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Communication of the Commission 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 (97/C 281/03)

(Text with EEA relevance)

1. Introduction

1.1. Member States maintain an active policy of supporting their export industry. Of the total aid given by Member States to their manufacturing industry over the period 1992 to 1994, 7 % went on supporting exports, largely in the form of favourable terms for export credits and export-credit insurance (1).

1.2. Export subsidies directly affect competition in the market place between rival potential suppliers of goods and services. Recognizing their pernicious effects, the Commission, as the guardian of competition under the Treaty, has always strictly condemned export aid in intra-Community trade (2). However, although Member States' support for their exports outside the Community can also affect competition within the Community (3), the Commission has not systematically intervened in this field under the State aid rules in Articles 92, 93 and 94 of the Treaty. There have been several reasons for this. First, this area is partly governed by the provisions of the Treaty relating to external trade, Articles 112 and 113, and Article 112 does indeed provide for harmonization of export aid. Secondly, it is not only competition within the Community that is affected by aid for extra-Community exports, but also the competitiveness of Community exporters vis-à-vis those of the Community's trading partners, which give similar aid. Finally, progress in controlling aid has been achieved under the Treaty's trade provisions and in the OECD and WTO.

1.3. While the Commission has so far refrained from exercising its State aid control powers in the areas of export credits and export-credit insurance, work by the Council's Export Credits Group (4) and cases before the Court of Justice of the European Communities (5) have shown that in one area at least, that of short-term export-credit insurance, the actual or potential distortions of competition in the Community may justify action by the Commission under the State aid rules without waiting for progress on other fronts. The distortions of competition can occur not only between exporters in different Member States in their trade within and outside the Community, but also between export-credit insurers offering their services in the Community.

1.4. The purpose of this Communication is to remove such distortions due to State aid in that sector of the export-credit insurance business in which there is competition between public or publicly supported export-credit insurers and private export-credit insurers. This commercial sector of export-credit insurance relates to the insurance of short-term export-credit risks on trade within the Community and with many countries outside it. Such risks are termed 'marketable' and will be defined in Section 2 below. The definition currently comprises only so-called 'commercial', as opposed to 'political', risks in trade within the Community and with the majority of OECD countries, listed in the Annex. While Member States have made considerable efforts to eliminate aid from the commercial sector of export-credit insurance in anticipation of action by the Community, the Single Market requires safeguards to ensure a level playing field in all circumstances.

This Communication will not deal with the insurance of medium and long-term export-credit risks which are largely non-marketable at the present time. In that area the factors which have led the Commission to refrain from extensive use of its State aid control powers still militate against such action. Instead, efforts are being made to harmonize the terms of export-credit insurance, premiums and country-cover policy, taking due account of the programmes in third countries so as not to undermine the competitiveness of Community exporters.

1.5. Section 2 of this communication describes the structure of the export-credit insurance

market and distinguishes the commercial or market sector, in which private insurers operate and which is covered by this communication between private and public or publicly supported export-credit insurers and explains why and to what extent the State aid Articles of the Treaty apply. Finally, in Section 4, the Commission states what action it considers necessary to ensure that any remaining State aid of the types listed in Section 3 is removed from the market sector and requests the Member States pursuant to Article 93 (1) of the Treaty to take such action, if required.

2. Market and non-market sectors of short-term export-credit insurance

2.1. The Report of the Council's Export Credit Group (hereinafter referred to as 'the Report'), complaints by private export-credit insurers and cases before the Court of Justice of the European Communities, have shown that in some Member States the same 'official' export-credit agencies that insure the medium and long-term risks of exporters for the account or with the guarantee (6) of the State also operate for the account or with the guarantee of the State in parts of the short-term export-credit insurance market where they are in competition with private export-credit insurers that have no such links with the State. The 'official' export-credit agencies in question may be government departments, State-owned or State-controlled companies or wholly privately-owned and controlled companies. For the purposes of this communication, such agencies will be termed 'public or publicly supported export-credit insurers'. As well as the 'official' agencies operating in both the medium/long and short-term fields, some privately owned and controlled export-credit insurers that only provide short-term insurance may be supported by their governments through guarantees or equivalent reinsurance arrangements for some segments of their business. These insurers, too, must be categorized as 'public or publicly supported'. On the other hand, export-credit insurers mainly or exclusively engaged in the short term that do not operate for the account or with the guarantee (7) of the State for any of their business will be termed 'private export-credit insurers'.

