations on aggressive tax planning and regarding measures intended to encourage third countries to apply minimum standards of good governance in tax

[37] An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final of 6.12.2012.

matters[38]. It must also be ensured that the rules on tax information exchange between tax administrations to prevent tax fraud and evasion, duly apply.

114. The fiscal advantage must be open to all investors fulfilling the required criteria, without discrimination as to their place of establishment and provided that the country concerned complies with the minimum standards on good governance in tax matters. Member States should therefore ensure an adequate publicity regarding the scope and the technical parameters of the measure. These should include the necessary ceilings and caps defining the maximum advantage that each individual investor may draw from the measure, as well as the maximum investment amount which can be made in individual eligible SMEs.

3.4.4. Conditions for measures supporting alternative trading platforms

115. Support for the operators of alternative trading platforms may be justified if it addresses the market failure affecting access to finance by the eligible undertakings. In order to allow a proper analysis of the incentive effect, the type of costs covered by State aid must be identified in advance to ensure that they could not fully be recouped in the short term given the scope of activities of the platform and the eligible undertakings targeted by the platform.

116. The operator of the platform must provide a business plan demonstrating that the aided platform can become self-sustainable in less than [10] years. Moreover, plausible counterfactual scenarios must be provided in the notification, comparing the situations with which the tradable undertakings would be confronted absent the aid and with aid, in terms of access to the necessary finance.

3.5. Incentive effect of the aid

117. State aid can only be found compatible with the Treaty if it has an incentive effect by changing the behaviour of the aid beneficiary in such a way that it undertakes activities which it would not carry out without the aid or would carry out in a more restrictive manner because of the market failure. At the level of the eligible undertakings, an incentive effect occurs when the final beneficiary can raise finance that would not be available otherwise in terms of form, amount or timing.

118. The risk finance measure must incentivise market investors to provide funding to potentially viable eligible undertakings above the current levels and/or to assume extra risk. An incentive effect is considered to be present if the risk finance measure mobilises investment from market sources so that the total financing provided to the eligible undertakings exceeds the budget of the measure. Hence, a key element in selecting the financial intermediaries should be their ability to mobilise additional private investment.

119. In assessing whether there is an incentive effect, there is a close connection with the assessment of the market failure discussed in Section 3.3. Further, the ability of the measure to achieve the leverage effect ultimately depends on the design of the measure as regards the balance of risks and rewards between public and private finance-providers, which is also closely related to the question whether the aid measure is appropriate. Therefore, once the market failure has been properly

[38] Commission Recommendation of 6.12.2012 on aggressive tax planning, C(2012) 8806 final; and Commission Recommendation of 6.12.2012 regarding measures intended to encourage third countries to apply minimum standards of good governance, C(2012) 8805 final.

identified and the measure has an appropriate design, it can be assumed that an incentive effect is present.

3.6. Proportionality of the aid (aid limited to the minimum)

120. State aid must be proportionate in relation to the market failure being addressed to achieve the policy objectives. It must be designed in a cost-efficient manner, in line with the principles of sound financial management. For an aid measure to be considered proportional, aid must be limited to the strict minimum necessary to attract funding from the market to close the identified funding gap, without generating undue advantages.

121. As a general rule, at the level of the final beneficiaries, risk finance aid is considered to be proportionate if the total amount of syndicated funding (public and private) provided under the measure is limited to the size of the funding gap identified in the *ex-ante* assessment. At the level of the investors, aid must be limited to the minimum necessary to attract private capital in order to achieve the minimum leverage effect and bridge the funding gap.

122. More specifically, the Commission considers that the measure is proportionate if all the conditions set out in paragraphs 123 to 137 are met.

3.6.1. Conditions for financial instruments

(a) Limits on risk-return sharing between public and private investors

123. The measure must ensure a balance between preferential conditions offered by a financial instrument to maximise the leverage effect and address the identified market failure as well as the need for the instrument to generate sufficient financial returns to remain operationally viable.

