G. SPECIFIC AID INSTRUMENTS
Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees

(2008/C 155/02)

This Notice replaces the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

1. INTRODUCTION

1.1. Background

This Notice updates the Commission’s approach to State aid granted in the form of guarantees and aims to give Member States more detailed guidance about the principles on which the Commission intends to base its interpretation of Articles 87 and 88 and their application to State guarantees. These principles are currently laid down in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (1). Experience gained in the application of this Notice since 2000 suggests that the Commission’s policy in this area should be reviewed. In this connection, the Commission wishes to recall for instance its recent practice in various specific decisions (2) with respect to the need to undertake an individual assessment of the risk of losses related to each guarantee in the case of schemes. The Commission intends to further make its policy in this area as transparent as possible so that its decisions are predictable and that equal treatment is ensured. In particular, the Commission wishes to provide small and medium-sized enterprises (hereafter ‘SMEs’) and Member States with safe-harbours predetermining, for a given company and on the basis of its financial rating, the minimum margin that should be charged for a State guarantee in order to be deemed as not constituting aid within the scope of Article 87(1) of the Treaty. Likewise, any shortfall in the premium charged in comparison with that level could be deemed as the aid element.

1.2. Types of guarantee

In their most common form, guarantees are associated with a loan or other financial obligation to be contracted by a borrower with a lender; they may be granted as individual guarantees or within guarantee schemes.

However, various forms of guarantee may exist, depending on their legal basis, the type of transaction covered, their duration, etc. Without the list being exhaustive, the following forms of guarantee can be identified:

— general guarantees, i.e. guarantees provided to undertakings as such as opposed to guarantees linked to a specific transaction, which may be a loan, an equity investment, etc.,

— guarantees provided by a specific instrument as opposed to guarantees linked to the status of the undertaking itself,

— guarantees provided directly or counter guarantees provided to a first level guarantor,

— unlimited guarantees as opposed to guarantees limited in amount and/or time. The Commission also regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State. The same applies to the acquisition by a State of a holding in an enterprise if unlimited liability is accepted instead of the usual limited liability,

— guarantees clearly originating from a contractual source (such as formal contracts, letters of comfort) or another legal source as opposed to guarantees whose form is less visible (such as side letters, oral commitments), possibly with various levels of comfort that can be provided by this guarantee.

Especially in the latter case, the lack of appropriate legal or accounting records often leads to very poor traceability. This is true both for the beneficiary and for the State or public body providing it and, as a result, for the information available to third parties.

1.3. Structure and scope of the Notice

For the purpose of this Notice:

(a) 'guarantee scheme' means any tool on the basis of which, without further implementing measures being required, guarantees can be provided to undertakings respecting certain conditions of duration, amount, underlying transaction, type or size of undertakings (such as SMEs);

(b) 'individual guarantee' means any guarantee provided to an undertaking and not awarded on the basis of a guarantee scheme.

Sections 3 and 4 of this Notice are designed to be directly applicable to guarantees linked to a specific financial transaction such as a loan. The Commission considers that, owing to their frequency and the fact that they can usually be quantified, these are the cases where guarantees most need to be classed as constituting State aid or otherwise.

As in most cases the transaction covered by a guarantee would be a loan, the Notice will further refer to the principal beneficiary of the guarantee as the ‘borrower’ and to the body whose risk is diminished by the State guarantee as the ‘lender’. The use of these two specific terms also aims to facilitate understanding of the rationale underpinning the text, since the basic principle of a loan is broadly understood. However, it does not ensure that Sections 3 and 4 are only applicable to a loan guarantee. They apply to all guarantees where a similar transfer of risk takes place such as an investment in the form of equity, provided the relevant risk profile (including the possible lack of collateralisation) is taken into account.

The Notice applies to all economic sectors, including the agriculture, fisheries and transport sectors without prejudice to specific rules relating to guarantees in the sector concerned.

This Notice does not apply to export credit guarantees.

1.4. Other types of guarantee

Where certain forms of guarantee (see point 1.2) involve a transfer of risk to the guarantor and where they do not display one or more of the specific features referred to in point 1.3, for instance insurance guarantees, a case-by-case analysis will have to be made for which, as far as is necessary, the applicable Sections or methodologies described in this Notice will be applied.

1.5. Neutrality

This Notice applies without prejudice to Article 295 of the Treaty and thus does not prejudice the rules in Member States governing the system of property ownership. The Commission is neutral as regards public and private ownership.

In particular, the mere fact that the ownership of an undertaking is largely in public hands is not sufficient in itself to constitute a State guarantee provided there are no explicit or implicit guarantee elements.

2. APPLICABILITY OF ARTICLE 87(1)

2.1. General remarks

Article 87(1) of the Treaty states that 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 common market.
These general criteria equally apply to guarantees. As for other forms of potential aid, guarantees given directly by the State, namely by central, regional or local authorities, as well as guarantees given through State resources by other State-controlled bodies such as undertakings and imputable to public authorities (1), may constitute State aid.

In order to avoid any doubts, the notion of State resources should thus be clarified as regards State guarantees. The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if it turns out that no payments are ever made by the State under a guarantee, there may nevertheless be State aid under Article 87(1) of the Treaty. The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment when the guarantee is given.

In this context the Commission points out that the analysis under State aid rules does not preclude the compatibility of a given measure with other Treaty provisions.

2.2. Aid to the borrower

Usually, the aid beneficiary is the borrower. As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium. When the borrower does not need to pay the premium, or pays a low premium, it obtains an advantage. Compared to a situation without guarantee, the State guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the State guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms. State guarantees may thus facilitate the creation of new business and enable certain undertakings to raise money in order to pursue new activities. Likewise, a State guarantee may help a failing firm remain active instead of being eliminated or restructured, thereby possibly creating distortions of competition.

2.3. Aid to the lender

2.3.1. Even if usually the aid beneficiary is the borrower, it cannot be ruled out that under certain circumstances the lender, too, will directly benefit from the aid. In particular, for example, if a State guarantee is given ex post in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted, or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be aid to the lender, in so far as the security of the loans is increased. Where the guarantee contains aid to the lender, attention should be drawn to the fact that such aid might, in principle, constitute operating aid.

2.3.2. Guarantees differ from other State aid measures, such as grants or tax exemptions, in that, in the case of a guarantee, the State also enters into a legal relationship with the lender. Therefore, consideration has to be given to the possible consequences for third parties of State aid that has been illegally granted. In the case of State guarantees for loans, this concerns mainly the lending financial institutions. In the case of guarantees for bonds issued to obtain financing for undertakings, this concerns the financial institutions involved in the issuance of the bonds. The question whether the illegality of the aid affects the legal relations between the State and third parties is a matter which has to be examined under national law. National courts may have to examine whether national law prevents the guarantee contracts from being honoured, and in that assessment the Commission considers that they should take account of the breach of Community law. Accordingly, lenders may have an interest in verifying, as a standard precaution, that the Community rules on State aid have been observed whenever guarantees are granted. The Member State should be able to provide a case number issued by the Commission for an individual case or a scheme and possibly a non-confidential copy of the Commission’s decision together with the relevant reference to the Official Journal of the European Union. The Commission for its part will do its utmost to make available in a transparent manner information on cases and schemes approved by it.

3. CONDITIONS RULING OUT THE EXISTENCE OF AID

3.1. General considerations

If an individual guarantee or a guarantee scheme entered into by the State does not bring any advantage to an undertaking, it will not constitute State aid.

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the Court has confirmed in its recent judgments (1) that the Commission should base its assessment on the principle of an investor operating in a market economy (hereafter referred to as the ‘market economy investor principle’). Account should therefore be taken of the effective possibilities for a beneficiary undertaking to obtain equivalent financial resources by having recourse to the capital market. State aid is not involved where a new funding source is made available on conditions which would be acceptable for a private operator under the normal conditions of a market economy (2).

In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given guarantee measure, the Commission sets out in this Section a number of sufficient conditions for the absence of aid. Individual guarantees are covered in point 3.2 with a simpler option for SMEs in point 3.3. Guarantee schemes are covered in point 3.4 with a simpler option for SMEs in point 3.5.

3.2. Individual guarantees

Regarding an individual State guarantee, the Commission considers that the fulfilment of all the following conditions will be sufficient to rule out the presence of State aid.

(a) The borrower is not in financial difficulty.

In order to decide whether the borrower is to be seen as being in financial difficulty, reference should be made to the definition set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (3). SMEs which have been incorporated for less than three years shall not be considered as being in difficulty for that period for the purposes of this Notice.

(b) The extent of the guarantee can be properly measured when it is granted. This means that the guarantee must be linked to a specific financial transaction, for a fixed maximum amount and limited in time.

(c) The guarantee does not cover more than 80 % of the outstanding loan or other financial obligation; this limitation does not apply to guarantees covering debt securities (4).

The Commission considers that if a financial obligation is wholly covered by a State guarantee, the lender has less incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to properly assess the borrower’s creditworthiness. Such risk assessment might, due to lack of means, not always be taken over by the State guarantor. This lack of incentive to minimise the risk of non-repayment of the loan might encourage lenders to contract loans with a greater than normal commercial risk and could thus increase the amount of higher-risk guarantees in the State’s portfolio.

(1) See Case C-482/99 referred to in footnote 3.
(3) OJ C 244, 1.10.2004, p. 2.
This limitation of 80 % does not apply to a public guarantee granted to finance a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest (SGEI) (*) and when this guarantee has been provided by the public authority having put in place this entrustment. The limitation of 80 % applies if the company concerned provides other SGEIs or other economic activities.

In order to ensure that the lender effectively bears part of the risk, due attention must be given to the following two aspects:

— when the size of the loan or of the financial obligation decreases over time, for instance because the loan starts to be reimbursed, the guaranteed amount has to decrease proportionally, in such a way that at each moment in time the guarantee does not cover more than 80 % of the outstanding loan or financial obligation,

— losses have to be sustained proportionally and in the same way by the lender and the guarantor. In the same manner, net recoveries (i.e. revenues excluding costs for claim handling) generated from the recuperation of the debt from the securities given by the borrower have to reduce proportionally the losses borne by the lender and the guarantor. First-loss guarantees, where losses are first attributed to the guarantor and only then to the lender, will be regarded as possibly involving aid.

