Commission Decision of 27 March 2012 on the measures SA. 26909 (2011/C) implemented by Portugal for the restructuring of Banco Português de Negócios (BPN) (notified under document C(2012) 2043) (Only the Portuguese version is authentic) (Text with EEA relevance) (2012/660/EU)

COMMISSION DECISION

of 27 March 2012

on the measures SA. 26909 (2011/C) implemented by Portugal for the restructuring of Banco Português de Negócios (BPN)

(notified under document C(2012) 2043)

(Only the Portuguese version is authentic)

(Text with EEA relevance)

(2012/660/EU)

THE EUROPEAN COMMISSION,

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

Having called on interested parties to submit their comments[(1)] pursuant to Article 108(2) of the Treaty and having regard to their comments,

Whereas:

1. Procedure

(1) On 2 November 2008, the Portuguese Government approved a draft law to nationalise the shares representing the share capital of Banco Português de Negócios, S.A. ('BPN' or 'the bank'). That law was published on 11 November 2008 as Law No 62-A/2008 ('Nationalisation Law'). The nationalisation of BPN took effect on 12 November at zero price.

(2) On 5 November 2008 the Portuguese authorities informed the Commission about the approval of the draft law by the Portuguese Government. On 11 and 13 November 2008 they informed the Commission of the publication of the Nationalisation Law.

(3) The Commission immediately requested further information concerning any state aid measures to be granted to BPN under the nationalisation procedure as well as the submission of a restructuring plan for BPN.

(4) Portugal did not submit any prior notification of any of the measures granted to BPN by the State. It informed the Commission of those measures only with considerable delay and after having been repeatedly requested to do so.

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(5) In this context, on 14 November 2008 the Commission made requests for information regarding the specific state aid measures provided to BPN as well as requesting a restructuring plan. The Commission then sent reminders on 5 January and 23 and 29 April 2009.

(6) The Portuguese authorities replied to the information requests on 8 January, 28 April and 23 June 2009, without providing information on specific state aid measures in favour of BPN or furnishing a restructuring plan. In their letter of 23 June 2009 the Portuguese authorities indicated that they were considering the option of segregating the assets of BPN and selling the bank.

(7) The Commission reiterated its requests for information on 17 July, 4 and 14 September, and 30 November 2009, and 5 February and 16 March 2010.

(8) The Portuguese authorities replied on 14 August 2009, indicating that commercial papers totalling up to EUR 2 billion were to be issued by BPN and subscribed by Caixa Geral de Depósitos (‘CGD’) with a state guarantee. In their view the guarantee resulted directly from the Nationalisation Law and therefore could not constitute state aid. On 12 October 2009 the Portuguese authorities sent further information on intervention by CGD and the State. They submitted additional information on 21 November 2009, and 17 and 18 February and 31 March 2010.

(9) Following a meeting held with the Portuguese authorities on 16 June 2010, on 12 August 2010 the Commission again asked the Portuguese authorities, *inter alia*, immediately to submit the restructuring plan for BPN. No plan was submitted and the Commission accordingly sent an official reminder on 31 August 2010 pursuant to Article 5(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 of the Treaty on the Functioning of the European Union)[(2)].

(10) On 14 September 2010, the Portuguese authorities sent a document entitled ‘Memorando: a nacionalização, a reestruturação e a reprivatização projectada do Banco Português de Negócios, SA’ (hereinafter ‘the Memorandum of 14 September 2010’) which outlined the restructuring plan of BPN and the main elements of the privatisation process.

(11) Having found that some information was still missing from the Memorandum of 14 September 2010, the Commission sent a letter on 29 September 2010 requesting additional information from the Portuguese authorities. By electronic mail of 15 November 2010 the Portuguese authorities sought an extension of the deadline for reply, which was granted by the Commission by letter of 18 November 2010. The Portuguese authorities provided additional clarifications by letter of 26 November 2010 and by electronic mail of 25 January 2011.

(12) On 16 February 2011 the Commission sought clarification on a number of points and requested further data. The Portuguese authorities replied on 16 March 2011.

(13) In the context of meetings preceding the signature on 17 May 2011 of the Memorandum of Understanding (the 'MoU')[(3)] between Portugal on the one hand and the International Monetary Fund, the European Central Bank and the European Commission on the other hand, the Commission had a meeting with the management of BPN on 27 April 2011. The MoU envisaged the sale of BPN by the end of July 2011. The Commission therefore sent on 20 May 2011 requests for information on the restructuring of the bank and on the planned sale process. Since no response was provided by the Portuguese authorities, a reminder was sent on 8 July 2011, together with an additional request for information following press reports on further state resources having been provided to BPN by means of a state guarantee. An overview of the privatisation process was provided by the Portuguese authorities on 5 August 2011.

(14) The Commission met with the Portuguese authorities on 10 August 2011. The Portuguese authorities provided additional information to the Commission during the meeting and subsequently on 28 August 2011. The Commission received further information on 14 September and 14 October 2011.

(15) By Decision of 24 October 2011 ('the Decision of 24 October 2011'), the Commission initiated the procedure laid down in Article 108(2) of the Treaty under case number SA.26909 with respect to alleged aid granted to BPN and Banco BIC Português S.A. ('BIC')[(4)].

(16) The Decision of 24 October 2011 was published on 20 December 2011. No third-party comments were received within the one-month deadline.

(17) On 9 December 2011, Portugal submitted to the Commission the Framework Agreement signed between BIC and the Portuguese authorities on that same day (the 'Framework Agreement').

(18) On 20 January 2012, Portugal submitted its reply to the observations raised in the Decision of 24 October 2011. On the same date, the Portuguese authorities also provided additional information, including a new restructuring plan for BPN (hereinafter the 'January 2012 Restructuring Plan') and a reply to additional questions which had been posed by the Commission on 21 December 2011 regarding the Framework Agreement. That information was supplemented on 3 February 2012 with a business and viability plan which had been prepared by BIC and which hereinafter for the purposes of this Decision is considered an integral part of the January 2012 Restructuring Plan. Further information was provided on 10, 17 and 23 February 2012, in reply to additional questions that the Commission had addressed to the Portuguese

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authorities on 8, 14 and 17 February 2012. On 16 March 2012, Portugal provided a series of commitments to the Commission.

(19) During the procedure, numerous information exchanges, teleconferences and meetings took place between the Portuguese State, BPN and the Commission.

2. Description of the beneficiaries and the measures

2.1 *The beneficiary and its difficulties*

(20) BPN is a financial institution based in Portugal providing a wide range of banking services. It was nationalised on 11 November 2008 at which time it had a network of 213 branches (4 of which were in France), approximately 2 200 employees and total assets of EUR 6,6 billion, accounting for around 2 % of the total assets of the Portuguese retail banking sector.

(21) According to the Portuguese authorities[(5)], BPN had been facing liquidity issues since the summer of 2008, with the rating agency Moody’s having downgraded BPN from Baa1 to Baa3 on 18 July 2008[(6)]. Whilst at the end of August BPN had a positive liquidity of EUR 316 million, by 22 October 2008 it had severe negative liquidity of EUR 831 million, with its deposit account with the Bank of Portugal (‘BdP’) far from the average amounts it would have had to maintain in order to comply with the legal limits. At that stage, during the month of October 2008, several initiatives were undertaken in order to allow the bank to overcome the liquidity difficulties it was facing and to prevent default in payments, in particular through the provision of special liquidity aid in the form of loans, and through other operations by the BdP and by the state-owned CGD[(7)].

(22) Given the volume of the losses being accumulated by BPN, further liquidity support was not considered feasible by the Portuguese authorities, in light of the ‘high risk to which [BdP and CGD] would be exposed’[(8)]. A plan had been put forward by the shareholders of BPN, but the Government, based on an opinion of the BdP issued on 30 October 2008, did not consider the plan to be feasible. Given that BPN no longer complied with the solvency requirements because of the high level of impairments[(9)], the Government then proposed to Parliament the nationalisation of BPN at zero price[(10)]. That proposal was approved on 11 November 2008 by Law 62-A/2008 (the ‘Nationalisation Law’).

(23) According to the Portuguese authorities, the impairments resulted from irregularities and illegal practices detected by the BdP and external audits conducted during June 2008, which were later described in a 2009 BdP report as constituting ‘fraudulent behaviour, persistent and deliberate, undertaken at the highest level of the management of the Group’[(11)]. These practices led to investigations and to the launch of several administrative infringement proceedings (‘processos de contra-ordenação’) and to the filing of a complaint with the Office of the Public Prosecutor of the Republic.

(24) Under the Nationalisation Law, CGD was assigned the task of managing BPN, appointing the members of BPN's management bodies, and establishing the management objectives of BPN within 60 days of the nationalisation. Furthermore, the Nationalisation Law also set out the provision that any credit or liquidity assistance measures undertaken by CGD 'in favour of BPN within the context of the nationalisation or in substitution of the State … shall benefit from a state guarantee'[(12)].

2.2 *The financial support measures prior to nationalisation*

(25) Prior to its nationalisation in November 2008, BPN had already benefited from a number of financial support measures described by the Portuguese authorities as 'special liquidity support measures'[(13)]. On 17 February 2010, the Portuguese authorities informed the Commission that in the period up to 30 October 2008, BPN had obtained special liquidity assistance measures from both CGD and the BdP for a total amount of EUR 501,6 million, consisting of four loans granted to BPN by CGD for a total amount of EUR 315 million[(14)] and emergency liquidity assistance (ELA) provided in October 2008 by the BdP for an amount of EUR 186,6 million[(15)].

(26) Whilst the BdP was reimbursed after the nationalisation, the four loans granted by CGD were reimbursed only on 9 March 2009, with the issuance of the first commercial paper by BPN.

2.3 *The financial support measures after the nationalisation*

(27) In March 2009, BPN issued commercial paper with guaranteed subscription by CGD and a state guarantee for a global amount of EUR 2 billion. The Commission was informed only on 14 August 2009 of these state guarantees.

(28) By letter of 17 February 2010, the Portuguese authorities also mentioned that CGD had been authorised on 27 October 2009 to subscribe a further EUR 1 billion of commercial papers with a state guarantee. Subsequently, by electronic mail of 14 June 2010, the Commission was further informed that the total of the state guarantees on commercial papers issued by BPN and subscribed by CGD had risen to EUR 4 billion, as in April 2010 a third issue of BPN commercial paper had been organised and was subscribed by CGD for an amount of EUR 1 billion.

(29) In this context, it should be noted that since its nationalisation in November 2008 and until June 2011, BPN had constantly made use of money market credit facilities given to it by CGD. The amounts owed by BPN to CGD under these short-term instruments reached approximately EUR 2,2 billion on 28 February 2009. According to the data provided by the Portuguese authorities, those amounts were reduced with the issue of the commercial paper referred to in paragraphs (27), and (28)[(16)].

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(30) By June 2011, the exposure of BPN to CGD in money market instruments was approximately EUR 1 billion. Although the financing was being carried out on a daily basis, it was, according to the Portuguese authorities, of a structural nature with longer dates[(17)], and was also substituted by the fourth, and last, commercial paper issue of June 2011, with the launch of two issues of EUR 500 million each.

(31) According to the figures supplied by the Portuguese authorities on 3 February 2012, the outstanding amount owed by BPN to CGD (apart from the commercial paper issues) was EUR 433,7 million on 31 December 2011 and EUR 232 million on 31 January 2012.

Table 1

Overview of liquidity obtained by BPN from CGD, as at 31 December 2011

	With explicit state guarantee	**CGD Loans(without explicit state guarantee)**	**Total**
BPN	1 400 000 000,0	433 732 654,56	1 833 732 654,56
Special Purpose Vehicles[a]	3 100 000 000,0	795 111 660,0	3 895 111 660,0
Total	4 500 000 000,0	1 228 844 314,56	5 728 844 314,56

a The Special Purpose Vehicles were segregated from an accounting point of view from BPN on 31 December 2010, and formally taken over directly by the State on 15 February 2012.

Source: Portuguese authorities

(32) It should be noted that under Article 2(9) of the Nationalisation Law all credit or liquidity lines offered by CGD to BPN in the context of the nationalisation are to be guaranteed by the Portuguese State.

(33) It is therefore clear that all of the amounts described in Table 1 above benefited from a state guarantee pursuant to Article 2(9) of the Nationalisation Law and the various orders issued by the Secretary of State for the Treasury and Finance. The remuneration for the state guarantees was set at 0,2 % per year.

2.4 *The Restructuring of BPN*

The 2010 restructuring plan

(34) An initial restructuring plan of 13 September 2010 (hereinafter 'the 2010 Restructuring Plan') was sent to the Commission by the Portuguese authorities on 16 September 2010.

