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State Aid: Portugal Resolution of Banif

European Union: European Commission

Margrethe Vestager

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EUROPEAN COMMISSION

Brussels, 21.12.2015
C(2015) 9763 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 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, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State aid SA.43977 (2015/N) – Portugal
Resolution of Banif – Banco Internacional do Funchal S.A.**

Sir,

The Commission wishes to inform the Portuguese authorities that, having examined the information supplied by your authorities on the measure referred above, it has decided not to raise objections to the measure for the reasons set out below.

Having examined the information supplied by your authorities in the notification of 20 December 2015, the Commission has also decided to revoke its decision C(2015)5199 final of 24 July 2015 in case SA.36123 ("the Opening decision").

1. PROCEDURE

- (1) Over the course of 2012, in the context of the European financial stabilisation mechanism established for Portugal on 11 May 2010¹, the Portuguese authorities entered into a dialogue with the Commission on the problems that Banif – Banco Internacional do Funchal, S.A. ("Banif" or "the bank") was facing.

¹ See Council Regulation (EU) No 407/2010 of 11 May 2010 establishing the European financial stabilisation mechanism, OJ L 118, 12.5.2010, p. 1.

S. Ex.^a o Ministro dos Negócios Estrangeiros
Augusto SANTOS SILVA
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- (2) On 9 November 2012, the Portuguese authorities submitted a draft restructuring plan for the Banif group ("the group")² to the Commission. Several meetings and telephone calls between the Portuguese authorities, Banif and the Commission took place between September 2012 and January 2013.
- (3) On 11 January 2013, the Portuguese authorities notified to the Commission urgent recapitalisation measures for Banif. On 21 January 2013, the Commission temporarily approved the requested rescue recapitalisation³ ("the Rescue Decision"). According to the Rescue Decision, the Portuguese authorities were due to submit a restructuring plan by 31 March 2013.
- (4) The Portuguese authorities submitted a restructuring plan on 2 April 2013 and updated it several times, on 10 April 2013, 29 June 2013, 21 August 2013, 4 February 2014 and 9 June 2014. All of those versions were subject to electronic mail exchanges and conference calls between the Portuguese authorities and the Commission.
- (5) On 8 October 2014, the Portuguese authorities submitted a new draft restructuring plan for Banif containing a set of additional measures. The draft restructuring plan contained some of the measures that had already been included in the previous versions of the restructuring plans. No agreement was reached between the Portuguese authorities and the Commission services.
- (6) On 24 July 2015, the Commission adopted a decision to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU") on the basis of doubts as to the rescue recapitalisation aid received by Banif under the Rescue Decision (the "Opening Decision")⁴. On the basis of the information available at the time, the Commission had doubts as to the compatibility with the internal market of the State aid received by Banif in 2013 under the Rescue Decision. More specifically, the Commission expressed doubts on Banif's viability, doubts on the burden-sharing and doubts on whether distortions of competition were being adequately addressed.
- (7) On 24 August 2015, the Portuguese authorities requested a prolongation of the deadline to reply on the doubts raised by the Commission in the Opening Decision. On 28 August 2015, the Commission granted the Portuguese authorities a deadline extension of 15 working days.

² Meaning the legal entity Banco Internacional do Funchal S.A. and all entities falling under its control. At the date of the present Decision, the Banif group includes 17 legal entities (Banif - Banco Internacional do Funchal, S.A., Banif Mais, S.A., Banif Plus Bank, ZRT, Margem Mediação de Seguros, Lda., Banif Banco de Investimento, S.A., Banif Gestão de Activos, Banif – Brasil S.A., Banif – Banco de Investimento (Brasil), S.A., Banco Caboverdiano de Negócios, Banif Bank (Malta), Plc, Banif International Bank, Ltd, Banif Finance (USA), Corp, Banif Rent, S.A., Banif Açor Pensões, Banif Imobiliária, Banif Açores Inc Fall River & Newark, Banif Açores Inc San Jose) as per the Restructuring plan of 8 October 2014, out of which Banif S.A. is the main one, representing over 80% of the group's assets. The group's organizational and legal structure has evolved over time. Since October 2012, Banif SA is the parent company of the Banif group.

³ Commission Decision SA.34662 (2013/N), OJ C 5, 09.01.2015, p. 2.

⁴ Commission Decision SA.36123 (2015/C) (ex 2013/N) – Portugal, Recapitalisation of Banif - Banco Internacional do Funchal S.A., OJ C 426, 18.12.2015, p. 10.

- (8) On 22 September 2015, the Portuguese authorities submitted their initial comments on the doubts raised in the Opening Decision, which were further elaborated in a meeting on 8 October 2015. The submission included proposed new restructuring measures and alternative scenarios for the bank, potentially including new State support. The submission also indicated that Banif might face a capital shortfall in 2016, due to additional provisioning needs on the loan and real estate portfolio. In the submission, the Portuguese authorities proposed to carve out the impaired assets from the bank, and subsequently sell separately the resulting "clean bank" (the "Clean Bank") and the asset carve-out (the "carve-out"). The Portuguese authorities were of the view that such a carve-out could be implemented in a way that although it involved new public funding, it would not constitute aid, because it would be done at market terms.
- (9) The Commission had doubts as to the no aid nature of such a transaction in the case of Banif. On 29 October 2015, the Commission sent a request for information to the Portuguese authorities whereby it set out that if public funds were involved, the proposed asset carve-out would have to be assessed as an impaired asset measure. The Commission also indicated that any new provision of funds by the Portuguese State to the bank or the carve-out would most likely constitute new State aid to Banif and fall under the provisions of Directive 2014/59/EU⁵ on Bank Recovery and Resolution.
- (10) Based on the information submitted by the Portuguese authorities in their submission of 18 September 2015 and the meeting of 8 October 2015, the Commission sent a letter to the Bank of Portugal on 9 November 2015, urging it to carry out a comprehensive Asset Quality Review ("AQR") for Banif as soon as possible, with the involvement of the Single Supervisory Mechanism ("SSM") of the European Central Bank. The Commission recalled that a new capital injection from the Portuguese State would constitute new aid, and it would trigger resolution under Directive 2014/59/EU. The Commission also pointed out that before a new decision could be taken by the Commission on an eventual new aid measure to Banif, the Portuguese authorities first had to comment on the Opening Decision by providing a satisfactory answer to the doubts expressed by the Commission as to the compatibility of the State aid that Banif received under the Rescue Decision.
- (11) By letter dated 12 November 2015, the Commission called on the Portuguese authorities to develop a comprehensive solution for Banif by the first week of December 2015 at the latest, if they wished to provide new State aid still before the end of 2015. The Commission also invited the Portuguese authorities to engage in a constructive dialogue in order to find solutions compatible with State aid rules.

⁵ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1903/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance, OJ L 173, 12.6.2014, p. 190-348.

- (12) On 13 November 2015, in reply to the Commission's request for information dated 29 October 2015, the Portuguese authorities submitted an updated version of the information submitted earlier on 18 September 2015, and confirmed that Portugal would not consider providing additional aid to Banif.
- (13) On 19 November 2015, the Bank of Portugal submitted to the Commission a presentation containing different contingency scenarios that were being considered in the possible event of a resolution of Banif. That presentation was discussed in a meeting between the Commission services and the Bank of Portugal on 20 November 2015. Following the meeting, the Commission requested further information from the Bank of Portugal concerning the different scenarios presented. The Bank of Portugal replied to the Commission's letter on 23 November 2015, providing further technical details.
- (14) On 26 November 2015, the Bank of Portugal replied to the Commission's letter of 9 November 2015. The Bank of Portugal stated that it had recently finalized an analysis of several risk situations in Banif with a potential important impact on its prudential situation. The Bank of Portugal also informed that they had sent a letter to Banif on 17 November 2015, asking the bank to address a number of weaknesses identified by the Bank of Portugal and requesting a capital raising plan by 1 December 2015. The Bank of Portugal stated that a solution for Banif was being pursued along the lines of the proposal formulated on 18 September 2015, namely the sale of a "clean bank" conducted by Banif itself. It also stated that it had assessed contingency scenarios, should the sale not materialise. The Bank of Portugal finally considered that in 2016, and subject to the bank continuing as a standalone entity, an AQR should be started.
- (15) On 27 November 2015 the Commission replied to the Bank of Portugal's letter of 26 November 2015, recalling that the aid granted in 2013 under the Rescue Decision had not yet been found compatible with the TFEU, that Portugal had not yet submitted an updated restructuring plan or commitments that would substantiate Banif's claims of viability. The Commission had not been kept informed on the sale process that was ongoing and under which conditions it was being conducted, despite the ongoing in-depth investigation on the aid granted to Banif in 2013. The Commission also reiterated that the proposal of 18 September 2015 on a sale with an asset carve out would be assessed as new aid if public funds were involved, and that the standstill obligation set out in Article 108(3) TFEU applied.
- (16) On 3 December 2015, the scenarios considered for Banif were discussed in a meeting between the Portuguese authorities and the Commission services. The Portuguese authorities maintained they were pursuing the sale of Banif without new State aid, while preparing alternatives for the resolution of the bank in case a sale would not be successful. Exchanges of information on the envisaged options continued over the following days.

- (17) On 9 December 2015, following further discussions, the Commission provided clarifications to the Portuguese authorities on how it would assess whether the sale would contain further aid or not.
- (18) On 11 December 2015, the Portuguese authorities agreed with the Commission services on how to proceed further based on a set of Commitments by Portugal, covering the ongoing sales process and alternatives in resolution. The agreement included a milestone on 15 December 2015 for Portugal to decide whether it wanted to pursue the ongoing sales process on the assumption of no further aid required or finding a solution in resolution based on whether it had received binding offers in the ongoing sales process for the Clean Bank and its assessment of their commercial interests.
- (19) On 18 December 2015, the Portuguese authorities informed the Commission of offers received in the ongoing sales process but considered that a sale would not be possible outside resolution as new State aid would have to be granted. Between 18 and 20 December numerous exchanges of information and phone contacts took place between the Portuguese authorities and the Commission services.
- (20) On 19 December 2015, the Portuguese authorities put Banif into resolution.
- (21) On 20 December 2015, Portugal notified resolution aid to Banif and re-notified the aid measures of the Rescue Decision as liquidation aid for Banif. The notification included two letters by the Bank of Portugal of 12 December 2015, on the resolution measures taken by the Bank of Portugal in relation to Banif, and a list of commitments by Portugal with respect to Banif.
- (22) By letter of 20 December 2015, Portugal agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation 1/1958⁶ and to have the present decision adopted and notified in English.

2. DESCRIPTION

2.1. The beneficiary

- (23) Banif was incorporated in 1988 as a successor of the loss-making Caixa Económica do Funchal (Madeira). In 1991, Banif held 20 branches in Madeira and 11 in mainland Portugal. By 2012, the number of branches was 312.
- (24) Banif grew into a multifaceted bank and insurance conglomerate with 680 points of sale worldwide through an expansion and acquisition policy first on mainland Portugal, but also on the Azores (1996) and abroad [Cayman Islands (1993), Venezuela (1995), South Africa (1995), Brazil (1996, Banco Primus 1999, EconoFinance 2001, Indusval 2002), Canada (1996), United States (1996), Bermuda (1996), Italy (2000), United Kingdom (2005), Cape Verde (2007), Malta (2008), and Spain (2010)].

⁶ Council Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

- (25) One of the main subsidiaries of Banif was Banif Mais, whose main activities were the provision of collateralized consumer finance (including car financing and leasing for individuals) and equipment finance. It had EUR 545 million in total assets at the end of 2013, concentrated in Portugal, but the company also operated in Hungary, Spain, Poland and Slovakia. On 12 December 2014, the Banif group announced the sale of 100% of the share capital of Banif Mais to Cofidis Participations, S.A., a company incorporated in France, for an amount of EUR 400 million. The sale was completed on 4 June 2015.
- (26) Following the recapitalisation of Banif in January 2013 by the Portuguese State in the wake of the Rescue Decision, subsequent smaller private capital increases and a liability management exercise, the current holders of qualifying shareholdings⁷ of Banif are listed in Table 1, with their corresponding voting rights. Banif shares are listed on the Lisbon Stock Exchange (Euronext Lisbon) in the B Compartment⁸. As of 30 June 2015, Banif's market capitalisation stood at ca. EUR 730 million against a book value of the equity of EUR 696 million⁹.

