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State aid SA. 43996 (2015/N) – Thirteenth Prolongation of the Portuguese Guarantee Scheme

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Subject: State aid SA.43996 (2015/N) – Portugal
Thirteenth Prolongation of the Portuguese Guarantee Scheme

Sir,

1. PROCEDURE

(1) On 29 October 2008 the Commission approved the Portuguese Guarantee scheme ("the scheme") by its decision in State aid case NN60/2008 ("the original decision")[1].

(2) On the basis of subsequent notifications, the Commission approved the prolongation of the scheme by its decisions of 22 February 2010 in State aid case N 51/2010[2], of 23 July 2010 in State aid case N 315/2010[3], of 21 January 2011 in State aid case SA.32158[4], of 30 June 2011 in State aid case SA. 33178[5], of 21 December 2011 in State aid case SA. 34034[6], of 27 June 2012 in State aid case SA.34958[7], of 17 December 2012 in State aid case SA.35743[8], of 1 August 2013 in State aid case SA.36869[9], of 19 December 2013 in State aid case SA.37698[10], of 30

[1] OJ C 9, 14.01.2009, p. 1, a corrigendum to which appears in OJ C 25, 31.01.2009, p. 25.
[2] OJ C 96, 16.04.2010, p. 1.
[3] OJ C 283, 20.10.2010, p. 5.
[4] OJ C 111, 9.4.2011, p. 5.
[5] OJ C 344, 24.11.2011, p. 1.
[6] OJ C 99, 03.04.2012, p. 2.
[7] OJ C 246, 15.8.2012, p. 1.
[8] OJ C 36, 17.12.2013, p. 1.
[9] OJ C 2, 07.01.2014, p. 1.
[10] OJ C 50, 21.02.2014, p. 1.

S. Ex.ª o Ministro dos Negócios Estrangeiros
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July 2014 in State aid case SA.38900[11], of 4 February 2015 in State aid case SA.39991[12] and of 22 July 2015 in State aid case SA.42404[13].

(3) On 22 December 2015, Portugal notified a thirteenth prolongation of the scheme from 1 January to 30 June 2016.

(4) By letter dated 22 December 2015, Portugal agreed exceptionally to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation 1/1958 and to have the present decision adopted and notified in English.

2. FACTS

2.1. Description of the scheme

(5) To stabilise the financial market, Portugal passed law 60-A/2008 of 20 October 2008[14] and its implementing provisions, Portaria nº 1219-A/2008 of 23 October 2008[15], Portaria nº 946/2010 of 22 September 2010[16], Portaria nº 80/2012 of 27 March 2012[17] and law 82-B/2014 of 31 December 2014[18].

(6) The total budget of the prolonged scheme is EUR 24.67 billion[19].

(7) The beneficiaries of the scheme are all credit institutions incorporated in Portugal, including subsidiaries of foreign banks with registered office in Portugal. Only institutions which are solvent for the purposes of Portuguese law may benefit from the scheme.

(8) Under the approved Portaria n° 80/2012, the scheme covers the issuance of non-subordinated debt with a minimum maturity of three months and a maximum maturity up to five years. In case of guarantees on the issuance of covered bonds (on mortgages and on the public sector), the maturity can go up to seven years.

(9) The remuneration for guarantees on liabilities will be calculated in accordance with the formula set out in the 2011 Prolongation Communication[20], as described in the Commission decision in State aid case SA.34958[21]. The indicative guarantee fees for the period from the adoption of the present decision to 30 June 2016 can be found in the Annex and are based on an updated sample of European banks established by the Commission on 9 November 2015.

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[11] OJ C 348, 3.10.2014, p. 28.
[12] OJ C 94, 20.03.2015, p. 10.
[13] OJ C 369, 6.11.2015, p. 1.
[14] Diário da República, 1.ª série, n.º 203.
[15] Diário da República, 1.ª série, n.º 206.
[16] Diário da República, 1.ª série, n.º 185.
[17] Diário da República, 1.ª série, n.º 62.
[18] Diário da República, 1.ª série, n.º 252
[19] Article 136 of the 2014 Portuguese State Budget.
[20] Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 356, 6.12.2011, p. 7.
[21] Recitals 13 to 16. See footnote 7.

(10) A detailed description of the scheme is provided in the original decision, in particular recital 9 concerning the legal basis, recitals 5 to 8 concerning the objective of the scheme and recitals 10 to 21 on the general description of the scheme. The Portaria n° 80/2012 introduced the requirement in terms of maturities described in recital (8).

