EUROPEAN COMMISSION

Brussels, 23.01.2013

C(2013) 102 final

In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […].	PUBLIC VERSION This document is made available for information purposes only.

Subject: State aid SA.35546 (2013/C) (ex 2012/NN) – Portugal

Past measures in favour of Estaleiros Navais de Viana do Castelo S.A.

Sir,

The Commission wishes to inform Portugal that, having examined the information supplied by your authorities on the measures 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.

1. PROCEDURE

(1) By e-mail of 3 October 2012, the Portuguese authorities informally submitted to the Commission a brief memorandum on the State measures seeking to maximise revenues from the privatisation of Estaleiros Navais de Viana do Castelo S.A. (hereinafter "ENVC"). On the basis of the information provided, the Commission decided to open an *ex officio* case on 5 October 2012, registered with number SA.35546 (2012/CP). Portugal was informed of the opening of the case by letter of 11 October 2012.

(2) The Commission requested additional information by letter of 12 October 2012, to which Portugal replied by e-mail of 9 November 2012 and letter of 20 November 2012. It appeared from that information that ENVC had benefited in the past from a number of measures that might constitute state aid. A conference-call with the Portuguese authorities took place on 16 October

2012. At the request of the Portuguese authorities, a meeting between the Commission and the Portuguese authorities took place on 11 December 2012. Additional information was submitted by Portugal by letter of 28 December 2012 and by e-mail of 18 January 2013.

2. BACKGROUND

2.1. The beneficiary

(3) ENVC is the largest Portuguese shipyard. Founded in 1944, the company was nationalised in 1975. It is currently fully owned by the State through EMPORDEF, a 100% State-owned holding company controlling a number of State-owned enterprises (hereinafter "SOEs") in the defence sector. ENVC's registered capital amounts to EUR 29.88 million. It has no subsidiaries and holds very small stakes in two other companies.[1]

(4) ENVC currently employs some 638 workers and is the only shipyard in Portugal capable of constructing military vessels.[2] At present, ENVC's shipbuilding portfolio is limited to the construction of two asphalt carriers commissioned by Petróleos de Venezuela S.A. and the finalisation of two ocean patrol vessels for the Portuguese Navy.

(5) The company currently operates on land under concession. This concession was first granted to ENVC in 1946 and subsequently modified in 1948, 1949 and 1974. In 1989 the concession area was extended to its present size and the duration – originally until 2006 – was extended until 2031.[3] An extension of the scope and duration of the concession […]* is currently being considered.

2.2. The privatisation procedure

(6) ENVC is currently undergoing privatisation and the process – which is not covered by the Memorandum of Understanding on specific economic policy conditionality signed between Portugal and the Commission, the International Monetary Fund and the European Central Bank – is very much advanced. The privatisation will be carried out within the framework of the Portuguese Privatisation Law.[4]

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1 ENVC holds a 0.19% stake in ENVC – Sociedade Imobiliária S.A. and a 1% stake in Oficina Inovação S.A.

2 On the basis of the information provided by Portugal, it appears that the capacity in terms of workforce devoted to the construction of vessels for military purposes peaked in 2005 at 33% of the total activity of ENVC (including construction, repairing, etc.). From 2006 to 2011, the average capacity devoted to military construction has been approximately 11%, but in 2012 it fell to zero due to the cancellation of an order of the Portuguese Army to build military vessels.

3 The concession agreement was also modified in 2005 and 2007 to allow ENVC to sub-concession part of the land for the manufacturing of wind generators.

* Covered by the obligation of professional secrecy.

4 *Lei Quadro das Privatizações*, approved by Law No 11/90 of 5 April 1990 and re-published by Law No 50/2011 of 13 September 2011. In view of the fact that ENVC was nationalised in 1975, the current operation is, legally speaking, a re-privatisation.

(7) The specific rules governing the privatisation process, i.e. Decree-Law 186/2012 and Resolution of the Council of Ministers 73/2012, were published in the Portuguese Official Gazette on 13 and 29 August 2012 respectively.[5]

(8) The Resolution of the Council of Ministers 73/2012 clarifies that the privatisation is to be carried out by a direct sale – no tender – of up to 95% of ENVC's share capital. It also states that the sale of shares will be conducted in two phases: (i) a preliminary phase open to all interested investors for the submission of non-binding offers so as to assess their eligibility, and (ii) a second phase for the submission of binding offers open to a selected number of investors who previously submitted non-binding offers and were considered eligible.

