COMMISSION DECISION

of 30 April 2008

on State aid C 56/06 (ex NN 77/06) implemented by Austria for the privatisation of Bank Burgenland

(notified under document number C(2008) 1625)

(Only the German version is authentic)

(Text with EEA relevance)

(2008/719/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

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

Whereas:

I. PROCEDURE

(1) On 4 April 2006, the Commission received a complaint from a Ukrainian/Austrian investors' consortium (hereinafter called 'the Consortium') [2] claiming that Austria had infringed the State aid rules in the privatisation process of Hypo Bank Burgenland AG (hereinafter called 'BB'). In particular, the tender procedure, which allegedly had been unfair, untransparent and discriminatory towards the complainant, had resulted in the sale of BB, not to the highest bidder (the complainant), but to the Austrian insurance company Grazer Wechselseitige Versicherung AG together with GW Beteiligungserwerbs- und –verwaltungs-G.m.b.H. (hereinafter called 'GRAWE').

(2) A first request for information was sent to Austria on 12 April 2006. On 25 April 2006 Austria requested an extension of the time limit, which was partially granted by letter dated 28 April 2006. Austria answered by letters dated 15 May 2006 and 1 June 2006. A meeting was held with the Austrian authorities on 27 June 2006. A second request for information was sent on 17 July 2006 and the complete reply received on 18 September 2006.

(3) In the meantime, by e-mail and letters dated 21 April 2006 and 2 June 2006, the Commission received further information from the Consortium.

(4) By letter dated 21 December 2006, the Commission informed Austria that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measure.

(5) The Commission Decision to initiate the formal investigation procedure (hereinafter also called 'the opening decision') was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the measure.

(6) The Commission received comments from interested parties. A Hungarian party submitted information both within, and also — without giving particular reasons — outside the deadline set by the decision. The comments received within the deadline were sent on 22, 26 and 27 February 2007 and on 9 March 2007. Further information from that interested party was received after expiry of the deadline on 19 and 28 March 2007.

(7) The successful bidder GRAWE — the potential aid beneficiary — also provided comments. These comments were sent on 9 March 2007, together with a request for an extension of time, which was granted. GRAWE submitted further comments by letter dated 19 April 2007; the complete file including annexes arrived at the Commission on 26 April 2007. After a meeting with the Commission on 8 January 2008, GRAWE submitted more comments on 5 February 2008.

(8) Austria submitted its own comments after the opening of the formal investigation procedure on 1 March 2007, after a time extension had been granted.

[1] OJ C 28, 8.2.2007, p. 8.
[2] For a detailed description see below.
[3] See footnote 1.

(9) All comments received within the initial (Hungarian party) or extended (GRAWE) deadline were forwarded to Austria, which was given the opportunity to react. Its comments were received by letter dated 5 June 2007. At a later stage, on 8 February 2008, the Commission sent all other information received outside the deadline by GRAWE or the Hungarian third party to Austria for comments.

(10) A number of meetings were held with Austria, GRAWE and the Ukrainian authorities. The last meeting with Austria took place on 1 April 2008. More comments from Austria were received by e-mails dated 14 December 2007 and 23 January, 25 February, 5 March and 9 April 2008.

(11) On 22 March 2007, the complainant, which had not commented on the decision to initiate the formal investigation procedure, provided the Commission with an update on the state of play with one of its court proceedings in Austria (decision of the Vienna Higher Regional Court (Oberlandesgericht) dated 5 February 2007 and subsequent appeal by the complainant to the Supreme Court (Oberster Gerichtshof) of Austria). The complainant had filed a number of actions with Austrian courts which have all been unsuccessful so far.

II. DETAILED DESCRIPTION OF THE AID

1. The Consortium (the complainant)

(12) The complainant is an Austro-Ukrainian consortium which, at the time of the sale of BB, consisted of two Ukrainian joint-stock companies, Ukrpodshipnik and Ilyich, and two Austrian companies, SLAV AG and SLAV Finanzbeteiligung GmbH, the latter one having been founded specifically for the purpose of acquiring BB. Ukrpodshipnik and Ilyich are major Ukrainian groups employing nearly 100 000 staff and having a total annual turnover of about USD 4 billion in various fields such as steel production, shipbuilding, pipelines, metal processing and power stations. Ukropodshipnik is also active in the financial markets via Commercial Bank Active Bank Ltd (hereinafter called 'Active Bank'), which has operated since 2002 under a full banking licence in Ukraine. SLAV AG was founded in Vienna in 1992 as a subsidiary of the Ukrpodshipnik corporation, operating as a trading company. Its shares are quoted on the Vienna stock exchange. The fact that there was a reorganisation between the members of the Consortium after the sale which led to SLAV AG now being the owner of the Ukraine-based companies is irrelevant to the assessment of this case.

(13) Through the intended acquisition of BB, the Consortium was pursuing two major strategic objectives. First, being already active in the financial market sector in Ukraine, the Consortium wished to grow in this business segment. Secondly, with it exporting a large part of its products across the world, BB would have provided access to the international financial markets and supported the Consortium's international expansion. The business plan for BB drawn up by the Consortium reflected these strategic objectives and would, therefore, have changed BB's regional focus.

(14) Neither the information at the disposal of the Commission nor comments by third parties submitted following the opening of the procedure called the economic viability of the Consortium into question. In the course of the investigation, no information was received indicating that the Consortium would not be a serious undertaking, until, at a very late stage in the investigation, the Austrian authorities drew the Commission's attention to a German case in which the Bundesanstalt für Finanzdienstleistungsaufsicht (hereinafter called 'BaFin') had prevented the sale of shares in a German bank to an undisclosed Ukrainian group, in view of doubts surrounding the unclear origin of the funds – an assessment which was confirmed by a German administrative court ([4]).

2. GRAWE (the beneficiary)

(15) The buyer GRAWE consists of Grazer Wechselseitige Versicherung AG and GW Beteiligungserwerbs- und -verwaltungs-G.m.b.H. GRAWE is a well established major Austrian financial services group. It is active in insurance, banking and real estate both in Austria and in a large number of Central European countries, with subsidiaries in Slovenia, Croatia, Belgrade, Sarajevo, Banja Luka, Hungary, Bulgaria, Romania, Ukraine, the Republic of Moldova and Podgorica. Head offices are mostly located in the national capital. Grazer Wechselseitige Versicherung AG offers all the usual forms of insurance, but also proposes financial and leasing services. Its headquarters are in Graz and there are main offices in all provincial capitals. Annual premium income in 2006 came to about EUR 660 million and the number of insurance contracts managed amounted to 3,3 million.

([4]) See press release No 7/2008 of 22 February 2008 of the Frankfurt am Main Administrative Court, provided by Austria (www.vg-frankfurt.justiz.hessen.de).

(16) In 2006 Grazer Wechselseitige Versicherung AG held direct stakes in two entities in the banking and investment sector. The major one was a 43,43 % interest in HYPO Group Alpe Adria, a financing group in the Alps-to-Adriatic region. Hypo Group Alpe Adria has offices in Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Germany, Hungary, Italy, Liechtenstein, the former Yugoslav Republic of Macedonia, Montenegro, Serbia, Slovenia and Ukraine. It employs more than 6 500 people to serve more than 1,1 million customers and had more than EUR 30 billion of assets in 2006. In 1989 GRAWE acquired Capital Bank, an independent institution, specialising in recent years in private banking and investment banking with about 70 investment funds under management.

(17) The business plan drawn up by GRAWE for the acquisition of BB did not provide for any change in BB's business model or for the integration of BB into the existing banking activities of the group.

(18) In 2007 GRAWE sold about 15 % of its holding in HYPO Group Alpe Adria and realised considerable book profits. In using the existing loss carry-over of EUR […] (*) million ([5]) of BB, GRAWE made tax savings ([6]) which it used to offset the net purchase price of EUR […] million ([7]) paid for BB.

3. **Hypo Bank Burgenland AG (BB)**

(19) Until it was sold, HYPO Bank Burgenland AG was a joint stock corporation under Austrian law with its registered office in Eisenstadt, Austria. Before the sale of BB to the Austrian insurance group GRAWE, which is the aid measure in question, and since the shareholders' meeting of March 2005, the Federal Province of Burgenland (hereinafter called 'the Province of Burgenland') held 100 % of the equity ([8]). BB group was of only regional importance with a balance sheet value of some EUR 3,3 billion in 2005.

(20) Prior to the sale, BB operated under a full banking licence in the Province of Burgenland and in western Hungary, where it had a wholly owned subsidiary, Sopron Bank RT. Founded as a regional mortgage bank, BB's task had been to promote monetary and credit transactions in the Province of Burgenland. Historically, its main business had been to grant mortgage loans and issue mortgage bonds and municipal bonds. At the time of the sale, it acted as a universal bank and offered all other banking and financial services.

(21) Until its privatisation, BB still benefited from so-called *Ausfallhaftung* ([9]). Following an agreement between the Commission and Austria leading to Commission Decision C(2003) 1329 final ([10]), *Ausfallhaftung* had to be abolished by 1 April 2007. As a general rule, all liabilities existing on 2 April 2003 continue to be covered by *Ausfallhaftung* until their maturity expires. After that, *Ausfallhaftung* can be maintained between 2 April 2003 and 1 April 2007 for newly created liabilities provided their maturity does not go beyond 30 September 2017. However, the privatisation of BB had the effect that this transitional period ended prematurely, on the day of closing of the deal with GRAWE, i.e. on 12 May 2006 ([11]). New liabilities incurred after that date are no longer covered by *Ausfallhaftung*. On 31 December 2005, liabilities covered by *Ausfallhaftung* amounted to approximately EUR 3,1 billion, not including the issue of the additional bonds described in paragraph 44.

(22) As a result of past losses, BB had tax losses to carry over of approximately EUR 376,9 million as at 31 December 2004. Since 1 January 2005, Austrian tax law allows companies (within the same group) to offset profits and losses against each other. It depends on the company's specific structure to what extent this can be done.

(*) *Business secret*.

([5]) Loss carry-over as of 31 December 2004.

([6]) The corporation tax rate in Austria is 25 %.

([7]) Four real estate companies with a nominal value of EUR […] million were directly transferred to the Land prior to closing at a price of EUR […] million.

([8]) At the shareholders' meeting in March 2005 it was decided to merge the free float shares and to compensate the free float shareholders owning 6,79 % of the equity.

