102TACD2022

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the "Commission") as an appeal against a decision made by the Revenue Commissioners (hereinafter the "Respondent") on 13th June 2017 determining that the Appellant is not a "qualifying company" for the purposes of section 494(4A) of the Taxes Consolidation Act 1997 ("hereinafter the "TCA1997).

2. The total amount of tax at issue is €236,985.00.

Background

3. [redacted] Limited (hereinafter the "Appellant") is a limited company involved in [redacted] [redacted] which was incorporated on 29th July 1998.

4. On 14th March 2017 the Appellant submitted a "Form EII 1" application to the Respondent for relief for investment in corporate trades in respect of 466,329 shares which the Appellant issued on 31st December 2016.

5. By way of letter dated 13 h June 2017 the Respondent refused the Appellant's application on the basis that the Appellant was not considered to be a qualifying company pursuant to section 494(4A) of the TCA1997 (as enacted between 13th October 2015 and 31st December 2018) which provides that a company must comply with paragraphs 5 and 6 of Article 21 of Commission Regulation (CU) No 651/2014 also known as the General Block Exemption Regulation (hereinafter the "GBER").

6. The letter dated 13th June 2017 from the Respondent went on to state that the Appellant had to that date been the beneficiary of €1,867,731.90 in State aid in the form of Employment and Investment Incentive (hereinafter the "EII"), Business Expansion Scheme (hereinafter the "BES") and Seed Capital relief. The letter stated that:

   "*The issue in this case is that the company does not meet the requirements of Article 21 paragraph 6 b of GBER as the business plan did not foresee the need to raise additional risk finance to that already raised. Risk finance investment, within the meaning of Article 21, means State aid that has been approved by the EU as risk finance investment.*"

7. Further communication took place between the Parties and on 6th July 2017 the Respondent wrote to the Appellant stating the following:

   "*The company's business plan (19 June 2001), at page 6, foresaw an investment of IRL£500,000 over a three year period, May 2001 to April 2004 inclusive. This amount is further cited at page 6 of the plan as the amount needed to achieve the three year projections set for the three year period May 2001 to April 2004 inclusive. At page 38 of the business plan the financial requirements are set at IRL£400,000 (rather than IRL£500,000), the Business Expansion Scheme (now EII) being the source of IRL£250,000.*

   [redacted] Limited, to date, has been the beneficiary of €1,8XX,XXX.XX in State-aid in the form of Employment and Investment Incentive (EII), Business Expansion Scheme (BES) and Seed Capital Relief. This level of risk finance far exceeded that which was foreseen in the company's original plan.

   My determination in this case remains unaltered from that given to the company by letter on 13 June 2017 in that the company would not be considered a qualifying company per section 494(4A) Taxes Consolidation Act 1997. Subsection (4A) stated a company must comply with paragraphs 5 and 6 of Article 21 Commission Regulation (EU) No. 651/2014 (GBER). The company does not meet the requirement of Article

21 paragraph 6(b) of GBER as the business plan did not foresee the need to raise additional risk finance to that already raised, Risk finance investment, within the meaning of Article 21, means State aid that has been approved by the EU as risk finance investment."

8. The oral hearing took place remotely before the Commissioner on 30th May 2022. The Appellant's director Mr [redacted] appeared at the oral hearing and the Appellant was represented by a Tax Agent. The Respondent was represented by Counsel. The Commissioner heard submissions on behalf of the Appellant and on behalf of the Respondent.

Legislation and Guidelines

9. The legislation relevant to the within appeal is as follows:

Section 494(4A) TCA1997 (in force from 13th October 2015 – 31st December 2018):

"*(4A) A company that does not meet the requirements of paragraphs 5 and 6 of Article 21 of Commission Regulation (EU) No. 651/2014 of 17 June 2014 shall not be a qualifying company.*"

Paragraph 6 Article 21, EU Commission Regulation No. 651/2014:

"6. The risk finance aid may also cover follow-on investments made in eligible undertakings, including after the 7 year period mentioned in paragraph 5(b), if the following cumulative conditions are fulfilled:

(a) the total amount of risk finance mentioned in paragraph 9 is not exceeded;

(b) the possibility of follow-on investments was foreseen in the original business plan;

(c) the undertaking receiving follow-on investments has not become linked, within the meaning of Article 3(3) of Annex I with another undertaking other than the financial intermediary or the independent private investor providing risk finance under the measure, unless the new entity fulfils the conditions of the SME definition."