(9) The Resolution of the Council of Ministers 73/2012 also establishes that the remaining 5% of the share capital of ENVC will be sold to its employees through a public offer, which will take place simultaneously or subsequent to the direct sale of up to 95% of ENVC's share capital. This public offer will be subject to a simplified regime. The shares will be sold to the employees at a discounted price which is to be determined by the Government. ENVC will not become a public limited company and its shares will not be listed.

(10) On the basis of Article 4 of Decree-Law 186/2012, the criteria for the selection of the non-binding offers and for establishing the short-list of potential investors invited to submit binding offers and to participate in the second phase of the procedure are the following:

(i) the percentage of shares that the investor is willing to buy and the price offered for the shares;

(ii) the presentation of a strategic plan that maximises the maintenance of the human resources of ENVC, as well as the promotion of competitiveness of the shipbuilding and ship repair sectors and the development of the national economy;

(iii) the contribution to the financial and economic sustainability of ENVC;

(iv) the inexistence or mitigation of legal, labour or financial and economic constraints to the direct selling of the shares, namely regarding deadline and payment conditions; and

(v) the appropriateness, financial and technical capacity and the guarantees given regarding all criteria abovementioned.

(11) In addition to the criteria set out in Decree-Law 186/2012, Article 5 of the Resolution of the Council of Ministers 73/2012 states that the selected investor must be in a position to protect the equity interests of the Portuguese State, namely with regard to the financial flows deriving from the direct sale, and to contribute to the maintenance of ENVC's identity as well as of its assets. Also, Article 1(4) of the Resolution of the Council of Ministers 73/2012 foresees that ENVC can be subject to economic and financial restructuring measures during the privatisation procedure.

[5] *Diário da República* nº 156 of 13.8.2012, at page 4364 and *Diário da República* nº 167 of 29.8.2012, at page 4838, respectively.

(12) Portugal indicated that over 70 potential investors were identified by EMPORDEF and its financial advisor. Selected investors were given the opportunity to carry out due diligence from 7 September 2012. From the information submitted by Portugal it appears that six investors submitted non-binding offers, of which two were discarded for not complying with the privatisation model.[6] Therefore, only four investors were invited to the second phase.[7] Three investors submitted binding offers by the deadline of 5 November 2012, but only two were considered eligible: Brazil's Rio Nave Serviços Navais and Russia's JSC River Sea Industrial Trading.[8]

(13) On the basis of information publicly available in the press – not confirmed by Portugal – the offers are below EUR 10 million, i.e. less than a third of ENVC's registered capital of EUR 30 million, and include a commitment to maintain all jobs, while the State would assume all liabilities of ENVC, estimated to be in the region of EUR 260 million.[9]

(14) Portugal explained that on 8 November 2012, EMPORDEF issued a report on the bids, followed by another report from the privatisation commission on 13 November 2012. After that, the selection of the investor and the approval of the share and purchase agreement will occur by way of resolution of the Council of Ministers.

(15) Although the initial intention of Portugal was to choose the investor before the end of 2012, by its letters of 28 December 2012 and 18 January 2013, Portugal explained that the two final bidders had been informed that the outcome of the privatisation process is conditioned to the final position of the Commission on this matter. The Commission thus understands that no final decision has been taken as regards the selection of the best bid.[10]

3. DESCRIPTION OF THE MEASURES

(16) On the basis of the information provided by Portugal in the context of the privatisation, it appears that ENVC may have benefited from several aid measures in the past. Some of these measures seem to have been provided either by EMPORDEF or by the Portuguese Treasury in order to cover operating costs and/or losses of ENVC between 2006 and 2012, for a total amount in excess of EUR 181 million. The measures are summarised in table 1 below.

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6 One bidder (the Portuguese-German Consortium AMAL Construções Metálicas S.A. / MPC Münchmeyer Petersen Marine GmbH) was interested in obtaining a concession to exploit ENVC's premises but not in acquiring the shares. The other bidder (the US firm Tradequip Services & Marine Inc.) envisioned the acquisition of all assets of ENVC and not 95% of the share capital. Both failed to submit an indicative offer.

