COMMISSION DECISION

of 20 July 2010

on the State aid C 33/09 (ex NN 57/09, CP 191/09) implemented by Portugal in the form of a State guarantee to BPP

(notified under document C(2010) 4932)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(2011/346/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions [1] and having regard to their comments,

Whereas:

(1) This decision concerns State aid granted by Portugal in the form of a State guarantee in favour of Banco Privado Português (hereinafter 'BPP').

1. PROCEDURAL ASPECTS

(2) On 13 March 2009 the Commission approved by decision ('the Rescue Aid Decision') [2] a State guarantee underwriting a EUR 450 million loan granted to BPP by six Portuguese banks on 5 December 2008. The measure was authorised for a period of 6 months on the basis of Article 87(3)(b) of the EC Treaty (now Article 107(3)(b) TFEU), on the assumption that the Portuguese authorities would implement their commitment to submit a restructuring plan within 6 months (i.e. by 5 June 2009).

(3) On 15 July 2009 the Commission called on the Portuguese authorities to urgently submit the restructuring plan for BPP. Since the requested plan was not submitted, by letter dated 6 October 2009 the Commission sent an official reminder pursuant to Article 5(2) 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 [3].

(4) On 10 November 2009 the Commission initiated the formal investigation procedure with respect to the alleged State aid measure. In the same decision the Commission issued an information injunction requesting Portugal to submit the restructuring plan by 22 December 2009.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* on 6 March 2010 [4]. The Commission invited interested parties to submit comments on the aid measure. Comments were submitted by letter dated 6 April 2010 by a third party who wished to remain anonymous.

(6) The Commission requested information from Portugal by letter of 12 March 2010, to which Portugal replied by letter dated 13 April 2010, registered as received on 14 April 2010.

(7) The comments from interested parties were transmitted to Portugal by letter of 15 April 2010. Portugal replied to these comments by letter dated 13 May 2010, registered on 14 May 2010.

(8) The Commission requested further information on 29 April 2010, which Portugal submitted by letter dated 13 May 2010. Portugal provided further information on 15 and 21 June 2010.

[1] OJ C 56, 6.3.2010, p. 10.
[2] OJ C 174, 28.7.2009, p. 1.
[3] OJ L 83, 27.3.1999, p. 1.
[4] See footnote 1.

2. THE BENEFICIARY AND THE MEASURE

2.1. The beneficiary

(9) BPP is a financial institution based in Portugal providing private banking, corporate advisor and private equity services. BPP's clients are private and institutional depositors, including five mutual agricultural credit banks (*caixas de crédito agrícola mútuo*), one savings bank (*caixa económica*), several pension funds, insurance companies and others. BPP is present in Portugal, Spain and to a lesser extent in Brazil and in South Africa.

(10) BPP's shares are not listed in a stock exchange and, hence, the market price of its shares is not observable. As of 30 June 2008, total assets on BPP's balance sheet amounted to EUR 2,9 billion, representing less than 1 % of the total assets of the Portuguese banking sector. BPP is 100 %-owned by the group Privado Holding SGPS (sociedade gestora de participações sociais) S.A. As of 30 June 2008, the majority of the shares of this holding company (51,5 %) were held by 12 shareholders. In 2009 the Privado Holding group had 187 employees, 148 of whom worked for BPP.

2.2. Financial difficulties of the bank

(11) According to the Portuguese authorities, BPP developed liquidity difficulties owing to the deterioration of the global economic situation, which significantly reduced the bank's ability to manage its liquidity.

(12) On 24 November 2008 BPP informed the Portuguese Central Bank ('Bank of Portugal') that it risked being unable to meet its payment obligations. BPP was then allowed to suspend all its payments as from 1 December 2008.

(13) On 5 December 2008 BPP received a EUR 450 million loan backed by a State guarantee, under the conditions specified below. The loan and the guarantee covered only BPP's liabilities as registered in the balance sheet on 24 November 2008 and the loan was to be used only to reimburse depositors and other creditors and not to cover liabilities of other entities of the group.

2.3. The emergency aid measure

(14) On 5 December 2008 BPP signed a loan agreement ('the loan agreement'), backed by a State guarantee, for EUR 450 million, with six major Portuguese banks (Banco Comercial Português, S.A., Caixa Geral de Depósitos, S.A., Banco Espírito Santo, S.A., Banco BPI, S.A., Banco Santander Totta, S.A., Caixa Central – Caixa Central de Crédito Agricola Mútuo CRL) ('the bank syndicate'). The loan had a maturity of 6 months, renewable up to 2 years, and bore an interest rate of EURIBOR + 100 basis points. The remuneration for the loan was determined on the basis of the cost of funding for the creditor banks at the time of the transaction.