Submissions

<u>*Appellant's Submissions*</u>

10. In its written Outline of Arguments the Appellant submitted that the Respondent was wrong to refuse the relief claimed.

11. The Appellant submitted that it believes that the Business Plan meets the requirements of paragraph 6(b) of Article 21 of the GBER.

12. In support of this it was submitted that paragraph 6(b) of the GBER stated the requirement that "*the <u>possibility</u> of follow-on investments was foreseen in the original business plan*." (emphasis added).

13. It was submitted that Article 2 of the GBER contains the following relevant definitions:

> *"(71) 'risk finance investment' means equity and quasi-equity investments, loans including leases, guarantees, or a mix thereof to eligible undertakings for the purposes of making new investments;*
>
> *…*
>
> *(77) 'follow-on investment' means additional risk finance investment in a company subsequent to one or more previous risk finance investment rounds;"*

14. It was argued in written submissions that page 6 of the Business Plan contains specific reference to follow-on investments under the heading "*Financial Performance & Projections*" which, it was submitted, shows the estimated future investment required to meet the 3 year expansion plan of the Appellant.

15. In addition it was submitted that on page 36 reference to same is made under the heading "*Financials*". It was submitted that this shows that the original Business Plan did not envisage only one investment round but rather that it was looking further ahead and foreseeing future follow-on investments in compliance with the relevant definition.

16. It was submitted that the Business Plan quantified the amount that might be required in the future based on then available business information. It was stated that the fact that the extra investment then identified in the Business Plan proved to be low and that a greater level of investment was subsequently required and raised has no bearing on the issue and is not in itself sufficient grounds for the refusal of the relief claimed.

17. The written submissions also submitted that it is not a requirement of paragraph 6(b) of Article 21 of the GBER that the Business Plan foresees any particular quantum of follow-on investments and therefore the Respondent was incorrect in refusing the relief claimed on the basis that the risk finance obtained by the company since its original business plan exceeded that which was foreseen in same.

18. At the oral hearing it was submitted on behalf of the Appellant that what is at issue in the within appeal is whether the Appellant's Business Plan foresaw future investments and whether it complies with paragraph 6(b) of Article 21 of the GBER.

19. The Appellant submitted that its Business Plan did foresee future investments and that the Business Plan brings the Appellant into compliance with paragraph 6 of Article 21 of the GBER.

20. It was submitted that the Business Plan is 50 pages long and contains comprehensive background information on the Appellant and comprehensive information on the way forward for the Appellant. In addition it was submitted that the Business Plan sets out in detail in the 3 year plan where sales are broken down over 12 separate categories and where costs are broken down over 35 separate headings. It was submitted that the Business Plan is neither general nor non-specific.

21. In support of this the Appellant submitted that the final paragraph of page 17 of the Business Plan provides an inference that more than one round of funding / investment in the Appellant was envisaged. This, it was submitted, is contained in the sentence which states: "*What can be readily achieved through our own internal funding and early profits must now be expanded to a 1st round of funding from outside the company.*"

22. It was submitted that it is common parlance within business plans and a common indicator that when a company is going for its first round of investment that there will most likely be follow-on investment rounds. It was submitted that if an investor was to seek financial advice any accountant looking at a Business Plan would advise a first round investor to be aware that such a company would be looking for further investment in the future and therefore there would be potential for dilution when investing into a company that is going to be raising money in the future.

Respondent's Submissions

23. In its written Outline of Arguments the Respondent submitted that the Appellant's application for EII relief was refused as it did not meet the requirements of paragraph 6(b)

of Article 21 of the GBER and section 494 of the TCA1997. This, it was submitted, was because the original Business Plan did not foresee the need to raise additional finances.

