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COMMUNICATION FROM THE COMMISSION

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

(Text with EEA relevance)

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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-EU trade and for exports outside the EU. To prevent Member States' support for export-credit insurance from distorting competition, its assessment under EU 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 EU), but also among export-credit insurers operating in the EU. 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 apply 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 purpose of this Communication is to prevent state aid from distorting 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 TFEU 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

1 OJ C 281, 17.9.1997, p. 4.
2 OJ C 217, 2.8.2001, p. 2.
3 OJ C 307, 11.12.2004, p. 12.
4 OJ C 325, 22.12.2005, p. 22.
5 OJ C 329, 7.12.2010, p. 6.

and equal treatment. To that end, it lays down a set of conditions that must be fulfilled when export-credit insurers operating for the account of or guaranteed by the State wish to enter the short-term credit insurance market for marketable risks.

6. Risks that are in principle non-marketable are outside the scope of this Communication. Therefore, it will not deal with export-credit insurance with a risk period of two years or more, as that is currently considered non-marketable.

7. Section 2 describes the scope of the Communication and the definitions used in it. Section 3 deals with the applicability of Article 107(1) TFEU and the general prohibition of state aid for the export-credit insurance of marketable risks. Finally, section 4 provides for some exemptions from the definition of marketable risks and specifies the conditions for state intervention in the insurance of those exempted marketable risks.

2. SCOPE OF THE COMMUNICATION AND DEFINITIONS

2.1. Scope

8. This Communication applies to export-credit insurance with a risk period of less than two years.

2.2. Definitions

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

‘Co-insurance’: the percentage of each insured loss that is not indemnified by the insurer and that the insured has to bear for its own account or for another insurer’s account.

‘Credit period’: the period of time the insured exporter gives to the buyer to pay for the delivered goods.

‘Commercial risks’: risks including, in particular,

– arbitrary repudiation of a contract by a debtor, i.e. any arbitrary decision by a non-public debtor to interrupt or terminate the contract without a legitimate reason;

– arbitrary refusal by a non-public debtor to accept the goods covered by the contract without a legitimate reason;

– insolvency of a non-public debtor or its guarantor;

– protracted default, which is non-payment by a non-public debtor or by a guarantor of a debt resulting from the contract.

‘Export-credit insurance’: an insurance product whereby the insurer takes over the commercial and/or political risk, as defined in this Communication, of protracted default, insolvency or bankruptcy of the buyer in a trade transaction.

‘Manufacturing period’: the period between the date of an order and the delivery or shipment of the goods.

‘Marketable risks’: commercial and political risks with a maximum risk period of less than two years, established on (public and non-public) debtors in countries where there is sufficient private capacity to cover all economically justifiable risks. These countries are listed in the annex to this Communication. All other risks are considered non-marketable.

‘Political risks’: risks including, in particular,

– the risk that a government buyer or country prevents the fulfilment of a transaction or fails to meet payment obligations in 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 prevents the performance of a transaction;

– the risk that a country remains in default to transfer to the country of the insured the moneys paid by buyers domiciled in that country.

‘Risk period’: the manufacturing period plus the credit period.

‘Single-risk cover’: cover for all sales to one debtor or for a single contract with one debtor.

‘Top-up cover’: additional cover over a credit limit established by another insurer.

3. APPLICABILITY OF ARTICLE 107(1) TFEU

3.1. General principles

10. Article 107(1) TFEU 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. Where export-credit insurance is provided by insurers operating for the account of or guaranteed by the State, 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. Where export-credit insurers operating for the account of or guaranteed by the State enjoy certain advantages compared to private insurers, state aid may be involved. The advantage can take different forms and might include, for example:

(a) de jure or de facto 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 under Council Directive 73/239/EEC[6];

(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; and

(f) direct reinsurance by the State or 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 insurers mentioned above in respect of marketable risks affect intra-EU trade in services. Moreover, they lead to variations in the insurance cover available for marketable risks in different Member States. This distorts competition among companies in Member States and has secondary effects on intra-EU trade regardless of whether intra-EU exports or exports outside the EU are concerned[7]. Where export-credit insurers operating for the account of or guaranteed by the State enjoy any such advantages compared to private insurers, it is necessary to define the conditions under which they can operate to ensure they do not benefit from state aid. This requires that they do not insure marketable risks.

14. Advantages for insurers can also be at least partly passed on to exporters. Such advantages may distort competition and trade and constitute state aid within the meaning of Article 107(1) TFEU. 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.