(35) In that plan, the Portuguese authorities explained their intention to split BPN into a good bank and a bad bank and to then try to sell the good bank.

The extent of the bank to be reprivatised: creation of the SPVs

(36) The State wanted to proceed through an open tender process with the sale of the 'good bank', BPN S.A., which was to be exclusively a retail bank. That process was to be conducted on the basis of a call for expressions of interest, for which the specification ('Caderno de Encargos') was approved on 16 August 2010 by the Portuguese authorities[18].

(37) Under the 2010 Restructuring Plan, a number of BPN's assets and liabilities were to remain outside the scope of the reprivatisation and transferred to three new Special Purpose Vehicles ('SPVs'), Parvalorem, Parups and Parparticipadas. These SPVs would initially remain within BPN and after the sale would be transferred to the State. Loans and credits would be transferred to Parvalorem, real estate and investment funds to Parups, and subsidiaries to Parparticipadas. The Portuguese authorities valued the total amount of assets to be transferred to the SPVs at EUR 3 885 million, with EUR 2 507 million transferred to Parvalorem, EUR 1 228 million to Parups and EUR 150 million to Parparticipadas.

(38) Loans were transferred at nominal value; fund units, securities and real estate were to be transferred at purchase price, and companies owned by BPN at their book value. The Portuguese authorities estimated that the overall impairments as of December 2010 totalled EUR 1 798 million broken down as follows: i) loans: EUR 1 474 million; ii) real estate: EUR 16 million; iii) fund units: EUR 247 million; and iv) securities: EUR 61 million. According to the information provided by the Portuguese authorities on 20 January 2012, these assets were transferred to the SPVs on 23 and 30 December 2010[19]. However, the SPVs remained within BPN until 15 February 2012, when they were removed from BPN and transferred to another state-controlled company.

(39) According to the Portuguese authorities, the transfer of assets to the SPVs was done on the basis of objective criteria, taking into account the volume of impairments as well as the fact that certain activities were not core for BPN after the nationalisation (consumer credit, investment bank, asset management, investment fund management, insurance and international business). BPN was to reposition itself as a pure retail bank with reduced exposure to the uncertainty of wholesale funding.

(40) The SPVs financed the acquisition of the assets through two financing lines for EUR 3 895 million, consisting of bonds with a state guarantee for EUR 3 100 million acquired by CGD and loans from CGD with pledged assets for an aggregated value of EUR 795 million. The revenues from the sale of the assets to the SPVs allowed BPN to pay back EUR 3 900 million of financing which it had obtained from CGD - EUR 3 600 billion of the initial EUR 4 billion of commercial paper (meaning that an amount of EUR 400 million of commercial paper guaranteed by the State would remain unpaid by BPN), as well as EUR 300 million of short-term money market loans.

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(41) Following the transfer of assets, BPN's balance sheet was reduced by around 30 %.

(42) According to information received from the Portuguese authorities, in order to allow BPN to comply with legal and regulatory requirements (namely in order to reach the 9 % core tier 1 capital required for 2011[(20)]), and given that the own capital of BPN would still be negative after the transfer of assets to the SPVs, the State would have had to recapitalise BPN by about EUR 417 million[(21)].

The first two calls for reprivatisation

(43) The base price set for BPN (which excluded the assets to be transferred to the SPVs) in the tender published by Portugal was fixed at EUR 171,1 million based on the valuations of third party consultants Deloitte (EUR […][(22)] million) and Deutsche Bank (EUR […] million). BPN's new CGD management had in the meantime started a restructuring process for the bank. Operational costs were reduced by [1-10] % from December 2008 to December 2010; BPN's activity was reduced in order to achieve a bank exclusively focused on retail commercial banking. That reduction in activity resulted partly from the drop in deposits following the nationalisation, but also from the transfer of assets to the three SPVs. These measures reduced losses in 2010 to EUR [50-150] million, compared with EUR [150-250] million in 2009. Since the beginning of 2009, in an attempt to improve the bank's image and range of products, the new management undertook the launch of […] new products and campaigns. Measures to improve the risk management and internal control systems of the bank were also implemented by the new management.

(44) No interested parties came forward in response to the first two calls for privatisation by 30 September and 30 November 2010.

(45) Following the failure of the tender process, in January 2011 Portugal indicated its intention to restructure BPN, making it more independent of CGD by appointing a new board, independent of the latter. It also sought to accelerate the operational recovery of BPN, by redefining the bank's brand and corporate identity and by reinforcing the recovery plan through cost cuts and enhancing commercial dynamics. However, despite several requests, no updated restructuring plan was provided to the Commission.

(46) In the MoU of 17 May 2011, the Government gave an undertaking to launch a new privatisation process.

(47) In the MoU, the Portuguese authorities committed to 'launching a process to sell Banco Português de Negócios (BPN) on an accelerated schedule and without a minimum price. To this end, a new plan is submitted to the EC for approval under competition rules. The target is to find a buyer by end-July 2011 at the latest. To facilitate the sale, the three existing special purpose

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vehicles holding its non-performing and non-core assets have been separated from BPN, and more assets could be transferred into these vehicles as part of the negotiations with prospective buyers. BPN is also launching another program of more ambitious cost cutting measures with a view to increase its attractiveness to investors. Once a solution has been found, CGD's state guaranteed claims on BPN and all related special purpose vehicles will be taken over by the state according to a timetable to be defined at that time'[23].

Sale to BIC

(48) A third privatisation attempt was launched at the beginning of May 2011 without a minimum price in order to find a buyer for BPN by 31 July 2011, as agreed in the MoU.

(49) A tender procedure was held during which contacts with potential interested buyers took place. An Investment Opportunity Overview ('IOO') was also produced. According to the IOO, interested parties had to bid for up to 100 % of the shares of BPN, but could ask for additional assets and liabilities to be removed from BPN's balance sheet. They could also ask for higher recapitalisation scenarios. A memorandum governing the rules of the process was signed between BPN and the potential bidders allowing them to enter a data room, set up on 15 June 2011 for five weeks.

(50) Four binding offers were submitted by 20 July 2011. These offers were analysed by the boards of CGD and BPN who submitted their opinion to the shareholder – the State – by 25 July 2011.

(51) Three of the four bidders submitting binding offers were eliminated. According to the Portuguese authorities, two bidders (Montepio and Aníbal Ribeiro) did not fulfil the requirements of the memorandum signed with BPN[24]. Montepio did not bid for the acquisition of the shares of BPN, but only for selected assets and liabilities, while Aníbal Ribeiro had not provided sufficient proof of managerial and financial capacities to run a bank. The third bid, from NEI[25], complied with the memorandum's requirements, but there was insufficient proof of its capabilities to run the bank and of its financial capacity to assume future capital needs of BPN.

(52) Based on the only valid offer submitted under the tender procedure, which was made by BIC on 20 July 2011 (the 'BIC offer of 20 July 2011'), the Government decided on 31 July 2011 to continue exclusive negotiations with BIC.

(53) BIC was authorised by the BdP to exercise commercial banking activities on 9 October 2007 and actually started its activity in Portugal in May 2008, being active mainly in corporate banking and in private banking. BIC's main shareholders are a group of investors from Angola, and include Portuguese shareholders such as Amorim Projectos SGPS, SA (which has a 25 % shareholding). As at December 2010, it had a turnover of EUR 389 million, with total assets of EUR 1 billion, and at 31 March 2011 it had capital of

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EUR 32 million and 7 branches. According to the information provided by Portugal the market share of BIC in the market segments where it is active is less than 1 %[26].

The sale conditions

(54) According to the information provided by the Portuguese authorities, following the BIC offer of 20 July 2011[27], the negotiations with BIC culminated with the signing on 9 December 2011 of a Framework Agreement for the sale of BPN to BIC[28].

(55) The BIC offer of 20 July 2011 set out only general terms, and provided for:

i. a recapitalisation by the State in order for BPN to reach a core tier 1 ratio of [between 9 and 18] % plus EUR [100-300] million;

ii. the removal of part of the credit loans to be selected by BIC in order to achieve a loan-to-deposit ratio of [110-150] %;

iii. the transfer out of BPN of all non-performing loans above the threshold of approximately EUR […] million (estimated level of provisioning of loans at BPN);

iv. the right of BIC to remove from the balance sheet of BPN additional assets and liabilities (e.g. loans to credit institutions, financial assets, real estate assets, some provisions, other assets and other liabilities) that have been provided outside the scope of its normal activity;

v. the transfer out of BPN of deposits selected by BIC that are not offering market conditions;

vi. the granting of a money line to BIC from CGD for up to [150-650] million for a period of […] years, with a lending rate at […] months Euribor. That amount would be increased if deposits were to fall below EUR […] billion;

vii. the maintenance of 500 to 600 employees of BPN (out of approximately 1 600 employees) and of 160-170 branches which are in facilities belonging to the bank or with leasing contracts with a maturity up to 12 months.

viii. the transfer to the State of the costs linked to litigation; and

ix. an acquisition price of EUR 30 million to be paid by BIC.

(56) Following the negotiations, that lasted approximately five months, the Framework Agreement provides for:

i. a recapitalisation by the State to reach the minimum capital level and the additional level required by BIC — BIC required a final capital level of EUR [200-400] million after the balance sheet adjustments it had proposed[29];

ii. the removal of part of the loans in BPN, over and above those loans which had already been transferred to the SPVs as of 30 December 2010[30]. The

removal of the additional loans would allow a loan-to-deposit ('LTD') ratio of [110-150] % to be achieved. That ratio had been set at [110-150] % in the BIC offer of 20 July 2011;

iii. the right of BIC to remove from the balance sheet additional assets and liabilities (e.g. loans to credit institutions, financial assets, real estate assets, some provisions, other assets and other liabilities);

iv. the right of BIC to sell back within […] months loans that are non-performing for at least […] days (up to a maximum of […] of the nominal value of the total loan portfolio selected by BIC after compensation with existing deposits) and for the amount exceeding the level of provisioning (EUR […] million[31])[32];

v. the right of BIC to transfer deposits with pricing at least […] basis points ('bps') above the relevant reference rate[33] or to receive from the State the difference in remuneration[34];

vi. the right of BIC to request the transfer, before closing, of other assets and liabilities of BPN, such as loans to credit institutions, physical and financial assets, etc;

vii. the granting of a money line to BIC from CGD until [> 2013] for up to EUR [150-350] million, with a lending rate at […] months Euribor[35] plus a spread of […] bps. That money line would be made available if the level of deposits of BPN were to fall below EUR […] billion;

viii. the maintenance of a credit line of EUR [150-500] million with CGD until [> 2013] for the ongoing commercial paper programme bearing a state guarantee for three years but with a commitment from CGD that it would not call the loan before […];

ix. the maintenance of approximately half of the employees of BPN (at least 750 out of approximately 1 600 employees). The State would cover the total cost of closing the branches not taken over by BIC and of paying compensation to dismissed employees or to employees whose place of employment would be changed;

x. the transfer to the State of the costs linked to litigation risks;

xi. an acquisition price of EUR 40 million paid by BIC;

xii. a price clause for the sharing with the State of 20 % of net profits (after tax) for the earnings to be generated by BPN during the next five years, for earnings cumulatively exceeding EUR 60 million;

xiii. the commitment by BIC not to pay out dividends or any other equivalent benefits to shareholders in relation to BPN for a period of five years.

(57) According to the January 2012 Restructuring Plan, the combined entity resulting from the sale of BNP to BIC (the 'combined entity') will be

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profitable after […] years in a base line scenario, as well as in a less favourable one. It is thus estimated that the core tier 1 capital ratio of the combined entity will drop from [10-15] % of the combined entity's risk-weighted assets (RWA) after the first year to […] % after the fifth year. The projected fall would be due to the negative results of the first years linked to the restructuring to be undertaken by BIC and the increase of the activity of the bank in terms of resizing it to return to viability by granting more credit to the economy. The restructuring will include investments in the bank's agencies and image, as well as in the integration of processes, procedures and organisation, and in IT. The return on equity (ROE) is expected to grow from – [1-5] % in year 1 to + [1-5] % in year 5, whereas the return on assets (ROA) is expected to grow from – [0-2] % in year 1 to + [0-2] % in year 5.

(58) In a less favourable scenario, characterised by a higher level of non-performing loans and by higher financing costs, the core tier 1 capital ratio is expected to drop to [8-12] % in year 5, from [10-15] % at the end of year 1.

(59) Finally, the Portuguese State injected capital into BPN on 15 February 2012 for an amount of EUR 600 million[36].

3. Grounds for initiating the formal investigation procedure

(60) In the Decision of 24 October 2011, the Commission expressed doubts on whether:

— BPN, as a combined entity with the purchaser, was viable;

— the aid granted to BPN was limited to the minimum and the sale to BIC was the least expensive option compared with a liquidation scenario;

— the measures limiting distortions of competition were sufficient; and

— the sale process entailed aid to the buyer.