124. The Commission considers that where any asymmetric risk-adjusted returns or risk-return sharing is established through an open, transparent, and non-discriminatory call to select private investors, it is considered to be proportionate and to reflect a fair rate of return (FRR). The Commission considers that a properly conducted selection process is always the preferred way of establishing the FRR.

125. Where private investors are not selected through such a call, to avoid over-compensation of investors or financial intermediaries, as appropriate, the FRR must be established by an independent expert on the basis of analysis of market benchmarks and market risk using the discounted cash flow valuation methodology. On that basis, the independent expert must calculate a minimum level of FRR and add to that the appropriate margin to reflect the risks.

126. In such a case, there must be appropriate rules in place to appoint the independent expert who will establish the FRR. As a minimum, the expert must be licensed to provide such advice, be registered with the relevant professional associations, comply with deontological and professional rules issued by those associations, be independent and be liable for the accuracy of its delivered expertise. In principle, independent experts are to be selected via an open, transparent and non-discriminatory selection procedure. The same independent expert may not be used twice within a period of [5] years.

127. In light of the above, the design of the measure may contain various asymmetric profit-sharing or asymmetrically timed public and private investments, as long as the expected risk-adjusted returns for the private investors are limited to the FRR.

(b) <u>Remuneration of financial intermediaries, managers and entrusted entities</u>

128. As a general principle, the Commission considers that economic alignment of interests between the Member State and the financial intermediaries, their managers or entrusted entities, as appropriate, can minimise the aid. The interests at issue must be aligned both in terms of achievement of the specific policy targets and in terms of financial performance for the public instrument.

129. The remuneration of the financial intermediary or its manager, as appropriate, must contain a significant performance-based component, rewarding its financial performance and the attainment of the specific policy targets set in advance. The level of performance-based fees should be justified based on the practice in the target market segment and the investment strategy. The managers must be remunerated not only for successful placement (disbursement) and the amount of private capital raised, but also for successful return on investments, such as income receipts and capital receipts above a certain minimum rate of return or hurdle rate.

130. The total management fees must not exceed operational and management costs necessary for the execution of the financial instrument concerned, covering costs in a sustainable way in line with market practice and without distorting the alignment of interests. The fees may not include investment costs.

131. Financial intermediaries, their managers, or entrusted entities, as appropriate, must be selected through an open, transparent and non-discriminatory call. The overall fee structure of the financial intermediary, its managers, or the entrusted entity can then be evaluated as part of the scoring of that selection process and the maximum remuneration can be established as a result of such selection.

132. In certain justified cases, the selection of the financial intermediary, its manager, or the entrusted entity may be done without an open call, and they may be designated via an appropriate procedure instead. This is notably the case of the EIB, the EIF or entrusted entities. Such a designation may be justified where no suitable proposals have been submitted following a call to potential entities. In addition, a negotiation procedure could be justified where a risk finance measure with specific characteristics requires a particular type of entity with specific technical competence and high degree of specialisation.

133. In the absence of an open selection procedure, the total management costs and fees of the financial intermediary or its managers, or the entrusted entity must be capped. For financial instruments deploying equity investments, the total remuneration of the fund manager should in principle not exceed [3]% of the capital to be contributed to the fund.

3.6.2. *Conditions for fiscal instruments*

134. The Commission considers that those tax reliefs which do not fulfil all the conditions of the General Block Exemption Regulation must comply with the conditions set out in paragraphs 135 to 137 in order to be considered proportionate:

135. Total investment for each beneficiary undertaking may not exceed EUR [10] million in total.

136. In the case of income tax relief, investors providing finance to eligible undertakings may receive relief of up to [30%] of the amount invested in qualifying investments, provided the maximum of the investor's pre-fiscal scheme income tax liability is not exceed. Losses arising on a disposal of the shares may be set against income tax. In the case of tax-relief on dividends, any dividend received in respect of

qualifying shares may be fully exempt from income tax. Similarly, in the case of capital gain tax relief, any profit on the sale of qualifying shares can be fully exempt from capital gain tax. Capital gains tax liability on disposal of existing qualifying shares can be deferred if reinvested in qualifying shares within [1] year.

