

## AIDE D'ÉTAT — ROYAUME-UNI

## Aide d'État SA.15373 (2013/C-18) (ex 2013/NN) — Suivi du régime d'aides existant «Enterprise Capital Funds» (C17/2004)

## Invitation à présenter des observations en application de l'article 108, paragraphe 2, du traité sur le fonctionnement de l'Union européenne

(Texte présentant de l'intérêt pour l'EEE)

(2014/C 37/05)

Par la lettre du 20 novembre 2013, reproduite dans la langue faisant foi dans les pages qui suivent le présent résumé, la Commission a notifié au Royaume-Uni sa décision d'ouvrir la procédure prévue à l'article 108, paragraphe 2, du traité sur le fonctionnement de l'Union européenne concernant l'aide/la mesure susmentionnée.

Les parties intéressées peuvent présenter leurs observations sur la mesure à l'égard de laquelle la Commission ouvre la procédure, dans un délai d'un mois à compter de la date de publication du présent résumé et de la lettre qui suit, à l'adresse suivante:

Commission européenne  
Direction générale de la concurrence  
Greffe des aides d'État  
1049 Bruxelles  
BELGIQUE

Télécopieur: +32 2296121242

Ces observations seront communiquées au Royaume-Uni. L'identité des parties intéressées qui présentent des observations peut faire l'objet d'un traitement confidentiel sur demande écrite et motivée.

## TEXTE DU RÉSUMÉ

## 1. PROCÉDURE

Le régime britannique d'aides d'État «Enterprise Capital Funds» (ECF - Fonds de capital-investissement pour les entreprises) (SA.15373) a été approuvé par la Commission le 3 mai 2005 après ouverture d'une procédure formelle d'examen [C 17/2004 (ex N 566/03)], en vertu de l'article 87, paragraphe 3, point c, du traité CE (devenu article 107, paragraphe 3, point c, du TFUE) et, en particulier, sur la base de la communication sur les aides d'État et le capital-investissement adoptée en 2001<sup>(1)</sup>, alors en vigueur.

Par lettre du 18 octobre 2006, les autorités britanniques se sont engagées à prendre les mesures nécessaires concernant l'ensemble des régimes de capital-investissement existants au Royaume-Uni.

En 2011, le régime des ECF a été retenu pour l'exercice de suivi des aides d'État [SA. 15373 (ex 2011/MX)]. La Commission a alors constaté que le Royaume-Uni n'avait pas pris les mesures nécessaires pour mettre le régime des ECF en conformité avec les lignes directrices de 2006 concernant les aides d'état visant à promouvoir les investissements en capital-investissement dans les petites et moyennes entreprises (les «lignes directrices de 2006»). Par courriel du 16 juin 2013, les autorités britanniques ont communiqué des renseignements relatifs à la mise en œuvre du régime existant, qui a été mis à jour le 12 juin 2013.

## 2. DESCRIPTION DU RÉGIME EXISTANT

Conjuguant investissements privés et publics, le régime d'aides «ECF» visait à améliorer l'accès des PME au capital d'expansion dans tout le Royaume-Uni. La limite maximale du financement public accordé aux ECF était fixée au double des capitaux privés levés par le fonds. Dans les ECF, la répartition des pertes et des bénéfices entre les investisseurs privés et publics reposait sur la logique suivante: en cas de résultats négatifs, les pertes étaient réparties équitablement entre investisseurs privés et publics, tandis qu'en cas de résultats positifs, les profits étaient redistribués sans clause *pari passu* (en d'autres termes, les investisseurs privés recevaient la majeure partie des bénéfices à partir d'un certain taux de rentabilité). Grâce à ce mécanisme, les ECF revêtaient une dimension commerciale tout en impliquant une aide d'État.