24. It was submitted that the Appellant's contention that its original Business Plan foresaw the possibility of follow-on investments is not borne out by the contents of the Business Plan. The Respondent submitted that the Appellant's Business Plan only references an immediate need for IR£500,000 and as a result does not meet the requirements of paragraph 6(b) of Article 21 of the GBER.

25. In addition the Respondent noted that to date, the Appellant has been the beneficiary of €1,867,731.90 in State aid in the form of the BES which was a precursor to the EII, Seed Capital Relief and the EII.

26. In oral submissions at the appeal hearing the Respondent submitted that the issue which arises is whether the Appellant's Business Plan sufficiently covers or envisages the need for follow-on investments to comply with the requirements of paragraph 6(b) of Article 21 of the GBER.

27. The Respondent submitted that page 36 of the Appellant's Business Plan states that in order to achieve its 3 year expansion target it required an investment of IRL£500,000. The Respondent submitted that this is not enough to satisfy the requirements of paragraph 6(b) of Article 21 of the GBER which requires the need for following on investment to be identified in the Business Plan. The Respondent submitted that this requirement is something more than a vague or general loose statement and that which is required is something specific or viable as set out in Article 14 of the GBER.

28. The Respondent submitted that in the intervening period between 2001 and 2017 the Appellant had raised €1.8 million in State aid through the BES, Seed Capital and EII schemes and that this far exceeds the IRL£500,000 envisaged in the Business Plan. The Respondent submitted that, if the Commissioner was of the opinion that the Business Plan did envisage the need for follow-on investments, that need has long since been met and that the additional relief applied for in the application the subject matter of this appeal was not envisaged in the Business Plan.

Material Facts

29. The following material fact is at issue in the within appeal:

    i. The Appellant's Business Plan dated 19th June 2011 meets the requirements of paragraph 6(b) of Article 21 of the GBER by foreseeing the possibility of follow-on investments.

30. The Appellant has relied on pages 6, 17 and 36 of the Business Plan in support of its appeal.

31. The Appellant submitted that page 6 of the Business Plan contains specific reference to follow-on investments under the heading "*Financial Performance & Projections*" which, it was submitted, shows the estimated future investment required to meet the 3 year expansion plan of the Appellant. Page 6 of the Business Plan states as follows:

> "***Financial Performance & Projections***
>
> *In the last 12 months [redacted] has secured a turnover of over £375,000. This has been achieved through limited internal investments and profits generated. Our 3-year expansion plan projects total turnover by Year 3 of over £1.4 million with profits of over £400,000. To achieve this target the company requires an investment of £500,000."*

32. The Appellant also relied on page 17 of the Business Plan which states as follows:

> ***"The Proposition***
>
> *[redacted] pilot phase is now completed. Since incorporation in 1998 we have developed new products and services, tested them in a variety of target market sectors, and gathered extensive marketing information. This practical experience forms the backbone of our expansion plan. We have identified the two key growth areas for the company as [redacted]. The proposition looks at each in detail.*
>
> *[redacted] has financed growth from internal funding and profits generated in this pilot phase. Our success has seen the company grow to an annual turnover of IR£375,000.*
>
> *What can be readily achieved through our own internal funding and earn early profits must now be expanded to a 1st round of funding from outside the*

company. Our knowledge of the market sectors we have targeted is excellent, a public profile is established, and this plan is informed by tested products and services." (emphasis added)

33. In particular the Appellant points to the sentence "*What can be readily achieved through our own internal funding and early profits must now be expanded to a 1st round of funding from outside the company.*" This, the Appellant submits, is sufficient to establish that the Business plan foresaw the possibility of follow-on investment. Although not highlighted by the Appellant in either written submissions or at the oral hearing, the Commissioner notes that page 3 of the Business Plan under the Executive Summary Introduction contains the above sentence in precisely the same wording and format.

