



The Market Economy Operator Test for Risk Finance Measures:

Practical guidance for Member States

Document version: 26 January 2024

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1. Introduction

- (1) The Commission has historically acknowledged the importance to the economies of Member States of the risk finance market and the need to improve access to risk finance for start-ups, small and medium-sized enterprises (SMEs), small middle-capitalisation firms (mid-caps) and innovative mid-caps. In that vein, the Commission has defined, through a set of guidelines,² the criteria for the assessment of compatibility of State aid in the field of risk finance.
- (2) Member States must notify to the Commission, pursuant to Article 108(3) TFEU, risk finance measures which: (i) constitute State aid within the meaning of Article 107(1) TFEU, and (ii) do not

¹ Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ C 262, 19.7.2016, p. 1). The NoA allows the removal of the section entitled 'The market economy operator test' of the 2014 Risk Finance Guidelines (the NoA was adopted two years after the adoption of those Guidelines). The 2021 Risk Finance Guidelines (see footnote 2) therefore do not contain that section.

² The original guidelines were adopted in 2001 (Information from the Commission, State aid and risk capital, OJ C 235, 21.8.2001, p. 3) and were subsequently replaced in 2006 (Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises, OJ C 194, 18.8.2006, p. 2), in 2014 (Communication from the Commission, Guidelines on State aid to promote risk finance investments, OJ C 19, 22.1.2014, p. 4) and in 2021 (Communication from the Commission, Guidelines on State aid to promote risk finance investments, OJ C 508, 16.12.2021, p. 1).

satisfy all the conditions for risk finance aid as laid down in the General Block Exemption Regulation (GBER).³

- (3) However, Member States might also choose to design risk finance measures in such a way that the measures do not entail State aid under Article 107(1) TFEU, for instance because they are in line with normal market conditions, or because they fulfil the conditions of the applicable de minimis Regulation.⁴ Such measures do not need to be notified to the Commission.
- (4) In the NoA, the Commission clarifies its understanding of how the notion of State aid under Article 107(1) TFEU should be interpreted, including on when a public support measure does not constitute State aid due to being carried out under normal market conditions (see section 4 of the NoA). The purpose of this document is to provide Member States with practical guidance on when that latter situation might be present in the future in the specific context of measures to support risk finance. For the avoidance of doubt, this guidance does not apply to Union resources which do not constitute State resources.

2. Market economy operator test in the area of risk finance

- (5) In general, a public intervention might not be considered to constitute State aid if one of the constituent elements of the notion of State aid is missing, for example the granting of an economic advantage that an undertaking could not have obtained in the absence of State intervention. The CJEU has developed the market economy operator (MEO) test: the behaviour of public bodies (including public undertakings) should be compared to that of private operators or investors of a comparable size acting in similar circumstances under normal market conditions, to determine whether the economic transactions carried out by such bodies grant an advantage to their counterparts. The NoA provides detailed guidance on the MEO test (see its section 4.2).
- (6) Risk finance measures often involve complex constructions usually consisting of three levels and creating incentives for one set of economic operators (investors, level 1) to provide risk finance to another set of operators (target undertakings in which investments are made, level 2). Depending on the design of the measure, and even if the intention of the public authorities might be only to provide benefits to the latter group, undertakings at either or both levels might benefit from State aid. Moreover, risk finance measures usually involve one or more financial intermediaries (level 3), which might have a status separate from that of the investors and the target undertakings,⁵ and might have a manager or a management company, for example in a holding fund (also referred to as 'fund of funds') structure. In such cases, it is also necessary to consider whether the financial intermediary and/or its manager can be considered to benefit from State aid.
- (7) For risk finance measures, compliance with the MEO test can be established where public authorities co-invest alongside private investors on *pari passu* terms in order to create an

³ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1), section 3 entitled 'Aid for access to finance for SMEs'.

⁴ Commission Regulation (EU) No 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 TFEU to de minimis aid (OJ L 2023/2831, 15.12.2023, p. 1).

⁵ Financial intermediaries might invest own resources and thus be also investors at the same time.

incentive for those private investors (level 1) to invest in target undertakings (level 2), as explained in sections 3 and 4. Alternatively, an appropriate selection procedure can demonstrate compliance with the MEO test for the transaction parties i.e., the investors (level 1) and the financial intermediaries and/or their managers (level 3), as explained in section 5.

3. Private investors that are relevant for the MEO test

- (8) Private investors include, in particular, credit institutions investing at own risk and from own resources, private endowments and foundations, family offices and business angels, corporate investors, insurance undertakings, pension funds, academic institutions, as well as private individuals or natural persons.⁶
- (9) The European Investment Bank (EIB), the European Investment Fund (EIF), an international financial institution in which a Member State is a shareholder, or a legal entity that carries out financial activities on a professional basis⁷ which has been given a mandate by a Member State or a Member State's entity at central, regional or local level to carry out development or promotional activities (national promotional bank or another promotional institution), would not be considered private investors.
- (10) In light of their special institutional setup within the Union and their governance rules, the Commission would accept investments by the EIB and/or the EIF as a *pari passu* reference for the MEO test in accordance with point (15)⁸.

