



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

5 March 2015\*

(Reference for a preliminary ruling — State aid — State guarantee underwriting a loan — Decision 2011/346/EU — Questions concerning validity — Admissibility — Article 107(1) TFEU — Statement of reasons — Effect on trade between Member States — Article 107(3)(b) TFEU — Serious disturbance in the economy of a Member State)

In Case C-667/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal do Comércio de Lisboa (Portugal), made by decision of 17 October 2013, received at the Court on 16 December 2013, in the proceedings

**Estado português**

v

**Banco Privado Português SA**, in liquidation,

**Massa Insolvente do Banco Privado Português SA**,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, J.-C. Bonichot, A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Banco Privado Português SA, in liquidation, and Massa Insolvente do Banco Privado Português SA, by M. Ferreira Santos and R. Leandro Vasconcelos, advogadas,
- the Portuguese Government, by L. Inez Fernandes and A. Cunha, acting as Agents, assisted by M. Pena Machete and G. Reino Pires, advogados,
- the European Commission, by M. França, L. Flynn and M. Afonso, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

\* Language of the case: Portuguese.

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns, first, the validity of Commission Decision 2011/346/EU 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 (OJ 2011 L 159, p. 95) and, secondly, the interpretation of Article 14(1) and (2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU](OJ 1999 L 83, p. 1).
- 2 The request has been made in proceedings between the Estado português (the Portuguese State), on the one hand, and Banco Privado Português SA ('BPP'), in liquidation, and Massa Insolvente do Banco Privado Português SA (the general body of creditors of BPP), on the other, concerning the inclusion of that State's claim in the liabilities of BPP, in the context of its winding-up, for an amount of EUR 24 462 921.24, plus any interest due, representing the amount to be recovered of the unlawful aid granted to BPP by means of a State guarantee to that bank underwriting a loan of EUR 450 million ('the guarantee').

### Legal context

#### *EU law*

Regulation No 659/1999

- 3 Article 1(f) of Regulation No 659/1999 defines unlawful aid as new aid put into effect in contravention of Article 108(3) TFEU.
- 4 Article 14 of that regulation, entitled 'Recovery of aid', provides:
  - '1. 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 (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of [EU] law.
  2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.
  3. Without prejudice to any order of the Court of Justice of the European [Union] pursuant to Article [278 TFEU], recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to [EU] law.'

The Decision of 13 March 2009

- 5 By Decision C(2009) 1892 final of 13 March 2009 on State aid NN 71/08 — Portugal, Auxílio estatal ao Banco Privado Português — BPP (OJ 2009 C 174, p. 1; 'the Decision of 13 March 2009'), the Commission, as an emergency measure, decided not to raise objections concerning the aid granted by Estado português in the form of a guarantee underwriting a loan of EUR 450 million granted to BPP by

six Portuguese banks on 5 December 2008. That guarantee was authorised on the basis of Article 87(3)(b) EC (now Article 107(3)(b) TFEU) for a period of six months, that is to say, up to 5 June 2009.

6 It is clear from recital 34 of that decision that the Commission's assessment of the aid was without prejudice to the assessment which it would make if the measure were to be needed beyond the period referred to in the previous paragraph.

7 Recital 39 of that decision states:

'Notwithstanding the high level of collateralisation, the remuneration for the ... guarantee remains considerabl[y] lower than would generally be considered as adequate for distressed banks. The Commission considers that this remuneration may, exceptionally, be appropriate in order to keep [BPP] afloat, although only for the short term of the rescue phase. This level of remuneration is, furthermore, subject to the submission of the restructuring plan. The Commission anticipates that the costs of public intervention in favour of BPP will, in the longer term, be reflected in the restructuring plan for the restoration of [its] viability and to take account of the competitive impact of the support given to them in compensatory measures. In this context, the Commission also recalls and notes positively the commitment of the Portuguese authorities to present a restructuring plan within 6 months from the granting of the measure to [BPP], i.e. by 5 June 2009.'

8 The Commission noted, in recital 41 of the Decision of 13 March 2009, that any prolongation of the aid beyond the period of six months would have to be notified to it for approval.

