AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

51TACD2023

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 1 March 2022 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 oral hearing of this appeal took place on 12 January 2023.

Background

3. [redacted] (hereinafter the "Appellant") is a limited company involved in the [redacted] and was incorporated on 15 October 2004.

4. The Appellant raised risk finance investments over a number of years from December 2012 through the Employment Investment Incentive (hereinafter the "EII") as follows:

Date	Amount €
17 December 2012	25,000
31 December 2012	75,000
12 February 2013	27,500
17 October 2013	12,500
24 December 2013	37,500
3 January 2014	15,000
4 March 2014	12,500
7 July 20014	100,000
31 December 2015	50,000
Total	355,000

5. During 2017 and 2018 the Appellant, through its Agent, submitted seven applications for relief under the EII scheme totalling €130,000 as follows:

Date of Application	Investor	Amount of Investment €
30 June 2017		15,000
12 July 2017		15,000
1 September 2017		10,000
14 September 2017		30,000
5 December 2017		30,000
28 December 2017		10,000
29 May 2018		20,000
Total		**130,000**

6. Following submission of the applications the Parties entered into correspondence with the Appellant's Agent and latterly with Mr [redacted], a director of the Appellant, and additional information was sought, in particular the Respondent sought the Appellant's business plan.

7. On 20 September 2019 the Appellant's Agent submitted a document entitled "[redacted] *Business Opportunity Outline*" to the Respondent. In addition, the Appellant submitted a document entitled "[redacted] *Business Plan*" which was unsigned and was marked as dated "*Jan 2015*" at the top of each page and which also contained the phrase "*Date of this agreement ZZ Zzzzz 2016*" in the heading of document and the phrase "*Date: ZZ Zzzzz 2016"* in the signature areas of the document.

8. On 15 December 2021 the Respondent wrote to the Appellant and asked, *inter alia*, whether it had ever prepared a business plan prior to 2015.

9. The Appellant responded on 10 January 2022 and stated, *inter alia*, "*No. The business plan dated 2015 was sent in because Revenue said we HAD to have a BP to be eligible for the previous applications*".

10. On foot of the response received from the Appellant the Respondent was not satisfied that the Appellant was a "qualifying company" for the purposes of 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").

11. By way of letter dated 1 March 2022 the Respondent issued a decision refusing the Appellant's applications for relief under the EII scheme on the basis that the Appellant was not considered to be a qualifying company pursuant to section 494(4A) of the TCA1997.

12. The Appellant submitted a Notice of Appeal to the Commission on 29 March 2022 appealing the Respondent's decision of 1 March 2022.

Legislation and Guidelines

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

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

"*(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."

Paragraph 14(c) Article 21, EU Commission Regulation No. 651/2014:

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

…

(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;

…"

Submissions

Appellant's Submissions

14. In its Notice of Appeal the Appellant submitted the following grounds of appeal:

"[redacted] *has been eligible for EII participation since 2012 and have been filling the appropriate forms until 2017. We have been in contact with Revenue since May 2016 trying to resolve this situation, where some of our investors (shareholders) are still awaiting EII approval. We have sent in forms, bank statements and everything we were asked. We were told at one stage that the problem was a backlog of applications.*

A business plan was provided and amended at the guidance of Revenue. We believe we have provided Revenue with all that was asked to finalise the EII approval."

15. In its Statement of Case the Appellant submitted the following outline of relevant facts:

"███ *submitted EII forms from 2012 until 2017. From 2012 until 2015 we were granted on issuing EII forms to our investors and were not aware of any changes, until we got a letter from* ███ *our company secretary informing us of new forms to be submitted.* ███ *sent us the forms and we submitted them. A few months passed before we enquired how the applications were proceeding,* ███ *informed us Revenue were experiencing a backlog dealing with the new form and they would get back to us.* ███ *stated they were having problems getting someone in Revenue to deal with our applications.*

From 2016 to 2017 we have provided ███ *with a plethora of documentation and emails pertaining to our applications, as requested by Revenue. This procedure took an incredibly long time. A requirement of the new forms was that we had to provide a Business Plan, which we did.*

A further requirement was that we had to provide minutes of a Directors meeting (copies) indicating our intention of pursuing EII funding, which were provided.