Table 1: Qualified Shareholders of Banif and their corresponding voting rights.

Entity	Shares	% of Share Capital	% of Voting rights¹⁰
Portuguese State	70 000 000 000 ¹¹	60.533%	49.374%
Estate of Horácio da Silva Roque ¹²	7 290 416 599	6.304%	8.087%
Auto-Industrial, Investimentos e Participações, SGPS, SA	2 125 000 000	1.838%	1.838%

⁷ According to the MANAGEMENT REPORT AND ACCOUNTS - 1º HALF 2015, p. 230, as published by Banif at: http://www.banif.pt/img/Management_Report_Accounts_Banif_1H2015.pdf.

⁸ Companies with a capitalisation between EUR 150 million and EUR 1 billion.

⁹ Based on Consolidated Results for first half 2015 published by Banif on their website and based on a stock quote of 0.0063 EUR per share.

¹⁰ Voting rights for issues other than those specified in no. 8 of article 4 of Law no. 63-A/2008, of 24 November. For issues that do fall under the mentioned provision of the law, the number of voting rights equals the percentage of the share capital.

¹¹ Corresponding to 44,511,019,900 shares which have voting rights without restrictions; the 25,488,980,100 remainder shares have voting rights limited to amendments regarding statutory changes, fusions, spin-offs, transformations, dissolutions and other resolutions requiring a qualified majority for its approval, under the terms of Law no. 63-A/2008, of 24 November.

¹² The shareholding by Estate of Horácio da Silva Roque (Herança Indivisa de Horácio da Silva Roque) (6.304% of Banif's share capital) is composed out of (i) 6.014% for Açorana Seguros SA (7.714% of the Banif voting rights); (ii) 0.2655% for Rentipar Financeira SGPS SA (0.3406% of Banif's voting rights); (iii) 0.0001% for Members of the corporate structures of Rentipar Financiera SGPS SA (0.0002% of Banif's voting rights); (iv) 0.0239% for Vestiban – Gestão e Investimentos SA (0.0306% of Banif's voting rights) and (v) 0.0001% for Renticapital – Investimentos Financeiros SA (0.0002% of Banif's voting rights).

(27) In terms of current size and market position, Banif is a universal banking group in Portugal with a balance sheet size of approximately EUR 13.6 billion and risk-weighted assets ("RWAs") amounting to EUR 8 billion at 30 June 2015 and significant market shares only in Madeira and the Azores.¹³ Banif had market shares of 3.4% for loans and 3.1% for deposits in Portugal, while in Madeira its market share was 23.2% for loans and 36% for deposits, and in Azores 31% for loans and 37.1% for deposits. Banif offers its products mainly to individuals and SME clients.

2.2. The events leading to the Commission's formal investigation procedure

(28) Under the Rescue Decision, Banif received a total of EUR 1.1 billion as State recapitalisation divided into two measures¹⁴:

- i. the issuance of 70 billion new shares of Banif at a price of EUR 0.01 each to be subscribed by Portugal, equalling a capital increase of EUR 700 million ("special shares"); and
- ii. the subscription by Portugal of Contingent Convertible securities ("CoCos" or "hybrid securities") in the amount of EUR 400 million issued by Banif. Those instruments are eligible for solvency purposes as Core Tier 1 ("CET1") capital.

(29) In addition to the recapitalisation temporarily approved by the Rescue Decision, Banif also benefited from government guarantees on liabilities, under the Portuguese Guarantee scheme¹⁵. As of end 2012, Banif had a total of EUR 1.175 billion of government-guaranteed bonds ("GGBs") maturing in 2014 and 2017. In January 2013, subsequent to Portugal's acquisition of the special shares and CoCos, Banif reimbursed in advance a five-year GGB amounting to EUR 300 million. A further EUR 280 million were redeemed in July 2014. The remaining EUR 595 million GGBs were redeemed three months ahead of schedule on 1 October 2014.

(30) The conditions of the CoCos included, among others, milestones for their repayment of at least EUR 150 million by end-June 2013, an additional EUR 125 million by end-2013, and a repayment of all outstanding CoCos (i.e. further EUR

¹³ See the submission by the Portugal of 30 June 2015, referred to in recital (8) above.

¹⁴ Recitals (20) to (38) of the Rescue Decision describe the approved aid measures.

¹⁵ Originally approved through Commission decision in State aid case NN60/2008, OJ C 9, 14.01.2009, p. 1, a corrigendum to which appears in OJ C 25, 31.01.2009, p. 25, and subsequently prolonged every six months: in State aid case N 51/2010 OJ C 96, 16.04.2010, p. 1; on 23 July 2010 in State aid case N 315/2010, OJ C 283, 20.10.2010, p. 5; on 21 January 2011 in State aid case SA.32158, OJ C 111, 9.4.2011, p. 5.; on 30 June 2011 in State aid case SA. 33178, OJ C 344, 24.11.2011, p. 1; on 21 December 2011 in State aid case SA. 34034, OJ C 99, 03.04.2012, p. 2; on 27 June 2012 in State aid case SA.34958, OJ C 246, 15.8.2012, p. 1.; on 17 December 2012 in State aid case SA.35743, OJ C 36, 17.12.2013, p. 1.; on 1 August 2013 in State aid case SA.36869, OJ C 2, 07.01.2014, p. 1.; on 19 December 2013 in State aid case SA.37698, OJ C 50, 21.02.2014, p. 1.; on 30 July 2014 in State aid case SA.38900, OJ C 348, 3.10.2014, p. 28.; on 4 February 2015 in State aid case 39991, OJ C 94, 20.03.2015, p. 8.

125 million) by end-2014.¹⁶ However, Banif did not meet the deadline to repay the outstanding EUR 125 million of CoCos by end-2014.

- (31) In view of the high amount of the aid granted in 2013 constituting 10% of RWA, and the significant problems of Banif, the Rescue Decision provided that a restructuring plan of Banif would need to provide for a material overhaul of Banif's business model, implying deep restructuring measures, a considerable downsizing and a limited future geographical focus, or in the alternative an orderly winding-down if the bank could not return to viability.
- (32) Over several versions of the restructuring plan, the projected business strategy of Banif underwent various refinements and changes. The most recent version of the restructuring plan, of October 2014, foresaw the creation of a Core Unit within the bank focussing on strictly defined target segments and product offerings, and a Legacy unit inheriting all assets that did not fit in the Core Unit. It also set out key objectives, projecting a return to profitability in 2016, as well as providing some high-level options for the repayment of the received State aid.
- (33) The restructuring plan submitted for Banif was assessed by the Commission in light of the requirements of the Restructuring Communication¹⁷, according to which long-term viability is achieved when a bank is able to compete in the marketplace for capital on its own merits in compliance with the relevant regulatory requirements. As such, a bank has to cover all its costs and provide an appropriate return on equity taking into account the risk profile of the bank, as well as repay over time or adequately remunerate the received State aid. The restructuring plan should identify the causes of the bank's difficulties and weaknesses, explain how the restructuring is addressing them, and ensure the restoration of viability.
- (34) This assessment was reflected in the Opening Decision by which the Commission decided to initiate the procedure laid down in Article 108(2) TFEU, i.e. the formal investigation procedure, based on doubts about whether the restructuring plan of Banif was appropriate to ensure the long-term viability of Banif¹⁸ and the repayment of the State aid¹⁹. Moreover, the restructuring plan raised concerns about the adequacy of the burden-sharing and measures to limit distortions of competition²⁰: the Commission considered that the restructuring plan did not sufficiently prove that the proposed measures were substantial enough to address the distortions of competition arising from the significant amount of aid granted, as well as to ensure adequate burden-sharing, seen that the CoCos were not repaid or converted into equity by the timeline set in the Rescue Decision, and there was uncertainty about the restructuring measures being implemented.

¹⁶ Paragraph 7 of the "Annex: Commitments by Portugal" to the Rescue Decision.

¹⁷ Communication from the Commission 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.

¹⁸ See recitals (64) to (76) of the Opening decision.

¹⁹ See recitals (77) to (81) of the Opening decision.

²⁰ See recitals (82) to (90) of the Opening decision.

2.3. The events triggering the resolution of Banif

- (35) In its opening decision, the Commission had already raised serious concerns about the situation of the bank as witnessed by the quality of the loan tapes and data provided more generally.
- (36) This is also reflected in the year-end 2014 financial statements of the bank, Banif had a consolidated net income of EUR -295 million²¹ compared to EUR -470 million in 2013. The 1Q2015 consolidated results show a further decrease of the balance sheet to approximately EUR 12.9 billion and a net income of EUR 6.5 million compared to a loss of EUR 39.7 million in 1Q2014. The bank's Common Equity Tier 1 ("CET1") (CRD IV / CRR²² phasing in) at 31 March 2015 was 8.0%, with a solvency ratio of 9.0%.
- (37) According to the submission of Portugal of 13 November 2015, the Bank of Portugal had requested Banif to present a capital plan containing additional capital-raising measures in order to accommodate three specific risk factors, Banif's large real estate exposure, the risk of additional loan portfolio impairments and the potential for de-recognition of Deferred Tax Assets ("DTAs") booked by Banif due to lower profitability levels.
- (38) The increasing challenges faced by the bank are summarized in the 12 December 2015 letter by the Bank of Portugal to the Portuguese Ministry of Finance. The Bank of Portugal described Banif's capital position as "debilitated", its solvency position dangerously close to the regulatory minimum requirements (8%) and its management as unable to present a set of credible measures.
- (39) As presented by the Bank of Portugal letter to the Commission of 26 November 2015²³, Banif had already started a sales process which the Bank of Portugal was urging the bank to conduct in an accelerated manner as a response to the bank's capital falling below minimum legal requirements. The letter informed that an initial information package would be delivered on the following day to interested parties, in order to receive non-binding offers as soon as possible.
- (40) The sales process on the Clean Bank was launched with a first formal contact with potential investors on 23 November 2015. 7 Interested investors signed the Non-Disclosure Agreement (NDA). The Information Memorandum was shared on 27 November 2015, together with the opening of a virtual data room.
- (41) The sales process ran by Banif also included the carve-out of impaired assets. This process was launched on 10 November 2015, with the opening of a virtual data

²¹ Audited financial statements for 2014 indicate a loss of EUR 295 million at consolidated level (which includes Banif Mais –SGPS SA) and a loss of EUR 363 million at Banif SA level.

²² Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 200/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 16.6.2013, p. 338 ("CRD IV") and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation EU No 648/2012 ("CRR"). OJ L 176, 27.6.2013, p. 1 ("CRD IV").

²³ See recital (14).

room on 11 November. As of 30 November 2015, 24 potential investors signed the NDA.

- (42) The Commission was only informed about the details of the ongoing sales efforts after the facts.
- (43) The purpose of that dual sales approach, according to Banif and its advisors, was to increase the market appetite for both Banif, as well as for the carved out portfolio, taking into account the fact that traditional banking activities and the management of distressed assets usually attract different kinds of investors. Therefore, Banif claimed that by separately selling the carved-out impaired assets and the Clean Bank, more potential purchasers could be attracted and better offers received for the separate parts.
- (44) Although the envisaged sale seemed to include State resources, Banif was conducting the process under the assumption that the State intervened as a market economy investor, i.e. on equivalent terms and conditions that a normal private economy investor would be willing to accept. On that basis, and on the basis of the estimation that the amount incurred by the State in the transaction would be outweighed by the return to the State as a result of the transaction, Banif considered that the sale it was pursuing did not entail new State aid to Banif.
- (45) The deadline for binding offers to be received for the Clean Bank was set for 15 December 2015²⁴. In the absence of adequate offers at that date, Portugal notified the resolution of Banif, as described in section 3.2 below.