Decision 2011/346

9 Recitals 9, 12, 13 and 19 to 24 of Directive 2011/346 are worded as follows:

'(9) BPP is a financial institution based in Portugal providing private banking, corporate advisor and private equity services. ... BPP is present in Portugal, Spain and to a lesser extent in Brazil and in South Africa.

...

(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 ... guarantee ... 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.

...

(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).

(20) In its decision of 13 March 2009 the Commission approved the measure for a period of 6 months from the granting of the ... 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 abovementioned commitments.

...

(23) By e-mail dated 23 June 2009 Portugal informed the Commission that it had taken the decision to extend the ... 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.'

<sup>10</sup> As regards the categorisation of the guarantee as 'State aid' for the purposes of Article 107(1) TFEU, recitals 57 to 60 of Decision 2011/346 state as follows:

'(57) As ... established in the ... Decision of 13 March 2009, the ... 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 [Decision of 13 March 2009] 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 ... guarantee was considerabl[y] 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.

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

(59) The argument put forward by the Portuguese authorities that BPP was not [active] 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 ... 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.'

<sup>11</sup> As regards the assessment of the compatibility of the aid with the internal market, recitals 65, 67, 68 and 70 to 72 of that decision are worded as follows:

'(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

[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 (OJ 2008 C 270, p. 8; “the Banking Communication”)]. ...

...

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

(68) ... The [Decision of 13 March 2009] linked the approval of the ... 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.

...

(70) [R]egarding the obligation to present the restructuring plan, ... the fact remains that [that] plan was not presented within the required timeframe set out in the [Decision of 13 March 2009] and therefore the basis on which approval was given was not upheld.

(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 [Decision of 13 March 2009] 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 ... 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.’

12 Article 1 of Decision 2011/346 declares that ‘[t]he State aid involved in the guarantee relating to a EUR 450 million loan unlawfully granted by Portugal, in breach of Article 108(3) [TFEU], in favour of [BPP] is incompatible with the internal market’.

13 Under Article 2(1) of that decision, ‘Portugal shall recover the aid referred to in Article 1 from the beneficiary’.

14 Article 3(1) of that decision provides that ‘[r]ecovery of the aid referred to in Article 1 shall be immediate and effective’.

*Portuguese law*

- 15 Article 91(2) of the Code on Insolvency and Compulsory Administration of Undertakings ('Código da Insolvência e da Recuperação de Empresas'), approved by Decree-Law No 53/2004 of 18 March 2004 ('the CIRE'), provides:

'Any debt which is not yet due at the time of the declaration of insolvency in respect of which remunerative interest is not due or in respect of which interest lower than the statutory interest rate is due is regarded as being reduced to the amount which — if it is increased by interest calculated on that amount at, respectively, the statutory rate or at a rate equal to the difference between the statutory rate and the agreed rate, for the period up to the maturity date — would correspond to the amount of the debt in question.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 16 On 9 September 2010, Estado português brought an action before the Tribunal do Comércio de Lisboa (Lisbon Commercial Court) under provisions of the CIRE, seeking the registration and inclusion in the liabilities of BPP, in the context of BBP's winding-up, of that State's claim resulting from the recovery ordered by Decision 2011/346.
- 17 Before the referring court, Massa Insolvente do Banco Privado Português SA opposed that action on the ground that Decision 2011/346 was unlawful and, for that reason, deprived Estado português's claim of all legal basis.
- 18 In that context, on 9 September 2011, the defendants in the main proceedings brought an action before the General Court of the European Union seeking the annulment of Decision 2011/346, which the General Court dismissed on 12 December 2014 (judgment in *Banco Privado Português and Massa Insolvente do Banco Privado Português v Commission*, T-487/11, EU:T:2014:1077).
- 19 In the meantime, because of the action pending before the General Court, the referring court had stayed the proceedings, pending a decision upholding Decision 2011/346 or declaring it invalid. However, Estado português brought an appeal against that decision to stay the proceedings before the Tribunal da Relação de Lisboa (Lisbon Court of Appeal), which ordered the continuation of the proceedings, drawing attention to the possibility, for the referring court, to make a request for a preliminary ruling to the Court.
- 20 The referring court has doubts as to the validity of Decision 2011/346. In the first place, as regards the categorisation of the guarantee as 'State aid', for the purposes of Article 107(1) TFEU, the referring court notes that the criteria for the application of that provision do not provide that trade between Member States must simply be liable to be affected by the measure at issue, but that it must actually be affected. The reasons stated for Decision 2011/346 do not, however, in its view, allow the conclusion to be drawn that the Commission found that the guarantee actually affected trade between Member States. Moreover, according to that court, the existence of such an effect on trade cannot necessarily be inferred from the facts. The referring court notes in that respect that, as can be seen from recital 77 of Decision 2011/346, the guarantee was granted to BPP in order to secure a loan which was used to reimburse creditors whose claims were due or whose credit lines were expiring and that, as from 1 December 2008, BPP had stopped operating in the market.
- 21 In the second place, as regards the assessment of the compatibility of the aid, the referring court points out that the Decision of 13 March 2009 had concluded that the guarantee could be considered compatible with the internal market under Article 107(3)(b) TFEU for a period of six months as from the date on which that guarantee was given, namely 5 December 2008, until 5 June 2009, since failure by BPP to comply with its financial obligations could negatively affect the Portuguese financial sector.