([9]) *Ausfallhaftung* (deficiency liability) is a guarantee measure for public credit institutions which, in April 2003, covered about 27 savings banks and seven *Landeshypothekenbanken* (public mortgage banks). It gives rise to a guarantee obligation whereby, in the event of the insolvency or liquidation of a credit institution, the guarantor (the State, the province or the municipality) is obliged to step in. The bank's creditors have direct claims against the guarantor, which, however, is required to perform only if the bank's assets are insufficient to satisfy the creditors. *Ausfallhaftung* is limited neither in time nor in amount. BB does not pay any consideration for the guarantee.

([10]) OJ C 175, 24.7.2003, p. 8. Austria accepted the appropriate measures suggested in the Decision by letter dated 15 May 2003, registered as received on 21 May 2003.

([11]) According to Section 4, paragraph 7 of the Law on the public mortgage bank of Burgenland, the transitional period for liabilities covered by *Ausfallhaftung* will cease to exist for all new liabilities if Bank Burgenland (or the majority of its shares) is sold before the end of the transitional period agreed with the Commission.

4. **The restructuring of BB**

(23) By Decision of 7 May 2004 ([12]) (hereinafter called 'the restructuring decision'), the Commission approved restructuring aid for BB totalling EUR 360 million consisting of two measures: a guarantee agreement dated 20 June 2000 between the Province of Burgenland and BB (EUR 171 million plus 5 % interest ([13]) and a framework agreement dated 23 October 2000, which consists of a claims waiver on the part of Bank Austria for BB totalling EUR 189 million, a better-fortune agreement between these two contracting parties ([14]) and a guarantee agreement on the part of the Province of Burgenland for BB amounting to EUR 189 million ([15]).

(24) The restructuring Decision included the following retrospective amendments to the guarantee agreement of 20 June 2000 and the framework agreement. The guarantee agreement of 20 June 2000 was modified so that BB's annual operating profits will no longer be used to reduce the amount covered by the guarantee provided by the Province of Burgenland and BB will be able to call on the guarantee at the earliest when the annual accounts for the financial year 2025 are closed. The Province of Burgenland will have the right to make the open guarantee payment to BB in full or only in part as from the moment when the annual accounts for the financial year 2010 are closed. The framework agreement of 23 October 2000 was amended as follows: BB's annual profits will no longer be used to meet the better-fortune obligation towards Bank Austria AG. The Province of Burgenland will meet the better-fortune obligation towards Bank Austria and will pay the amounts still outstanding under the guarantee agreement immediately prior to the privatisation of BB with a one-off payment.

([12]) Commission Decision 2005/691/EC on State aid C 44/03 (ex NN 158/01) which Austria is planning to implement for Bank Burgenland AG (OJ L 263, 8.10.2005, p. 8).

([13]) The guarantee agreement relates to the loan commitments of the HOWE complex. BB's annual operating profits are used to cover the amount of the guarantee. Accordingly, the amount of the guarantee will be reduced by the amount of BB's annual profits where these are not needed to distribute preference dividends. BB will be able to call on the guarantee provided by the Province of Burgenland at the earliest when the annual accounts for the financial year 2010 are closed.

([14]) The claims waiver is in exchange for an interest-bearing better-fortune clause on the part of BB and provides for repayment of the full amount of Bank Austria's claim, plus interest, in seven instalments starting on 30 June 2004. From that date, BB had therefore to repay the amount of the claims waiver plus interest accrued up to that date. The redemption of the better-fortune clause is based on BB's annual profits.

([15]) In the event of BB being unable to meet its better-fortune obligation, the Province of Burgenland has assumed an irrevocable deficiency guarantee towards Bank Austria AG which is effective for each year in the period 2004-10 and under which the Province of Burgenland must cover any shortfall towards Bank Austria AG. Under this agreement, both BB and the Province of Burgenland are free to meet the better-fortune obligation towards Bank Austria AG ahead of the deadlines set.

(25) The amendments regarding the use of annual profits to reduce the amounts guaranteed would not have taken effect if BB had not been privatised. As long as the Province of Burgenland remained the owner of BB, the two guarantees would have remained unchanged, the amounts guaranteed would have been further reduced by BB's annual profits and BB's better-fortune obligation would have remained unchanged.

(26) BB's privatisation was an essential component of the restructuring plan approved by the Commission. The Province of Burgenland regarded BB's privatisation as the best possible guarantee of the bank's long-term viability.

(27) Following the Commission Decision and starting in 2003, the Province of Burgenland made two attempts to sell and privatise BB, both of which failed. The third attempt — the aid measure described below — started with an announcement in the media on 18 October 2005.

5. **The privatisation of BB**

5.1. The privatisation process

(28) The Commission notes that the parties which were involved in the sale of BB differ in their description of the sales process. However, the Commission considers that the following elements of the sale of BB, as set out in the opening decision and as supplemented by the comments of Austria and the comments of GRAWE, are uncontroversial.

(29) In 2005 the Province of Burgenland launched a third tender procedure to privatise BB. The international investment bank HSBC Trinkaus & Burkhardt KGaA, Düsseldorf, jointly with HSBC plc, London (together hereinafter called 'HSBC'), which were commissioned to carry out the privatisation process, publicly announced the intention to sell BB in the Official Journal of Vienna (*Amtsblatt zur Wiener Zeitung*) on 18 October 2005 at a national level and in the English-language edition of Financial Times Europe on 19 October 2005 at an international level and asked parties interested in acquiring shares in BB to come forward.

(30) While 24 potential bidders both within and outside the European Union reacted to the announcement, only 14 officially signalled their interest in tendering and were therefore provided with a 'process letter' in order to enter the next phase of the tender process. In the process letter, the potential bidders were asked for an indicative, non-binding offer to buy the bank before 6 December 2005.

(31) Only three of the 14 potential bidders came forward with indicative offers on time, which were pitched at EUR 65 million, EUR 100 million and EUR 140 million respectively ([16]), and entered the second phase aimed at leading to a binding offer for which the deadline was set at 6 February 2006. This second phase included, in particular, a due diligence phase to be carried out in an Internet data room from 7 January to 30 January 2006, supplemented by a number of presentations and meetings. The bidders also had the opportunity to ask questions during and after the due diligence process.

(32) On 6 February 2006 two bidders submitted a binding offer, GRAWE on the one hand, and the Consortium on the other.

(33) With these two bidders the binding offers were individually negotiated further. These negotiations ended on 4 March 2006.

(34) On 5 March 2006 the Province of Burgenland awarded the contract to GRAWE despite the purchase price offered by GRAWE (EUR 100,3 million) being significantly lower than the price offered by the Consortium (EUR 155 million). The decision was based on a written recommendation by HSBC (hereinafter called 'the recommendation') dated 4 March 2006, supplemented by oral explanations to the members of the Government of the Province of Burgenland on the day of the decision. The Government of the Province of Burgenland formally agreed to the sale on 7 March 2006. The closing of the deal took place on 12 May 2006.

(35) On the eve of closing, BB issued bonds to the amount of EUR 700 million. A forecast in 2005 had foreseen the issue of only EUR 320 million of additional bonds before the privatisation. The issue was effected under *Ausfallhaftung*. Capital Bank, a subsidiary of GRAWE, subscribed to EUR 350 million of the total EUR 700 million bonds.

5.2. The selection criteria in the process letter

(36) The following criteria for evaluating the offers were based on a decision of the Government of the Province of Burgenland of 6 September 2005 and were enumerated in the process letter:

(a) the purchase price and reliability of the purchase price payment;

(b) maintenance of the autonomy of BB;

(c) continued operation of BB and, at the same time, avoidance of use of *Ausfallhaftung*;

(d) willingness to conduct any necessary capital increases;

(e) transaction security;

(f) considerations of time in carrying out the transaction.

(37) The process letter further stated that the shareholder of BB would, on the basis of the recommendation, make a discretionary choice as to which bidders could enter the second phase of the sales process.

5.3. The warranty clause in the contract with GRAWE

(38) The contract with GRAWE contains a warranty by the Province of Burgenland that the State aid rules are infringed neither in the context of the guarantee agreements which are the subject matter of the restructuring decision, nor in the context of the sales contract itself. This warranty is supplemented by a clause which entitles the buyer GRAWE to be compensated by the Province of Burgenland in respect of any recovery ordered by the Commission in a negative decision. If the State aid rules were to prohibit such an adjustment of the sales price, the buyer could, according to this clause, rescind the contract.

([16]) A fourth bidder made an indicative offer of EUR 115,5 million, but out of time and incomplete. The offer was therefore not considered any further.

5.4. The recommendation by HSBC

(39) The recommendation compares the two offers by GRAWE and the Consortium on the basis of the selection criteria mentioned above. It points out that the purchase price would lead to a decision in favour of the Consortium. However, in view of the other criteria — reliability of the purchase price payment, continued operation of the bank and avoidance of use of *Ausfallhaftung*, capital increases and transaction security — HSBC recommends a sale to GRAWE (see paragraphs 27 to 29 of the opening decision for further details).

III. DECISION TO INITIATE THE FORMAL INVESTIGATION PROCEDURE UNDER ARTICLE 88(2) OF THE EC TREATY

(40) The Commission decided to open the formal investigation procedure under Article 88(2) of the EC Treaty for the following main reasons.

(41) Applying the principles set out in the XXIIIrd Report on Competition Policy [17], the Commission could not establish that the sale had taken place free of aid, especially as it was obvious that the Consortium, while submitting a substantially higher offer, was not chosen as the buyer of BB by the Province of Burgenland. In addition, there were a number of discrepancies in the way the bidding procedure was described by the complainant on the one hand and Austria on the other.

Doubts related to the tender procedure

(42) As to the tender procedure, the Commission expressed doubts as to whether it could be regarded as transparent, unconditional and non-discriminatory. The Commission especially doubted whether the bidders had been treated in the same way during the tender procedure and also whether a private vendor would have imposed some of the conditions attached to the sale as set out in HSBC's process letter.

(43) The Commission expressed further doubts on the transparency of the final selection, given that there was no indication as to how the criteria would be weighted; moreover, the further criterion of 'refinancing of BB after the sale', which was stressed during the negotiations, was not included in the list (see paragraphs 65 to 69 of the opening decision for further details).

Other considerations

(44) Furthermore, the Commission could not rule out the possibility that an economic advantage had been conferred on GRAWE, for the following reasons.

(a) the price difference, indicating that the market price had not been paid in selling BB to GRAWE;

(b) the issue of further bonds worth EUR 380 million covered by *Ausfallhaftung*, which was not an element of the business plan of BB which had been given to the potential buyers and which apparently had not been offered to the Consortium;

(c) the uncertainty whether higher bids might have been offered or whether other competitors might have participated in the sale, had the conditions referred to above not been imposed.