Also requested was audited accounts and bank statements proving monies received and lodged, which were also provided."

16. At the oral hearing the Appellant was represented by its Director, ███. Mr ███ stated that the Appellant had submitted a 48 page business plan to the Respondent. He also stated that in 2010 the Appellant had a business plan which it had not submitted either to the Respondent or to the Commission. He stated that none of the investors ever requested a Business plan from the Appellant and that a business plan was only requested by the Respondent in relation to the EII investment applications submitted in 2017 and 2018.

17. Mr ███ further stated that when the Respondent required a business plan the Appellant brought in a third party to assist it with completing a business plan but that a business plan which was compliant with the Respondent's requests was never completed. Mr ███ stated that the business plan submitted to the Respondent on 10 January 2022 was as good as could be done at the time.

Respondent's Submissions

18. The Respondent submitted that the Appellant's applications for EII relief were refused as the Appellant is not a qualifying company for the purposes of section 494(4A) of the TCA1997. The Respondent submitted that because the Appellant did not have an original business plan and because the Appellant did not have a business plan in place at the time of the initial share issue in 2012, it was not possible for the Appellant to have complied with the requirement of the possibility of follow-on investments to having been foreseen in the original business plan as required by paragraph 6(b) of Article 21 of the GBER

19. In addition the Respondent submitted that the Appellant was not in compliance with the provisions of paragraph 14(c) of Article 21 of the GBER which states that 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. Ex-ante financial viability in this context means financial viability based on forecasts rather than on results.

Material Facts

20. The following material facts are not at issue in the within appeal and the Commissioner accepts same as a material facts:

    i. The Appellant received relief under the EII scheme between December 2012 and December 2015 totalling €355,000;

    ii. The Appellant submitted seven applications for relief under the EII scheme in 2017 and 2018 totalling €130,000.

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

    i. At the time of the seven applications for relief under the EII scheme in 2017 and 2018 the Appellant has a business plan which foresaw the possibility of follow on investment in compliance with paragraph 6(b) of Article 21 of the GBER.

22. 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"*

23. 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".*

24. 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)

25. 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 (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, 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)

26. *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."

27. 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 must have a business plan and that the applicant's business plan must foresee the possibility of follow-on investment.

28. The Appellant has, in correspondence with the Respondent and at the oral hearing, submitted that it did not have a business plan prior to submitting the applications for relief under the EII scheme in 2017 and 2018. The undated document submitted by the Appellant to the Respondent on 10 January 2022 is, by the Appellant's own submission, a document which did not exist prior to the submission of the applications for relief under the EII scheme in 2017 and 2018. In addition this document did not exist prior to 2012 when the first applications for relief under the EII scheme were submitted by the Appellant.

29. As a result the Commissioner finds that the Appellant did not have a business plan which foresaw the possibility of follow-on investment when submitting its applications for state Aid under the EII scheme in 2017 and 2018. Therefore, the Commissioner finds that the Appellant was not in compliance with paragraph 6(b) of Article 21 of the GBER.

30. Therefore this material fact is not accepted.

31. For the avoidance of doubt the Commissioner finds the following as material facts in this appeal:

    i. The Appellant received relief under the EII scheme between December 2012 and December 2015 totalling €355,000;

    ii. The Appellant submitted seven applications for relief under the EII scheme in 2017 and 2018 totalling €130,000.

Analysis

32. 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*."

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

34. 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.

35. 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.*"

36. 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 13th 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.

37. 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.

38. 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.

39. 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.

40. 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

41. 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.

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

43. 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.

44. 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.

45. 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."

46. The Commissioner has already found as a material fact that the Appellant did not have a business plan which foresaw the possibility of follow-on investments.

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

48. 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 and was therefore not entitled to relief under the EII scheme.

49. The Commissioner finds that the Respondent's decision of 1 March 2022 that the Appellant was not a qualifying company pursuant to the provisions of section 494(4A) of the TCA1997 was correct.

Determination

50. 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.

51. The Commissioner appreciates that the Appellant may be disappointed that it is not entitled to relief under the EII scheme. 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, which assisted the Commissioner.

52. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular, section 949AL 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 42 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll
Appeal Commissioner
30 January 2023

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.