EUROPEAN COMMISSION

Brussels, 27 October 2010
C(2010) 7275 final

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

Subject: State Aid C 28/2010 (ex NN 19/2010) – Portugal
Short-term export credit insurance

Sir,

The Commission wishes to inform you that it has decided to initiate the procedure laid down in Article 108(2) of the TFEU in respect of the above measure, for the reasons set out below.

I. PROCEDURE

(1) By e-mail dated 9 January 2009, Portugal informed the Commission of its intention to put in place a short-term export credit insurance scheme and provided information about the design of the scheme. The scheme was notified by Portugal on 12 January 2009 under section 5.1 of the Commission communication 'Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis'[1] (hereinafter referred to as 'the Temporary Framework').

(2) The Commission requested additional information from Portugal by e-mail dated 14 January 2009. A reminder was sent to Portugal by letter dated 26 February 2009. Portugal submitted additional information on 2 March 2009. The Commission sent a second request for information by letter dated 9 March 2009, and indicated to Portugal in the same letter that the premium rates of the scheme did not seem to comply with the state aid rules.

[1] OJ C 16, 22.1.2009. The Commission has applied the Temporary Framework since 17.12.2008, and previously authorised the Portuguese scheme "Limited amounts of aid" (state aid N 13/2009) on 19.1.2009.

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By letter dated 6 April 2009 Portugal requested an extension of the deadline. A further extension was requested by letter of 21 April 2009 and on 29 April 2009 Portugal submitted the information requested by the Commission in its letter of 9 March 2009. The Commission sent a third request for information by letter dated 13 May 2009. By letter of 9 June 2009 Portugal requested an extension of the deadline. The Commission sent a reminder by letter dated 10 July 2009. Additional information was submitted by Portugal on 31 July 2009. The Commission sent Portugal a fourth request for information by letter dated 25 September 2009. By letter of 26 October 2009 Portugal requested an extension of the deadline. The Commission sent reminders to Portugal on 4 December 2009 and 1 February 2010. Portugal submitted additional information on 19 February 2010.

(3) As the Portuguese authorities confirmed that the scheme had been […][*] implemented since January 2009, it was transferred to the register of non-notified aid. The Commission informed Portugal of this transfer by letter dated 19 April 2010.

(4) On 7 June 2010 representatives of the Commission met with the Portuguese authorities. Following the meeting, Portugal submitted additional information on 18 June 2010.

II. MARKET FOR SHORT-TERM EXPORT CREDIT INSURANCE IN PORTUGAL

(5) According to the Portuguese authorities, four private insurers are active in the Portuguese export credit market, namely COSEC, CESCE, COFACE and Credito Y Caución. The market leader in the credit insurance market is COSEC, with a market share of 42%.

(6) The Portuguese authorities consider that the current financial crisis has resulted in an increasingly conservative attitude on the part of credit insurers, reflected in the level of insurance cover for risks inherent in commercial operations. Only 18% of the total amount requested for transactions with foreign clients was accepted and of these the cover granted represented less than a third of the volume requested. The acceptance rate for domestic trade transactions was 20%. On 31 December 2007 the amount of outstanding guarantees was EUR 19.1 billion for domestic trade operations and EUR 7.3 billion for export operations, while on 31 August 2008 they amounted to EUR 18 billion and EUR 6.9 billion respectively.

(7) The market rate charged by private insurers was on average 0.36% of turnover in 2009 as against average market rates of 0.23% and 0.24% in 2007 and 2008 respectively.

(8) Letters were provided from exporters stating that their credit insurance limit with private insurers had been reduced or cancelled. In the case of one insurer, Portugal provided a summary table with past and new limits granted by a private insurer, in most cases showing the complete cancellation of cover and, in some cases, a reduction in cover for both export and domestic transactions. The reasons for refusing cover given for each client in the table are either confidential or state that the latest financial data for the applicant company show a fragile or negative liquidity situation. Portugal also provided a large number of letters from a private export credit insurer, indicating that it had cancelled, or in some cases, reduced the credit risk cover for various clients. The reasons for refusal are not, however,

[*] Confidential information

given. Finally, Portugal provided one letter from a private insurer (COSEC) stating that as a result of the recent increase in risk seen in both Portugal and on foreign markets, insurers were obliged to apply more restrictive policies and it included statistical data to back up this statement as regards both export credit and domestic trade transactions. The statistical data show that the volume of outstanding guarantees on 31 August 2008 was 5.6% and 4.9% lower than on 31 December 2007 for the domestic trade and export credit segments respectively.