If a Member State wishes to provide a guarantee above the 80 % threshold and claims that it does not constitute aid, it should duly substantiate the claim, for instance on the basis of the arrangement of the whole transaction, and notify it to the Commission so that the guarantee can be properly assessed with regards to its possible State aid character.

(d) A market-oriented price is paid for the guarantee.

As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium on the guaranteed or counter-guaranteed amount. When the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not contain aid.

If no corresponding guarantee premium benchmark can be found on the financial markets, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, has to be compared to the market price of a similar non-guaranteed loan.

In both cases, in order to determine the corresponding market price, the characteristics of the guarantee and of the underlying loan should be taken into consideration. This includes: the amount and duration of the transaction; the security given by the borrower and other experience affecting the recovery rate evaluation; the probability of default of the borrower due to its financial position, its sector of activity and prospects; as well as other economic conditions. This analysis should notably allow the borrower to be classified by means of a risk rating. This classification may be provided by an internationally recognised rating agency or, where available, by the internal rating used by the bank providing the underlying loan. The Commission points to the link between rating and default rate made by international financial institutions, whose work is also publicly available (§). To assess whether the premium is in line with the market prices the Member State can carry out a comparison of prices paid by similarly rated undertakings on the market.

The Commission will therefore not accept that the guarantee premium is set at a single rate deemed to correspond to an overall industry standard.

(*) Such an SGEI must comply with Community rules such as Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67), and the Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

(§) Such as Table 1 on agencies' credit ratings to be found in the Bank for International Settlements Working Paper No 207, available at: http://www.bis.org/publ/work207.pdf
3.3. Valuation of individual guarantees for SMEs

As an exception, if the borrower is an SME (10), the Commission can by way of derogation from point 3.2(d) accept a simpler evaluation of whether or not a loan guarantee involves aid. In that case, and provided all the other conditions laid down in points 3.2(a), (b) and (e) are met, a State guarantee would be deemed as not constituting aid if the minimum annual premium (‘safe-harbour premium’ (11)) set out in the following table is charged on the amount effectively guaranteed by the State, based on the rating of the borrower (12):

<table>
<thead>
<tr>
<th>Credit quality</th>
<th>Standard &amp; Poor’s</th>
<th>Fitch</th>
<th>Moody’s</th>
<th>Annual safe-harbour premium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highest quality</td>
<td>AAA</td>
<td>AAA</td>
<td>Aaa</td>
<td>0.4 %</td>
</tr>
<tr>
<td>Very strong payment capacity</td>
<td>AA +</td>
<td>AA +</td>
<td>Aa 1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>AA</td>
<td>AA</td>
<td>Aa 2</td>
<td>0.4 %</td>
</tr>
<tr>
<td></td>
<td>AA –</td>
<td>AA –</td>
<td>Aa 3</td>
<td></td>
</tr>
<tr>
<td>Strong payment capacity</td>
<td>A +</td>
<td>A +</td>
<td>A 1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>A</td>
<td>A</td>
<td>A 2</td>
<td>0.55 %</td>
</tr>
<tr>
<td></td>
<td>A –</td>
<td>A –</td>
<td>A 3</td>
<td></td>
</tr>
<tr>
<td>Adequate payment capacity</td>
<td>BBB +</td>
<td>BBB +</td>
<td>Baa 1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>BBB</td>
<td>BBB</td>
<td>Baa 2</td>
<td>0.8 %</td>
</tr>
<tr>
<td></td>
<td>BBB –</td>
<td>BBB –</td>
<td>Baa 3</td>
<td></td>
</tr>
<tr>
<td>Payment capacity is vulnerable to adverse conditions</td>
<td>BB +</td>
<td>BB +</td>
<td>Ba 1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>BB</td>
<td>BB</td>
<td>Ba 2</td>
<td>2.0 %</td>
</tr>
<tr>
<td></td>
<td>BB –</td>
<td>BB –</td>
<td>Ba 3</td>
<td></td>
</tr>
<tr>
<td>Payment capacity is likely to be impaired by adverse conditions</td>
<td>B +</td>
<td>B +</td>
<td>B 1</td>
<td>3.8 %</td>
</tr>
<tr>
<td></td>
<td>B</td>
<td>B</td>
<td>B 2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>B –</td>
<td>B –</td>
<td>B 3</td>
<td>6.3 %</td>
</tr>
<tr>
<td>Payment capacity is dependent upon sustained favourable conditions</td>
<td>CCC +</td>
<td>CCC +</td>
<td>Caa 1</td>
<td>No safe-harbour annual premium can be provided</td>
</tr>
<tr>
<td></td>
<td>CCC</td>
<td>CCC</td>
<td>Caa 2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>CCC –</td>
<td>CCC –</td>
<td>Caa 3</td>
<td></td>
</tr>
<tr>
<td></td>
<td>CC</td>
<td>CC</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In or near default</td>
<td>SD</td>
<td>DDD</td>
<td>Ca</td>
<td>No safe-harbour annual premium can be provided</td>
</tr>
<tr>
<td></td>
<td>D</td>
<td>DD</td>
<td>C</td>
<td></td>
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<td></td>
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</table>


(11) These safe-harbour premiums are established in line with the margins determined for loans to similarly rated undertakings in the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 34, 19.1.2008, p. 6). Following the study commissioned by the Commission on that topic (http://ec.europa.eu/comm/competition/state_aid/studies_genreports/full_report.pdf, see pages 23 and 156-159 of the study), a general reduction of 20 basis points has been taken into account. This reduction corresponds to the difference in margin for a similar risk between a loan and a guarantee in order to take into account the additional costs specifically linked to loans.

(12) The table refers to the rating classes of Standard & Poor’s, Fitch and Moody’s, which are the rating agencies most frequently used by the banking sector in order to link their own rating system, as described in point 3.2(d). However, ratings do not need to be obtained from those specific rating agencies. National rating systems or rating systems used by banks to reflect default rates are equally acceptable provided they supply the one-year probability of default as this figure is used by rating agencies to rank companies. Other systems should allow for a similar classification through this ranking key.
The safe-harbour premiums apply to the amount effectively guaranteed or counter-guaranteed by the State at the beginning of each year concerned. They must be considered as the minimum to be applied with respect to a company whose credit rating is at least equal to those given in the table (13).

In the case of a single upfront guarantee premium, the loan guarantee is deemed to be free of aid if it is at least equal to the present value of the future guarantee premiums as indicated above, the discount rate used being the corresponding reference rate (14).

As outlined in the table above, companies with a rating corresponding to CCC/Caa or worse cannot benefit from this simplified methodology.

For SMEs which do not have a credit history or a rating based on a balance sheet approach, such as certain special purpose companies or start-up companies, the safe-harbour premium is set at 3.8% but this can never be lower than the premium which would be applicable to the parent company or companies.

These margins may be revised from time to time to take account of the market situation.

3.4. Guarantee schemes

For a State guarantee scheme, the Commission considers that the fulfilment of all the following conditions will rule out the presence of State aid:

(a) the scheme is closed to borrowers in financial difficulty (see details in point 3.2(a));

(b) the extent of the guarantees can be properly measured when they are granted. This means that the guarantees must be linked to specific financial transactions, for a fixed maximum amount and limited in time;

(c) the guarantees do not cover more than 80% of each outstanding loan or other financial obligation (see details and exceptions in point 3.2(c));

(d) the terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the beneficiaries make it, in all probability, self-financing. The self-financing nature of the scheme and the proper risk orientation are viewed by the Commission as indications that the guarantee premiums charged under the scheme are in line with market prices.

This entails that the risk of each new guarantee has to be assessed, on the basis of all the relevant factors (quality of the borrower, securities, duration of the guarantee, etc). On the basis of this risk analysis, risk classes (15) have to be defined, the guarantee has to be classified in one of these risk classes and the corresponding guarantee premium has to be charged on the guaranteed or counter-guaranteed amount;

(e) in order to have a proper and progressive evaluation of the self-financing aspect of the scheme, the adequacy of the level of the premiums has to be reviewed at least once a year on the basis of the effective loss rate of the scheme over an economically reasonable time horizon, and premiums adjusted accordingly if there is a risk that the scheme may no longer be self-financing. This adjustment may concern all issued and future guarantees or only the latter;

(f) in order to be viewed as being in line with market prices, the premiums charged have to cover the normal risks associated with granting the guarantee, the administrative costs of the scheme, and a yearly remuneration of an adequate capital, even if the latter is not at all or only partially constituted.

As regards administrative costs, these should include at least the specific initial risk assessment as well as the risk monitoring and risk management costs linked to the granting and administration of the guarantee.

(13) For example, a company to which a bank assigns a credit rating corresponding to BBB-/Baa3 should be charged a yearly guarantee premium of at least 0.8% on the amount effectively guaranteed by the State at the beginning of each year.

(14) See the Communication referred to in footnote 11 providing that: ‘The reference rate is also to be used as a discount rate, for calculating present values. To that end, in principle, the base rate increased by a fixed margin of 100 basis points will be used’ (p. 4).

(15) See further details in footnote 12.
As regards the remuneration of the capital, the Commission observes that usual guarantors are subject to capital requirement rules and, in accordance with these rules, are forced to constitute equity in order not to go bankrupt when there are variations in the yearly losses related to the guarantees. State guarantee schemes are normally not subject to these rules and thus do not need to constitute such reserves. In other words, each time the losses stemming from the guarantees exceed the revenues from the guarantee premiums, the deficit is simply covered by the State budget. This State guarantee to the scheme puts the latter in a more favourable situation than a usual guarantor. In order to avoid this disparity and to remunerate the State for the risk it is taking, the Commission considers that the guarantee premiums have to cover the remuneration of an adequate capital.

The Commission considers that this capital has to correspond to 8 % (16) of the outstanding guarantees. For guarantees granted to undertakings whose rating is equivalent to AAA/AA- (Aaa/Aa3), the amount of capital to be remunerated can be reduced to 2 % of the outstanding guarantees. Meanwhile, with regard to guarantees granted to undertakings whose rating is equivalent to A+/A- (A1/A3), the amount of capital to be remunerated can be reduced to 4 % of the outstanding guarantees.

The normal remuneration of this capital is made up of a risk premium, possibly increased by the risk-free interest rate.

