Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

12 December 2014*

(State aid — Financial sector — Bank loan backed by a State guarantee — Aid intended to remedy a serious disturbance in the economy of a Member State — Article 107(3)(b) TFEU — Decision declaring the aid to be incompatible with the internal market — Guidelines on State aid to rescue and restructure distressed undertakings — Compliance with the Commission's notices concerning aid to the financial sector in the current financial crisis — Legitimate expectations — Obligation to state reasons)

In Case T-487/11,

Banco Privado Português, SA, established in Lisbon (Portugal),

Massa Insolvente do Banco Privado Português, SA, established in Lisbon,

represented by C. Fernández Vicién, F. Pereira Coutinho, M. Esperança Pina, T. Mafalda Santos, R. Leandro Vasconcelos and A. Kéri, lawyers,

applicants,

v

European Commission, represented by L. Flynn and M. Afonso, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2011/346/EU of 20 July 2010 on State aid C 33/09 (ex NN 57/09, ex CP 191/09) implemented by Portugal in the form of a State guarantee to BPP (OJ 2011 L 159, p. 95).

THE GENERAL COURT (Fourth Chamber),

composed of M. Prek, President, I. Labucka and V. Kreuschitz (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 March 2014,

gives the following

* Language of the case: Portuguese.

Judgment[1]

Background to the dispute

1 Banco Privado Português, SA ('BPP') is a financial institution with its principal place of business in Lisbon (Portugal) which provides private banking, corporate advisor and private equity services in Portugal, Spain and, to a lesser extent, Brazil and South Africa. BPP's clients are private and institutional depositors, including five mutual agricultural credit banks, one savings bank, several pension funds, insurance companies and others. BPP's shares are not listed on a stock exchange. As of 30 June 2008, the 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 wholly owned by the holding company Privado Holding SGPS (sociedade gestora de participações sociais), SA ('the holding company').

2 As from September 2008, BPP developed cash-flow difficulties owing to the deterioration of the global economic situation. Thus, on 24 November 2008 BPP formally informed the Portuguese Central Bank ('Bank of Portugal') that it risked being unable to meet its payment obligations. With effect from 1 December 2008, the Bank of Portugal decided, inter alia, to 'relieve BPP, for a period of three months, of the timeous observance of obligations entered into previously, particularly in the course of its private banking business, in so far as this is necessary for [its] restructuring and recovery'.

3 By Order 31268-A/2008 of 1 December 2008, published in the *Diário da República*, second series, No 235, of 4 December 2008, the Portuguese authorities decided to grant BPP a State guarantee under Law No 112/97 of 16 September 1997, in other words outside the framework of the Portuguese guarantee scheme deriving from Law No 60-A/2008 of 20 October 2008, as approved by the Commission of the European Communities by Decision C(2008) 6527 of 29 October 2008 on State aid NN 60/08 implemented by Portugal — Guarantee scheme for credit institutions in Portugal (OJ 2009 C 9, p. 2). This State guarantee was given on 5 December 2008 and was intended to secure a loan of EUR 450 million to be granted to BPP by a consortium of six Portuguese banks, namely Banco Comercial Português, SA, Caixa Geral de Depósitos, SA, Banco Espírito Santo, SA, Banco BPI, SA, Banco Santander Totta, SA and Caixa Central — Caixa Central de Crédito Agrícola Mútuo, CRL ('the creditor banks'). According to the relevant clauses of the loan agreements and the State guarantee, the amount borrowed was exclusively intended to cover BPP's liabilities as recorded in the balance sheet on 24 November 2008 and was to be used only to reimburse depositors and other creditors and not to cover liabilities of other subsidiaries of the holding company. The term of the loan was limited to six months, renewable up to twenty-four months. The interest rate was set at EURIBOR plus 100 basis points. The remuneration for the State guarantee was fixed at 20 basis points, taking into consideration the collateral presented by BPP.

4 Pursuant to a pledge agreement signed on 5 December 2008 between BPP, the Portuguese State and the Bank of Portugal, BPP established — by way of collateral in favour of the Portuguese State — a first right of pledge on several assets, including securities and moveable assets, as well as a first mortgage on immovable assets owned by subsidiaries of the holding company. At that stage, the collateral was estimated to be worth EUR 672 million, although on 7 May 2010 the Bank of Portugal estimated its worth at EUR 582 million.

5 On 5 December 2008, the Portuguese authorities informed the Commission of the grant of the State guarantee to BPP.

1 — Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

6 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, by way of an urgent measure, decided not to raise objections to the grant of the State guarantee to BPP on the ground that it was compatible with the internal market, in accordance with Article 87(3)(b) EC.

7 By Order 13364-A/2009, published in the *Diário da República*, second series, No 109, of 5 June 2009, the Portuguese authorities extended the State guarantee in question by six months. They informed the Commission thereof by e-mail dated 23 June 2009, but did not formally notify it of the extension pursuant to Article 88(3) EC.

8 On 23 December 2008, 12 January 2009, 19 February 2009, 24 April 2009 and 10 July 2009, BPP submitted recovery plans to the Bank of Portugal, none of which were notified by the Portuguese authorities to the Commission.

…

10 By letter of 23 June 2009 addressed to the Commission, the Portuguese authorities stated that the six-month extension of the State guarantee was intended to enable BPP to finalise a restructuring and recovery plan and come up with a solution, in a short period of time, to safeguard the interests of its clients, particularly investors in guaranteed return products.

11 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 aid in question had been regarded as unlawful since 6 June 2009. In the absence of a reply from the Portuguese authorities, the Commission sent them a reminder on 6 October 2009, 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 [88 EC] (OJ 1999 L 83, p. 1).

12 By decision and letter of 10 November 2009 addressed to the Portuguese Republic, the Commission initiated the formal investigation procedure pursuant to Article 88(2) EC concerning the grant of the State guarantee to BPP and invited interested parties to submit comments (OJ 2010 C 56, p. 10, 'the decision initiating the procedure'). By the decision initiating the procedure, the Commission also required the Portuguese Republic, pursuant to Article 10(3) of Regulation No 659/1999, to submit the restructuring plan of BPP within 30 days from receipt of its letter, in other words by 22 December 2009.

…

14 On 3 December 2009, the Portuguese authorities informed the Commission of the extension of the State guarantee by six months, or until 5 June 2010, explaining that, in particular, 'the immediate disruption of BPP would clearly have compromised the solution currently under consideration' and 'the creditor banks [had] agreed to extend [the] term [of the loan] by 6 months, without changing the applicable conditions and without additional financing, provided that the corresponding State guarantee was also extended'. This extension of the State guarantee was implemented by Order 26556-B/2009, published in the *Diário da República*, second series, No 236, of 7 December 2009. The Portuguese authorities did not formally notify the Commission of the extension pursuant to Article 108(3) TFEU.

15 In a document sent to the Commission on 25 February 2010, the Portuguese authorities set out the information that, in their opinion, should provide a basis for a solution to the problems created by BPP with regard to a significant proportion of its clients, namely investors in the 'absolute return' product, which, among other measures, resulted in the establishment of a Fundo Especial de Investimento (FEI) (special investment fund) on 30 March 2010.