7 Namely Brazil's Rio Nave Serviços Navais Ltda, Russia's JSC River Sea Industrial Trading, Norway's Volstad Maritime AS and Portugal's Atlanticeagle Shipbuilding Lda.

8 Although Volstad Maritime submitted a binding offer on 5 November 2012, it was disqualified for submitting it after the deadline of 10 o'clock am.

9 See http://www.jornaldenegocios.pt/home.php?template=SHOWNEWS_V2&id=588135 and http://www.publico.pt/Economia/ministerio-da-defesa-recebeu-tres-propostas-para-compra-de-estaleiros-de-viana-do-castelo-1570108.

10 This understanding is corroborated by information appearing in the press on 27 December 2012, see http://www.publico.pt/economia/noticia/governo-adia-a-venda-dos-estaleiros-de-viana-1578775. The press also reports that the Portuguese authorities intend to take a final decision "within weeks".

Table 1: Past measures granted to cover operating costs and/or losses of ENVC

Year	Measure	Provider	Amount (in EUR)
2012	Interest-bearing loans to cover operating costs	EMPORDEF	101,088,928.79
2006	Capital increase of ENVC	EMPORDEF	24,875,000
--	Loans granted in 2006, 2008, 2010 and 2011 to cope with operating costs	Treasury	56,000,000

(17) From the information provided by Portugal, it appears that in 2012 several banks ceased providing loans to ENVC and were only willing to do so in relation to EMPORDEF. As a result, and in order to ensure the continuation of activity by ENVC, EMPORDEF – as its sole shareholder – provided financial support to ENVC in the form of multiple interest-bearing loans amounting to a total of EUR 101,088,928.79. Portugal explains that these loans were granted to cover operating costs and to ensure the rollover of existing bank loans. The interest rates applicable depend on the contracts, ranging from 2% for a loan of EUR […] million to 8.451% for a loan of EUR […] million. Portugal claims that the interest rates replicate the bank interest rates applicable to the underlying loans to EMPORDEF.

(18) In 2006, EMPORDEF carried out an increase of ENVC's capital of EUR 24.875 million. Portugal notes that this capital increase was allegedly needed in order to comply with Article 35 of the Portuguese Companies Code ("*Código das Sociedades Comerciais*"), the alternatives being a reduction of ENVC's capital or the liquidation of the company.[11]

(19) Finally, in 2006, 2008, 2010 and 2011, ENVC obtained a total of EUR 56 million from the Portuguese Treasury ("*Direção-Geral do Tesouro e Finanças*") in the form of several loan agreements. Portugal states that the interest rates applicable were EURIBOR plus variable spread depending on the contract. These loans were apparently granted to cover previous outstanding financial responsibilities and cash requirements to cope with operating costs.

(20) Portugal has also provided information about a number of other measures allegedly granted to ENVC in the past for uncertain reasons. The measures are summarised in table 2 below.

[11] In its submission of 28 December 2012, Portugal refers to a capital increase carried out in 2009. This point should be clarified during the formal investigation procedure.

Table 2: Other past measures granted to ENVC

Year	Measure	Provider	Amount (in EUR)
2012	Standby letters of credit for the construction of […]	Caixa Geral de Depósitos ("CGD")[12] + EMPORDEF	128,900,000*
2011	Comfort letter for a loan granted by Banco Comercial Português (BCP)	EMPORDEF	400,000
"	Comfort letter for a loan granted by BCP	EMPORDEF	990,000
2010	Comfort letter for a loan granted by BCP	EMPORDEF	5,000,000
"	Comfort letter for letters of credit by CGD	EMPORDEF	12,890,000
"	Comfort letter for a loan granted by BCP	EMPORDEF	12,500,000
2009	Comfort letter for revolving loan by Banco Espírito Santo (BES)	EMPORDEF	4,500,000
"	Comfort letter for revolving loan by CGD	EMPORDEF	15,000,000
2008	Letter to BCP (undetermined purpose)	EMPORDEF	Undetermined*
2007	Comfort letter for revolving loan by CGD	EMPORDEF	5,000,000
--	Aid for shipbuilding 2000-2007	Treasury	27,129,933.21*
--	Aid for professional training 2000-2007	Treasury	257,791*
--	Construction of Atlântida vessel		40,000,000*

** To be confirmed and/or clarified*

(21) In 2012, ENVC entered into a contract with Petróleos de Venezuela S.A., a company owned by the Venezuelan State, for the construction of two asphalt carriers. The contract value for each vessel was EUR 64.45 million, totalling EUR 128.9 million. Advance payments to ENVC for both carriers were subject to Standby Letters of CGD, which issued these letters of credit on the basis of comfort letters issued by EMPORDEF.