(15) According to the Portuguese authorities, without a State guarantee no lender was willing to finance BPP at a reasonable rate, given its difficult financial situation. The State guarantee that accompanied the loan was granted in accordance with Law No 112/97, i.e. outside the Portuguese guarantee scheme (Law 60-A/2008) which had been approved by the Commission on 29 October 2008 ([5]). In particular, the Portuguese authorities stated that the general guarantee scheme, which is limited to solvent banks, would be an inappropriate framework for the State intervention in favour of BPP, given the increasing financial deterioration of the bank and the specific risks linked to this transaction.

(16) The remuneration for the State guarantee was fixed at 20 basis points, taking into consideration the collateral presented by BPP.

(17) The collateral consists of: (i) first right of pledge on several assets as specified in a contract concluded by Portugal, BPP and Bank of Portugal; and (ii) first mortgage on immovable assets owned by BPP. This collateral was estimated by the Portuguese authorities to be worth around EUR 672 million when the loan agreement and the guarantee agreement were signed ([6]). The provision of collateral is regulated by an agreement subscribed by the Treasury, BPP and the Bank of Portugal, in which the latter was appointed as custodian and collateral manager on behalf of the Treasury. According to the Portuguese authorities, the Portuguese State holds, under national law, privileged and priority rights over the collateral.

(18) During the period of validity of the loan covered by the State guarantee, BPP committed not to sell, provide as collateral or otherwise dispose of its present and future assets.

(19) In the context of the Commission's examination of the emergency aid measure, Portugal committed to provide a restructuring plan for BPP within 6 months of the State intervention (i.e. by 5 June 2009).

([5]) Decision of 29 October 2008 in Case NN 60/08 – *Guarantee scheme for credit institutions in Portugal*.

([6]) The Portuguese authorities presented a new Bank of Portugal estimate, dated 7 May 2010, evaluating the collateral at EUR 582 million.

(20) In its decision of 13 March 2009 the Commission approved the measure for a period of 6 months from the granting of the State guarantee, i.e. until 5 June 2009. The Commission also considered the submission of the restructuring plan by 5 June 2009 as necessary given the exceptionally low level of remuneration.

(21) In order to prolong the validity of the guarantee beyond the initial period of 6 months, the Portuguese authorities committed to submit a specific notification to the Commission.

(22) Portugal has not fulfilled the above-mentioned commitments.

2.4. **Extension of the emergency aid measure**

(23) By e-mail dated 23 June 2009 Portugal informed the Commission that it had taken the decision to extend the State guarantee for a further period of 6 months (*Despacho* No 13364-A/2009 of the Ministry of Finance of 5 June 2009). However, Portugal neither notified that extension nor sought the Commission's approval.

(24) Since the Commission decision approved the aid only until 5 June 2009, the rescue aid became unlawful on 6 June 2009.

(25) A recovery plan was submitted to the Bank of Portugal by BPP's administrators on 24 April 2009.

(26) By letter dated 5 June 2009 the Portuguese authorities explained to the Commission that the delay in submitting a restructuring plan for BPP was due to the fact that the recovery and restructuring plan proposed by BPP had not been accepted by the Bank of Portugal.

(27) On 9 June 2009 the Ministry of Finance and Public Administration published a document entitled '*Esclarecimento do Ministério das Finanças e da Administração Pública – Decisão relativa ao Banco Privado Português*' ('Clarifications by the Ministry of Finance and Public Administration – Decision regarding Banco Privado Português') (hereinafter 'the document of 9 June 2009'), which stated that the recovery and restructuring plan submitted on 24 April 2009 by BPP to the Bank of Portugal proposed, among other things, a recapitalisation operation with a State contribution of between EUR 150 and 200 million in the form of ordinary shares, preferential shares and supplementary obligations with no return. This plan was not accepted as it was considered 'not to comply with the recapitalisation regulations defined in Law No 63-A/2008, or with the guidance on this topic from the European Union aimed at ensuring compliance with Community competition rules, given that State aid is present in this case'.

(28) The document of 9 June 2009 also reported that a large number of BPP's clients had placed their savings under the management of the bank, which had invested them in financial instruments spread over dozens of vehicle companies based in offshore jurisdictions ('Absolute Return' instruments). Despite the risk inherent in these products, BPP had fixed a remuneration rate and had guaranteed all the capital invested by these clients upon maturity. This guarantee of return was never communicated to the supervisory authorities; nor was it included and recorded on the bank's balance sheet. By concealing this liability, the bank's shareholders were spared from having to inject more capital to meet the legal and regulatory requirements in force. Additionally, according to the document of 9 June 2009, the investigation by the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* – CMVM) and the Bank of Portugal found serious irregularities that amount to criminal practice on the part of BPP.