3. DESCRIPTION OF THE MEASURES

3.1. Rescue recapitalisation aid and liquidation aid: Measures 1 and 2

- (46) Banif received under the Rescue Decision a total of EUR 1.1 billion as a recapitalisation (10% of the bank's RWAs at the time) by the Portuguese State, divided into two measures²⁵.
- (47) The conditions of the CoCos included, among others, the following milestones for Banif²⁶:
- by end-June 2013, to raise private capital of EUR 450 million and the proceeds to be used to repay CoCos in an amount of at least EUR 150 million;
 - by end-2013, to repay another tranche of CoCos in an amount of at least EUR 125 million; and
 - by end-2014, to repay all outstanding CoCos (i.e. further EUR 125 million).
- (48) Banif did not succeed in raising EUR 450 million of private capital by 30 June 2013 and was therefore not capable to use the proceeds to repay EUR 150 million as committed. Instead, the bank raised approximately EUR 240.7 million by August 2013, another EUR 70.8 million by October 2013, and EUR 138.5 million

²⁴ See commitment (3) in Annex I to this Decision.

²⁵ Recitals (20) to (38) of the Rescue Decision describe the approved aid measures.

²⁶ Paragraph 7 of the "Annex: Commitments by Portugal" to the Rescue Decision.

in May 2014. EUR 56 million of that private capital came from Açoreana, which was a 47% subsidiary of Banif and acted as its insurance arm.

- (49) The first CoCo repayment of EUR 150 million was performed in August 2013. However, Banif did not meet the deadline to repay the next tranche of the CoCos (EUR 125 million) by end-2013 which was then repaid four months later, in April 2014. Banif never adhered to the commitment to repay the final outstanding tranche of CoCos (EUR 125 million) by end-2014.
- (50) In the context of the process leading to the resolution of Banif covered by this Decision, Portugal has re-notified as liquidation aid the rescue recapitalisation aid granted to Banif on the basis of the Rescue Decision in 2013. According to the Portuguese authorities, this was necessary, in view of the fact that as a result of the resolution strategy presented for Banif, the bank would exit the market.

3.2. The resolution measures

- (51) In view of Banif's situation, the Bank of Portugal as resolution authority has determined the conditions for resolution laid down in Article 32(1) of Directive 2014/59/EU, i.e. (i) financial institution failing or likely-to-fail, (ii) no alternative private measures and (iii) a public interest in resolution, were fulfilled.
- (52) The resolution authority has stated that resolution was necessary and proportionate to achieve (i) continuity of essential functions, (ii) protection of depositors and (iii) preserve financial stability (resolution objectives according to Article 31 of Directive 2014/59/EU). The resolution authority has concluded that ordinary national insolvency proceedings were not able to achieve these objectives to the same extent.
- (53) Pursuant to Article 36 of Directive 2014/59/EU, the resolution authority has carried out a provisional valuation with a view to determining the resolution measures. In the context of that valuation, the loan book was segmented in performing and non-performing loans, and haircuts were applied by segment (overall significantly aggravated for NPLs), to simulate the sale of assets in a constrained period of time, and estimate the "exit value". Under a liquidation scenario, the haircuts were derived by considering the shortest possible timeframe.
- (54) Portugal notified the resolution of Banif by means of the application of the asset separation tool together with the sale of business tool as described in Article 37 of Directive 2014/59/EU.

3.3. The sale of business tool – Measure 3

- (55) Under the sale of business tool, the Bank of Portugal envisaged to sell to a private sector purchaser a set of assets, rights and liabilities of Banif. The resolution strategy of the Bank of Portugal was built on the assumption that, as a result of the transfer of assets to the AMC, the perimeter of assets and rights to be sold to the private sector purchaser in the sale of business tool, revalued with prudent, fair and realistic assumptions, represented a clean and profitable portfolio of assets.

- (56) The perimeter of the Clean Bank was valued by the Bank of Portugal at an exit value of EUR 11 071 million, and included the following²⁷:
- i. EUR 746 million of bonds to be issued by the AMC with a guarantee of the resolution fund and a counter-guarantee by the government,
 - ii. Assets, licenses and rights, including property rights, of Banif, with the exception of (i) the assets transferred to the AMC; (ii) own shares of Banif; (iii) and any shares or units representing the share capital of international subsidiaries of Banif²⁸. Only the subsidiary managing the real-estate used in the course of business of the Clean Bank and Banif International Bank Limited, with its seat in Nassau, Bahamas, is included in the perimeter of the Clean Bank.
- (57) The perimeter also includes Banif's responsibilities to third parties (liabilities or off-balance-sheet items). That includes, essentially, deposits and guaranteed and privileged credit claims, as shown in Annex 2 – Perimeter of the entities. Total liabilities included in the perimeter amount to EUR 11 534 million.
- (58) Liabilities of Banif that were not included in the Clean Bank's perimeter remain in the Remaining Bank as follows:
- i. any obligations towards, or liabilities arising from, instruments which are or have at some point been eligible for the calculation of Banif own funds as defined in Regulation (EU) No 575/2013, the Capital Requirements Regulation ("CRR")²⁹;
 - ii. Any credit claim arising from debt instruments issued by Banif, excluding the ones which are guaranteed;
 - iii. Any liability towards a subordinated creditor, except deposits of or loans granted by entities whose holdings have been transferred to the Clean Bank or to the AMC or entities which are in a group relation with those entities;
 - iv. Liabilities to credit institution (other than those to related parties) arising from loans granted to Banif, unless those loans are guaranteed or have an original maturity of less than seven days;
 - v. Liabilities to (a) individuals or entities, whose participation, direct or indirect, was equal to or higher than 2% of the share capital of Banif within the two-year period preceding the transfer, or (b) members of the Board of Directors in the two-year period preceding transfer, unless it is shown that those individuals, entities or members of the Board of

²⁷ See for details Annex 2 – Perimeter of the entities.

²⁸ Including: Banif - Banco Internacional do Funchal (Brasil), S.A; BCN-Banco Caboverdiano de Negócios, S.A.; Banif International Bank, Ltd.; Banif Holding (Malta), Ltd; Banif Securities Holdings, Ltd; Banif, Inc. (Fall River); Banif - Banco Internacional do Funchal (Cayman) Ltd; Banif International Holdings, Ltd; Banif Acores, Inc (San José); Banif Finance Ltd; Banif (Brasil), Ltda. – as per the outline of the resolution strategy of the Bank of Portugal in relation to Banif.

²⁹ OJ L 176, 27.6.2013, p. 1–337

Directors were not at the origin of Banif's financial difficulties and have not contributed to aggravate that situation, due to action or failure to act in the performance of their function;

- vi. All contingent or unknown liabilities except those incurred by Banif in the ordinary course of banking business (including obligations of Banif under letters of credit, bank guarantees, performance bonds and other similar contingent liabilities entered into by Banif in the ordinary course of its banking business), were recorded in Banif's books of account at the date of the resolution decision.

(59) In line with the resolution strategy, the resolution authority of Portugal proceeded to the sale of the Clean Bank, applying the sale of business tool in the resolution of Banif, through a competitive tender process, with the objective of minimizing the cost of the resolution.

3.3.1. *The sales process*

(60) As described in recitals (37) to (41), Banif already attempted a voluntary sale process in the weeks leading up to 15 December 2015. This process was run by Banif. However, that voluntary sales process turned out ultimately not successful, which necessitated the application of the resolution measures.

(61) On 19 December 2015, the resolution authority informed a limited number of potential private sector purchasers in the ongoing sales process run by Banif that the offers would now have to be made in the framework of the resolution measures.

(62) According to information received from the Portuguese authorities, in total, 3 binding and 1 non-binding offers were submitted by interested bidders by the end of the process on 19 December 2015.

(63) By the Resolution Decision of 20 December 2015, the resolution authority selected the offer submitted by Banco Santander Totta S.A. ("the Buyer"), at a purchase price of EUR 150 million, subject to conditions.

(64) The Buyer's offered price was based on the following assumptions:

- i. A net-asset position of the Clean Bank of at least EUR [300-1000]* million, which should result in a minimum CET1 fully loaded of EUR [200-900] million excluding the DTAs under the Portuguese Special Regime³⁰.
- ii. A provision of EUR [700-1300] million should be undertaken against a contribution of an equivalent amount in cash or asset equivalent of Portuguese Government Bonds or alternatively an additional EUR [700-1300] million should be contributed in cash or asset equivalent of Portuguese Government Bonds. The amount consists of EUR [700-

* Confidential information.

³⁰ Law no. 61/2014 of 26 August 2014 special regime applicable to deferred tax assets.

1200] million to cover credit and other risks, and EUR [10-100] million to cover restructuring costs [...].

- (65) The gap between the price offered by the Buyer for the assets and liabilities of the Clean Bank planned to be transferred to the Buyer (so called "funding-gap") amounted to EUR 2 255 million. That funding gap is filled by a contribution of EUR 489 million by the Resolution Fund and EUR 1 766 million by the Portuguese Government in the form of cash or Government bonds. The offer by the Buyer also contains an adverse material change clause. The total amount of aid notified is up to a maximum of EUR 3 001 million which is also supposed to contain any aid in the transfer of the carve-out.
- (66) The transfer of assets and liabilities of the Clean Bank to the Buyer will take place after the adoption of the present Decision and the resolution decision of the Bank of Portugal.

3.3.2. *The Remaining Bank*

- (67) All assets, rights and liabilities which are not included in the perimeter of the transfer to the AMC and which are not sold under the sale of business tool (Annex 2 – Perimeter of the entities) remain in Banif, as a residual bank ("the Remaining Bank"). The Remaining Bank will cease operating as a going-concern bank. The Remaining Bank will be subject to a special management framework, and will be wound up under normal insolvency procedures within a reasonable timeframe: the Portuguese authorities have committed to ask the SSM for the withdrawal of the Remaining Bank's banking license before 31 January 2016.
- (68) The assets remaining in the Remaining Bank will include: own shares of Banif and any shares or units that represent the share capital of international subsidiaries of Banif. The assets, rights and licenses remaining in the Remaining Bank are estimated to amount to EUR 400 million, while the liabilities to EUR 431 million.

3.3.3. *The Buyer: Banco Santander Totta S.A.*

- (69) At 30 June 2015, the Buyer had a network of 561 branches and corporate centers in Portugal, employing 5 308 people. The Buyer also has a branch in London, as well as an international financial branch in the Autonomous Region of Madeira. The Buyer also has subsidiaries and representations offices abroad, as well as investments in subsidiaries and associated companies.
- (70) At 30 June 2015, the Buyer's net income amounted to EUR 102.7 million, its credit portfolio stood at EUR 26.7 billion, while its customer resources totalled EUR 26.8 billion. Total assets of the Buyer amounted to EUR 39 218 million, and its RWAs to EUR 16,046 million. It had a strong capital position, with a total shareholders' equity of EUR 2,911 million and capital ratios, in line with the CRD IV/CRR rules applicable in 2015, of 13.2% CET1 ratio and a Tier1 ratio of 15.6%.

(71) The rating of the Buyer continues to be the best in the Portuguese financial system. In June 2015, the long term debt risk notations were as follows: FitchRatings BBB, Moody's Ba1, S&P BB and DBRS BBBH.³¹

3.3.4. *The Integration/viability plan of the Clean Bank*

(72) The Buyer presented an integration plan of the acquired assets, rights and liabilities of the Clean Bank, anticipating that the resulting combined entity will be the third largest lender in Portugal, with a [10%-20%] market share for total loans. The transaction will allow the Buyer to grow its deposit market share in the Portuguese market from [8%-11%] to [10%-15%].