(45) The Commission also mentioned the potential effect of the tax loss carry-over on the economic value of the respective offers. The warranty clause contained in the contract with GRAWE was a further matter for concern.

(46) On the stipulation in the contract concerning compensation for early discharge (*Vorfälligkeitsentschädigung*) of the guarantee agreement of 20 June 2000, the Commission wondered whether the restructuring decision had been fully complied with by Austria.

IV. COMMENTS FROM INTERESTED PARTIES

(47) The Commission received comments from the beneficiary GRAWE and from a Hungarian third party [18]. The comments from GRAWE support and supplement Austria's arguments and these are dealt with together below.

[17] European Commission, XXIIIrd Report on Competition Policy 1993, paragraphs 402 *et seq*.

[18] The factual information provided by the complainant need not be dealt with in this context.

(48) The Hungarian interested party submitted a number of documents which refer to an alleged earlier fraud concerning primarily the business of BB in Hungary, where its subsidiary Sopron Bank RT is situated. It maintained that the fraud could be kept secret only by selling BB to an Austrian bidder. Numerous documents were provided, relating especially to a number of Hungary-based subsidiaries linked with BB, such as extracts from trade registers, the founding charters of the undertakings concerned, minutes of annual meetings or other company data, covering periods clearly prior to the sale of BB. The Commission was unable to establish any relevant link between these documents and the privatisation procedure it had to assess under the State aid rules. These comments could therefore not be taken into account.

V. COMMENTS FROM AUSTRIA AND GRAWE

(49) Austria stressed and supplemented the arguments which had already been presented before the Commission decided to open the formal investigation procedure. In this, Austria was largely supported by GRAWE.

1. Admissibility

(50) On procedural grounds, Austria maintained that the Commission should not go into the details of this complaint as the Consortium, which had not yet entered the European banking market and was therefore not even a competitor, could not be regarded as an 'interested party' within the meaning of Article 1(h) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [now Article 88] of the EC Treaty ([19]). Any alleged discrimination would, rather, be linked with the freedom of establishment and the free movement of capital; entry into the European banking market could not be obtained via a State aid procedure. The Commission should also take into consideration the fact that the Consortium was not active subsequent to the Commission's opening decision and had made it publicly known that it no longer had any interest in acquiring the bank.

(51) The Commission would be exceeding its discretionary powers by examining this case. Austria stressed that the Austrian courts had dealt extensively with the case under State aid law, had intensively heard witnesses, had fully evaluated the facts and had concluded that an open, fair and transparent tender procedure had been carried out. The Commission should have endorsed this view instead of opening a formal investigation procedure.

([19]) OJ L 83, 27.3.1999, p. 1.

2. General issues related to the tender procedure and its outcome

The circumstances of the tender

(52) Austria stressed that there had been an open, fair and transparent tender procedure, confirmed by the courts in Austria dealing with the matter. The final decision was not taken before 4 March 2006. All parties had been given the same opportunities to obtain the information they needed for their due diligence, even if the parties did not use it in the same way.

(53) Even though there had been strong reservations against the Consortium from the start, it was legitimate to keep the Consortium in the tender procedure as long as possible, instead of excluding it on the basis of the indicative offers. Such behaviour was in keeping with that of a private vendor, who would thus increase competition between the bidders in order to drive the price as high as possible. In addition, Austria had kept expecting the Consortium to put itself forward as a financially strong business partner, as it had announced during the negotiations. Such a partner could have changed the situation substantially.

(54) GRAWE submitted that it could not perceive that it had been treated in a preferential manner during the tender procedure, either by the Province of Burgenland or by the Austrian Financial Market Authority (FMA).

The recommendation

(55) Austria pointed out that HSBC's recommendation was no more than a summary of the privatisation process and could not in itself be regarded as the only basis for the decision taken. The recommendation was only intended to give a short overview of the procedure and the offers. Its findings had been complemented by oral explanations given to the decision makers. Austria supplemented this information by providing a note which had been drafted by HSBC for the Province of Burgenland to help it prepare its reply to the Commission's first request for information of 12 April 2006, and in which the findings were further commented on. According to Austria, the recommendation should not be regarded as an expert opinion on the value of the bank, which was not required by European law. The decision made on 5 March 2006 was instead based on experience acquired in the course of the privatisation process, the recommendation, oral valuations and confidential explanations by HSBC representatives.

The comparability of the offers by GRAWE and the Consortium

(56) A number of elements in both the submissions by Austria and the comments by GRAWE address the comparability of the offers made by the two bidders.

(57) As far as the compensation for early discharge (*Vorfälligkeitsentschädigung*) of the 4guarantee agreement of 20 June 2000 is concerned, Austria argued that the Commission had misinterpreted the relevant arrangements provided for in the offers of both final bidders. The compensation related to the fact that the Province of Burgenland would be making its payments under the guarantee agreement several years earlier than planned ([20]). This was not an element of the purchase price, as apparently assumed by the Commission. Furthermore, the scheme did not call the earlier decision on the restructuring of BB into question, but helped reduce the aid which had at the time been authorised by the Commission.

(58) In regard to the warranty clauses and the warranty periods provided for in the sales contracts with GRAWE and the Consortium, Austria argued that they were the result of the individually conducted negotiations with each party. The different arrangements in regard to the limits of liability, the amounts of exemption and the warranty periods (two years for the Consortium and three years for GRAWE) did not discriminate between bidders.

(59) Only the draft contract with the Consortium stipulated an annual fee of EUR 100 000 for *Ausfallhaftung*, to be paid until 2017 to the Province of Burgenland. In explanation, Austria pointed out that the contract with GRAWE did not stipulate an annual fee as this was already included in the sales price offered by GRAWE.

(60) Concerning the issue of new bonds, Austria argued that the decision of the management board to issue new bonds to the amount of EUR 380 million, complementing the prior decision — based on the planning in BB's business plan — to issue bonds worth EUR 320 million in September 2005, had been independent of the forthcoming privatisation and from the future owner of BB. The Province of Burgenland did not think that the issue of those additional bonds had been worth mentioning in the process letter, as this would not have been decisive for the sale. However, both bidders had been informed during the due diligence and the issue would have taken place regardless of the identity of the buyer. GRAWE alone had incorporated this in its draft contract. Austria stressed that the issue of an additional EUR 380 million of bonds was done in order to benefit as much as possible from the favourable refinancing conditions under *Ausfallhaftung*. This had been mentioned repeatedly in the course of the negotiations with the Consortium. Indeed, had BB been sold to the Consortium, it would have profited from the better refinancing conditions to a considerably higher extent than GRAWE as buyer. Austria argued that the refinancing conditions of BB in the event of a sale to the Consortium would have been more costly, given that GRAWE was rated and the Consortium was not only not rated, but had its seat in Ukraine and BB could therefore expect at most refinancing conditions for a — hypothetical — rating of 'BB' or 'B', if at all.

(61) In regard to the special arrangement with GRAWE to transfer four of BB's real estate subsidiaries back to the Province of Burgenland prior to closing at their book value of EUR 25 million, Austria pointed out that, given that BB's auditor confirmed on 31 December 2005 that the market value of the property would be equal to its book value, this transfer would have only a liquidity effect. This liquidity effect therefore did not need to be taken into account in the comparison of the two offers.

(62) An advance payment of EUR 15 million into a trust account with Ukraine-based Active Bank on the day of signing of the contract was offered by the Consortium. GRAWE had to transfer the sales price in full on the day of closing.

The warranty clause concerning State aid in the contract with GRAWE

(63) Austria took the view that the clause, which was also part of the draft contract with the Consortium ([21]), was standard in any sales contract in such transactions as part of the sales conditions and price and was in line with the State aid rules. It was in the legitimate interest of BB's buyer, who had not been willing to bid a higher price and might be asked to pay more through a recovery order as a consequence of a State aid decision. Besides, the Commission should also take into account the fact that the clause included a right of the buyer to withdraw from the contract if the clause was invalid under the State aid rules.

([20]) As stated above, according to the amended guarantee agreement of 20 June 2000 the Province of Burgenland had the right to make the open guarantee payment to BB in full or in part as from the moment when the annual accounts for the financial year 2010 are closed.

([21]) However, the warranty in the draft contract with the Consortium did not include a guarantee that the sales contract itself was free of aid.

(64) According to GRAWE, the Commission's doubts were irrelevant as long as there was no recovery order. GRAWE stressed that the buyer in a tender procedure had very limited means to prevent behaviour by a public seller that was potentially relevant to a State aid assessment. GRAWE considered that such a clause gave the State even more reason to comply with the State aid rules and was therefore in turn in the Commission's interest.

3. **The market conformity of the sales price paid by GRAWE**

(65) According to Austria, the existence of an open and transparent tender procedure which produced the market price was demonstrated by the fact that three bidders came forward with an indicative offer, of which GRAWE's offer was second. This indicated that GRAWE's offer had not been below BB's market value.

(66) Austria referred to the outcome of the second attempt to privatise BB. All four offers at the time had been within a range of EUR 85 million to EUR 93 million. The EUR 100,3 million paid by GRAWE could therefore also be considered to be in line with market conditions.

(67) According to the State aid rules, Austria was not obliged to sell the bank in an open tender procedure at all but was free to choose either an open tender procedure or an expert evaluation. As long as the sales price was in keeping with these prior evaluations, State aid was not involved. In this context, the Commission had disregarded the fact that Austria had already presented a number of studies in the early phase of the investigation confirming its view that the price paid by GRAWE had been in line with market conditions.

(68) Austria and GRAWE backed up their arguments by referring to the following studies and documents:

(a) an indicative evaluation of BB made by HSBC: this study concluded that, if BB was privatised and sold to a buyer of good credit standing, its value would be in the range of EUR 50-70 million depending on the value attributed to the tax loss carry-over. The value of the equity would then amount to EUR 33,4 million ([22]);

(b) an evaluation of the stand-alone value of BB carried out by gmc-unitreu Wirtschaftsprüfungs- und Steuerberatungs GmbH on the occasion of the acquisition of all the shares by the Province of Burgenland in order to prepare the ground for the privatisation of BB. On the basis of figures similar to those used by HSBC, the study concluded that on 30 June 2004 BB was worth between EUR 44,4 million and EUR 53,9 million ([23]);

(c) the Consortium's own assessment, which assumed a stand-alone equity value of BB in the range of EUR 50-75 million.

(69) In addition, Austria argued that the bidders had priced in the conditions of the tender procedure and therefore both offers had been higher than the actual market value.

(70) Austria offered to commission a further study by an independent expert in order to establish that a price in line with market conditions had been paid.