The Report showed that when public or publicly supported export-credit insurers operated for the account or with the guarantee of the State on parts of the short-term market where they were in competition with private insurers, they enjoyed certain financial advantages which could distort competition against private insurers. In no country did public or publicly supported export-credit insurers have a monopoly for short-term business.

One of the most difficult areas dealt with by the Report was the provision of reinsurance by the State, either directly or indirectly. The Report identified reinsurance arrangements which provide 100 % cover and are equivalent to guarantees as a subsidy. It is now recognized that reinsurance facilities whereby the State only participates in or supplements a private-sector reinsurance treaty may also give insurers benefiting from them an advantage over private insurers not receiving such cover, thereby distorting competition.

2.2. Despite the recent improvements made - with public or publicly supported export-credit insurers increasingly hiving off their short-term business to separate companies or introducing separate accounting - it has been noted above that action is still needed to create the desired level playing field. The first task is to identify the sector in which a competitive market exists. The Report used as the decisive criterion for distinguishing the market sector, whether or not private reinsurance was available generally, rather than only in individual cases. It was observed that the answer was generally 'yes' for commercial risks on non-public buyers, but that for political risks (including risks on public buyers, currency transfer risks and non-commercial, catastrophe risks) the capacity available was so inadequate that cover for such risks was clearly to be regarded as a market activity. On the basis of an analysis of the private reinsurance market by reference to the three criteria of duration, location and nature of risks insured, the Report considered 'marketable' risks to involve commercial risks with a risk period of normally a maximum of three years for exports worldwide

2.3. Subsequent comments from Member States, business associations and insurers indicated that generally speaking that definition was too broad. Most of those submissions agreed with the

Report that political risks should be excluded because the private reinsurance market was not large enough, and they preferred a maximum risk period of two years for commercial risks. Also, it appeared to be very difficult to reinsure on the private market the commercial risk of protracted default in non-OECD countries.

2.4. In view of the close links between protracted default and insolvency - protracted default risks being liable to turn into insolvency - and the resulting need to classify both risks in the same category (marketable or non-marketable), it is prudent to exclude all commercial risks on non-OECD countries from the definition of marketable risks and from the scope of this communication for the time being. Finally, it appears that at present there are still difficulties in obtaining private reinsurance of commercial risk in some OECD countries.

2.5. In view of the above, 'marketable' risks are defined for the purposes of this communication as commercial risks on non-public debtors (8) established in the countries listed in the Annex. For such risks the maximum risk period (that is, manufacturing plus credit period with normal Berne Union starting point and usual credit term) is less than two years.

All other risks (that is, political, catastrophe (9) risks and commercial risks on public buyers and on countries not listed in the Annex) are considered not yet to be marketable.

'Commercial risks' are defined for the purposes of this communication as:

- arbitrary repudiation of a contract by a debtor, that is, any arbitrary decision by a non-public debtor to interrupt or terminate the contract without legitimate reason,
- arbitrary refusal by a non-public debtor to accept the goods covered by the contract without legitimate reason,
- insolvency of a non-public debtor or his guarantor,
- non-payment by a non-public debtor or by a guarantor of a debt resulting from the contract, that is, protracted default.

2.6. The capacity of the private reinsurance market varies. This means that the definition of marketable risks is not immutable and may change over time; for example, it might be extended to cover political risks. The definition will therefore have to be reviewed regularly (namely, at least once a year) by the Commission. The Commission will consult the Member States and other interested parties on such reviews (10). In so far as necessary, changes to the definition will have to take account of the scope of Community legislation governing export-credit insurance, in order to avoid any conflict or legal uncertainty.

3. Factors distorting competition between private and public or publicly supported export-credit insurers

3.1. The factors that may distort competition in favour of public or publicly supported export-credit insurers insuring marketable risks include (11):

- de jure or 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 on the private market,

- any difference in obligations, compared with private insurers, to maintain adequate provisions.