In Decision 2011/346 however, the Commission nevertheless concluded that the aid was incompatible since Estado português had not submitted a recovery plan before the expiry of the abovementioned six-month period, a condition on which approval of the aid measure was based. The referring court takes the view that Decision 2011/346 does not specify the reasons why the fact that Estado português did not submit a recovery plan for BPP affects the conclusion in the Decision of 13 March 2009 on the compatibility of the aid concerned, in particular during the period from 5 December 2008 to 5 June 2009.

- 22 In the third place, according to the referring court, there is a contradiction in the statement of reasons for Decision 2011/346, and between the statement of reasons and the enacting terms thereof, as regards the time at which the aid became unlawful. According to recital 24 of that decision, the aid became unlawful as from 6 June 2009. Recital 72 of that decision, however, states that the aid was incompatible with the internal market between 5 December 2008 and 15 April 2010. The enacting terms of Decision 2011/346 state solely that the aid is incompatible with the internal market. The question of the time from which that guarantee must be regarded as being unlawful is decisive for the purpose of calculating the amount of aid.
- 23 Lastly, in the fourth place, the referring court claims that the application, in the present case, of Article 91(2) of the CIRE may lead to the reduction of the amount to be reimbursed to Estado português. It is therefore necessary, in its view, to clarify whether, where the relevant preconditions are met, Article 14 of Regulation No 659/1999 precludes reduction of the amount which the State may recover pursuant to Article 91(2) of the CIRE.
- 24 In those circumstances, the Tribunal do Comércio de Lisboa decided to stay the proceedings and to refer the following four questions to the Court of Justice for a preliminary ruling:

‘(1) Is Decision [2011/346] vitiated by failure to state adequate reasons on the ground that:

- (a) it failed to state the reason why the guarantee provided by Estado português affects trade between Member States?
- (b) it failed to specify the reason why the aid granted in the form of a guarantee, which was initially considered to be covered by Article 107(3) TFEU, was then declared to be incompatible with the [internal] market?

(2) Is Decision [2011/346] vitiated by a contradiction between its statement of reasons and its enacting terms as to the date from which the [aid] is to be considered unlawful: 5 December 2008 or 5 June 2009?

(3) Does Decision [2011/346] infringe Article 107(1) TFEU, in so far as the aid granted did not affect trade between Member States, particularly in view of the purpose of the loan and the actual use made of it and the fact that the beneficiary has not carried out its activities since 1 December 2008?

(4) Does Decision [2011/346] infringe Article 107(3) TFEU, in so far as the aid was intended to remedy a serious disturbance in the economy of a Member State and, as such, is compatible with the [internal] market?’