34. The Appellant, through its Tax Agent, submitted that any investor considering the Business Plan would be of the view that reference to a first round of funding from outside the company would be a common indicator that when a company is going for its first round of investment that there will most likely be follow-on investment rounds. It was submitted that if an investor was to seek financial advice any accountant looking at a Business Plan would advise a first round investor to be aware that such a company would be looking for further investment in the future and therefore there would be potential for dilution when investing into a company that is going to be raising money in the future. The Commissioner notes that no independent expert evidence was adduced on behalf of the Appellant.

35. In addition the Appellant is reliant on page 36 of the Business Plan which states as follows:

"***Financials***

To achieve the targets we have set out in this plan, and which are represented in the following financial tables, ██████ requires an investment of £500,000."

36. The Appellant has submitted a copy of the Business Plan to the Commissioner in support of its appeal. The Commissioner has carefully considered the Business Plan in order to come to a finding as to whether it foresaw the possibility of follow-on investments.

37. At the oral hearing the Commissioner put it to the Appellant that the Business Plan submitted contains a reference to a 3 year plan on 12 separate occasions and that financial requirements for years 1 and 2 are specified at page 38. The Appellant submitted that this is quite common in business plans because the focus is initially on the period for which the figures are provided with intention that this will be an ongoing business going

into the future. It was submitted that when a business plan is written for investors, it is not practice to allude too much to the future because investors want to see specifics of what is going to happen in the near future. This, it was submitted, would in general be the reason why there is so much emphasis on the 3 year period of projections in the Business Plan the subject matter of the within appeal.

38. The Commissioner asked the Appellant's Tax Agent whether business plans might include longer periods than 3 years, for instance for 10 years. In response the Tax Agent agreed that he has seen a lot of those types of business plans but that he would always advise clients that projections for periods in excess of 3 years are irrelevant. The Commissioner put it to the Tax Agent that what is at issue in the within appeal is whether the Business Plan complies with paragraph 6(b) of Article 21 of the GBER by foreseeing the possibility of follow-on investments and not what an investor might infer from its contents. The Tax Agent agreed with the Commissioner in this regard.

39. Having considered the submissions made and the contents of the Business plan the Commissioner finds that the financial projections contained in the Business Plan the subject matter of the within appeal are confined to a 3 year period.

40. Article 2(77) of the GBER defines "*follow-on investment"* as meaning:

    "…*additional risk finance investment in a company subsequent to one or more previous risk finance investment rounds"*

41. The Commissioner finds that the Business Plan does not at any point make any reference to additional investment in the Appellant subsequent to one or more previous investment rounds. The Appellant invites the Commissioner to infer that reference at page 17 (and page 3) of the Business Plan to a "*…1st round of funding from outside the company*" is sufficient to establish that the Business Plan foresaw the possibility of follow-on investment rounds.

42. The correct interpretation of EU law is well settled and it is submitted that this corpus of law demonstrates that the Respondents have applied the correct interpretation to the Regulation. In Henn and Darby v DPP [1981] AC 850, 905 Diplock LJ said:

    "The European court, in contrast to English courts, applies teleological rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties; sometimes, indeed to an English judge, it may seem to the exclusion of the

letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth".

43. In *Shanning International Ltd v Lloyds TSB Bank plc* [2001] UKHL 31, 24 Steyn LJ said:

"There is an illuminating discussion in Cross, Statutory Interpretation, 3rd edn. pp 105–112 of the correct approach to the construction of instruments of the European Community … The following general guide provided by Judge Kutscher, a former member of the European Court of Justice, is cited by Cross (at p 107):

> 'You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to <u>its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning.</u> The rule must be understood in connection with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration.'

Cross points out that of the four methods of interpretation – literal, historical, schematic and teleological – the first is the least important and the last the most important. Cross makes two important comments on the doctrine of teleological or purposive construction. First, in agreement with Bennion, Statutory Interpretation, 4th edn, Section 311, Cross states that the British doctrine of purposive construction is more literalist than the European variety, and permits a strained construction only in comparatively rare cases. Judges need to take account of this difference. Secondly, Cross points out that a purposive construction may yield either an expansive or restrictive interpretation." (emphasis added)

44. In *Re Olympus UK Ltd* [2014] EWHC 1350 (Ch), at paragraphs 47 and 48 Hildyard J. said:

"As is well known, the approach of the Court of Justice of the European Union to interpretation is teleological: the search is for an interpretation that gives effect to the objectives of the Directive. These include (<u>a) uniformity in the application of EU law, (b) "effectiveness" or "effet utile", and (c) the achievement of the aims of the Directive, as expressed in its recitals,</u> being to enable, facilitate and reduce the complexity of cross-border mergers.