The risk premium must be paid to the State on the adequate amount of capital in all cases. Based on its practice, the Commission considers that a normal risk premium for equity amounts to at least 400 basis points and that such risk premium should be included in the guarantee premium charged to the beneficiaries (17).

If, as in most State guarantee schemes, the capital is not provided to the scheme and therefore there is no cash contribution by the State, the risk-free interest rate does not have to be taken into account. Alternatively, if the underlying capital is effectively provided by the State, the State has to incur borrowing costs and the scheme benefits from this cash by possibly investing it. Therefore the risk-free interest rate has to be paid to the State on the amount provided. Moreover, this charge should be taken from the financial income of the scheme and does not necessarily have to impact the guarantee premiums (18). The Commission considers that the yield of the 10-year government bond may be used as a suitable proxy for the risk-free rate taken as normal return on capital;

(g) in order to ensure transparency, the scheme must provide for the terms on which future guarantees will be granted, such as eligible companies in terms of rating and, when applicable, sector and size, maximum amount and duration of the guarantees.

3.5. Valuation of guarantee schemes for SMEs

In view of the specific situation of SMEs and in order to facilitate their access to finance, especially through the use of guarantee schemes, two specific possibilities exist for such companies:

— the use of safe-harbour premiums as defined for individual guarantees to SMEs,

— the valuation of guarantee schemes as such by allowing the application of a single premium and avoiding the need for individual ratings of beneficiary SMEs.


(17) For a guarantee to a BBB rated company amounting to 100, the reserves to be constituted thus amount to 8. Applying 400 basis points (or 4 %) to this amount results in annual capital costs of 8 % × 4 % = 0.32 % of the guaranteed amount, which will impact the price of the guarantee accordingly. If the one-year default rate anticipated by the scheme for this company is, for instance, 0.35 % and the yearly administrative costs are estimated at 0.1 %, the price of the guarantee deemed as non-aid will be 0.77 % per year.

(18) In that case, and provided the risk-free rate is deemed to be 5 %, the annual cost of the reserves to be constituted will be, for the same guarantee of 100 and reserves of 8 to be constituted, 8 % × (4 % + 5 %) = 0.72 % of the guaranteed amount. Under the same assumptions (default rate of 0.35 % and administrative costs of 0.1 %), the price of the guarantee would be 0.77 % per year and an additional charge of 0.4 % should be paid by the scheme to the State.
The conditions of use of both rules are defined as follows:

**Use of safe-harbour premiums in guarantee schemes for SMEs**

In line with what is proposed for simplification purposes in relation to individual guarantees, guarantee schemes in favour of SMEs can also, in principle, be deemed self-financing and not constitute State aid if the minimum safe-harbour premiums set out in point 3.3 and based on the ratings of undertakings are applied (19). The other conditions set out in points 3.4(a), (b) and (c) as well as in point 3.4(g) still have to be fulfilled, and the conditions set out in points 3.4(d), (e) and (f) are deemed to be fulfilled by the use of the minimum annual premiums set out in point 3.3.

**Use of single premiums in guarantee schemes for SMEs**

The Commission is aware that carrying out an individual risk assessment of each borrower is a costly process, which may not be appropriate where a scheme covers a large number of small loans for which it represents a risk pooling tool.

Consequently, where a scheme only relates to guarantees for SMEs and the guaranteed amount does not exceed a threshold of EUR 2.5 million per company in that scheme, the Commission may accept, by way of derogation from point 3.4(d), a single yearly guarantee premium for all borrowers. However, in order for the guarantees granted under such a scheme to be regarded as not constituting State aid, the scheme has to remain self-financing and all the other conditions set out in points 3.4(a), (b) and (c) as well as in points 3.4(e), (f) and (g) still have to be fulfilled.

3.6. **No automatic classification as State aid**

Failure to comply with any one of the conditions set out in points 3.2 to 3.5 does not mean that the guarantee or guarantee scheme is automatically regarded as State aid. If there is any doubt as to whether a planned guarantee or guarantee scheme constitutes State aid, it should be notified to the Commission.

4. **GUARANTEES WITH AN AID ELEMENT**

4.1. **General**

Where an individual guarantee or a guarantee scheme does not comply with the market economy investor principle, it is deemed to entail State aid. The State aid element therefore needs to be quantified in order to check whether the aid may be found compatible under a specific State aid exemption. As a matter of principle, the State aid element will be deemed to be the difference between the appropriate market price of the guarantee provided individually or through a scheme and the actual price paid for that measure.

The resulting yearly cash grant equivalents should be discounted to their present value using the reference rate, then added up to obtain the total grant equivalent.

When calculating the aid element in a guarantee, the Commission will devote special attention to the following elements:

(a) whether in the case of individual guarantees the borrower is in financial difficulty. Whether in the case of guarantee schemes, the eligibility criteria of the scheme provide for exclusion of such undertakings (see details in point 3.2(a)).

The Commission notes that for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee;

(19) This includes the provision whereby for SMEs which do not have a credit history or a rating based on a balance sheet approach, the safe-harbour premium is set at 3.8% but this can never be lower than the premium which would be applicable to the parent companies.

G.1.1
(b) whether the extent of each guarantee can be properly measured when it is granted.

This means that the guarantees must be linked to a specific financial transaction, for a fixed maximum amount and limited in time. In this connection the Commission considers in principle that unlimited guarantees are incompatible with Article 87 of the Treaty;

(c) whether the guarantee covers more than 80 % of each outstanding loan or other financial obligation (see details and exceptions in point 3.2(c)).

In order to ensure that the lender has a real incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to assess properly the borrower’s creditworthiness, the Commission considers that a percentage of at least 20 % not covered by a State guarantee should be carried by the lender (20) to properly secure its loans and to minimise the risk associated with the transaction. The Commission will therefore, in general, examine more thoroughly any guarantee or guarantee scheme covering the entirety (or nearly the entirety) of a financial transaction except if a Member State duly justifies it, for instance, by the specific nature of the transaction;

(d) whether the specific characteristics of the guarantee and loan (or other financial obligation) have been taken into account when determining the market premium of the guarantee, from which the aid element is calculated by comparing it with the premium actually paid (see details in point 3.2(d)).

4.2. Aid element in individual guarantees

For an individual guarantee the cash grant equivalent of a guarantee should be calculated as the difference between the market price of the guarantee and the price actually paid.

Where the market does not provide guarantees for the type of transaction concerned, no market price for the guarantee is available. In that case, the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate this company would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account. If there is no market interest rate and if the Member State wishes to use the reference rate as a proxy, the Commission stresses that the conditions laid down in the communication on reference rates (21) are valid to calculate the aid intensity of an individual guarantee. This means that due attention must be paid to the top-up to be added to the base rate in order to take into account the relevant risk profile linked to the operation covered, the undertaking guaranteed and the collaterals provided.

4.3. Aid element in individual guarantees for SMEs

For SMEs, the simplified evaluation system outlined in point 3.3 can also be applied. In that case, if the premium for a given guarantee does not correspond to the value set as a minimum for its rating class, the difference between this minimum level and the premium charged will be regarded as aid. If the guarantee lasts more than a year, the yearly shortfalls are discounted using the relevant reference rate (22).

Only in cases clearly evidenced and duly justified by the Member State concerned may the Commission accept a deviation from these rules. A risk-based approach still has to be respected in such cases.

4.4. Aid element in guarantee schemes

For guarantee schemes, the cash grant equivalent of each guarantee within the scheme is the difference between the premium effectively charged (if any) and the premium that should be charged in an equivalent non-aid scheme set up in accordance with the conditions laid down in point 3.4. The aforementioned theoretical premiums from which the aid element is calculated have therefore to cover the normal risks

(20) This is based on the assumption that the corresponding level of security is provided by the company to the State and the credit institution.
(21) See the Communication referred to in footnote 11.
(22) See further details in footnote 14.
associated with the guarantee as well as the administrative and capital costs (23). This way of calculating the grant equivalent is aimed at ensuring that, also over the medium and long term, the total aid granted under the scheme is equal to the money injected by the public authorities to cover the deficit of the scheme.

Since, in the case of State guarantee schemes, the specific features of the individual cases may not be known at the time when the scheme is to be assessed, the aid element must be assessed by reference to the provisions of the scheme.

Aid elements in guarantee schemes can also be calculated through methodologies already accepted by the Commission following their notification under a regulation adopted by the Commission in the field of State aid, such as Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (24) or Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (25), provided that the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake.

Only in cases clearly evidenced and duly justified by the Member State concerned may the Commission accept a deviation from these rules. A risk-based approach still has to be respected in such cases.

4.5. Aid element in guarantee schemes for SMEs

The two simplification tools outlined in point 3.5 and relating to guarantee schemes for SMEs can also be used for aid calculation purposes. The conditions of use of both rules are defined as follows:

Use of safe-harbour premiums in guarantee schemes for SMEs

For SMEs, the simplified evaluation system outlined above in point 3.5 can also be applied. In that case, if the premium for a given category in a guarantee scheme does not correspond to the value set as a minimum for its rating class (26), the difference between this minimum level and the premium charged will be regarded as aid (27). If the guarantee lasts more than a year, the yearly shortfalls are discounted using the reference rate (28).

Use of single premiums in guarantee schemes for SMEs

In view of the more limited distortion of competition that may be caused by State aid provided in the framework of a guarantee scheme for SMEs, the Commission considers that if an aid scheme only relates to guarantees for SMEs, where the guaranteed amount does not exceed a threshold of EUR 2.5 million per company in this given scheme, the Commission may accept, by way of derogation from point 4.4, a valuation of the aid intensity of the scheme as such, without the need to carry out a valuation for each individual guarantee or risk class within the scheme (29).

(23) This calculation can be summarised, for each risk class, as the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor of the risk class (risk being the probability of default after inclusion of administrative and capital costs), which represents the market premium, and (b) any premium paid, i.e. (guaranteed sum × risk) – premium paid.


(26) This includes the possibility whereby SMEs which do not have a credit history or a rating based on a balance sheet approach, the safe-harbour premium is set at 3.8 % but this can never be lower than the premium which would be applicable to the parent company or companies.

(27) This calculation can be summarised, for each risk class, as the outstanding sum guaranteed multiplied by the difference between (a) the safe-harbour premium percentage of that risk class and (b) the premium percentage paid, i.e. guaranteed sum × (safe-harbour premium – premium paid).