It should be noted that when Council Directive 73/239/EEC (12) was amended by Directive 87/343/EC (13) it was understood that the exclusion of export-credit insurance operations for the account of or guaranteed by the State (Article 2 (2) (d) of the original Directive) did not include operations in the field of short-term commercial risks which public or publicly supported export-credit insurers effected for their own account and not guaranteed by the State (14). This means that to insure short-term commercial risks, public or publicly supported insurers must have a certain amount of own funds (solvency margin, including guarantee fund) and technical provisions (notably and equalization reserve) and must have obtained authorization in accordance with Article 6 et seq. of Directive 73/239/EEC,

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

- awards of aid or provisions of capital by the State. With regard to the latter, the principle should be observed that, unless the State is acting as would a private investor in a market economy, capital injections involve State aid (15); provision by the State of services in kind, such as access to and use of State infrastructure, facilities or privileged information (for instance, information about debtors gathered by embassies) on terms not reflecting their cost; and reinsurance by the State, either directly, or indirectly via a public or publicly supported export-credit insurer, on terms more favourable than those available from the private reinsurance market, which leads either to under-pricing of the reinsurance or to the artificial creation of capacity that would not be forthcoming from the private market.

3.2. The types of treatment listed in paragraph 3.1 give, or may give, the export-credit insurers that receive them a financial advantage over other export-credit insurers. Such financial advantages granted to certain enterprises distort competition and constitute State aid within the meaning of Article 92 (1) of the Treaty.

Article 92 (1) is applicable to all measures which grant a financial or economic advantage to certain enterprises or products and involve a charge on or a loss to public funds, whether actual or contingent, and for which nothing or little is required from the beneficiary concerned, in so far as such measures affect trade between Member States and distort or threaten to distort competition by favouring certain undertakings or the production of certain goods (16).

The financial advantages listed in paragraph 3.1 in respect of marketable risks as defined in paragraph 2.5 affect intra-Community trade in services. Moreover, they lead to variations in the insurance cover available for marketable risks in different Member States, thereby distorting competition between companies in Member States and having secondary effects on intra-Community trade regardless of whether intra-Community exports outside the Community are concerned (17). The exceptions provided for in Article 92 of the Treaty do not apply to aid for the insurance of marketable risks. The distorting effects of such aid in the Community outweigh any possible national or Community interest in supporting exports. That view has been confirmed by the judgment of the Court of Justice Case C-63/89 which was directly concerned with the issue addressed by this communication. The Court held that although the Directive on partial harmonization of equalization reserves for insurance companies, which exempted export-credit insurance operations for the account of or guaranteed by the State, was not unlawful, the factors distorting competition between private and public or publicly supported export-credit insurers 'might justify recourse to legal action to penalize infringement of the provisions (of Article 92)' (18). In its judgment in Case C-44/93 (19), the Court assumed that the advantages in question constitute State aid and confirmed that the Commission might take action to secure their withdrawal.

4. Action required to eliminate distortions of competition in short-term export-credit insurance with respect to marketable risks

4.1. State aid of the types listed in paragraph 3.1, which is enjoyed by public supported export-credit insurers for the marketable risks defined in paragraph 2.5, may distort competition and would therefore be ineligible for exemption under the State aid rules of the Treaty.

4.2. Member States are therefore requested under Article 93 (1) of the Treaty to amend, where necessary, their export-credit insurance systems for marketable risks in such a way that the granting of State aid of the following types to public or publicly supported export-credit insurers in respect of such risks is ended within one year of the publication of this Communication:

(a) State guarantees for borrowing or losses;

(b) exemption from the requirement to constitute adequate reserves and the other requirements listed in the second indent of paragraph 3.1;

(c) relief or exemption from taxes or other charges normally payable;

(d) award of aid or provisions of capital or other forms of finance in circumstances in which a private investor acting under normal market conditions would not invest in the company or on terms a private investor would not accept;

(e) provision by the State of services in kind, such as access to and use of State infrastructure, facilities or privileged information (for instance, information about debtors gathered by embassies), on terms not reflecting their cost; and

(f) reinsurance by the State, either directly, or indirectly via a public or publicly supported export-credit insurer, on terms more favourable than those available from the private reinsurance market, which leads either to under-pricing of the reinsurance cover or to the artificial creation of capacity that would not be forthcoming from the private market.