Les ECF étaient autorisés à investir dans les PME éligibles par apport de fonds propres ou de quasi-fonds propres compris entre 250 000 de GBP (357 000 d'EUR) et 2 millions de GBP (2,9 millions d'EUR). Les investissements entièrement composés d'instruments d'endettement étaient expressément interdits dans le cadre de ce régime. Les investissements de suivi étaient autorisés dans la mesure où la totalité des fonds propres que la PME avait obtenus grâce aux ECF ou à d'autres investisseurs en capitaux propres ne dépassaient pas 2 millions de GBP (2,9 millions d'EUR). Lorsque les circonstances l'exigeaient, des investissements de suivi supérieurs à cette limite n'étaient autorisés qu'au terme d'une période d'au moins six mois et afin d'éviter la dilution du capital, à condition qu'ils soient plafonnés à 10 % des capitaux souscrits par chaque ECF. Dans le cadre du régime

<sup>(1)</sup> JO C 235 du 21.8.2001, p. 3.

des ECF, 12 fonds ont été créés, dont sept après le 18 août 2007, soit au-delà du délai dont disposaient les autorités britanniques pour adopter les mesures appropriées après l'entrée en vigueur des lignes directrices le 18 août 2006. Ces fonds ont investi dans 94 entreprises.

Sur la base des éléments de preuve fournis par les autorités britanniques, la Commission croit comprendre que trois ECF ont réalisé des investissements de suivi dans sept entreprises afin d'éviter une éventuelle dilution. Elle croit savoir que le régime a permis aux ECF de recourir à un «mécanisme de préemption» leur permettant d'exercer un droit de premier refus afin d'acquérir de nouvelles actions émises par toute entité faisant l'objet d'un investissement et présente dans le portefeuille d'un ECF, le but étant d'éviter que des investisseurs privés n'investissent dans ces entreprises et, par là même, ne diluent la participation de l'ECF. Les autorités britanniques ont toutefois indiqué qu'un tel mécanisme n'a jamais été utilisé dans la pratique et elles se sont engagées à ne pas en faire usage à l'avenir.

### 3. ÉVALUATION

À l'issue de l'évaluation, la Commission a émis des doutes quant à la conformité du régime des ECF avec les lignes directrices de 2006 en vigueur et notamment en ce qui concerne les points suivants:

#### a) **Éligibilité de l'investissement dans plusieurs entités**

Les lignes directrices de 2006 (point 4.3.2) limitent l'investissement en capital-investissement: 1) aux petites entreprises jusqu'à la phase d'expansion; 2) aux moyennes entreprises jusqu'à la phase de démarrage, qu'elles soient situées dans une région assistée ou non; 3) aux moyennes entreprises jusqu'à la phase d'expansion, à condition qu'elles soient situées dans une région assistée.

La Commission fait observer que six entreprises ayant fait l'objet d'un investissement se trouvaient en phase d'expansion, étant donné qu'elles menaient des activités commerciales depuis un certain nombre d'années au moment du premier investissement réalisé par l'ECF. Quatre des six entreprises susmentionnées étaient de petites entreprises au moment de l'investissement. Les investissements ont donc été réalisés conformément aux limites fixées dans les lignes directrices de 2006. En revanche, deux sociétés, Reevo et Interactive Investors, étaient des entreprises de taille moyenne<sup>(1)</sup> au moment où l'ECF a investi,

compte tenu du nombre de personnes qu'elles employaient<sup>(2)</sup>. De plus, étant situées à Londres, région non assistée, elles n'auraient pu bénéficier d'investissements que jusqu'à la phase de démarrage.

À ce stade de l'enquête, la compatibilité de ces deux investissements avec les lignes directrices de 2006 paraît sujette à caution dans la mesure où peu d'éléments attestent d'une défaillance du marché. Les tiers sont invités à présenter des observations sur ces investissements tardifs et sur l'existence d'une défaillance du marché, comme le prévoient les lignes directrices de 2006.