III. DESCRIPTION OF THE MEASURE

3.1 Objective

(9) The objective of the measure is to address a market failure and help to restore confidence in the credit insurance market.

(10) The purpose of the scheme is therefore to provide credit insurance coverage to exporters and companies who are temporarily confronted with the unavailability of export insurance cover in the private market for transactions with buyers in OECD countries or for domestic transaction cover.

3.2 Legal basis

(11) The national legal basis for the measure is Decree Law No 175/2008 of 26 August 2008 creating Finova, and Decree Law No 211/1998 of 16 July 1998 laying down the rules applicable to mutual guarantee societies (as amended by Decree Laws Nos 19/2001 of 30 January 2001 and 309-A/2007 of 7 September 2007).

3.3 Implementing body

(12) The scheme is implemented through private credit insurers active in the Portuguese market (COSEC, CESCE, COFACE and Credito Y Caución).

3.4 Terms and conditions

(13) The scheme covers commercial risks (such as insolvency and protracted default) linked to export transactions for periods of less than two years with OECD countries and to domestic trade transactions.

(14) The public insurance operates as a risk sharing facility ('a top-up') with private insurers. The public insurance is granted only as a supplement to cover provided by a private insurer, under exactly the same terms and conditions. However, the applicable insurance premium is equal to 60% of the premium charged by the private insurer. The amount covered by the public insurance may never exceed the amount covered by the private insurer.

(15) In the event of occurrence of the insured event, any recovered amounts are divided between the State and the private insurer providing the basic cover, in proportion to the share of the total cover guaranteed, i.e. *pari passu*. The recovery procedure is administered by the private insurer.

(16) The average rate applicable under the scheme is 0.21% of turnover. Although the scheme was originally notified as a short-term export credit insurance measure, it also covers domestic trade transactions.

(17) According to information submitted by the Portuguese authorities on 18 June 2010, 361 companies had subscribed to the scheme by then. Total coverage granted is EUR 204 million of which EUR 85 million for export transactions and the rest for domestic trade.

3.5 Duration

(18) The measure was notified on 12 January 2009 and was scheduled to last from 1 January 2009 to 31 December 2010.

3.6 Budget

(19) The maximum public guarantee per single beneficiary is limited to EUR 1.5 million. The overall budget of the measure covering both export and domestic transactions is EUR 2 billion.

3.7 Implementation of the measure

(20) The scheme came on stream on 1 January 2009. Portugal submitted information on 18 June 2010 showing the breakdown of utilisation of the scheme by insurance company implementing the measure, by domestic and export operations, by sector of activity and by company size. The segmentation of the credit limits granted is given in the following tables:

(21) Utilisation by intermediary insurer:

Insurance company	Number of companies	Credit limit in euro
Cosec	255	144 640 571
Credito y Caucion	41	28 617 071
Cesce	45	26 505 350
Coface	20	4 224 000
Total	**361**	**203 986 992**

(22) Breakdown of credit limits by domestic and export transactions:

	Credit limit in euro
Domestic trade transactions	119 066 366
Export transactions	84 920 626

(23) Breakdown by beneficiary's sector of activity

Sector of activity	Number of companies	Credit limit in euro
Industry	238	112 103 589
Trade	111	87 631 904
Construction	4	1 700 000
Transport	2	471 500
Other	6	2 080 000
Total	**361**	**203 986 992**

(24) Breakdown by size of beneficiary

Size	Number of companies	Credit limit in euro
Large companies	117	111 669 611
Medium-sized companies	141	70 447 200
Small and micro-companies	103	21 870 181
Total	**361**	**203 986 992**

IV. POSITION OF THE PORTUGUESE AUTHORITIES

(25) According to Portugal the notified measure is a general measure as it does not imply any economic advantage and it raises no *de facto* or *de jure* selectivity issues. In particular, the measure does not entail selectivity at the level of insurers, as all credit insurance providers operating in Portugal can subscribe to the scheme.

(26) Furthermore, according to Portugal, no effects on competition or trade have been identified as the measure addresses a market failure and does not compete with or prevent the activity of credit insurers.

(27) According to the Portuguese authorities, the breakdown of utilisation of the scheme by activity sector, customer size and regional distribution shows a high dispersion and does not diverge from the usual activity of insurance companies. Furthermore, the scheme is also used by companies based in other Member States, which again, according to Portugal, pointed to its non-discriminatory nature and shows that competition was not distorted.