16 In the same document, besides the measures intended to provide a solution to the benefit of BPP's clients, the Portuguese authorities also reiterated the need for the grant and extension of the State guarantee, the BPP financing transaction having been a short-term instrument which was necessary in order to keep BPP trading, make it possible to carry out a feasibility assessment at a later stage, and stabilise the national financial system. Furthermore, the Portuguese authorities made it clear in that document that the sole aim of the State guarantee was to enable BPP to submit a restructuring plan and, ultimately, enable the implementation of a solution designed to ensure that its investors were protected. Lastly, in the document in question, the Portuguese authorities described the content of BPP's restructuring and recovery plans of 12 January, '27 April' and 10 June 2009, as well as the Bank of Portugal and the Portuguese Government's rejection of those plans.

17 By decision of 15 April 2010, which came into force on 16 April 2010 at 12 noon, the Bank of Portugal revoked BPP's banking licence, given the impossibility of restructuring or recapitalising the bank.

18 On 21 April 2010, the creditor banks applied for enforcement of the State guarantee and, on 7 May 2010, the Portuguese State reimbursed them the total amount of the loan forming the subject-matter of that guarantee.

19 On 22 April 2010, the Bank of Portugal lodged an application at Lisbon Commercial Court for the liquidation of BPP (case 519/10.5TYLSB), pursuant to Article 8(2) of Decree Law No 199/2006 of 25 October 2006, and presented a proposal for the appointment of a liquidation committee. By order of 23 April 2010, Lisbon Commercial Court decided to continue with the liquidation, appointing a liquidation committee and setting a deadline of 30 days for the notification of claims.

20 On 20 July 2010, the Commission adopted Decision 2011/346/EU on State aid C 33/09 (ex NN 57/09, ex CP 191/09) implemented by Portugal in the form of a State guarantee to BPP (OJ 2011 L 159, p. 95, 'the contested decision'), declaring the aid to be incompatible with the internal market (Article 1) and ordering the Portuguese Republic to proceed with its immediate and effective recovery (Articles 2 and 3).

…

22 By letter of 23 February 2011, following a request from the Portuguese authorities, the liquidation committee acknowledged that the Portuguese State held a claim right equal to the amount of the loan under which it enjoyed a right of subrogation.

Procedure and forms of order sought

23 By application lodged at the Registry of the General Court on 9 September 2011, BPP and Massa Insolvente do Banco Privado Português, SA (taken together, 'the applicant') brought the present action.

24 The applicant contends that the Court should:

— annul the contested decision;

— in the alternative, annul the contested decision in so far as it declared the aid in question to be unlawful and incompatible with the internal market for the period between 5 December 2008 and 5 June 2009;

— in the further alternative, annul the contested decision in so far as it orders the recovery of the aid in question;

— in the further alternative, annul the contested decision in so far as it orders the recovery of the aid in question for the period between 5 December 2008 and 5 June 2009;

— order the Commission to pay the costs.

…

29 The Commission contends that the Court should:

— dismiss the principal and alternative claims;

— order the applicant to pay the costs.

…

32 Following a change in the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was accordingly allocated.

33 Upon hearing the report of the Judge-Rapporteur, the General Court (Fourth Chamber) decided to open the oral procedure.

34 At the hearing held on 14 March 2014, the parties presented their oral arguments and answered the oral questions asked by the Court. In answer to an oral question put by the Court during the hearing, the applicant stated that it accepted the Court's decision to introduce the defence into the file, despite it being out of time, formal note of which was made in the record of the hearing.

Law

Summary of the pleas for annulment

35 In support of its action, the applicant relies on seven pleas in law.

…

43 In accordance with the scheme of the provisions of Article 107 TFEU, the Court considers it necessary to examine the third plea in law first, which alleges manifest error of assessment of the facts and infringement of the concept of State aid as provided for in Article 107(1) TFEU. The Court will then examine the second plea in law, alleging infringement of the derogating provision set out in Article 107(3)(b) TFEU, followed by the fourth to seventh pleas in law, and only at the end will the first plea in law, alleging failure to state reasons, be considered.

Third plea in law, alleging manifest error of assessment of the facts and infringement of Article 107(1) TFEU

Preliminary observations

44 According to the applicant, even though the Commission enjoys a broad 'discretionary' power under Article 107(1) TFEU, it is nevertheless required to conduct a careful and impartial examination of all the relevant information in a case. Thus, the Commission must carry out a proper analysis of the situation of the market, the position of the recipient and its competitors in that market and the patterns of trade between Member States, and 'indicate the advantage conferred by the [aid] measure

in [such] trade' in the light of the facts and law existing when its decision was adopted. In the present case, the applicant claims that the Commission applied the law incorrectly to the facts and did not take into account that BPP had not pursued a trade activity corresponding to its ordinary corporate objects since 24 November 2008, or that the State guarantee was exclusively intended to provide funding to meet certain balance sheet liabilities predating the grant of the guarantee. Thus, the Commission failed to have regard to the fact that, as from that date, BPP was no longer in competition with other credit institutions, although by finding that BPP 'could have entered or re-entered the market at short notice', the Commission acknowledged that BPP was no longer trading on the market. Furthermore, the Commission did not take account of the fact that the purpose of the State guarantee was exclusively to provide funding to meet BPP's liabilities as recorded in the balance sheet on 24 November 2008 and could only be used to reimburse depositors and other creditors. It could not to be used to trade on the market or cover liabilities of other subsidiaries of the holding company, either non-pecuniary liabilities or liabilities stemming from other trade activities or financial services provided, directly or indirectly, by BPP. Therefore, the grant of the guarantee did not enable BPP to carry on the normal business of a credit institution on the market, as an actual or potential competitor, nor did it confer an advantage on BPP which distorted competition in relation to other credit institutions or affected trade between Member States. Recital 72 in the preamble to the contested decision confirms that conclusion in so far as the Commission found that the liquidation of BPP demonstrated that there was no distortion of competition.

…

46 As regards the applicant's argument that 'the Commission enjoys broad discretionary powers' under Article 107(1) TFEU, it is sufficient to recall that this argument clearly misconstrues settled case-law recognising that State aid is a legal concept which must be interpreted on the basis of objective factors, so that, first, the European Union Courts must, in principle, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU and, second, save as otherwise provided, the Commission does not have any discretion in that regard (see, to that effect, Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraphs 111 to 113). Consequently, this argument must be dismissed.

47 Nevertheless, it must be determined whether the Commission's assessments concerning the existence of State aid, as set out in recitals 56 to 60 in the preamble to the contested decision, are vitiated by errors of fact or of law, since the applicant's reasoning, in so far as it states that the Commission 'applied the law incorrectly to the facts', must be interpreted as referring both to the criterion of advantage and to the criteria of effect on trade between Member States and distortion of competition as provided for in Article 107(1) TFEU.

48 Therefore, it is necessary to determine, first of all, whether the Commission was right in the contested decision to characterise the State guarantee as an aid measure conferring an economic advantage on BPP.

The existence of an economic advantage in favour of BPP

49 Article 107(1) TFEU provides that, save as otherwise provided in the Treaties, 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.