Thus, the literal meaning may have to yield to a teleological or purposive approach: see again In re Itau BBA International Ltd [2013] Bus LR 490, para 5. Even if the wording in EU legislation may, as a matter of purely semantic analysis, seem clear, it is still necessary to refer to the spirit; general scheme and the context of the provision or the practicalities of its operation…". (emphasis added)

45. *CILFIT v Ministero della Sanita* Case C-283/81 provides at paragraph 20 that:

"[…] every provision of EU law must be placed in its context and interpreted in light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."

46. The Commissioner finds, starting with the ordinary meaning of the words, that paragraph 6(b) of Article 21 of the GBER is clear in its meaning that when applying for State Aid an applicant's business plan must foresee the possibility of follow-on investment.

47. The section at page 6 of the Business Plan entitled "*Financial Performance and Projections*" states "*…Our 3-year expansion plan projects total turnover by Year 3 of over £1.4 million with profits of over £300,000. To achieve this target the company requires an investment of £500,000.*" The Commissioner notes that the Business Plan contains reference to a 3 year plan on at least 12 separate occasions.

48. The Commissioner further notes that the Business Plan contains a section entitled "*Future Developments*" at page 6. This section identifies that the Appellant has "*…many additional product and service possibilities which are being actively investigated. We believe that following the implementation of this expansion plan we will be in a unique position to target the following sectors (among others):*

- *TV documentaries (e.g. current discussions with ████)*
- *E-learning*
- *Off-site records storage*
- *Document management*
- *RM software expansion into the continental European market.*"

49. The Commissioner finds that the mention of a "*1st round of funding from outside the company*" on two occasions in the Business Plan is not sufficient to establish that the Business Plan foresaw the possibility of follow-on finance. The Commissioner finds that it would be incorrect to infer from the wording "*1st round of funding*" that the possibility of follow-on finance was foreseen in the Business Plan.

50. The Commissioner accepts the Appellant's submission that the 3 year plan set out in the Business plan is neither general nor non-specific. The Commissioner accepts that in the Business Plan sales are broken down over 12 separate categories and where costs are broken down over 35 separate headings. The Commissioner finds that the contents of the section entitled "*Future Developments*" at page 6 of the Business Plan establishes that the funding referred to in the Business Plan related to the 3 year plan which was set out in the Business Plan and does not establish that the Business Plan foresaw the possibility of follow-on investments.

51. Therefore this material fact is not accepted.

Analysis

52. As with all appeals before the Commission the burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

> "*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable*."

53. The Commissioner notes that there was no dispute between the Parties as to the law governing the within appeal.

54. EII is an income tax relief for investors in certain qualifying corporate trades. For an EII qualifying investment in shares issued after 13 October 2015 and before 31 December 2018 certain rules applied. The Irish tax rules prior to and subsequent to this period, differ.

55. Section 494 of the TCA1997 which was enacted from 13th October 2015 until 31st December 2018 is relevant. What is at issue in the within appeal is whether the Appellant was a "*qualifying company*" pursuant to section 494(4A) of the TCA1997 which states as follows:

> "*(4A) A company that does not meet the requirements of paragraphs 5 and 6 of Article 21 of Commission Regulation (EU) No. 651/2014 of 17 June 2014 shall not be a qualifying company.*"

56. In order to qualify for relief, the company issuing the shares must be a qualifying company and must meet the conditions set out in section 494 of the TCA1997 as enacted between

13h October 2015 and 31st December 2018. Section 494(4A) of the TCA1997 provides that a company which does not meet the requirement of paragraphs 5 and 6 of Article 21 of the GBER shall not be a qualifying company.