V. ASSESSMENT

5.1 Existence of aid

(28) Pursuant to Article 107(1) of the TFEU, aid granted by a Member State or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is prohibited, in so far as it affects trade between Member States.

State resources

(29) The insurance is directly provided by the State and any losses stemming from the scheme affect the national budget. The scheme therefore involves state resources.

Selectivity of the measure and advantages

(30) As regards insured companies, the Commission first notes that only companies with some trading activity can benefit from the measure, whereas companies with an economic activity not related to a trading activity (e.g. services) cannot benefit from the scheme. This is also clear from the data provided by Portugal showing that the beneficiaries of the scheme are largely concentrated in industrial and trading sectors.

(31) Furthermore, only companies that have a credit cover limit with a private insurer are eligible for the scheme. In fact, companies which are refused cover by private credit insurers are not eligible for a 'top-up'. Finally, the scheme contains a public insurance ceiling per client and supplier, which could favour SMEs over large enterprises.

(32) As regards the advantage, exporters and trading companies subscribing to the top-up scheme pay a lower premium than the market premium. In addition, according to Portugal, cover for the risks that come under the scheme is unavailable in the market, or is reduced. In this case the companies benefiting from the scheme receive an advantage in the form of access to insurance cover that would be otherwise unavailable.

(33) Since the risks inherent in the portfolios of private credit insurers and the related financing needs are modified by the measure, the Commission cannot, at this stage, rule out that the scheme is sectorally selective and provides a selective advantage for private insurers.

(34) In the light of the above, the Commission is of the view that there are strong indications that the measure confers a selective advantage on the exporters and trading companies subscribing to the scheme.

Effect on trade and distortion of competition

(35) The transactions covered by the scheme are export credit transactions and domestic transactions in tradable goods. Therefore, the scheme directly affects trade between Member States. As for coverage of domestic transactions, the scheme may potentially affect trade between Member States as it could significantly distort trade flows, for instance by diverting economic activities from exports into domestic transactions.

(36) According to the case law of the Court of Justice, the mere fact that the competitive position of an undertaking is strengthened compared with other competing undertakings, by giving it

an economic benefit which it would not otherwise have received in the normal course of its business, points to a possible distortion of competition.[2]

(37) The purpose of the measure is to support commercial activities of undertakings in Portugal as opposed to undertakings in other Member States. The measure may, therefore, distort competition in the internal market.

Conclusion

(38) The Commission therefore considers at this stage that the proposed measure constitutes state aid within the meaning of Article 107(1) of the TFEU. Such aid may be considered compatible with the internal market if it can benefit from one of the derogations provided for in the Treaty.

5.2 Compatibility of the measure aimed at short-term export credit insurance

(39) The Commission examined the measure relating to short-term export credit insurance in the light of the Temporary Framework and the Commission Communication pursuant to Article 93(1) of the EC Treaty applying Articles 92 and 93 of the Treaty to short-term export credit insurance[3] (hereinafter 'the Communication').

(40) Point 2.5 of the Communication defines 'marketable risks' as those on public and non-public debtors established in the countries listed in the Annex to the Communication.[4] Financial advantages in favour of exporters or export credit insurers, which respectively enter or cover a transaction qualified as a marketable risk, are normally prohibited.

(41) In respect of the effects on competition in the private insurance market of short-term export credit schemes, point 3.1 of the Communication states that factors that may distort competition between private and publicly supported export-credit insurers insuring marketable risks include *de jure* and *de facto* state guarantees of borrowing and losses. Such guarantees enable insurers to borrow at rates lower than the normal market rates or make it possible for them to borrow money at all. Furthermore, they obviate the need for insurers to reinsure themselves in the private market.

(42) As far as countries not listed in the Annex to the Communication are concerned, such risks are 'non-marketable' within the meaning of the Communication and public support for insuring them is in compliance with the Communication.

(43) Furthermore, according to point 4.2 of the Communication, Member States should not grant state aid in respect of marketable risks, unless these risks can be considered temporarily non-marketable. Point 4.4 of the Communication states that risks incurred on debtors established in countries listed in the Annex to the Communication are considered temporarily non-marketable only if it can be demonstrated that private insurance cover for the risks generally viewed as marketable is unavailable. In particular, Member States which wish to invoke this escape clause must provide a market report and produce evidence from

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2 Judgment of the Court in Case 730/79 *Philip Morris Holland BV* v *Commission of the European Communities* [1980] ECR 2671.