- 25 In the alternative, the Tribunal do Comércio de Lisboa also asks the following question of interpretation:

‘Do paragraphs 1 and 2 [of Article 14] of Regulation No [659]/1999 preclude, in this specific case, a reduction in the amount to be recovered, when that provision is applicable, without discrimination, to all creditors of the insolvent company?’

## Consideration of the questions referred

### *Admissibility*

26 The request for a preliminary ruling contains five questions, the first four concerning the validity of Decision 2011/346 and the fifth concerning the interpretation of Article 14(1) and (2) of Regulation No 659/1999. It is appropriate to examine separately the admissibility of the first four questions, on the one hand, and that of the fifth question, on the other.

### Admissibility of the questions concerning the validity of Decision 2011/346

27 The Portuguese Government submits that the questions concerning the validity of Decision 2011/346 are inadmissible. Referring to the judgment in *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), the Portuguese Government argues that, since it did not bring any action for the annulment of Decision 2011/346 before the General Court, that decision has become definitive as against it, with the result that its validity can no longer be called into question before a national court. Moreover, no application for suspension of operation of Decision 2011/346 has been made. That decision must therefore be applied in such a way as to allow the immediate and effective recovery of the aid.

28 In this respect, it must be recalled that, in its judgment in *TWD Textilwerke Deggendorf* (EU:C:1994:90, paragraph 17), the Court held that it is not possible for a recipient of State aid forming the subject-matter of a Commission decision which is directly addressed solely to the Member State of that recipient, who could undoubtedly have challenged that decision and who allowed the mandatory time-limit laid down in this regard in the sixth paragraph of Article 263 TFEU to pass, effectively to call into question the lawfulness of that decision before the national courts (see, also, judgments in *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 30, and in *Lucchini*, C-119/05, EU:C:2007:434, paragraph 55). The Court has taken the view that to find otherwise would enable the recipient of the aid to overcome the definitive nature which a decision necessarily assumes, by virtue of the principle of legal certainty, once the time-limit laid down for bringing proceedings has passed (judgment in *Nachi Europe*, EU:C:2001:101, paragraph 30 and the case-law cited).

29 The situation on which that case-law is based does not correspond to that here at issue in the main proceedings. The recipient of the aid at issue in the main proceedings — which brought, within the period laid down in the sixth paragraph of Article 263 TFEU, an action for annulment of Decision 2011/346 before the General Court, which resulted in the judgment in *Banco Privado Português and Massa Insolvente do Banco Privado Português v Commission* (EU:T:2014:1077) — cannot be regarded as seeking to circumvent the definitive nature of that decision on the ground that it is contesting the validity of that decision before the referring court.

30 In addition, since the approach adopted by the Court in paragraph 18 of the judgment in *TWD Textilwerke Deggendorf* (EU:C:1994:90) is based on the risk that the definitive nature of an EU measure might be circumvented, it applies only as regards a party which invokes the unlawfulness of an EU measure before a national court, whereas it could undoubtedly have brought an action under Article 263 TFEU for the annulment of that measure, but failed to do so within the prescribed period. Consequently, the fact that Estado português, which does not contest the lawfulness of Decision 2011/346 before the national court, did not bring an action for annulment of that decision before the General Court is irrelevant for the purpose of assessing whether the questions concerning the validity of that decision are admissible.

31 Lastly, it does not follow from the judgment in *TWD Textilwerke Deggendorf* (EU:C:1994:90) that the admissibility of a question referred for a preliminary ruling concerning the validity of an EU measure is conditional upon an application having been made for suspension of operation of that measure



pursuant to Article 278 TFEU. That judgment does not refer to the enforceability of the EU measure the validity of which is called into question, but is based rather on the risk that the definitive nature of that measure might be circumvented.

32 Consequently, the first four questions referred, concerning the validity of Decision 2011/346, are admissible.

Admissibility of the question relating to the interpretation of Article 14(1) and (2) of Regulation No 659/1999

33 According to the Commission, the order for reference does not explain the relevance of that question. It therefore takes the view that that question is inadmissible.