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[6] 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).

[7] 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-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 for both can therefore affect intra-Community competition and trade.

4. CONDITIONS FOR THE PROVISION OF EXPORT-CREDIT INSURANCE FOR MARKETABLE RISKS

4.1. General principles

15. As set out above, where export-credit insurers operating for the account of or guaranteed by the State enjoy any financial advantages compared to private insurers, as described in point 12, they must not insure marketable risks. Should they 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 first of all 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/EC[8].

16. Subsidiaries of export-credit insurers operating for the account of or guaranteed by the State must not receive state aid for their insurance of marketable risks as specified in point 12.

17. 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 within the meaning of point 12(f).

4.2. Exceptions to the definition of marketable risks

18. Notwithstanding the definition of marketable risks, commercial and political risks incurred on debtors established in the countries listed in the annex, are considered non-marketable in the following situations:

    (a) if the Commission decides to temporarily remove one or several countries from the list of marketable risk countries defined in the annex, by means of the mechanism described in section 5.2, because the capacity of the private insurance market in any of those countries is insufficient to cover all economically justifiable risks;

    (b) if the Commission, on being notified by a Member State, decides that the risks incurred by small and medium-sized enterprises falling within the relevant EU definition[9] and having a total annual export turnover not exceeding EUR 2 million, are temporarily non-marketable in the Member State concerned;

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[8] 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).

[9] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

(c) if the Commission, on being notified by a Member State, decides that single-risk cover with a credit period of between 181 days and two years is temporarily non-marketable in the Member State concerned;

(d) if the Commission, on being notified by a Member State, decides that due to other factors, related in particular to the supply conditions of export-credit insurance, certain risks are temporarily non-marketable in the Member State concerned.

19. To minimise distortions of competition in the internal market, temporarily non-marketable risks as specified in point 18 can be covered by export-credit insurers operating for the account of or guaranteed by the State, provided they fulfil the conditions specified in section 4.3.

4.3. Conditions for the provision of cover for exempted marketable risks

4.3.1. Quality of cover

20. The quality of cover offered by export-credit insurers operating for the account of or guaranteed by the State must be consistent with market standards. In particular, only economically justified risks, including protracted default, can be covered. The risks specified in point 18(b) and (c), which private insurers assessed and refused under whole turnover policies because they were not economically justified, cannot be covered. The maximum percentage of cover must be 90 % for commercial risks and political risks and the claims waiting period must be a minimum of 90 days.

4.3.2. Underwriting principles

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

4.3.3. Adequate pricing

22. Risk-carrying in the export-credit insurance contract must be remunerated by an appropriate premium. In order to minimise the crowding out of private insurers, average premium rates under publicly supported schemes must be set at a higher level 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 charged will ensure that exporters return to private insurers as soon as market conditions allow them to do so and the risk becomes marketable again.

23. Pricing is considered adequate if the minimum premium[10] ('safe-harbour premium') for the relevant risk category as set out in the following table is charged. The safe-

[10] For the relevant risk category, the safe-harbour risk premium range was established on the basis of one-year Credit Default Swap (CDS) spreads, based on a composite rating including ratings of all three

harbour premium applies unless Member States provide evidence that these rates are inappropriate for the case in question.

Risk category[11]	**Annual risk premium**[12] (% of insured volume)
Excellent[13]	[0.2 % — 0.4 %]
Good[14]	[0.5 % — 0.9 %]
Satisfactory[15]	[1.2 % — 2.3 %]
Weak[16]	[2.5 % — 4.5 %]
Bad[17]	No safe-harbour premium provided

24. For co-insurance, reinsurance and top-up cover, pricing is considered adequate if the premium charged is at least [20 %] higher than the premium for the original cover.

25. An administration fee should be added to the risk premium. The minimum fee of [0.2 % – 0.5 %] of insured volume should be charged regardless of the term of the contract.

4.3.4. Transparency and reporting

26. Member States must publish the schemes put in place for the risks specified in point 18 on the websites of export-credit insurers operating for the account of or guaranteed by the State, specifying all applicable conditions.

27. Member States must submit annual reports to the Commission on risks specified in point 18 that are covered by export-credit insurers operating for the account of or guaranteed by the State on 30 [June] of the year following the intervention.

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main credit rating agencies (Standard & Poor, Moody's and Fitch), for the past five years (2007–11), assuming that average loss ratios for short-term export-credit insurance are [40 %].