4. Comments from interested parties

(61) The Commission received no comments from third parties.

5. Position of the Portuguese State

5.1 *Position of the Portuguese State on the Decision of 24 October 2011 (Opening Decision)*

(62) The Portuguese authorities claim that the January 2012 Restructuring Plan complies with the Restructuring Communication. In addition to that plan, the Portuguese authorities submitted by letter of 20 January 2012 a number of observations on the Decision of 24 October 2011.

(63) The Portuguese authorities consider that three types of measure in favour of BPN do not constitute state aid.

(64) First, Portugal claims that there is no aid in the support measures granted to BPN before the nationalisation, namely the ELA and the four loans granted by CGD in October 2008. Portugal argues that the ELA was granted by the

BdP in an independent manner, at a penal interest rate and with collateral from BPN. The loans by CGD in October 2008 were granted at market terms with a competitive interest rate and appropriate guarantees, and accordingly did not confer any economic advantage on BPN.

(65) Second, Portugal denies that state aid was involved in the financing granted to BPN by CGD after the former's nationalisation (interbank money market operations and underwriting of commercial paper by CGD). Portugal argues they were commercial transactions whose terms and conditions were equivalent to comparable transactions carried out by prudent investors in a market economy. They therefore conferred no economic advantage on BPN.

(66) Finally, the Portuguese authorities also consider that no state aid was granted to BIC as a buyer of BPN. The Portuguese authorities argue that the sale process was transparent, objective and non-discriminatory. BIC's proposal was globally the best in economic terms and should therefore be regarded as reflecting the market price. The Framework Agreement signed on 9 December 2011 largely reflected the terms of the BIC offer of 20 July 2011. The Portuguese authorities also consider that despite the sale price being negative, the only alternative to the sale (a liquidation of BPN) would have obliged the State to support a higher financial burden and would have posed a threat to the stability of the national financial system.

(67) At the same time, Portugal acknowledges that some measures in favour of BPN constitute state aid. They are the state guarantee on commercial paper issued by BPN, the transfer of selected assets to the SPVs in 2010, the recapitalisation of BPN undertaken on 15 February 2012 in view of the sale, and some of the measures granted in the context of the projected sale to BIC (such as the state guarantee on the commercial paper programme which will be maintained after the sale).

(68) Furthermore, Portugal argues that all the measures constituting state aid are compatible with EU law, as they address a serious disturbance in the Portuguese economy pursuant to Article 107(3)(b) of the Treaty.

(69) According to Portugal, the January 2012 Restructuring Plan allows BPN to re-establish its long-term viability without the need of further aid. First, the State has restructured BPN through the separation of assets and the transfer of some assets to the SPVs, and through the reduction of its presence on the market by more than 50 % and the halting of activities that did not constitute the core of the retail bank, as well as through different risk control measures and a prudent commercial policy. Second, according to the BIC projections, when BPN is integrated into BIC the combined entity should reach positive results […] the restructuring plan, both in a base line scenario and in a less favourable one. Third, the negative sale price is acceptable because liquidation is more expensive for the State and would pose a threat to financial stability.

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(70) Portugal considers that the measures are restricted to the minimum necessary in order to guarantee the stability of the Portuguese financial sector and to re-establish the viability of BPN.

(71) Additionally, Portugal argues that the sale scenario was the only alternative to the more costly liquidation scenario. Other options (integration into CGD and stand-alone restructuring) would not allow sufficient resources in net present value terms to be generated to compensate for the initial investment that would have to be made. Portugal estimates the cost of the sale to BIC at around EUR […] million to […] million (excluding the potential impact of some future contingencies which Portugal considers will not materialise), which is lower than the cost of liquidation under a number of different scenarios.

(72) Furthermore, according to Portugal, the liquidity granted to BPN through the guarantee on issuance of commercial paper by BPN following the nationalisation was necessary to ensure the continued activity of the bank during the restructuring.

(73) Regarding the selection of assets transferred to the SPVs, Portugal considers that it was done based on objective criteria with the aim of promoting the long-term viability of BPN and of making potential buyers interested in the reprivatisation process. Portugal also claims that further transfers of assets within the framework of the sale to BIC are adequate to guarantee the future viability of BPN and are limited to the minimum necessary to allow the sale.

(74) Portugal claims that the increase in the capital of BPN undertaken on 15 February 2012 is designed to ensure that BPN will not face a capital short-fall during the period covered by the January 2012 Restructuring Plan. According to the plan's projections for core tier 1 capital, that ratio is expected to decrease to [10-15] % in 2016 under the base case scenario and to [8-12] % in a less favourable scenario, compared to the minimum mandatory level of 10 % which will be effective as of the end of 2012. Portugal also states that the sale conditions offered by BIC within an open and transparent sale process without minimum price are the minimum necessary to ensure the future viability of BPN, as liquidation would be more expensive for the State and might threaten financial stability.

(75) Portugal also claims that both the former shareholders of BPN and BPN itself have shared or will share sufficiently the costs of the restructuring process, ensuring adequate burden-sharing. BPN's previous shareholders had received no compensation as a result of the nationalisation and had lost the entirety of the capital they had invested in the bank.

(76) However, Portugal considers that it is not appropriate to seek burden-sharing from clients who contributed subordinated debt to BPN, given the specific circumstances of the sale of those instruments […]. In some cases, the

technical specifications of the products prevent BPN from refusing to pay clients interest to reimburse capital.

(77) According to Portugal, BPN's contribution to the restructuring process is also significant as its management was replaced following the nationalisation, its commercial and risk management policies have been substantially altered and it will see its activity reduced by more than 50 %.

(78) Portugal concedes that the transfer of assets to the SPVs at book value took place above the assets' real economic value and without remuneration for the State. However, Portugal considers that an own contribution by BPN is ensured through its nationalisation at zero price, which was followed by a deep restructuring. Portugal claims that any advantage that could result for BPN from the separation of assets into the SPVs would be partially recovered through the reprivatisation price for the bank, which was the highest possible. Portugal also considers that the state guarantee is properly remunerated. Despite the remuneration being lower (at 0,2 % per year) than is required for government guarantees[(37)], any potential additional income received by BPN (or any expense that does not materialise) during the restructuring process would benefit the State, which currently owns the entirety of BPN's shares.

(79) Concerning the capital increase in BPN undertaken on 15 February 2012, Portugal comments that it will not alter the shareholder structure of BPN and that the capital will be at least partially recovered through the sale of BPN, as it contributes to avoiding the even higher cost of liquidation.

(80) Portugal also considers that the measures adopted or to be adopted by the State do not distort competition. Portugal points out that the combined entity will have a market share lower than 1 % ([0-1] % of market share in the banking sector, 14th in terms of credit to clients and 15th in terms of deposits). Moreover, the measures are not likely to have a negative impact on the entry of foreign banks on the domestic market, as is evident from the fact that BIC itself is held by an Angolan financial group. Portugal also considers that there is no moral hazard as the bank has been nationalised, its management has been removed, its shareholders obtained no compensation and the bank has undergone a profound restructuring.

(81) Further, Portugal considers that a number of measures taken within the process would be adequate and sufficient to limit any distortion of competition. BPN had a reduced presence on the market before the nationalisation (9th largest bank in Portugal with market shares between [1-5] % and [1-5] % depending on the markets), it was restructured and its presence on the market was reduced by more than 50 % and was re-centred on retail banking. The nationalisation happened without compensation of previous shareholders, while the commercial strategy and the risk control policy of BPN were changed in its wake.

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(82) The Portuguese authorities also claim that the sale process for BPN was open and transparent. Finally, BIC is prohibited from distributing dividends until 2016 in order to ensure that the financial support granted to BPN is used for ensuring the long-term viability of the bank. The profit-sharing agreement between the State and BIC for results above EUR […] million allows the State to recover part of the restructuring costs of the bank. BIC's commitment not to refer to state aid it has received in its commercial communication ensures, according to the Portuguese authorities, that the aid is not used to the detriment of competitors. Other possible commitments foreseen in the Commission guidance for bank restructuring (such as measures to foster market opening, market share limits or the divestment of additional assets and activities) are not appropriate in the context of BPN's restructuring.

5.2 *Commitments given by the Portuguese State*

(83) As regards the implementation of the restructuring plan, the Portuguese authorities commit to the following:

Capital level

(84) The core tier 1 capital ratio of BPN at the date of the sale to Banco BIC will not be higher than [10-18] %.

(85) If Banco BIC or the combined entity chooses to return loans to the State or any entity controlled by the State after the sale, it will pay back to the State the capital associated with those loans to the tune of [10-18] % of the loans' risk weighted assets.

Non-performing loans

(86) Banco BIC and the combined entity will not be entitled to transfer non-performing loans to the State or any entity controlled by the State after [> 2013].

(87) Banco BIC or the combined entity will transfer non-performing loans to the State or any entity controlled by the State under the conditions set out in paragraph (85) above only after having completely exhausted the provisions available at the date of the sale in the accounts of BPN.

Liquidity lines

(88) The existing credit line for EUR [150-500] million set out in the Framework Agreement in relation to BPN's commercial paper programme and guaranteed by the State, will not be extended beyond […] years from the date of sale.

(89) The remuneration of the EUR [200-400] million liquidity line to be granted by CGD to Banco BIC or the combined entity will be set as a minimum at Euribor +[…] bps.

(90) Until 31 December 2016 Portugal will request the prior approval of the Commission in advance of any granting of credit lines or guarantees by CGD or the State to Banco BIC or the combined entity after the sale.

Ban on acquisitions

(91) Banco BIC and the combined entity will not make any acquisition in undertakings until 31 December 2016 unless the total gross cumulative purchase price paid by Banco BIC and the combined entity for all acquisitions during a fiscal year is less than EUR […] million. The total gross cumulative purchase price of any such acquisitions will be calculated without including the assumption or transfer of debt in relation to such acquisitions.

Subordinated debt

(92) Banco BIC, the combined entity and Portugal will not exercise until 31 December 2016 any call option rights in relation to subordinated debt issued by BPN prior to the date of the sale.

Marketing

(93) Banco BIC or the combined entity will not refer to the use of state aid in its marketing campaigns and communications to investors.

6. Assessment

6.1 *Existence of aid*

(94) Article 107(1) of the Treaty on the Functioning of the European Union provides that 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, insofar as it affects trade between Member States, be incompatible with the internal market. It follows that a state measure qualifies as state aid if it meets the following four (cumulative) criteria:

— state resources;
— selective advantage;
— distortive impact on competition; and
— impact on trade between Member States.

6.1.1. *Measures in favour of BPN and of the economic activity after the sale*

6.1.1.1 Measures granted before the nationalisation

(95) Portugal argues that the measures granted to BPN before the nationalisation do not constitute state aid. The measures consist of the ELA and the four loans granted by CGD before the nationalisation of BPN in October and November 2008.

ELA

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(96) Regarding the ELA, as pointed out by the Portuguese authorities in their observations on the Decision of 24 October 2011, the emergency liquidity support granted to BPN before the nationalisation was decided upon independently by the BdP at a penalising interest rate and supported by guarantees provided by BPN, without a state guarantee.

(97) At the time of the attribution of the ELA facility (17 and 27 October 2008) no decision had been taken regarding the solvency and nationalisation of BPN (since those decisions were taken only in early November 2008). The ELA was not part of a larger aid package, but rather the offering of liquidity as part of the normal activities of the BdP.

(98) The Commission therefore concludes that there was no state aid in the provision of ELA by the BdP to BPN, in line with the Banking Communication[38].

Loans granted by CGD

State resources

(99) Concerning the loans granted by CGD, the Commission notes that prior to the nationalisation of BPN, the bank received from CGD loans for a total of EUR 315 million and not EUR 235 million[39].

(100) The Commission notes that CGD is wholly owned by the State, which appoints the members of its Board. In order to establish whether the loans are imputable to the State, the specific circumstances under which they were granted need to be assessed in order to determine whether CGD acted for reasons differing from normal commercial practice. To that end, the following considerations are relevant.

(101) First, at the time when the first three loans were granted in October 2008, BPN's difficulties were already widely known. According to the Portuguese authorities, BPN had been facing liquidity problems since the summer of 2008, as evidenced by significant changes in the top management of BPN (changed twice since the beginning of 2008), audits of BPN undertaken by the BdP in June and the downgrading of BPN by Moody's to Baa3 on 18 July 2008. Further, the second, third and fourth loans were granted after 22 October 2008, the date by which, according to Portugal, BPN was in a position of severe negative liquidity. Any lender acting under normal commercial practice would have requested from BPN the information necessary to understand its liquidity position and repayment capacity before extending an additional loan to it, and would therefore have become acquainted with BPN's precarious financial position.