(28) See further details in footnote 11.

(29) See further details in footnote 11.
5. **COMPATIBILITY WITH THE COMMON MARKET OF STATE AID IN THE FORM OF GUARANTEES**

5.1. **General**

State guarantees within the scope of Article 87(1) of the Treaty must be examined by the Commission with a view to determining whether or not they are compatible with the common market. Before such assessment of compatibility can be made, the beneficiary of the aid must be identified.

5.2. **Assessment**

Whether or not this aid is compatible with the common market will be examined by the Commission according to the same rules as are applied to aid measures taking other forms. The concrete criteria for the compatibility assessment have been clarified and detailed by the Commission in frameworks and guidelines concerning horizontal, regional and sectoral aid. The examination will take into account, in particular, the aid intensity, the characteristics of the beneficiaries and the objectives pursued.

5.3. **Conditions**

The Commission will accept guarantees only if their mobilisation is contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking, or any similar procedure. These conditions will have to be agreed between the parties when the guarantee is initially granted. In the event that a Member State wants to mobilise the guarantee under conditions other than those initially agreed to at the granting stage, then the Commission will regard the mobilisation of the guarantee as creating new aid which has to be notified under Article 88(3) of the Treaty.

6. **REPORTS TO BE PRESENTED TO THE COMMISSION BY THE MEMBER STATES**

In accordance with general monitoring obligations, in order to further monitor new developments on the financial markets and since the value of State guarantees is difficult to assess and changes over time, the constant review, pursuant to Article 88(1) of the Treaty, of State guarantee schemes approved by the Commission is of particular importance. Member States shall therefore submit reports to the Commission.

For aid guarantee schemes, these reports will have to be presented at least at the end of the period of validity of the guarantee scheme and for the notification of an amended scheme. The Commission may however consider it appropriate to request reports on a more frequent basis, depending on the case.

For guarantee schemes, for which the Commission has taken a non-aid decision, and especially when no solid historic data exists for the scheme, the Commission may request, when taking its non-aid decision for such reports to be presented, thereby clarifying on a case-by-case basis the frequency and the content of the reporting requirement.

Reports should include at least the following information:

(a) the number and amount of guarantees issued;
(b) the number and amount of guarantees outstanding at the end of the period;
(c) the number and value of defaulted guarantees (displayed individually) on a yearly basis;
(d) the yearly income:
   1. income from the premiums charged;
   2. income from recoveries;
   3. other revenues (e.g. interest received on deposits or investments);

(e) the yearly costs:
   1. administrative costs;
   2. indemnifications paid on mobilised guarantees;
(f) the yearly surplus or shortfall (difference between income and costs); and
(g) the accumulated surplus or shortfall since the beginning of the scheme (\(^{(32)}\)).

For individual guarantees, the relevant information, mainly that referred to in points (d) to (g), should be similarly reported.

In all cases, the Commission draws the attention of Member States to the fact that correct reporting at a remote date presupposes correct collection of the necessary data from the beginning of the use of the scheme and their aggregation on a yearly basis.

The attention of Member States is also drawn to the fact that for non-aid guarantees provided individually or under a scheme, although no notification obligation exists, the Commission may have to verify that the guarantee or scheme does not entail aid elements, for instance following a complaint. In that case, the Commission will request information similar to that set out above for reports from the Member State concerned.

Where reports already have to be presented following specific reporting obligations established by block exemption regulations, guidelines or frameworks applicable in the State aid field, those specific reports will replace the reports to be presented under the present guarantee reporting obligation provided the information listed above is included.

7. IMPLEMENTING MEASURES

The Commission invites Member States to adjust their existing guarantee measures to the stipulations of the present Notice by 1 January 2010 as far as new guarantees are concerned.

\(^{(32)}\) If the scheme has been active for more than 10 years, only the last 10 annual amounts of shortfall or surplus are to be provided.
CORRIGENDA

Corrigendum to Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees

(Official Journal of the European Union C 155 of 20 June 2008)

(2008/C 244/11)

On page 15, in point 3.3 ‘Valuation of individual guarantees for SMEs’, the table is replaced by the following:

<table>
<thead>
<tr>
<th>Credit quality</th>
<th>Standard &amp; Poor’s</th>
<th>Fitch</th>
<th>Moody’s</th>
<th>Annual safe harbour premium</th>
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<td>Highest quality</td>
<td>AAA</td>
<td>AAA</td>
<td>Aaa</td>
<td>0,4 %</td>
</tr>
<tr>
<td>Very strong payment capacity</td>
<td>AA +</td>
<td>AA +</td>
<td>Aa 1</td>
<td>0,4 %</td>
</tr>
<tr>
<td></td>
<td>AA</td>
<td>AA</td>
<td>Aa 2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>AA –</td>
<td>AA –</td>
<td>Aa 3</td>
<td></td>
</tr>
<tr>
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<td>A +</td>
<td>A 1</td>
<td>0,55 %</td>
</tr>
<tr>
<td></td>
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<td>A</td>
<td>A 2</td>
<td></td>
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<tr>
<td></td>
<td>A –</td>
<td>A –</td>
<td>A 3</td>
<td></td>
</tr>
<tr>
<td>Adequate payment capacity</td>
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<td>BBB +</td>
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<td>0,8 %</td>
</tr>
<tr>
<td></td>
<td>BBB</td>
<td>BBB</td>
<td>Baa 2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>BBB –</td>
<td>BBB –</td>
<td>Baa 3</td>
<td></td>
</tr>
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<td>Payment capacity is vulnerable to adverse conditions</td>
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<td>BB +</td>
<td>Ba 1</td>
<td>2 %</td>
</tr>
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<td></td>
<td>BB</td>
<td>BB</td>
<td>Ba 2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>BB –</td>
<td>BB –</td>
<td>Ba 3</td>
<td></td>
</tr>
<tr>
<td></td>
<td>B +</td>
<td>B +</td>
<td>B 1</td>
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<td></td>
<td>B</td>
<td>B</td>
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<td></td>
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<tr>
<td></td>
<td>B –</td>
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<td></td>
</tr>
<tr>
<td>Payment capacity is dependent upon sustained favourable conditions</td>
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<td>DDDD</td>
<td>Ca</td>
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</tr>
<tr>
<td></td>
<td>D</td>
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</table>
Commission Communication on State aid elements in sales of land and buildings by public authorities

(97/C 209/03)

(Text with EEA relevance)

I. INTRODUCTION

On a number of occasions in recent years the Commission has investigated sales of publicly owned land and buildings in order to establish whether there was an element of State aid in favour of the buyers. The Commission has drawn up general guidance to Member States in order to make its general approach with regard to the problem of State aid through sales of land and buildings by public authorities transparent and to reduce the number of cases it has to examine.

The following guidance to Member States:

— describes a simple procedure that allows Member States to handle sales of land and buildings in a way that automatically precludes the existence of State aid,

— specifies clearly cases of sales of land and buildings that should be notified to the Commission to allow for assessment of whether or not a certain transaction contains aid and, if so, whether or not the aid is compatible with the common market,

— enables the Commission to deal expeditiously with any complaints or submissions from third parties drawing its attention to cases of alleged aid connected to sales of land and buildings.

This guidance takes account of the fact that in most Member States budgetary provisions exist to ensure that public property is in principle not sold below its value. Therefore, the procedural precautions recommended to avoid State aid rules coming into play are formulated in a way that should normally allow Member States to comply with the guidance without changing their domestic procedures.

The guidance concerns only sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements.

The guidance does not affect specific provisions or practices of Member States intended to promote the quality of and access to private housing.

II. PRINCIPLES

1. Sale through an unconditional bidding procedure

A sale of land and buildings following a sufficiently well-publicized, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid. The fact that a different valuation of the land and buildings existed prior to the bidding procedure, e.g. for accounting purposes or to provide a proposed initial minimum bid, is irrelevant.

(a) An offer is ‘sufficiently well-publicized’ when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications and through real-estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers.

The intended sale of land and buildings, which in view of their high value or other features may attract investors operating on a Europe-wide or international scale, should be announced in publications which have a regular international circulation. Such offers should also be made known through agents addressing clients on a Europe-wide or international scale.

(b) An offer is ‘unconditional’ when any buyer, irrespective of whether or not he runs a business or of the nature of his business, is generally free to acquire the land and buildings and to use it for his own purposes. Restrictions may be imposed for the prevention of public nuisance, for reasons of environmental protection or to avoid purely speculative bids. Urban and regional planning restrictions imposed on the owner pursuant to domestic law on the use of the land and buildings do not affect the unconditional nature of an offer.

(c) If it is a condition of the sale that the future owner is to assume special obligations — other than those arising from general domestic law or decision of the planning authorities or those relating to the general protection and conservation of the environment and to public health —
for the benefit of the public authorities or in the general public interest, the offer is to be regarded as 'unconditional' within the meaning of the above definition only if all potential buyers would have to, and be able to, meet that obligation, irrespective of whether or not they run a business or of the nature of their business.

2. Sale without an unconditional bidding procedure

(a) Independent expert evaluation

If public authorities intend not to use the procedure described under 1, an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.

An 'asset valuer' is a person of good repute who:

- has obtained an appropriate degree at a recognized centre of learning or an equivalent academic qualification,

- has suitable experience and is competent in valuing land and buildings in the location and of the category of the asset.

If in any Member State there are not appropriate established academic qualifications, the asset valuer should be a member of a recognized professional body concerned with the valuation of land and buildings and either:

- be appointed by the courts or an authority of equivalent status,

- have as a minimum a recognized certificate of secondary education and sufficient level of training with at least three years post-qualification practical experience in, and with knowledge of, valuing land and buildings in that particular locality.

The valuer should be independent in the carrying out of his tasks, i.e. public authorities should not be entitled to issue orders as regards the result of the valuation. State valuation offices and public officers or employees are to be regarded as independent provided that undue influence on their findings is effectively excluded.

'Market value' means the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale (\(^{(1)}\)).

(b) Margin

If, after a reasonable effort to sell the land and buildings at the market value, it is clear that the value set by the valuer cannot be obtained, a divergence of up to 5% from that value can be deemed to be in line with market conditions. If, after a further reasonable time, it is clear that the land and buildings cannot be sold at the value set by the valuer less this 5% margin, a new valuation may be carried out which is to take account of the experience gained and of the offers received.