50 Consequently, only advantages conferred directly or indirectly through State resources or constituting an additional burden on the State are to be regarded as aid within the meaning of Article 107(1) TFEU. The very wording of that provision and the procedural rules laid down in Article 108 TFEU

show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question (Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom* v *Commission and Others* [2013] ECR, paragraph 99 and the case-law cited).

51 In particular, measures which, in various forms, mitigate the burdens normally included in the budget of an undertaking, and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to be aid, since Article 107(1) TFEU defines measures of State intervention in relation to their effects (see, to that effect, *Bouygues and Bouygues Télécom* v *Commission and Others*, paragraph 50 above, paragraphs 101 and 102 and the case-law cited).

52 Furthermore, State intervention capable of both placing the undertakings which it applies to in a more favourable position than others and creating a sufficiently concrete risk of imposing an additional burden on the State in the future, may place a burden on the resources of the State. In particular, advantages given in the form of a State guarantee can entail an additional burden on the State (see, to that effect, *Bouygues and Bouygues Télécom* v *Commission and Others*, paragraph 50 above, paragraphs 106 and 107 and the case-law cited).

53 In the present case, as regards the characterisation of the State guarantee as aid within the meaning of Article 107(1) TFEU, it should be noted that, in recital 24 in the preamble to the decision of 13 March 2009, the Commission essentially found that, as a result of the State guarantee, BPP had secured financing which it would not have been able to obtain on the market and, to that extent, enjoyed an economic advantage which strengthened its position compared to that of its competitors, thereby distorting competition and affecting trade between Member States. In recital 38 in the preamble to that decision, the Commission stated, in essence, that a fee of 20 basis points was below the level that should be applied in accordance with the ECB's recommendation of 20 October 2008, which indicates a flat fee of 50 basis points for guarantees of less than one year given to solvent banks. In recital 39 in the preamble to the decision, the Commission added, in particular, that '[n]otwithstanding the high level of collateralisation, the remuneration for the State guarantee remain[ed] considerabl[y] lower than would generally be considered as adequate for distressed banks'.

…

55 The above considerations clearly show that, first, starting with the decision of 13 March 2009, the Commission has consistently and coherently assessed the State guarantee as aid within the meaning of Article 107(1) TFEU and, second, in recital 59 in the preamble to the contested decision, it replied to the Portuguese authorities' argument — as reproduced, in substance, by the applicant in the course of this action — that BPP had ceased to operate on the market on 1 December 2008.

56 As regards the existence of an advantage, it should be noted that the applicant does not dispute — either in this plea or in the other pleas put forward in support of its action — the Commission's assessment that, first, without the State guarantee, in other words under 'normal' market conditions, BPP would not have been able to secure the loan on the favourable financial terms granted by the creditor banks and, second, the remuneration for the State guarantee was considerably lower than the level that would generally be considered appropriate for distressed banks (see recital 57 in the preamble to the contested decision). Nor does the applicant deny that this economic advantage was financed out of State resources, a criterion which was met, at the latest, after reimbursement of the loan by the Portuguese State to the creditor banks in enforcement of the State guarantee (see the end of recital 56 in the preamble to the contested decision).

57 All the applicant disputes is that the grant of this advantage was linked to a competitive activity carried on by BPP on the market with regard to other financial institutions. Even if that argument were to be upheld, it could not have any effect on the characterisation of the State guarantee as an advantage.

58 Consequently, in the contested decision, the Commission rightly found that BPP had enjoyed an advantage deriving from State resources.

The criteria of economic activity, effect on trade and distortion of competition

59 As regards the argument that, from 24 November 2008 onwards, BPP was no longer active on the market as an actual or potential competitor of other financial institutions, it must be observed, first, that the applicant does not deny that, at that time, BPP retained its status as an undertaking within the meaning of Article 107 TFEU in so far as it continued to pursue an economic activity, albeit on a lesser scale (see, to that effect, Case C-437/09 *AG2R Prévoyance* [2011] ECR I-973, paragraphs 41 and 42 and the case-law cited, and Case T-347/09 *Germany* v *Commission* [2013] ECR, paragraphs 25 and 26 and the case-law cited).

60 Second, as regards the criterion of effect on trade between Member States, it has been held that when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. In that regard, the fact that an economic sector, such as the financial services sector, has been involved in an important liberalisation process at Community 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, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 141, 142 and 145, first indent, and the case-law cited).

61 Third, as for the criterion of distortion of competition, it should be borne in mind that aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition (Case C-494/06 P *Commission* v *Italy and Wam* [2009] ECR I-3639, paragraph 54; see, to that effect, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30).

62 Fourth, it is apparent from settled case-law that, for the purpose of classifying a State measure, the Commission is not required to establish the existence of a real impact of the aid on trade between Member States and an actual distortion of competition, but is required only to examine whether that aid is capable of affecting such trade and distorting competition (see, to that effect, Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* [2011] ECR I-4727, paragraph 134).

63 In the present case, BPP's banking licence was revoked on 16 April 2010 and it went into liquidation on 22 and 23 April 2010. Therefore, between 24 November 2008 and the above dates, BPP continued to be a market player. Thus, when the State guarantee was granted, not only was BPP a beneficiary 'undertaking' within the meaning of Article 107(1) TFEU, but at that time it also carried on, at the very least, a reduced commercial activity consisting of offering or managing certain financial services or products, management which could only be continued thanks to the loan and State guarantee.

64 The applicant has not succeeded in demonstrating that there was no such commercial activity by BPP.

65 Thus, first, on 1 December 2008, the Bank of Portugal decided, inter alia, to 'relieve BPP, for a period of three months, of the timeous observance of obligations entered into previously, particularly in the course of its private banking business, in so far as this is necessary for [its] restructuring and recovery', which necessarily entailed its continued presence on the market during the period in question.

66 Second, both the loan agreement and the agreement concerning the State guarantee, as authorised by Order 31268-A/2008 of 1 December 2008, were intended to cover BPP's liabilities as recorded in the balance sheet on 24 November 2008 and to reimburse its depositors and other creditors who had made themselves known as of that date. The fact that the issue of financing these liabilities had been provisionally resolved shows, in itself, that BPP was able to continue its commercial activity to a certain degree.

67 Third, it is common ground that, between 23 December 2008 and 10 July 2009, BPP submitted several restructuring plans to the Bank of Portugal which the latter did not accept. That was the reason why the Portuguese authorities did not notify any of the plans to the Commission (see paragraph 8 above). The only possible ultimate aim of these plans was to enable the recovery and restructuring of BPP so that it could resume its normal commercial activity in full. In this connection, reference should be made, first of all, to paragraphs 2, 30 and 31 of the communication from the Commission entitled '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 communication on financial institutions'), which establishes a link between the restructuring and the return to long-term viability of the financial institutions concerned; next, to paragraph 4 of the Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (OJ 2009 C 195, p. 9); and, last, to paragraph 17 of the communication from the Commission entitled 'Community guidelines on State aid for rescuing and restructuring firms in difficulty' (OJ 2004 C 244, p. 2, 'the rescue and restructuring guidelines'). To the same effect, the Commission correctly stated that the letter from the Portuguese authorities of 23 June 2009 and the document they sent to the Commission on 25 February 2010 confirmed that those authorities had tied the grant and the extension of the State guarantee to the necessity to allow BPP, in particular, to draw up a restructuring plan and, therefore, provisionally maintain its presence on the market.

