

Action of Land Burgenland against the judgment of the General Court (Sixth Chamber) of 28 February 2012 in Joined Cases T-268/08 and T-281/08 Land Burgenland and Republic of Austria v European Commission, lodged on 8 May 2012

(Case C-214/12 P)

(2012/C 194/25)

Language of the proceedings: German

Parties

Appellant: Land Burgenland (represented by: U. Soltész and P. Melcher, Rechtsanwälte, supported by A. Egger, Rechtsanwalt)

Other parties: European Commission, Republic of Austria

Form of order sought by the appellant

- Set aside the judgment of the General Court of 28 February 2012 in Joined Cases T-268/08 and T-281/08;
- Give final judgment in the case and annul Decision 2008/719/EC of the European Commission of 30 April 2008 on State aid C 56/06 (ex NN 77/06) implemented by Austria for the privatisation of Bank Burgenland (OJ 2008 L 239, p. 32) and order the European Commission to pay the costs of the proceedings before the General Court and the Court of Justice;
- In the alternative to the second form of order, refer the case back to the General Court for a decision in keeping with the legal assessment in the judgment of the Court of Justice and reserve the costs.

Pleas in law and main arguments

By the present appeal, the appellant challenges the judgment of the General Court (Sixth Chamber) of 28 February 2012 in Joined Cases T-268/08 and T-281/08 in which it dismissed the action of the appellant against Commission Decision 2008/719/EC of 30 April 2008 on State aid implemented by Austria for the privatisation of Bank Burgenland.

The appellant relies on four grounds of appeal:

1. Infringement by the General Court of the right to be heard through the failure to appraise an essential part of the eighth plea in law

In the submissions that were not appraised, the appellant criticised the fact that the Commission exclusively took account of the advantage associated with the 'additional bonds' in the amount of EUR 380 million and thereby disregarded the advantage which was associated with the bonds in the amount of EUR 320 million and thus the absence of any 'aid element' in the sale of Bank Burgenland to Grazer Wechselseitige Versicherung.

Those submissions were not acknowledged by the General Court although the appellant had expressly pointed them out

to the General Court in its observations on the Report for the Hearing because they were not contained in the Report for the Hearing.

2. Infringement of Article 107(1) TFEU through the finding that, during the evaluation of the offers, the Commission did not err in law in not taking account of the risks arising from *Ausfallhaftung* for the Province of Burgenland (Land Burgenland)

In that respect, the General Court wrongly relied on case-law which is not applicable to the present case or, if the case-law were applicable at least in principle, it is in conflict with the considerations of the General Court.

In addition, the General Court did not take account of other case-law which is in conflict with its arguments.

Finally, the General Court wrongly considered that the risks arising from *Ausfallhaftung* were not relevant, although *Ausfallhaftung* constitutes existing and therefore lawful aid.

3. Infringement of Article 107(1) TFEU through the finding that the Commission did not err in law in relying on the offer of the Consortium in order to determine the market value of Bank Burgenland

The General Court wrongly concluded that there was no manifest error of assessment in the choice and application of the methods for determining the market value of Bank Burgenland by the Commission.

In addition, the General Court considered that the tender procedure carried out for the sale of Bank Burgenland was unconditional, contrary to the unambiguous conclusions of the Commission, and, without checking, relied on the incorrect conclusion of the Commission that the 'deficient' conditions had no effect on the amount of the offers.

Furthermore, the General Court considered that the taking into account by the Commission of the clearly excessive offer of the Consortium was without fault although the determination of the excess was decisively based on the fact that *Ausfallhaftung* did not apply and that the risks arising from *Ausfallhaftung* were not to be taken into account.

4. Infringement of Article 107(1) TFEU through the finding that the Commission did not err in law in determining that neither the outcome nor the length of the procedure before the Finanzmarktaufsichtbehörde (authority responsible for the supervision of financial markets, 'FMA') justified the sale of Bank Burgenland to Grazer Wechselseitige Versicherung

The General Court considered that the finding of the Commission that nothing indicated that the FMA was going to prohibit the sale to the Consortium was without fault but in so doing incorrectly assumed that the evidence put forward by the appellant was not relevant for the authorisation procedure before the FMA and had not been taken into account by the FMA.

In addition, in finding that nothing indicated that the length of the procedure before the FMA had seriously compromised the chances of privatisation of Bank Burgenland, the General Court ignored the hard evidence put forward by the applicant.

Finally, the General Court applied an incorrect standard of examination and review.

Appeal brought on 14 May 2012 by the Republic of Austria against the judgment of the General Court (Sixth Chamber) delivered on 28 February 2012 in Joined Cases T-268/08 and T-281/08 Land Burgenland and Republic of Austria v European Commission

(Case C-223/12 P)

(2012/C 194/26)

Language of the case: German

Parties

Appellant: Republic of Austria (represented by: C. Pesendorfer, Agent)

Other parties to the proceedings: European Commission, Land Burgenland

Form of order sought

- Set aside the judgment of the General Court of 28 February 2012 in Joined Cases T-268/08 and T-281/08;
- give final judgment itself in the matter and annul Commission Decision 2008/719/EC of 30 April 2008 on State aid C 56/06 (ex NN 77/06) implemented by Austria for the privatisation of Bank Burgenland (OJ 2008 L 239, p. 32) and order the European Commission to pay the costs of the proceedings before the General Court and the Court of Justice;
- in the alternative to the second head of claim above, refer the case back to the General Court for determination in line with the legal assessment contained in the judgment of the Court of Justice, and reserve its decision on costs.

Pleas in law and main arguments

By the present appeal the appellant challenges the judgment of the General Court (Sixth Chamber) of 28 February 2012 in Joined Cases T-268/08 and T-281/08 by which the General Court dismissed the appellant's action against Commission Decision 2008/719/EC of 30 April 2008 on State aid imple-

mented by Austria for the privatisation of Bank Burgenland.

The appellant submits two grounds of appeal:

1. **Infringement of Article 107(1) TFEU in so far as it was determined that the Commission did not err in law in its evaluation of the offers by failing to consider the risks arising for the Land Burgenland from the *Ausfallhaftung* (deficiency liability)**

The General Court wrongly relies on case-law that is not applicable to the present case or — inasmuch as it is applicable, at least in principle — is inconsistent with the General Court's considerations.

The General Court moreover failed to consider other case-law that is inconsistent with its considerations.

Lastly, the General Court erred in taking the view that the risks arising from the *Ausfallhaftung* could not be taken into account, even though the *Ausfallhaftung* constitutes existing and thus lawful aid.

2. **Infringement of Article 107(1) TFEU in so far as it was determined that the Commission did not err in law in finding that neither the outcome nor the length of the procedure before the Austrian Financial Market Authority (FMA) justified the sale of Bank Burgenland to Grazer Wechselseitige Versicherung**

The General Court considered the Commission's conclusion that there was no indication that the FMA would forbid the purchase by the consortium to be correct, but erred in proceeding on the assumption that the information supplied by the appellant had not been relevant to the FMA approval process and had not been taken into account by the FMA.

The General Court also overlooked specific evidence adduced by the appellant when it found that there was no indication that the length of the FMA procedure had seriously jeopardised the chances of privatising Bank Burgenland.

Lastly, the General Court applied the wrong standard of assessment and review.