(c) Special obligations

Special obligations that relate to the land and buildings and not to the purchaser or his economic activities may be attached to the sale in the public interest provided that every potential buyer is required, and in principle is able, to fulfil them, irrespective of whether or not he runs a business or of the nature of his business. The economic disadvantage of such obligations should be evaluated separately by independent valuers and may be set off against the purchase price. Obligations whose fulfillment would at least partly be in the buyer's own interest should be evaluated with that fact in mind: there may, for example, be an advantage in terms of advertising, sport or arts sponsorship, image, improvement of the buyer's own environment, or recreational facilities for the buyer's own staff.

The economic burden related to obligations incumbent on all landowners under the ordinary law are not to be discounted from the purchase price (these would include, for example, care and maintenance of the land and buildings as part of the ordinary social obligations of property ownership or the payment of taxes and similar charges).

(d) Cost to the authorities

The primary cost to the public authorities of acquiring land and buildings is an indicator for the market value unless a significant period of

time elapsed between the purchase and the sale of the land and buildings. In principle, therefore, the market value should not be set below primary costs during a period of at least three years after acquisition unless the independent valuer specifically identified a general decline in market prices for land and buildings in the relevant market.

3. Notification

Member States should consequently notify to the Commission, without prejudice to the *de minimis* rule (*'), the following transactions to allow it to establish whether State aid exists and, if so, to assess its compatibility with the common market.


(a) any sale that was not concluded on the basis of an open and unconditional bidding procedure, accepting the best or only bid; and

(b) any sale that was, in the absence of such procedure, conducted at less than market value as established by independent valuers.

4. Complaints

When the Commission receives a complaint or other submission from third parties alleging that there was a State aid element in an agreement for the sale of land and buildings by public authorities, it will assume that no State aid is involved if the information supplied by the Member State concerned shows that the above principles were observed.
II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance

(Text with EEA relevance)

(2012/C 392/01)

1. INTRODUCTION

1. Export subsidies can adversely affect competition in the marketplace among potential rival suppliers of goods and services. That is why the Commission, as the guardian of competition under the Treaty, has always strongly condemned export aid for intra-Union trade and for exports outside the Union. To prevent Member States' support for export-credit insurance from distorting competition, its assessment under Union State aid rules needs to be clarified.

2. The Commission has used its power to regulate State aid in the area of short-term export-credit insurance to address actual or potential distortions of competition in the internal market, not only among exporters in different Member States (in trade within and outside the Union), but also among export-credit insurers operating in the Union. In 1997, the Commission laid down the principles for State intervention in its Communication to the Member States pursuant to Article 93(1) of the EC Treaty applying Articles 92 and 93 of the Treaty to short-term export-credit insurance (1) (the 1997 Communication). The 1997 Communication was to be applied for a period of five years from 1 January 1998. It was subsequently amended and its period of application was prolonged in 2001 (2), 2004 (3), 2005 (4) and 2010 (5). It now applies until 31 December 2012.

3. Experience gained in applying the 1997 Communication, in particular during the financial crisis between 2009 and 2011, suggests that the Commission's policy in this area should be reviewed.

4. The rules set out in this Communication will help to ensure that State aid does not distort competition among private and public or publicly supported export-credit insurers and to create a level-playing field among exporters.

5. It aims to give Member States more detailed guidance about the principles on which the Commission intends to base its interpretation of Articles 107 and 108 of the Treaty and their application to short-term export-credit insurance. It should make the Commission's policy in this area as transparent as possible and ensure predictability and equal treatment. To that end, it lays down a set of conditions that must be fulfilled when State insurers wish to enter the short-term export-credit insurance market for marketable risks.

6. Risks that are in principle non-marketable are outside the scope of this Communication.

7. Section 2 describes the scope of this Communication and the definitions used in it. Section 3 deals with the applicability of Article 107(1) of the Treaty and the general prohibition of State aid for the export-credit insurance of marketable risks. Finally, Section 4 provides for some exceptions from the definition of marketable risks and specifies the conditions for State intervention in the insurance of temporarily non-marketable risks.

2. SCOPE OF THE COMMUNICATION AND DEFINITIONS

2.1. Scope

8. The Commission will apply the principles set out in this Communication only to export-credit insurance with a risk
period of less than two years. All other export finance instruments are excluded from the scope of this Communication.

2.2. Definitions

9. For the purposes of this Communication the following definitions will apply:

‘co-insurance’ means the percentage of each insured loss that is not indemnified by the insurer but is borne by another insurer;

‘credit period’ means the period of time given to the buyer to pay for the delivered goods and services under an export-credit transaction;

‘commercial risks’ means risks including, in particular:
— arbitrary repudiation of a contract by a buyer, that is to say any arbitrary decision made by a non-public buyer to interrupt or terminate the contract without a legitimate reason,
— arbitrary refusal of a non-public buyer to accept the goods covered by the contract without a legitimate reason,
— insolvency of a non-public buyer and its guarantor,
— protracted default, that is to say non-payment by a non-public buyer and by its guarantor of a debt resulting from the contract,

‘export-credit insurance’ means an insurance product whereby the insurer provides insurance against a commercial and political risk related to payment obligations in an export transaction;

‘manufacturing period’ means the period between the date of an order and the delivery of the goods or services;

‘marketable risks’ means commercial and political risks with a maximum risk period of less than two years, on public and non-public buyers in the countries listed in the Annex; all other risks are considered non-marketable for the purposes of this Communication.

‘political risks’ means risks including, in particular:
— the risk that a public buyer or country prevents the completion of a transaction or does not pay on time,
— a risk that is beyond the scope of an individual buyer or falls outside the individual buyer's responsibility,
— the risk that a country fails to transfer to the country of the insured the money paid by buyers domiciled in that country,
— the risk that a case of force majeure occurs outside the country of the insurer, which could include warlike events, in so far as its effects are not otherwise insured,

‘private credit insurer’ means a company or organisation other than a State insurer that provides export-credit insurance;

‘quota-share’ means reinsurance that requires the insurer to transfer, and the reinsurer to accept, a given percentage of every risk within a defined category of business written by the insurer;

‘reinsurance’ means insurance that is purchased by an insurer from another insurer to manage risk by lowering its own risk;

‘risk period’ means the manufacturing period plus the credit period;

‘single-risk cover’ means cover for all sales to one buyer or for a single contract with one buyer;

‘State insurer’ means a company or other organisation that provides export-credit insurance with the support of, or on behalf of, a Member State, or a Member State that provides export-credit insurance;

‘top-up cover’ means additional cover over a credit limit established by another insurer;

‘whole turnover policy’ means a credit insurance policy other than single risk-cover: that is to say, a credit insurance policy that covers all or most of the credit sales of the insured as well as payment receivables from sales to multiple buyers.

3. APPLICABILITY OF ARTICLE 107(1) OF THE TREATY

3.1. General principles

10. Article 107(1) of the Treaty states that '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'.

11. If export-credit insurance is provided by State insurers, it involves State resources. The involvement of the State may give the insurers and/or the exporters a selective advantage and could thereby distort or threaten to distort competition and affect trade between Member States. The following principles are designed to provide guidance on how such measures will be assessed under State aid rules.

3.2. Aid for insurers

12. If State insurers have certain advantages compared to private credit insurers, State aid may be involved. The advantages can take different forms and might include, for example:

(a) State guarantees of borrowing and losses;
(b) exemption from the requirement to constitute adequate reserves and the other requirements stemming from the exclusion of export-credit insurance operations for the account of or guaranteed by the State from First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (1);

c) relief or exemption from taxes normally payable (such as company taxes and taxes levied on insurance policies);

d) awards of aid or provisions of capital by the State or other forms of financing that are not in accordance with the market economy investor principle;

(e) provision by the State of services in kind, such as access to and use of State infrastructure, facilities or privileged information, on terms that do not reflect their market value;

(f) direct reinsurance by the State or a direct State reinsurance guarantee on terms more favourable than those available on the private reinsurance market, leading to under-pricing of the reinsurance cover or to the artificial creation of capacity that would not be forthcoming from the private market.

3.3. Prohibition of State aid for export credits

13. The advantages for State insurers listed in point 12 with regard to marketable risks affect intra-Union trade in credit insurance services. They lead to variations in the insurance cover available for marketable risks in different Member States. This distorts competition among insurers in different Member States and has secondary effects on intra-Union trade regardless of whether intra-Union exports or exports outside the Union are concerned (2). It is necessary to define the conditions under which State insurers can operate if they have such advantages compared to private credit insurers, in order to ensure they do not benefit from State aid. This requires that they should not be able to insure marketable risks.

14. Advantages for State insurers are also sometimes passed on to exporters, at least in part. Such advantages may distort competition and trade and constitute State aid within the meaning of Article 107(1) of the Treaty. However, if the conditions for the provision of export-credit insurance for marketable risks, as set out in section 4.3 of this Communication, are fulfilled, the Commission will consider that no undue advantage has been passed on to exporters.

4. CONDITIONS FOR PROVIDING EXPORT-CREDIT INSURANCE FOR TEMPORARILY NON-MARKETABLE RISKS

4.1. General principles

15. As stated in point 13, if State insurers have any advantages compared to private credit insurers, as described in point 12, they must not insure marketable risks. If State insurers or their subsidiaries wish to insure marketable risks, it must be ensured that in so doing, they do not directly or indirectly benefit from State aid. To this end, they must have a certain amount of own funds (a solvency margin, including a guarantee fund) and technical provisions (an equalisation reserve) and must have obtained the required authorisation in accordance with Directive 73/239/EEC. They must also at least keep a separate administration account and separate accounts for their insurance of marketable risks and non-marketable risks for the account of or guaranteed by the State, to show that they do not receive State aid for their insurance of marketable risks. The accounts for businesses insured on the insurer's own account should comply with Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (3).

16. Member States providing reinsurance cover to an export-credit insurer by way of participation or involvement in private sector reinsurance treaties covering marketable and non-marketable risks, must be able to demonstrate that the arrangements do not involve State aid as referred to in point 12(f).

17. State insurers may provide export-credit insurance for temporarily non-marketable risks, subject to the conditions set out in this Communication.