57. Articles 107 to 109 of The Treaty on the Functioning of the European Union (hereinafter the "TFEU") contain the competition provisions that prohibit State Aid, except in certain circumstances. These Articles were introduced by the "Treaty of Lisbon" and are effective from 1 December 2009. Such State Aid is considered to be incompatible with the EU internal market. In accordance with the definition of State Aid, set out in Article 107(1) of the TFEU, the former Business Expansion Scheme ('BES') and the later EII are classified as State Aid.

58. With effect from 1 July 2014, the EU revised its State Aid rules, providing for new General Block Exemption Rules ("GBER") whereby Member States no longer have to seek EU approval for State Aid schemes if they come within the criteria for GBER.

59. Article 21, paragraph 6(b) of Commission Regulations (EU) No.651/2014 of 17 June 2014 of GBER, declared certain categories of aid compatible with the internal market, commonly referred to as the General Block Exemption Regulation ('GBER'), in the application of Articles 107 and 108 of the treaty.

60. EII is risk finance based State Aid which comes within Article 21 of GBER. EII is exempt from the notifications requirement of Article 108(3) of the TFEU, on the proviso that the conditions set out in Article 21 and Chapter 1 of GBER are fulfilled. In order to comply with the GBER changes were made to the Irish EII tax rules

61. Section 507(1) of the TCA1997 was amended to ensure reporting of EII reliefs complied with Article 11 EU regulation 651/2014, State Aid Reporting linked to GBER.

62. Provisions were also included in section 494 of the TCA1997 to ensure qualifying companies comply with GBER.

63. Section 18 of the Finance Act 2015 inserted subsection 4A into Section 494 of the TCA1997 and defines "*qualifying companies*" for EII. For shares issued after 13th October 2015, the criteria set out in paragraph 5 and 6 of Article 21 of EU Regulation No. 651/2014, must be satisfied before a subscription for shares in a company will qualify for EII.

64. It is not disputed that the Appellant meets the criteria set out in paragraph 5 of Article 21 of EU Regulation No. 651/2014. What is in dispute is whether the Appellant meets the criteria set out in paragraph 6(b) of Article 21 of EU Regulation No. 651/2014.

65. Paragraph 6 of Article 21 sets out the conditions that must be met for follow-on investments made subsequent to the initial investment. All of these conditions must be met.

> *"6. The risk finance aid may also cover follow-on investments made in eligible undertakings, including after the 7 year period mentioned in paragraph 5(b), if the following cumulative conditions are fulfilled:*
>
> *(a) the total amount of risk finance mentioned in paragraph 9 is not exceeded;*
> *(b) the possibility of follow-on investments was foreseen in the original business plan;*
> *(c) the undertaking receiving follow-on investments has not become linked, within the meaning of Article 3(3) of Annex I with another undertaking other than the financial intermediary or the independent private investor providing risk finance under the measure, unless the new entity fulfils the conditions of the SME definition."*

66. The Commissioner has already found as a material fact that the Business Plan did not foresee the possibility of follow-on investments.

67. Therefore the Commissioner finds that the Appellant does not meet the requirements of paragraph 6 of Article 21 of the GBER.

68. As a consequence the Commissioner finds pursuant to section 494(4A) of the TCA1997 as enacted between 13th October 2015 and 31st December 2018 that the Appellant is not a qualifying company.

69. The Commissioner notes that the Appellant's written submissions also submitted that it is not a requirement of paragraph 6(b) of Article 21 of the GBER that the Business Plan foresees any particular quantum of follow-on investment and therefore the Respondent was incorrect in refusing the relief claimed on the basis that the risk finance obtained by the company since its original business plan exceeded that which was foreseen in same. As the Commissioner has already found as a material fact that the Business Plan did not foresee the possibility of follow-on investments, the Commissioner makes no finding in relation to the question of quantum foreseen by the Business Plan.

Determination

70. For the reasons set out above, the Commissioner determines that the within appeal has failed and that it has not been shown that the relevant relief was allowable.

