

## PROCEDURY ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

## KOMISJI EUROPEJSKIEJ

## POMOC PAŃSTWA – NIEMCY – AUSTRIA

Pomoc państwa C 16/09 (ex N 254/09) oraz N 698/09 – BayernLB, Niemcy i Hypo Group Alpe Adria, Austria

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 TFUE

(Tekst mający znaczenie dla EOG)

(2010/C 85/10)

Pismem z dnia 23 grudnia 2009 r., zamieszczonym w języku autentycznym na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Austrię i Niemcy o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 TFUE dotyczącego wyżej wspomnianych środków pomocy.

Komisja postanowiła tymczasowo nie zgłaszać zastrzeżeń wobec środków pomocy, opisanych w piśmie następującym po niniejszym streszczeniu.

Zainteresowane strony mogą zgłaszać uwagi na temat środków pomocy, w odniesieniu do których Komisja wszczyni postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma. Uwagi należy kierować do Kancelarii ds. Pomocy Państwa w Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:

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Uwagi te zostaną przekazane władzom austriackim i niemieckim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

## I. PROCEDURA

(1) W dniu 12 maja 2009 r. (sprawa C 16/09) Komisja wyraziła wątpliwości dotyczące pomocy na restrukturyzację (dokapitalizowanie w kwocie 10 mld EUR oraz kilka środków pomocy związanej z aktywami) dla BayernLB w kontekście jej zgodności z art. 107 ust. 3 lit. b) TFUE. Podobnie Komisja wyraziła wątpliwości, czy grupa Hypo Group Alpe Adria (HGAA), spółka zależna BayernLB, która również otrzymała pomoc od Austrii, jest zasadniczo zdrowym podmiotem, a otrzymana przez nią pomoc zgodna z art. 107 ust. 3 lit. b) TFUE.

(2) W dniu 18 grudnia 2009 r. Austria powiadomiła o nowej pomocy, która została przyznana HGAA, aby umożliwić temu bankowi utrzymanie do końca roku minimalnych ustawowych wymogów kapitałowych.

## II. FAKTY

(3) Jesienią 2009 r. opinia ekspertów wykazała, że HGAA powinna dokonać dalszych odpisów aktualizacyjnych, które doprowadziłyby do takiego zmniejszenia współczynnika kapitałowego banku, że pod koniec 2009 r. wskaźnik kapitału podstawowego wynosiłby poniżej 4 %, czyli mniej niż ustawowo wymagane minimum. Mimo tego właściciele nie byli gotowi do dokapitalizowania banku niezbędnym

kapitałem. W związku z tym austriacki organ nadzorujący rynek finansowy przedstawił właścicielom ultimatum, w którym zażądał podjęcia koniecznych decyzji o dokapitalizowaniu HGAA do dnia 11 grudnia 2009 r.; w przeciwnym razie organ nadzoru miał podjąć wobec banku interwencję.

- (4) W dniu 14 grudnia 2009 r. zawarto umowę, w której przewidziano, że Austria nabędzie wszystkie akcje HGAA, płacąc każdemu właścicielowi symboliczną cenę 1 EUR. Ponadto Austria i właściciele banku postanowili wzmocnić podstawę kapitałową banku w zakresie kapitału podstawowego poprzez dokapitalizowanie, gwarancje dotyczące aktywów oraz rezygnację z istniejących praw wynikających z instrumentów i funduszy kapitału drugiej kategorii (Austria 450 mln EUR, Karyntia 200 mln EUR i BayernLB 825 mln EUR) oraz zapewnić bankowi kilka rodzajów płynności. Austria zwraca się o tymczasowe zatwierdzenie środków na okres sześciu miesięcy.
- (5) Mimo przeniesienia swojego udziału w HGAA BayernLB będzie nadal zapewniał HGAA finansowanie w kwocie (\*) EUR.

### III. OCENA

- (6) Środki stanowią pomoc tymczasowo zgodną w rozumieniu art. 107 ust. 3 lit. b) TFUE, ponieważ są zgodne z planem nadzwyczajnej pomocy na rzecz banków (z wyjątkiem środków zapewnionych przez Karyntię) i w każdym razie niezbędne, aby zapobiec niewypłacalności banku o znaczeniu systemowym, co potwierdził również austriacki bank centralny. Należy zatem tymczasowo zezwolić na przedmiotowe środki do czasu podjęcia przez Komisję ostatecznej decyzji w sprawie restrukturyzacji HGAA i BayernLB, jednak zgoda ta nie może dotyczyć okresu dłuższego niż sześć miesięcy.
- (7) Ponadto Komisja postanowiła przedłużyć postępowanie określone w art. 109 ust. 2 TFUE dotyczące powyższych środków pomocy na rzecz HGAA i BayernLB. Komisja ma między innymi wątpliwości co do tego, czy banki będą w stanie odzyskać rentowność, czy zapewniono wystarczający podział obciążeń i czy podejmuje się odpowiednie środki służące ograniczeniu zakłóceń w funkcjonowaniu rynku.