68 Fourth, as is apparent from paragraph 15 of the rescue and restructuring guidelines, the general principles of which are stated to apply pursuant to paragraph 10 of the communication on financial institutions, rescue aid, such as State guarantees, are — by their nature — only supposed to be temporary and reversible assistance, limited to a maximum period of six months. Their 'primary objective' is 'to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan'. Likewise, paragraph 30 of the communication on financial institutions states that '[w]here the guarantee scheme has to be called upon for the benefit of individual financial institutions it is indispensable that this emergency rescue measure aimed to keep the insolvent institution afloat … is followed up … by adequate steps leading to a restructuring or liquidation of the beneficiary' triggering 'the requirement of the notification of a restructuring or liquidation plan for recipients of payments under the guarantee'. Thus, in the present case, in accordance with these principles, the State guarantee, as authorised in the decision of 13 March 2009 for a period of six months, was primarily, if not exclusively, intended to ensure that BPP's commercial activity could continue temporarily until the Portuguese authorities had submitted the restructuring plan.

69 None of the arguments put forward by the applicant demonstrates that BPP's commercial activity did not continue until 16 April 2010, when its banking licence was actually revoked.

…

72 In view of the above considerations, the Court must dismiss the applicant's argument that, as from 24 November 2008, BPP no longer engaged in any commercial activity enabling it to avoid the application of Article 107(1) TFEU, as the Commission has proven in the contested decision that, at that time, BPP was an undertaking which carried on such a commercial activity, albeit on a lesser scale, and enjoyed an economic advantage.

73 It also follows from the foregoing that, in the light of the case-law cited in paragraphs 60 to 62 above, the applicant cannot argue that the grant of the advantage in question did not affect trade between Member States and distort competition. By allowing BPP to carry on its commercial activity for a certain period of time and to a certain degree, the aid in question, first, strengthened BPP's economic position compared to other competing undertakings in intra-Community trade and, second, temporarily released it from costs — namely higher financing costs in order to honour its payment obligations — which it would normally have to bear in the routine management of its assets or its day-to-day commercial activities.

74 Lastly, in so far as the applicant argues that recital 72 in the preamble to the contested decision states, in a contradictory fashion, that there was no distortion of competition, suffice it to note that this recital refers only to the future situation of BPP after the revocation of its banking licence and its entry into liquidation, which led the Commission to conclude, in line with its earlier assessment of the situation prior to such revocation, that, in the future, 'there will be no risk of distortion of competition … regarding BPP'.

75 Consequently, the third plea in law must be rejected as unfounded in its entirety.

Second plea in law, alleging infringement of Article 107(3)(b) TFEU

Summary of the arguments of the parties

76 According to the applicant, the contested decision does not take account of the fact that the State guarantee fulfils the conditions for derogation laid down in Article 107(3)(b) TFEU, in that it was intended 'to remedy a serious disturbance in the economy of a Member State', particularly during the period between 5 June 2009 and 15 April 2010, nor does it take account of the conditions for compatibility set out in the communication on financial institutions under the heading '3. Guarantees covering the liabilities of financial institutions'. In this connection, the applicant essentially states that the context in which the Commission authorised the State guarantee by its decision of 13 March 2009 did not change and lasted until 15 April 2010. Consequently, the measure continued to be warranted and its extension was even necessary to control the systemic risk posed by the disruption of BPP. In the contested decision, the Commission infringed Article 107(3)(b) TFEU by disregarding that aspect and by failing to rule on the compatibility of the alleged aid with the internal market.

…

Summary of the content of the decision of 13 March 2009 …

Summary of the content of the contested decision …

Assessment

82 By this plea in law, the applicant essentially criticises the Commission for not adhering, in the contested decision, to its initial assessment as set out in the decision of 13 March 2009 regarding the compatibility of the aid in question with the internal market under Article 107(3)(b) TFEU and the criteria laid down in the communication on financial institutions, even though the extension of the State guarantee, the terms and conditions of which remained unchanged, was necessary 'to remedy a serious disturbance in the economy' of Portugal. It is therefore necessary to determine whether, by doing so, the Commission committed a manifest error of assessment or an error of law in the application of Article 107(3)(b) TFEU.

83 It should be recalled, first of all, that the derogation set out in Article 107(3)(b) TFEU and, therefore, the notion of 'serious disturbance in the economy of a Member State' must be interpreted narrowly (see, to that effect, Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraph 98). The Commission enjoys a wide discretion when applying this provision, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. The European Union Courts, in reviewing whether that freedom was lawfully exercised, cannot substitute their own assessment in the matter for that of the competent authority, but must confine themselves to examining whether the authority's assessment is vitiated by a manifest error or by misuse of powers (see, to that effect and by analogy, Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 71, and *Comitato 'Venezia vuole vivere' and Others* v *Commission*, paragraph 62 above, paragraph 176).

84 Next, it is important to note that it is not in dispute between the parties that the decision of 13 March 2009 contained only a provisional and urgent assessment of the compatibility of the aid in question and that the authorisation of the Commission was clearly limited in time and subject to the condition that the Portuguese authorities would comply with their commitment to submit a plan for the restructuring of BPP within six months, in other words by 5 June 2009. Furthermore, that decision expressly takes note of the commitment of those authorities to notify the Commission of any potential extension of the State guarantee beyond the initial period of six months, as covered by the provisional authorisation (see recitals 39, 41 and 44 in the preamble to the decision of 13 March 2009). Against that background, it is irrelevant that these basic details are found only in the grounds of the decision and not in its enacting terms, which merely set out the decision not to raise any objections; the enacting terms must be read in the light of those grounds (see, to that effect, order in Case T-387/04 *EnBW Energie Baden-Württemberg* v *Commission* [2007] ECR II-1195, paragraph 127 and the case-law cited).

85 It should be pointed out that, in recitals 31 and 32 in the preamble to the decision of 13 March 2009, the Commission relied on the communication on financial institutions, paragraph 10 of which refers to the general principles laid down in the rescue and restructuring guidelines. Thus, paragraph 30 of that communication essentially requires — as regards the application of a guarantee scheme to individual cases — that the emergency rescue measure aimed to keep the insolvent financial institution afloat be followed up by adequate steps leading to a restructuring or liquidation of the beneficiary, which triggers the requirement to notify a restructuring plan designed to ensure the reinstatement of the institution's long-term viability or a liquidation plan. In addition, it is apparent from paragraph 10 of that communication, read in conjunction with paragraph 15 of the rescue and restructuring guidelines, that exceptional rescue measures, such as a State guarantee, must not, as a rule, exceed six months. Similarly, it is apparent from paragraph 25(a) and (c) of those guidelines that rescue aid in the form of a guarantee must 'come to an end within a period of not more than six months' and 'be accompanied, on notification, by an undertaking given by the Member State concerned to communicate to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof … that the guarantee has been terminated'. Lastly, paragraphs 28 and 29 of the guidelines state that 'the Commission may decide to initiate such proceedings … if it considers that … the guarantee has been misused, or that, after the six-month deadline has expired, the failure to reimburse the aid is no longer justified' and that '[t]he approval of rescue aid does not necessarily mean that aid under a restructuring plan will subsequently be approved; such aid will have to be assessed on its own merits'.