71. It is understandable the Appellant will be disappointed with the outcome of this appeal. The Appellant was correct to check to see whether its' legal rights were correctly applied. The Commission commends both Parties for the manner in which they conducted the appeal.

72. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular, section 949 thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll
Appeal Commissioner
15th June 2022

Appendix 1

GBER

Aid for access to finance for SMEs

Article 21

Risk finance aid

1. Risk finance aid schemes in favour of SMEs shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided the conditions laid down in this Article and in Chapter I are fulfilled.

2. At the level of financial intermediaries, risk finance aid to independent private investors may take one of the following forms:

(a) equity or quasi-equity, or financial endowment to provide risk finance investments directly or indirectly to eligible undertakings;

(b) loans to provide risk finance investments directly or indirectly to eligible undertakings;

(c) guarantees to cover losses from risk finance investments directly or indirectly to eligible undertakings.

3. At the level of independent private investors, risk finance aid may take the forms mentioned in paragraph 2 of this Article, or be in the form of tax incentives to private investors who are natural persons providing risk finance directly or indirectly to eligible undertakings.

4. At the level of eligible undertakings, risk finance aid may take the form of equity, quasiequity investments, loans, guarantees, or a mix thereof.

5. Eligible undertakings shall be undertakings which at the time of the initial risk finance investment are unlisted SMEs and fulfil at least one of the following conditions:

(a) they have not been operating in any market;

(b) they have been operating in any market for less than 7 years following their first commercial sale;

(c) they require an initial risk finance investment which, based on a business plan prepared in view of entering a new product or geographical market, is higher than 50% of their average annual turnover in the preceding 5 years.

6. The risk finance aid may also cover follow-on investments made in eligible undertakings, including after the 7 year period mentioned in paragraph 5(b), if the following cumulative conditions are fulfilled:

(a) the total amount of risk finance mentioned in paragraph 9 is not exceeded;

(b) the possibility of follow-on investments was foreseen in the original business plan;

(c) the undertaking receiving follow-on investments has not become linked, within the meaning of Article 3(3) of Annex I with another undertaking other than the financial intermediary or the independent private investor providing risk finance under the measure, unless the new entity fulfils the conditions of the SME definition.

7. For equity and quasi-equity investments in eligible undertakings, a risk finance measure may provide support for replacement capital only if the latter is combined with new capital representing at least 50 % of each investment round into the eligible undertakings.

8. For equity and quasi-equity investments as referred to in paragraph 2(a), no more than 30% of the financial intermediary's aggregate capital contributions and uncalled committed capital may be used for liquidity management purposes.

9. The total amount of risk finance referred to in paragraph 4 shall not exceed EUR 15 million per eligible undertaking under any risk finance measure.

10. For risk finance measures providing equity, quasi-equity or loan investments to eligible undertakings, the risk finance measure shall leverage additional finance from independent private investors at the level of the financial intermediaries or the eligible undertakings, so as to achieve an aggregate private participation rate reaching the following minimum thresholds:

(a) 10% of the risk finance provided to the eligible undertakings prior to their first commercial sale on any market;

(b) 40% of the risk finance provided to the eligible undertakings referred to in paragraph 5(b) of this Article;

(c) 60% of the risk finance for investment provided to eligible undertakings mentioned in paragraph 5(c) and for follow-on investments in eligible undertakings after the 7-year period mentioned in paragraph 5(b).

11. Where a risk finance measure is implemented through a financial intermediary targeting eligible undertakings at different development stages as referred to in paragraph 10 and does not provide for private capital participation at the level of the eligible undertakings the financial intermediary shall achieve a private participation rate that represents at least the weighted average based on the volume of the individual investments in the underlying portfolio and resulting from the application of the minimum participation rates to such investments as referred to in paragraph 10.

12. A risk finance measure shall not discriminate between financial intermediaries on the basis of their place of establishment or incorporation in any Member State. Financial intermediaries may be required to fulfil predefined criteria objectively justified by the nature of the investments.