#### TEKST PISMA

„The Commission wishes to inform Germany and Austria that, having examined the information supplied by the Austrian authorities on the additional aid measures in the form of a capital injection and guarantees to the benefit of Hypo Group Alpe Adria (HGAA), it has decided to extend the proceedings laid down in Article 108(2) of the Treaty on the Functioning of the European Union<sup>(1)</sup> (TFEU) which were

(\*) Informacje poufne.

<sup>(1)</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

opened by Decision C(2009) 3811 final on 12 May 2009, and has decided to temporarily find those additional aid measures compatible with the internal market until the submission of a credible restructuring plan and its assessment by the Commission but at most for a period of six months.

### 1. PROCEDURE

- (1) On 18 December 2008, the European Commission authorised in case N 615/08 emergency State aid from Germany to BayernLB from 18 December 2008 in form of a risk shield of EUR 4,8 billion and a capital injection of EUR 10 billion on the basis of Article 107(3)(b) TFEU for a period of six months or until the submission of a credible and substantiated restructuring plan for the bank<sup>(2)</sup>.
- (2) Furthermore, BayernLB received a liquidity guarantee line of EUR 15 billion from Germany for liquidity loans on the basis of the German emergency bank support scheme in December 2008, of which EUR 5 billion were drawn for an issue in January 2009 while the remaining EUR 10 billion were given back unused to the guarantor Germany in October 2009.
- (3) In December 2008, BayernLB's subsidiary HGAA received EUR 700 million from BayernLB following large write-downs and losses and EUR 900 million in Tier 1 *Partizipationskapital*<sup>(3)</sup> from the Republic of Austria on the basis of the Austrian emergency bank support scheme<sup>(4)</sup>.
- (4) HGAA has also received guarantees of EUR 1,35 billion for bond issues under a debt issuance programme on the basis of the Austrian emergency bank support scheme.
- (5) On 29 April 2009, Germany notified a restructuring plan for BayernLB (including HGAA) to the Commission. At the same date, Austria provided a viability plan for HGAA<sup>(5)</sup>.
- (6) In its Decision C(2009) 3811 final adopted on 12 May 2009 (case N 254/09) the Commission raised doubts on the restructuring aid to BayernLB and whether the restructuring plan was apt to restore the viability of BayernLB. In the same decision, the Commission raised doubts whether HGAA was fundamentally sound and it expressed doubts on the compatibility with Article 107(3)(b) of the aid given to HGAA by Austria.

<sup>(2)</sup> Commission Decision of 18 December 2008 in Case N 615/08 *BayernLB*, OJ C 80, 3.4.2009, p. 4.

<sup>(3)</sup> *Partizipationskapital* has no voting rights.

<sup>(4)</sup> Commission Decision of 9 December 2008 in Case N 557/08, OJ C 3, 8.1.2009, p. 2, *Maßnahmen nach dem Finanzmarktstabilitäts- und dem Interbankmarktstärkungsgesetz für Kreditinstitute und Versicherungsunternehmen in Österreich*, last prolonged by Commission Decision of 16 December 2009 in Case N 663/09.

<sup>(5)</sup> A viability plan needs to be provided when a bank is fundamentally sound.

- (7) Between May and December 2009, a number of meetings and telephone conferences took place between representatives of the Commission, the German and the Austrian authorities and the banks. The additional measures which are subject to this Decision were notified on 18 December 2009.
- (8) Given the urgency to obtain a Commission decision on these measures, both Germany and Austria have exceptionally agreed that the authentic language for this decision should be English.