(22) Portugal also explains that EMPORDEF has issued numerous other comfort letters and guarantees in support of financing agreements between ENVC and commercial banks (see table 2 above). No additional details were provided.

(23) According to the information available, it appears that between 2000 and 2007 ENVC may have received State subsidies for shipbuilding activities amounting to EUR 27,129,933.21. This amount corresponds to multiple non-

[12] CGD is 100% owned by the Portuguese State.

refundable subsidies for the construction of a number of vessels and tankers, which Portugal claims were provided according to Decree Law 296/89 implementing Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding.[13] ENVC may have also received financial aid for professional training amounting to EUR 257,791, allegedly granted under the Operational Programme for Employment, Training and Social Development (POEFDS) sponsored by the European Social Fund.

(24) In relation to the Atlântida vessel, Portugal explains that its construction was awarded to ENVC through direct negotiation with Atlanticonline, the public company responsible for the ocean transportation in Azores. The initial value of the contract for the Atlântida vessel was EUR 40 million, subsequently increased to EUR [45 – 50] million.

(25) At an unknown date, Atlanticonline terminated its contract with ENVC claiming that the Atlântida was incapable of reaching the stipulated speed. According to the termination agreement, ENVC had to pay back to Atlanticonline EUR 40 million. It appears that ENVC has repaid EUR 33 million, while the remaining EUR 7 million plus interest are still pending. In addition, Portugal has provided unclear explanations as regards the market value of the Atlântida vessel in June 2012, which allegedly amounted to EUR [25 – 35] million.

4. COMMENTS OF PORTUGAL

(26) As regards the economic situation of ENVC, Portugal admits that ENVC should be considered a firm in difficulty within the meaning of the Community guidelines on state aid for rescuing and restructuring firms in difficulty[14] (hereinafter "the R&R Guidelines"), since it is currently operating well below its maximum capacity and shows increasing losses, diminishing turnover, declining cash flow, mounting debt and falling net asset value.

(27) Portugal is of the view that the past measures granted to ENVC do not constitute state aid. However, Portugal has provided very little detail on the measures and very succinct explanations as to why they do not entail state aid to ENVC. In essence, Portugal argues that the funding was provided on market terms and against a return that would be satisfactory for a private shareholder operating under prevailing market conditions.

(28) Portugal also claims that EMPORDEF, as ENVC's sole shareholder, and ultimately the State, as the sole shareholder of EMPORDEF, are in any event responsible and ultimately liable for the management decisions of ENVC and thus also for ENVC's obligations. These include payment of outstanding debts, (comprising those deriving from construction contracts), acquisitions of manufacturing inputs and loan agreements with banks.

(29) As regards the construction of the Atlântida vessel (see recitals (24) and (25) above), Portugal maintains that there are no reasons to consider that the price to be paid to ENVC was above market conditions. Portugal also claims that the manufacturing costs of this vessel for ENVC outweighed the contract value

[13] OJ L 69, 12.3.1987, p. 55. This Directive however ceased to apply since 31 December 1990 (see Article 13).

[14] OJ C 244, 1.10.2004, p. 2.

and that ENVC will most likely be forced to sell it for less than its construction cost.

(30) Portugal argues in particular that the decision of EMPORDEF to provide financial support to ENVC in the form of interest-bearing loans in 2012 (see recital (17) above) seems to be a decision that would have been taken by a private investor under similar market conditions while considering the options of liquidation, restructuring or sale. Portugal adds that the loans were provided to cover ENVC's operating costs and to ensure the rollover of existing bank debts, already taking into consideration the privatisation scenario. As a result, Portugal is of the view that the funding was provided on market terms and against a return that would be satisfactory for a private shareholder operating under prevailing market conditions and thus does not constitute state aid. In any case, Portugal adds that if EMPORDEF were to take over this debt in order to ensure that ENVC is privatised free of debt, then this support should be considered aid to the privatisation.