However, pending the outcome of the review mentioned in paragraph 4.3, existing complementary State reinsurance arrangements remain permissible for an interim period, provided that:

- the State reinsurance is a minority element in the insurer's overall reinsurance package,
- where the reinsurance treaties of the insurer combine marketable and non-marketable risks, and any State reinsurance thus unavoidably attaches to marketable risk, the level of State reinsurance for marketable risks must not exceed that which would have been available from the private reinsurance market if reinsurance had been sought for those risks in isolation,
- the State reinsurance does not act so as to enable the insurer to insure business on individual buyers beyond the limits set by the participating private-market reinsurers,
- the premium for State reinsurance demonstrably reflects the risk, is calculated using commercial market techniques and, where an equivalent market premium rate is available, is at least equal to that rate,
- the State reinsurance for marketable risks is open to all credit insurers who are able to satisfy the common eligibility criteria.

4.3. For the purposes of complying with paragraph 4.2, public or publicly supported export-credit insurers will, at the very least, have to keep a separate administration and separate accounts for their insurance of marketable risks and non-marketable risks for the account or with the guarantee of the State, demonstrating that they do not enjoy State aid in their insurance of marketable risks. The accounts for business insured on the insurer's own account should comply with Council Directive 91/674/EC (20).

Furthermore, any Member State providing reinsurance cover to an export-credit insurer by way of participation or involvement in private sector reinsurance treaties covering both marketable and non-marketable risks will have to demonstrate that its arrangements do not involve State aid within the meaning of paragraph 4.2 (f).

For this purpose the Commission, in close liaison with the Member States, will continuously, as from the publication of this Communication, monitor such arrangements on the basis of six-monthly reports submitted by Member States concerned and by the end of 1998 will carry out a complete review of such arrangements. The review will take into account all the knowledge and experience acquired in the meantime about the operation of the short-term export-credit insurance market, and Member States' intervention therein, from the reports on implementation supplied under paragraph 4.5 from the first of the annual reviews to be undertaken under paragraph 4.6 and from any notifications of use of the escape clause under paragraph 4.4. Should the review find that the arrangements in a Member State involve State aid, then the Member State will be required to terminate them by the end of 1999 at the latest.

4.4. The principle that export-credit insurance for marketable risks should be provided by public or publicly supported export-credit insurers only if the financial advantages listed in paragraph 4.2 are withdrawn from them may be departed from in the circumstances set out below.

In certain countries, cover for marketable export-credit risks may be temporarily unavailable from private export-credit insurers or from public or publicly supported export-credit insurers operating for their own account, owing to a lack of insurance or reinsurance capacity. Therefore those risks are temporarily considered to be non-marketable.

In such circumstances, those temporarily non-marketable risks may be taken on to the account of a public or publicly supported export-credit insurer for non-marketable risks insured for the

account of or with the guarantee of the State. The insurer should, as far as possible, align its premium rates for such risks with the rates charged elsewhere by private export-credit insurers for the type of risk in question.

Any Member State intending to use that escape clause should immediately notify the Commission of its draft decision. That notification should contain a market report demonstrating the unavailability of cover for the risks in the private insurance market by producing evidence thereof from two large, well-known international private export-credit insurers as well as a national credit insurer, thus justifying the use of the escape clause. It should, moreover, contain a description of the conditions which the public or publicly supported export-credit insurer intends to apply in respect of such risks.

Within two months of the receipt of such notification, the Commission will examine whether the use of the escape clause is in conformity with the above conditions and compatible with the Treaty.

If the Commission finds that the conditions for the use of the escape clause are fulfilled, its decision on compatibility is limited to two years from the date of the decision, provided that the market conditions justifying the use of the escape clause do not change during that period. Furthermore, the Commission may, in consultation with the other Member States, revise the conditions for the use of the escape clause; it may also decide to discontinue it or replace it with another appropriate system.

4.5. This communication will apply from 1 January 1998 for a period of five years. Member States are requested to inform the Commission within two months of notification of this communication, whether they accept its recommendations. By 1 January 1999 at the latest, Member States must inform the Commission of the action they have taken to comply herewith. Should it appear either through those reports or otherwise that the systems in operation in the Member States still involve State aid, the Commission will assess such aid pursuant to Articles 92 and 93 of the Treaty, in accordance with the policy set out above.

4.6. In cooperation with the Member States and interested parties, the Commission will review the definition of marketable risks and the operation of the present communication in the light of market developments and possible Community legislation. All information received by the Commission from Member States and interested parties in connection with such reviews will with the permission of the supplier of the information, be made available to all the other participants in the review.

