



EUROPEAN COMMISSION

Competition DG

Markets and cases III: Financial services
State aids II – Task Force Financial Crisis

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COMP D3-D5/KK/AP/mj – 2011/11689

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Subject: CP 80/2010 - Complaint against the UK export credit scheme

Dear Sir and Madam,

I refer to your letter dated 27 October 2010 concerning the above mentioned matter.

I would like to inform you that following your letter the Commission services requested the UK authorities to provide additional information, in particular in respect of the contractual relationship between GEFCO and ECGD and the limitations imposed by the latter on the activity of the former. The additional information provided confirms the conclusion formulated already in the letter of 1 October 2010 that GEFCO is not allowed to carry out any other economic activity for as long as it receives any support from ECGD. The fact that GEFCO's role is limited to supporting ECGD in the achievement of its tasks confirms that GEFCO is not an entity engaged in an economic activity defined as offering goods and services in the market¹. Therefore one fails to see how it could be considered as an undertaking in competition with others, which is a prerequisite for the application of the EU State aid rules.

¹ Joined cases C-180/98 to C-184-98, *Pavlov*, [2000] ECR I-6451.

Please specify the name of the case and the case number in all correspondence.

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In your complaint you allege that the UK authorities are in breach of the Article 108(3) of the Treaty of the Functioning of the European Union, which stipulates in particular that the Commission shall be informed of any plans to grant or alter aid and shall not put it into effect before the Commission approval. In this respect we would like to recall that the Member State is under obligation to notify only those measures, which can be qualified as State aid within the meaning of art. 107(1) TFEU. In order for a measure to constitute a State aid, it has to satisfy four constitutive conditions. More specifically, the measure must: i) be granted by a Member State or through State resources, ii) be selective; iii) confer an advantage on an undertaking; and iv) distort or threaten to distort competition and affect trade between Member States. As a consequence, a Member State would be regarded as infringing the obligations created by Article 108(3) only if the measure concerned fulfils all above conditions cumulatively, which is however not the case in respect of the above measures raised in your complaint.

Having regard to your allegation that the measure might be in breach of the World Trade Organisation's Agreement on Subsidies and Countervailing Measures (ASCM), in the first place we would like to admit that there is the obligation on the part of the Commission to ensure that Articles 107 TFEU and 108 TFEU are applied consistently with other provisions of the Treaty.² However, the compliance of a measure with the other EU primary and secondary legislation is analysed only in the second stage of State aid investigation, provided that the measure is indeed considered to constitute State aid in the first place. Thus, while the compliance with other provisions is an important factor taken into account in the compatibility assessment, it is irrelevant to the examination of the State aid character of the above measure. Since in the present case we do not consider at this stage that the measure concerned involves the State aid element in the meaning of Article 107(1) TFEU, there is no need for the compatibility assessment. Using the procedure provided for State aid measures to assess the compatibility of a non-aid measure with the Trade provisions of the TFEU is not only inappropriate, but could in fact constitute a misuse of procedure.

You also allege that the Article 107(1) TFEU does not limit the interpretation of the term "favouring" (or conferring an advantage) to whether or not the undertaking derives financial or pecuniary profit from the State. Further, you submit that the sole test of whether the arrangements between ECGD and GEFCO constitute State Aid is whether the guarantees and the other support provided by ECGD distort or threaten to distort competition. In this respect, first, we would like to recall that according to the settled case law the fulfilment of each of the criterion (see point 3 above) of the State aid notion is analysed separately. Then, please note that Article 107(1) defines as State aid those measures that inter alia have the effect of "*favouring certain undertakings of certain goods*". The word "favouring" makes clear that there must be "an economic advantage" granted to the beneficiary compared to its competitors.³ When, as it is in the present case, the potential advantage arising from the transactions is entirely passed on to the State, it can no longer be perceived as an advantage distorting competition, since the State as a public authority is not in competition with other market operators.

² Case T-359/04 *British Aggregates and Others v Commission*, not yet published.

³ See, for example, Case C-143/99 *Adria-Wien Pipeline*, [2001] ECR I-8365, C-237/04 *Enirisorse* [2006] ECR I-2843, C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941 and C-399/08P *Deutsche Post*, not yet published.

In summary, on the basis of the currently available information the prerequisite for the State aid assessment seems not to be fulfilled, namely GEFCO cannot be considered to be an undertaking. Further, even if GEFCO could be considered an undertaking, not all four criteria mentioned above, which have to be met cumulatively for a measure to constitute State aid, seem to be met. In particular, based on the information provided, it could not be demonstrated that the measure confers an advantage on GEFCO and that it distorts or threatens to distort competition.

In the light and on the basis of the submitted information, the services of DG Competition consider that there are insufficient grounds at this stage for continuing the analyses, regarding the State aid aspects, pursuant to Article 20(2) of Council Regulation (EC) No 659/1999⁴ and suggest closing this file.

Should you wish to submit further information to substantiate your complaint, we would ask you to do so within one month from the date of this letter. If additional information is not provided within the prescribed period, the complaint shall be deemed to be withdrawn.

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized 'S' shape with a horizontal line through it, followed by a small 'P' and a period.

Karl SOUKUP
Head of Unit

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⁴ See Article 20.2 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [now 108] of the EC Treaty.