137. Independent of the type of tax relief, eligible shares must be newly issued full-risk ordinary shares in final beneficiaries defined in the *ex-ante* assessment and they must be held for at least [3-5] years. The relief cannot be available to investors who are not independent from the company invested in.

3.7. Avoidance of undue negative effects on competition and trade

138. State aid must be designed in a way that limits competition distortions and keeps the internal market open and competitive. This, in practice, leads to the exclusion of certain measures and identification of cases where the negative effects are likely to outweigh any positive effects. In other cases, the negative effects have to be balanced against the overall positive effects of the measure. In the case of risk finance measures, the potential negative effects have to be assessed at each level where aid may be present: the investors, the investment intermediaries and their managers, and the final beneficiaries.

139. To enable the Commission to assess the likely negative effects, the Member State may submit any study at its disposal, as well as *ex-post* evaluations carried out for similar schemes, in terms of eligible undertakings, similar funding structures or design parameters and target area.

140. First, at the level of the market for the provision of risk finance, State aid may result in crowding out private investment. This might reduce the incentives for private investors to provide funding to eligible undertakings and encourage them to wait until the State provides aid for such investments. This risk becomes more relevant, the higher the amount of the total financing into the final beneficiaries, the larger the size of those beneficiary undertakings and the more advanced their development stage, as private financing becomes progressively available in those circumstances. Moreover, State aid should not replace the normal business risk of investments that the investors would have undertaken even in the absence of State aid. However, to the extent that the market failure has been properly defined, it is less likely that the risk finance measure will result in such crowding out.

141. Second, at the level of financial intermediaries, aid may have distortive effects in terms of increasing or maintaining an intermediary's market power, for example in respect of serving the market in a particular region. Even where aid does not strengthen substantial market power directly, it may do so indirectly, by discouraging the expansion of existing competitors, inducing their exit or discouraging the entry of new competitors.

142. In particular, where a Member State appoints a public financial intermediary without an open, transparent and non-discriminatory call, the Commission will pay particular attention to the market power held by the selected intermediary on the relevant market and the potential negative effects on competition, in particular the crowding out effects on private financial intermediaries.

143. Risk finance measures must be targeted at growth oriented undertakings which, though potentially viable and with growth perspectives, are unable to attract adequate level of financing from private resources. Therefore, a measure which provides for the setting up of a public fund whose business plan does not

demonstrate sufficiently the viability of the targeted eligible undertakings, and under which, consequently, risk finance aid is more likely to function as a grant, is unlikely to meet the balancing test.

144. In order to avoid the risk of maintaining inefficient market structures, investment funds of a small scale, a limited regional focus and without adequate governance arrangements, will be analysed with respect to their efficiency. Regional risk finance schemes may not have sufficient scale and scope due to a lack of diversification, which could reduce their efficiency and result in the granting of aid to less viable companies due to the lack of sufficient number of eligible undertakings as investment targets. Such investments could distort competition and provide undue advantages to certain undertakings.

145. Third, at the level of the final beneficiaries, the Commission will assess whether the measure has distortive effects on the product markets where those undertakings compete. For instance, the measure may distort competition if it targets companies in underperforming sectors. A substantial capacity expansion induced by State aid in an underperforming market might, in particular, unduly distort competition, as the creation or maintenance of overcapacity could lead to a squeeze on profit margins, a reduction of competitors' investments or even their exit from the market. It may also prevent companies from entering the market. This results in inefficient market structures which are also harmful to consumers in the long run. Where the market in the targeted sectors is growing, there is normally less reason to be concerned that the aid will negatively affect dynamic incentives or will unduly impede exit or entry.