4. **The role of *Ausfallhaftung* in the sale of BB**

(71) Throughout the investigation Austria repeatedly stressed the importance of *Ausfallhaftung* and the ensuing financial interest of the Province of Burgenland in the sale of BB, and in this was supported by GRAWE. The criterion of 'continued operation of Bank Burgenland and, at the same time, avoidance of the use of *Ausfallhaftung*' was one of the conditions Austria had made public in the tender procedure and hence was known to all concerned. In this connection, Austria and GRAWE presented the following arguments in particular.

([22]) HSBC took into account only the tax loss carry-over that BB could actually use on the basis of its own business. In this connection, HSBC assumed that the buyer's good rating would more or less automatically apply also to BB (so-called 'transfer of good credit standing' — '*Bonitätstransfer*'). In total, HSBC valued BB using three scenarios, including a further scenario based on continued ownership of BB by the Province of Burgenland, with no privatisation taking place, and a scenario based on a future owner with no credit standing/rating (such as the Consortium).

([23]) A tax loss carry-over of EUR 5,6 million was taken into account.

(72) The basis for *Ausfallhaftung* could be found in statute. However, as a company limited by shares ('AG'), BB had a private-law legal form and the guarantee itself was a private-law institution (Section 1356 of the General Civil Code); the conditions and extent of the liability of the Province of Burgenland were therefore governed by private-law provisions. The State had acted as owner of Bank Burgenland and not in its public-law capacity. In not accepting this argument, the Commission was ignoring the separation of powers in Austria between the legislature (the source of *Ausfallhaftung*), on the one hand, and the executive (the Province of Burgenland, which had taken the decision to sell BB), on the other. The relationship between the Province of Burgenland and BB could be likened to the situation of a parent company giving a guarantee for its subsidiary in the form of a comfort letter (*Patronatserklärung*). Such a guarantee would be taken into account when selling a subsidiary, as would any other off-balance sheet risk. Austria further supported this view by referring to a judgment of the Austrian Supreme Court of 4 April 2006 ([24]).

(73) Furthermore, the Commission and Austria had agreed on the abolition of the guarantee as existing aid after a transitional period. Until its abolition, *Ausfallhaftung* would be 'legalised', which should also allow the Province of Burgenland to take it into consideration when selling BB. The guarantee had not been granted by the Province of Burgenland with a view to the privatisation process and Austria had had no legal means of discharging itself from its guarantee prior to the sale of BB. If the risk associated with *Ausfallhaftung* could not be taken into account under these circumstances, the Commission would effectively be preventing the Province of Burgenland from privatising BB. This would contradict the privatisation requirement in the Commission's earlier decision on BB and would unlawfully restrict Member States' freedom to privatise their assets.

(74) Austria's view was confirmed by the Commission's own practice and by the European Courts. In particular, the Commission had recognised that liabilities and off-balance sheet risks could be taken into account in a privatisation procedure ([25]). In *Gröditzer Stahlwerke*, the Court of Justice of the European Communities also implicitly recognised that a guarantee given by the State, which was relevant to the liquidation of the undertaking, should be taken into account ([26]). The recognition of *Ausfallhaftung* as existing aid was therefore relevant.

(75) The risk that *Ausfallhaftung* might be called upon depended on the future risk profile of the bank and, therefore, on the risk profile of its new owner. The Province of Burgenland had considered the risk associated with the Consortium as owner to be unacceptable. The fact that BB remained under the supervision of the FMA did not change this prognosis, as the FMA intervened only ex post.

The liquidation scenario presented by Austria

(76) Austria provided a calculation for the amount guaranteed by *Ausfallhaftung* and a liquidation scenario. It pointed out that the approach used in the calculation was identical to the one presented to the Commission in the procedure leading to the restructuring decision.

(77) GRAWE submitted that it was wrong to use a liquidation scenario in this context as the Province of Burgenland had to decide, not on a liquidation of BB, but on which buyer it should choose. The liquidation scenario had been intended for a different situation (decision on restructuring aid). In addition, in a situation of *Ausfallhaftung*, the Province of Burgenland would not be able to demand the liquidation of all assets, as all creditors could address the Province directly with their claims.

The refinancing of BB after its sale

(78) Austria linked this element to the criterion of 'continued operation of BB and, at the same time, avoidance of the use of the guarantee', maintaining that the announcement of the sale of BB to the Consortium might have led to an increase in BB's refinancing needs and a significant liquidity outflow, and eventually might have triggered *Ausfallhaftung*. BB's liquidity in the wake of the sale had been a crucial factor in the decision-making. The Consortium had also not excluded the possibility of deposit withdrawal by clients or the cancellation of inter-bank credit lines, albeit to a significantly lesser extent than estimated by Austria. While the Consortium expected a maximum of EUR 500 million of withdrawals, Austria submitted calculations which quantified the net liquidity outflow at, at best, EUR 750 million and, at worst, EUR 1,25 billion. The Consortium bore the burden of proving that it could secure the refinancing, but had failed to discharge it. Instead, it had merely provided non-binding 'letters of intent' from various banks.

([24]) Judgment of the Austrian Supreme Court of 4 April 2006, 1 Ob251/05a, also provided by GRAWE, in which it was held that *Ausfallhaftung* was inseparably linked with the Province of Burgenland's role as shareholder.

([25]) Commission Decision of 8 September 1999 on aid granted by France to Stardust Marine (OJ L 206, 15.8.2000, p. 6), paragraph 82; Commission Decision of 11 April 2000 on the aid granted by Italy to Centrale del Latte di Roma (OJ L 265, 19.10.2000, p. 15), paragraph 91.

([26]) Judgment of the Court of Justice of 28 January 2003 in Case C-334/99 *Gröditzer Stahlwerke* [2003] ECR I-1139, paragraphs 136 *et seq*.

(79) Austria further underlined that it would have been less concerned on this score had the Consortium presented a financially strong business partner, as it had announced during the negotiations.

5. **Issues regarding the authorisation of the sale by the FMA**

(80) Austria explained that, according to Section 20 of the Banking Act, the FMA could only carry out the so-called 'fit & proper test' of the buyer of a bank when the parties had already entered into a binding agreement. A hypothetical evaluation of more than one potential buyer would exceed the FMA's powers. For the same reason, it was not possible to provide the Commission ex post with such an evaluation, as requested in the opening decision. Consequently, the FMA had refused to examine the documents both of the Consortium and of GRAWE, as both potential buyers had provided the FMA with documents in order to obtain permission prior to the sale ([27]). The FMA was required to evaluate any deal in an unbiased manner.

(81) Austria stated that it had nevertheless tried to obtain a statement concerning the two remaining bidders. Informally, the FMA had indicated that an evaluation of GRAWE, which was well known to the authority, would probably only take a few weeks. In contrast, the evaluation of the Consortium also involved other authorities outside the European Union and would therefore presumably take more than three months. However, the FMA was bound by law to react within three months; otherwise the sale would be deemed authorised. Therefore, a sale to the Consortium would inevitably lead to the FMA provisionally prohibiting the sale as a first step. The FMA could, however, continue with the examination and, if necessary, revoke its earlier refusal. The whole process could take up to a year. According to the FMA, the outcome would have been 'entirely open'.

(82) Against this background, Austria stressed that the Province of Burgenland had needed to sell BB on the basis of its own prognosis of the FMA's final decision. However, Austria had considered that the FMA would never have allowed a sale to the Consortium. The main considerations underlying the prognosis by the Province of Burgenland had been as follows:

([27]) The FMA was addressed by the Consortium by letter dated 6 December 2005 and by GRAWE by letter dated 10 January 2006. Both parties were subsequently informed by the FMA that it could not deal with their letters at that time.

(83) Back in 1994 SLAV International Bank AG had applied for a banking licence in Austria. The application was rejected on 17 November 1997. One of the grounds for rejection had been that the Ukrainian fund which was the owner at the time did not apply International Accounting Standards (IAS). Apart from a small member of the Consortium, Active Bank Ltd with activities in Ukraine only, no banking activities had been carried on within the group thus far. None of the Consortium's members was rated by an internationally recognised rating agency. In contrast, in GRAWE Bank Burgenland would be gaining an experienced partner in the banking and capital market sector that had an 'A' rating and was well known to the FMA.

(84) Similarly, Austria referred to its experience during the two earlier unsuccessful attempts at privatising BB. Especially during the second attempt, which ended in failure in August 2005, a Lithuania-based bank with a Russian owner had taken part and Austria had reason to believe that the FMA would have forbidden such a deal.

(85) Austria also noted that the decision would be more time-consuming owing to the non-existence of a memorandum of understanding as a basis for mutual cooperation and information exchange between the FMA and the Ukrainian National Bank.

(86) Furthermore, in order to preserve its good reputation, it was in GRAWE's interests to intervene in the event of BB experiencing difficulties. The same could not be said of the Consortium. In addition, Austria stressed that, with a Ukraine-based owner, BB would never obtain a rating similar to GRAWE's 'A' rating, but rather a rating between 'BB' and 'B', in accordance with the principle that an undertaking cannot secure a better rating than the country in which it is established.

6. **Further elements of the prognosis of the Province of Burgenland**

(87) Austria also presented a note by HSBC confirming all considerations by the Province of Burgenland as to the probability that the FMA would authorize the deal and that *Ausfallhaftung* might be availed of in the event of a decision in favour of GRAWE. The price difference was far outweighed by the much smaller risk in the event of a sale to GRAWE.

(88) The Consortium's business plan was also a matter for concern. It had not been submitted until late in the process on 27 February 2006 and provided for the integration of Ukraine-based Active Bank Ltd. Indeed, the Consortium made this a condition precedent to acquiring BB. However, there were a number of elements in this business plan which the Province of Burgenland considered highly dangerous to BB's very existence.

(89) In particular, only a very small part of the new capital pledged by the Consortium had been earmarked for strengthening the regional activities of BB (EUR 17 million out of a total of EUR 85 million), the rest being intended for Ukraine-based Active Bank. According to the business plan, the future main centre of gravity of the business was to be in Ukraine instead of in the Province of Burgenland — a situation which involved exchange risks.

(90) Also, the Province of Burgenland had never been able to find out how the Consortium intended to integrate Active Bank, the value of which was over-estimated. For prudential reasons, the Province of Burgenland assumed a worst-case scenario for BB in which a failure of Active Bank would seriously jeopardise BB and, ultimately, even result in BB's insolvency.

(91) Based on that business plan, the Province of Burgenland would not have sold BB even if the Consortium had been the only bidder ([28]).

(92) Furthermore, Austria had been concerned about the fact that the FMA would have needed considerably more time to evaluate a sale to the Consortium. A timely privatisation of BB was required by the decision concerning the restructuring of BB. In addition, GRAWE had limited the validity of its offer to 31 March 2006. The Province of Burgenland therefore risked being left without a buyer if the FMA prohibited the sale.