#### b) **Utilisation des opérations de remplacement de biens de production**

Sur la base des éléments de preuve fournis par les autorités britanniques, la Commission croit savoir que le fonds [...] (\*) a investi dans une opération de rachat d'entreprise par endettement (BIMBO). L'entreprise visée, Andante Travels, était en activité depuis 28 ans au moment de l'investissement, elle employait alors [...] (\*) personnes et enregistrait un chiffre d'affaires de [...] (\*).

Les lignes directrices de 2006 interdisent les rachats et les opérations de remplacement de biens de production. Par conséquent, l'ampleur de l'impact de ces opérations sur la concurrence devrait être évaluée en permettant aux tiers de présenter leurs observations à ce sujet.

Compte tenu de ce qui précède, la Commission estime à titre préliminaire que les investissements susmentionnés et réalisés par les ECF ont conféré un avantage économique à plusieurs entreprises dans la mesure où elles ont bénéficié d'investissements/d'aides non conformes aux règles définies dans les lignes directrices de 2006. À ce stade, la Commission doute que ces aides puissent être considérées comme étant compatibles avec le marché intérieur.

Conformément à l'article 14 du règlement (CE) n° 659/1999 du Conseil, toute aide illégale pourra faire l'objet d'une récupération auprès de son bénéficiaire.

<sup>(1)</sup> Au moment du premier investissement réalisé par les ECF, Reevo comptait 9 années d'activité commerciale, employait [...] (\*) personnes et enregistrait un chiffre d'affaires de [...] (\*). Quant à l'entreprise Interactive Investors, elle était en activité depuis 11 ans, employait [...] (\*) personnes et enregistrait un chiffre d'affaires de [...] (\*).

(\*) Données couvertes par le secret professionnel.

<sup>(2)</sup> Recommandation 2003/361/CE — JO L 124 du 20.5.2003, p. 36. Conformément à l'article 2 de l'annexe de la recommandation de la Commission du 6 mai 2003 concernant la définition des micro, petites et moyennes entreprises, une moyenne entreprise est définie comme une entreprise qui emploie entre 50 et 250 personnes et dont le chiffre d'affaires annuel n'excède pas 50 millions d'euros ou le total de son bilan annuel n'excède pas 43 millions d'euros. En outre, une petite entreprise est définie comme une entreprise qui occupe moins de 50 personnes et dont le chiffre d'affaires annuel ou le total du bilan annuel n'excède pas 10 millions d'euros.

## TEXTE DE LA LETTRE

«The Commission wishes to inform the United Kingdom that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereafter "TFEU").

## 1. PROCEDURE

- (1) The Enterprise Capital Funds ("ECFs") scheme (SA.15373) was approved by the Commission on 3 May 2005 under Article 87(3)(c) of the EC Treaty (now Article 107(3)(c) TFEU) and in particular on the basis of the Risk Capital Guidelines of 2001 ("RCGs of 2001")<sup>(1)</sup>, in force at the time, after opening a formal investigation procedure (C 17/2004 (ex N 566/03)).
- (2) In September 2006, following a meeting with the UK authorities, the services of the Commission informed the UK authorities that the ECFs scheme was not in line with the Risk Capital Guidelines adopted in August 2006 (hereafter "RCGs of 2006") and invited them to take appropriate measures to bring the ECFs scheme in line with them.
- (3) By letter of 18 October 2006, the UK authorities committed to take appropriate measures concerning all their existing risk capital schemes.
- (4) In 2011, the ECFs scheme was selected for the State aid monitoring exercise (SA.15373 (ex 2011/MX)). It was found that the UK had failed to take appropriate measures to bring the ECFs scheme in line with the RCGs of 2006.
- (5) A meeting took place on 21 May 2013 between the Commission services and the UK authorities where the former proposed that the monitoring case and several changes to the scheme, which were subsequently notified on 21 August 2013 (SA.36428) by the UK authorities, be treated separately in two cases but parallel in time.
- (6) By e-mail of 16 June 2013, the Commission services received information on the implementation of the existing scheme. The information was updated by e-mail of 12 July 2013.
- (7) Two teleconferences took place on 1 and 2 July 2013 to discuss several elements of the case, and a meeting took place on 6 August 2013 where the UK authorities clarified several aspects of the operations that took place under the existing scheme.