4. *Pari passu* transactions to establish compliance with market conditions

- (11) In general, the Commission would consider an investment to be in line with the MEO test, and thus not to constitute State aid, if it is implemented *pari passu* between public investors and private investors (as defined in section 3). The NoA provides detailed guidance on cases where compliance with market conditions can be directly established in the situation of *pari passu* transactions (see its section 4.2.3.1(i) and the criteria therein).
- (12) First, an intervention might only be considered *pari passu* if the terms and conditions of the transaction are the same for the public bodies and all private investors involved. In the risk finance area, a 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 might also be considered to be in line with normal market conditions, as long as the private investors do not receive any advantage. Where a measure allows private

⁶ However, investments that are imputable to the State would not be considered as relevant examples of a MEO's conduct. For detailed guidance on the criterion of imputability, see section 3.1 of the NoA.

⁷ See the definition of financial institution set out at Article 4(26) of the European Parliament and Council Regulation (EU) No 575/2013 of the of 26 June 2013 on prudential requirements for credit institutions (OJ L 176, 27.6.2013, p. 1).

⁸ *Mutatis mutandis*, this could also apply to other multilateral banks such as the European Bank for Reconstruction and Development and the Nordic Investment Bank.

investors to carry out risk finance investments into an undertaking on terms more favourable than public investors investing in the same undertaking, then those private investors might receive an advantage (*non pari passu* investments).⁹

- (13) Second, an intervention might only be considered *pari passu* if the intervention of the public bodies and private operators is decided and carried out at the same time. Transactions by public and private investors would be considered to be decided and carried out at the same time if the private and public investors co-invest into the target undertakings via the same investment transaction. In the case of investments through public-private financial intermediaries (for example, a public private partnership (PPP)), investments by the public and private investors would be presumed to be decided and carried out at the same time.
- (14) Third, an intervention might only be considered *pari passu* if the participation of private operators has real economic significance and is not merely symbolic or marginal.¹⁰ The Commission has considered and continues to consider a private investment of at least 30% of the overall volume of the investment to have real economic significance in the case of risk finance measures.¹¹
- (15) For the purpose of analysing whether an investment with State resources fulfils the conditions of *pari passu*, Investments by the EIB and/or the EIF referred to in point 10, where they are made at own risk and from own resources, can be a *pari passu* reference if those EIB and/or EIF investments are matched by at least an equal share of genuine private investors investing at the same terms and conditions.¹² Where the investment of genuine private investors represents at least 15% of the overall investment volume, the investment by the EIB and/or the EIF (at own risk and from own resources) can be higher than the genuine private contribution and higher than what is necessary to achieve the 30% threshold referred to in point (14).¹³
- (16) When the structure involves multiple levels (e.g. holding fund), the economic significance of the private participation should be calculated either
 - a. at the holding fund level i.e., on the entire financing amount. Public funding in a parallel fund or previous commitments of public funding should be counted towards the total financing amount; or

⁹ Such an advantage might take different forms, such as preferential returns (upside-incentive) or reduced exposure to losses in the event of underperformance of the underlying transaction compared to the public investors (downside protection).

¹⁰ See point 87(c) and footnote 142 of the NoA.

¹¹ See paragraph 34 of the 2014 Risk Finance Guidelines.

¹² For example, the co-investment by the EIB and/or the EIF (at own risk and from own resources) and by the private investor(s) represents 30% of the overall volume of the investment, and the amount of the private investment represents at least half of such co-investment with the EIB and/or the EIF *i.e.*, at least 15% of the overall investment volume.

¹³ For example, a co-investment by the EIB and/or the EIF and by the genuine private investor(s) represent in total 35% of the overall volume of the investment, where the amount of the genuine private investment represents 15% of the overall investment volume and the EIB/EIF investment represents 20% of that volume. For the avoidance of doubt, point (10) applies only to the investment by the EIB and/or the EIF for the purpose of reaching the threshold of 30% referred to in points (14) and (15).

- b. within the holding fund, at each specific fund level or at project (final recipient/beneficiary) level. If not all specific funds or projects achieve sufficiently significant private participation, the Member State can decide to implement in parallel an aid scheme within which the Member State can provide financing to specific funds or projects that do not achieve such market conformity.
- (17) Fourth, an intervention might only be considered *pari passu* if the starting position of the public bodies and the private operators involved is comparable with regard to the investment, taking into account, for instance, their prior economic exposure *vis-à-vis* the undertaking concerned, the possible synergies which can be achieved (for example, a supply relationship between the investor and the undertaking concerned), the extent to which the different investors bear similar transaction costs, or any other circumstance specific to the public body or private operator which could distort the comparison (for example, when the relationship between the public body and the private operator is at arm's length, which means that the conditions of the investment between them do not differ from those which would be stipulated between independent undertakings).
- (18) When any of the *pari passu* criteria above is not met, the risk finance measure might constitute State aid if the other constituent elements of the notion of aid are met.