4.2. Exceptions to the definition of marketable risks: temporarily non-marketable risks

18. Notwithstanding the definition of marketable risks, certain commercial and political risks on buyers established in the countries listed in the Annex, are considered temporarily non-marketable in the following cases:

(a) if the Commission decides to temporarily remove one or more countries from the list of marketable risk countries in the Annex, by means of the mechanism described in Section 5.2, because the capacity of the private insurance market in is insufficient to cover all economically justifiable risks in the country or countries concerned;

(2) In its judgment in Case C-142/87 Kingdom of Belgium v Commission of the European Communities, the Court held that not only aid for intra-Union exports, but also aid for exports outside the Union, can influence intra-Union competition and trade. Both types of operation are insured by export-credit insurers and aid for both can therefore affect intra-Union competition and trade.

To minimise distortions of competition in the internal market, risks which are considered temporarily non-marketable in accordance with point 18 can be covered by State insurers, provided they fulfil the conditions in section 4.3.

4.3. Conditions for providing cover for temporarily non-marketable risks

4.3.1. Quality of cover

The quality of cover offered by State insurers must be consistent with market standards. In particular, only economically justified risks, that is to say, risks that are acceptable on the basis of sound underwriting principles, can be covered. The maximum percentage of cover must be 95 % for commercial risks and political risks and the claims waiting period must be a minimum of 90 days.

4.3.2. Underwriting principles

Sound underwriting principles must always be applied to the assessment of risks. Accordingly, the risk of financially unsound transactions must not be eligible for cover under publicly supported schemes. With regard to such principles, risk acceptance criteria must be explicit. If a business relationship already exists, exporters must have a positive trading and/or payment experience. Buyers must have a clean claims record, the probability of the buyers’ default must be acceptable and their internal and/or external financial ratings must also be acceptable.

22. Risk-carrying in the export-credit insurance contract must be remunerated by an adequate premium. To minimise the crowding out of private credit insurers, average premiums under publicly supported schemes must be higher than the average premiums charged by private credit insurers for similar risks. This requirement ensures the phasing out of State intervention, because the higher premium will ensure that exporters return to private credit insurers as soon as market conditions allow them to do so and the risk becomes marketable again.

Pricing is considered adequate if the minimum premium (2) (‘safe-harbour premium’) for the relevant buyers’ risk category (3) as set out in the following table is charged. The safe-harbour premium applies unless Member States provide evidence that these rates are inadequate for the risk in question. For a whole turnover policy, the risk category must correspond to the average risk of buyers covered by the policy.

<table>
<thead>
<tr>
<th>Risk category</th>
<th>Annual risk premium (4) (% of insured volume)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excellent (5)</td>
<td>0,2-0,4</td>
</tr>
<tr>
<td>Good (1)</td>
<td>0,41-0,9</td>
</tr>
<tr>
<td>Satisfactory (4)</td>
<td>0,91-2,3</td>
</tr>
<tr>
<td>Weak (6)</td>
<td>2,31-4,5</td>
</tr>
</tbody>
</table>

(1) Safe harbour for a 30-day insurance contract can be obtained by dividing the annual risk premium by 12.
(2) The excellent risk category includes risks equivalent to AAA, AA+, AA, AA-, A+, A- in Standard & Poor’s credit ratings.
(3) The good risk category includes risks equivalent to BBB+, BBB or BBB-in Standard & Poor’s credit ratings.
(4) The satisfactory risk category includes risks equivalent to BB+, BB or BB-in Standard & Poor’s credit ratings.
(5) The weak risk category includes risks equivalent to B+, B or B-in Standard & Poor’s credit ratings.

25. An administration fee must be added to the risk premium regardless of the term of the contract in order for pricing to be considered adequate.

(1) Safe harbour for a 30-day insurance contract can be obtained by dividing the annual risk premium by 12.
(2) The excellent risk category includes risks equivalent to AAA, AA+, AA, AA-, A+, A- in Standard & Poor’s credit ratings.
(3) The good risk category includes risks equivalent to BBB+, BBB or BBB-in Standard & Poor’s credit ratings.
(4) The satisfactory risk category includes risks equivalent to BB+, BB or BB-in Standard & Poor’s credit ratings.
(5) The weak risk category includes risks equivalent to B+, B or B-in Standard & Poor’s credit ratings.

4.3.4. Transparency and reporting

26. Member States must publish the schemes put in place for risks which are considered temporarily non-marketable in accordance with point 18 on the websites of State insurers, specifying all applicable conditions.

27. They must submit annual reports to the Commission on risks which are considered temporarily non-marketable in accordance with point 18 and are covered by State insurers. They must do so at the latest on 31 July of the year following the intervention.

28. The report must contain information on use of each scheme, including in particular the total volume of credit limits granted, turnover insured, premiums charged, claims registered and paid, amounts recovered and the administrative costs of the scheme. The Commission will publish the reports on its website.

5. PROCEDURAL ISSUES

5.1. General principles

29. The risks specified in point 18(a) can be covered by State insurers, subject to the conditions in section 4.3. The Commission does not have to be notified in such cases.

30. The risks specified in point 18(b), (c) and (d) can be covered by State insurers, subject to the conditions in section 4.3 and following notification to and approval by the Commission.

31. Failure to fulfil any one of the conditions set out in Section 4.3 does not mean that the export-credit insurance or insurance scheme is automatically prohibited. If a Member State wishes to deviate from any of the conditions or if there is any doubt about whether a planned export-credit insurance scheme fulfils the conditions set out in this Communication, the Member State must notify the scheme to the Commission.

32. Analysis under State aid rules does not prejudice the compatibility of a given measure with other Treaty provisions.

5.2. Modification of the list of marketable risk countries

33. When determining whether the lack of sufficient private capacity justifies the temporary removal of a country from the list of marketable risk countries, as referred to in point 18(a), the Commission will take the following factors into account, in order of priority:

(a) contraction of private credit insurance capacity: in particular, the decision of a major credit insurer not to cover risks on buyers in the country concerned, a significant decrease in total insured amounts or a significant decrease in acceptance ratios for the country concerned within a six-month period;

(b) deterioration of sovereign sector ratings: in particular, sudden changes in credit ratings within a six-month period, for example multiple downgrading by independent rating agencies, or a big increase in Credit Default Swap spreads;

(c) deterioration of corporate sector performance: in particular, a sharp increase in insolvencies in the country concerned within a six-month period.

34. When market capacity becomes insufficient to cover all economically justifiable risks, the Commission may revise the list of marketable risk countries at the written request of at least three Member States or on its own initiative.

35. If the Commission intends to modify the list of marketable risk countries in the Annex, it will consult and seek information from Member States, private credit insurers and interested parties. The consultation and the type of information sought will be announced on the Commission’s website. The consultation period will usually not be longer than 20 working days. When, on the basis of the information gathered, the Commission decides to modify the list of marketable risk countries, it will inform Member States in writing and announce the decision on its website.

36. The temporary removal of a country from the list of marketable risk countries will be valid for no less than 12 months. Insurance policies relating to the temporarily removed country which are signed during that period may be valid for a maximum of 180 days after the date on which the temporary removal ceases. New insurance policies may not be signed after that date. Three months before the temporary removal ceases, the Commission will consider whether to prolong the removal of the country concerned from the list. If the Commission determines that market capacity is still insufficient to cover all economically justifiable risks, taking into account the factors set out in point 33, it may prolong the temporary removal of the country from the list, in accordance with point 35.

5.3. Notification obligation for exceptions in point 18(b) and (c)

37. The evidence currently available to the Commission suggests that there is a market gap as regards the risks specified in point 18(b) and (c) and that those risks are therefore non-marketable. It must be borne in mind, however, that the lack of cover does not exist in every Member State and that the situation could change over
time, as the private sector might become interested in this segment of the market. State intervention should only be allowed for risks which the market would otherwise not cover.

38. For these reasons, if a Member State wants to cover the risks specified in point 18(b) or (c), it must make a notification to the Commission pursuant to Article 108(3) of the Treaty and demonstrate in its notification that it has contacted the main credit insurers and brokers in that Member State (1) and given them an opportunity to provide evidence that cover for the risks concerned is available there. If the credit insurers concerned do not give the Member State or the Commission information about the conditions of cover and insured volumes for the type of risks the Member State wants to cover within 30 days of receiving a request from the Member State to do so, or if the information provided does not demonstrate that cover for the risks concerned is available in that Member State, the Commission will consider the risks temporarily non-marketable.

5.4. Notification obligation in other cases

39. As regards the risks specified in point 18(d), the Member State concerned must, in its notification to the Commission pursuant to Article 108(3) of the Treaty, demonstrate that cover is unavailable for exporters in that particular Member State due to a supply shock in the private insurance market, in particular the withdrawal of a major credit insurer from the Member State concerned, reduced capacity or a limited range of products compared to other Member States.

6. DATE OF APPLICATION AND DURATION

40. The Commission will apply the principles in this Communication from 1 January 2013 until 31 December 2018, except for point 18(a) and section 5.2, which will be applied from the date of adoption of this Communication.

(1) The contacted credit insurers and brokers should be representative in terms of the products offered (for example, specialised providers for single risks) and the size of the market they cover (for example, representing jointly a minimum share of 50 % of the market).
ANNEX

List of marketable risk countries

All Member States
Australia
Canada
Iceland
Japan
New Zealand
Norway
Switzerland
United States of America
II

Communication from the Commission amending the Annex to the Communication from the Commission to the Member States on the application of Article 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance

(2013/C 372/01)

I. INTRODUCTION

(1) The Communication from the Commission to the Member States on the application of Article 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (1) (the Communication) stipulates in paragraph 13 that State insurers (2) cannot provide short-term export-credit insurance for marketable risks. Marketable risks are defined in paragraph 9 as commercial and political risks with a maximum risk period of less than two years, on public and non-public buyers in the countries listed in the Annex to that Communication.

(2) As a consequence of the difficult situation in Greece, a lack of insurance or reinsurance capacity to cover exports to Greece was observed in 2012. This led the Commission to amend the Communication of the Commission to the Member States pursuant to Article 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance, by temporarily removing Greece from the list of marketable risks countries (3). This modification expires on 31 December 2013. As a consequence, as from 1 January 2014, Greece would in principle be considered again as marketable, since all EU Member States are included in the list of marketable countries listed in the Annex to the Communication.