## 2. DESCRIPTION

### 2.1. The beneficiaries

#### BayernLB

- (9) BayernLB is a German Landesbank with its headquarters in Munich. It is — indirectly through the holding company BayernLB Holding AG — owned by the Free State of Bavaria (approx. 94 %) and the Association of the Bavarian Savings Banks (approx. 6 %). In 2008, the group had a consolidated balance sheet total of EUR 422 billion. This consolidated balance sheet includes HGAA. On this consolidated basis, BayernLB realised losses amounting to EUR 5 billion in 2008 compared to a profit of EUR 92 million in 2007. BayernLB has around 19 000 employees.
- (10) For BayernLB, HGAA has currently a book value of EUR 2,3 billion. BayernLB has EUR [...] (\*) of capital in HGAA. It is currently providing liquidity amounting to EUR [3-5 billion] to HGAA.
- (11) BayernLB is an international commercial bank with a regional focus in Germany and selected European countries. BayernLB is active in Austria and Central and Eastern Europe via HGAA.
- (12) BayernLB provides banking services for retail banking (*Privatkundengeschäft*), corporate clients (*Firmenkundengeschäft*), money markets and securities (*Geldmarkt- und Wertpapiergeschäft*) as well as other financial services such as leasing.
- Hypo Group Alpe Adria
- (13) HGAA is an international finance group with a balance sheet total of EUR 43 billion and risk weighted assets of EUR 32,8 billion as of 31 December 2008. Currently, HGAA has 8 100 employees. In banking, the bank offers loans, payment services, export credit documentation and deposits as well as the sale of investment products and asset management services. As regards leasing, the group concentrates on cars, real estate, planes and ships.
- (14) HGAA is active in a total of 12 countries (Austria, Italy, Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Germany, Lichtenstein (activity in liquidation), Hungary, Bulgaria, the former Yugoslav Republic of Macedonia and Ukraine). The bank has substantial market shares in the south-eastern European countries where it is active: Slovenia [ $< 5\%$ ], Croatia [ $> 8\%$ ], Bosnia and Herzegovina [ $> 10\%$ ], Serbia [ $< 7\%$ ], and Montenegro [ $> 10\%$ ].

- (15) The holding company of the HGAA group is the Hypo Alpe-Adria-Bank International AG (HAABInt.), located in Klagenfurt (Austria). At present, BayernLB owns 67,08 % of the group. The other shareholders are: GRAWE-Gruppe (*Grazer Wechselseitige Versicherung AG*) with 20,48 % <sup>(1)</sup>, and the *Kärntner Landesholding* controlled by the Land Carinthia, with 12,42 %. A further 0,02 % of the group is owned by employees (*Hypo Alpe Adria Mitarbeiter Privatstiftung*, Klagenfurt).

### 2.2. The events leading to the granting of the additional aid measures

- (16) In recent years, HGAA pursued a growth strategy, in particular aimed at taking advantage of the rapidly growing markets in south-eastern Europe. In the past decade, HGAA entered Bosnia and Herzegovina, Serbia, Montenegro, Bulgaria, the former Yugoslav Republic of Macedonia and Ukraine. In addition to those markets, the group also entered Hungary and Germany during that period.
- (17) The expansion strategy of the bank has also been made possible by the liability guarantees of the Land Carinthia amounting to EUR 19 billion which has enabled the bank to borrow money at highly favourable conditions.
- (18) In the current crisis, the economic conditions of the countries where the bank is operating have deteriorated significantly. In particular, the economies of south-eastern Europe have tumbled from a prolonged period of strong economic growth into significant declines of real GDP.
- (19) These developments affected the credit worthiness of borrowers and the quality of the loan portfolio. In June 2009, the share of loans classified as non-performing amounted to [...], up from [...] one year earlier. However, the losses and increasing share of non-performing loans for HGAA were also to a significant extent caused by a lack of control mechanisms [...].
- (20) In that context, BayernLB and HGAA commissioned a report on the credit risk of HGAA from outside experts (PriceWaterhouseCoopers). The report, which is dated from 13 November 2009, was based on a review conducted between 1 August 2009 and 6 November 2009 and takes into account information provided by HGAA. The analysis covered a wide range of loans and assets (including 52 ownership participation stakes), but excluding other assets such as loans for employees.
- (21) The report found among others significant problems regarding (i) the way HGAA monitors the credit process, (ii) the valuation of the available collateral ([...]). After further explanations, the experts accepted [...].

(\*) Confidential information.

<sup>(1)</sup> Indirect ownership via the controlled participations in Hypo-Bank Burgenland AG and a further holding company, BVG Beteiligungs- und Verwaltungsgesellschaft mbH.