146. State aid may prevent the market mechanisms from delivering efficient outcomes by rewarding the most efficient producers and putting pressure on the least efficient to improve, restructure or exit the market. Where inefficient firms receive aid, it may prevent other undertakings from entering or expanding in the market and it may weaken incentives for competitors to innovate. To the extent that risk finance aid measures are designed in such a way that only the more viable and promising undertakings are selected, this risk would appear, however, fairly limited.

147. The Commission will also assess any potential negative delocalisation effects. In this regard, the Commission will analyse whether regional funds are likely to incentivise delocalisation within the internal market. Where the financial intermediary's activities are focused on a non-assisted region bordering assisted regions, or a region with higher or the same regional aid intensity as the target region, the risk of such distortion is more pronounced. A regional risk finance measure focussing only on certain sectors might also have negative delocalisation effects.

148. Where the measure has negative effects, the Member State must identify the means to minimise such distortions. For instance, the Member State may demonstrate that the negative effects will be limited to the minimum, taking into account, for example, the size of the overall investment amount, the expected beneficiaries and the characteristics of the targeted sectors. In balancing positive and negative effects, the Commission will also take into account the magnitude of the positive effects.

149. The Commission will only apply the principles set out in these Guidelines to risk finance schemes. They will not be applied in respect of ad hoc measures providing risk finance aid to individual undertakings.

150. It is important to recall that risk finance aid measures always involve financial intermediaries, except for fiscal incentives applicable to direct investments in

eligible undertakings. Therefore, a measure whereby the Member State or a public entity makes direct investments in companies without the involvement of financial intermediaries cannot be declared compatible with the internal market under the risk finance State aid rules.

151. In light of their more established track record and built-up collateral, the Commission does not consider that there is a general market failure related to access to finance by large undertakings. As pointed out in Section 4.2.1(a), small mid-caps that are no longer covered by the definition of SME as a result of the successful implementation of their growth plans may still face the same or similar financing constraints as other young SMEs. As mentioned in section 4.2.1(b) above, innovative mid-caps that carry out R&D and innovation projects may also face financing constraints when they try to commercialize their R&D results. Therefore, in such a case, it may be necessary to allow for the provision of risk finance aid.

152. Risk finance aid may not be awarded to companies listed on the official list of a stock exchange or a regulated market, since the fact that they are listed demonstrates their ability to attract private financing. Furthermore, in most cases, companies listed on a stock exchange are usually large undertakings which are outside the scope of these Guidelines.

153. Risk finance aid measures in the total absence of private investors will not be declared compatible. In such cases, the Member State must consider alternative policy options which may be more appropriate to achieve the same objectives and results, such as regional investment aid or start-up aid.

154. Risk finance aid measures where no appreciable risk is undertaken by the private investors, and/or where the benefits flow entirely to the private investors will not be declared compatible. Sharing the risks and rewards is a necessary condition to limit the financial exposure of, and a fair return to, the State. It is also necessary to ensure that investment decisions are taken in a profit-oriented manner and that State aid does not substitute the normal business risk.

155. Without prejudice to provide risk finance aid in support of replacement capital as defined by Article 19(6) of the General Block Exemption Regulation, risk finance aid may not be used to support buyouts.

156. Moreover, risk finance aid will not be considered to be compatible with the internal market if awarded to:

(a) undertakings in difficulty, as defined by the Community guidelines on State aid for rescuing and restructuring firms in difficulty[39], as amended or replaced;

(b) undertakings that have received illegal State aid which has not been fully recovered;

(c) undertakings in the coal, steel and synthetic fibres sectors[40].

157. These Guidelines do not apply to aid to export-related activities, namely aid directly linked to the quantities exported, the establishment and operation of a distribution network or to other current expenditure linked to the export activity, as well as aid contingent upon the use of domestic in preference to imported goods.

[39] OJ C 244, 1.10.2004, p.2, as prolonged by OJ C 156, 9.7.2009, p. 3 and OJ C 296, 2.10.2012, p. 3.