## 2. DESCRIPTION OF THE EXISTING ECFS SCHEME (DECISION OF 2005)

- (8) Combining public and private investment, the ECFs scheme aimed at improving access to expansion capital for SMEs throughout the UK. Public investment was limited to two times the private capital raised by the fund, *i.e.* minimum one third of an ECF fund was to be provided by private investors.

(9) The distribution of the profits and losses between public and private investors in the ECFs was based on the logic that, on the downside, the losses were distributed on equal terms with the private investors being fully exposed, while on the upside the distribution of the profits was non *pari passu*, *i.e.* private investors received most of the profits notably above a certain profitability rate.<sup>(2)</sup> This mechanism ensured that ECFs were commercially oriented while entailing state aid.

(10) According to the rules of the scheme<sup>(3)</sup>, an ECF may invest expansion capital in any company:

- that meets the EU definition of an SME;
- where the purpose of the relevant investment, or the application of the proceeds of such investment by the relevant company or undertaking, is predominantly related to or for the benefit of the economy of the UK;
- whose equity or other securities are not, at the time of investment, listed on a recognised stock exchange (such as the London Stock Exchange) or otherwise quoted on a non-recognised exchange, *i.e.* AIM, Ofex or any other market on which prices are quoted publicly;
- where the trade of such company is a qualifying trade as defined in Paragraph 4, Schedule 28B of the Income and Corporation Taxes Act 1988, or where the company is undertaking research and development with a view to carrying on a qualifying trade<sup>(4)</sup>.

(11) ECF funds invested in eligible SMEs by means of equity and quasi-equity instruments between £250,000 (€357,000) and £2m (€2.9m). Pure debt investments were explicitly forbidden under the scheme<sup>(5)</sup>.

<sup>(2)</sup> The government receives a prioritised return equivalent to the interest charged on the balance of outstanding loans to the fund (at the time 4.3%). Once the government has received its prioritised return, outstanding loans may then be repaid to the government and the private investors under the terms specified in the ECFs' partnership agreement. All further distributions to investors are to be divided between the government and all other private investors in a fixed profit-sharing ratio.

<sup>(3)</sup> Enterprise Capital Fund – Guidance for applicants <http://www.capitalforenterprise.gov.uk/files/Guidance%20for%20Prospective%20ECF%20Managers%20-%20V2.pdf>

<sup>(4)</sup> A trade will not qualify if one or more excluded activities together make up a 'substantial part' of that trade. The main excluded activities are: (1) dealing in land, financial instruments, or in goods other than in the course of an ordinary trade of retail or wholesale distribution; (2) financial activities, property development, or providing legal or accountancy services; (3) leasing (including letting assets on hire, except in the case of certain ship-chartering activities); (4) receiving royalties or licence fees, except where these arise from an intangible asset such as a patent or know-how, most or all of which has been created by the company (or one of its subsidiaries); (5) farming, market gardening, or forestry; (6) operating or managing hotels, guest houses, hostels, or nursing or residential care homes; and (7) providing services to another company in certain circumstances where the other company's trade consists to a substantial extent in excluded activities. Source: Enterprise Capital Funds – Guidance for applicants

<sup>(5)</sup> ECFs Partnership agreement, Point 3.6: "[ECF] may not acquire Investments in a Portfolio Company... (d) in loan finance or debt instruments with no associated equity securities."

<sup>(1)</sup> OJ C 235, 21.8.2001, p. 3.