3 OJ C 281, 17.9.1997, p. 4.

4 The list includes EU and OECD countries.

two major, internationally recognised export credit insurers as well as a national credit insurer, both demonstrating the unavailability of cover for the risks in the private insurance market. Moreover, the publicly supported export credit insurer must, as far as possible, align its premium rates for such non-marketable risks with the rates charged elsewhere by private export credit insurers for the type of risk in question and provide a description of the conditions which the public export credit insurer intends to apply in respect of such risks.

(44) In order to speed up the procedure, the Temporary Framework simplifies, until 31 December 2010, the proof that Member States need to produce to demonstrate the unavailability of cover. To this end, Member States must submit evidence supplied by a large internationally recognised private export credit insurer and a national credit insurer or by at least four well-established exporters in the domestic market.

Unavailability of cover in the private insurance market and application of the escape clause

(45) Portugal submitted a number of letters from exporters which show that they have been refused cover for a number of transactions. Nevertheless the Commission has doubts whether the letters demonstrate the unavailability of cover, as the reasons for refusal given are either confidential or explicitly state that refusal is due to the customer's poor liquidity and financial position. In that respect, the Commission notes that the refusal by a private insurer to provide cover, if based on a sound financial analysis, does not in itself constitute evidence of an unavailability of cover in the private market.

(46) The Commission further notes that Portugal provided a letter from one private insurer pointing to the unavailability of cover in the private market, including data in support of such a claim. However, the Commission notes that in order to meet the requirements of the Temporary Framework a second letter from a private insurer would be necessary to demonstrate the unavailability of cover in the private insurance market.

(47) To conclude, although the information provided by Portugal indicates strains in the private credit insurance market, the Commission is of the view at this stage that it is not sufficient to demonstrate the unavailability of cover.

Alignment of premium rates with rates charged by private credit insurers

(48) The rates charged under the state aid scheme represent 60% of the rate charged by a private insurer to cover the same client. The Commission further notes that the risk transferred to the State in the scheme can be considered higher than the risk covered by the private insurer on a stand alone basis. Indeed, as the credit insurance cover limit is extended to double the initial credit limit granted by the private insurer, there is a higher probability that the insured event will occur. Therefore the Commission considers at this stage that in the case of a top-up scheme where the decision to extend the cover is taken only after the premium for the initial credit insurance limit has been set, the price of the top-up must reflect a higher risk of possible excess cover.

(49) The Commission notes that in any case the rates charged under the scheme are lower than the current rates in the export credit insurance market and also lower than the 2007 and 2008 rates. Therefore the Commission has doubts whether the premium rates charged under

the scheme can be considered to be aligned with the rates charged by private export credit insurers for the type of risk in question, as required under point 4.4 of the Communication.

(50) In view of the above, the Commission at this stage has strong doubts that the export credit insurance part of the scheme can be considered to be compatible aid under the Communication.

5.3 Compatibility of the aid with domestic trade insurance operations

(51) Whereas the Communication and the Temporary Framework set criteria for assessing the compatibility of aid measures for short-term export credit insurance, it does not cover domestic trade transactions. Furthermore, the Commission considers that the domestic insurance scheme has the potential to distort trade between Member States, as domestic trade insurance below market price could divert trade transactions away from exports in favour of domestic transactions or, indeed, have a major impact on imports.

(52) However, Portugal set up the scheme in the context of the current financial crisis and therefore it must be established whether, in view of the far-reaching consequences of the current economic crisis, the scheme could be regarded as compatible directly under Article 107(3)(b) of the TFEU.

(53) Article 107(3)(b) of the TFEU enables the Commission to declare aid compatible with the internal market if it aims 'to remedy a serious disturbance in the economy of a Member State'. The Commission recalls that the Court of First Instance has stressed that Article 107(3)(b) of the TFEU needs to be applied restrictively and must tackle a disturbance in the entire economy of a Member State.[5]

(54) In line with the principles set out in the Temporary Framework (paragraph 4.1), in order to be deemed compatible, such aid measures must fulfil the following criteria:

a. *Appropriateness*: The aid must be well targeted in order to be able to effectively achieve the objective of remedying a serious disturbance in the economy. This would not be the case if the measure were not appropriate to remedy the disturbance.

b. *Necessity*: The aid measure must, in its amount and form, be necessary to achieve the objective. This implies that it must be of the minimum amount necessary to reach the objective, and take the form most appropriate to remedy the disturbance. In other words, if a lesser amount of aid or a measure in a less distortive form were sufficient to remedy a serious disturbance in the entire economy, the measure in question would not be necessary. This is confirmed by settled case law of the Court of Justice.[6]

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[5] See, in principle, Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG* v *Commission* [1999] ECR II-3663, paragraph 167. Confirmed in the Commission Decision in case C 47/1996, *Crédit Lyonnais*, OJ L 221, 8.8.1998, p. 28, point 10.1.