- (22) On that basis, two scenarios drawn up, of which Scenario I is described as “rather optimistic” and Scenario II as “rather cautious”. No stress or worst-case scenario is assumed in either. [...]
- (23) In sum, therefore, the report concludes that an additional EUR [...] will be needed in terms of additional potential write-downs.
- (24) In addition to other further write-downs, the total additional requirements for write-downs for HGAA amount to between EUR [...] in 2009.
- (25) Based on the report, the expected losses would reduce the capital ratio of the bank to a Tier 1 capital ratio of below 4 % by the end of 2009 which is less than the regulatory required minimum. Initially, the current owners were not ready to inject the necessary capital into the bank.
- (26) The Austrian financial market supervisory authority issued an ultimatum to the owners to take the necessary decisions for a recapitalisation of HGAA by 11 December 2009; otherwise the bank would face supervisory action.
- 2.3. The additional measures**
- (27) After intense negotiations between the owners and Austria, the following was agreed upon in a term sheet dated 14 December 2009. Austria notified this measure on 18 December 2009.
- (28) The ownership of HGAA will change as Austria will acquire all shares by contract for the symbolic price of EUR 1 from each of the owners. This measure will be based on the Austrian law for remedying a serious disturbance in Austria's economy *Finanzmarktstabilitätsgesetz* (FinStaG)<sup>(1)</sup>. As a result, the bank would be nationalised and 100 % owned by Austria.
- (29) By 31 December 2009, as a matter of immediate support to ensure that HGAA fulfils the minimum regulatory requirements, BayernLB will renounce on all its rights deriving from already existing EUR 300 million *Ergänzungskapital* (Tier 2). By the same date and for the same reasons, Austria will grant temporarily to HGAA asset guarantees of an amount of up to EUR 100 million on the conditions for distressed banks under the Austrian emergency bank support scheme. If more capital measures are needed to fulfil the regulatory minimum capital requirements any further capital injection will be split between BayernLB and Austria [...].
- (30) A number of measures are to be undertaken with the aim of increasing the capital of HGAA and achieving a Tier 1 capital ratio of 8 % by 30 June 2010.
- (31) In total, the previous owners agreed to inject EUR 1 055 million.
- (32) Of this, BayernLB will in addition to the already mentioned EUR 300 million existing *Ergänzungskapital* (Tier 2) (see recital (29)), also renounce all its rights deriving from funding provided to HGAA amounting to EUR 525 million. This will have a total positive impact on the bank's capital of EUR 825 million. The amount of EUR 525 million could be lower if BayernLB provided more capital as a matter of urgency (see recital (29)).
- (33) The Land Carinthia will convert existing Tier 2 capital in the amount of EUR 50 million into non-convertible *Partizipationskapital* (Tier 1) without voting rights with a dividend of 6 %, which will be due for the first time for the business year 2013. Under the same conditions, the Carinthia-controlled *Landesholding* will inject further EUR 150 million non-convertible *Partizipationskapital* (Tier 1) at the latest by 30 June 2010.
- (34) GRAWE will inject EUR 30 million non-convertible *Partizipationskapital* (Tier 1) without voting rights with a dividend of 6 % which will be due for the first time for the business year 2013.
- (35) Austria will inject an additional EUR 350 million of Tier 1 *Partizipationskapital* or other Tier 1 capital instruments into HGAA. The injected capital — whose form is not yet specified — will be injected and remunerated in accordance with the Austrian emergency bank support scheme.
- (36) A number of measures are undertaken to ensure liquidity for HGAA.
- (37) BayernLB will re-issue a liquidity line terminated on 11 December 2009, amounting to EUR [...]. Furthermore, the existing liquidity of EUR [...] from BayernLB will remain with the bank until the end of 2013. For 2014, BayernLB will let funding within the bank amounting to EUR [...] and [...] for 2015. If Austria sells its majority stake or if the bank is split, BayernLB has the right to withdraw this funding and Austria guarantees its repayment.
- (38) The existing business relationships will be maintained between the bank and the Land Carinthia as well as the enterprises which are under control of the Land Carinthia. This maintains liquidity of EUR [> 200] million.
- (39) GRAWE will provide liquidity amounting to EUR 100 million. This liquidity will be provided at the latest on 31 December 2009 with a maturity of at least 31 December 2013, EUR 50 million will be secured by Austrian covered bank bonds (*Pfandbriefe*) and further EUR 50 million secured by high-value collateral to be provided by HGAA.

<sup>(1)</sup> Federal Law 136: Law on strengthening the interbank market (IBSG) and Law on the stability of the financial markets (FinStaG), published on 26 October 2008, Austrian Federal Law Gazette I, No 136/08.

(40) As regards the implications of these additional measures for BayernLB, the rescue of HGAA by Austria under the above conditions implies that BayernLB will have to write down the full book value of HGAA, which amounts to EUR 2,3 billion. It has furthermore to renounce receivables from HGAA for already provided funding amounting to EUR 825 million and will have to sell its existing shares in HGAA to Austria.