- (12) Follow-on investments were permitted so long as the total equity funding raised by the SMEs from ECFs and other equity investors was no more than the £2m (€2.9m) limit.
- (13) Follow-on investments in excess of the above limit, *i.e.* £2m (€2.9m), were permitted, where necessary, only after a period of at least 6 months and to prevent dilution, subject to an upper limit of 10% of each ECF's committed capital.
- (14) From the evidence provided by the UK authorities, the Commission understands that three ECFs, made follow-on anti-dilution investments in 7 companies. The Commission understands that the scheme allowed the ECFs to use a "pre-emption mechanism" whereby the ECFs could exercise a right of first refusal to acquire new shares issued by any investee in the ECF's portfolio, in order to prevent private investors from investing in such companies and thereby dilute the ECF's shareholding. However, the UK authorities have indicated that such a mechanism has never been applied in practice and that they committed not to make use of it in the future.
- (15) The ECFs scheme was initially approved for a period of 10 years, until 2 May 2015, and was intended to be self-financing over the medium term. For the first year of its operation, the UK allocated €65m to cover the cash-flow cost of the initial public participation.
- (16) 12 funds were created under the ECFs scheme, out of which 7 were created after 18 August 2007 that is, the date after which the scheme should have been aligned with the RCGs of 2006. The pre-2007 funds invested in 67 companies, while the post 2007 funds invested in 94 companies. Therefore, a total of 161 undertakings have benefited from the scheme.

### 3. OUTCOME OF THE MONITORING

- (17) The ECFs scheme was monitored by the Commission services in the light of (1) the Commission's decision of 2005 approving the measure and (2) the RCGs of 2006.
- (18) The assessment led to the conclusion that the scheme was not in line with the RCGs of 2006 as the UK authorities should have taken appropriate measures within 12 months from their entry into force, *i.e.* as from 18 August 2007, which they failed to do. The issue of appropriate measures arose with respect to ECFs that received public capital after 18 August 2007 *i.e.* after the date by which the UK authorities should have adopted appropriate measures, at the latest, following the entry into force of the RCGs of 2006 on 18 August 2006. In practice, this meant that only the funds created after the end of the transitional period would need to comply with the RCGs of 2006, whilst the already existing risk capital funds could continue to operate under the rules established by the RSGs of 2001.
- (19) For the reasons explained in section 4 below, the Commission has doubts with respect to the compliance of the ECFs scheme's implementation with the RCGs of 2006, and particularly with respect to:
- Eligibility for investment of several investees;
  - Use of capital replacement operations.

## 4. ASSESSMENT

### 4.1. Existence of State aid

- (20) In the decision of 2005 the Commission concluded that State aid within the meaning of Article 107(1) of the TFEU is present at the level of the investors and at the level of the beneficiary SMEs. Therefore, through the implementation of the ECF scheme, the companies that are the object of the current monitoring case have received State aid in the sense of the above mentioned article. The UK authorities do not contest this conclusion.

### 4.2. Eligibility for investment of several investees

- (21) Since the creation of the scheme, the ECFs invested in 161 companies, of which 94 were investments made after 18 August 2007. Out of the 94 companies, 40 companies had not had sales at the time of the first investment. Of the remaining 54 companies, 6 appear to have been in their expansion stage since, at the moment of ECF's first investment, they had had commercial activities for a significant number of years.
- (22) The RCGs of 2006 (Point 4.3.2) limit the investment of risk capital to: (1) small enterprises up to the expansion stage and irrespective of their location, *i.e.* located in assisted or non-assisted areas (2) medium-size enterprises up to the start-up stage, irrespective of their location, and (3) medium-sized enterprises up to the expansion stage located in assisted areas.
- (23) The Commission notes that four out of the six above mentioned companies fulfil the definition of small enterprises at the moment of the investment. Therefore, although they seem to have been companies in their expansion stage, given their size, the investments were made in accordance with the limits set out in the RCGs of 2006.
- (24) The two other companies, Interactive Investors and Reevo (<sup>1</sup>) exceeded, at the moment of the first investment, the threshold for a small enterprise (<sup>2</sup>). Therefore, at the moment of the investment, the two companies qualified as medium enterprises. Moreover, given their location in London, which is a non-assisted area, they could have received investment only up to the start-up phase (<sup>3</sup>).
- (25) Consequently, the Commission expresses doubts with respect to the compatibility of the aid for the investments into the two companies as they qualified as medium size enterprises, were in their expansion stage and were located in non-assisted areas.