34 It must be borne in mind in this regard that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, inter alia, judgment in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 40 and the case-law cited, and order in *Dél-Zempléni Nektár Leader Nonprofit*, C-24/13, EU:C:2014:40, paragraph 39).

35 However, the Court must examine the circumstances in which cases are referred to it by the national court in order to assess whether it has jurisdiction. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see judgment in *Kamberaj*, EU:C:2012:233, paragraph 41 and the case-law cited, and order in *Dél-Zempléni Nektár Leader Nonprofit*, EU:C:2014:40, paragraph 40).

36 In that regard, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see judgment in *Kamberaj*, EU:C:2012:233, paragraph 42 and the case-law cited, and order in *Dél-Zempléni Nektár Leader Nonprofit*, EU:C:2014:40, paragraph 41).

37 In the present case, the referring court seeks the Court's interpretation of Article 14(1) and (2) of Regulation No 659/1999 in order to enable it to assess the compatibility of Article 91(2) of the CIRE with those provisions.

38 However, there is nothing in the file submitted to the Court to indicate that Article 91(2) of the CIRE is applicable to the dispute in the main proceedings. That provision relates to claims which are not yet due 'at the time of the declaration of insolvency in respect of which remunerative interest is not due or in respect of which interest lower than the statutory interest rate is due'.

39 Estado português's claim at issue in the main proceedings became due before the initiation of the process of winding up BPP, on 15 April 2010. As noted in recital 24 of Decision 2011/346, since the Decision of 13 March 2009 declared the State aid at issue in the main proceedings to be compatible with the internal market only for a period of six months, and thus up to 5 June 2009, that aid had in any event to be regarded as unlawful, under Article 108(3) TFEU, as from 6 June 2009.

- 40 Furthermore, the referring court refers only in hypothetical terms to the applicability of Article 91(2) of the CIRE to the dispute in the main proceedings.
- 41 In those circumstances, it must be held that the fifth question referred does not involve an interpretation of EU law which meets an objective need of the decision that the referring court must take (see orders in *Abt and Others*, C-194/10, EU:C:2011:182, paragraph 37, and in *Dél-Zempléni Nektár Leader Nonprofit*, EU:C:2014:40, paragraph 44).
- 42 Consequently, the fifth question referred, concerning the interpretation of Article 14(1) and (2) of Regulation No 659/1999, is inadmissible.

### *Substance*

The first part of the first question and the third question

- 43 By these questions, which it is appropriate to examine together, the referring court asks, first, whether the reasons provided for the categorisation of the guarantee as ‘State aid’ for the purposes of Article 107(1) TFEU are sufficient, given the fact that Decision 2011/346 does not indicate why that guarantee affects trade between Member States. Secondly, that court asks whether the Commission was entitled to find that the guarantee affects trade between Member States, within the meaning of Article 107(1) TFEU, in view of the purpose of the loan which that guarantee secured and the fact that BPP had no longer been carrying out its activities since 1 December 2008.
- 44 It is clear from settled case-law of the Court that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (judgment in *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 79 and the case-law cited).
- 45 Since, in order for a measure to be categorised as ‘State aid’ for the purposes of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled (judgments in *Commission v Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 38 and the case-law cited, and in *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 19), a Commission decision categorising a national measure as State aid must set out the reasons why that institution takes the view that the State measure in question fulfils all of those conditions.
- 46 As to whether Decision 2011/346 contains a sufficient statement of reasons in relation to the condition that trade between Member States must be affected, referred to in Article 107(1) TFEU, it must be recalled that the Commission is not required to establish that a State measure has a real effect on trade between Member States and that competition is actually being distorted. The Commission is required only to establish that that measure is liable to have such effects (see, to that effect, judgments in *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 54; *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 140; *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 76; and *Eventech*, C-518/13, EU:C:2015:9, paragraph 65).
- 47 In the present case, it must be pointed out that the Commission presented evidence that the advantage enjoyed by BPP was liable to affect trade between Member States. The Commission refers in this regard, in recital 58 of Decision 2011/346, to the strengthening of BPP’s competitive position in comparison with other banks. It also notes, in recital 59 of that decision, BPP’s activities and its position in national and international financial markets. Recital 9 of that decision states that BPP is active in two Member States and provides private banking, corporate advisor and private equity services.