2.5. **The situation of the Absolute Return investment products**

(29) In the document of 9 June 2009, the Portuguese authorities also stated that they were studying with the supervisory authorities a solution to minimise losses for BPP's clients holding Absolute Return instruments whose investments were jeopardised. The solution envisaged by the Government would include, among other things, the following features: (1) the creation of a new financial instrument, representative of the current indirect Absolute Return portfolio, to replace the investors' current positions; (2) the financial instrument would be issued and managed by an entity independent of BPP and owned and managed by national banking institutions.

2.6. **The formal investigation procedure and the second extension of the emergency aid measure**

(30) On 15 July 2009 the Commission invited the Portuguese authorities to urgently submit the restructuring plan for BPP, even in a provisional form, recalling that the rescue aid had become unlawful since 6 June 2009.

(31) Since the requested plan was not submitted, by letter dated 6 October 2009 the Commission sent an official reminder pursuant to Article 5(2) of Regulation (EC) No 659/1999.

(32) On 10 November 2009 the Commission initiated the formal investigation procedure with respect to the alleged State aid measure. In the same decision the Commission issued an information injunction requiring Portugal to submit the restructuring plan by 22 December 2009.

(33) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([7]). The Commission invited interested parties to submit comments on the aid measure.

(34) On 3 December 2009 the Portuguese authorities informed the Commission that the State guarantee would be extended for a further 6 months. According to the Portuguese authorities the State was forced to renew the guarantee as an immediate disruption of BPP would clearly have compromised the solution currently under consideration. Since BPP was obviously in no condition to repay the loan, the banks that had granted the loan to BPP agreed to extend its maturity by another 6 months, without changing the current terms and without additional financing, on the condition that the corresponding State guarantee was also extended.

(35) On 5 December 2009 the State guarantee was consequently extended for a further 6 months. The extension was not notified to the Commission: the Portuguese authorities merely informed the Commission that the guarantee on the loan would be renewed.

(36) On 25 February 2010 the Portuguese authorities sent a letter explaining the elements that the Government considered should provide a basis for a solution to the problems created by BPP for a significant proportion of its clients, namely investors in the Absolute Return investment product.

(37) In the same letter the Portuguese authorities informed the Commission that on 11 December 2009 the Government had decided to:

(i) establish a closed and non-harmonised Special Investment Fund (*Fundo Especial de Investimento* – FEI), made up of the resources (gross assets and liabilities) held in the Absolute Return investment product, characterised by the following: (a) passive management of the Special Investment Fund; (b) in-kind share subscription; (c) 4-year term with possibility of extension up to a maximum of 10 years by decision of the assembly of shareholders (1 share = 1 vote); (d) voluntary membership of clients;

(ii) renew the State loan guarantee of EUR 450 million until the Special Investment Fund was established;

(iii) activate the Deposit Guarantee Fund (*Fundo de Garantia de Depósitos* – FGD), which guarantees repayment in full of the value of the cash credit balances of each depositor, where that value does not exceed EUR 100 000, and the Investor Compensation System (*Sistema de Indemnização aos Investidores* – SII), which guarantees compensation of up to a maximum of EUR 25 000 per investor, under the terms laid down by law, and does not involve any State resources;

(iv) grant insurance cover of up to EUR 250 000 to clients who joined the FEI, provided they were covered by the FGD and SII criteria; thus, the negative difference, if any, between the client's revenue – in the form of reimbursements from the FGD and the SII and payments from the FEI – and the nominal value of the investment, up to a ceiling of EUR 250 000, at 24 November 2008, is insured by the State.

(38) The commitment taken on by the Portuguese State in relation to FEI's investors, as resulting from its legal system, will be applicable only on the date of the Fund's extinction, which is 4 years from the date of its establishment – 30 March 2014 ([8]).

(39) On 1 February 2010 the Portuguese Securities Market Commission (CMVM) granted authorisation for the establishment of the FEI as described above, with Privado Fundos – Sociedade Gestora de Fundos de Investimento, S.A. responsible for managing the Fund and Banif – Banco de Investimento, S.A serving as depository for the Fund.

(40) The FEI was established on 30 March 2010.