86 Indeed, the applicant has not questioned the power of the Commission, pursuant to Article 107(3)(b) TFEU, to limit the authorisation in time and make it conditional on compliance with the commitments given by the Member State in accordance with the communication on financial institutions and the rescue and restructuring guidelines. Nor did it put in question the fact that, in the present case, the Portuguese authorities actually gave commitments in the manner described in the decision of 13 March 2009.

87 First, it is therefore apparent from the above considerations that, in recitals 31 and 32 in the preamble to the decision of 13 March 2009, the Commission accurately followed the relevant criteria set out in its communication on financial institutions, read in the light of the rescue and restructuring guidelines; the temporal limit and the conditions to which the provisional authorisation of the Commission were subject were based on the application of that communication.

88 Second, it must be stated that, in the contested decision, the Commission rightly considered that, from 5 June 2009 onwards, the relevant criteria of the provisional authorisation for the aid in question, as granted in the decision of 13 March 2009, were not or were no longer met. Thus, contrary to their commitments, the Portuguese authorities failed to submit a plan for the restructuring of BPP, even after expiry of the deadline set for that purpose, and, moreover, they twice extended the State guarantee beyond the maximum limit of six months, as permitted by the decision of 13 March 2009 and by the communication on financial institutions, read in conjunction with the rescue and restructuring guidelines, without formally notifying those extensions to the Commission.

89 Third, as regards the assessment of the compatibility of the aid in question in the light of Article 107(3)(b) TFEU, it should be borne in mind that, even in recital 39 in the preamble to its decision of 13 March 2009, the Commission had essentially found that, notwithstanding the high level of collateralisation, the remuneration for the State guarantee remained considerably lower than would generally be considered as adequate for distressed banks, and that only exceptionally could it accept such remuneration as appropriate in so far as it ensured BPP's survival for a short rescue period, and this only on the condition that a restructuring plan be submitted within six months. That assessment meets the requirements set out in paragraph 30 of the communication on financial institutions, read in conjunction with paragraphs 15 and 25 of the rescue and restructuring guidelines, according to which rescue aid can only be temporary and reversible, limited to a period of six months, and must be followed by the submission of a restructuring or liquidation plan, or proof that the loan has been reimbursed in full and, in the case of a State guarantee, proof that the guarantee has been terminated. Furthermore, in recital 71 in the preamble to the contested decision, the Commission recalled — in a manner consistent with the above considerations — that the remuneration for the State guarantee fell below the level normally required under the communication on financial institutions in order for aid to be considered to be compatible aid and that the authorisation of this level of remuneration in its decision of 13 March 2009 was conditional on the submission of a restructuring or liquidation plan.

90 It is also apparent from the above considerations that the applicant has no valid basis for claiming that the context in which the Commission provisionally authorised the State guarantee by its decision of 13 March 2009 did not change and remained the same until 15 April 2010.

91 Lastly, the applicant cannot complain that the Commission committed a manifest error of assessment or disregarded the limits of its broad discretion under Article 107(3)(b) TFEU, in the context of the communication on financial institutions, or even departed unlawfully from the rules it imposed on itself in that regard (see Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 60 and the case-law cited); in the present case, the Commission accurately followed the rules contained in that communication in order to declare the aid in question to be incompatible with the internal market.

92 Accordingly, without committing any manifest errors of assessment or errors of law in the application of Article 107(3)(b) TFEU, the Commission found that, since no restructuring or liquidation plan had been submitted as of 5 June 2009, the State guarantee as well its extension beyond 5 June 2009 had to be declared incompatible with the internal market.

93 Consequently, this plea in law must be rejected as unfounded.

Fourth plea in law, alleging infringement of Article 108(2) TFEU

94 In this plea in law, in the first place, the applicant essentially complains that the Commission disregarded the fact that the State guarantee did not confer an economic advantage on BPP warranting a recovery order. The grant of that guarantee did not reduce BPP's losses or alter its situation of financial imbalance. Accordingly, the recovery order is not suited to the primary objective to be pursued, namely to eliminate the distortion of competition caused by the economic advantage conferred. The contested decision therefore infringes Article 108(2) TFEU.

95 It is sufficient to refer to the considerations set out in paragraphs 56 to 58 above to find that this first limb of the fourth plea in law must be rejected as unfounded. The applicant's argument that the grant of the State guarantee did not reduce BPP's losses or alter its situation of financial imbalance is irrelevant. Only as a result of the guarantee was BPP able to secure the loan on the favourable financial terms granted by the creditor banks and, in addition, the remuneration for the State guarantee was considerably lower than the level that would generally be considered appropriate for distressed banks (see recital 57 in the preamble to the contested decision and paragraph 89 above). The applicant did not actually dispute this finding.

96 In the second place, the applicant claims, as its principal argument, that the Commission infringed Article 108(2) TFEU by ordering recovery of the aid in question purely on procedural grounds, namely the failure to submit a restructuring plan and to notify the extensions of the State guarantee. Accordingly, the contested decision violated the 'principles of substantive justice, proportionality and appropriateness'. As a subsidiary plea, the applicant complains that the Commission unlawfully ordered recovery for the period between 5 December 2008 and 5 June 2009, even though, during that period, BPP enjoyed authorisation for the aid, authorisation which was granted in the decision of 13 March 2009.

97 As regards the principal ground for complaint in this second limb, it should be recalled that, under Article 14(1) of Regulation No 659/1999, which intends to implement the first subparagraph of Article 108(2) TFEU, 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, unless such recovery would be contrary to a general principle of EU law. Furthermore, in accordance with settled case-law, the withdrawal of unlawful aid through recovery is the logical consequence of finding that it is unlawful. Consequently, the Member State to which a decision requiring recovery of unlawful aid is addressed is obliged to take all measures necessary to ensure implementation of that decision. In that regard, the Member State concerned must succeed in actually recovering the sums owed (see Case C-243/10 *Commission* v *Italy* [2012] ECR, paragraph 35 and the case-law cited).

98 In addition, the purpose of the recovery obligation is to re-establish the situation that existed on the market prior to the granting of the aid. More specifically, the recovery of aid that is incompatible with the internal market aims to remove the distortion of competition caused by the competitive advantage the recipient of the aid has enjoyed in the market compared with its competitors, thereby restoring the situation prior to the payment of the aid (see, to that effect, Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 27, and Case C-496/09 *Commission* v *Italy* [2011] ECR I-11483, paragraph 61). These principles are also mentioned in paragraphs 13 and 14 of the notice from the Commission entitled 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid' (OJ 2007 C 272, p. 4).