- 48 In the light of the case-law cited in paragraphs 44 to 46 of the present judgment, it must be held that Decision 2011/346 is supported by an adequate statement of reasons, since it discloses in a clear and unequivocal manner the reasons for which the institution which adopted the measure in question concluded, in recital 60 of Decision 2011/346, that the condition of trade between Member States being affected, for the purpose of Article 107(1) TFEU, was fulfilled in this case.
- 49 As regards the question whether the Commission was entitled to find that the guarantee affected trade between Member States, within the meaning of Article 107(1) TFEU, it follows from paragraph 46 of the present judgment that, for the purpose of categorising a national measure as ‘State aid’, it suffices to examine whether that measure is liable to affect trade between Member States.
- 50 In that respect, it must be noted that the purpose of the loan which the guarantee secured, which, as can be seen from recital 13 of Decision 2011/346, was to be used only to reimburse depositors and other creditors of BPP, does not preclude the guarantee from being liable to affect trade between Member States.
- 51 With regard to the criterion of trade between Member States being affected, it has been held that, when aid granted by a Member State strengthens the position of an undertaking in comparison with other competing undertakings in trade between Member States, that trade must be regarded as being affected by that aid. In this regard, the fact that an economic sector, such as that of financial services, has been involved in a significant liberalisation process at EU level, enhancing the competition that may already have resulted from the free movement of capital provided for in the Treaty, may serve to determine that the aid has a real or potential effect on competition and affects trade between Member States (see, to that effect, *Cassa di Risparmio di Firenze and Others*, EU:C:2006:8, paragraphs 141, 142 and 145, first indent).
- 52 The guarantee conferred an advantage on BPP which, as can be seen from recital 57 of Decision 2011/346, was able to obtain the loan under better financial conditions than those normally available in the market for companies in similar circumstances, if indeed such loans would have been available at all. Against that background, recital 59 of that decision correctly found that the advantage in question was liable to affect trade between Member States in view of BPP’s activities and its position in national and international financial markets. As the Commission points out, without the injection of capital made possible by the guarantee, BPP’s customers would have probably opted for a competing bank once BPP began to show signs of financial difficulties.
- 53 The assertion that BPP had ceased commercial activity cannot call into question the Commission’s finding in that regard, set out in recital 59 of Decision 2011/346.
- 54 Even if it were established that BPP had ceased operating, it could — until its banking licence was revoked on 15 April 2010 — have resumed its normal commercial activity. Consequently, the Commission was entitled to find, in recital 59 of Decision 2011/346, that it was only from 15 April 2010 that all risk that BPP might re-enter the market and thereby potentially affect trade between Member States was eliminated.
- 55 It follows that the examination of the first part of the first question and the examination of the third question have disclosed nothing capable of affecting the validity of Decision 2011/346.

The second part of the first question and the second question

- 56 The referring court asks whether Decision 2011/346 is not vitiated by failure to state sufficient reasons, inasmuch as the aid which had initially been declared compatible with the internal market was, in that decision, declared to be incompatible with it. The referring court also raises the question whether that

decision is not based on a contradictory statement of reasons since it states in recital 24 that the aid became unlawful as from 6 June 2009, whereas it states in recitals 71 and 72 that the same aid had to be held to be incompatible with the internal market as from 5 December 2008.