[40] As defined in Annex I to the General Block Exemption Regulation.

158. The Commission will not apply the principles set out in these Guidelines to measures which entail by themselves, by the conditions attached to them or by their financing method, a non-severable violation of Union law[41], in particular:

(a) measures where the aid is subject to the obligation to use nationally produced goods or national services;

(b) measures which violate Article 49 of the Treaty on the freedom of establishment; where the aid is subject to the obligation for financial intermediaries, their managers or final beneficiaries to have or move their headquarters in the target area (region or Member State). This is without prejudice to the requirement for financial intermediaries or their managers to have the necessary licence to carry out investment and management activities in the Member State concerned or for final beneficiaries to have an establishment and carry out economic activities in the target area;

(c) measures which violate Article 63 of the Treaty on the free movement of capital.

159. According to Article 19(7) the General Block Exemption Regulation, maximum 30% of a fund's aggregate capital contributions and uncalled committed capital may be used for purposes other than the provision of risk finance to eligible undertakings. The risk finance measures cannot be declared compatible if that ceiling is surpassed.

3.8. Transparency

160. Member States must publish on a central website, or on a single website retrieving information from several websites (for example regional websites), at least the following information on notified risk finance aid measures: the text of the notified aid scheme and its implementing provisions, the granting authority, the total amount of the Member State's participation in the measure, the names of the selected intermediaries, the methodology for calculating the remuneration of the managers as well as the management costs and fees effectively paid, the names of individual beneficiaries as well as the volumes and forms of finance provided to each beneficiary. Such information must be published after the granting decision to grant aid has been taken, must be kept for at least 10 years and must be available for the general public without restrictions.[42] The transparency rules shall not apply to aid beneficiaries which are natural persons.

3.9. Cumulation

161. Risk finance aid may be cumulated with any other State aid measure with identifiable eligible costs.

162. Risk finance aid approved in accordance with these Guidelines shall not be cumulated with any *de minimis* aid irrespective of its form, or any risk finance aid granted in accordance with Articles 19, 20 or 21 of the General Block Exemption Regulation or risk capital aid granted under the General Block Exemption Regulation of 2008.

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[41] See for instance Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 78 and Case C-333/07 *Régie Networks v Rhone Alpes Bourgogne* [2008] ECR I-10807, paragraphs 94-116.

[42] This information should be regularly updated (for example every six months) and should be available in non-proprietary formats.

163. Risk finance aid approved in accordance with these Guidelines may be cumulated with other risk finance aid granted under another risk finance measure approved under these Guidelines, or a risk capital measure approved under the Risk Capital Guidelines, up to the overall investment amount per final beneficiary approved under any of the respective measures.

164. Union funding centrally managed by the Commission that is not directly or indirectly under the control of the Member States does not constitute State aid and therefore shall not be taken into account for the purposes of cumulation.

4. EVALUATION

165. To further ensure that distortions of competition and trade are limited, the Commission may require that certain schemes be subject to a limited duration (see paragraph 39) and to an evaluation as set out in paragraphs 167 to 167. Such an evaluation must address the following issues:

(a) whether the assumptions and conditions underlying the *ex ante* assessment and which led to the compatibility decision have been achieved;

(b) the effectiveness of the aid measure in light of its pre-defined general and specific objectives and indicators; and

(c) the impact of the risk finance measure on markets and competition.

166. An evaluation may be required for the following aid schemes:

(a) large schemes;

(b) schemes with a regional focus;

(c) schemes with a narrow sectoral focus;

(d) schemes which are modified, where the modification impacts on the eligibility criteria, the amount of investment or the financial design parameters; the evaluation shall be submitted as part of the notification;

(e) schemes containing novel characteristics in particular with respect to the channels of funding;

(f) schemes where the Commission so requests in the decision approving the measure, in light of its potential negative effects.