(41) On 16 April 2010 the Bank of Portugal issued a communication stating that BPP's banking licence had been revoked by decision of 15 April, given the impossibility of restructuring or recapitalising the bank. On 22 April the Bank of Portugal then requested the liquidation of BPP at the competent court (Tribunal de Comércio de Lisboa), presenting at the same time a proposal for the appointment of a liquidation committee. The liquidation of BPP follows the Portuguese liquidation rules specifically applicable to banking institutions. The Portuguese authorities estimate that the various legal steps set out under the relevant legislation mean that the liquidation may take approximately 1 year.

([7]) See footnote 1.

([8]) According to the Portuguese authorities this date may be extended up to a maximum period of 10 years from the date of the establishment of the FEI.

(42) On 13 May 2010 the Portuguese authorities communicated to the Commission that, on the basis of the loan agreement ([9]), the guarantee had been called in by the bank syndicate and had been executed on 7 May, when Portugal had reimbursed EUR 450 million to the six banks. The Portuguese State stated that it had already taken the necessary steps to enforce its privileged and priority rights as creditor over the collateral relating to the guarantee, having presented its claims to the relevant court ([10]).

3. COMMISSION DECISION ON THE FORMAL INVESTIGATION PROCEDURE

(43) In its decision of 10 November 2009 initiating the formal investigation procedure, the Commission set out its preliminary assessment and doubts as to the compatibility of the measures at hand with the internal market. The measures in question were:

— The pricing of the guarantee, which was below the level normally required pursuant to the Banking Communication ([11]). The Commission doubted that the remuneration was appropriate taking into account the risk. The Commission only authorised such pricing based on Portugal's commitment to submit a restructuring plan which would, in the longer term, adequately address this advantage.

— The fact that Portugal had not submitted the restructuring plan despite being formally reminded to do so by the letter dated 6 October 2009.

— The extension of the guarantee (on 5 June 2009) beyond the 6 months initially approved by the Commission.

4. OBSERVATIONS FROM PORTUGAL

(44) In their comments on the initiation of the formal investigation procedure, the Portuguese authorities argued that they were not unaware of the commitment they undertook vis-à-vis the Commission to deliver a plan for the restructuring of BPP. However, according to their submission of 13 April 2010, the ultimate responsibility for presenting the restructuring plan rested with BPP (with approval by the Bank of Portugal) and the responsibility of the Portuguese State was only to transmit the plan to the Commission. The Portuguese authorities did not present the restructuring plan to the Commission simply because the plan presented by BPP was not approved by the Bank of Portugal. The injunction laid down in the Commission Decision of 10 November 2009 could not therefore be fulfilled, notwithstanding the political efforts by the Portuguese State to ensure that BPP actually met its obligations vis-à-vis the Bank of Portugal, the State and, ultimately, the Commission.

(45) As regards the State aid to BPP, Portugal argues that it was, and is, compatible with the internal market pursuant to Article 107(3)(b) TFEU insofar as it was granted to guarantee the stability of the national financial system, by analogy with what was happening in the European context.

(46) As regards the extensions of the State guarantee on the EUR 450 million loan, Portugal argues that they did not constitute new State aid as there was no change to the situation underlying the Commission's approval of the State aid measure. The State guarantee, extended twice, remained unaltered in its conditions: (i) there was no increase in the value of the loan; (ii) there was no modification to the obligations met by the loan ([12]); (iii) under the guarantee contract, the guarantee would only expire thirty days after the date of the last payment of capital and interest and the Commission was aware that the loan agreement was for 2 years ([13]).

(47) As for the non-notification of the extensions of the State guarantee, the Portuguese authorities argue that the renewal of the loan agreement was not dependent on the Portuguese State but on the bank syndicate and BPP, and that failure to extend the guarantee would have led to the same negative repercussions for the Portuguese financial system that had fully justified the Commission's approval of the State aid measure. Furthermore, Portugal considers that the extensions of the guarantee were automatic under the contract regulating the loan agreement, although they were formalised nonetheless for reasons of legal certainty vis-à-vis the bank syndicate.

(48) Further, according to the Portuguese authorities, the extensions (even if they are considered to constitute new aid) did not give rise to an economic advantage, because BPP was not, in practice, operating, at least from 1 December 2008 onward. Thus the measure, with or without the extensions, did not 'grant an economic advantage to BPP or strengthen its position in relation to its competitors for the simple reason that BPP was not operating on the market and, consequently, was not in competition with other banks' ([14]). Portugal therefore considers that the measure affected neither competition nor trade among Member States.

([9]) The loan agreement provided that the dissolution or insolvency of BPP would trigger the early reimbursement of the guaranteed amount from BPP (Article 16). According to the Portuguese authorities, the revocation of BPP's licence by the Bank of Portugal implies such dissolution and, therefore, under the contract the loan amounts became due and were called in by the bank acting as agent under the loan agreement.