2.2. Actual use of the scheme

(11) Along with the notification, the Portuguese authorities submitted a report dated 15 October 2015 on the operation of the scheme until that date.

(12) Regarding the functioning of the scheme, the outstanding amount of guarantees at mid-December 2015 was EUR 3.5 billion, all of which covered liabilities of Novo Banco. In its decision of 19 December 2015 in State aid case SA.43976, the Commission approved an amendment to the resolution plan of Banco Espirito Santo[22]. That decision approves the extension of the government-guaranteed bank bonds issued by Novo Banco – a structure created in 2014 to rescue assets and liabilities of Banco Espirito Santo - by one additional year, while Portugal committed that Novo Banco would not issue new government-guaranteed bank bonds.[23] Novo Banco is therefore outside the scope of the scheme for the purpose of the present decision. However, the 3.5 billion government-guaranteed bank bonds for Novo Banco are included in the total budget of EUR 24.67 billion and the outstanding amount represents around 15% thereof.

3. POSITION OF PORTUGAL

(13) Portugal requests a prolongation of the scheme until 30 June 2016.

(14) Portugal submits that the scheme constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (“TFEU”), but is of the view that the proposed prolongation is compatible with the internal market on the basis of Article 107(3)(b) TFEU as it is necessary to remedy a serious disturbance in the economy of Portugal.

(15) Portugal submitted a letter by the Bank of Portugal[24] further supporting the need for the proposed prolongation of the scheme to safeguard the stability of the financial system in Portugal, because prevailing market conditions do not allow for a termination of the scheme. In particular, the Bank of Portugal notes that despite the gradual improvement in economic growth and the enhancement of the Portuguese State's issuance in the medium- and long-term debt market, the Portuguese private economy still faces some constrains regarding the regular access to funding, mainly in the medium to long term. According to the Bank of Portugal, until October 2015 Portuguese financial institutions have been exhibiting reduced issuance activity, which although mitigated by the positive effects of the expanded asset purchase programme might also be the result of worsening of risk perception of Portuguese banks by financial markets.

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[22] Commission press release IP/15/6381.

[23] Recitals 32 and 33.

[24] Letter by the Bank of Portugal of 24 November 2015.

(16) To date, four issuances of debt in the international private market have been carried out by Portuguese financial institutions during the second half of 2015. They were issued by three institutions, with maturities of five to seven years, totalling an amount of EUR 1.55 billion. Portugal submits that although those operations show improved market sentiment towards the Portuguese entities, they do not represent a complete normalization of the financing conditions of the Portuguese banking system and, in particular, the full restoration of its access to capital markets.

(17) Portugal reasserted the existing commitments relating to the scheme, as reflected in recital (17) of the previous prolongation decision[25], namely:

(a) to grant aid measures under the scheme only to solvent credit institutions which have no capital shortfall[26]; banks which have already received approved rescue aid at the date of entry into force of the 2013 Banking Communication, i.e. before 1 August 2013, but have not yet obtained a final approval of the restructuring aid, can also receive support under the scheme without individual notification. In such a case an update to the restructuring plan has to be submitted if the restructuring plan had not already provided for the envisaged guarantee measure;

(b) to grant the guarantees under the scheme only for the new issuance of senior debt (subordinated debt is excluded);

(c) to provide guarantees only on debt instruments with maturities from three months up to five years (or a maximum of seven years in the case of covered bonds) and to limit the guarantees with a maturity of more than three years to one-third of the total outstanding amount of guarantees granted to each individual bank;

(d) to determine the minimum level of State guarantee remuneration in line with the provisions of Article 4 of Executive Order nr. 1219-A/2008, of 23 October (as amended by Executive Order nr. 80/2012, of 27 March), in accordance with the formula set out in the Commission's Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis[27];

(e) to communicate to the Commission, within three months following each issuance of guaranteed bonds, the actual fee charged;

(f) that any credit institution that is granted guarantees on new liabilities or on renewed liabilities for which, at the time of the granting of the new guarantee, the total outstanding guaranteed liabilities (including guarantees accorded before the date of this decision) exceed both a ratio of 5% of total liabilities and the total amount of EUR 500 million, will be required to present a restructuring plan within two months of the granting of the guarantees;

[25] OJ C 369, 6.11.2015, p.1.