(73) The integration plan foresees the discontinuation of the brand "Banif" within a few weeks after the purchase and the complete integration of the acquired activities within the Buyer's existing business in Portugal within [...].

(74) The integration will result in significant reduction of the branches and FTEs associated with the Clean Bank's perimeter. The sales structure foresees that the headquarters of Banif and all its employees will remain in the Remaining Bank, still providing services to the Buyer for a short transitional period. In total, the Buyer's business plan foresees to limit Banif's workforce to [500-1500] FTEs (only [20-100] – [50-200] head office FTEs would remain and the branch closures would lead to a redundancy of [50-400] – [100-500] FTEs).

(75) The Buyer intends to keep most branches in Madeira and Azores, since the Buyer's network on these islands is fairly limited, but Banif has a large network in these locations, However, the overlap between the Buyer's branch network and that of the Clean Bank in mainland Portugal is substantial ([50%-80%]). The Buyer therefore projects to reduce this overlap by closing [30-80]branches.

3.4. The asset separation tool - Carve-out of a portfolio of impaired loans – Measure 4

(76) The carve-out portfolio, to be transferred to a newly created Asset Management Company (the "AMC") in the context of the application of the asset separation tool, includes loans, real estate assets, restructuring funds, loans to restructuring funds, real estate funds and equity stakes, as listed in Annex 2 – Perimeter of the entities.

(77) The assets, rights and licenses to be transferred to the AMC, at the provisional valuation of the Bank of Portugal, amount to EUR [500-2000] million. For the asset transfer from Banif to the AMC, the Bank of Portugal will use transfer prices corresponding to an overall weighted average of [...] of net book value, or [...] of gross book value amounting to EUR 746 million.

(78) The Bank of Portugal will not transfer to the AMC any liabilities or off-balance-sheet items of Banif.

(79) The AMC will be financed with:

³¹ Half year Report 2015, Banco Santander Totta S.A.

- i. EUR 50 000 share capital provided by the Resolution Fund³², who will be the sole and controlling shareholder of the AMC; and
 - ii. The issuance of bonds guaranteed by the Resolution Fund and counter-guaranteed by Portugal, subscribed by Banif. After being subscribed by Banif, the bonds will be transferred to the private sector purchaser under the sale of business tool. The nominal value of the bonds will correspond to the value of the assets to be transferred to the AMC, namely EUR 746 million.
- (80) According to the Portuguese authorities the AMC will be sold [...] or wound down. The Portuguese authorities also committed that the assets of the Remaining Bank³³ shall be put in wind down in [...] ³⁴, including the carve-out in respect of which eventually no signing occurs by [...] or in respect of which the related transaction does not close by [...]. Portugal also committed that the AMC will not conduct any new business as from the date of this decision.

4. POSITION OF PORTUGAL

- (81) Portugal accepts that the measures as described in this Decision constitute State aid and requests the Commission to verify their compatibility with the internal market on the basis of Article 107(3)(b) TFEU, as they are necessary in order to remedy a serious disturbance in the Portuguese economy.
- (82) By letter dated 12 December 2015, the Bank of Portugal stated that the eventual disruption in the provision of the critical activities provided by Banif is likely to generate systemic risks and jeopardize the Portuguese financial stability. The Bank of Portugal considered the application of resolution measures to Banif necessary to safeguard the financial stability and to minimise the costs for depositors. In that light, it presented the resolution strategy.
- (83) The Bank of Portugal indicated that liquidation under ordinary insolvency would put financial stability at risk and destroy value. Within the context of the valuation, the amount of losses in a liquidation scenario was estimated at approximately EUR 3 987 million, of which EUR 1 412 million would be absorbed by privileged and guaranteed creditors, including holders of non-guaranteed deposits.
- (84) In the case of Banif, the Bank of Portugal has taken into account the systemic importance of the institution in the provision of financial services at the domestic level, in particular due to its singular importance in the Portuguese islands of Madeira and Azores (where Banif holds dominant market shares, as presented in recital (27)). The geographical isolation of Azores and Madeira from the mainland further increases the importance of the local banks' activities in the provision of financial services to those regions.

³² The Resolution Fund was created in 2012, on the basis of Ministerial Order no. 420/2012, December 21, which established the Portuguese Resolution Fund Regulation; and the Decree-Law nr. 31-A/2012 of 10 February 2012, for the purpose of providing financial assistance to the application of resolution measures adopted by the Bank of Portugal.

³³ Defined in section 3.2.4 below.

³⁴ See commitment (28) in Annex 1 to this Decision.

- (85) Considering the specificities of the Portuguese economy and the strong economic and social asymmetries between regions - namely between the mainland and the Islands (Azores and Madeira) - the Bank of Portugal considers the financial services provided by Portuguese financial institutions in each region in order to establish a clear mapping of the relative systemic importance of each institution to the financial stability. Based on these considerations, the Bank of Portugal specified that, in its role of National Macroprudential Authority, it has identified Banif as an Other Systemically Important Institution.
- (86) In addition, the Portuguese authorities submit that the measures are necessary, in view of the precarious capital position of Banif, and the financial stability considerations which call for actions to address the bank's situation. They also contend that the aid is limited to the minimum necessary to allow an orderly resolution.
- (87) The Portuguese authorities also submit that the design of the measures ensures full burden-sharing by the shareholders and subordinated creditors of the bank. The Bank of Portugal has provided the Commission with a letter, stating that all subordinated creditors of the bank will be left in the Remaining Bank subordinated to the claims of the resolution authority on the remaining assets so that they will effectively absorb losses.
- (88) The Portuguese authorities submit that the measures are compatible with the 2013 Banking Communication³⁵ and the Impaired Assets Communication (IAC).³⁶
- (89) Concerning the compatibility with the IAC of the asset transfer measure (i.e. the carve-out of impaired assets), Portugal submitted that the timeframe for the application of the asset separation tool does not allow the required valuations to establish the real economic value (REV) of the assets to be transferred, in line with the requirements of the IAC. Nevertheless, in order to ensure that the REV is estimated in a sufficiently conservative manner, Portugal proposes to use a haircut of [...] of gross book value.
- (90) With regard to the aid measures approved through the Rescue Decision and re-notified as liquidation aid, Portugal submits that the liquidation aid is compatible with the 2013 Banking Communication, in view of the fact that, as a result of the resolution strategy presented for Banif, the bank will exit the market.
- (91) Portugal submitted commitments included in Annex 1 to the present decision.

³⁵ Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C216, 30.7.2013, p. 1.

³⁶ 25.02.2009 Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector OJ C 72, 26.03.2009, pages 1-22.

5. EXISTENCE OF STATE AID

5.1. Measures 1 and 2 – Rescue recapitalization and Liquidation aid

- (92) The Commission first has to assess whether the Measures constitutes State aid within the meaning of Article 107(1) TFEU. According to that provision, State aid is 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, in so far as it affects trade between Member States.
- (93) Measure 1 is the rescue recapitalization aid that was provided under the Rescue Decision. In recitals (44) to (49) of the Rescue Decision, the Commission assessed Portugal's subscription of new shares in the amount of EUR 700 million and of Hybrid Securities, i.e. the CoCos, in the amount of EUR 400 million, both issued by Banif. The Commission found that the rescue recapitalization aid approved under the Rescue Decision fulfilled the conditions laid down in Article 107(1) TFEU, and hence qualified as State aid to the benefit of Banif.
- (94) In the context of the resolution of Banif, Portugal has re-notified the rescue recapitalization aid granted to Banif on the basis of the Rescue Decision, as liquidation aid. Measure 2 is the renotified and requalified aid.
- (95) The Commission's assessment of the existence of aid laid down in the Rescue Decision remains applicable. In addition, Portugal accepts that the measures constitute State aid.

5.2. New aid measures

- (96) In addition, Portugal has notified further capital aid of up to EUR 3 001 million for the purpose of loss absorption and providing the positive net asset value required in the sale of the Clean Bank perimeter to the Buyer and the aid element contained in a transfer of assets with a gross book value of EUR [...] million to an AMC owned by the Resolution Fund. Such aid will be provided to Banif in resolution. The resolution was triggered by the decision of 19 December 2015 of the Bank of Portugal as supervisor and resolution authority in accordance with the conditions of Article 32 of Directive 2014/59/EU.

5.3. Existence of aid in Measure 3- capital aid in resolution

- (97) According to the description of the Measures in section 3.2, the Commission recalls that only EUR 489 million of the overall State contribution to the currently known funding gap of EUR 2 255 million is going to be paid through the Resolution Fund while the remaining EUR 1 766 million are contributed directly by Portugal. A further contribution of EUR 324 million can be provided bringing the total of capital contribution to a maximum of EUR 2 579 million. The support from Portugal involves State resources and allows the economic activity represented by the Clean Bank to avoid immediate exit from the market. The latter therefore obtains a selective advantage. The measure distorts competition by preventing the normal outcome of market forces and it affects trade between Member States given the liberalised nature of financial services in the Union. The

Commission thus considers the contribution by Portugal to be State aid. This is not contested by Portugal.

- (98) In line with established case-law³⁷, the Commission considers that the intervention of the Resolution Fund – even if financed through private contributions – involves State resources. The Resolution Fund was established by the State by virtue of Ministerial Order no. 420/2012, December 21, which established the Portuguese Resolution Fund Regulation; and the Decree-Law nr. 31-A/2012 of 10 February 2012, for the purpose of providing financial assistance to the application of resolution measures adopted by the Bank of Portugal. Moreover, its initial capital was covered by the Bank of Portugal and the contributions by the banks in Portugal are compulsory. The management and use of its resources is decided in accordance with the law with the aim to provide financial assistance to the application of resolution measures adopted by the resolution authority. In the present case, the use of the Resolution Fund resources has been triggered by the resolution measure adopted by the Bank of Portugal. The Commission therefore considers that the measure is financed through State resources and is imputable to the State.
- (99) The Commission also notes that the resolution measure is selective in nature, since it ensures the effective application by the resolution authority of the resolution tools and powers with regard to the resolution of Banif.
- (100) Moreover, the Commission considers that the capital aid financed through the Resolution Fund or by the State directly provides the Bank's activities with a clear advantage by covering accumulated losses as well as the negative prices resulting from the sale of business where the key productive banking assets will be transferred (branches, infrastructure, deposits and performing loans). As is clear from the significantly negative prices (net of all guarantees and conditions), the transferred activities would not have been attractive without this additional capital aid provided by the State. This is supported by the fact that proposed aid-free sales process of Banif was unsuccessful.
- (101) The support from Portugal involves State resources and allows the economic activity represented by the Clean Bank to avoid immediate exit from the market allowing it to continue competing on the market.³⁸ The latter therefore obtains a selective advantage. The measure distorts competition by preventing the normal outcome of market forces and it affects trade between Member States given the liberalised nature of financial services in the Union. It also affects trade between Member States as some subsidiaries of foreign banking groups are present on the Portuguese banking market or potentially interested in entering that market.

³⁷ See Case C-345/02 *Pearle and others* ECLI:EU:C:2004:448, paragraphs 37 and 38. That approach was applied in Commission decision in the State aid case NN 61/2009 – "Rescue and restructuring of Caja Castilla-La Mancha", Spain, 29.06.2010, C(2010)4453 corr., recitals 96-118.

³⁸ See Commission decision of 25.01.2010 in the State aid case NN 19/2009 – Restructuring aid to Dunfermline Building Society, recital 51; Commission decision of 25.10.2010 in State aid case N 560/2009 – Aid for the liquidation of Fionia bank, recital 56; Commission decision of 8.11.2010 in State aid case N 392/2010 – Restructuring of CajaSur, recital 52.

(102) The Commission therefore considers the contribution by the Resolution Fund of EUR 489 million, as well as the contribution by Portugal of EUR 1 766 million and the possibility of providing further capital of EUR 324 million up to a total maximum of EUR 2 579 million, as State aid to the Clean Bank within the meaning of Article 107(1) TFEU. Any additional aid has to be notified separately.