(102) Second, the amounts of the loans were very significant compared with the size of BPN's balance sheet and liabilities at the time, constituting a significant individual exposure to a bank in difficulty for CGD.

(103) Third, the loans were granted in October and November 2008, soon after the failure of Lehman Brothers, at a time when interbank markets were largely inaccessible even for the strongest international financial institutions, let alone banks facing significant liquidity challenges.

(104) Fourth, concerning the fourth loan, the Commission notes that CGD was not only managing BPN in the interests of the State pursuant to Article 2(7) of the Nationalisation Law but also obtained a state guarantee pursuant to Article 2(9) of the Nationalisation Law in respect of all credit and liquidity it might grant to BPN in the context of the nationalisation and 'in substitution of the State'.

(105) Given the financial and economic situation in general, and the widely-known difficulties of BPN in particular, it would be highly unlikely that another institution would have provided the liquidity in question to BPN, which explains why the Portuguese authorities considered the CGD liquidity measures as being of a 'special' nature (see paragraph (25)).

(106) Based on each of these considerations, the Commission concludes that the CGD's decision to grant the relevant loans to BPN before its nationalisation was not a normal commercial decision. The decision to do so must be considered as directly imputable to the State. The loans therefore constitute state resources.

Advantage

(107) As the loans allowed BPN to obtain liquidity that it would otherwise not have been able to obtain on the market, they provided BPN with the liquidity it needed in order to continue to operate and to compete, *inter alia*, for loans and deposits on the banking markets in which it was active.

(108) The Commission therefore considers that BPN obtained an economic advantage.

Selectivity

(109) The measures concerned are selective as they solely benefit BPN.

Distortion of competition and impact on trade

(110) Despite Portugal's comment to the effect that BPN ranked only ninth in the Portuguese banking sector before its nationalisation, the loans by CGD distorted or threatened to distort competition by placing BPN in a beneficial position vis-à-vis other competing banks, allowing it to obtain liquidity that it would not otherwise have obtained on the market.

(111) Given that BPN was active at national, European and international level at the time the loans were made, including for instance through its French subsidiary, the measures also threatened to affect trade between Member States.

Conclusion

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision of 27 March 2012 on the measures SA. 26909 (2011/C) implemented by Portugal for the restructuring of Banco Português de Negócios (BPN) (notified under document C(2012) 2043) (Only the Portuguese version is authentic) (Text with EEA relevance) (2012/660/EU). (See end of Document for details)*

(112) The Commission therefore considers that the four loans totalling EUR 315 million made by CGD to BPN in October and November 2008 constitute state aid.

6.1.1.2. Measures granted after the nationalisation, not specifically linked to the sale to BIC

(113) The Commission has already established in the Decision of 24 October 2011 that the nationalisation does not constitute state aid in favour of BPN's shareholders.

(114) The following measures, which were not specifically linked to the sale to BIC, were granted after the nationalisation of BPN:

(a) the state guarantee on liabilities issued by BPN and funded by CGD, including both issuance of commercial paper subscribed by CGD and use of money market credit facilities provided by CGD;

(b) the transfer of assets and liabilities to three SPVs owned by the State.

The State guarantee on liabilities issued by BPN

State resources

(115) The state guarantee on commercial paper issued by BPN (and the SPVs) and subscribed by CGD, which was granted to BPN after the nationalisation, was directly financed by the Member State. Additionally, under Article 2(9) of the Nationalisation Law all credit or liquidity lines offered by CGD in favour of BPN (and of the SPVs) in the context of the nationalisation were to be guaranteed by the Portuguese State. It is therefore indisputable that all funding provided by CGD to BPN (or the SPVs) after nationalisation involves state resources.

(116) Additionally, it should be underlined that after the nationalisation CGD was the only entity providing funding to BPN or to the SPVs, and that its exposure increased over time as other liabilities matured and were not rolled over by the original lenders or substituted by lending from other institutions. The lack of alternative funding sources for BPN is not surprising, given that its financial difficulties and its precarious future were public knowledge.

Advantage

(117) The state guarantees allowed BPN to obtain financial support in a situation where there were no alternatives for it on the market.

(118) They allowed BPN to continue activity on the market, competing for business (not only for the maintenance of business but also possibly for new business) as well as to meet its obligations towards clients and other market players.

(119) On the basis of the foregoing, the Commission concludes that the state guarantees confer an economic advantage on BPN.

Selectivity

(120) The measures concerned are selective as they benefit a specific entity, BPN. Moreover, for the part of the liquidity line continuing after the sale, they also benefit the combined entity.

Distortion of competition and impact on trade

(121) Given the position of BPN in the Portuguese financial sector, and the fact that the financial sector is open to intense competition at Union level, as well as the fact that BPN is competing with a significant number of subsidiaries of foreign banks in Portugal, the Commission considers that any advantage from state resources would have the potential to affect intra-Union trade and to distort competition within the meaning of Article 107(1) of the Treaty.

Conclusion

(122) The state guarantees in favour of BPN allowed BPN to receive a large amount of funding which was not available on the market and provided BPN with a selective advantage. They allowed BPN to remain on the market and pursue its activities without further contamination from its previous situation. They constitute state aid.

The transfer of assets to the SPVs

State resources

(123) The removal of certain assets from BPN to the SPVs, which are wholly owned by the Member State, means that the Member State bears the entire financial responsibility for them and incurs all the risks for assets in the SPVs, at least some of which may be irrecoverable. The measure therefore involves state resources.

Advantage

(124) The Commission considers that the transfer of assets to the SPVs before the sale, at book value for EUR 3,9 billion (with impairments estimated at EUR 1,8 billion) involves an advantage to BPN because there was no *ex ante* transparency, assets were not valued at market price and the State was not remunerated in the framework of the transfer.

(125) The Commission considers that the transfer of assets at book value and not at market value confers an economic advantage on BPN compared with its competitors.

Selectivity

(126) The measures concerned are selective as they benefit a specific entity, BPN.

Distortion of competition and impact on trade

(127) Given the position of BPN in the Portuguese financial sector, and the fact that the financial sector is open to intense competition at Union level, as well as the fact that BPN is competing with a significant number of subsidiaries of foreign banks in Portugal, the Commission considers that any advantage from state resources would have the potential to affect intra-Union trade and to distort competition within the meaning of Article 107(1) of the Treaty.

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6.1.1.3. Measures granted after the nationalisation, linked to the sale to BIC

(128) In addition to the measures granted to BPN after the nationalisation that were unconnected to the sale to BIC, additional measures were granted in connection with the sale to BIC. They comprise:

a) the recapitalisation of BPN with a view to the sale;

b) the transfer of additional assets and liabilities to BPN linked to the sale;

c) the right of BIC to transfer non-performing loans to the State, after the sale;

d) the transfer to the State, in view of the sale, of costs linked to litigation risks; and

e) the granting by CGD of a liquidity line to the combined entity after the sale and the maintenance of a credit line of commercial paper, after the sale, secured by the State, of EUR [150-500] million.

The recapitalisation of BPN in view of the sale

State resources

(129) A EUR 600 million recapitalisation of BPN took place on 15 February 2012. That measure was carried out directly by the State and through state resources in view of the sale to BIC.

Advantage

(130) The EUR 600 million recapitalisation of BPN on 15 February 2012 was calibrated to provide BPN with EUR [200-400] million of equity capital at the moment of the sale. The latter amount corresponded at the time of BIC's offer of 20 July 2011 to an estimated [10-18] % of core tier 1 capital. It is significantly in excess of the regulatory minimum (9 % of core tier 1 as of end 2011 and 10 % core tier 1 as of end of 2012)[(40)].

(131) The Commission considers that the capital injection confers an economic advantage on BPN and on the economic activity after the sale. The advantage stems from ensuring that the capital necessary to meet and exceed regulatory requirements is available to BPN following the recapitalisation and will also be available to the combined entity. That capital allows BPN, and will also allow the combined entity, to be active on the markets and to provide new credit, in an economic context in which other competitors must deleverage.

Selectivity

(132) The measures concerned are selective as they solely benefit a specific entity - BPN and the combined entity that will continue the economic activity after the sale.

Distortion of competition and impact on trade

(133) Portugal claims that BPN continued reducing its market share following the nationalisation and that the combined entity will have a market share of less

than 1 % in terms of credit to clients, client recourses or banking products and of less than 2 % on any of the relevant markets. Nevertheless, the measures distort or threaten to distort competition as they place BPN and the combined entity after the sale to BIC in a beneficial position vis-à-vis other competing banks. The capital in excess in the combined entity shields the economic activity from investment risks that other competitors face. It also increases the likelihood that additional liquidity will be available to both beneficiaries and could facilitate future expansion by BPN and the combined entity in an economic context where other competitors active in Portugal must deleverage.

(134) Given the position of BPN in the Portuguese financial sector, and the fact that the financial sector is open to intense competition at Union level, as well as the fact that BPN is competing with a significant number of subsidiaries of foreign banks in Portugal, the Commission considers that any advantage from state resources would have the potential to affect intra-Union trade and to distort competition within the meaning of Article 107(1) of the Treaty.

Conclusion

(135) The EUR 600 million recapitalisation of BPN which took place on 15 February 2012 constitutes state aid.

The transfer of additional assets and liabilities from BPN linked to the sale

(136) The measures granted in connection with the sale to BIC include the right of BIC to request the transfer, before closing, of other assets and liabilities of BPN, such as loans to credit institutions, or physical and financial assets. They also include the right of BIC to transfer deposits with pricing […] bps above the relevant reference rate or to receive from the State the difference in remuneration for such deposits.

State resources

(137) The removal from BPN of certain loans and liabilities (including deposits) selected by BIC is directly financed by the Member State. Any items removed from BPN will either be transferred at book value to the SPVs, which are wholly owned by the Member State, or will in any case be under its financial responsibility. The Member State would thereby bear the financial burden of managing and disposing of those assets and liabilities. The Member State would also have to finance the difference between the applicable interest on deposits and the pricing threshold of […] bps above the reference rate.

Advantage

(138) The Commission considers that the transfer of additional assets and liabilities to the SPVs before the sale involves an advantage to BPN and the combined entity, because there was no *ex ante* transparency, assets were not valued at market price and the State was not remunerated in the framework of the transfer.

(139) The Commission considers that the transfer of assets at book value and not at market value confers an economic advantage on BPN and the combined

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entity compared with its competitors. BIC could freely choose the assets to be removed under that condition of the Framework Agreement and those assets would be neither valued at market value, nor the State reimbursed for them. On the contrary, to the extent that this option reduces the RWA of BPN, it would result in an increase of the bank's capital ratio, and consequently of its capacity to extend new loans and to be active in the market. After the sale, that advantage would be carried over to the combined entity.

(140) The remuneration by the State of the difference between the applicable interest on deposits and the pricing threshold of […] bps above the reference rate removes a cost that BPN would have to bear in normal circumstances, and therefore confers an advantage on it.

Selectivity

(141) The measures concerned are selective as they solely benefit a specific entity - BPN – and the economic activity that will be continued after the sale.

Distortion of competition and impact on trade

(142) The measures distort or threaten to distort competition as they place BPN and the combined entity after the sale to BIC in a beneficial position vis-à-vis other competing banks by not requiring it to deleverage unlike other competitors and by allowing BPN and the combined entity to grant more credit to the economy.

(143) Given the position of BPN in the Portuguese financial sector, and the fact that the financial sector is open to intense competition at Union level, as well as the fact that BPN is competing with a significant number of subsidiaries of foreign banks in Portugal, the Commission considers that any advantage from state resources would have the potential to affect intra-Union trade and to distort competition within the meaning of Article 107(1) of the Treaty.

Conclusion

(144) The transfer of additional assets and liabilities (including deposits) from the balance sheet of BPN to the SPVs before the sale constitutes state aid.

The right of BIC to transfer non-performing loans to the State after the sale

(145) BIC has the right to sell back within […] months loans that are non-performing for at least […] days (up to a maximum of […] % of the nominal value of the total loan portfolio selected by BIC after compensation with existing deposits) and for the amount exceeding the level of provisioning (EUR […] million).

State resources

(146) The right of BIC to remove additional assets and liabilities from the balance sheet after the sale is directly financed by the Member State. Any items removed from BPN will either be transferred at book value to the SPVs, which are wholly owned by the Member State, or will in any case be under its financial responsibility. The Member State would thereby bear the financial burden of managing and disposing of those assets.

Advantage

(147) The Commission considers that the possibility of removing non-performing loans after the sale enables BPN and the combined entity to expand their activity and grant more credit in an economic context where other competitors active in Portugal must deleverage. Indeed, if the same level of equity were retained, the bank's capital ratio would increase through the removal of non-performing loans and the reduction of RWA. Consequently its capacity to extend new loans and to be active in the market would increase.