[26] "No capital shortfall" is certified by the competent supervisory authority, as it is established, in line with point 28 of the 2013 Banking Communication, in a capital exercise, stress test, asset-quality review or an equivalent exercise at Union, euro area or national level, which has to be confirmed by the competent supervisory authority.

[27] C(2011) 8744 final, p. 7.

(g) that any institutions which cause the guarantee to be called upon will be required to submit individual restructuring or liquidation plans to the Commission within two months from such event;

(h) to impose a ban on advertising referring to the State support received by the beneficiaries of the scheme and to prevent the latters from employing any aggressive commercial strategies, which would not take place without the State support;

(i) to present every three months (15 April, 15 July, 15 October and 15 January, at the latest) a report on the operation of the scheme, on guaranteed issuances and on the actual fees charged.

(j) to complement reports on the operation of the scheme with updated available data on the cost of comparable non-guaranteed debt issuances (as regards nature, volume, rating, currency).

(18) In line with the requirements of the 2011 Prolongation Communication, Portugal provided an indicative fee (estimation) for financial institution without CDS prices, as Portuguese banks' CDS prices are still tainted with sovereign risks and therefore not representative. The estimation was based on an application of the scheme's remuneration formula and recent market data.

4. ASSESSMENT

4.1. Existence of State aid

(19) According to Article 107(1) TFEU, 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.

(20) For the reasons indicated in the original decision, the Commission considers that the scheme constitutes State aid within the meaning of Article 107(1) TFEU because it concerns the provision of State resources to a certain sector, i.e. the financial sector, which is open to intense international competition. Under the scheme, participating banks obtain guarantees under conditions which would not be available to them under market conditions, thereby receiving an advantage. Given the characteristics of the financial sector, any advantage from State resources to a bank affects intra-Union trade and threatens to distort competition. The scheme therefore constitutes State aid within the meaning of Article 107(1) TFEU.

4.2. Compatibility of the scheme

4.2.1 Legal basis for the compatibility assessment

(21) Under the scheme, Portugal intends to provide aid in the form of guarantees in favour of banks.

(22) Given the exacerbation of tensions in sovereign debt markets that has taken place since 2011 and in light of the persisting circumstances and risks, the Commission

considers it appropriate, as confirmed by the 2013 Banking Communication[28], to examine the measure under Article 107(3)(b) TFEU.

(23) Article 107(3)(b) TFEU empowers the Commission to find that aid is compatible with the internal market if it is intended "to remedy a serious disturbance in the economy of a Member State". The Commission has acknowledged that the global financial crisis can create a serious disturbance in the economy of a Member State and that measures supporting banks are apt to remedy that disturbance. That assessment has been confirmed in the Recapitalisation Communication[29] and the Restructuring Communication. The Commission still considers that the conditions for State aid to be approved pursuant to Article 107(3)(b) TFEU are present. The Commission confirmed that view by adopting the 2013 Banking Communication[30].

(24) The Commission does not dispute the position of the Portuguese authorities that while in June 2014 Portugal exited its three-year Economic Adjustment Programme (which included the implementation of an ambitious reform agenda and contributed to regaining economic growth and restoring investor confidence for the sovereign), regular access of banks to funding in financial markets can remain vulnerable. Those concerns should continue to be addressed in order to safeguard financial stability and credit availability in the Portuguese economy. Despite the ability of Portugal to issue medium- and long-term debt and notwithstanding the issuance of debt by Portuguese financial institutions in the international debt market[31], banks in Portugal still rely on Central Bank funding, though on a decreasing trend.

(25) Therefore, the Commission cannot firmly conclude yet that market access conditions for the Portuguese banking system as a whole have been fully restored. The Commission notes that the availability of the scheme can enhance the ability of the Portuguese financial institutions to access the capital markets in case of urgency. Hence, the Commission finds that the scheme aims at remedying a serious disturbance in the Portuguese economy.

(26) Therefore, the Commission continues to base its assessment of State aid measures in the banking sector on Article 107(3)(b) TFEU.

(27) In order for an aid to be compatible under Article 107(3)(b) TFEU, it must comply with the general principles for compatibility under Article 107(3), viewed in the light of the general objectives of the Treaty. Therefore, according to the Commission's case practice[32] any aid or scheme must comply with the following conditions: (i) appropriateness, (ii) necessity and (iii) proportionality.