#### 2.4. The plan provided for Bayern LB and HGAA

(41) BayernLB has drawn up a restructuring plan to return to viability by 2013<sup>(1)</sup>. The restructuring plan included a significant reduction of the activities of BayernLB and a concentration on core activities and core regions. Furthermore, BayernLB planned sales of subsidiaries, including the sale of HGAA after having restored viability, so as to make them attractive for the capital markets. The target date for the sale of HGAA was [...]. No update of the plan has been provided to the Commission yet.

(42) For HGAA so far only a viability plan has been provided to the Commission because Austria considered HGAA fundamentally sound. The Commission had questioned in its Decision C(2009) 3811 final adopted on 12 May 2009 whether HGAA was indeed fundamentally sound and articulated doubts on the compatibility with Article 107(3)(b) TFEU of the aid given to HGAA by Austria.

### 3. THE POSITION OF GERMANY AND AUSTRIA

(43) Germany takes the position that the measures undertaken by the Republic of Austria do not constitute State aid in favour of BayernLB. However, should the Commission find otherwise, Germany submits that this additional aid is compatible with Article 107(3)(b) TFEU and that no additional restructuring measures are required beyond those foreseen in the restructuring plan for BayernLB, [...].

(44) Austria now agrees that HGAA is distressed and commits to submit a restructuring plan for HGAA by 31 March 2010, aiming at in-depth restructuring. The plan will take into account all current and previous aid granted by Austria and will take into account the considerations put forward by the Commission in its decision of 12 May 2009.

(45) Austria states that the measures provided to HGAA constitute State aid but argues that the measures are compatible with the internal market based on Article 107(3)(b) TFEU. In the meantime Austria requests a temporary authorisation for six months for reasons of financial stability. The Austrian Central Bank (*Österreichische Nationalbank, OeNB*) has confirmed in a letter

of 7 December 2009 that HGAA is a bank with systemic importance for the financial market in Austria and that without the support measures the bank would face supervisory action.

## 4. ASSESSMENT

### 4.1. Existence of aid

(46) According to Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(47) As regards the acquisition of shares by Austria, the Commission notes that such an acquisition is in principle allowed under the *Finanzmarktstabilitätsgesetz* (Financial Market Stability Law, *FinStaG*) which provides for the purchase of existing shares. Austria gave a commitment for the approval of the emergency bank support scheme that the purchase of existing shares would be considered only where other individual measures under the *FinStaG* proved to be inadequate. In the present case, the owners have in fact been unable to find a solution and therefore this condition is also met. Such an acquisition is also addressed in point 37 of the Commission decision on the Austrian emergency bank support scheme. There it is explained that such an acquisition itself does not imply aid to the previous owners if the existing shareholders receive a price for their shares which is not higher than the value without State intervention (or any speculation in this regard). That condition is met as the shareholders in fact receive no consideration for their shares. The Commission therefore concludes that the purchase of shares in itself does not constitute aid to the owners or to HGAA or BayernLB (the latter is also an owner).

(48) The additional measures implemented by Austria and the Land Carinthia can be attributed to the State, constitute a selective advantage to HGAA and potentially BayernLB and because HGAA and BayernLB operate in a sector characterised by intense international competition, have the potential to affect trade within the European Union and to distort competition.

(49) In particular, the capital increase permits HGAA to receive sufficient equity capital, which, in the light of the bank's difficult position and the current constraints upon financial markets, it would not have been able to receive to such an extent and under such terms. This capital allows HGAA to avoid regulatory action and to stay active on the market.

(50) The aid to HGAA consists of a guarantee and a recapitalisation by Austria of EUR 450 million and EUR 200 million by Land Carinthia. In addition, HGAA received capital from BayernLB that BayernLB was only able to provide because it had been supported with State aid itself.

<sup>(1)</sup> The details of this restructuring plan are set out in Decision C(2009) 3811 final, see recital 6 of this Decision.

- (51) The Commission also considers that HGAA receives aid through the maintenance of liquidity by the Land Carinthia and the enterprises it controls. This is an advantage for HGAA because it imposes a contractual obligation on the Land Carinthia which a market economy investor would not normally accept without consideration. This is in particular the case regarding HGAA, which is a distressed bank and where its owners are well aware of the risks of providing it liquidity.
- (52) The aid for HGAA seems also to benefit BayernLB. Without the aid, HGAA would have become insolvent and BayernLB would have lost not only its capital in that bank but also (part or all of) liquidity provided to HGAA totalling EUR [3-5 billion]. In addition, the rescue of HGAA might prevent a possible negative reputational effect for BayernLB which could follow if it has let its biggest subsidiary go bankrupt. Therefore, the Commission considers at this stage that BayernLB benefited from the aid granted to its subsidiary HGAA.
- (53) In sum, the Commission finds that the measures constitute State aid to the benefit of HGAA and apparently also aid to the benefit of BayernLB.