(148) The combined entity will also have an advantage over its competitors that are faced with impairments on lower quality assets, which they have to absorb, limiting the capital available to them for new lending. The combined entity, in contrast, will not have its capital base reduced by such impairments and the decreasing value of its loan portfolio.

(149) In addition, the option of BIC to give back non-performing loans to the State until no later than […] after the date of the sale could alter the RWA of the bank and result in a higher core tier 1 capital than the level of [10-18] % implied in the offer of BIC of 20 July 2011. The Commission notes Portugal's commitment in this respect that if Banco BIC or the combined entity chooses to return loans to the State or any entity controlled by the State after the sale, it will pay back to the State the capital associated with those loans to the tune of [10-18] % of the loans' risk weighted assets and will, in addition, transfer non-performing loans and pay back the capital associated with those loans to the State only after having completely exhausted the provisions available at the date of the sale in the accounts of BPN.

Selectivity

(150) The measure concerned is selective as it solely benefits a specific entity - BPN – and the economic activity that will be continued after the sale.

Distortion of competition and impact on trade

(151) The measure distorts or threatens to distort competition as it places BPN and the combined entity after the sale to BIC in a beneficial position vis-à-vis other competing banks by not requiring it to deleverage unlike other competitors and thus allowing BPN and the combined entity to grant more credit to the economy.

(152) Given the position of BPN in the Portuguese financial sector, and the fact that the financial sector is open to intense competition at Union level, as well as the fact that BPN is competing with a significant number of subsidiaries of foreign banks in Portugal, the Commission considers that any advantage from state resources would have the potential to affect intra-Union trade and to distort competition within the meaning of Article 107(1) of the Treaty.

Conclusion

(153) The measure could allow BPN and the combined entity, in the absence of a commitment to give back the capital linked to the loans, to retroactively modify the RWA of the bank after the sale. This would result in a higher proportional capitalisation of the bank. It thereby confers an advantage on the bank and distorts competition with other competitors. The measure constitutes state aid.

The transfer of litigation risks to the State

State resources

(154) The transfer of BPN's litigation risks to the State constitutes a liability which is taken over by the State.

Advantage

(155) By taking over a liability from BPN, the State is granting an advantage to BPN and to the combined entity in comparison with their competitors who must incur equivalent liabilities on their own balance sheet.

Selectivity

(156) The measure concerned is selective as it solely benefits a specific entity (BPN and the combined entity resulting entity after the sale to BIC).

Distortion of competition and impact on trade

(157) The measure provides capital relief to BPN and the combined entity where no alternatives existed on the market and where other competitors must incur such liabilities on their balance sheet.

(158) Given the position of BPN in the Portuguese financial sector, and the fact that the financial sector is open to intense competition at Union level, as well as the fact that BPN is competing with a significant number of subsidiaries of foreign banks in Portugal, the Commission considers that any advantage from state resources would have the potential to affect intra-Union trade and to distort competition within the meaning of Article 107(1) of the Treaty.

Conclusion

(159) The measure provides a capital relief measure and constitutes state aid.

The granting by CGD of a EUR 300 million liquidity line to the combined entity after the sale and the maintenance of a credit line of commercial paper of EUR [150-350] million in favour of BPN

State resources

(160) The granting of a EUR [150-350] million liquidity line to the combined entity after the sale and the maintenance of a credit line of commercial paper of EUR [150-500] million by CGD in favour of BPN after the sale must be considered as imputable to the State taking into account the specific circumstances under which they occurred.

(161) First, CGD is wholly owned by the State, which appoints the members of its Board. As noted in paragraph (100), CGD was appointed by law to manage

BPN and also obtained a state guarantee pursuant to Article 2(9) of the Nationalisation Law in respect of all credit and liquidity it might grant to BPN in the context of the nationalisation and 'in substitution of the State'. That guarantee continues to apply to the EUR [150-500] million credit line.

(162) Second, the decisions to grant the liquidity and credit lines were not taken independently by CGD, but were part of the conditions of the sale negotiated between BIC and the Portuguese authorities.

(163) The granting by CGD of a EUR [200-400] million liquidity line to the combined entity after the sale and the maintenance by CGD of a credit line of commercial paper of EUR [150-500] million after the sale are therefore both directly imputable to the Member State.

Advantage

(164) The measures allow BPN and the combined entity to have easy and cheap access to liquidity.

(165) Concerning the EUR [200-400] million credit line granted by CGD to BIC, the Commission notes that it will provide a cushion for the combined entity's funding position, should there be deposit outflows after the sale. No such credit line is granted by CGD to any entity other than the combined entity. The credit line therefore constitutes an economic advantage for the combined entity.

(166) The maintenance of a credit line, with state guarantee, of EUR [150-500] million until […] for the ongoing commercial paper programme also gives BPN and the combined entity an advantage over its competitors in terms of access to liquidity.

Selectivity

(167) The measures concerned are selective as they solely benefit a specific entity (BPN and the combined entity resulting from the sale to BIC).

Distortion of competition and impact on trade

(168) The advantage granted to BPN and the combined entity after the sale distorts competition, all the more so considering the current high cost of borrowing on the financial markets.

(169) Given the position of BPN in the Portuguese financial sector, and given that the financial sector is open to intense competition at Union level, and that BPN is competing with a significant number of subsidiaries of foreign banks in Portugal, the Commission considers that any advantage from state resources would have the potential to affect intra-Union trade and to distort competition within the meaning of Article 107(1) of the Treaty.

Conclusion

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision of 27 March 2012 on the measures SA. 26909 (2011/C) implemented by Portugal for the restructuring of Banco Português de Negócios (BPN) (notified under document C(2012) 2043) (Only the Portuguese version is authentic) (Text with EEA relevance) (2012/660/EU). (See end of Document for details)*

(170) The grant by CGD of a EUR [200-400] million liquidity line to the combined entity after the sale and the maintenance of a credit line of commercial paper of EUR [150-500] million in favour of BPN constitute state aid.

6.1.1.4. Possible aid to the buyer

(171) According to point 49 of the Banking Communication, in order to ensure that no aid is granted to the buyer of a financial institution sold by the State, it is important that certain requirements are respected and in particular that: the sale process is open, transparent, non-discriminatory and unconditional, the sale takes place on market terms, and the State maximises the sale price for the assets and liabilities involved.

(172) Concerning the first requirement, while the sale process started as an open and unconditional tender procedure, the binding offer submitted by BIC was not final as regards several material aspects of the proposed transaction, including the ultimate extent of BPN's assets and liabilities that BIC intended to acquire, and the exact number of branches and the number of staff to be taken over. All those aspects were discussed in subsequent bilateral negotiations between the Portuguese authorities and BIC, and culminated in the Framework Agreement of 9 December 2011. Even the Framework Agreement is not final as regards the exact extent of the bank being acquired. In particular, it does not determine the assets and liabilities that BIC will take over, despite clearly specifying that BPN will have equity of EUR [200-400] million at the moment of sale. In other words, neither the BIC offer of 20 July 2011 nor the Framework Agreement clearly specify what BIC is buying, but both fix a precise price for it.

(173) In this connection, it is important to note that the Framework Agreement should not deviate from the terms of BIC's binding offer of 20 July 2011 by providing additional advantages to BIC and/or the combined entity. Indeed, given the very loose terms of the 20 July 2011 binding offer, BIC could very well extract additional concessions from the State, e.g. by reducing the extent of the assets and liabilities it effectively acquires. Such additional concessions would result in a higher core tier 1 ratio than the BIC offer of 20 July 2011 implied, without contradicting the terms of the sale process.

(174) The Commission therefore welcomes Portugal's commitment to limit the level of capitalisation of BPN on the date of the sale to [10-18] % of core tier 1 capital, as implied in BIC's offer. The additional commitment of Portugal for BIC to give back the capital linked to any non-performing loans that it would return to the State or to a state -owned vehicle after the sale ensures that the level of core tier 1 capital will not be unduly increased after the sale.

State resources

(175) As demonstrated in section 6.1.1.3 all the measures linked to the sale to BIC involve state resources.

Advantage

(176) In the absence of a determination of the core tier 1 capital of BPN in the BIC offer of 20 July 2011 or the Framework Agreement (both of which only indicate the absolute amount of capital to exist in BPN at the moment of the sale without taking into account the bank's RWA or the right to BIC to select assets and liabilities to be transferred to the SPVs prior to the sale), the Commission notes that it is possible that BPN may end up with a core tier 1 ratio in excess of what was implied in the offer. According to information submitted by the Portuguese authorities, [10-18] % of core tier 1 is the level of capital implied in BIC's offer of 20 July 2011.

(177) The Commission notes however that Portugal has undertaken to limit the level of capitalisation of BPN on the date of the sale to [10-18] % of core tier 1 capital, as implied by BIC's offer. This will allow the State to maximise the sale price for the assets and liabilities involved. This commitment is necessary to ensure that no advantage is granted to BIC.

(178) Moreover, by exercising the right to transfer to the State further non-performing loans after the sale, BIC could reduce further the extent of the bank, thus increasing the core tier 1 ratio for the combined entity to a higher level than the one implied in BIC's offer of 20 July 2011. This could confer an additional advantage on BIC. The additional commitment of Portugal for BIC to give back the capital linked to any non-performing loans that it would return to the State or to a state-owned vehicle after the sale ensure that the level of core tier 1 capital will not be increased further after the sale. This additional commitment is necessary to avoid conferring an advantage on BIC.

Selectivity

(179) The measures concerned are selective as they benefit a specific entity, namely BIC, and implicitly also the combined entity.

Distortion of competition and impact on trade

(180) Given the position of BPN in the Portuguese financial sector, and the fact that the financial sector is open to intense competition at Union level, as well as the fact that BPN is competing with a significant number of subsidiaries of foreign banks in Portugal, the Commission considers that any advantage from state resources would have the potential to affect intra-Union trade and to distort competition within the meaning of Article 107(1) of the Treaty.

Conclusion

(181) In view of the commitments granted by Portugal, the Commission can conclude that the final results of the process, including the elements agreed upon with BIC in the Framework Agreement, would not have altered the outcome of the tendering procedure and no advantage is granted to BIC by the sale process.

6.1.2 *Quantification of the aid*

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision of 27 March 2012 on the measures SA. 26909 (2011/C) implemented by Portugal for the restructuring of Banco Português de Negócios (BPN) (notified under document C(2012) 2043) (Only the Portuguese version is authentic) (Text with EEA relevance) (2012/660/EU). (See end of Document for details)*

(182) BPN and the combined entity that will continue BPN's economic activities benefited from several state aid measures as summarised below:

Table 1

Aid measures granted to BPN and the combined entity

Description		**Amount EUR million**
a.	Loans granted by CGD before nationalisation	315
b.	Transfer of EUR 3,9 billion of assets to the SPVs before the tender process	Between 1 800 and 4 000
c.	Capital injection by the State of 15 February 2012	600
d.	Liquidity lines granted by CGD to BPN (as of 31 December 2011)	[150-500]
of which covered by an explicit state guarantee		[200-400]
e. Liquidity lines requested by BIC for the combined entity		
of which maintenance of the existing commercial paper programme		400
of which new liquidity line		300

(183) First, it must be noted that these aid measures are not all to be considered as cumulative, as according to the Portuguese authorities, some measures replaced others (for example, the initial loans granted by CGD before nationalisation were replaced by the commercial paper issued by BPN after nationalisation).

(184) Measures b and c either involve capital injections or are equivalent to capital injections. They amount to at least EUR 3 billion, or around 50 % of BPN's balance sheet before nationalisation. In addition, the total amount of state guarantees on the commercial paper issuance programme granted by Portugal in favour of BPN since nationalisation amounts to EUR 5 billion, EUR 4,5 billion of which had been used as at 31 December 2011.

(185) In addition, there is the right for BIC to transfer deposits with a pricing above […] bps or to have the State remunerate the difference, with a cost

estimated by Portugal as amounting to around EUR […]. Finally, the transfer to the State of costs linked to litigation, and the transfer in the context of the sale of additional assets and liabilities, including non-performing loans, from the balance sheet of BPN to the SPVs, involve additional aid, which was considered non quantifiable by Portugal.

6.2 *Compatibility of the various aid measures: application of Article 107(3)(b) TFEU*

(186) Article 107(3)(b) of the Treaty on the Functioning of the European Union empowers the Commission to declare aid compatible with the internal market if it is intended 'to remedy a serious disturbance in the economy of a Member State'.