[6] See Case 730/79 *Philip Morris* [1980] ECR 2671. This principle was recently reaffirmed by the Court of Justice in Case C-390/06 *Nuova Agricast* v *Ministero delle Attività Produttive*, where the Court held that, 'As is clear from Case 730/79 …, aid which improves the financial situation of the recipient undertaking without being necessary for the attainment of the objectives specified in Article 87(3) EC cannot be considered compatible with the common market ….'

c. *Proportionality*: The positive effects of the measures must be properly balanced against the distortions of competition, in order for the distortions to be limited to the minimum necessary to reach the measures' objectives. Article 107(1) of the TFEU prohibits all selective public measures that are capable of distorting trade between Member States. Any derogation under Article 107(3)(b) of the TFEU which authorises state aid must ensure that such aid is limited to that necessary to achieve its stated objective.

(55) The Commission first notes that the measure was put in place in the context of the current financial crisis and that it is limited in time until the end of 2010.

(56) The Commission has received letters from exporters and a letter from a private insurer indicating a reduction in the insurance cover for domestic transactions. On the basis of the information received on insurance for domestic transactions, the Commission has doubts whether the said reduction in volume (paragraph 8) has the potential to disturb the economy of Portugal. The breakdown of the scheme's budget between export and domestic trade insurance could, however, be a sign of a market failure in domestic trade financing, which would need to be substantiated by the Portuguese authorities. Therefore at this stage the Commission has doubts whether the measure is appropriate to address a serious disturbance in the economy.

(57) The Commission notes that the aim of the measure is to address the unavailability of cover in the insurance market. However, the measure does not only provide additional cover to companies, it also provides an advantage in terms of pricing, given that the premiums are below market rates. As mentioned in paragraph 48 in respect of export credit, the rates charged under the state aid scheme represent 60% of the rates charged by a private insurer to cover the same client, while the fact that the cover limit is extended to double the initial limit implies a higher risk not reflected by the premium. The Commission therefore does not consider at this stage that the level of the pricing under the scheme is justified in view of the need to address the unavailability of insurance cover or that it is proportionate to achieving its stated objective given the potential distortions of competition.

(58) The Commission therefore has doubts about the compatibility of the measure under review with Article 107(3)(b) of the TFEU.

(59) Furthermore, at this stage of the procedure and in view of the strong concerns expressed in paragraphs 51 *et seq.* relating to the measure's potential to distort trade between Member States, the Commission does not see any other possible grounds for compatibility of the measure under either Article 107(2) or Article 107(3) of the TFEU and has strong doubts that it could be found compatible with the Treaty.

5.4 Conclusion

(60) The Commission is of the view that Portugal has not submitted sufficient evidence to eliminate doubts that the pricing of the top-up cover provided by the State is in keeping with the requirements of the Communication and is as such compatible with the internal market. The Commission also has doubts at this stage whether the cover is unavailable in the Portuguese short-term export credit market. In particular, the proof of unavailability of cover does not seem to fulfil the requirements of the Temporary Framework.

(61) As regards the domestic trade insurance scheme, the Commission has doubts as to the necessity, appropriateness and proportionality of the scheme and its compatibility under Article 107(3)(b) and (c) of the TFEU.

(62) For the above reasons, at this stage of the procedure the Commission has doubts as to the compatibility of the proposed measure with the internal market.

VI. DECISION

(63) In light of the above, the Commission has decided to initiate the procedure laid down in Article 108(2) of the TFEU and requires Portugal, within one month of receipt of this letter, to provide all documents, information and data needed for the assessment of the measure.

(64) The Commission would remind Portugal that Article 108(3) of the TFEU has suspensive effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

(65) The Commission would remind Portugal that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform the EFTA Surveillance Authority by sending it a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

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

European Commission
Directorate-General for Competition
State Aid Registry
Rue Joseph II, 70
B - 1049 Brussels
Fax No: +32 2 296 12 42

We would ask you to state the case name and number in all correspondence.

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President of the Commission