## 4.2. Compatibility of the aid

### 4.2.1. Application of Article 107(3)(b) TFEU

- (54) Article 107(3)(b) TFEU enables the Commission to declare aid compatible with the internal market if it is granted “to remedy a serious disturbance in the economy of a Member State”. The Commission recalls that the Court of First Instance has stressed that Article 107(3)(b) TFEU needs to be applied restrictively and must relate to a disturbance in the entire economy of a Member State<sup>(1)</sup>. In light of the on-going fragile situation on the financial market the Commission currently bases its assessment of State aid measures in the banking sector on this provision as the breakdown of a systematically relevant bank can directly affect the financial markets and indirectly the entire economy of a Member State.
- (55) The Austrian Central Bank has confirmed that HGAA is a bank with systemic importance for the financial market in Austria but also in certain countries in South Eastern Europe. Without the measures, HGAA risks closure by the supervisory authorities. The Commission will therefore

assess the State aid measures for HGAA under Article 107(3)(b) TFEU. Any possible aid to BayernLB will be examined in the context of the ongoing formal investigation procedure.

### 4.2.2. Compatibility of the measures

- (56) In order to apply Article 107(3)(b) TFEU the Commission has issued guidance in the Banking Communication<sup>(2)</sup> on support measures in the financial crisis, inter alia for guarantees and recapitalisations. The conditions have been complemented and clarified regarding recapitalisations in the Recapitalisation Communication<sup>(3)</sup>.
- (57) Capital increases and measures with a similar effect in favour of banks are, in principle, a suitable means of enabling them to withstand the effects of the financial crisis and to continue their ongoing role as providers of credit. However, the Commission has to assess if the additional emergency measures are remunerated in line with the Recapitalisation Communication.
- (58) HGAA will receive temporary asset guarantees (EUR 100 million) and potentially further capital (at most EUR 350 million) which will be injected and remunerated in line with point 29 on emergency aid measures to distressed banks of the Austrian emergency bank support scheme (case N 557/08). The remuneration of these measures is thus in line with an approved scheme which is itself in accordance with the Recapitalisation Communication.
- (59) HGAA will also receive capital from the Land Carinthia. This is however not remunerated in line with the Austrian emergency bank support scheme because HGAA will only pay a dividend of 6 % starting from 2013. The Commission acknowledges that this might be motivated by the aim of rescuing the bank and thereby avoiding that the liabilities guarantees will be called in the context of an insolvency of HGAA. Notwithstanding this, the Commission has at this stage doubts about the level of remuneration because 6 % is far below the standards of the Austrian emergency bank support scheme and the Recapitalisation Communication which stipulate a remuneration of at least 10 % for a bank in distress. The Commission will need to further investigate the issue. The Commission can accept such remuneration temporarily because the bank is anyhow loss-making at the moment and it would not be in a position to pay any remuneration. However, the remuneration must subsequently be reassessed, possibly requiring a higher overall remuneration or additional in-depth restructuring.

<sup>(1)</sup> Cf., in principle, Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG Commission* [1999] ECR II-3663, paragraph 167. Applied in Commission Decision in Case C 47/96, *Crédit Lyonnais*, OJ L 221, 8.8.1998, p. 28, point 10.1, Commission Decision in case C 28/02 *Bankgesellschaft Berlin*, OJ L 116, 4.5.2005, p. 1, points 153 et seq and Commission Decision in Case C 50/06 *BAWAG*, OJ L 83, 26.3.2008, p. 7, point 166. See Commission Decision of 5 December 2007 in Case NN 70/07, *Northern Rock*, OJ C 43, 16.2.2008, p. 1, Commission Decision of 30 April 2008 in Case NN 25/08, *Rescue aid to WestLB*, OJ C 189, 26.7.2008, p. 3, and Commission Decision of 4 June 2008 in Case C 9/08 *SachsenLB*, OJ L 104, 24.4.2009, p. 34.

<sup>(2)</sup> Banking Communication — Application of the State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8.

<sup>(3)</sup> Communication from the Commission — Recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.1.2009, p. 2.