(31) In relation to the 2006 capital increase (see recital (18) above), Portugal argues that EMPORDEF decided to increase the capital of ENVC in order to ensure compliance with on-going financial and commercial commitments. Portugal considers that at the time, taking into consideration the perspectives of continuing ENVC's activities and relevant circumstances, it seemed a reasonable option that any private investor would have probably taken.

(32) As regards the funding provided by the Treasury to ENVC (see recital (19) above), Portugal is of the opinion that it does not entail any direct advantage or aid to ENVC since it was provided on market terms and against a return that would be satisfactory for a sole indirect shareholder operating under prevailing market conditions taking into account the size of the construction portfolio of ENVC.

5. ASSESSMENT

(33) As a preliminary point, this decision addresses the issue of whether ENVC must be considered a firm in difficulty (section 5.1 below). Subsequently, the Commission will examine whether the measures described above in section 3 constitute state aid to ENVC within the meaning of Article 107(1) TFEU (section 5.2 below). Having noted that, in view of the fact that the measures were put in place without ever having been notified to the Commission, those measures must be qualified as unlawful aid (section 5.3 below), the Commission will then carry out a preliminary assessment of the compatibility of the measures with the internal market (section 5.4 below).

5.1. Difficulties of ENVC

(34) Portugal appears to admit that ENVC should be considered a firm in difficulty within the meaning of the R&R Guidelines. However, in view of the claim of the Portuguese authorities that the past measures are in line with the market economy operator principle, the Commission considers it necessary to examine whether ENVC would qualify as a firm in difficulty at the time when the measures were taken.

(35) Recital 9 of the R&R Guidelines states that the Commission regards a firm as being in difficulty when it is unable, whether through its own resources or with

the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

(36) Recital 10 of the R&R Guidelines clarifies that a limited liability company is regarded as being in difficulty where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months, or where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

(37) Recital 11 of the R&R Guidelines adds that, even if the conditions in recital 10 are not satisfied, a firm may be considered to be in difficulty in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

(38) The Commission notes that ENVC is a limited liability company which has continuously registered significant losses since at least 2000 (see table 3 below):

Table 3: Net results of ENVC since 2000 until 30 June 2012[15]

	Net result (in EUR million)
2000	- 2.72
2001	- 4.98
2002	- 11.12
2003	- 26.87
2004	- 27.02
2005	- 14.38
2006	- 5.26
2007	- 8.04
2008	- 12.07
2009	- 22.26
2010	- 41.90
2011	- 22.70
30 June 2012	- [5 – 10]

15 Source: annual accounts of EMPORDEF for 2006, 2007 and 2008 (available at http://www.empordef.pt/main.html), annual accounts of ENVC for 2001, 2002, 2003, 2009, 2010, 2011, and half-year results for 2012.

(39) In addition to the significant losses of ENVC, which constitute a first indication of the difficulties of the company, it also appears that some of the other usual signs of a firm being in difficulty are present. For instance, ENVC's turnover has been in constant decrease since at least 2008, passing from EUR 129.62 million in that year to EUR 55.58 million in 2009, EUR 20.22 million in 2010, EUR 15.11 million in 2011, and EUR [3 – 5] for the year to 30 June 2012.

(40) On the basis of the information provided by the Portuguese authorities, it also appears that ENVC has had negative equity since at least 2009: EUR -25.62 million in 2009, EUR -74.49 million in 2010 and EUR -124.22 million in 2011.[16] As of 30 June 2012 ENVC has negative equity in excess of EUR [135 – 145] million. According to Portugal, since this negative equity represents more than half of the registered capital of ENVC, compliance with Article 35 of the Portuguese Companies Code is required.[17] This seems to suggest that ENVC fulfils the criteria under domestic law for being subject of collective insolvency proceedings.

(41) In view of the above and on the basis of the information available, the Commission is at this stage of the opinion that ENVC could qualify as a firm in difficulty within the meaning of the R&R Guidelines at the time when the past measures were granted.

5.2. Existence of state aid

(42) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(43) In order to conclude on whether state aid is present, it must therefore be assessed whether the cumulative criteria listed in Article 107(1) TFEU (i.e. transfer of State resources, selective advantage, potential distortion of competition and affectation of intra-EU trade) are met for the measures identified.