([10]) See page 8 of the reply of 15 June 2010.

([11]) Commission Communication on 'The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis' (the 'Banking Communication') (OJ C 270, 25.10.2008, p. 8).

([12]) Reply II – 1 and 2 of 15 June 2010.

([13]) Reply II – 1.2 of 13 April 2010.

([14]) Reply of 15 June 2010.

(49) In its observations on the comments of the interested parties (see below), the Portuguese authorities stated that the EUR 450 million loan was used in a transparent way in order to avoid systemic contagion and to meet BPP's liabilities as registered in the balance sheet on 24 November 2008.

(50) The Portuguese authorities also observe that Portugal will assert its rights over the collateral attached to the guarantee as part of BPP's liquidation proceedings. In view of its status as a privileged creditor of BPP, Portugal is confident that it will be able to recoup the full amount of EUR 450 million it disbursed to the creditor banks. In this respect, the Portuguese authorities note that the value of the collateral was, as of 7 May 2010, more than 20 % higher than the total amount of the guaranteed loan.

(51) As regards the State's commitment to compensate losses up to EUR 250 000 of Absolute Return clients who joined the FEI, Portugal argues that this commitment does not constitute State aid since: (i) it does not entail the transfer of any State resources to the FEI's management company or to any other body active on the market; (ii) it is a regular and accepted mechanism that is a logical extension of the system for compensating investors; (iii) it does not entail any economic advantage for investors, to whom it is directed generically and in exclusive terms, in accordance with national and European legal requirements, or any distortion of competition on the market or in relations between Member States.

(52) Furthermore, Portugal argues that actual payments to FEI clients following this commitment will be minimal, if indeed any are made at all. The Portuguese authorities consider the EUR 250 000 insurance cover to be a measure to instil confidence in FEI clients, which however will not lead to actual disbursement in most scenarios. Under a conservative scenario, based on the assumption that the assets in the FEI deteriorate further from their value in October 2009 over the next 4 years, Portugal calculates that the maximum disbursement per client would be approximately EUR 68 000. In more favourable scenarios, there would be no disbursement at all.

5. OBSERVATIONS FROM OTHER INTERESTED PARTIES

(53) Pursuant to Article 6 of the Commission Decision of 10 November 2009 to open the formal investigation procedure, the Commission received comments, on 6 April 2010, from duly identified third parties who wished to remain anonymous. In their comments on the initiation of the formal investigation procedure the interested parties pointed out that none of the conditions under which the State guarantee on the loan was granted (maximum duration of 6 months and the submission of a restructuring plan) had been respected. Therefore, according to the observations submitted, the aid was illegal and the Commission should order Portugal to discontinue the guarantee. Moreover, the EUR 450 million, instead of being used for the restructuring of the bank, was used to reimburse certain clients of BPP, penalising all the others.

6. ASSESSMENT

6.1. Qualification of the measures as State aid

(54) Article 107(1) TFEU states:

'Save as otherwise provided in this Treaty, 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.'

(55) In order for Article 107(1) TFEU to be applicable, there needs to be an aid measure imputable to the State which is granted through State resources, affects trade between Member States and distorts competition in the internal market by conferring a selective advantage on certain undertakings.

6.1.1. *The State guarantee on the EUR 450 million loan*

(56) The Commission recalls that it has already established in the Rescue Aid Decision of 13 March 2009 that the State guarantee constitutes State aid ([15]). The measure is financed through State resources as it consists of a State guarantee granted by Portugal. Indeed, the reimbursement made by the Portuguese State to the bank syndicate on 13 May 2010 (see recital 42 above) clearly demonstrates that State resources were involved.

(57) As also already established in the Rescue Aid Decision of 13 March 2009 ([16]), the State guarantee allowed BPP to obtain better financial conditions for the loan obtained than those normally available in the market for companies in similar circumstances, in the unlikely event, as admitted by the Portuguese authorities, that such loans would have been available at all. In this regard, the Rescue Aid Decision already stated that the fee of 20 basis points was well below the level resulting from the application of the European Central Bank's recommendation of 20 October 2008. Despite the high level of collateralisation, the Commission concluded that the remuneration for the State guarantee was considerable lower than would generally be considered as adequate for distressed banks. This remuneration was considered appropriate only for the rescue phase, subject to the submission of a restructuring plan before 5 June 2009.

([15]) Recitals 21 to 24 of the Decision.
([16]) Recitals 34, 38 and 39.

