

Revision of the Risk Finance Guidelines

Explanatory note

The proposed revisions to the Risk Finance Guidelines¹ are directly linked to the results of the Fitness Check, a comprehensive policy evaluation assessing whether the State aid rules, which were part of the State Aid Modernisation, are “fit for purpose”. The results of the Fitness Check are set out in the Staff Working Document on the Fitness Check, published on 30 October 2020.²

The results of the fitness check evaluation confirmed that, overall, the State aid rules for risk finance implemented in 2014 worked well and contributed to addressing the market failure preventing SMEs in the EU from attracting the financing required for them to grow and succeed, and this without unduly distorting competition.

Nevertheless, the fitness check evaluation has also shown the need for further simplifying and clarifying the application of the rules to facilitate the deployment of State aid schemes in support of risk finance. With this aim, the following categories of targeted amendments of the Risk Finance Guidelines are envisaged:

- i. reordering the existing provisions to increase readability and ease of application, including the consolidation of existing requirements for the *ex ante* assessment, which are currently dispersed among different parts of the Guidelines (**Category 1**);
- ii. further clarifying the specific content and level of evidence needed to demonstrate a specific market failure or another relevant obstacle in access to finance in line with existing case practice (**Category 2**);
- iii. focusing the Guidelines on compatibility of State aid to avoid overlaps with the Notice on the Notion of Aid (**Category 3**);
- iv. streamlining existing formulations and aligning definitions to increase consistency with the GBER without changing the substance of the rules (**Category 4**).

The provisions of the Risk Finance Guidelines are complemented by the General Block Exemption Regulation (“GBER”)³, which lays down *ex ante* compatibility conditions on the basis of which Member States can implement State aid measures without prior notification to the Commission. The Commission is carrying out, in parallel to the revision of the Risk Finance Guidelines, a targeted revision of the GBER, which will also include a targeted amendment of the Risk Finance-relevant GBER provisions and which will ensure consistency with the revised Risk Finance Guidelines.

The revised Risk Finance Guidelines contain the following targeted improvements:

Category 1: reordering of provisions to increase readability and ease of application

- a. A new subsection 4.1 was introduced to consolidate all requirements linked to the *ex ante* assessment which in the current Risk Finance Guidelines are dispersed over

¹ Guidelines on State aid to promote risk finance investments, OJ C 19, 22.1.2014, p. 4–34.

² On-line available on: https://ec.europa.eu/competition/state_aid/modernisation/fitness_check_en.html

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, latest amendment: OJ L 215, 7.7.2020, p. 3–6.

several subsections. This not only streamlines the structure of the Risk Finance Guidelines but also provides more clarity to the Member States.

- b. Section 4 of the Risk Finance Guidelines on the compatibility assessment applicable to risk finance aid measures which need to be notified to the Commission has been revised to incorporate the judgment of the Court of Justice of 22 September 2020 in Case C-594/18 P.⁴

Category 2: further clarifying the specific content and level of evidence needed to demonstrate a specific market failure or another relevant obstacle in access to finance in line with existing case practice

- a. The fitness check showed that Member States have difficulties to quantify the funding gap. Therefore, the requirement to quantify the funding gap has been made more proportionate, i.e. it will only remain in place for schemes with the largest amounts of aid for individual beneficiaries. The revised Risk Finance Guidelines would hence have different requirements depending on the situation as follows:
 - For most cases (e.g. small mid-caps, innovative mid-caps, companies receiving the aid more than ten years after registration) an *ex ante* assessment demonstrating a specific market failure (or another relevant obstacle in access to finance) remains required but provided that the investment per company is below the GBER threshold of EUR 15 million, a quantification of the funding gap is no longer required;
 - For risk finance measures that concern financial instruments with private investor participation below the minimum ratios provided for in the GBER, the *ex ante* assessment should furthermore provide a detailed assessment of the level and structure of supply of private funding for the type of eligible undertaking in the relevant geographic area and demonstrate that the identified market failure or the other relevant obstacle cannot be addressed with measures designed according to the requirements set out in the GBER;
 - For risk finance investments exceeding the cap fixed per eligible undertaking in the GBER (i.e. EUR 15 million), the *ex ante* assessment should also quantify the funding gap (i.e. the level of unmet demand for finance from eligible undertakings) due to the identified market failure (or another relevant obstacle).