5.2.1. State resources

(44) The Commission has been provided with limited information on the past measures (see section 3 above), in particular regarding the details on the

[16] From the annual accounts of ENVC for 2001, 2002 and 2003 it appears that ENVC also had negative total equity in 2000 (EUR -5.99 million), 2001 (EUR -10.97 million), 2002 (EUR -22.09 million) and 2003 (EUR -48.97 million).

[17] "Resultando das contas de exercício ou de contas intercalares, tal como elaboradas pelo órgão de administração, que metade do capital social se encontra perdido, ou havendo em qualquer momento fundadas razões para admitir que essa perda se verifica, devem os gerentes convocar de imediato a assembleia geral ou os administradores requerer prontamente a convocação da mesma, a fim de nela se informar os sócios da situação e de estes tomarem as medidas julgadas convenientes. […] Do aviso convocatório da assembleia geral constarão, pelo menos, os seguintes assuntos para deliberação pelos sócios: a) A dissolução da sociedade; b) A redução do capital social para montante não inferior ao capital próprio da sociedade, com respeito, se for o caso, do disposto no n.º 1 do artigo 96.º; c) A realização pelos sócios de entradas para reforço da cobertura do capital".

interest rates of the loans, the conditions of the capital injection, the exact nature of the comfort letters, etc.

(45) On the basis of the information available, the Commission is of the preliminary view that the past measures involve State resources, since they were provided either by the Treasury directly or by the 100% State-owned holding company EMPORDEF.

(46) In relation to EMPORDEF, the Commission is at this stage of the view that its decisions are imputable to the Portuguese State within the meaning of the *Stardust Marine* case-law.[18] As direct evidence of imputability, the Commission notes that the the State is the sole shareholder of EMPORDEF and observes that the President of EMPORDEF and its Executive Directors are nominated directly by the Minister for National Defence.[19]

(47) In addition to the above, the rules governing the privatisation of ENVC (see recital (6) above) clearly indicate that the final decision is to be taken by the Portuguese Government and not by EMPORDEF. In terms of indirect evidence, the Commission observes that on 4 January 2012, the Portuguese Ministry for National Defence issued a press release stating the following: "*on 2 July 2011, the Ministry for National Defence decided to suspend the decommissioning of [ENVC]. In August, the Ministry for National Defence mandated the new administration of EMPORDEF to find a solution that would avoid the decommissioning and closure of ENVC*".[20] Furthermore, on multiple occasions the Minister for National Defence has publicly announced the steps to be undertaken as regards the privatisation process of ENVC.[21]

(48) In the light of the above, at this point in time the Commission is of the view that EMPORDEF's actions are imputable to the State and that the past measures entailed the use of State resources.

5.2.2. Selective advantage

(49) As regards whether the past measures provided ENVC with an undue selective advantage, the Commission is at this stage of the opinion that this is the case. Despite the limited information available, the Commission considers it unlikely that any rational private operator would have provided ENVC with measures such as those mentioned in section 3 above. Indeed, given the

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18 Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397.

19 See list of nominations in the web page of the Ministry of National Defence (http://www.portugal.gov.pt/pt/o-governo/nomeacoes/ministerio-da-defesa-nacional.aspx). See in addition EMPORDEF's web page (http://www.empordef.pt/main.html) as well as several press releases, for example http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1768612 or http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1950754.

20 The original text in Portuguese is as follows: "[…] no passado dia 2 de julho de 2011 o Ministério da Defesa Nacional decidiu suspender o desmantelamento dos Estaleiros Navais de Viana do Castelo. Em agosto, o Ministério da Defesa Nacional mandatou a nova administração da Empordef para que fosse encontrada uma solução que evitasse esse desmantelamento e encerramento dos ENVC". See http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120104-mdn-envc.aspx.

21 See for instance http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120319-mdn-modelo-reprivatizacao.aspx, http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120502-mdn-envc.aspx and http://www.portugal.gov.pt/pt/os-ministerios/ministerio-da-defesa-nacional/mantenha-se-atualizado/20120713-seamdn-envc.aspx.

difficulties of ENVC at the relevant time (see section 5.1 above), it seems unlikely that a rational private market operator, operating under market conditions, would have provided such financing to a company like ENVC, which has been heavily loss making since at least 2000 (see table 3 above).