(3) However, in accordance with paragraph 36 of the Communication, three months before the temporary removal ceases, the Commission has started to review the situation in order to determine whether the current market situation justifies the expiry of Greece's removal from the list of marketable risk countries in 2014, or whether the market capacity is still insufficient to cover all economically justifiable risks, so that a prolongation is needed.

II. ASSESSMENT

(4) When determining whether the lack of sufficient private capacity to cover all economically justifiable risks justifies the prolongation of the temporary removal of Greece from the list of marketable risk countries, the Commission consulted and sought information from Member States, private credit insurers and other interested parties. The Commission published an information request on the availability of short term export credit insurance for exports to Greece on 8 October 2013 (4). The deadline for replies expired on 6 November 2013. 24 replies were received from Member States, private insurers and exporters.

(5) Information submitted to the Commission or available to it, clearly indicates that there is still insufficient private export credit insurance capacity for Greece and that no significant capacity is forecasted to become available in near future. The total insured turnover for Greek risks has remained constantly low in 2012/2013. Private export-credit insurers remain cautious in providing insurance coverage for exports to Greece and do not offer sufficient insurance capacity for new credit insurance limits or even to cover existing turnovers. At the same time, State insurers continued to register increasing demand for credit insurance for exports to Greece as a result of the lack of availability of

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2. A State insurer is defined as a company or other organisation that provides export-credit insurance with the support of, or on behalf of, a Member State, or a Member State that provides export-credit insurance, see point 9.
private insurance. No submissions provided data indicating that Greece should be reinserted in the list of marketable countries.

(6) Since the decision to temporarily remove Greece from the list of marketable countries in December 2012, private capacity has not been restored in 2013. Respondents confirmed that the situation is particularly difficult for small and medium sized exporters and in some cases a complete stop of underwritings has been registered. The majority of the submissions considered that private capacity is still too narrow to insure exports to Greece and it is expected to only expand to a limited extent in 2014. The analysis of the Commission on the lack of sufficient private export credit insurance capacity for Greece, as set out in that decision, remains valid.

(7) The economic outlook for Greece has been conservatively revised upwards since last December (1). However, according to the European Economic Forecast — Autumn 2013, the Greek economy remains in recession, with a real GDP contracting at decelerating pace during 2013. Real GDP is expected to expand in 2014 mainly due to exports and investment. In contrast, private consumption is expected to still decline, in line with disposable income. At the same time, according to information submitted during the public consultation, the total number of business insolvencies is expected to continue to rise in 2014.

(8) For those reasons, on the basis of the information gathered, the Commission established a lack of sufficient private capacity to cover all economically justifiable risks and decided to prolong the removal of Greece from the list of marketable risks countries.

III. AMENDMENT TO THE COMMUNICATION

(9) The following amendment to the Communication from the Commission to the Member States on the application of Article 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance will apply from 1 January 2014 until 31 December 2014:

— The Annex is replaced by the following

LIST OF MARKABLE RISK COUNTRIES
All Member States with the exception of Greece
Australia
Canada
Iceland
Japan
New Zealand
Norway
Switzerland
United States of America

(1) For example: S&P and Fitch: B- from CCC in July 2012; Moody’s rating remained stable at C.
Commission notice on the application of the State aid rules to measures relating to direct business taxation  
(98/C 384/03)  
(Text with EEA relevance)  

Introduction

1. On 1 December 1997, following a wide-ranging discussion on the need for coordinated action at Community level to tackle harmful tax competition, the Council (Ecofin) adopted a series of conclusions and agreed a resolution on a code of conduct for business taxation (hereinafter ‘code of conduct’) ('). On that occasion, the Commission undertook to draw up guidelines on the application of Articles 92 and 93 of the Treaty to measures relating to direct business taxation and committed itself 'to the strict application of the aid rules concerned'. The code of conduct aims to improve transparency in the tax area through a system of information exchanges between Member States and of assessment of any tax measures that may be covered by it. For their part, the State aid provisions of the Treaty will also contribute through their own mechanism to the objective of tackling harmful tax competition.

2. The Commission's undertaking regarding State aid in the form of tax measures forms part of the wider objective of clarifying and reinforcing the application of the State aid rules in order to reduce distortions of competition in the single market. The principle of incompatibility with the common market and the derogations from that principle apply to aid 'in any form whatsoever', including certain tax measures. However, the question whether a tax measure can be qualified as aid under Article 92(1) of the Treaty calls for clarification which this notice proposes to provide. Such clarification is particularly important in view of the procedural requirements that stem from designation as aid and of the consequences where Member States fail to comply with such requirements.

3. Following the completion of the single market and the liberalisation of capital movements, it has also become apparent that there is a need to examine the particular effects of aid granted in the form of tax measures and to spell out the consequences as regards assessment of the aid's compatibility with the common market ('). The establishment of economic and monetary union and the consolidation of national budgets which it entails will make it even more essential to have strict control of State aid in whatever form it may take. Similarly, account must also be taken, in the common interest, of the major repercussions which some aid granted through tax systems may have on the revenue of other Member States.

4. In addition to the objective of ensuring that Commission decisions are transparent and predictable, this notice also aims to ensure consistency and equality of treatment between Member States. The Commission intends, as the code of conduct notes, to examine or re-examine case by case, on the basis of this notice, the tax arrangements in force in the Member States.

A. Community powers of action

5. The Treaty empowers the Community to take measures to eliminate various types of distortion that harm the proper functioning of the common market. It is thus essential to distinguish between the different types of distortion.

6. Some general tax measures may impede the proper functioning of the internal market. In the case of such measures, the Treaty provides, on the one hand, for the possibility of harmonising Member States' tax provisions on the basis of Article 100 (Council directives, adopted unanimously). On the other, some disparities between planned or existing general provisions in Member States may distort competition and create distortions that need to be eliminated on the basis of Articles 101 and 102 (consultation of the relevant Member States by the Commission; if necessary, Council directives adopted by a qualified majority).

7. The distortions of competition deriving from State aid fall under a system of prior Commission authorisation, subject to review by the Community judiciary. Pursuant to Article 93(3), State aid measures must be notified to the Commission. Member States may not put their proposed aid measures into effect until the Commission has approved them. The Commission examines the compatibility of aid not in terms of the form which it may take, but in terms of its effect. It may decide that the Member State must amend or abolish aid which the Commission finds to be incompatible with the common market. Where aid has already been implemented in breach of the procedural rules, the Member State must in principle recover it from the recipient(s).

8. Article 92(1) of the EC Treaty states that "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 common market'. In applying the Community rules on State aid, it is irrelevant whether the measure is a tax measure, since Article 92 applies to aid measures "in any form whatsoever'. To be termed aid, within the meaning of Article 92, a measure must meet the cumulative criteria described below.

9. Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including:

- a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet),
- a total or partial reduction in the amount of tax (such as exemption or a tax credit),
- deferment, cancellation or even special rescheduling of tax debt.

10. Secondly, the advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. This criterion also applies to aid granted by regional or local bodies in the Member States ('). Furthermore, State support may be provided just as much through tax provisions of a legislative, regulatory or administrative nature as through the practices of the tax authorities.

11. Thirdly, the measure must affect competition and trade between Member States. This criterion presupposes that the beneficiary of the measure exercises an economic activity, regardless of the beneficiary's legal status or means of financing. Under settled case-law, for the purposes of this provision, the criterion of trade being affected is met if the recipient firm carries on an economic activity involving trade between Member States. The mere fact that the aid strengthens the firm's position compared with that of other firms which are competitors in intra-Community trade is enough to allow the conclusion to be drawn that intra-Community trade is affected. Neither the fact that aid is relatively small in amount ('), nor the fact that the recipient is moderate in size or its share of the Community market very small ('), nor indeed the fact that the recipient does not carry out exports (') or exports virtually all its production outside the Community (') do anything to alter this conclusion.

12. Lastly, the measure must be specific or selective in that it favours "certain undertakings or the production of certain goods'. The selective advantage involved here may derive from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities. However, the selective nature of a measure may be justified by 'the nature or general scheme of the system' ('). If so, the measure is not considered to be aid within the meaning of Article 92(1) of the Treaty. These various aspects are looked at below.

(') With the exception, however, of aid meeting the tests of the de minimis rule. See the Commission notice published in OJ C 68, 6.3.1996, p. 9.
Distinction between State aid and general measures

13. Tax measures which are open to all economic agents operating within a Member State are in principle general measures. They must be effectively open to all firms on an equal access basis, and they may not de facto be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. However, this condition does not restrict the power of Member States to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the different factors of production. Provided that they apply without distinction to all firms and to the production of all goods, the following measures do not constitute State aid:

- tax measures of a purely technical nature (for example, setting the rate of taxation, depreciation rules and rules on loss carry-overs; provisions to prevent double taxation or tax avoidance),

- measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs (research and development (R&D), the environment, training, employment).

14. The fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid. Thus, measures designed to reduce the taxation of labour for all firms have a relatively greater effect on labour-intensive industries than on capital-intensive industries, without necessarily constituting State aid. Similarly, tax incentives for environmental, R&D or training investment favour only the firms which undertake such investment, but again do not necessarily constitute State aid.

15. In a judgment delivered in 1974 (\(^{(*)}\)), the Court of Justice held that any measure intended partially or wholly to exempt firms in a particular sector from the charges arising from the normal application of the general system 'without there being any justifi-

(\(^{(*)}\) See footnote 8.)

16. The main criterion in applying Article 92(1) to a tax measure is therefore that the measure provides in favour of certain undertakings in the Member State an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified 'by the nature or general scheme' of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State concerned. If this is not the case, then State aid is involved.

The selectivity or specificity criterion

17. The Commission’s decision-making practice so far shows that only measures whose scope extends to the entire territory of the State escape the specificity criterion laid down in Article 92(1). Measures which are regional or local in scope may favour certain undertakings, subject to the principles outlined in paragraph 16. The Treaty itself qualifies as aid measures which are intended to promote the economic development of a region. Article 92(3)(a) and (c) explicitly provides, in the case of this type of aid, for possible derogations from the general principle of incompatibility laid down in Article 92(1).