5.4. Existence of aid in Measure 4 – transfer of impaired assets to the AMC

(103) As assessed in recitals (97) to (98), the Commission considers the measures taken by the resolution authority to be imputable to the State, and financing from the Resolution Funds as constituting State aid.

(104) As assessed in recitals (97), (99) and (100), any measure taken selectively in favour of the Clean Bank has the potential to distort competition and affect trade.

(105) According to information provided by Portugal, the AMC is both capitalised by the resolution fund and controlled by the resolution authority and thereby fulfils the same conditions as measures implemented by the resolution authority directly.

(106) Portugal accepts the view of the Commission that the transfer of the portfolio described in section 3.4 from the bank to the AMC occurs above market prices and therefore does provide an advantage to the Clean Bank, but submits that the transfer is below real economic value ("REV") and therefore compatible with the IAC.

(107) According to the information provided by Portugal, the portfolio contains a number of different asset classes, mainly non-current assets held for sale and investment properties – mostly real estate, equity participations in restructuring funds, real estate funds and businesses, loans to restructuring funds, real estate funds, own shareholders or other specific groups, and a portfolio of 27 351 individual credit exposures (the "Gamma loans" portfolio).

(108) While the Commission has no available market information on any of these different assets, Portugal has provided details on the "exit valuation" performed by Oliver Wyman to assess the likely losses on those portfolios. The Portuguese authorities also rely on the assessment by Oliver Wyman for the purposes of the valuation requirement in resolution under Article 36 of Directive 2014/59/EU. Regarding this exit valuation, the Commission considers that a great number of the resulting haircuts are insufficient to give it confidence that the resulting values would correspond to market values.

(109) The Portuguese authorities have further submitted non-binding offers for the carve-out perimeter. However, the Commission notes that the carve-out perimeter described in the non-binding offers – although probably overlapping – is only three quarters the size of the carve-out finally considered in the framework of the resolution and has to recall that non-binding offers cannot be relied upon for the establishment of a market value.

(110) Therefore, the Commission concludes that Portugal has not put the Commission in a position to identify the aid amount and has not provided sufficient detail of

information on the assets in question in due time for a valuation or an assessment to be performed.

- (111) However, the Commission considers that it has the flexibility to consider safe harbour values³⁹ for the determination of the appropriate market value taking into account the urgency of the specific case, and the fact that Portugal does not dispute that Measure 4 constitutes aid.
- (112) It is an obligation for the Commission when considering safe harbour values to ensure that these are sufficiently conservative. In order to arrive at sufficiently conservative values, the Commission has based itself on previous experience and past case practice, accepting proposed haircuts where they seem sufficiently prudent and otherwise distinguishing between tangible and intangible assets, and using additional haircuts where exposures are too large to risk potential errors. Based on such an approach, the Commission estimates the safe harbour market value of EUR 324 million for the entire portfolio of a gross book value of EUR [...] million, which corresponds to an average haircut of [...]. The Commission has sufficient confidence to accept this result as not being greater than the appropriate market value.
- (113) The Commission further considers that the arguments provided in recitals (100) and (101) apply to Measure 4 *mutatis mutandis* and concludes therefore that Measure 4 provides a selective advantage to the Clean Bank, distorting competition and affecting trade. Therefore, the conditions for the existence of State aid to the Clean Bank under Measure 4 are fulfilled.
- (114) Based on a transfer value at a conservative lower limit for REV of EUR 746 million, the aid amount contained in this measure is estimated at EUR 422 million.

5.5. Summary of the aid measures to Banif and the Clean Bank

- (115) The below table summarises the aid measures granted to Banif (amounts in EUR million):

Measures in the Rescue Decision, re-notified as liquidation aid to Banif	
Capital support, out of which:	1 100
<i>Measure 1 - Capital injection</i>	700
<i>Measure 2 - Subscription of CoCos (CET1 instruments)</i>	400
New aid for the resolution measures – aid to the Clean Bank	
Measure 3 – Resolution financing	2 579 (max)
Measure 4 - Transfer of impaired assets to the AMC	422

³⁹ Communication from the Commission on the treatment of impaired assets in the Community banking sector, annex I and annex IV, OJ C 72, 26.3.2009, p.1-22

TOTAL	4 101 (max)
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5.6. Existence of aid to the buyer

- (116) Given the choice of the Sale of Business tool for the resolution of Banif, the Commission has to verify that the sales process has been fair, open, competitive and transparent, that the sale happens on market terms and that the offer is chosen that maximises the value of the assets and liabilities sold.
- (117) The Commission notes that the sales process has started with a voluntary phase without informing the Commission prior to its launch, in spite of the fact that the formal investigation procedure was ongoing at that time.
- (118) Nonetheless, based on the information on the sales process the Commission received from Portugal since then, it has no indications suggesting that the sales process had not been fair, open and transparent. The fact that three binding and one non-binding offer had been received further suggests that it had been competitive. The Commission has also no indication that the sale had been conducted at anything other than market price or that the finally accepted offer had not been the commercially most interesting of the available binding offers.
- (119) On the basis of these considerations, the Commission excludes the presence of aid to the Buyer.

6. COMPATIBILITY OF THE AID

- (120) As regards compatibility with the internal market of Measures 1 and 2 provided to Banif, and Measures 3 and 4 provided to the Clean Bank, the Commission must first determine whether the aid can be assessed under Article 107(3)(b) TFEU. Subsequently, the Commission has to assess whether the notified aid measure is compatible with the internal market.

6.1. Legal basis for the compatibility assessment

- (121) Article 107(3)(b) TFEU enables the Commission to find aid compatible with the internal market if it is "to remedy a serious disturbance in the economy of a Member State." The Commission has acknowledged that the global financial crisis may create a serious disturbance in the economy of a Member State which can be addressed through State measures supporting financial institutions. This has been successively detailed and developed in the six Crisis Communications⁴⁰, as well as in the 2013 Banking Communication.

⁴⁰ 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 ("*2008 Banking Communication*"), OJ C 270, 25.10.2008, p. 8; Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ("*Recapitalisation Communication*"), OJ C 10, 15.1.2009, p. 2; Communication from the

- (122) In the 2013 Banking Communication, the Commission acknowledged that Member States should encourage the exit of non-viable players, while allowing for the exit process to take place in an orderly manner so as to preserve financial stability. The Commission recognises that, due to the specificities of credit institutions and in the absence of mechanisms allowing for the resolution of credit institutions without threatening financial stability, it might not be feasible to liquidate a credit institution under ordinary insolvency proceedings. For that reason, State measures to support the resolution of failing credit institutions may be considered as compatible aid, subject to compliance with the requirements specified in point 44 of the 2013 Banking Communication⁴¹.
- (123) Member States may choose a number of tools for the organisation of the resolution of ailing credit institutions. Any State aid measures to support such a resolution must comply with the principles specified in points 69 to 82 of the 2013 Banking Communication.
- (124) By resolution decision dated 19 December 2015, the Bank of Portugal as national resolution authority has determined that Banif was failing or likely-to-fail and that there was a public interest in putting Banif into resolution because of potentially severe adverse impacts on other banks and the wider financial system in Portugal, should Banif undergo a disorderly liquidation. The assessment of the Portuguese authorities is that the disorderly liquidation of Banif would destabilise the Portuguese financial markets and trigger a general crisis of confidence.
- (125) For the purpose of the present decision, the Commission accepts the decision by the resolution authority that the resolution tools provided for in Directive 2014/59/EU and chosen in this specific case are apt to preserve financial stability.
- (126) In view of the above, the Commission considers that the Measures 1, 2, 3 and 4 for the resolution of Banif have to be examined under Article 107(3)(b) TFEU.

6.2. Compatibility assessment

- (127) The 2013 Banking Communication, and in particular its Section 6, sets out the State aid rules applicable to the liquidation of financial institutions in the current circumstances. According to those rules, in order to be compatible with Article

Commission on the treatment of impaired assets in the Community financial sector ("*Impaired Assets Communication*"), OJ C 72, 26.3.2009, p. 1; 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 ("*Restructuring Communication*"), OJ C 195, 19.8.2009, p. 9; Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ("*2010 Prolongation Communication*"), OJ C 329, 7.12.2010, p. 7 and Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ("*2011 Prolongation Communication*"), OJ C 356, 6.12.2011, p. 7.

⁴¹ Point 44 of the 2013 Banking Communication states: "In cases where the bank no longer meets the minimum regulatory capital requirements, subordinated debt must be converted or written down, in principle before State aid is granted. State aid must not be granted before equity, hybrid capital and subordinated debt have fully contributed to offset any losses."

107(3)(b) TFEU, the liquidation of a financial institution has to, among others, fulfil the following conditions:

- i. *Limitation of costs of winding down*: aid amounts should enable the credit institution to be wound down in an orderly fashion, while limiting the amount of aid to the minimum necessary;
- ii. *Limitation of distortions of competition*: aid should not result in longer-term damage to the level playing field and competitive markets and measures to limit distortions of competition due to State aid have to be taken as long as the beneficiary credit institution continues to operate;
- iii. *Own contribution (burden-sharing)*: appropriate own contribution to the costs of winding down should be provided by the aid beneficiary, particularly by preventing additional aid from being provided to the benefit of the shareholders and subordinated debt holders. Therefore, the claims of shareholders and subordinated debt holders must not be transferred to any continuing economic activity;
- iv. *Restoring long-term viability*: the sale of an ailing bank to another financial institution can contribute to the restoration of long-term viability, if the purchaser is viable and capable of absorbing the transfer of the ailing bank, and may help to restore market confidence.

(128) Measure 4 entails an aided transfer of impaired assets from Banif to the AMC of EUR 746 million. Therefore, besides the 2013 Banking Communication, its compatibility must also be assessed under the Impaired Assets Communication, in addition to the criteria mentioned in recital (129) as aid for the winding down of the Remaining Bank. In the context of the present procedure, it is appropriate to examine the compatibility of Measures 1, 2, 3 and 4 with the 2013 Banking Communication and the Restructuring Communication before examining the compatibility of Measure 4 with the Impaired Assets Communication.

6.3. Compatibility of Measures 1, 2, 3 and 4 under the 2013 Banking Communication

6.3.1. Limitation of liquidation costs

(129) As described above, the amount of aid needed has been determined by the outcome of a provisional valuation performed by the resolution authority, and will have to be confirmed by an independent final valuation under Article 36 Directive 2014/59/EU.

(130) The counterfactual scenario (i.e. the immediate liquidation or bankruptcy) is estimated by the Portuguese authorities to increase the resolution costs. The Bank of Portugal estimates that the disorderly resolution of Banif would generate around EUR 3 987 million in losses. The Commission has no reason to question that assessment.

- (131) As resolution measure, Portugal will apply the Sale of Business resolution tool combined with the Bail-in tool which under the Portuguese implementation law of Directive 2014/59/EU is already applicable in 2015.
- (132) Under the proposed deal structure, losses of EUR [100-600] million are materialising in the transfer of assets to the Remaining Bank, losses of EUR [750-1500] million from the proposed transfer value of the carve-out portfolio have to be absorbed and a further cash contribution of EUR [700-1300] million and a further EUR [300-1000] million of net asset value is required by the Buyer, bringing the entire amount of costs of the resolution at this juncture to EUR 3 486 million.
- (133) As the amount of costs of EUR 3 486 million incurred in resolution is lower than the estimated losses in liquidation of EUR 3 987 million, the Commission considers the orderly resolution aid to be limited to the minimum necessary.