(50) On that basis, the Commission concludes, at this stage, that the past measures provided an advantage to ENVC. The advantage would be selective in nature given that its sole beneficiary was ENVC.

5.2.3. Distortion of competition and affectation of intra-EU trade

(51) The measures are likely to affect trade between Member States as ENVC is in competition with shipyards from other Members States of the European Union as well as from the rest of the world. The measures in question thus enabled ENVC to continue operating so that it does not have to face, as other competitors, the consequences that would normally follow from its poor financial results.

(52) Under these conditions, the past measures seem to constitute state aid within the meaning of Article 107(1) TFEU.

5.3. Unlawful aid

(53) The Commission notes that, if the past measures identified were to constitute state aid, they would have been granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU. Thus, the Commission considers at this stage that the past measures granted to ENVC appear to constitute unlawful state aid.

5.4. Compatibility of the past measures with the internal market

(54) Insofar as the measures identified above constitute state aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that provision.

(55) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met.[22] The Portuguese authorities consider that the measures do not constitute state aid and have not provided any possible grounds for compatibility. If some of the past measures were to constitute state aid, Portugal considers that they should be considered "aid to the privatisation".

(56) The Commission has nonetheless assessed whether any of the possible compatibility grounds laid down in the TFEU would *prima facie* be applicable to the measures under assessment.

(57) In the first place, the Commission considers at this stage that the exceptions laid down in Article 107(2) TFEU are clearly not applicable and have not been invoked by the Portuguese authorities. The same conclusion would apply to the exceptions foreseen in Article 107(3), points (d) and (e), TFEU.

(58) In view of the fact that ENVC seemed to be a firm in difficulty within the meaning of the R&R Guidelines at the time when the past measures were provided and continues to be in difficulty at present (see section (33) above), it

[22] Case C-364/90 *Italy v Commission* [1993] ECR I-2097, at para 20.

does not appear at this stage that the exception relating to the development of certain areas or of certain sectors laid down in Article 107(3)(a) TFEU could apply, despite the fact that the beneficiary is located in an assisted area under Article 107(3)(a) TFEU and could be eligible for regional aid.

(59) The Commission has also assessed whether any of the measures could be compatible on the basis of Article 107(3)(b) TFEU under the crisis rules enshrined in the Temporary Framework.[23] However, the measures under assessment do not appear to fulfil the conditions for applicability of the Temporary Framework.

(60) Article 107(3)(c) TFEU provides that state aid can be authorised where it is granted to promote the development of certain economic sectors and where this aid does not adversely affect trading conditions to an extent contrary to the common interest.

(61) The measures under assessment do not appear to have been granted pursuant to the specific state aid rules applicable the shipbuilding industry, i.e. the current Framework on state aid to shipbuilding[24] or its predecessors in force at the time the past measures were granted.[25] The conditions that must be fulfilled for those rules to be applicable do not seem to have been respected.

(62) In any event and given the nature of the past measures and of the difficulties of ENVC, the only relevant criteria appear to be those concerning aid for rescuing and restructuring firms in difficulty under Article 107(3)(c) TFEU. Should the Commission come to the conclusion that the past measures constitute state aid, then such aid would normally have to be assessed in the light of the criteria of the R&R Guidelines.

(63) The Commission notes that the conditions for rescue aid laid down in section 3.1 of the R&R Guidelines do not seem to be met: a number of the measures under assessment do not consist of liquidity support in the form of loan guarantees or loans, the measures do not seem to have been provided on the grounds of serious social difficulties and they were not accompanied by an undertaking given by Portugal to communicate to the Commission a restructuring plan or a liquidation plan, etc.

(64) In relation to restructuring aid as defined in section 3.2 of the R&R Guidelines, the Commission observes that Portugal did not notify to the Commission any of the measures identified above as restructuring aid and thus failed to demonstrate that any of the necessary elements for it to be considered as such are present (restructuring plan, own contribution, compensatory measures, etc.).

(65) Recital 34 of the R&R Guidelines requires that grant of the aid is conditional on implementation of a restructuring plan, which must be endorsed by the

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[23] Temporary Framework for state aid measures to support access to finance in the current financial and economic crisis, OJ C 16, 22.1.2009, p. 1, as modified by the Communication from the Commission amending the Temporary Community Framework for state aid measures to support access to finance in the current financial and economic crisis, OJ C 303, 15.12.2009, p. 6. The Temporary Framework expired in December 2011.