18. The Treaty clearly provides that a measure which is sectorally specific is caught by Article 92(1). Article 92(1) expressly includes the phrase 'the production of certain goods' among the criteria determining whether there is aid that is subject to Commission
monitoring. According to well-established practice and case-law, a tax measure whose main effect is to promote one or more sectors of activity constitutes aid. The same applies to a measure that favours only national products which are exported (iii). Furthermore, the Commission has taken the view that a measure which targets all of the sectors that are subject to international competition constitutes aid (iii). A derogation from the base rate of corporation tax for an entire section of the economy therefore constitutes, except for certain cases (ii), State aid, as the Commission decided for a measure concerning the whole of the manufacturing sector (iv).

19. In several Member States, different tax rules apply depending on the status of the undertakings. Some public undertakings, for example, are exempt from local taxes or from company taxes. Such rules, which accord preferential treatment to undertakings having the legal status of public undertaking and carrying out an economic activity, may constitute State aid within the meaning of Article 92 of the Treaty.

20. Some tax benefits are on occasion restricted to certain types of undertaking, to some of their functions (intra-group services, intermediation or coordination) or to the production of certain goods. In so far as they favour certain undertakings or the production of certain goods, they may constitute State aid as referred to in Article 92(1).

Justification of a derogation by 'the nature or general scheme of the system'

22. If in daily practice tax rules need to be interpreted, they cannot leave room for a discretionary treatment of undertakings. Every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail. As far as administrative rulings merely contain an interpretation of general rules, they do not give rise to a presumption of aid. However, the opacity of the decisions taken by the authorities and the room for manoeuvre which they sometimes enjoy support the presumption that such is at any rate their effect in some instances. This does not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules.

23. The differential nature of some measures does not necessarily mean that they must be considered to be State aid. This is the case with measures whose economic rationale makes them necessary to the functioning and effectiveness of the tax system (iv). However, it is up to the Member State to provide such justification.

Discretionary administrative practices

21. The discretionary practices of some tax authorities may also give rise to measures that are caught by Article 92. The Court of Justice acknowledges that treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria (v).

24. The progressive nature of an income tax scale or profit tax scale is justified by the redistributive purpose of the tax. Calculation of asset depreciation and stock valuation methods vary from one Member State to another, but such methods may be inherent in the tax systems to which they belong. In the same way, the arrangements for the collection of fiscal debts can differ from one Member State to the other. Lastly, some conditions may be justified by objective differences between taxpayers. However, if the tax authority has discretionary freedom


(---) In particular, agriculture and fisheries, see paragraph 27.


to set different depreciation periods or different valuation methods, firm by firm, sector by sector, there is a presumption of aid. Such a presumption also exists when the fiscal administration handles fiscal debts on a case by case basis with an objective different from the objective of optimising the recovery of tax debts from the enterprise concerned.

25. Obviously, profit tax cannot be levied if no profit is earned. It may thus be justified by the nature of the tax system that non-profit-making undertakings, such as foundations or associations, are specifically exempt from the taxes on profits if they cannot actually earn any profits. Furthermore, it may also be justified by the nature of the tax system that cooperatives which distribute all their profits to their members are not taxed at the level of the cooperative when tax is levied at the level of their members.

26. A distinction must be made between, on the one hand, the external objectives assigned to a particular tax scheme (in particular, social or regional objectives) and, on the other, the objectives which are inherent in the tax system itself. The whole purpose of the tax system is to collect revenue to finance State expenditure. Each firm is supposed to pay tax once only. It is therefore inherent in the logic of the tax system that taxes paid in the State in which the firm is resident for tax purposes should be taken into account. Certain exceptions to the tax rules are, however, difficult to justify by the logic of a tax system. This is, for example, the case if non-resident companies are treated more favourably than resident ones or if tax benefits are granted to head offices or to firms providing certain services (for example, financial services) within a group.

27. Specific provisions that do not contain discretionary elements, allowing for example tax to be determined on a fixed basis (for example, in the agriculture or fisheries sectors), may be justified by the nature and general scheme of the system where, for example, they take account of specific accounting requirements or of the importance of land in assets which are specific to certain sectors; such provisions do not therefore constitute State aid. Lastly, the logic underlying certain specific provisions on the taxation of small and medium-sized enterprises (including small agricultural enterprises (**) is comparable to that underlying the progressiveness of a tax scale.

C. Compatibility with the common market of State aid in the form of tax measures

28. If a tax measure constitutes aid that is caught by Article 92(1), it can nevertheless, like aid granted in other forms, qualify for one of the derogations from the principle of incompatibility with the common market provided for in Article 92(2) and (3). Furthermore, where the recipient, whether a private or public undertaking, has been entrusted by the State with the operation of services of general economic interest, the aid may also qualify for application of the provisions of Article 90 of the Treaty (**).

29. The Commission could not, however, authorise aid which proved to be in breach both of the rules laid down in the Treaty, particularly those relating to the ban on discrimination and to the right of establishment, and of the provisions of secondary law on taxation (**). Such aspects may, in parallel, be the object of a separate procedure on the basis of Article 169. As is clear from case-law, those aspects of aid which are indissolubly linked to the object of the aid and which contravene specific provisions of the Treaty other than Articles 92 and 93 must however be examined in the light of the procedure under Article 93 as part of an overall examination of the compatibility or the incompatibility of the aid.

30. The qualification of a tax measure as harmful under the code of conduct does not affect its possible qualification as a State aid. However the assessment of the compatibility of fiscal aid with the common market will have to be made, taking into account, inter alia, the effects of aid that are brought to light in the application of the code of conduct.

31. Where a fiscal aid is granted in order to provide an incentive for firms to embark on certain specific projects (investment in particular) and where its intensity is limited with respect to the costs of carrying out the project, it is no different from a subsidy and may be accorded the same treatment. Nevertheless, such arrangements must lay down sufficiently transparent rules to enable the benefit conferred to be quantified.


(*) Operators in the agricultural sector with no more than 10 annual work units.
In most cases, however, tax relief provisions are general in nature: they are not linked to the carrying-out of specific projects and reduce a firm’s current expenditure without it being possible to assess the precise volume involved when the Commission carries out its ex ante examination. Such measures constitute ‘operating aid’. Operating aid is in principle prohibited. The Commission authorises it at present only in exceptional cases and subject to certain conditions, for example in shipbuilding, certain types of environmental protection aid (*) and in regions, including ultra-peripheral regions, covered by the Article 92(3)(a) aid derogation provided that they are duly justified and their level is proportional to the handicaps they are intended to offset (**) . It must in principle (with the exception of the two categories of aid mentioned below) be regressive and limited in time. At present, operating aid can also be authorised in the form of transport aid in ultra-peripheral regions and in certain Nordic regions that are sparsely populated and are seriously handicapped in terms of accessibility. Operating aid may not be authorised where it represents aid for exports between Member States. As for State aid in favour of the maritime transport sector the specific rules for that sector apply (**).

If it is to be considered by the Commission to be compatible with the common market, State aid intended to promote the economic development of particular areas must be ‘in proportion to, and targeted at, the aims sought’. For the examination of regional aid the criteria allow account to be taken of other possible effects, in particular of certain effects brought to light by the code of conduct. Where a derogation is granted on the basis of regional criteria, the Commission must ensure in particular that the relevant measures:

— contribute to regional development and relate to activities having a local impact. The establishment of off-shore activities does not, to the extent that their externalities on the local economy are low, normally provide satisfactory support for the local economy,

— relate to real regional handicaps. It is open to question whether there are any real regional handicaps for activities for which the additional costs have little incidence, such as for example the transport costs for financing activities, which lend themselves to tax avoidance,

— are examined in a Community context (**). The Commission must in this respect take account of any negative effects which such measures may have on other Member States.

** Procedures 

34. Article 93(3) requires Member States to notify the Commission of all their ‘plans to grant or alter aid’ and provides that any proposed measures may not be put into effect without the Commission’s prior approval. This procedure applies to all aid, including tax aid.

35. If the Commission finds that State aid which has been put into effect in breach of this rule does not qualify for any of the exemptions provided for in the Treaty and is therefore incompatible with the common market, it requires the Member State to recover it, except where that would be contrary to a general principle of Community law, in particular legitimate expectations to which the Commission’s behaviour can give rise. In the case of State aid in the form of tax measures, the amount to be covered is calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. Interest is added to this basic amount. The interest rate to be applied is equivalent to the reference rate used to calculate the grant equivalent of regional aid.

36. Article 93(1) states that the Commission ‘shall in cooperation with Member States, keep under constant review all systems of aid existing in those States’. Such review extends to State aid in the form of tax measures. So as to allow such review to be carried out, the Member States are required to submit to the Commission every year reports on their existing State aid systems. In the case of tax relief or full or partial tax exemption, the reports must provide an estimate of budgetary revenue lost. Following its review, the Commission may, if it

(*) Community guidelines on State aid for environmental protection (OJ C 72, 10.3.1994, p. 3).

considers that the scheme is not or is no longer compatible with the common market, propose that the Member State amend or abolish it.

E. Implementation

37. The Commission will, on the basis of the guidelines set out in this notice and as from the time of its publication, examine the plans for tax aid notified to it and tax aid illegally implemented in the Member States and will review existing systems. This notice is published for guidance purposes and is not exhaustive. The Commission will take account of all the specific circumstances in each individual case.

38. The Commission will review the application of this notice two years after its publication.

Non-opposition to a notified concentration
(Case No IV/M.1202 — Renault/Iveco)

(98/C 384/04)

(Text with EEA relevance)

On 22 October 1998, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EEC) No 4064/89. The full text of the decision is only available in French and will be made public after it is cleared of any business secrets it may contain. It will be available:

— as a paper version through the sales offices of the Office for Official Publications of the European Communities (see list on the last page),

—in electronic form in the ‘CFR’ version of the CELEX database, under document number 398M1202. CELEX is the computerised documentation system of European Community law; for more information concerning subscriptions please contact:

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Withdrawal of notification of a concentration
(Case No IV/M.1246 — LHZ/Carl Zeiss)

(98/C 384/05)

(Text with EEA relevance)

On 24 September 1998, the European Commission received notification of a proposed concentration between LH Systems and Carl Zeiss Stiftung. On 1 December 1998, the notifying parties informed the Commission that they withdrew their notification.