6.3.2. *Limitation of distortions of competition*

- (134) The Commission notes positively the choice of the Sale of Business as primary resolution tool, thereby limiting competition concerns.
- (135) The economic successor of the aided entity, the Clean Bank, has been sold through a competitive tender thereby providing the opportunity to all market participants to bid for the corresponding market share.
- (136) Furthermore, the Commission considers that the commercial presence of the Clean Bank will be significantly reduced compared with the old Banif, in particular through commitments by Portugal to reduce the FTEs of the Clean Bank to [500-1500] and the number of branches from 161 to [50-150] within [...] months of the date of adoption of the present decision.
- (137) Moreover, the Commission notes that the Clean Bank will be bought by a much larger commercial bank which will absorb the business sold in a very short time-span. Finally, the Commission takes positive note of Portugal's commitment that the Banif brand will disappear.
- (138) Portugal also commits to an advertising ban and an acquisition ban.
- (139) In light of these considerations, the Commission concludes that distortions of competition stemming from the continued market presence of the aided entity are limited.

6.3.3. *Own contribution (burden-sharing)*

- (140) For resolution aid to be declared compatible, section 3.1.2 of the 2013 Banking Communication, to which its point 78 refers, explains that shareholders and subordinate debt holders have to contribute to a maximum to the cost of the intervention.
- (141) Under the 2013 Banking Communication, all shareholders and holders of subordinated debt instruments have to contribute maximally to the cost of the intervention. Using its resolution powers, the resolution authority has generated EUR 431 million of capital through applying bail-in to holders of subordinated

debt as well as liabilities from other credit institutions. This has to be added to the amount of shareholder capital still present in Banif of EUR 650 million bringing the total up to EUR 1 081 million. In the resolution, Portugal's equity participation in a nominal amount of 700 million and the outstanding hybrid instrument in the nominal amount of 125 million, which were provided in the 2013 rescue, participated fully in the loss.

- (142) On 20 December 2015, the Portuguese authorities provided a letter stating that all debt instruments of Banif – Banco Internacional do Funchal S.A. that rank subordinated to senior debt will be part of the bail-in, in the sense that they will have no further claims on assets within the AMC or the Clean Bank and in the case of the Remaining Bank the Resolution Fund has a preferential claim over its assets and will absorb losses to the extent of their entire outstanding amount.
- (143) Overall, the Commission positively notes that of the overall losses in resolution of EUR 3 486 million, a significant proportion has been raised through burden-sharing measures.
- (144) As a result, the Commission concludes that shareholders and subordinated debt holders will have contributed to the maximum extent possible, thereby satisfying the burden-sharing requirement.

6.3.4. Restoring long-term viability

- (145) For the restoration of long-term viability, the Commission first notes positively that the Clean Bank is acquired by the Buyer, i.e. Santander Totta, a large, international commercial banking operation with already a significant presence in Portugal.
- (146) The Buyer in Portugal is 3.25 times the size of the Clean Bank which represents only about 2.76% of the total assets of the Buyer globally.
- (147) As described in recital (73), the rating of the Buyer continues to be the best in the Portuguese financial system. In June 2015, Moody's even increased the rating of the Buyer's deposits and covered bonds. The Buyer's long term debt risk notations are consistently higher or equal to those of the Republic of Portugal.
- (148) As of 30 June 2015, the Buyer reported a CET1 ratio of 13.2% (compared to 12.6% in June 2014), calculated according to the applicable CRD IV/CRR rules in 2015. The capital position of the Buyer is also reflected in the Tier 1 ratio of 15.6%, compared to 14.8% in June 2014.
- (149) As of 30 June 2015, the Buyer obtained a net income of EUR 102.7 million, corresponding to a ROE of 8.7%. The Buyer projects the Clean Bank to contribute EUR [0-75] million to the combined entity's net income in 2016, EUR [15-100] million in 2017 and EUR [25-125] million in 2018.
- (150) The fact that the Buyer's balance sheet is 3.25 times that of the Clean Bank, combined with the provision of EUR [700-1300] million of part cash and part Government bonds, the carve out of the most problematic assets and the implicit support of the Buyer, for which this acquisition would mean a mere increase of the

balance sheet by 0.85%, provide additional assurance for the long term viability of the combined entity.

(151) The Buyer projects to have a positive contribution to its net income of around [5%-25%] for the period 2016-2018. In addition, thanks to in depth restructuring which includes [...], the Buyer intends to exploit synergies in its commercial action plan, which it claims will lead to a lower cost of deposits⁴², lower financing needs and an overall increased efficiency.

(152) For these reasons, the Commission therefore has no reason to doubt the viability of the Buyer or its ability to integrate the Clean Bank it acquired.

6.4. Compatibility of Measures 4 under the Impaired Asset Communication

(153) Measure 4 has to be assessed under the criteria listed in the Impaired Assets Communication ("IAC"), as its purpose is to free the Clean Bank from the need to register either a loss or a reserve for a possible loss on its impaired assets.

(154) The Commission has to recall that Portugal has not put the Commission in a position to easily identify either the market value ("MV") or the real economic value ("REV") under the IAC. This is due to the extremely limited time the Commission was given to assess the carve-out with significant changes being administered to the perimeter up to the last moment before the adoption of this Decision.

(155) The Commission recalls that it considers having flexibility for the determination of the appropriate market value⁴³ as long as these values are sufficiently conservative to provide comfort to the Commission that the likelihood of the transaction containing aid through a transfer price above the market price is low.

(156) The IAC lays down the following compatibility criteria: (i) the eligibility of the assets; (ii) transparency and disclosure of impairments; (iii) the management of the assets; (iv) a correct and consistent approach to valuation; and (v) the appropriateness of the remuneration and burden-sharing.

6.4.1. Eligibility of assets

(157) As regards the eligibility of the assets, section 5.4 of the IAC indicates that asset relief requires a clear identification of impaired assets and that certain limits apply in relation to eligibility to ensure compatibility.

(158) Whilst the IAC cites as eligible assets those that have triggered the financial crisis (the IAC explicitly refers to US mortgage-backed securities), it also allows for the

⁴² The integrated entity is expected to benefit from lower credit spreads, thus reducing the cost of deposits and the possibility to stabilise its asset and liability management by increasing its Medium & Long Term funding base.

⁴³ Commission decisions of SA.39543 (2015/N) – Italy, Resolution of Banca delle Marche S.p.A.; SA.41134 (2015/N) – Italy, Resolution of Banca Popolare dell'Etruria e del Lazio – Soc. Coop, SA.43547 (2015/N) – Italy, Resolution of Cassa di risparmio della Provincia di Chieti S.p.A. – not yet published.

possibility to "extend eligibility to well-defined categories of assets corresponding to a systemic threat upon due justification, without quantitative restrictions".

- (159) As regards the present case, the impaired measure is targeted not only at non-performing assets, but also contains a large number of heterogeneous asset classes. Most of these asset classes – non-liquid real estate exposures, real estate funds, restructuring funds as well as NPLs – come with significant impairments and will be very difficult to sell in the market unless at significant discounts. What is more, the straight out equity exposures have been written down significantly.
- (160) The Commission therefore considers that the assets in the carve-out perimeter can be accepted as in line with the eligibility criteria of the IAC.

6.4.2. *Transparency and disclosure*

- (161) As regards transparency and disclosure, section 5.1 of the IAC requires full ex-ante transparency and disclosure of impairments by eligible banks on the assets which will be covered by the asset relief measures, based on an adequate valuation, certified by recognised independent experts and validated by the relevant supervisory authority. The IAC requires that disclosure and valuation should take place prior to government intervention.
- (162) Section 5.5 of the IAC accepts that alternative methodologies for valuation may need to be employed to take account of specific circumstances related to, e.g. timely availability of relevant data, provided they attain equivalent transparency.
- (163) The Commission considers that in this specific case, the transparency requirements have been challenging for the planned transaction in particular in view of the extremely short deadlines and time available and the fact that the perimeter has been defined and re-defined during the sales process along the negotiations with potential bidders.
- (164) Nonetheless, the Commission positively notes that the assets to be transferred have been clearly identified, including line-by-line data on the impaired loan portfolio.
- (165) The Commission further takes into consideration that the measure is implemented in resolution in the very specific framework of a sale of business implemented over the course of one weekend on the basis of Banif going into orderly wind-down if no buyer is found.
- (166) In light of those elements and in the context of the function of Measure 4 as a mechanism to allow Banif to exit the market as a stand-alone operator within a very short period, the Commission considers that the transparency requirements can be regarded as fulfilled.

6.4.3. *Valuation*

- (167) The Commission recalls again that the provided timelines for the proposed impaired asset measure do not allow it to comply with the valuation requirement. Moreover, the level of detail provided on the carve-out perimeter is clearly insufficient for an assessment to be done.

- (168) Regarding further elements to be taken into account, the Commission recalls that it has been provided with some granular data on the exit valuation commissioned by the Bank of Portugal as well as the values of the non-binding offers received on a different – probably somewhat overlapping – carve-out portfolio.
- (169) Because of the severe limits on time and information provided, the Commission has to consider that Portugal has not put the Commission into a position to consider the valuation criterion to be fulfilled.
- (170) However, grounded in its past case practice and long-ranging experience in the valuation of impaired asset measures, the Commission considers that a rough estimate for the REV can nevertheless be calculated, taking into account the safe-harbour MV of the portfolio as assessed in recital (112) and previous experience on the differential stresses to be applied in the assessment of the MV and REV in a distressed market. On that basis, the Commission would consider that the REV is most likely going to be in a range between EUR [...] million and EUR [...] million corresponding to [...] of gross book value.
- (171) Comparing the lower value estimate to the lowest REV assessment in the Commission's past case practice of 27%, the resulting value of [...] or EUR 746 million provides significant confidence to the Commission that the actual REV is not going to be lower than the value of EUR 746 million.
- (172) Nonetheless and on balance, the Commission concludes on the basis of the preceding considerations that the valuation criterion of the IAC is not fulfilled.

6.4.4. Management of the assets

- (173) As regards the management of assets, section 5.6 of the IAC stipulates the necessity of ensuring a clear functional and organisational separation between the beneficiary bank and the assets to be transferred, notably as to their management, staff and clientele.
- (174) The non-performing assets to be transferred from the Clean Bank will be managed by the newly created AMC, which is fully independent from the Clean Bank or its purchaser. It can therefore be concluded that the separate asset management is in line with the requirements of the IAC.

6.4.5. Burden-sharing

- (175) As regards burden-sharing, section 5.2 of the IAC repeats the general principle that banks ought to bear the losses associated with impaired assets to the maximum extent so as to ensure equivalent shareholder responsibility and burden-sharing.
- (176) As described in the recitals (140) to (144), adequate burden-sharing measures have been implemented.
- (177) However, the IAC requires further for the purposes of remuneration (recital 41) and burden-sharing (recital 50) that the transfer has to be based on the REV of the assets. If the Commission is not in a position to ensure that the transfer value is lower than the REV, the aid can only be accepted if conditions are introduced

"allowing the recovery of this additional aid at a later stage, for example through claw-back mechanisms".

- (178) At the same time, based on recital 50 of the IAC, the Commission has the flexibility of considering where it is materially impossible to ensure that losses are covered by the beneficiary of the aid, aid can exceptionally be accepted on the basis of stricter requirements regarding the return to viability and addressing distortions of competition.
- (179) The Commission notes that in view of the delayed assessment of the REV in this case, a claw-back mechanism is difficult to implement because of the legal uncertainty related to such a claw-back.
- (180) At the same time, the Commission recalls that the restructuring of the Clean Bank is going to be particularly deep and rapid: the brand is going to disappear probably still this year (or very early next year), the size of the bank will shrink by [20%-60%] in terms of FTE and branches within [...] and will be fully integrated into the Buyer including IT systems by the end of 2016. Therefore, the economic activity of Banif will effectively disappear entirely within one year.
- (181) The Commission notes further that the transfer is going to be transacted at a price of EUR 746 million. As assessed previously, this value is extremely low and thereby very unlikely to be above the actual REV to be assessed at a later stage following the adoption of this Decision.
- (182) Therefore, the Commission concludes that because of the extremely conservative value for the proposed transfer value of EUR 746 million, the likelihood is very low that the full valuation later will find a REV lower than this amount.
- (183) The Commission further concludes that even if the latter complete valuation would find a REV lower than the proposed transfer value, it could accept such aid on the basis of the extremely deep and rapid restructuring which addresses both return to viability as well as removing distortions of competition.