Overall, this proposal reduces the administrative burden for Member States but keeps the requirement of quantification in place for the schemes providing the largest aid amounts to individual companies. For the other schemes, an *ex ante* assessment demonstrating a market failure (or another relevant obstacle) remains necessary in combination with other safeguards to ensure the aid remains proportional to the market failure (or the other relevant obstacle).

- b. For fiscal instruments, point 149 of the Risk Finance Guidelines so far limited the total investment per beneficiary to the EUR 15 million set out by the GBER. However, for

⁴ Judgment of the Court of Justice of 22 September 2020, Austria v Commission (Hinkley Point C), Case C-594/18 P, EU:C:2020:742.

financial instruments no such constraint applies. Therefore, this point of the Risk Finance Guidelines has been aligned with the rule for financial instruments and hence allows also for fiscal instruments risk finance investments above EUR 15 million if this can be justified on the basis of the *ex ante* assessment.

Category 3: focusing the Guidelines on compatibility of State aid to avoid overlaps with the Notice on the Notion of Aid

In 2016, two years after the entry into force of the 2014 Risk Finance Guidelines, the Commission published, as part of the State Aid Modernisation package, the Notice on the Notion of Aid ("NoA"). In the NoA, the Commission clarified its understanding of how the notion of State aid laid down in the Treaty should be interpreted, including on when a public support measure does not constitute State aid due to being carried out under normal market conditions. The guidance provided in the NoA to that effect allows the removal of Section 2.1 "The market economy operator test" of the revised Risk Finance Guidelines to streamline their content towards the determination of compatibility of aid measures.

Category 4: streamlining existing formulations and aligning definitions to increase consistency with the GBER

- a. The 2014 Risk Finance Guidelines provided an ad hoc definition of 'innovative mid-caps', which would be those mid-caps with research and development (R&D) and innovation costs reaching at least 15 % of their total operating costs in at least one of the three years preceding the first investment under the risk finance State aid measure, or at least 10 % per year of their total operating costs in the three years preceding the first investment under the risk finance State aid measure. The current text proposes to align this definition with the GBER, by defining 'innovative mid-caps' as mid-caps that are at the same time 'innovative enterprises' within the meaning of Article 2(80) of the GBER. As a consequence, more mid-caps can be considered 'innovative mid-caps' and are therefore eligible for risk finance aid under the Risk Finance Guidelines, because the innovative character can be established, as in the GBER, either by an external expert evaluation certifying this feature or when R&D costs reach at least 10% of the total operating costs in at least one year of the three preceding the aid.
- b. In Section 3 on notifiable aid, it is proposed to modify the current point 47(c) so that measures that allow companies to receive risk finance aid more than ten years after registration will be assessed under the Risk Finance Guidelines, while under the current rules the limit is set at more than seven years after their first commercial sale.

This aims to avoid uncertainties regarding the identification of the "first commercial sale" that have been pointed out during the fitness check evaluation. Replacing the "first commercial sale" date by "registration" date as starting date for the period during which enterprises can generally receive risk finance aid will simplify the application of the rules, given that registration is more straightforward to interpret than "first commercial sale". For eligible undertakings that are not subject to registration, the ten-year eligibility period may be considered to start from the moment when the enterprise either starts its economic activity or is liable to tax for its economic activity. Furthermore, the use of the registration date as a baseline is consistent with certain GBER provisions (such as Article 22 regarding start-up aid).

It is proposed to extend the relevant time period from seven to ten years to avoid reducing *de facto* the time period of eligibility, because registration usually takes place before the first commercial sale. In this context, the study conducted in the evaluation points to ten years as the appropriate cut-off for eligibility given that SMEs that are ten years old or younger are more likely to face issues when accessing finance compared to more experienced SMEs.