11 The risk categories are based on credit ratings. Ratings do not need to be obtained from specific rating agencies. National rating systems or rating systems used by banks are equally acceptable. For firms without a public rating, a rating based on verifiable information could be applied.

12 Safe harbour for a 30-day insurance contract can be obtained by dividing the range by 12.

13 The excellent risk category includes risks equivalent to AAA, AA+, AA, AA-, A+, A, A- in Standard & Poor’s credit ratings.

14 The good risk category includes risks equivalent to BBB+, BBB or BBB- in Standard & Poor’s credit ratings.

15 The satisfactory risk category includes risks equivalent to BB+, BB or BB- in Standard & Poor’s credit ratings.

16 The weak risk category includes risks equivalent to B+, B or B- in Standard & Poor’s credit ratings.

17 The bad risk category includes risks equivalent to CCC and below in Standard & Poor’s credit ratings and should in principle not be covered.

28. The report must contain information on use of the scheme, including in particular the total volume of credit limits granted, turnover insured, premiums charged, claims registered and paid, and amounts recovered.

5. PROCEDURAL ISSUES

5.1. General principles

29. The risks specified in point 18(a) can be covered by export-credit insurers operating for the account of or guaranteed by the State, subject to the conditions specified in section 4.3. In such cases the Commission does not have to be notified.

30. The risks specified in point 18(b), (c) and (d) can be covered by export-credit insurers operating for the account of or guaranteed by the State, subject to the conditions specified 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 Member States wish to modify any of the conditions or if there is any doubt about whether a planned export-credit insurance or insurance scheme fulfils the conditions set out in this Communication, it should be notified to the Commission.

32. Analysis under state aid rules does not prejudge 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 set out in point 18(a), the Commission will take the following indicators into account:

(a) Contraction of private credit insurance capacity: in particular, the withdrawal of a major international insurer from a specific market, a significant decrease (of between at least [20 and 30 %]) in total insured amounts and a significant decrease (of between at least [20 and 30 %]) in acceptance ratios for a market within a 12-month period, detected in one Member State.

(b) Deterioration of sovereign sector ratings: in particular, sudden changes in credit ratings within a 12-month period, for example multiple downgrading within a 12-month period by independent rating agencies, and a big increase in CDS spreads compared to the average value of the group of countries representing the top 25 % of all marketable risk countries.

(c) Deterioration of corporate sector performance: in particular, a sharp increase in insolvencies in the importing country within a 12-month period.

34. The Commission may revise the list of marketable risk countries at the written request of five Member States or on its own initiative when market capacity becomes insufficient to cover economically justifiable risks. It must obtain the relevant data from private export insurers and Member States.

35. When the Commission proposes modifying the list of marketable risk countries in the annex, it must consult Member States, private insurers and interested parties. The consultation period must usually not be longer than 15 working days. Member States must be informed of the Commission's decision in writing.

36. The modified list of marketable risk countries must be valid for a period of no less than 12 months. Insurance policies signed during that period must be valid for a maximum of 90 days after the expiry date of the modified list. Three months before the expiry of the modified list, the Commission may decide to prolong its validity if market capacity as specified in point 33 is still insufficient.

37. The Commission may, in consultation with Member States and interested parties, revise the indicators for modifying the list of marketable risk countries. It may also decide to revise the method for modifying the list.

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

38. In the cases specified in points 18(b) and (c), the evidence currently available to the Commission suggests that there is a market gap and that those risks are therefore non-marketable. It must be borne in mind 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.

39. For these reasons, when a Member State wants to cover the risks specified in point 18(b) or (c), it must demonstrate in its notification that it has contacted two major insurers in its country and given them an opportunity to provide evidence that cover for the risks concerned is available in the country. If the insurers concerned do not provide data, to the Member State or directly to the Commission, within 30 days of receipt of request from a Member State, on the conditions of cover and insured volumes for the type of risks the Member State wants to cover, the Commission will consider the risks unmarketable.

5.4. Notification in other cases

40. For the cases specified in point 18(d), the Member State concerned must 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 insurer from the country, reduced capacity or a limited range of products compared to other Member States.

6. DATE OF APPLICATION AND DURATION

41. This Communication shall enter into force on 1 January 2013 and be valid until 31 December 2018.

ANNEX

LIST OF MARKETABLE RISK COUNTRIES

All the Member States of the European Union

Australia

Canada

Iceland

Japan

New Zealand

Norway

Switzerland

United States of America