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28 Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 216, 30.7.2013, p. 1).

29 Commission Communication - Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2).

30 See points 4 to 6.

31 In the second half of 2015, three Portuguese banks (Banco BPI, Montepio and Santander/Totta) issued a total of EUR 1 550 million of unguaranteed debt in the market. The respective issuances were rated between BBB and A- at the timing of the issuance and have maturities between five to seven years.

32 See Commission decision of 6.9.2013 in State Aid Case SA.37314 "Rescue aid in favour of Probanka"(OJ C 314, 29.10.2013, p. 1) and Commission decision of 6.9.2013 in State Aid Case SA.37315 "Rescue aid in favour to Factor Banka" (OJ C 314, 29.10.2013, p. 2).

(28) The 2013 Banking Communication and the Restructuring Communication formulate assessment criteria which reflect those general principles and their requirements in light of the specific policy context.

4.2.2 Compatibility assessment of the scheme

Appropriateness

(29) The scheme should be appropriate to remedy a serious disturbance in the Portuguese economy. The objective of the scheme is to temporarily offer appropriate measures to establish backstops for the financial system in a timely and efficient manner, where banks face difficulties in obtaining sufficient funding. The Commission observes that confidence in the creditworthiness of the banks is still vulnerable in Portugal, which can result in difficulties in obtaining necessary funding on the financial markets. Hence, a backstop mechanism by the Member State, which in case of urgency ensures that banks would have access to funding, is an appropriate means to address vulnerabilities in the financial sector arising from a serious disturbance in the economy.

(30) Points 23 and 60(a) of the 2013 Banking Communication explain that guarantee schemes will continue to be available in order to provide liquidity to banks but that such schemes should be limited to banks without a capital shortfall. The Commission observes that Portugal has committed to restrict the scheme only to banks without a capital shortfall as certified by the competent supervisory authority.

(31) Moreover, the Commission notes that Portugal has committed to grant guarantees only for new issues of banks' senior debt, as prescribed in point 59(a) of the 2013 Banking Communication.

(32) In addition, the Commission notes that the aid measure does not violate intrinsically linked provisions of Directive 2014/59/EU on bank recovery and resolution[33], which in this specific case relate to Article 32(4)(d)(ii). The scheme criteria ensure that the institutions benefitting from the scheme would not be deemed failing or likely to fail on the sole basis of their participation in the scheme. If the scheme criteria did not ensure that outcome, the scheme could not be deemed appropriate since it would not be apt to remedy the serious disturbance in the Portuguese economy.

(33) The first subparagraph of Article 32(4) of Directive 2014/59 establishes that an institution shall be deemed to be failing or likely to fail and placed into resolution, (if all the other pre-conditions for resolution are met), where, inter alia, extraordinary public financial support is required, except when, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, the extraordinary public financial support takes the form, inter alia, of a State guarantee of newly issued liabilities.

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[33] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190.

(34) The second subparagraph of Article 32(4) of Directive 2014/59 provides that in order not to trigger resolution such State guarantees on newly issued liabilities must be confined to solvent institutions and must be conditional on final approval under the Union State aid framework. Those measures must be of a precautionary and temporary nature and must be proportionate to remedy the consequences of the serious disturbance and must not be used to offset losses that the institution has incurred or is likely to incur in the near future.

(35) The Commission notes that the scheme is limited to solvent institutions. The guarantees granted under the scheme are of a temporary nature since the window of their issuance is limited to six months and their maturity is limited to five years (seven years in the case of covered bonds) and are of a precautionary nature since they only cover newly issued liabilities. The guarantees granted under the scheme are also appropriate to remedy the consequences of the serious disturbance, as explained in recital 25. Therefore the Commission concludes that the aid measure does not seem to violate the intrinsically linked provisions of Directive 2014/59..

Necessity

(36) With regard to the scope of the measure, the Commission notes positively that Portugal has limited the size of the scheme by setting its maximum budget at EUR 24.67 billion and that the scheme applies until 30 June 2016.

(37) The Commission notes that Portugal has committed to grant guarantees only on debt instruments with maturities from three months to five years (or a maximum of seven years in the case of covered bonds) and limit guarantees with a maturity of more than three years to one-third of the outstanding guarantees granted to the individual bank, which complies with the requirements in points 59(b) and 60(b) of the 2013 Banking Communication.