(58) Unlike other banks, which did not benefit from the State guarantee on loans, BPP obtained an economic advantage in that the fee charged for the State guarantee was clearly below the market level.

(59) The argument put forward by the Portuguese authorities that BPP was not operating in the market after 1 December 2008 cannot be accepted. Given that BPP's banking licence was only revoked by the Bank of Portugal on 15 April 2010, BPP could have entered or re-entered the market at short notice. Indeed, recovery plans for BPP submitted between December 2008 and April 2009 show the bank's potential to continue exercising an economic activity as a consequence of the rescue measure. Given BPP's activities and position in national and international financial markets, this advantage potentially affects competition and trade between Member States within the meaning of Article 107(1) TFEU. Only from 15 April 2010, with the revocation of the banking licence, did BPP lose any ability to re-enter the market and to potentially distort competition and affect trade between Member States.

(60) On the basis of the foregoing, the Commission concludes that the State guarantee conferred an economic advantage on BPP through the use of State resources imputable to Portugal. This advantage is liable to affect competition and trade between Member States within the meaning of Article 107(1) TFEU. The measure therefore constitutes State aid.

6.1.2. *The EUR 250 000 guarantee for FEI clients*

(61) As described above, the beneficiaries of this measure are the clients of BPP who invested in the Absolute Return products and opted to join the FEI. Without the solution implemented by Portugal, FEI clients would risk not being reimbursed or, more likely, being reimbursed a lesser amount than under the guarantee. According to Portugal's own estimates, it is likely that their return as FEI clients is increased by the guarantee. Therefore FEI clients have received an advantage from the measure.

(62) However, the simple fact of depositing funds does not necessarily constitute a commercial activity within the meaning of State aid rules, and indeed, according to the submission made by Portugal, the majority of the FEI participants are individuals who are not undertakings. However, insofar as the FEI amounts covered by the State guarantee serve to benefit undertakings, they may constitute State aid.

(63) Nevertheless, the figures provided by Portugal clearly show that disbursement by the State will be well below the *de minimis* threshold of EUR 200 000 over 3 years ([17]), once account is taken of the cover provided by the Investor Compensation System and by the Deposit Guarantee Fund as well as of the likely value that, under prudent assumptions, the investors will recover from the underlying assets.

6.2. **Compatibility pursuant to Article 107(3)(b) TFEU**

6.2.1. *The State guarantee on the EUR 450 million loan*

(64) Portugal argues that the aid element should be assessed on the basis of Article 107(3)(b) TFEU, which enables the Commission to declare aid compatible with the internal market if it is aimed at remedying 'a serious disturbance in the economy of a Member State'. The Commission recalls that the General Court has stressed that Article 107(3)(b) TFEU needs to be applied restrictively and must tackle a disturbance in the entire economy of a Member State ([18]).

(65) The Commission has already acknowledged that the current global financial crisis can create a serious disturbance in the economy of a Member State and that measures supporting banks may be considered apt to remedy this disturbance. This assessment has been confirmed in the Banking Communication ([19]), the Recapitalisation Communication ([20]), the Impaired Asset Communication ([21]) and the Restructuring Communication ([22]) adopted by the Commission. Article 107(3)(b) TFEU may therefore serve as a legal basis for aid measures taken to address this systemic crisis. As regards more specifically the Portuguese economy, this was also the appropriate legal basis for the various Commission decisions approving the

([17]) Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

([18]) See, as regards the principles, Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG* v *Commission* [1999] ECR II-3663, paragraph 167, followed in Commission Decision of 20 May 1998 in Case C 47/96, *Crédit Lyonnais* (OJ L 221, 8.8.1998, p. 28, paragraph 10.1), Commission Decision of 18 February 2004 in Case C 28/02 *Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, p. 1, recital 153 *et seq*) and Commission Decision of 27 June 2007 in Case C 50/06 *BAWAG* (OJ L 83, 26.3.2008, p. 7, recital 166). See also Commission Decision of 5 December 2007 in Case NN 70/07, *Northern Rock* (OJ C 43, 16.2.2008, p. 1), Commission Decision of 30 April 2008 in Case NN 25/08 *Rescue aid to WestLB* (OJ C 189, 26.7.2008, p. 3) and Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB* (OJ L 104, 24.4.2009, p. 34).

([19]) Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8).

([20]) Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2).

([21]) Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ C 72, 26.3.2009, p. 1).

([22]) Commission communication on the return to viability and the assessment of the restructuring measures in the financial sector in the current crisis under the State aid rules (OJ C 195, 19.8.2009, p. 9).

measures undertaken by the Portuguese authorities to combat the financial crisis, in particular its approval of the Portuguese recapitalisation scheme and the extension thereof, the last such decision dating from March 2010 ([23]).