(93) On 5 March 2008 Austria referred to a German court judgment confirming a BaFin decision prohibiting the sale of shares in a German bank to a Ukrainian group. Austria did not maintain that the Ukrainian group concerned by this case was the Consortium, but it nevertheless found its own prognosis to be supported by the decision, which it had taken BaFin 13 months to reach.

(94) In Austria's view, the question of a timely sale was closely linked to the required transaction security. A failure of the third privatisation round would have endangered the bank and might in the aftermath even have led to BB'S insolvency, triggering *Ausfallhaftung*.

7. **Other risk evaluation methods presented by Austria and GRAWE**

(95) Austria submitted further explanations of the recommendation by HSBC, which follows an approach based on total guaranteed liabilities. A moderate increase in the probability that *Ausfallhaftung* might be triggered if BB were sold to the Consortium was sufficient to outweigh the difference between the two offers and hence pointed to a decision in favour of GRAWE.

(96) GRAWE, supported by Austria, submitted an expert opinion based on an option pricing model to explain and justify the sale to GRAWE. This expert opinion came to the conclusion that, even assuming a small increase of 1,83 % in the volatility of the assets following the sale of BB to the Consortium, the resulting risk to the Province of Burgenland in terms of *Ausfallhaftung* would be increased considerably. Hence the decision to sell BB to GRAWE was justified.

(97) Very late in the procedure, on 22 February 2008, Austria submitted an analysis of how the capital markets valued a guarantee such as *Ausfallhaftung*. A more detailed exposition of the approach taken in the analysis, produced by Morgan Stanley, was provided on 9 April 2008. The analysis started from the assumption that the Province of Burgenland could re-insure itself on the capital markets against the risk of *Ausfallhaftung* by means of a credit default swap. Austria argued that the results of the analysis showed that the decision by the Province of Burgenland was justified. It estimated the cost of such insurance at EUR 51,3-64,1 million in the event of a sale of BB to GRAWE and at EUR 521,6 million in the event of a sale of BB to the Consortium. Morgan Stanley's estimates were lower (EUR 354 million as at 12 May 2006), but were still said to support Austria's findings.

([28]) Austria and GRAWE placed particular emphasis on this point, referring to similar findings by the Eisenstadt Regional Court.

8. **Compatibility of the aid with the common market**

(98) Austria did not submit any comments on the compatibility of the aid with the common market.

(99) GRAWE argued that the measure, if considered to be State aid, should be found compatible with the common market in the light of Article 87(3)(c) of the EC Treaty. The privatisation of BB was closely bound up with the earlier restructuring decision, according to which BB should continue to operate as a regional bank in the Province of Burgenland. Judging by its business plan, the Consortium as owner did not foresee such an orientation. This would additionally have endangered the proper implementation of the restructuring decision.

VI. **LEGAL ASSESSMENT OF THE AID**

1. **Admissibility**

(100) First of all, the Commission would recall that, according to Article 10(1) of Council Regulation (EC) No 659/1999, it must examine information from whatever source regarding alleged unlawful aid. Austria therefore assumes the existence of a margin of discretion which in reality the Commission does not enjoy, being bound by law to deal with a complaint such as that lodged by the Consortium. As GRAWE's only competitor in the final stage of the tender procedure for acquiring BB, the Consortium is undoubtedly an 'interested party' within the meaning of Article 1(h) of the above-mentioned Regulation. Subsequent developments — such as press reports suggesting that the Consortium had abandoned its initial plans to buy the bank — have no influence on the Commission's obligation to continue with its investigation. In this respect the Commission would point out that the Consortium has not withdrawn its complaint ([29]).

(101) The Commission would point out that the national court decisions referred to by Austria neither predefine nor limit its competence to assess the case under Articles 87 and 88 of the EC Treaty. In this respect, the Commission would also note that the outcome of none of the decisions it was provided with is actually based on State aid law ([30]).

2. **Existence of State aid within the meaning of Article 87(1) of the EC Treaty**

(102) As provided in Article 87(1) of the EC Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market. The privatisation of BB has to fulfil all the criteria of this Article in order to qualify as State aid.

2.1. State aid in the context of privatisation – the legal framework

(103) As set out in the opening decision, the Commission's assessment in the context of a privatisation starts from a number of principles which are set out in the XXIIIrd Report on Competition Policy (herein after called 'the Competition Report') and subsequent practice ([31]).

(104) One of the circumstances set out in the report which allows the Commission to assume, without further examination, that no State aid is involved is that the undertaking is sold to the highest bidder. However, it is evident in this case that BB has not been sold to the highest bidder. This is sufficient in itself to justify the decision to initiate the formal investigation procedure ([32]).

(105) Another important element to consider in the privatisation context is the conditions attached to such a sale. In the opening decision, the Commission referred to the importance attached to this in the Competition Report when requiring, as a condition of accepting a privatisation to be free of aid, that 'a competitive tender must be held that is open to all comers, transparent and not conditional on the performance of other acts such as the acquisition of assets other than those bid for or the continued operation of certain businesses'.

([29]) Considerations related to the freedom of establishment, mentioned by Austria, need not be addressed in the context of the State aid procedure. See paragraph 314 of the judgment of the Court of First Instance of 12 February 2008 in Case T-289/03 *BUPA*, not yet reported, to be found at www.curia.europa.eu

([30]) See, for example, decision of the Eisenstadt Regional Court, 27 Cg 90/06 p-40 of 20 May 2006, especially p. 28 and decision of the Vienna Higher Regional Court, 2 R 150/06b, of 5 February 2007, especially p. 15, both of which make it clear that it is not necessary to adopt a position on the existence of State aid.

([31]) See European Commission, XXIIIrd Report on Competition Policy 1993, paragraphs 402 *et seq.*; see also paragraphs 61 *et seq.* of the opening decision.

([32]) See also Competition Report, paragraphs 402 *et seq.*

(106) The Commission also pointed to its subsequent *Stardust Marine* decision, in which it further emphasised the importance of the 'non-discriminatory' character of the procedure ([33]). In line with the Communication on State aid in sales of land and buildings by public authorities ([34]) (hereinafter called 'the Communication on sales of land'), the Commission now takes the approach that conditions in principle can be imposed, if all potential buyers would have to, and be able to, meet that obligation, irrespective of the nature of the buyer's business ([35]). In this context, the Commission had noted that the selection criteria chosen for the sale of the bank could imply conditions and have to be evaluated as such (see paragraphs 141-143 below for details).

(107) During the formal investigation procedure, Austria seemed to proceed, firstly, from the assumption that the Communication on sales of land can be directly applied to the privatisation of an undertaking and, secondly, Austria seemed to assume that a potentially faulty tender procedure could be overcome by falling back on prior independent evaluations which had been carried out in the context of the privatisation of BB. Austria even proposed to commission a new study on the market value of BB.

(108) The specific relevance of the conditions attached to the transaction is considered in paragraphs 141-143. As a general observation on the first point, however, it has to be noted that it is necessary to distinguish between the rules as regards privatisations and the rules concerning the sale of land and buildings. While not imposing a call for tenders as the only possible procedure for a privatisation, the Competition Report explicitly refers to privatisations and provides guidance on the prerequisites of a procedure ensuring that privatisation does not entail State aid. The Competition Report does not state that an independent evaluation of the entity to be privatised, carried out before the sale, would be sufficient to establish that a sale at that price would then be considered automatically as being free of aid. This is particularly evident where there has in fact been a bidding process.

(109) The possibility of establishing the market price by evaluation is only mentioned in the Communication on sales of land as a means of establishing the market price in the absence of a bidding procedure. Even in the case of a land sale, it follows from the terms and the structure of the Communication on sales of land that a Member State cannot justify selling to a person other than the highest bidder by reference to an evaluation. In the case of the sale of land as in the case of a privatisation, a bidding procedure must be considered to result in a market price being established.

(110) However, the Commission is of the opinion that this is not the situation in this case, even supposing — for the sake of argument — that Austria's view on the 'applicability' of the Communication on sales of land could be endorsed. It is true that the Communication on sales of land accepts both an open tender and an ex-ante evaluation as valid means of demonstrating the absence of State aid. However, this latter approach is *a priori* only admissible if the evaluation is carried out prior to the sale. Once the Province of Burgenland opted for an open tender which produced valid offers on the market, it would be inconsistent to accept any prior evaluation and to set aside higher offers, as suggested by Austria in the second point mentioned in paragraph 107.

(111) The proposal of Austria would only need to be considered if the outcome of the tender procedure needed to be set aside owing to the absence of an open, transparent and unconditional tender.

(112) In this respect, the Commission considers that the tender produced two valid offers, although the Commission cannot fully exclude that the offers might even have been higher had the conditions not been applied to the sale (the impact of the conditions will be discussed in greater detail in paragraphs 141-143). In the presence of both independent evaluations and a higher binding offer to buy BB, it is clearly the latter which gives a better proxy of the market value of the sales project, since it reflects not merely a hypothetical assessment, but an actual offer.

(113) Based on this, any prior evaluation of the value of BB presented by Austria has become irrelevant for the assessment of this case ([36]). Furthermore, an ex-post evaluation, as proposed by Austria, is of no relevance in the presence of this tender and the valid offers it produced.

([33]) Commission Decision 2000/513/EC of 8 September 1999 on aid granted by France to Stardust Marine (OJ L 206, 15.8.2000, p. 6), paragraph 7. The subsequent annulment of this decision by the Court of Justice does not refer to this point.

([34]) OJ C 209, 10.7.1997, p. 3.

([35]) See Section II 1.(c) of the Communication.

([36]) This applies especially to HSBC's evaluation in the recommendation to the Province of Burgenland, the evaluation of BB's stand-alone-value by gmc-unitreu in the context of BB's restructuring prior to any privatisation attempt, and the Consortium's own stand-alone evaluation of BB (which is of no consequence as the Consortium is free to take the value of further factors into account, specific to the Consortium alone).

(114) In view of the conditions applied, the Commission notes also that, even if the company was sold to the highest bidder for a price significantly higher than its estimated value, there may still be State aid involved if the price the private investor paid is lower than it would have been in the absence of such conditions ([37]).

(115) In conclusion, the Commission has to assess the privatisation of BB in the light of Article 87(1) of the EC Treaty, without reference to the Communication on sales of land or the Competition Report, given the fact that the presumption 'free of aid' according to the latter does not apply.