(187) The Commission has acknowledged that the global financial crisis can create a serious disturbance in the economy of a Member State and that measures supporting banks may be apt to remedy that disturbance. That analysis has been confirmed in the Banking Communication, Recapitalisation Communication[41], the Impaired Assets Communication[42] (IAC) and the Restructuring Communication[43]. The Commission continues to take the view that state aid may be approved pursuant to Article 107(3)(b) of the Treaty in view of the reappearance of stress in financial markets. The Commission confirmed that view by adopting the 2011 Prolongation Communication that prolongs beyond 31 December 2011 the application of state aid rules to support measures in favour of banks in the context of the financial crisis[44].

(188) Portugal in particular has been severely hit by the financial and economic crisis. Its effects have been confirmed in the Commission's various decisions[45] approving the measures taken by the Portuguese authorities to combat the financial crisis. In addition, account should be taken of the challenging economic and financial situation which led to an official request for international assistance from Portugal on 7 April 2011, leading to the signing of the MoU on 17 May 2011.

(189) The Commission considers that the disorderly failure of BPN would entail serious consequences for the Portuguese economy. The measures can therefore be assessed under Article 107(3)(b) of the Treaty.

6.3 *Compatibility under the Restructuring Communication*

(190) The Restructuring Communication sets out the state aid rules applicable to the restructuring of financial institutions in the current crisis. According to the Restructuring Communication, in order to be compatible with Article 107(3)(b) of the Treaty, the restructuring of a financial institution in the context of the current financial crisis has to:

(i) lead to a restoration of the viability of the bank;

(ii) include sufficient own contribution by the beneficiary (burden-sharing);

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(iii) contain sufficient measures limiting the distortion of competition.

6.3.1 *Viability*

(191) Points 9 and 10 of the Restructuring Communication state that the Member State should provide a comprehensive and detailed restructuring plan which should provide complete information on the business model. The plan should also identify the causes of the difficulties faced by a financial institution and alternatives to the restructuring plan proposed.

(192) The restructuring plan should demonstrate that the bank's strategy is based on a coherent concept and show that the bank has restored long-term viability without reliance on state support.

(193) The Restructuring Communication in point 17 confirms that a sale of (part of) the financial institution to a third party can help to restore its long-term viability. In the present case the Commission observes that the Portuguese authorities have chosen to sell BPN through a tender process. As a result, the banking business will be sold to BIC after certain adjustments, and selected assets will be transferred to the SPVs with the goal of being liquidated over time. The Commission therefore has to assess whether the banking business of BPN which will be part of the business of the buyer (the combined entity), will be viable.

(194) In the Decision of 24 October 2011 the Commission indicated that it had not received a business plan effectively demonstrating the viability of BPN as an integrated entity with BIC and thus it could not reach a conclusion in that respect. Portugal submitted a detailed business plan for BPN integrated with BIC in the form of the January 2012 Restructuring Plan (including the additional information on the business and viability provided on 3 February 2012).

(195) According to the January 2012 Restructuring Plan, the part of BPN which is sold to BIC has a considerably smaller balance sheet, of around EUR […] billion, in comparison with that of BPN at the moment of nationalisation.

(196) Together with BIC's assets, the combined entity will have total assets of around EUR […] billion.

(197) The balance sheet of BPN at the moment of the sale to BIC contains only the more viable activities and the best assets of the bank. In particular, the loan portfolio transferred to BIC has been cleaned and most of the illiquid assets have been transferred to the SPVs.

(198) BPN's liabilities consist mainly of retail deposits totalling EUR 1 669 million and subordinated debts totalling EUR 246 million.

Table 2

BPN after the sale and after capital injection (Pro forma)[a]

	EUR Million
Cash, central banks and credit institutions	[…]
Net credits to customers	[…]
Other assets	[…]
TOTAL ASSETS	[…]
Deposits	[…]
Other liabilities	[…]
Subordinated debt	[…]
TOTAL LIABILITIES	[…]
Own Capital	[…]
TOTAL LIABILITIES AND CAPITAL	[…]

a Submission by Portugal dated 17 February 2012, Annex II.

(199) The restructuring measures already initiated by the interim administrators will be continued by BIC, remedying the specific causes of BPN’s problems.

(200) As indicated in paragraph (24) above, the management has been fully replaced. Taking into account the specific circumstances that led to the nationalization of BPN, and in particular numerous alleged cases of fraud committed by the former management of the bank, several legal proceedings[46] have been initiated by the new management to defend the interests of the bank. The bank’s risk assessment procedures have been completely redesigned to implement best practices.

(201) The new administrators of BPN also concentrated on the optimisation of the cost structure and adopted a number of initiatives to reduce operational costs. Between December 2008 and December 2010 operational costs were reduced by around EUR […] million and personnel costs were reduced by around EUR […] million.

(202) According to the January 2012 Restructuring Plan, BIC’s strategy is to concentrate on the core retail business and to exploit BPN’s network to become the reference bank to support trade and financial transactions between Portugal and Angola.

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(203) That plan is based on reasonable underlying macroeconomic assumptions, when account is taken of the current situation of the markets in Portugal, with the economy forecast to remain in recession until 2014.

(204) The financial projections show that at the end of the restructuring period (31 December 2016) the combined entity is expected, even in a stress scenario, to be able to cover its costs and realise an ROE of approximately [1-10] %.

(205) The expected initial capital base is going to be well above the minimum capital requirements with a core tier 1 ratio of around [10-18] %, thanks to the capital injection by the State.

(206) As a result of the significant capital injection by the State, the projected capital ratios of the bank during and at the end of the restructuring period are expected to stay above the minimum requirements and thus to safeguard the solvency of the bank. According to the business plan provided by Portugal and reflected in the January 2012 Restructuring Plan, under a base case scenario the core tier 1 capital at the end of the restructuring period (31 December 2016) will be [8-12] %, slightly above the minimum regulatory requirements of 10 % established by the BdP as of December 2012[(47)], and under a stressed scenario just below it ([7-11] %) as indicated in Graph 1 attached to paragraph (207).

(207) That evolution is expected to be mainly due to the need to implement the business plan set out in the January 2012 Restructuring Plan by granting a larger volume of credit to the economy, and to the impact of negative results in the first years of the restructuring plan. The negative results will mainly be due to the still high cost structure of the bank, when compared with its business volume, combined with the cost of the restructuring BIC will undertake.

Graph 1 **Projections for the combined entity BPN/BIC under the base case scenario, 2012-2016**

[…]

(208) As to liquidity, the business plan relies mainly on deposits, with a projected deposit growth of around [1-10] % per year. The Commission considers that a stable financing of the combined entity via deposits is an important feature of the restructuring plan. Considering the small size of the combined entity and its growth potential, the projections for deposit evolution are credible.

(209) At the same time, the Commission considers that in order to ensure the viability of the combined entity, there should be no incentive to replace deposits with wholesale funding. In that vein, it is important that the remuneration of the liquidity line requested by BIC to compensate for a possible deposit outflow is increased to at least Euribor +[…] bps. Portugal's commitment in this respect is necessary to ensure the compatibility of the restructuring aid with the internal market, taking into account the fact that […] has a significant amount of deposits which are currently remunerated in

excess of Euribor +[…] bps, a level at which BIC can choose not to retain those deposits. If the remuneration on the new credit line were not set at a level which gives BIC an incentive to maintain the level of deposits in line with what is foreseen in the January 2012 Restructuring Plan, BIC could be induced to substitute deposits with cheaper funding from CGD. Such a substitution might improve the combined entity's short-term profitability, but at the same time it would damage its prospects of viability.

(210) In that respect, it is also important to note that at Euribor +[…] bps, the credit line is still granted at more favourable terms than BIC is likely to obtain in the market. While no comparable benchmark has been provided to the Commission for similar transactions occurring in the market, the Commission notes that it would be unlikely that a credit line of that duration and size would be available on the market, even at higher interest levels. Additionally, the Commission considers it instructive that the remuneration on loans granted by CGD […] is fixed at Euribor […] months +[…] bps.

(211) On the basis of the foregoing the Commission's doubts on the viability of BPN have been allayed.

6.3.2 *Aid limited to the minimum and burden-sharing*

(212) The Restructuring Communication indicates that an appropriate contribution by the beneficiary is necessary in order to limit the aid to a minimum and to address distortions of competition and moral hazard. To that end: a) both the restructuring costs and the amount of aid should be limited and b) a significant own contribution is necessary.

(213) The principles on the own contribution of the beneficiary bank in the restructuring phase are laid down in section 3 of the Restructuring Communication. It requires (i) that the restructuring aid is limited to the minimum to cover costs necessary for restoring viability; (ii) that the beneficiary bank should use to the extent possible its own resources to finance restructuring, for example, through the sale of assets and (iii) that the costs associated with the restructuring are also adequately borne by those who invested in the bank by absorbing losses with available capital and by paying an adequate remuneration for state interventions. The objective of burden-sharing is twofold: to limit distortions of competition and to address moral hazard[48].

(214) A restructuring plan should clearly show that the aid has been kept to the minimum necessary. Costs associated with the restructuring should be borne not only by the State but to a maximum extent also by those who invested in the bank. In other words, the bank and its capital holders should contribute to the restructuring as much as possible with their own resources. Restructuring aid should be limited to covering costs which are necessary for the restoration of viability. Accordingly, an undertaking should not be endowed with public

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resources which could be used to finance market-distorting activities not linked to the restructuring process, such as acquisitions[(49)].

Limitation of the aid to the minimum

(215) As regards the limitation of the aid to the minimum, the Restructuring Communication indicates in point 23 that the restructuring aid should be limited to covering the costs which are necessary for the restoration of viability.

(216) To that end, the Commission needs to assess: first, the claim of the Portuguese authorities that the costs associated with the sale of BPN to BIC are lower than the costs that would be incurred by Portugal if BPN were liquidated; and second, whether the aid granted for the restructuring of BPN has been kept to the minimum necessary.

Sale/orderly liquidation comparison

(217) In the Decision of 24 October 2011 the Commission questioned several aspects of the quantitative comparison between the two scenarios as provided by Portugal at the time.

(218) In the January 2012 Restructuring Plan Portugal provided an updated comparison of the two scenarios and modified its initial assumptions to address the main concerns expressed by the Commission in the Decision of 24 October 2011, which related to the costs in the event of orderly liquidation. Specifically, Portugal addressed the haircut on loans and the treatment of subordinated bond holders.

(219) In particular, Portugal provided additional information and an alternative benchmark regarding its assumption in relation to the haircut to book value of 30-50 % on the sale of loans. Portugal also provided the final figures on the loans eventually taken over by BIC, whose amount was not known at the moment of the initial comparison, on 17 February 2012. It also removed from the orderly liquidation scenario costs associated with the reimbursement of certain subordinated bond holders, as specified in paragraph (221).

(220) The Commission considers that, when account is taken of the current economic situation and the substantial deleveraging of the banking sector, the application of a haircut on the sale of a loan portfolio is justifiable. Also, if the loans had to be held until maturity, the State would need to incur financing costs and bear the credit risk until maturity. The Commission therefore can accept the lower range estimate of a haircut provided by Portugal, i.e. a haircut of [20-50] %.

(221) In relation to subordinated bond holders, the Commission understands that the total amount of EUR 245 million is composed of various issuances. It may be possible […]. Portugal submitted that, after a legal assessment of the conditions of each issuance, […].

(222) Table 3 provides an overview of the estimation of inflows/outflows, taking account of the revised assumptions mentioned in paragraphs (219)-(221) above. That estimation takes into account only the marginal costs linked to the two scenarios (and not the costs already incurred) and is based on the balance sheet data of BPN at the time of the sale to BIC[(50)].

Table 3

Comparison of the sale to BIC and orderly liquidation scenarios (Data in EUR million)

		Sale to BIC	**Liquidation**
OUTFLOWS			
1	Payment of the funding to credit institutions		[…][a]
2	Payment of deposits from clients		[…]
3	Capital increase	[…]	
4	Subordinated bond holders excluding perpetual issuance TBC		[…]
	Total Outflows	[…]	[…]
		Sale to BIC	**Liquidation**
INFLOWS			
5	Sale of client loans (EUR 2 114 million net of haircut 30 %)		[…]
6	Reimbursement cash and loans to credit institutions		[…][b]
7	Price BPN sale	[…]	
8	Deposits sale premium - 2 % of the deposit balance		[…]
	Total Inflows		[…]

a Value of debts to credit institutions taken over by BIC before the capital injection by the State.

b Value of cash and loans to credit institution taken over by BIC before the capital injection by the State.

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Table 3

Comparison of the sale to BIC and orderly liquidation scenarios (Data in EUR million)

	ESTIMATED DIFFERENCE	[…]	[…]

a Value of debts to credit institutions taken over by BIC before the capital injection by the State.

b Value of cash and loans to credit institution taken over by BIC before the capital injection by the State.