- (60) In addition, the existing business relationship — and the resulting liquidity — will remain between the bank and the Land of Carinthia and businesses controlled by it. As noted in point 52, this amounts to an additional liquidity aid for HGAA because this liquidity might potentially be withdrawn by Land and those respective companies, if acting under normal market considerations. This support requires an appropriate remuneration or additional in-depth restructuring. In keeping with the Banking Communication, appropriate remuneration would be in line with that required for loans to distressed banks under point 36 of the Austrian emergency bank support scheme or for liquidity guarantees under point 25 of the Austrian emergency bank support scheme. The remuneration must therefore be reassessed, possibly requiring a higher overall remuneration or additional in-depth restructuring.
- (61) Austria had previously granted aid to HGAA under the Austrian emergency bank support scheme and has submitted a viability plan. Austria now agrees that HGAA is in distress. The present measures are a second recapitalisation for a distressed bank, for which an individual notification is required according to point 5 of the decision in case N 352/09 on the prolongation of the Austrian emergency bank support scheme. Moreover, the same requirement flows from point 16 of the Restructuring Communication, which states that all aid granted during the restructuring/viability assessment period must be notified individually. This applies to recapitalisations but also to guarantees.
- (62) The purpose of the requirement to provide a new notification for banks seeking additional recapitalisation or guarantees is to assess such measures on the basis of a restructuring plan and not grant them under a scheme. This allows the Commission to ensure that the aid is limited to the minimum necessary, and that the aid measures are integral part of a coherent restructuring including adequate measures to limit distortions of competition. However, the Commission has established that it will authorise urgent measures temporarily in exceptional circumstances if such measures need to be granted quickly for reasons of financial stability<sup>(1)</sup>.
- (63) Austria has provided a commitment to supply a restructuring plan. Moreover, in the report of 13 November 2009 the need for additional capital has already been established. The supervisory authorities have confirmed that the aid is necessary in order to prevent insolvency of a systemically relevant bank. The same applies to the guarantees which are also needed to ensure the continuation of the bank business.
- (64) The survival of HGAA requires that those measures can be granted before a decision about the restructuring plan can be taken and Austria requests an urgent approval. On the basis of the above and in view of the request for an authorisation for six months the measures are limited in time
- and scope to the minimum necessary. Therefore, a temporary approval of the capital and liquidity measures is required and is compatible with the internal market pursuant to Article 107(3)(b) TFEU. During that period HGAA and BayernLB will have sufficient time to update their plans and to seek final approval.
- 4.2.3. *Extension of the Procedure regarding the restructuring aid HGAA*
- (65) The formal investigation procedure will be extended with respect to the new measures for the benefit of HGAA. The newly granted measures constitute restructuring aid because they are needed to restore the viability of HGAA. The compatibility of the restructuring aid will be assessed on the basis of the restructuring plan or liquidation plan to be submitted in the light of the Restructuring Communication<sup>(2)</sup>. In view of the level of the problems of HGAA, the Commission considers that the option of an orderly winding down of the bank would need to be [...] considered in the process of deciding on its future.
- (66) The Commission has at this stage doubts that the newly introduced restructuring measures as well as the previous measures are apt to restore the viability of HGAA. First, it needs to be emphasised that the additional aid which has become necessary is evidence that the submitted viability plan is not sufficient to restore the viability of HGAA. Furthermore, the Commission notes that the external report commissioned by HGAA and BayernLB has found serious problems in the credit monitoring procedures of HGAA as well as in its collateral valuation. As a result, the previously projected potential losses could well increase still further, in particular if the benign view concerning LGD ratios were not to materialise. Moreover, the Commission doubts that the scenarios applied by the external consultants (Scenario I and II) are sufficiently prudent in relation to “a protracted global recession” as specified in point 13 of the Restructuring Communication. Therefore, the Commission continues to have doubts in relation to the return to long-term viability of the rescued HGAA.
- (67) In relation to burden sharing the Commission doubts that the burden sharing of the owners has been appropriate. This applies in particular to BayernLB which has consolidated accounts with HGAA and which could have contributed more to the rescue action. In this regard, BayernLB has a guarantee from Austria to recover liquidity if HGAA is split or following a similar measure which would make HGAA no longer viable. Moreover, the

<sup>(1)</sup> Commission Decision of 13 November 2009 in Case C 15/09, *Hypo RealEstate*, not yet published.

<sup>(2)</sup> Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.9.2009, p. 9. Although the decision of 12 May 2009 made reference to the 2004 Guidelines on State aid for rescuing and restructuring firms in difficulty, the Commission has clarified in point 49 of the Restructuring Communication that all aid notified to the Commission before 31 December 2010 will be assessed as restructuring aid to banks pursuant to that Communication instead of the 2004 Guidelines.

burden sharing of the Land Carinthia and GRAWE needs to be further investigated. In particular, the Land Carinthia and GRAWE will receive a remuneration for their capital while the capital coming from BayernLB will not be remunerated. Also, the liquidity provided by GRAWE will be highly collateralised, in contrast to the liquidity provided by the other owners.