- 57 In that regard, it must be noted that the first sentence of Article 108(3) TFEU imposes on the Member States an obligation to inform the Commission of any plans to grant or alter aid. According to the last sentence of Article 108(3) TFEU, a Member State planning to grant aid may not put its proposed measures into effect until that procedure has resulted in a final decision by the Commission. The prohibition laid down by that provision is designed to ensure that aid cannot become operational before the Commission has had a reasonable period in which to study the proposed measures in detail and, if necessary, to initiate the procedure provided for in Article 108(2) TFEU (see, to that effect, judgments in *France v Commission*, C-301/87, EU:C:1990:67, paragraph 17, and in *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 33 to 36).
- 58 Article 108(3) TFEU thus establishes a prior control of plans to grant new aid (judgments in *Lorenz*, 120/73, EU:C:1973:152, paragraph 2; *CELF and Ministre de la Culture et de la Communication*, EU:C:2008:79, paragraph 37; and *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 25).
- 59 It follows from settled case-law of the Court that an aid measure which is put into effect in infringement of the obligations arising from Article 108(3) TFEU is unlawful. Such an interpretation is, moreover, confirmed by Article 1(f) of Regulation No 659/1999 (see judgment in *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 28 and the case-law cited).
- 60 The Commission is required to examine the compatibility of the planned aid with the internal market, even in the case where the Member State infringes the obligation not to put aid measures into effect and the aid is, accordingly, unlawful. The Court has held that the Commission's decision on the compatibility of an aid measure does not affect the unlawfulness of that measure resulting from the infringement of the obligation laid down in the first sentence of Article 108(3) TFEU. Any other interpretation would have the effect of according a favourable outcome to the non-observance, by the Member State concerned, of the last sentence of Article 108(3) TFEU and would deprive it of its effectiveness (see, to that effect, judgments in *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon*, C-354/90, EU:C:1991:440, paragraph 16, and in *CELF and ministre de la Culture et de la Communication*, EU:C:2008:79, paragraph 40).
- 61 In those circumstances, the fact that Decision 2011/346 mentions different dates from which the State aid must be regarded as unlawful, on the one hand, and incompatible with the internal market, on the other, does not disclose any contradiction in the statement of reasons underlying that decision.
- 62 In addition, recitals 20, 21, 57 and 67 to 71 of Decision 2011/346 set out to the requisite legal standard the reasons for which the guarantee is declared incompatible with the internal market even if the Decision of 13 March 2009 had concluded that the aid was compatible with the internal market subject to certain conditions.
- 63 It can be seen from recitals 20, 21, 57, 67, 68 and 70 of Decision 2011/346 that the Decision of 13 March 2009 was provisional in nature and had been adopted in the light of the commitments given by the Portuguese authorities, on the one hand, not to extend the guarantee beyond 5 June 2009 without first notifying the Commission and receiving its approval and, on the other hand, to submit a restructuring plan for BPP within a period of six months, that is to say by 5 June 2009 at the latest. Recital 67 of Decision 2011/346, however, notes that the Portuguese authorities extended the guarantee twice without first notifying the Commission or requesting its approval and that the restructuring plan for BPP was not submitted, even after the Commission had enjoined the Portuguese Republic to that effect. Accordingly, after noting the conditions to which approval of the

aid measure was subject and establishing that those conditions had not been complied with, the Commission concluded, in recital 71 of Decision 2011/346, that the guarantee was incompatible with the internal market.

64 It follows that the examination of the second part of the first question and of the second question has also disclosed nothing capable of affecting the validity of Decision 2011/346.

The fourth question

65 By its fourth question, the referring court seeks to ascertain whether Decision 2011/346 infringes Article 107(3)(b) TFEU inasmuch as it declares incompatible with the internal market aid which is intended 'to remedy a serious disturbance in the economy of a Member State', within the meaning of that provision. The referring court also asks whether, pursuant to that provision, the guarantee must be considered to be compatible with the internal market.

66 In this respect, it must be recalled that the aid which is covered by Article 107(3)(b) TFEU is not *ex lege* compatible with the internal market, but rather may be considered by the Commission to be compatible with that internal market. That assessment falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union (see, to that effect, *Deutsche Lufthansa*, EU:C:2013:755, paragraph 28).

67 In the application of Article 107(3) TFEU, the Commission enjoys a discretion, the exercise of which involves complex assessments of an economic and social nature (see, to that effect, judgments in *Deufil v Commission*, 310/85, EU:C:1987:96, paragraph 18, and in *Italy v Commission*, C-372/97, EU:C:2004:234, paragraph 83). Thus, the Court, in reviewing whether that discretion was lawfully exercised, cannot substitute its own assessment in the matter for that of the Commission (see, to that effect, judgments in *Spain v Commission*, C-169/95, EU:C:1997:10, paragraph 34, and in *Unicredito Italiano*, EU:C:2005:774, paragraph 71).