(223) Overall the options of orderly liquidation whereby the State would pay all deposits (other than those of subordinated creditors holding perpetual bonds) and whereby the State would pay the whole exposure to credit institutions would be more costly than the sale to BIC.

(224) The Commission recognises the uncertainty linked to a number of assumptions, namely the possibility to recover the credits transferred to BIC. Account should also be taken of the fact that orderly liquidation could have negative spillovers on confidence in the whole banking sector and the sovereign rating of the Member State.

(225) On the basis of the available information, the Commission concludes that the option of restructuring of the bank, i.e. the sale to BIC, contributes to limiting the aid amount to the minimum.

Aid limited to minimum in the restructuring of BPN

(226) BPN received a significant amount of aid before and after the nationalisation as indicated in paragraphs (182) to (185). The aid was necessary to keep the bank afloat for the period necessary to implement the chosen restructuring, which is the sale of its viable parts to BIC and the liquidation over time of the bad assets. As a result of the restructuring process, BPN will disappear as an independent bank. The retail banking business that will be taken over by BIC has a balance sheet of less than 35 % of the balance sheet of BPN before its nationalisation. In the prevailing market conditions, these measures (and in particular the separation of the non-retail banking assets in the SPVs) are intimately linked to the viability of the bank that remains on the market. The business and activities other than retail banking have been transferred to the SPVs to be liquidated over time. The Commission recognises that the significant delays in the implementation of the restructuring of BPN are connected to the exceptional circumstances that affected the Portuguese economy and led to the signing of the MoU of 17 May 2011.

(227) As indicated by the Commission in its Decision of 24 October 2011, in addition to the measures granted to BPN before its sale, BIC is requiring additional measures, which are indicated in paragraph (56).

(228) In its Decision of 24 October 2011 the Commission raised the question of whether the capital injection requested by BIC was the minimum amount necessary to ensure viability. Taking into account the balance sheet adjustments requested by BIC in its offer of 20 July 2011 and the June 2011 BPN financial statements, Portugal estimated that a level of capital of EUR [200-400] million represents a core tier 1 capital ratio of [10-18] %.

(229) Portugal claims that level of capital is the result of the tender process, when account is also taken of the price BIC will pay to the State (EUR 40 million). It is justified by the costs of refocusing the bank on its core business and the need to maintain a sufficient buffer of additional capital. Portugal considers that the buffer is adequate to maintain a sufficient level of own capital, in particular in the initial years of the integration, when account is also taken of the negative reputation of BPN and the difficult economic situation of Portugal.

(230) It should be noted that according to the January 2012 Restructuring Plan the capital ratio is estimated to reach [8-12] % at the end of the fourth year after the sale and, under a stressed scenario, to reach [7-11] % (slightly lower than the minimum required by law in Portugal of 10 %).

(231) The Commission can therefore conclude that the capital level equivalent to a core tier 1 ratio of [10-18] % is the result of the tender process and is necessary to ensure the viability of the bank, based on the January 2012 Restructuring Plan.

(232) The Commission also regards as positive the fact that the Framework Agreement with BIC includes a commitment by BIC not to distribute dividends or other equivalent benefits to shareholders in relation to BPN for a period of five years. The purpose of that commitment is to ensure that the capital injected in BPN will not immediately leave the bank, in the form of resources distributed to shareholders.

(233) However the final assets eventually taken over by BIC differ from the BIC offer of 20 July 2011 and BIC also reserves the right to give back loans that are non-performing. The Commission therefore considers that in order to maintain the aid to the minimum, any reduction in RWA resulting from the restitution of loans to the State should be accompanied by a corresponding reduction in capital, to the tune of [10-18] % of the reduction in the RWA. The reduction in capital could take the form of a haircut to the book value of the loans given back to the State.

(234) The Commission notes that BIC has suggested that the combined entity could maintain a core tier 1 ratio of [10-18] % in the event it were to give back non-performing loans, by extending new credit to the economy. The Commission considers that such a measure would not limit the aid to the minimum for the following reasons. First, BIC's own capital ratio before the sale will be inferior to [10-18] % at the date of the sale. Therefore as soon as BPN is merged

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with BIC, the level of core tier 1 in the combined entity will immediately decrease (as reflected in the January 2012 Restructuring Plan). Accordingly, if the combined entity were to maintain a core tier 1 ratio of [10-18] % after the merger, it would have a capitalisation above what BIC itself has forecast. Second, the January 2012 Restructuring Plan already factors in new lending to the economy, and for that purpose the (very high) [10-18] % core tier 1 level in BPN at the moment of the sale is considered sufficient. There is therefore no need to dedicate even more capital than is foreseen in the January 2012 Restructuring Plan to the production of new loans. In this respect, the Commission takes a positive view of the commitment given by Portugal that the core tier 1 capital ratio of BPN at the date of the sale to Banco BIC will not be higher than [10-18] % and that if non-performing loans are transferred to the State or any entity controlled by the State after the sale, Banco BIC or the combined entity will transfer to the State or any entity controlled by the State any capital associated with those loans to the tune of [10-18] % of the loans' risk weighted assets.

(235) In addition, the Restructuring Communication states that an acquisition ban is necessary to keep the aid limited to the minimum necessary. Point (23) of the Restructuring Communication mentions explicitly that 'an undertaking should not be endowed with public resources which could be used to finance market-distorting activities not linked to the restructuring process. For example, acquisitions of shares in other undertakings or new investments cannot be financed through State aid unless this is essential for restoring an undertaking's viability'.

(236) The Commission observes that already in the January 2012 Restructuring Plan it was indicated that the combined entity will become a viable entity that should realise an acceptable ROE and is even expected to realise profits. That return to viability does not hinge on acquisitions. On the contrary, the Commission considers that an acquisition ban will ensure that the capital considered necessary for the restructuring remains in the bank, therefore aiding the return to viability. In this respect, the Commission considers that the commitment by Portugal to enforce an acquisition ban is necessary to ensure the compatibility of the restructuring aid with the internal market.

Own contribution

(237) As regards own contribution, the Restructuring Communication requires restructuring costs to be borne not only by the State but also by a bank's past investors and former shareholders. That requirement ensures that rescued banks bear adequate responsibility for the consequences of their past behaviour and creates appropriate incentives for their future behaviour.

(238) In the present case the Commission takes a positive view of the fact that the shareholders have lost their stake in the bank without any compensation. They are thus adequately participating in the burden-sharing for a bank whose value was negative according to the estimation of two independent entities

appointed by Portugal. It also regards as positive the fact that the board of BPN has been changed and replaced in the context of the nationalisation process.

(239) However, the Commission notes that subordinated bond holders, holding an amount of EUR 245 million, will be maintained in the bank that is being privatised and may continue to receive coupons.

(240) As stated in point 26 of the Restructuring Communication, ‘banks should not use State aid to remunerate own funds (equity and subordinated debt) when its activities do not generate sufficient profits’.

(241) As to the period under which BPN was in restructuring, BPN has not complied with the Commission’s policy on hybrid instruments as set out in point 26 of the Restructuring Communication. The Commission clarified there that in a restructuring context the discretionary offset of losses (for example by releasing reserves or reducing equity) by beneficiary banks in order to guarantee the payment of dividends and coupons on outstanding subordinated debt, is in principle not compatible with the objective of burden-sharing. The Commission notes that the payment of coupons did not respect that principle and should be compensated for by a more in-depth restructuring[51].

(242) The Commission considers that the far-reaching restructuring of the bank can be sufficient to compensate for the lack of burden-sharing.

(243) However, since the bank is now being sold, a ban on calls until 31 December 2016 is necessary to provide a minimum level of burden-sharing from the bank’s capital holders.

(244) In this respect, the Commission takes stock of the commitment by Portugal that, in order to contribute to the restructuring process of BPN, Banco BIC, the combined entity and Portugal will not exercise until 31 December 2016 any call option rights in relation to subordinated debt issued by BPN prior to the date of the sale.

Remuneration of the aid measures

(245) The Commission notes that the remuneration for each of the aid measures listed in paragraphs (182) to (185) above, and in particular the guarantees, the capital injection and the transfer of assets to the SPVs, is not in line with the relevant Communications of the Commission.

(246) The state guarantees were priced at 20 bps, well below the level resulting from the application of the Commission’s rules on the remuneration of state guarantees on liabilities issued by financial institutions.

(247) The EUR 600 million capital injection into BPN of February 2012 clearly does not bear a remuneration that is in line with the Recapitalisation Communication. Indeed, the Portuguese authorities expect no remuneration on the capital injected. As a matter of fact, the capital was injected with the purpose of allowing the sale of the bank at a negative price.

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(248) As to the transfer of assets to the SPVs at book value, whilst the Commission acknowledges from a theoretical point of view that the transfer of assets to the three SPVs is intended to protect BPN's viability and to allow for its sale, the transfer at book value entails aid that is not in line with the main requirements of the IAC. In particular, the transfer is at book value, well above the real economic value and no remuneration for the State is contemplated. The IAC recognises that in-depth restructuring can compensate for potential misalignments with the main criteria of that Communication, including those on pricing. The existence of in-depth restructuring of BPN is an element that could allow the Commission to find that measure compatible with the Impaired Assets Communication. Thus, the transfer of assets to the SPVs could be assessed together with the rest of the measures in favour of BPN and as a part of the far-reaching restructuring.

(249) Point 25 of the Restructuring Communication sets out that any derogation from an adequate burden-sharing ex ante which may have been exceptionally granted in the rescue phase for reasons of financial stability should be compensated for by a further contribution at a later stage of the restructuring, for example in the form of claw-back clauses and/or by farther-reaching restructuring including additional measures to limit distortions of competition.

(250) The Commission considers that the restructuring of BPN is sufficiently far-reaching. It notes first that the bank is small in size. As a result of the restructuring process, BPN will disappear as an independent bank. The retail banking business that will be taken over by BIC has a balance sheet of less than 35 % of the balance sheet of BPN before its nationalisation. Businesses and activities other than retail banking have been exited for good.

(251) Therefore, the Commission can conclude that burden-sharing is adequate in light of the far-reaching restructuring of BPN.

6.3.3 *Measures to limit distortions of competition*

(252) As regards measures to limit distortions of competition, the Restructuring Communication provides that the nature and form of such measures will depend on the amount of aid and the conditions and circumstances under which it was granted and also on the characteristics of the market(s) on which the beneficiary bank will operate.

(253) While the amount of aid received by BPN is significant, account should be taken of the limited size of BPN. As indicated in point 32 of the Restructuring Communication, the Commission will analyse the likely effects of the aid on the markets where the beneficiary bank operates after the restructuring. First of all, the size and the relative importance of the bank on its market, once it is made viable, will be examined.

(254) In that regard, the Commission notes that BPN will no longer continue as the same economic entity as before the state intervention.[52] It has undergone

nationalisation and a profound in-depth restructuring. As a result, a much smaller bank will compete on the market.

(255) BPN was the seventh-largest financial institution in Portugal by balance sheet size at the end of 2008. Since its nationalisation, it has been reduced in size, in particular as a result of a deposit outflow. It ranks 12th as of mid-2011 with a market share for both deposits and loans of less than 1 %. Deposits and loans nearly halved in the period 2008-2011.

(256) In its observations on the Decision of 24 October 2011, Portugal stated first that, already before the nationalisation, BPN had a market share of around [1-2] %. Second, after nationalisation, BPN was significantly restructured and its size continued to be reduced. Third, even after the integration with BIC, the new integrated entity will have less than [< 1] % of market share in Portugal, as the market share of BPN is currently around [< 1] % for both credit to customers and deposits and the market shares of BIC is in the order of [< 1] % for loans and [< 1] % for deposits.

(257) The Commission also notes that the sale of the banking business via a tender procedure gave competitors the opportunity to acquire the brand and business of BPN thereby limiting the distortions of competition.

(258) The Commission also takes a favourable view on the dividend policy as described in paragraph ((56) (xiii)).

(259) In addition, point 44 of the Restructuring Communication also mentions that banks should not cite state support as a competitive advantage when marketing their financial offers. The Commission regards as positive the commitment given by Portugal that BIC will not refer to the use of state aid in its marketing campaigns and communication to investors.

(260) In its Decision of 24 October 2011, the Commission expressed doubts as to whether the envisaged measures were sufficient when account was taken of the significant amount of aid and the fact that BPN had received a recapitalisation, guarantees and impaired asset measures which were not remunerated in accordance with the requirements of the relevant Communications.

(261) In particular, the Commission noted that that the bank would operate in the market with an initial core tier 1 capital ratio of [10-18] %, far above the minimum levels of 9 % required at the end of 2011 and of 10 % at the end of 2012.