(38) Regarding the remuneration level, the Commission observes that Portugal, in line with point 59(c) of the 2013 Banking Communication, has committed to follow the pricing and other conditions for State guarantees laid down in the 2011 Prolongation Communication which requires, in particular, the application of a pricing method based largely on market data.

(39) For Member States currently or recently subject to a financial assistance programme, it is appropriate to consider the CDS spreads of individual banks located there as temporarily non-representative of the intrinsic risk of those banks, because the respective CDS rates reflect not only the banks' intrinsic risk profile, but also the sovereign risk. This appears to continue to be the case in Portugal for the time being.

(40) On that basis, the Commission does not object to Portugal's intention to continue to determine the guarantee fee for banks which have a traded CDS on the basis of the CDS of the sample of Union banks in the "BBB- and lower" rating category. The Commission will review its assessment of the macro-economic situation and appropriateness of that exceptional pricing mechanism if and whenever a further prolongation of the scheme is notified.

Proportionality

(41) As regards proportionality, the Commission notes, first, that Portugal, in line with point 59(d) of the 2013 Banking Communication, has committed to submit a restructuring plan within two months for any bank granted guarantees on new liabilities or on renewed liabilities for which, at the time of the granting of the new guarantee, the total outstanding guaranteed liabilities (including guarantees accorded before the date of the decision) exceed both a ratio of 5% of the bank's total liabilities and a total amount of EUR 500 million. That commitment ensures that the use of the scheme will not enable banks with structural weaknesses in their business models to postpone or avoid the necessary adjustments.

(42) Second, the Commission notes that Portugal has committed, in line with point 59(f) of the 2013 Banking Communication, to a number of behavioural safeguards such as a ban on advertisements referring to the State support and a ban on any aggressive commercial strategies which would not take place without the State support. Such safeguards help ensure that the participating institutions do not misuse the received State support to expand their activities.

(43) Finally, the Commission welcomes Portugal's undertaking to submit individual restructuring or liquidation plans, within two months, for banks which cause the guarantee to be called upon, in line with point 59(e) of the 2013 Banking Communication.

(44) As regards the combination of the scheme with other aid measures, the Commission recalls that, as indicated in the Annex to the Restructuring Communication, the restructuring plans to be submitted should contain all State aid received as individual aid or under a scheme during the restructuring period.

(45) Furthermore, based on point 16 of the Restructuring Communication, the Commission recalls that, should further aid not initially foreseen in a notified restructuring plan be necessary for the restoration of viability, such additional aid cannot be granted under an approved scheme but needs to be subject to individual ex ante notification. All State aid measures received by a bank as individual aid or under the scheme during the restructuring period will be taken into account in the Commission's final decision on that bank.

Monitoring

(46) The Commission welcomes, in line with point 60(c) and (d) of the 2013 Banking Communication, that Portugal undertakes to present every three months a report on the operation of the scheme, on guaranteed issuances and on the actual fees charged and to supplement it with updated available data on the cost of comparable non-guaranteed debt issuances (nature, volume, rating and currency).

Conclusions on the compatibility of the aid measure

(47) On the basis of the above, the Commission finds the notified prolongation to be in line with the 2013 Banking Communication and the Restructuring Communication. The prolonged scheme remains an appropriate, necessary and proportionate measure to remedy a serious disturbance of Portugal's economy and does not alter the Commission’s previous assessment in the original decision and the subsequent prolongation decisions. The notified prolongation until 30 June 2016 therefore

complies with the requirements set out above, and in particular with the 2013 Banking Communication and the Restructuring Communication, and is compatible with the internal market pursuant to Article 107(3)(b) TFEU. The present decision however only covers the period from its adoption until 30 June 2016.

(48) In line with the Commission's decisional practice, the Portuguese Guarantee Scheme can therefore be prolonged until 30 June 2016. Any further prolongation will require the Commission's approval and will have to be based on a review of the developments in financial markets and the scheme's effectiveness.

CONCLUSION

The Commission has accordingly decided to consider the aid to be compatible with the internal market pursuant to Article 107(3)(b) TFEU and not to raise objections to the scheme.

Portugal exceptionally accepts that the present decision be adopted in the English language, for reasons of urgency.

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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: http://ec.europa.eu/competition/elojade/isef/index.cfm.
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B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully,
For the Commission

Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

Annex

Indicative guarantee fees as of 22 December 2015	
Institute	**Premium per institute (basis points)**
Banks without CDS spread	80

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