2.2. Existence of State aid

(116) The Province of Burgenland is one of nine Austrian federal states. The resources of the Province of Burgenland can in principle be considered as 'granted by a Member State or through state resources' within the meaning of Article 87(1) of the EC Treaty.

(117) Furthermore, the Commission notes GRAWE's cross-border and international activities, so that any advantage from state resources would affect competition in the banking sector and have an impact on intra-Community trade ([38]).

(118) However, the sale of BB to GRAWE only involves State aid if the Province of Burgenland did not behave like a market economy operator, thus providing a selective advantage to the buyer. This would be the case if the Province of Burgenland did not behave like a private seller and accepted a sales price below the market value of BB. In assessing this question, the Commission applies the 'private vendor test'.

(119) In applying this principle, it is necessary to evaluate the actual tender procedure and the offers it produced in order to find whether and to what extent an advantage has been granted to GRAWE. In principle, there are two elements here which could be the source of an advantage. First, selling the company to the second highest bidder, and second, the influence of the conditions on the value of the company to all bidders.

([37]) Commission Decision 2000/628/EC of 11 April 2000 on the aid granted by Italy to Centrale del Latte di Roma (OJ L 265, 19.10.2000, p. 15), paragraph 82.

([38]) See also the Commission Decision of 27 June 2007 in Case C50/2006 *BAWAG* (OJ L 83, 26.3.2008, p. 7), paragraph 125.

(120) The Province of Burgenland was confronted with a bid by the Consortium which at face value outweighed the offer of GRAWE by EUR 54,7 million. A private market operator might nevertheless exceptionally accept the lower bid if:

(a) first, it was obvious that the sale to the highest bidder was not realisable; and

(b) second, it was justified in taking into account factors other than price. Although the successful bid was at face value not the highest one, this is not in itself irrefutable evidence of aid. The concept of the 'highest bid' can be interpreted more broadly to take differences in off-balance-sheet risks between bids into account ([39]).

(121) The first aspect depends essentially on whether the Province of Burgenland could count on receiving payment of the purchase price, which is generally known as transaction security (first element) and whether the Consortium could be expected to obtain the necessary permission from the Financial Market Authority (or any other authority involved in the deal) (second element).

(122) The second aspect depends on whether other factors are present, such as guarantees or off-balance-sheet risks, which can be taken into account by the public seller, the Province of Burgenland, and which would outweigh the price difference with the highest bid.

The first element of the first aspect: transaction security

(123) Concerning transaction security as the first element of the first aspect, the Commission stresses for reasons of clarity that this refers to the ability of the buyer to pay the purchase price and — in this context — nothing more ([40]). The Commission agrees with Austria that this is a vital element of the sales process. No private vendor could be expected to choose a buyer when there was a realistic possibility that the purchase price would not be paid.

([39]) Commission Decision of 8 September 1999 on aid granted by France to Stardust Marine (OJ L 206, 15.8.2000, p. 6) paragraph 78.

([40]) Austria uses the term 'transaction security' also in order to explain that a lengthy examination by the FMA was to be avoided as prolonged uncertainty would have put the viability of BB at risk.

(124) In the whole course of the procedure, Austria did not argue that the Consortium would not be capable of paying the purchase price. In view of the economic power of the companies of the Consortium (described in paragraph 12), the Commission sees no reason to doubt that the financing of the EUR 155 million purchase price was feasible. The Consortium proposed an advance payment of EUR 15 million into a trust account with Ukraine-based Active Bank in order to demonstrate its ability to pay the EUR 155 million.

The second element of the first aspect: approval of the FMA

(125) It is also evident that a private market seller would not choose a buyer who would in all probability not obtain the necessary permission from the FMA (or any other authority involved in the deal). Austria argued that the FMA would never have authorized a sale of BB to the Consortium – not even if this bid had been the only offer. According to Austria, GRAWE's offer, even if it had not been the highest bid, had been the 'best bid'.

(126) From a procedural point of view, the Commission does not dispute that the FMA was prohibited by Austrian law to carry out the so-called 'fit & proper test' based on Section 20 of the Banking Act in view of the two potential bidders; it is indeed a common requirement in any comparable procedure that a specific buyer has to be identified before regulatory approval can be given. It is therefore coherent that the FMA rejected both the Consortium's and GRAWE's 'applications' for approval prior to the sales decision. Based on Austrian law, the Commission also accepts that an ex-post statement by the FMA was not possible.

(127) The Commission notes, however, that the FMA, while providing factual information on its procedures or the earlier application of SLAV AG, never openly endorsed Austria's views in that regard, but confirmed to the Commission that the outcome of its investigation had been 'completely open'.

(128) In this context, the Commission also notes that the FMA refrained from making general statements, independently of the case in point, on elements it would have considered crucial to its assessment — such as, for example, the existence of a buyer rating. There are therefore no elements whatsoever indicating that this or any other considerations advanced by Austria would have adversely influenced its assessment, let alone have led necessarily to a negative outcome.

(129) In the absence of such statements by the FMA or other evidence, the Commission cannot accept Austria's argument that the FMA would certainly have prohibited a deal with the Consortium.

(130) Also, the mere length of the FMA procedure – less than three months for GRAWE, but up to one year for the Consortium — is not sufficient to disqualify the Consortium. Austria pointed out that BB would have suffered from prolonged uncertainty, ending up as a bank in difficulty. However, neither in principle nor *in concreto* can the Commission accept this argument. In principle, this would be tantamount to discriminating against any bidder outside the European Union — even maybe from another Member State, as this reasoning could equally be applied to any potential purchaser presently unknown to the FMA, i.e. any non-Austrian undertaking. As to the case in point, the Commission notes that BB was not in difficulty at the time of sale. As the sales procedures had been ongoing since 2003, the urgency is also not sufficiently explained. In this context, the argument that GRAWE had put a time limit on its offer is also not acceptable, since this would afford numerous opportunities to influence tender procedures in a discriminatory fashion.

(131) Referring to the Province of Burgenland's own considerations in order to second-guess the FMA's decision, the Commission also cannot accept Austria's reference to an earlier application for a banking licence made by a predecessor of SLAV AG in 1994. The Commission would point out that the two situations are not comparable, even though the 'fit & proper-test' to be carried out in connection with the sale of BB is part of the — much wider — requirements of a full banking licence, as was applied for in the earlier case [41]. However, the ownership structure of the former applicant was quite different and the political situation in Ukraine has also changed considerably since. In addition, the only reason put forward by Austria as to why permission was withheld — non-application of International Accounting Standards (IAS) by the fund owning the undertaking — seems to be of a purely formal nature and there was nothing to indicate that compliance with IAS was still an issue for the differently composed consortium at the time of the sale of BB. As the FMA is legally bound to evaluate a new application in an unbiased manner, the Commission does not think that this earlier procedure relating to a different party would have had any influence if the Province of Burgenland had sold BB to the Consortium.

[41] Both situations are covered by Section 20 of the Banking Act or parts thereof.

(132) The Commission also has to reject the unsubstantiated claims which Austria has made in order to disqualify the Consortium as a credible buyer. The Commission's Decision needs to be based on facts. This point concerns, first, the reference made by Austria to the second privatisation procedure, where, according to Austria, the FMA had implied that the sale to a Lithuania-based bank with a Russian owner would not have been permitted. Not only was this allegation not substantiated but also it referred to a completely different party. Second, the Austrian authorities referred at a very late stage in the procedure to the German court judgment confirming a BaFin decision prohibiting a sale of shares in a German bank to an unidentified Ukrainian group ([42]). This information would not have been available at the relevant time and could thus not have played any part in a possible decision of the FMA. Last but not least, as already noted, the Commission notes that the FMA is bound to examine each case on its own merits.

(133) On the basis of the above, the Commission concludes that there is neither any evidence nor any indication that the FMA would have forbidden a sale to the Consortium. A private market vendor would therefore not have disqualified the Consortium on this basis.

The second aspect: the influence of Ausfallhaftung on the sales decision

(134) As in any other case, the Commission confirms that only those factors can be considered which would have been taken into consideration by a market economy investor ([43]). This excludes risks stemming from potential liability to pay state aid as these would have not been incurred by a market economy investor ([44]). As far as the privatisation of BB is concerned, the decisive element in this respect is the existence of *Ausfallhaftung*, which Austria puts forward to justify the sale to GRAWE.

(135) The Commission is of the opinion that *Ausfallhaftung* is an element which should not have been considered by the Province of Burgenland. As stated in the opening decision, taking *Ausfallhaftung* into account would mix up the role of the Province of Burgenland as grantor of the aid and the role of the Province of Burgenland as seller of the bank.

(136) The Commission first has to reject all Austria's arguments which call the categorisation of *Ausfallhaftung* as (existing) State aid into question. In the light of Commission Decision C(2003) 1329 final on the abolition on *Ausfallhaftung* ([45]), which followed an agreement between Austria and the Commission and which was not challenged by Austria before the European Courts, this argument is not acceptable. Had Austria — as it would appear in the course of these proceedings — indeed disagreed with the categorisation of *Ausfallhaftung* as State aid, it was free to challenge this before the Court of Justice.

(137) Furthermore, in response to Austria's argument that existing aid is legal, it should be stressed that existing aid is still aid given by a public authority. All Court decisions so far clearly set out the basic principle that the role of the State as seller of an undertaking and the role of the State and its obligations as a public authority should not be mixed up when applying the market-economy investor test ([46]). There is no precedent to back up Austria's view that a market economy investor would have taken into account a guarantee categorised as state aid: *ex hypothesi*, no market investor would have issued a guarantee that did not conform to the market investor principle and the decision on the abolition of *Ausfallhaftung* confirms that *Ausfallhaftung* was not granted on market terms. The Court of Justice has held that specific guarantees, which were considered to be illegal aid, could not be taken into account when calculating the potential costs of liquidation ([47]). This does not mean that *a contrario* an existing aid measure could be taken into account. The Commission considers that it is not relevant whether the aid was illegal or existing. As long as the measure qualifies as aid, no private vendor would have granted it and would not therefore have taken such a measure into consideration ([48]).

([42]) The Commission would point out that the press release provided by Austria to substantiate this information does not mention the identity of the Ukrainian group. It might indeed be entirely different from the Consortium.

([43]) Judgment of the Court of Justice in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* (*Hytasa*) [1994] ECR I-4103, paragraph 22.

([44]) See Case C-334/99 *Gröditzer Stahlwerke*, paragraphs 134 *et seq*.

([45]) OJ C 175, 24.7.2003, p. 8; for details, see above.

([46]) See, for example, the judgment of the Court of Justice in Case C-334/99 *Gröditzer Stahlwerke*, paragraph 134.