167. The evaluation must be carried out by an expert independent from the state aid granting authority on the basis of a common methodology[43] and must be made public. The evaluation must be submitted to the Commission in sufficient time to allow for the assessment of the possible prolongation of the aid scheme and in any case upon expiry of the scheme. The precise scope and methodology of the evaluation that is to be carried out will be defined in the decision approving the aid scheme. Any subsequent aid measure with a similar objective must take into account the results of that evaluation.

[43] Such a common methodology may be provided by the Commission.

5. FINAL PROVISIONS

5.1. Entry into force and applicability of the rules

168. These Guidelines enter into force on the day of their publication in the *Official Journal of the European Union* and on that day replace the Risk Capital Guidelines[44].

169. The Commission will apply the principles set out in these Guidelines for the compatibility assessment of all risk finance aid to be awarded after its entry into force. Risk capital aid unlawfully awarded or to be awarded before the entry into force of these Guidelines will be assessed in accordance with the rules in force at the date on which the aid was awarded. The Commission will apply the principles set out in these Guidelines in respect of risk finance aid until 31 December 2020.

170. For the purpose of the applicability of the State aid rules, in the case of financial risk finance measures, the date of award of the aid is the date of the commitment of the State resources to the financial intermediary - and not the actual investment in the final beneficiaries, - which is the date of signature of the funding agreement with the financial intermediary. Therefore, a financial intermediary that has been set up before the entry into force of these Guidelines but which receives additional commitment of State resources after their entry into force, must invest according to the rules of these Guidelines.

171. For fiscal risk finance measures, the date of award of the aid to the investors or the financial intermediaries or their managers, where applicable, is the application of the tax relief on the eligible investments as defined by the risk finance measure. At the level of the final beneficiaries, the date of award of the aid is the date of the risk finance investment made into the undertaking.

5.2. Appropriate measures

172. The Commission extends the Risk Capital Guidelines until 30 June 2014.

173. The Commission considers that the implementation of these Guidelines will lead to substantial changes in the State aid rules applicable to risk capital aid in the Union. Furthermore, in light of the changed economic and social conditions, it appears necessary to review the continuing justification for and effectiveness of all risk capital aid schemes. For these reasons, the Commission proposes the following appropriate measures to Member States pursuant to Article 108(1) of the Treaty:

    (a) Member States should amend, where necessary, their existing risk capital aid schemes approved by the Commission, in order to bring them in line with these Guidelines within six months after their entry into force;

    (b) Member States are invited to give their explicit unconditional agreement to these proposed appropriate measures within two months from the date of entry into force of these Guidelines. In the absence of any reply, the Commission will assume that the Member State in question does not agree with the proposed measures.

174. In line with section 5.1 above, and in order to preserve the interests of private investors, the proposal for appropriate measures does not apply to risk capital

[44] OJ C 194/2, 18.8.2006.

measures with fund-type funding structures where the financial intermediaries were set up and the commitment of State resources was made before the entry into force of these Guidelines but which continue to operate thereafter, without receiving any additional commitment of State resources. Those financial intermediaries may continue to invest according to their original investment conditions. Therefore, Member States must apply appropriate measure in respect of schemes which provide for fund-type funding structures with financial intermediaries set up before the entry into force of these Guidelines but which receive commitment of additional State resources after their entry into force.

5.3. Reporting and monitoring

175. In accordance with Council Regulation (EC) No 659/1999[45] and Commission Regulation (EC) No 794/2004[46], Member States must submit annual reports to the Commission.

176. Member States must maintain detailed records regarding all aid measures. Such records must contain all information necessary to establish that the conditions regarding eligible costs and maximum aid intensities have been fulfilled. These records must be maintained for 10 years from the date of award of the aid and must be provided to the Commission upon request.

5.4. Revision

177. The Commission may decide to review or amend these Guidelines at any time if this should be necessary for reasons associated with competition policy or in order to take account of other Union policies and international commitments, developments in the markets, or for any other justified reason.

[45] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1.)

[46] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation (EC) No 659/1999 (OJ L 140, 30.4.2004, p. 1.)