(66) As regards the case at hand, the Commission also notes that, in its Rescue Aid Decision, the applicability of Article 107(3)(b) TFEU was assessed and considered to be applicable, as BPP's failure to comply with its financial obligations could negatively affect the whole Portuguese financial system (see recitals 33 to 45 of the Rescue Aid Decision).

(67) Whilst not submitting the restructuring plan, notwithstanding repeated requests and an information injunction, as described in recitals 30 to 32 above, Portugal extended the guarantee twice without prior notification to and approval of the Commission.

(68) The Portuguese authorities' arguments that the Commission was aware that, under the contract, the guarantee might be provided for 2 years and that there was no material change to the State guarantee cannot be accepted. The Rescue Aid Decision linked the approval of the State guarantee to implementation of the commitment by the Portuguese authorities to present the restructuring plan within 6 months. This commitment was not complied with by the Portuguese authorities.

(69) Further, the existence of a contractually stipulated renewal of the State guarantee based on a decision by the bank syndicate and BPP cannot discharge Portugal from the precise and explicit obligations arising from the commitments it offered to the Commission, and on which the Rescue Aid Decision was based, or from its obligations pursuant to Article 108(3) TFEU.

(70) Portugal's position regarding the obligation to present the restructuring plan, arguing that its only duty was to transmit that plan to the Commission, cannot be accepted either in light of the commitments on which the Rescue Aid Decision was based. In any event, the fact remains that the restructuring plan was not presented within the required timeframe set out in the Rescue Aid Decision and therefore the basis on which approval was given was not upheld.

([23]) See the approval of the Recapitalisation scheme of credit institutions in Portugal, Commission Decision of 20 May 2009 in Case N 556/08 (OJ C 152, 7.7.2009, p. 4, in particular recitals 65 to 67) and its extension in Commission Decision of 17 March 2010, in Case N 80/10 (OJ C 119, 7.5.2010, p. 2).

(71) It follows that the pricing of the guarantee was below the level normally required under the Banking Communication for it to be considered as compatible aid, and that the Commission only authorised that level of pricing in the Rescue Aid Decision on the basis of a commitment by Portugal to submit a restructuring or liquidation plan which would adequately minimise the distortion of competition. No such plan having been presented by 5 June 2009, the Commission therefore concludes that neither the guarantee provided by Portugal on 5 December 2008 nor its continuation after 5 June 2009 is compatible with the internal market.

(72) Although Portugal presented no restructuring plan for BPP, the Portuguese authorities have provided information proving that the liquidation procedure which began on 15 April 2010 with the revocation of BPP's banking licence will lead to its liquidation. Moreover, no compensation will be awarded to the shareholders of BPP other than any amounts stemming from the liquidation procedure itself. Based on this information, the Commission considers that there will be no risk of distortion of competition in the future regarding BPP. However, this conclusion does not remedy the incompatibility of the measure granted by Portugal for the period between 5 December 2008 and 15 April 2010.

Amount of aid

(73) In order to determine a market price for the loan interest, the Commission has based its assessment on the Communication from the Commission on the revision of the method for setting the reference and discount rates ([24]). The Commission establishes reference rates which are supposed to reflect the average level of interest rates charged in the market on medium and long-term loans backed by normal securities. This reference rate is a floor rate which may be increased in situations involving a particular risk, for example an undertaking in difficulties or where the security normally required by banks is not provided. In exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee.

(74) The guarantee enabled BPP to obtain better financial terms for the loan than those normally available on the financial markets. The Commission considers that the aid element of the guarantee can be calculated as the difference between the interest rate that BPP should have paid for a loan under market conditions, i.e. without a guarantee, and the interest rate at which the guaranteed loan was actually provided. This difference can be deemed to correspond to the premium a market economy guarantor would have asked for these guarantees.

([24]) OJ C 14, 19.1.2008, p. 6.

(75) In the present case the Commission considers that, without the guarantee, BPP would have paid an interest rate at least equal to the reference interest rate plus 400 basis points because it was a company in difficulty providing a high level of collateralisation. The Commission considers the spread of 400 basis points to be appropriate given the high collateralisation of the loan (see recital 17), which increased the likelihood that the lender would be able to recover at least part of the loan notwithstanding the very distressed situation of BPP. The aid element of the guarantee thus consists in the difference between the reference interest rate plus 400 basis points and the interest rate at which the guaranteed loan was provided (i.e. EURIBOR + 100 basis points), after deduction of the price actually paid for the guarantee, i.e. 20 basis points.