- (68) Furthermore, the Commission will need to take into account in its assessment of burden sharing whether any additional guarantees, comfort letters or similar instruments exist in the relation between HGAA and its owners.
- (69) In view of the fact that measures to limit distortions of competition must in line with point 31 of the Restructuring Communication, also reflect the amount of aid and since the aid amount for HGAA has in the meantime more than doubled, significantly more measures will be required than were envisaged in the viability plan.

#### *BayernLB*

- (70) The formal investigation procedure must be extended in respect to the restructuring of BayernLB. The additional measures will need to be taken into account when assessing the restructuring plan of BayernLB in the light of the Restructuring Communication.
- (71) The Commission considers at this stage that the newly granted aid measures constitute also additional aid for the benefit of BayernLB as without the rescue measure it would otherwise have lost part of the liquidity it had provided to HGAA.
- (72) At this stage, it also seems that the rescue process for HGAA might pose a threat to the viability of BayernLB because it has to write down the book value of HGAA, to provide additional capital measures and to renounce its rights on additional capital already within HGAA. Due to these new write-downs and losses the Commission thus doubts the viability of BayernLB and deems it necessary to receive a revised restructuring plan in the light of the altered situation.
- (73) Moreover, the Commission has received indications that BayernLB intends to use reserves to avoid losses and in particular a loss participation of its capital holders. The Commission has doubts whether this is in line with its well-established policy<sup>(1)</sup>.
- (74) As regards measures for limiting market distortions, the Commission recalls that BayernLB agreed to sell HGAA over time as such a measure. However, the Commission considers at this stage that the sale of HGAA cannot be

considered as a measure for addressing competition distortions as the measure seems necessary for the viability of BayernLB. The Commission doubts therefore that the overall level of measures proposed by BayernLB in its restructuring plan for limiting distortions of competition is sufficient.

- (75) In sum, the Commission therefore requests an updated restructuring plan from BayernLB taking these considerations into account.

#### 5. DECISION

The Commission has decided to temporarily find compatible with the internal market on the basis of Article 107(3)(b) TFEU until the submission of a credible restructuring plan and its assessment by the Commission but at most for a period of six months the following measures in favour of HGAA:

1. the temporary guarantee of EUR 100 million under the conditions for distressed banks under the Austrian emergency bank support scheme;
2. the recapitalisation of EUR 200 million by Land Carinthia;
3. a further recapitalisation under the conditions for distressed banks under the Austrian emergency bank support for a maximum amount of EUR 350 million;
4. the liquidity provided by the Land of Carinthia.

The acquisition by Austria of shares in HGAA does not in itself constitute aid.

In the light of the foregoing considerations, the Commission has further decided to extend the proceedings laid down in Article 108(2) TFEU with respect to the above aid measures in favour of HGAA both as regards HGAA and BayernLB. The Commission will in this context also reassess the necessity of the above measures. In particular, the Commission will reassess the remuneration for the measures provided to HGAA by the Land Carinthia.

The Commission has also decided to extend the proceedings pursuant to Article 108(2) TFEU with a view to assess potential restructuring aid received by BayernLB through the additional aid provided to the HGAA group and with the view of assessing the viability and the measures proposed for limiting market distortions of BayernLB in light of the new situation.

The Commission reminds Austria of its commitment to provide an in-depth restructuring plan for HGAA by 31 March 2010 as well as all reports establishing the current situation of HGAA. The Commission also reminds Germany to submit a revised restructuring plan for BayernLB as well as to indicate the amount of equity replacing capital of the liquidity held by BayernLB in HGAA. Austria and Germany are also requested to indicate existence of any guarantees or similar instruments which the owners might have with HGAA or any of its assets or liabilities.

<sup>(1)</sup> See point 26 of the Restructuring Communication and Memo 09441 of 8 October "State aid: Commission recalls rules concerning Tier 1 and Tier 2 capital transactions for banks subject to a restructuring aid investigation".



Austria is requested to forward a copy of this letter to HGAA immediately. Germany is requested to forward this letter to BayernLB immediately.

The Commission wishes to remind Austria that Article 108(3) TFEU has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Austria and Germany that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publishing a notice in the EEA Supplement to the *Official Journal of the European Union*, and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.”

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