99 In the light of these principles and the fact that, in the present case, the Commission rightly found in the contested decision that the State aid was incompatible with the internal market and, therefore, unlawful, it must be considered that the Commission correctly ordered the Portuguese State to recover the aid in question, including the advantage attached to the grant of the State guarantee. As explained in paragraphs 56, 73 and 95 above, as a result of the State guarantee, BPP enjoyed an

economic advantage capable of affecting trade between Member States and distorting competition, which warranted the order to withdraw that competitive advantage from it so as to restore the situation prior to payment of the aid on the relevant market. Therefore, the applicant's main ground for complaint that the Commission ordered recovery of the aid in question purely on procedural grounds is unfounded and must be rejected.

100 As regards the subsidiary question whether the Commission was entitled to order recovery of the economic advantage conferred by the State guarantee for the period between 5 December 2008 and 5 June 2009 (see recitals 71 and 85 in the preamble to the contested decision), as covered by the provisional authorisation given in the decision of 13 March 2009, reference should first of all be made to the considerations set out in paragraphs 88 and 89 above.

101 It must be noted that paragraphs 15 and 25(a) and (c) of the rescue and restructuring guidelines, the general principles of which are applicable pursuant to paragraph 10 of the communication on financial institutions, do not express any views on the purpose or on the substantive or temporal scope of recovery orders, or on the detailed rules concerning them. Thus, paragraph 25(a) and (c) of the guidelines simply sets out the conditions for the possible authorisation of rescue aid. Paragraph 25(a) of the guidelines states that, after the maximum period of six months, as a rule, 'any loan must be reimbursed and any guarantee must come to an end', while paragraph 25(c) thereof requires 'proof [to be given] that the loan has been reimbursed in full and/or that the guarantee has been terminated'. Thus, paragraph 25 does not define the advantage attached to the grant of such a loan or guarantee, which might be subject to a recovery order, or how it is to be quantified, which, in the case of guarantees, is addressed in point 4.2 of the notice [of the Commission on the application of Articles 87 and 88 … EC … to State aid in the form of guarantees (OJ 2008 C 155, p. 10, 'the notice on guarantees'] and the communication from the Commission of 19 January 2008 on the revision of the method for setting the reference and discount rates (OJ 2008 C 14, p. 6, 'the communication on reference rates').

102 However, by restricting the possibility of authorising aid to rescue aid 'in the form of loan guarantees or loans' of a 'temporary and reversible' nature, paragraphs 15 and 25 of the rescue and restructuring guidelines are based on the general premiss that any advantage granted provisionally by means of rescue aid, in any form whatsoever, must be repaid if the conditions for authorisation to which its provisional grant is subject are not or are no longer met. This interpretation is consistent with the reversibility and the spirit of rescue aid, which is intended only to enable the distressed undertaking to withstand a short-term critical situation, at the end of which it either manages to recover by itself, triggering the obligation to reimburse the aid, or submits a restructuring or liquidation plan. In the case of a State guarantee, this principle necessarily requires repayment of the economic advantage that the guarantee entailed for the beneficiary for the duration of its grant; its mere withdrawal with immediate effect is not sufficient for that purpose and, moreover, is at odds with the notion of recovery, considered in paragraphs 97 and 98 above.

103 Since the Portuguese authorities did not comply with their commitments under the decision of 13 March 2009, which was based on an accurate and coherent application of paragraph 30 of the communication on financial institutions, read in conjunction with paragraphs 15 and 25 of the rescue and restructuring guidelines, the Commission was right to include that period in the recovery order for the purpose of securing full repayment of the advantage granted.

104 Therefore, the applicant cannot complain that the Commission infringed Article 108(2) TFEU by ordering recovery of the advantage attached to the grant of the State guarantee in so far as it covered the period between 5 December 2008 and 5 June 2009.

105 Consequently, the subsidiary ground for complaint in this second limb must also be rejected.

106 In the third place, as regards the calculation of the amount to be recovered, the applicant claims that the Commission disregarded, particularly in recital 82 in the preamble to the contested decision, first, point 4.2 of the notice on guarantees, second, the remuneration conditions provided for in the special guarantee scheme in favour of credit institutions having their principal place of business in Portugal, pursuant to Portuguese Law 60-A/2008 of 20 October 2008, implemented by Order 1219-A/2008 of 23 October 2008, as approved by Decision C(2008) 6527, and, third, the spreads charged to Portugal between December 2008 and April 2010 for new transactions for loans given by national financial institutions.

107 As regards the first ground for complaint, the applicant states that the criteria set out in point 4.2 of the notice on guarantees correspond to a 'primary criterion' and a 'subsidiary criterion'. Accordingly, the Commission should not have calculated the amount of the alleged aid on the basis of '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', because there were comparable elements on the market which were not examined.

108 It should be recalled that point 4.2 of the notice on guarantees provides that '[f]or an individual guarantee the cash grant equivalent of a guarantee should be calculated as the difference between the market price of the guarantee and the price actually paid'. This point also states the following:

'Where the market does not provide guarantees for the type of transaction concerned, no market price for the guarantee is available. In that case, the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate this company would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account. If there is no market interest rate and if the Member State wishes to use the reference rate as a proxy, the Commission stresses that the conditions laid down in the communication on reference rates … are valid to calculate the aid intensity of an individual guarantee. This means that due attention must be paid to the top-up to be added to the base rate in order to take into account the relevant risk profile linked to the operation covered, the undertaking guaranteed and the collaterals provided.'

109 It follows from these provisions that if the Commission finds that no market price for the guarantee in question is available, it is required to calculate the aid element 'in the same way as the grant equivalent of a soft loan', and it may not — because of the limit it imposed on the exercise of its own discretion (see the case-law cited in paragraph 91 above) — depart from that obligation or calculation method.

110 However, it is apparent from the wording of recitals 81 and 82 in the preamble to the contested decision that, notwithstanding the correct reference to the notice on guarantees as it appears in the *Official Journal of the European Union* and as it applies in the present case, the Commission erroneously mentioned the provisions of its earlier notice 'on the application of Articles 87 and 88 … EC … to State aid in the form of guarantees' (OJ 2000 C 71, p. 14) and, in particular, the first indent of point 3.2, according to which '[t]he 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, the interest subsidy representing the difference between the market rate and the rate obtained thanks to the State guarantee after any premiums paid have been deducted'. In recital 82 in the preamble to the contested decision, the Commission recalled, in essence, that since no appropriate market price could be determined for

remuneration of the State guarantee, a reasonable benchmark had to be defined. However, without referring to its absolute and unconditional obligation mentioned in paragraph 108 above, the Commission stated:

'As set out in the first indent of point 3.2 of the … 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.'

111 Nevertheless, it must be stated that, in the present case, the method the Commission chose to calculate the amount of the economic advantage relating to the guarantee in question was the method that, in any event, it ought to have chosen under point 4.2 of the notice on guarantees, namely the method using the grant equivalent of a soft loan. Accordingly, the mere fact that the Commission erroneously referred to the provisions of the earlier notice and used the word 'can' rather than 'should' is not capable of invalidating the approach taken in the contested decision.

112 Therefore, the first ground for complaint must be rejected, in so far as it alleges that the Commission disregarded point 4.2 of the notice on guarantees; the possible existence of comparable elements on the market in order to determine a market price for the State guarantee must be assessed in the context of the second and third grounds for complaint.