[24] OJ C 364, 14.12.2011, p. 9.

[25] Namely the 2004 Framework on state aid to shipbuilding (OJ C 317, 30.12.2003, p. 11) and Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding (OJ L 202, 18.7.1998, p. 1).

Commission in all cases of individual aid. If the measures identified were to constitute state aid, they would have been granted before notification to the Commission and in the absence of a credible restructuring plan satisfying the conditions laid down in the R&R Guidelines. This circumstance would in itself be sufficient to exclude compatibility of the measures with the internal market.

(66) In addition, the Commission observes that Portugal has not put forward any elements that would ensure compliance with the necessary requirements for finding restructuring aid compatible: restoration of the long-term viability of ENVC, acceptable levels of own contribution, adequate compensatory measures, etc.

(67) The Commission thus lacks evidence to conclude whether any of these measures could be found compatible on the basis of the R&R Guidelines as rescue or restructuring aid.

5.5. Conclusion on compatibility

(68) At this stage the Commission has doubts on the compatibility of the past measures in favour of ENVC with the internal market.

6. PLANNED MEASURES IN THE CONTEXT OF THE PRIVATISATION OF ENVC

(69) The Commission notes that Portugal itself argues that a number of the measures identified above should be viewed as "aid to the privatisation", in the context of which a number of new measures in favour of ENVC are also planned. Those new measures are summarised in table 4 below.

Table 4: Planned aid measures in favour of ENVC (indicative amounts)

Year	Measure	Provider	Amount (in EUR)
2012	Funding of ENVC's pension fund deficit		[10,000,000 – 15,000,000]
"	Transfer of past debt to EMPORDEF	EMPORDEF	[50,000,000 – 60,000,000]
"	Write-off of debt of ENVC transferred to EMPORDEF (see recital (17) above)	EMPORDEF	101,088,928.79
"	Transfer of operating debt to EMPORDEF	EMPORDEF	[85,000,000 – 95,000,000]
"	Interest-bearing loans to pay social security and taxes	EMPORDEF	Undetermined*
"	Funding of compensations derived from delays in the execution of construction contracts		Undetermined *

** To be confirmed and/or clarified*

(70) Portugal acknowledges that the exact nature and amount of these measures is not yet clear, since they will depend on the actual content of the binding offers and the price conditions of these offers. Portugal has not provided details on the two binding offers received (see recital (12) above).

(71) Although the planned measures accompanying the privatisation of ENVC are not subject to the present decision, the Commission, in view of the economic situation of ENVC and the nature of the planned measures, considers it likely that, if implemented in the form currently foreseen, those measures would contain state aid.

(72) The Commission notes, in particular, that an unconditional tender where the company is sold to the highest bidder is the best possible way to minimise the risk of state aid being present.[26] What is more, according to a well-settled Commission practice confirmed by the case-law,[27] attaching to the sale of a company conditions that a market operator would not impose justifies the presumption that State aid might be involved. A market economy vendor would normally sell his company for the highest price without imposing conditions that would depress that price. On the basis of the information provided by Portugal to date, the privatisation process will not include an unconditional tender and the sale includes a number of conditions which appear capable of significantly affecting the price that could be obtained (see recital (10) above).

(73) In this respect, the Commission wishes to remind Portugal that Article 108(3) TFEU has suspensory effect. Portugal should not implement the planned measures without having obtained prior authorisation from the Commission.

7. DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Portugal to submit its comments and to provide all such information as may help to assess the past measures in favour of ENVC, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

In relation to the planned measures accompanying the privatisation of ENVC, the Commission wishes to remind Portugal that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect.

The Commission would also draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Portugal that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European*

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[26] See Commission Staff Working Document – Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises, available at http://ec.europa.eu/competition/state_aid/studies_reports/swd_guidance_paper_en.pdf.

[27] See for instance Commission Decision in case C 29/1990 (ex NN 88/1989), *Intelhorce SA – Spain*, OJ L 176, 30.6.1992, p. 57. The Court of Justice endorsed this principle in Joined Cases C-278/92, C-279/92 and C- 280/92 *Spain v Commission* [1994] ECR I-4103, at para 28.

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.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
1049 Brussels
Belgium

Fax No: +32-2-296-1242

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-president