([47]) See, for example, Case C-334/99 *Gröditzer Stahlwerke*, paragraph 138.

([48]) Reference can also be made to the judgment of the Court of First Instance in Case T-11/95 *BP Chemicals* [1998] ECR II-3235, paragraphs 170-171, 179-180 and 198. According to this ruling, if the State grants aid and intervenes shortly afterwards in the company claiming that the second intervention complies with the market economy investor principle (MEIP), the Commission still needs to assess the second intervention in the light of the MEIP, taking into account the effects of the first aid measure. If aid may have repercussions on subsequent interventions of the State, it is also coherent to assume that the existence of State aid may influence the behaviour of the Province of Burgenland when selling BB.

(138) It might have been different if the Province of Burgenland had granted a commercial guarantee, as a private investor and not as state aid. This is however not the case here.

(139) Austria did not mention any other factors, such as off-balance-sheet risks or guarantees other than *Ausfallhaftung*, which could have been taken into account for the evaluation of the bids.

(140) In view of these findings, given that 'continued operation of BB and, at the same time, avoidance of the use of *Ausfallhaftung*' was one, if not the decisive element in the Province of Burgenland's decision to sell BB to GRAWE regardless of its lower bid, the Commission finds that Austria did not behave as a private market vendor would have done. The economic advantage to GRAWE is at least equal to the difference between the Consortium's bid and the actual sales price ([49]).

2.3. The conditions attached to the sale of BB

(141) Even if the existence of aid is already proven by the choice of the lower bid in this case, the Commission also had to consider to what extent the different conditions of the tender might have affected the sales price. As stated, the Commission had doubted in the opening decision that the tender had been open, transparent and non-discriminatory; furthermore, the Commission had expressed doubts regarding the impact of the conditions on potential bidders who might have refrained from bidding and regarding the impact of the conditions on the price offered by the bidders (those bids being potentially lower than in an unconditional tender).

(142) On the basis of the information obtained during the formal investigation procedure, the Commission finds that the Consortium, from a purely procedural point of view (due diligence, possibility of meetings, FMA) does not seem to have been disfavoured by the HSBC experts mandated to carry out the tender procedure. The Commission finds this view also confirmed by the extensive fact-finding carried out by the Eisenstadt Regional Court, as evidenced by its ruling of 20 May 2006 ([50]).

(143) The Commission evaluated the impact of the conditions on the offers. The conditions set out in the privatisation procedure might suggest that the Province of Burgenland did not endeavour to obtain the highest price for the bank. The Commission has no grounds to consider that in fact this restricted the number of bidders or influenced the price. No comments by third parties were received indicating that they had initially been interested in buying BB, but had been deterred from continuing with the tender process in view of these conditions in the process letter. The tender had also been made public sufficiently. Even if some of the other conditions of the tender are still questionable ('time constraints', 'willingness to conduct any necessary capital increases' and 'maintenance of the autonomy of BB'), their impact on the value of the offers is not apparent. The Commission has therefore not found any evidence or indications to suggest that a procedure allowing the full potential of BB to be realised would have led to a higher bid. Nor did the Consortium suggest that the conditions in the process letter had reduced the level of its own bid. The Consortium, while accepting that the purchase price and transaction security were a valid criterion for any seller, pointed out that a condition such as 'continued operation of BB and, at the same time, avoidance of the use of *Ausfallhaftung*' or 'willingness to conduct any necessary capital increases' would not be enforceable in the future. Consequently, in this particular case where the tender produced two valid offers ([51]) and in view of the non-detectable impact of the conditions on the sales price, the higher offer is considered to be a good proxy of the market price ([52]).

2.4. Other considerations concerning 'Ausfallhaftung'

(144) Although the Commission cannot accept Austria's position on the relevance of *Ausfallhaftung* to this case, it has dealt with the arguments Austria provided in relation to this — wrong — presumption. However, the Commission found that, even if Austria's position was followed and the existence of *Ausfallhaftung* was taken into account, this would still not turn GRAWE's bid into the 'best bid'.

([49]) To what extent the prices need to be adjusted in order to be comparable is discussed in section VI.5.

([50]) Eisenstadt Regional Court, 20 May 2006, 27 Cg 90/06 p – 40.

([51]) Austria also complained that in the *Craiova* case the Commission disregarded the tender and used the net asset value, because conditions were attached to the tender. It argued that, similarly, the Commission should also accept an expert valuation in this case. In this respect it is considered that both cases are not comparable as in *Craiova* the conditions were such that the tender (with only one bid) could not be used any more to determine the market price, while in this case there were two competitive bids which provide a good proxy of the market price.

([52]) See also the Commission Decision of 8 September 1999 on aid granted by France to Stardust Marine (OJ L 206, 15.8.2000, p. 6), paragraph 82, where a similar approach was taken. This particular issue was not raised in the subsequent annulment of the decision by the Court of Justice.

Liquidity withdrawal in the wake of a sale to the Consortium and consideration of Ausfallhaftung

(145) In the event of BB being liquidated, its assets would be evaluated and the revenues used to reimburse creditors. If the revenues from the liquidation of the assets were insufficient to reimburse the creditors, BB's own funds of about EUR 90 million would be depleted. Any remaining shortfall would be allocated equally among the outstanding liabilities and thus result in default for the creditors. *Ausfallhaftung*, as a direct claim by BB's creditors against the Province of Burgenland, would create the obligation for the Province of Burgenland to step in and fully compensate the creditors for the default of the liabilities covered by *Ausfallhaftung*. The share of the liabilities covered by *Ausfallhaftung* will decrease from 100 % at the time the deal was closed (May 2006) to nearly 0 % in 2017.

(146) Such a possible liquidation of BB could be sparked by difficulties of the bank either to refinance itself in the capital markets or to comply with regulatory requirements, such as minimum capital ratios.

(147) Austria argued that the liquidity problem would especially have emerged as soon as the sale to the Consortium was announced in the press. The net outflow would have ranged from EUR 500 million at best to EUR 1,25 billion at worst. The Consortium would not have proved capable of providing new liquidity on such a scale. Therefore the sale of BB to the Consortium was not even an option.

(148) The Commission recognises that the announcement of the sale of BB to the Consortium by the Province of Burgenland could have resulted in the withdrawal of deposits and inter-banking lines, but the calculations presented by Austria seem to be wrong for a number of reasons. Based on comparable events, the assumption of withdrawals of 50 – 60 % of deposits is unrealistic ([53]). The liquidity outflow for new business in such a crisis situation would be limited by BB to the minimum required ([54]). Furthermore, looking at the calculations submitted by Austria, tradable assets are not or only partly liquidated ([55]) and some liquidity outflow positions are incomprehensible ([56]). The Commission is of the view that even in a crisis situation the expected liquidity outflow could be compensated by an efficient and preventive liquidity management of BB and the resulting net outflow kept under control. In this context the Commission would emphasise that preventive measures could have been taken by BB and the owner to limit the liquidity outflow and notes that the Province of Burgenland had already committed itself to raising EUR 380 million of new liquidity for BB by issuing new bonds covered by *Ausfallhaftung* before the sale of the bank. The Commission cannot concur with Austria's argument that the issue of additional bonds, providing BB with additional liquidity in the amount of EUR 380 million, would not have been a decisive factor for any of the bidders for the bank, when at the same time Austria argues that the expected liquidity squeeze was a reason not to sell BB to the Consortium. One might also argue that the Province of Burgenland could have solved the liquidity issue, if considered significant, by issuing additional bonds in the amount of the missing liquidity, as they did in the event for GRAWE by issuing the additional EUR 380 million.

(149) In view of the above, the Commission assumes that insolvency or liquidation of BB would originate more in regulatory reasons than in a liquidity shortage following the announcement of the deal. Austria argues that the insolvency risk in the event of a sale of BB to the Consortium would be substantially higher than with GRAWE as new owner. GRAWE would continue BB's regional business focused on retail and wholesale and not change the current business model. According to the business plan submitted by the Consortium, BB's business model would have taken a more risky direction including such activities as international trade finance. The possible integration of Active Bank into BB would have exposed BB to exchange rate fluctuations of the euro against the Ukrainian Hrywnja, which are very expensive to hedge. Austria also argued that other factors such as lack of experience in the banking sector and the lower rating of the Consortium would have significantly increased the risk of insolvency of BB.

(150) The Commission recognises that it is highly hypothetical to predict the long-term development of BB in the two sales scenarios. The Province of Burgenland has to accept that once it sells BB to a new owner, regardless of whether this is GRAWE or the Consortium, it has only a very limited influence on the new strategic orientation of the bank. In this context it is important to note that the future business model of BB cannot be defined in the sales contract in a binding way, but it is the new owner's responsibility to decide the new strategic orientation of the bank, including the required capital increases and future integrations of other companies.

([53]) Even in the *BAWAG* case, where the bank was confronted with a bank run after management fraud, deposit withdrawals were limited to 20-30 %.

([54]) The liquidity forecast foresees EUR 300 million for the acquisition of new shares/securities and inter-banking lines.

([55]) In a situation where liquidity needs to be generated BB would sell shares and other tradable securities, which can be easily sold without losses, in order to generate free liquidity.

([56]) The effect of the cancellation of swaps with mutual put agreement on the liquidity is assumed to be negative and in the amount of the nominal value of the swaps.

(151) Even so, the new owners are limited in their business management by existing banking regulations. On the one hand, as an Austria-based bank operating with an Austrian banking licence, BB continues to be supervised by the Austrian banking regulator and has therefore to fulfil the same regulatory requirements (e.g. minimum capital ratios) as other European banks. On the other hand, as an integral part of the global financial network, BB needs at least an investment grade rating in order to obtain inter-bank refinancing. Thus BB is also exposed to the own funds requirements of the rating agencies. Higher risk taking must therefore be accompanied by adequate new own capital, which must be injected by the owners.

(152) The Commission likewise cannot concur with Austria's argument that it is indispensable that BB's future owner should have extensive banking experience. It is not the owners' role to manage BB, it is for BB's management to do so. Furthermore the Commission does not understand why BB's rating after the sale should be identical to that of GRAWE or the Ukrainian State, as put forward by Austria. On the one hand, GRAWE did not claim to give a general guarantee (*Patronatserklärung*) for BB and the bank will therefore be primarily rated on the basis of its own performance. On the other hand, BB remains an Austrian bank located in Austria and hence the alleged B-rating of the Ukrainian State — which might play a role in the case of a bank located in that State — is *prima facie* irrelevant. In this context it is also important to note that BB will continue to be covered by the *Ausfallhaftung* guarantee.