13. A risk finance measure shall fulfil the following conditions:

(a) it shall be implemented via one or more financial intermediaries, except for tax incentives to private investors in respect of their direct investments into eligible undertakings;

(b) financial intermediaries, as well as investors or fund managers shall be selected through an open, transparent and non-discriminatory call which is made in accordance with applicable Union and national laws and aimed at establishing appropriate risk-reward sharing arrangements whereby, for investments other than guarantees, asymmetric profit sharing shall be given preference over downside protection;

(c) in the case of asymmetric loss-sharing between public and private investors, the first loss assumed by the public investor shall be capped at 25 % of the total investment;

(d) in the case of guarantees falling under point 2(c), the guarantee rate shall be limited to 80% and total losses assumed by a Member State shall be capped at a maximum of 25% of the underlying guaranteed portfolio. Only guarantees covering expected losses of the underlying guaranteed portfolio can be provided for free. If a guarantee also comprises coverage of unexpected losses, the financial intermediary shall pay, for the part of the guarantee covering unexpected losses, a market-conform guarantee premium.

14. Risk finance measures shall ensure profit-driven financing decisions. This is considered to be the case where all of the following conditions are fulfilled:

(a) financial intermediaries shall be established according to the applicable laws.

(b) the Member State, or the entity entrusted with the implementation of the measure, shall provide for a due diligence process in order to ensure a commercially sound investment strategy for the purpose of implementing the risk finance measure, including an appropriate risk diversification policy aimed at achieving economic viability and efficient scale in terms of size and territorial scope of the relevant portfolio of investments;

(c) risk finance provided to the eligible undertakings shall be based on a viable business plan, containing details of product, sales and profitability development, establishing ex-ante financial viability;

(d) a clear and realistic exit strategy shall exist for each equity and quasi-equity investment.

15. Financial intermediaries shall be managed on a commercial basis. This requirement is considered to be fulfilled where the financial intermediary and, depending on the type of risk finance measure, the fund manager, fulfil the following conditions:

(a) they shall be obliged by law or contract to act with the diligence of a professional manager in good faith and avoiding conflicts of interest; best practices and regulatory supervision shall apply;

(b) their remuneration shall conform to market practices. This requirement is presumed to be met where the manager or the financial intermediary is selected through an open, transparent and non-discriminatory selection call, based on objective criteria linked to experience, expertise and operational and financial capacity;

(c) they shall receive a remuneration linked to performance, or shall share part of the investment risks by co-investing own resources so as to ensure that their interests are permanently aligned with the interests of the public investor;

(d) they shall set out an investment strategy, criteria and the proposed timing of investments;

(e) investors shall be allowed to be represented in the governance bodies of the investment fund, such as the supervisory board or the advisory committee.

16. A risk finance measure providing guarantees or loans to eligible undertakings, shall fulfil the following conditions:

(a) as a result of the measure, the financial intermediary shall undertake investments that would not have been carried out or would have been carried out in a restricted or different manner without the aid. The financial intermediary shall be able to demonstrate that it operates a mechanism that ensures that all the advantages are passed on to the largest extent to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or lower interest rates;

(b) in the case of loans, the nominal amount of the loan is taken into account in calculating the maximum investment amount for the purposes of paragraph 9;

(c) in the case of guarantees, the nominal amount of the underlying loan is taken into account in calculating the maximum investment amount for the purposes of paragraph 9. The guarantee shall not exceed 80% of the underlying loan.

17. A Member State may assign the implementation of a risk finance measure to an entrusted entity.

18. Risk finance aid for SMEs that do not fulfil the conditions laid down in paragraph 5 shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided that

> *(a) at the level of the SMEs, the aid fulfils the conditions laid down in Regulation (EU) No 1407/2013; and*
>
> *(b) all the conditions laid down in the present Article, with the exception of those set out in paragraphs 5, 6, 9, 10, and 11, are fulfilled; and*
>
> *(c) for risk finance measures providing equity, quasi-equity or loan investments to eligible undertakings, the measure shall leverage additional financing from independent private investors at the level of the financial intermediaries or the SMEs, so as to achieve an aggregate private participation rate reaching at least 60% of the risk finance provided to the SMEs.*