6.4.6. *Conclusion on Measure 4*

- (184) In light of the above, the Commission considers that the transfer of the carve-out to the AMC meets some of the conditions and requirements of the IAC, namely on eligibility, transparency and disclosure, management and burden-sharing, as adapted and complemented by the 2013 Banking Communication.
- (185) Under Directive 2014/59/EU the option of a Sale of Business with an asset carve-out is available. As is also the case in the present case, a Sale of Business is usually conducted under very short time delays. This seems to be in direct conflict with the requirements of ex-ante valuation under the IAC.
- (186) Moreover, such resolution aid provided is assessed as liquidation aid under the 2013 Banking Communication. Recital 78 referring to the applicability of burden-sharing and preventing the outflow of capital does not recall the possibility of providing impaired asset measures on a rescue basis under section 3.2 of the 2013 Banking Communication. However, and in order to ensure that the intention of the

European Co-legislators can be accommodated in the State aid framework, the Commission considers that also the conditions of section 3.2 apply *mutatis mutandis* in liquidation aid under resolution.

(187) Therefore, the Commission considers that in this very specific case where the bank to be resolved ceases to exist within a very short timeframe and is fully assumed into a much larger entity, it can grant the temporary approval of Measure 4 on the basis of a very conservative transfer value for a period of three months, requiring a full valuation of MV and REV during that time and approving the measure finally in a second decision.

6.5. Conclusion on the compatibility of aid for the orderly resolution of Banif

(188) The Commission considers that Measures 1, 2 and 3 are compatible with the internal market within the meaning of Article 107(3)(b) TFEU.

(189) The Commission further considers that Measure 4 is temporarily compatible with the internal market for a period of three months requiring a further Commission decision for a final assessment, for the reasons provided in section (152).

6.6. Monitoring

(190) In accordance with section 6.5 of the 2013 Banking Communication, regular reports are required to allow the Commission to verify that the commitments are being implemented properly. As stated in the commitments given by Portugal, Portugal will ensure that the Monitoring Trustee, who will be appointed by the Resolution Fund with the approval of the Commission, will monitor the commitments given by Portugal.

(191) The Commission therefore finds that proper monitoring of the implementation of the commitments is ensured.

7. COMPLIANCE OF THE RESOLUTION OF THE BANK WITH THE PROVISIONS OF DIRECTIVE 2014/59/EU

(192) Although Portugal has already transposed Directive 2014/59 into national law⁴⁴, the Commission needs to assess whether the measure violates indissolubly linked provisions of Directive 2014/59.

(193) That obligation is in line with the jurisprudence of the Union Courts, which have consistently held⁴⁵ "*that those aspects of aid which contravene specific provisions TFEU other than [Articles 107 and 108 TFEU] may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately to that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore*

⁴⁴ Act XXXVII of 2014 on the further development of the system of institutions strengthening the security of the individual players of the financial mediating system (Hungarian Resolution Act), transposing the Bank Recovery and Resolution Directive (BRRD) in Hungarian law.

⁴⁵ See *inter alia* Joined Cases C-134/91 and C-135/91 *Keramina-Keramische v Greece* EU:C:1992:434, paragraph 20; Case T-184/97 *BP Chemicals v Commission* EU:T:2000:217, paragraph 55; and Case T-289/03 *BUPA and others v Commission* EU:T:2005:78, paragraphs 313 and 314.

of necessity be determined in the light of the procedure prescribed in [Article 108]".⁴⁶

- (194) To ascertain whether a violation of a provision of Union law is indissolubly linked to the object of the aid, a relation of necessity has to be established. It means that the State aid measure has to be connected with a national measure in a way that necessarily breaches a specific provision of Union law which is relevant for the compatibility analysis under paragraphs 2 and 3 of Article 107 of the Treaty.
- (195) In this decision, according to the information provided by Portugal, the Commission has identified the use of at least the following provisions of Directive 2014/59/EU:
- (196) The Commission notes that the measure seems to be in line with the provisions of Article 32(1) of Directive 2014/59, specifying the conditions required to take a resolution action.
- (197) In addition the applied resolution tools, namely the sale of business tool and the asset separation tool, are allowed resolution tools under Directive 2014/59/EU, as mentioned in Articles 38 and 42 respectively. Also, Article 37 (5) of Directive 2014/59/EU is complied with, which requires that the asset separation tool is only applied together with another resolution tool.
- (198) Therefore, the Commission concludes that the resolution aid does not seem to violate the intrinsically linked provisions of Directive 2014/59/EU in the context of the State aid rules.
- (199) This is without prejudice to the prerogative of the Commission to initiate infringement procedures against a Member State for breach of Union law, including breach of the provisions of Directive 2014/59/EU.

8. THE REVOCATION OF THE OPENING DECISION

- (200) The Commission took the Opening Decision to initiate the procedure laid down in Article 108(2) TFEU, based on doubts that the restructuring plan which had been presented for Banif could ensure the bank's long-term viability and the repayment of the State aid. Moreover, the restructuring plan raised concerns from the perspective of burden-sharing and measures to limit distortions of competition.
- (201) The Commission made its assessment in the Opening Decision based *inter alia* on the assumption that Portugal was aiming at a restructuring plan of Banif that would comply with the requirements of the Restructuring Communication, as had been foreseen in the Rescue Decision. On 20 December 2015, Portugal re-notified the aid measures of the Rescue Decision as liquidation aid for Banif, and notified new liquidation aid measures in the context of the resolution of Banif.

⁴⁶ Case 74/76 *Ianelli v Meroni* EU:C:1977:51 paragraph 14.

(202) Thereby, the premises of the Commission assessment in the Opening Decision are no longer applicable. Banif will not be subject to a restructuring plan, but to a resolution strategy, as notified by Portugal.

(203) As the doubts expressed in Opening Decision were related to the restructuring plan of the bank, they have become without object, therefore that decision should be revoked.

9. CONCLUSION

The Commission has accordingly decided to consider the aid provided under Measures 1, 2 and 3 to be compatible; and the aid provided under Measure 4 to be temporarily compatible for a period of three months with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union, and not to raise objections to the liquidation aid measures in favour of Banif in form of capital aid measures of up to EUR 3 001 million.

The Decision C(2015)5199 final of 24 July 2015 in case SA.36123 is hereby revoked.

The Commission notes that Portugal exceptionally accept that the adoption of the Decision be in the English language.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission



ANNEX 1 – COMMITMENTS OF PORTUGAL

The Portuguese Republic (“Portugal” or “the Portugal”) hereby submits the following Commitments (the “Commitments”).

The present Commitments supersede the commitments that are provided for as annex to the Decision of the European Commission dated of 21 January 2013 and in case of doubt the former shall prevail.

I. General

- (1) Portugal ensures that the present Commitments will be correctly and fully implemented.
- (2) Portugal ensures that Banif or its legal successor shall take the measures necessary to correctly and fully comply with the present Commitments.

II. Resolution of Banif

- (3) Banif will be split in resolution between a clean bank ("Clean Bank") and a remaining bank (“Remaining Bank”). A separate asset bundle for sale to another third party has been carved out in resolution into an Asset Management Company ("Carve-out").
- (4) The separate entities (Clean Bank, Remaining Bank and Carve-out) are described in detail in a separate document.
- (5) The Clean Bank has been sold to a third party (the “Purchaser”) on 20 December 2015 in a sale of business, implemented within the resolution of Banif through a sale of business to be closed upon the approval by the European Commission of the State aid granted within the resolution and without prejudice to any other EU applicable rules such as merger control rules. The Clean Bank has been sold to a commercial bank which has both a meaningful presence in Portugal understood as a total balance sheet of at least 3 (three) times that of Banif and a total balance sheet of 5 (five) times that of Banif globally. The names of eligible potential purchasers and their bids have been provided to the Commission upon having been received. The Purchaser has not been and shall not be financed directly or indirectly by Banif.

- (6) In the framework of the application of the asset separation tool provided for in Article 42 of the BRRD, Portugal will establish an Asset Management Company (“AMC”) responsible for the management of the carved out asset. The AMC will be funded through the issuance of bonds guaranteed by the Resolution Fund.
- (7) Portugal will inform the Commission of the sale of the Carve-out or parts of it. Portugal ensures that the selling process is open, transparent, non-discriminatory and competitive and will take place on market terms. This Commitment is without any prejudice to other notification requirements, for instance for merger control purposes. The sales price will, if negative, not exceed the aid amount foreseen in the present decision foreseen for the transactions in the resolution framework. Any guarantees, warranties and equivalent instruments implying the use of public resources, and which have not been notified for the purposes of the present decision will be notified to the Commission in order to be included in the calculation of the sales price.

III. Perimeter of the sale

- (8) Since December 2012 Banif has reduced its FTEs from 2409 to 1603, corresponding to a reduction of 25%. Within [...] months of the date of adoption of the present decision, Banif will further reduce FTEs to maximum [500-1500]. Further reductions of the FTEs may be decided by the Purchaser.
- (9) Since December 2012 Banif has reduced the number of its branches on mainland Portugal from 312 to 150, corresponding to 52%, and from 72 to 59 in Azores and Madeira, corresponding to 17%. Within [...] months of the date of adoption of the present decision, Banif will further reduce branches to a total of maximum [50-150]. Further reductions of the branches may be decided by the Purchaser.
- (10) None of the currently existing subsidiaries of Banif have been included in the perimeter of the Clean Bank, except the one carrying solely own used real estate assets for the course of its ordinary business and its subsidiary in the Bahamas.
- (11) No international business remains in the Clean Bank as represented through branches, representations or contracts with independent agents. All international presence should be either closed, or placed in the Remaining Bank as soon as legally possible after the Commission’s decision, and in any event not later than 31 December 2016. This Commitment will not prevent the Purchaser with

international presence from giving the Clean Bank commercial access to its own international presence.

IV. Divested business

- (12) If the business divested through the sale of the Clean Bank is to be managed as a stand-alone entity, a further reduction of both Total Assets and Risk-Weighted Assets (“RWA”) will be implemented of 5% by 31 December 2016, 10% by 31 December 2017 and 15% by 31 December 2018.⁴⁷
- (13) Portugal ensures that the Purchaser of the Clean Bank will discontinue the trade name Banif (or any combinations of it) by no later than three months as of the date of Closing.
- (14) If managed as a stand-alone entity, Portugal commits that the Clean Bank and/or its Purchaser will refrain from advertising referring to the State support received by Banif and from employing any aggressive commercial strategies which would not take place without the State aid. The Clean Bank will further refrain from acquiring any new businesses during the three years following the Closing in case it is managed as a stand-alone unit or in case it is acquired by a larger entity without physical presence in Portugal that intends to keep the Clean Bank as a stand-alone subsidiary using the stand-alone subsidiary balance sheet for any such acquisition.
- (15) From the date of the present decision, and if managed as a stand-alone entity, the Clean Bank will price every single new credit deal using an appropriate internal pricing tool and apply a funding transfer price commensurate with a maturity matching funding cost and risk cost, leading to a positive Economic Value Added and a Return on Equity (“RoE”) of at least 10% in each year of the future exposure up to the maturity of the deal. For the purpose of this calculation, the volume weighted average of all live transactions with a single client since the date of this decision can be taken into account, so that a new transaction might generate a lower return if it is compensated by returns of other recent (live) transactions or fee generating business. Any individual new credit deal will have

⁴⁷ Reference point is the date of the present Commission decision. Subject to a successful viability assessment of the resulting entity by the Commission and if the business divested, which originally was managed as a stand-alone entity, becomes fully integrated into a larger entity, this Commitment can be renegotiated at the time of that integration.

a credit documentation demonstrating a predeal calculated RoE of at least 10% for the either the individual deal or the entire recently concluded live exposures.