(153) Notwithstanding this, it cannot be entirely ruled out that BB, whoever the new owner may be, might face serious difficulties in the future and insolvency/liquidation might become unavoidable. In such a scenario it is important to understand that BB is a very small bank (significantly less than 1 % of the size of major European banks by balance sheet) and that the liquidation of BB would have a minor or even negligible impact on the Austrian or European banking system. The sale of BB's assets in the amount of approximately EUR 3,5 billion (credits, bonds, shares, derivatives, real estate) on the global financial markets would not lead to a dysfunctioning of the market and therefore the markets and especially the prices of assets would remain stable.

(154) Austria submitted a liquidation scenario. The liquidation scenario assumes that the liquidation of the assets will occur in 2006 and that the achievable price of the assets depends on their weighted risk. The adjustments made are in the range of 2 % for 0 % risk-weighted assets (RWA) up to 20 % for 100 % RWA. The liquidation scenario includes adjustments of EUR 90 million for the liquidation of off-balance-sheet items. After deduction of the own funds, the scenario arrives at the conclusion that *Ausfallhaftung* and therefore the Province of Burgenland would have to step in with around EUR 270 million in a liquidation scenario.

(155) The Commission agrees with the general methodology of the liquidation scenario provided by Austria in order to obtain a first estimate of the potential losses involved in an insolvency of BB. The Commission is, however, of the opinion that the adjustments made on the assets are too high (e.g. 10–20 % adjustments on mortgage-backed credits which can be securitised and sold in packages) and cannot understand the off-balance-sheet adjustments. Furthermore, Austria assumed a 100 % probability that liquidation will take place in 2006 and therefore took into account the nominal values of the assets. Such a scenario does not appear to be realistic.

(156) Reflecting these comments in the liquidation scenario, the Commission would conclude that each per cent of probability that *Ausfallhaftung* will be triggered in the future could be taken into account with a maximum of EUR 1 million by the Province of Burgenland. This means that, in order to compensate for the price difference of the Consortium's bid, the probability of an insolvency of BB with the Consortium as new owner has to be assumed to be more than 50 % higher than in the case of GRAWE. The Commission does not see any grounds for such an assumption and therefore concludes that, even if the Province of Burgenland could have taken *Ausfallhaftung* into account as an evaluation factor, GRAWE's bid was not the best offer.

Other methodologies presented by Austria and GRAWE

(157) Austria and GRAWE also submitted other methods ([57]) of evaluating the different risks involved with the two bidders. The Commission considers that the general methodology applied in the liquidation scenario best reflects the specific conditions of an insolvency case and it is therefore not only the most appropriate, but also the most transparent and comprehensible method of estimating the risks stemming from *Ausfallhaftung*. Those further methods presented by Austria are not relevant and, moreover, either not comprehensible, based on improper assumptions or not applicable to the specific conditions of the case.

([57]) Evaluation of HSBC, finance-based scientific approach, capital-market-orientated approach.

2.5. The warranty clause concerning State aid in the contract with GRAWE

(158) The sales contract between the Province of Burgenland and GRAWE furthermore contains a warranty clause which stipulates — among other things — that the Province of Burgenland is obliged to reimburse GRAWE such amount as the Commission might fix in a recovery decision (and all related procedural costs for the buyer). Although the buyer retains a right to rescind the contract if an adjustment of the purchase price is illegal, this element of the purchase contract needs to be highlighted in a decision. First, such a warranty clause, negotiated after the tender procedure, changes the conditions of the sale for the particular buyer and might have induced GRAWE to come forward with a higher bid; second and even more importantly, such a warranty clause amounts to a circumvention of any recovery decision the Commission might take. This strongly contrasts with the obligation of Member States to implement Commission Decisions and to cooperate with the Commission. Therefore, this clause should not be applied, as otherwise it would amount to new state aid to GRAWE.

2.6. Final conclusion on the existence of State aid

(159) In conclusion, the sale of BB to GRAWE constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

3. **Compatibility with the common market**

(160) In the opening decision, the Commission indicated that, on the basis of the information available, none of the reasons for declaring the aid compatible according to Article 87(2) or (3) seemed to apply.

(161) Austria concentrated on demonstrating that the measure did not constitute State aid. The only arguments as to a potential compatibility of the aid with the common market have been put forward by the beneficiary. In GRAWE's opinion, the earlier decision on restructuring aid to BB implied that even a privatised BB — privatisation having been a precondition for declaring the aid compatible with the common market — should keep its regional orientation. Only GRAWE's business plan fulfilled this requirement.

(162) The Commission considers that the restructuring decision by no means supports this argument. Apart from the operational, functional and financial measures offered by Austria and agreed by the Commission, privatisation is a further element to secure the bank's long-term viability. The earlier decision examines the effects of a hypothetical liquidation of BB, and in this context the Commission concedes that 'it would appear conceivable that basic financial services would be in short supply in certain rural regions in Burgenland' ([58]). However, this statement does not imply a condition of such kind in the privatisation process, which is not mentioned elsewhere.

(163) On the basis of the above, the Commission's initial finding is confirmed. The aid cannot be declared compatible with the common market.

4. **Full effectiveness of Commission Decision 2005/691/EC on the restructuring of Bank Burgenland**

(164) In the decision to initiate the formal investigation procedure, the Commission doubted whether the early discharge of the guarantee agreement of 20 June 2000, as approved in the Commission Decision of 7 May 2004, was permissible, as this might be in conflict with the decision on the restructuring of BB. However, having examined this issue further, the Commission finds that the arrangement is indeed consistent with that decision.

5. **Recovery**

(165) Since the measure was implemented without prior notification to the Commission and is incompatible with the state aid rules, Austria should be required to recover the aid from the beneficiary.

(166) The amount to be recovered should be such as to eliminate the aid. Based on the findings in section VI 2.2 and 2.3, the aid in this case amounts to the difference between the Consortium's bid and the actual sales price.

(167) Following this approach, the calculation of this difference is, however, not equal to the face value of the two offers, which would amount to EUR 54,7 million. In order to render the two bids completely comparable, adjustments have to be made as a consequence of different contractual arrangements with GRAWE and the Consortium. Both offers include a number of ancillary conditions which have to be quantified and compared with the relevant condition in the competitive bid. The Commission considers, therefore, that the above-mentioned difference between the two offers needs to be adjusted in the following manner by Austria when recovering the aid amount:

([58]) See paragraph 80 of the restructuring decision.

(168) As regards the compensation related to the early discharge of the guarantee agreement of 20 June 2000, the payment by the Province of Burgenland to the Consortium in the amount of EUR 15 million is EUR 2,1 million higher than the EUR 12,9 million payment to GRAWE. Thus an adjustment which reduces the difference between the Consortium's bid and the actual sales price by EUR 2,1 million has to be made.

(169) The quantification of the impact of the different arrangements on the limits of liability, the amounts of exemption and the warranty periods is complex. Austria argued that overall the approach negotiated with GRAWE and the Consortium was balanced and did not confer an appreciable advantage on either bidder. The Commission agrees with Austria that the impact of the warranty arrangements on the price difference is minor but nevertheless considers that its quantification is necessary. On the basis of the available information, the Commission is not able to assess whether the different warranty arrangements confer an advantage on one of the bidders and, therefore, Austria will have to provide a comparative overview of all warranty arrangements. In addition, Austria will need to quantify the financial impact of these arrangements on the purchase prices proposed by both bidders.

(170) The EUR 100 000 annual provision to be paid for the continued *Ausfallhaftung* guarantee by the Consortium until 2017 constitutes an additional revenue stream for the Province of Burgenland and therefore requires an adjustment which increases the difference between the Consortium's bid and the actual sales price by the present value of the provisions paid until 2017.

(171) The issue of new additional bonds in the amount of EUR 380 million under the state guarantee was mentioned neither in the process letter nor in the draft contract with GRAWE. The Commission is of the view that such an arrangement was of considerable importance in the sale process and should have been mentioned in the draft contract with the Consortium. Furthermore the Consortium confirmed that it did not take into account the issuance of additional new bonds in its offer. Therefore the Commission is of the view that the advantage granted to GRAWE related to the refinancing advantage resulting from the additional EUR 380 million requires an adjustment which increases the difference between the Consortium's bid and the actual sales price. The basis for the calculation is the interest rate paid by BB for the additional bonds in the amount of EUR 380 million compared with the costs of refinancing BB after the closing.

(172) The Commission has not received any information which enables it to finally assess whether the arrangement to transfer four of BB's real estate subsidiaries back to the Province of Burgenland prior to closing at their book value of EUR 25 million constitutes an advantage which requires an adjustment to the difference between the Consortium's bid and the actual sales price. This could be the case if the market value of the property were lower or higher than its book value. Austria needs to provide an evaluation by an independent expert, appointed by an independent body, of the market value of the property of BB's four real estate subsidiaries. This evaluation should take into account rentals which can be received on the market.

(173) The Commission is of the view that, as long as the interest on the agreed advance payment of EUR 15 million by the Consortium into a trust account with Ukraine-based Active Bank for the period between the day of the signing of the contract and the closing is credited to the Consortium, it does not require any adjustment.

(174) As to the issue raised in the opening decision of the tax loss carry-over, the Commission assessed whether it has to be taken into account for the quantification of the aid amount and concludes that this is not the case. Nevertheless, the Commission is of the opinion that the potential benefit to third parties of the tax loss carry-over should have been considered in any evaluation of BB (best-owner approach).

VII. **CONCLUSION**

(175) The Commission finds that Austria has unlawfully implemented the aid to GRAWE in relation to the privatisation of BB in breach of Article 88(3) of the EC Treaty. The aid is incompatible with the common market. The full aid amount has to be quantified by Austria on the basis of the difference between the two final offers submitted as part of the tender procedure, appropriately adjusted as indicated above,

HAS ADOPTED THIS DECISION:

Article 1

The State aid unlawfully granted by Austria, in breach of Article 88(3) of the EC Treaty, in favour of GRAWE is incompatible with the common market. The aid corresponds to the difference between the two final offers submitted as part of the tender procedure, appropriately adjusted in accordance with the parameters set out by in paragraphs 167-174 of this Decision.

Article 2

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

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

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

Article 3

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

2. Austria shall ensure that this Decision is implemented within four months of the date of its notification.

Article 4

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

(a) the total amount (principal and recovery interest) to be recovered from the beneficiary, established in accordance with the parameters set out in this Decision, together with a detailed explanation of the method used to calculate this amount and the evaluation of the property by an independent expert;

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

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

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

Article 5

This Decision is addressed to the Republic of Austria.

Done at Brussels, 30 April 2008.

For the Commission

Neelie KROES

Member of the Commission