(1) Source: Fifth survey on State aids in the European Community, EC Commission, 1997, p. 20. From 1992 onwards the cutbacks in subsidized export credits agreed in the Helsinki package are likely to reduce this figure.

(2) In its seventh report on competition policy (1977), point 242, the Commission stated that export aids in intra-Community trade 'cannot qualify for derogation whatever their intensity, form, grounds or purpose`.

(3) See judgment of the Court of Justice in Case C-142/87 Belgium v. Commission [1990] ECR I-959. See also Case C-44/93 Assurances du Crédit v. OND and Belgium [1994] ECR I-3829, paragraph 30.

(4) 'L'assurance crédit et le marché unique 1992 (court-terme)` , report presented to the coordination group, rapporteur, P. Callut.

(5) See Case C-63/89 Assurances du Crédit and Cobac v. Council and Commission [1991] ECR I-1799, and Case C-44/93 Assurances du Crédit v OND and Belgium [1994] ECR I-3829.

(6) In some cases, such as in The Netherlands, medium and long-term business is conducted not under a guarantee, but under a comprehensive reinsurance agreement with the government.

(7) Or with equivalent reinsurance arrangements.

(8) Or non-public guarantors. A public debtor or guarantor is a debtor or guarantor who, in one form or another, represents the public authority itself and cannot either judicially or administratively be declared insolvent. For the purposes of this communication, publicly owned

or publicly controlled companies resident in the countries listed in the Annex as a marketable risk country and subject to the normal provisions of private company law are considered to be non-public debtors/guarantors.

(9) That is, war, revolution, natural disasters, nuclear accidents, and so forth, not so-called 'commercial, catastrophe risks` (catastrophic accumulations of loss on individual buyers or countries) which may be covered by excess of loss reinsurance and are commercial risks.

(10) Inter alia, the Commission will call on the help of the Council (for example, its Export Credits Group).

(11) The tying by a public or publicly supported export-credit insurer of insurance of non-marketable risks to the acceptance of cover for marketable risks might infringe Article 86 of the EC Treaty. Such action could both be the subject of proceedings by the Commission and challenged in the courts and before national competition authorities.

(12) 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 (OJ L 228, 16. 8. 1973, p. 3).

(13) Council Directive 87/343/EEC of 22 June 1987 amending Council Directive 73/239/EEC 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 (OJ L 185, 4. 7. 1987, p. 72).

(14) See judgment of the Court of Justice in Case C-63/89, *Assurances du Credit and Cobac v. Council and Commission*, cited in footnote 5, p. 1848 (paragraph 22).

(15) See communication of the Commission to the Member States concerning public authorities' holdings in company capital (EC Bulletin 9-1984) and communication of the Commission on the application of Articles 92 and 93 of the EC Treaty to public undertakings in the manufacturing sector (OJ C 307, 13. 11. 1993, p. 3).

(16) See judgments of the Court of Justice in Case 30/59 *Steenkolenmijnen v. High Authority* [1961] ECR p. 1, paragraph 19; Case 173/73 *Italy v. Commission* [1974] ECR p. 709, Case 730/79 *Philip Morris v. Commission* [1980] ECR p. 2671.

(17) In its judgment in Case C-142/87 *Belgium v. Commission*, cited in footnote 3, the Court held that not only aid for intra-Community exports, but also aid for exports outside the Community can influence intra-Community competition and trade. Both types of operation are insured by export-credit insurers and aid with respect to both can therefore have effects on intra-Community competition and trade.

(18) Cited in footnote 5; see paragraph 24. Advocate-General Tesouro, in his opinion in the case, considered that when there is competition between private and public or publicly backed export-credit insurers, 'it is highly doubtful whether the Member States can legitimately provide financial backing for public operators. Intervention of that kind could be incompatible with the rules on public aid` ([1991] ECR I-1835, point 15).

(19) Cited in footnote 3; see especially paragraph 34.

(20) Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ L 374, 31. 12. 1991, p. 7).

ANNEX

List of marketable risk countries

European Union

Austria

Belgium

Denmark

Finland

France
Germany
Greece
Ireland
Italy
Luxembourg
Netherlands
Portugal
Spain
Sweden
United Kingdom

Countries which are members of the OECD and which are considered to be marketable risk countries

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