- (16) If managed as a stand-alone entity, twelve months after the date of the present decision, the Clean Bank will have, whenever legally in a position to do so, re-priced existing credit engagements so that, when taking into account risk costs, maturity matching funding costs and capital costs, a ROE of 10% per annum will be earned on the engagement. Exceptions to the re-pricing can be made if clients are already in a restructuring-of-debt situation. In such restructuring cases where a ROE of 10% cannot be achieved, the maturity of the restructured engagement must not exceed 6 months, after which a re-evaluation shall take place with the aim of terminating the engagement as quickly as possible.

V. Remaining bank

- (17) Assets of the Remaining Bank including the carve-out in respect to which no signing has occurred by [...] or in respect of which the related transaction does not close by [...] will be put in wind down in the month that follows.
- (18) Portugal ensures that an application will be filed for the removal of the license of the Remaining Bank to the relevant supervising authority no later than 31 January 2016. Upon removal of the banking license, a liquidation committee will be appointed by the competent insolvency court upon proposal by the Banco de Portugal to ensure a proper liquidation process.
- (19) The Resolution Fund must receive a senior liability in the Remaining Bank, equivalent in the amount to the amount paid for loss absorption in the sale of the Clean Bank.
- (20) The Remaining Bank will not generate any New Business.
- (21) The following shall not be considered as New Business:
- Additional financing to existing customers which is contractually committed at the day of the Commission's Decision or is strictly necessary to preserve the value of the loan collateral, or is otherwise related to minimising capital losses and/or enhancing the expected recovery value of a loan. Each of such forced renewal maturities must not exceed 3 months;
 - Derivative transactions which are necessary in order to manage interest rate, currency and credit risks in the existing portfolio, e.g. asset swaps, provided that they have the effect of reducing the overall market risk position of the unit;
 - Debt to equity or debt to investment funds participation units transactions in the context of credit restructuring or recovery.

- (22) For all the Portuguese activities, the Remaining Bank will enact a claim and litigation policy aiming at maximizing recovery and preventing any discrimination or preferential treatment in the management of litigations. The Remaining Bank shall ensure that all necessary actions are taken to maximize the recoveries.
- (23) With respect to support to its foreign subsidiaries, the Remaining Bank will not provide additional equity or subordinated capital at all.
- (24) Portugal commits that the Remaining Bank will not acquire any stake in any undertaking, be it an asset or share transfer. That ban on acquisitions covers both undertakings which have the legal form of a company and any package of assets which forms a business.

VI. Monitoring Trustee

- (25) A Monitoring Trustee shall be appointed to monitor the full compliance with the Commitments in accordance with the template agreement provided for as Annex I hereto. The Monitoring Trustee shall consist of one or more natural or legal person(s), independent from Banif, the Clean Bank or the Remaining Bank, proposed by Portugal and approved by the Commission.

ANNEX 1.1 – MONITORING TRUSTEE

APPOINTMENT OF THE MONITORING TRUSTEE

1.1 Portugal ensures that Banif, the Clean Bank and the Remaining Bank appoint a Monitoring Trustee as set out below. At the end of the mandate, the Trustee will submit a final report.

1.2 The Monitoring Trustee must be independent of Banif, the Clean Bank and the Remaining Bank. The Monitoring Trustee must possess, for example as an investment bank, consultant or auditor, the specialised knowledge, expertise and manpower that is required in order to carry out its mandate, and must at no time be exposed to any conflict of interest. The Monitoring Trustee is to be remunerated by Banif, the Clean Bank and the Remaining Bank in a way that must not impede the independent and effective fulfilment of its mandate.

1.3 Portugal will submit two or more proposals to the Commission for approval as Monitoring Trustee no later than four weeks after notification of the Decision.

1.4 These proposals must contain sufficient information about those potential trustees to enable the Commission to verify whether the proposed trustees fulfil the requirements set out in paragraph 1.2 of the present Appendix, and must in particular include the following:

- a. the full terms of the proposed mandate with all the provisions which are necessary to enable the Monitoring Trustee to fulfil its duties; and
- b. the draft of a work plan describing how the proposed persons intend to carry out their assigned duties if they are appointed as the Monitoring Trustee.

1.5 The Commission has the discretion to approve or reject the proposed persons and to approve the proposed mandate subject to any modifications that it deems necessary in order to enable the Monitoring Trustee to fulfil its obligations. If only one name is approved, Banif, the Clean Bank and the Remaining Bank will appoint the person or institution concerned as Monitoring Trustee or cause that person or institution to be appointed, in accordance with the mandate approved by the Commission, or submit

alternative proposal(s) to be reviewed and approved by the Commission. If more than one name is approved, Portugal and Banif, the Clean Bank and the Remaining Bank are free to decide which of the approved persons should be appointed as Monitoring Trustee. The Monitoring Trustee will be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

1.6 If all the proposed persons are rejected, Portugal shall submit the names of at least two

different persons or institutions within two weeks of being informed of the changes or the rejection, in accordance with the requirements and procedure set out in paragraphs 1.1 till 1.4 of the present Appendix.

1.7 If all further proposed persons are also rejected by the Commission, the Commission will nominate a Monitoring Trustee which Banif, the Clean Bank and the Remaining Bank will appoint, in accordance with a trustee mandate approved by the Commission.

(I) GENERAL DUTIES AND OBLIGATIONS

(a) The Monitoring Trustee is to assist the Commission to ensure Banif, the Clean Bank and the Remaining Bank's compliance with the Commitments and to assume the duties of a Monitoring Trustee specified in the Commitment catalogue. The Monitoring Trustee is to carry out the duties under its mandate in accordance with the work plan, as well as revisions of the work plan that have been approved by the Commission. The Commission may, on its own initiative or at the request of Portugal or Banif, the Clean Bank and the Remaining Bank, issue orders or instructions to the Monitoring Trustee in order to ensure compliance with the Commitments. Banif, the Clean Bank and the Remaining Bank is not entitled to issue instructions to the Monitoring Trustee.

(II) DUTIES AND OBLIGATIONS OF THE MONITORING TRUSTEE

(a) The duty of the Monitoring Trustee is to monitor full and correct compliance with the obligations set out in the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee, issue any orders or instructions to the Monitoring Trustee or Banif, the Clean Bank and the Remaining Bank in order to

ensure compliance with the Commitments attached to the Decision.

The Monitoring Trustee:

- a. is to propose to the Commission in its first report a detailed work plan describing how it intends to monitor compliance with the Commitments attached to the Decision;
- b. is to monitor compliance with all Commitments;
- c. is to assume the other functions assigned to the Monitoring Trustee in the Commitments attached to the Decision;
- d. is to submit a half-yearly draft written report to the Commission, Portugal and Banif, the Clean Bank and the Remaining Bank within thirty days after the end of each semester. The Commission, Portugal and Banif, the Clean Bank and the Remaining Bank can submit comments on the draft within ten working days of receipt. Within five working days of receipt of the comments, the Monitoring Trustee is to prepare the final report and submit it to the Commission and to Portugal. Only afterwards the Trustee is to send a copy of the final report to Banif, the Clean Bank and the Remaining Bank. If the draft report or the final report contains any information that may not be disclosed to Banif, the Clean Bank and the Remaining Bank, only a non-confidential version of the draft report or the final report is to be sent to Banif, the Clean Bank and the Remaining Bank. Under no circumstances is the Monitoring Trustee to submit any version of the report to Portugal and/or Banif, the Clean Bank and the Remaining Bank before submitting it to the Commission;
- e. the report is to focus on the duties set out in the mandate by the Monitoring Trustee and compliance with the Commitments by Banif, the Clean Bank and the Remaining Bank, thus enabling the Commission to assess whether Banif, the Clean Bank and the Remaining Bank is being managed in accordance with the Commitments. If necessary, the Commission may specify the scope of the report in more detail. In addition to these reports, the Monitoring Trustee is to report

promptly in writing to the Commission if it has reasons to suppose that Banif, the Clean Bank and the Remaining Bank is failing to comply with the Commitments.

**(III) DUTIES AND OBLIGATIONS OF BANIF, THE CLEAN BANK
AND THE REMAINING BANK**

(a) Banif, the Clean Bank and the Remaining Bank is to provide and to require its advisors

to provide the Monitoring Trustee with all such cooperation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks under its mandate. The Monitoring Trustee is to have unrestricted access to any books, records, documents, management or other personnel, facilities, sites and technical information of Banif, the Clean Bank and the Remaining Bank or of the business to be sold that are necessary to fulfil its duties under the mandate. Banif, the Clean Bank and the Remaining Bank is to make available to the Monitoring Trustee one or more offices at its business premises and all employees of Banif, the Clean Bank and the Remaining Bank are to be available for meetings with the Monitoring Trustee in order to provide it with all the information it needs to perform its duties.

(b) The Monitoring Trustee may appoint advisors (in particular for corporate finance or legal advice), if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the mandate, provided that any costs and other expenses incurred by the Monitoring Trustee are reasonable. Should Banif, the Clean Bank and the Remaining Bank refuse to approve the advisors proposed by the Monitoring Trustee, the Commission may approve their appointment instead, after hearing Banif, the Clean Bank and the Remaining Bank's reasons. Only the Monitoring Trustee or the Commission are entitled to issue instructions to the advisors.

**(IV) REPLACEMENT, DISCHARGE AND REAPPOINTMENT OF THE
MONITORING TRUSTEE**

(a) If the Monitoring Trustee terminates its functions under the Commitments or if there

are any other significant grounds, such as a conflict of interest on the part of the Monitoring Trustee, the Commission can, after hearing the Monitoring Trustee, Portugal and Banif, the Clean Bank and the Remaining Bank, require its replacement.

(b) If the Monitoring Trustee is removed in accordance with paragraph (a) of the present Appendix, it may be required to continue in its function until a new Monitoring Trustee is in place to whom the previous Monitoring Trustee has effected a full handover of all relevant information. The new Monitoring Trustee is to be appointed in accordance with the procedure referred to in paragraphs 1.1 till 1.7 of the present Appendix.

(c) Besides removal in accordance with paragraph (a) of the present Appendix, the Monitoring Trustee is to cease its activities only after the Commission has discharged it from its duties. This discharge is to take place when all the obligations with which the Monitoring Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it is subsequently found that the relevant Commitments have not been fully and properly implemented.

Annex 2 – Perimeter of the entities

Assets (NBV, €MM)	OSC	Carve out	Clean portfolio
Cash and deposits at central banks	€-1	0	€-1
Deposits with credit institutions	0	0	€-1
Financial assets held for trading	0	0	€-1
Other financial assets at FV	0	€-1	€-1
AMV bond (assuming a haircut of 0% on NBV by DG Comp)	0	0	€-1
Financial assets available for sale	0	€-1	€-1
Investments in credit institutions	0	€-1	€-1
Loans to customers	0	€-1	€-1
Investments held to maturity	0	€-1	0
Assets with repurchase agreement	0	0	€-1
Non-current assets held for sale	€-1	€-1	0
Investment Properties	0	€-1	0
Other tangible assets	0	0	€-1
Other intangible assets	0	0	€-1
Invest in jointly controlled entities	€-1	€-1	€-1
Current tax assets	0	0	0
Existing DTAs	€-1	0	€-1
Other assets	0	€-1	€-1
Total	€-1	€-1	€-1
DTAs generated by the carve-out	€-1		€-1
Total after new DTAs	€-1	€-1	€-1

Liabilities (NBV, €MM)	OSC	Carve out	Clean portfolio
ECB	0		€-1
Securitisation	0		€-1
Due to other banks and REPOS	€-1		€-1
Deposits	0		€-1
Borrowings/ bonds	0	746	€-1
Other liabilities	0		€-1
Subordinated debt	€-1		0
Adjustment between latest data (December 18 th) and October data			€-1
Equity			
Total	€-1		
Total	€-1	746	€-1