113 By the second and third grounds for complaint, the applicant claims that the Commission did not take into account the remuneration provided for in the special guarantee scheme in favour of credit institutions having their principal place of business in Portugal, as approved by Commission Decision C(2008) 6527, or the spreads charged to Portugal between December 2008 and April 2010 within the framework of new transactions for loans given by national financial institutions, which were significantly lower than the rate referred to in the contested decision, having regard to, in particular, the high level of collateralisation.

114 In respect of the second ground for complaint, it is sufficient to note — as the Commission did — that the special scheme only applies to Portuguese financial institutions which satisfy the solvency criteria of the law in question, which was taken into account in paragraph 39 of the abovementioned Commission decision. The Commission was therefore right to consider that an institution in distress and on the verge of insolvency, as BPP was when the State guarantee was granted, did not qualify for the special scheme and, therefore, was not entitled to the interest rates it provided for. The Commission was also entitled to point out that, in any event, the remuneration rates under the special scheme were not, by definition, in line with market conditions.

115 As regards the third ground for complaint, alleging that the Commission should have taken into account the spreads charged to Portugal between December 2008 and April 2010, namely the market rates, it must be observed that, in the light of BPP's financial situation when the aid in question was granted, the Commission was entitled to consider that BPP was highly unlikely to be able to secure a bank loan on the market without the intervention of the Portuguese State and that it was not possible to determine an appropriate market price for remuneration of the State guarantee (recitals 81 and 82 in the preamble to the contested decision). The circumstances on the basis of which the guarantee was granted — particularly, first, BPP's financial difficulties which required the Bank of Portugal to relieve it temporarily of its payment obligations, second, the very high levels of funding needed to ensure BPP's continued presence on the market, namely EUR 450 million, and, third, the crisis in the national, European and international financial markets — entitled the Commission to find, without committing any error, that notwithstanding the level of collateralisation offered, BPP would not have been able to secure a comparable guarantee on the market for a similar amount of financial support. Accordingly, the Commission was entitled to rely, in accordance with point 4.2 of the notice on guarantees, on the calculation method using the grant equivalent of a soft loan.

116 In those circumstances, the present plea in law must be rejected as unfounded in its entirety.

Fifth plea in law, alleging infringement of the right to 'sound administration' …

Sixth plea in law, alleging infringement of the principles of legal certainty and of the protection of legitimate expectations

122 By the sixth plea in law, the applicant essentially claims that the principles of legal certainty and of the protection of legitimate expectations preclude the order for recovery of the aid in question, at the very least as regards the recovery ordered for the period between 5 December 2008 and 5 June 2009, which was covered by the authorisation given in the decision of 13 March 2009. According to the applicant, BPP was legitimately entitled to believe, first, that the procedure 'was following its legal course' and, second, as a subsidiary argument, that the State guarantee was compatible with the internal market during that period.

…

124 As a preliminary point, it should be stated that the applicant's reasoning as set out in this plea in law is based only on arguments claiming that its alleged legitimate expectations were disappointed and not on an infringement of the principle of legal certainty, as interpreted by the case-law (Case C-17/01 *Sudholz* [2004] ECR I-4243, paragraph 34, and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80). The analysis should therefore be limited to the alleged infringement of the principle that legitimate expectations be protected.

125 This principle protects any individual in a situation in which an EU institution, body or agency, by giving that person precise assurances, has led him to entertain well-founded expectations. Such assurances, in whatever form they are given, constitute precise, unconditional and consistent information (see, to that effect, Case C-537/08 P *Kahla Thüringen Porzellan* v *Commission* [2010] ECR I-12917, paragraph 63, and Joined Cases C-630/11 P to C-633/11 P *HGA and Others* v *Commission* [2013] ECR, paragraph 132). Furthermore, in view of the mandatory nature of the review of State aid by the Commission, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 108 TFEU and a diligent business operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (see, to that effect, Case C-81/10 P *France Télécom* v *Commission* [2011] ECR, paragraph 59 and the case-law cited).

126 It is in the light of these case-law principles that the substance of the different grounds for complaint and arguments put forward by the applicant in support of this plea in law should be reviewed.

127 First, the applicant does not claim that the Commission gave it, at any stage of the administrative procedure, precise assurances leading it to entertain well-founded expectations. As indicated in paragraph 119 above, the decision of 13 March 2009 was merely a provisional and urgent assessment of the compatibility of the aid in question, subject to the condition that the Portuguese authorities would comply with their commitments to submit a plan for the restructuring of BPP within six months, in other words by 5 June 2009, and notify the Commission of any potential extension of the State guarantee beyond the initial six-month period. In addition, it is apparent from a combined reading of recitals 39, 41 and 44 in the preamble to the decision of 13 March 2009, which the applicant does not deny BPP was aware of during the administrative procedure, and of paragraphs 8

to 10 of the decision initiating the procedure (see paragraph 13 above), that BPP could not entertain a legitimate expectation that, at the end of the procedure, the aid in question would ultimately be declared to be compatible with the internal market.

128 Second, as regards the period which elapsed between the adoption of the decision of 13 March 2009 and the adoption of the contested decision, the applicant does not put forward any arguments to show that such period was unreasonable or capable of leading BPP to entertain legitimate expectations. On the contrary, in the present case, the Commission reminded the Portuguese authorities on 15 July and 6 October 2009 — shortly after the 5 June 2009 expiry date — of the need to submit a restructuring plan for BPP (see paragraph 11 above). Furthermore, the Commission adopted the decision initiating the procedure, setting out the reasons for its doubts as to the compatibility of the State guarantee with the internal market (paragraphs 8 to 10 of that decision), on 10 November 2009, just one month later, although it is true that the decision was only published in the Official Journal on 6 March 2010. In addition, in paragraph 9 of that decision, the Commission clearly stated that in the absence of a restructuring plan, it was not able 'to evaluate whether the State guarantee granted on 5 December 2008 and the prolongation of 5 June 2009 [was] compatible with the [internal] market in relation to both the duration and the pricing of the guarantee'. Lastly, that decision was accompanied by an instruction to the Portuguese authorities to submit a restructuring plan for BPP by 22 December 2009 (see paragraph 12 above). The applicant does not even claim that BPP was unaware of it at that stage.

129 It therefore follows that, in the decision initiating the procedure, the Commission called in question the compatibility of the State guarantee with the internal market for the entire period concerned, including the period between 5 December 2008 and 5 June 2009, for the reasons set out in paragraph 127 above. Accordingly, the applicant cannot argue that the lapse of a period of 15 months between the decision of 13 March 2009 and the date of adoption of the contested decision was such as to give rise to legitimate expectations that the Commission would nevertheless declare the aid in question to be compatible with the internal market. The mere fact that the decision of 13 March 2009 did not expressly refer to the possibility of a declaration of incompatibility at a later point in time leading to the immediate recovery of the advantage granted is not sufficient to create such legitimate expectations; the Commission's subsequent approach complied with the relevant rules noted in paragraphs 85, 101 and 102 above and the decision initiating the procedure unequivocally stated that, in the absence of a restructuring plan for BPP, the provisional authorisation for the aid in question, as given in the decision of 13 March 2009, was unlikely to be confirmed or continued by the decision to be adopted at the end of the administrative procedure.