(262) In addition, BIC requested the right to sell back within […] months loans that were non-performing for at least […] days (up to […] % of the total nominal value of the loan portfolio). It also requested the maintenance of liquidity support from CGD in two forms. The first of them is the maintenance of the commercial paper programme line of credit for up to EUR [150-500] million with a state guarantee for three years and the commitment by CGD to maintain

the terms of the credit line until […]. The second is a new credit line to be granted by CGD for up to EUR [150-350] million to compensate for a fall in deposits below EUR 1,8 billion, with a remuneration of Euribor +[…] bps.

(263) This should ensure that the state aid is not used by the combined entity to grow at the expense of competitors and that the competition distortions caused by the aid are properly addressed.

(264) Given the tense situation in the market and the tight conditions imposed upon the banking sector by Portugal as a result of the events leading to the signature of the MoU, the Commission considers that these liquidity lines would significantly affect the extent to which the combined entity will be able to compete on the market with other players that have not received state aid.

(265) The state aid can therefore be declared compatible only if there are sufficient measures in place ensuring that the state aid is not used to the detriment of competitors, some of which have not received similar public support. A level playing-field should remain in place between banks which have received public support and those which have not. The state aid should not weaken incentives for non-beneficiaries to compete, invest and innovate, or create entry barriers which could undermine cross-border activity.

(266) It is necessary to ensure that the combined entity does not benefit from a competitive advantage arising from the shift of liquidity risk to the State and from the capital endowment.

(267) Firstly, the Commission considers that in order to limit competition distortions resulting from the fact that the bank would have a capital level above the minimum requirement (see paragraph (261)), any reduction in RWA resulting from the restitution of loans to the State should be accompanied by a corresponding reduction in capital. Therefore, the commitment given by Portugal on the maximum capital level of BPN is necessary to ensure the compatibility of the restructuring aid with the internal market.

(268) Secondly, the Commission considers that the duration of the credit line of EUR [150-500] million linked to BPN's commercial paper programme should be limited to a period of […] years. Moreover, the remuneration for the second liquidity line should be closer to market conditions and set at Euribor +[…] bps. At the same time, Portugal should request the prior approval of the Commission in advance of any granting of credit lines or guarantees by CGD or the State until 31 December 2016, to ensure that those limitations are not circumvented. In that respect, the Commission takes note of the commitments given by Portugal on the liquidity lines; they are necessary to ensure the compatibility of the restructuring aid with the internal market.

(269) Thirdly, the Restructuring Communication also links an acquisition ban to distortions of competition. In points 39 and 40, the Communication explains that 'state aid must not be used to the detriment of competitors, which do not

enjoy similar public support', and that 'banks should not use state aid for the acquisition of competing businesses'. The Commission welcomes Portugal's commitment referred to in paragraph (236) to enforce an acquisition ban until 31 December 2016.

(270) Lastly, the entitlement for BIC to give back non-performing loans to the State should end as of […] and not […] months after the date of the sale. The Commission considers that BIC has had the opportunity to review BPN loans since the opening of the tender and in particular after the signing of the Framework Agreement on 9 December 2011. In addition the loan portfolio has already been cleaned twice: with the transfer of the least performing loans to the SPVs in December 2010 and subsequently by BIC as the buyer requested the right to give back to the State additional amounts of loans to meet the [110-150] % LTD ratio.

(271) The Commission notes that any further possibility of return offers BIC a protection against the risk of the worsening economic situation. Any subsequent 'non-performance' would in all likelihood reflect the worsening of the economic situation, and thus affect the entire banking sector. The entitlement for BIC to give back non-performing loans to the State distorts competition as no other banks will have that possibility. The window for returns should therefore be reduced until […] as a maximum. In this respect, the Commission welcomes the commitment given by Portugal to respect the […] deadline.

6.3.4 *Conclusion*

(272) If all the commitments described in section 5.2 are correctly implemented, the January 2012 Restructuring Plan provides sufficient evidence that the long-term viability of the combined entity has been restored, that sufficient burden-sharing is achieved and that adequate measures to limit undue distortions of competition are taken. Therefore, the Commission can declare the January 2012 Restructuring Plan to be in line with the Restructuring Communication.

6.3.5 *Monitoring*

(273) Point 46 of the Restructuring Communication indicates that, in order to verify that the restructuring plan is being implemented properly, detailed regular reports from the Member State are necessary. Accordingly, Portugal should provide the Commission with such reports every six months, starting from the date of this Decision.

7. **Conclusion**

(274) The Commission regrets that Portugal unlawfully implemented the state aid listed in section 6.1.2 'Quantification of the state aid' in breach of Article 108(3) of the Treaty. However, that aid, along with the other aid measures considered in this Decision, can be found compatible if the commitments described in section 5.2 are implemented,

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HAS ADOPTED THIS DECISION:

Article 1

1 The following measures granted by Portugal constitute state aid:

i. Loans granted by CGD before nationalisation;

ii. Loans and liquidity lines granted by CGD to BPN after nationalisation and before the sale, with or without an explicit state guarantee;

iii. Transfer of assets from BPN to the SPVs at book value before and after the sale;

iv. Capital injection by the State of 15 February 2012;

v. Liquidity lines to be granted by CGD requested by BIC for the combined entity;

vi. Right for BIC to transfer deposits with a pricing above […] bps to the State, or to have the State remunerate the difference; and

vii. Transfer to the State of costs linked to litigation.

2 The aid measures set out in paragraph 1 are compatible with the internal market in light of the commitments set out in Section 5.2.

Article 2

Within two months of notification of this Decision, Portugal shall inform the Commission of the measures it has taken to comply with this Decision. Furthermore, Portugal shall submit detailed reports on the measures taken to comply with it, starting six months from the date of this Decision.

Article 3

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 27 March 2012.

For the Commission

Joaquín ALMUNIA

Vice-President

(**1**) OJ C 371, 20.12.2011, p. 14.

(**2**) OJ L 83, 27.3.1999, p. 1.

(**3**) Portugal, 'Memorandum Of Understanding On Specific Economic Policy Conditionality', 17 May 2011, http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf.

(**4**) As described in more detail in paragraph (53) BIC is a small bank which has been active in Portugal since 2008.

(**5**) 'Note on Banco Português de Negócios' dated 17 February 2010.

(**6**) See for example p. 96 of the Report on Financial Stability of the Bank of Portugal for the year 2008.

(**7**) CGD is a bank wholly owned by the Portuguese State.

(**8**) 'Note on Banco Português de Negócios' dated 17 February 2010, page 4.

(**9**) Those impairments were estimated, after the nationalisation, 'at more than 20 % of the total of the assets of BPN at that time'; see Memorandum of 14 September 2010, p. 17.

(**10**) According to the evaluations of both Deutsche Bank and Deloitte, BPN had a negative asset and financial value at the date of nationalisation.

(**11**) Report on Financial Stability of the Bank of Portugal for the year 2008, cited at p. 16 of Memorandum of 14 September 2010.

(**12**) Article 2(9) of the Nationalisation Law.

(**13**) See p. 3 of the document sent by the Portuguese authorities entitled 'Nota: Banco Português de Negócios, S.A.' dated 17 February 2010.

(**14**) In October 2008, CGD signed three short-term loan agreements with BPN: (i) on 9 October 2008 for an amount of EUR 200 million with a pledge over certain assets as well as the promise of mortgage rights over buildings under the control of BPN (ii) on 28 October 2008, for an additional amount of EUR 15 million, and (iii) on 29 October 2008, in the form of a new loan for EUR 20 million. A fourth short-term loan was granted by CGD for the purposes of liquidity provision to BPN for an additional EUR 80 million and was signed on 3 November 2008. All four loans were undertaken on Euribor 1 month plus spread of 1 % and the second, third and fourth loans benefited from the same collateral rights as the first EUR 200 million loan.

(**15**) According to the 'Nota on BPN' dated 17 February 2010, the ELA facility was contracted on 17 October 2008, and was increased on 27 October 2008.

(**16**) See p. 32 of January 2012 Restructuring Plan.

(**17**) See p. 28 of January 2012 Restructuring Plan.

(**18**) Resolução do Conselho de Ministros n.º 57-B/2010) for the reprivatisation of BPN. The decree-law setting out the legal framework for the privatisation of BPN was approved in November 2009.

(**19**) See p. 35 of January 2012 Restructuring Plan.

(**20**) See the 'Aviso de Banco de Portugal nº 3/2011' that requires credit institutions to reach a consolidated basis core tier 1 ratio of 9 % by 31 December 2011.

(**21**) See response of the Portuguese authorities of 17 February 2012, Q. 7.

(**22**) Confidential data.

(**23**) Point 2.10 and 2.11 of the MoU.

(**24**) A Memorandum governing the rules of the process was signed between BPN and the parties who declared an interest to enter the data room.

(**25**) Núcleo Estratégico de Investidores (NEI), a group of investors.

(**26**) See document sent by the Portuguese authorities entitled 'Plano Revisto', dated 20 January 2012, p. 125.

(**27**) Minuta de contrato de compra e venda das acções no âmbito da reprivatização do Banco Português de Negócios, S.A.

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(**28**) According to Article 2.5 (c) of the Framework Agreement the agreement would be terminated should the sale not be concluded by 31 March 2012 (subject to the possibility for BIC to extend that deadline).

(**29**) The amount of the capital injection needed to reach the level sought by BIC was estimated by the Portuguese authorities as follows: approximately EUR […] million in September 2011, EUR […] million in November 2011, and EUR 600 million in January 2012.

(**30**) The SPVs passed from the control of BPN on 15 February 2012 and were transferred to the State.

(**31**) The Portuguese authorities note that the current non-performing loans amount to EUR […] million as at September 2011, see document sent by the Portuguese authorities entitled 'Plano Revisto', dated 20 January 2012, p. 126.

(**32**) According to the Portuguese authorities, the existing provisions should ensure that BIC will in practice not use that possibility, as non-performing loans would need to increase in the first year following the sale by around […] % for BIC to be able to use that option

(**33**) That reference rate may vary depending on duration and currency of the deposits (EURIBOR/LIBOR).

(**34**) That possibility was included in the Framework Agreement in order not to impose on BIC any less prudent decisions taken by the previous management of BPN.

(**35**) According to the answer of the Portuguese authorities of 2 September 2011 and the document sent by the Portuguese authorities entitled 'Plano Revisto', dated 20 January 2012, p. 126, BIC can use that money line for up to three years during a drawing period of four years.

(**36**) Electronic mail from the Portuguese authorities received on 17 February 2012 in response to Commission's request for information of 8 February 2012, question17. According to that response, the capital injection led to the reimbursement of EUR 210 million of CGD money market loans.

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

(**38**) Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8, point 51.

(**39**) Considering the submission of 20 January 2012 that sets out the loan of EUR 80 million granted on 3 November 2008.

(**40**) See the 'Aviso de Banco de Portugal n° 3/2011' that requires credit institutions to reach a consolidated basis core tier 1 ratio of 9 % by 31 December 2011.

(**41**) OJ C 10, 15.1.2009, p. 2.

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

(**43**) 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 C 195, 19.8.2009, p. 9.

(**44**) Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 356, 6.12.2011, p. 7.

(**45**) Commission Decision of 29 October 2008 in State aid case NN60/2008 – Portuguese guarantee scheme, OJ C 9, 14.1.2009 and Corrigendum, OJ C 25, 31.1.2009, prolonged by the Commission Decision of 22 February 2010 in State aid case N51/2010, OJ C 96, 16.4.2010, further prolonged by the Commission Decision of 23 July 2010 in State aid case N315/2010, OJ C 283, 20.10.2010, further prolonged by the Commission Decision of 21 January 2011 in State aid case SA.32158, OJ C 111, 9 April 2011 and further prolonged by the Commission Decision of 21 December 2011 in State aid case SA.34034, not yet published.

(**46**) Including 45 actions against BPN ex management, 25 civil proceedings and 20 criminal proceedings.

(**47**) See Notice of Banco de Portugal of 10 May No 3/2011, Official Gazette No 95, Series II.

(**48**) See point 22 of the Restructuring Communication.

(**49**) See Case T-17/03 *Schmitz-Gotha Fahrzeugwerke GmbH* v *Commission* [2006] ECR II-1139.

(**50**) Submission by Portugal dated 17 February 2012, Annex II.

(**51**) See, amongst others, Commission Decisions in Case N 61/2009, *Rescue and Restructuring of Caja Castilla la Mancha*, OJ C 289, 26.10.2010, p. 1.

(**52**) See, amongst others, Commission Decisions in Case N 61/2009, *Rescue and Restructuring of Caja Castilla la Mancha*, OJ C 289, 26.10.2010, p. 1 and in Case NN 19/2009, *Restructuring aid to Dunfermline Building Society*, OJ C 101, 20.4.2007, p. 7.

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