(76) In this context the Commission also notes that Portugal has stated that it has already filed the necessary claims in order to enforce its privileged and priority rights over the collateral it holds over BPP and that it will continue to do so until it has recovered the full amount of the loan ([25]). The Commission considers that Portugal has an obligation to do so in order to enforce the provisions in the guarantee agreement; any failure to enforce its rights over the collateral in order to recover the full amount of the loan would constitute State aid in favour of BPP.

6.3. **Use of the EUR 450 million loan by BPP**

(77) The interested third party who submitted comments on the Commission Decision to open a formal investigation alleged that the EUR 450 million loan, instead of being used for the restructuring of BPP, was used to reimburse certain clients of the bank, penalising all the others. The Commission received information from the Portuguese authorities showing that the loan was used to reimburse creditors of BPP whose credits were due or whose credit lines were expiring and who decided not to extend the credits or renew the credit lines. The Commission did not find any substantiated evidence to sustain the allegations of the interested third party.

7. **CONCLUSION**

(78) In the light of the foregoing, the Commission concludes that the State guarantee conferred on BPP constitutes State aid within the meaning of Article 107(1) TFEU, which cannot be declared compatible with the internal market.

8. **RECOVERY**

(79) According to Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. Only aid which is incompatible with the internal market must be recovered.

([25]) See pages 8 and 13 of the reply of 15 June 2010.

(80) The purpose of recovery is to restore the situation that existed prior to the granting of the aid. This is achieved once the incompatible aid is repaid by BPP, which therefore forfeits the advantage which it enjoyed over its competitors. The amount to be recovered should be such as to eliminate the economic advantage given to BPP.

(81) According to point 3.1 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (hereinafter 'Commission Notice on guarantees') ([26]), in the case of an individual State guarantee, the aid element must be assessed by reference to the terms of the guarantee and loan. In the light of the severe financial difficulties of BPP at the time the guarantee was given, it was highly unlikely that the company would have been able to obtain a bank loan on the market without State intervention.

(82) For the exact quantification of the amount of aid, given that no appropriate market price can be determined for remuneration of the State guarantee, a reasonable benchmark has to be defined. As set out in the first indent of point 3.2 of the Commission Notice on guarantees, the 'cash grant equivalent' of a loan guarantee in a given year can be calculated in the same way as the grant equivalent of a soft loan. Hence the aid amount can be calculated as the difference between a theoretical market interest rate and the interest rate obtained by means of the State guarantee, after any premiums paid have been deducted.

(83) In the case at hand, given BPP's financial difficulties and taking into account the collateral provided, BPP should have paid for a loan under market conditions, i.e. without a guarantee, the reference interest rate plus a risk premium of 400 basis points. The aid amount should therefore be calculated as the difference between this theoretical market rate and the interest rate at which the guaranteed loan was actually provided (i.e. EURIBOR + 100 basis points), after deduction of the price actually paid for the guarantee, i.e. 20 basis points.

(84) As regards the full amount of the loan itself, according to the Portuguese authorities, the Portuguese State has thus far taken all the necessary measures and steps in order to enforce its priority rights over the collateral it holds from BPP (the value of which has been estimated at significantly above the loan value) ([27]). The Commission assumes that the Portuguese State will continue to enforce those rights, thereby obtaining the full loan amount within the liquidation process as it has itself stated in its reply of 15 June 2010 ([28]).

([26]) OJ C 155, 20.6.2008.

([27]) See page 8 of the reply of the Portuguese authorities of 15 June 2010.

([28]) See page 13.

(85) The amount referred to in recital 83 constitutes the amount to be recovered, plus the interest effectively accrued on that amount from the date on which the aid was put at the disposal of the beneficiary (5 December 2008) until its actual recovery. That interest cannot be lower than the amount calculated pursuant to Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 ([29]),

HAS ADOPTED THIS DECISION:

Article 1

The State aid involved in the guarantee relating to a EUR 450 million loan unlawfully granted by Portugal, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Banco Privado Português is incompatible with the internal market.

Article 2

1. Portugal shall recover the aid referred to in Article 1 from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Portugal shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 4

1. Within 2 months following notification of this Decision, Portugal shall submit the following information to the Commission:

(a) the total amount (principal and interest) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the Portuguese State has enforced its priority rights over the collateral offered by Banco Privado Português in the context of the guarantee.

2. Portugal shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 20 July 2010.

For the Commission
Joaquín ALMUNIA
Vice-President

([29]) OJ L 140, 30.4.2004, p. 1.