68 The defendants in the main proceedings contend that it follows from recitals 64 to 76 of Decision 2011/346 that the Commission concluded that the guarantee was incompatible with the internal market on the basis of non-compliance on purely procedural grounds, namely the fact that the Portuguese Republic extended the guarantee twice without first informing the Commission or requesting its approval, and the fact the Portuguese Republic did not submit a restructuring plan for BPP within the six-month period laid down in the Decision of 13 March 2009. According to the defendants in the main proceedings, the Commission therefore failed to assess whether the aid in question was intended to remedy a serious disturbance in the economy of the Member State concerned, within the meaning of Article 107(3)(b) TFEU.

69 In that respect, it must be recalled that, as regards the assessment, in the light of Article 107(3)(b) TFEU, of State guarantees granted to financial institutions in the context of the global financial crisis, the Commission imposed a limit on the exercise of its discretion by adopting the Banking Communication. The Commission therefore cannot depart from the rules set out in that Communication under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 211).

70 It is clear from the Banking Communication that the grant of a State guarantee must be regarded as an emergency measure and must, accordingly, necessarily be temporary (paragraphs 13 and 24). Such a guarantee must also be accompanied by restructuring or liquidation measures in relation to the beneficiary (paragraphs 29 to 31).

- 71 In its Decision of 13 March 2009, the Commission applied the criteria set out in the Banking Communication. Thus, as can be seen from recital 39 of that decision, the Commission approved the guarantee for a period of six months, that is to say, up to 5 June 2009, on condition that the Portuguese Republic submit a restructuring plan by that date at the latest, in accordance with the commitment made by that Member State. The Commission specified, in recital 34 of that decision, that its assessment of the aid was without prejudice to the assessment which it would make if the measure were to be extended beyond that six-month period and noted, in recital 41, that any extension of the guarantee had first to be notified to it for approval.
- 72 The Commission also complied with the Banking Communication in taking the view, in recitals 67, 70 and 71 of Decision 2011/346, that upon the expiry of the six-month period referred to in the Decision of 13 March 2009, the relevant criteria which had led the Commission to grant provisional authorisation of the aid in question were no longer fulfilled, since, contrary to their commitments, first, the Portuguese authorities had failed to present a restructuring plan for BPP within the prescribed period and, secondly, those authorities had twice extended the guarantee beyond the maximum period of six months without formally notifying the Commission of those extensions.
- 73 It can be seen from recital 39 of the Decision of 13 March 2009 and from recital 71 of Decision 2011/346 that the Commission could authorise the level of pricing of the guarantee, which was significantly lower than the level normally required under the Banking Communication, only for a short period and subject to the condition that the Portuguese Republic would, within six months, submit a restructuring or liquidation plan which would adequately minimise any distortion of competition.
- 74 Contrary to what is claimed by the defendants in the main proceedings, the temporal limitation of aid granted in the form of a State guarantee and the obligation to notify any subsequent extension of that guarantee, as well as the obligation resting on the beneficiary of that guarantee to submit a restructuring plan are not mere formal requirements, but rather necessary conditions for that aid to be declared compatible with the internal market and means of ensuring that the emergency aid granted to an undertaking in difficulty does not go beyond what is necessary to achieve the common-interest objective concerned, which consists, in the present case, in preventing a serious disturbance in the national economy.
- 75 Accordingly, the examination of the fourth question has also disclosed nothing capable of affecting the validity of Decision 2011/346.
- 76 It follows from all of the foregoing that examination of the questions referred by the national court has disclosed nothing capable of affecting the validity of Decision 2011/346.

### **Costs**

- 77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

**Examination of the questions referred for a preliminary ruling by the Tribunal do Comércio de Lisboa (Portugal) has disclosed nothing capable of affecting the validity of Commission Decision 2011/346/EU 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.**

[Signatures]