130 Third, the applicant's argument that the failure to submit a restructuring plan for BPP is entirely attributable to the Portuguese authorities must be dismissed as unfounded and, in any event, irrelevant. Even if that were true, and irrespective of the reasons why the plan was not notified to the Commission, the Commission cannot be held responsible for that failure or for having caused BPP to entertain a legitimate expectation in that context. On the contrary, as recalled in paragraph 128 above, after expiry of the 5 June 2009 deadline, the Commission took all appropriate steps to urge the Portuguese authorities to submit a restructuring plan for BPP to it as soon as possible.

131 Fourth, as regards the argument that, on account of its previous practice in taking decisions in respect of other financial institutions affected by the financial crisis, the Commission caused BPP to entertain a legitimate expectation that the aid in question would ultimately be declared to be compatible with the internal market, it is sufficient to note that the applicant did not claim or demonstrate that, in those other cases, the Commission was faced with a comparable situation to that giving rise to the present case. Furthermore, the applicant did not dispute the Commission's assertion that, in those other cases, the Member States submitted restructuring or liquidation plans for the financial institutions concerned. In any event, in so far as the applicant seeks to claim, in that context, an infringement of the principle of equal treatment to its detriment, this aspect is dealt with under the seventh plea in law, alleging infringement of the right to 'fair treatment' (see paragraphs 136 to 143 below).

132 Fifth, the applicant's argument that the recovery order amounts to a 'penalty' against BPP and seriously harms the interests of its investors and creditors is irrelevant and, in any event, unfounded in law. According to settled case-law, an order for recovery of unlawful aid is not a penalty in the strict sense of the term, but seeks only to restore the situation prior to the grant of the aid (see, to that effect, Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraphs 178 to 182, and Joined Cases T-230/01 to T-232/01 and T-267/01 to T-269/01 *Diputación Foral de Álava and Others* [2009] ECR, paragraph 377). In addition, the applicant does not explain whether and to what extent the classification of a recovery order as a 'penalty' is capable of affecting the scope of the protection to which BPP was entitled under the principle that legitimate expectations be protected, since, in the present case, the relevant criteria for the application of that principle are not satisfied.

133 Sixth, in the light of the considerations set out in paragraphs 89 and 99 above, the applicant is wrong to claim that the contested decision ordered recovery purely on procedural grounds. Furthermore, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful when it has been granted — as occurred with the repeated extension of the State guarantee in this case — in breach of the obligation to give prior notice to the Commission and of the prohibition on implementing that aid under Article 108(3) TFEU and was, therefore, unlawful (see, to that effect, *France Télécom* v *Commission*, paragraph 125 above, paragraph 59 and the case-law cited).

134 Lastly, the Commission rightly contends that the obligation of the Member States to recover aid that is unlawful and incompatible with the internal market is not curtailed or called in question by the fact that the beneficiary is insolvent (Case C-42/93 *Spain* v *Commission* [1994] ECR I-4175, paragraph 33).

135 In those circumstances, this plea in law must be rejected in its entirety as in part unfounded and in part irrelevant.

Seventh plea in law, alleging infringement of the right to 'fair treatment'

136 In support of this plea in law, the applicant relies on several decisions concerning aid granted to financial institutions which the Commission adopted in the context of the financial crisis. It essentially infers from these decisions that BPP received unequal or unfair treatment. According to the applicant, in Decision 2012/660/EU of 27 March 2012 on the measures SA.26909 (2011/C) implemented by Portugal for the restructuring of Banco Português de Negócios (BPN) (OJ 2012 L 301, p. 1), in particular, the Commission was more 'tolerant' of the Portuguese authorities than in the present case even though, first, the two measures in question had been notified at almost the same time, second, in BPN's case, the Portuguese authorities had also been slow to submit a restructuring plan and, third, the measures supporting BPN, including a State guarantee, were 'incomparably more significant from a financial point of view'.

…

138 In the light of the applicant's arguments summarised in paragraph 136 above, this plea in law must be construed as referring to the principle of equal treatment.

139 The general principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. The comparability of different situations must be assessed with regard to all the elements which characterise them. These elements must in particular be determined and assessed in the light of the subject-matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act

relates must also be taken into account (Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraphs 23, 25 and 26 and the case-law cited, and Case C-176/09 *Luxembourg* v *Parliament and Council* [2011] ECR I-3727, paragraphs 31 and 32).

140 It must therefore be established whether the applicant has demonstrated to the requisite standard that the situations giving rise to the other decisions adopted by the Commission in the context of the financial crisis were, at the very least, comparable to the situation giving rise to the contested decision.

141 As regards, in particular, the comparability of the situation giving rise to the decision concerning BPN and that forming the subject-matter of the contested decision, the evidence adduced by the applicant is not sufficient to support the proposition that BPN and BPP were in a comparable situation for the purpose of applying the principle of equal treatment, and the mere notification at more or less the same time of the aid measures planned by the Portuguese authorities to assist these two banks is not decisive in that regard. Thus, it is apparent from recitals 9 to 14 in the preamble to the decision concerning BPN that, unlike the present case, the Portuguese authorities had actually submitted a restructuring plan for BPN to the Commission, although belatedly and subsequently accompanied by additional information, at the Commission's request. Furthermore, in BPN's case, by decision of 24 October 2011 (OJ 2011 C 371, pp. 14 and 15), the Commission initiated the formal examination procedure under Article 108(2) TFEU not because there was no restructuring plan at all, but because the initial restructuring plan submitted had become obsolete owing to the sale of BPN and the Commission had to assess a revised plan at a later stage. In the light of the decisive nature of the Portuguese authorities' failure to submit a plan to restructure BPP for the declaration that the aid in question was incompatible with the internal market (see, in particular, recital 71 in the preamble to the contested decision), these key differences in the respective situations of BPN and BPP in themselves warranted the finding that the situations were not comparable and that, therefore, the principle of equal treatment as relied on by the applicant could not apply in the present case.

142 As regards the other decisions relied on, it is sufficient to note that the applicant failed to provide information enabling the possible comparability of the situations in question to be assessed, so that this line of argument cannot be upheld for the reasons set out in paragraph 131 above.

143 Accordingly, this plea in law must be rejected as unfounded in its entirety.

First plea in law, alleging failure to state reasons …

162 It follows from all of the foregoing considerations that the action must be dismissed in its entirety, without there being any need to assess the applicant's request for an order requiring the Commission, by way of a measure of inquiry under Article 65 of the Rules of Procedure, to introduce into the file a complete version of the document produced as Annex B.2 to the defence, including some of the documents attached thereto.

Costs

163 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

164 Since the applicant has been unsuccessful in all of its pleas in law, it must, in accordance with the forms of order sought by the Commission, be ordered to pay the costs incurred by the Commission in addition to its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Banco Privado Português, SA and Massa Insolvente do Banco Privado Português, SA to bear their own costs and pay those incurred by the European Commission.

Prek Labucka Kreuschitz

[Signatures]

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