<sup>(1)</sup> At the moment of the first investment Reevo had 9 years of commercial activity; it employed [...] (\*) persons and had an annual turnover of [...]. Interactive Investors had 11 years of commercial activity; it employed [...] persons and had an annual turnover of [...]; Source: UK authorities

(\*) Covered by the obligation of professional secrecy;

<sup>(2)</sup> See Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124 of 20.5.2003, p. 36), Annex I, Article 2(2) (50 employees).

<sup>(3)</sup> The Commission also notes that Reevo had been backed by well-known venture capital firms, *i.e.* [...] and [...] (Source: UK authorities) which puts in question whether the company faced any market failure.

(26) The Commission may declare compatible measures providing finance for medium-sized enterprises in their expansion stage located in non-assisted areas, subject to a detailed assessment (balancing) of the individual case under Chapter 5 of the RCGs of 2006, including any evidence of market failure. At this stage of the investigation, the compatibility of the aid for these two investments with the RCGs of 2006 seems doubtful as there is limited evidence with respect to the market failure they faced. Third parties are invited to submit comments notably on the existence of a market failure with respect to such late-stage development companies as well as any other information relevant for making an in-depth assessment of the aid measure at issue under Section 5 of the RCG 2006.

#### 4.3. Use of a capital replacement transaction

(27) Based on the evidence provided by the UK authorities, the Commission understands that the fund [...] invested in one buy-in management buy-out <sup>(1)</sup> (BIMBO). The target company, Andante Travels, had 28 years of commercial activities at the moment of the investment. At the moment of the investment, the company employed [...] persons and had an annual turnover of [...].

(28) Under the RCGs of 2006 the venture capital and risk capital measures refer to new/fresh capital being provided to the investees. Since they have limited impact on the cash/balance sheet of an investee, capital replacement operations are not foreseen as compatible measures under the Guidelines. Hence, in its practice the Commission considers them as not covered by the Guidelines <sup>(2)</sup>, irrespective of the location of the investee, *i.e.* assisted or not-assisted area. In order to further assess the conditions in which the operation took place and to test its impact on competition, the Commission has decided to open the formal investigation procedure with respect to the above BIMBO operation and invites third parties to present comments on it.

#### 5. CONCLUSION

(29) Based on the foregoing analysis, the Commission considers that the ECFs may have granted aid outside of the scope of the approved scheme without prior notification. Therefore it has decided to open the formal investigation procedure provided for in Article 108(2) TFEU in relation to funding decisions by the ECFs as to the following elements:

- a) Eligibility for investment into Reevoov and Interactive Investor;
- b) Use of one capital replacement transaction, namely the above BIMBO that benefited Andante Travels.

(30) The Commission requires the United Kingdom and all interested parties, within one month from the receipt of this letter, to provide all documents, information and data needed for assessing the compatibility of the above-mentioned measures with Article 107(3)(c) TFEU..

(31) The Commission wishes to remind the authorities of the United Kingdom that Article 108(3) TFEU has suspensory effect, and would draw their attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

(32) The Commission informs the authorities of the United Kingdom that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.»

---

<sup>(1)</sup> Management buy-out is a form of replacement capital through which one or more managers of a company take control of the company's capital by acquiring the majority of shares from the actual owner(s). When the buyer is an outsider of the company who will become manager once the operation is completed, the transaction is called management buy-in. A BIMBO occurs when existing management, along with outside managers, decide to buyout a company. Buy-in management buyout (BIMBO) is a form of a buyout that incorporates characteristics of both a management buy-out and a management buy-in.

<sup>(2)</sup> See, e.g., Case SA.36489 (2013/N), recital (41)