5. Selection procedure to exclude aid to transaction parties

- (19) The NoA provides detailed guidance for cases where compliance with market conditions can be directly established in the situation of a “competitive, transparent, non-discriminatory and unconditional tender procedure” (see its section 4.2.3.1(ii)).¹⁴
- (20) Where (i) the private investors, (ii) the financial intermediary, or (iii) the manager or the management company of the financial intermediary (manager) are chosen through a competitive, transparent and non-discriminatory selection procedure or tender, on a deal-by-deal basis, it would be considered that they do not receive State aid.¹⁵ Any specific conditions attached to the tender should be closely and objectively related to the subject matter and to the specific economic objective of the contract i.e., the selection of the financial intermediary or its manager.¹⁶
- (21) Where the financial intermediary or its manager are public entities and were not chosen through a selection procedure satisfying the above-mentioned criteria, the intermediary or its manager would be considered as not receiving State aid if:
- a. their management fee is capped and their overall remuneration reflects normal market conditions, for example when it is linked to performance; and
 - b. they are managed commercially i.e., take investment decisions in a profit-oriented manner at arm's-length from the State.

¹⁴ See paragraphs 84 and 89-96 of the NoA.

¹⁵ See paragraphs 84 and 90 of the NoA.

¹⁶ See paragraph 96 of the NoA.

- (22) Concerning private investors (for example, in a fund for which the financial intermediary acts), compliance with the MEO test can be reached either in the situation of *pari passu* transactions (see section 4) or when the private investors are selected through a competitive, transparent and non-discriminatory selection procedure or tender, on a deal-by-deal basis: appropriate mechanisms must be in place to exclude any possible interference by the State in the day-to-day management of the fund.

6. Aid to financial intermediaries

- (23) In general, the Commission considers that a financial intermediary¹⁷ is a vehicle for the transfer of public support to investors and/or undertakings in which the investment is made, rather than a beneficiary of aid in its own right, irrespective of whether the financial intermediary has legal personality or is merely a bundle of assets managed by an independent management company.
- (24) However, measures involving direct transfers to, or co-investment by, a financial intermediary might constitute aid to that intermediary unless such transfers or co-investments are made on terms that would be acceptable to a normal economic operator in a market economy.
- (25) The fact that financial intermediaries might increase their assets and their managers might achieve a larger turnover through their commissions is considered to constitute only a secondary economic effect of the risk finance measure and not aid to the financial intermediaries and/or their managers.
- (26) However, if the risk finance measure is designed in such a way as to channel its secondary effects towards individual financial intermediaries identified in advance, those financial intermediaries might be considered to receive indirect aid (see section 5 on selection procedure).
- (27) Where the risk finance measure is managed by an entrusted entity¹⁸, without that entity co-investing with the Member State, the entrusted entity is considered as a vehicle to channel the financing and not a beneficiary of aid, as long as it is not overcompensated.
- (28) However, where the entrusted entity provides funding to the measure or co-invests with the Member State in a manner similar to financial intermediaries, the Commission will assess whether the entrusted entity receives State aid (see section 5 on selection procedure).

7. Aid to the undertakings in which the investment is made

- (29) Where the investment is in line with the MEO test (see above the sections on *pari passu* and selection procedure) at the other levels (i.e., investors, financial intermediary and/or the manager), the Commission considers that the target undertakings are not beneficiaries of State aid, because the investments they receive are considered to be made on market terms¹⁹.

¹⁷ Article 2 of the GBER provides a definition of financial intermediary.

¹⁸ Article 2 of the GBER provides a definition of entrusted entity.

¹⁹ For the avoidance of doubt, when a selection procedure (see section 5) is used to demonstrate compliance with the MEO test at the level of private co-investors, aid can still be present in the risk finance measure, and thus the *pari passu* conditions (see section 4) have to be met at the level of the target undertakings.

- (30) Where aid is present at the level of the investor, the financial intermediary or its manager, the Commission would generally consider that it is at least partly passed on to the target undertaking. This is the case even where investment decisions are taken by the manager of the financial intermediary with a purely commercial logic.
- (31) In conclusion, based on sections 4 to 7 of this guidance, the Commission, if all of the constituent elements of the notion of aid are present at one or more levels (i.e., investors, financial intermediary and/or the manager; even if not at all levels), would still consider that the target undertaking receives aid (if the constituent elements of the notion of aid are present).

8. Loans or guarantees

- (32) The NoA provides detailed guidance on the specific considerations to establish whether the terms of loans and guarantees are in line with market terms (see its section 4.2.3.4), which in turn refers to the conditions set out – for loans – in the Communication on the reference rate²⁰ and – for guarantees – in the Notice on guarantees.²¹ The Communication on the reference rate sets out a proxy that can be used in the absence of specific market information on a given debt transaction or on comparable transactions.²² By contrast, where specific market information is available, that information should be used to assess the market-conformity of the loan.
- (33) Where a loan or a guarantee provided to a target undertaking or fund under a risk finance measure fulfils such conditions, that undertakings or fund would not be considered to receive State aid.

²⁰ 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).

²¹ 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).

²² See points 111 and 113 of the NoA.